

# GOSSIPING ABOUT JUDGES

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## ABSTRACT

*Gossip about judges is an essential source of information to civil litigators. Hearing third-party assessments of a judge's personality, demeanor, intelligence, curiosity, and openness to new interpretations of the law can substantially affect a lawyer's strategic decisions during the course of litigation, and sometimes whether litigation occurs at all. Yet gossip about judges rarely merits mention and has evaded serious study.*

*This Article brings attorney gossip about judges out into the open, identifying its strategic benefits and drawbacks and explaining how attorneys use gossip (and other secondhand information on judges) to anticipate the likely outcome of judicial decisions. It further explains how common attorney practices in modern civil litigation unintentionally compromise the accuracy and reliability of gossip about judges and offers some thoughts on restoring the full value of this little-discussed resource.*

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## I. INTRODUCTION

Lawyers deal in information. It is the primary tool of the trade, the essence of the profession.<sup>1</sup> The skill and competence of a lawyer is measured in significant part by his or her ability to locate, digest, and present information that governs and reflects human interactions. And yet one of the most substantial and important sources of information available to litigation attorneys—one on which they rely routinely, extensively, and often automatically—rarely merits mention. That source of information is gossip.

Gossip—which I use here to denote all forms of evaluative secondhand information about a person shared outside that person's presence—is ubiquitous in civil litigation. Far from its reputation as idle or sinister talk, it plays an essential role in the development of litigation strategy. In particular, information gleaned from gossip enables attorneys to form impressions about the key players in a case.<sup>2</sup> In turn, these impressions—of opposing counsel, potential witnesses, judges, jurors, and even the attorney's own clients—help the attorney predict, explain, and influence outcomes during the course of litigation. As a result, gossip serves as a crucial supplement to, and frequently a substitute for, information obtained from published sources and through direct interaction with key players.

While the search for and use of gossip is applicable to all individuals involved in a case, my focus here is on gossip about trial judges—and more specifically, federal district judges. How attorneys form impressions of these judges has enormous practical importance. District judges are imbued with substantial procedural discretion throughout the civil pretrial and trial process, especially in areas such as discovery, scheduling, the admission of evidence, and the imposition of sanctions. They have considerable interpretative flexibility in emerging or unsettled areas of substantive law. Even in areas where judicial discretion is arguably more restrained by well-settled law and procedural rules, there is an inevitable human element to judicial decision-making.<sup>3</sup> And because judges are not interchangeable, lawyers need to get to know them through all available means. Information on a judge's personality, demeanor, intelligence, curiosity,

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1. One commentator has suggested that as a group, only historians seek, collect, and analyze information more than lawyers. Japhet Otiike, *The Information Needs and Seeking Habits of Lawyers in England: A Pilot Study*, 31 INT'L INFO. & LIBR. REV. 19, 20 (1999).

2. See, e.g., Shannon Awsumb, *Social Networking Sites: The Next E-Discovery Frontier*, 66 BENCH & B. MINN. 22 (2009); Thaddeus Hoffmeister, *Investigating Jurors in the Digital Age: One Click at a Time*, 60 U. KAN. L. REV. 611 (2012); Eric P. Robinson, *Virtual Voir Dire: The Law and Ethics of Investigating Jurors Online*, 36 AM. J. TRIAL ADVOC. 597 (2013).

3. Chad M. Oldfather, *Judges as Humans: Interdisciplinary Research and the Problems of Institutional Design*, 36 HOFSTRA L. REV. 125, 125 (2007).

openness to new interpretations of the law, and perceptions of the strength of the case can substantially affect a lawyer's strategic decisions during the course of litigation and sometimes even affect whether litigation occurs at all.

Despite these useful qualities, and although the role of gossip in other professional settings has been extensively analyzed, gossip about judges has evaded serious academic inquiry.<sup>4</sup> Part of the problem is its naturally low profile: gossip is effectively information in the shadows. Few practitioners have written about it; fewer still have admitted to engaging in it.<sup>5</sup> It is often transmitted quietly and privately,<sup>6</sup> making it difficult to observe and study empirically.<sup>7</sup> Scholars, too, have largely ignored the importance of gossip—and its cousin, judicial reputation—in attorney decision-making. The extant scholarship on judicial reputation is concerned almost exclusively with the *judge's* perspective: how reputational concerns motivate judges to decide cases,<sup>8</sup> for example, or how judges attempt to manipulate their reputations to secure promotion, influence, or their own public legacies.<sup>9</sup> That is fine as it goes, but litigation attorneys—not judges—are the primary creators, users, and manipulators of a trial judge's reputation. Understanding their perspective, then, would

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4. This is the case, until relatively recently, even for the study of gossip in social and other non-professional settings. See Eric K. Foster, *Research on Gossip: Taxonomy, Methods, and Future Directions*, 8 REV. GEN. PSYCHOL. 78, 80 (2004) ("Psychology researchers have largely overlooked gossip.").

5. But see Amy B. Auth, Book Review, FED. LAW., June 2009, at 79, 79 (reviewing JAMES P. GRAY, *WEARING THE ROBE: THE ART AND RESPONSIBILITIES OF JUDGING IN TODAY'S COURTS* (2007)).

6. See JACK LEVIN & ARNOLD ARLUKE, *GOSSIP: THE INSIDE SCOOP* 8 (1987) ("The information transmitted [by gossip] is typically not yet widely known . . . [W]e are, at least for a moment, among the privileged few who have it.")

7. Notwithstanding the practical difficulty, one set of researchers has attempted to study gossip experimentally through the use of "fictional gossip episodes." David Sloan Wilson et al., *Gossip and Other Aspects of Language as Group-Level Adaptations*, in *THE EVOLUTION OF COGNITION* 347, 348 (Cecilia Heyes & Ludwig Huber eds., 2000).

8. See, e.g., Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 629 (2000) (suggesting that "for Supreme Court Justices, substantive outcome was a more accurate predictor of judicial reputation than either quotability or a large number of process-based and substance-independent indicia of judicial craft").

9. See, e.g., RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* (1990); Nuno Garoupa & Tom Ginsburg, *Judicial Audiences and Reputation: Perspectives from Comparative Law*, 47 COLUM. J. TRANSNAT'L L. 451, 452-53 (2009) [hereinafter Garoupa & Ginsburg, *Judicial Audiences*]; Nuno Garoupa & Tom Ginsburg, *Reputation, Information and the Organization of the Judiciary*, 4 J. COMP. L. 226, 229-30 (2009) [hereinafter Garoupa & Ginsburg, *Reputation*]; Thomas J. Miceli & Metin M. Cosgel, *Reputation and Judicial Decision-Making*, 23 J. ECON. BEHAV. & ORG. 31 (1994).

seem to be of enormous practical and theoretical value for all users of the civil justice system.<sup>10</sup>

There is also some urgency to studying gossip about judges, because gossip is poised to take on a much more important role in attorney decision-making in the federal courts in the coming years. Opportunities for direct interaction between attorneys and judges are rapidly diminishing. Total courtroom time in the federal district courts fell by nearly ten percent between 2007 and 2012, providing fewer opportunities for attorneys to enjoy direct encounters (and especially repeated encounters) with judges in a courtroom setting. Moreover, lawyers are more frequently choosing litigation strategies that deny them repeated professional exposure to their local federal judges. Pressure to reduce the time and cost of litigation has encouraged counsel to seek resolution of cases at the earliest possible stage, decreasing their opportunities to interact with judges during late-stage events leading up to trial. Growing efforts to avoid certain judges through forum shopping or extrajudicial resolution hampers the ability to develop robust professional relationships with the judiciary. And the rise of multijurisdictional practice has made it at least somewhat less likely that lead counsel in a case will regularly work and interact in the same legal community as the judge before whom they appear. Collectively, these trends suggest a twenty-first century litigation landscape in which meaningful opportunities for repeated, direct interaction between bench and bar will be increasingly difficult to come by.

A drop in direct interaction is a boon for gossip. Attorneys' needs for information on judges will not disappear even as face-to-face meetings with them do, and secondhand information will be required to fill the gap. Gossip will become more important to an attorney's strategic calculus, and litigators will increasingly rely on information gleaned from colleagues, local counsel, public evaluations, and even the internet to supplement or substitute for their personal knowledge and experience with the judge.

The fact that gossip may be increasingly *relied upon*, however, is unlikely to make it more *reliable*—at least in the sense of more likely to accurately and adequately reflect the judge's true behaviors and inclinations. Quite the opposite. Like the children's game of "telephone," in which a communication invariably becomes more corrupted as it is transmitted farther from its original source, gossip and other secondhand information decline in reliability as they grow in

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10. For a forceful commentary on this point, see Ronald K.L. Collins, *Litigation Scholarship* 3-4 (Univ. of Wash. School of Law, Research Paper No. 2013-22), available at <http://ssrn.com/abstract=2276234>.

circulation. Gossip's utility, in other words, requires people to experience healthy levels of direct interaction to serve as a check on the veracity of secondhand information. If opportunities for personal interactions between judges and attorneys continue to decline, the gossip that rushes in to fill the void will be of increasingly questionable value.

Not all gossip will be unreliable, of course. Even in an age of declining direct interaction, some lawyers will continue to interact repeatedly with judges and have a strong sense of a particular judge's sensibilities and predilections. But just as accessible gossip is likely to become less reliable, such sources of reliable gossip are likely to become less accessible. That is, gossip that acts as an accurate predictor of the judge's behavior and decisions will become a scarcer commodity, and will be valued as such by those who possess it. Attorneys who cannot access important gossip—because they are new to the profession, do not practice regularly in that courthouse or jurisdiction, or simply are not connected to the right people—will have less access to the judge's decision-making process or the judge himself, with predictably troubling access issues for their clients as well.

In light of gossip's potential power in litigation, its unexamined status is no longer justifiable. This Article accordingly brings attorney gossip about judges out of the shadows, so that its power and its pitfalls can be better understood. Part II describes the informational strengths of gossip, in particular its ability to help attorneys predict and influence litigation outcomes and enforce a stable local litigation culture. Part III turns to gossip's weaknesses, drawing upon the cognitive and psychological literature to show how the transmission of secondhand information is susceptible to distortion and how attorneys attempt to compensate for those distortions. Part IV then specifically considers the future of gossip in one forum for which data are readily available: the federal district courts. That Part identifies a precipitous drop in direct courtroom time between judges and lawyers and explains how the changing face of attorney-judge interaction threatens to make accessible gossip less reliable, and reliable gossip less accessible, in the coming years. Finally, Part V examines some possible approaches for reversing this trend and improving the quality of gossip about judges in a civil litigation setting.

## II. WHY GOSSIP ABOUT JUDGES?

### A. *Gossip as a Source of Information*

At first, gossip may seem an unlikely information source for litigators. We are accustomed to the idea of attorneys poring through statutory text and case law to fashion legal arguments, reviewing documents and deposition transcripts to compile evidence and factual background, or (more recently) using aggregated litigation data to

better organize, contextualize, and predict the outcomes of their arguments before the court.<sup>11</sup> Each of these sources carries the weight of perceived objectivity: statutes and case law reflect legal precedent, evidentiary sources reflect historical fact, and aggregate data reflect empirical reality. Gossip, by contrast, has “a decidedly shady reputation.”<sup>12</sup> Historically, it has been seen as a “malicious, destructive, and largely reprehensible” activity.<sup>13</sup> Even under more forgiving modern standards, many people today still view gossip primarily as “idle talk” undertaken purely for the sake of entertainment<sup>14</sup>—the equivalent of “intellectual chewing gum.”<sup>15</sup>

But this lightweight reputation is undeserved, or at least overstated. Gossip in fact has a variety of valuable social and informational effects. Most importantly, information spread through gossip always has an evaluative dimension,<sup>16</sup> a useful characteristic that is typically absent from other sources of information available to the litigator. Consider, for example, the statement that “Judge Jones is eligible to take senior status.” Taken alone, that information is of little strategic value to a lawyer. Perhaps it allows general inferences about Judge Jones’s age, experience, and seniority, but as a basic fact it provides little to work with. But now consider the following exchange:

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11. See generally Dru Stevenson & Nicholas J. Wagoner, *Bargaining in the Shadow of Big Data*, 67 FLA. L. REV. (forthcoming 2015), available at <http://ssrn.com/abstract=2325137>.

12. R. I. M. Dunbar, *Gossip in Evolutionary Perspective*, 8 REV. GEN. PSYCHOL. 100, 100 (2004).

13. *Id.* Some societies have even made gossiping a punishable offense. Nicholas Emmer, *Gossip, Reputation, and Social Adaptation*, in GOOD GOSSIP 117, 119 (Robert F. Goodman & Aaron Ben-Ze’ev eds., 1994) (describing forms of punishment in fourteenth- to eighteenth-century Britain, ranging from public shaming to medieval torture devices); see also LEVIN & ARLUKE, *supra* note 6, at 3-4 (1987) (discussing cultural critiques of gossip in West Africa, within the Seminole Indian tribe, and among twentieth century American journalists).

14. Gary Alan Fine & Ralph L. Rosnow, *Gossip, Gossipers, Gossiping*, 4 PERSONALITY & SOC. PSYCHOL. BULL. 161, 162 (1978).

15. *Id.* at 164 (quoting FREDERICK ELMORE LUMLEY, MEANS OF SOCIAL CONTROL 215 (1925)).

16. LEVIN & ARLUKE, *supra* note 6, at 7 (noting that gossip “may describe, but always in order to make a judgment of praise or of blame”); Donna Eder & Janet Lynne Enke, *The Structure of Gossip: Opportunities and Constraints on Collective Expression Among Adolescents*, 56 AM. SOC. REV. 494, 494 (1991) (defining gossip as “evaluative talk about a person who is not present”); Foster, *supra* note 4, at 83 (summarizing definitions in the literature as “the exchange of personal information (positive or negative) in an evaluative way (positive or negative) about absent third parties” in a context of congeniality); Nicole H. Hess & Edward H. Hagen, *Psychological Adaptations for Assessing Gossip Veracity*, 17 HUM. NATURE 337, 339 (2006) (defining gossip as “a convenient short-hand for personal conversations about reputation-relevant behavior”); Laurence Thomas, *The Logic of Gossip*, in GOOD GOSSIP, *supra* note 13, at 47 (noting that factual statements without innuendo do not constitute gossip).

Attorney Able: Judge Jones seemed very distracted during the motion session today.

Attorney Baker: Well, he *is* eligible to take senior status.

In this context, the same factual information about Judge Jones is now infused with innuendo—perhaps suggesting that his age has affected his focus, or that he is spending time on the bench actively contemplating retirement. Either way, the information about Judge Jones is no longer merely descriptive but also evaluative: the tone and timing of Attorney Baker’s comment suggest a connection (reasonable or not) between Judge Jones’s behavior in court and his eligibility for senior status. It is this evaluative dimension that allows gossip to provide an alternative, unofficial, and frequently “more accurate and more complete” source of data about a person or institution.<sup>17</sup>

Although gossip has been resistant to a universal definition, consistent with the foregoing discussion I intend to use the term relatively broadly here, simply to mean information about an absent person’s personal qualities or behavior that is communicated in an evaluative way. In this sense, I use “gossip” interchangeably with the more pedestrian term “evaluative secondhand information.” Because the attorney-judge relationship is typically a professional work relationship, most frequently this evaluative information relates to a judge’s professional competence and ideological inclinations. Attorney gossip of the salacious or malicious type (which judge has a drinking problem, or a failing marriage, or sexist tendencies), certainly exists, but it is frankly less useful: personal gossip about a judge is of practical value to lawyers only when it provides clues about the judge’s professional behavior.

Like other forms of information, gossip about judges can be transmitted verbally, in writing, or even through actions.<sup>18</sup> Often it is shared privately or semi-privately, in response to a direct request from one attorney to another. Several studies have found that lawyers frequently consult their colleagues for information on judges as the need arises,<sup>19</sup> and lawyers themselves advise asking other counsel about their experiences with a judge.<sup>20</sup> Within law firms, formal and informal logs of encounters with a given judge are routinely

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17. Aaron Ben-Ze’ev, *The Vindication of Gossip*, in GOOD GOSSIP, *supra* note 13, at 11, 23.

