

## COMPLEXITY IN LITIGATION: A DIFFERENTIAL DIAGNOSIS

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*Everything should be as simple as possible, but not simpler.<sup>1</sup>*

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1. *Everything Should be Made as Simple as Possible, But Not Simpler*, QUOTE INVESTIGATOR, <http://quoteinvestigator.com/2011/05/13/einstein-simple/>, archived at <http://perma.cc/X4FS-72KL> (last visited Sept. 14, 2015) (paraphrasing Albert Einstein).

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## INTRODUCTION

This note examines complex litigation with the goal of providing practical options for its management. It is written from a judge's perspective. While it does not consider problems unique to lawyers, such as funding, document management, coordination with other counsel and so on, it will arm lawyers with a sense of what at least some judges are trying to do, or say they are trying to do. Lawyers, as well as judges, may find useful the strategies discussed in the latter part of the note. Because experiments in the complex area may spread to other cases,<sup>2</sup> the issues noted here may be of interest outside the complex arena. And this note may also be useful to those outside the law interested to see how complex mechanisms actually play out in the legal context.

As I say, I have tried for a practical approach. I borrow and cite from academic literature as useful, but no more. As many have noted, there is a divergence between the interests of academia and the needs of the courts and practicing lawyers,<sup>3</sup> and I work here for the latter crowd.

I have been inspired by work in the field—or fields—of complexity theory, but I claim no more than inspiration. As with complex systems, litigation (1) is made up of pieces: parties, motions, pleadings, arguments, and so on; (2) is a function of generally deterministic rules; (3) generates systems with emergent attributes, not just extrapolations of their elements; and (4) leads to unpredictable results. Litigation has complex feedback loops, may suffer from tight coupling, and can be defined (or at least

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2. See generally Jay Tidmarsh, *Civil Procedure: The Last Ten Years*, 46 J. LEGAL EDUC. 503 (1996) (discussing trends in civil procedure).

3. See, e.g., James L. Oakes, *Commentary on Judge Edwards' "Growing Disjunction Between Legal Education and the Legal Profession"*, 91 MICH. L. REV. 2163 (1993) (discussing the teaching of legal ethics); Bryan A. Garner, *Interview of Chief Justice John G. Roberts, Jr.*, 13 SCRIBES J. LEG. WRITING 5, 37 (2010), <http://legaltimes.typepad.com/files/garner-transcripts-1.pdf>, archived at <http://perma.cc/Y32H-BS99> ("I think it's extraordinary these days—the tremendous disconnect between the legal academy and the legal profession. They occupy two different universes. What the academy is doing, as far as I can tell, is largely of no use or interest to people who actually practice law. Whether it's analytic, whether it's at whatever level they're operating, it doesn't help the practitioners or help the judges.")

analyzed) by the flow of information from one piece or phase to the next—these are features of many complex systems. I will discuss these features below. But this is still all analogy, and I will use it just as long as it is useful.<sup>4</sup>

And it is useful, I think, as an aid in the diagnosis of the problems of complex litigation. It is easy to think either that all complex litigation shares common attributes (many parties and issues, frequent trips to the courtroom) pointing us to a series of common approaches (frequent case management conferences, informal discovery conferences); or that every case is unique, and needs an entirely improvised attack. Neither of these is correct. There *are* patterns. Complexity theory inspires a review of problems and argues their categorization; it helps us focus on the animating features of a case, and so in turn helps us manage it as efficiently, and fairly, as we can. Medicine has its *differential diagnosis*, a process by which the symptoms are collected, and used to identify the disease. Some diseases have similar symptoms, but (we hope) not all the symptoms are features of more than one disease. Diseases repeat, and if we know their symptoms, we can diagnose. So too, as we look to the features of various complex cases, we can isolate the animating aspects and target our efforts appropriately, treating the right condition and avoiding judicial control that will not, actually, help.

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4. That is, it doesn't matter whether the law, or a part of it, or its processes, really are or are not complex systems. Compare, e.g., Carla Crandall, *If You Can't Beat Them, Kill Them: Complex Adaptive Systems Theory and the Rise in Targeted Killing*, 43 SETON HALL L. REV. 595, 608 (2013) (“[M]uch of the complexity associated with complex adaptive systems derives from the fact that these systems are comprised of various interrelated and interdependent agents of components. So it is with the legal system.”), with R. George Wright, *The Illusion of Simplicity: An Explanation of Why the Law Can't Just Be Less Complex*, 27 FLA. ST. U. L. REV. 715, 744 (1999-2000) (“Ultimately, the law is as simple or as complex as it is, in whatever respect, because that degree of simplicity or complexity is consistent with the current, broad balance of legal and political forces.”), and D. Bourcier, et al., *Toward Measures Of Complexity In Legal Systems*, PROCEEDINGS OF THE 11TH INT'L CONFERENCE ON ARTIFICIAL INTELLIGENCE & LAW, 211 (2007), <http://portal.acm.org/citation.cfm?id=1276359>, archived at <http://perma.cc/4N9T-CVCZ> (noting that describing the legal system as a complex system is “at best inspired by some analogy with characterizations of complex systems in mathematics, physics or ecology” and proposing the development of a “structure-based” measure and “content-based” measure to measure the complexities of the legal system). See generally Jeffrey Rudd, *J.B. Ruhl's “Law-and-Society System”: Burying Norms and Democracy Under Complexity Theory's Foundation*, 29 WM. & MARY ENVTL. L. & POL'Y REV. 551, 551-52 & n.2 (2005) (discussing the problems that plague the modern regulatory state). Some academic material is helpful in mapping out the sorts of complexities (in the less technical sense) that affect the law but their recommendations are too vague to be useful to lawyers and judges. See, e.g., Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, And Cures*, 42 DUKE L.J. 1 (1992) (defining a complex legal system as one whose rules, processes, institutions and supporting culture have density, technicality, differentiation, and indeterminacy).

In Section II, I review the definition of a “complex” case and isolate and explain its emphasis on the need for a judge to manage the case. Section III provides a brief description of complex systems generally, offering a series of characteristics that help, at least by analogy, analyze complex litigation. I use Section IV to argue that the focus of the court’s work in complex cases should be on settlement, and I introduce the notion of the *early inflection point* as a point, or points, in the life of a case—short of trial—where settlement is reasonable. Section V uses two fictional cases to rough out the essential, and striking, differences between simple and complex cases, and in so doing begins the process of mapping out just what it is that makes a case complex. I break Section VI into two parts, each addressing a series of specific characteristics or aspects (symptoms, one might say) of complex cases, explaining how these affect the progress of the case. Then in Section VII, I explore the many tools and techniques judges have to manage and ameliorate the aspects and characteristics of complex cases. Section VIII concludes with a last look at the distinction between “outlier” and “core” issues as a general guide-post to the work of a complex judge.

#### I. DEFINITION OF COMPLEX CASE

The definition of a “complex” case is not just an academic exercise. In its identification of characteristics, it leads us to useful management techniques.

I, of course, first turned to the state rules and had intended to mock them, just a little, as tautological. For purposes of deciding when to assign cases to a complex judge, the rules define a complex case as one that requires such a judge:

A “complex case” is an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel.<sup>5</sup>

The factors suggestive of a need for such a judge are these:

“(1) Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve; (2) Management of a large number of witnesses or a substantial amount of

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5. CAL. R. CT. 3.400(a). For a short history of the events that led to the creation of the complex courts in California, see Mitchell L. Bach, et al., *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 BUS. LAW. 147, 206 (2004) (discussing the creation of specialized business courts in the United States).

documentary evidence; (3) Management of a large number of separately represented parties; (4) Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court; or (5) Substantial post judgment judicial supervision.”<sup>6</sup>

All this is not quite a tautology, for it comes to rest on the rationale for complex designation: the need for *judicial intervention*. This is a recognition that the usual rules—and in California, we have a lot of them, from legislatively-prescribed discovery procedures, rules of court, a code of civil procedure, and laws found in other codes as well—won’t work. The typical self-enforcement mechanisms of discovery, even augmented by discovery motions, and the economic incentives of the parties to get to trial or settle, won’t work. Left to their own devices, the lawyers, operating in the interests of their clients as they are meant to do, will create vast inefficiencies both for themselves and the court which ultimately tries the case. Professor Tidmarsh identifies the pertinent “dysfunctions,” and the consequent need for judicial intervention: “The hypothesis of complexity . . . holds that an essential attribute of complex litigation is lawyer, factfinder, or party dysfunction remediable by an assertion of judicial power . . . .”<sup>7</sup>

This insight meshes with that extracted from complexity theory: a complex system in effect takes on a life of its own, an unpredictable and sometimes dangerous life of its own. External supervision is required to prevent this. I briefly develop the complex systems analogy below, Section III.

In the usual case, lawyers run the whole show up to trial. Judges only

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6. CAL. R. CT. 3.400(b). The definition often includes these sorts of cases: class actions, securities fraud, mass tort, construction defect, insurance coverage with multiple policies, construction defect, and multi-party cases generally.

7. Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1789 (1992). See generally, Jack Friedenthal, *Tackling Complex Litigation*, 74 NOTRE DAME L. REV. 1301, 1310 & n.20 (1999) (reviewing Jay Tidmarsh & Roger H. Trangsrud, *COMPLEX LITIGATION AND THE ADVERSARY SYSTEM* (1998)). Tidmarsh exposes not just lawyer dysfunction, but also that of (i) the jury as it tries to do its fact finding function in a complex case, Tidmarsh, *supra*, at 1766, and (ii) the parties, *id.* at 1773. See also Jay Tidmarsh, *Looking Forward*, 1 SEDONA CONF. J. 1, 4 (2000) (stating that the Federal Rules of Civil Procedures have revolutionized thoughts about procedure). It is important to state that by “dysfunction” neither Professor Tidmarsh nor I suggest disapproval or reproach. Rather, the suggestion is this: we ordinarily expect the legitimate incentives and capabilities of parties, lawyers, juries and others involved in a lawsuit together to produce justice, we might say, “the just, speedy, and inexpensive determination of every action and proceeding.” FED. R. CIV. P. 1. To some extent in many cases, but in particular in complex cases, that expectation is insupportable (absent the judicial intervention discussed in this note).

decide when an issue is offered up at the instigation of and on timing set by the parties. The primary job of the judge is to decide legal issues. An example of a mundane motion may help distinguish this usual case from the complex one. In the usual case, there is no stay of discovery and if on the rare occasion one is sought, it is by way of noticed motion. That's about three to four weeks' notice of hearing, moving, opposition, and reply papers, supported by declarations and often authenticated exhibits, and then oral argument. In large metropolitan areas, the motion will probably cost thousands of dollars to brief and argue. In a complex case, there may be reasons to stop and start discovery, to phase it, to have some but not all issues subject to discovery; handling these request in the usual way would be, to put it as mildly as I can, inefficient. So these issues are often handled at case management conferences, or a phone call; perhaps five minutes, and no filings, may be needed.

That most common of beasts, the demurrer, provides another simple example. In a routine case, the demurer is filed, ruled on, leave to amend may be given, a new complaint is filed and perhaps is then subject to another demurrer. The judge simply rules on these as they come. In more complicated cases, different parties come into the case at different times and may file demurrers to different versions of the complaint; rulings as to one may be moot or conflict with rulings as to another. In these situations the judge must interfere, stop the uncoordinated filings, and synchronize all demurrers to be heard at the same time.<sup>8</sup>

Below in Section V, I provide a more detailed contrast between the simple and complex case. Here, I only note the key distinction: the interventionist role of the judge in the complicated case as a result of the failure of the usual rules of procedure and the inefficiencies of the usual roles of the participants. This distinction defines the complex case.

Judges in complex cases also have a concomitant role: reducing the special types of uncertainty that complex cases exhibit. Uncertainty is a principal cost of complexity.

Of courses, all cases have uncertainty built into them.<sup>9</sup> Disputed facts,

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8. Complexity in this sense is a creature of trial courts, not appellate courts. This sort of complexity is a function of the intersection between the law (court opinions and statutes) and the practicalities of its implementation, which are rarely considered in any detail by the appellate courts and the legislature, although the issues are often considered by those drafting the statewide and local rules of court.

9. Quite aside from our intuitions about this, it may be formally (i.e., inevitably) true as well. See Hillel Bavli, Note, *Applying the Laws of Logic to the Logic of Laws*, 33 *FORDHAM URB. L.J.* 937 (2005) (“[A]pplication of Gödel’s Incompleteness Theorem to the legal context would establish a priori limitations on the capacity for consistency to exist within the law, as well as on the faculty to establish internal logical consistency within the law.”).

conflicting ways to apply the law to the facts, ranges of potential damages (such as for pain and suffering and punitive damages), whether the jury will believe a key witnesses—all these, and more, make even the simplest case uncertain and so susceptible to a range of reasonable settlement values. Increasing complexity makes this worse:

As the complexity of legal regulation has grown, predicting the outcome of adjudication in such cases has become more difficult. Law has become “more indeterminate,” in the sense that litigants and judges “have less faith that legal doctrine provides a single right answer.”<sup>10</sup>

In a complex case, prediction within *any* plausible range may be impossible. This is often true as the case begins, if for example a theory new to the law is pled, the potential liability of a host of defendants is utterly unclear (and so their proportionate liability), or the facts are so many and so dense it is not clear any trial can ever handle them. In some cases (such as mass torts) the threat of defendants’ bankruptcy, the uncertain interplay of overlapping insurance policies, the potential impact of related litigation,<sup>11</sup> or other overarching issues may make it impossible to rely on a traditional evaluation of a case. Obviated here is the conceit that litigation will, if properly processed, reach the “right” result as if it were a foreordained truth (like the guilt or innocence of a criminal defendant, or the truth of who, in a car accident case, ran the red light). The “right” result in many cases, and certainly in many complex cases, will be the consequence of bargaining, influenced perhaps heavily by court decisions, many of which will be on the tumultuous edge of developing law, but also by extra-legal concerns such as reputation, available resources and opportunity costs, and so on.

But there is more. Parties and lawyers believe that the other side will play off the infinite intricacies of procedural law, designed to produce a fair substantive result, to undermine a fair result. Parties know that complexity encourages the pursuit of outlier issues, it can slow down litigation, refocusing on procedural disputes (the resolution of which is unlikely to change a party’s views on a reasonable settlement) and away from substantive disputes (the resolution of which should propel parties towards settlement). This, in turn, increases uncertainty and decreases faith that settlement will reflect the “true” value of the case.

Parties in complex cases do have a powerful resistance to reaching the

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10. John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 558 (2012) (quoting Marc Galanter, “. . . A Settlement Judge, Not a Trial Judge:” *Judicial Mediation in the United States*, 12 J.L. SOC’Y 1, 14 (1985)).

11. Findings in other case may have a preclusive effect in the present case under doctrines of res judicata and collateral estoppel. These doctrines may block (or “preclude”) litigation of issues already decided in another case.

merits too early; the tendency is to pause, search the whole terrain for possibly useful facts, investigate each potentially useful theory, and only then gingerly approach the merits. The stakes are high; the issues are many, some unprecedented; caution is the watchword. There may be serious uncertainty as to exactly *what the issues are*, and so how to cabin discovery and other aspects of the case.<sup>12</sup> It is child's play to demand or produce an overwhelming number of documents, depositions or interrogatories, to file weak motions, to condition progress in the case on other events such as litigation in other jurisdictions, to interpose (and invent) myriad claims and defenses, bring in other entities as cross defendants or at least the targets of discovery subpoenas. Some of this is bad behavior, but much of it is not.

These complex procedures result in uncertainty, perpetuated by delay. Judges can ameliorate this.

## II. COMPLEX SYSTEMS

I do not insist that complex litigation is “complex” in the technical sense, but at the risk of conflating the two uses of the term, I have thought it useful to briefly outline the usual characteristics of complex systems. The analogy is useful, and my outline of specific types of complex cases at Section VI will borrow from this, as well as providing a visceral feel for the sorts of uncertainty lurking in complex cases. In turn, this analogy will help explain some of the solutions mapped out in Section VII.

Complex systems include population dynamics, weather and the turbulent flow of a river or stream, the brain's electrical activity, evolution, some computer expert systems (i.e. software which generates expert opinions), financial markets, the immune system, the internet, and so on.<sup>13</sup> Their basic architecture is a network of elements which together function in ways not directly predicible from the behavior of the elements as such, although at the same time the action of the elements as such may be wholly

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12. See Keith Broyles, *Taking the Courtroom into the Classroom: A Proposal for Educating the Lay Juror in Complex Litigation Cases*, 64 GEO. WASH. L. REV. 714, 720 (1996) (quoting Tidmarsh, *supra* note 8).

13. M. E. J. Newman, *Complex Systems: A Survey*, 79 AM. J. PHYS. 800 (2011); see Melanie Mitchell, COMPLEXITY: A GUIDED TOUR 12-13 (2009) (discussing the commonalities among complex systems when examined at a higher level of generality). Complicated systems are not necessarily *complex*. Complicated may just mean many parts, say, reviewing a dozen elements and fifteen sub-elements to see if all elements of a cause of action have been proved. Complex systems include a lot of *moving* parts, i.e. parts which affect each other in unpredictable ways, as outlined in the text. Outside of this section where I introduce the technical sense of “complex,” I will not keep the two terms strictly distinct.

deterministic. Fluid dynamics, which studies fluids such as turbulent water as well as the weather, provides a straightforward example. The behavior of the elements, such as air or water molecules, as affected by their environments (which might be constraints such as earth and stones) is determined; any given movement is, in isolation, predictable and governed by the immutable law of physics. But the overall patterns of the turbulent river or weather are unpredictable. Rather, they can be approximated, and the odds of a given configuration might be calculable, but the actions of the overall system cannot be, practically, calculated, and the overall system has fundamental descriptors that are not descriptions of the constituent elements. This higher-level set of characteristics is sometimes referred to as emergent. For example, one might say of a body that it is beautiful, or of a brain that it is smart, but these terms would not be useful in describing a cell or synapse. Beauty and intelligence are emergent qualities.

In complex systems, the components influence each other in many ways. They influence each other reciprocally (so that elements A and B influence each other), collectively (A and B together influence C, which may then influence A), differently (A's influence on C is high, while B's influence is low) and divergently (A inhibits C, but B encourages C). Each of these elements (A, B, C) may be made up of constituents; that is, some complex systems are systems of systems. The brain is a fair example of all of these sorts of interactions. Neurons interact with each other: many will influence one, and that one may be part of a group that influences the former set; some neurons inhibit, and others excite, the cells to which they are connected; and so on.

We commonly see in complex systems: (a) complicated feedback loops that can act as sophisticated information processing schemes and (b) no central control—that is, as indicated, the emergent behavior is the result of the amalgam of elements, not of a supervisory module. Some complex systems give rise to adaptive behavior; that is, they change according to the environment. Evolution itself is of course the prime example, but to some extent one sees this in the flocking behavior of birds, ant colonies, financial markets, cities, and expert systems.

Finally, some complex systems are highly sensitive to changes in initial conditions, or indeed subsequent inputs, and these decisive inputs may not be perceptible, and their impact may not be predictable (although it may be discerned after the fact). The term “chaotic” may be applied to describe this feature. Very slight changes in the speed and direction of water molecules may create profoundly different patterns, including the transition from non-turbulent to turbulent conditions. Local weather is highly dependent on slight changes in conditions, and slight changes in the number of prey or food sources may have catastrophic impacts on

populations.

