Case Management and the Hawaii Courts: The Evolving Role of the Managerial Judge in Civil Litigation

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I. INTRODUCTION

Over the last fifteen years vociferous criticism has been leveled at the civil litigation system in the United States. Criticism has been voiced by litigants with horror stories, by a disenchanted general public and by overwhelmed practicing attorneys. Much of the criticism has focused on the symptoms of systemic problems: overcrowded dockets, undue cost, delay, waste, and insensitivity to human needs. Additional scholarly criticism has been directed at perceived failures of the adversary system—failures ostensibly rooted in conceptually and technically flawed procedures which encourage frivolous filings, promote runaway discovery and only begrudgingly authorize judicial control over cases at any time prior to trial.[1]

This criticism has generated a flurry of activity and serious efforts to revamp the rules of civil procedure. Recent efforts have not only tinkered with existing

[1] *See* Batista, *Sanctioning Attorneys For Discovery Abuse—The Recent Amendments to the Federal Rules of Civil Procedure: Views From the Bench and Bar*, 57 ST. JOHN'S L. REV. 671 (1983); Brazil, *Improving Judicial Control Over the Pretrial Development of Civil Actions: Model Rules For Case Management and Sanctions*, 1981 AM. B. FOUND. RES. J. 875; Miller, *The Adversarial System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1 (1984); Nordenberg, *The Supreme Court and Discovery Reform: The Continuing Need For an Umpire*, 31 SYRACUSE L. REV. 543 (1980); Rosenberg & King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 B.Y.U. L. REV. 579.

rules but dramatically reconceptualized important aspects of the adversarial process itself. One indicia of the depth of current concern is the frequency of major amendments to the Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure were amended significantly four times over their first forty-one years and were amended thrice between 1980 and 1985. Recent amendments have created the "managerial judge" by actively introducing judges into the litigation process from its outset, by authorizing judges to limit and control discovery even before there is abuse or overuse and by liberalizing the standard for imposing punitive sanctions to compel attorneys to streamline the process of litigation through the elimination of "unreasonable" filings.[2]

In response to this national trend and to the Hawaii Judiciary's efforts in improving judicial administration, the Hawaii state court system is also undergoing both restructuring and fine-tuning. The Judiciary has adopted a sophisticated system of docket control,[3] tightened circuit court rules to facilitate case preparation and settlement before trial[4] and initiated an ambitious mandatory arbitration program as part of its emphasis on alternative dispute resolution.[5] Significantly, the Judiciary's Rules Committee is also presently considering substantial changes to the Hawaii Rules of Civil Procedure, including changes similar to those made in the federal rules concerning managerial judges.

Will the federal procedural innovations be effective? Or are they merely a band-aid cure for a systemic ailment? Do they rest on a firm theoretical foundation? What will this mean for judges, litigants, lawyers and the public? In Hawaii, what is and indeed should be the evolving role of the civil litigation judge? Should the Hawaii Rules of Civil Procedure be amended to follow the new federal rules and empower the managerial judge?

The first purpose of this article is to stimulate public discussion of these questions by examining the impact of the proposed new managerial rules. Careful scrutiny and discourse are essential in light of their potentially dramatic effect upon Hawaii's civil litigation system. The second purpose is to recommend adoption of new managerial rules 11, 16, 26(b)(1), 26(f) and 26(g) with adjustments. These rules, sensitively applied, should enhance the overall quality

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[2] *See* Order Amending the Federal Rules of Civil Procedure, 97 F.R.D. 165 (1983). *See also* Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981) [hereinafter Peckham, *Judge as Case Manager*].

[3] The Hawaii Judiciary recently adopted a master calendar system designed to centralize caseflow. The civil and criminal calendars in the First Circuit Court are each controlled by one administrative judge in charge of case assignment and reporting. THE JUDICIARY, STATE OF HAWAII, 1984-1985 ANNUAL REPORT 4 (1985). In addition, civil case filing, tracking, calendaring, and monitoring of orders and judgments are now computerized as part of the plan for a centralized statewide system of automation. THE JUDICIARY, STATE OF HAWAII, 1985-86 ANNUAL REPORT 10 (1986).

[4] HAW. CIR. CT. R. 12, 12.1.

[5] HAW. ARB. R. (1986).

of justice delivered through the Hawaii state courts by reducing litigation delay and cost without unduly burdening attorneys or the courts, sacrificing judicial impartiality or diminishing fair access.

This article starts with the concept of the managerial judge and its place generally within the adversarial process. It next examines the concept's efficiency rationale in the context of enhancing the quality of justice. Finally, it examines specific provisions of the new federal rules which give judges significant managerial powers to pare down the pretrial process and quicken the resolution of cases. The appropriateness of these rules is evaluated not only in terms of efficiency but also in terms of the basic values underlying the civil litigation system—particularly the values of participation and substantive effectuation.

Predicting the impact of the adoption of the new rules, of course, involves a degree of conjecture. Missing as a backdrop are empirical studies involving the Hawaii circuit courts. The recommendations, however, are rooted in considerably more than guesswork. Numerous studies preceded the adoption of the new federal rules in 1980 and 1983. Commentators at the time overwhelmingly favored adoption. Five years of operation in the federal courts have yielded generally favorable, albeit preliminary, results. The available data on the impact of managerial judges and comments by judges themselves indicate that greater efficiency has been achieved without sacrificing fairness. State court experiments with managerial procedures also have found a marked reduction in delay and pretrial cost.

Perhaps most important, this article's recommendations are directly in line with the Hawaii Judiciary's policy goals. The recommendations appear to be the next logical step for streamlining the Hawaii civil litigation process. Adoption of the rules would keep Hawaii in the forefront of improvements in judicial administration for state courts.[6] As Judge Peckham has observed:

> [T]he leaders of the American bar and bench now urge state jurisdictions to abandon their traditional passive role of allowing lawyers to control the process of the litigation, with all the cost and delay that ensue. Instead, the trial courts are being asked to monitor and supervise aggressively their cases from start to finish. I perceive that we are about to witness a dramatic change in the way most of our state trial courts do business.[7]

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[6] In 1986, Hawaii Supreme Court Chief Justice Lum received the American Judges Association's Award of Merit for his work on improving judicial administration.

[7] Peckham, *A Judicial Response To the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 254 (1985) [hereinafter Peckham, *A Judicial Response*]. Judge Peckham is the Chief Judge for the United States District Court for the Northern District of California and is a primary exponent of the managerial judge.

II. "JUSTICE DELAYED, JUSTICE DENIED:" THE PROBLEM OF CASE CONGESTION AND MOUNTING PRETRIAL COSTS

A primary goal of the Hawaii Judiciary has been the reduction of case congestion and ultimately the elimination of undue delay and cost in resolving cases. The adage "justice delayed is justice denied"[8] has become even more poignant over the last decade as court congestion and delays have worsened across the country.[9] "Litigation explosion"[10] and "hyperlexis"[11] are the descriptive terms often employed. Some dispute has arisen about the extent, impact and even existence of the "litigation explosion."[12] Two facts, however, are undisputed: (1) case filings and the overall complexity of cases have increased dramatically over the last fifteen years; and (2) the cost of litigating has soared.

A. Increased Case Filings

In 1985, then United States Supreme Court Chief Justice Warren Burger commented:

> The caseloads in both federal and state courts experienced fantastic growth during the past sixteen years. From 1969 to 1984, new filings annually in federal district courts grew from 112,606 to 298,330. . . . The cases passing through the state court systems show a similar sharply upward curve. Numbers are only part of the story; cases are becoming increasingly complex. Both trends are cause for concern—and possibly alarm—when projected toward the twenty-first

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[8] Hoffman, *Forward* to FEDERAL JUDICIAL CENTER, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS vii (1977) ("Justice delayed may be justice denied or justice mitigated in quality").

[9] In the late 1950's, then Chief Justice Earl Warren recognized the dangers of court congestion and delays:

> Interminable and unjustifiable delays in our courts are today compromising the basic legal rights of countless thousands of Americans and imperceptibly corroding the very foundations of constitutional government in the United States. Today, because the legal remedies of many our people can be realized only after they have sallowed with the passage of time, they are mere forms of justice.

Address by Chief Justice Earl Warren, ABA Annual Meeting (1958), *cited in* Yager, *Justice Expedited—A Ten-Year Summary*, 7 UCLA L. REV. 57 (1960).

[10] Sarat, *The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions*, 37 RUTGERS L. REV. 319 (1985).

[11] Manning, *"Hyperlexis," Our National Disease*, 71 NW. U. L. REV. 767 (1977).

[12] *See* Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 61 (1983) (suggesting that the litigation explosion may be a myth created by an "elite" of judges, professors, deans and practitioners).

century.[13]

Civil case filings in Hawaii state courts reached a peak in the six-year period between 1977 and 1983,[14] increasing by 150% in the First Circuit alone.[15] Although case filings have diminished somewhat since then, the most recent statistics still indicate that the number of cases currently filed annually are 60% greater than the number filed in 1977.[16] In addition, available data, although sketchy, suggests that the median time for disposition of civil cases[17] increased slightly between 1981 and 1986.[18] Although this data paints a general picture at best, it does underscore the importance of the Hawaii Judiciary's commitment to improving procedures and reducing congestion, delay and undue cost.[19]

The increase in case filings nationwide is commonly attributed to the coalescence of legal developments and socio-psychological forces. Legislatures and courts have recognized many new substantive[20] and procedural[21] rights by pro-

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[13] Burger, *Introduction* to *Reducing the Costs of Civil Litigation*, 37 RUTGERS L. REV. 217 (1985) (Symposium). Nationally, annual civil filings in state courts increased 20% in the five-year period between 1978 and 1983. BUREAU OF JUSTICE STATISTICS BULLETIN, CASE FILINGS IN STATE COURTS 1 (1983).

[14] In 1981, the total case load for the Hawaii circuit courts was 34,000. In 1986, total case load was 40,000—a 30 percent increase. In 1981, total case load for district courts was 880,000 cases. In 1986, case load was over one million cases. In 1981, total case load for the family courts was 40,000. In 1986, total case load was almost 60,000—a 50% increase. Address by Hawaii Supreme Court Chief Justice Herman Lum, American Conference of Judges (Oct. 22, 1986) [hereinafter Chief Justice Lum's Speech].

[15] The number of civil filings for the Hawaii First Circuit Court were: FY 1977-78, 3111; FY 1978-79, 3373; FY 1979-80, 3589; FY 1980-81, 3927; FY 1981-82, 5717; FY 1982-83, 6783. Civil filings since then declined some and then stabilized: FY 1983-84, 5181; FY 1984-85, 4995; FY 1985-86, 4869. Information from Mitch Yamasaki, Office of the Administrative Directors of the Courts, The Judiciary, State of Hawaii (Jan. 23, 1987).

[16] *Id.* Part of the recent decrease in filings may be attributable to the state judiciary's aggressive alternative dispute resolution program and such private mediation programs as the Neighborhood Justice Center.

[17] Median time of disposition was: FY 1981-82, 274 days; FY 1982-83, 263 days; FY 1983-84, 402 days; FY 1984-85, 309 days; FY 1985-86, 282 days. *Id.*

[18] Case backlog pressures have eased. The annual number of case terminations increased substantially as an apparent result of the court's use of a retired judge in 1983 to dispose of stagnant cases and the employment of a "pure" master calendar system. Annual civil case terminations have increased by twenty-nine percent. Chief Justice Lum's Speech, *supra* note 14.

[19] Conversations with Honolulu litigators revealed what appear to be two generally held perceptions about litigation in the Hawaii First Circuit Court: (1) most cases proceed at a reasonable pace, primarily due to the deadlines in the new Circuit Court Rules and the tough noncontinuance policy maintained by Chief Administrative Judge Philip Chun; and (2) the litigation system tolerates too many tenuous filings as well as excessive pretrial activity in a significant number of cases.

[20] For example, federal legislation has created claims for sexual discrimination, truth-in-lending violations and interstate racketeering. Burger, *Annual Report on the State of the Judiciary*, 69

viding a judicial forum for the vindication of interests society has come to deem important. More attorneys are competing in the marketplace and advertising has emblazoned "attorneys-for-hire" in the public consciousness.

Perhaps most significant, people are more aware of their legal rights and are more willing to pursue them in court. Commentators view this trend both favorably and with alarm. They favorably view the assertion of bona fide claims that heretofore went unasserted simply for lack of recognition.[22] They also deem salutary the assertion of novel claims, especially by politically and socially disadvantaged groups, that are plausibly rooted in lines of developing legal thought.[23] They view with alarm the "increased [and indiscriminate] tendency to define personal problems and social troubles in terms of legal rights and obligations . . . [which] cause an escalating case load for judicial institutions."[24] More people are looking to judges to resolve what are essentially nonlegal disputes.

The expansion of substantive rights, the increased availability of attorneys, the aggressive advertisment of attorney services and a litigious societal outlook encourage case filings in a procedural system already designed for easy initial access. Conclusory pleadings supported by bare factual outlines will survive a rule 12(b)(6) motion to dismiss for failure to state a claim.[25] Mechanisms established to deter groundless filings have proven woefully inadequate.[26]

Finally, economic incentives make lawsuits in this country easy to maintain

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A.B.A. J. 442, 442-43 (1983) ("[I]n just the short span of [fourteen] years Congress has enacted more than 100 statutes creating new claims, entitlements, and causes of action."). State courts have created claims of strict products liability and wrongful termination of employment. *See also* Miller, *supra* note 1, at 5-6.

[21] Many new procedural rights have been recognized, especially in the context of administrative agency regulation of private interests. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).

[22] *See, e.g.*, Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 49. Simon notes that knowledge of one's legal rights is essential to the proper functioning of the system. "[T]he poor, who are unable to purchase legal services, may remain poor for precisely that reason. Their ignorance of the law puts them in an inferior bargaining position which will prevent them from realizing the full value of their labor in the market." *Id.* at 49-50.

[23] *See infra* note 25.

[24] Sarat, *supra* note 10, at 321-22.

[25] Conley v. Gibson, 355 U.S. 21, 47-48 (1957), established the enduring standard for satisfaction of rule 8(a)(2)'s requirement of a "short plain statement of the claims showing that the pleader is entitled to relief." The Court in *Conley* stated that a complaint survives a rule 12(b)(6) motion "unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 46-47. For a wonderful illustration of the application of that standard, see Dioguardi v. Durning, 139 F.2d 774 (2d. Cir. 1944). The official forms to the rules also aptly illustrate the minimal pleading threshold. *See, e.g.*, FED R. CIV. P. Form no. 9; HAW. R. CIV. P. Form no. 9.

[26] *See infra* section IV(B).

and acceptable to lose. The cost of responding to discovery requests is borne by the producing party, and prevailing parties generally are not entitled to payment of their attorneys' fees by the losing parties.[27] When all of these forces combine, justice within the system "becomes costly, slow, and as a result, inaccessible. The goal of access to justice is defeated when too many claims overwhelm the limited resources of the courts."[28]

B. Spiraling Litigation Costs

The cost of legal services, and litigation in particular, has sky-rocketed.[29] Escalating cost has contributed to public cynicism about the judicial system and lawyers.[30] The direct victims of spiraling cost are the courts and litigants. Society is also a victim as confidence in the judicial system diminishes and as fair access to courts is inhibited. Acknowledging the insidious nature of such societal cost, the American Bar Association has taken the position that "[i]t is ethically wrong for the judicial resolution of disputes to be prohibitively expensive."[31]

Two major contributing factors have been identified. First, congestion due to the sheer volume of cases has delayed disposition time and imposed additional costs upon litigants and courts.[32] Second, and more important, expansive use of liberal pretrial procedures has fueled rising pretrial costs. Most of the strident criticism of the civil litigation system has focused on the overuse of discovery rules which were designed to maximize truth-seeking but which are often used primarily as strategic weapons.[33] Justice Powell's comments are representative:

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[27] The cost of responding to discovery requests is borne primarily by the party producing the information. *See generally* FED. R. CIV. P. 30-34. Most important, the "American Rule" on attorneys' fees precludes the prevailing party from recovering its fees from the loser. *See generally* Rosenberg, *Contemporary Litigation in the United States*, in LEGAL INSTITUTIONS TODAY: ENGLISH AND AMERICAN APPROACHES COMPARED 153 (H. Jones ed. 1977).

[28] Sarat, *supra* note 10, at 322.

[29] It is estimated that in 1983 "the portion of the gross national product (GNP) attributable to legal services was over $33 billion, representing a 58.6 percent increase in real terms [above inflation] . . . over 1973." Levin & Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 222 (1985). Although little data is publicly available, general consensus is that the cost of litigating in Hawaii has risen markedly as fee rates have climbed and as more complicated cases have been filed.

[30] *See generally* YANKELOVICH, SKELLY & WHITE, INC., THE PUBLIC'S IMAGE OF COURTS (National Center for State Courts 1978).

[31] ABA ACTION COMM'N TO REDUCE COURT COSTS AND DELAY, ATTACKING LITIGATION COSTS AND DELAY 59 (1984) [hereinafter ABA ACTION COMM'N].

[32] *See*, Peckham, *A Judicial Response*, *supra* note 7, at 254 n.4.

[33] Professor Brazil's study of Chicago litigators found that between 80% and 92% of the attorneys agreed that "the purpose of imposing work burdens or economic pressure on another

> Delay and excessive expense now characterize a large percentage of all civil litigation. The problems arise in significant part, as every judge and litigator knows, from abuse of discovery procedures available under the rules.[34]

Mounting criticism about delay and excessive pretrial cost compelled the American Bar Association to create the Action Commission to Reduce Court Costs and Delay.[35] The Federal Judicial Center and the National Center for State Courts have assiduously studied the problem.[36] In September of 1985 the National Center and thirty-five cosponsoring organizations held a nationwide conference on reducing cost and delay.[37]

The overwhelming conclusion of these bodies and scholars is that the "key [to reducing delay and costs] lies in controlling the pretrial process"[38] and that the key to controlling the pretrial process is the managerial judge.[39]

III. CASE MANAGEMENT AND THE MANAGERIAL JUDGE

A. *Functions of the Managerial Judge*[40]

The hallmark of the managerial judge is early intervention in and control over

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party or attorney . . . had been a factor affecting their use of discovery tools." Brazil, *Civil Discovery: Lawyers' View of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RESEARCH J. 787, 857-58.

[34] Amendments to the Federal Rules of Civil Procedure, 55 F.R.D. 521 (1980) (Powell, J., joined by Rehnquist, J., and Stewart, J., dissenting). Professor Brazil's study revealed that "[e]ven litigators who frankly admitted that they were becoming wealthy primarily because of fees attributable to discovery expressed amazement and concern about the rapid escalation of the expense of conducting and complying with discovery." Brazil, *Views From the Frontlines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217, 233-34.