18. Deborah Turner, *Orally-Based Information*, 66 J. DOCUMENTATION 370, 371 (2010).

19. Olike, *supra* note 1, at 32; Margaret Ann Wilkinson, *Information Sources Used by Lawyers in Problem-Solving: An Empirical Exploration*, 23 LIBR. & INFO. SCI. RES. 257, 266 (2001).

20. Peter R. Bornstein, *Persuading a Cold Judge*, 35 LITIG. 27, 28 (2009); Bert I. Huang, *Trial by Preview*, 113 COLUM. L. REV. 1323, 1333 n.35 (2013); Thomas A. Mauet, *Bench Trials*, 28 LITIG. 13, 14 (2002).

available.<sup>21</sup> Gossip may also be shared more diffusely among attorneys through individual “war stories” in informal social settings.<sup>22</sup> Indeed, tales from trial practice, especially those featuring “some foible of a bumbling opposing counsel, a hapless judge, or a pathetic client,”<sup>23</sup> are common currency among litigators.<sup>24</sup>

Public stories about judges are also available.<sup>25</sup> These sources include mainstream media coverage of the judge,<sup>26</sup> profiles or discussions of the judge in academic or professional publications,<sup>27</sup> court-sponsored or court-approved publications identifying individual judges’ preferred practices and protocols,<sup>28</sup> and published ratings and

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21. Many firms have implemented case management software that (among other things) tracks each case within the firm and the assigned judge; this software allows an attorney in the firm to easily find others who have appeared before the judge. See Daniel J. Siegel, *Case Management in the Cloud*, 49 TRIAL 28, 29 (2013).

22. See David C. Brody, Management Note, *Judicial Performance Evaluations by State Governments: Informing the Public While Avoiding the Pitfalls*, 21 JUST. SYS. J. 333, 338 (2000).

23. Eileen A. Scallen, *Evidence Law as Pragmatic Legal Rhetoric: Reconnecting Legal Scholarship, Teaching and Ethics*, 21 QUINNIPIAC L. REV. 813, 816 (2003).

24. The gossip machine runs both ways: judges frequently and admittedly share their own war stories about lawyers who appear before them. See Hon. Marvin Aspen, *The Tenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 146 F.R.D. 205, 229 (1993) (“Just like you [lawyers] in this room have a book on every judge that you’ve practiced before and you tell war stories about that judge, we judges do the same thing. When a lawyer is involved in outrageous conduct or unprofessional conduct before me, when I’m sitting around having lunch with my colleagues, we talk about it. We don’t keep it a secret.”).

25. “The two major forms of communication typical of gossip are private conversations and public communication by the media.” Ben-Ze’ev, *supra* note 17, at 16.

26. Some have suggested that media coverage of individual judges leans toward negative portrayals. See, e.g., Michael W. Manners et al., *Balancing Act: Can Judicial Independence Coexist with Court Accountability?*, 41 CT. REV. 44, 48 (2005) (“You can’t do much about the bad stories about judges. They’re going to always be there, and you can’t get people, journalists, to do good stories, happy-faced stories about you and what you do every day.”).

27. The Federal Bar Association, for example, runs periodic profiles on federal judges from around the country and makes those profiles available to its members in its publication, *The Federal Lawyer*, and on its website. See, e.g., *Federal Bar Association*, FED. LAW., <http://www.fedbar.org/magazine.html> (last visited Nov. 8, 2014).

28. See, e.g., MCLE NEW ENGLAND, THE U.S. DISTRICT COURT SPEAKS: DISTRICT OF MASSACHUSETTS (6th ed. 2011) (listing questionnaire responses from federal district and magistrate judges about their preferred practices). Many court websites similarly identify “best practices” particular to a court or judge.



evaluations of the judge, both formal<sup>29</sup> and informal.<sup>30</sup> In the past decade, these sources have also come to include heavily trafficked websites devoted to chronicling judicial behavior in and out of court, tracking everything from “benchslaps” of ill-prepared attorneys to judges who encounter their own legal trouble.<sup>31</sup>

Related to judicial gossip is judicial reputation. Judicial reputation is a by-product of stories and judgments by individual attorneys (and others who have come before the judge);<sup>32</sup> it effectively represents aggregated private judgments about the judge’s “vices and virtues, strengths and weaknesses.”<sup>33</sup> Whereas individual war stories provide specific snapshots of judicial behavior and decision-making, reputation reflects a more general social judgment about the judge’s expected future behavior within a distinct legal community:<sup>34</sup> the lawyers who have appeared—and may appear again—before the judge in court.<sup>35</sup>

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29. Approximately nineteen states, plus Puerto Rico and the District of Columbia, conduct formal judicial performance evaluations for some or all of their judges on a periodic basis. In most jurisdictions with such programs, written evaluation results are made publicly available. See Rebecca Love Kourlis & Jordan M. Singer, *Using Judicial Performance Evaluations to Promote Judicial Accountability*, 90 JUDICATURE 200, 204-05 (2007). Federal judicial evaluations have been far more sporadic. One longstanding program is run by the Chicago Council of Lawyers for its local federal judges. See CHI. COUNCIL OF LAWYERS, AN EVALUATION OF THE UNITED STATES DISTRICT JUDGES IN CHICAGO (2006), available at [http://www.chicagocouncil.org/programs/federal\\_judicial\\_evaluations](http://www.chicagocouncil.org/programs/federal_judicial_evaluations).

30. Informal rating sites of judges, which allow anyone to leave anonymous comments on individual judges, have proliferated in recent years. See, e.g., THE ROBIN ROOM, <http://www.therobingroom.com> (last visited Nov. 8, 2014); ROBEPROBE, <http://www.robeprobe.com> (last visited Nov. 8, 2014).

31. See ABOVE THE LAW, <http://www.abovethelaw.com> (last visited Nov. 8, 2014); see also UNDERNEATH THEIR ROBES, <http://www.underneaththeirrobes.blogs.com> (last visited Nov. 8, 2014).

32. JOHN WHITFIELD, PEOPLE WILL TALK: THE SURPRISING SCIENCE OF REPUTATION 5 (2012).

33. Nicholas Emler, *A Social Psychology of Reputation*, 1 EUR. REV. SOC. PSYCHOL. 171, 178 (1990).

34. WHITFIELD, *supra* note 32, at 181; Gloria Origgi, *A Social Epistemology of Reputation*, 26 SOC. EPISTEMOLOGY 399, 402 (2012); William M. Sage, *Reputation, Malpractice Liability, and Medical Error*, in ACCOUNTABILITY: PATIENT SAFETY AND POLICY REFORM 167-69 (Virginia A. Sharpe ed., 2004); Nancy A. Welsh, *The Reputational Advantages of Demonstrating Trustworthiness: Using the Reputation Index with Law Students*, 28 NEGOTIATION J. 117, 134 (2012).

35. This definition is admittedly more restrictive than those proposed by other commentators. Cf. Garoupa & Ginsburg, *Judicial Audiences*, *supra* note 9, at 454 (defining judicial reputation generally as “a mechanism to convey individual and collective information to the relevant audiences”). It is certainly true that judges must speak simultaneously to multiple audiences, including lawyers, other judges, current and future litigants, the media, other branches of government, and the public. See generally LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR (2008) (addressing judicial approaches to each of these groups). The same judge may have somewhat different, overlapping, and interacting reputations with these various constituencies; the way a district judge is seen by the Court of Appeals or the local media, for example, may influence

The sharing of evaluative secondhand information on judges benefits litigators both individually and as a community. As individuals, attorneys use gossip about a judge to supplement or substitute for their own direct experience with that judge. This additional information enriches attorneys' ability to predict the outcomes of future interactions with a given judge. As a legal community, attorneys use gossip about judges to acculturate newcomers, enforce informal norms within the community, and place reputational pressure on judges to perform their own work fairly, accurately, and efficiently. The remainder of this Part explores these individual and communal benefits.

*B. Gossip and the Individual Lawyer: Prediction,  
Strategy, and Access in Civil Litigation*

Litigation strategy is predicated on prediction. The "vast majority of lawyers" recognize that anticipating likely court outcomes is a core feature of their professional expertise.<sup>36</sup> One commentator has deemed the ability to predict outcomes "a major component of the 'added-value'" that attorneys offer.<sup>37</sup> Others have suggested that "[l]awyers' judgments of the likelihood of potential outcomes may be the most important factor underlying clients' decisions whether to proceed to trial or pursue settlement, whether or not to drop a case, and whether or not to invest more time and money in discovery."<sup>38</sup>

At its core, prediction in litigation involves anticipating how an issue would be decided if it were brought to the court for a final decision. This exercise has a straightforward but critical strategic purpose: to determine whether the court should be invited to decide the issue in the first place. This fundamental strategic consideration

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how attorneys perceive that judge as well. However, because attorneys who appear in court have a special professional relationship with judges, *see id.* at 98-100, and because those attorneys who are unfamiliar with a judge are most likely to seek out the judge's reputation among their peers and colleagues, I limit my reputational discussion to that distinct legal community. I have explored the perceptions of judges by other audiences elsewhere. *See, e.g.,* Rebecca Love Kourlis & Jordan M. Singer, *A Performance Evaluation Program for the Federal Judiciary*, 86 DENV. U. L. REV. 7 (2008) (discussing the general public); Jordan M. Singer, *The Mind of the Judicial Voter*, 2011 MICH. ST. L. REV. 1443 (2011) (discussing voters); Hon. William G. Young & Jordan M. Singer, *Bench Presence: Toward a More Complete Model of Federal District Court Productivity*, 118 PENN ST. L. REV. 55 (2013) (discussing litigants).

36. Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 PSYCHOL. PUB. POL'Y & L. 133, 134 (2010).

37. Mary Helen McNeal, *Slow Down, People Breathing: Lawyering, Culture and Place*, 18 CLINICAL L. REV. 183, 211 (2011).

38. Craig R. Fox & Richard Birke, *Forecasting Trial Outcomes: Lawyers Assign Higher Probability to Possibilities That Are Described in Greater Detail*, 26 L. & HUM. BEHAV. 159, 159 (2002).

arises at every stage of civil litigation. Should a putative plaintiff file a complaint? Should a defendant file a motion to dismiss? What claims, defenses, or counterclaims should be raised? Should the plaintiffs seek class certification, and if so, at what stage? Should a party bring to the court's attention a discovery dispute, seek sanctions, or challenge the introduction of evidence or expert testimony? Should a party seek summary judgment? Should it request a bench trial over a jury trial? For these types of issues (in which the attorney has the choice to engage the court in the first instance), prediction enables a simple, binary calculus: if the anticipated outcome is likely to benefit the client, the issue should be raised with the court; if the outcome is likely to not benefit (or worse, harm) the client, the issue should not be raised with the court.<sup>39</sup>

Prediction is an equally important strategic tool if an issue has already been raised by opposing counsel or by the court itself. If the outcome is predicted to be harmful to the client, the attorney will work to manage the harm (by, say, conceding certain issues to avoid the risk of a less desirable judicial interpretation) or will attempt to remove the issue from the judge's control altogether (by, say, settling the case out of court). If the outcome is ambiguous, the attorney will still structure the presentation of evidence and arguments to achieve the best possible decision for the client. In any scenario, predicting what the court is likely to do permits an attorney to organize her strategies and arguments in specific and beneficial ways.

How can an attorney know what the court is likely to do? Sometimes, the judge will signal the probable outcome in advance. Such signals may be explicit (such as a "tentative ruling" on a dispositive motion<sup>40</sup> or a direct statement that one party "has a very strong

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39. See Lara K. Kamrath & Abigail A. Scholer, *The Cognitive-Affective Processing System*, in 5 HANDBOOK OF PSYCHOLOGY: PERSONALITY AND SOCIAL PSYCHOLOGY 161, 162 (Irving B. Weiner et al. eds., 2012). This is, of course, a bit of an oversimplification. For example, if several different procedural options each yield a predicted positive outcome, an attorney might reasonably pursue only the strongest option. Or an attorney might decline to raise a minor issue with the judge—even if she thinks it likely that she will win—if the result would strain her professional credibility with the judge later in the case (say, for example, if the attorney thinks that she is likely to win a relatively minor discovery dispute but knows that the judge generally views discovery disputes as an annoyance and a waste of time). The larger point here is that the predicted outcome provides an essential starting point for inviting judicial engagement at every stage of civil litigation.

40. See Alexander J. Konik, *Tentative Rulings in California Trial Courts: A Natural Experiment*, 47 COLUM. J.L. & SOC. PROBS. 325 (2014) (discussing the longstanding practice of issuing tentative rulings on motions in California state courts); Joshua Stein, *Tentative Oral Opinions: Improving Oral Argument Without Spending a Dime*, 14 J. APP. PRAC. & PROCESS 159 (2013) (discussing tentative opinion practice in two California Courts of Appeal); see also Steven S. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 U. KAN. L. REV. 849, 863 (2013) (discussing the practice of "premotion conferences" in advance of summary judgment in the federal district courts).

case”<sup>41</sup>), implicit (such as an unfavorable ruling on a pretrial evidentiary motion, or judicial body language suggesting skepticism about a particular line of argument),<sup>42</sup> or subtle and attenuated (such as terminology in earlier written opinions indicating a willingness to entertain certain types of cases or rule in certain broad directions in the future).<sup>43</sup> Collectively, these signals provide counsel with valuable information about the probability of a particular outcome—a *preview* of the outcome—which in turn is thought to guide more informed attorney decision-making.<sup>44</sup>

More often, however, judicial signals are not forthcoming, and a direct preview of the decision is not possible. Indeed, the very notion of judicial signaling presupposes a relationship between the judge and the attorneys in the case. Whether the judge signals directly or indirectly, intentionally or unintentionally, she is signaling to particular attorneys who are litigating a particular case involving particular legal and factual issues. There are many times in the course of a case, however, when an attorney cannot afford to wait for a direct signal from the judge. In these situations, attorneys must substitute direct previews with *virtual* ones, by guessing in an educated way how the judge would decide the issue.

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41. *E.g.*, *United States v. City of Akron*, 794 F. Supp. 2d 782, 804 (N.D. Ohio 2011); *CarboMedics, Inc. v. ATS Med., Inc.*, No. 06-CV-4601(PJS/JJG), 2008 WL 4323732, at \*11 (D. Minn. 2008) (also noting that “[t]he Court fully expects that CarboMedics will prevail on this issue at trial[.]”).

42. *See, e.g.*, Huang, *supra* note 20, at 1328; Richard A. Nagareda, *1938 All Over Again? Pretrial as Trial in Complex Litigation*, 60 DEPAUL L. REV. 647, 663-64, 688 (2011).

43. *See* Tonja Jacobi, *The Judicial Signaling Game: How Judges Shape Their Dockets*, 16 SUP. CT. ECON. REV. 1 (2008) (setting out a general theory of signaling); Andrew P. Morriss et al., *Signaling and Precedent in Federal District Court Opinions*, 13 SUP. CT. ECON. REV. 63 (2005) (exploring judicial signaling in opinions related to the federal sentencing guidelines).

44. In the light of the professed value to litigators of judicial signals, some commentators have taken a normative stance in favor of sharing information on the likely outcome of the case at even earlier stages. Noting that “[p]arties in litigation provide clear indications that they desire reliable information about case value,” for example, Geoffrey Miller has proposed the use of “preliminary judgments” to provide counsel with a judge’s early sense of the likely outcome of the case. *See* Geoffrey P. Miller, *Preliminary Judgments*, 2010 U. ILL. L. REV. 165, 204. Together with Samuel Issacharoff, Professor Miller has also proposed a reformulated motion to dismiss designed to force the parties to reveal pertinent information on the merits through early-stage targeted discovery. Samuel Issacharoff & Geoffrey Miller, *An Information-Forcing Approach to the Motion to Dismiss*, 5 J. LEGAL ANALYSIS 437 (2013). Richard Nagareda offered a more general prescription, noting that “[a] world of vanishing trials invites exploration of whether procedural doctrine might benefit from the development of additional pretrial motions that are not dispositive but, rather, informative—motions that do not speak to whether trial may occur but seek instead to inform directly the pricing of claims via settlement.” Nagareda, *supra* note 42, at 653.

