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# The Adversary System: Dinosaur or Phoenix\*

Arthur R. Miller\*\*

## I. THE EVILS OF COST AND DELAY

The inefficiency with which the wheels of justice grind is not unique to our time. In ancient China, a peasant who resorted to the courts was considered ruined, no matter what the eventual outcome of the suit. Hamlet rued "the law's delay." Goethe quit the legal profession in disgust over cases that had been languishing in the German courts for three hundred years. And in *Bleak House* Charles Dickens applied his great talent for social criticism to the ramifications of one of the classic examples of English legal ineptitude—*Jarndyce v. Jarndyce*. It is in this tradition that today the Chief Justice of the United States Supreme Court can be counted on to devote at least one major public address every year to the subject of improving the quality and increasing the speed of the administration of justice.

The inability of the American judicial system to adjudicate civil disputes economically and efficiently is one of the most pressing issues facing the courts today. It is axiomatic that justice delayed is justice denied. From the perspective of most people ensnared in the litigation process, a half-decade wait for the resolution of a serious dispute is intolerable. Major business ventures cannot wait that long to have the legality of their activities tested. Many courthouse supplicants simply cannot pay their medical bills and feed their families for years without being recompensed for disabling injuries received in highway or industrial accidents. Nor should ghetto dwellers have to remain in a rat-infested apartment building for months on end awaiting a court to compel their slumlord to take action. Those

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with modest claims or who are enmeshed in simple cases should not be forced to wait in a courthouse queue that has all the trappings of a judicial gridlock. In a world in which computers operate in nanoseconds and people travel to the moon in a few days, four or five years is a long time indeed to wait to have one's day in court. Moreover, the escalating cost of litigation, coupled with intolerable delay, leads to an overall financial and emotional price tag for justice that often is beyond the means of all but the wealthy and sturdy.

On the one hand, the prospect of being involved with the "law" for a period of this magnitude and at this cost chills the enthusiasm and debilitates the resolve of many a citizen with a legitimate grievance against a neighbor, employer, merchant, or government. Those who are cowed may refrain from bringing suit and nurse their wounds as best they can, often building up and reinforcing antagonisms toward society's "them's" and "it's" who, they are convinced, have subjugated them once again. Or perhaps they will accept a settlement, often discounted by an amount that reflects the value of avoiding five years of combat in the courts but that may not represent the fair market value of the claim.

On the other hand, those with nerves of steel and a crusader's spirit will run the gauntlet of the judicial system. Would-be gladiators with strong hearts but comparatively weak pocketbooks will become co-venturers with their attorneys by entering into contingent fee arrangements, under which the attorney agrees to champion the client's cause for a stated percentage of the ultimate take, if any. Of course, this kind of economics means that unless the attorney feels the claim is a "sure thing" or will command a sizeable settlement, the case will languish while the attorney pursues others that are more likely to produce "a piece of the action."

## II. THE LITIGATION EXPLOSION

The current state of affairs usually is attributed to what is called the "litigation explosion." Ever since World War II, and especially during the past twenty-five years, litigants have been flocking to the courts in unprecedented numbers.<sup>1</sup> Americans,

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1. See W. McLAUCHLAN, *FEDERAL COURT CASELOADS* (1984) (quantitative analysis of caseloads in federal courts); see also V. FLANGO, R. ROPER & M. ELSNER, *THE BUSINESS OF STATE TRIAL COURTS* (1983) (same for state courts). Moreover, the number of time-consuming, complex cases in federal courts has grown strikingly in recent years. See American College of Trial Lawyers, *Rec-*

it is said, are without question the most litigious people on earth, with one lawyer for every four hundred people—three times as many lawyers per capita as Germany and twenty times as many as Japan.<sup>2</sup> Small wonder, therefore, that in the decade of the 1970's, federal district court filings more than doubled and trials lasting over thirty days more than tripled.<sup>3</sup>

To understand the real reasons for the litigation explosion, however, one must dig beneath the clichés and avoid being dazzled by the statistics. The tremendous increase in litigation is a result of changes in the character and makeup of the legal profession, massive growth in the number of substantive rights recognized by American law, some unfortunate side effects of policies and procedures embodied in our extremely permissive and forgiving procedural system, and the unique economics of the American legal system.

#### A. THE CHANGING DEMOGRAPHY OF THE LEGAL PROFESSION

Dramatic changes over the past two decades in the composition and temperament of the legal profession have contributed to the increased resort to litigation in America. While the number of attorneys has doubled since 1960,<sup>4</sup> the rise of the no-fault concept in auto insurance and divorce law at least partially has closed off two extremely lucrative and steady sources of income for a significant portion of the litigating bar. The competition among more lawyers for the available business, coupled with the foreclosure of these traditional litigation opportunities, has sent attorneys questing after new and different areas of practice.<sup>5</sup> Moreover, law students have become more litigation-oriented, particularly with the advent of curriculum offerings in trial practice, clinical education, professional responsibility, and advocacy.<sup>6</sup> Contemporary legal education fos-

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*ommendations on Major Issues Affecting Complex Litigation*, 90 F.R.D. 207, 209-10 (1981).

2. See Bok, *A Flawed System*, HARV. MAG. 38, 40 (May-June 1983), reprinted in 33 J. LEGAL EDUC. 570, 571 (1983); Kester, *Are Lawyers Becoming Public Enemy Number One?*, THE WASHINGTONIAN 114, 116 (Feb. 1984).

3. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770, 770 (1981); see also Granelli, *Long Trials Play Havoc With Courts*, Nat'l L.J., Dec. 27, 1982, at 1, col. 4 (discussing increase of protracted trials and causes thereof).

4. Bok, *supra* note 2, at 40, reprinted in J. LEGAL EDUC. at 571.

5. Class action, securities, and antitrust litigation are among the areas that have grown as a result of this "retread" phenomenon. Miller & Culp, *Litigation Costs, Delay Prompted the New Rules of Civil Procedure*, Nat'l L.J., Nov. 28, 1983, at 24.

6. See Bok, *supra* note 2, at 45, reprinted in J. LEGAL EDUC. at 582-83.

ters a cult of civil litigation by training more and more trial lawyers, which is somewhat ironic since in many parts of the nation more than ninety percent of civil suits never even reach trial.<sup>7</sup>

Moreover, many of the young litigators, who account for much of the expansion in the profession, were educated during the social upheaval of the 1960's and early 1970's, a period when it was fashionable to emphasize litigation as a weapon in the fight for social and political justice, civil rights, environmental protection, consumerism, and employee safety. Many of the student rebels and reformers of that period have become the ideological advocates of the 1980's. Thus, a significant segment of the bar is willing and eager to institute lawsuits, often as class actions,<sup>8</sup> that would not have been brought in times past because no cadre of "public interest" lawyers was available to take up the cudgels merely to pursue points of principle.<sup>9</sup> Although today's law students seem somewhat less idealistic than their predecessors, the continued popularity of clinical programs providing legal services for the poor and disadvantaged indicates that the commitment to using the law as an instrument of social justice has not waned.<sup>10</sup>

The natural tendency of lawyers to be competitive is encouraged by the lowering of certain barriers that the profession once imposed on its own conduct. Lawyers are given a freer rein to promote themselves through advertising and, although frowned upon in the more genteel quarters of the bar, advertising has become a significant way of luring potential plaintiffs who might not have resorted to the courts absent the siren call of Madison Avenue techniques and optimistic accounts of pots of gold at the end of the litigation rainbow.<sup>11</sup> Another develop-

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7. Miller & Culp, *supra* note 5, at 24. In fact, the percentage of those cases terminated in federal district courts that ever reach trial has decreased from 10.0% in 1970 to 5.4% in 1983. See ADMINISTRATIVE OFFICE OF UNITED STATES COURTS, 1983 ANNUAL REPORT OF THE DIRECTOR, Table 29, at 142 (1983) [hereinafter cited as 1983 REPORT].

8. See generally Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664 (1979) (describing increased use of class action device and factors contributing thereto).

9. Kester, *supra* note 2, at 141-42 ("Whatever subsidizes legal services subsidizes added litigation.").

10. See Miller, *supra* note 8, at 675.

11. See generally *Bates v. State Bar*, 433 U.S. 350 (1977) (attorney advertising is commercial speech protected by first amendment); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (fee schedule published by county bar association constitutes price-fixing under Sherman Act).

ment is the tolerance of certain practices relating to finding plaintiffs and funding lawsuits, most notably in the class action context, that once would have been branded as solicitation, champerty, and maintenance.<sup>12</sup> This is not to say that these practices should be condemned. Indeed, improving both the flow of information and the availability of new types of group-based litigation to those in need of legal redress is desirable. But the effect is to increase the volume of business that must be handled by our already-overburdened courts.

## B. THE GROWTH IN SUBSTANTIVE RIGHTS

The rise in court filings also can be attributed in part to the recognition and enlargement of substantive rights. Over the last twenty-five years we have witnessed the wholesale creation of new causes of action—by both statute and court decision—and an increase in legal confrontation between citizen and government involving the tremendous expansion of federal regulation. Today, we Americans enjoy more rights than any people on the face of the earth, but these rights inevitably breed lawsuits. After all, if people are given rights, one should not be surprised when they assert them.

Throughout the 1960's and 1970's Congress seemed to be operating a "new-right-of-the-month club." Largely as a result of two pieces of legislation—the Civil Rights Act of 1964<sup>13</sup> and the Voting Rights Act of 1965<sup>14</sup>—the number of federal civil rights cases alone increased by a factor of more than twenty-five between 1960 and 1972.<sup>15</sup> The same societal forces that fueled the civil rights movement also impelled Congress to respond to other demands for justice, and new statutory rights of action became available in the environmental, consumer, political rights, and safety fields.

Congress has not been the only actor in this process, however. The sensitivity of courts in recent years to due process

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12. See Miller, *supra* note 8; see also A. MILLER, AN OVERVIEW OF CLASS ACTIONS: PAST, PRESENT, AND FUTURE (Federal Judicial Center 1977).

13. Pub. L. No. 88-352, 78 Stat. 241 (codified at 28 U.S.C. § 1447 (1982); 42 *id.* §§ 1971, 1975a-1975f, 2000a to 2000h-6).

14. Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1982)).

15. McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections* (pt. 1), 60 VA. L. REV. 1, 1 (1974) (approximately 300 civil rights actions filed in fiscal year 1960 compared to 8,000 in fiscal year 1972). See generally 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1776 (1970 & Supp. 1983) (describing civil rights class actions under Rule 23(b)(2) for injunctive or declaratory relief).

and equal protection concerns has generated a myriad of cases involving a kaleidoscopic range of matters that were not within the standard litigation repertoire twenty-five years ago—dress and hair codes, academic and government employment status, prisoners' rights, and welfare benefits, to name a few. The cases in these areas reflect the revolution in thinking about entitlements and private rights that raged in the courts and law reviews during the late 1960's.<sup>16</sup> Judicial recognition of new private rights of action has encouraged the emergence of class actions based on conceptions of corporate democracy, consumer rights, competitive behavior, and environmental protection. Today we may be facing a new wave of litigation, this one involving toxic substances. The success of such actions reflect both increased pressure on the courts, particularly the federal courts, to recognize new substantive rights and, to a degree, judicial acquiescence to that pressure.<sup>17</sup>

The frequent recognition of new legal rights, coupled with a strong presumption in favor of deciding cases on their merits, has made lower court judges extremely reluctant to terminate private actions prior to trial. The result is that plaintiffs' attorneys, eyeing the prospects of surviving pretrial motions and reaching the jury, giving them at least a chance for a substantial verdict, have become increasingly inclined to institute actions pursuing less substantial violations of law and more avant-garde theories of liability. Not surprisingly, many defense attorneys have become sufficiently concerned about their clients' potential exposure that they often counsel the discreet course of settlement rather than running the risk of a trial. This willingness to settle in itself encourages others to bring suit. To the extent that the courts have leant a sympathetic ear to new theories of entitlement and liability and have been unwilling to terminate cases prior to trial, their bloated dockets represent, in a sense, a self-inflicted wound.<sup>18</sup>

The federal courts also have become a forum for highly complex and controversial matters involving big government,

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16. See Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966); Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Reich, *The New Property*, 73 YALE L.J. 733 (1964).

17. See Kester, *supra* note 2, at 115 (characterizing this approach of Congress as "a way to legislate that pushes tough political problems onto [the courts]").

18. See *id.* at 117; Miller, *supra* note 8, at 670-75.

big business, and a variety of public interest groups.<sup>19</sup> Administrative agency action involving entitlement programs, government grants for the needy, extensive regulation of business, and environmental, consumer, and safety protection has been a significant source of judicial business. The burden of oversight has been placed on the courts, resulting in increased litigation between the government and either individuals or businesses affected by government activity. Intercorporate warfare in the courts, particularly in the antitrust and competitive tort fields, also has mushroomed. Virtually unknown ten or fifteen years ago, waging intercorporate lawsuits has become "business by other means" for many corporations.<sup>20</sup>

Of course, we probably have entered an era of retrenchment with respect to government regulation and the creation of new substantive rights. The Supreme Court has become demonstrably less responsive to claims of due process violations<sup>21</sup> and is increasingly antagonistic toward judicial recognition of implied rights of action.<sup>22</sup> Moreover, the present administration is committed to deregulating the economy<sup>23</sup> and narrowing the scope of the Freedom of Information Act.<sup>24</sup> Yet even if the Court and the Executive Branch are completely successful in halting the expansion of government and in cropping the

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19. Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment*, 57 ST. JOHN'S L. REV. 680, 722-23 (1983); see also Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 465-68 (1980) (noting that weighty social issues often are at issue in the "new" institutional litigation).

20. See Miller, *supra* note 8, at 672-73.

21. Compare *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) (peaceful wearing of armbands was within the protection of due process clause) with *Ingraham v. Wright*, 430 U.S. 651 (1977) (due process clause does not require notice and hearing prior to imposition of corporal punishment).

22. See, e.g., *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (antitrust treble damages recovery unavailable to indirect purchasers); *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977) (tender offerors do not have standing to sue under § 14(e) of Securities Exchange Act of 1934, designed to protect investors solicited in a tender offer); *Cort v. Ash*, 422 U.S. 66 (1975) (shareholders have no federal cause of action under 18 U.S.C. § 610, which prohibits certain election contributions by corporations).

23. Rosenbaum, *3 Cabinet Choices Breeze Through Senate Hearings*, N.Y. Times, Jan. 7, 1981, at A16, col. 3.

24. See N.Y. Times, June 16, 1981, at A21, col. 5. As part of this effort, President Reagan signed an order widening the range of potentially classified government documents. See Raines, *Reagan Order Tightens the Rules on Disclosing Secret Information*, N.Y. Times, Apr. 3, 1982, at A1, col. 2. The order effectively broadened the scope of an exemption to the Freedom of Information Act covering classified documents. 5 U.S.C. § 552(b)(1) (1982).



growth of new rights of action,<sup>25</sup> it is unlikely that we will see in our lifetime an actual diminution in the number of lawsuits instituted.

### C. OUR EGALITARIAN PROCEDURAL SYSTEM

Our procedures also tend to encourage litigation by facilitating access to the courthouse and ensuring survival once inside. Entry to the system is easy. Gone is the screening function once performed by a particularized pleading requirement, which deterred suits by requiring enough knowledge and preinstitution investigation to enable the plaintiff to make specific allegations regarding the defendant's conduct. The threshold barrier against frivolous litigation has been lowered by the substitution of notice pleading for issue and fact pleading;<sup>26</sup> there are virtually no effective control mechanisms or filtration devices at the front end of the litigation process. Why have we done this? Actually it is out of the purest of motives; our easy-access procedures reflect the desire to provide all citizens with the right to a day in court.<sup>27</sup> But perhaps we have become victims of our own propaganda, which literally beckons potential litigants with sweet talk of "equal access to justice."

The liberal and permissive Federal Rules of Civil Procedure, created as a model of simplicity in an age of relatively uncomplicated cases, may be contributing to the protraction of cases in today's era of complex regulation and behemoth disputes.<sup>28</sup> In our zeal to enable everyone to dine at the "Justice

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25. The deregulation efforts of the Administration, however, likely will stimulate litigation. For example, the Administration has announced major changes in federal air pollution regulations of the Environmental Protection Agency that almost certainly will generate legal challenges. See Farnsworth, *U.S. Proposes Eased Car Standards*, N.Y. Times, Apr. 7, 1981, at A1, col. 2. The same probably is true of the changes regarding the application of the Freedom of Information Act to classified documents. See *supra* note 24.

26. The Supreme Court has characterized pleading under the federal rules as "notice pleading." *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957). But see *Clark, Pleading Under the Federal Rules*, 12 Wyo. L.J. 177, 181 (1958) (objecting to such characterization as nebulous). The Federal Rules, however, do require detailed pleading with respect to a small number of special matters. FED. R. CIV. P. 9; see 5 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 1291-1315 (1969 & Supp. 1983) (describing pleading special matters).

27. See Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CALIF. L. REV. 264, 266, 277-78 (1979).

28. Judge Clark's famous opinion in *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944) (reversing the district court's dismissal of Dioguardi's "inartistically" drawn amended complaint), cited with approval in *Conley v. Gibson*, 355 U.S. 41, 46 n.6 (1957), became "a focal point of opposition to the so-called liberal 'notice-pleading' of the Federal Rules." J. COUND, J. FRIEDENTHAL & A. MILLER, *CIVIL PROCEDURE: CASES AND MATERIALS* 394 (3d ed. 1980); see, e.g., McCaskill,

trough," all we ask of claimants is that they tell us where it hurts and what they want in a "short and plain statement of the claim,"<sup>29</sup> making it virtually impossible to stop a litigant at the courthouse door. Once inside, it is like floating in space, with no restraints or gravitational forces to drag a litigant down. Motions to dismiss are not difficult to survive.<sup>30</sup> Appellate courts have cautioned against premature termination, making a provision like Federal Rule 12(b)(6) something of an artifact.<sup>31</sup> Nor is the motion for summary judgment an effective filter for marginal or frivolous cases. In the federal system, district judges have been encouraged by certain Supreme Court decisions to believe that complicated cases should not be disposed of by summary judgment,<sup>32</sup> producing a better-safe-than-sorry judicial approach.

Having survived the preliminary motions, it is just a hop-skip-and-a-jump into the quicksand of discovery, a debilitating and often interminable process. This pretrial structure permits artful attorneys to hide the ball and keep alive hopeless claims, as well as defenses, for a much longer time than was possible under the more arduous, discarded procedural systems of the past. In many ways, contemporary federal litigation is analogous to the dance marathon contests of yesteryear. The object of the exercise is to select a partner from across the "v," get out on the dance floor, hang on to one's client, and then drift aimlessly and endlessly to the litigation music for as long as possible, hoping that everyone else will collapse from exhaustion.

#### D. ECONOMIC INCENTIVES TO LITIGATE

Not only do our procedures make entry into the courthouse easy and survival virtually automatic, but the economics of con-

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*The Modern Philosophy of Pleading: A Dialogue Outside the Shades*, 38 A.B.A. J. 123 (1952) (sharply criticizing the *Dioguardi* decision).

29. FED. R. CIV. P. 8(a)(2).

30. See FED. R. CIV. P. 15 (liberal provisions for amendment of pleadings).

31. Motions under Federal Rule 12(b)(6) for "failure to state a claim upon which relief can be granted" rarely are successful. The Supreme Court has stated:

In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would support relief.

*Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). See 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (1969).

32. See, e.g., *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464 (1962) (summary procedures should be used sparingly in complex antitrust litigation).

temporary litigation actually creates an incentive to resort to the courts. The "American rule" of letting costs lie where they fall removes a powerful disincentive to legal combat that is present in most other countries—the knowledge that the loser must pay the litigation costs, including attorneys' fees, of the winner.<sup>33</sup> This cost-shifting discourages the bringing of marginal claims by imposing the risk of bearing double costs. But allowing the winner to recover costs from the loser is inconsistent with the American dream of providing everyone with easy access to justice by eliminating as many barriers to the courthouse as possible.<sup>34</sup> Further, discouraging attorneys from pursuing novel or "frontier" legal theories, when the risk of bearing double costs is the highest, would impair what many feel is one of the chief virtues of the American justice system, the creativity of the bar. Unfortunately, the price tag for this otherwise unobjectionable attitude is an elevated litigation rate.

Moreover, the availability of contingent fee arrangements—a uniquely American institution—makes it possible for cases to be brought that would not be economically viable if plaintiffs had to fund them up front.<sup>35</sup> Once again, however, the laudable

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33. See, e.g., *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975); *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306, 306 (1796); see also A. MILLER, *ATTORNEYS' FEES IN CLASS ACTIONS* 12-21 (Federal Judicial Center 1980) (discussing the no-fee rule and exceptions to it).

Compare the English practice of including counsel fees in costs recoverable by the successful party, described in Goodhart, *Costs*, 38 *YALE L.J.* 849, 856-59 (1929). For proposals that we adopt some variation of the English system, see Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 *IOWA L. REV.* 75 (1963); Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 *VAND. L. REV.* 1216 (1967). See also Silberman, *Masters and Magistrates Part I: The English Model*, 50 *N.Y.U. L. REV.* 1070, 1113-15 (1975) (discussing the impact of the English cost-shifting system on the efficacy of pretrial management by magistrates).