[35] *See, e.g.*, ABA ACTION COMM'N, *supra* note 31, at 2; P. CONNOLLY, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 28 (Federal Judicial Center 1978).

[36] *See* Sipes, *Reducing Delay In State Courts—A March Against Folly*, 37 RUTGERS L. REV. 299, 303-04 (1985).

[37] *Id.* at 309 n.49.

[38] Miller, *supra* note 1, at 14.

[39] The managerial judge in civil litigation is seen as a solution complemented by methods of alternative dispute resolution. *See generally* Moukhad, *CPR Working Taxonomy of Alternative Legal Processes: Part IV*, in ALTERNATIVES TO THE HIGH COST OF LITIGATION (Spec. supp. 1983).

The Hawaii First Circuit Court has embarked on an ambitious mandatory court-annexed arbitration program for tort claims under $50,000. HAW. ARB. R. (1986). The 1986 Hawaii legislature, sitting in special session on tort reform, raised that ceiling to $150,000. Arbitral proceedings are conducted by private volunteer attorneys screened initially by the court. Discovery is minimized and firm deadlines for resolution of cases are imposed.

[40] "Judicial administration," in its larger sense, has two components. The first might be termed "system administration." This encompasses calendar control, computer tracking of filing

the civil litigation process.[41] Rather than waiting for the completion of substantial discovery and an impending trial date, the managerial judge intervenes early in the process and guides the pretrial development of the case. The entire pretrial phase of litigation is no longer left to often harried attorneys who essentially proceed unsupervised according to strategic concerns and the pressures of day-to-day law practice.

General consensus is that the intent of the original federal rules—the smooth self-execution of the pretrial phase,[42] has been subverted by liberal pleading and discovery rules, a hands-off judicial posture and attorneys' allegiance solely to their clients.[43] Expansive use of the rules of pleading and discovery is generally considered imperative to the zealous representation of one's client.[44] One result is a client well-served in terms of maximal development of the merits of his position but perhaps ill-served in terms of ultimate costs and benefits. Another result is a party's partial capitulation solely as a consequence of the threatened cost of further litigation. In some situations an otherwise fair outcome on the merits is nevertheless rendered "unjust" by the time lag or the psychic and financial cost of achieving it. These are the concerns of the managerial judge.

As discussed below, after the filing of the complaint and answer the managerial judge enters a preliminary scheduling order to get the case moving quickly. In this manner, the judge controls the initial joinder of parties, the timely filing of pleadings and establishes an initial discovery schedule.[45]

Rule 11 provides the managerial judge with the authority to control "unreasonable" filings (pleadings and motions) through the application of a tighter standard for sanctioning frivolous filings. The new standard eliminates subjective bad faith as the benchmark for imposing sanctions and substitutes a rea-

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deadlines and a streamlined methodology for trial setting and assigning cases to judges. Responsibility for these tasks falls with the administrative judge generally rather than trial judges. The focus of this article is not on system administration but on the second aspect of judicial administration—"individual case management."

The term "managerial judge" encompasses the single judge assigned total responsibility over a case from the outset, as in the federal courts, or alternatively, as potentially in the Hawaii circuit courts, the collective efforts of several judges performing various tasks related to different aspects of a single case.

[41] Comment, *Recent Changes in the Federal Rules of Civil Procedure: Prescriptions to Ease the Pain?*, 15 TEX. TECH L. REV. 887, 890 (1984) [hereinafter Comment, *Prescriptions*]. *See also* Cavanagh, *The August 1, 1983 Amendments to the Federal Rules of Civil Procedure: A Critical Evaluation and A Proposal For More Effective Discovery Through Local Rules*, 30 VILL. L. REV. 767, 789 (1985).

[42] Prior to recent amendments, the rules were not intended to encourage judicial involvement in the pretrial stage of litigation. *See* FED. R. CIV. P. 16 advisory committee note.

[43] "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 . . . ." Miller, *supra* note 1, at 17.

[44] Comment, *Prescriptions*, *supra* note 41, at 903. *See also* HAW. C.P.R. Canon 7.

[45] FED. R. CIV. P. 16(b). See *infra* section IV(a) for a detailed discussion of federal rule 16.

sonableness standard.[46] By design, this modestly heightens attorney responsibility to conduct an inital investigation, reduces stress on the court and litigants and minimizes costly future fighting over meritless positions. Assuming a sensitive judicial touch, this can be achieved without returning to the byzantine intricacies of a code pleading system[47] and without limiting access to the courts or the inhibiting the assertion of novel yet plausible theories of law.[48]

The managerial judge also controls the pretrial process by controlling discovery. He does so by setting discovery schedules pursuant to rules 16, 26(b)(1) and 26(f), by preventing the filing of "unreasonable" discovery requests and responses (through new rule 26(g)[49] which is similar to rule 11), and perhaps most important, by "limiting" discovery *at the outset* even before there has been abuse or overuse. New rule 26(b)(1)(iii)[50] empowers the managerial judge to tailor and limit discovery according to the needs of the case, the amount in controversy, the importance of the legal issues and, significantly, the resources of the parties.

Finally, with a sense for development of the case, the managerial judge is actively involved in searching for the earliest moment to achieve a fair settlement. In contrast, the standard settlement conference under existing procedures which, although effective, usually triggers settlement a month or less before trial, after discovery is completed and trial preparation has begun.[51]

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[46] See *infra* section IV(B) for a detailed treatment of federal rule 11.

[47] In code pleading states tremendous resources are often expended fighting over the sufficiency of pleadings. Code pleading generally requires a statement of "facts sufficient to state a caurse of action," and parties battle over whether the allegations are indeed facts or mere legal conclusions and whether the facts are evidentiary or ultimate. *See, e.g.*, Gillespie v. Goodyear Service Stores, 258 N.C. 487, 128 S.E.2d 762 (1963). The notice pleading system of the federal and Hawaii rules was designed to eliminate such technical requirements and the ensuing cost of challenges.

[48] *See* Zaldivar v. City of Los Angeles, 780 F.2d 823, 830-31 (9th Cir. 1986). See *infra* section IV(B)(5) for a discussion of the concerns over the adoption of new rule 11.

[49] *See infra* text accompanying note 292.

[50] *See infra* text accompanying note 278.

[51] Even under the much-improved system in the Hawaii First Circuit Court, judges still do not become involved in supervising, controlling or directing the development of the case except where a case is designated complex litigation. The new circuit court rules require filing of detailed pretrial statements (plaintiff's statement is due one year from the filing of the complaint and defendant's responding statement is due sixty days later, subject to extensions granted by the court) (HAW. CIR. CT. R. 12(a)(2)), witness lists (HAW. CIR. CT. R. 12(a)(2)(iv)), and settlement conference statements (HAW. CIR. CT. R. 12.1(b)). Active judicial control of the case, however, does not occur until shortly before trial, usually at the settlement conference or the pretrial conference in preparation for trial.

B. Rationale for the Managerial Judge: Enhancing the Quality of Justice—Reducing Delay and Pretrial Cost Without Sacrificing Impartiality or Diminishing Fair Access

Although "quality of justice" is a phrase with myriad meanings, it can be usefully defined and given practical effect. It must be the focal point of any analysis of the appropriateness of new rules. Commentators assume that the new powers of managerial judges will result in quicker disposition of cases and reduced pretrial activity and that this increased efficiency will necessarily mean better quality justice.[52] Indeed, as discussed below, researchers, judges, and commentators agree that managerial rules implemented by committed judges significantly increase judicial efficiency. The "inexpensive" resolution of disputes is the primary value embodied in the federal procedural system.[53] However, other value must also be examined.

Greater efficiency does not assure that the judicial process will be fairer.[54] Perhaps the starkest example involves the elimination of procedural due process hearing rights. While this would provide greater judicial efficiency, the quality of justice[55] would suffer in many instances. If discovery is so truncated that parties are encouraged to hide the "truth" or the pleading threshold is so high that substantial access to the courts is inhibited, enhanced system efficiency will be served but justice will not be served.

The impact of new managerial rules on the quality of justice might be most productively assessed in terms of basic values underlying the process of civil litigation. Efficiency is but one of values which underlie the common law civil litigation system. At least four basic values other more qualitative than efficiency are acknowledged as significant. These are, according to Professor

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[52] *See, e.g.*, Franaszek, *Justice and the Reduction of Litigation Cost: A Different Perspective*, 37 RUTGERS L. REV. 337, 350 (1985) ("The rhetoric of reducing litigation cost attempts to fuse justice with reducing expenses, often in a simplistic or conclusory manner. Although arguing that the legal system is fairer when its cost is minimized, this rhetoric bypasses the troubling questions of deriving justice from the market's allocation—and pricing—of litigation.").

[53] The rules are to be "construed to secure the just, speedy and inexpensive determination of every action." FED. R. CIV. P. 1.

[54] *See* Franaszek, *supra* note 52, at 343-44.

[55] One commentator has noted that the evaluation of the impact of litigation reform on the quality of justice can be undertaken from either of two perspectives:

> At its most extreme, inquiry into the quality of justice is a counterfactual inquiry, examining whether reform procedures make any difference in the substantive disposition of a controversy. More commonly, however, analyses of this quality of justice explores whether the reformed litigation process minimizes the possibility of erroneous decisions by providing a full and fair hearing. It is an evaluation of a procedure, not an end result. If the procedure leaves unaltered the present configurations of the litigation system (except for its cost), it is considered to be "just."

Franaszek, *supra* note 52, at 344.

Michelman, dignity, participation, deterrence and substantive effectuation.[56] A system single-mindedly geared towards efficiency risks disserving these values. especially participation, as access is inhibited, and substantive effectuation, as complicated or novel but socially important legal positions are deprived of full development.

In light of the tension between efficiency and these values, the new managerial rules could be said to enhance the quality of justice if they maximize access to courts for those with nonfrivolous claims and allow for reasonable and fair case development on the merits while minimizing unnecessary burdens on the court and litigants. Enhancing the quality of justice in this manner is especially important for defendants who might find it cheaper to settle than to litigate a tenuous claim and for plaintiffs who might find it necessary to give up on a bona fide claim because the cost of vindicating it is prohibitively expensive.[57]

1. *Efficiency*

The standard reason proffered for the creation of the managerial judge is increased efficiency.[58] Early intervention and tighter control mean less delay. Reducing delay benefits the litigants by resolving disputes and defining rights and obligations more quickly.[59] Less delay generally means less cost.[60] Early

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[56] Briefly,

> [d]ignity values reflect concern for the humiliation or loss of self-respect which a person might suffer if denied an opportunity to litigate. Participation values reflect an appreciation of litigation as one of the modes in which persons exert influence, or have their wills "counted," in societal decisions they care about. Deterrence values recognize the instrumentality of litigation as a mechanism for influencing or constraining individual behavior in ways thought socially desirable. Effectuation values see litigation as an important means through which persons are enabled to get, or are given assurance of having, whatever we are pleased to regard as rightfully theirs.

Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1172.

[57] The key, it would appear, is the system's pretrial capacity to (1) discourage "unreasonable or unnecessary" filings, (2) limit discovery while allowing parties reasonable access to relevant information, (3) pace reasonably pretrial activities, and (4) facilitate early settlement. See *infra* section IV for an in-depth discussion of the impact of the new rules on these aspects of the litigation system.

[58] *See* Franaszek, *supra* note 52, at 350, 362.

[59] Delay may be in the interest of certain defendants and their insurers who, assuming liability, might find it more profitable to defer payment until the last possible moment, reasoning that a possible assessment of prejudgment interest on the amount ultimately paid will be less than their return on the amount invested during the "deferral" period.

[60] The ABA Commission's study found that a reduction in case disposition time did not necessarily result in a reduction in cost as measured by attorney time spent on each pretrial activity. ABA ACTION COMM'N, *supra* note 31, at 64. The Commission noted, however, that to

judicial control also means pared down pretrial activity. Fewer pleadings and motions, and discovery tailored to the needs of the case translate into reduced pretrial expenses. Less cost obviously benefits the court and the litigants already before the court. It also expands opportunities for access for persons with meritorious claims who have been excluded from the judicial process due to the cost of participation.

Initially, opponents of active case management asserted that it might be unnecessarily costly.[61] They contended that since the judge's time is the most expensive judicial resource, additional judicial supervision would further increase costs.[62] Growing evidence to the contrary seems to have tempered the criticism. Nevertheless careful examination of the issue is warranted.

The goal and the apparent reality of case management is that the managerial judge limits pretrial activity and "brings cases to settlement or trial sooner than if their progress were left entirely to the impetus of the parties."[63] Studies have not definitively assessed the overall cost savings or the extent to which cost savings are passed on to litigants. Studies are in agreement, however, that the cost savings ultimately achieved through judicial management exceed any additional initial management costs.[64]

a. Federal courts

The Federal Judicial Center studied various case management techniques, focusing on six federal judicial districts.[65] The Center concluded that early judicial intervention, firm scheduling and oversight of discovery were effective management techniques.[66] Average disposition time was cut in half.[67]

Judicial involvement in the pretrial phase of federal litigation has grown in

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the extent the reduction of delay is a consequence of settlements earlier in the process, cost savings to litigants will result since attorney time will be spent on fewer activities. *Id.* at 65.

[61] *See, e.g.*, Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 422-24 (1982).

[62] Professor Resnik has asserted that "[r]ather than concentrate all of their energy deciding motions, charging juries, and drafting opinions, managerial judges must meet with parties, develop litigation plans, and compel obedience to their new management rules." *Id.* at 423-24.

[63] Peckham, *A Judicial Response*, *supra* note 7, at 267.

[64] "Certain studies have demonstrated a high level of elasticity in judicial productivity, suggesting that additional pretrial demands upon judges might be met with little or no impact on existing judicial functions." Nordenberg, *supra* note 1, at 565-66. *See also* Will, Merhige & Rubin, *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203 (1977). See *infra* note 155 and accompanying text concerning additional transitional costs from a traditional to a managerial model.

[65] CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS 1, 5 (Federal Judicial Center 1977).

[66] *Id.* at 33-35.

[67] *Id.* at 19, 35.

importance.[68] Judicial case management has been so effective that although the number of case filings has increased, the average time of disposition has decreased.[69] Delay "has been substantially reduced."[70]

b. State courts

The ABA Action Commission To Reduce Court Costs and Delay,[71] established in 1979, studied pilot programs using cost reduction measures in state courts. The experiments focused on case management and simplified pretrial procedures.[72] The Commission concluded that for state courts, like federal courts, "[j]udicial caseflow management controls will decrease the time consumed by litigation. Based on our work, we believe a comprehensive set of controls following a case from its filing through disposition will produce the most significant reductions in overall case processing time."[73] This conclusion was later embodied in a new section to the ABA's Standard 2.50 - Caseflow Management and Delay Reduction.[74] Most important, the Commission found that time schedules, in combination with tailored discovery produced the greatest reduction of pretrial activity.[75]

The National Center for State Courts also exhaustively studied trial court delay, concluding in 1978 that "the most promising technique for reducing delay is court management of case processing from commencement to disposition."[76] Several studies have since been conducted to examine the effectiveness of case management in state courts. Although the type of management procedures examined differed, all involved judicial control from the outset of a case. The results were consistent on one key point: "court control of the pace of litigation during all pretrial stages has produced dramatic improvements in shortening the time required to bring disputes to a conclusion."[77]

Dramatic results were achieved in a case management experiment in Mari-

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[68] Judges' managerial powers were expanded by amendments to FED. R. CIV. P. 11, 16 and 26(b) and 26(g) in 1983. Amendments to rules 26(f), 33(c), 34(b) and 37(b)(2) were made in 1980 to control escalating costs.

[69] Peckham, *Judge as Case Manager*, *supra* note 2, at 770.

[70] Peckham, *A Judicial Response*, *supra* note 7, at 258.

[71] The Commission was created to test court procedures aimed at reducing delay and cost in litigation. ABA ACTION COMM'N, *supra* note 31.

[72] *Id.* at 1-2.

[73] *Id.* at 21.

[74] ABA STANDARD 2.50—CASEFLOW MANAGEMENT AND DELAY REDUCTION (1976).

[75] ABA ACTION COMM'N, *supra* note 31, at 15.

[76] Sipes, *supra* note 36, at 304 (citing T. CHURCH, A. CARLSON, J. LEE & T. TAN, JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS, EXECUTIVE SUMMARY PRECIS 64 (National Center for State Courts 1978).

[77] Sipes, *supra* note 36, at 312.

copa County Superior Court in Phoenix, Arizona. In one year the managerial judges cut average case disposition time by more than one-third, reduced pending case loads by 36% and settled 31% more cases than non-managerial judges.[78] The "Economical Litigation Project," which involved two experiments in Kentucky circuit courts, also yielded significant results. The experiments were conducted consecutively and covered four years, including follow-up interviews with attorneys. The management procedures used a "case flow manager," who was a court administrator to set and monitor pleading deadlines. Individual judges thereafter monitored the cases and closely controlled discovery.[79] The

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[78] *Id.* at 304.

[79] *See* Planet, *Reducing Case Delay and The Costs of Civil Litigation: The Kentucky Economical Litigation Project*, 37 RUTGERS L. REV. 279 (1985).