Such educated guesses are not always easy. The outcomes of judicial decisions are “the products of complex human interactions,”<sup>45</sup> and in anticipating outcomes lawyers must account for a wide range of potential inputs, including written law, established facts, yet-to-be established facts, social prejudices, informal legal norms, witness credibility, the skill of opposing counsel, the complexity and nature of the story to be told, the parties’ financial and emotional health, and the proclivities of judge and jury.<sup>46</sup> As two commentators have pithily summarized, “[t]he skilled strategist knows that one can no more predict the outcome of a case from the facts and the law than one can predict the outcome of a game of chess from the positions of the pieces and the rules of the game. In either case, one needs to know who is playing.”<sup>47</sup>

Knowledge of the interpersonal elements affecting judicial decision-making is not found in books or other written sources. Instead, such knowledge resides within the heads of individual lawyers—what Lynn LoPucki and others have described as “mental models” of the law.<sup>48</sup> Mental models eschew the details of the formal, written law in favor of more simplified, customary understandings of how the law actually works in practice. As LoPucki explains, “[a] shared mental model of law implicitly proclaims ‘this is how we do things’ (or, if the conversation should skip to a higher plane, ‘this is the right thing to do’).”<sup>49</sup> Shared mental models, then, are more a product of personal experience and attention to interpersonal relationships than rigorous analytics. The primary difference between experienced and inexperienced litigators is the ability to account adequately for the cognitive, cultural, and otherwise human elements of litigation.<sup>50</sup>

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45. Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. 1405, 1472 (2000).

46. See Lynn M. LoPucki, *Court-System Transparency*, 94 IOWA L. REV. 481, 499 (2009); Marjorie Anne McDiarmid, *Lawyer Decision Making: The Problem of Prediction*, 1992 WIS. L. REV. 1847, 1882.

47. LoPucki & Weyrauch, *supra* note 45, at 1472. Or put slightly differently, does the attorney fundamentally trust the decision-maker to favor his client in the issue presented? “[T]rust is about positive expectations regarding the other in a risky situation.” T. K. Das & Bing-Sheng Teng, *Trust, Control, and Risk in Strategic Alliances: An Integrated Framework*, 22 ORG. STUD. 251, 255 (2001).

48. Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers’ Heads*, 90 NW. U. L. REV. 1498, 1500 (1996).

49. *Id.* at 1501.

50. See Gary L. Blasi, *What Lawyers Know: Lawyering Experience, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 321-22, 355 (1995) (offering a hypothetical example); McDiarmid, *supra* note 46, at 1888 (noting that “neglect[ing] to consider the attitude of [the] judge . . . is precisely [the] type of mistake that young lawyers and non-lawyers make all the time”).

LoPucki's examination of shared mental models focused on substantive law,<sup>51</sup> but similar mental models are as prevalent—perhaps more prevalent—in the realm of adjudicative procedure. Just as litigators create mental models to predict the likely substantive outcome of a case, they also create mental models of the likely path that the case will follow and the likely reactions, behaviors, and attitudes of the key players in the case. The more sophisticated the mental model—the more it accounts for loopholes, idiosyncrasies, and exceptions to the general rule—the more it will be able to reliably predict the path of the case and its ultimate outcome.<sup>52</sup>

The exact process by which people convert disparate information about another person into a mental model, or impression, of that person remains a rapidly evolving topic within the field of cognitive psychology.<sup>53</sup> Indeed, only in the past decade have researchers begun to account systematically for ways in which people process information about others in concrete social contexts.<sup>54</sup> For purposes of this discussion, however, two important aspects seem relatively clear. First, impression formation is typically an ongoing process: we adjust our perceptions and evaluations of other people at every stage of a relationship, taking into account new information as it becomes available.<sup>55</sup> As one set of researchers has explained, “[i]mpressions of others arise out of direct social interaction, and the interaction patterns themselves affect the impression formation process.”<sup>56</sup> Second, the formation of impressions in a socially situated context typically takes into account both firsthand (direct) information and secondhand (in-

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51. See LoPucki, *supra* note 48, at 1501 (noting that most of his examples are drawn from the field of debtor-creditor relations).

52. See Blasi, *supra* note 50, at 321-23 (presenting an illustrative scenario on the relationship between the sophistication of an attorney's mental model and the sophistication of the attorney's ultimate strategy).

53. See C. Neil Macrae & Galen V. Bodenhausen, *Social Cognition: Thinking Categorically about Others*, 51 ANN. REV. PSYCHOL. 93, 113 (2000) (noting that “[r]esearch on the nature of social cognition has proceeded at . . . an explosive pace”).

54. See Eliot R. Smith & Elizabeth C. Collins, *Contextualizing Person Perception: Distributed Social Cognition*, 116 PSYCHOL. REV. 343, 343 (2009); Eliot R. Smith & Gün R. Semin, *Situated Social Cognition*, 16 CURRENT DIRECTIONS IN PSYCHOL. SCI. 132 (2007).

55. Aditya Johri, *From a Distance: Impression Formation and Impression Accuracy Among Geographically Distributed Coworkers*, 28 COMPUTERS IN HUM. BEHAV. 1997, 1998 (2012); Lara K. Kammrath et al., *Keeping Up Impressions: Inferential Rules for Impression Change Across the Big Five*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 450, 450 (2007); Oscar Ybarra, *When First Impressions Don't Last: The Role of Isolation and Adaptation Processes in the Revision of Evaluative Impressions*, 19 SOC. COGNITION 491, 514-15 (2001).

56. Thomas Holtgraves & Thomas K. Srull, *The Effects of Positive Self-Descriptions on Impressions: General Principles and Individual Differences*, 15 PERSONALITY & SOC. PSYCHOL. BULL. 452, 460 (1989).

direct) information about a target person.<sup>57</sup> Gossip and other secondhand information therefore have value both at the very outset of a relationship (as a substitute for information about a person gleaned from direct contact) and once the relationship is underway (as a supplement to information gleaned through direct contact). Whether used as a substitute or a supplement, gossip allows a litigator to form a coherent mental impression of a judge, through which the litigator may predict case and event outcomes.

### 1. *Gossip as a Substitute for Direct Interaction*

Lawyers often face the prospect of appearing before a judge with whom they have never directly interacted. Some lawyers are new to the profession, others new to the legal community. But even the most experienced litigators will face new judges from time to time, as older judges retire (or, in some state courts, are voted out) and new judges replace them. In these situations, a lawyer attempting to predict the outcome of a case event cannot rely on personal experience in front of the judge, but nevertheless will attempt to create a mental model of the judge through secondhand information.

Initial mental models of other people are not drawn on a blank slate. Rather, in most situations people initially “simplify the task of understanding others by categorizing them as members of familiar social groups.”<sup>58</sup> That is, people rely initially on stereotypes. Upon first learning about a new person, they automatically interpret that person’s observed or reported behavior to fit within broad character traits.<sup>59</sup> Such categorical thinking is instantaneous and entirely natural. It is also cognitively valuable: as one set of researchers has noted, “[t]he ability to understand new and unique individuals in terms

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57. See, e.g., Elizabeth C. Collins et al., *Integrating Advice and Experience: Learning and Decision Making with Social and Nonsocial Cues*, 100 J. PERSONALITY & SOC. PSYCHOL. 967, 976 (2011).

58. Steven L. Neuberg & Susan T. Fiske, *Motivational Influences on Impression Formation: Outcome Dependency, Accuracy-Driven Attention, and Individuating Processes*, 53 J. PERSONALITY & SOC. PSYCHOL. 431, 432 (1987). Several leading scholars have suggested a continuum of impression formation, in which a perceiver may initially form an impression based on categorical assumptions, individuating attributes, or something in between. *Id.*; see also Susan T. Fiske et al., *Category-Based and Attribute-Based Reactions to Others: Some Informational Conditions of Stereotyping and Individuating Processes*, 23 J. EXPERIMENTAL SOC. PSYCHOL. 399 (1987). Under this continuum, “people initially categorize others, then attend to additional attributes in order to assess the fit of the initial category (i.e., they judge how typical the person is of the category).” *Id.* at 403. I therefore focus first on categorical assumptions here, because the label “judge,” especially in the context of litigation, will always be initially available to the attorney even when individuating information on a judge is not.

59. Fiske et al., *supra* note 58, at 403; Thomas K. Srull & Robert S. Wyer, Jr., *Person Memory and Judgment*, 96 PSYCHOL. REV. 58, 59 (1989).

of old and general beliefs is certainly among the handiest tools in the social perceiver's kit."<sup>60</sup>

How we categorize a new person depends on what we already know about him. Often, the observer will have already developed general trait expectations about the target person before learning any additional personal information about the target. In this case, the observer will use the expected traits as the basis for his or her interpretation.<sup>61</sup> For example, knowing that a target person is ninety years old may invoke expectations of physical frailty, or knowing that a target person is a marathon runner may invoke expectations of physical fitness. If, on the other hand, the observer has not previously formed any expectations about the target person's traits, she will interpret the target's behaviors in light of whatever applicable trait concepts come to mind.<sup>62</sup> For example, learning that a target person gave someone an answer on a test may invoke general expectations of dishonesty or kindness, depending on which trait concept is the most accessible to the observer.<sup>63</sup>

These general principles become more concrete when applied to the litigator-judge relationship. Litigators have natural expectations about the typical traits of trial judges, among them "impartiality, fairness, independence, integrity, civility, and professionalism."<sup>64</sup> That is, a generic trial judge is expected to display both traits of professional morality (patience, lack of bias, fealty to the law) and professional competence (clarity of expression, adequate legal reasoning, familiarity with applicable rules and standards). These expectations may have been refined by years of practice, but even before joining the bar most lawyers develop images of a generic judge from their law school experience; civics education; personal experience in the court system as a party, witness, or juror; and encounters with popular culture depictions of the judiciary.<sup>65</sup>

General expectations of a judge may be further influenced by an attorney's beliefs about the court on which the judge sits. For example, if the court has been characterized (fairly or unfairly) by others

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60. Daniel T. Gilbert & J. Gregory Hixon, *The Trouble of Thinking: Activation and Application of Stereotypic Beliefs*, 60 J. PERSONALITY & SOC. PSYCHOL. 509, 509 (1991).

61. Srull & Wyer, *supra* note 59, at 58-59.

62. *Id.* at 59.

63. *See id.* at 58-59.

64. Oldfather, *supra* note 3, at 125.

65. *See id.* at 127; *see also* David Ray Papke, *The Impact of Popular Culture on American Perceptions of the Courts*, 82 IND. L.J. 1225 (2007).



as a “rocket docket,”<sup>66</sup> business-friendly,<sup>67</sup> hostile to civil rights claims,<sup>68</sup> or even a “judicial hellhole,”<sup>69</sup> an attorney may presume that the behavior of an unknown judge on that court conforms to the general culture of the institution.<sup>70</sup> Similarly, an attorney’s expectations about the judges on a particular court may be influenced by the method of judicial selection for that court, with lifetime appointees seen as generally more “independent” or “activist” (depending on one’s politics) and elected judges seen as generally more “responsive” or “reactionary” (again depending on one’s view).<sup>71</sup> Previous experience with other judges on the court may also set attorney expectations about a new judge: studies have shown that first impressions may be strongly influenced by one’s attitudes about previously encountered people who are associated with the target person.<sup>72</sup> Finally, attorneys may have preconceptions about judges based on the expectations derived from the culture of a substantive legal practice. For example, bankruptcy attorneys may develop categorical expectations about bankruptcy judges, or divorce attorneys about family law judges.<sup>73</sup>

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66. “Rocket docket” is the term used (sometimes by the courts themselves) to denote courts in which accelerated pretrial schedules are the norm and extensions of time strongly disfavored. See Carrie E. Johnson, *Rocket Dockets: Reducing Delay in Federal Civil Litigation*, 85 CALIF. L. REV. 225, 227 (1997).

67. For more than a decade, the U.S. Chamber of Commerce has ranked state courts by litigation environment, based on perceptions of corporate attorneys. See U.S. CHAMBER INST. FOR LEGAL REFORM, 2012 STATE LIABILITY SYSTEMS SURVEY: LAWSUIT CLIMATE RANKING: THE STATES (2012), available at [http://www.uschamber.com/sites/default/files/reports/lr\\_FinalWeb\\_PDF.pdf](http://www.uschamber.com/sites/default/files/reports/lr_FinalWeb_PDF.pdf).

68. See Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1586-87 (1989).

69. The term “judicial hellhole” has been used by the American Tort Reform Foundation to describe state jurisdictions in which “judges . . . systematically apply laws and court procedures in an unfair and unbalanced manner, generally against defendants” in civil lawsuits. AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2012/13, at 2 (2012), available at [http://www.judicialhellholes.org/wpcontent/uploads/2012/12/ATRA\\_JH12\\_04.pdf](http://www.judicialhellholes.org/wpcontent/uploads/2012/12/ATRA_JH12_04.pdf).

70. See, e.g., Penelope Pether, *Constitutional Solipsism: Toward a Thick Doctrine of Article III Duty; or Why the Federal Circuits’ Nonprecedential Status Rules Are (Profoundly) Unconstitutional*, 17 WM. & MARY BILL RTS. J. 955, 967 (2009).

71. These general characterizations are not entirely baseless. Some studies have suggested, for example, that certain state courts are friendlier to in-state litigants, business interests, or tort plaintiffs. See, e.g., Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 73 (2011) (finding that every dollar of judicial campaign donations from business groups is associated with an increase in the likelihood that elected judges will decide cases for business interests); Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 186 (1999) (finding that tort awards against out-of-state defendants in states with partisan elections are approximately \$240,000 higher than awards against in-state defendants in those same states).

72. See Edward B. Noffsinger et al., *The Effect of Associated Persons Upon the Formation and Modifiability of First Impressions*, 120 J. SOC. PSYCHOL. 183, 192 (1983).

73. Mary Helen McNeal and Lynn Mather, among others, have made this point with respect to communities of lawyers in a specific substantive practice. LYNN MATHER ET AL.,

The categorical expectations that initially shape an attorney's mental model of an unknown judge are enhanced, refined, or challenged by judge-specific gossip. Again consider Attorney Able, who is representing a client in a contract dispute assigned to Judge Jones. Able has never appeared before Judge Jones, but she has been before other judges in the same court, and those experiences—together with her categorical impression of a typical trial judge—have provided her with a general idea of what Judge Jones may be like. But as a responsible advocate, Attorney Able wants to know more about Judge Jones before proceeding very far with the case. She independently contacts two colleagues, Attorneys Baker and Charles, who have recently appeared before Judge Jones in unrelated matters. Baker tells her that Judge Jones gave him ample time to argue a summary judgment motion in his recent case and asked pointed and detailed questions throughout the motion session. Charles tells her that he has appeared in front of Judge Jones “a couple dozen times” and considers the Judge to be patient and dignified in the courtroom but also slow to issue orders on motions and not a particularly adept case manager.

Able will attempt to interpret this additional information in light of the generic vision of a trial judge that she has already formed. Charles's information is purely evaluative (in that it does not describe any specific instance of judicial behavior), so Able will compare the trait concepts that Charles used to describe Judge Jones (patient, dignified, slow) with her categorical impressions of a generic trial judge.<sup>74</sup> Baker's information describes a particular instance of Judge Jones's behavior, so Able will try to interpret those described behaviors in terms of a more general trait concept.<sup>75</sup> For example, the behavior of allowing counsel ample time to argue the case might be interpreted as patience, and the behavior of asking multiple, pointed questions might be interpreted as care and thoughtfulness. To the extent that the described or inferred traits match, they will bolster Able's existing evaluative concept of Judge Jones. To the extent they do not match (if, for example, Baker had reported that Judge Jones issued his summary judgment order within a week of oral argument, contrary to Charles's report that the judge was slow to issue orders on motions), Able will have more difficulty constructing the evalua-

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DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE 179-80 (2001); McNeal, *supra* note 37, at 216-17. Just as lawyers in a substantive legal community may reinforce their own expectations about behavioral and practice norms, so too may lawyers develop and reinforce expectation about judges operating within the same substantive legal community.