For a visceral view of this, consider traffic: a small (but unpredictably small) number of extra cars on the road transforms a smooth trip to the stop and start behavior of commute hours. The smallest variation in billiards—the speed of the cue’s strike, the precise point and angle at which the ball is hit—may make an enormous difference to the movement.

I summarize the relevant aspects of complex systems. First, knowing everything there is to know about the composition, the elements, or the parts is not enough to predict the behavior of the whole, and this is even more so when the whole system changes over time, adapting to new conditions. Second, there is no central control. Third, concomitantly, the behavior of complex systems may be unpredictable, and very small changes, including changes we do not register as such, can have a significant impact.

### III. MANAGING CASES TOWARDS SETTLEMENT

Most cases settle. The odds of a complex case settling are even higher.<sup>14</sup> Thus the judge’s time is best spent managing cases towards settlement. This obviously also involves trial preparation, for the case may end up there, but usually the critical trial-related preparation is that which plainly alerts the parties to the value of the case, and so brings settlement closer.

Since the case will likely terminate with settlement, the central issue is: What must be done to get to settlement? Judges should at least allude to this at each case management conference. In most cases, settlement is furthered by reducing uncertainty to such an extent that the parties do not think it worthwhile to continue litigation. Phrased this way, we can

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14. See *Complex Litigation: Key Findings from the California Pilot Program*, 3 NAT’L CTR. FOR ST. CT.’S, CIVIL ACTION, Winter 2004, at 4 (describing the likelihood of complex cases settling). Very few class actions go to trial. See CALIFORNIA ADMINISTRATIVE OFFICE OF THE COURTS, FINDINGS OF THE STUDY OF CALIFORNIA CLASS ACTION LITIGATION, 2000-2006 at 11-12 (2009), <http://www.courts.ca.gov/documents/class-action-lit-study.pdf>, archived at <http://perma.cc/8HLA-ZTZ6> (“This analysis highlights another unique trait of class action litigation in that class action cases very rarely proceed through trial to a verdict. Only seven-tenths of one percent of cases in the sample ended in a trial verdict, and, of these, only two cases reached trial with a certified class. This is considerably lower than the 8.6% average trial disposition rate for all unlimited civil cases in the study courts over the same time period”). See Peter H. Schuck, *Judicial Avoidance of Juries in Mass Tort Litigation*, 48 DEPAUL L. REV. 479, 486-87 (1998) (“The asymmetric incentives and the risk aversion exhibited by mass tort plaintiffs (and their lawyers) and by mass tort defendants evidently exert a powerful gravitational pull away from trials and toward settlement despite—or perhaps because of—the enormous legal, factual, and procedural uncertainties surrounding these cases”).

generate a paradox: litigation should be costless—friction free. For surely costly time-consuming litigation is bad. On the other hand, costless litigation means we may never reach the point where settlement makes sense. To be sure, litigation would still stop when one side was offered at least as much as it thought it might win at trial. But for the *other* side to settle, the parties must either suffer from an asymmetry of information such that settlement at a certain dollar figure is seen as favorable to both sides, or they must be so close to both symmetrical information and perfect information (i.e. both sides have virtually all of the information there is, and it is (of course) the same information. I call this the “perfect case”) that merely the waste of time of continuing what is otherwise costless litigation is enough to convince them to settle. Practically, these latter situations do not exist: parties almost never have the same (symmetric) information, and never perfect information, because the latter must include knowing, for example, the make-up of the jury, how the court will exercise discretion in each decision, and so on. It requires being able to foretell the future.

Entirely costless litigation, therefore, is not possible (litigation takes time if nothing else) nor is desirable. The cost of litigation expands the settlement range making it reasonable to factor in the cost of litigation and so augment the range of reasonable settlements. So, for example, if litigation costs \$10, and plaintiff expects to win \$50, then any settlement from \$41 and up is good. A converse calculation may be made for defendant: if her costs too are \$10, then any settlement costing \$9 or less is good. When the odds of prevailing and a likely verdict are factored in, a range can be generated of settlements which are good for both sides, and that is the point: unlike settlement of a perfect case, which has a single point for reasonable settlement (and equals the actual result after full litigation), real cases with imperfect information have a range. That range is the settlement envelope.<sup>15</sup>

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15. This has also been described as a “surplus” the parties can divide to create a reasonable outcome. See, e.g., Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predictors of Failure to Settle*, 49 CASE W. RES. L. REV. 315, 319-20 (1999) (describing as “surplus,” the total costs saved had the parties in a particular case settled rather than take the matter to trial). For more on settlement envelopes and how they are affected by various strategies, see Curtis Karnow, *Conflicts of Interest and Institutional Litigants*, 32 J. LEGAL PROF. 7 (2008) (discussing how the settlement strategies of institutional litigants serve long-term priorities at the expense of short-term, seemingly irrational settlement agreements). Early settlement is preferred to late settlement; among other reasons, because the settlement envelope shrinks as fees and costs are expended. Costs become sunk, and the \$10 in the text shrinks to \$8, \$3, and so on. See generally Curtis Karnow, *Timing Settlement* (2011), [http://works.bepress.com/cgi/viewcontent.cgi?article=1006&context=curtis\\_karnow](http://works.bepress.com/cgi/viewcontent.cgi?article=1006&context=curtis_karnow), archived at <http://perma.cc/KF5Z-QW37> (offering a brief survey of empirical studies

But note this: if the parties do not think they have a perfect case (and they never do), then each knows, by definition, that the other side might accept a less favorable (to the other party) settlement than the one the first party is about to accept. This is the fear of “leaving something on the table.” So if plaintiff knows defendant is willing to offer \$X, then plaintiff also has reason to think that something better than \$X might be possible. Every settlement of an imperfect case (and that means every actual case) risks leaving something on the table (unless and until a credible ultimate “bottom line” figure is offered).

The trick then is not precisely to make litigation costless, even if that were feasible. It is to get to a certain point in the litigation where settlement is reasonable, and to get there as fast and as cost-free as possible, but for the *subsequent* costs to be relatively high. I will call that point the *inflection point*. An unfortunate instance of this is what actually happens in the real world. The moment before trial is often seen as the inflection point. Lawyers and parties seem willing to spend whatever it takes to get to trial, but fear trial itself as both a decisive and very expensive moment in the case. Thus it is that so many cases settle just before trial (“on the courthouse steps,” as the legal wags have it).<sup>16</sup> This standard model is lousy, but it survives because it lives off a classic cognitive fallacy: compressed costs and risks are noticed more than when they are spread out. We notice (and fear) the airplane crash in which 250 people are killed at the same instant, and ignore the 250 people killed at railway crossings each year. As with cost, so too risk: we attend closely to the compressed risk of a single investment with a 50% chance of going bad, but perhaps ignore the risks of gambling over a multi-year period with a similar risk of loss. So, too, we figure the costs of trial, in time and money, but often fail to map out the pretrial work in identifiable, and priced, chunks. In any event, working towards an inflection point substantially *earlier* than trial—an *early* inflection point (“EIP”) I will term it—is difficult because the moment before trial *remains* a competing inflection point, and because the moment before trial remains symbolically the moment when the parties are closest to perfect and symmetrical information—closest to the perfect case. That, in turn, means (if the parties are drinking their own Kool-Aid) that it is not until just before trial that a settlement is most likely not to leave anything on the table, which in turn is taken to mean that it is just before trial that one is most likely to get the best settlement. That estimate of perfect timing is fallacious in many cases (this

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regarding how best to time mandatory settlement conferences).

16. See generally Andrew J. Wistrich et al., *How Lawyers’ Intuitions Prolong Litigation*, 86 S. CA. L. REV. 571, 571 (2013) (discussing why many cases do not settle until the eve of trial, or “on the courthouse steps”).

is the Kool-Aid) because it does not account for: (1) the now sunk costs of arriving at that “perfect” moment; (2) the fact that events since what could have been an EIP might have made things *worse* on the merits for at least one of the parties; (3) the moment before trial is only the roughest proxy for a perfect case, because much uncertainty still remains, and as we will see in complex cases, always remains.<sup>17</sup>

So we arrive at the basic question for the court: how do we help the parties quickly reach an EIP? How do we make it as cheap and fast as possible to get to this point with the threat of relatively great expense and risk thereafter? That is the problem. There is something difficult, or complex about the case that blocks the parties from reaching an EIP, a point at which much material information is shared, but (obviously) uncertainty still remains. A case that is close, but not too close, to a perfect case; indeed, as far *back* (at least in time) from a perfect case as we can manage; where we have resolved just *enough* of the uncertainty.

I propose an inventory of these types of impediments—the characteristics of what we might call “complex” cases, and other cases. These are what in a general way make cases “hard.” It is important to tease these out because there are different solutions to different conditions. Taking a metaphor from medicine, we examine a case and create a differential diagnosis, a list of attributes that suggests the problem to be solved and the remedy to employ.

#### IV. EXEMPLARS: SIMPLE AND COMPLEX (COMPLICATED) CASES

But first let us gain some insight into what makes cases hard by contrasting a simple and a complex case.

The “simple” case is a small drug possession case. The officer saw the defendant jaywalking, detained him, says he was given consent to search the man’s backpack, and found a small amount of drugs. It is a misdemeanor. In contrast to what we may call a complex case, this misdemeanor case has the following characteristics: there are at most a couple of fact issues such as the credibility of the arresting officer, which will likely dictate the results of the suppression hearing as well as the jury verdict. The credibility of the defendant might be at stake, but probably not, as he is unlikely to testify. In a rare case, the nature of the drugs (or perhaps their quantity) might be at issue. There are a few legal issues such as the standards under the Fourth Amendment for a detention, and whether the defendant’s words and actions really were tantamount to consent

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17. In class actions, we have an EIP just as the certification motion is being filed. The stakes are so high in such a motion that parties frequently parlay the uncertainty of a result into settlement.

(assuming the officer is telling the truth). There might be an issue whether there was a prejudicial delay in the prosecution, requiring a speedy trial analysis, but probably not. The lawyers and the judge in this case have done all this before: previous fact patterns have been almost identical, and the legal issues are, in fact, identical to those in prior cases. The outcomes available in this case are very limited: the defendant will either be acquitted or found guilty, and although there are of course many variations among locales—and it may depend on whether he pleads out or is convicted by the jury—the sentence in the specific court is probably highly predictable: there is, as one might say, a “market,” and the players (the judges and lawyers) know the price for the crime. The simpler and more common the crime, the better known the market, and thus the more predictable the outcome.

What else can we say about this simple case? As a function of the limited number of legal issues, which have been frequently visited in the past, the law is stable. It is unlikely that a new appellate decision will need to be reviewed. And as a function of this it is pretty clear what the line is between issues where review will be *de novo* (such as on the legal issues outlined above) and those area where the trial judge has discretion, such as fact finding in the suppression hearing, sentencing within a given range, and the usual evidentiary issues. In other words, it is generally clear what *type* of decision is at stake, including the nature of the decision maker (judge, jury), the factors to be considered, the nature of appellate review, and thus the sort of record one is expected to make. Moreover, appellate review will occur once: after judgment. It will probably be based on the harmless error rule with the key trial determinations (the result of the suppression hearing and the jury verdict) likely upheld as within the discretion of those factfinders.<sup>18</sup>

The complex case (here I use the term “complex” in a non-technical sense) is just the opposite of the misdemeanor. If the drug possession case is typical of the simple matter, what is typical of the complex matter? Nothing is, and that is the point. Each case is different from the next. Even

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18. Of course, even this “simple” case may not be free of difficult problems for the lawyers and the judge. Jury selection and maintenance raise a host of problems that must be decided on the spot, such as bias in selection, detecting bias in the jurors, communications among jurors and others, and simply managing the lives of all these people for a few days can be stressful. Incompetent lawyers, or those who have decided the best tactic to is antagonize the trial judge, defendants’ complaints about lawyers (competent or not) and their sometime wishes to represent themselves, all contribute the difficulties of any criminal trial, as do sometime difficult evidentiary issues. The trial of a “simple” misdemeanor can easily be more difficult than that of a “complex” civil case. But these difficulties do not affect the outcome in the sense that the prediction of these difficulties will not impact the parties’ settlement posture.

where the general area of law is the same—say insurance coverage or securities fraud—the past is only the roughest guide to the present. We do know this about complex cases: there will be many issues, perhaps from problems with service in other states and nations, to jurisdiction and venue, preemption, choice of law, anti-SLAPP motions, demurrers, motions to strike, perhaps class certification issues, and often numerous hard fought discovery motions—and all that long before the merits are seriously addressed.<sup>19</sup> The lawyers and the judge probably have not handled these issues before. It may be that none of the decisive jury instructions is found in the forms, and the lawyers and judge are very likely to be required to read unfamiliar appellate opinions. Indeed, it is likely that a series of significant legal questions are undecided so that the judge will find herself constantly estimating the appropriate rules. This is another way of saying the law may be unstable, even where the *type* of issue is common. For example, complex cases may involve arbitration agreements, anti-SLAPP motions, the reach and scope of a tort duty, or class certification issues. These are frequently seen, but the law is uncertain in all those areas. Preemption issues are notoriously difficult, not because the three types of preemption are new,<sup>20</sup> but because precedent provides only the most general constraints. In some cases both the court and the jury must issue decisions posing interesting timing and coordination problems. Even in a relatively simple complex case, such as for insurance coverage with one insurer, it might be unclear whether the issue is the interpretation of the contract—and thus for the court to decide—or the determination of a fact—for the jury to decide.<sup>21</sup>

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19. It is understood that early procedures such as anti-SLAPP motions, TROs, and preliminary injunctions will likely involve at least a preliminary estimate of the merits. *See* CAL. CIV. PROC. § 425.16 (West 2015) (governing anti-SLAPP motions).

20. *See* *Town of Atherton v. Cal. High-Speed Rail Auth.*, 175 Cal. Rptr. 3d 145, 159 (Ct. App. 2014) (“The United States Supreme Court has recognized three types of preemption under the supremacy clause: express preemption, conflict preemption, and field preemption.” (quoting *People v. Burlington N. Santa Fe R.R.*, 148 Cal. Rptr. 3d 243, 248 (Ct. App. 2012))).

21. *See generally* *Entin v. Superior Court*, 146 Cal. Rptr. 3d 52, 56-57 (Ct. App. 2012) (explaining that a litigant’s jury trial right can turn on whether the court determines the matter is a declaratory relief action); *Shopoff & Cavallo LLP v. Hyon*, 85 Cal. Rptr. 3d 268 (Ct. App. 2008) (holding that regardless of the nature of the specific claims, the matter is still tried to the court, because it is an interpleader action); *Oceanside 84, Ltd. v. Fid. Fed. Bank*, 66 Cal. Rptr. 2d 487 (Ct. App. 1997) (finding that when a court uses extrinsic evidence used to a contract, the ultimate fact might require a jury, even if unnecessary in the case); *Walton v. Walton*, 36 Cal. Rptr. 2d 901 (Ct. App. 1995) (discussing a contract case that appears triable to a jury, but because specific performance is the requested remedy, the case is instead tried to the court). Even when legal damages are one of the possible remedies—a usual indicia of a right to a jury—a jury right might not attach, such as in an action for accounting. *De Guere v. Universal City Studios, Inc.*, 65 Cal. Rptr. 2d 438, 454-

Because multiple legal issues have a decisive impact, and some of those are novel, the relationship between the trial and appellate courts is different in complex civil cases than it is in, for example, simple criminal cases. Some trial court determinations such as deciding anti-SLAPP motions, or granting a motion to stay or dismiss on grounds of inconvenient forum (or because service of summons was quashed<sup>22</sup>), issuing preliminary injunctions,<sup>23</sup> and denial of class certification<sup>24</sup> are subject to a right to appellate review, and the appellate courts are often asked to step in with a writ on other issues where early intervention may avoid wasted time down the road. The review is almost always on an issue of law and so is *de novo*<sup>25</sup> which in turn means the work done at the trial level is of little use to the reviewing court, and so in those cases, all the work is in effect being done twice. Some of these appellate interventions come with a heavy price. Appeals take about 18 months<sup>26</sup> and writs anywhere from very little time, if the court summarily denies the petition, to probably about the same time as appeals.<sup>27</sup> When (as is usual) an appellate proceeding is issue-

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55 (Ct. App. 1997) (demonstrating that even when legal damages is a possible remedy—a usual indicia of a right to a jury—a jury right does not attach).

22. CAL. CIV. PROC. CODE § 904.1(a)(3) (West 2015).

23. CAL. CIV. PROC. CODE § 904.1(a)(6) (West 2015).

24. *In re Baycol Cases I & II*, 248 P.3d 681 (Cal. 2011).

25. The review is said to be “abuse of discretion” on class certification motions. *Brinker Rest. Corp. v. Superior Court*, 273 P.3d 513, 521 (Cal. 2012). However, given the nature of the issues on appeal, the scope of review is frequently more stringent than this suggests. See generally JON B. EISENBERG ET AL., CALIFORNIA PRACTICE GUIDE: CIVIL APPEALS AND WRITS ¶ 8:225 (2015 ed. 2015) (discussing reversal of a class action certification or settlement). For an interesting view on the relationship between federal trial and appellate courts in complex cases, and an argument that there is insufficient review, see Melissa A. Waters, *Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era* 80, N.C. L. REV. 527 (2002) (explaining the historical reasons for the imbalance of power between trial and appellate courts, as well as their consequences for mass tort litigation).

26. The range differs in the various California courts. From time of filing to disposition, it varies from the third division of the Fourth District with an average of 393 days to the Third District in Sacramento which has an average of 607 days. The state median is 469 days. But a given case can take much, much longer. In the courts just cited, 90% of the cases are disposed of, respectively, in 575 days, 973 days, and 742 days (state median). To rephrase, if one is in Third District and the case is in the top 10% of time-consuming cases, it will take over two and half years to process. JUDICIAL COUNCIL OF CAL., *Statewide Caseload Trends* 1, 28 (2014), <http://www.courts.ca.gov/documents/2014-Court-Statistics-Report.pdf>, archived at <http://perma.cc/F826-GGKU>http

27. The time for writs is not published, and I have simply assumed that a fully briefed and argued writ proceeding, which results in a full opinion, may take about the same time as an appeal. A retired state justice has suggested to me this is roughly right although in my experience the time period is often shorter for a writ. In the First District, which is one of the faster appellate courts in the state, in 2013 on interlocutory writs, there were 22 written opinions and 310 matters disposed of without written opinion. In 2012, there were 13

dispositive it will for that reason define the contours of pretrial preparation including discovery. This makes it difficult, and sometimes impossible, to continue with the case in a coordinated fashion while the appellate proceedings are pending.<sup>28</sup>

In most civil cases, not to speak of complex ones, there is a very wide variety of possible outcomes: compensatory damages can of course vary from zero<sup>29</sup> to whatever it is the plaintiff seeks, and worse, if punitive or emotional distress damages *may* be available (whether they are in fact or not), or attorneys' fees, the outcome is even less predictable. Depending on the case, the possible outcomes for injunctive relief may be few, or many. There is no "market" for this case because it is very likely one of a kind; as I say, the lawyers [and the judge] have not seen it before. But now I mean this here also in a stronger sense, because most complex litigators have a very limited trial experience. Unlike their colleagues in the criminal courts, and with some exceptions, civil litigators rarely try cases. It really is *sui generis* for them. This poses its own series of problems, some of which I will allude to later.

