

JUDICIAL MISEDUCATION FROM LITIGATION SECRECY

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INTRODUCTION

Secrecy in civil litigation has, unquestionably, had deleterious effects on public health. And judges have exacerbated these harms by not being careful stewards with sealing practices. A number of scholars have explored these interrelated phenomena and how the balance being struck between transparency and secrecy is driven by factors like judicial economy incentives. But these accounts tend to overlook a system benefit of information sharing in litigation: educating judges about practice innovations.

Conceptually, educating judges about practice innovations is linked to several strands of procedural scholarship. First, the rise of managerial judging and the decrease in trials means that judges have to understand what is happening in practice if they are to effectively and efficiently shepherd the pre-trial proceedings towards settlement. Second, several recent articles have highlighted the importance of litigation culture in developing procedural law—this phenomenon suggests that judges also would be well served in their law-making function by more information about practice innovations.

These concerns about judges staying abreast of developing practices are not just theoretical. There have been several recent examples of litigation innovations arising out of the mass-tort context such as the use of common-benefit funds outside of class actions, third-party litigation funding, and claim aggregators. And there have been hundreds—if not thousands—of articles exploring the explosion of the use of artificial-intelligence tools in litigation. These new practices highlight the practical need for judges to educate themselves to understand the realities of the cases before them and to police potential professional-conduct concerns.

But formal continuing judicial training cannot fully meet the varied real-time needs of judges. The upshot of this lack of educational opportunities is that lawyers may fill the gap. In effect, lawyers are to judges as lobbyists are to legislators—repeat players who provide information to decisionmakers to implicitly promote their own interests.

This Essay concludes with a brief case study. It identifies how claim aggregators’ practices are kept opaque in civil litigation. It explains why claims aggregators’ practices might be relevant to judges’

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case management decisions. It then turns to the professional-conduct issues that might arise from the practices.

I. CONVENTIONAL UNDERSTANDING OF LITIGATION SECRECY

The legal scholarship on litigation secrecy identifies five primary costs and benefits of the practice: protection of privacy; decreased friction in discovery; promotion of settlement; diminished public accountability of courts, and; reduced enforcement of substantive laws. This Part briefly describes the trade-offs before delving more fully into how judges have worsened some of the ills by not being careful stewards with their sealing practices. It then reviews the existing literature explaining how the balance being struck between transparency and secrecy is driven by factors like judicial-economy incentives and the management of externalities.

A. Standard Accounts of the Costs & Benefits of Litigation Secrecy

Many positions on litigation secrecy follow from broader conceptions about the role of courts with those that see the resolution of the parties' disputes as the primary function of courts taking a mostly positive view of it.² On the other hand, if the protection of the public interest is the main role, than litigation secrecy is much more problematic. Either way, any analysis must identify the varied interests at stake and consider their balance.

Privacy is an interest that naturally attends litigation secrecy. Litigation-related materials may contain personal information about a litigant or third party.³ Recognizing this interest, Federal Rule of Civil Procedure 5.2 requires the redaction of certain personal information in court filings.⁴ Trade secrets also usually merit protection.⁵

Litigation secrecy is generally thought to facilitate the efficient exchange of information too.⁶ When secrecy is guaranteed, the producing party is more likely to offer material that it otherwise might withhold based on a privilege or relevance objection and to streamline costly discovery review.⁷ Still, litigation secrecy also can be drag on the efficiency of the litigation system as a whole by requiring duplicative efforts by different parties.⁸ It might also protect judicial economy by reducing satellite litigation and public relations efforts.⁹

A third benefit of litigation secrecy is how it can expand the parties' bargaining range.¹⁰ For example, if a defendant is concerned about potential liability in other cases, it might include a confidentiality premium

² See Laurie K. Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 286 (1999); Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 482 (1991); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427 (1991).

³ See Marcus, *supra* note __, at 482-83.

⁴ See FED. R. CIV. P. 5.2.

⁵ See Marcus, *Discovery Controversy*, *supra* note __, at 469-70.

⁶ Howard M. Erichson, *Court-Ordered Confidentiality in Discovery*, 81 CHI.-KENT L. REV. 357, 359 (2006).

⁷ See *id.*

⁸ See Benham, *supra* note **Error! Bookmark not defined.**, at 2199; Doré, *supra* note **Error! Bookmark not defined.**, at 305; Marcus, *supra* note __, at 496.

⁹ See Marcus, *supra* note __, at 484-87.

¹⁰ See Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 510-11 (1994).

On the other side of the ledger, litigation secrecy may hamper public oversight of the courts.¹¹ Relatedly, a lack of transparency can systemically harm the overall accuracy of court determinations and education of the public.¹²

Most problematically, litigation secrecy can reduce the effective enforcement of substantive laws by hiding information—such as defects in a popular product—that would otherwise reveal a public hazard.¹³ And this is not a theoretical concern. For example hundreds of people died due to poor tire quality and vehicle design but information about the defects took almost a decade to come to light.¹⁴ Thus, many critics of litigation secrecy suggest that it focuses too narrowly on the specifics of the case without accounting for the social benefits of information sharing.

B. Problematic Judicial Practices & Explanations

The harms of litigation secrecy have been aggravated by problematic judicial practices. Several different studies have found that judges misapply the prevailing standard for sealing court documents.¹⁵ Most notably, a team lead by Nora Freeman Engstrom, David Freeman Engstrom, and Jonah B. Gelbach used sophisticated machine-learning tools to analyze more than 2 million federal civil dockets, finding support for the concern that judges simply rubber stamp protective orders.¹⁶ A cynical account might explain this tendency by pointing to judges' incentives to maximize their ease paired with the typical lack of opposition.¹⁷ A slightly less cynical version would note that our modern system of civil procedure highly promotes settlement and, thus, court solicitude merely reflects confidentiality's ability to effectuate such resolutions.¹⁸ The least cynical view is that judges' sealing practices represent an ad hoc and, perhaps, inexpert but fair balancing of competing externalities.¹⁹ This final approach accords with Ronen Avraham and William H.J. Hubbard's more general theory of procedural design, which proposes that civil procedure's consistent underlying goal is to manage positive and negative externalities.²⁰ And, as is detailed below, it suggests room for public goods like a more informed judiciary.

II. OVERLOOKED & UNMET NEED FOR JUDICIAL EDUCATION ON LITIGATION PRACTICE

As noted above, the conventional understanding of litigation secrecy has been criticized for focusing too narrowly on the costs and benefits that inhere only within the specific case in which the sealing order is sought as opposed to the broader impact on society. But even that critique misses a practice component. When a court issues a sealing order, it also may shroud the informal practices of

¹¹ See Doré, *supra* note __, at 296.

¹² See Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1835-36 (2014); see also Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1683 (2016).

¹³ See Marcus, *supra* note __, at 458.

¹⁴ See Dustin B. Benham, *Dirty Secrets: The First Amendment in Protective-Order Litigation*, 35 CARDOZO L. REV. 1781, 1785-86 (2014).

¹⁵ See, e.g., Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. Davis L. Rev. 1249, 1290 (2020); Nora Freeman Engstrom, David Freeman Engstrom, Jonah B. Gelbach, Austin Peters & Aaron Schaffer-Neitz, *Secrecy by Stipulation*, 74 DUKE L.J. 99, 135-36 (2024)

¹⁶ Freeman Engstrom, Freeman Engstrom, Gelbach, Peters & Schaffer-Neitz, *supra* note __, 135-36.

¹⁷ See Dustin B. Benham, *Tangled Incentives: Proportionality and the Market for Reputation Harm*, 90 TEMP. L. REV. 427, 456 (2018); Barton; Rowe.

¹⁸ Dustin B. Benham, *Foundational and Contemporary Court Confidentiality*, 86 MO. L. REV. 211, 216-17 (2021).

¹⁹ See Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 872 (2007) (describing how it “aims to improve upon the largely superficial economic debate so far—'efficiently increasing settlement' versus 'inefficiently imposing externalities'”); Endo (*Contracting*), *supra* note __.

²⁰ Ronen Avraham & William H.J. Hubbard, *Civil Procedure as the Regulation of Externalities: Toward a New Theory of Civil Litigation*, 89 U. CHI. L. REV. 1 (2022).

the litigants, which can be nearly as important—over the long-term—as the substantive information being kept secret. And this practice piece is especially meaningful because of three interrelated phenomena: the rise of managerial judging, the instrumental power of litigation culture, and the fast rate of change in contemporary legal practice. Additionally, the natural solution—formal continuing judicial education programming—is not sufficient for several endemic issues.

A. Overlooked Benefit of Educating Judges on Practice Innovations

There is limited scholarly discussion of judges' need to know about practice innovations. But the necessity is implicit within several other literatures that speak to the proper aim of trial-court judges, the impact of custom on procedural doctrine and rules, and the rapid changes in legal practice.

1. *Managerial Judging*

In 1982, Judith Resnik coined the term “managerial judging” to describe jurists’ move away from a passive, adjudicatory role towards a more active part that worked with litigants to direct and shape the pretrial proceedings with the interrelated goals of reducing cost and delay while promoting settlement.²¹ Trial courts had long noted their inherent powers “to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.”²² Changes to the Federal Rules of Civil Procedure further moved the judiciary firmly into “an era of authorized managerialism” in which a wide grant of discretion is a standard feature of the various rules.²³ Whether this shift in the judicial role is ultimately for good or bad,²⁴ each component of managerial judging reinforces the need to educate trial-level courts about contemporary litigation practices.²⁵ To make this more concrete, Federal Rules of Civil Procedure 16, 26, and 11 are discussed below.

In 1983, Rule 16 was amended “to meet the challenges of modern litigation” and “to make[] scheduling and case management an express goal of pretrial procedure.”²⁶ The original version charged judges to consider important pretrial concerns such as the simplification of the issues and it authorized judges to schedule conferences and issue pretrial orders at their discretion.²⁷ The biggest change in 1983 was to mandate a pretrial scheduling order with the goal of “encourage[ing] the court to become involved in case management early in the litigation.”²⁸ This transformation from a rule focused on trial preparation to pretrial managerialism was reflected in its title change from “Pre-Trial Procedure; Formulating Issues” to “Pretrial Conferences; Scheduling; Management.”²⁹ By 1989, a district court judge commented, “I think it can be safely said that the ‘passive model’ of judging no longer prevails, and that in Rule 16 the drafters endorsed—if not by mandating aggressive judicial involvement, then

²¹ Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982).