34. See Kuenzel, *supra* note 33, at 81. For other views on the reasons behind the no-fee rule, see Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 *CALIF. L. REV.* 792, 798-99 (1966) (no-fee rule developed because of mistake of 1848 New York legislature in fixing the amount of attorneys' fees recoverable in dollars and cents rather than in percentage of the amount claimed or recovered); Goodhart, *supra* note 33, at 873 (rule stems from popular distrust of lawyers). Even if one rejects the view that the American rule grew out of a policy favoring unfettered access to the courtroom, it nonetheless is evident that the absence of the in terrorem effect of the English rule reduces the risk of litigation. See Kuenzel, *supra* note 33, at 78.

35. The ABA Model Code of Professional Responsibility notes that contingent fee arrangements "have long been commonly accepted in the United States in proceedings to enforce [civil] claims" and that such arrangements "provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20

aim of making justice accessible to all is achieved at the cost of a higher incidence of litigation. Add to this the growing phenomenon of court-awarded attorneys' fees under approximately one hundred federal statutes,<sup>36</sup> which offers a sweetener above and beyond the relief awarded to the plaintiff, and one begins to recognize that there is a substantial economic incentive to litigate in certain substantive contexts.<sup>37</sup>

Finally, in some circumstances our tax system actually encourages litigants to drag out their litigation. For example, in the business arena the tax deductibility of litigation expenses means that the government is, in effect, subsidizing lawsuits. For a defendant it may be more economical to stall cases by paying tax deductible, albeit huge, legal fees in order to defer payment of the ultimate judgment or even a "reasonable" settlement.<sup>38</sup> There is also the possibility that if one lasts long enough in the dance marathon contest, the ravages of time and expense may cause the opponent to give up and go away.<sup>39</sup>

#### E. SUMMARY

The crowded condition of our nation's courts really is quite understandable. Today's litigation environment is plagued by regulatory schemes that are byzantine in their complexity, a

(1980). The Model Code explicitly excepts contingent fee contracts from the prohibition against acquiring a proprietary interest in a client's cause of action. See *id.* DR 5-103(A)(2) & DR 2-106(B)(8) (1980).

Professor David L. Shapiro has characterized the contingent fee system as "the American analogue—similar in some ways, quite different in others—to the English practice of requiring the loser to pay the winner's legal fees." Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 781 (1980). For a comprehensive discussion of contingency fee arrangements, see MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* (1964). See also Comment, *Providing Legal Services for the Middle Class in Civil Matters: The Problem, the Duty and a Solution*, 26 U. PITT. L. REV. 811, 829 (1965) (noting that contingent fee arrangements are not well-suited to all types of legal actions).

36. *E.g.*, Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982); see *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260-61 n.33 (1975) (listing federal statutes authorizing payment of attorneys' fees); 3 H. NEWBERG, *CLASS ACTIONS* § 7040 (1977 & Supps. 1980, 1984) (same).

37. See Kester, *supra* note 2, at 116-17 (questioning the wisdom of granting fee awards under the Civil Rights Attorney's Fees Awards Act at top hourly rates in cases that would have neither commanded nor required such high-priced legal talent).

38. See Sofaer, *supra* note 19, at 721.

39. See Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RESEARCH J. 219, 229 (forcing adversary to settle or to dismiss claim are two motivations for excessive discovery); Sherwood, *Curbing Discovery Abuse: Sanctions Under the Federal Rules of Civil Procedure and the California Code of Civil Procedure*, 21 SANTA CLARA L. REV. 567, 569-70 (1981) (same).

procedural system that encourages people to have a day in court regardless of the social cost, cost-allocation rules that make ideological or purely tactical advocacy economically viable, a plethora of substantive rights for all to seize upon, and a corps of litigators just itching for action. Although our commitment to equal access to justice is laudable, one must begin to question whether we can continue to afford the present system.

### III. POSSIBLE APPROACHES FOR REFORM

Suggested solutions to the crisis in our courts caused by the litigation explosion are as varied as its causes. One way to attack the problem of too many cases for too few judges is simply to increase the number of judges on the bench. Another option is to affect the other end of the equation—to cut the number of cases by reversing the expansion of substantive rights that has contributed to the current congestion. Another, and perhaps more promising, possibility is to improve the way in which the existing system works. This approach, embodied in recent amendments to the Federal Rules of Civil Procedure, emphasizes greater use of judicial management techniques by trial judges as the most realistic and efficient way of getting the greatest quantity of justice from our courts.

#### A. THE APPOINTMENT OF MORE JUDGES

The rate of appointment of additional judges has not matched the increased demand for the services of the judicial system. Nor, in all honesty, could it. America has a staggering profusion of courts—federal, state, city, probate, small claims, divorce, juvenile, and tax. Staffing the benches of these various tribunals, even at existing levels, consumes a substantial portion of the pool of highly competent lawyers who are politically acceptable and willing to be distracted from the more lucrative arena of private practice. In some parts of the country an increase in judicial salaries might attract a few more good judges, but unless this increase is accompanied by money for additional clerks, secretaries, librarians, books, courthouses, and court reporters, the system is not likely to run any more smoothly than it does now.

Moreover, simply expanding the system offers no panacea. Even if sufficient funds were available to hire enough judges to handle the avalanche of cases, such an expansion is likely to have the unfortunate result of reducing the overall quality of the judiciary unless great care is taken in the appointment pro-

cess. Not only would there be more judgeships to fill from the same pool of legal talent, but the mere increase in the number of judges also would dilute the intangible rewards that draw candidates to the bench—the prestige, status, and uniqueness of a judgeship.<sup>40</sup> These problems, combined with this nation's reluctance to expend substantial sums on the administration of justice, make it unlikely that simply expanding the existing system is a pragmatic or realistic approach. Indeed, increasing the number of judges might simply attract more cases.

#### B. CURTAILMENT OR DIVERSION OF SUBSTANTIVE RIGHTS

Attempts to force a reduction in the number of cases filed by constricting, or even eliminating, presently available substantive rights seem both unwise as a policy matter and doomed to failure. There are simply too many statutes on the books, too many precedents in the reporters, and too many advocates seeking clients to hope that somehow the tidal wave of lawsuits will recede in the near future. Nor can we undo what has been done. The elimination of rights that have been achieved by various segments of the population is not only unfeasible, but undesirable.

Nor is the magic elixir to be found among the ancient nostrums peddled by savants who advocate the wholesale removal of certain classes of cases, such as automobile accident litigation, from the courts. Closing the courthouse door on potential claimants is a sufficiently desperate cure for revitalizing the judicial process that it should be held in abeyance until less drastic surgery has been tried. Moreover, shifting part of the burden from the courts to administrative agencies, arbitration panels, or other "specialized" tribunals smacks of robbing Peter to pay Paul.<sup>41</sup>

#### C. IMPROVEMENT OF SYSTEMIC EFFICIENCY

We cannot do much about the demand for our scarce judicial resources. The demographic changes in the profession to some degree are beyond our power to control. A quantitative expansion of our judicial capacity seems to be a dead end. What then is the solution? Perhaps it begins by recognizing

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40. Kester, *supra* note 2, at 117; see also Rosenberg, *Devising Procedures that are Civil to Promote Justice that is Civilized*, 69 MICH. L. REV. 797, 800 (rejecting the "add-judges" approach to improving the system).

41. *But see* Kester, *supra* note 2, at 143 (encouraging greater use of arbitration in certain contexts).

that much of the existing problem results from the underlying inefficiency of our procedures and methodology.<sup>42</sup> What is needed are qualitative changes in how we use the resources we do have.

Our first line of attack in meeting the litigation crisis must be an attempt to improve the processing of cases that are on the dockets of our courts. It is self-evident that delay exacerbates congestion, and every case that languishes on the calendar tends to create its own churning effect. The limited empirical evidence we have suggests that the longer a case sits unattended, the more work it eventually will generate for the system.<sup>43</sup>

Fundamental changes are needed in the way we handle the cases as they come through the courthouse door. More specifically, the key lies in controlling the pretrial process. Concerns about the trial phase are misplaced since over ninety percent of the cases in most courts terminate through settlement or dismissal prior to trial.<sup>44</sup> Furthermore, judicial energy put into managing a case effectively during pretrial should pay off even in the minority of cases that ultimately go to trial. A well-managed case will be tried more efficiently since the judge, at least under an individual assignment calendar, will have become familiar with it, and issues will have been narrowed and extraneous conflicts excised. Reform of the trial process, therefore, is too little, too late; rather, shortening the time frame between institution and termination in those cases that never reach trial and streamlining pretrial in those cases that do go to trial offers some real potential for progress.

The strong judicial activity throughout pretrial that is required to control this phase of litigation is contrary to both the traditional conception of the judge as a neutral and passive arbiter and the notion that the pretrial system is a self-executing and cooperative phase. This vision of a lack of judicial involvement during pretrial has retained its vitality for many years as evidenced, for example, by the 1970 amendment to Federal

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42. See S. FLANDERS, *CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS* 17 (Federal Judicial Center 1977) (studying effectiveness of judicial management in expediting the handling of cases).

43. See *id.* at 13-16, 74-76 (suggesting methods to reduce backlog of cases); P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, *JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 67-70* (Federal Judicial Center 1978) (discussing correlation between judicial controls during discovery and more rapid progress through other stages of case) [hereinafter cited as *JUDICIAL CONTROLS: DISCOVERY*].

44. See *supra* note 7.

Rule 34 making document discovery operate extrajudicially.<sup>45</sup>

Unfortunately, however, the ideal of a smooth pretrial process engineered and controlled by the attorneys has not been realized, especially in complex and difficult cases.<sup>46</sup> The vision that adversarial tigers would behave like accommodating pussycats throughout the discovery period, saving their combative energies for trial, has not materialized.<sup>47</sup> Given the realities of modern large-scale litigation, the rulemakers' expectations for a self-executing, cooperative pretrial phase have proven to be somewhat naive. Attorneys have neither cooperated voluntarily to move cases through discovery nor policed each other by seeking sanctions for abusive discovery tactics.<sup>48</sup> The truth is that we have a pretrial system characterized by over-litigiousness, hyperactivity, and marginal behavior by attorneys, producing excessive cost and delay.<sup>49</sup> What has gone wrong? Why has the vision underlying the Federal Rules become distorted in so much of today's litigation?

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45. See FED. R. CIV. P. 34 and advisory committee note to 1970 amendment; see also 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2207 (1970).