> Under the ELP rules and using internal procedures developed by the court staff, a typical civil case would be processed as follows.
>
> 1. Filing
>
> The rules apply to contract, personal injury, property damage, and property rights cases. From the time of filing, each ELP case is monitored by the court administrator acting as caseflow manager to ensure service within thirty days and the filing of answers within twenty days of service. Plaintiff's counsel is notified by telephone to effect service or move for default. If plaintiff's counsel does not act upon the admonishments of the caseflow manager, the judge sends a letter seeking counsel's cooperation in moving the case along.
>
> 2. Motions
>
> Under the ELP rules, unopposed motions are presumed to be granted, and only opposed motions are scheduled for hearing. The hearing date is set by the parties using a tight rule-made schedule. . . . The judges routinely rule from the bench and take few motions under advisement.
>
> 3. Discovery
>
> A discovery conference is set for approximately two weeks after joinder. At the conference, which can be conducted by the judge in person or by telephone, a discovery plan is made and later set forth by an order that includes a discovery completion date and either a final pretrial conference or a trial date.
>
> Under the rules, the use of depositions and interrogatories is limited. Depositions of the parties can be taken by notice, but nonparty depositions of expert or fact witnesses are allowed only by leave of court. The plaintiff's deposition must be taken by the defendant before any other discovery is initiated. Interrogatories are limited to twenty single-part questions per set. At the discovery conference, the judge considers counsels' requests for more interrogatories or depositions of nonparty witnesses. Counsel's allotted discovery time is based on the complexity of the case, the availability and access of witnesses for depositions, and factors unique to the case. The rules provide for a presumptive discovery period of fifty days.
>
> The original version of the ELP rules provided no deadline for the filing of summary judgment motions, but a 1983 revision requires all such motions to be filed by the completion of discovery. At that time, which is ten days prior to the final pretrial conference, the parties must also exchange certain pretrial information including lists of witnesses with summaries of their testimony; descriptions of physical evidence and copies of documents to be presented at trial; lists of experts, their qualifications, and summaries of their testimony; and brief statements describing each issue of law and fact. Another modification of the

ABA's Action Commission evaluated the raw data and found that time of disposition, pretrial activity and overall cost to litigants were all significantly reduced:

> 1. Total case processing time from filing to disposition and elapsed time at major litigation phases were both significantly reduced.
> 2. The number of procedural events (e.g., motions, discovery, hearings) was also reduced.
> 3. These reductions were achieved without apparent impact on the case outcome.
> 4. Reductions in case processing time and procedural activity resulted in savings in the amount of time spent on ELP cases by most attorneys.
> 5. These savings in attorney time resulted in reduced fees (twenty-four percent reduction) to clients in hourly fee arrangements; contingent fee billings blocked any such pass-through.
> 6. The reductions in case processing and attorney time and in the amount of procedural activity were achieved without affecting the qualitative aspects of the litigation process represented by attorneys' abilities to prepare adequately for trial or settlement.[80]

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original ELP rules requires that this information also be filed with the court, and the parties must file a certificate of compliance by the deadline date.

4. Pretrial Conference

The primary objective of the final pretrial conference is not to generate settlements but to prepare for trial. The principal objectives of the conference are to simplify the issues, resolve pending procedural issues, dispose of summary judgment motions, and ensure that the attorneys will be prepared to make crisp evidentiary presentations at trial. While the judge is urged to inquire into the status of settlement negotiations, this is done primarily to determine the extent to which the trial calendar can be stacked. In simpler cases the court bypasses the final pretrial conference entirely.

5. Trial

ELP cases are not given priority over other cases on the judge's civil docket. Under the rules, trials should be held within thirty days of the final pretrial conference. The rules also prohibit the continuance of trial unless counsel makes a showing of good cause.

6. Managing the ELP Docket

Under the ELP, cases are subject to internal operating procedures intended to eliminate nonproductive time between litigation events and to maximize judge and court staff time. Key is the function of a court employee designated as the caseflow manager, who monitors ELP cases for compliance with the time standards contained in the rules, enabling the court to centralize caseflow management. The caseflow manager is authorized to contact counsel to ascertain the case status and may be involved in scheduling hearings, conferences, and trials in ELP cases. The ELP rules also adhere to a strict continuance policy. Using these management devices, judge time spent in administrative matters should be reduced, and events are more efficiently scheduled to avoid court continuances.

Id. at 281-83.

[80] *Id.* at 284-85.

These and other similar studies[81] are not definitive and, of course, do not guarantee identical results in the Hawaii courts. They do indicate, however, that the managerial judge in the Hawaii courts is likely to make the civil litigation system more efficient by reducing both delay and pretrial cost.

2. *Assuring impartiality and preserving fair access*

Innovations for greater systemic efficiency carry qualitative risks. In evaluating the qualitative impact of the managerial judge, two important points of analysis emerge. The first is the appropriateness of the managerial judge in the adversarial process in terms of judicial impartiality. The second is the impact of the managerial rules on fair access to the judicial process.

a. The adversarial process and judicial impartiality

In light of current and projected needs of the civil litigation system, are we willing to accept in concept a further modification of the classic adversarial model to encompass managerial judges? Judges, the bar and the public must be willing to accept and implement a subtle yet important shift in the roles of judge and lawyer. In the federal courts, strong concern was initially voiced about what was perceived to be the potentially deleterious impact of the managerial judge upon the adversary system.[82]

For a time proponents and opponents of the managerial judge engaged in heated debate.[83] The intensity of the debate has subsided as preliminary results indicate the salutary effect of the federal managerial judge.

Opponents of the managerial judge argued that radical departure from the role of judge as passive uninvolved arbiter was dangerously inconsistent with classical notions of the adversary system. They also argued that the active managerial judge would become "interested" in the outcome of the case, therefore tainted, and that his possibly biased direction of the pretrial phase of the case would essentially be shielded from appellate review.[84] In short, the managerial judge would have raw power without accountability and be likely to exert too great an influence on the case—the quality of justice would suffer.

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[81] For example, the ABA Commission's study of time schedule management in Vermont courts found reduced case disposition time. It also found, however, that in the absence of simplified pretrial procedures and judicial control over discovery, scheduling deadlines did not noticeably diminish pretrial activity. *Id.* at 75.

[82] Resnik, *supra* note 61, at 430.

[83] *See generally* Resnik, *supra* note 61; Flanders, *Blind Umpires—a Response to Professor Resnik*, 35 HASTINGS L.J. 505 (1984).

[84] Resnik, *supra* note 61, at 429-30.

(1) The managerial judge as an evolutionary rather than revolutionary change in the adversarial process

Concern about the managerial judge's "radical" alteration of the adversary system seems to be rooted in a positivist view of law. The role of judges is to assure "blind justice."[85]

the classical adversarial model

The classical positivist model of civil litigation assumes a society of individuals with conflicting interests who resort to a system of law to enable individuals to resolve conflicts with some semblance of imposed order. The litigants are self-interested gladiators who determine truth through combat. The judge is a neutral, uninvolved observer whose role is to make the ultimate arbitral decision in light of the "facts" presented within a rigid and defined system of procedure designed to constrain excesses in the judge's actions. Law is viewed as systematic and objective in character,[86] and procedural rules simply "impose regularity on the actions of the" judge.[87]

Although we cling to traditional positivist notions of individualism and blind justice in the resolution of private conflicts between individuals,[88] that model of civil litigation for federal and Hawaii courts has been rejected. Both the Federal and Hawaii Rules of Civil Procedure, with the provisions for full discovery, and liberal pleading and joinder, coupled with the general expansion of substantive rights, have rendered the classical model anachronistic.[89] Scholars have recognized that the basic premise of this model, a society of individuals with conflicting interests looking to law solely as the sovereign's tool for neutral resolution of intensely individualized conflicts, does not reflect the reality or the function of law in society.[90] Law regularizes shared expectations about societal interactions, and judges are not simply dispassionate oracles who blindly apply a set of hardened rules to the information garnered and presented by the parties.[91]

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[85] The textual discussion of various theoretical models is necessarily abridged. Its purpose is to provide a general conceptual overview for evaluating concerns about the managerial judge's impact on the adversarial process.

[86] *See generally* H. HART, THE CONCEPT OF LAW (1961); Chayes, *The Role of Judges in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282-83 (1976).

[87] Simon, *supra* note 22, at 43.

[88] Resnik, *supra* note 61, at 381-83.

[89] Miller, *supra* note 1, at 7-8.

[90] Simon, *supra* note 22, at 60.

[91] See *infra* notes 95-104 and accompanying text for a discussion of the purposivist or realist model.

Although procedural rules are ostensibly "designed to deal with a technical problem,"[92] their actual function is far-reaching and their impact extends beyond the mere "technical problems." The reality is that without close supervision, individual litigants can manipulate neutral procedures to "thwart the enforcement of the substantive rules and to affect the exercise of state power in accordance with their individual ends."[93] When this occurs, judicial decisions "result not from the neutral, systematic application of rules to given factual premises, but from strategic exercise of procedural discretion by private parties."[94] Attorneys engaged in large case litigation, particularly construction and antitrust litigation, will verify this reality.

The classical adversarial model does not account for this interaction between judge and litigants and does not accurately reflect the effect of procedural rules upon substantive norms.

"purposivist" model

Legal philosophers and judges within the common law system have laid bare the failings of the classical model and have developed and refined what might be generally termed a "purposivist" or "realist" view of the law and the process of civil litigation.[95] In general outline the purposivist model underlies the federal and Hawaii rules and influences the manner in which judges interpret and apply rules of procedure. The basic premise of the purposivist model is that people are bound together by shared norms. The purpose of law is not just to maintain order, but also to "coordinate the actions of citizens so as to further their common purposes as effectively as possible."[96]

Societal norms, by definition, are generally self-enforcing, but not in all instances. Substantive "law is a technical apparatus for advancement of social norms;"[97] and rules of procedure are the tools for that advancement. Thus, in terms of both substance and procedure, "[j]udges reach behind rules directly to the social purposes the rules are intended to serve and when they find the rules

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[92] Simon, *supra* note 22, at 44.

[93] *Id.*

[94] *Id.*

[95] *See e.g.*, K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960); R. POUND, THE SPIRIT OF THE COMMON LAW chs. 7-8 (1921); L. Brandeis, *Business—A Profession, The Opportunity in the Law, The Living Law*, in BUSINESS: A PROFESSION, 1-12, 313-27, 344-63 (1914); Pound, *The Lawyer as a Social Engineer*, 3 J. PUB. L. 292 (1954). *See also* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, ch. II (1958) (unbound edition prepared for classroom use).

[96] Simon, *supra* note 22, at 62.

[97] *Id.* at 63.

wanting in light of the relevant purposes, they . . . modify the rules."[98] Implicit in this view is the recognition that the manipulation of procedural rules can alter substantive outcomes and that judges must therefore carefully scrutinize private use of supposedly neutral state-authorized procedures.

This belief appears to inform federal and Hawaii judges' wide-ranging interpretations of procedural rules in the "interest of justice"[99] and the judicial engrafting of principles such as "prejudice" onto the literal terms of the rules.[100] Judges use these concepts correctively to avoid results that flow from the literal provisions of rules, but which are inconsistent with strongly perceived norms of either procedural and substantive fairness.[101] Although the rules of procedure provide a sturdy framework for litigation, there is considerable play in the joints. Responsibility devolves to the judge to assure that litigants exercise that play fairly according to larger norms of procedural fairness.

So, despite lingering positivist notions, we already have in place a flexible procedural system which belies the concept of the dispassionate, completely uninvolved judge who makes no value judgments in rigidly administering a case or deciding a dispute. We have a procedural system in which judges are

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[98] *Id.* Professor Llewellyn's comments are apt.

> Far be it from me to dispute that the concepts of substantive rights and of rules of substantive law have had great value. They moved definitely and sharply toward fixing the attention of thinkers on the idea that procedure, remedies, existed not merely because they existed, nor because they had value in themselves, but because they had a purpose. From which follows immediate inquiry into what the purpose is, and criticism, if the means to its accomplishment be poor. They moved, moreover, to some extent, toward sizing up the law by significant life-situations, instead of under categories of historically conditioned, often archaic remedy-law: a new base for a new synthesis; a base for law reform.

K. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 11 (1962). The purposivist model has been criticized as too illusive—that no two judges will have the same perception of social norms. This illusiveness is said to diminish the legitimacy of the procedural system because the public perceives the system as arbitrary in implementation.

[99] The rules are to "be construed to secure the *just*, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1. FED. R. CIV. P. 15 provides: "[L]eave [to amend] shall be freely given as *justice* so requires."

[100] *See* Beeck v. Aquaslide 'N Dive Corp., 562 F.2d 537 (8th Cir. 1977); Bail v. Cunningham Bros., Inc., 452 F.2d 182 (7th Cir. 1971); Zielinski v. Philadelphia Piers, Inc., 139 F. Supp. 408 (E.D. Pa. 1956). *See also* Wong v. City & County of Honolulu, 66 Haw. 389, 665 P.2d 157 (1983).

[101] For example, in International Savings & Loan Ass'n v. Woods, ____ Haw. ____, 731 P.2d 151 (1987), the Hawaii Supreme Court ruled in a mortgage foreclosure action that although the mortgagor failed to comply with the express appeal certification requirements of rule 54(b) the court would entertain the mortgagor's appeal of the interlocutory decree of foreclosure. The court noted that a contrary ruling would mean loss of the mortgagor's home before an appeal could be properly filed. The court then expressly limited its ruling to the mortgagors before it, declaring that all mortgagors in future actions would have to comply with the certification requirements of rule 54(b).

involved in assessing values and social norms as a means for fairly operating the system and doing justice.[102]

Indeed, federal and Hawaii judges already make countless pretrial value judgments that shape the course of the litigation, and in many instances, ultimate results. Judges rule on the sufficiency of pleadings (should a litigant be allowed to burden the system by being allowed to get to the discovery phase to determine if she has a legitimate claim), control aspects of discovery (at least after problems arise, through protective orders, orders compelling discovery, and sanctions) and orchestrate settlements. In doing so, they make implicit value judgments about the social and legal importance of the issues, the importance of providing a judicial forum for the plaintiff, the need for information in light of the cost of obtaining it, the relative interests and financial strengths of the parties and the sincerity of the efforts of the parties and their attorneys in their use of the system.[103]

The role of the active managerial judge, therefore, is less a revolutionary recasting of the role of the civil litigation judge in the adversarial process. The managerial judge is an *evolutionary* extension in light of current needs.

(2) Concerns about impartiality

Assuming general acceptance of the concept of the managerial judge in the adversarial process, do the specific powers conferred upon judges by new rules of procedure enhance or at least preserve procedural fairness? As discussed above, it appears that new rules 11, 16, 26(b)(1), 26(g), and 26(f), which coalesce into powers of the managerial judge, would increase efficiency of the Hawaii

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[102] One judge candidly described the process as follows:

> [T]he judge really decides by feeling, and not by judgment; by "hunching" and not by ratiocination, and . . . the ratiocination appears only in the opinion . . . the vital motivating impulse for the decision is an intuitive sense of what is right or wrong for that cause, and . . . the astute judge, having so decided, enlists his every faculty and belabors his laggard mind, not only to justify that intuition to himself, but to make it pass muster with his critics . . . .

Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 285 (1929).

[103] Professor Llewellyn discusses "a sophisticated reversion to a sophisticated realism:"

> Gone is the ancient assumption that law is because law is; there has come since, and remains, the inquiry into the purpose of what courts are doing, the criticism in terms of searching out purposes and criticizing means. Here value judgments reenter the picture, and should. Observing particular, concrete facts of conduct and of expectation which suggest the presence of "an interest," one arrives at his value conclusion that something in those facts calls for protection at the hands of state officials.

K. LLEWELLYN, *supra* note 98, at 22.

courts.[104] Would those rules, implemented by the managerial judge, taint the pretrial process by removing the cloak of disinterested judicial impartiality?

The principal criticism of case management has been that fairness in the pretrial process is jeopardized under the new rules since the judge, in managing of the pretrial process, interacts intimately with the parties and their attorneys and becomes a participant in shaping the litigation, thereby diminishing objectivity. In addition, a judge's view is thought to be colored by considering matters inadmissible in evidence at trial.[105] Professor Resnik has maintained that not only will awareness of inadmissible evidence taint a judge's perception of the final outcome, frequent intimate pretrial contact will prejudicially influence a judge's handling of a trial.[106] This danger is exacerbated, it is contended, because control over the pretrial process is especially susceptible to abuse since it is shielded from appellate review.[107]

These are weighty criticisms. Responses, principally by judges, have been strong and seem persuasive. The notion of impartiality advanced by critics of managerial judges appears to be unrealistically based on the positivist concept of the arbiter who retains his neutrality by avoiding contact with parties' pretrial skirmishings. But, as Judge Peckham has eloquently put it, "[i]mpartiality is a capacity of mind—a learned ability to recognize and compartmentalize the relevant from the irrelevant and to detach one's emotions from one's rational faculties."[108] Modern civil litigation systems are built upon this concept of impartiality. In many pretrial situations, such as in rulings on evidentiary motions, judges are exposed to inadmissible material.[109] In these situations, "we do not consider the judicial mind contaminated."[110] In the experience of Judge Peckham, judges are eminently capable of impartially sorting through the type of information considered by judges in resolving discovery disputes or making scheduling decisions.[111] As Professor Miller has aptly noted, "[t]he goal of judicial neutrality . . . does not require judicial ignorance. The notion that justice is or ought to be blind should extend only to ensuring impartiality."[112]

One meritorious suggestion is that impartiality and even-handed managerial decisions can be encouraged by conducting status and pretrial conferences, in-

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[104] *See supra* notes 58-80 and accompanying text.

[105] Resnik, *supra* note 61, at 426-31.

[106] *Id.* at 427.

[107] *Id.* at 429-30.

[108] Peckham, *A Judicial Response*, *supra* note 7, at 262.

[109] On issues of relevance under rules 401-403 of the Federal Rules of Evidence, "[r]uling requires knowledge of the lawyer's strategies and the full contour of the case being developed." Flanders, *supra* note 83, at 520.

[110] Peckham, *A Judicial Response*, *supra* note 7, at 262.

[111] *Id.* at 263.

[112] *See generally* Miller, *supra* note 1.

cluding dispositions of discovery disputes, on the record.[113] This would provide a detailed record for appellate review. A useful record could also be generated through pretrial conference orders supplemented by recorded attorney commentary on objectionable aspects of the orders.

Providing a solid record would be consistent with the apparent movement in federal appellate courts away from almost total deference to lower court pretrial decisions[114] to a posture of moderate scrutiny under the abuse of discretion standard.[115] Although the absence of a final judgment would preclude interlocutory review of pretrial decisions in most instances,[116] moderate appellate scrutiny even after final judgment would serve to rectify serious mismanagement decisions[117] and establish workable parameters for future decisions. This could be accomplished without opening the appellate floodgates since relatively few cases would reach the final judgment stage for appeal.

The current practice in the Hawaii circuit courts, having pretrial procedures including settlement conferences, conducted by a judge who does not handle the actual trial would more adequately address many of the aforementioned concerns about impartiality.[118] Thus, the concerns about improper judicial bias, although signalling a need for constant caution, should be addressable through judicial sensitivity, a scrutinizing private bar, modest appellate review based on a solid record of pretrial proceedings and, at least in Hawaii, a separation of pretrial and trial judges.

b. Fair access

Another and perhaps more significant potential adverse effect of the managerial rules is the subtle diminishing of fair access to the judicial process. "Access," as used here, encompasses both initial entry into the system and the

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[113] Peckham, *A Judicial Response*, *supra* note 7, at 263.

[114] *See, e.g.*, Link v. Wabash R.R., 370 U.S. 626 (1962) ("The authority of a court to dismiss [a plaintiff's action] sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs . . . .").

[115] *See, e.g.*, Silas v. Sears, Roebuck and Co., 586 F.2d 382 (5th Cir. 1978) (trial court's discretion to impose an appropriate solution for a party's noncompliance with a pretrial order is broad but not unlimited). *See generally* Peckham, *Judge as Case Manager*, *supra* note 2.