²² *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (citing *United States v. Hudson*, 7 Cranch 32, 34 (1812); *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962)).

²³ Thomas D. Rowe, Jr., *Authorized Managerialism Under the Federal Rules-and the Extent of Convergence with Civil-Law Judging*, 36 Sw. U. L. Rev. 191, 192–93 (2007).

²⁴ Contrast Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. Chi. L. Rev. 306, 328-29 (1986) with Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 Yale L.J. 27, 30 (2003).

²⁵ See Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: "Twixt the Cup and the Lip"*, 87 Denv. U. L. Rev. 227, 243 (2010) (“These procedures also allow a judge to learn about the case before the parties ask for a decision on dispositive motions.”) and Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 638-39 (1989) (criticizing the move towards managerial judging because of judges’ lack of case information).

²⁶ Fed. R. Civ. P. 16 advisory committee’s note to 1983 amendment.

²⁷ Fed. R. Civ. P. 16 (1938).

²⁸ *Id.* See also Richard L. Marcus, *Slouching Towards Discretion*, 78 Notre Dame L. Rev. 1561, 1588 (2003); Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. Rich. L. Rev. 1261, 1268 (2010).

²⁹ Rowe, *supra* note ___, at 195.

by at least expressly permitting such involvement—the managerial model of judging.”³⁰ Later amendments in 1993 and 2006 broadened the rule to further foster trial judges’ more active management of pre-trial procedures.³¹ As Thomas D. Rowe, Jr., put it, “By any measure, Rule 16 gives judges more managerial arrows than can fit in an ordinary quiver.”³² And the upshot is that district courts are now charged to consider sixteen topics that go to pretrial procedures,³³ some of which necessitate knowledge about existing practice as with the controlling and scheduling discovery that is discussed in greater detail below.³⁴ One major piece of Rule 16 is its promotion of settlement,³⁵ which requires judges to understand the litigation dynamics of both the specific case and the broader ecosystem.³⁶

Rule 26 also underwent a major overhaul in 1983, which further pushed district courts towards active case management through its increased supervision of discovery.³⁷ Per the Advisory Committee’s note, the amended rule “contemplates greater judicial involvement in the discovery process” and encouraged judges to proactively identify and address potentially redundant or disproportionate discovery.³⁸ In 1993, Rule 26(f) added a mandatory discovery-planning conference to provide courts with information that would inform their case management to reduce costs and move the parties towards rapprochement.³⁹ In 2015, Rule 26(b) was amended again to add a direct proportionality limitation to discovery.⁴⁰

A case from the District of Nebraska directly speaks to how this change implicitly requires judges to know about litigation practices in that proportionality turns on such factors such as the “importance of the issues at stake in the action” and “the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”⁴¹ In the District of Nebraska case, the producing party argued that certain discovery requests would be unduly burdensome because it would have to identify employees, collect documents from them, and then review the documents for privilege.⁴² The district court rejected this argument because “[s]uch practices are standard for all discovery.”⁴³

³⁰ Charles R. Richey, *Rule 16: A Survey and Some Considerations for the Bench and Bar*, 126 F.R.D. 599, 603 (1989)

³¹ Rowe, *supra* note __, at 195; Fed. R. Civ. P. 16 advisory committee’s note to 1993 & 2006 amendments.

³² Rowe, *supra* note __, at 196.

³³ Fed. R. Civ. P. 16 (2026).

³⁴ See Easterbrook, *supra* note __, at 638-39.

³⁵ See J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. Rev. 1713, 1720 (2012); Robin J. Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 B.U. L. Rev. 127, 172 (2018).

³⁶ See Elliott, *supra* note __, 329 (“Judges must be capable of detecting circumstances in which the existence of significant process costs introduces distortions into settlements.”); Ellen E. Deason, *Beyond “Managerial Judges”: Appropriate Roles in Settlement*, 78 Ohio St. L.J. 73, 74–76 (2017).

³⁷ Fed. R. Civ. P. 26 advisory committee’s note to 1983 amendment.

³⁸ *Id.* See also Seth Katsuya Endo, *Technological Opacity & Procedural Injustice*, 59 B.C. L. Rev. 821, 844 (2018); Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 Duke L.J. 669, 679 (2010).

³⁹ Fed. R. Civ. P. 26 advisory committee’s note to 1993 amendment. See also Gensler, *supra* note __, at 679; Resnik, *supra* note __, 390; Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. Rev. 1777, 1809–10 (2015).

⁴⁰ Fed. R. Civ. P. 26 advisory committee’s note to 2015 amendment. See also Endo (*Opacity*), *supra* note __, at 845; Morris A. Ratner, *Restraining Lawyers: From “Cases” to “Tasks”*, 85 Fordham L. Rev. 2151 (2017) (“In the sphere of procedure, the December 2015 amendments to the Federal Rules of Civil Procedure [] reinforce and expand court involvement in active case management.”).

⁴¹ Fed. R. Civ. P. 26(b). See generally Seth Katsuya Endo, *Preventive Transparency in Third-Party Litigation Funding*, 120 Nw. U. L. Rev. 501, 529 (2025) (describing attempts to use Rule 26(b)’s proportionality command to force disclosure of information about third-party litigation funding).

⁴² *Hlavinka Equip. Co. v. CLAAS of Am., Inc.*, No. 8:22CV379, 2024 WL 665087, at *3 (D. Neb. Feb. 16, 2024).

⁴³ *Id.*

The general notion that actively supervising discovery requires information about practice also underlies prominent jurist Frank Easterbrook’s objection to the move towards managerialism, which turned on his belief that judges might not have the information necessary to effectively administer the case.⁴⁴ In fact, even the parties might not have the necessary information given the information asymmetries and fluid dynamics of the litigation.⁴⁵ But these case-specific concerns can be mitigated and should be informed by judges’ more general information about litigation practices.

Rule 11 was part of the 1983 amendments too, transformed from a “sleepy little eight-sentence rule” into a strong sanctioning tool that could be used to control litigants’ conduct by ensuring that legal and factual positions advanced by the parties were supported by a reasonable inquiry.⁴⁶ The range of available sanctions was broadened, and their imposition only required that the lawyer failed to meet a lower “reasonable inquiry” standard, which replaced a “willful” mens rea in the original version.⁴⁷ While the mandatory imposition of sanctions under the 1983 version was deemed too unwieldy, the 1993 amendments otherwise largely retained the changes.⁴⁸ And it is well understood that the current version of Rule 11 requires courts to assess whether the challenged conduct was consistent with “objective norms of what reasonable attorneys would have done.”⁴⁹ Further illustrating the need for district courts to stay abreast of litigation practice in its use of Rule 11, several courts have explicitly justified the great deference accorded to trial courts by acknowledging, “Necessarily, the district court will have a better grasp of what is *acceptable trial-level practice among litigating members of the bar* than will appellate judges.”⁵⁰

2. *Litigation Culture as Procedural Rules*

Managerial judging is now embedded in the Federal Rules of Civil Procedure but this set of formal written rule is increasingly understood to be only a part of the picture.⁵¹ Two recent law review articles—Edith Beerdsen’s *Discovery Culture* and Diego A. Zambrano’s *The Unwritten Norms of Civil Procedure*—thoughtfully explore how the actual operation of procedural rules depends heavily on litigation norms and conventions,⁵² which additionally supports the argument that litigation secrecy can have deleterious effects by shrouding what is happening in practice.

Beerdsen explains how the day-to-day reality of discovery in civil litigation is largely driven by “discovery culture,” a term she coined to describe the informal norms and practices that govern everyday practice within legal communities. Beerdsen examined ten years of deposition disputes from three federal district courts, finding that parties generally navigate around Rule 30’s presumptive ten-deposition limit without judicial intervention. The conceptual payoff of Beerdsen’s finding is that informal norms have largely displaced the formal written law. And, thus, judges cannot discharge their

⁴⁴ See Easterbrook, *supra* note __, at 638-39.

⁴⁵ See Steven Baicker-McKee, *Reconceptualizing Managerial Judges*, 65 Am. U. L. Rev. 353, 390–91 (2015).

⁴⁶ Rowe, *supra* note __, at 194.

⁴⁷ *Id.*; see also Fed. R. Civ. P. 11 advisory committee’s note to 1983 amendment.

⁴⁸ Fed. R. Civ. P. 11 advisory committee’s note to 1993 amendment

⁴⁹ *In re Big Rapids Mall Assoc.*, 98 F.3d 926, 930 (6th Cir. 1996). See also *Jones v. Warden of Stateville Corr. Ctr.*, 918 F. Supp. 1142, 1156–57 (N.D. Ill. 1995) (“It further finds that Jones has refused to conform his conduct to accepted norms despite past warnings and that restrictive measures are necessary to ensure that his abusive litigation practices do not continue.”).

⁵⁰ See, e.g., *Eastway Const. Corp. v. City of New York*, 637 F. Supp. 558, 566 (E.D.N.Y. 1986), *order modified and remanded*, 821 F.2d 121 (2d Cir. 1987) (emphasis added). See also Warren E. Burger, *School for Judges*, 33 F.R.D. 139, 147 (1964) (“Since an appellate judge, even more than a trial judge, tends to lose contact with lawyers and the world he formerly moved in, with all its need for daily accommodation, he needs constant exposure to fresh ideas.”).

⁵¹ See Diego A. Zambrano, *The Unwritten Norms of Civil Procedure*, 118 Nw. U. L. Rev. 853 (2024); Edith Beerdsen, *Discovery Culture*, 57 Ga. L. Rev. 981 (2023).

⁵² See Zambrano, *supra* note __; Beerdsen, *supra* note __.

responsibilities to supervise discovery—or, presumably, any other phase of civil litigation—through mastery of the written rules alone. Instead, judges must have a strong understanding of the dominant practices within the legal community.

Zambrano takes a more expansive approach, considering how norms shape every aspect of civil litigation such as the division of labor between state and federal judges, to the application of Rule 11 sanctions, discovery technology, and multidistrict litigation. As discussed above, Rule 11's standard requires judges to know the standards of legal practice. Zambrano further identifies a norm against applying sanctions that limits the text and often leads judges to ignore a statutory command to certify parties' compliance with the rule in certain securities cases.⁵³ While this norm is largely a judicial one, it has roots in a consensus amongst practitioners that Rule 11 motions are "harmful to the profession and legal morale."⁵⁴ And this example, again, illustrates how practice norms can upend textual commands while also revealing how judges can be active participants who propagate litigation practices.⁵⁵ Zambrano also discusses a second example from discovery. Zambrano details how the rise of technology-assisted review presented new technical questions about the use of these new review tools. In the absence of any direct instructions from the existing rules, several non-profits came up with some practices that became norms against which lawyers' conduct is measured.⁵⁶

3. Two Major Changes in Contemporary Practice

A third strand of civil procedure scholarship discusses the rapid changes in contemporary legal practice. Two especially relevant changes involve the development of new legal technology tools and the profusion of complex litigation.