Finally, I note two further related contrasts between the simple criminal and a complex (or indeed any) civil one. First, with rare exceptions, a criminal case will terminate based on the merits (and I am indeed assuming that a plea bargain is based on the merits, i.e. on the strength of the prosecutor's case<sup>30</sup>). The exceptions have to do with, e.g., the relatively rare suppression of evidence by the court, *Brady* violations, or perhaps a statute of limitations or speedy trial problem. This is not necessarily so in civil cases where (unlike criminal cases) there is a risk that funds will not be available to take the case all the way through. In short, the monetary cost of litigation is a serious factor in the life of a civil case in a way it is not in criminal cases.<sup>31</sup> Once a criminal case

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written opinions and 280 disposed of without opinions. *Id.* at 33. That is, written opinions were provided in 2013 in about 0.07% of the cases, and in 2012 the figure was 0.04%.

28. Obviously an appeal severely limits what a trial court can do, CAL. CIV. PROC. CODE § 916 (West 2015), but I mean something more here. First, when an appeal involves some but not all parties, it is at least conceivable that a judge might opt to delay matters as to the parties not covered by the appeal so that a reversal will not require the wholesale duplication of effort. And although they need not do so, trial judges may opt to delay pending a writ proceeding, and especially when the appellate panel has requested briefing (which shows serious interest in the issue).

29. Actually, they vary down to *below* zero: plaintiffs may be stuck with costs and attorney's fees of the other side. CAL. CIV. PROC. CODE §§ 998, 1033.5 (West 2015).

30. *But see* Jed S. Rakoff, *Why Innocent People Plead Guilty*, THE N.Y. REVIEW OF BOOKS (November 2014), <http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty/>, archived at <http://perma.cc/M2NV-33VU> (explaining why innocent people take plea bargains).

31. To be sure, prosecutors have their priorities, and cannot take every case; and

commences, it would be bizarre if it were to resolve based on the fact that one party or the other was about to run out of funds. But that possibility lurks in every civil case. It is a potent source of uncertainty and creates a potent pressure point for settlement.

This leads to a second contrast. As noted just above, in civil cases, there is a threat to both sides; there is always a cost to a side even when the side is confident in victory. In civil cases, this risk can be augmented by the cross complaint, which has the effect of multiplying the uncertainty of outcomes. I do not mean just cross complaints against the plaintiff although that can be plenty destabilizing: the defendant may be able to bring in a plethora of other parties and, in so doing, vastly increase the stakes, the costs, and uncertainty. This routinely happens in construction defect cases which might start out with a plaintiff homeowner suing the general contractor, who then in turn brings in all possible subcontractors as cross defendants. Of course, these risks do not obtain in criminal trials.<sup>32</sup>

The result is, as is intuitively obvious, that the result in complex civil cases is difficult to predict. I have belabored the obvious because I wish to tease out and discuss the specific types of problems that make outcomes in complex civil cases difficult to predict, and in turn difficult to settle early (i.e. at an EIP).

For the judge, a complex civil case is not just more work than a simple case, it is different work. For example, judges handling a misdemeanor drug case are by and large trial judges and all their decisions are made in the context of trial. Complex civil judges may go for years without a jury trial: their work is management and motions.

## V. ASPECTS OF COMPLEX CASES

For convenience I have divided comments here into two parts, although some discussion under one might easily have been categorized under the other. The first part looks at a few of the animating forces which may be found in any case and more so in complex cases. As the subtitle suggests, I think of these not so much as good descriptions of a *type* of case—I discuss that in the second part—but rather specific mechanisms which create difficulties. The second part roughly maps a sort of taxonomy of complex cases, calling out their aspects and the reasons why they are complex. Each of these discussions aims to explain why judicial

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neither they nor defense counsel have the resources to undertake every possible pretrial investigation.

32. Certainly there are very complicated criminal trials, especially with multiple defendants, gang allegations, and difficult issues of confession admissibility. In the text, I am still contrasting the simple criminal case with the complex civil case.

intervention is helpful—or required.

A. *Catalysts, Inhibitors and Other Mechanisms*

1. Outliers & The Edge Problem

All legal issues have edges (or, if we were writing in the 1960s, “penumbras”<sup>33</sup>), where the signal to noise ratio shifts from high to low. Especially during pretrial work such as discovery (but also at trial), not every minute is spent precisely on topic. Lawyers understandably have concerns with impeachment, background and context. We also see deliberate attempts to misdirect, an unsettled grip on [or straight-out misunderstanding of] issues, as well as the deep desire of most lawyers to account for each possibility and leave no stone unturned. These investigations all lie at the “edge,” or border of core legal issues, and they threaten to confound and derail a case. These are the black holes of discovery, and where juries go mad listening to what seems to be extraneous nattering at trial. In motion practice, it is these issues which lead to the sometimes unauthorized filing of sur-replies and replies to sur-replies, requests to impeach impeaching witnesses, notices of depositions to those who wrote book reviews of books on which experts rely. Lawyers’ automatic, reflexive tendency in this direction is neatly summarized in the classic introduction to most document demands: “Produce any and all documents which refer, constitute, reflect or otherwise relate to [insert issue]. . .” Every word in a contract could be deemed ambiguous and if so its every use by every person involved in the contracting process might be—if at some far distant remove—relevant. Every witness has a history, and some events from those histories might relate to her credibility; every narrative of deceit, misconduct, malpractice or other offense has tentacles ranging back in time and outwards to other people and events—which might all be documented and ripe for exploration. These are the edges of the core issues, the outlier issues.

Every core issue has many such edges, and many issues may generate a very large number of edges which in turn may swamp consideration of the core issues. Complex cases have many of these outliers,<sup>34</sup> and as

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33. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

34. See, e.g., Michelle J. White, *Legal Complexity and Lawyers’ Benefit from Litigation*, 12 INT’L REV. L. & ECON. 381, 382 (1992), <http://deepblue.lib.umich.edu/handle/2027.42/29878>, archived at <http://perma.cc/M7BG-4QRA> (“Legal complexity is defined here in terms of the amount of information that must be collected and processed in order for lawyers to evaluate a case and litigation to proceed. For example, a statute that is vaguely worded is more complex than one that is clearly worded, since when the statute is vague, lawyers need to consult additional sources of

described below, parties in these cases have the means and motives to pursue them.

## 2. Friction

Friction is the cost of doing business: the transaction costs. It is the reason there are no perpetual motion machines; it is the second law of thermodynamics. In litigation, it is the cost of getting things done, whether it is the cost in time of picking up the phone for a meet and confer, the price of an expensive summary judgment motion, privilege logs with a thousand entries, or flying to Denver for a deposition. Obviously friction goes up with complexity: it may take a minute to arrange a conference call with one lawyer, and weeks to get it done among twenty lawyers; and because counsel are expected to confer and coordinate on every discovery motion, hearing schedules and depositions, joint case management conferences, demurrers (motions to dismiss), mediations, and much else, this friction is significant. Friction rises rapidly with the number of lawyers, parties and issues (see the Edge Problem).<sup>35</sup>

Almost all the procedural rules in the rules of court and California's Code of Civil Procedure, as well as local rules and individual judges' guidelines, were originally designed to reduce friction. They set defaults, sometimes inflexible defaults, in order to avoid having as it were to reinvent the wheel in every case. It would be beyond exhausting if in each case everything from the number of lines per page and how to secure judicial notice, to the format and timing of motions had to be negotiated or argued and decided by the judge. Some devices, like a separate statement of undisputed facts (or format for objections) in summary judgment motions, or a separate statement in discovery motions, are required because they make issues easier to decide. Having rules and defaults allows the parties and judges to spend their time on substantive matters.<sup>36</sup>

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information for clarification. Legal rules that involve additional tests are more complex, since each extra test requires that additional evidence be collected and evaluated").

35. As every lawyer knows, transaction costs rise rapidly in complex litigation also because discovery is very expensive, a function of the fact that documents, including massive amounts of electronic documents, may be sought by the parties. This subject has been the subject of much writing, and I do not discuss it as a separate problem. Voluminous, expensive discovery does contribute to the impact of many of the aspects I break out for separate discussion below, such as money, the shock wave effect, phasing, and deep reach.

36. However, some rules may be seen as creating transaction costs in the name of affording due process and safeguards, such that we have higher level of confidence in the result than we would otherwise. At least in our legal world, such rules are not merely transaction costs, a sort of potentially avoidable friction which interferes with the substance of litigation; instead, they are basic to the process.

But every rule extracts its pound of flesh: effort is required to comply with page limits, forms and formats, and timing requirements. Time and effort is also required to revamp issues in a case to fit into the molds of the law. For example, a complex transaction must, to be the subject of suit, fit within the constraints of how a cause of action is defined. Often the rules act as counters in a zero-sum game: they are imposed by the court to make the job of judges easier, but make the jobs of lawyers more expensive. Twenty years ago, the Superior Court in Los Angeles mandated blue backers: extra-long blue paper backing for each filing. These made it simpler for some judges to locate a given filing, but created headaches for lawyers. One north Bay Area county court required lawyers to appear in person to obtain a hearing date on demurrers: I asked a judge there why this has been done. It was an enormously successful rule, she assured me. Why? Because it reduced the incidence of demurrers to almost zero. Now, that is friction with a vengeance. In evaluating objections to deposition designations, I require lawyers to create a single document which reflects all designations, counter-designations and objections: this imposes a burden on them, in order to save myself the burden of combing through sometimes a dozen documents at the same time in a multi-party case to get a sense of the objections in context. Roughly the same rationale applies to requirements for the format of jury instructions, the provision of copies of out-of-state cases, and so on and so forth.

The rules and defaults are written with the standard case in mind, and some friction will always be imposed, but of course there are few of these ideal standard cases, and so there will always be unnecessary friction, and wise counsel and judges will try to ameliorate those costs. Lawyers will ask for relief from the rules, often for the best of reasons. But even those efforts are costly: seeking leave to file more pages than allowed, having noticed periods reduced, negotiating informal discovery and factual stipulations—all sensible moves—are not free. Some approaches, such as bench trials as well as the use there of declarations and depositions in lieu of live direct testimony, may well reduce friction but always at a cost, for example, the loss of a jury, and the sustained live evaluations of significant witnesses. With the second law of thermodynamics, there's no such thing as a free lunch.

### 3. Information Flow

A case is series of events, each done presumably to inform the next. At the highest level of abstraction, the complaint and answer inform the scope of discovery, which informs the evidence to be had at trial, which sets the stage for appeals. Theoretically, each stage cabins the next. This

happens because, to be overly obvious, information flows from one phase to the next. Breaks in this flow are bad, and the rapid flow of information is good—although as we will see with the shock wave effect discussed below, information may flow too fast to be useful.

Cases assigned to judges for all purposes, including cases assigned to complex departments, benefit from—but sometimes are harmed by—increased information flow from one point to the next in the life of the case. There are some ways in which information is carried forward regardless of whether a single judge is assigned to the case. For example, doctrines of judicial estoppel,<sup>37</sup> the use of formal stipulations, prior orders (of any judge) in the case,<sup>38</sup> concessions made on the record and in pleadings (such as judicial admissions in complaints) are all sources of information which carry forward into subsequent phases. Statements made in one brief or memorandum can be used against the author in later motion practice. More informally, case management and other conferences in singly assigned cases generate information outside the written record, and while lawyers may not technically be bound by these discussions, they do create an overall sense of where the case is going and what parties are willing to do, from which it can be difficult to stray. This helps constrain the case. The use of court reporters, and case management orders summarizing events and positions taken by the parties, preserve the information.

Because the judge's memory is also a repository of information, it is beneficial to have a single judge assigned to all phases of the case.<sup>39</sup> It is inefficient when a new judge is presiding to have lawyers re-educate a

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37. See e.g., *Jackson v. Cnty. of Los Angeles*, 70 Cal. Rptr. 2d 96, 102 (Ct. App. 1997).

38. Some court orders are useful in this sense, and not others. For example, a decision not to quash service of summons is not likely useful thereafter, but a decision on demurrer may inform a subsequent motion for judgment on the pleadings. Some decisions are not strictly speaking determinative in a subsequent phase but they may be persuasive, and this is so especially when the same judge is presiding. Thus an order in a discovery motion only resolves that dispute, but may have a strong influence on the resolution of the next discovery dispute (regardless of who brings it). So too with a denial of summary judgment: such an order has no subsequent utility (it is not admissible at trial for example) but its reasoning may influence the subsequent choice of jury instructions and rulings on motions, for example: directed verdict, a new trial, and judgment notwithstanding the verdict. Some rulings, such as a determination that a plaintiff has enough evidence to survive an anti-SLAPP motion, may play a significant and perhaps decisive role in motions for summary judgment and adjudication, and motions for a preliminary injunction; and vice-versa.

39. I provide a short explanation for those unfamiliar with the options for judge assignment. Some counties (and, historically, most all California counties) have a *master calendar* approach by which cases are sent out for trial depending on which judge is ready on that day. Earlier, the parties may have been sent to a variety of different judges, for example for settlements, writs, motions (perhaps different judges depending on the motion), and case management (such as might be under these circumstances).

judge on the facts, or re-persuade the judge on the law.<sup>40</sup>

There are at least two adverse consequences of this information flow. First, the judge may evaluate a current dispute under the influence of future potential disputes and a present dispute in light of a past one. A simple example is a late discovery dispute: the merits of allowing the discovery may be overtaken by the imminence of a trial date. Parties may not ask for an early trial date if they think it might cut off some other procedure such as a forecast summary judgment motion or discovery. A party's desire for extensive discovery and the concomitant plea that there are myriad fact issues may come back to haunt the party at the time of summary judgment, when that party desires to argue that no fact issue remains in the case. Many lawyers believe a judge is more tempted to grant a summary judgment motion if she is the future trial judge than if she is not. In each such event, the specific merits of the present motion or issue are evaluated in the context of future proceedings. Some commentators have suggested that to enable their views on substantive issues such as qualified immunity for peace officers, judges may be influenced to not find constitutional violations;<sup>41</sup> and they may be constrained in their interpretations of statutes such as the American Disabilities Act.<sup>42</sup> And having issued preliminary relief (such as a temporary restraining order or preliminary injunction), judges may have in effect steered themselves into granting future relief consistent with the old order, regardless of the new evidence adduced.<sup>43</sup>

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40. It is not, however, necessarily inefficient for the *court*. While single assignment is routine in federal trial courts, it is not in state courts where some use *master* calendars to send cases off for trial as soon as a courtroom is empty. This ensures the best use of courtroom for trials, whereas in single assignment cases, a courtroom may have no trials for extended periods of time. This may be seen as a waste of the scarce resource. The optimal approach (from the court's point of view) of course depends on the types of cases generally handled by the court, and where there are different types—and there always are—a combination of master calendar and single assignment judges is optimal. That means that some cases will never be singly assigned.

41. See Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 670 (2009) (discussing the thought process of judges in qualified immunity cases). Judges may modify their views on one element in order to avoid an unpleasant ruling on a different element. One type of the avoidance canon, by which courts generate an interpretation of a statute in order to avoid constitutional issues, may be an example. Cf. Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 23-24 (1996) (explaining the use of the avoidance canon that judges use to avoid answering certain constitutional questions). See generally Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1216 (2006) (discussing the canon of constitutional avoidance).

42. See Cheryl L. Anderson, *Ideological Dissonance, Disability Backlash, and the ADA Amendments Act*, 55 WAYNE L. REV. 1267, 1297 (2009) (discussing judicial interpretations of the American Disabilities Act).

43. See Kevin J. Lynch, *The Lock-in Effect of Preliminary Injunctions*, 66 FLA. L. REV.

Concomitantly, lawyers who foresee this free flow of information (such as where we have a singly assigned judge) may be hesitant to commit early in one context for fear of upsetting their position in an as-yet un contemplated future context. I recall a case in which at the first case management conference I asked the parties if they agreed that the key contract was unambiguous and that I need not look at extrinsic evidence. No one knew of any ambiguities, and so the lawyers agreed, on the record. Within twenty-four hours one side had frantically retracted the concession for fear that its future discovery would be limited, and that it might be unable to make arguments—as yet unformulated—on the interpretation of the contract. This fear is deep-seated; whereas judges hope to secure early agreements to streamline a case, lawyers generally refuse until they know everything there is to know—that is, until it is too late to do anyone any good. Attaining just the right information flow—enough to truly expedite the case, but not so much that the parties balk—is a key to case management.

As we see in the next section, there is another danger to information flow.

#### 4. The Shock Wave Effect (telescoping information)

Every new (and not so new) judge knows what it is like to drink from a fire hose. The most difficult assignments are those with fast, high volume calendars: 30, perhaps 70 matters in a morning.<sup>44</sup> We see this in some misdemeanor, drug, and family courts. Those judges operate first with scripts, and later almost instinctively. Heuristics—rules of thumb—and standard procedures guide their actions. The slightest variation can cause chaos. This is not because the judges are incapable of figuring out what to do with variations, but because there is no time to account for them. Decisions which spaced out over time present only a sort of linear difficulty become *qualitatively* far more difficult and sometimes impossible when they must be made in a very short amount of time. There isn't enough time to absorb the information from one event or moment to use it

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779, 806 (2014) (discussing the effect of giving a preliminary injunction in later litigation).

44. The numbers are often much higher. John R. Emshwiller et al., *Justice Is Swift as Petty Crimes Clog Courts*, WALL ST. J., Nov. 30, 2014, <http://www.wsj.com/articles/justice-is-swift-as-petty-crimes-clog-courts-1417404782>, archived at <http://perma.cc/8FBQ-FAUA> (“In Florida, misdemeanor courts routinely disposed of cases in three minutes or less, usually with a guilty plea, according to a 2011 National Association of Criminal Defense Lawyers study. In Detroit, court statistics show, a district judge on an average day has over 100 misdemeanor cases on his or her docket—or one every four minutes.”); Bernice B. Donald, *The Art of Judging*, JUDGES’ J., 17 (1994) (“Trial judges in high-volume courts are often confronted with dockets containing 50 to 100 cases per day.”).

in the next.

An analogy to shock waves illustrates this qualitative distinction. When an object moves faster through a medium (such as water or air) than the information about it can be transmitted, what was a gradual compression is instantaneously transformed into a shock wave of explosive force. This has been termed a *phase transition* which for our purposes simply suggests a swift, powerful, and highly significant change in phenomenon—generated solely and literally by increasing the speed of information flow.<sup>45</sup>

So it may be in litigation when there are a large number of issues to be resolved in finite time. As suggested, this may happen in cases not traditionally thought of as complex. It happens in busy law and motion courtrooms, where for example multiple motions for summary judgment are scheduled most days (on top of other motions). It happens in routine trials: it may be literally infeasible to handle a large number of pretrial motions in limine just before the jury is about to be summoned, or last minute reviews of jury instructions, or ruling on objections to expert testimony during trial.<sup>46</sup>

In the complex arena the shock wave may manifest when hundreds or thousands of mass tort cases are assigned to one judge. More routinely a judge may have dozens of demurrers in a single case to hear one morning, or other proceedings with differing input from a large number of parties on a large number of issues. In the context of a single motion, the shock wave effect may be seen as an example of a *tight or close coupling* problem. Some complex systems such as space craft and nuclear reactor systems have many subsystems which are all performing simultaneously and are closely coupled, that is, the impact of one subsystem on others is not buffered; accordingly failure may cascade through the systems without constraint.<sup>47</sup>

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45. See generally *Shock Wave*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Shock\\_wave](http://en.wikipedia.org/wiki/Shock_wave), archived at <https://perma.cc/6P6A-XRR7> (“The abruptness of change in the features of the medium, that characterize shock waves, can be viewed as a phase transition . . .”). See also G. E. Duvall et al., *Phase transitions under shock-wave loading*, 49 No. 3 REV. MODERN PHYSICS, 523 (1977) (“Shock phenomena most commonly experienced by an individual are the boom from supersonic aircraft, the crack of a rifle, and automobile pileups on crowded freeways. The fact that the last-named event produces a shock wave suggests what is indeed true: that shock waves are very general and are, if not ubiquitous, at least pervasive.”).