[116] *See*, 28 U.S.C. § 1291 (1982); *Id.* § 1292. But see HAW. REV. STAT. § 641-(1)(b) (1985), stating that "an appeal . . . may be allowed . . . whenever the circuit court may think the same advisable for the speedy termination of litigation before it." This statute, unlike the federal statute, could be used to appeal all pretrial decisions in Hawaii circuit courts, upon certification of the appeal by a circuit court judge.

[117] Egregious mismanagement decisions might be corrected immediately through writs of mandamus or prohibition.

[118] HAW. CIR. CT. R. 12.1.

ability reasonably to develop the merits of one's legal position. "Fair" access is diminished where unduly harsh threshold requirements chill plaintiffs from bringing potentially meritorious claims that are based on plausible extensions of existing law or novel legal theories rooted in evolving societal concerns, or where unduly truncated discovery opportunities prevent fair development of important aspects of difficult cases.

Procedural innovations, however efficient, which preclude participation in these ways undermine the system's quality of justice. The system is qualitatively undermined by retarding the evolution and development of the law, by fueling public sentiment that the system is unresponsive to societai concerns and by effectively excluding people, especially those without recourse through political channels, who have no other means for vindicating rights society is on the verge of recognizing as legally significant.[119]

The drafters of the new federal rules were aware of this potential problem. The new rules were intended to reduce cost and delay without diminishing fair access. As discussed in detail in part IV, the rules on their face are structured with ample flexibility to assure fair access and courts have been applying them accordingly.[120]

Briefly, rule 11's attempt to deter "unreasonable" filings is not intended "to chill an attorney's enthusiasm or creativity."[121] In an effort to assure fair access federal courts have drawn a high line between frivolous claims subject to sanctions and novel claims with a plausible legal basis: a claim is "legally unreasonable" only if it bears no chance of success under existing precedents and where no reasonable argument can be made to extend, modify or reverse existing law.[122]

Indeed, the overall impact of the managerial rules may well be to enhance fair access. Discovery rules 26(b)(1), 26(f) and 26(g) are intended, *inter alia*, to limit discovery according to the importance of the issues, the needs of the case, the amount at stake and the resources of the parties.[123] This should expand access opportunities for persons of modest means.

Fair access, however, may be inhibited in another manner under the new rules—if the managerial judge becomes overly zealous in limiting discovery and prevents fair development of important legal positions. This is a concern with

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[119] *See infra* notes 247-249 and accompanying text. Professor Rawls approaches "justice" focussing on a system's treatment of the least advantaged. The moral value and social efficacy of a legal system, according to Rawls, should be measured by the system's capacity to accord those least advantaged the equivalent opportunity to achieve fair substantive outcomes as those of greater advantage. J. RAWLS, A THEORY OF JUSTICE (1971).

[120] *See infra* notes 247-249 and accompanying text.

[121] *See infra* note 247.

[122] *See infra* text accompanying note 246.

[123] *See infra* section IV(C).

due process overtones. While rules do confer considerable discretionary power,[124] that power is set within parameters that attempt to accommodate two competing concerns: minimizing the overuse of pretrial rules as strategic weapons and facilitating the quest for relevant information. Managerial judges have been sensitive to this accommodation. Thus far state experiments have concluded that managerial judges have not negatively affected the qualitative pretrial development of cases, quality quality measured in terms of an attorney's ability to develop the case for trial.[125] While these experiments are not the last word on the issue, they indicate that judicial sensitivity in implementing the new discovery rules can go a long way towards accommodating the competing concerns.

IV. AN ANALYSIS OF THE MANAGERIAL RULES: NEW RULES 11, 16 & 26

This section examines the prominent provisions of the "managerial" rules in the context of the foregoing discussion on enhancing the quality of justice.

A. Judicial Control Over the Pretrial Process—New Rule 16

New rule 16 provides the main vehicle for early judicial control over the pretrial process. Its purpose is to reduce delay and cost by making case management standard practice while allowing for less active judicial handling of cases requiring minimal supervision.[126]

The 1983 amendments to federal rule 16 concerning pretrial conferences were the first changes to the rule since its enactment in 1938. The original version of the rule, which is identical to the current Hawaii rule, had been soundly criticized as ineffectual. The Advisory Committee noted four principal criticisms:

> 1. [pre-trial] conferences are often seen as a mere exchange of legalistic contentions with no real analysis of the particular case;
> 2. the result is frequently nothing more than an agreement on minutiae;
> 3. [pre-trial] conferences are seen as unnecessary and time-consuming in cases that

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[124] *See supra* notes 114-115 and accompanying text.

[125] *See supra* notes 79-80 and accompanying text.

[126] The Advisory Committee recognized that an amendment to rule 16 "is necessary to encourage pretrial management that meets the needs of modern litigation." FED. R. CIV. P. 16 advisory committee note. The Committee noted that "when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices." *Id. See also* FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN THE UNITED STATES DISTRICT COURTS (Federal Judicial Center 1977).

will be settled before trial;

4. [pre-trial] meetings can be ceremonial and ritualistic with having little effect on the trial and being of minimal value, particularly when the attorneys attending the sessions are not the ones who will try the case or lack authority to enter binding stipulations.[127]

In response to these criticisms and in light of the evolving role of the managerial judge, the Advisory Committee amended rule 16 in three important areas. First, the new rule is far more encompassing in scope. Former rule 16 was narrow in focus; it was designed to frame issues for trial. The new rule authorizes the court to call pretrial conferences to manage all phases of the pretrial process.[128] In addition to framing issues and facilitating trial preparation,[129] the

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[127] FED. R. CIV. P. 16 advisory committee note.

[128] *Id.* FED. R. CIV. P. 16 provides:

(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

(1) expediting the disposition of the action;

(2) establishing early and continuing control as that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more preparation, and;

(5) facilitating the settlement of the case.

(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the judge, or a magistrate when authorized by district court rule, shall, after consulting with the attorneys for the parties and any unrepresented, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

(2) to file and hear motions; and

(3) to complete discovery.

The scheduling order also may include

(4) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(5) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in no event more than 120 days after filing of the complaint. A schedule shall not be modified except by leave of the judge or magistrate when authorized by district court rule upon a showing of good cause.

(c) Subjects to Be Discussed at Pretrial Conferences. The participants at any conference under this rule may consider and take action with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence;

rule is expressly designed to establish early judicial control to avoid unduly pro-

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(5) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(6) the advisability of referring matters to a magistrate or master;

(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

(8) the form and substance of the pretrial order;

(9) the disposition of pending motions;

(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

(11) such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.

(d) Final Pretrial Conference. Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

(f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or his own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B),(C),(D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

In contrast, HAW. R. CIV. P. 16, which is identical to the original version of Federal rule 16, provides:

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amend-

tracted case development,[130] to discourage wasteful or dilatory pretrial tactics[131] and to promote early settlement.[132]

The new rule reflects the Advisory Committee's sentiments on the expanded range of concerns of the managerial judge and lists items for consideration during pretrial conferences. Among the significant new items are the "elimination of frivolous claims or defenses" at the outset,[133] the appropriateness of referral of the dispute to an alternative dispute resolution mechanism,[134] early settlement[135] and the need "for adopting special procedures for managing difficult or protracted actions."[136] To enhance productivity, the rule requires the presence of an attorney for each party who is authorized to enter into stipulations on matters "participants may reasonably anticipate may be discussed . . . ."[137]

Second, new rule 16 mandates the issuance of a scheduling order within 120 days of the filing of the complaint.[138] The mandatory aspect of the scheduling order is revolutionary. It is rooted in the conclusion of numerous studies indicating that scheduling orders significantly reduce case disposition time[139] and in the apparent belief that judges will not bother to generate scheduling orders unless so compelled.

The scheduling order sets initial time limits for joinder of parties,[140] amendments of pleadings,[141] filing and hearing of motions[142] and completion of discovery.[143] The rule 16 scheduling order, in conjunction with rule 26(b)(1) re-

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ments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

[129] FED. R. CIV. P. 16(a)(4).

[130] FED R. CIV. P. 16(a)(2). For an interesting discussion on creating an accelerated pretrial schedule utilizing alternative dispute resolution and modifications to rule 16, see McMillan & Siegel, *Creating a Fast-Track Alternative Under the Federal Rules of Civil Procedure*, 60 NOTRE DAME L. REV. 431 (1985).

[131] FED. R. CIV. P. 16(a)(3).

[132] FED. R. CIV. P. 16(a)(5).

[133] FED. R. CIV. P. 16(c)(1).

[134] FED. R. CIV. P. 16(c)(7).

[135] FED. R. CIV. P. 16(a)(5).

[136] FED. R. CIV. P. 16(c)(10).

[137] FED. R. CIV. P. 16(c).

[138] FED. R. CIV. P. 16(b).

[139] *See supra* notes 63-80 and accompanying text.

[140] FED. R. CIV. P. 16(b)(1).

[141] *Id.*

[142] FED. R. CIV. P. 16(b)(2).

[143] FED. R. CIV. P. 16(b)(3).

garding discovery limitations and the optional rule 26(f) discovery conference,[144] is intended to establish realistic time constraints according to the needs of the particular case. This individual tailoring of timetables should provide for greater efficiency than a single system-wide timetable for all cases.[145] Realistic timetables effectively control both the pace and quality of pretrial activities. They

> stimulate litigants to narrow the areas of inquiry and advocacy to those they believe are truly relevant and material. Time limits not only compress the amount of time for litigation, they should also reduce the amount of resources invested in the litigation. Litigants are forced to establish discovery priorities and thus to do the most important work first.[146]

Flexibility is built into the scheduling order mandate. Parties can seek to amend the order for "good cause."[147] Rule 16 also authorizes the court, via local rules, to exempt categories of cases from the mandatory scheduling order.[148] For example, cases with less than $25,000 in controversy may tend to be self-limiting in terms of the pretrial process and may not need a scheduling order. Rule 16 contemplates a blanket exemption for such cases.

Third, new rule 16 authorizes the managerial judge to impose sanctions. The former rule made no provision for sanctions, although courts sometimes drew upon their inherent powers to impose sanctions.[149] Sanctions are authorized for failure to obey pretrial or scheduling orders, for failure to appear at pretrial

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[144] FED. R. CIV. P. 26(f).

[145] Where local court rules establish a single timetable for all cases, that timetable could be viewed as setting the outer time limits. See HAW CIR CT. R. 12 for an example of a single timetable that applies to all cases.

[146] REPORT TO THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES 28 (1979).

[147] FED. R. CIV. P. 16(b). The "good cause" standard for modifying the scheduling order is less stringent than the "substantial hardship" standard embodied in other rules. *See* FED. R. CIV. P. 26(b)(3). The Advisory Committee did not want undue difficulty in obtaining modifications to compel attorneys to seek initially "the longest possible periods for completing pleading, joinder and discovery." FED. R. CIV. P. 16 advisory committee note.

[148] Although a mandatory scheduling order encourages the judge to become involved in case management early in the litigation, subdivision (b) "envisions that there are some categories of cases which are routine, which historically are seldom tried, which often are filed for tactical reasons or other reasons, and it would be an unnecessary burden on counsel and the court to enter a scheduling order." Address by Charles E. Wiggin, Annual Judicial Conference, Second Judicial Circuit of the United States, 101 F.R.D. 161, 179 (1983) [hereinafter Wiggin Speech]. Subdivision (b) of rule 16 "permits each district court to promulgate a local rule under Rule 83 exempting certain categories of cases in which the burdens of scheduling orders exceed the administrative efficiencies that would be gained." FED. R. CIV. P. 16 advisory committee note.

[149] *See* FED. R. CIV. P. 16(f) advisory committee note.

conferences, for being substantially unprepared to participate in such conferences and for refusing to participate in good faith.[150] The sanctions specified in the rule are inclusive and range from orders of default to assessments of attorneys fees.[151] The Advisory Committee hoped to assure vigorous use of rule 16 as a management tool by providing a range of sanctions to encourage attorney compliance.[152]

New rule 16's goals and scope are thus exemplary. They appropriately expand the powers of the judge to control the pretrial process. The mandatory scheduling order in section (b), however, introduces several potential administrative problems.

When should the scheduling order be entered? Is the 120 day deadline realistic? A scheduling order will be effective only if the outlines of the case have developed sufficiently to suggest the ultimate number of parties involved, the significance and complexity of the issues and likely discovery needs. A perfunctory scheduling order based on a bare-bones complaint and answer will not be an order tailored to the needs of the case. Federal court experience has yet to determine the wisdom of the 120 day deadline. A more workable deadline might be 180 days, or six months. This would allow for completion of basic pleadings and preliminary discovery (interrogatories and document productions). At this stage of the litigation the court and counsel may be better able to evaluate the needs of the case and fashion a meaningful scheduling order that provides realistic discovery guidance.[153]

Will the mandatory scheduling order, which must be preceded by some form of judge/attorney contact, be ineffectual if not wasteful for certain categories of cases? Undoubtedly so. As mentioned above,[154] section (b) builds in flexibility by authorizing local rule exemptions. The administrative problem lies in adequately pre-defining exempt categories and in fitting actual cases into those categories. Categories readily definable according to fixed criteria—such as amount in controversy—may not in practice adequately demarcate cases for which

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[150] Under subdivision (f), the judge has discretion to impose sanctions under rule 37(b)(2)(B), (C), or (D) and/or assess reasonable expenses incurred resulting from noncompliance, including attorneys fees.

[151] FED. R. CIV. P. 16(f).

[152] FED. R. CIV. P. 16(f) advisory committee note ("explicit reference to sanctions reenforces [sic] the rule's intention to encourage forceful judicial management").

[153] Another option is to schedule a mandatory pretrial conference to coincide with defendant's filing of its pretrial statement. Under Hawaii Circuit Court Rule 12(a)(8) the responsive pretrial statement is due 60 days after plaintiff's pretrial statement is filed, which is due one year after the complaint is filed. No such conference is currently held. The parties would be as much as six months from trial and in practice substantial discovery is conducted during that period. *See* HAW. CIR. CT. R. 12(a)(e). A scheduling/discovery order entered at that time might productively guide the remainder of the pretrial process.

[154] See *supra* note 148 for a discussion of section (b).

scheduling orders are counterproductive. Categories defined by important but soft factors—such as importance or complexity of the issues, difficulty of discovery, obstinance of counsel—require preliminary factual development and judgment calls. This problem appears to be eminently solvable over time. Trial and error tinkering with exempt categories is one approach.

Another potential administrative problem involves the initial availability of judicial resources. The transition to mandatory scheduling orders and early pretrial conferences may entail initial commitment of additional judicial resources. The commitment involves "additional" start-up resources because judges will be required to do more at an earlier time. The commitment is "initial" because studies and federal court experience indicate that as cases are processed through the system the overall cost and time savings will far surpass additional up-front judicial costs.[155]

Finally, a pure master calendar system requires some modification to accommodate rule 16's mandatory scheduling order and early pretrial conferences. New rule 16 was structured with the federal courts' "individual assignment" system in mind. Under this system, each case is assigned to a particular judge when it is filed.[156]

That judge is responsible for all aspects of the case—from pleading to post-trial motions. In contrast, the Hawaii's First Circuit Court segregates judges according to function under a master calendar system. The average civil case will see at least three judges—one for motions, one for settlement shortly before trial and one for trial. How adaptable is the master calendar system?

Commentators generally believe that a judge in an assignment system is "more motivated to monitor and expedite his cases because he feels greater individual responsibility for those cases . . . [and any] lack of diligence and organization will soon be reflected in the increase in his pending case load."[157] They also believe, however, that active case management is appropriate in a master calendar system.[158] Judge Peckham has noted that it is possible to "integrate effective case management with a master calendar system . . . [and] state court judges who prefer the master calendar system should not hesitate to institute case management techniques because of the fear that their efforts will

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[155] *See supra* notes 63-80 and accompanying text.

[156] Federal district courts changed from a master calendar system to an individual assignment system in 1969.

[157] Peckham, *A Judicial Response*, *supra* note 7, at 257. *See also* Enslen, *Should Judges Manage Their Own Caseloads*, 70 JUDICATURE 200 (1987).

[158] An early study by the ABA Commission On Standards of Judicial Administration concluded that "the success of caseflow management thus is not necessarily dependent on the procedural characteristics of case assignment" (whether individual or master calendar). M. SOLOMON, CASEFLOW MANAGEMENT IN TRIAL COURTS 29-30 (1973) (Supporting Study 2).

be wasted."[159]

If the anticipated reduction in judicial case load materializes as a result of the Hawaii mandatory arbitration program more judges should be available to handle the cases that bypass arbitration—predominantly larger, more complex cases.[160] In this projected setting, there is sound reason to believe that a master calendar system can be adapted to achieve the efficiencies of managerial judges in an assignment system.[161]

In light of the potential administrative problems just discussed, the most prudent approach for Hawaii courts may be to adopt rule 16 without the mandatory aspect of the scheduling order. Rule 16, so modified, in conjunction with rules 26(b)(1) and 26(f), would give judges significant power to control the pretrial process without making active management mandatory. This would forestall administrative difficulties, discussed above, while awaiting evaluation and refinement of the mandatory scheduling order process by the federal or

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[159] Peckham, *A Judicial Response*, *supra* note 7, at 257.

[160] *See supra* note 39. Peter Adler, head of the Hawaii Supreme Court's Alternative Dispute Resolution Program, estimates that with the legislatively imposed ceiling of $150,000, up to ninety percent of all tort claims may be processed through arbitration. The program later plans to expand to also encompass contract claims. Currently the arbitration program is in its fledgling stage. Its ultimate impact on judicial case loads is still a matter of conjecture.

[161] "Pretrial judges" could not only handle motions but also enter the initial scheduling orders and establish parameters for discovery. This would provide pretrial continuity, with the judges developing basic familiarity with the cases that bypass arbitration. These judges would also be in a position to orchestrate early settlement—although a separate settlement judge would still be used if needed. "Trial judges" would then be assigned as the cases go to trial, just as under the present master calendar system. For flow charts of modified master calendar systems which encompass case management principles, see M. SOLOMON, *supra* note 158, at 16, 17.

A second option would be the "case flow manager" system used in the ELP experiment in the Kentucky courts. *See supra* note 79 and accompanying text.

Another option would be to keep the present system in place for simple cases and designate all multi-party, discovery-intense cases "complex litigation" and assign those cases to judges early on. The anticipated reduction in cases due to the mandatory arbitration program may allow for more individual case assignments.