Legal tools that use machine-learning or other versions of artificial intelligence are making new inroads into legal practice, moving from high-volume, process-based aspects of practice (e.g., the use of predictive coding in discovery)⁵⁷ to more sophisticated work (e.g., drafting answers and initial discovery requests).⁵⁸ Illustrating the ubiquity of advanced technology in legal practice, several years ago, Chief Justice John Roberts was asked whether "smart machines, driven with artificial intelligences, will assist with courtroom fact finding or, more controversially even, judicial decision making." Roberts replied, "It's a day that's here...."⁵⁹ And a new wave of scholarship has taken aim at how these AI tools are changing the legal profession.⁶⁰ Ray Brescia contends that we have entered a new

⁵³ Zambrano, *supra* note __, at 905 (citing M. Todd Henderson & William H. J. Hubbard, *Judicial Noncompliance with Mandatory Procedural Rules Under the Private Securities Litigation Reform Act*, 44 J. Legal Stud. 887, 890 (2015))

⁵⁴ *Id.* at 904–05.

⁵⁵ *Id.* at 917.

⁵⁶ *Id.* at 903 (citing, as an example, *John B. v. Goetz*, 531 F.3d 448, 459 (6th Cir. 2008)).

⁵⁷ See Remus; Endo.

⁵⁸ *The Law Firm Disrupted: Walmart Won't Pay You to Cut and Paste*, Law.com (Apr. 5, 2018); Wendy Everette, Catherine Gellis, *The Year in Law & Technology*, 9 J.L.: Periodical Laboratory of Leg. Scholarship 188, 194 (2019) ("Ogletree Deakins became the first law firm to publicly license document-drafting technology from LegalMation. The document-drafting software assists with generating a draft Answer from the text of a Complaint."); see generally Dana Remus & Frank Levy, *Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law*, 30 Geo. J. Legal Ethics 501, 541 (2017) (describing pattern of disruption).

⁵⁹ <http://blogs.discovermagazine.com/crux/2017/05/16/are-we-ready-for-robot-judges/#.XdMTfVdKiUk>

⁶⁰ See, e.g., Eric C. Chaffee, *The Role of Technology in Professional Advice*, 50 U. Tol. L. Rev. IX, xi (2019) ("On October 12, 2018, The University of Toledo Law Review hosted a symposium on The Role of Technology in Professional Advice."); Melissa Caperton, *Oklahoma Law Review Symposium Examines the Influence of Artificial Intelligence on the Legal Profession* (Feb. 11, 2019) ("On Feb. 8, the *Oklahoma Law Review's* Symposium, 'Lawyering in the Age of Artificial Intelligence,' brought together legal scholars from across the country..."), <http://www.law.ou.edu/news-and-media/oklahoma-law-review-symposium-examines-influence-artificial-intelligence-legal>; <https://www.law.com/dailyreportonline/2019/04/12/can-artificial-intelligence-solve-big-laws-60b-question>.

era of legal practice, which he dubbed “Lawyer 3.0.”⁶¹ Recent empirical work identified legal employers’ appetite for hiring lawyers with strong understandings of such tools, which confirms the importance of these practice changes.⁶² And the federal judiciary, itself, has acknowledged the need for education on these how these developments have changed society more broadly.⁶³

Over this same period, multidistrict litigation (MDL) has become the predominant type of civil case within the federal system with estimates reaching as high as 40%.⁶⁴ MDLs require different modes of lawyering—often involving significant amounts of cooperation between parties—and the procedural guidance has been sparse, which leads to highly active managerial judging that turns on practice norms.⁶⁵ Accordingly, this general shift in litigation exacerbates the harms of keeping litigation practices a secret.

More generally, in a world of rapidly changing litigation practices, courts should be actively policing potential professional misconduct. While state courts have the primary responsibility for regulating lawyers,⁶⁶ federal courts cannot fully disclaim that duty.⁶⁷ And innovations in practice may, almost inherently, involve conditions of uncertainty that may strain the accepted bounds of professional responsibility. For example, in MDLs, attorneys have claimed common-benefit fees in situations that bring up significant, contested legal ethics issues.⁶⁸ As frontline witnesses to these practices, judges can see exactly what is happening.⁶⁹ Moreover, they have the authority to guide innovations and reforms to ensure that the public is properly protected.⁷⁰

B. The Formal Judicial Education Gap

If one of the deleterious effects of litigation secrecy is that it may limit what judges learn about practice innovations, a potential solution is formal judicial education.” On one hand, there is now more of this sort of programming than ever before. Ninety percent of states now have continuing judicial education requirements. Still, major gaps remain. State requirements vary greatly from one to twenty hours of training per year and there are no requirements for federal judges.⁷¹ Furthermore,

⁶¹ Ray Brescia, *Lawyer 3.0: A Guide to Next-Wave Lawyering* (Bristol 2026).

⁶² Jessica de Perio Wittman & Kathleen Brown, *Taking on the Ethical Obligation of Technology Competency in the Academy: An Empirical Analysis of Practice-Based Technology Training Today*, 36 *Geo. J. Legal Ethics* 1, 21–22 (2023).

⁶³ U.S. Courts, Statement of Purpose - Privately Funded Seminars Disclosure (Oct. 2006) (“In an age where rapid technological changes are revolutionizing virtually every aspect of American life, the law must keep pace with changes that society undergoes.”), at <https://www.uscourts.gov/administration-policies/privately-funded-seminars-disclosure-system/statement-purpose-privately-funded-seminars-disclosure>.

⁶⁴ See Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 *N.Y.U. L. Rev.* 846, 846 (2017). *But see* Zachary D. Clopton, *MDL as Category*, 105 *Cornell L. Rev.* 1297, 1306-07, 1314-16 (2020).

⁶⁵ See Zambrano; Burch; Gluck; Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 54 *U. Chi. L. Rev.* 449 (1986); *In re Bard IVC Filters Prods. Liab. Litig.*, 603 *F. Supp. 3d* 822, 832 (D. Ariz. 2022), *aff’d sub nom. In re Bard IVC Filters Prod. Liab. Litig.*, 81 *F.4th* 897 (9th Cir. 2023).

⁶⁶ See *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass’n*, 457 *U.S.* 423, 434 (1982) (“States traditionally have exercised extensive control over the professional conduct of attorneys.”).

⁶⁷ See Judith A. McMorrow, *Rule 11 and Federalizing Lawyer Ethics*, 1991 *BYU L. Rev.* 959;

⁶⁸ See Seth Katsuya Endo, *Ethical Guardrails to Unbounded Procedure*, 93 *Fordham L. Rev.* 49, 94–95 (2024).

⁶⁹ Danielle Kalil, *A Blueprint for Judicial Innovation – Takeaways from Advancing Innovation: A National Summit on Judicial Leadership* (Nov. 10, 2025), at https://iaals.du.edu/sites/default/files/documents/publications/blueprint_judicial_innovation.pdf.

⁷⁰ *Id.*

⁷¹ See Evan Murphy, Markus Kimmelmeier & Patrick Grimes, *Barriers, and Impact of Continuing Judicial Education: A Survey of U.S. Judges*, 57 *Ct. Rev.* 40, 41 (2021); Faith Khalik, Alisa Lincoln, *Salus Populi: Educating Judges on the Social Determinants of Health*, 71 *J. Legal Educ.* 260, 281 (2022) (citing *About the FJC*, Fed. Jud. Ctr., <https://www.fjc.gov/about> (last visited Feb. 11, 2022) (describing the duties of the Federal Judicial Center to educate federal judges but not a requirement that judges attend trainings)).

several systemic issues reduce the efficacy of continuing judicial education programming, especially as it relates to innovations in practice given the pace of legal change.

1. *Brief History of Continuing Judicial Education Programming in America*

For most of the U.S.'s history, there were no continuing judicial education requirements and limited programming.⁷² Some specialized-court judges received training and federal district judges received instruction on pre-trial procedure.⁷³ But there was significant skepticism the need for formal educational programming for judges.⁷⁴ In the 1960s, there was a profound sea change as judicial education programs proliferated to ensure the continued effectiveness of the courts as they faced increased complexity, diversity, and volume in the matters being litigated.⁷⁵ The first formal judicial education program—a two-week seminar for appellate judges put on by New York University School of Law's Institute of Judicial Administration—was offered in 1956.⁷⁶ The first program for trial judges took place two years later.⁷⁷ In 1961, the American Bar Association, the American Judicature Society, and eight other organizations created a committee to evaluate whether judicial education programs were a worthwhile endeavor, organizing about fifty seminars for judges over a two-year period.⁷⁸ The committee's efforts culminated in the founding of the National College of the State Trial Judges in 1963.⁷⁹

Congress picked up on these early efforts and, in 1967, it established the Federal Judicial Center (FJC), which was charged “to further the development and adoption of improved judicial administration” and is expressly authorized to “to stimulate, create, develop, and conduct programs of continuing education and training for personnel of the judicial branch of the Government and other persons whose participation in such programs would improve the operation of the judicial branch....”⁸⁰ In 1990, as part of the Civil Justice Expense and Delay Reduction Plans, Congress passed a statute requiring the Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts to “develop and conduct comprehensive education and training programs to ensure that all judicial officers, clerks of court, courtroom deputies, and other appropriate court personnel are thoroughly familiar with the most recent available information and analyses about litigation management and other techniques for reducing cost and expediting the resolution of civil litigation.”⁸¹

For state courts, Congress authorized the State Justice Institute to award grants to “support education and training programs for judges and other court personnel, for the performance of their general duties and for specialized functions, and to support national and regional conferences and seminars for the dissemination of information on new developments and innovative techniques.”⁸² And, by 1986, all states provided—if not mandated—some form of judicial education.

⁷² Robert G. Bone, *Judging As Judgment: Tying Judicial Education to Adjudication Theory*, 2015 J. Disp. Resol. 129, 130 (2015) (citing Delmar Karlen, *Judicial Education*, 52 A.B.A. J. 1049, 1049 (1966))

⁷³ *Id.* at 130 (citing Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 Harv. L. Rev. 924, 944-45 & n. 63 (2000)).