46. See Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806, 819 (1981) (noting the inability of the legal community to "devise . . . a self-executing set of ideal rules" to control discovery).

47. See Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1298-1302 (1978) (describing optimistic hopes of rulemakers for cooperation during pretrial).

48. See, e.g., *Herbert v. Lando*, 441 U.S. 153, 179 (1979) (Powell, J., concurring) (referring to "the widespread abuse of discovery that has become a prime cause of delay and expense in civil litigation"); *ACF Industries, Inc. v. EEOC*, 439 U.S. 1081, 1087 (1979) (Powell, J., dissenting from denial of cert.) ("I have referred briefly to the concern that exists with respect to abuse of discovery to emphasize that, at least until rule changes can be made, there is a pressing need for judicial supervision in this area."); *Amendments to Federal Rules of Civil Procedure*, 446 U.S. 997, 997-1001 (1980) (Powell, J., dissenting from the adoption of 1980 amendments to the federal discovery rules and urging more comprehensive reforms) [hereinafter cited as Powell dissenting statement]; SEGAL, SURVEY OF THE LITERATURE ON DISCOVERY FROM 1970 TO THE PRESENT: EXPRESSED DISSATISFACTIONS AND PROPOSED REFORMS 67 (Federal Judicial Center 1978) (observing consensus that main abuses are overdiscovery and avoidance of discovery requests); Rosenberg & King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 B.Y.U. L. REV. 579 (proposing rules amendments designed to avoid the "excesses of redundancy and disproportionality" in discovery).

49. Many judges, practitioners, and commentators have assailed the gamesmanship, harassment, overdiscovery, evasion, delay, and spiralling costs that currently afflict the pretrial process. See, e.g., Brazil, *supra* note 47. Several other sources are cited in Brazil, *Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 AM. B. FOUND. RESEARCH J. 873, 880 n.13, 882 n.27 [hereinafter cited as *Improving Judicial Controls*].



The answer, in part, lies in the fact that the real battleground in contemporary complex civil litigation has become the pretrial stage. That is where adversarial energies and ingenuity most often are focused. It is a battleground traditionally controlled by attorneys who do not necessarily share the systemic interest in swift and efficient movement of cases toward trial. Although the announced aim of the judicial system is to work from institution to disposition with efficiency and cooperation, it is not necessarily to the advantage of either party to do so. To the contrary, it is almost certain that in complex cases it will be in the interest of one side or the other to drag out the pretrial proceedings.<sup>50</sup>

This intentional delay is the inevitable consequence of the reality that the outcome of complex cases today is likely to be affected dramatically, if not determined, by what happens during pretrial. For example, class actions stand or fall based on whether they are certified, and for an attorney the critical phase of the action may be the appointment of lead counsel. In other situations success may turn on information elicited through discovery to flesh out claims and defenses or to ascertain where jurisdiction lies. Not only do many of these pragmatic decision points occur before trial, but they have nothing to do with the merits of the action. Attorneys, steeped in the grand tradition of the litigator, are trained to be aggressive, adversarial animals and to employ every weapon in their arsenal to achieve the aims of their clients and to frustrate those of their opponents. It is unrealistic to expect them to act in a cooperative spirit or adhere to Marquess of Queensberry rules on what has become the central battlefield of modern litigation.<sup>51</sup>

#### IV. SOME THOUGHTS ON IMPROVING SYSTEMIC EFFICIENCY

Meaningful reform of the existing litigation system requires rethinking many of the assumptions on which it is based. It must start, as already suggested, with a reevaluation of the entire pretrial process and of the assumption that it successfully can be left to attorneys to control and manage. But

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50. Brazil, *supra* note 39, at 231-32. Brazil reports that his survey results indicate that "in larger case litigation . . . the problem of delay appears to be more often a production of intentional jockeying than it is in the smaller cases." *Id.* at 231.

51. See *Improving Judicial Controls*, *supra* note 49, at 880-84, 928-30; Brazil, *supra* note 47, at 1303-05, 1311-15; Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1032, 1054 (1975).

the reappraisal must go further. It must include an examination of the adversary system itself and ask whether the roles that have been assigned to lawyers and judges are appropriate, whether these players can be made to function more effectively, and whether we can afford to allow the current economics of litigation to remain as it is.

#### A. THE NEED TO UPGRADE ATTORNEY BEHAVIOR

The chief source of frustration in processing cases is not outright rule violations or disobedience of court orders but rather sheer overuse of the system, which can take the form of frivolous claims, sham defenses, unnecessary motions, or abuse of the discovery system. This hyperactivity results from a variety of motives, ranging from legitimate professional considerations, such as doing the best and most thorough job possible for one's client, to improper ones, such as harassment and driving up the litigation costs of the opponent. This behavior is easily explainable given a professional ethic mandating that lawyers owe complete allegiance to their clients, very little to the system, and none at all to the adversary.<sup>52</sup>

Prior to the current era of liberal discovery, the costs of gathering information fell on the party seeking it. The Federal Rules of Civil Procedure have altered dramatically the natural cost-benefit calculation that once had imposed some restraint on the seeker of information, encouraging instead a better-safethan-sorry approach to discovery decisions that makes the cardinal rule: when in doubt, discover. Interrogatories and discovery requests under Federal Rules 33 and 34, respectively, are at least as costly to respond to as to formulate. Indeed, in an era of boilerplate interrogatories formulated by young associates and spewed out by word processors, masses of questions can be churned out at low cost to the initiating party but at high cost to the responding party. Given the American no-fee rule,

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52. The Model Code exhorts the advocate to urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-4 (1980). Compare Renfrew, *supra* note 27, at 278-79 (discovery abuse stems from high stakes of litigation and desire for higher fees) with Friedenthal, *supra* note 46, at 817 (depth of discovery attributable to attorneys' desire to avoid malpractice claims for overlooking crucial information during discovery process).

someone who wishes to abuse the system or simply to be overzealous or unduly optimistic is able to engage in a war of attrition, raising the opposition's litigation costs with little fear that those costs will come home to roost.<sup>53</sup>

In terms of lawyer economics pretrial hyperactivity generates billable hours—it keeps the meter running.<sup>54</sup> Additionally, until the recent recession there was little effective client control over, or interest shown in, the number of hours spent on discovery or the number of motions made.<sup>55</sup> Even if the client does have a desire to contain litigation costs, the mystique surrounding high-stakes litigation deters control by creating a perception that good legal talent is pricey and that litigation is an expensive undertaking. This impression may have become a self-fulfilling prophecy. Moreover, as already noted,<sup>56</sup> the tax deductibility of litigation expenses makes it cheaper in some cases for defendants to pay legal fees in order to defer the payment of a monetary judgment or the imposition of injunctive relief as long as possible.

Statutes providing for court-awarded fees exacerbate this phenomenon. The shift in this area from percentage-of-the-recovery awards to the lodestar method of computing attorneys' fees in terms of hours worked times normal billing rate<sup>57</sup> provides an incentive to generate more litigation activity per case. Conversely, in contingent fee cases, the client has little or no meaningful incentive to control expenditures of lawyer time.

When prolonging pretrial and overuse of discovery are in the interests of both client and attorney, hyperactivity naturally follows. The combination of the mandate of zealous representation of one's client and the attorney's own economic self-interest provides a powerful inducement against efficient processing of cases. In contrast, vague notions that attorneys owe a duty to the judicial system by virtue of their status as court officers are feeble counterweights in making day-to-day tactical decisions. The cost of all this is substantial. Ultimately, these patterns of delay impair the ability of others who

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53. See *supra* notes 33-34 and accompanying text.

54. See Brazil, *supra* note 39, at 235 (reporting survey results indicating that meter-running is a frequent abuse).

55. See Brazil, *supra* note 47, at 1314-15 (noting inability of clients to differentiate between needed and wasteful discovery tactics).

56. See *supra* note 38 and accompanying text.

57. See Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 239-43 (1983) (general historical overview of this shift); see also A. MILLER, *supra* note 33, at 60-184 (circuit-by-circuit analysis of standards for fee awards).

are in the queue waiting for their turn to gain access to justice and increase the price of justice to the public, which eventually finances a good portion of the cost of today's dance marathon contests.

It is not intuitively obvious how to recast the litigation obligations of the lawyer. We have lived so long with the emphasis on "duty to client" that redirecting the responsibilities of lawyers to the system is easier said than done. Yet once it is understood that the court system is a societal resource, not merely the private playpen of the litigants, the difficult task of discouraging hyperactivity must be undertaken.<sup>58</sup>

The 1983 amendments to the Federal Rules of Civil Procedure represent a modest step in that direction.<sup>59</sup> They attempt to check abuses by requiring an attorney's signature on all litigation papers—pleadings, motions, and discovery requests and responses—certifying that, based on "reasonable inquiry," there is good ground to support the document and the signer's motivation is not improper.<sup>60</sup> The message is clear. An attorney must "stop and think" before acting—that is the litigator's duty to the system—or be subjected to sanctions. The determination of whether this is mere wishful thinking on the part of the rulemakers or a harbinger of things to come must await future evaluation as we accumulate experience with this type of provision.

## B. INCREASED JUDICIAL MANAGEMENT

There is a growing feeling that the only means of preserving any substantial portion of the system may be to control the excesses of lawyer hyperactivity through the infusion of active judicial management from institution of a case to its termination.<sup>61</sup> This approach flies in the face of the traditional vision of our system as one in which lawyers conduct cases and judges

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58. See Brazil, *supra* note 47, at 1349 (proposing "shifting counsels' principal obligation during the investigation and discovery stage away from the partisan pursuit of clients' interests and toward the court"); Frankel, *supra* note 51, at 1031 (stressing the attorney's primary obligation as a seeker of truth rather than as a client's "hired gun").

59. See Sofaer, *supra* note 19, at 680 (evaluating 1983 amendments).

60. See FED. R. CIV. P. 7(b)(3), 11 & 26 and advisory committee notes to 1983 amendment; see also Miller & Culp, *The New Rules of Civil Procedure: Managing Cases, Limiting Discovery*, NAT'L L.J., Dec. 5, 1983 (discussing 1983 amendments to Rules 16 and 26).

61. See Renfrew, *supra* note 27, at 267 (advocating judicious use of sanctions to help to make justice more accessible); Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83, 92-93 (1983) (emphasizing need for improved judicial management).

preside from a neutral distance, stepping in only to decide questions and disputes that are framed by the advocates. There has been understandable reluctance to tinker with, let alone jeopardize or fundamentally alter, the basic tenets of a system so entrenched and venerated. But given the tremendous frustration throughout the legal profession and the public at large with the current state of affairs, one must ask seriously whether the adversary system as we know it has become too costly and inefficient a device for resolving civil disputes.