This would require revision to reinterpretation of Circuit Court rule 12(a)(11). Relatively few cases are currently designated complex litigation. There are at least two apparent reasons. First, the unofficial commentary to the rule cautions reluctance: "The court will not grant the motion just because a case has multiple parties or issues, or involves a potentially substantial amount of money." HAW. CIR. CT. R. 12(a)(11) unofficial comment. Early assignment of a case will be made "only when [the court] is satisfied an early assignment will effectuate the interests of judicial economy and fairness to litigants." *Id.* Second, the parties must request the designation, and, as discussed below, attorneys generally desire to control the pretrial process and do not often file 12(a)(11) motions. *Id.*

The feasibility of these and other options for implementing new managerial rules requires further study and discussion. It does appear, however, that any number of options would be effective.

other state courts.

B. *New Rule 11—"Stop, Look, and Inquire"*[162]

New federal rule 11 gives the managerial judge a potent weapon for combating cost and delay arising out of groundless filings by eliminating the requirement of subjective bad faith for the imposition of sanctions and replacing it with an objective "reasonableness" standard. The rule requires parties and their attorneys to "stop, look and inquire" reasonably before asserting claims or defenses or filing motions. Although the new federal rule has been in effect for only three years, it's impact has been dramatic.[163] Federal district and appellate

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[162] *See* Note, *Reasonable Inquiry Under Rule 11—Is the Stop, Look, and Investigate Requirement a Litigant's Roadblock?*, 18 IND. L. REV. 751 (1985) [hereinafter Note, *Reasonable Inquiry*].

[163] *See* McLaughlin v. Bradlee, 803 F.2d 1197 (D.C. Cir. 1986) (sanctions upheld where suit barred by collateral estoppel doctrine filed with intention to harass or to cause delay.); Reliance Ins. Co. v. Sweeney Corp. 792 F.2d 1137 (D.C. Cir. 1986) (appellant and attorney sanctioned for frivolous appeal after failing to cite any authority or reveal any facts underlying their position and failing to respond to an order to show cause concerning sanctions); Eastway Constr. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985) (attorney's fees awarded to municipal defendant in groundless antitrust and civil rights action); Norris v. Grosvenor Mktg., Ltd., 803 F.2d 1281 (2d Cir. 1986) (Second Circuit advised district court upon remand to exercise its "broad discretion in fashioning sanctions" and grant defendant's request for [r]ule 11 sanctions in meritless breach of contract action barred by prior arbitration); Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986) (reversal of lower court award of attorney's fees to defendants in unconstitutional arrest, excessive force, and malicious prosecution action; rule 11 limited to testing the attorney's conduct at the time a paper is signed and does not impose a continuing obligation to the attorney); Lieb v. Topstone Indus., Inc., 788 F.2d 151 (3d Cir. 1986) (copyright infringement action remanded to district court for articulation of reasons behind denial of award of attorney's fees); Stephens v. Lawyers Mut. Liab. Ins. Co., 789 F.2d 1056 (4th Cir. 1986) (order imposing rule 11 sanctions against plaintiff's counsel in declaratory judgment action on liability insurance policy reversed as abuse of discretion because action "had a reasonable basis in fact and law and was not objectively frivolous nor interposed for any improper purpose"); Cohen v. Virginia Elec. and Power Co., 788 F.2d 247 (4th Cir. 1986) (attorney's fees award affirmed because plaintiff's motion for leave to amend was filed for improper purpose of determining whether defendant would oppose it, with the intention of withdrawing the motion if opposed); Davis v. Veslan Enter., 765 F.2d 494 (5th Cir. 1985) (attorney's fees imposed for undue delay against defendant who filed removal petition after jury returned its verdict); Sites v. I.R.S., 793 F.2d 618 (5th Cir. 1986) (rule 11 sanctions appropriate where taxpayers' petitions to quash summons to their bank were filed despite "longstanding, unequivocal, dispositive precedent rejecting taxpayer's claims"); Albright v. Upjohn Co., 788 F.2d 1217 (6th Cir. 1986) (district court's denial of attorney's fees reversed as abuse of discretion where plaintiff's attorneys failed to conduct sufficient prefiling investigation of the facts and the law underlying products liability claim); Frazier v. Cast, 771 F.2d 259 (7th Cir. 1985) (order for rule 11 sanctions affirmed against attorney for asserting factually baseless defense of exigent circumstances in civil rights action for warrantless entry of home); Rodgers v. Lincoln Towing Serv., Inc., 771 F.2d 194 (7th Cir. 1985) (plaintiff's attorneys sanctioned for refusing to "recognize established law of the U.S. Supreme Court and this

courts, although sometimes with differing interpretations,[164] have enthusiastically embraced the new rule. "[T]he message of [new] [r]ule 11 and of the sanctions that have been imposed under [r]ule 11, is clear: *'don't waste the court's or the opposing party's time.'* "[165]

Former federal rule 11, which is identical to current Hawaii rule 11, proved totally ineffective in preventing meritless filings. There are no reported cases of sanctions under Hawaii rule 11.[166] In the forty-five year history of the former federal rule 11, only eleven reported cases found violations.[167]

Circuit that defeated several of the plaintiff's claims"); MGIC Indem. Corp. v. Weisman, 803 F.2d 500 (9th Cir. 1986) (District Court of Hawaii's award of attorney's fees affirmed against plaintiff for asserting mail fraud charges not "well grounded in fact" or "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law"); Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986) (order for rule 11 sanctions for "misleading" arguments in brief reversed; rule 11 construed as not imposing upon district courts the burden of evaluating under ethical standards the accuracy of all lawyer's arguments); Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986) (order for sanctions reversed where plaintiff's claim under Voting Rights Act had an objectively defensible legal basis even though the claim ultimately failed); Chevron, U.S.A., Inc. v. Hand, 763 F.2d 1184 (10th Cir. 1985) (sanctions against defendant upheld where defendant agreed to a stipulated settlement dismissing the case and then hired another attorney solely to delay the entry of the stipulated dismissal through a groundless motion to set aside the settlement). The one Supreme Court case mentioning new rule 11 is Burnett v. Grattan, 468 U.S. 42, 50 n.13 (1984) (noting that "the administration of justice is not well-served by the filing of premature, hastily drawn complaints").

[164] KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS xi (Federal Judicial Center 1985).

[165] ABA SECTION OF LITIGATION, SANCTIONS: RULE 11 AND OTHER POWERS 9 (1986) (emphasis original) [hereinafter SANCTIONS].

[166] In response to continuing criticism of frivolous suits, the Hawaii legislature in 1980 and again in 1986 passed legislation attempting to deter groundless actions. Unfortunately, neither enactment is likely to achieve its goal.

In 1980 the legislature enacted section 607-14.5 of the Hawaii Revised Statutes (attorneys' fees in civil actions) authorizing courts to award attorneys' fees, as they "deem just" upon a specific finding that "all claims by the party are completely frivolous and are totally unsupported by the facts and the law." Act of June 17, 1980, ch. 286, 1980 Haw. Sess. Laws 547. The statute is vague and extremely limited in scope. It only applies where all claims in the action are "completely frivolous" (which is undefined) *and* have no basis at all in law and fact. It applies only to "claims," including counterclaims. *See* Harada v. Ellis, 4 Haw. App. 439, 667 P.2d 834 (1983). It does not apply to defensive pleadings or motions. The award can be made only against the plaintiff itself; plaintiff's attorney cannot be sanctioned.

In 1986, as a part of its tort reform package, the legislature authorized awards of attorneys' fees for claims or defenses "not reasonably supported by law." HAW. REV. STAT. § 607-14.5 (Supp. 1986). Awards are not to exceed 25% of the amount claimed. This provision is poorly crafted. If its aim is to deter ill-supported defenses as well as groundless claims, why is the ceiling on fee awards determined in both instances by the amount of plaintiff's prayer? Why is frivolousness defined only in terms of claims not reasonably supported by "law"? The law may initially support a claim based on allegations which prove to be factually groundless. Ultimately, new rule 11, if adopted, may provide needed guidance on interpretations of this section.

[167] *See* Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Fed-*

Under the former federal rule, a party or attorney's signature certified that he had read the document filed and that "to the best of his knowledge, information and belief, there was good ground to support it."[168] An attorney could be sanctioned only for "willful violations."[169] These provisions were consistently interpreted to mean that an attorney could not be sanctioned if for whatever reason he personally believed at the time that there was some good ground to support his filing.[170] This subjective standard, requiring proof of bad faith, failed to deter frivolous litigation.[171] Proof of what counsel actually believed at the time presented an insurmountable hurdle in most instances, and judges were reluctant to sanction attorneys who were not shown to be intentionally abusing the system.

Rule 11 fell into disuse. Consequently, the federal rules were effectively devoid of early screening or deterrent mechanisms for claims, defenses and motions which appeared plausible on paper but which upon reasonable investigation clearly lacked support in fact or law. Without early screening or deterrent mechanisms attorneys were allowed to be fast and loose or at least careless in their filings. Indeed, attorneys were subtly encouraged in that direction due to the increased settlement leverage for the filing party—the cost to an opponent responding to and attempting to defeat a groundless filing is often high. Attorneys vaguely defined public responsibilities as officers of the court were often subsumed by their private obligations as zealous advocates for their clients.

In 1983, the Supreme Court and Congress responded by amending rule 11 to expand judicial powers to strike filings and impose disciplinary sanctions as means for checking the filing of papers not reasonably supported by law or fact. Deterrence was the stated rationale. One study found that some judges also attributed compensatory and punitive purposes to the rule.[172] Whether singular or tripartite in purpose, the amended rule modestly increases the pre-filing in-

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eral Rule of Civil Procedure 11, 61 MINN. L. REV. 1 (1976). *See also Amended Rule 11 of the Federal Rules of Civil Procedure: How Go the Best Laid Plans*, 54 FORDHAM L. REV. 1 (1985).

[168] *Id. See also* FED. R. CIV. P. 11 (1938).

[169] *Id.*

[170] *See, e.g.*, Nemeroff v. Abelson, 620 F.2d 339 (2d Cir. 1980); *In re* Ramada Inns Sec. Litig., 550 F. Supp. 1127 (D. Del. 1982).

[171] 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1334 (1971). Under the original version of rule 11, courts experienced considerable confusion as to:

(1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action,

(2) the standard of conduct expected of attorneys who sign pleadings and motions, and

(3) the range of available and appropriate sanctions.

FED. R. CIV. P. 11 advisory committee note. *See also* RHODES, RIPPLE & MOONEY, SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE 64-65 (Federal Judicial Center 1981).

[172] *See* KASSIN, *supra* note 164, at x.

vestigative responsibilities of attorneys and parties and imposes mandatory sanctions for unreasonable filings.[173] Awards of attorneys' fees against both parties and their attorneys are intended to create an economic disincentive for careless or abusive filings.

In practice, federal courts have tended to apply rule 11 in a straightforward manner, avoiding uncertainty that might unfairly disrupt the way most attorneys practice. According to a survey of cases by the Federal Judicial Center during the year following adoption of the new rule, although federal judges imposed sanctions in a variety of situations, they imposed them predominantly where filings were clearly careless or abusive. Representative cases include "the filing of a claim after the statute of limitations had expired, or without subject matter jurisdiction, and frivolous motions to disqualify defendant's attorney, for summary judgment, or for a change of venue."[174] Recent federal court decisions have also limited the scope of rule 11, addressing concerns that the rule not impair fair access to the courts or impose undue burdens upon counsel.[175]

Under the new federal rule 11:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer knowledge, information and belief *formed after reasonable inquiry* it is *well grounded in fact and is warranted by existing law or good faith argument for the extension, modification, or reversal of existing law, and* that is *not interposed for any improper purpose*, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.[176]

The rule thus enunciates a new two-part standard for attorney performance: (1) whenever he signs a pleading or motion he must have conducted reasonable inquiry to determine whether the filing is "legally unreasonable or without factual foundation";[177] *and* (2) whenever he signs a pleading or motion he is certifying that it is not filed for a purpose that is "improper."[178]

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[173] Wiggin Speech, *supra* note 148, at 161. Judge Mansfield, Chairman of the Advisory Committee commented that the primary purpose of the amendment to rule 11 was to "reduce frivolous claims, defenses or motions" and to deter "costly meritless maneuvers." Letter from Judge Mansfield, Chairman of the Advisory Committee to Judge Gignoux and the Members of the Standing Committee on Rules of Practice and Procedure, 97 F.R.D. 165, 192 (1983). *See also* Note, *Reasonable Inquiry, supra* note 162, at 751, 773 (1985).

[174] KASSIN, *supra* note 164, at 6.

[175] *See, e.g.*, Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986); Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986); Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986).

[176] FED. R. CIV. P. 11 (emphasis added).

[177] *Zaldivar*, 780 F.2d at 830 (9th Cir. 1986).

[178] *See generally* Unioil, Inc. v. E.F. Hutton & Co., 802 F.2d 1080, 1089 (9th Cir.), *withdrawn pending petition for reh'g*, 809 F.2d 548 (9th Cir. 1986).

1. Reasonable inquiry requirement

The most significant change to rule 11 lies in the redefinition of the concept of "frivolousness." The amended rule eliminates the subjective good faith test of the original version and replaces it with an objective "reasonable inquiry" standard.[179] The Advisory Committee commented that the new "standard is more stringent than the original good faith formula and thus it is expected that a greater range of circumstances will trigger its violation."[180]

One purpose of this new standard is to eliminate ignorance as an excuse for the assertion of plainly unsubstantiable positions.[181] It does not matter who performed the inquiry, but rather, "whether as a result the attorney has adequate knowledge . . . sufficient to enable him to certify that the paper" is reasonably supported."[182] There is no longer allowance for a "pure heart, empty head excuse."[183]

New rule 11 thus imposes an affirmative duty on the part of the attorney to reasonably investigate the basis of the claim, defense or motion before filing. Judicial inquiry on a rule 11 motion focuses on what investigative steps the attorney took before certifying the filing. Whether the inquiry was "reasonable" depends on the circumstances of each situation. Relevant factors include:

[H]ow much time for investigation was available to the signer; whether he had to

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[179] Some courts have apparently persisted in applying a subjective bad faith standard. *See, e.g.*, Suslick v. Rothchild Sec. Corp., 741 F.2d 1000 (7th Cir. 1984) (award of attorney's fees denied because no showing of subjective bad faith on part of plaintiff or her counsel where district court all but invited plaintiff to resumit complaint on at least two occasions); Gieringer v. Silverman, 731 F.2d 1272 (7th Cir. 1984) (attorney's fees denied to defendants where no showing of subjective bad faith on part of plaintiffs even though plaintiffs statements in depositions seemed to indicate their sole purpose in bringing suit was to obtain settlement); Rubin v. Buckman, 727 F.2d 71 (3d Cir. 1984) (district court on remand should give parties opportunity to present submissions on bad faith issue in reconsidering defendants' request for attorney's fees).

[180] *Zaldivar*, 780 F.2d at 829 (1986) (quoting FED. R. CIV. P. 11 advisory committee note). Attorneys fees have been awardable under an objective reasonableness standard in civil rights litigation. The Civil Rights Attorneys Fees Act, 42 U.S.C. § 1988 (1982), entitles the prevailing party to recovery of its attorneys fees. Where the defendant has prevailed, it must establish "that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in bad faith." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978).

[181] *See* Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 187 (1985).

[182] *Id. See generally* Home-Pack Transport, Inc. v. Donovan, 39 Fed. R. Serv. 2d 1063, 1066 (D. Md. 1984) (counsel violated rule 11 by not making reasonable inquiry where motion had no basis in law and was not submitted under time pressure even though counsel obtained oral advice of other attorneys and acted in good faith).

[183] KASSIN, *supra* note 164, at 5. Although the new Federal rule has stricken the requirement of willfulness, it still remains a factor to be considered in determining the appropriate choice of sanctions. *See* Wiggin Speech, *supra* note 148, at 178.

> rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.[184]

Thus the "reasonableness" standard embodied in rule 11 is flexible. It is intended to accommodate the realities of law practice and not to impose unduly onerous or unrealistic investigative burdens upon counsel.[185]

The following discussion addresses the two components of rule 11's reasonable inquiry standard: whether the filing is well-grounded in fact and whether it is warranted by law or a good faith argument for change in the law. It then addresses post-filing inquiry obligations and questions about the scope of the reasonable inquiry requirement.

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[184] FED. R. CIV. P. 11 advisory committee note. At least two federal district courts have identified the level and type of legal experience of counsel as a relevant factor. *See, e.g.*, McQueen v. United Paperworkers Int'l Union Local 1967, No. C-1-84-1196 (S.D. Ohio, Feb. 26, 1985) (inquiry into expertise attorney may aid court in assessing reasonableness of counsel's conduct under rule 11); Huettig & Schromm, Inc. v. Landscape Contractors Council, 582 F. Supp. 1519 (N.D. Cal. 1984) (sanctions appropriate where the two attorneys who signed the complaint had seven and twelve years experience and held themselves out as labor law specialists, thus raising strong inference that their bringing of action was for improper purpose).

[185] How will judges actually account for the realities of law practice in the context of rule 11 standards? The answer touches upon several interrelated variables: the judge's commitment to rule 11's purposes, the judge's perception of the demands of law practice and the judge's sense of what was fair to have asked of the particular attorney in light of his experience and resources.

The Federal Judicial Center's study of judicial application of rule 11 standards yielded interesting findings. The study was conducted shortly after the adoption of new rule 11, when judges were in the initial stages of interpreting its provisions. The study found that judges tended to apply a mixed subjective intent/objective reasonableness standard to certain types of cases. As a result some good faith violations of the reasonableness standard elicited disciplinary action and some did not. Kassin, *supra* note 164, at 27. Judges tended to sanction "simple negligence or laziness more heavily than they do incompetence or lack of experience, despite their apparent equivalence in implying the lack of bad faith." *Id.* Judges also tended to be more lenient in imposing sanctions upon pro se litigants. This seems to imply that judges examine the reasons for the groundless filing and determine whether the reasons are acceptable according to such factors as the experience and resources of counsel (or the absence of counsel).

The study concluded that "the 1983 amendments to Rule 11 have apparently increased judges' willingness to enforce the certification requirements." *Id* at 45. It also stated, however, that judges in certain types of cases apply a modified objective standard to minimize the perceived harshness of the pure objective standard: "judges rather naturally make distinctions within the category of good faith violations. . .[and] in the absence of bad faith only serious forms of [unreasonable] misconduct appear to have resulted in the award of fees." *Id.* at 27. The study suggests a four-tiered model describing judges' initial rulings under new rule 11.

a. Well-grounded in fact

For most filings, reasonable factual inquiry includes thorough discussions with the client and important witnesses[186] and a review of available documents.[187] Although rule 11 is designed to eliminate the "file first ask later" approach, it does not require the equivalent of substantial discovery before filing. Where a party and attorney are unable to obtain important information through informal investigation, they have discharged their duty of reasonable inquiry.[188] It is the omission or misstatement of material fact, avoidable through ordinary investigation, that is the focal point of the reasonable factual inquiry requirement.