46. The objection will be that the testimony exceeds the scope of deposition testimony and is not within the scope of the expert’s expertise. Thus the judge may be asked—perhaps at a brief sidebar conference—to compare (a) the subject matter of sometimes multiple volumes of testimony, (b) the scope of a formal disclosure or outline of proposed testimony and (c) the areas within which the expert is actually qualified to have opinions.

47. See CHARLES PERROW, *NORMAL ACCIDENTS: LIVING WITH HIGH-RISK TECHNOLOGIES* (1999)(explaining the possible dangers of failure in high risk technologies );

There are analogies in the legal system, in particular with complex motions such as those for class certification, summary judgment and anti-SLAPP. One error can cascade through the sequence of sub-issues, resulting in a failed motion, with resultant very high inefficiencies. Summary judgment motions are entirely notorious in this respect: small errors in form and format,<sup>48</sup> errors in the title of papers,<sup>49</sup> errors in timing service,<sup>50</sup> and inaccurate handling of evidentiary objections can doom an otherwise meritorious proposal<sup>51</sup> (or indeed result in granting motions that otherwise would never be granted<sup>52</sup>). In these motions, a large number of

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CHARLES PERROW, *THE NEXT CATASTROPHE: REDUCING OUR VULNERABILITIES TO NATURAL, INDUSTRIAL, AND TERRORIST DISASTERS* 260-61, 264 (2007) (describing operating system vulnerabilities).

48. CAL. R. CT. 3.1350(d) (stating separate statement must identify and be arranged by each cause of action). Other formatting requirements are found at California Rules of Court 3.1350(h). Failures in properly arranging the separate statement may lead to denial of the motion. *See also* CAL. CIV. PROC. CODE § 437c(b)(1) (West 2015) (describing the supporting papers for a motion for summary judgment); *Batarse v. Serv. Emps. Int'l Union Local 1000*, 147 Cal. Rptr. 3d 340, 350 (Ct. App. 2012) (“In *Security Pacific*, the plaintiff filed a motion for summary judgment; the defendant, represented by counsel, filed opposition that included a separate statement of disputed and undisputed facts. The trial court denied the motion without prejudice because it was not in proper form . . .” (citing *Sec. Pac. Nat'l Bank v. Bradley*, 5 Cal. Rptr. 2d 220 (Ct. App. 1992))); *Kojababian v. Genuine Home Loans, Inc.*, 94 Cal. Rptr. 3d 288, 297 (Ct. App. 2009) (holding that the trial court was correct to deny the opportunity to cure failure to file statement of undisputed material facts).

49. If the notice of motion seeks only summary *judgment*, a court cannot grant summary *adjudication*. *Homestead Sav. v. Superior Court*, 224 Cal. Rptr. 554, 559 (Ct. App. 1986); CAL. R. CT. 3.1110(a), 3.1350(b).

50. *Robinson v. Woods*, 86 Cal. Rptr. 3d 241, 250 (Ct. App. 2008) (holding the motion cannot be granted if 75 days' notice not provided, and court cannot provide relief); *see also* *Urshan v. Musicians' Credit Union*, 15 Cal. Rptr. 3d 839 (Ct. App. 2004) (holding that trial courts do not have the discretion to shorten the notice period); *McMahon v. Superior Court*, 130 Cal. Rptr. 2d 407 (Ct. App. 2003) (holding that trial courts do not have the authority to shorten the minimum notice period for summary judgment hearings).

51. Objections must be made in a certain form. CAL. R. CT. 3.1354. If not, the objections may be overruled, and consequently evidence will come in and may thus either rebut a factual dispute where there ought to be one (and so have the motion granted), or successfully create a factual dispute where there ought not to be one (and so have the motion denied). *See* *Cole v. Town of Los Gatos*, 140 Cal. Rptr. 3d 722, 734 n.6 (Ct. App. 2012) (“[W]here a trial court is confronted on summary judgment with a large number of nebulous evidentiary objections, a fair sample of which appear to be meritless, the court can properly overrule . . . all of the objections on the ground that they constitute oppression of the opposing party and an imposition on the resources of the court.”).

52. For example, if plaintiff fails to properly authenticate its evidence in opposition to the motion, or makes the wrong objection to the moving defendant's motion, or fails to prepare a proper separate statement in opposition, the motion may be granted when it otherwise would not be. *See* *Hodjat v. State Farm Mut. Auto. Ins. Co.*, 149 Cal. Rptr. 3d 93 (Ct. App. 2012) (holding that the court did not abuse its discretion in refusing to consider evidentiary objections not filed separately in compliance with Rules of Court).

papers interact with each other, and these papers are subject to a very wide spectrum of tests for adequacy.<sup>53</sup> Generally, there is no time to fix things; all the papers are submitted at once and a single point of failure will be decisive. Often, because these motions are made when the case is mature and close to trial, and because the notice period is ferociously long,<sup>54</sup> there will not be a second chance.

Similar problems are encountered in motions to certify a class where everything happens at once: the evidence is presented; it must be admissible, or objections must be correct; the class definition must cohere with liability theories; and ascertainability must be demonstrated. The choice of liability theories will affect the adequacy of the class definition, and both will affect the decision of what evidence to submit. These factors will likely determine whether the common issues predominate over individual issues, a central inquiry in this type of motion. The balance here must be just right, for the case is probably over if the court denies the certification motion. We even have a nice term for it: death knell.<sup>55</sup>

Anti-SLAPP motions are infamously complex. By these motions defendants at a very early stage of litigation seek to strike the complaint on the basis that the complaint is a covert weapon designed to inhibit defendants from exercising their constitutional rights to free speech and petitioning the government. A classic example involves a chain store company suing the local neighborhood association on a trumped-up charge of defamation or interference with prospective contractual advantage because the association is demonstrating to stop the corporation's plans to build a giant store in the residential area.<sup>56</sup> Within the confines of a single motion, generally decided at once, and probably on a day when other motions are up for argument, the following issues may be presented: (i)

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53. As the notes above suggest, some papers are measured by formatting requirements. Others require a mastery of the law of evidence, while others must be titled correctly.

54. Seventy-five days' notice is required, which is usually extended to eighty days to account for mailed service. Before the flood, these sorts of motions used to be filed with the same notice period as any other motion, about fifteen days. *See, e.g., Taylor v. Jones*, 175 Cal. Rptr. 678, 679 (Ct. App. 1981) (declining to modify the requisite notice period for a motion for summary judgment to less than fifteen days).

55. The death knell doctrine allows the defeated class representative who brought the suit to appeal the certification denial, even though her individual case is still alive in the trial court. Normally this would bar an appeal because appeals are allowed only after a complete and final judgment. *See Marengo v. DirecTV LLC*, 183 Cal. Rptr. 3d 587, 591-93 (Ct. App. 2015) (defining the death knell doctrine and deciding that the case does not fall within the death knell doctrine's procedural requirements).

56. *See, e.g., Mann v. Quality Old Time Serv., Inc.*, 15 Cal. Rptr. 3d 215, 221 (Ct. App. 2004) (analyzing an anti-SLAPP motion in a defamation and trade libel case). *See generally* THOMAS R. BURKE, ANTI-SLAPP LITIGATION (2015 ed. 2015) (discussing anti-SLAPP motions).

whether to allow some discovery; (ii) whether the complaint properly pleads a cause of action under standards similar to those used in demurrers;<sup>57</sup> (iii) whether the claims implicate the defendant's constitutional rights to speech or petitioning under one or more of four related tests; (iv) whether there are applicable exemptions within those tests; (v) whether the actions complained-of in the complaint plainly allege criminal conduct; (vi) under standards similar to those used in summary judgment motions, whether the plaintiff has enough evidence to support the claims, which may require a claim-by-claim analysis to determine if there is a match with evidence as well as rulings on objections to evidence; (vii) whether attorney fees are awardable under one or two different standards (depending on which side prevails on the underlying anti-SLAPP motion).<sup>58</sup> These motions are very difficult to brief because there are many different sorts of analyses at play, and the result on one may have a decisive effect on the next. These motions are difficult to decide for similar reasons. This presents a classic case of the shock wave effect.

## 5. Money

The injection of well-funded parties or very high stakes creates

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57. *See, e.g.*, *Wilson v. Parker*, 50 P.3d 733, 739 (Cal. 2002) (evaluating whether plaintiff sufficiently stated a claim).

58. Even this labored description of an anti-SLAPP motion hides such complexities as (1) handling mixed causes of action; *see, e.g.*, *GetFugu, Inc. v. Patton Boggs LLP*, 162 Cal. Rptr. 3d 831, 833-34 (Ct. App. 2013) (reversing an order granting a special motion to strike with respect to one cause of action and affirming the order in all other respects); *Cho v. Chang*, 161 Cal. Rptr. 3d 846, 851 (Ct. App. 2013) (“[T]he guiding principle in applying the anti-SLAPP statute to a mixed cause of action case is that ‘a plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of one ‘cause of action.’” (quoting *Fox Searchlight Pictures, Inc., v. Palodino*, 106 Cal. Rptr. 2d 906, 918 (Ct. App. 2001))); *City of Colton v. Singletary*, 142 Cal. Rptr. 3d 74, 89 (Ct. App. 2012) (“When a cross-complainant presents a mixed cause of action that involves protected and non-protected activities, as is the case here, the question presented is whether the gravamen of the cause of action targets protected activity.” (quoting *Haight Ashbury Free Clinics v. Happening House Ventures*, 110 Cal. Rptr. 3d 129, 138-39 (Ct. App. 2010))); *cf. Burrill v. Nair*, 158 Cal. Rptr. 3d 332, 349-51 (Ct. App. 2013) (holding that if a plaintiff can plead a probability of prevailing on any part of her claim, the cause of action will not be stricken); (2) determining the “gravamen” of a cause of action; *see, e.g.*, *Old Republic Constr. Program Grp. v. Boccardo Law Firm, Inc.*, 179 Cal. Rptr. 3d 129, 135 (Ct. App. 2014) (“The question whether a cause of action arises from specified conduct for purposes of the statute depends on ‘the principal thrust or gravamen of the plaintiff’s cause of action.’” (quoting *Robles v. Chalilpoyil*, 104 Cal. Rptr. 3d 628 (Ct. App. 2010))); and (3) deciding what the commercial exception covers; *see, e.g.*, *Brill Media Co. v. TCW Grp.*, 33 Cal. Rptr. 3d 371, 383-85 (Ct. App. 2005) (analyzing whether California Code of Civil Procedure section 425.16, subdivision (b)(1) applies to defendants’ alleged conduct).

complexity; more precisely, money triggers the potential for complexity in any case. There are roughly four related ways in which money becomes a problem in this sense: via (1) attorneys' fees clauses; (2) very wealthy parties; (3) substantial insurance defense funds, and (4) high money stakes.

Cases where the victor may obtain attorney's fees become increasingly difficult to settle as those investments go up,<sup>59</sup> and in these cases we do not have the usual incentives to conserve resources. Those incentives are also often missing in cases that involve very wealthy parties and parties with unsupervised defense expenditures pursuant to an insurance policy,<sup>60</sup> who are frequently unreasonable in their assessment of risk and cost.

This willingness to spend infects a case. Cases where a lot of money is at stake are not *necessarily* more complex than smaller cases, but this is difficult for parties and lawyers to grasp. I am frequently told that I should allow more time, discovery, procedures, pages in a brief, weeks of trial, or hours of argument because there is a lot of money at stake. This becomes a self-fulfilling prophecy, a vicious cycle: high stakes convince parties to expect very high costs, so they secure the services of high cost attorneys, which causes costs to rise.

The result is a variant of the *lottery effect*. In lotteries, we are irrationally willing to give up money in return for an infinitesimally small chance of a very high reward. Parties and lawyers assume the high stakes justify high spending on very low probability options. Where spending \$50,000 may be absurdly high in a low stakes case to ensure one has every last email from the other side, parties in a \$20 million case will conclude otherwise. The same reasoning leads a party to map and test out every issue which conceivably has any relationship to the merits—the Edge Problem. A party may spend a lot of money on a low probability option because it may increase the odds of eventual success and slightly shift the

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59. See CURTIS KARNOW, *Timing Settlement*, *supra* note 15, at 6 (“We know from experience that the availability of attorney’s fees often blocks settlement late in the life of the case, especially when the fees expended outweigh the reasonable settlement of the case absent such fees.”).

60. An insurer’s duty to defend may create incentives to throw huge sums of money into a case, in order to avoid or reduce the possibility of a judgment in excess of policy limits. Insured parties wish to avoid judgments in excess of those limits as a matter of course. Insurers have the same wish because they do not want to be accused of having acted unreasonably, breaching the covenant of good faith and fair dealing, and consequently on the hook for a judgment in excess of policy limits. See *generally* *Gulf Ins. Co. v. TIG Ins. Co.*, 103 Cal. Rptr. 2d 305, 312 (Ct. App. 2001) (discussing the elements of a cause of action for breach of the covenant of good faith and fair dealing); H. WALTER CROSKEY ET AL., CALIFORNIA PRACTICE GUIDE: INSURANCE LITIGATION ¶¶ 12:225-:341 (2015 ed. 2015) (discussing a bad faith action based on an insurer’s failure or refusal to settle a third party’s claims against the insured).

settlement envelope in its favor; in a high stakes case, a very small shift may be worth a lot of money. The cost of a procedure or motion pales to relative insignificance in the light of very high stakes, at least as far as the parties are concerned.

From the perspective of the courts, this is dysfunctional behavior. Wise case management and thoughtful settlement positions tend to focus on the probable outcome and probable worth of the case.<sup>61</sup> We ask what the case is *probably* worth and what evidence is *probably* going to be useful. When we ask how to best spend our time or resources, we implicitly tag the options with high and low costs and high and low utility and preferentially seek high utility and low cost.

But when the stakes are very high or the parties have a vast amount to spend (the two do not always describe the same cases), the parties tend to concentrate on the outlier areas. They focus on not only the middle of the bell curve where the most useful procedures likely reside, but also at the outliers: the tail ends of the probability bell curve, which involve making motions, doing discovery, and taking positions that will *probably* make no difference and can be read by the court (and juries) as frivolous.

There are two related areas of quicksand here. In the context of discovery motions, judges are told that under the rule of proportionality, the *stakes should be considered* when directing expenditures of resources to comply with discovery demands.<sup>62</sup> We simply cannot have a \$50,000 demand for documents when the case is worth \$10,000. But the converse is not necessarily true: that we *should* have a \$50,000 demand in a case worth \$20 million.

As suggested above, especially in cases involving potential recovery of attorney's fees from the other side, but in any case in which very large amounts of money have been spent, settlement becomes increasingly difficult as the case goes on. Parties and lawyers are subject to what I call the Vietnam Syndrome and what economists usually call the "sunk costs" fallacy. Having sunk innumerable dollars into the litigation, parties will not settle for some small fraction of that amount—even though past expenditures are usually irrelevant to the settlement decision, which should be based on the odds of securing a future return at trial. If a plaintiff could win a maximum of \$100 at trial, then she should settle for some reasonable fraction of that; it does not matter if she spent \$50 or \$5,000 to get to that point. But in fact it does: irrational cognitive fallacies infect decision making all the time,

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61. See *infra* Section VIII (exploring judges' tools for managing complex cases).

62. FED. R. CIV. P. 26(b) requires judges to limit discovery when "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive."

and cases involving a lot of money make this more likely.<sup>63</sup> The problem is more intractable when there is an attorneys' fees clause because it is *not* entirely irrational to count past expenditures. In those cases, the tail truly does end up wagging the dog: consideration of the fees often trumps an evaluation of the merits.

#### 6. The Unintended Impact of Complex Treatment

In California, there are two courts that pick the cases they will hear: the Supreme Court, which generally chooses which cases to review, and the complex litigation courts, which pass on applications for complex treatment filed by one or more parties. Presumably the parties seek complex treatment because they wish for wise management and the opportunity to channel their efforts, constrain costs, and have some control. However, designation of a case as "complex" may increase the costs and complexity of litigation, and it may vastly increase the time to judgment.

As I will discuss below in Section VII, the complex litigation judge has many weapons in her arsenal. Chief among them include the ability to pace and stagger such events as discovery and motions and bifurcate issues into a series of bench trials and other sorts of phasing. These tools may solve one set of problems but create others. These tools solve the shock wave problem and help the judge reach the right (i.e., considered) result when the crush of work may make serious evaluation of an issue difficult.

On the other hand, complex designation may ensure that *every possible issue*, including outliers, will be treated. Absent complex designation, the issues may not have been raised or may have been seen as moot or irrelevant.<sup>64</sup> That designation may increase the time and money spent on litigation. In non-complex cases, issues such as jury instructions and evidentiary rulings may never be raised because the case settles, a different determination (e.g. a summary judgment order) terminates or modifies the case, or as the case unfolds at trial, the issue is ignored by the lawyers or mooted by other events. Since the vast majority of cases settle, issues that arguably matter only to trial may never be reached. Trial has a wonderfully focusing effect on the experienced lawyer: the thirty-five affirmative defenses are unceremoniously thrown overboard; claims are pared down; of the fifty persons on the witness list, ten show up; problems with the admissibility of thousands of documents are forgotten in favor of

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63. See generally Andrew J. Wistrich et al., *supra* note 16, at 612-20 (discussing the "sunk-cost fallacy").

64. Thus appellate courts are reluctant to interfere with trial proceedings, short of an appeal. Issues raised by writ petitions may never have to be considered at the end of the case.

the fifty items that the jury will actually review.<sup>65</sup> Even potentially decisive issues such as statutes of limitations may be swept under the rug as the relative strength and power of other issues dominate the trial.

Complex judges tend to peel out as many issues as they can as early as possible. (I am guilty here: I have jocularly<sup>66</sup> suggested to horrified lawyers that we have a jury instruction conference a week after the Answer is filed.) But when all of the issues are handled before trial, sometimes long before trial, the focusing effect of trial is lost. When judges manage a complex case for years before it gets to trial, each conceivable issue can be broken out for early, separate, exhaustive treatment. This increases the odds of spending time and money on outlier issues, and it can turn a two year case into a five year case.

Getting to trial as fast as one practically can is an important governor of discovery costs. We do discovery to avoid “ambush” at trial and to ensure high confidence in the final result. But discovery also *redirects* costs by shifting them from the trial to pretrial work. This reduces trial time, which includes the high cost of a judge’s time<sup>67</sup> to pretrial work. Discovery diminishes trial complexity at the cost of *increasing* pretrial complexity. But without a trial—and especially in complex cases, we rarely have trials<sup>68</sup>—all the costs are incurred, but not all the benefits are gained.