Fortunately, the mood of the profession seems to be changing, largely because of increased caseloads. Since 1970 the number of civil cases filed annually in federal district courts has increased nearly threefold.<sup>62</sup> During that same period, however, the median time from filing to ultimate disposition actually decreased from ten to seven months.<sup>63</sup> Quite clearly, a large part of this improvement is attributable to more efficient management by judges<sup>64</sup> and increased assistance from professional administrators.<sup>65</sup> Indications are that judges are increasingly concerned about various litigation practices and are growing more receptive to suggestions that they actively participate in the control of the pretrial process.<sup>66</sup>

In short, the notion that judges should leave cases to the lawyers has been compromised substantially by the widespread frustration with the present situation and the resulting recognition of the need for effective management. The Federal Judicial Center's 1977 study of district court case management procedures revealed that all the courts visited had procedures designed to manage and control cases starting at their early stages.<sup>67</sup> The differences among the courts studied lay not in their willingness to adopt methods to manage cases, for each court had such procedures, but rather in the means employed, their effectiveness in moving cases along expeditiously, and the

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62. 1983 REPORT, *supra* note 7, Table 13, at 114 (241,842 cases filed in 1983 compared to 87,321 in 1960).

63. Compare *id.* Table C5A, at 282 with ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR, Table C5, at 245i (1970).

64. See Peckham, *supra* note 3, at 770.

65. See generally Solomon, *The Training of Court Managers*, 1981 B.Y.U. L. REV. 683 (1981) (discussing increasing use and improved training of professional court administrators).

66. See *infra* notes 67-70 and accompanying text; see also *infra* note 89 (greater use of sanctions).

67. S. FLANDERS, *supra* note 42, at ix; see also Cohn, *Federal Discovery: A Survey of Local Rules and Practices in View of Proposed Changes to the Federal Rules*, 63 MINN. L. REV. 253, 296 (1979).

number of cases each judge could handle.<sup>68</sup> The impact of case management was dramatic, with courts employing strong management controls having an average disposition time for cases that was approximately half of the average figure for courts using few such controls.<sup>69</sup>

Moreover, the impression that judges are unwilling to depart from their traditional role as passive and detached arbiters appears to be mistaken. To the contrary, there seems to be a strong spirit of willingness among judges to assume the role of active managers and to experiment with procedures designed to enhance their effectiveness in that role, although in some quarters, particularly at the state level, the flesh of experience and training may yet be weak. Significantly, follow-ups to another Federal Judicial Center study found that participating districts whose efficiency had been low had already adopted procedures found to be common in the more efficient courts.<sup>70</sup>

Even attorneys, usually seen as jealous guardians of control over their cases, are not averse to a stronger judicial hand.<sup>71</sup> Ironically, this is due in part to the natural tendency to define abuse as what the opposition is doing to one. Lawyers tend to see abusers not when they look in the mirror but rather only when they look across the negotiating table or the courtroom. Given the frustration felt by many litigators about the atmosphere of lawlessness that often bogs down actions through hyperactivity, missed deadlines, and repeated rescheduling, the judge is seen as an ally against a common enemy—the abusive opponent. Thus, the bar may not be a major obstacle to more aggressive management and enforcement of

68. S. FLANDERS, *supra* note 42, at ix-x.

69. A table from the study is reproduced in relevant part below:

Effects of Judicial Controls: Courts  
Disposition time (days)

	Strongest Controls	Moderate Controls	Least Controls
(a) settled cases	262	380	501
(b) tried cases	394	597	919
(c) settled or tried cases	283	402	543

*Id.* Table 59, at 130.

70. P. CONNOLLY & P. LOMBARD, *JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: MOTIONS x-xi* (Federal Judicial Center 1980).

71. Based on the results of a recent ABA-sponsored empirical study of lawyers' attitudes toward discovery problems, Professor Brazil reports that 80% of large case lawyers favor a more active judicial role in controlling the discovery process and 90% favor more frequent imposition of sanctions for discovery abuse. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RESEARCH J. 787, 865-66.

the rules, even at the expense of a measure of its independence and autonomy.

### C. NARROWING THE SCOPE OF DISCOVERY

In recent years, proposals have been made suggesting that the most effective way to respond to the problem of overuse of discovery is to narrow its scope from "relevant to the subject matter"<sup>72</sup> of the action to "relevant to the issues" therein<sup>73</sup> and to impose limits on the number of interrogatories that can be asked without leave of the court.<sup>74</sup> Support for these proposals has emphasized their symbolic value in indicating to litigants that hyperactive discovery, especially when it amounts to a fishing expedition or raw harassment, will not be tolerated.<sup>75</sup>

Opposition to such proposals, which thus far has prevailed,<sup>76</sup> focuses on the fact that they seem to represent a retreat to the bad old days of issue pleading.<sup>77</sup> Although the desirability of limiting cumulative and duplicative discovery is generally acknowledged, placing the responsibility and initiative for enforcement in the hands of private attorneys leaves the door wide open for adversarial abuse. Satellite litigation resulting from motions to limit discovery as beyond its legitimate scope is likely to vitiate any time savings achieved by imposing

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

73. A.B.A., SECTION OF LITIGATION, REPORT OF THE SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE 2-3 (1977) [hereinafter cited as STUDY OF DISCOVERY ABUSE]. The former Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States recommended a slightly less restrictive modification requiring that the information sought during discovery be "relevant to the claim or defense" of one of the parties to the litigation. *Preliminary Draft of Proposed Amendment to the Federal Rules of Civil Procedure*, 77 F.R.D. 613, 623 (1978) [hereinafter cited as *Preliminary Draft*]; see Brazil, *supra* note 47, at 1333-35.

74. STUDY OF DISCOVERY ABUSE, *supra* note 73, at 18, 20 (limiting parties to 30 questions as of right); *Preliminary Draft*, *supra* note 73, at 645-49 (permitting courts to set discretionary limits); see Brazil, *supra* note 47, at 1335-37.

75. *E.g.*, Lindquist & Schechter, *The New Relevancy: An End to Trial by Ordeal*, 64 A.B.A. J. 59 (1978); see also Powell dissenting statement, *supra* note 48.

76. When it submitted its revised proposals in 1979, the Advisory Committee withdrew the two controversial ones described above. In so doing, it expressed its preference for prompt judicial intervention to prevent threatened discovery abuse, noting that abuse was "not so general as to require basic changes in the rules that govern discovery in all cases." *Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 80 F.R.D. 323, 332 (1979).

77. *E.g.*, Becker, *Modern Discovery: Promoting Efficient Use and Preventing Abuse of Discovery in the Roscoe Pound Tradition*, 78 F.R.D. 267, 274-75 (1978).

tighter standards.<sup>78</sup>

Furthermore, this cure may be worse than the disease. Discovery appears to be a problem in only a comparatively small percentage of cases. No discovery at all is employed in fifty percent of the lawsuits instituted in the federal courts,<sup>79</sup> and excessive discovery or unwarranted failure to produce in response to discovery requests is not an issue in most of the remaining actions.<sup>80</sup> The proposed remedy, therefore, is unnecessary in the majority of cases.<sup>81</sup> If implemented in the destructive adversarial atmosphere that currently exists, it simply might add more issues over which to skirmish to the smorgasbord of delaying tactics already available to attorneys.

In 1983 the rulemakers took a more benign approach than the drastic one of cutting back on the scope of discovery. Rule 26(b) was amended to impose an obligation on judges to limit discovery that is either redundant or unduly burdensome under the circumstances of the action,<sup>82</sup> two practices that uni-

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78. See Sofaer, *supra* note 19, at 699. In light of the experience of state courts and federal district courts that have promulgated rules placing numerical limits on interrogatories, see P. Connolly, Working Papers: Survey of Numerical Limits on Interrogatories (Federal Judicial Center 1978) (copy on file with *Minnesota Law Review*), satellite litigation over whether these limits have been exceeded also is likely should a comparable proposal be included in the Federal Rules.

79. See JUDICIAL CONTROLS: DISCOVERY, *supra* note 43, at 28-29 (52% of surveyed cases reporting no discovery activity); C. ELLINGTON, A STUDY OF SANCTIONS FOR DISCOVERY ABUSE 17 (U.S. Dep't of Justice 1979) (55% of federal cases surveyed in Atlanta and 62% of those in Chicago having no discovery activity) (copy on file with *Minnesota Law Review*); Sofaer, *supra* note 19, at 696-97.

80. See C. ELLINGTON, *supra* note 79, at 17 (73% of those cases with some discovery activity having no recorded discovery problem); Brazil, *supra* note 39, at 223 n.9 (Chicago small case attorneys reporting discovery problems with evasive or incomplete answers in 47% of their cases over the prior five years, as opposed to a figure of 75% for larger case attorneys); Sofaer, *supra* note 19, at 696-97; see also Preliminary Report of the Discovery Committee of the Southern District of New York, app. A, 11-12 (Aug. 24, 1983) (25% of responding attorneys reporting that they had experienced no discovery problems in the prior three years, and 67% reporting they had discovery problems in no more than half their cases during that period) (copy on file with *Minnesota Law Review*).

81. In addition, quantitative and other limits on discovery already have been instituted by local rule in a number of federal district courts. See T. GUYER, SURVEY OF LOCAL CIVIL DISCOVERY PROCEDURES 23-26 (Federal Judicial Center 1977); P. Connolly, *supra* note 78, at app. B.

82. Specifically, the amendment authorizes courts to limit discovery when they determine that

(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, tak-



versally are regarded as being beyond the scope of legitimate discovery. The amendment also requires attorneys, when making a discovery request or response, to certify that their papers do not transgress either the "stop-and-think principle" or the proscription against redundant or disproportionate discovery.<sup>83</sup> Of course, this amendment also is heavily dependent on lawyer cooperation and a willingness on the part of judges to monitor lawyer behavior and to enforce the standards established by the new rule.

#### D. THE WIDER USE OF SANCTIONS

Although judicially imposed sanctions always have been available to discourage rule violations and attorney misbehavior,<sup>84</sup> the regime has relied primarily on party-initiated sanction proceedings with minimal judicial involvement. This is theoretically an attractive model since it conserves judicial resources for functions that represent a better allocation of a judge's time and talent. Historically, however, the threat of sanctions has been virtually a toothless tiger. Lawyers have not sought them, partly out of a conviction that judges would not award them; judges have not awarded them, partly because attorneys do not request them.<sup>85</sup> In reality, something akin to a conspiracy of si-

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ing into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

FED. R. CIV. P. 26(b)(1); *see id.* 26(b) advisory committee note to 1983 amendment; Miller & Culp, *supra* note 60, at 25.