Unioil, Inc. v. E.F. Hutton & Co., Inc.[189] illustrates the application of this requirement. In *Unioil*, plaintiffs brought a class action suit against several brokerage houses and individuals alleging market manipulation of Unioil stock.[190] Without investigation or inquiry, Joseph L. Alioto, plaintiff's counsel, improperly named Zelezny, a stockbroker, as the class representative.[191] Alioto had not

Four-Tiered Model Describing Judges' Rulings on Rule 11 Motions for Sanctions

Characterization of Attorney's Conduct	Rule 11 Prescriptions	Actual Decision Model (% Sanctions Granted)
1. Nonviolation (pleading is reasonable under the circumstances)	No sanctions	No sanctions (2%)
2. Nonwillful good-faith violation (reasonableness standard not met because of factors such as incompetence, lack of experience, case complexity, and oversight)	Sanctions	Variable sanctions (61%)
3. Willful good-faith violation (reasonableness standard not met because of personally controllable factors such as neglect or laziness)	Sanctions	Sanctions (85%)
4. Willful bad-faith violation (reasonableness standard not met because of willful disregard or misrepresentation of the facts or law, or improper purpose)	Sanctions	Sanctions (98%)

[186] Wold v. Minerals Eng'g Co., 575 F. Supp. 166 (D. Colo. 1983) (personal interviews with client and key witnesses).

[187] Florida Monument Builders v. All Faiths Memorial Gardens, 605 F. Supp. 1324 (S.D. Fla. 1984).

[188] *See* Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986) (reasonableness of plaintiff's factual inquiry must be assessed in light of the availability of relevant information); Mohammed v. Union Carbide Corp., 606 F. Supp. 252, 262 (E.D. Mich. 1985). ("The difficulty of investigating [antitrust claims] prior to the initiation of a lawsuit lessens the extent of investigative efforts that an attorney must undertake to satisfy the 'reasonable inquiry' standard.")

[189] 802 F.2d 1080 (9th Cir.), *withdrawn pending petition for reh'g*, 809 F.2d 548 (9th Cir. 1986).

[190] Plaintiffs alleged a "concerted scheme to sell Unioil stock short in violation of federal antitrust and securities laws, RICO, and various California laws." *Unioil*, 802 F.2d at 1084.

[191] Based on Zelezny's deposition testimony, the Ninth Circuit affirmed the district court's

contacted Zelezny prior to filing the complaint or conducted an independent investigation, relying instead upon the reference of forwarding counsel.[192] Subsequently, the district court dismissed the action and imposed sanctions under rule 11 for failure to conduct reasonable inquiry.[193] Alioto appealed the imposition of sanctions.

Under the subjective standard of former federal rule 11 and current Hawaii rule 11, only a willful violation would have subjected Alioto to sanctions. Thus, unless the defendant could have shown that Alioto filed the complaint with the knowledge that Zelezny was an improper class representative, sanctions would have been inappropriate. Under the reasonable inquiry standard of the new rule, however, Alioto's subjective intent was deemed irrelevant. The Ninth Circuit found that Alioto failed to conduct reasonable investigation since a competent attorney would have taken further steps prior to the filing of the lawsuit to insure that the class claims were properly represented.[194]

Wells v. Oppenheimer & Co., illustrates the appropriateness of sanctions for motions not well-grounded in fact.[195] The court sanctioned defense counsel for filing an unreasonable motion for summary judgment, finding that "although the defendants acted in subjective good faith in moving for summary judgment, there was no objective basis for the attorney to conclude that the motion was well-grounded as the questions of fact were obvious."[196] Implicit in the court's decision were concerns about undue expense to the plaintiff, unnecessary time burdens on the court and improper use of the summary judgment motion as a discovery shortcut.

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finding that Zelezny's claims clearly were not typical of those of the class and that Zelezny's apparent conflicting interest class members' interests clearly made him "inadequate" as a class representative. *Id.* at 552, 558.

[192] The Ninth Circuit deemed not clearly erroneous the district court's findings that (1) Alioto had reason to know that Zelezny was the only named plaintiff who appeared to be independent of Unioil, (2) Alioto knew virtually nothing about forwarding counsel on his inquiry into Zelezny's suitability as a class representative, (3) Alioto's firm represented itself as experienced in complex business litigation, (4) Alioto had ample time to investigate before filing, (5) no severe time or monetary constraints impeded any investigation, and (6) the class of allegations threatened defendants with mass liability and aroused a vigorous and costly defense. *Id.* at 557.

[193] The district court also found plaintiff's counsel in violation of rule 11 for: (1) attempting to disengage from class discovery without cause and from the class action suit without court approval; and (2) failure to comply with the requirements for statements under oath. *Id.* at 553.

[194] *Id.* at 558-59. *Cf.* Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 365 F. Supp. 975 (E.D. Pa. 1973) (court applied what amounted to the reasonable inquiry standard to find a violation under old rule 11).

[195] 101 F.R.D. 358 (S.D.N.Y. 1984).

[196] *See id. See also* SFM Corp. v. Sundstrand Corp., 102 F.R.D. 555 (N.D. Ill. 1984) (sanctions imposed for groundless summary judgment motions).

b. Warranted by law or a good faith argument for a change in law

Rule 11 also requires reasonable inquiry to determine whether the filing is warranted by law or a good faith argument for a change in the law. Although the Ninth Circuit recently held that rule 11 and the ethical rules are not coextensive,[197] rule 11 does address a problem with ethical as well as practical dimensions: the assertion in court of a position lacking any plausible legal basis. Thus an attorney's duty of zealous client representation does not abrogate her obligation not to misrepresent the law to the court.

In a case providing important guidance for Hawaii attorneys, the Ninth Circuit in *Zaldivar v. City of Los Angeles*[198] delineated the standard for determining whether a pleading or motion is warranted by law. In *Zaldivar*, plaintiffs asserted that defendant's failure to distribute a bilingual recall notice constituted a violation of the Federal Voting Rights Act.[199] The district court granted summary judgment against plaintiffs, holding that the Act was inapplicable because it did not apply to conduct of private individuals and because it applied only to "acts of voting" and a recall notice is not an act of voting.[200] Subsequently, the district court sanctioned plaintiffs under rule 11, finding plaintiffs' claims "frivolous" and "totally without merit."[201] The Ninth Circuit, however, reversed the imposition of sanctions.

The Ninth Circuit noted that under rule 11's "warranted by law" requirement, the pleader "need not be correct in his view of the law;" rather, "at a minimum, [the pleader based on reasonable inquiry] must have a good faith argument for his or her view of what the law should be."[202] The court concluded that sanctions under rule 11 were inappropriate since plaintiffs had advanced the plausible argument that the literal provisions of the Voting Rights Act were to be expansively construed to effect the strong remedial purposes of the Act. In light of legislative history and expansive judicial construction of analogous provisions, the court found the legal basis of plaintiffs' position objectively defensible, even though that position ultimately failed.[203]

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[197] Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986).

[198] 780 F.2d 823 (9th Cir. 1986).

[199] *Id.* at 825-27. Plaintiffs filed an action in federal district court to enjoin the City of Los Angeles from processing defendants' recall petitions. *Id.* at 826.

[200] *Id.* at 827.

[201] *Id. See also* Zaldivar v. City of Los Angeles, 590 F. Supp. 852 (C.D. Cal. 1984).

[202] *Zaldivar*, 780 F.2d at 827.

[203] *Id.* at 834. The Ninth Circuit recognized the Advisory Committee's mandate that courts are 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. *See* FED. R. CIV. P. 11 advisory committee note. *See also*, Davis v. Veslan Enter., 765 F.2d 494 (5th Cir. 1985) (assertion must be based on a plausible view of the law); Eastway Const. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985) (Where it is patently clear that

In contrast, the plaintiff's claims in *Rodgers v. Lincoln Towing Service, Inc.*[204] lacked an objectively defensible legal basis, and were therefore sanctionable. The Seventh Circuit affirmed the district court's finding of "counsel's incompetence in the handling of this matter by making 'frivolous' and 'worthless' claims,"[205] noting that "counsel has refused to recognize or to grapple with the established law of the [United States] Supreme Court and of this Circuit that defeats several of the claims."[206]

Advocacy of positions foreclosed by prevailing precedent does not in all situations constitute a rule 11 violation. "[G]ood faith argument[s] for the extension, modification, or reversal of existing law"[207] fall squarely within the bounds of permissible conduct. All arguments for changes in law, however, do not pass rule 11 muster. A new legal theory or an argument for reversal of existing law must be made in "good faith."[208] This good faith standard is a marked departure from the subjective intent standard of former rule 11. "Good faith arguments" are to be measured objectively: Did counsel through reasonable inquiry have any reasonable basis for his arguments for a change of law?[209] Counsel's arguments need not bear a high probability of success so long as they are objectively defensible;[210] that is, they have a plausible basis in developing lines of legal or social thought, and therefore have some "realistic possibility" of success.[211]

c. Post-filing inquiry

The reasonableness requirement in new rule 11 is tested at the time of filing. Judicial debate exists, however, as to whether the duty of reasonable inquiry continues after initial filing. The Fifth Circuit in *Southern Leasing Partners, Ltd. v. McMullan*,[212] held that counsel had a continuing obligation under rule 11 to

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a claim has absolutely no chance of success under existing precedents, and where no reasonable argument can be advanced to extend, modify or reverse the law as it stands, rule 11 is violated.).

[204] 771 F.2d 194 (7th Cir. 1985).

[205] *Id.* at 206.

[206] *Id.* at 205.

[207] FED. R. CIV. P. 11.

[208] *Id.*

[209] *See* Eastway Const. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985). For a discussion of rule 11's potential for chilling vigorous advocacy see *infra* text accompanying notes 244-49.

[210] FED. R. CIV. P. 11.

[211] *See* Note, *The Dynamics of Rule 11*, 61 N.Y.U. L. REV. 300, 324 (1986) [hereinafter Note, *Rule 11 Dynamics*].

[212] 801 F.2d 783 (5th Cir. 1986). In *Southern Leasing*, the district court imposed sanctions under rule 11 for the filing of an action which was later dismissed on res judicata grounds. *Id.* at 787. The court held that reasonable inquiry, pre or post-filing, would have revealed the impropri-

review, reexamine, and reevaluate his position as the facts came to light after initial filing. This position is generally consistent with the rule's ultimate goal of deterring litigation over meritless positions. It tends, however, to impose onerous monitoring burdens on counsel.

In light of the reasonableness calculus which attempts to balance burdens and benefits, the Second Circuit's position in *Oliveri v. Thompson*[213] seems more sensible. The court in *Oliveri* held that "[r]ule 11 applies only to the initial signing of a 'pleading, motion, or other paper.' "[214] Concerned about overburdening attorneys, the court concluded that under rule 11 an attorney does not have a continuing obligation to monitor the validity of the position advocated. This is consistent with the Advisory Committee comments which focus inquiry on the attorney's conduct solely at the time of "submission."[215]

d. Scope of reasonable inquiry requirement

Disagreement also exists about the scope of rule 11's reasonable inquiry requirement. Must every allegation in a complaint (or every argument in a motion) fail the reasonable inquiry test before rule 11 is violated? Or does an "unreasonable" claim (or argument) in an otherwise well-grounded filing constitute a rule 11 violation as to the unreasonable part?

The Ninth Circuit recently held that the entire "pleading, motion, or other paper" must fail the reasonable inquiry test.[216] A pleader might therefore, with impunity, allege one plausible claim and join with it ten groundless claims. The opposing party's cost of defeating those ten claims goes unreimbursed and considerable court time is consumed. The pleader is encouraged to over-plead because of the additional initial settlement leverage. The Seventh Circuit has adopted what appears to be a better approach. Even though some of the assertions in a filed document satisfy the reasonable inquiry standard, those that do

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ety of the claim. *Id.* at 789. *See also* Woodfork v. Gavin, 105 F.R.D. 100 (N.D. Miss. 1985) (attorney obligated to reevaluate earlier certification of case under rule 11 if he subsequently learns of information of evidence which reasonably leads him to believe there is no factual or legal basis for his position); Smith v. United Transp. Union Local 81, 594 F. Supp. 96 (S.D. Cal. 1984) (rule 11 sanctions appropriate where attorneys raised affirmative defenses previously stricken by the court and obviously ignored relevant law subsequently brought to their attention by plaintiffs).

[213] 803 F.2d 1265 (2d Cir. 1986). In *Oliveri*, the Second Circuit reversed the district court's order to impose sanctions under rule 11 for plaintiff's failure to dismiss civil rights claims after discovery indicated that the claims were tenuous. *Id.* at 1281.

[214] *Id.* at 1274.

[215] *See supra* note 203.

[216] Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1540 (9th Cir. 1986). ("The Rule permits the imposition of sanctions only when the 'pleading, motion, or other paper' itself is frivolous, not when one of the arguments in support . . . is frivolous.").

not trigger rule 11 sanctions.[217] This approach better addresses the problem of undue litigant and court costs arising out of the shotgun method of litigating.

2. *Improper purpose test*

The second part of the rule 11 certification requirement concerns improper purposes. Sanctions are warranted if the pleading or motion is filed for an "improper purpose, such as to harass or to cause unnecessary delay, or needless increase in the cost of litigation."[218] This provision addresses the problem of "misusing judicial procedures for personal or economic harassment."[219]

Although an "improper purpose" test suggests an examination into subjective intent, several federal courts of appeal have steadfastly rejected this notion.[220] Instead, courts inquired into whether the signer's actions under the circumstances, as objectively measured, manifested a desire to harass or delay.[221] The focus is not on the actual consequences of the signer's act, and it is not enough that the filings "bother, annoy or vex the complaining party."[222]

Chevron U.S.A., Inc. v. Hand[223] is illustrative. The defendant's initial counsel negotiated a favorable settlement on defendant's behalf.[224] Attorneys for the parties filed a "stipulation and dismissal" that ended the suit and severed the supply/purchase business relationship of the parties.[225] Defendant, however, hired another attorney solely, it appears, to delay effectuation of the stipulation

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[217] Rodgers v. Lincoln Towing Serv., Inc., 771 F.2d 194 (7th Cir. 1985) (The failure of "several" but not all of plaintiff's claims to satisfy the reasonable inquiry standard constituted a rule 11 violation.). *See also* Mohammed v. Union Carbide, 606 F. Supp. 252 (E.D. Mich. 1985) (Rule 11 sanctions imposed for lack of reasonable prefiling inquiry in defamation claim, even though reasonable inquiry had been conducted on complex antitrust claim.); Florida Monument Builders v. All Faiths Mem. Gardens, 605 F. Supp. 1324 (S.D. Fla. 1984) (entire pleading need not be frivolous to trigger rule 11 sanctions).

[218] *See* FED. R. CIV. P. 11 advisory committee note.

[219] *Golden Eagle*, 801 F.2d at 1537.

[220] *See, e.g.*, Eastway Const. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985); Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986).

[221] According to Judge Schwarzer:

> In considering whether a paper was interposed for an improper purpose, the court need not delve into the attorney's subjective intent. The record in the case and all of the surrounding circumstances should afford an adequate basis for determining whether particular papers or proceedings caused delay that was unnecessary, whether they caused increase in the costs of litigation that was needless, or whether they lacked any apparent legitimate purpose.

Schwarzer, *supra* note 181, at 195.

[222] *Id.*

[223] 763 F.2d 1184 (10th Cir. 1985).

[224] *Id.* at 1186.

[225] *Id.*

and dismissal until defendant could "find another source of supply."[226] That new attorney filed a rule 60(b) motion challenging the stipulation.[227] The Tenth Circuit affirmed the district court's finding that the motion was filed for the purpose of delay and was therefore in violation of the second prong of rule 11.[228]

In *Zaldivar*,[229] the Ninth Circuit wrestled with the issue of whether a complaint well-grounded in fact and law may, nevertheless, violate rule 11 because it was filed for an "improper purpose."[230] The court found that since rule 11 provides that a filing must be "well grounded in fact and . . . warranted by existing law . . . *and* [must not be] interposed for any improper purpose," the two clauses operate independently and the violation of either constitutes a violation of the rule.[231] The court declined to decide in general principle when a properly grounded pleading or motion might still constitute impermissible harassment. Focusing on the specific facts of *Zaldivar* and implicitly on fair access concerns, the court articulated a principle narrowly limited to the filing of complaints, concluding that a single complaint which complies with the well-grounded-in-fact and warranted-by-law clauses cannot constitute impermissible harassment, regardless of the motivation for its filing.[232]

The court did, however, outline two scenarios where otherwise proper filings might be deemed sanctionable harassment. The court noted that the "filing of excessive motions . . . even if each is well grounded in fact and law, may under particular circumstances be 'harassment' under [r]ule 11."[233] The court also indicated that the "filing of [an] action in federal court, after the rejection in state court of its legal premise" might constitute harassment "under the second prong" of rule 11, provided that there "exist[s] an identity of parties involved in the successive claims, and a clear indication that the proposition urged in the second claim was resolved in the earlier one."[234]

3. *Mandatory sanctions*

Once a court finds a violation of rule 11, "the court, upon motion or upon its own initiative, *shall* impose upon the person who signed it, or represented

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[226] *Id.*

[227] *Id.*

[228] *Id.* at 1187.

[229] *See supra* text accompanying notes 188-193.

[230] *Zaldivar*, 780 F.2d at 832. ("In short, may an attorney be sanctioned for doing what the law allows, if the attorney's motive for doing so is improper?")

[231] *Id.*

[232] *Id.*

[233] *Id.* at 832 n.10.

[234] *Id.* at 834.

party, or both, an appropriate sanction, which may include an order to pay the other party . . . the amount of the reasonable expenses incurred because of the filing . . . including a reasonable attorney's fee."[235] New rule 11 thus explicitly mandates the imposition of sanctions once the rule's standards have been violated.[236]

Judges retain considerable discretion in fashioning appropriate sanctions.[237] A court is not limited in its selection. The most common sanction is an assessment of the opposing party's reasonable costs, including attorney's fees.[238] Sanctions are usually imposed upon the attorney, although parties also have been penalized.