## B. Case Types

Here I outline five general types of complex cases. These share some characteristics, and each may be animated by some of the mechanisms I have just outlined above. But distinguishing them will be useful as we go over some of the means of control later in Section VII.

### 1. Multi-step

Some cases and issues in cases are seen as complex because the participants must traverse a long series of steps, factors, or tests. When the steps must be handled in a short period of time, we run into a shock wave effect. We can see this operate at a small scale with a hearsay objection, sometimes formulated and ruled on within a few seconds at trial. The

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65. However, not all lawyers handling complex cases are accomplished trial lawyers. These lawyers may still hope to use 10,000 exhibits.

66. That is, jocose only as a judge thinks it, which usually means: not funny at all.

67. Judges’ time is a “high” cost in the sense that it is scarce and is often a bottleneck in the processing of cases.

68. See *supra* text accompanying note 15.

purpose of the evidence must be ascertained, which first requires a good grip on the issues to be proved at trial; that is, materiality must be first treated. Then the many types of exceptions to the hearsay rule are evaluated. Similar analyses are made under California Evidence Code section 1101(a) regulating the admission of character evidence.<sup>69</sup>

As described above some motions—typically those thought of as complex—have this multi-step aspect: anti-SLAPP, summary judgment and class certification. While any judge can handle these motions, the nature of these motions is a reason to have judges familiar with the procedures do so: they know what can go wrong, what to look for, even when the lawyers do not.

Some legal tests with multiple factors are sequential; anti-SLAPP, for all of its Rube Goldberg complexity, is an example. One methodically plods through any requests for discovery, examines the complaint to determine if it is well-pled, reviews exemptions and exceptions, the criminal activity preclusion, the first prong, the second prong, considers fee requests, and so on.<sup>70</sup>

More significantly for present purposes, other tests require the simultaneous balancing of multiple incommensurate factors each of which is more or less present across a spectrum: these tests could be termed complex, as opposed to merely complicated. The humble discovery motion, often requiring the balancing of burden with relevancy, is a perfect example: these classic two factors are *incommensurate*, i.e. they are not on the same scale, yet judges are asked to balance them *against* each other.<sup>71</sup> So too with the balancing done for preliminary injunctions: we balance (i) the likelihood of prevailing (the merits) against (ii) the result of a *separate*

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69. See B. SIMONS, SIMONS CALIFORNIA EVIDENCE MANUAL § 6:1, at 470-72 (2015 ed. 2015) (discussing California Evidence Code section 1101(a)).

70. See generally, ROBERT I. WEIL ET AL., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 7:500 (2015) (providing an overview of anti-SLAPP motions).

71. While discovery fights are commonly thought of as involving two factors, there are more. As I write elsewhere in this note, the *stakes* of the case are pertinent to the proportionality factor. And what I have termed the *relevancy* issue actually hides two separate factors: the pertinence or materiality of the issue in the case and the utility or relevancy of the specific discovery at stake to that issue. There is a further factor, usually hidden in the evaluation of burden: the availability of other means of discovery. I summarize: if Alice wants a document from Bob, the burden analysis will involve (a) the stakes in the case (e.g., lots of money versus not very much), (b) where else the data on the document could be found (nowhere else, versus from a lot of different places including Alice's own files, implicating an analysis of the burden *on Alice* to get the data from some other place), and (c) how much time and effort it will cost Bob to produce it. The other factors are: what issue the document relates to (a core issue versus outlier), and how important the document is to that issue (it will help a little versus help a lot). That is five factors. Each is on a spectrum (from a little to a lot), and with exception of Alice's and Bob's burdens, each spectrum is entirely incommensurate with all the others.

balancing of respective harms to the parties. And so too for the common balancing under California Evidence Code section 352: the prejudicial impact of the evidence versus its probative value.<sup>72</sup> Other common tests, such as trademark infringement, require the evaluation of about eight incommensurate factors,<sup>73</sup> and the test to determine if one is an employee or an independent contractor depends on evaluating one primary factor and seven secondary factors.<sup>74</sup> Deciding attorneys' fees for services to a minor or a person with a disability involves fourteen factors, some with subparts, and almost all of them incommensurate with each other.<sup>75</sup> There are nineteen factors to consider as one decides whether to let cameras in a courtroom.<sup>76</sup> Tests for alter ego liability,<sup>77</sup> sentencing, and many others involve this multi-step, multi-factor process, often as part of a single analysis and almost always pitting incommensurate factors (many of which are more or less present, as across a spectrum) against each other.

But we are not done. There are different ways in which these factors interact, and the rules of interaction are not always obvious. In some situations, all the factors are, as it were, in the soup: they all have an essential role. Discovery motions and the balancing under California Evidence Code section 352 probably fall under this rubric.<sup>78</sup> In other situations, any of the factors might be decisive. For example, class action certification motions are doomed if any of the usual factors (e.g.,

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72. CAL. EVID. CODE § 352 (West 2015).

73. See *Winchester Mystery House, LLC v. Global Asylum, Inc.*, 148 Cal. Rptr. 3d 412, 426 (Ct. App. 2012) (discussing the eight *Polaroid* factors (citing *Polaroid Corp. v. Polaroid Elec. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961)), *cert. denied*, 368 U.S. 820 (1961)); see also *In re E.I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (3d Cir. 1973) (holding that the *Du Pont* factors are used in opposition proceedings within the Trademark Office when two marks are in apparent conflict, as opposed to the district court context where *Polaroid* is the typical citation).

74. See *S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 409 (Cal. 1989) *cited with approval in Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165, 176 (Cal. 2014) (discussing the factors for an independent contractor); see also 17 U.S.C. § 107 (2012) (stating that the factors—such as the key factors of (1) amount of original material used and (2) the impact on the market for the original item—are incommensurate.); cf. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577–78 (1994) (holding that in an action alleging copyright infringement, a court should weigh each of many factors on a “case-by-case” basis, and depending on the facts of the case, some factors may weigh more heavily than others).

75. CAL. R. CT. 7.955.

76. The last factor being: “(S) Any other factor the judge deems relevant.” CAL. R. CT. 1.150(e)(3).

77. There are at least fourteen factors for alter ego liability “[a]mong” others “under the particular circumstances of each case,” and as the court noted, the “long list of factors is not exhaustive.” *Greenspan v. LADT, LLC*, 121 Cal. Rptr. 3d 118, 138-39 (Ct. App. 2010), (quoting *Zoran Corp. v. Chen*, 110 Cal. Rptr. 3d 597 (Ct. App. 2010)).

78. CAL. EVID. CODE § 352 (West 2015).

ascertainability, counsel competence, predominance of common issues, etc.) fails.<sup>79</sup> In other contexts, there are many relevant factors but only a few are usually decisive, as in the tests for independent contractor status.<sup>80</sup> Sometimes the rhetoric of the tests suggests all factors ought to be considered, but this is false: one or two factors are in practice decisive and the rest are brusquely arranged to conform.<sup>81</sup> Sometimes the factors are just a list of things to think about, any of which might have some, or a lot, of weight, but not necessarily. Setting a trial date is like that.<sup>82</sup> In other situations, the list of factors is actually a way of listing the aspects or characteristic of a legal notion: enough of them and the notion is manifest. For example, the Supreme Court has cited about eight factors involved in deciding whether one is an *agent* of another.<sup>83</sup> For all their variety, these factors all harken back to a single guiding thread: they are different ways of thinking about *control and direction*; they are facets of the single factual predicate which in sum might, or might not, lead one to conclude that someone was an *agent* of another.

This is not the place to complain too much about these tests;<sup>84</sup> there

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79. See generally WILLIAM B. RUBENSTEIN ET AL., *NEWBERG ON CLASS ACTIONS* §§ 3:2 (5th ed. 2011) (discussing a prerequisite to class certification in some courts that the class is definite and ascertainable), 3:50-3:88 (discussing the adequacy of counsel requirement), 3:18 (discussing the common issues requirement); ROBERT I. WEIL, *supra* note 70, ch. 14 (2015) (discussing representative and class actions).

80. See Judd J. Balmer, *Civil Forfeiture Under 21 U.S.C. § 881 and the Eighth Amendment's Excessive Fines Clause*, 38 ARIZ. L. REV. 999, 1028 (1996) (discussing how the multifactor tests for permissible civil forfeitures generally comes down to a look at two factors).

81. This is probably true in trademark infringement cases. Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CAL. L. REV. 1581, 1582 (2006) (“[C]ourts typically declare that no single factor outcome is dispositive. The data clearly contradict this assertion.”).

82. CAL. R. CT. 3.729 (listing the twenty-five factors. The twenty-fifth one reads: “(25) Any other factor that would significantly affect the determination of the appropriate date of trial.”).

83. *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989) (“No one of these factors is determinative. . . . [T]he skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits, and the tax treatment of the hired party.”).

84. Others have done so in a wide variety of contexts. See, e.g., *Palmer v. Chicago*, 806 F.2d 1316, 1318 (7th Cir. 1986) (“[A]s with so many multi-‘pronged’ legal tests it manages to be at once redundant, incomplete, and unclear.”); Benjamin L. Ellison, *More Connection, Less Protection? Off-Campus Speech with on-Campus Impact*, 85 NOTRE DAME L. REV. 809, 847 (2010) (articulating tests for First Amendment protection for off campus speech by students); Autumn Fox et al., *An Eagle Soaring: The Jurisprudence Of Justice*

may not be any other good way to capture the complexity of the real world problems that end up in court and at the same time provide some guidance for their resolution. For now it is enough to note three things.

First, there is an uncertain relationship among factors and the peculiarity of balancing incommensurate factors.

Second, the balancing of factors by trial judges generally implies an abuse of discretion standard on appeal, and so some assurance that if the trial judge seemed to be thinking about them, the judge's decision will be upheld. But this expectation is upset when, despite the rhetoric, the trial and appellate courts do not share the same assumption about the *way* in which the factors are to be wielded.<sup>85</sup>

Third, one will generally need a wide variety of facts before one can even begin to make the decision, and when the list of factors is open ended, one will not know when one has enough facts. This is much more a problem for the parties and lawyers than it is for the judge: the judge is entitled simply to look at what has been served up, decide who has the burden of convincing her, and then see if the burden has been met (I set aside the other problems in weighing the factors). The problem is that the lawyers will not know when to stop *their* investigation and accumulation of evidence.

Some complex cases have this feature too, that is, they require the parties and court to move through a long series of steps. The case begins with a series of demurrers, moves to discovery, then perhaps to a class certification motion, then fuller merits discovery, motions for summary judgment, and so on. Cases may be more complicated: the parties may have early motions to quash service of summons, to change venue, for a

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*Antonin Scalia*, 19 CAMPBELL L. REV. 223 (1997) (discussion of Justice Scalia's advocacy for clear rules); Matthew P. Harrington, *After the Flood: Cleaning Up the Test for Admiralty Jurisdiction over Tort*, 29 U.C. DAVIS L. REV. 1, 40 (1995) (describing a test for admiralty jurisdiction); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (discussing the totality of circumstances test).

85. We have this issue with, for example, class certification decisions. See EISENBERG ET AL., *supra* note 26 ("The law, however, does not require any particular level of detail in the trial court's order.") (quoting *Dailey v. Sears, Roebuck & Co.*, 154 Cal. Rptr. 3d 480, 491 (Ct. App. 2013)). While evidentiary rulings are said to be subject to the deferential abuse of discretion standards, see *Twenty-Nine Palms Enters. Corp. v. Bardos*, 149 Cal. Rptr. 3d 52, 62 (Ct. App. 2012), and rarely lead to reversal, Margaret A. Berger, see *When, If Ever, Does Evidentiary Error Constitute Reversible Error?*, 25 LOY. L.A. L. REV. 893, 894 (1992), when trial judges get the law wrong, the appellate courts say so, and may reverse, even when the issue is a balancing test, see, e.g., *People v. Edwards*, 193 Cal. Rptr. 696, 744 (Cal. Ct. App. 2015), and because many such rulings are in fact just the application of law. See, e.g., *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Tokio Marine & Nichido Fire Ins. Co.*, 185 Cal. Rptr. 3d 296, 303 (Ct. App. 2015) (applying the factors for class certification); *Collins v. Navistar, Inc.*, 155 Cal. Rptr. 3d 137, 160 (Ct. App. 2013) (using the factors in deciding on class certification).

temporary restraining order and then preliminary injunction, and so on. This is the usual reason *complex* cases are so designated. Perhaps because of the money at stake or available, the number of motions brought makes these parties “frequent fliers”—the case will benefit from a smooth movement of information from one phase to the rest. Jiggering with the various steps—taking them out of order, or constraining the time for each—might advance the case. We will discuss these and other control mechanisms below in Section VII.

## 2. Sprawling

Another frequent reason for complex designation is that a case is related to a sometimes vast series of other cases, both locally and sometimes across the nation. Multi-district court litigation (MDL) is the classic example. Mass tort actions, such as those brought against makers of allegedly dangerous drugs, surgical implants, cars, and so on will be brought as separate actions—sometimes many thousands of separate actions—across the country, and will find themselves in both state and federal courts. The federal system can collect all the federal cases before a single judge,<sup>86</sup> and California has a means to send its cases, regardless of where filed in the state, to a single judge.<sup>87</sup> The various states do not have a formal means of coordinating multi-state collections, and accordingly the coordination often is done through the federal MDL case. Often, these cases are coordinated for pretrial purposes, and then are peeled off to separate courtrooms, perhaps back to the county of their origin, for trial. But still, many hundreds of cases may await trial in a single courthouse.

There are many variants of this pattern of sprawling litigation. Sometimes, such as in antitrust, securities, and other fraud cases, there are parallel criminal investigations, and simply the existence or *possibility* of criminal investigations can stymie the civil litigation because principal defense actors are, for very good reason, likely to refuse to participate in discovery. Major frauds can take years to resolve, with a concomitant impact on the civil side. In asbestos cases, the same set of defendants—sometimes in the hundreds—are named in a large number of cases, and while those cases may not be formally coordinated, the positions taken on discovery and, most importantly, settlement are inextricably intertwined;

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86. 28 U.S.C. §§ 1407, 2112; *see generally*, JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, <http://www.jpml.uscourts.gov/rules-procedures> (last visited Nov. 12, 2015), *archived at* <http://perma.cc/G9TK-MBE8> (articulating procedures for the United States Judicial Panel on Multidistrict Litigation).

87. *See, e.g.*, CAL. R. CT. 3.510-.516 (stating rules for state-wide coordination of complex cases).

suffice it here to note that settlement of one case is a function of settlement positions taken in a large number of other cases.<sup>88</sup> In other situations, the same parties file in many different jurisdictions for some perceived local advantage—the classic race to the courthouse. In one case I had, a party filed in one county; this was met with the other side’s filing in a second county for a declaration that the first party’s lawyers should be disqualified; cases were also filed in two other state counties, as well as in one federal court where remand proceedings were pending when I held my first case management conference. We had, at one time, claims in three counties, some of the state claims on appeal (in two different appellate districts), and some in federal court. And that was with a single plaintiff and single defendant.

Defendants in, for example, mass tort actions are usually represented by a single coordinating firm (there will likely be local counsel in each court), but this may not be true of plaintiffs’ counsel; there may be many, many of them, each interested in pressing his own case, taking advantage of discovery and other events in other cases as they seek to reduce costs in his own case. One should not make the mistake of concluding that therefore the management troubles just come from plaintiffs; they do not. A defendant in these situations is well placed to use events in one case to interfere with events in others: to use otherwise local features of one case to delay proceedings nation-wide. Both plaintiffs and defendants have the ability to impose high costs on the other side.

A central obstacle in these sorts of sprawling cases is the World War II convoy problem: the litigation moves at the speed of the slowest case. The center of gravity may be the federal MDL case because, as I have mentioned, it collects federal cases from around the United States and so deals with issues shared with all the state jurisdictions. Discovery is often coordinated through the MDL. Occasionally a decisive issue, such as federal preemption, might be handled there and have at least strong persuasive (if not decisive) impact on the state actions. For all these reasons, any delays in the MDL (which may be the slow boat) ramify throughout the rest of the cases. The agglutination of these cases may also suggest that they settle as a group, which too may delay the resolution of any given subset of cases.

If not funneled through either an MDL or particular massed state proceedings, coordination of discovery in these cases can be difficult, and even with coordination there is often at least some discovery that needs to be done on a per case basis; for example, in mass tort cases, the specifics of exposure, medical history, and related background for each plaintiff.

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88. See *infra* p. 62 (alluding to the notion of the institutional litigant).

As suggested above, settlement of these cases can be tricky. Parties are often unwilling to settle an isolated case on its own merits for at least two reasons. First, the cost of pre-trial activity is not attributable to the one case but spreads out over many cases; settlement of the one case may make little difference to the defendants' general exposure and will not materially reduce the plaintiffs' pre-trial costs. Second, as I have discussed elsewhere,<sup>89</sup> the parties are "institutional litigants" and can never settle one case without considering the impact on the rest of the case inventory, and so each party tends to be more intransigent on a given case than it otherwise would. This intransigence can be ameliorated when parties settle groups of cases at once, because this helps them conceal their weakness on any given case. That is, group settlements tend to hide the fact that the plaintiffs and defendants placed a low value (from their respective perspectives) on what is for each a weak case. This preserves their reputation as tough negotiators and so does not undermine future negotiations. Thus, in asbestos litigation individual cases almost never settle, but groups of them do. This poses serious problems for the administration of a given case because there is little a judge can do to move it towards settlement, and frequently nothing happens until the case is in trial, for it is only at that point that parties begin to expend time and effort on the case.<sup>90</sup>

### 3. Multi-party

Even within the context of a single case with many parties, coordination and settlement can be difficult to arrange, although usually not on the same scale as for a collection of distributed cases noted just above. In this category we find coverage actions with many potential insurers and tort claims against a long list of users, manufactures, and distributors (asbestos cases are an example of this).

Moving these sorts of cases towards settlement can be complicated by the rules that apply to set-offs as a result of earlier settlements. There are the usual pressures for early settlement such as savings on costs of litigation and, perhaps, taking advantage of an asymmetry of information that would be rectified as discovery progressed. But there are also

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89. Curtis Karnow, *Conflicts of Interest and Institutional Litigants*, 32 J. LEGAL PROF. 7 (2008).

90. Especially in asbestos cases, the parties usually need to do very little to prepare an *individual* case for trial. At least in my court, they usually file roughly the same motions in limine, the same oppositions; use the same experts, exhibits, demonstrations; and often are content to use the first few days of trial to offer deposition testimony (which costs little to present).

pressures to delay settlement. Under Proposition 51 (embodied in Cal. Civ. Code section 1431.2), joint tortfeasors are all jointly and severally liable for economic damages such as medical bills and wage loss, but each is only liable for a percentage of non-economic damages (such as pain and suffering) corresponding to a defendant's percentage of fault.<sup>91</sup> A defendant may wish to delay settlement for a variety of the usual reasons, but also because in these multi-party cases its liability for economic damages—which defaults to 100%—will reduce as a function of set-offs by other defendants: all things equal, one wishes to be the last settling defendant because at that point the value of the case has been severely diminished. This may have the effect of pushing many settlements to just before trial—or, as in many asbestos cases, just after trial has begun.