⁷⁴ *Id.*

⁷⁵ *Id.* at 130-131. These efforts also may be understood as part of the general modernization/reform efforts of the time. See Burger, *supra* note ___, at 147.

⁷⁶ Burger, *supra* note ___, at 139.

⁷⁷ Bone, *supra* note ___.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ 28 U.S.C. § 620.

⁸¹ 28 USCA § 480.

⁸² 42 U.S.C. § 10705

Substantively, continuing judicial education programs originally focused on substantive and procedural legal issues.⁸³ But it has grown to include related topics such as scientific developments and pertinent societal trends.⁸⁴

2. *Current Landscape*

At the federal level, the FJC provides a broad array of continuing judicial education programs.⁸⁵ It has expanded its offerings from seminars for new district judges to include training for more experienced trial and appellate judges through national and regional workshops. Topics include specific substantive issues like judicial ethics. Also, the trainings also cover practical skills too, such as “case management, the judicial role, leadership, ethics, and court management.”⁸⁶ The orientation seminars for new judges—which are a significant portion of the formal training received by federal jurists—are tailored to the different categories of judges. In total, the FJC puts on more than fifty programs—from in-person conferences to webinars—that serve about 2,000 federal judges each year.⁸⁷

A key characteristic of the FJC is its independence. By design, it is an independent agency that has no policymaking agenda and is separated from the day-to-day administration concerns of the courts.⁸⁸ As one of its past directors said, the FJC’s “job is simply to provide the best information and resources that we can to the courts, and being independent allows us to do that without having a vested interest in any particular approach or policy that might exist. The judges and the people in the courts and the Judicial Conference all know we are not trying to put a thumb on the scales one way or the other.”⁸⁹ Of course, this is not to say that the FJC is a cure-all. It lacks the resources to fund all the programs that every judge might need.⁹⁰ Additionally, former federal appellate judge Richard Posner characterized the FJC’s programming as so overly cautious that “much of its instructional output [is] rather pedestrian”⁹¹

At the state level, all but five states have annual continuing education requirements for judges that are mandated by state statute or court rules.⁹² On the low end, three states require between one and nine hours. Thirty-eight states require between ten and nineteen hours. Two states require twenty

⁸³ Duane Benton & Jennifer A.L. Sheldon-Sherman, *What Judges Want and Need: User-Friendly Foundations for Effective Judicial Education*, 2015 J. Disp. Resol. 23, 25 (2015) (citing Patricia Murrell, *Judging: A Role with a Soul*, 45 Judges J. 1, 3 (2006) (“The content of judicial education programs has historically been centered on substantive law.”); John W. Kennedy, *Personality Type and Judicial Decision Making*, 37 Judges J. 4, 5 (1998)); Burger, *supra* note ___, at 146 (noting first seminars covered various trends in tort law).

⁸⁴ Benton & Sheldon-Sherman, *supra* note ___, at 25; Jeremy Fogela & S.I. Strong, *Judicial Education, Dispute Resolution & the Life of a Judge: A Conversation with Judge Jermy Fogel*, Direct of the Federal Judicial Center, 2016 J. Disp. Resol. 259 (2016).

⁸⁵ SalusPopuli, *Judicial Education Programs: Surveying the Landscape 6-7* (October 2020), at https://43b3a781-7ead-4730-ae9d-948d339eea87.filesusr.com/ugd/82396f_5dd19d834ffe47d19f18678adb7b52ed.pdf.

⁸⁶ *Id.* See also Benjamin A. Kahn, *Who Educates Judges?*, Am. Bankr. Inst. J., March 2026, at 16, 17; <https://www.fjc.gov/education>.

⁸⁷ Nancy Joseph, *Would United States Judges Benefit From More Graduate Training?* 8, at <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1001&context=mjs>

⁸⁸ Kahn, *supra* note ___, at 16.

⁸⁹ *Id.*

⁹⁰ U.S. Courts, *Statement of Purpose - Privately Funded Seminars Disclosure* (Oct. 2006) (“The Federal Judicial Center provides high quality educational programs to the judiciary, but it does not and likely never will have sufficient resources to meet the needs of every judge.”), at <https://www.uscourts.gov/administration-policies/privately-funded-seminars-disclosure-system/statement-purpose-privately-funded-seminars-disclosure>. To make this more concrete, a recent congressional budget allocated only \$2.2 million to CJE programming. https://www.uscourts.gov/sites/default/files/fy_2025_congressional_budget_summary.pdf

⁹¹ Richard Posner, *Divergent Paths: The Academy & the Judiciary* 358 (2016).

⁹² See Evan Murphy, Markus Kimmelmeier, & Patrick Grimes, *Motivations, Barriers, and Impact of Continuing Judicial Education: A Survey of U.S. Judges*, 57 Ct. Rev. 40, 41 (2021).

or more hours. And two states have slightly different systems. Although there is substantial variation across the states, many of the CJE programs are offered by state agencies or state universities and are funded through the respective judiciaries.⁹³ The subject matter usually encompasses: “(1) substantive legal knowledge; (2) judicial and technical competence; (3) character, civility, and ethics; and (4) personal growth and development.”⁹⁴

As the former head of the FJC has acknowledged, private CJE providers are, effectively, a necessity given the wide variety of programmatic needs and the limited government funds.⁹⁵ And, recall, the very first formal CJE programs were developed not by a government provider but by a private law school’s institute.⁹⁶ So it is no surprise that there are, at least, seventy private organizations offering CJE programs. Perhaps chief amongst these providers is the National Judicial College, which offers about a hundred courses each year on a wide range of subjects, including practice skills and substantive legal issues. This programming reaches more than 2,700 judges each year. Other significant generalist CJE providers include the National Center for State Courts, the American Academy of Judicial Education, and the National Association of State Judicial Educators. There are also academic entities such as Duke Law School’s Bolch Judicial Institute and the Law and Economics Center at George Mason University School of Law.⁹⁷ The Law and Economics Center is one of a set of providers that focuses on a specific subject area.⁹⁸ There also are for-profit organizations.⁹⁹ Federal judges now must disclose certain information related to their attendance at nongovernmental education programs¹⁰⁰ and these disclosures—which prominently feature the organizations noted above—can be found on the FJC website.¹⁰¹

3. Systemic Challenges

Notwithstanding the plethora of formal CJE programming, several systemic challenges limit its effectiveness in meeting judges’ need to learn about practice innovations. First, most judges are generalists. Second, the opportunities and incentives for judges to take advantage of existing programs can vary. Third, the rapid pace of change in contemporary litigation practices, again, hinders the ability of CJE providers to create programs.

Since the very beginning of formal CJE programming in the United States, commentators have noted that the difficulty in needing the needs of generalist judges who need to know both judicial skills for which they have not been trained as well as *all* areas of substantive law.¹⁰² Judges also must have some understanding of “science, history, economics, sociology, anthropology, philosophy and

⁹³ See Faith Khalik & Alisa Lincoln, *Salus Populi: Educating Judges on the Social Determinants of Health*, 71 J. Legal Educ. 260, 273-74 (2022).

⁹⁴ Murphy, Kimmelmeier & Grimes, *supra* note __, at 41 (citing Patricia H. Murrell & Philip D. Gould, *Educating for Therapeutic Judging: Strategies, Concepts, and Outcomes*, 78 Rev. Jur. U.P.R. 129, 144 (2009)).

⁹⁵ Fogel & Strong, *supra* note __, at 277 (“I don’t know that judicial education organizations aimed at state court judges are able to keep up with demand.”)

⁹⁶ Burger, *supra* note __, at 139.

⁹⁷ S.I. Strong, *Writing Reasoned Decisions and Opinions: A Guide for Novice, Experienced, and Foreign Judges*, 2015 J. Disp. Resol. 93, 128 n.10 (2015); Bruce A. Green, *May Judges Attend Privately Funded Educational Programs? Should Judicial Education Be Privatized?: Questions of Judicial Ethics and Policy*, 29 Fordham Urb. L.J. 941 (2002).

⁹⁸ Green, *supra* note __, at 941 (highlighting three providers focused on law and economics).

⁹⁹ Strong (*Writing*), *supra* note __, at 128 n.10.

¹⁰⁰ See Russell R. Wheeler, *A Primer on Regulating Federal Judicial Ethics*, 56 Ariz. L. Rev. 479, 487–88 (2014).

¹⁰¹ See, e.g., <https://psds.uscourts.gov/psdsdetail.pdf>.

¹⁰² See Burger, *supra* note __, at 141; Jack B. Weinstein, *The Contribution of Henry G. Manne Towards the Education of the American Judiciary*, 50 Case W. Res. L. Rev. 421 (1999).

other disciplines, which are the foundations of judicial decisions of fact and of law.”¹⁰³ And, thus, there is a large universe of information that judges should know.

A survey of judges revealed two factors that can hinder participation in CJE programming.¹⁰⁴ First, funding for CJE can fluctuate greatly.¹⁰⁵ A lack of financial support can reduce the number of governmental programs. Additionally, it can force judges to bear the monetary burden themselves.¹⁰⁶ Second, judges noted that overcrowded dockets can make it hard to find time to take advantage of CJE programs.¹⁰⁷

In further considering the incentives for judges to participate in CJE programs, commentators have identified a lack of accountability for most judges. All federal judges and some state judges have lifetime tenure and, thus, their professional development relies on their intrinsic motivation.¹⁰⁸ And even elected judges do not usually answer meaningfully to an electorate that usually relies on proxies like political affiliation rather than individual performance.¹⁰⁹ The lack of a structural check is exacerbated by the longstanding cultural touchstone that judges, by dint of their role, are experts who do not need formal continuing education.¹¹⁰

Finally, the rapid pace of change in contemporary practice may make it difficult to create and deploy timely CJE programs. In part, there might not be widespread knowledge about innovations in practice. Additionally, creating new programs on the fly carries with it intrinsic logistical difficulties.

III. LITIGATORS FILL THE GAP

If formal judicial education does not fully solve judges’ need to understand what is happening in practice, litigators may fill the gap. In effect, lawyers are to judges as lobbyists are to legislators—repeat players who provide information to decisionmakers to implicitly promote their own interests. Without intending to belabor this analogy, this Part describes the present account of lobbying judges before offering its conception of litigators as partisan educators.