74. See Srull & Wyer, *supra* note 59, at 59.

75. See *id.*

tive concept of Judge Jones, and is liable to seek further information from additional sources.<sup>76</sup> Able will continue to seek information on Judge Jones until she has formed an evaluatively coherent concept of him. That concept may ultimately prove to be positive (Judge Jones is fair, careful, and deliberate) or negative (Judge Jones is slow), but it must be stable, or Able will continue to seek out further information.

Once an evaluatively coherent impression of a person is formed, it is sticky, in that it provides foundational assumptions about the other person that are not easily overcome.<sup>77</sup> But sticky is not the same as immovable. First impressions can—and do—change over time in response to new information about a person.<sup>78</sup> Therefore, even as Able's initial impression of Judge Jones takes shape, she may continue to seek additional information about him from other lawyers. This is particularly true if her initial impression of Judge Jones is positive. Studies have shown that people assign less significance to positive information about a person than they do negative information and are more open to reevaluating their impressions of others when those impressions are initially positive.<sup>79</sup> Because the stakes for a client are so high, litigators are similarly likely to treat positive gossip about a judge as a cause only for cautious optimism and will seek out more information to confirm or disprove that initial impression.

What if Able's initial impression of Judge Jones is negative? Negative first impressions are typically more powerful than positive impressions in ordinary social settings and are harder to overcome.<sup>80</sup> Litigation, however, is *not* an ordinary social setting and litigators have special incentive to treat any initial impression of a judge—positive or negative—as only mildly presumptive. For one thing, litigators have a strong reason to form the most accurate impression possible of the judge, so that predictions of the judge's behavior and reactions will carry the greatest value. For another, litigation attorneys are accountable to their clients and colleagues within their firms and feel natural pressure to justify their predictions and decisions to those parties. Studies have suggested that both the desire for accuracy and the pressure of accountability reduce the effects of negative first impressions and motivate people to collect further infor-

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76. *See id.*

77. *See Ybarra, supra* note 55, at 491 (citing studies).

78. *Id.* at 514-15; *see also* Kammrath et al., *supra* note 55, at 450.

79. *See Ybarra, supra* note 55, at 492-93 (citing studies). The general explanation for this behavior is that people with bad qualities still exhibit positive behavior from time to time (say, a generally dishonest person who sometimes acts honestly), so a positive act is not dispositive of an overall positive disposition. *See id.*

80. *Id.*; *see also* Roy F. Baumeister et al., *Bad Is Stronger Than Good*, 5 REV. GEN. PSYCHOL. 323, 323-24 (2001); Jerker Denrell, *Why Most People Disapprove of Me: Experience Sampling in Impression Formation*, 112 PSYCHOL. REV. 951, 952 (2005).

mation on others.<sup>81</sup> Even a negative first impression, then, likely will not deter Able from asking for more information on Judge Jones going forward.

Note that Able formed her first impression of Judge Jones without ever interacting with him directly. Her impression rests instead on an amalgam of indirect information about the judge: Able's categorical expectations of trial judges generally, her categorical expectations of judges within the specific court and legal community, and gossip specifically about Judge Jones provided by Baker, Charles, and whatever other sources she ultimately decides to consult. Moreover, Able's impression is based on a mere subset of the secondhand information that is available about Judge Jones. First impressions need not be based on all available information; rather, they are most often based on the first subset of available information that permits an evaluatively coherent concept of the target person to be formed.<sup>82</sup> In short, secondhand information may be all that an attorney needs to form an impression of a judge sufficient to enable a virtual preview of case outcomes.

## 2. *Gossip as a Supplement to Direct Interaction*

It seems intuitive that gossip would be important to an attorney who has never encountered a judge before. But gossip and other secondhand information are valuable even to litigators who have enjoyed a long history of sustained interaction with the judge. Although an indirect source of information, gossip serves as a constant check on the attorney's own mental model of the judge. Gossip that aligns with the attorney's experience with the judge will serve to confirm the attorney's impression of that judge and make the attorney more confident about predicting the judge's reactions to the events in his case. Gossip that cuts against the attorney's experience will force the attorney to reevaluate his mental model to some degree and to be more cautious in his predictions.

To see how gossip affects even the seasoned litigator, it is useful to first consider how attorney impressions of judges are influenced by direct encounters. Direct interaction is a powerful source of information. It provides behavioral and contextual evidence of the judge's demeanor and propensities—a chance to see the judge in his “natural habitat,” as it were—and forces an attorney to continually reconsider

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81. See Steven L. Neuberg, *The Goal of Forming Accurate Impressions During Social Interactions: Attenuating the Impact of Negative Expectancies*, 56 J. PERSONALITY & SOC. PSYCHOL. 374, 384-85, (1989) (discussing accuracy); Philip E. Tetlock, *Accountability and the Perseverance of First Impressions*, 46 SOC. PSYCHOL. Q. 285, 290 (1983) (discussing accountability).

82. See Srull & Wyer, *supra* note 59, at 61.

her preexisting mental model of the judge. Again consider Attorney Able, whom we last saw preparing for her first court hearing before Judge Jones. When Able finally does appear before Judge Jones for the first time, she will interpret his demeanor and behavior in light of the initial impression she has already formed of him through gossip and categorical expectations.<sup>83</sup> If Judge Jones exhibits behavioral traits that are consistent with Able's initial impression, she will assume that her impression was correct, and that impression will be reinforced. If Able sees Judge Jones's behavior as inconsistent with her initial impression, however (say, if the judge appeared impatient or disinterested), a coherent evaluation may be more difficult to construct and Able will feel less confident about what to expect from Judge Jones in subsequent interactions. She will have to devote more attention to either confirming or disconfirming her initial impression by collecting more evidence about Judge Jones.<sup>84</sup>

Over time, repeated direct interactions with Judge Jones will help Able adjust her initial impression of his personality and behavior. In particular, every time Judge Jones's actions or behavior do *not* match Able's established conception of him, she will pay extra attention to that information and incorporate it into a new, more refined, impression.<sup>85</sup> This effect, called highlighting,<sup>86</sup> occurs automatically when conflicting information is presented, even if that information was not affirmatively sought out.<sup>87</sup> Thus, even if Able has developed an impression of Judge Jones as patient and even-tempered on the bench, she will revise that impression after encountering the judge on a day when he appears rushed, impatient, or flustered.

The degree to which Able revises her impression of Judge Jones depends in part on the personality traits that the judge's behavior invokes. Certain personality traits are more resistant to impression change than others. Studies have shown that perceptions of a person's morality, agreeableness, conscientiousness, and emotional stability are highly volatile, in that even one negative piece of information about the target person's behavior with respect to these traits can sully an otherwise positive impression.<sup>88</sup> These traits are accordingly said to have high maintenance rates—one must consistently

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83. See *id.* at 59, 61; Tetlock, *supra* note 81, at 286.

84. See James L. Hilton et al., *Attention Allocation and Impression Formation*, 17 PERSONALITY & SOC. PSYCHOL. BULL. 548, 549 (1991); Srull & Wyer, *supra* note 59, at 59.

85. See Srull & Wyer, *supra* note 59, at 62.

86. Collins et al., *supra* note 57, at 969.

87. YUNG-KUEI HUANG & LINCHI KWOK, AN ANALYSIS OF INFORMATION SOURCES FOR TRUST DEVELOPMENT IN MANAGERIAL RELATIONSHIPS (2011).

88. Kammrath et al., *supra* note 55, at 452 (discussing agreeableness, conscientiousness, and emotional stability); Ybarra, *supra* note 55, at 491 (discussing morality).

demonstrate high levels of positive behavior in these areas in order to keep a positive impression.<sup>89</sup> By contrast, the traits of competence, openness, and extraversion are far more resistant to change and are said to have low maintenance rates—a single piece of negative or disconfirming information on these traits is more likely to be seen as an aberration, such that the perceiver will give the target person the benefit of the doubt and continue to view the target generally positively.<sup>90</sup> As a result, Able's competence assessment of Judge Jones as a timely case manager is unlikely to change considerably if the Judge is slow to act on an isolated motion. By contrast, her morality assessment of Judge Jones as a patient and conscientious jurist is more likely to be revised downward by a single courtroom appearance in which the judge appears distracted, annoyed, or distant.

What if Judge Jones's behavior is perfectly consistent with Able's existing impression of him? In social settings, information that is consistent with preexisting impressions of another person is frequently downplayed and given less attention than inconsistent or disconfirming information.<sup>91</sup> Once again, however, there is good reason to believe that the context of civil litigation is different and that new confirmatory information is regularly and consciously integrated into a litigator's mental model of a judge. For example, research suggests that people seek out and integrate confirmatory information about a person when they are dependent on that person to achieve a particular outcome.<sup>92</sup> For litigators, outcome-dependency vis-à-vis a presiding judge is a natural state of being. The judge controls many outcomes, large and small, throughout the pretrial process. In a similar vein, studies have shown that confirmatory information from a second-hand source was perceived to be of the highest utility in evaluating another person's performance.<sup>93</sup> Attorneys therefore should naturally absorb—and even seek out—gossip about the judge to confirm their existing impressions and bolster their confidence that the judge will react in an anticipated way.

Direct interaction with the judge, then, plays a significant role in developing a litigator's overall impression of the judge's personality, demeanor, and disposition toward substantive and procedural arguments. But gossip has an important role to play as well. Just as di-

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89. Kammrath et al., *supra* note 55, at 451.

90. *Id.*

91. Collins et al., *supra* note 57, at 969.

92. Neuberg & Fiske, *supra* note 58, at 441-42 (discussing own findings and citing additional studies).

93. See Krista L. Uggerslev & Lorne M. Sulsky, *Presentation Modality and Indirect Performance Information: Effects on Ratings, Reactions, and Memory*, 87 J. APPLIED PSYCHOL. 940, 946 (2002).

rect judicial behavior that conflicts with an attorney's impression is highlighted and used to revise the attorney's assessment of the judge, so too are third-party war stories and reputational assessments of the judge that involve disconfirming information. Thus information from Attorney Baker that Judge Jones yelled at a lawyer during a recent hearing will be highlighted and blended into Able's existing impression of Judge Jones—even if Able's impression is based primarily on her own direct interaction with or direct observation of the judge.<sup>94</sup> Similarly, even if Able's direct experience suggests that Judge Jones carefully and thoroughly reads the parties' briefs before a motion session, her impression of the Judge's thoroughness is apt to change (at least to some degree) upon hearing from Attorney Charles that Judge Jones has a reputation for quickly skimming briefs and relying heavily on notes and bench briefs prepared by his law clerks.

Why would an attorney care about secondhand information on a judge whom she already knows through a direct relationship? The short answer is that indirect information, even in the form of gossip, serves as an important check on what attorneys (indeed, all people) think they know about others. Indeed, there is a lively and unresolved debate in the cognitive literature about whether accurate knowledge of another person increases with the length of a relationship.<sup>95</sup> Gossip—which is, after all, someone else's firsthand information transmitted through a social network<sup>96</sup>—provides additional information that acts as a consistency check on our own beliefs about a person. Consistent secondhand information about a person not only strengthens impressions of that person developed through direct interaction but also lends the secondhand source greater perceived utility.<sup>97</sup> As long as the information-seeking attorney considers the transmitted information to be reasonably reliable,<sup>98</sup> then, she is likely

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94. See Collins et al., *supra* note 57, at 977; Srull & Wyer, *supra* note 59, at 62.

95. See, e.g., David A. Kenny et al., *Consensus in Interpersonal Perception: Acquaintance and the Big Five*, 116 PSYCHOL. BULL. 245, 249 (1994); William B. Swann Jr. & Michael J. Gill, *Beliefs, Confidence and the Widows Ademoski: On Knowing What We Know about Others*, in METACOGNITION: COGNITIVE AND SOCIAL DIMENSIONS 107-08 (Vincent Y. Yzerbyt et al. eds., 1998).

96. Smith & Collins, *supra* note 54, at 360-61.

97. Uggerslev & Sulsky, *supra* note 93, at 945; see also Collins et al., *supra* note 57, at 977 (finding that indirect and direct information on a person must be integrated, “redundant information is learned rather than ignored,” and “mutually supportive information from different types of sources is treated as confirmatory rather than as redundant”).

98. If the information is not considered reliable, it is more apt to be held in play by the seeking attorney until other information helps make its meaning clear. See James L. Hilton et al., *Suspicion and Dispositional Inference*, 19 PERSONALITY & SOC. PSYCHOL. BULL. 501, 505 (1993). Moreover, in some instances, gossip may carry indicia of reliability but in fact may not be reliable. I address the consequences of reliance on bad gossip in Part III.

to fold that information into her perspective of the judge, adding depth and fullness to her overall impression.

*C. Gossip and the Community: Attorney Acculturation  
and Judicial Quality*

So far, we have considered the value of gossip from the point of view of the individual litigator. But gossip about judges also has value to the larger legal community. One benefit is cultural education. As a general matter, stories transmitted through gossip may help acculturate new members to a group by sharing information about the group's social norms or indirectly promoting beneficial group values.<sup>99</sup> For litigators, gossip about judicial expectations and customs may serve as a way to indirectly reaffirm the expectations and customs of the local legal community as a whole. Attorneys who are new to the bar, or who are appearing in court *pro hac vice*, may be competent to follow written court rules, but will also be expected (perhaps implicitly) to adopt the informal norms of the local bar. Exchanging information on presiding judges may help with this process. For example, sharing gossip that a given judge (or court) almost never grants extensions of time, or becomes visibly irritated with discovery disputes, or expects parties to negotiate resolutions to pending motions while waiting their turn in morning motion sessions, may cut down on those types of motions and encourage parties to resolve such issues on their own.

Gossip also benefits the legal community by establishing expectations about the quality of the local judiciary. Judicial quality matters to lawyers for a variety of reasons—among them efficient case management, outcome accuracy, and procedural fairness.<sup>100</sup> Using war stories and reputation to convey morals about judicial activity reinforce those norms within the community. Emphasizing such norms sends a message to both sitting and aspiring judges about the expectations that the bar has for the bench.<sup>101</sup> War stories, reputation, and cultural norms also allow the bar to influence the selection and retention of judges. Where judges are appointed, lawyers who serve on nominating committees can draw upon local norms as well as specific information they have on the lawyers in the community to select top

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99. Roy F. Baumeister et al., *Gossip as Cultural Learning*, 8 REV. GEN. PSYCHOL. 111, 113 (2004); Foster, *supra* note 4, at 86; Ralf D. Sommerfeld et al., *Gossip as an Alternative for Direct Observation in Games of Indirect Reciprocity*, 104 PROC. NAT'L ACAD. SCI. 17,435, 17,435 (2007).

100. See Young & Singer, *supra* note 35, at 57-58.

101. See BAUM, *supra* note 35, at 99-100.



candidates.<sup>102</sup> Where judges are elected or re-elected (as in many state courts), attorneys can draw upon a judge's reputation—as well as their own familiarity with the judge—to inform interested voters.<sup>103</sup>

Assessments of judicial quality also matter to the judges themselves, both as a matter of professional pride<sup>104</sup> and (in many jurisdictions) as a gauge of professional respect in advance of reelection, retention, or reappointment decisions. A sitting judge who commands a strong reputation or individual reviews from the lawyers who appear before her is more likely to maintain her job at the end of a set term.<sup>105</sup> By contrast, a judge with a poor professional reputation among the bar will face a harder road to another term on the bench.<sup>106</sup> Even judges with life tenure face the consequences of judicial quality assessments; though they ordinarily cannot be removed from the bench, their poor reputations encourage lawyers to avoid them whenever possible.<sup>107</sup>

As conscientious professionals, most judges would like to know what others think of their performance, so that they can build upon their strengths and improve upon their weaknesses. But judges also face a very hard time getting good feedback on the jobs they are doing, because no lawyer will dare complain to them directly. This is particularly true when the cause for complaint is not an evidentiary or procedural objection, but a personal peccadillo. The judge who appears unprepared, or seems inefficient, or looks not to be paying attention during hearings and trials, will never hear that critique directly from a lawyer in the case.<sup>108</sup> Several states have attempted to compensate for this information vacuum with formal, periodic judicial performance evaluations—programs that combine anonymous attorney surveys with courtroom observation, peer review, and relat-

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102. See ALBERT M. KALES, *UNPOPULAR GOVERNMENT IN THE UNITED STATES* 238-39 (1914). But see Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System*, 34 *FORDHAM URB. L.J.* 125, 150 (2007) (suggesting that privileging lawyer expertise on nominating commissions may be in tension with democratic ideals).