A final word on class actions; they are commonly thought of as multi-party cases and thus, complex. But they are not, practically speaking, multi-party cases and they are not necessarily complex. True, there is good value in having one judge assist with discovery and keeping the parties focused on an early certification determination, and it is exceedingly helpful if the judge is familiar with the usual class actions issues; for these reasons, these cases are usually assigned to judges in complex departments, which just perpetuates the assignment of those cases to those judges. But, at least up to trial (and there is almost never a trial), they do not usually pose complex issue of manageability. However, some class actions benefit from assignment to complex departments for other reasons—for example, because they are also *deep reach* cases.

#### 4. Deep Reach

There are two core characteristics of what I term *deep reach* cases. First, the issue reaches deep into an organization, arguably involving many of its actions and perhaps personnel. The equivalent is a contested divorce proceeding in a family law department: those cases may involve years of intimate details of almost every aspect of the family's life. The consequence for the civil litigation case is that the scope of permissible discovery may be very broad, and so it may be very difficult to distinguish between core and outlier issues. The second characteristic is one I have mentioned before: a lot of money is at stake. The two characteristics can

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91. See, e.g., *AmeriGas Propane, LP v. Landstar Ranger, Inc.*, 179 Cal. Rptr. 3d 330, 342 (Ct. App. 2014) (“Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant’s percentage of fault, and a separate judgment shall be rendered against that defendant for that amount” (quoting CAL. CIV. CODE § 1341.2 (West 2015))); *Arena v. Owens-Corning Fiberglas Corp.*, 74 Cal. Rptr. 2d 580 (Ct. App. 1998) (analyzing the applicability of Proposition 51).

be a lethal combination, just as they are in a high stakes, well-funded divorce action. Typical examples of deep reach cases are antitrust and some securities fraud cases. Some cases involving valuable family trusts might also qualify, as do some cases under the state's Unfair Competition Practices Act and unfair competition law,<sup>92</sup> which attack the essential manner in which a company interacts with the consuming public. Defendants in these cases often consider them an attack on their core structure, almost an existential threat. Discovery is typically one-way, against defendants, with costs by default borne by defendants, so there are few economic constraints on discovery (although just reviewing voluminous paper from defendants is a burden on plaintiffs).

### 5. Multiple Path

Some cases are characterized by multiple paths which may unfold together or separately, creating difficult loops and feedback processes. Some paths may moot others and so may be a waste of time depending on the outcome of some other path.

Some cases are actually many cases, all of which may or may not proceed simultaneously. For example, legal malpractice cases often are a "case within a case," that is, a plaintiff has to prove both (i) the malpractice and (ii) that the matter the accused's attorneys worked on (the underlying case) would have turned out better than it did. Failure on either prong kills the case. Some cases, such as construction defect matters, also involve insurance coverage issues, which may be in a related case or brought in the case itself. The merits of these two may be intertwined: the existence of coverage may have a deep impact on how the construction case is defended—indeed, whether it is defended at all—and of course the merits of the construction case may be decisive on the scope of duties (especially indemnity) under the insurance policy.

This loop/feedback pattern may be seen in phases of many cases and not just complex ones. In general, a party may have a legal position which if valid authorizes discovery, but discovery may be needed to evaluate the validity. For example, punitive damages may be sought for malicious or fraudulent conduct, but plaintiffs may need some discovery in order to adequately plead the malice or fraud. We may ask whether contract interpretation requires extrinsic evidence, but we may need extrinsic evidence before we can answer the question. In class actions, the first order of business is usually the certification motion, and much time and

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92. CAL. BUS. & PROF. CODE §§ 17000-17002. See generally *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 973 P.2d 527 (Cal. 1999) (discussing both statutes).

money can be saved if merits discovery is postponed until after certification because a denial of the motion may moot much of that merits discovery.<sup>93</sup> But many class actions settle and the parties usually need merits discovery in order to present the settlement to the court for approval.<sup>94</sup> Percipient (fact) discovery is usually done before expert discovery because in the usual case experts rely on the facts. But sometimes expert opinion makes it clear that more fact discovery is needed (i.e. to impeach or bolster the expert's assumptions) and on occasion it is only the expert opinion which, if valid, justifies the cost of securing fact discovery. For example, assume plaintiff alleges damages as loss of business opportunities. Plaintiff may wish to obtain the confidential financial records of dozens of other companies which an expert says are similar to the plaintiff corporation to provide a basis for the calculation of damages. If the expert's theory is speculative or otherwise invalid, the discovery is a waste of time and money and risks revealing highly sensitive information to competitors, but the discovery may be needed in order to evaluate the theory. To evaluate whether a settlement is in "good faith" so as to cut off other parties' right to equitable contribution or indemnity,<sup>95</sup> parties opposing the good faith motion may want discovery of what the settling parties know in order to show either collusion among them or that the settling parties have severely underestimated the value of the case.<sup>96</sup> But one of the goals in such a motion is to *avoid* the cost of litigation including discovery. Anti-SLAPP motions have two prongs: usually defendants bear the burden of showing the claims implicate first amendment activity, and then plaintiffs shoulder the burden of making a prima facie case on merits. As noted above, this is often done within the confines of a single motion. But some courts may stagger the treatment of the prongs,<sup>97</sup> handling first either prong one<sup>98</sup> or

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93. Also, a successful certification motion may result in modification of the class definition, or perhaps only certification of certain issues, which might then confine the scope of subsequent merits discovery.

94. To grant final approval, the trial court must "independently [satisfy] itself that the consideration . . . received for the release of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation." *Kullar v. Foot Locker Retail, Inc.*, 85 Cal. Rptr. 3d 20, 31 (Ct. App. 2008).

95. CAL. CIV. PROC. CODE § 877.6; *see Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.*, 698 P.2d 159, 166 (Cal. 1985) (providing factors that a court should consider when determining whether a settlement was made in good faith under § 877.6, such as whether it was made "within the reasonable range of the settling tortfeasor's proportional share of comparative liability for the plaintiff's injuries").

96. While the good faith of the settlement is based on what the parties know at the time, *Cahill v. San Diego Gas & Elec. Co.*, 124 Cal. Rptr. 3d 78, 101 (Ct. App. 2011), not all parties may have the same knowledge.

97. *See, e.g., All One God Faith, Inc. v. Organic & Sustainable Indus. Standards, Inc.*, 107 Cal. Rptr. 3d 861, 869-72 (Ct. App. 2010) ("bifurcating" the hearing such that the first

prong two,<sup>99</sup> perhaps mooting the other prong.

Because cases have multiple and (often) looped paths, each party may spend considerable energy jockeying for precedence, seeking to reach a decisive moment on its issues before the other side does so on its issues. It is usually not wise to have counsel navigate these procedural options on their own: judicial direction is required.

## VI. CONTROLS

The mechanisms and types of cases outlined above are aspects of complex litigation. They are the symptoms of dysfunction in the sense noted in Section II above, that is, they suggest the need for judicial supervision. Just as control structures are used to guide complex systems generally and help ensure they do not explode (sometimes literally) out of control, courts have developed controls and constraints to manage complex cases. Some of these can be ordered by the judge, such as the bifurcation of an issue, staggered discovery, stays, and certain limits on discovery. But most of these techniques require the cooperation of the lawyers, and that can be difficult to obtain, surprisingly so given the fact the lawyers asked for assignment to a complex department in the first place. The reason is, however, probably straightforward: parties may sign up for efficiencies and controls in the abstract but not in the specifics, because in each instance a constraint is likely to be perceived as favoring one side or the other. So parties will agree that early resolution is preferable to late resolution, but will object to a specific early trial date because it might not give them enough time to prepare; they will agree that expedited informal resolution of discovery disputes is best but not when imposing an onerous, time-consuming process on the *other* side might teach the other side a thing or two. Often, counsel desire complex treatment because the litigation is literally unmanageable without it, such as the coordination of mass tort

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prong was evaluated in the first part of the hearing).

98. Prong two need not be addressed if defendants fail at prong one. *Malin v. Singer*, 159 Cal. Rptr. 3d 292, 307 (Ct. App. 2013). Parties can ask for discovery, but this will usually relate to prong two. Thus, if the case can be resolved at prong one, no discovery may be needed. *Garment Workers Ctr. v. Superior Court*, 12 Cal. Rptr. 3d 506, 509-10 (Ct. App. 2004). The trial court in one case never reached the second prong—but the Court of Appeal did. *Schwarzburd v. Kensington Police Prot. & Cmty. Servs. Dist. Bd.*, 170 Cal. Rptr. 3d 899, 905, 908 (Ct. App. 2014).

99. *See, e.g.*, *S. Cal. Gas Co. v. Flannery*, 181 Cal. Rptr. 3d 436, 442-43 (Ct. App. 2014); *Hardin v. PDX, Inc.*, 173 Cal. Rptr. 3d 397, 403 (Ct. App. 2014) (utilizing only the second prong). If there is a *prima facie* case under prong two, it does not matter if the prong one first amendment concerns are implicated—the motion will be denied. *S. Cal. Gas Co.*, 181 Cal. Rptr. 3d, at 442-43.

claims, but this may not signal counsel's willingness to otherwise submit to judicial control. Sometimes, lawyers have no idea why they signed up for complex treatment.<sup>100</sup> (This note is for them.)

### A. *Constraints*

First, we begin with a series of constraints. Each of these techniques can be seen as a constraint, or providing direction, but with very different emphases. The first set—stays and phasing—breaks the case apart into defined pieces, in effect uncoupling the parts. The second—time limits—makes it more likely the parties will use the time for the principal issues and reduces the odds of wasting time on outliers. The third—sanctions—identifies and presumably stops bad behavior; but there are also discovery sanctions, which have no moral opprobrium and are designed, again, just to reduce the odds of spending time on outliers.

#### 1. Stays & Phasing

General stays are rare. They are done because there is a pending appeal<sup>101</sup> or because some other process will, or is likely to, entirely resolve the case. For example, the court case might be stayed pending arbitration or because events in a related case—say, an MDL case—are likely to prove decisive because (1) settlement in the related case will include the local case or (2) discovery in the related case will generally take care of the discovery needs in the local case.

More common are partial stays, designed to—in effect—phase or bifurcate events. In a class action, a judge might allow discovery solely on certification issues and wait until certification has been granted to allow more general discovery on the merits. Where an anti-SLAPP motion has been brought, the statute itself blocks all discovery except to the extent the judge believes discovery is needed to decide that motion. Similarly, where a motion to quash service of summons on the basis that the court has no personal jurisdiction over the defendant has been made, the court may allow some discovery on the jurisdictional issues. The court might also block discovery pending the resolution of demurrers to the complaint (motions to dismiss as they are called in federal court).

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100. I recall an initial case management conference when I asked the lawyers, as I usually do, what *they* had in mind for the progress of the case. They told me they would like to do some percipient discovery, take a few expert depositions, file a summary judgment motion, and then have a jury trial. They did not know what to say when I asked them why they were in a complex department.

101. CAL. CIV. PROC. CODE § 916 (West 2015).

Without phasing, all issues are subject to simultaneous investigation, discovery and dispute; all issues are to be resolved towards the end of the case via motion for summary judgment, trial, or settlement. Phasing selects an issue or two, permits investigation of those all with a view towards an early resolution of the issue. That early resolution might actually resolve the case as a whole, such as when it deals with standing, statutes of limitations, the existence of damages, and so on, or it might nevertheless have such an impact on the parties that it helps settle the case. For example, one might decide a statutory defense, the scope of duties, whether there is a basis for punitive damages, the retroactive application of a law, whether a witness can be compelled to testify over an assertion of privilege, whether extrinsic evidence will be heard, if attorney's fees can be recovered, or otherwise the applicable law. There are many fora for these determinations: an early jury instruction conference to decide the law, early motions in limine to decide the admissibility of evidence (such as whether an expert will be allowed to express an opinion—often a decisive issue), a bifurcated bench trial on any of these issues, as well as the usual (if more painful) mechanism of summary adjudication of issues. Pending the resolution of the issue, the court might stop all other discovery and other efforts, or some of those.

In these ways, phasing creates an early inflection point—the EIP I discussed in Section IV above. Multiple phases create multiple EIPs. Another sort of phasing is so-called reverse bifurcation, by which one first decides if there are any damages at all, or the amount of them, without (as is usual) first treating the issues of liability. Knowing the actual value of the case can further settlement: it is another EIP.<sup>102</sup>

Phasing is also used to tailor the subsequent event, if not to avoid it. For example, one might phase a class certification motion. Typically, when all class (and sometimes other) discovery is done, the parties brief the motion as usual: opening briefs, opposition, reply, and a hearing. But one can also have the opening papers filed first without much discovery, take a pause to see what discovery, if any, is needed by defendants, do that, file the opposition, take a pause to see what discovery, if any, is needed by plaintiff's counsel to respond to the opposition, file the reply, and then have the hearing. The advantage is that discovery is only done if the other side, in its papers, made it pertinent. So one does not frantically go about discovery because of positions one is afraid the other side *might* take, but only because the other side has *in fact* taken a position on some factual issue. This artfully cabins the scope of relevant discovery and, not

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102. See generally Drury Stevenson, *Reverse Bifurcation*, 75 U. CIN. L. REV. 213 (2006) (explaining how reverse bifurcation encourages settlement).

incidentally, makes it almost impossible to object to the discovery demanded by the other side.

Phasing decouples issues. Instead of leaving the resolution of all uncertainties until the last moment, it progressively resolves one uncertainty after the next, without having to undertake the entire costs of litigation. In this way, it also avoids the shock wave effect, probably allowing more time per issue, and so a greater likelihood of getting it right. It creates EIPs. It may reduce the costs of litigation by removing issues from the case. It can help avoid inadvertent failure: without phasing, the parties generally find out about gaps in their evidence and analysis only at trial, long after it is too late to do anything about it. With phasing, problems are evident far earlier, and the parties at least have the chance to ask the judge for more time, or another shot. Just as it is wise to take potentially dangerous complex systems (such as nuclear reactors and space ships) and decouple the sequence of events, make them more loosely interactive,<sup>103</sup> so too there are real benefits in phasing complex litigation.

There are, of course, disadvantages. Most importantly, phasing may lengthen the time of the litigation. Phasing class certification motions injects substantial delays between the opening briefs and the hearing (although if one counts the time needed for discovery for a non-phased motion it might be about the same). Writs, and sometimes appeals, may be taken after a phase, and this may inject literally years of delay. In busy trial courts, calendaring a series of bifurcated trials involving a lot of lawyers may create enormous delays, more so than setting a single, final trial. A case I inherited from another judge has gone through three phased bench trials over nine years.

Phasing usually blocks discovery on an issue not yet deemed ripe. But it might be far more efficient to take on the entire discovery at once: most obviously, phasing such that witnesses are repeatedly deposed, or documents are repeatedly produced from the same repositories or custodians, may be grotesquely inefficient.

Phasing segregates issues, and so the parties are unable to, in effect, borrow from one issue to reinforce a weakness in a different issue; this can strip away useful, and sometimes essential, context and background. For example, it is difficult to segregate liability from the bases for punitive damages: the same acts are probably at issue. In a construction defect case, the liability of a subcontractor, although in the abstract different from that of the general contractor, probably cannot be evaluated in isolation. There is also the “halo effect,” whereby great strength on one issue—for example,

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103. See Perrow, *NORMAL ACCIDENTS*, *supra* note 47, at 88, 96-97 (noting the risks associated with complex, as opposed to linear, systems).

severe injury such as death in a car accident—might unconsciously influence a jury’s determination on fault.<sup>104</sup> I do not suggest this is a valid reason to object to phasing, but it explains why lawyers might object.

Finally, as discussed above,<sup>105</sup> staggering or phasing creates costs by forcing attention onto issues which otherwise would be ignored.

## 2. Time Limits

Nothing, *nothing* controls a case better than setting a reasonable trial date as early as possible—and ensuring the date does not move. This in effect sets time limits for all pretrial work, including discovery and motions, such as for summary judgment. Only a credible trial date works this way. To be credible, the judge must confer with the lawyers and understand what is really needed to get the case ready. While setting a trial date early in the case is simple in a routine case, it is far more difficult in complex litigation because the parties cannot advise on how much time it will take to be prepared. They don’t know. The pendency of related cases (such as a MDL), the future need for discovery, and other uncertainties, which depend on the outcome of earlier phases or events, contribute to this uncertainty. In one case, I was unable to set a firm trial date because the defendants did not know what discovery would be needed, which in turn was a function of the plaintiffs’ inability to fully specify all the bad acts they wished to pursue. This was a function of the fact that the plaintiffs did not know all the acts the defendants had undertaken or what, if any, basis the defendants had had for undertaking those acts (a key issue which made the acts legitimate or not), which in turn required some preliminary discovery from the defendants.

There is a trap here, though. Just insisting on an early trial date might telescope pretrial work and so aggravate the shock wave effect. A recent case settled only a few days before trial, and after enormous work on pretrial motions, jury instructions, witness preparation, and the like. When I asked why the case has not settled earlier, the lawyers told me the trial

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104. I am using the term “halo effect” here far more broadly than is usual to suggest that views on one issue can irrationally affect one’s conclusions about an unrelated issue. More properly and commonly, it describes people’s conclusions on, for example, a subject’s intelligence, competence, or moral status based just on how the subject looks. *See, e.g.*, Charles W. Murdock & Barry Sullivan, *What Kahneman Means for Lawyers: Some Reflections on Thinking, Fast and Slow*, 44 *LOY. U. CHI. L.J.* 1377, 1391-92 (2013) (Describing the “halo effect” as “[t]he tendency to extrapolate from one or more positive (or negative) characteristics, and to like (or dislike) everything about a person.”); *see also* Curtis Karnow, *Deciding*, 55 *THE BENCH* 10 (Spring 2015) (noting that biases or impressions may impede rational decision making).

105. *See supra* p. 47.

date had been set too close to the end of discovery, and the parties had not had the opportunity to evaluate their position before rushing headlong into trial preparation. The lesson here is to consider shifting back in time the close of percipient and expert discovery—discussed next.

One may set early dates for the close of percipient and expert discovery. By default in the California courts, these are set by reference to the trial date, and expert discovery takes place shortly before trial. In complex litigation this is often unwise: experts may be key, early expert discovery is likely to provide an EIP, the value of which is lost the closer to trial expert discovery takes place. Also, trial preparation is extremely difficult, more so for complex litigation, and collapsing all expert discovery into the two months before trial often creates chaos. In complex cases, the parties are more likely to have disagreements on expert discovery, asserting surprise and the need for modifications to the usual rules. In some cases, the California default of simultaneous expert disclosure should be replaced by staggered expert discovery in order to ensure the right issues are confronted.

Time allocations for trials should be fixed, or the parties should be told that such limits will be set, or refined, as trial approaches based among other things on the parties' witness lists. When the trial is set, a certain number of days will be set aside, and in busy courtrooms the dates after that trial will probably be filled with other cases. In other words, when a trial is set, the length of the trial is also fixed, and the parties must be expressly told that their case will have to fit within that schedule. The amount of time available for each side is always far, far less than the parties unconsciously think they will have. Time estimates accompanying witness lists frequently would require a trial three or four times the number of days originally set aside. But lawyers often have a very difficult time shifting from pretrial to trial thinking. They have this problem because, by and large, they are not trial lawyers; they are pre-trial lawyers, and complex cases almost never go to trial. The difference between trial and pretrial thinking is vast. Pretrial has an expansive focus ranging out to every issue, including every edge issue and outlier that conceivably might be of any assistance in the case, limited solely by objections of the other party and the judge, and cost (and when there is a lot of money involved, not even that). Pretrial work in complex cases routinely involves discovery that involves millions of documents, scores (or more) of witnesses, motions comprising hundreds of pages, many hundreds of written objections, and so on. Entire rainforests are destroyed to feed the beast of pretrial work.