A. Present Account of Lobbying Judges

1. *Basic Definition of Lobbying (Legislators)*

Lobbying is generally understood to be any attempt to influence legislation through communication with governmental policymakers.¹¹¹ The nature of the influence can vary but it typically has focused on legislators. A seminal account, which has influenced contemporary

¹⁰³ Weinstein, *supra* note __, at 421.

¹⁰⁴ Murphy, Kimmelmeier & Grimes, *supra* note __, at 43-44.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See generally Michael J. Mazza, *A New Look at an Old Debate: Life Tenure and the Article III Judge*, 39 Gonz. L. Rev. 131, 135 (2004) (noting that Alexander Hamilton advocated for lifetime tenure of federal judges to ensure their independence); S.I. Strong, *Judicial Education and Regulatory Capture: Does the Current System of Educating Judges Promote A Well-Functioning Judiciary and Adequately Serve the Public Interest?*, 2015 J. Disp. Resol. 1, 5 (2015) (discussing judges’ ability to control what sorts of programming—if any—they participate in); Murphy, Kimmelmeier & Grimes, *supra* note __, at 43 (finding significant percentage of judges participated in CJE for professional development).

¹⁰⁹ See Michael R. Dimino, Sr., *The Worst Way of Selecting Judges—Except All the Others That Have Been Tried*, 32 N. Ky. L. Rev. 267 (2005) (“We all know the defects of judicial elections. The public is too ignorant of the legal system, the candidates, and the law to make wise choices; consequently, judges are elected often because of their famous names, ethnicities, position on the ballot, party affiliation, and the like, rather than through an assessment of merit.”).

¹¹⁰ See Bone, *supra* note __, at n.7; see also Francis C. Cady & Glenn E. Coe, *Education of Judicial Personnel: Coals to Newcastle*, 7 Conn. L. Rev. 423, 424 (1975); Emily Kadens, *The Puzzle of Judicial Education: The Case of Chief Justice Williams de Grey*, 75 Brook. L. Rev. 143, 145 (2009).

¹¹¹ See Lloyd Hitoshi Mayer, *What Is This “Lobbying” That We Are So Worried About?*, 26 Yale L. & Pol’y Rev. 485, 486 (2008).

understandings,¹¹² distinguishes between “direct” appeals to legislators and “indirect” efforts focused on the public.¹¹³ Direct lobbying can take the form of social influence, the provision of information, and financial support.¹¹⁴ Indirect lobbying may involve prompting constituents to bring pressure, campaigning to pick legislators who promise to support the lobbyists’ agenda, and molding constituents’ opinions.¹¹⁵

While lobbying is protected by the First Amendment right to petition and the standard definition would encompass the activities of American heroes like Martin Luther King, Jr., it frequently raises public concerns about lobbyists’ undue influence on public policy.¹¹⁶ Across the political spectrum, prominent politicians decry lobbyists’ ability to shape legislation to benefit insiders, even when they use the legal means described above.¹¹⁷ The underlying notion is that lobbyists use their access or other resources to distort the link between voters’ preferences and legislative outputs.¹¹⁸ And, of course, there also is the risk that lobbyists could use illegal means like outright bribery.¹¹⁹ The high-profile scandal involving Jack Abramoff in the early 2000s illustrates this concern.¹²⁰

Mapping this basic definition of lobbying to judges presents a few real—but not insurmountable—complexities. All federal and many state judges are not elected precisely because they are meant to be politically insulated from voters’ preferences.¹²¹ And judges are not generally supposed to have a policymaking role under most normative conceptions.¹²² On the other hand, judges play a meaningful role in the development of the law¹²³ and, as a matter of consensus American judicial ethics, are not supposed to be influenced by factors beyond the cases before them.¹²⁴ A few recent examples, discussed in the next section, illustrate the current salience of this concern.

2. Current Salience of Judicial Lobbying

Over the past few years, public confidence in the U.S. Supreme Court has fallen to its lowest point as the justices have been implicated in a variety of ethical muddles that involve the possibility of

¹¹² See, e.g., Marjorie E. Kornhauser, *The “Invisible Government” and Conservative Tax Lobbying 1935-1936*, Law & Contemp. Probs., 2018, at 167, 167–68 (“There are numerous ways to influence legislation: legal or illegal; open or hidden; direct--appeals to legislators-- or indirect--through shaping public opinion.”).

¹¹³ Edward B. Logan & Simon N. Patten, *Lobbying*, 144 Annals of the American Academy of Political and Social Science 1, 52, 61 (1929).

¹¹⁴ *Id.* at 52-59.

¹¹⁵ *Id.* at 61-65.

¹¹⁶ Mayer, *supra* note __, at 486-87.

¹¹⁷ See Richard L. Hasen, *Fixing Washington*, 126 Harv. L. Rev. 550, 551 (2012)

¹¹⁸ Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 Stan. L. Rev. 191, 217 (2012)

¹¹⁹ Vincent R. Johnson, *Regulating Lobbyists: Law, Ethics, and Public Policy*, 16 Cornell J.L. & Pub. Pol’y 1, 12 (2006) (noting history of bribery in early days of America)

¹²⁰ Hasen (Lobbying), *supra* note __, at 196.

¹²¹ See Mazza, *supra* note __; Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 Ga. L. Rev. 1167, 1186 (2003) (“America’s traditional paradigm of judicial integrity naturally includes the assumption that judges and courts are independent from public or private pressure or lobbying.”). *But see* Raymond A. Sobocinski, *Adumbrations on Judicial Campaign Speech*, 43 Idaho L. Rev. 193, 237 (2006); Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16 (1962) (“The root difficulty is that judicial review is a countermajoritarian force in our system.”).

¹²² See Donald L. Horowitz, *The Courts and Social Policy* 36-56 (1977).

¹²³ See Brian T. Fitzpatrick, *Errors, Omissions, and the Tennessee Plan*, 39 U. Mem. L. Rev. 85, 121 (2008) (“Judges (especially appellate judges) have a great deal of discretion to make public policy when they decide cases.”).

¹²⁴ See, e.g., American Bar Association Model Code of Judicial Conduct R. 2.4(C) (“A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.”); R. 2.9(A) (“A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter....”).

improper influence having been brought to bear.¹²⁵ Commentators have noted that much of the conduct would violate the Code of Conduct for United States Judges, which applies to all other federal judges, and to other laws like the Ethics in Government Act, which do apply to the members of the Court.¹²⁶

Four scandals came to light in 2023. First, in April 2023, it was reported that a politically active billionaire, Harlan Crow, had paid for Justice Thomas to accompany him on dozens of undisclosed luxury vacations, which included flights on Crow’s private airplane and similar extravagances.¹²⁷ Crow also purchased Thomas’s family properties, donated significant funds to a political organization founded by Thomas’s wife, and paid for the private school tuition of Thomas’s grandnephew.¹²⁸ Shortly thereafter, another publication revealed that a law firm executive purchased a piece of real estate, which had languished on the market for years, from Justice Gorsuch just a few days after his appointment to the bench.¹²⁹ Gorsuch heard more than twenty cases involving the law firm without disclosing this potential conflict of interest.¹³⁰ A month later, an article detailed free undisclosed luxury vacations provided to Justice Alito by other major political donors.¹³¹ Alito failed to recuse himself from numerous cases involving one of the donor’s hedge fund.¹³² Following on the heels of the Alito report, another publication discovered that Justice Sotomayor had used her staff to push sales of her book.¹³³ Additionally Sotomayor failed to recuse herself in cases involving her publisher.¹³⁴

3. Existing Taxonomy on Lobbying Judges

Kedric L. Payne, a senior official at the Campaign Legal Center, posited that “[j]udicial lobbying is not new; however, the activity has become more visible over recent decades.”¹³⁵ Payne then described three types of judicial lobbyists: pop-up lobbyists; junket lobbyists, and; amici. Each of these types of judicial lobbying matches one or more of the methods described in Logan and Patten’s seminal work on legislative lobbying.

Payne defines “pop-up” lobbyists as those who seek in influence the court “by strategically and casually interacting with judges and Justices.”¹³⁶ He describes two examples that closely mirror the sort of social influencing that Logan and Patten described. In the Logan and Patten account, a member of Congress was taken on fancy outings and given gifts by somebody who sought to influence certain legislation.¹³⁷ While that version involved an explicit ask, the cultivation methods are the same as used in the Payne examples of judicial pop-up lobbyists.

In Payne’s first example, Reverend Robert Schenck recruited “stealth missionaries” to befriend several U.S. Supreme Court justices.¹³⁸ The lobbyists purchased access to events attended by the

¹²⁵ Brie Sparkman Binder & Debra Perlin, *Americans and the Court: How Public Outcry Has Influenced the Court to Address Judicial Ethics Crises*, 52 Hofstra L. Rev. 631, 648 (2024).

¹²⁶ *Id.* at 647-48.

¹²⁷ *Id.* See also *Chapter Three Judicial Ethics*, 137 Harv. L. Rev. 1677, 1680–81 (2024).

¹²⁸ *Id.*

¹²⁹ *Id.* at 1682.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 1683.

¹³⁵ Kedric L. Payne, Campaign Legal Center, *Regulating Judicial Lobbyists to Reform Supreme Court Ethics*, 86 U. Pitt. L. Rev. 599, 602 (2024).

¹³⁶ *Id.* at 603.

¹³⁷ Logan & Patten, *supra* note ___, at 53.