103. See, e.g., Lawrence H. Averill, Jr., *Observations on the Wyoming Experience with Merit Selection of Judges: A Model for Arkansas*, 17 *U. ARK. LITTLE ROCK L. REV.* 281, 318 (1994). But see Stephen L. Wasby, *O.T. 1990: The Year of the Judge*, 16 *JUST. SYS. J.* 136, 139 (1992) (arguing that voters are generally unaware of judicial reputation).

104. Karl S. Coplan, *Legal Realism, Innate Morality, and the Structural Role of the Supreme Court in the U.S. Constitutional Democracy*, 86 *TUL. L. REV.* 181, 196 (2011) (discussing judges' concerns about professional reputation).

105. Stephen Kelson, *Judicial Independence and the Blame Game: The Easiest Target Is a Sitting One*, 15 *UTAH B.J.* 14, 17 (2002).

106. See *id.*

107. See *infra* Part III.B.

108. See Young & Singer, *supra* note 35, at 95.

ed analyses to provide judges with constructive feedback on their recent performance.<sup>109</sup> In other states without formal programs (as well as the occasional federal jurisdiction), the state or local bar conducts its own anonymous surveys and shares the information with judges.<sup>110</sup> These programs, however, are neither uniformly dispersed nor of uniform quality. The judge's general reputation as a jurist, by contrast, is available in every legal community and provides a sort of backdoor feedback for the judge that is more easily and consistently available.

In sum, gossip is a necessary, and often healthy, part of civil litigation culture. Evaluative secondhand information both substitutes for direct interaction with a judge, and supplements that interaction, allowing attorneys to form the impressions of judges that color their predictions and related litigation strategies. Gossip even indirectly reinforces cultural norms. But gossip is also an adulterated information source, prone to error and distortion, with which attorneys must grapple. It is to these flaws in secondhand information that I now turn.

### III. THE PERILS OF GOSSIP

Gossip about judges can carry a great deal of social and informational value for litigators, but the extent of that value is ultimately only as good as the quality of the gossip itself. And gossip's quality is hardly assured—even when conducted in good faith, the transmission of secondhand information is naturally prone to a number of cognitive distortions that compromise its accuracy and reliability. This Part identifies those cognitive distortions and describes the methods that attorneys use to ensure that the gossip they hear reflects as accurately as possible a judge's behavior and predilections. Like users of gossip in other contexts, litigators attempt to confirm the validity of new secondhand information by comparing that information to their personal experiences and the relevant experiences of others.

#### A. *Distortion in the Transmission of Information*

The transmission of gossip is fraught with potential accuracy and clarity problems. In any secondhand retelling, both the speaker and the listener have incentives not to transmit (or capture) the entire story within its full context. Rather, both parties are selective users of information. As one set of researchers has explained:

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109. For an overview of these programs, see Kourlis & Singer, *supra* note 29, at 204-05.

110. See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SHARED EXPECTATIONS: JUDICIAL ACCOUNTABILITY IN CONTEXT, at app. A (2006) (discussing unofficial state bar programs); Kourlis & Singer, *supra* note 35, at 15-19 (discussing federal pilot programs).

[I]ndividuals' interaction partners might not find their perception of an individual important or interesting enough to pass on to others. And those who receive secondhand information about an individual might not care enough to pay attention to it and retain it over time. Indeed, receivers of secondhand information listen only selectively to it, which can lead to a divergence in perceptions between the provider and receiver of the information.<sup>111</sup>

Put differently, the transmission of information about another person is colored by the desire of both the teller and the listener for "a good story."<sup>112</sup> And this desire creates both supply-side and demand-side inaccuracy.

On the supply side, speakers often emphasize information about the target person's actions or behaviors and omit or "downplay information about the context in which [those behaviors] took place."<sup>113</sup> Favoring certain details over others is a natural component of storytelling: "[S]tory construction usually involves stretching evidence to conform to the contours of a relatively simple skeleton theme. . . . We must leave out the details that don't fit, and invent some that make things work better."<sup>114</sup> The result is a depiction of the target person that is livelier, sharper, and more memorable, but also lacking in context and background information.

The selective transmission of information about another person is often a conscious decision. A speaker may skew information negatively, as when an attorney seeking to make himself the hero of a war story paints the judge as irrational, incompetent, arbitrary, or "downright unreasonable."<sup>115</sup> An attorney may relate a story about a judge who berated counsel for no apparent reason other than his nasty disposition, omitting that the outburst was caused by the attorney's own lack of preparation, dilatory actions, or disrespect for the court.<sup>116</sup> A speaker may also skew the shared information positively.

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111. Cameron Anderson & Aiwa Shirako, *Are Individuals' Reputations Related to Their History of Behavior?*, 94 J. PERSONALITY & SOC. PSYCHOL. 320, 321 (2008) (internal citations omitted).

112. THOMAS GILOVICH, *HOW WE KNOW WHAT ISN'T SO: THE FALLIBILITY OF HUMAN REASON IN EVERYDAY LIFE* 90 (1991) (quotation marks omitted).

113. Thomas Gilovich, *Secondhand Information and Social Judgment*, 23 J. EXPERIMENTAL SOC. PSYCHOL. 59, 60 (1987).

114. Ian McGregor & John G. Holmes, *How Storytelling Shapes Memory and Impressions of Relationship Events Over Time*, 76 J. PERSONALITY & SOC. PSYCHOL. 403, 403 (1999) (quoting Roger C. Schank & Robert P. Abelson, *Knowledge and Memory: The Real Story*, in 8 ADVANCES IN SOCIAL COGNITION 1, 34 (Robert S. Wyer, Jr. ed., 1995)) (quotations omitted).

115. Joan Humphrey Lefkow, *What Persuades When the Judge Has Discretion?*, 31 LITIG. 21, 22 (2004).

116. See Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1207, 1232 (2012) (listing factors that trigger judicial anger at attorneys).

For example, an attorney may feel loyalty to a judge, developed through previous personal or professional relationships, gratitude for earlier decisions, or social connections. Commentators have identified this fealty as a common phenomenon among a judge's former clerks, but other professional groups such as law professors, legal journalists, and fellow judges have also been shown to cast the judges they admire and socialize with in an unduly positive light. Judges themselves may try to manage their own reputations through these connections, allowing loyal friends and admirers to promote and preserve their positive reputations and challenge or explain away negative perceptions.<sup>117</sup>

A speaker may also transmit selective information about a third person unconsciously and instinctively, to suit the listener's knowledge and attitudes.<sup>118</sup> The social psychologists E. Tory Higgins and William Rholes have termed this phenomenon the "shared reality" effect.<sup>119</sup> They explain:

The communicator is apt to modify the message about the stimulus person to match the listener's attitude, for a number of reasons. One reason is to avoid conflict with the listener. . . . If the stimulus is evaluatively ambiguous (i.e., both favorable and unfavorable labels can be used to encode it), then the communicator is apt to use whichever label is evaluatively consistent with the listener's attitude. For example, if the stimulus person's behavior can be labeled as either "confident" or "conceited," the communicator is apt to label the stimulus person as "confident" when the listener ostensibly likes this person, but as "conceited" when the listener dislikes this person. When the stimulus is evaluatively unambiguous (i.e., either only favorable labels or only unfavorable labels can be used to encode it), then the communicator may omit labeling the stimulus altogether when its evaluative implications are inconsistent with the listener's attitude.<sup>120</sup>

The desire to achieve "shared reality" with any given audience is sufficiently strong that a storyteller may change the message of the story to suit different audiences, even if there is only a brief delay

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117. In this area, the bulk of scholarship has focused on Justice Oliver Wendell Holmes, Jr., whose close relationships both with his law clerks and with like-minded admirers at Washington, D.C.'s so-called "House of Truth" in the early part of the twentieth century facilitated his canonization among the most esteemed members of the American judiciary. I. Scott Messinger, *The Judge as Mentor: Oliver Wendell Holmes, Jr., and His Law Clerks*, 11 YALE J.L. & HUMAN. 119 (1999); Brad Snyder, *The House that Built Holmes*, 30 LAW & HIST. REV. 661 (2012).

118. See E. Tory Higgins & William S. Rholes, "Saying Is Believing": Effects of Message Modification on Memory and Liking for the Person Described, 14 J. EXPERIMENTAL SOC. PSYCHOL. 363, 363-64 (1978).

119. See generally *id.*

120. *Id.* at 364.

between the storytelling opportunities. One study, for example, found that storytellers who shared information on a target person with one audience “significantly modified their messages to suit the attitudinal characteristics of their second audience” after a delay of only fifteen minutes.<sup>121</sup> Put in more concrete terms, a lawyer’s description of a judge to one colleague could differ significantly from that provided to another colleague on the same day, depending on the perceived attitudes of the listeners. One can imagine, for example, a junior litigation partner describing an awkward courtroom experience with a judge in modest and careful terms to a senior partner, but later describing the same experience to a junior associate in a way that makes the junior partner look heroic and the judge look unreasonable. The reaction of the listener, and the power dynamic between the speaker and listener, can change the way the story is remembered and told.

By emphasizing certain characteristics and behaviors of a judge to achieve “shared reality” with an audience, a lawyer can even influence her own memory of the judge and the event. Over time, as details of her original interaction with the judge fade, the lawyer is more likely to recall—and rely upon—the characterizations of the judge that she used most prominently when relaying the story. Thus even a firsthand encounter can become caricatured over time as it is shared with others. In psychological terms, “[o]nce a communicator has labeled a stimulus, the label becomes part of the information recalled about the stimulus, and the stimulus is likely to be reconstructed in recall so as to be consistent with the characteristics of the category designated by the label.”<sup>122</sup>

On the demand side, listeners frequently fail to collect all the information available on a target person, selectively listen to the information that is available, and assimilate the information they do hear into preexisting beliefs about the target person. These distorting behaviors are entirely natural and in some respects cognitively desirable,<sup>123</sup> but they nevertheless compromise the overall accuracy of a gossip-based impression. One common problem is the failure to accumulate sufficient information on a target judge from secondhand sources. We previously saw Attorney Able seeking out information on Judge Jones from several different colleagues, but sometimes a com-

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121. C. Douglas McCann et al., *Primacy and Recency in Communication and Self-Persuasion: How Successive Audiences and Multiple Encodings Influence Subsequent Evaluative Judgments*, 9 SOC. COGNITION 47, 61 (1991) (emphasis omitted).

122. Higgins & Rholes, *supra* note 118, at 364-65.

123. Human beings have a finite and limited capacity to collect and process information about others; we are “cognitive miser[s].” Emler, *supra* note 33, at 178 (quotations omitted).

prehensive search is impractical: the decision to search for and collect new information on a judge may be bounded by time and resource constraints which limit the amount of information the attorney can acquire.<sup>124</sup> While some case events afford attorneys the luxury to carefully research the judge before making critical strategic decisions, others do not.<sup>125</sup> (Consider, for example, a quickly scheduled hearing on a temporary restraining order or preliminary injunction, a dispute requiring judicial intervention during a deposition, or the use of a rotating “motions judge” in state court). The danger of limiting one’s sources, of course, is that the sources that *are* relied upon may not fully or accurately reflect the judge’s true disposition or even the judge’s general reputation in the broader legal community.<sup>126</sup>

Even if multiple sources are consulted, listeners may not always take account of all the information they are told. Lack of focus is one contributor. Lawyers under time pressure, or who face environmental or intellectual distractions while listening to secondhand information about a judge, are less likely to process that information thoroughly.<sup>127</sup> Even without a heightened cognitive load, however, listeners to secondhand information typically fail to situate target behavior in context even when that context is provided.<sup>128</sup> That is, even if the storyteller offers a comprehensive account of the activity and circumstances surrounding the judicial behavior, the listener is prone to tune out many of those details in favor of particular information that (for whatever reason) he deems most relevant.

What the listener considers relevant may itself be driven by a host of natural cognitive biases. One of the most common biases is the primacy effect, whereby the attorney forms an image of the judge based on the first information he receives about the judge (from whatever source), and maintains that image of the judge even after

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124. Steve W.J. Kozlowski & J. Kevin Ford, *Rater Information Acquisition Processes: Tracing the Effects of Prior Knowledge, Performance Level, Search Constraint, and Memory Demand*, 49 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 282, 285 (1991).

125. One study found that the information-seeking behavior of appellate judges is similarly affected by time constraints. Otike, *supra* note 1, at 28 (citing M. M. Hainsworth, *Information Seeking Behavior of Judges of the Florida District Courts of Appeal* (1992) (unpublished Ph.D. thesis, Florida State University)).

126. As one scholar has noted, reputation is best thought of as a “collective phenomenon and a product of social processes, and not as an impression in the head of any single individual.” Emler, *supra* note 33, at 171.

127. Robert S. Baron et al., *Why Listeners Hear Less Than They Are Told: Attentional Load and the Teller-Listener Extremity Effect*, 72 J. PERSONALITY & SOC. PSYCHOL. 826, 836 (1997).

128. *Id.* at 836-37; see also Mary L. Inman et al., *Do We Tell Less Than We Know or Hear Less Than We Are Told? Exploring the Teller-Listener Extremity Effect*, 29 J. EXPERIMENTAL SOC. PSYCHOL. 528, 547-48 (1993).

subsequent information provides contrary evidence.<sup>129</sup> The primacy effect is natural and influences human impressions far beyond the lawyer-judge relationship, but its potential to skew lawyer perceptions of a judge based purely on secondhand information is powerful. A related cognitive bias is the performance cue effect, by which an attorney's expectations about a judge's decisions and behavior (drawn, perhaps, from war stories, media coverage, or the judge's general reputation) color her assessment of the judge's *actual* decisions and behavior. Thus a judge who asks pointed and challenging questions during a motion hearing may be seen as thoughtful, probing, and "tough but fair" by Attorney A (who had received mostly positive secondhand information on the judge) but rude, unfocused, and egotistical by Attorney B (who had received primarily negative secondhand information on the judge). While research into the performance cue effect with respect to attorney ratings of judges has been relatively limited, the effect has been observed in a variety of other professions in which observer assessments play an important role, including higher education,<sup>130</sup> professional and amateur athletics,<sup>131</sup> and medicine.<sup>132</sup>

Collectively, the supply-side and demand-side distortions contribute to a larger "extremity effect," whereby impressions of a third person "become simpler, sharpened, and polarized" as they are transmitted between speaker and listener.<sup>133</sup> In this respect, the transmission of secondhand information about a person is largely indistinguishable from the transmission of a rumor: as it travels, "it tends to grow shorter, more concise, more easily grasped and told."<sup>134</sup> With each subsequent transmission, background information is eliminated or leveled, and remaining details are sharpened to fit and promote the leading motif of the story.<sup>135</sup> The result is that a

129. Inman et al., *supra* note 128, at 547; Tetlock, *supra* note 81, at 286 (citing studies).

130. See, e.g., Bryan W. Griffin, *Instructor Reputation and Student Ratings of Instruction*, 26 CONTEMP. EDUC. PSYCHOL. 534, 547 (2001).

131. See, e.g., Leanne C. Findlay & Diane M. Ste-Marie, *A Reputation Bias in Figure Skating Judging*, 26 J. SPORT & EXERCISE PSYCHOL. 154, 163-64 (2004); David W. Rainey et al., *The Effects of a Pitcher's Reputation on Umpires' Calls of Balls and Strikes*, 12 J. SPORTS BEHAV. 139, 146-47 (1989); John K. Scheer & Charles J. Ansorge, *Effects of Naturally Induced Judges' Expectations on the Ratings of Physical Performances*, 46 RES. Q. 463, 467-68 (1975); R. C. Thelwell et al., *Can Reputation Biases Influence the Outcome and Process of Making Competence Judgments of a Coach?*, 23 SCANDINAVIAN J. MED. & SCI. SPORTS e65, e69 (2013).