Jury trials are different: juries can be expected to absorb a handful of exhibits, relatively few witness will be called and extreme attention is required to fit the case into the time allocated; core issues finally come

front and center, the outliers cast away. If pretrial is the use of vast nets, trial is surgery with a scalpel. The point is not to prescribe trial rules here, but that a focus on the needs of trial may help circumscribe and focus *pretrial* work. Setting trial time allocations, noting a chess clock will be used to track that time,<sup>106</sup> and frequent allusions to gathering what is needed for *trial*, assists this focus (it also reduces the odds of misery in those cases that do go to trial).

### 3. Sanctions

Sanctions inhibit bad behavior if the lawyers think the court will employ them. The routine type of sanctions is the fee-shifting sanctions common in discovery motions. The Legislature requires that these sanctions be imposed on the losing party (or if there is no meet and confer in advance of the motion) unless the losing party took a reasonable, even if ultimately unsuccessful, position.<sup>107</sup> There are as well sanctions for discovery *abuse*, which is entirely different. In these cases, a party has violated the rules such as by withholding documents when it said it had turned everything over. Those sanctions can be fines, evidence preclusion, and if a party refuses to comply with a court order, terminating sanctions—the other side is deemed to have won the suit. And finally, there are sanctions generally for taking frivolous positions<sup>108</sup> and violating rules.<sup>109</sup>

These sanctions are meant to block time-wasting frivolous positions, but as with many weapons, their efficacy is best found in the threat and not the actual use. Some judges may impose sanctions (if appropriate) early on, hoping to send a message that will smooth out the rest of the case, and fee-shifting discovery sanctions may have to be imposed under the statutory directive when a losing position has no substance. But there are

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106. See, e.g., *United States v. Reaves*, 636 F. Supp. 1575, 1580 (E.D. Ky. 1986) (discussing the benefits of setting time limits).

107. See, e.g., CAL. CIV. PROC. CODE. §§ 2030.300(d), 2031.320(b), 2032.260(b) (West 2015) (providing for monetary sanctions relating to making or opposing discovery motions).

108. See CAL. CIV. PROC. CODE § 128.5 (West 2015); see also CAL. CIV. PROC. CODE § 128.7 (West 2015) (describing bad faith pleadings).

109. See CAL. CIV. PROC. CODE § 177.5 (West 2015) (providing for violation of court order); CAL. CIV. PROC. CODE § 575.2 (West 2015) (providing for sanctions for violating local rules); see also CAL. R. CT. 2.30 (sanctioning violations of rules of court). There are other sorts of sanctions unique to certain motions or procedures. See, e.g., CAL. CIV. PROC. CODE § 2033.420 (West 2015) (imposing sanctions after wrongful denial of requests for admission); CAL. CIV. PROC. CODE § 473(b)–(c)(1) (West 2015) (sanctions on set aside of default); CAL. CIV. PROC. CODE § 437(c),(j) (West 2015) (same regarding default judgment or dismissal); CAL. CIV. PROC. CODE § 396b(b) (West 2015) (sanctions in favor of prevailing party on motion for transfer of venue); CAL. CIV. PROC. CODE §§ 1209, 1218 (West 2015) (providing for sanctions for contempt of court).

so many other ways judges have to send messages of disapproval that, generally speaking, sanctions are treated as an ultimate recourse.

There are disadvantages to using sanctions as a routine means to control litigation. First, they take time, that is, time away from the real work of the case. They require additional briefing, and perhaps additional hearings. This is satellite litigation, and it's a distraction. Second, issues which may look like outliers—a red flag signaling pointless litigation and perhaps a frivolous position—may turn out to be of real significance especially in complex litigation when commonly the significance of issues ripens as the case progresses. Concomitantly, the threat of sanctions may cut off inquiries that may have led to something interesting. Finally, some judges think an award of sanctions injures the environment of collaboration they seek to create, pushing the case back to the bad old model of aggressive, antagonistic combat. By this reasoning, one award of sanctions inevitably generates a reciprocal demand for sanctions from the side that paid the first award; and then, there is no end to it.

### B. *Focusing Devices*

In this category I briefly discuss a variety of options that help the judge and the parties focus their energies on what is truly at issue. Some of these are somewhat artificial, such as page limits. Others really do eliminate unnecessary disputes because they require adequate communications: a goal so often missed by counsel.

- In cases with many parties, the court can appoint (or have the parties select) a liaison, lead, or coordinating counsel. Obviously this works best when the fundamental interests of the allied parties are the same, but liaison counsel can still help funnel debate for parties with somewhat diverse positions. Papers filed by liaison counsel can state the areas of agreement and avoid repetition.
- Formally (as a result of a motion), or informally at say a case management conference, the court can require the filing of what I think of as a “bill of particulars.” These are specifications, the details of a claim (or defense) which while sufficiently unambiguous to pass muster on pleading rules and so avoid demurrer, nevertheless are so confusing or vague that it is difficult to know what discovery might be useful. The same information can probably be secured through well-crafted contention interrogatories, but my own view is that if I cannot manage a case because I do not understand the claims and oral discussion with counsel is not helpful, a written

specification can be of great assistance.

- Educate the judge. In cases that depend on a good understanding of a technology or unusual industry, it can be helpful to set aside some time early on in the case to educate the judge. Perhaps experts will be present. It will likely be off the record to provide maximum flexibility to the parties and not have them fear some slip early on in the case will come back to haunt them. Such a hearing will not only help the judge make better informed decisions, but it may also obviate the natural and sometimes unconscious desire of lawyers to file motions, such as preliminary injunctions and summary judgment motions, to “educate” the judge and prime him or her to be receptive to their later positions on the merits. And not incidentally, these events compel the parties to focus on the specifically relevant aspects of the technology or industry, including requisite experts that are really likely to be important to the case.
- Limit motions. Nothing focuses the mind as much as page or word limits. The phrase attributed to many, “I have made this longer than usual because I have not had time to make it shorter,” reflects the discipline needed to make writing tight and to the point (I have generally regretted granting permission for oversized briefs). Some federal judges bar motions such as discovery motions without prior permission, and some courts have limits on the number of motions in limine that can be filed.
- Meet and confer requirements. These are widely seen as effective, and indeed the requirement is written into California’s discovery code. It reflects the sense that many disputes are misunderstandings, and my “one-shot” discovery procedure (discussed just below), which forces the parties to further meet and confer, frequently reduces the scope of disputes (the informal conferences I discuss below also are premised on this). Some judges insist, or strongly recommend, parties confer on demurrers so that the plaintiff can fix the fixable problems, and when the complaint is finally challenged, it is likely the best complaint there can be, avoiding the all-to-frequent result of repeatedly sustaining demurrers with leave to amend.<sup>110</sup> Parties may also be asked

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110. Law effective January 1, 2016 mandates meet-and-confer on demurrers in California. S. 383, 2015 Leg., Reg. Sess. (Cal. 2015).

to confer on areas for expert disclosure and other discovery, such as agreeing to limits on depositions and presumptive limits on the number of interrogatories. More generally, there is a significant premium in complex cases on getting past the cartoon image of the contentious lawyer. Much of the work done in complex courts is procedural, and there, at least, as the parties and the judge find their way through sometimes unfamiliar territory, there is a need to act cooperatively, leaving the fights to the substance of the dispute.<sup>111</sup>

- Discovery. Because so much of what the parties do is discovery, I use this rubric to discuss a variety of focusing devices.

First, for reasons I have alluded to above, early close of discovery will limit the opportunities for peripheral and relatively useless demands.

Second, the parties may agree or the court may order limits on the number of depositions, interrogatories, and so on. This can be effective but it can also drive up costs if the parties need to come into court to get relief from the limits when the unexpected happens.

Third, I encourage the use of the “one-shot” procedure, which replaces the cumbersome, expensive formal discovery motion contemplated by state law, with its classic tripartite briefing (opening, opposition and reply papers), separate statements of facts, notice of motion, and (often) a long series of attachments. The formal motion usually has the same arguments repeated ad nauseam in the separate statement, in every single interrogatory or document demand at issue (which could number in the dozens or hundreds even when it is exactly the same argument), and then again in the accompanying memorandum of points and authorities. The opposition then does the same thing. In a one-shot, the parties pass one document back and forth, inserting their position on the dispute— —but only once. They continue to exchange the document among themselves until they have satisfactorily responded to the other’s points, just as a majority opinion and dissent will revise their drafts until each is satisfied it has addressed what it desires of the other side’s stance. The very act of passing the one-shot draft between the parties is a “meet and confer” and many issues may drop out. When I get the submission, I read each side’s position— —once and only on what is in dispute. I can usually get an order out resolving the matter within a few days.

Fourth, courts should use cost-shifting to help resolve discovery battles over the burden of production when the value of the discovery is

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111. See generally Jay Tidmarsh, *Civil Procedure: The Last Ten Years*, 46 J. LEGAL EDUC. 503, 505 (1996) (discussing a departure from adversarial rules for complex cases).

marginal. That is, while the default rule is that producing parties are responsible for the costs of production, judges should consider transferring the burden to the demanding party.<sup>112</sup> For example, cost shifting may be proper when a party requests to have electronically stored information translated into a reasonably useable format.<sup>113</sup> There may be difficult questions of affordability, and courts of course may hesitate to shift the burden when the practical effect would be to deny the discovery; but again the issue will generally be considered in the context of discovery of marginal utility.

Fifth, judges can encourage a series of informal procedures; the one-shot is an example (although the submission and order are filed and so reviewable on appeal). Other informal procedures include telephone rulings on objections (specifically, instructions not to answer questions) during depositions—thereby avoiding costly motions and possibly renewed depositions—and informal off the record discovery conferences where practical issues can be hashed out and misunderstandings can be resolved.

Sixth, expedited discovery devices are especially useful when many parties provide similar information. For example, in many mass tort cases, all plaintiffs fill out a questionnaire on the facts of their exposure to the alleged toxin, medical history, names of treating doctors, drugs taken, prognosis, and so on, without the necessity of formal demands and responses.

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112. Philip J. Favro et al., *New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure*, 2012 MICH. ST. L. REV. 933, 958 (2012) (“[C]ost-shifting is imposed for disproportionate ESI discovery, particularly for over-discovery of email. Given the high costs associated with the production of email and the infrequent use of such evidence at trial, the Order places sweeping restrictions on its discovery.”) (footnotes omitted).

113. See *OpenTV v. Liberate Techs.*, 219 F.R.D. 474, 478 (N.D. Cal. 2003) (“A responding party should not be required to pay for the production of inaccessible electronic data if the cost of such production is significantly disproportionate to the value of the case, i.e. disproportionately expensive discovery warrants cost-shifting.” (citing *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 288 (S.D.N.Y. 2003))); *Toshiba Am. Elec. Components, Inc. v. Superior Court*, 21 Cal. Rptr. 3d 532, 541 (Ct. App. 2004) (“By enacting the cost-shifting clause of section 2031(g)(1) our Legislature has identified the expense of translating data compilations into usable form as one that, in the public’s interest, should be placed upon the demanding party.”) The classic statement is from *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 324 (S.D.N.Y. 2003) (“A court should consider cost-shifting *only* when electronic data is relatively inaccessible, such as in backup tapes.”) (emphasis in original). Since, cases have used a variety of criteria to decide when to impose cost shifting. See generally *Medtronic Sofamor Danek, Inc. v. Michelson*, 229 F.R.D. 550, 553 (W.D. Tenn. 2003) (adopting an eight factor balancing test to determine whether cost shifting is undue.); Amy Longo et al., *Current Trends In Electronic Discovery* in TRIAL EVIDENCE IN THE FEDERAL COURTS: PROBLEM AND SOLUTIONS (2005) (collecting cases on cost shifting).

*C. Speedier and Simpler Procedures*

I collect here devices and procedures many of which could as easily be thought of as focusing mechanisms, because a device that simplifies generally helps focus the judge and the lawyers on the important issues.

The simplest approach is to do nothing at all. When the parties are engaged in a different forum and the heavy lifting of discovery and resolution of key issues will be conducted there, the best approach may be to stay the local proceedings, as long as events in the other forum seem to be moving at a reasonable speed.

But otherwise, speed is key.

Complex litigation is notoriously slow. Each of the many moving parts— the large number of parties and lawyers, issues, related cases, and documents— tend to turn the case into a quivering gelatinous mass. To be sure, complex litigation moves, but not in any particular direction. Many lawyers are cautious and do not wish to proceed until they are satisfied they have every possible contingency covered and every piece of information they may need to prevail. Frequently the *other* side will object to moving on the very same grounds, i.e., until the other side has done so. These self-inhibiting loops are manifest at the most mundane level. For example, Alice might ask Bob for the evidence that supports Bob's position. Bob answers that he cannot do so until he sees the evidence he has demanded from Alice. Or, after the discovery deadline, Bob makes a motion for summary judgment (which might end the case), and Alice objects that she needs more discovery to respond.<sup>114</sup> Bob argues she should have secured the evidence before, and Alice retorts she did not know what would be at issue until she saw Bob's motion. This stand-off either threatens the previously firm trial date or destroys Bob's right to have his motion heard— likely delaying the case.

Delay is the default in most litigation, and most especially in complex litigation. Thus, one of the most important things a judge can do, from the first case management conference on, is to act very rapidly while allowing the parties a fair chance to be heard. This sets expectations by example. The one-shot procedure discussed above carries this out. For the same reason, judges should issue orders as fast as practicable and have the parties rapidly complete their meet-and-confer on discovery disputes, sending the message that interminable exchange of letters and emails to prove good faith meetings is not necessary; as soon as the parties have conferred on all issues, the motion (or other procedure) should be instigated. By the same token, judges should be wary of extended briefing schedules stipulated to

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114. CAL. CIV. PROC. CODE § 437c(h) (West 2015).

by the parties unless there are very good reasons for those.

Summary judgment can be difficult for reasons to which I have alluded. The procedure has many parts and each has to go just right to allow the judge to reach the merits of the motion. Any dispute on a material fact is likely to torpedo the motion. The procedure is also liable to severe abuse: parties sometimes file many hundreds of (or more) objections.<sup>115</sup> The parties may be better served with a bifurcated bench trial at which the judge can rule on disputed facts if it turns out that there is such a dispute. Bench trials can be expedited with the use of depositions and declarations on direct,<sup>116</sup> allowing a party to cross-examine any witness live in court. Another restriction on state court summary adjudication practice is that the motion must dispose of an entire cause of action, type of damages, or duty; but frequently there is some key fact or legal dispute the resolution of which would rapidly advance the case—perhaps to settlement—but does not fit nicely into these permitted categories of motions. Again, a bifurcated bench trial—which may take a matter of hours or a day—can be arranged to resolve these issues.<sup>117</sup> Bench trials are so important in complex litigation that I discuss them separately below.

Whether for jury or bench trials, the parties should be encouraged to make stipulations and have the trial focus solely on the core disputes. Thus, the parties should agree on the exhibits to be introduced, or at least their authenticity. Summaries of voluminous exhibits should be stipulated to, and at least with juries, those summaries should be used at trial instead of the underlying documents.

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115. In *Nazir v. United Airlines, Inc.*, 100 Cal. Rptr. 3d 296 (Ct. App. 2009), 764 objections were made over 350 pages. The judge was confronted with 3000 pages of materials for this one motion. See also *Cole v. Town of Los Gatos*, 140 Cal. Rptr.3d 722, 781 n.6 (Ct. App. 2012) (“[W]here a trial court is confronted on summary judgment with a large number of nebulous evidentiary objections, a fair sample of which appear to be meritless, the court can properly overrule . . . all of the objections on the ground that they constitute oppression of the opposing party and an imposition on the resources of the court.”) (emphasis in original). Remarkably, parties have a *statutory* right to bypass written objections and at the hearing—after the judge has read everything and likely has a tentative view of the merits—rise in court and make all the objections they want orally. CAL. CIV. PROC. CODE §§ 437c(b)(5), 437c(d); CAL. R. CT. 3.1352(2). However, lawyers rarely take this measure. In an amendment to California’s controlling statute CAL. CIV. PROC. CODE § 437c, effective January 1, 2016, judges will only be required to rule on objections material to the motion.

116. Where more than e.g. 250 testimony pages are submitted, a summary (a couple of pages, maximum) should also be provided.

117. California experimented with what was designated CAL. CIV. PROC. CODE § 437c(s), subject to a sunset provision effective January 2015. This permitted the parties and the court to agree to resolve any issue via the summary judgment/adjudication procedures. The statute has been resurrected as § 437c(t) effective January 2016. The parties can secure similar benefits through a bifurcated bench trial.

Judges may use case management conferences and informal off-the-record conferences to resolve a host of disagreements on a highly expedited basis. Some issues truly need formal briefing, but without court intervention, *all* issues will be formally briefed, using up to a month to do what could be done in five minutes at a conference. Such issues as discovery sequencing and associated stays, protective orders, perhaps misjoinder, and the general scope of discovery, may be treated this way, assuming no party seriously objects. An informal conference can be especially useful where discovery disputes do not raise a substantial legal issue (such as privilege or privacy) but rather practical problems about timing and burden.

In the spirit of encouraging the model of cooperation over the old forms of combat among lawyers, courts are suggesting and sometimes requiring parties to confer, or meet with the judge, in pre-motion conferences.<sup>118</sup> There, the parties might agree on abridging lengthy notice periods for motions; determine whether, in advance of filing a summary judgment motion, any discovery issues remain (and avoid California Code of Civil Procedure section 437c(h) problems); seek clarity on decisive legal issues; and agree to facts and the admissibility of evidence. My earlier suggestion of conferences in advance of demurrers has a similar rationale.

Traditionally, a series of critical events takes place just before trial. Generally, there is a reason for this: the parties do not have information they need to engage earlier. But sometimes they do; the speedier, earlier attention to these issues may create EIPs and—if the trial is to go forward—helps the court and parties prepare with less uncertainty, which in turn helps avoid the shock wave effect. These critical events are: jury instructions, expert admissibility, and other important evidentiary rulings. In a simple civil case, these events may be treated the day before the jury is picked. In more complex cases, these events can be handled months in advance of trial. An early jury instruction conference is a splendid way for

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118. “We also encourage judges to hold premotion conferences before summary-judgment motions are filed and fully briefed. Here, the question is less one of whether any motion will be filed but of the scope of what gets filed and briefed. We and others have noted elsewhere that summary-judgment motions are routinely over-briefed, often by both the moving and responding parties. All too often they are ‘kitchen sink’ affairs that address every claim and defense, raise every possible issue, and set forth page after page of fact assertions on even the tiniest details, all of which then requires volumes of ‘supporting’ exhibits. And yet in most cases, the motion will turn on a fraction of that content. So why is it all there? Uncertainty and its cousin, anxiety. The fear of being second-guessed (colloquially known as ‘CYA’) looms large here. Absent any guidance from the judge, the parties cannot know in advance what will matter. The only safe strategy is to hit every conceivable target with all of the ammunition available.” Steven S. Gensler & Lee H. Rosenthal, *Four Years After Duke: Where Do We Stand on Calibrating the Pretrial Process?*, 18 LEWIS & CLARK L. REV. 643, 668 (2014) (footnotes omitted).

the judge to indicate her thoughts on key legal issues, including some of which may require substantial briefing on such issues as choice of law or the construction of a new statute. An early conference may surface a discussion on whether an issue is truly for the jury or the court. The lawyer's choice of trial strategy may depend on these views from the court. Early ruling on whether an expert can provide a certain opinion may in effect decide the case and result in an early settlement.