83. The attorney must certify that the discovery request, response, or certification is consistent with the rules and warranted by law, not interposed to harass or for some other improper purpose, and not unreasonable or unduly burdensome. FED. R. CIV. P. 26(g); *see id.* 26(g) advisory committee note to 1983 amendment; Liman, *The Quantum of Discovery vs. the Quality of Justice: More is Less*, 4 LITIGATION, Fall 1977, at 8, 9, 58 (recommending such a certification requirement); Miller & Culp, *supra* note 60, at 25. *But see* Sofaer, *supra* note 19, at 700-01 (criticizing the certification requirement as unduly burdensome in most cases). Similarly, other amendments to Rules 7 and 11 strengthened the certification provisions with respect to papers other than discovery documents. *See supra* note 60 and accompanying text.

84. In addition to Federal Rule 37, other sources of authority for imposing sanctions for abuse of judicial process include Federal Rule 41, various local rules, 28 U.S.C. § 1927, contempt statutes, and the inherent power of the court. *See* R. RODES, K. RIPPLE & C. MOONEY, SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE (Federal Judicial Center 1981) [hereinafter cited as SANCTIONS IMPOSABLE]; 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2282 (1970); Renfrew, *supra* note 27, at 267-71.

85. In a 1978 Federal Judicial Center study, attorneys moved for sanctions in connection with less than one percent of all discovery requests, and judges ruled on less than half of the motions made. The judges sided with the moving party in about three-quarters of their rulings, however, usually imposing un-

lence has been in effect.

Sanctions have been underutilized partly because they seem to exist at two polar—and equally unattractive—extremes. On one end of the spectrum are nominal fines, court costs, and reprimands—wrist slaps not worth an attorney's effort to seek or a judge's energy to consider or impose. At the other extreme, harsh remedies, such as striking pleadings or imposing involuntary dismissals or defaults, have seemed too draconian to impose on clients for what typically is the misbehavior of the attorney or mere procedural failings.<sup>86</sup> Only the ancient Greeks are reported to have killed the messenger who brought bad news.

Various understandable elements of professional culture have inhibited the sanction process. Many judges, who usually come from the same ranks as the attorneys appearing before them, are slow to penalize attorneys for using adversarial tactics in which they themselves may have indulged when they were practitioners.<sup>87</sup> Moreover, attorneys cannot be expected to request sanctions against opponents. They must be mindful of a variation on the golden rule: "Do not seek sanctions against what is done to you today, for it may be what you will try on your opponent tomorrow."<sup>88</sup> Finally, much of the delay is caused by conduct that is neither black nor white. Rather, discovery activity exists on a continuum that runs from the genuinely proper to the marginally acceptable to the downright abusive. Since the point at which discovery becomes cumulative or redundant is indefinite, it is difficult for attorneys to know when to initiate sanction proceedings or for the court to

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conditional sanctions. *Judicial Controls: Discovery*, *supra* note 47, at 24-25; see also Renfrew, *supra* note 27, at 271.

86. See, e.g., *Dove v. Codesco*, 569 F.2d 807, 810 (4th Cir. 1978); *McCargo v. Hedrick*, 545 F.2d 393, 396 (4th Cir. 1976); *Ali v. A & G Co.*, 542 F.2d 595, 597 (2d Cir. 1976) (Oakes, J., dissenting opinion); *Hassenflu v. Pyke*, 491 F.2d 1094, 1095 (5th Cir. 1974); *Reizakis v. Loy*, 490 F.2d 1132, 1135-36 (4th Cir. 1974); *Pond v. Braniff Airways, Inc.*, 453 F.2d 347, 349 (5th Cir. 1972); *Flaska v. Little River Marine Constr. Co.*, 389 F.2d 885, 887-88 (5th Cir.), *cert. denied*, 392 U.S. 928 (1968); *Durgin v. Graham*, 372 F.2d 130, 131 (5th Cir.), *cert. denied*, 388 U.S. 919 (1967); *Improving Judicial Controls*, *supra* note 49, at 921-37; *Sofaer*, *supra* note 19, at 710-13; Note, *Federal Pre-trial Practice: A Study of Modification and Sanctions*, 51 GEO. L.J. 309, 342-43 (1963); Comment, *Involuntary Dismissal for Disobedience or Delay: The Plaintiff's Plight*, 34 U. CHI. L. REV. 922, 929-30 (1967).

87. See C. ELLINGTON, *supra* note 79, at 112-113; *Improving Judicial Controls*, *supra* note 49, at 927-28; Kaminsky, *Proposed Federal Discovery Rules for Complex Litigation*, 48 FORDHAM L. REV. 907, 993 (1980).

88. See *Improving Judicial Controls*, *supra* note 49, at 946-47; *Brazil*, *supra* note 39, at 240-43; Renfrew, *supra* note 27, at 272.

feel confident enough to step in and order them, especially if the judge lacks sufficient familiarity with the conduct of the parties at the time the alleged abuse occurs.

Despite these factors, courts in recent years have indicated a greater willingness to impose sanctions,<sup>89</sup> and the recent amendments to the Federal Rules should encourage this trend. The increased involvement demanded by the rules, the clear mandate to judges in Rule 26 to limit disproportionate and redundant discovery, and the encouragement to formulate issues and facilitate settlement all reflect a plan of measured judicial intrusion as a check on uncontrolled adversarial delay.<sup>90</sup> Since judicial involvement in the pretrial process will familiarize the court with the case as it matures, judges should be in a better position to evaluate lawyer behavior than they were in the past. Indeed, if the system operates as intended, judges should be able to warn lawyers away from improper activity before it happens, and lawyers, sensing an increased judicial presence, may exercise greater restraint than they might have otherwise.

The increased realism, flexibility, and availability of sanctions that may be imposed under the amended rules also should help to overcome the reluctance of lawyers to invoke them. Under the new approach to sanctions, the judge is encouraged to make the punishment fit the crime by increased reliance on cost-shifting.<sup>91</sup> After all, it really is simple equity to

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89. There clearly is a change in the tenor of judicial thinking and pronouncements on the use and propriety of sanctions. Compare *Padovani v. Bruchhausen*, 293 F.2d 546, 548-49 (2d Cir. 1961) (expressing concern that the overuse of sanctions would place undue emphasis on the pleadings) with *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (per curiam) (holding that "the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent").

The combination of the Supreme Court's decision in *National Hockey League* and the increased pressure of crowded dockets has caused lower courts to make more frequent use of discovery sanctions. See 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2284, at 232-33 (Supp. 1983); *Improving Judicial Controls*, *supra* note 49, at 922; Renfrew, *supra* note 27, at 271, 281-82; Schroeder & Frank, *The Proposed Changes in the Discovery Rules*, 1978 ARIZ. ST. L.J. 475, 489 n.67; Werner, *Survey of Discovery Sanctions*, 1979 ARIZ. ST. L.J. 299, 316; Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033, 1044-47 (1978).

90. For discussions of the 1983 amendments to the Federal Rules, see Hall, *New Rules Amendments Are Far Reaching*, 69 A.B.A. J. 1640 (1983); Miller & Culp, *supra* note 60; Miller & Culp, *supra* note 5. Although there are as yet no empirical studies on sanctions under the 1983 amendments, reports received by the author indicate an increasing use of cost-shifting throughout the country.

91. The Advisory Committee observed that the new language in Federal

make the one who fouls the nest pay the costs of cleaning it up. The court no longer is limited to punishing the innocent client for the sins of a lawyer, hoping that the latter will suffer indirectly.<sup>92</sup> Nor need the judge be content to punish the attorney whose behavior falls short of willfulness or contempt with a mere slap on the wrist in the form of a published reprimand, a measure of dubious deterrent force since it hardly is credible that potential clients leaf through the reporters when selecting counsel.

The certification requirements imposed on lawyers and the accompanying higher standards of inquiry and preparation that must be met in order to satisfy the signer's professional duty are now to be enforced by the court's imposition of sanctions on either the party or counsel.<sup>93</sup> Since a higher standard of conduct can be demanded from an attorney than from a lay client,<sup>94</sup> the type of behavior required to trigger sanctions need not be as culpable as that which warrants dismissal. At least the court now has the discretion to punish the individual at fault. Not only does this conform more closely to our notions of fairness, but it is more likely to have a deterrent effect on future abuse.<sup>95</sup>

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Rule 11 regarding sanctions is meant to discourage abuse by "building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith." FED. R. CIV. P. 11 advisory committee note to 1983 amendment. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67 (discussing inherent power of court to award attorneys' fees when party conducts litigation in bad faith); *Miller & Culp*, *supra* note 5, at 34 (noting cost-shifting effect of new amendments); *Peckham*, *supra* note 3, at 800-04 (discussing factors to be considered in choosing appropriate sanctions); *Sofaer*, *supra* note 19, at 706-710 (observing that monetary sanctions are a flexible device for targeting sanctions at those individuals most responsible for discovery abuses).

92. See SANCTIONS IMPOSABLE, *supra* note 84, at 70-79 (explaining sanctions available for disciplining attorneys for rules violations); *Sofaer*, *supra* note 19, at 710-13 (commenting on propriety of sanctioning attorneys); see also *supra* note 86 and accompanying text.

93. See *supra* notes 60 & 83 and accompanying text.

94. See *Jaquette v. Black Hawk County, Iowa*, 710 F.2d 455, 462 (8th Cir. 1983) (discussing court's authority to assess costs and attorneys' fees against an attorney personally); *McCandless v. Great Atl. & Pac. Tea Co.*, 697 F.2d 198, 201 (7th Cir. 1983) (holding that "although subjective bad faith should be required before assessing fees against a party, a lesser standard should be applied when judging an attorney's conduct"); see also Underwood, *Legal Ethics and Class Actions: Problems, Tactics and Judicial Responses*, 71 Ky. L.J. 787, 818-19 (1982-83) (noting that amended Federal Rule 11, with its more demanding certification requirements, could help to deter counsel from filing frivolous class actions by requiring them to tailor the complaint to the facts of the particular case rather than relying on discovery to generate a claim).