¹³⁸ Payne, *supra* note ___, at 602.

justices.¹³⁹ They then made social overtures and fostered good will by taking the justices and their families out to meals at restaurants, outings at private clubs, and trips to their luxury properties.¹⁴⁰ For example, a couple hosted several justices at their vacation home in Jackson Hole, Wyoming.¹⁴¹ Once they were in social contact, the lobbyists were told “to use certain phrases to influence the Justices while steering clear of the specifics of cases pending before the court.”¹⁴² These efforts, arguably, culminated in Schenk’s organization learning the favorable outcome of an important case directly from a justice before it was publicly announced.¹⁴³

Payne’s second example links back to one of the scandals described above in Part III(2) wherein billionaire Paul Singer befriended Justice Alito and took him on a luxury fishing trip valued at \$100,000.¹⁴⁴ Several years after the trip, the Supreme Court favorably ruled on a long-pending case involving Singer, ultimately leading to a \$2 billion settlement.¹⁴⁵ Alito denied any influence, stating, “On no occasion have we discussed the activities of his businesses, and we have never talked about any case or issue before the Court.”¹⁴⁶ But this, of course, does not mean that Singer did not subtly influence Alito.¹⁴⁷

Payne next defines “junket lobbyists” as “academic institutions or similar organizations that offer training on a specific legal topic for judges and Justices.”¹⁴⁸ A common characteristic of such programs is that they take place in desirable vacation destinations, which promotes participation.¹⁴⁹ Payne identifies the Law and Economics Center as an exemplar and notes that it paid for federal judges’ transportation, meals, or lodging to destinations like the Italian coast and the beaches of Hawaii more than 150 times from 2021-22 with the express goal of educating the judiciary about free-market economics.¹⁵⁰ Its donors include many repeat-play litigants like the U.S. Chamber of Commerce.¹⁵¹ And noted jurist Jack Weinstein even acknowledged that “the knowledge and perspective Professor Manne helped impart [through Weinstein’s participation in programming offered by the Law and Economics Center] did affect my decisions and those of my colleagues in the judiciary” while disavowing any impropriety and downplaying the appeal of the resort setting.¹⁵² But the junkets, again, looks very similar to the traditional examples of social influence lobbying such as when a representative of a life insurance company entertained legislators.¹⁵³ Even more directly, it is a clear delivery mechanism—outside of the normal channels that are open to all—of information that the lobbyists think it will be helpful for the decisionmaker to have.¹⁵⁴ As ethicist Bruce Green observes, “The public may infer that many judges are being influenced in little ways over time.”¹⁵⁵ And this risk is especially

¹³⁹ *Id.* at 605.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 604.

¹⁴³ *Id.* at 605-06.

¹⁴⁴ *Id.* at 606-07.

¹⁴⁵ *Id.* at 608.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* See also Green, *supra* note __, at 942-43 (noting that ABC’s 20/20 aired a segment on “Junkets for Judges”).

¹⁴⁹ Payne, *supra* note __, at 608-09.

¹⁵⁰ *Id.* at 609-10.

¹⁵¹ *Id.* at 610-11.

¹⁵² Weinstein, *supra* note __, at 421.

¹⁵³ Logan & Patten, *supra* note __, at 54.

¹⁵⁴ *Id.* (noting importance of providing information to policymakers).

¹⁵⁵ Green, *supra* note __, at 1002.

high when a small group of providers “essentially take over the field of judicial education” on a particular topic that might favor their donors.¹⁵⁶

Payne is more equivocal about whether amici are true lobbyists because a lack of transparency is a touchstone for him and not all amici hide their hands.¹⁵⁷ But there is a long history of characterizing amicus briefs as judicial lobbying¹⁵⁸ that continues to this day.¹⁵⁹ Undoubtedly, amicus briefs are mechanism for non-parties to educate courts about issues in a case—a function that is generally accepted within the academy and legal profession.¹⁶⁰ And, again, this is just like the standard information-providing function described by Logan and Patten.¹⁶¹ Justice Bryer confirmed the value of such activities, “[Amicus] briefs play an important role in educating judges on potentially relevant technical matters, helping to make us not experts but educated lay persons and thereby helping to improve the quality of our decisions.”¹⁶²

Coordinated amicus briefs also may function similarly to traditional lobbying methods in which policymakers are apprised of the public support for a position. More than seventy-five years ago, two scholars decried, “More and more the Court was being treated as if it were a political-legislative body, amenable and responsive to mass pressures from any source.”¹⁶³ They highlighted a case in which a newspaper requested its readers to file personal amicus briefs in a high-profile case.¹⁶⁴ About fifty years ago, Philip B. Kurland echoed this sentiment, characterizing the main function of amicus briefs as “demonstrating to the Court that a group of its constituents demands a particular result.”¹⁶⁵ Again, more than a hundred years ago, Logan and Patten described similar methods of lobbying Congress.¹⁶⁶

Even more perniciously, a flood of amicus briefs orchestrated by a party might create the appearance of broad support when there is none.¹⁶⁷ Payne describes several high-profile Supreme Court cases in which interest groups secretly financed organizations that filed supportive amicus briefs.¹⁶⁸ These efforts are similar to the propaganda efforts used to saturate the public airways and legislative offices in the early nineteen hundreds.¹⁶⁹

¹⁵⁶ *Id.* at 1002-03.

¹⁵⁷ Payne, *supra* note ___, at 615-16.

¹⁵⁸ *Id.* (citing Fowler V. Harper & Edwin D. Etherington, *Lobbyists Before the Court*, 101 U. Pa. L. Rev. 1172 (1953)). *Id.* at 1172 (“The lobbying device available for use before the Court is the brief amicus.”).

¹⁵⁹ See, e.g., Eugene Temchenko, *Discovering the Truth Behind an Amicus Brief*, 94 N.D. L. Rev. 95, 98 (2019) (“Today, however, amici curiae appear as advocates in favor of one party or another, with influential parties “lobbying” the court.”).

¹⁶⁰ Brandon D. Harper, *The Effectiveness of State-Filed Amicus Briefs at the United States Supreme Court*, 16 U. Pa. J. Const. L. 1503, 1504–05 (2014)

¹⁶¹ Logan & Patten, *supra* note ___, at 54.

¹⁶² Joseph D. Kearney ; and Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 831 n.6 (2000) (citing *Justice Breyer Calls for Experts to Aid Courts in Complex Cases*, N.Y. Times, Feb. 17, 1998, at A17).

¹⁶³ Harper & Etherington, *supra* note ___, at 1173.

¹⁶⁴ *Id.* at 1172-73.

¹⁶⁵ Philip B. Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change*, 59 Cornell Law Review 616, 632 (1974).

¹⁶⁶ Logan & Patten, *supra* note ___, at 25 (“One of the outstanding methods of indirect lobbying used by the Joint Committee was to get the constituents to communicate with their Congressmen and Senators when bills in which the utilities were interested appeared in Congress.”).

¹⁶⁷ See Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency*, 131 Yale L.J. Forum 141, 146–47 (2021).

¹⁶⁸ Payne, *supra* note ___, at 615-17.

¹⁶⁹ Logan & Patten, *supra* note ___, at 28.

B. Litigation as Lobbying

There is very little literature that considers if and how litigation is like lobbying.¹⁷⁰ Perhaps, it is simply too obvious. After all, by definition, litigators attempt to influence the outcome of cases by communicating with the assigned judges—conduct that precisely matches with our earlier definition of lobbying.¹⁷¹ But it is nonetheless worth building out a more detailed analysis that addresses the question of how to educate judges about innovations in practice. And from this exploration, four important points emerge. First, litigators can play an important role as educators on issues. Second, consistent litigation campaigns can lead to seismic shifts over time. Third, transparency is a critical accountability check given the partisan nature of litigating. Fourth, trial courts currently have tools to enhance transparency in litigation practice.

1. *Litigators as Educators*

The American civil litigation system is an adversarial one in which judges rely on litigators to marshal the facts and legal arguments.¹⁷² And, thus, both judges and lawyers frequently laud the latter's role as educators of the former. As one appellate judge put it:

In the final analysis, it matters much less what judges knew before they pick up the briefs in the case. We really are students of the lawyers. We work very hard to learn the case by reading the briefs, and reading the opinion of the tribunal below, often a district court judge, and studying the evidentiary record. It's easy for people to think that judges make decisions based on what they knew before they picked up the case. I'd say about 90% of the decision making in each case comes from the work on that particular case. The lawyers are very good at explaining things, particularly the best lawyers. People may ask, you don't have any training in microbiology, so how can you rule on a case involving that sort of technology? The answer really is: because the lawyers teach it to me the way they had to teach it to the district judge and in many cases a jury of laypeople untrained in science or law. If you're a diligent student, you can learn what you need to learn. I don't normally feel intimidated by the technological side of the patent cases or the economic side of the international trade cases or the technical side of the contract cases involving, say, construction of a military aircraft under a contract. We're like perpetual graduate students. We're always studying things written by people who know more than we know and getting grounded in the specific facts and information in order to be able to make decisions that hopefully are sound and well informed. That's really how the process works. The lawyers teach the judges and then, when the decision and the opinion stages are front and center, in a sense, the judges are teaching the lawyers. It cycles around like that. It's an interesting process and it's a great way to learn.¹⁷³

¹⁷⁰ Most of the discussions are focused on the role of amicus briefs, as discussed above. See Part III(A)(3), *infra*.

¹⁷¹ See Mayer, *supra* note ___, 486.

¹⁷² Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 Ga. L. Rev. 1167, 1191–92 (2003); Kevin Thomas Frazier, *An “F” In Judicial Education: Why Emerging Technologies and New Risks Demand Judicial Education Reform*, 50 Ohio N.U. L. Rev. 27 (2023) (“Our adversarial judicial system hinges on parties making the strongest arguments possible and judges understanding the strengths and weaknesses of those arguments.”).

¹⁷³ Pamela Banner Krupka, *An Interview with Chief Circuit Judge Paul R. Michel*, 2 *Landslide* 18, 20 (2009). See also William G. Long, *Headaches of a Judge—A Challenge to the Bar*, 27 Wash. L. Rev. & St. B.J. 128, 133 (1952) (“The daily task of lawyers is to educate judges who know no law and juries who know nothing about the facts.”).

Even the U.S. Supreme Court Justices are not immune. In a case involving the Communication Decency Act, Justice Sotomayor commented, “We really don't know about these things. You know, these are not like the nine greatest experts on the Internet.”¹⁷⁴

A lawyer echoed these sentiments, stating:

“Judicial education” is not just what goes on at the National Judicial College or a circuit conference. Lawyers educate judges in the course of every case. Lawyers are the essential complement to the other kind of judicial education, especially because different judges have very different notions of what they can take judicial notice of, and they want lawyers to bring this information into the courts.¹⁷⁵

Several examples make this point more concretely. An expert in employment discrimination noted that she helps “plaintiffs’ lawyers educate judges and opposing counsel on common patterns of bias against mothers.”¹⁷⁶ A nonprofit focused on juvenile justice created a factsheet to help lawyers educate judges on their responsibilities regarding ensuring the right to counsel for minors.¹⁷⁷ A non-exhaustive list of other topics that appear in the scholarship on lawyers’ role in educating judges includes best practices for setting bail, the relationship between substance use disorder and criminal culpability, and the admissibility of post-traumatic stress disorder.¹⁷⁸

Consistent with these views of litigators’ role as educators, the notion that a significant function of lobbyists is to educate legislators to solve for capacity constraints has become a standard account over the past twenty years.¹⁷⁹ While lobbyists’ defining advantage is their access to legislators, they influence policy by providing policymakers “with credible information with which that legislator or staffer can argue for a particular legislative action.”¹⁸⁰ Professors Richard L Hall and Alan V. Deardorff coined the term as a “legislative subsidy” to capture this function.¹⁸¹ They further explain that the legislative subsidy is “a matching grant of policy information, political intelligence, and legislative labor provided to strategically selected legislators,” not corrupt vote-buying.¹⁸² This information is valuable because legislators may lack “policymaking capacity,” which encompasses “all

¹⁷⁴ Frazier, *supra* note ___, at 27 (quoting Transcript of Oral Argument at 45, Reynaldo Gonzales, et al. v. Google, 598 U.S. 617 (2023) (No. 21-1333)).