Many judges have standing orders, guidelines, or the equivalent. I do.<sup>119</sup> Their function is to clear the underbrush and avoid debate on incidental procedural issues. As with indications that certain motions in limine are usually granted (such as those barring mention of settlement discussions, bifurcation of punitive damages, and so on), these guidelines act as default decisions, rapidly disposing of common procedural problems. They also set a tone, form expectations favoring quick informal resolutions, and offer options for reaching such resolutions. This avoids friction. However, there is a danger: in some cases not susceptible to the defaults, time and money is spent to avoid them. Lawyers may need an additional hearing or make separate arguments to show that their situation is not contemplated by these defaults; and that too is friction.

#### D. *Early Trial types*

Parties need not wait for the usual trial of all issues at the end of the usual pursuit of discovery and the usual panoply of pretrial motions. Three alternatives are worth mentioning: bifurcated bench trials, bellwether cases, and expedited jury trials. The first is the subject of separate discussion below, Section F.

The second approach is a bellwether case.<sup>120</sup> This is used generally in mass tort actions. One case, or a few cases, are picked for trial and the results are used to guide settlement of the rest of the cases. Of course the bellwether cases must be *representative* of the rest of the cases. In some caseloads, a case or two may obviously be representative because there are no strongly disparate fact patterns. In other caseloads, the facts are widely divergent—some cases are patently *very* good for one side or the other. It is simple to select a case from the first type of caseload. As to the

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119. User's Manual for Department 304 (July 2015) (on file with author), <http://www.sfsuperiorcourt.org/sites/default/files/pdfs/Fireside%20chat%20July%202015.pdf>, archived at <http://perma.cc/KEL7-8CH4>

120. Loren H. Brown et al., *Bellwether Trial Selection in Multi-District Litigation: Empirical Evidence in Favor of Random Selection*, 47 AKRON L. REV. 663, 665 (2014); Zachary B. Savage, *Scaling Up: Implementing Issue Preclusion in Mass Tort Litigation Through Bellwether Trials*, 88 N.Y.U. L. REV. 439, 442 (2013).

second, typically the parties agree on one of a variety of mechanisms: try two cases— one presenting a strong case for each side— to learn the potential outside limits of the value of the rest of the caseload,<sup>121</sup> and (or) use a randomly selected case from a small group which each side has been able to modify by striking those cases seen to be highly favorable to the other side. Depending on which facts are thought to be outcome determinative, it may also be possible to undertake “stratified random sampling, an established statistical procedure for selecting predictive groups” to generate suitable bellwether trials.<sup>122</sup> The use of bellwether trials requires faith that juries will share the parties’ views of which facts drive verdicts. Sometimes they do not, and the verdicts are not predictable even after a series of trials.<sup>123</sup>

Expedited jury trials are something of an experiment in California.<sup>124</sup> Under law as modified for 2016, eight jurors are selected, each side gets five hours for trial, and the case is done within a day or two. The bases for appeal are limited. Originally developed for simple cases such as minor traffic accidents and contract disputes, the model can be used for anything the parties desire. With a cooperative judge, the time for trial can be extended, a couple of alternate jurors used, and other modifications may be had. For complex litigation, this model allows the parties to slice off a key fact issue as to which one side or the other insists on a jury determination, and have it very rapidly dealt with long before the parties must gear up for the ultimate (and very expensive) trial.

#### E. *Special Master*

Outside professionals, often but not always lawyers, can be of great use in some cases. Typically the label “special masters” suggests they are

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121. Joseph F. Madonia & Anthony G. Hopp, *Case Management Techniques in Complex Tort Litigation*, 17 NAT. RES. & ENV'T, 238, 241 (2003).

122. Richard O. Faulk et. al., *Building A Better Mousetrap? A New Approach to Trying Mass Tort Cases* 29 TEX. TECH L. REV. 779, 784, 796 (1998). As this article suggests, a critical premise of bellwether trials is that the important facts for all the cases are well-known (that the litigation is “mature”); otherwise it is probably impossible to speak of a “representative” cases at all. See also Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2344 (2008) (discussing that separately from the use of bellwether trials to set the stage for settlement is the issue of *preclusive* effect of the first trial on the others).

123. Peter H. Schuck, *Judicial Avoidance of Juries in Mass Tort Litigation*, 48 DEPAUL L. REV. 479, 484-85 (1998).

124. CAL. CIV. PROC. CODE. §§ 630.01–630.12 (West 2015); CAL. R. CT. 3.1545–3.1552. As of January 1, 2016, the provisions as modified will continue in force. As of 2016, many “limited” cases (where the demand is for less than \$25,000) *must* be tried under these provisions. Assemb. 555, 2015 Leg., Reg. Sess. (Cal 2015).

acting on behalf of and are responsible to the court. But that term does not have technical meaning in California state courts. Instead, the court may appoint or endorse the parties' use of a *referee*.<sup>125</sup> There is considerably more flexibility to do this in a complex case,<sup>126</sup> and typically referees are used for two purposes: manage discovery and settlement.<sup>127</sup> In some cases, and especially construction defect litigation, the referee does both, almost always at the behest of the parties. In some cases, the referee may be needed to review, for example, enormous quantities of documents which are the focus of a discovery dispute. In certain areas, such as construction defect litigation, these referees are highly efficient— and it is just for that reason the parties want them. It can be easier to get more time from a referee, and at a convenient time for the lawyers.<sup>128</sup> Otherwise, their use is discouraged.<sup>129</sup> There are at least three reasons. First, the *courts* ought to be handling judicial work; it is peculiar to make the parties pay for what is an essential service of the state. (I distinguish the imposition of these costs on a party responsible for some abusive tactic which made it necessary to hire a referee.) Second, it may be awkward where one or more parties cannot afford the referee; and if one side pays all the expenses, that generates its own awkward problem, a problem of optics, we might say.<sup>130</sup> Third, a discovery dispute hearing should be thought of as a potential case management conference, an opportunity to have further helpful discussions and perhaps intervention from the court; for the fight might actually have been sparked by some other covert but systemic problem. Farming out all the discovery disputes gives up one good technique of tracking the progress of the case.

#### F. *Bench trials*

First, a few words on complexity at trial. In many “complex litigation” cases, the complexity is not at trial so much as it is in pretrial

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125. CAL. CIV. PRO. CODE § 638 (West 2015).

126. See Weil et al., *supra* note 70, at ¶ 12:47.9a (discussing the use of referees in complex cases).

127. A court may not require parties to submit to mediation conducted by a referee. CAL. R. CT. 3.920(b). But the parties can *opt* to have anyone conduct a mediation, and in some cases they ask the “special master” to do so.

128. See Terry Friedman (J., ret.), “The Appointment of Discovery Referees in Complex Litigation,” L.A. LAW. 23 (Oct. 2011) (discussing the benefits with using a discovery referee).

129. See Taggares v. Superior Court, 72 Cal. Rptr. 2d 387 (Ct. App. 1998) (discussing the utility of using a discovery referee).

130. *Id.*, at 397 (holding that, even though the plaintiff is indigent, the defendant cannot be ordered to pay the entire referee fee).

management (so this note has focused on pretrial, not trial work). By the time a construction defect case gets to trial, there may only be left the relatively modest claims of a general contractor against a single subcontractor; a mass tort trial might present relatively simple allegations that one drug affected one patient. A class action which is not certified might end up as a small claims action with a single plaintiff. As a result, it may be wise to de-complexify a case when there is nothing left to warrant more than routine judicial handling.

Nevertheless, jury trials are more complicated than bench trials (in my last example, the small claims case ends up as a bench trial in any event). Bench trials allow the judge to decide the key issues in the case in a less formal and constrained venue than the jury trial. A bifurcated bench trial allows the parties to peel out a key issue and have it resolved early in the case. It is a powerful phasing mechanism, and may go far, very far, in reducing uncertainty. For this reason some parties will embrace it, and others will not. If the issue at stake is entitled to a jury trial, the only thing a judge can do is order a bifurcated jury trial. In most instances, the parties must agree to the bench trial; indeed, as the first sentence of this paragraph suggests, it is exactly where a jury right exists that the bench trial is so promising from a management perspective.<sup>131</sup>

The bench trial, as such, is a control. It helps govern not only trial, but pre-trial actions for the following reasons.

First, bench trials tend to minimize the pursuit of discovery and argument which are not directed to the merits, that is, so-called “jury appeal” issues. To be sure, lawyers will still believe that judges can be affected by these things, and will paint the other side as evil, malingering, a giant uncaring company, greedy, obstructionist and so on, but there is less of this when they know a bench trial is in the offing. Thus the number of outlier issues pursued by the parties is reduced. In any event, lawyers will still make good faith and important arguments on the credibility of witnesses or the plausibility of a position.

Pre-trial preparation is less complex for bench trials, specifically because bench trials are less complex than jury trials.

The most significant advantage of the bench trial in complex cases is that the parties can find their way as they go. Bench trials may be far superior where legal issues are novel, admissibility is uncertain, and a fairly wide variety of evidence may be relevant, or not, depending on some difficult, ultimate decisions by the judge. In jury trials most of these decisions must be made in advance: The jury instructions, jury verdicts,

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131. I emphasize: from a *management* perspective. Parties have perfectly good reasons for insisting on the right to a jury, complexities or no, and I suggest no position on the competence of juries to address complex issues and reach a reasonable result. See note 135.

and so on, must be attended to before the jury is about to be instructed, that is, before the evidence has all come in and been absorbed. To avoid the shock wave effect many judges want at least substantial settlement of these issues before the trial even starts. For example, where there is a reasonable argument that the expert should not testify at all, a judge faced with a jury trial may have to schedule a pretrial hearing, listing to testimony perhaps for days<sup>132</sup> in order to rule on the admissibility of the expert's testimony—and if it is admissible, the expert will then have to testify all over again.

In jury trials, evidentiary ruling have to be made on the spot, perhaps before it is clear which theory governs liability or exactly what the scope of that theory is. Bench trials provide the luxury of admitting substantial amounts of evidence (e.g. exhibits and depositions) prophylactically as it were, without taking up much court time, which may after reflection be discounted or ignored by the judge given a certain decision on the law; but all of which are still part of the record and so can be shown to the court of appeal.

As a result of all these factors, preparation for a bench trial is less complex and time consuming than for a jury trial.

Bench trials can be scheduled for non-consecutive days: this can allow a much, much earlier trial than if a jury were required; indeed, in a busy single assignment court, this can make over a year's difference. Because the very same case will cost significantly more when litigated over a period of e.g. 3 years than 2 years, advancing trials like this will always save money.

Many useful pretrial management techniques, which effectively group parties into collectives, are not available at a jury trial. During pre-trial, the court can appoint or accept liaison counsel and steering committees, require or allow parties to simply join in motions (or limit oral argument) when they have nothing unique to add, require joint submissions of e.g. case management conference statements and other papers, and so on. In the event of jury trials specifically, much of this flexibility disappears. In jury trials, the time for and complexity of many procedures rises as a function of the number of parties. For example, each party may have its own witnesses, each party has a right to ask questions of every witness, to ask questions at *voir dire*, to make an opening and a closing, to be heard on most legal issues including every juror bias issue, evidentiary ruling, jury instruction, special verdict form, and so on. The number of preemptory

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132. See *Sargon Enters., Inc. v. Univ. of S. Cal.*, 288 P.3d 1237 (Cal. 2012) (holding eight days of pretrial hearings). See generally, Curtis Karnow, *Sargon and the Science of Reliable Experts*, 22.1 ABTL REPORT 1 (2013), [http://works.bepress.com/cgi/viewcontent.cgi?article=1012&context=curtis\\_karnow](http://works.bepress.com/cgi/viewcontent.cgi?article=1012&context=curtis_karnow), archived at <http://perma.cc/U9SJ-DG98>(discussing the admission of expert testimony).

challenges also usually rises as the number of parties rise, but is capped by the number of “sides” at trial.<sup>133</sup> To be sure, parties still have some of these rights in a bench trial, such as opening, closing, and asking questions of witnesses, but because lawyers are properly content to have much of the evidence in paper format, as opposed to the real-time oral presentations required at a jury trial, these rights are not so often invoked: In a bench trial, the bulk of opening and closing is done with trial and post-trial briefs and witnesses can be presented through deposition extracts and having direct testimony by way of declarations, reserving the right to live cross examination. Certainly motions in limine can be filed in both sorts of trials, but they are not usually useful, and sometimes utterly pointless, in a bench trial.<sup>134</sup>

Think of it this way. The jury trial is the ultimate shock wave. Every single bit of evidence has to be assembled and ready to go, generally delivered orally (no matter how scriptory or complicated the evidence is).<sup>135</sup>

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133. This is one of the few techniques judges do have at trial to collect parties into larger categories: many or all defendants, for example, may be on the same “side” and so may have to jointly exercise one set of peremptory challenges. CAL. CIV. PRO. CODE § 231(c) (West 2015).

134. Because the proper purpose of these motions is to ensure the *jury* is not exposed to inadmissible evidence, they are of less use for bench trials. *See* *Edwards v. Centex Real Estate Corp.*, 61 Cal. Rptr. 2d 518, 529 (Ct. App. 1997) (“The purpose of a motion in limine is ‘to avoid the obviously futile attempt to “unring the bell” in the event a motion to strike is granted in the proceedings *before the jury*.’” (emphasis added) (quoting *Hyatt v. Sierra Boat Co.*, 145 Cal. Rptr. 47, 59 (Ct. App. 1978))). Some judges believe these sorts of motions are just out of place in a bench trial. *E.g.*, John N. Sharifi, *Techniques for Defense Counsel in Criminal Bench Trials*, 28 AM. J. TRIAL ADVOC. 687 (2005); Randy Wilson, *The Bench Trial: It Really Is Different*, ADVOCATE, Summer 2009, <http://www.justex.net/JustexDocuments/12/Articles/Bench%20Trial.pdf>, archived at <http://perma.cc/GR5E-2PBB>; Bonnie Sudderth, *Limine Motions – Their Uses and Limitations*, Judge Bonnie Sudderth L. Blog on the Tex. Rules of Evidence, (July 9, 2011) <http://judgebonniesudderth.wordpress.com/tag/motion-in-limine/>, archived at <https://perma.cc/SA7N-UH74> (explaining in limine motions should not be filed in a bench trial). It is pointless to file in limine motions in a bench trial when the asserted problem is prejudice under CAL. EVID. CODE § 352 (West 2015), because judges usually can be relied on avoid the bias, and, more practically, because the same judge will be viewing the evidence to evaluate it in the section 352 analysis anyway. Too, when the main issue is undue consumption of time under § 352, in limine motions are pointless when either little time is at stake, or when about the same amount of time would be expended on for example, an Evidence Code section 402, CAL. EVID. CODE § 402 (West 2015), pretrial hearing (or reading voluminous depositions extracts or reviewing the documents) as at trial.

135. Jury trials in complex cases present special difficulties, because juror competence may decline as complexity rises. Matthew A. Reiber et al., *The Complexity of Complexity: An Empirical Study of Juror Competence in Civil Cases*, 78 U. CIN. L. REV. 929, 955-62 (2010); *see also* Andrew J. Wilhelm, *Complex Litigation in the New Era of the iJury*, 41 PEPP. L. REV. 817, 851-55 (2014) (explaining that using technology to present information to jurors will allow jurors to understand complex cases). *But see* Richard C. Waites et al.,

Misfires generally cannot be fixed. There are few recourses available after a jury is discharged. The bench trial, even if set for the same number of days, is far more flexible; its moving parts are not quite so closely coupled. In the words of complexity theory, the impact of small unpredictable events (such as a sick witness, a lost document, an unforeseen ruling on admissibility such as that on an expert or because a theory was not clearly pled in a complaint or as an affirmative defense) is likely to be far greater in a jury than a bench trial. A ferocious amount of pretrial work is needed to account for the contingencies of jury trials, some of it just because a jury is involved.

#### VII. CONCLUSION: THE PROBABLE CASE

Every settlement judge and mediator has had this moment. A lawyer or party is expressing a firm conviction that he will prevail, and prevail utterly, obliterating the other side. The defendant will destroy the plaintiff and present a costs bill of half a million dollars. Or the plaintiff will win millions in pain and suffering, plus enormous punitive damages. There may be good tactical reasons for taking this approach in a settlement conference, such as trying to modify the other side's expectations, anchoring the discussions, manifesting resolve, and so on. But some actually believe the extreme positions they articulate,<sup>136</sup> and that's where the negotiations break down. These folks are fixed on a possible outcome. Their forecast may indeed be *possible*, but because it is not *probable* it fails to move the case along, and communication with the other side is threatened.

Remotely possible positions are outliers; as with the lottery effect, they are a bad basis on which to pursue a case.

Complex litigation tends towards what I term the *possible* case. I have described the incentives, motivations, and power of parties in these cases to pursue outlier issues, and indeed the techniques used by judges that sometimes enable this. Parties want every last email and every deposition. They may be able to afford the one-in-a-million long shot. They must make every argument. From the perspective of each individual actor—the lawyers, the parties, perhaps the insurers, many (perhaps all) of the

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*Are Jurors Equipped to Decide the Outcome of Complex Cases?*, 29 AM. J. TRIAL ADVOC. 19, 44 (2005) (discussing how trial lawyers can help jurors understand complex issues). These concerns suggest a variety of techniques should be used at trial to help the jury.

136. Daniel Kahneman et al., *Hawkish Bias*, (2009) <http://www.princeton.edu/~kahneman/docs/Publications/Hawkish%20Biases.pdf>, archived at <http://perma.cc/B7K3-E4AG> (reprinted in AMERICAN FOREIGN POLICY AND THE POLITICS OF FEAR 76-96 (A. Trevor Thrall et al. eds. 1st ed. 2009)).

witnesses including hired experts and others with a stake in the outcome—these may well be rational positions. The more complex the case, the more acute the intuitions that: (i) much is uncertain and (ii) some shift, perhaps some further iota of information, might influence the outcome. And it might.

But this approach never reaches an EIP—the early (short of trial) inflection point for serious settlement discussions—because the parties never reach a perfect case. There is always, *always*, money left on the table. When every possible avenue is pursued, only a trial can terminate the case, and not even that because there is always the appeal. Managing such a case to settlement is doomed.

To counter this dysfunction, judges must direct the parties away from the *possible* case to the *probable* case. We ask, rhetorically, what are likely to be the decisive issues, the key documents and witnesses, the core depositions? Judges try to move as directly as possible to those issues, and detours are not justified just because the parties can afford them or indeed just because they agree to them.

Judicial intervention is guided, I think, by a variant of the rule popularized by Carl Sagan, to the effect that “extraordinary claims require extraordinary evidence.” I need little to convince you I have a white cat named Lilly; I need much more to have you believe I also raise zebras. So too with outlier issues: The less likely the task is to make a difference to the case, the greater the resistance of the court to spend time on it and the greater the showing required that the court and parties should spend resources on it.

But this is just a default, and as with all defaults it must sometimes be thrown overboard. The next case may involve new technologies, new economic relationships, the first application of a statute; and an “outlier” might herald an important new area of law.