132. Sage, *supra* note 34, at 168-69.

133. Daniel R. Ames & Lara K. Kammrath, *When the Dirt Sticks: Negativity in Secondhand Impressions* 3 (Colom. Bus. Sch., Working Paper, 2005); see also Gilovich, *supra* note 113, at 60.

134. Gordon W. Allport & Leo Postman, *An Analysis of Rumor*, 10 PUB. OP. Q. 501, 505 (1946-47).

135. *Id.*

secondhand impression of a person is typically much simpler and “cleaner” than a firsthand impression.<sup>136</sup> Such an impression may be more memorable and vivid, but it also lacks the nuance and situational context that helps explain so many typical human behaviors.

Even if supply-side and demand-side inaccuracy could be avoided, secondhand information is further prone to staleness. Individual war stories, courtroom observations of the judge, and even written opinions capture a specific interaction at a specific moment in time. Even if they accurately reflected the judge’s disposition and personality at that moment, circumstances can and do change. Judging, like any profession, has a learning curve. A newly appointed judge with a purely criminal practice background may need some time to feel comfortable managing civil cases and deciding associated motions. Even a judge who is familiar with a procedure from practice experience may be unusually tentative on some matters early in her judicial career. Judges may similarly need some time to feel out their personalities on the bench: How strictly will they address attorneys? How will they handle scheduling and the use of court staff? What tactics and behaviors will they use to set the tone of their respective courtrooms? A lawyer who interacts with a new judge may later find that the judge’s early actions have changed considerably as she has grown in judicial experience.

Staleness also affects judicial reputation. What once was thought to adequately capture a judge’s professional character and personality may not hold up over time. Put another way, “reputations suffer from neglect” and may diverge from an individual’s actual character unless constantly replenished with “visible behavioural evidence that is consistent with the qualities and identities” the individual currently displays.<sup>137</sup> Moreover, the problem of a mismatch between reputation and reality extends far beyond the judiciary. As one social psychologist put it, “[w]e all know the disappointing experience of having trusted the reputation of a famous tourist spot and, once there, wondering what are we were doing in such an awful place. Reputation is more resilient to time changes than the effective qualities it is supposed to represent.”<sup>138</sup>

As with individual-centered gossip or war stories, a judge’s general reputation in the legal community is a potentially valuable cognitive shortcut for litigators.<sup>139</sup> If reasonably accurate, it allows a

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136. *See id.*

137. Emler, *supra* note 33, at 184.

138. Origi, *supra* note 34, at 412.

139. *See* Emler, *supra* note 33, at 175. Reputation serves as a useful shortcut in social and professional interactions in large part because it allows us to get the gist of a person’s predicted behavior without expending significant time and energy.



lawyer who is unfamiliar with a judge to predict the likely outcome of a professional encounter as if she did know the judge.<sup>140</sup> But the complex social interactions that influence a judge's reputation also pose special problems for lawyers who seek to rely on it. First, research suggests that an individual's reputation is only mildly related to his or her history of behavior.<sup>141</sup> Individuals who are better known in a community (for example, a particularly prominent or socially connected judge) may see a stronger link between reputation and behavior but overall the connection is surprisingly low.<sup>142</sup> Second, even if a community of lawyers as a whole has a complete and updated perception of a judge's reputation, individual lawyers are likely to be missing at least some key information—and it is individual attorneys, not a community “oracle,” that information-seeking lawyers turn to when trying to ascertain information on judges. A lawyer consulted about a judge's reputation can only offer his or her own perception of that reputation—a perception that may be clouded by staleness<sup>143</sup> or personal affinity or dislike for the judge in question.<sup>144</sup>

### B. *Compensating for Distortion*

With so many natural cognitive distortions, it may seem incredible that any information is ever transmitted with a sufficient degree of accuracy to be useful to the listener. And yet secondhand information is used every day—by lawyers and everyone else—with reasonable confidence and typically without ill effects. Lawyers sift through the gossip and other secondhand information they obtain, considering its nature and sources, and comparing it to their existing impressions of a judge. Apparently reliable information is folded into the attorney's overall impression of the judge; unreliable information is discounted or discarded.<sup>145</sup>

The social psychologist Thomas Gilovich has suggested the following four “helpful guidelines” for evaluating the reliability of secondhand claims: (1) consider the source of the claims and that source's expertise or familiarity with the subject; (2) trust facts and distrust projections; (3) be cognizant of sharpening and leveling as

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140. See Garoupa & Ginsburg, *Reputation*, *supra* note 9, at 229; Origgi, *supra* note 34, at 416; Welsh, *supra* note 34, at 134. In this sense, gossip can serve as a viable alternative for direct observation of the judge. See Sommerfeld et al., *supra* note 99, at 17, 435.

141. Anderson & Shirako, *supra* note 111, at 320.

142. *Id.* at 329.

143. Origgi, *supra* note 34, at 412.

144. Most judges care about their professional reputations and will work independently and with supporters to improve or defend their reputations. See *supra* note 117 and accompanying text.

145. See Hilton et al., *supra* note 84, at 548.

information is relayed; and (4) be wary of the testimonial of a single person.<sup>146</sup> Although these guidelines were addressed to public scrutiny of media reports, they apply equally well to scrutiny of gossip about judges. In particular, as applied to litigators, all four of Gilovich's guidelines counsel reliance on sources of information that reflect direct, recent, and preferably repeated interaction with the judge in question. A lawyer who has enjoyed repeated and recent interaction with a judge is less likely when sharing information on that judge to project behavioral attributes from a single encounter, less likely to have stale information, and more likely to appreciate how judicial behavior and reactions may change in different litigation contexts.<sup>147</sup>

Litigation attorneys have many avenues by which to implement Gilovich's recommendations. They seek out information from the most reliable and experienced colleagues they can find. They turn to multiple colleagues to confirm information. Where time permits, they arrive at court at least a few minutes early to observe the judge in action in unrelated cases. They consult reputational and secondary sources on the judge's behavior and decisions. They compare others' war stories against their own personal experience. In short, they look to sources that are tied as closely as possible to another attorney's fresh, direct, and repeated interaction with the judge. The more interaction with a judge a source has had, and the more recent the interaction, the more the source's assessment of the judge is likely to be trusted.

#### IV. THE FUTURE OF GOSSIP IN THE FEDERAL DISTRICT COURTS

Given the central role of repeated, direct interaction between attorneys and judges in improving the accuracy and quality of gossip about judges, both the bench and the bar would be expected to show a deep interest in growing and maintaining high levels of professional interaction. But in fact, face-to-face meetings between judges and attorneys in federal district courts are in steady and significant decline. Moreover, several trends in federal civil litigation are likely to invite further decline in the coming years. Pressure on attorneys to resolve cases early in the litigation process (by motion or settlement) reduces opportunities for lawyer-judge interaction at later stages of litigation. The use of procedural mechanisms to choose or avoid certain judges decreases the number of non-voluntary and non-instrumental interactions between attorneys and judges, especially in courts where

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146. GILOVICH, *supra* note 112, at 109-11.

147. Moreover, lawyers who have had repeated direct interactions with the judge are less likely to have false negative impressions of the judge. See Denrell, *supra* note 80, at 961.

judges are not randomly assigned (or where random assignment can be gamed). Finally, the growth of multijurisdictional civil practice reduces the number of repeated interactions that a litigator may have with a judge in his local legal community.

Together, these trends reflect a classic collective action problem for federal civil litigators. As individual advocates, lawyers act perfectly rationally in avoiding judges with negative reputations by resolving cases early and expanding their practices beyond their local communities. As a group, however, they would benefit from extensive interactions with all members of the judiciary: a multitude of regular interactions should contribute to more robust impressions and judicial reputation, fresher war stories, and the greater availability of contextualized secondhand information about a judge. Furthermore, the drop in direct interaction carries significant consequences for litigators as a group: fewer interactions makes it more difficult for attorneys to monitor the accuracy of judicial reputation and other judicial gossip, rendering accessible gossip less reliable and reliable gossip less accessible.

#### A. *The Changing Face of Attorney-Judge Interaction*

At least in the federal courts, lawyers and judges are seeing fewer and fewer opportunities for repeated, face-to-face professional interaction. One prominent reason: the time allocated to courtroom activity is in steady decline. In Fiscal Year 2012 (FY2012) federal district judges collectively reported spending about 263,000 total hours with parties in open court or their chambers,<sup>148</sup> a drop of nearly nine percent from just four years earlier.<sup>149</sup> The year-over-year decline has been stubbornly persistent since at least Fiscal Year 2008 (FY2008).<sup>150</sup>

Only about 65,000 of the hours reported in FY2012 were dedicated to trials and evidentiary hearings in civil cases,<sup>151</sup> a yearly average of 107 hours per active federal district judge.<sup>152</sup> Assuming ordinary workweeks and vacation schedules, 107 hours a year translates to less than two hours per judge per week in the courtroom on civil trials and evidentiary hearings. An additional 200 or so hours per active judge per year were reported for “other procedural hours” a catch-all category that includes conferences and motion hearings for both civil

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148. Jordan M. Singer & Hon. William G. Young, *Measuring Bench Presence: Federal District Judges in the Courtroom, 2008-2012*, 118 PENN. ST. L. REV. 243, 258 (2013).

149. *Id.* (showing that about 287,000 hours were reported in federal district courts in FY2008).

150. *See id.*

151. *Id.* at 259 fig. 1.

152. *Id.* at 260 tbl. 1.

and criminal matters.<sup>153</sup> Even assuming generously that most of the “other procedural” hours were taken up with civil matters, actual face-to-face interactions between the judge and counsel in civil cases only amounts to about 300 hours per active district judge per year. In fact it is even less per active district judge, because the reported hours include time spent by senior and visiting judges as well. Judge Brock Hornby’s observation that the federal district judge today is more likely to be poring over documents at her desk than adjudicating cases in open court is, unfortunately, empirically supported.<sup>154</sup>

This ongoing decline in “bench presence” (as I have termed it elsewhere)<sup>155</sup> means that both judicial decisions and attorney strategies are less likely to be informed by the exchange of ideas and information that typifies a courtroom hearing. More importantly for purposes of attorney gossip, a decline in bench presence means less opportunity for repeated, sustained interaction between the bench and the bar. Indeed, by definition, fewer total courtroom hours must translate to fewer chances for an attorney to appear before the judge, less time on average during each appearance, or both.

The causes of the drop in total courtroom time are no doubt complex and multifaceted, but the downward trend is consistent and unmistakable. Moreover, in recent years the drop in federal bench presence has proceeded in lockstep with several other trends that likewise reduce opportunities for direct interaction between civil litigators and federal district judges: the push to resolve cases at an early stage in litigation, the reluctance of attorneys to raise issues or otherwise interact with a judge who has a poor professional reputation, and the growth of multijurisdictional civil practice.

### 1. *Pressure to Resolve Cases Early*

Today’s civil litigators are under pressure to resolve their cases at the earliest possible stage. At the federal level, roughly twenty percent of civil cases terminate before any court action, and another seventy percent terminate with court action at the pretrial phase, typically on a dispositive motion or by settlement.<sup>156</sup> Only about one per-

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153. See *id.* at 260.

154. See D. Brock Hornby, *The Business of the U.S. District Courts*, 10 GREEN BAG 2D 453, 462 (2007).

155. See Singer & Young, *supra* note 148, at 247 (defining “bench presence” as “the number of hours a federal district judge spends on the bench, presiding over the adjudication of issues in an open forum”); Young & Singer, *supra* note 35, at 58 (same).

156. Table C-4: U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending March 31, 2013, U.S. CTS., available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/C04Mar13.pdf>; see also Chris Guthrie, *Procedural Justice Research and*

cent of cases actually make it to trial.<sup>157</sup> Pretrial resolution is fueled by a host of considerations, including client concerns about cost and delay,<sup>158</sup> attorney economics,<sup>159</sup> the judicial desire to streamline dockets,<sup>160</sup> discomfort or inexperience with the intricacies of the trial process,<sup>161</sup> and the substantive merits of the case.<sup>162</sup> Assisted by relatively recent changes to the Federal Rules of Civil Procedure and Supreme Court decisions, attorneys have responded to these pressures by using procedural tactics to force a judicial signal on the likely outcome of a case at earlier and earlier stages of the litigation.<sup>163</sup>

There is nothing inherently wrong with a decision to resolve a case short of trial, especially if the likely outcome is easily predictable.<sup>164</sup> The regular termination of cases before trial, however, does have consequences for both the quantity and quality of lawyer-judge interaction. Imagine, for example, that Attorney Able represents a

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*the Paucity of Trials*, 2002 J. DISP. RESOL. 127, 128-29 (describing the breakdown of federal civil terminations in FY2000).

157. See, e.g., Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1256-57 (2005); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004). The trends are similar in state courts; see also LYNN LANGTON & THOMAS H. COHEN, CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005, at 1 (2009), available at <http://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf>; Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976-2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 762-63 (2004).

158. See, e.g., Paul R. J. Connolly & Sandra Smith, *The Litigant's Perspective on Delay: Waiting for the Dough*, 8 JUST. SYS. J. 271, 274-77 (1983); Daniel W. Shuman, *When Time Does Not Heal: Understanding the Importance of Avoiding Unnecessary Delay in the Resolution of Tort Cases*, 6 PSYCHOL. PUB. POL'Y & L. 880, 886-95 (2000).

159. For example, attorneys paid through contingency fees watch their effective hourly rates plummet as the case moves on: one study found that the mean effective hourly rate for lawyers working on contingency fell from \$589 for cases resolved without any court action to \$141 for cases resolved during or after trial. Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L.Q. 739, 791 tbl. 10a (2002).

160. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (decrying settlement as a "highly problematic technique for streamlining dockets"); Hillel Y. Levin, Iqbal, Twombly, and the Lessons of the Celotex Trilogy, 14 LEWIS & CLARK L. REV. 143, 145 (2010) (suggesting that doctrinal changes to both motions to dismiss and summary judgment standards were driven in significant part by concerns about docket management).

161. See Tracy Walters McCormack & Christopher John Bodnar, *Honesty is the Best Policy: It's Time to Disclose Lack of Jury Trial Experience*, 23 GEO. J. LEGAL ETHICS 155, 165 (2010).

162. See, e.g., Edward Labaton, *A View From the Trenches*, 38 ARIZ. L. REV. 513, 514 (1996) ("The merits are indeed the most critical element in a settlement.").

163. See Nagareda, *supra* note 42, at 660-81 (identifying doctrinal developments since 1986 that have steadily pushed merits determinations and related judicial signals to earlier and earlier stages in litigation).

164. The well-known literature on this point circles around the seminal 1984 piece by Priest and Klein. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 14-15 (1984); see also ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 71-76 (2003) (describing the basic economic model of settlement).

defendant manufacturer in a small product liability suit. An initial examination of the allegations and a discussion with the client convinces Able that the case lacks merit, so she decides to file a motion to dismiss with the court. In conversations with the client, Able concludes that if the motion to dismiss is unsuccessful, the best move is to try to settle the case for nuisance value. While dismissal is plainly the preferred outcome, either outcome would end the annoyance of the case for the client in relatively short order (Able's reasoning places her in good company; one recent study found that seventeen percent of federal cases in which a motion to dismiss was denied nevertheless settled within thirty days of the court's ruling).<sup>165</sup> This strategy may be a good one for the client and for the specific case, but it comes at a cost: Able's only direct interaction with the presiding judge in the case is likely to come at a hearing on the motion to dismiss. Moreover, because Able's interaction with the judge will come so early in the case, she will have only a thin expectation of how the judge might behave in later stages of litigation. The weakness of that impression will have no bearing on the instant case, but it will render Able at least marginally less familiar with the judge, and thus marginally less effective, the next time she appears before him. Moreover, her value to other lawyers as a source of gossip about the judge is also at least marginally less effective as a result of the early case termination: a colleague trying to get a good handle on what the judge is like might be confident in Able's description of his handling of the motion to dismiss, but far less confident in extrapolating that description to the discovery, summary judgment, or trial phases.