95. The Supreme Court legitimated the prophylactic purpose of sanctions in deterring further abuse in *National Hockey League v. Metropolitan Hockey*

Expanding the range of sanctions available to the court also gives the judge flexibility to attack the particular abuse with appropriate punishment, rather than limiting the bench either to harsh measures that will be imposed rarely or to trivial ones that have no significant punitive or deterrent force. The amended rules give the judge an explicit and implicit mandate to operate with a scalpel instead of a meat-ax, to tailor the sanction to the magnitude and form of the abuse. Rather than dismissing an entire lawsuit for failure to make discovery on a given issue, an action that is vulnerable to reversal as overly severe,<sup>96</sup> the judge can direct that the recalcitrant party be estopped from denying the truth of the matter asserted by the requesting party, thereby limiting the punishment to the matter that occasioned the abuse.<sup>97</sup> Or the court can impose the costs of proving an issue at trial on a party or attorney who refused to admit its truth at a pretrial conference in cases in which there was no good faith basis for not doing so.<sup>98</sup>

Use of the pretrial conference procedure to encourage narrowing the issues, to elicit admissions when there is no real contest as to a question of fact, and to promote settlement<sup>99</sup>

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Club, Inc., 427 U.S. 639 (1976), thereby encouraging more frequent use of sanctions by the lower courts. See *supra* note 89.

96. Although Federal Rule 37(b)(2)(C) authorizes a court to dismiss an action for disobeying a discovery order, courts are reluctant to impose this severe sanction in all but the most egregious of situations. See, e.g., *Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v. Brownell*, 357 U.S. 197, 212 (1958) (holding that dismissal unwarranted when "failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner"); *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494, 504 (4th Cir. 1977), *cert. denied*, 434 U.S. 1020 (1978) (observing that dismissal improper absent "flagrant bad faith" and "callous disregard" of one's obligation under the Federal Rules).

97. The Federal Rules authorize a court to punish a discovery violation by issuing "[a]n order that the matters regarding which the order was made or any other designated facts shall be taken as established for purposes of the action in accordance with the claim of the party obtaining the order." FED. R. CIV. P. 37(b)(2)(A). See *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704-05 (1982) (affirming lower court's application of Federal Rule 37(b)(2)(A) to establish personal jurisdiction over a defendant that refused to cooperate with discovery aimed at establishing the requisite "minimum contacts"); *Black v. Sheraton Corp. of Am.*, 371 F. Supp. 97, 102 (D.D.C. 1974) (holding that government's failure to disclose FBI files related to its unlawful electronic surveillance of plaintiff justified deeming as established certain of plaintiff's damage claims).

98. FED. R. CIV. P. 37(c).

99. The 1983 amendment to Federal Rule 16 broadens the scope of the pretrial conference, "shifting the emphasis away from a conference focused solely on the trial and toward a process of judicial management that embraces the entire pretrial phase, especially motions and discovery." FED. R. CIV. P. 16(a) advisory committee note to 1983 amendment. A concrete example of this

also is reenforced in the new rules by an explicit mandate to ensure compliance through the use of sanctions.<sup>100</sup> This is certain to broaden the range of conduct that now may be considered improper; conduct formerly seen as a natural part of the adversary process now may be treated as sanctionable.<sup>101</sup>

#### E. SUMMARY

Engraved ethical norms of loyalty to one's client often combine with attorney self-interest to create powerful incentives to use adversarial tactics to protract pretrial. Since "surplus justice" accorded to litigants in one action brings about its denial or delay to others waiting in the courthouse queue, however, we no longer can afford to leave the enforcement of standards of litigation conduct in the hands of private parties. The judicial system—indeed, society at large—has an independent interest in how our court resources are used. If conditions continue to deteriorate, we might as well chisel off the legend above the Supreme Court's door, "Equal Justice Under Law," and replace it with a sign that says, "Closed—No Just, Speedy, or Inexpensive Adjudication for Anyone."

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emphasis on case management is the new requirement that a judge issue, within 120 days of filing, a scheduling order setting time limits for joinder of parties, amendment of pleadings, filing and hearing of motions, and completion of discovery for all cases except those exempted by local rule. FED. R. CIV. P. 16(b). See N. WEEKS, DISTRICT COURT IMPLEMENTATION OF AMENDED FEDERAL CIVIL RULE 16: A REPORT ON NEW LOCAL RULES (Federal Judicial Center 1984); Hall, *supra* note 90, at 1642-43; Miller & Culp, *supra* note 60, at 23-24; Sofaer, *supra* note 19, at 691-92.

100. A new addition to Rule 16 makes it clear that discovery sanctions available under Federal Rule 37 may be imposed for disobeying a scheduling or pretrial order or for failing to appear, appearing unprepared to participate, or failing to participate in good faith at a scheduling or pretrial conference. FED. R. CIV. P. 16(f). See Hall, *supra* note 90, at 1643; Miller & Culp, *supra* note 60, at 24; Sofaer, *supra* note 19, at 692-93.

101. In an attempt to encourage attorneys to engage in more serious evaluations of the prospects for settlement, the Advisory Committee proposed an amendment to Federal Rule 68 that would subject a party failing to accept a settlement offer that proved to be more advantageous than the judgment actually obtained to mandatory true-cost sanctions, including attorneys' fees and prejudgment interest. *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 98 F.R.D. 339, 361-67 (1983). The proposal drew an enormous amount of comment, much of which was negative. As a result, the Advisory Committee redrafted the proposal and recirculated it to the bench and bar in the fall of 1984. *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 102 F.R.D. 423 (1984). The new proposal would impose sanctions only for an unreasonable failure to accept a settlement offer and give district judges greater flexibility.

## V. THE RISKS OF CONCENTRATING ON THE IMPROVEMENT OF SYSTEMIC EFFICIENCY

There are potential difficulties with the suggested concentration on systemic reform, however. Although we cannot accurately predict their severity at this time, they nonetheless should be identified in the hope that any pernicious side effects of reorientation of attorney obligations, judicial management, imposition of sanctions, and preoccupation with efficiency can be minimized. The first question is whether anyone will pay attention to the new attitudes embodied in provisions such as the 1983 amendments to the Federal Rules. The success of this experiment depends on the active participation of lawyers and judges, which in turn depends in large measure on the perception that the burdens these changes impose on bench and bar are worth the efforts they entail.

There is reason to be optimistic. The frustration throughout the profession with cost and delay has created a widespread feeling that something must be done about it. This mood, coupled with a clear message from the Supreme Court that deterrence is a legitimate purpose for imposing sanctions for discovery abuse,<sup>102</sup> should increase judicial willingness to set standards of conduct and to punish violations by imposing sanctions with bite. Moreover, a promanagement philosophy is encouraged in federal district court judges through training and educational seminars conducted by the Federal Judicial Center. These programs, together with the policies enunciated in the recent amendments to the Federal Rules, will help to establish the emerging attitudes toward judicial management as the norm rather than an eccentric deviation.

Also helpful will be a growing understanding that the economies resulting from streamlining cases often can offset the time expended in scheduling, managing, and dealing with sanction requests. This should lead judges to begin thinking of management as cost-effective rather than as merely another labor-intensive burden. Although we will have to take this premise on faith until more data and experience are available, there is reason to believe that it is true and that a growing recognition of the efficiency of management ultimately will encourage its use.<sup>103</sup>

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102. See *supra* notes 89 & 95.

103. See *supra* note 69 for data on the relationship between case management techniques and overall disposition time. Undoubtedly, procedural uniformity should save judges time by reducing the amount of training they must

Another concern is that the frequent invocation of sanctions will create an acrimonious litigation atmosphere. The truth is that acrimony generated by delay and abuse already exists. Morale within the profession is not likely to get better if nothing is done; it is far more likely to get worse.<sup>104</sup>

A related apprehension is that the wider availability of sanctions will become an attractive plaything for the bar. The fear is that sanctions will take on a life of their own and, like some Frankenstein monster, generate satellite litigation. Indeed, lawyers always can rationalize that professional responsibility requires them to seek cost-shifting sanctions to reduce their clients' litigation costs.<sup>105</sup> Unfortunately, litigation has become so uncivilized in many substantive contexts that greater resort to the sanction process is likely. Thus, it seems realistic to anticipate a sharp escalation in sanction applications during the next few years; they even may become the cottage industry of the remainder of this decade, just as class actions were so fashionable in the early 1970's.<sup>106</sup> But to the extent that requests for sanctions border on the frivolous, there is reason to expect that judges, already sensitized to the potential for abuse through over-litigiousness and weary of its cost in terms of judicial resources, will give short shrift to unjustified or trivial attempts to exploit the sanction mechanism.<sup>107</sup>

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give attorneys who are unfamiliar with the procedures of their particular court. See S. FLANDERS, *supra* note 42, at 9. Moreover, the information we have indicates that judges and attorneys have recognized the inefficiency of poor judicial management and are willing to experiment with ways to improve the situation. See *supra* notes 67-71 and accompanying text.

104. See C. ELLINGTON, *supra* note 79, at 112-14; *Improving Judicial Controls*, *supra* note 49, at 925; Peckham, *supra* note 3, at 802-03; Renfrew, *supra* note 27, at 272; Sofaer, *supra* note 19, at 717.

105. See *supra* note 78 and accompanying text. *But see* Peckham, *supra* note 3, at 803 (predicting that freer imposition of monetary sanctions would not generate satellite litigation because violations of pretrial orders usually are obvious and would not be worth contesting). The Advisory Committee suggested one way to control the problem of satellite litigation:

To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record. Thus, discovery [in sanction proceedings] should be conducted only by leave of the court, and then only in extraordinary circumstances.

FED. R. CIV. P. 11 advisory committee note to 1983 amendment.

106. See Miller, *supra* note 8.

107. See *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 699 F.2d 484 (9th Cir. 1983) (punishing satellite litigation by assessing \$1250 damages, including attorney fees and costs incurred through appeal), *cert. denied*, 104 S.Ct. 1445 (1984). Courts generally have held, however, that Rule 37 sanction orders are interlocutory and therefore not immediately appealable under 28 U.S.C.



The next concern is that vigorous enforcement of the new rules may have a chilling effect on lawyers. In addition to curbing abuse, the obligations imposed by lawyer certification, judicial management, and the threat of sanctions might cause some lawyers to think, double-think, and triple-think themselves into paralysis. This might inhibit some of the greatest attributes of the American legal profession—its innovativeness, creativity, tenacity, and independence. But the advocate's obligation to represent a client vigorously always has been subject to the stricture that representation be accomplished within the limits of the system. The procedural codes and the principles of professional responsibility<sup>108</sup> codify those limits and should be obeyed in letter and spirit. Enforcement of the new behavioral rules need not gut creativity; in the hands of sensitive judges they merely will mark the limits of permissible lawyer behavior as have the earlier legal restraints.<sup>109</sup>

The requirement that lawyers "stop and think" before they act and the limits on redundant and disproportionate discovery need not exclude opportunities for good faith but aggressive advocacy and representation. Standards for controlling excessive contrariety need not restrain attorneys to that which is tried, true, and pedestrian.<sup>110</sup> Moreover, those who choose to

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§ 1291. This is true whether sanctions are imposed against a *party*, see, e.g., *Johnny Plocks, Inc. v. Firestone Tire & Rubber Co.*, 634 F.2d 1215 (9th Cir. 1980), but see *IBM v. United States*, 493 F.2d 112, 127-30 (2d Cir. 1973) (Timbers, J., dissenting), cert. denied, 416 U.S. 995 (1974), or against an *attorney*, see, e.g., *Eastern Maico Distributors, Inc. v. Maico-Fahrzeugfabrik*, 658 F.2d 944, 948-49 (3d Cir. 1981).