There is one cautionary note. Rule 11 is not intended to shift to the loser the burden of the prevailing party's attorney's fees whenever a complaint is dismissed or a motion is denied. Sanctions flow only from transgressions of rule 11 standards. A motion for sanctions that fails the reasonable inquiry test is itself subject to rule 11 sanctions.[239]

4. *Standards of appellate review*

Appellate review has become an important element of judicial efforts to clarify rule 11 standards. Conceptually, the standard of appellate review of rule 11 decisions is divided into three degrees of deference. First, de novo review is appropriate if the dispute centers upon the legal conclusion that the uncontroverted facts constituted a violation of rule 11.[240] Second, if the facts relied upon by the court are disputed on appeal, review is appropriate under the rule 52(a) clearly erroneous standard.[241] Finally, the abuse of discretion standard is applicable to challenges to the appropriateness of the type and extent of the

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[235] FED. R. CIV. P. 11 (emphasis added).

[236] The intent of mandatory sanctions is to reduce judicial reluctance to impose sanctions on violators. *See* Fed. R. Civ. P. 11 advisory committee note; Comment, *Prescriptions*, *supra* note 41, at 892.

[237] The Advisory Committee notes that under the new rule, "[t]he court . . . retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted." FED. R. CIV. P. 11 advisory committee notes.

In determining the appropriate sanction, courts should consider: (1) the gravity and impact of the violation; (2) the need for general deterrence; and (3) the need for punishment. *See* Schwarzer, *supra* note 221, at 200-201.

[238] *See* Kassin, *supra* note 164, at xi.

[239] *See* Anderson v. Pepsi Cola Metro. Bottling Co., No. 84-CV-8144-FL (E.D. Mich., Feb. 1, 1985); Miller v. Affiliated Fin. Corp., 600 F. Supp. 987, 991 (N.D. Ill. 1984).

[240] *Golden Eagle*, 801 F.2d at 1538.

[241] *Zaldivar*, 780 F.2d at 828.

sanctions.[242]

5. Concerns over the adoption of new rule 11

In expanding judicial power and establishing more stringent standards for attorney performance, Congress and the Supreme Court intended to minimize unreasonable filings thereby decreasing "delay and expense in civil proceedings."[243] A potential side effect of rule 11 is that it might deter development of creative or new legal theories.[244] Commentators worry that access to the judicial process might be severely curtailed, especially for the disadvantaged and politically powerless groups who have traditionally based their claims upon novel legal theories. Indeed, a rule that inhibits fair participation or prevents the effectuation of substantive rights, no matter how efficient in operation, would be unacceptable.

Judges applying new rule 11 must be sensitive to these potential pitfalls. The drafters of new rule 11 were, and they therefore specifically built into the rule flexibility to allow for the filing of creative or novel legal theories.[245] Under the rule, sanctions for "legally unreasonable" filings are appropriate only when the legal position asserted has no chance of success under existing precedents *and* when no reasonable argument can be made to extend, modify, or reverse existing law.[246] Recognizing the importance of access for people with potentially meritorious although unconventional claims or novel defenses, the comments to

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[242] *Id. See also* Westmoreland v. CBS, Inc. 770 F.2d 1168 (D.C. Cir. 1985). This conceptual construct is of course subject to judicial alteration in practice. The degree of judicial deference actually accorded and the reasons therefor are complex matters beyond the scope of this article.

[243] *See* Carter, *The History and Purpose of Rule 11*, 54 FORDHAM L. REV. 4 (1986). *See generally* Schwarzer, *supra* note 41.

[244] *See, e.g.*, Weiss, *A Practitioner's Commentary on the Actual Use of Amended Rule 11*, 54 FORDHAM L. REV. 23 (1985). *See also* Resnik, *supra* note 61.

[245] *See* Note, *Rule 11 Dynamics*, *supra* note 211, at 324. ("Rule 11 was not intended to penalize advocates of unpopular causes. Indeed, the 'argument to change the law' clause should be interpreted as an incentive to litigate colorable, albeit novel claims.").

[246] Eastway Const. Corp. v. City of New York, 762 F.2d 243 (1985). In *Eastway*, the Second Circuit Court noted that:

> In framing this standard, we do not intend to stifle the enthusiasm or chill the creativity that is the very lifeblood of the law. Vital changes have been wrought by those members of the bar who have dared to challenge the received wisdom, and a rule that penalized such innovation and industry would run counter to our notions of the common law itself. . . . [W]here it is patently clear that a claim has absolutely no chance of success under existing precedents, and where no reasonable argument can be advanced to extend, modify, or reverse the law as it stands, Rule 11 has been violated.

Id. at 254. *See also* Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986); Fraizer v. Cast, 771 F.2d 259 (7th Cir. 1985); Chevron, USA, Inc. v. Hand, 763 F.2d 1184 (10th Cir. 1985).

the amended rule specifically note that rule 11 is not meant to "chill an attorney's enthusiasm or creativity."[247]

The judicially-developed "objectively defensible" test for legal reasonableness set forth in *Zaldivar*,[248] and the "no reasonable argument" standard for extensions or modifications of existing law should therefore be applied within the context of the Advisory Committee's mandate to avoid chilling attorney creativity. Together, they provide solid judicial guidance for protecting litigants with novel positions plausibly connected with social and legal developments.[249]

Another concern is the possibly disproportionate impact of the new rule upon plaintiffs. In every case, rule 11's initial impact will be upon the plaintiff who is deciding whether or not to sue. The overall impact of the rule, however, along with its discovery counterparts 26(g) and 26(b)(1)(iii), should be more or less evenly felt by plaintiffs and defendants. Defendants will be constrained in filing counterclaims, many of which are filed to gain leverage, and in asserting groundless defenses. Defendants will also have to think twice about filing motions to dismiss or for summary judgment that are intended merely to pressure plaintiffs or to flush out plaintiffs' legal theories.[250]

Particularly significant from a plaintiff's perspective is the impact of rule 26(g), the discovery rule counterpart of rule 11. As discussed below, rule 26(g) proscribes "unreasonable" discovery requests, responses, and objections. In addition, rule 26(b)(1)(iii) authorizes the judge at the outset to limit discovery reasonably according to the needs of the case and the resources of the parties. The managerial judge, collectively employing these rules, can provide a significant measure of protection for plaintiffs from litigation excesses, especially in multiple defendant cases.

The absence of definitive studies or a solid body of federal court experience on the impact of rule 11 counsels caution in application and continuing scrutiny. The design of rule 11's drafters and judicial sensitivity to date, as exemplified in *Zaldivar*, however, indicate that rule 11's ultimate impact will not be the chilling of novel legal theories or the unfair burdening of plaintiffs or defendants. Its ultimate impact may well be the elimination of careless or thoughtless filings and filings by persons using the courts simply to vent their nonlegal grievances. Restricting access for the former is appropriate for obvious reasons. Restricting access for the latter is appropriate because lengthy groundless actions, however emotionally gratifying, are expensive in terms of the judge's and the litigants' time and ultimately preclude others from timely access

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[247] FED. R. CIV. P. 11 advisory committee note (1983).

[248] *See supra* text accompanying notes 188-193.

[249] For a further discussion of the impact of the new rules on fair access to the judicial process, see *supra* text accompanying notes 119-25 and *infra* text accompanying notes 281-82.

[250] *See, e.g.*, Wells v. Oppenheimer, 101 F.R.D. 358 (S.D.N.Y. 1984).

to the judicial process. The United States Supreme Court recently commented:

> [W]hile freedom and access to the court is indeed a cherished value, every misuse of any court's time impinges on the right of other litigants with valid or at least arguable claims to gain access to the judicial process. The time this Court expends examining and processing frivolous applications is very substantial, and that time could be devoted to considering claims which merit consideration.[251]

A final concern is that new rule 11 might lead to protracted and expensive satellite litigation.[252] Considerable litigation has arisen in federal courts.[253] The Advisory Committee anticipated litigation clarifying rule 11 standardds initially. Such questions as the nexus between rule 11 and the ethical rules need addressing.[254] It also predicted that as a body of law developed, litigation would subside. Clear guidance and strong initial enforcement should encourage confirmance and reduce the need for sanctions in future cases. The committee believed that the increased management efficiency of the district courts resulting from rule 11 would outweigh the initial burdens of ancillary litigation.[255] This should be especially true for the Hawaii courts if new rule 11 is adopted. By the time new rule 11 is adopted in Hawaii, a substantial body of federal cases will exist to guide Hawaii judges.[256]

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[251] Talamini v. Allstate Ins. Co., 470 U.S. 1067 (1985).

[252] *See, e.g.*, Unioil Inc. v. E.F. Hutton, 802 F.2d 1080 (9th Cir. 1986); Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986). *See generally* Weiss, *supra* note 244.

[253] *See supra* note 163.

[254] The Ninth Circuit recently clarified the nexus between rule 11 and the ethical rules. *See* Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986). In *Golden Eagle*, the court held that an attorney's violation of the ethical rules for failing to cite contrary authority does not constitute a violation of rule 11. Nor is rule 11 violated when an attorney "misleads" the court by implying that his legal position is based on existing law when it is based instead on a good faith argument for a change in the law. Rule 11 does not require counsel to specify whether his argument is based on existing law or an argument for change. *Id.* at 1540. Focusing on the text of Rule 11 and problems of judicial administration, the court articulated a general principle separating rule 11 from the ethical rules: "Rule 11 . . . does not impose upon the . . . courts the burden of evaluating under ethical standards the accuracy of all lawyers' arguments." *Id.* at 1542.

[255] *See* Wiggin Speech, *supra* note 248, at 161.

[256] The ABA Section of Litigation has offered "Practical Suggestions to Avoid Rule 11 Sanctions." Those general suggestions, omitting citations, bear repeating:

> (1) Recognize that your subjective good faith in filing the pleading is not enough to avoid sanctions.
>
> (2) Confirm that your pleading is not designed to harass the adversary or to delay or extend the cost of the proceeding, and remember that the objective circumstances of the litigation will probably determine whether there has been an improper purpose.
>
> (3) Conduct a thorough personal interview with your client and key witnesses about the

C. *Limiting discovery without stifling reasonable case development—new rules 26(b)(1), 26(f) & 26(g)*

Increasing attention has focused on the collision between the liberal truth-seeking spirit of the discovery rules and the unreasonable cost of "doing discovery" over the last ten years.[257] Although much of the concern has been directed toward larger case litigation, the discovery process in moderate-sized cases has also been criticized. New federal rules 26(b)(1), 26(f) and 26(g) significantly expand the powers of the managerial judge to control discovery from the outset of the litigation. These new rules, which are interwoven into new rule 16, attempt to direct the managerial judge to seek an accommodation of competing concerns by allowing for discovery of relevant information without permitting disproportionate cost.

The 1980 and 1983 amendments to rule 26 are designed to achieve this accommodation in four ways. The amendments (1) limit the scope of discovery on the basis of practical concerns never before recognized in the traditional adversarial system; (2) establish the discovery conference as a tool of the managerial judge; (3) require attorney certification of the "reasonableness" of discovery requests, responses and objections; and (4) specify sanctions for noncompliance.

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pleading.

(4) Review pertinent documents that may support pleading.

(5) If the facts supporting the pleading are available without discovery, greater factual certainty is required.

(6) If the facts are available *only* through discovery, evaluate proof available from your client and make a reasonable assessment of the proof likely from the adversary.

(7) Make your own personal assessment of legal issues such as jurisdiction and venue and of defenses which might bar the claim, such as statute of limitations.

(8) If you are not experienced in the given field (for example, anti-trust law or RICO claims), make an informed decision as to the validity of the claim or defense, or at the very least get an independent opinion from an experienced practitioner. You must bring some experience to bear on the issues before invoking the federal court system. Be aware, however, that reliance upon other counsel on fundamental questions of the law (as opposed to the facts) has resulted in sanctions.

(9) In writing your briefs, confirm that your legal theories are supported by existing law, or a good faith argument for the extension, modification or reversal of existing law. It is entirely appropriate to urge that existing law be changed. In fact, vigorous representation of your client requires such an approach. However, if your argument seeks a change of existing law, make it clear to the court in your brief what your position is and do not delude the court as to the actual state of the law.

(10) If you must file a pleading hurriedly to avoid a time bar, do so and *promptly thereafter* carry out the foregoing suggestions.

(11) If you are local counsel, do not sign the pleading or motion unless you have determined that Rule 11 has been complied with by lead counsel.

SANCTIONS, *supra* note 165, at 9-11 (emphasis added).

[257] *See infra* note 305.

The original version of rule 26 of the Federal Rules of Civil Procedure (and its current Hawaii counterpart) provided that unless the court ordered otherwise, "the frequency of use [of the methods of discovery] . . . is not limited."[258] This language embodied a policy favoring unlimited discovery in search of relevant information. In the seminal case on the scope of discovery, *Hickman v. Taylor*,[259] the Supreme Court affirmed this policy of broad discovery. The original rules contemplated attorney implementation of this policy with minimal judicial involvement. The Advisory Committee noted, as late as 1970, that the discovery rules were "designed to encourage extra judicial discovery with a minimum of judicial intervention."[260]

This self-regulating system, however, proved unworkable. Attorneys learned and were ultimately compelled to manipulate the discovery process to their client's advantage, resulting in widespread uneconomical overuse of the rules.[261]

> There is a very real concern in the legal community that the discovery process is now being overused. Wild fishing expeditions, since any material which might lead to the discovery of admissible evidence is discoverable, seem to be the norm. Unnecessary intrusions into the privacy of the individual, high cost to litigants, and the correspondingly unfair use of the discovery process as a lever toward settlement have come to be part of some lawyers' trial strategy.[262]

The original federal rules and the current Hawaii rules assumed collective attorney loyalty to the system and inherent market constraints as means for avoiding overuse of the discovery rules. Supervision and enforcement mecha-

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[258] FED. R. CIV. P. 26(a).

[259] 329 U.S. 495, 501 (1947). ("Civil trials no longer need be carried on in the dark . . . . Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.")

[260] FED. R. CIV. P. 26(a) advisory committee note.

[261] The focus on "overuse" of discovery machinery should be distinguished from violations of specific discovery rules.

> While there are instances in which lawyers make improper discovery requests under the rules or resist information that is clearly discoverable, it is suggested that this does not represent the critical problem with the discovery process. The most significant discovery problem is that the tools are so vast and the scope so broad that even obtaining the information to which a party is legitimately entitled under the rules has become a wasteful, time-consuming, dilatory, and expensive process.

Existing rule 37 provides sanctions for violations of specific discovery rules but does not address the problem of "overuse." rule 26(c) authorizes protective orders "for good cause shown" to prevent "undue burden or expense" but only becomes operative at the point of crisis—when a party is imminently threatened. It does not facilitate planning reasonably to limit discovery. Thus existing rules do not address the problem of potential "overuse" as viewed from the commencement of the case.

[262] *See* Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System In the Twenty-First Century*, 76 F.R.D. 277, 288 (1978).

nisms were woefully weak.[263] These assumptions proved unrealistic, especially for larger cases.[264] The new rules are more pragmatic. The reality is that an attorney's allegiance lies first and foremost with her clients. The canon of ethics requires it.[265] Business practicalities encourage it. Zealousness in representation readily translates into strategic use of opportunities allowed by the rules.[266] Given this firmly entrenched mind-set, with its underpinnings in the ethical code, and litigants' demands for hard-nosed litigators, the new rules acknowledge that it is unrealistic to expect all attorneys to voluntarily and consistently restrain themselves against misusing the opportunities provided by the system.[267]

New rule 26 demands attorneys' concomitant allegiance to the welfare of the system and everyone affected by it. It gives the managerial judge greater power to shape and control discovery. Indeed, the "is not limited" policy of former rule 26(a) has been replaced with a radically different policy. The new provisions are intended "to encourage district judges to identify instances of needless

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[263] *See* Cohn, *Federal Discovery: A Survey of Local Rules and Practices In View of Proposed Changes to the Federal Rules*, 63 MINN. L. REV. 253 (1979).

[264] Many cases are litigated without discovery disputes. However, even attorneys who prefer to minimize discovery struggles tend to perceive their allegiance to their clients to include strategic overuse of the discovery rules. Professor Brazil's study found:

> Our data portrays a system permeated with subtle and overt forms of resistance, a system whose tools often are used inartfully or as a means to exert pressure on or secure some tactical advantage over an opponent. This thoroughly adversarial process is inefficient and expensive. It also fails to achieve its primary purpose: to assure "mutual knowledge of all the relevant facts gathered by both parties [that] is essential to proper litigation."

Brazil, *supra* note 33 at 881.

[265] *See, e.g.*, HAW. C.P.R. Canon 7.

[266] Hawaii experience indicates that although attorneys are generally cooperative, client allegiance and concern about malpractice compels many attorneys to overuse discovery mechanisms. Civil administrative judge for the First Circuit Court, Philip Chun, observed:

> I think, perhaps, sometimes discovery is being abused. The parties want too much. They're "out fishing," but you have to look at it on a case-to-case basis. I don't think you can make the general statement that discovery is being abused, because definitely, with all the litigation we have now, if an attorney does not do his discovery, he is subject to malpractice.
>
> So you're stuck. You have to attempt to do the discovery and that's why, lots of times, it ends up before us as to whether or not that is discoverable.

Interview with Judge Philip Chun and Judge Edwin Honda, 19 HAW. B.J. 117, 130 (1985).

[267] As one litigator commented:

> Requiring that a lawyer either exercise restraints in carrying out discovery on his client's behalf or be sanctioned, interferes with the attorney's obligation of undivided allegiance to his client. The full parties' action of a lawyer in his role as partisan advocate touches "the integrity of the adjudicative process itself."

Fishbein, *New Federal Rule 26: A Litigator's Perpective*, 57 ST. JOHN'S L. REV. 739, 746 (1983).

discovery and to limit the use of various discovery devices accordingly."[268]

1. *Rule 26(b)(1)*

The conceptual centerpiece is amended rule 26(b)(1). The rule rejects three traditional notions of procedural fairness: first, that "more is better";[269] second, that "procedural neutrality" in the positivist sense means that rules must treat all parties as if they are on equal footing (even if they are not);[270] and third, that all issues are created equal in importance.[271] In rejecting these notions, rule 26(b)(1) acknowledges that outcomes are altered and the quality of justice is often impacted by the burden and expense of the parties' "permissible" use of discovery devices.[272]

The amended rule 26(b)(1) is therefore designed to "prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent."[273] It encourages judges to limit discovery before disputes arise. The managerial judge is authorized to limit discovery under 26(b)(1) upon motion by a party or on his own accord.[274] This provision therefore complements rule 16's provisions concerning scheduling and pretrial conferences.[275] During those conferences the judge can exercise his 26(b)(1) authority to set discovery timetables and limit the scope of permissible discovery.