The lost opportunity for Able to collect more evidence about the judge through direct interaction is unlikely to merit any real consideration in her overall decisional calculus for the case before her. Indeed, no lawyer would tell a client that she needs to prolong the case to learn more about the judge for the benefit of future interactions, especially on the client's dime. But when such decisions are multiplied by hundreds of thousands of cases every year, the marginal effect becomes substantial. Early case resolution, no matter its immediate and particularized benefits, robs lawyers of opportunities to know judges better, which in turn leads to less robust mental models of judges, weaker predictions, and less confidence in other attorneys' secondhand information.

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165. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21ST-CENTURY ANALYSIS 7 (2009).

## 2. *Experience Sampling and Judge-Shopping*

As a group, lawyers would benefit from more interactions with judges, since additional opportunities to observe a judge's behavior are more likely to improve the overall accuracy of the community's evaluation of the judge.<sup>166</sup> At the same time, no individual attorney wants to appear before a judge whose actions or decisions are predicted to provide a bad outcome for the client.<sup>167</sup> Typically, the interests of the client win out over those of the bar. If an attorney has had a bad experience with a judge, or has heard that others have had bad experiences, the attorney will try to avoid future interactions with that judge, either by seeking another forum or by preventing issues from being placed before the judge for decision.

Lawyers have at their disposal a variety of formal and informal procedures to sidestep judges whom they believe to be undesirable. Plaintiffs with several venue options can steer away from courts with judges thought to be unfriendly, and toward courts with more sympathetic jurists.<sup>168</sup> In some circumstances—most notably in bankruptcy and patent cases—the reputation of a court or even a particular judge has led to repeated and unmistakable forum-shopping.<sup>169</sup> In another well-known tactic, attorneys try to game the assignment process by waiting outside the clerk's office until a desired judge is next in line for a new case.<sup>170</sup> Once a case is filed, defendants may attempt to change the judge through transfer, disqualification, or (if originally in state court) removal.<sup>171</sup> Plaintiffs and defendants are also increasingly turning to arbitration and other forms of alternative dispute resolution, giving them much greater control over the identity of the

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166. See Denrell, *supra* note 80, at 953.

167. See *id.* at 952.

168. See Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79, 80 (1999); Gita F. Rothschild, *Forum Shopping*, 24 LITIG. 40, 42 (1998).

169. See, e.g., Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967, 984 (1999) (discussing bankruptcy filings in the Southern District of New York in the 1980s); Yan Leychkis, *Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the Eastern District of Texas as a Preeminent Forum for Patent Litigation*, 9 YALE J.L. & TECH. 193, 202 (2007) (discussing patent filings); Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357, 1392-93 (2000) (discussing bankruptcy filings in Delaware in the 1990s).

170. See Weyman I. Lundquist, *The New Art of Forum Shopping*, 11 LITIG. 21, 22 (1985); Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 296 (1996).

171. Such practices are risky and require follow-up investigation: if a motion to transfer, remove, or disqualify is successful, what is the risk that the replacement judge will be even less desirable? See James J. Ferrelli, *Why—or Why Not—Federal Court? (Be Careful What You Ask For)*, N.J. LAWYER, Feb. 2004, at 6-7.

decision-maker and effectively allowing them to pick their own private judges.<sup>172</sup>

Even when forum shopping is not possible or practical, the initial belief that a judge is likely to be unsympathetic to a party's position has real-world consequences. In the most extreme scenario, a putative plaintiff with a potentially meritorious claim may choose to forgo filing a lawsuit altogether, reasoning that the high risk of an unfriendly judge coupled with the high cost of prosecuting the case is simply not worth the time, energy, expense, or humiliation.<sup>173</sup> Alternatively, the plaintiff may file the case but leave out complex or novel claims—notwithstanding their merit—for fear of confusing or annoying the judge.<sup>174</sup> The defendant may do the same for novel or complex defenses. In less extreme scenarios, a party may choose to maintain the case in front of the judge but not raise certain issues during the pendency of the litigation—for example, by declining to file a motion to compel discovery if the judge is thought to be hostile to discovery disputes. On the other hand, a party may use cost, delay, or extralegal strategies to pressure the other side into settling the case before the judge is directly faced with resolving the substantive issues.<sup>175</sup> These consequences of such avoidance strategies are difficult or impossible to track empirically, but the anecdotal evidence of such behavior is strong.

The desire to avoid certain judges, and gravitation toward others, is known as experience sampling and is common in a wide variety of social and professional settings.<sup>176</sup> Like most people, lawyers naturally base future interactions with others on past impressions.<sup>177</sup> Such decisions may be quite rational—after all, the litigator wants to maximize the client's chance of winning. But experience sampling also makes it less likely that the judge will be able to correct a false negative impression: if a lawyer already thinks poorly of a judge, and is able to avoid that judge in the future, there will be no countervailing opportunities for the judge to demonstrate that the lawyer's impression is incorrect.<sup>178</sup>

The risk of selection bias resulting from experience sampling is especially high for new trial judges, most of whom lack prior judicial experience and many of whom can claim relative expertise only in

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172. Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1889, 1900 (1997).

173. See Steven Lubet, *Bullying from the Bench*, 5 GREEN BAG 2D 11, 15 (2001).

174. See *id.*

175. LoPucki & Weyrauch, *supra* note 45, at 1457-61.

176. See Denrell, *supra* note 80, at 951-52.

177. See *id.* at 953.

178. See *id.* at 951.



certain areas of criminal or civil law before ascending to the bench.<sup>179</sup> There is a steep learning curve associated with being a new judge, not just in quickly gaining familiarity with a wide range of rules and substantive doctrine, but also in finding one's voice and temperament on the bench. New judges may initially adopt a judicial style that is too harsh or too lenient for their respective personalities, and require some time to settle into their new public personae. A new judge's initial docket is also frequently composed of cases cast off by more experienced judges, which may involve complex facts or law, quarrelsome parties, or long-pending motions.<sup>180</sup> A new judge, then, must make her early reputation under highly challenging circumstances. If the judge succeeds, she will gain a strong reputation and will be sought out by attorneys going forward. But if her first year on the bench reflects relative delay, incompleteness, or harsh temperament, the resulting negative reputation may prove hard to overcome even if the judge's efficiency and demeanor change markedly in subsequent years.

One bulwark against experience sampling is to make it difficult or impossible for attorneys to select certain judges. "If individuals cannot voluntarily choose their future interaction partners . . . impressions based on previous interactions cannot influence the probability of future interactions."<sup>181</sup> Moreover, "a higher probability of non-voluntary or noninstrumental interactions implies a higher average evaluation" of judges.<sup>182</sup> To this end, most federal district courts have implemented random assignment systems to prevent egregious judge-shopping by lawyers and parties.<sup>183</sup> But as noted above, random assignment systems can be overcome or manipulated.

At bottom, the individual interest of attorneys to avoid a particular judge in a particular case outweighs the collective interest of attorneys to increase the level of direct interaction between bench and bar. Although a greater number of interactions in a greater number of settings are more likely to increase the accuracy of lawyers' impressions of judges, no lawyer is willing to sacrifice his client's posi-

179. See, e.g., Hon. Mary Vasaly, *Training the New Judge*, 68 BENCH & B. MINN. 26 (2011).

180. See, e.g., Comm. on the Fed. Courts of the Ass'n of the Bar of N.Y.C., *Article of Special Interest Report Evaluating the Individual Assignment System in the Southern District of New York After Three Years' Experience*, 69 F.R.D. 497, 506 (1976).

181. Denrell, *supra* note 80, at 953.

182. *Id.* at 956.

183. *Frequently Asked Questions: Federal Judges*, U.S. CTS., <http://www.uscourts.gov/Common/FAQS.aspx> (last visited Nov. 8, 2014) (noting that "[t]he majority of [federal district] courts use some variation of a random drawing" to assign new cases). Interestingly, some courts have undermined their own random assignment systems by allowing judges to accept later-filed "related" cases or by declining to preside over certain types of cases. Katherine A. Macfarlane, *The Danger of Nonrandom Case Assignment: How the Southern District of New York's "Related Cases" Rule Shaped Stop-and-Frisk Rulings*, 19 MICH. J. RACE & L. 199, 203 (2014).

tion in a given case for the collective good of the bar. The result is that lawyers who are assigned to judges of whom they have poor impressions are more likely to settle the case quickly, move the case to another venue, or turn to private dispute resolution. In any event, the bar's ability to learn from more interactions with the bench is compromised.

### 3. *The Growth of Multijurisdictional Litigation*

Finally, there are declining opportunities for lawyers and judges to engage with each other *repeatedly* across a variety of cases. Like any relationship, judge-lawyer relationships are made more nuanced and robust through repeated interactions. A single encounter over, say, a motion to dismiss may not provide a very good template for predicting each side's expectations and level of preparation on future motions to dismiss. That same encounter may be even less useful in predicting each side's expectations on different procedures such as discovery motions or evidentiary hearings. Lawyers who see the same judge in different settings can better anticipate the things that the judge will find important, and structure their evidence and arguments accordingly. Put slightly differently, "[t]he sophisticated, well-resourced, or repeat player—that is, the 'insider'—may be expected to have an advantage when it comes to anticipating what it means to have a certain judge in the case."<sup>184</sup>

Because criminal law is more localized, prosecutors (and perhaps to a slightly lesser extent criminal defense lawyers) regularly appear in front of the same judges and can better appreciate each judge's rhythms, interests, and quirks.<sup>185</sup> So, too, may civil litigators in specialized state courts come to know their local judges by virtue of regular practice there. And certainly the same is true for *some* federal civil litigators, especially those whose practice involves local clients and repeated filings in the same court. But federal civil litigation in particular is also more prone to the challenges of multijurisdictional practice. Increasingly, lawyers in private practice are called upon to

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184. Huang, *supra* note 20, at 1363.

185. As one set of scholars notes, a criminal case is typically processed by an intimate "courtroom workgroup" consisting of judges, prosecutors, defense attorneys, court clerks, and bailiffs who work together—and feed off of each other—in processing a criminal charge; as a result, a criminal defendant "confronts an organized network of relationships, in which each person who acts on his case is reacting to or anticipating the actions of others." JAMES EISENSTEIN & HERBERT JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* 10 (1991); *see also* PETER F. NARDULLI ET AL., *THE TENOR OF JUSTICE: CRIMINAL COURTS AND THE GUILTY PLEA PROCESS* 39-41 (1988) (introducing the idea of the "courthouse community" in local criminal law, which "includes not only those actors who regularly interact with one another in the disposition of criminal cases, but also the structure of communication patterns among the actors").

travel to and represent their clients in jurisdictions in which they do not regularly practice and may not even be admitted to practice.<sup>186</sup> Lead counsel in a case is more likely to not be from the same legal community as the judge.<sup>187</sup> Even though state and federal courts typically require attorneys appearing before them to have bar admission or be accompanied by a local counsel of record if admitted *pro hac vice*,<sup>188</sup> an out-of-town attorney is likely to have a lower level of familiarity with the judge than if that attorney had been in regular practice in the jurisdiction. Attorneys with national clientele may be highly competent and highly experienced, but they are at a natural disadvantage walking into a courtroom in which the presiding judge is completely or relatively unknown. While it is impossible to quantify, there are surely thousands of e-mails and phone calls exchanged between attorneys each year to the effect of “what do you know about Judge X?”<sup>189</sup>

Opportunities for judge-lawyer interaction are increasingly limited not only across cases but also within them. Part of this is due to the way that federal pretrial litigation is currently structured. Federal district courts use an individual calendaring system which typically keeps a case in front of a single district judge,<sup>190</sup> but even then magistrate judges and special masters frequently handle the bulk of discovery disputes and occasionally other non-dispositive motions. While this approach may (or may not) be more efficient for the courts and parties, one effect of this division of labor is that attorneys have less interaction with the district judge before they raise substantive legal or evidentiary issues with the court.

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186. See Robert A. Creamer & Thomas P. Luning, *An Introduction to the New Illinois Rules of Professional Conduct*, 17 CBA REC. 25, 27 (2003) (noting that “the work of the ABA’s Commission on Multijurisdictional Practice showed that a growing number of lawyers regularly represent clients in connection with transactions and litigation that take place in jurisdictions where the lawyers may not be admitted”); see also Randall S. Thomas, *What Should We Do About Multijurisdictional Litigation in M&A Deals?*, 66 VAND. L. REV. 1925, 1935 (2013) (noting that multijurisdictional litigation in the M&A field “has grown . . . dramatically in recent years”).

187. See, e.g., EDWARD P. WELCH & SARAH RUNNELLS MARTIN, MULTI-JURISDICTIONAL LITIGATION: SOME PRACTICAL THOUGHTS AND SOLUTIONS 1 (2012), available at <http://www.skadden.com/insights/multi-jurisdictional-litigation-some-practical-thoughts-and-solutions>.

188. See Clint Eubanks, *Can I Conduct This Case in Another State? A Survey of State Pro Hac Vice Admission*, 28 J. LEGAL PROF. 145, 148-50 (2004).

189. See Mauet, *supra* note 20, at 14 (recommending, in the context of “know[ing] your judge,” that attorneys “[a]sk other members of your firm and lawyer friends about their experiences with the judge in your kind of case”).

190. By contrast, many state courts employ a central assignment or “master calendar” system in which rotate judges through divisions, meaning that many different judges may handle motions or conferences related to a single case. Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1053 (1995).

### *B. The Commodification of Gossip*

The trends described above do not mean that attorney-judge interaction in the federal district courts will drop to zero or that the robust courtroom practice that many attorneys do experience will necessarily dwindle. But they do suggest that personal knowledge gained from repeated direct interaction with judges will become increasingly concentrated in the hands of a smaller cluster of active local litigators. That is, there will be many civil litigators who have little or no face-to-face dealings with judges and a handful of civil litigators who know the judges and their courts very well. For both groups, gossip about judges is apt to become a more valuable commodity: those without direct knowledge will rely more heavily on gossip in the increasingly rare circumstances they do face a judge, and those with extensive direct knowledge will find that their experiences and insight are valued in the marketplace. This eventual commodification of gossip about judges suggests two additional consequences: the gossip that remains accessible in the wider legal community will be less complete and less reliable, and the gossip that reliably and accurately reflects the judge's tendencies will be less accessible to all but a small, elite group of litigators.

#### *1. Accessible Gossip Will Become Less Reliable*

As discussed in Part III, the transmission of gossip is prone to a number of cognitive distortions. Since accurate impressions of judges are so important to litigators' predictive work, attorneys compensate for these distortions by seeking out information from multiple secondhand sources and giving preferential treatment to sources that reflect direct, recent, and preferably repeated interaction with the judge in question. In particular, regular, direct interaction between the bench and bar enhances the reliability of secondhand information about judges by combating staleness, providing points of comparison for individual war stories, and generally providing additional context to help confirm or disconfirm an attorney's developing impression of the judge. Direct interaction also lessens the power of the extremity effect: while any given story becomes sharper and more polarized with each retelling, a multitude of stories about the same judge enables a thoughtful listener to reconcile inconsistencies and develop a more nuanced impression of the judge.

A decline in direct interaction between judges and lawyers undoes much of this important reconciliatory work. Fewer face-to-face meetings between judges and lawyers translates to fewer new evaluative moments and fewer fresh waves of secondhand information. The gossip that remains is increasingly stale; even if both teller and listener attempt to place the judge's action in context, that context is dated

and is less certain to reflect the judge's current practices and proclivities. Fewer waves of new information also prolong the lifespan of stale gossip, as attorneys seeking additional information turn to older stories about the judge to confirm or disconfirm their impressions. Every new retelling of older gossip, however, contributes to the extremity effect, with the recalled (and retold) information becoming sharper, more decontextualized, and typically more negative with each repetition.<sup>191</sup> Even if attorneys continue their efforts to seek out multiple sources of information on a judge when forming their impressions, the quality of the available information will be degraded by the collective decline in attorney-judge interaction.