¹⁷⁵ Lynn Hecht Schafran, *Is the Law Male?: Let Me Count the Ways*, 69 Chi.-Kent L. Rev. 397, 408 (1993).

¹⁷⁶ Joan C. Williams, Rachel M. Korn, & Sky Mihaylo, *Beyond Implicit Bias: Litigating Race and Gender Employment Discrimination Using Data from the Workplace Experiences Survey*, 72 Hastings L.J. 337, 448 (2020).

¹⁷⁷ Mary Sue Backus, *The Adversary System Is Dead; Long Live the Adversary System: The Trial Judge As the Great Equalizer in Criminal Trials*, 2008 Mich. St. L. Rev. 945, 993 n.183 (2008),

¹⁷⁸ Robin Steinberg & Skylar Albertson, *Broken Windows Policing and Community Courts: An Unholy Alliance*, 37 Cardozo L. Rev. 995, 1014–15 (2016) (need for lawyers to educate judges on best practices involving bail); Leslie E. Scott, *Substance Use Disorder's (SUD) Impact on Criminal Decision-Making and Role in Federal Sentencing Jurisprudence: Arguing for Culpability-Based Sud Mitigation*, 19 Ohio St. J. Crim. L. 471, 510 (2022) (need for defense attorneys to educate judges about the relationship between SUD and culpability); Edgar Garcia-Rill & Erica Beecher-Monas, *Gatekeeping Stress: The Science and Admissibility of Post-Traumatic Stress Disorder*, 24 U. Ark. Little Rock L. Rev. 9, 31 (2001) (need to educate judges about PTSD); Faith Khalik & Alisa Lincoln, *Salus Populi: Educating Judges on the Social Determinants of Health*, 71 J. Legal Educ. 260, 262 (2022) (discussing the importance of educating judges on the social determinants of health, which is implicated by a wide range of legal issues); Christopher J. Copp & Markus Kemmelmeier, *Next Stop: Your Courtroom*, 105 Judicature 58, 64 (2021) (noting that judges need more education on autonomous vehicles before the issues arise in litigation).

¹⁷⁹ See Richard L. Hasen, *Fixing Washington*, 126 Harv. L. Rev. 550, 563 (2012) (citing Richard L. Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 Am. Pol. Sci. Rev. 69 (2006)); Dorie Apollonio, Bruce E. Cain & Lee Drutman, *Access and Lobbying: Looking Beyond the Corruption Paradigm*, 36 Hastings Const. L.Q. 13, 48 (2008).

¹⁸⁰ Hasen (Fixing), *supra* note ___, at 563.

¹⁸¹ Hall & Deardorff, *supra* note ___, at 69.

¹⁸² *Id.*

the institutional resources a government institution needs to make law—including agenda setting, expertise, institution building, and policy coordination.”¹⁸³ The information may include new data, case studies, or analysis around messaging that helps break down complex issues for the policymakers.¹⁸⁴ So, to the extent there is an exchange between lobbyists and policymakers, it is not necessarily a promise of votes for support of disfavored policies but, instead, it is informational support to enhance the efficacy of the policymakers’ efforts to advance their existing interests.¹⁸⁵ And, again, this is exactly what litigators see themselves as doing. In fact, Benjamin Barton suggested that judges’ reliance on quality lawyering to present information about the applicable facts and law is part of why they frequently support restrictions on admission to practice.¹⁸⁶ And there is no reason to think that ends with the substantive law.¹⁸⁷

2. *Ability of Concerted Litigation Practice to Change Law*

Litigators’ informal judicial education efforts can bear important fruit. Impact litigation is one example of concerted legal action designed to fundamentally change the law. And it often has been characterized as a form of lobbying in that it involves a sustained communication effort with judges about the law and the social importance of the issue to create a desired policy.¹⁸⁸ While each individual case involves these persuasion efforts, they also can be part of a larger campaign that uses incremental developments to ultimately get to more significant change. But even informal widespread litigation practices can lead to rule changes—usually, procedural ones designed to police conduct viewed as undesirable by judges. Three examples—all of which resulted in changes to the Federal Rules of Civil Procedure in 2015—are described below.

First, one of the less heralded changes was to Rule 34, requiring parties to state their objections “with specificity.”¹⁸⁹ A common litigation practice was for parties to begin their discovery productions with “a long list of generalized objections and ended with the statement that some documents would be produced ‘subject to’ those objections.”¹⁹⁰ And the problem was that the requesting party could not be sure what, if anything, was being withheld and why.¹⁹¹ While judges might have known about this problematic behavior, they often assumed Rule 34 already prevented it.¹⁹² But a plaintiff-side complex litigation lawyer brought it to rulemakers’ attention during the 2010 Duke Conference on Civil Litigation,¹⁹³ which further illustrates the importance of lawyers educating judges about litigation practices.¹⁹⁴

¹⁸³ See Adam S. Zimmerman, *Ghostwriting Federalism*, 133 Yale L.J. 1802, 1811 (2024); Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 122 Colum. L. Rev. 2187, 2199 (2022).

¹⁸⁴ Kati A. Tusinski, *A Description of Lobbying as Advocacy Public Relations*, at https://epublications.marquette.edu/cgi/viewcontent.cgi?article=1012&context=comm_fac

¹⁸⁵ Hall & Deardorff, *supra* note __, at 72.

¹⁸⁶ Barton, *supra* note __, at 1191–92.

¹⁸⁷ See Part III(B)(2) and Part IV, *infra*.

¹⁸⁸ See Scott L. Cummings, *Litigation at Work: Defending Day Labor in Los Angeles*, 58 UCLA L. Rev. 1617, 1687 (2011) (noting the use of impact litigation as part of a broad strategy to advance policy goals); Jill Maxwell, *Leveraging the Courts to Protect Women’s Fundamental Rights at the Intersection of the Family-Wage Work Structures and Women’s Role as Wage Earner and Primary Caregiver*, 20 Duke J. Gender L. & Pol’y 127, 130 (2012) (“While impact litigation has its limitations, this strategy can help to educate the judiciary and invigorate grassroots organizing.”).

¹⁸⁹ Fed. R. Civ. P. 34 advisory committee’s note to 2015 amendment.

¹⁹⁰ See Steven S. Gensler & Lee H. Rosenthal, *Breaking the Boilerplate Habit in Civil Discovery*, 51 Akron L. Rev. 683, 688 (2017) (citing Daniel C. Girard & Todd I. Espinosa, *Limiting Evasive Discovery: A Proposal for Three Cost-Saving Amendments to the Federal Rules*, 87 Den. U. L. Rev. 473 (2010)).

¹⁹¹ *Id.*

¹⁹² *Id.* at 687.

¹⁹³ *Id.* at 688.

¹⁹⁴ See also *id.* at 693, n.32 (listing articles by lawyers describing the problem).

A second change was to Rule 37, creating a new, uniform sanctions regime for spoliation of electronically stored information (ESI). The amendment was driven by the explosion of ESI, parties' inconsistent approach to preserving it, and the weaponization of sanctions for spoliation. Highlighting the need for lawyers to educate judges about developments in law and practice, several courts failed to identify the amended Rule 37(e) in highly relevant circumstances.¹⁹⁵

The third amendment was to Rule 26, directly integrating a proportionality requirement into the definition of discovery's scope.¹⁹⁶ Here, again, the change was driven by the rulemakers' understanding of prevalent, problematic litigation conduct—here, overly broad discovery requests.¹⁹⁷ Also, just as with Rule 37(e), judges continued to apply the old law until lawyers corrected them about the current state of the law and practice.¹⁹⁸

3. *Need for Transparency & Adversarial Check*

Lawyers' educational efforts are not an unalloyed good. Just as there are longstanding concerns about lobbyists influencing policymakers for their own advantage, lawyers are partisan who are dutybound to work on behalf of their clients, not for some abstract public good.¹⁹⁹ Accordingly, to avoid the possibility of capture, their education efforts should be transparent and subject to an adversarial check. To the former, judges need to know who is seeking to influence them so they can evaluate the information put before them.²⁰⁰ And the information must be public to keep judges further accountable and to prevent Galanter's repeat players from being able to game the system without meaningful, effective opposition.²⁰¹ In such a world, litigation secrecy exacerbates these power imbalances and inhibits beneficial, thoughtful percolation across the judiciary that would promote greater accuracy and legitimacy.²⁰²

4. *Court Tools*

Courts have the necessary tools to foster greater litigation transparency to ensure an adversarial check when it comes to practice innovations. First, in the absence of a specific procedural rule, courts may use their inherent powers to manage the litigation before them. And this is especially salient when, as noted in Part II(A)(3) above and Part IV below, a litigation practice raises significant professional-conduct concerns. Second, as described in Part IV, some practices create practical case management issues that are either encompassed by courts' inherent powers or Rule 26(b) if there is some relation

¹⁹⁵ See Tanya Pierce, *Righting the Ship: What Courts Are Still Getting Wrong About Electronic Discovery*, 72 SMU L. Rev. 785, 810–11 (2019) (citing *Kische USA LLC v. Simsek*, No. C16-0168JLR, 2018 WL 620493, at *1 (W.D. Wash. Jan. 29, 2018); *Galicía v. Nat'l R.R. Passenger Corp.*, No. CV 17-8020-JFW (JCx), 2018 WL 6314191, at *1 (C.D. Cal. July 20, 2018)).

¹⁹⁶ Fed. R. Civ. P. 26 advisory committee's note to 2015 amendment. See also *Endo (Opacity)*, *supra* note ___, at 845.

¹⁹⁷ The empirical picture is complicated but the *view* of overly broad discovery was widespread. See Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. Cin. L. Rev. 1083 (2015).