The first two subsections of rule 26(b)(1) authorize judges to limit discovery for commonly accepted reasons—if the discovery contemplated would be "cumulative or duplicative"[276] or could be obtained in a less burdensome manner.[277] In contrast, the third subsection, 26(b)(1)(iii), is striking in its originality. It articulates significant values often implicitly acknowledged by judges in

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[268] FED. R. CIV. P. 26 advisory committee note.

[269] *See supra* note 259 and accompanying text.

[270] *See supra* notes 86-94 and accompanying text.

[271] *Id.*

[272] *See supra* notes 98-102 and accompanying text.

[273] FED. R. CIV. P. 26(b)(1) advisory committee note.

[274] FED. R. CIV. P. 26(b)(1).

[275] *See* FED. R. CIV. P. 16(a)(3) (discouraging wasteful pretrial activities); FED R. CIV. P. 16(b)(3) (time limits for discovery); FED. R. CIV. P. 16(c)(11) (other matters as may aid in disposition).

[276] FED. R. CIV. P. 26(b)(1)(i).

[277] FED. R. CIV. P. 26(b)(1)(ii). The Advisory Committee noted:

> The first element of this standard, Rule 26(b)(1)(i), is designed to minimize redundancy in discovery and encourage attorneys to be sensitive to the comparative costs of different methods of securing information. Subdivision (b)(1)(ii) also seeks to reduce repetitiveness and to oblige lawyers to think through their discovery activities in advance so that full utilization is made of each deposition, document request, or set of interrogatories.

FED. R. CIV. P. 26 advisory committee note.

their rulings but never formally recognized in the adversarial process. Rule 26(b)(1)(iii) addresses the problem of over-discovery by establishing the principle of "proportionality."[278] The quest for relevant information is to be tempered by considerations of burden and expense. "Undue burden and expense" are to be measured by taking account of "the needs of the case, the amount in controversy," the "importance of the issues at stake," and the "limitations on the parties' resources."[279]

This last factor is particularly significant because the federal rules have finally acknowledged that the extent of a party's litigation resources can materially affect the outcome of a case. All parties are not created equal, and financial inequality and liberal discovery opportunities often combine to distort fair results. Thus, in limiting discovery under rule 26(b)(1)(iii), a judge is to consider the discovery needs of the case in light of the amount in controversy and "the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests."[280]

The cost reduction goal of 26(b)(1)(iii)'s proportionality principle is intended to benefit directly litigants and the court and ultimately the general public. Applied conscientiously over time, rule 26(b)(1)(iii) should also have the salutary effect of expanding access opportunities to middle income litigants as well as the poor and politically powerless who may have only the courts for recourse against injustice.[281]

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[278] In drafting the amended discovery rules the Judicial Conference determined that over discovery "results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues at stake." Committee on Rules of Practice & Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Fed. R. Civ. P. (June 1981)*, 90 F.R.D. 451, 481 (1981) [hereinafter Committee on Rules.].

[279] FED. R. CIV. P. 26(b)(1)(iii). The Advisory Committee notes state:

> The elements of Rule 26(b)(1)(iii) address the problem of discovery that is disproportionate to the individual lawsuit as measured by such matters as its nature and complexity, the importance of issues at stake in a case seeking damages, the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests, and the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved.

FED. R. CIV. P. 26(b) advisory committee note.

[280] *Id.*

[281] Poor people and politically powerless minority groups are usually represented, if at all, by public interest law organizations. Those organizations generally have severely limited litigation budgets. *See* United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938) (calling for a "more searching judicial inquiry" in his much-discussed footnote, Chief Justice Stone cited the precarious political position of "discrete and insular minorities" in a democratic society as distinguished from those with access to the political process"). *See also* Massachusetts Bd. of Retire-

Rule 26(b)(1) in general, and subsection (iii) in particular, also serve as a nice counterbalance to rule 11. Although, as discussed earlier,[282] rule 11's "stop, look and inquire" mandate will affect both plaintiffs and defendants, plaintiff's counsel may sometimes feel the greater initial impact since the threshold question in every suit is whether or not to file the complaint. Rule 11 is specifically designed to restrict access by deterring frivolous claims. Rule 26(b)(1)(iii), on the other hand, should expand access opportunities for cost-conscious plaintiffs with nonfrivolous claims, especially in multiple defendant settings. Applied sensitively, rules 11 and 26(b)(1)(iii) have the potential for restricting unwarranted filings while promoting fair access, benefiting both plaintiffs and defendants.

Criticism of new rule 26(b)(1)(iii) has focused not on conceptual propriety, but on problems of application. The "proportionality standard" has been described as "nebulous"[283] and an invitation to "judicial arbitrariness."[284] Critics note that a judge must determine "proportionality" without unduly restricting discovery since liberal discovery is the heart of a notice pleading system. This is thought to be a particularly onerous judgment call because "[t]he rule itself provides no guidance as to [how the various factors are to be weighed in determining] whether discovery is unduly burdensome or expensive."[285]

While lack of uniform application is a potential problem warranting continuing scrutiny, it does not seem particularly troublesome. The goals of rule 26(b)(1)(iii) are clearly stated, and its factors are clearly identified. Judges with litigation experience should at least have a basic sense for how those factors are to be weighed.[286] Consensus standards will evolve by word of mouth and judi-

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ment v. Murgia, 427 U.S. 307, 313 (1976); Graham v. Richardson, 403 U.S. 365, 372 (1971); ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 151 (1980).

[282] *See supra* text accompanying note 250.

[283] Cavanagh, *supra* note 41, at 799.

[284] Sherman & Kinnard, *Federal Court Discovery in the 80's—Making the Rules Work*, 95 F.R.D. 245, 280 (1982).

[285] Cavanagh, *supra* note 41, at 799.

[286] An additional concern is the traditional reluctance of judges to get involved in discovery matters. Will a change in the discovery rules necessarily bring about the desired degree of judicial supervision? Many possible explanations are given for traditional judicial reluctance, including the desire to maintain a neutral appearance, insufficient familiarity with the substance of complex areas of law and simply a lack of respect for and interest in discovery matters. *Id.*

Reluctance to intervene is understandable when judges are already overburdened with heavy case loads. However, studies indicate that this fear is unwarranted. Increased efficiency and reduced disposition time are the result of increased judicial control from the outset. *See supra* notes 58-80 and accompanying text.

Unless fundamental change is effected in both the philosophy underlying the rules and the attitudes of bench and bar towards them, "the Discovery Rules will continue to deny justice to those least able to bear the burdens of delay, escalating legal fees, and rising court costs." Order on 1980 Amendments to the Federal Rules of Civil Procedure, 446 U.S. 997, 1000-01 (1980)

cial opinions. On balance, the seemingly obtainable benefits of new rule 26(b)(1), especially in conjunction with new rule 16, appear to outweigh potential vagueness problems.

2. *Rule 26(f)*

An important 1980 addition to the rules, rule 26(f),[287] authorizes optional discovery conferences. The rule's purpose is to tentatively identify the "issues for discovery purposes, establish . . . a plan and schedule of discovery, set . . . limitations on discovery, if any . . . ."[288] Rule 26(f) thus supplements rule 16's provisions concerning pretrial conferences and the elimination of wasteful pretrial activities and 26(b)(1)'s substantive standards for limiting discovery. In Judge Schwarzer's experience, setting discovery guidelines tailored to the needs of the case will "reduce subsequent discovery disputes and piecemeal motions to compel or for protective orders, and tend to nip in the bud any notion by a party to wage an attrition campaign using discovery as a weapon."[289]

The limited availability of the discovery conference, however, tends to under-

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(Powell, J., dissenting).

[287] FED. R. CIV. P. 26(f) provides:

> At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorneys for any party if the motion includes:
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> (1) A statement of the issues as they then appear;
>
> (2) A proposed plan and schedule of discovery;
>
> (3) Any limitations proposed to be placed on discovery;
>
> (4) Any other proposed orders with respect to discovery; and
>
> (5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.
>
> Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.
>
> Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

[288] FED. R. CIV. P. 26(f).

[289] Schwarzer, *supra* note 181, at 407.

mine its effectiveness. A discovery conference is authorized under the rule only upon motion of one of the parties who establishes both parties' inability to resolve discovery disputes privately. The practical concern of the drafters of 26(f) about unnecessary discovery conferences is warranted. Mandatory discovery conferences would be wasteful in certain types of cases. The "solely at the option of the parties" provision of rule 26(f), however, seems inconsistent with the principle of managerial discretion embodied in rules 16 and 26(b)(1).[290] Rules 16 and 26(b)(1), in concert, implicitly give judges the discretion to do on their own initiative what rule 26(f) explicitly authorizes judges to do only upon request of the parties. It makes sense to revise new rule 26(f) to authorize judges to call discovery conferences on their own initiative as well as at the request of parties. This would preserve the optional nature of the discovery conference while giving the judge flexibility in managing cases.[291]

3. *Rule 26(g)*

New rule 26(g) is the discovery counterpart to rule 11. A substantial portion of the rule 11 analysis discussed above is applicable to subsections (1) and (2) of rule 26(g). The attorney signing a discovery request, response or objection certifies that it has been formed after "reasonable inquiry" and that it is (1) consistent with the discovery rules and warranted by existing law or a good faith argument for change in the law, (2) not interposed for any improper purpose, and (3) not "unreasonable or unduly burdensome or expensive given the needs of the case, the discovery already had in the case, the amount in controversy and the importance of the issues . . . ."[292]

The scope of 26(g) is limited. An attorney's signature on a discovery response does not certify the truthfulness of the response.[293] The attorney only certifies that she has made a reasonable effort to assure that her client has provided all

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[290] *See* FED. R. CIV. P. 16; FED. R. CIV. P. 26(b)(1).

[291] Justice Powell dissented to the 1980 amendments to rule 26(f) and other rules because the changes did not go far enough towards controlling the discovery abuses:

> I reiterate that I do not dissent because the modest amendments recommended by the Judicial Conference are undesirable. I simply believe that Congress' acceptance of these tinkering changes will delay for years the adoption of genuinely effective reforms. The process of change, as experience teaches, is tortuous and contentious. Favorable congressional action on these amendments will create complacency and encourage inertia. Meanwhile, the discovery Rules will continue to deny justice to those least able to bear the burdens of delay, escalating legal fees, and rising court costs.

Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521, 523 (1980) (Powell, J., dissenting).

[292] FED. R. CIV. P. 26(g).

[293] FED. R. CIV. P. 26 advisory committee note.

available information responsive to the discovery request.[294]

Prior to the adoption of rule 26(g), discovery sanctions were infrequently imposed both because of "confusion as to the range of available, and appropriate sanctions and because of a perceived reluctance by many courts to impose any sanctions."[295] New rule 26(g) explicitly requires that "sanctions be imposed on attorneys who fail to meet the [certification] standards . . . ."[296] Appropriate sanctions for violations include "an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee."[297]

Unlike the provisions for monetary sanctions in rule 37, 26(g) "deprives the court the power to decide not to sanction a lawyer's failure to satisfy the substantive obligations the rule imposes."[298] Once the court finds a violation of rule 26(g) standards the judge must impose sanctions. Thus, rule 26(g) establishes standards of behavior and requires the imposition of sanctions for transgressions of those standards.

Rules 37(a)(4) and 37(d) do not mandate the imposition of monetary sanctions for failure to perform acts specified in rule 37. The judge must still determine whether nonperformance (*e.g.*, improper answer interrogatories) was "substantially justified."[299] Rules 37(a)(4) and 37(d) thus delineate specific acts parties are to perform and vest discretion with the judge in deciding whether nonperformance warrants sanctions.[300] Practical experience suggests judicial reti-

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[294] *See* Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980).

[295] Sofaer, *Sanctioning Attorneys For Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment*, 57 ST. JOHN'S L. REV. 680, 690-91 (1983).

[296] FED. R. CIV. P. 26(g) advisory committee note.

[297] FED. R. CIV. P. 26(g). The Advisory Committee noted that the sanctions, which are specifically designed to curb discovery abuse, would be more effective if they were diligently applied and "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." FED. R. CIV. P. 26 advisory committee note (quoting National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 643 (1976)). For a discussion of the advantages of monetary sanctions to curb discovery abuse see Brazil, *supra* note 1, at 921-37; Sofaer, *supra* note 295, at 696-731.

[298] Brazil, *supra* note 1, at 939.

[299] FED. R. CIV. P. 37(a)(4), (d). Rule 37(b) does mandate the imposition of sanctions for violations of a court's prior discovery order, including sanctions of contempt, defaults and admissions of fact. Rule 37(b) differs from rule 26(g) and rules 37(a)(4) and 37(d) in that the former rule only applies to violations of existing discovery orders entered ostensibly to resolve pending discovery disputes, while the latter rules apply in the absence of prior court orders.

[300] *See, e.g.*, Baker v. Bledsoe, 85 F.R.D. 545, 548-49 (W.D. Okla. 1979) (rule 37 accords the trial judge "wide discretion in applying sanctions to protect the pretrial discovery process"). Commentators have noted that this discretionary approach "show[s] no evidence of being able to control the abuses attendant upon excessive and burdensome discovery." Epstein, Corcoran, Kreiger & Carr, *An Update on Rule 37 Sanctions After* National Hockey League v. Metropolitan Hockey Clubs, Inc., 84 F.R.D. 145, 171 (1980).

cence in imposing rule 37 sanctions except for egregious misconduct.[301]

4. Summary of new rule 26

In contrast to Hawaii's rule 26, which essentially leaves the discovery process to attorney control and provides for judicial control only in limited circumstances such as the issuance of protective orders, new federal rule 26 mandates "greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis."[302] Under the new rule, "[j]udges are encouraged [from the outset] to control discovery more closely, and the parties are encouraged to be less adversarial in their conduct.[303] Moreover, new rules 16, 26(b)(1), 26(f) (as modified), and 26(g) empower the judge to regulate discovery as the potential need for regulation is perceived, rather than to wait for party initiation.[304]

The amendments to federal rule 26 thus comprise a package designed to reduce delay and cost arising out of "overuse" of discovery mechanisms. They attempt to do so flexibly by establishing early judicial control as the standard practice while providing for minimal or no judicial intervention in where warranted. They attempt to reduce delay and cost not only to benefit litigants and the court but also to expand access opportunities to those excluded from the judicial process due to prohibitive cost. In so doing the new discovery rules are designed to address the principal criticisms about the fairness of the pretrial process.[305]

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[301] *See, e.g.*, Wong v. City & County of Honolulu, 66 Haw. 389, 665 P.2d 157 (1983). A 1979-1985 survey by the ABA Section of Litigation revealed "relatively few cases where the federal district courts have imposed sanctions for anything but the most egregious and abusive behavior in the conduct of discovery. Dispositive sanctions are imposed, but only after provocations sufficient to try the patience of most saints. Monetary sanctions are imposed but generally only in nominal amounts . . . ." SANCTIONS, *supra* note 166, at 13. *See generally* National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) (dismissal of an action for failure to obey a discovery order).

[302] FED. R. CIV. P. 26 (b) advisory committee note. *See* CONNOLLY, HOLLEMAN & KUHLMAN, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 77 (Federal Judicial Center 1978).

[303] Sofaer, *supra* note 295, at 695.

[304] New rule 26 also contemplates alternative dispute resolution mechanisms in combination with discovery provisions. *See* Peckham, *A Judicial Response*, *supra* note 7. Under this system, two stages of discovery would be adopted: (1) minimal discovery to enable the parties to make a realistic assessment of the strengths and weaknesses of the case; and (2) additional discovery needed for trial if alternative dispute resolution mechanisms fail. *Id.* at 255.

[305] The "unfairness" of the combination of undue delay and cost and the denial of fair access, all arising out of overuse of discovery procedures, is aptly described by Justice Powell:

> The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants. Persons or businesses of comparatively limited means settle unjust claims and

V. CONCLUSIONS AND RECOMMENDATIONS

The time is right for the managerial judge in Hawaii's circuit courts. The number of annual civil case filings in the circuit courts has risen dramatically over the last ten years. Increasingly complex cases are being litigated. The cost of litigating has soared. The Hawaii Judiciary's commitment to reducing litigation delay and pretrial cost is undisputed. The challenge is how best to act upon that commitment as the civil litigation process in Hawaii continues to evolve.

The recently revised Circuit Court Rules for the First Circuit initiated changes aimed at reducing the overall time of litigation. These rules have been generally effective in establishing a single set of deadlines for all cases, but the rules have not gone far enough. Judges still do not become involved in guiding the pretrial development of a case. As a result, uncontrolled and excessive pretrial activity still occurs. The court-annexed mandatory arbitration program promises to reshape the contours of the court's caseload. Ultimately, the program will divert substantial numbers of simpler and smaller cases away from the litigation system. The remaining cases will be predominantly larger and more complex.

Civil judges will be called upon to exercise greater managerial control over cases to expedite dispositions, lessen unnecessary pretrial activity and accompanying costs and assure fair access to and treatment by the system.

Amending The Hawaii Rules of Civil Procedure to incorporate new federal rules 11, 16, 26(b)(1), 26(f) and 26(g), with minor adjustments, will give civil judges needed managerial powers. Rule 11 is designed to eliminate the waste attendant to frivolous filings, focusing on reasonableness rather than good faith. It modestly increases attorney's initial investigative duties by assuring that filings are reasonably grounded in fact and law. It also assures that a document is not filed for an improper purposes such as delay or harassment.

Rule 16 authorizes pretrial conferences and gets the civil judge involved in shaping the pretrial development of a case. It permits the judge to set timetables for pleadings, for joinder of parties and for discovery. In conjunction with rules 26(b)(1) and 26(f), rule 16 authorizes the court to participate from the outset in shaping discovery according to the informational needs of the case, the amount in dispute, the importance of the issues and the resources of the parties. In adopting new rule 16, it has been suggested that the 120 day mandatory scheduling order be excised from the rule. Administrative problems in the implementation and ambiguous returns on the efficacy of the 120 day deadline

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relinquish just claims simply because they cannot afford to litigate. Litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system.

Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521, 523 (1980) (Powell, J., dissenting).

counsel caution at this time.

Rule 26(f) authorizes the court to call discovery conferences to define and limit the course of discovery before abuses of the system occur. Suggestions have been made to modify the rule to allow the court, as well as the litigants, to trigger discovery conferences. This would make the rule consistent with the broad managerial powers conferred upon judges by the other new rules.

Rule 26(g) completes the package of managerial rules. It is the discovery counterpart to rule 11 and authorizes the court to sanction unreasonable discovery requests, responses or objections, or those filed for an improper purpose.

State and federal court experiences to date indicate that a carefule application of the rules can yield positive results without unduly burdening attorneys, diminishing impartiality or impairing fair access to the system. The ultimate beneficiaries are litigants and the public as a greater sense of proportionality and fairness is restored to a much maligned system of justice.