A drop in direct interaction between judges and lawyers carries another consequence for the validity of secondhand information: a decline in social connectedness between bench and bar. Studies have shown that secondhand information (particularly in its reputational form) more accurately reflects a person's behavioral history when there is a high level of social connectedness within the relevant community.<sup>192</sup> As firsthand interactions between attorneys and judges decline, so does the social connectedness between bench and bar. The result is judicial reputations that are further removed from actual judicial behavior and more susceptible to the leveling and sharpening effects that already characterize secondhand information. Put another way, when direct interaction is absent, the sensational aspects of secondhand stories take on greater prominence and overall accuracy suffers. More extreme perceptions of a judge may lead to more decisions to forgo bringing cases or motions before that judge, further limiting interaction opportunities and creating a vicious circle of distorted beliefs.

Finally, and relatedly, a decline in bench-bar interaction compromises the vitality of the legal community's collective values. Stale or attenuated information on encounters with judges hinders the healthy acculturation of new attorneys in the community and may also establish inaccurate or unrealistic expectations of the judges in that community. If judges' reputations are grounded in stale encounters and ossified expectations, both litigators and judges may be disappointed.

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191. See generally AMES & KAMMRATH, *supra* note 133, at 20-21 (noting negativity and transmission effects of secondhand retellings); Inman et al., *supra* note 128, at 547 (noting tendency of listeners to rate target person more negatively than tellers).

192. See Cameron Anderson & Aiwa Shirako, *The Origins of Reputation: Behavior, Visibility, and Personality* 35-36 (Inst. for Research on Labor and Emp't, Working Paper No. 153-07, 2007); see also Cameron Anderson & Gavin J. Kilduff, *The Pursuit of Status in Social Groups*, 18 CURRENT DIRECTIONS IN PSYCHOL. SCI. 295, 297 (2009).

## 2. *Reliable Gossip Will Become Less Accessible*

Accurate mental models rely on direct interaction and gossip working in tandem. Repeated interaction is key, which is why the most robust mental models in legal communities are often associated with high levels of direct interaction and a close-knit gossip community. Indeed, it has been suggested that repetition of interaction contributes to the emergence of local legal cultures and has “a profound impact on their strength.”<sup>193</sup> Attorneys who operate in courts and legal communities where direct interaction and repetition are possible carry an advantage when it comes to understanding how those courts and individual judges operate.<sup>194</sup>

For some lawyers with a significant federal civil practice, that advantage is likely to be significant enough to buck the general trends away from regular attorney-judge interaction. For these lawyers, regular interaction remains a highly valuable strategic resource. They are able to form more complete impressions of each judge and his or her inclinations and behaviors, which enhances their ability to predict outcomes and judicial responses. Moreover, as this specialized knowledge becomes more limited, it becomes more valuable in the marketplace. Clients who anticipate going to trial—or even hanging their cases on a dispositive motion—will highly value lawyers who hold the metaphorical keys to the judge’s thought processes. Accurate and thorough impressions of judges, in other words, will be an increasingly rare and valuable commodity. Lawyers with this specialized knowledge accordingly will be less inclined to share it (in the form of gossip) with other lawyers or similar interested parties. When it is shared, it will be shared at a price.

The commodification of gossip poses important access to justice issues. Parties who cannot afford or otherwise gain access to a lawyer who is a judicial “insider” will often be at a comparative disadvantage. Indeed, at the extremes it threatens to create two classes of lawyers, roughly akin to the British system of solicitors and barristers—one group of lawyers will take cases in the expectation of resolving them well before trial, and a small group with specialized knowledge of judges will take cases in the expectation of resolving them in court.

Even without an extreme scenario, however, something important is lost when fewer attorneys have a strong sense of their local federal judges. Gossip stops being a meaningful supplement to attorney-judge interaction and increasingly becomes purely a substitute for that interaction. Strategic litigation decisions are based less on direct

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193. See McNeal, *supra* note 37, at 211.

194. *Id.* at 216-17.

experience, and more on reputation and rumor. For attorneys, this state of affairs makes prediction more difficult and resulting strategies at least marginally less effective. For judges, it threatens to make reputations and rumors about judicial behavior sharper and more negative than reality reflects.

## V. TOWARD BETTER GOSSIP

The trends that pull federal civil litigators away from regular, repeated courtroom interaction with judges are unlikely to ebb anytime soon. Early case resolution, multijurisdictional practice, and selective judicial avoidance each make sense from the strategic perspective of an individual case or client. Moreover, as these practices become more commonplace, they also become more entrenched. The current generation of young attorneys is increasingly comfortable with defining themselves as “litigators” rather than “trial lawyers”—with relative expertise in handling written briefing, discovery, and settlement, and relative non-expertise in oral argument, evidentiary objections, and trial techniques. As attorneys grow more comfortable with the court playing only a peripheral role in the actual resolution of disputes, the need to appear before a judge will seem less and less necessary. For some judges as well, a drop in interaction with attorneys may not be viewed as a bad thing—fewer hours spent listening to discovery disputes or hearing a lawyer simply rehash his brief at oral argument means more hours available to resolve motions or write opinions and orders in chambers.

Still, lawyers and judges should be deeply concerned about the continuing drop in professional interaction between bench and bar. For attorneys, a drop in interactions with judges means fewer opportunities for a judge to signal likely outcomes, fewer chances to build impressions of judicial demeanor and behavior based on personal observation, greater reliance on the observations and evaluations of others, and less confidence in predictions involving discrete case events. For judges, a drop in interactions with attorneys means fewer opportunities to showcase typical management and jurisprudential approaches, fewer chances to signal possible outcomes and preferences to counsel, and greater risk that one’s own reputational legacy is caricatured by natural operation of the extremity effect. Both lawyers and judges, then, have much to gain by maintaining a strong level of direct interaction—interaction that contributes to a healthy flow of fresh, contextualized secondhand information. The remainder of this Part begins to briefly sketch out some steps—some simple, some more intensive—to restore a healthy level of direct interaction and prevent the degradation of the quality and availability of secondhand information.

### A. *Strategies for Judges*

The extremity effect poses a particular challenge to the legitimacy of courts and individual judges. A negative judicial reputation not only influences attorneys, but also policymakers and the general public. A state judge who (fairly or unfairly) develops a reputation as biased, ideologically driven, incoherent, or unprofessional will find it more difficult to be reelected or reappointed to the bench.<sup>195</sup> A federal judge with the same reputation faces no risk of electoral retribution but may be less likely to be promoted within the judiciary.<sup>196</sup> Controlling one's own professional reputation is notoriously difficult.

But trial judges in particular have an easy mechanism for increasing direct interaction with attorneys and avoiding the most substantial risks of polarized reputations—encouraging more live hearings and trials.<sup>197</sup> It certainly can be done. Notwithstanding the national decline in both total courtroom hours and hours devoted to civil matters, several federal districts were able to raise their own hours in these areas between 2008 and 2012.<sup>198</sup> Even telephone and videoconferences provide some form of direct conversation between judges and attorneys and provide a regular source of fresh information by which attorneys can develop their impressions of the judge.<sup>199</sup> Nor is there any strong empirical evidence that deciding issues at or following a hearing is less efficient than deciding those issues on the papers; indeed, some studies have suggested that hearings are associated with the *faster* disposition of both discovery and dispositive motions.<sup>200</sup> By scheduling and encouraging more proceedings in the courtroom, judges provide countless additional opportunities for lawyers to interact with and observe them (and vice versa), all without provoking a decline in the judge's administrative efficiency.

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195. See Singer, *supra* note 35, at 1459.

196. See Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 7 (1993).

197. From FY2008 to FY2012, for example, the Eastern District of California and Eastern District of New York averaged more than 700 hours per active judge per year in the courtroom, upward of 150% of the national average. Singer & Young, *supra* note 148, at 262, tbls. 1-2.

198. A comparison of the relevant internal Administrative Office statistics shows that 10 of the 94 federal districts raised their overall courtroom time by at least 20% in FY2012 over FY2008, and 26 of the 94 districts raised their civil trial hours by at least 20% in the same period. Compare Administrative Office of the U.S. Courts, Table R-11, Total Hours Activity Report for the 12-Month Period ending Sep. 30, 2008 (on file with author), with Administrative Office of the U.S. Courts, Table T-8, Total Hours Activity Report for the 12-Month Period ending Sep. 30, 2012 (on file with author).

199. See Gensler & Rosenthal, *supra* note 40, at 861; see also Steven S. Gensler & Lee H. Rosenthal, *Measuring the Quality of Judging: It All Adds Up to One*, 48 NEW ENG. L. REV. 475, 486-90 (2014).

200. See Singer & Young, *supra* note 148, at 271-76.



Judges should also consider videotaping a representative sampling of hearings and trials and posting those videos on their court website for attorneys to access. This approach—already underway as part of a voluntary pilot program in fourteen federal district courts—permits attorneys who have not already interacted with the judge to observe the judge’s adjudicative style directly from any location at any time.<sup>201</sup> Alternatively, judges might work with the bar to develop a formal database of hearing and trial transcripts, thereby allowing attorneys to search for and review each judge’s approach to pretrial procedures, evidentiary questions, and substantive legal issues. Databases of videos and transcripts effectively create a “Judges on Demand”<sup>202</sup> library that can serve as educational and interpersonal tools for lawyers who are new to the judge’s courtroom.

### *B. Strategies for Lawyers*

Some attorneys may jump at opportunities for more direct interaction with judges and would be easily amenable to judges encouraging more live proceedings. But even those litigators who dislike courtroom interaction, or who favor it in principle but are constrained by the pressures for early resolution to avoid it in practice, should be incentivized to improve the quality of secondhand information about judges that is shared within the legal community. That is, lawyers should be made aware of the natural cognitive biases that affect the transmission of secondhand information, and should embrace personal accountability for transmitting and receiving that information as completely and fairly as practicable.

As noted in Part III, litigators already have a heightened incentive to process secondhand information on judges carefully. Relying on one or two sources, especially those of questionable reliability, might lead to an inaccurate impression of the judge and an inaccurate prediction of the judge’s likely response. But that heightened incentive is largely the result of intuition; most lawyers are presumably unaware of the specific nature of the extremity effect, the “shared reality” effect, or the propensity of both speaker and listener to omit contextual details. Educating lawyers about these specific cognitive biases might further encourage them to collect as much information as possible on a judge before engaging in predictions—especially if the preliminary information gathered leads to a negative first impression. Under-

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201. See *Judicial Conference Committee on Court Administration and Case Management Guidelines for the Cameras Pilot Project in the District Courts*, U.S. CTS., <http://www.uscourts.gov/uscourts/News/2011/docs/CamerasGuidelines.pdf> (last visited Nov. 8, 2014). Videos from the pilot are available at <http://www.uscourts.gov/Multimedia/cameras.aspx>.

202. I am indebted to Judge William Young for this phrase.

standing the nature of cognitive bias would also benefit attorneys as information presenters; while no transmission of secondhand information would perfectly capture the reality of a direct experience with the judge, heightening awareness of the natural biases inherent in transmission may provide further incentives for lawyers to share information as completely and fairly as they know how.

Of course, even perfect awareness of transmission bias will not alleviate all distortion in judicial gossip. Cognitive limitations and human emotion will always come into play. A lawyer who received a verbal “benchslap” from an angry judge may never share that experience with colleagues, or if it is shared the lawyer is unlikely to divulge that his own behavior, language, or unpreparedness sparked the judge’s response. Moreover, people are naturally social beings and storytellers—litigators all the more so. A good story never provides full and even-handed context; it highlights the most interesting and controversial parts. But even if heightened awareness of transmission bias leads to *marginally* heightened accountability among all lawyers in a community, secondhand information about judges will be better for it.

Moreover, where judges do not receive public evaluations, lawyers might want to periodically conduct their own judicial evaluations as a means of formally and transparently assembling their collective knowledge and experience with the local judiciary. Many local and state bars have polled their members from time to time,<sup>203</sup> seeking Likert scale-type assessments of the judge’s knowledge of the law, clarity of communication, courtroom demeanor, demonstrated impartiality, and similar issues related to procedural fairness.<sup>204</sup> While bar polls lack the comprehensive scope of state-sponsored evaluations,<sup>205</sup> they nonetheless offer several important opportunities to lawyers interested in forming robust and nuanced impressions of judges. First, bar polls are less prone to some of the transmission biases that occur in direct conversation between lawyers; a lawyer responding to a series of well-constructed questions cannot slip into “shared reality” or prioritize certain details as easily as she can in natural conversation. Second, bar polls may provide a more formal sense of the judge’s reputation in the community, which serves both as a meaningful starting point for lawyers who have never encountered the judge and as a useful point of comparison for lawyers who have encountered the

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203. See *supra* note 110 and accompanying text.

204. See, e.g., *Judicial Performance Evaluation (JPE)*, N.C. B. ASS’N, <http://www.ncbar.org/members/committees/jpe/> (last visited Nov. 8, 2014). A sample survey used by the North Carolina Bar can be found at <http://www.ncbar.org/media/13009240/jpesurveysample.pdf>.

205. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 110, at 61-63.

judge and have an existing impression. Finally, thoughtfully constituted bar polls (as well as more formal evaluations) may benefit the judges themselves, by providing a clearer snapshot of their respective reputations within the local legal community. Judges who are surprised with, or concerned about, the information contained in the bar polls can modify their own behavior and actions in response or address misunderstandings within the bar directly. This is especially the case if bar polls are paired with court metrics like average disposition times and bench presence data, thereby providing a chance to compare and contrast subjective reputation with objective information.

### *C. Strategies for Law Schools*

Even though it is the most open of secrets, practicing attorneys may be reluctant to have a candid conversation about the ways in which they share and use secondhand information on judges. If practitioners are unwilling to discuss the issues directly, perhaps law schools should. Professional responsibility classes rarely emphasize the psychological and cognitive aspects of lawyering, although such issues are directly relevant to client relationships, litigation and negotiation skills, and general professional judgment.<sup>206</sup> Law schools might consider integrating a unit on the psychology of professional decision-making into one or more courses generally and a unit on the psychology of litigation strategy into litigation-oriented courses. Exposing law students to the notion that they can learn about judges by seeking out secondhand information from colleagues, and how they may process and prioritize that information in light of natural cognitive biases, might create a more self-aware generation of litigators who are more motivated to improve the quality of the interpersonal information they share.

## VI. CONCLUSION

Gossip about judges is a rich source of information for litigation attorneys. Evaluative secondhand information about a trial judge helps an attorney predict outcomes of legal arguments or litigation tactics by virtually previewing the judge's reaction to those arguments and tactics. But gossip is only useful to the extent it is accurate and reliable. Bad gossip—which heavily distorts perceptions of the judge's previous actions and behaviors—has no beneficial predictive value.

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206. This may be beginning to change, in part due to the emergence of some excellent and accessible materials on these issues. *See, e.g.*, PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICY MAKERS (2010).

Attorneys already examine the gossip they receive for certain indicia of accuracy and reliability. They compare this secondhand information to their own firsthand experience with the judge. They consider the trustworthiness of the gossip's source. And they take into account how recently the events that spurred the gossip transpired. These vetting tools all fundamentally focus on the same question: How closely does secondhand information from the past reflect what an encounter with the judge would be like today? The more the secondhand source reflects recent, direct interaction with the judge, the more likely the attorney will credit the secondhand information in building a prediction model.

Certain trends in civil litigation, however, are threatening the quality of even carefully vetted gossip about judges. Attorneys are making strategic choices that deny them fuller opportunities to interact with judges in court, and direct interaction between bench and bar is in decline. If current trends continue, generally accessible gossip will become more important for most attorneys even as it becomes less reliable. In a worst-case scenario, most attorneys will only know judges through rumor and caricature, a losing situation for lawyers and judges alike.

Happily, that scenario is still avoidable, and the decline in direct interaction can be reversed with some effort. Federal district judges should consider holding more hearings, even if only by telephone or videoconference, to allow the attorneys before them to have a fuller picture of their judicial approach. Lawyers themselves should welcome more opportunities for courtroom observation and interaction, even if that time spent is not directly billable to a client. In short, quality gossip remains both possible and desirable, but the determinants of that quality rest with the lawyers who share secondhand information about judges as part of their daily practice. Individual attorney awareness of gossip's strengths and weaknesses is a good first step. Awareness within the community of lawyers—and a collective commitment to accurately reflecting the nuances of attorney-judge interaction—would be an even more significant achievement.