108. The new Model Rules of Professional Conduct state the attorney's obligation to the system more affirmatively than does the Model Code. Compare MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 (1983) ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.") with MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1980) ("A lawyer shall not . . . file a suit, assert a position, conduct a defense [or] delay a trial . . . when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."). Moreover, the Model Rules contain a provision, which has no Model Code counterpart, prohibiting lawyers from "mak[ing] a frivolous discovery request or fail[ing] to comply with a legally proper discovery request by an opposing party." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(d) (1983).

109. See Renfrew, *supra* note 27, at 274.

110. The Advisory Committee expressed this view with respect to the addition to Rule 11 regarding sanctions:

The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. . . .

FED. R. CIV. P. 11 advisory committee note to 1983 amendment. The reasoning in various court cases echoes this view. See, e.g., *Overnite Transportation Co. v.*

become lawyers—especially litigators—are not likely to lose their advocate's instincts or zeal out of a fear of sanctions.

Ultimately, we have to have confidence that trial judges will apply the new rules in ways that carry out their underlying purposes. We must rely on them to distinguish legitimate advocacy from illegitimate harassment or attrition and to avoid overkill by calibrating sanctions to fit the character of the conduct. By and large, our historic reliance on the good sense and discretion of trial judges has not been misplaced.

Having said that, however, it is important to understand that we are changing the traditional role of the judge. The degree of judicial participation in, and familiarity with, the case that extensive management implies is a substantial departure from the centuries-old image of the judge as passive overseer of the process. Changes in the amount of knowledge the judge is expected to have about the parties and the action as well as in the judge's role in encouraging admissions of uncontested issues, shaping and limiting discovery, and promoting settlement raise the specter of a judge with too much power, too much familiarity with the parties, and too much of an emotional stake in the outcome.<sup>111</sup> The fear, of course, is that a judge who has been scrapping in the trenches with the litigants throughout pretrial is ill-suited to rule objectively on discovery motions or to preside at trial. In the words of one commentator, "Although the sword remains in place, the blindfold and scales have all but disappeared."<sup>112</sup>

The goal of judicial neutrality, however, does not require judicial ignorance. The notion that justice is or ought to be blind should extend only to ensuring impartiality.<sup>113</sup> The argument that neutrality and fairness must entail know-nothing-

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Chicago Industrial Tire Co., 697 F.2d 789, 794-95 (7th Cir. 1983) (defendant not entitled to costs since plaintiff's claim, a matter of first impression, was not frivolous); Cheng v. GAF Corp., 713 F.2d 886, 890-92 (2d Cir. 1983) (no award of attorneys' fees to defendant since plaintiff's attempts to disqualify opposing attorney not unreasonable).

111. See Resnick, *Managerial Judges*, 96 HARV. L. REV. 376, 426-31 (1982) (arguing that judges acting as pretrial case managers are tainted for later adversarial adjudication); see also *Improving Judicial Controls*, *supra* note 49, at 887 (explaining as one source of judges' reluctance to manage discovery their "concern about preserving their impartiality, both in fact and in the eyes of counsel and litigants"). Professor Resnick's position is sharply criticized by the Circuit Executive for the Second Circuit in Flanders, *Blind Umpires—A Response to Professor Resnick*, 35 HASTINGS L.J. 505 (1984).

112. Resnick, *supra* note 111, at 431.

113. See *Textor v. Board of Regents*, N. Ill. Univ., 711 F.2d 1387, 1396 (7th Cir. 1983) (noting that generally "an opinion formed from contact with a case is not the type of personal prejudice that disqualifies a judge").

ness carried ad absurdum would have the judge approach each discrete issue in an action with an absolutely clean slate and an empty head. So long as a record of contacts with the judge is kept and the parties can put allegations of improper prejudice on the record,<sup>114</sup> there is no reason to fear the judge's familiarity with the action. What point is there in delivering a sanction scalpel capable of being employed to fit the punishment to the abuse with precision and delicacy, only to blindfold the surgeon?<sup>115</sup>

The chance of impaired judicial neutrality and the other dangers inherent in the "Brave New World of Management" at least are obvious to us. These are potential corruptions embedded in any system of justice imbued with a substantial element of discretion. To a large degree we are familiar with these risks and know how to deal with them. Although we must rely heavily on the conscientiousness and sound judgment of trial court judges to avoid unfair prejudice, we also have the policing capabilities of appellate courts and the knowledge that their oversight will be triggered by the protests of injured parties and counsel.<sup>116</sup>

The more insidious danger lies in the possibility of a casual and unconsidered debilitation of the adversary system through the overzealous pursuit of the very end we seek to achieve—the swift, efficient, and fair resolution of lawsuits. Strong judicial management is a potential threat to the adversary system as it has existed for hundreds of years because it calls for a significant change in the power relationship between judges and lawyers and in their respective functions.<sup>117</sup> Indeed, there are risks in imposing a meaningful duty on attorneys to act in the

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114. Cf. Resnick, *supra* note 111, at 432-33 (proposing that the Federal Rules be amended "to prohibit *ex parte* communications and to require judges to conduct all meetings with litigants on the record").

115. When there is reason to believe that the neutrality of the judge genuinely has been impaired, the case can be transferred to another judge. See 28 U.S.C. § 144 (1982) (providing for disqualification on the grounds of personal bias or prejudice). This leaves the parties in no worse position than had the original judge been uninvolved all along; in both situations the judge has none of the familiarity with the case that sometimes is quite helpful. Since there is no cure-all for this problem, one must rely on the sound discretion of judges both to preserve a measure of impartiality and to bow out gracefully when they are unable to do so. Cf. Silberman, *supra* note 33, at 1106-07 (use of magistrates during pretrial stage facilitates isolation of judges from potentially prejudicial influences).

116. See Hall, *supra* note 90, at 1643 (pointing out reviewability of sanction impositions). But see *supra* note 107 (sanction orders not *immediately* appealable).

117. See Resnick, *supra* note 111, at 380-86 (describing the "traditional judi-

interests of the judicial system, rather than exclusively in that of their clients, and in placing enforcement of that duty in the hands of judges, whose primary concern could well become efficiency rather than justice itself.<sup>118</sup> This could have an impact on our adjudicatory system that we do not contemplate and may come to regret. A mystique of disposition *uber alles* may be effective in keeping the docket current, but the price tag probably is too high.

The adversary system is merely a mechanism for seeking a fair adjudication of disputes; it is not an end in itself. Thus it should be flexible and, perhaps, yield if a more accurate and efficient procedure emerges. But we must remain vigilant and aware of the implications of what we are doing, lest we wake up some day years hence with the realization that we unthinkingly have presided over the dismantling of the adversary system and replaced it with something quite different from "Justice American-style."

## VI. THE NEED FOR ACTION

Far more expensive than any of the concerns just mentioned, however, would be paralysis. The price we pay in terms of damage to the morale of judges, court administrators, and users of the system for letting private litigants proceed unchecked is more than we can afford. The quality of our justice depends on the character of the personnel we are able to attract as judges and on how long they endure. In the long run the frustration created by the present state of affairs will deprive the system of considerable talent, both by motivating judges to resign early and by deterring potential candidates from serving at all. Judgeships compete with the high salaries of private practice and the prestige and autonomy of academia. The chief attractions of the bench are nonmonetary. If we want to prevent the quality of our judiciary from declining to an unacceptably low level, we must pay attention to the intangibles of the job—both its rewards and its frustrations.<sup>119</sup>

Beyond its impact on the judiciary, the failure to experiment with ways of combatting cost and delay constitutes an in-

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cial role"); see also *supra* note 58 and accompanying text (duty of lawyer to system). But see Flanders, *supra* note 111.

118. Compare Resnick, *supra* note 111, at 431 ("Case processing is no longer viewed as a means to an end; instead, it appears to have become the desired goal.") with S. FLANDERS, *supra* note 42, at 68-70 (stressing correlation between speed of handling cases and quality of justice).

119. See *supra* note 40 and accompanying text.

estimable disservice to the public. Its negative impact goes far beyond affecting the right of specific litigants to have their grievances determined promptly and in the fairest manner feasible. For many, the courthouse is considered a forum in which quiet reason and unselfish compassion combine to resolve disputes in a violence-free atmosphere. At a time when there are grave doubts about our ability to achieve social justice through the normal processes of government, a breakdown in the public's confidence in the judicial system or the development of a widespread conception of its being paleolithic in character could be catastrophic.

Yet, there already are signs of a debilitation in public confidence and a growing alienation with the system. Unfortunately, these signals are going largely unheeded. Many commercial disputants have forsaken the courts in favor of other conflict-resolving institutions, such as arbitration and private, quasi-judicial proceedings, that are believed to be more efficient and better able to provide decisions more attuned to the realities of the business world. Minority groups increasingly cry out that, far from being blind, justice simply is stacked in favor of those members of the establishment whose ancestors long ago fabricated the existing framework to protect themselves and their property interests and who now continue to use it as a shield to preserve their private fiefdoms. The efforts of legal aid societies and social action lawyers throughout the country to convince the disadvantaged that the law can be a weapon of redress thus far has made only modest headway. Accordingly, the faith of the poor and disadvantaged in the majesty of the law, kindled thirty years ago by *Brown v. Board of Education*<sup>120</sup> and other cases of that generation, is now being extinguished. Because of the primitive way in which our courts operate and the lack of any immediate prospect that some white-hatted posse will appear to head the disastrous possibility of systemic calcification off at the pass, it would be unconscionable to continue to ignore any potentially productive avenue for streamlining the functioning of our courts.

The time has come for the legal profession to respond to forces more constructive than "the winds of change." The historic genial anarchy at the courthouse must give way to rational reform. Ironically, whether we are goaded into serious action may depend on a realization that the only prospect more unacceptable than doing the wrong thing is doing nothing. But

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120. 347 U.S. 483 (1954) ("separate but equal" inherently unequal).

recognizing that we must act should not blind us to the possible harms that "reforms" may bring. These could stem from distortion or subordination of our aims or through prejudice, abuse, or ineffectiveness. We must remain alert to the perils of pursuing our objectives too effectively—of being too good at what we are about. After all, what purpose is there in making the trains run on time if they do not take us where we want to go?