¹⁹⁸ See Diego A. Zambrano, *Judicial Mistakes in Discovery*, 113 Nw. U. L. Rev. 197, 218 (2018) (concluding that “a compliant brief is [] associated with a marked increase in compliance (and decrease in noncompliance”).

¹⁹⁹ Frazier, *supra* note ___, at 27 (“Yet, parties are not compelled to offer the *most accurate and complete* information--their task is to present the *most compelling* evidence.”); Zambrano, *supra* note ___, at 919 (sharing Judge Henry Friendly's quotation, “Under our adversary system the role of counsel is not to make sure that truth is ascertained but to advance his client's cause by any ethical means.”).

²⁰⁰ See Payne, *supra* note ___.

²⁰¹ See Beerdsen, *supra* note ___; Whitehouse, *supra* note ___; Green, *supra* note ___.

²⁰² Elizabeth Y. McCuskey, *Submerged Precedent*, 16 Nev. L.J. 515, 573–74 (2016); T. Brett Dawson, *Judicial Education: Pedagogy for A Change*, 2015 J. Disp. Resol. 175, 178–79 (2015); Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 Mich. L. Rev. 734, 742 (1987).

to the underlying merits. Third, Rule 26(b) may be sufficiently expansive to include consideration of litigation secrecy's negative impact on the enforcement of substantive laws. Prior scholarship has explored whether the scope of discovery should encompass the social benefits of sharing information.²⁰³ The positive externalities of sharing information should be clear—i.e., providing information about problematic primary conduct and reducing costs in litigation.²⁰⁴ And this question is not entirely theoretical. Several years ago, the Sixth Circuit issued a decision that addressed the question of the appropriate denominator of discovery cost in the *National Prescription Opiates Litigation*.²⁰⁵ On one hand the Sixth Circuit said, “Nor can a party’s rights in one case be impinged to create efficiencies in the MDL generally.”²⁰⁶ But the Sixth Circuit, in dicta also acknowledged that “[T]he question whether discovery is “proportional to the needs of the case” under Rule 26(b)(1) must—per the terms of the Rule—be based on the court’s determination of the needs of the particular case in which the discovery is ordered. That limitation does not prevent the MDL court from creating efficiencies in the MDL generally; to the contrary, presumably the very reason the cases were transferred to the MDL court in the first place is that the needs of some cases are the same as those of many others.”²⁰⁷ Back before the district court, some of the defendants tried to revisit some discovery disputes based on an expansive reading of the Sixth Circuit’s holding. But the district court rejected these.²⁰⁸

IV. CLAIM AGGREGATORS AS CASE STUDY

While some past examples have been discussed above, the use of claim aggregators in complex civil litigation is an on-point, contemporary example of a practice innovation that judges need to know about. This Part briefly describes claim aggregators’ services before identifying several case management concerns and potential professional-conduct issues, which demonstrate the importance of litigation transparency so that judges learn of important litigation practices.

Claim aggregators (sometimes referred to as third-party filers or claims filing services) are companies that provide members of class actions with assistance in filing settlement claims, compiling supporting documentation and information, and submitting these claims to the claims administrator.²⁰⁹ They help identify and assemble claimants, offering expertise in navigating these processes as well as economies of scale in exchange for a portion of any recovery.²¹⁰ The services are valued because otherwise class members might fail in navigating the claims process or forgo it all together, especially when the value of the claims is low.²¹¹

²⁰³ See Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. Davis L. Rev. 1249, 1263 (2020) (citing Dustin B. Benham, *Proportionality, Pretrial Confidentiality, and Discovery Sharing*, 71 Wash. & Lee L. Rev. 2181, 2199-200 (2014); Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. Ill. L. Rev. 457, 481, 46 (1991)).

²⁰⁴ See Elizabeth Chamblee Burch, Alexandra D. Lahav, *Information for the Common Good in Mass Torts*, 70 DePaul L. Rev. 345, 350–51 (2021) (“Information revealed in lawsuits adjudicated in taxpayer-funded courts often benefits society as a whole...”); Gustavo Ribeiro, *(Marked Confidential): Negative Externalities of Discovery Secrecy*, 100 Denv. L. Rev. 171, 184 (2022) (noting how “[p]arties litigating similar claims could avoid duplicative discovery costs by accessing discovery materials produced in previous litigation”).

²⁰⁵ *In re Nat’l Prescription Opiate Litig.*, 956 F.3d 838, 845-46 (6th Cir. 2020).

²⁰⁶ *Id.* at 845.

²⁰⁷ *Id.* at 846.

²⁰⁸ *In re Nat’l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2020 WL 3166631, at *1–2 (N.D. Ohio June 15, 2020).

²⁰⁹ Gary I. Smith, Jr. & Jose Roman Lavergne, *Ethical Considerations Concerning Third Party Filer Services in Class Action Settlements 1* (citing Compl. ¶ X, SEC v. Cammarata, et al., No. 21-cv-4845, ECF No. 1 (E.D. Pa. Nov. 11, 2021)).

²¹⁰ See Samir D. Parikh, *Opaque Capital and Mass-Tort Financing*, 133 Yale L.J. Forum 32, 37 (2023); Charles R. Korsmo & Minor Myers, *Aggregation by Acquisition: Replacing Class Actions with A Market for Legal Claims*, 101 Iowa L. Rev. 1323, 1368 (2016); Jessica Erickson, *Automating Securities Class Action Settlements*, 72 Vand. L. Rev. 1817, 1829 (2019).

²¹¹ See Erickson, *supra* note __, at 1829-31.

Claim aggregators are not uncontroversial and their litigation-related conduct raises case management concerns that exemplify why litigation transparency is critical. The key issue is that the use of claim aggregators might increase the number of non-meritorious or non-complying claims through several different practices.

First, claim aggregators may file placeholder claims, which only identify the class member.²¹² The claim aggregator then cures the claims after the claims administrator provides notice of the deficient submission.²¹³ But this practice then may create significant administrative burdens, involving additional audits and redoing distribution calculations.²¹⁴

Second, there are concerns that claim aggregators might submit false claims.²¹⁵ For example, as the district court overseeing the JUUL Labs MDL observed, the *en masse* submission of claims may make it hard for the court “to communicate directly with claimants and conduct required follow up to identify fraudulent claims or verify the accuracy of claims and to resolve claim disputes.”²¹⁶ The idea is that the business is a volume one that does not incentivize the proper vetting of claims.²¹⁷ Illustrating the salience of this risk, in a different matter, a claim aggregator was charged with a \$40 million fraud.²¹⁸

Third, claim aggregators may submit unauthorized claims.²¹⁹ Commentators have observed that such practices may even run the risk of the claim aggregator “pocket[ing] the proceeds themselves.”²²⁰

Fourth, claim aggregators may solicit potential class members with false or misleading advertisements.²²¹ For example, the district court overseeing the *In re Visa Check/MasterMoney Antitrust Litigation MDL* flagged this concern.²²²

Professional-conduct rules are another concern for courts, which require them to know about the use of claim aggregators. Formally, the rules of professional conduct do not bind claim aggregators unless they are lawyers.²²³ But courts oversee litigators and the lawyers are responsible for any non-lawyer agents under their supervision.²²⁴ And there are a bevy of professional-conduct rules that are implicated by the use of claim aggregators.²²⁵ For example, the potential for false claims squarely

²¹² Smith & Lavergne, *supra* note __, at 13 (citing *In re Deepwater Horizon*, 641 Fed. Appx. 405 (5th Cir. 2016)).

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 13-14. *See also* Daniel J. Bussel, *The Mass Tort Claimants’ Bargain*, 97 Am. Bankr. L.J. 684, 719 (2023) (“Finally, meaningful sanctions, perhaps in the form of attorney fee-shifting, could be imposed on investors and claims aggregators who assert large numbers of meritless small claims.”). *But see* Nora Freeman Engstrom & Todd Venook, *Harnessing Common Benefit Fees to Promote MDL Integrity*, 101 Tex. L. Rev. 1623, 1649 (2023) (noting that reforms that shifted costs to claim aggregators might lead to better vetting).

²¹⁶ *In re JUUL Labs, Inc., Marketing, Sales Practices, and Prod. Liability Litig.*, Case No. 19-md-02913, 2023 WL 6205473 (N.D. Ca. Sept. 19, 2023).

²¹⁷ D. Theodore Rave, *Multidistrict Litigation and the Field of Dreams*, 101 Tex. L. Rev. 1595, 1596 (2023); *see also* Andrew D. Bradt, Zachary D. Clopton, D. Theodore Rave, *Dissonance and Distress in Bankruptcy and Mass Torts*, 91 Fordham L. Rev. 309, 321–22 (2022).

²¹⁸ *See Two New Jersey, One New York Securities Claims Aggregators Arrested and Charged With \$40m Fraud*, 2021 WL 5105987. *See also* Smith & Lavergne, *supra* note __, at 13 (citing *In re LIBOR-Based Financial Instruments Antitrust Litigation*, 327 F.R.D. 483, 501 (S.D.N.Y. 2018) and others).

²¹⁹ *See* Smith & Lavergne, *supra* note __, at 14 (citing several cases).

²²⁰ *Id.*

²²¹ *See* Smith & Lavergne, *supra* note __, at 14-15 (citing several cases).

²²² *In re Visa Check/MasterMoney Antitrust Litig.*, 2006 WL 1025588 (E.D.N.Y. Marc. 31, 2006).

²²³ *See* Smith & Lavergne, *supra* note __, at 8.

²²⁴ *See* American Bar Association Model R. of Prof’l Conduct R. 5.3.

²²⁵ *See* Smith & Lavergne, *supra* note __, at 8-9.

present the question of candor to the tribunal.²²⁶ And the solicitation practices might violate other rules.²²⁷ These legal ethics concerns link back to judges' duty to police lawyers' conduct and the risks that may attend practice innovations.²²⁸

CONCLUSION

To conclude, this Essay identifies a heretofore overlooked system benefit of information sharing in litigation: educating judges about practice innovations. The rise of managerial judging, the role of litigation culture on the development and application of formal procedural rules, and significant changes in practice all make this issue especially salient. And, because formal continuing judicial training cannot fully meet the varied real-time needs of judges, lawyers act as educators. But the partisan nature of litigation counsels towards transparency to ensure both judicial accountability and an adversarial check.

²²⁶ See ABA Model R. of Prof'l Conduct R. 3.3.

²²⁷ See ABA Model R. of Prof'l Conduct R. 7.1 & 7.3.

²²⁸ See Part II(A)(3), *infra*.