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Judicial Discretion and the 1983 Amendments to the Federal Civil Rules

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What if a federal district judge relied on Federal Rule of Civil Procedure 16 to require that the civil rights plaintiff whom you represent participate in a summary jury trial which would jeopardize the plaintiff's case by revealing most of it to the defendant? Suppose that a trial court invoked the same Rule to instruct an insurer that it must send to a settlement conference an officer having authority to settle within a range which the judge specified.

Imagine that, to win a lawsuit alleging deprivations of constitutional rights and to comply with Rule 11, you thoroughly researched the law, developing creative legal theories which supported several counts of a complaint. Suppose that a district court or a magistrate then strongly suggested during a pretrial conference that you drop those counts, because the judicial official believed that the counts were frivolous.

What if a judge applied Rule 26 to substantially limit a plaintiff's discovery as unduly burdensome or expensive, considering the litigant's resources or the relative insignificance of the case's needs, the amount in controversy or the issues at stake? Suppose that the court restricted discovery, even though the plaintiff had limited access to, and money for assembling data in the files of the defendant police department. This information was important in proving the case, and the plaintiff sought to permanently enjoin employment practices that purportedly discriminated against many workers. Moreover, what if the district judge or magistrate actually imposed, or threatened to levy, sanctions as onerous as attorneys' fees for failure to comply with his or her demands or suggestions?

Judicial officers have taken all of these actions, and numerous

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similar actions, pursuant to the 1983 amendments to Rules 11, 16 and 26. The actions are memorialized in many written determinations. A number of these cases have not been appealed and few of those appealed have been reversed, principally because circuit courts have deferentially reviewed this district court decisionmaking.

If the trial judges and magistrates have committed such expansive exercises of discretion to writing, consider what actions they might be taking informally. Indeed, substantial anecdotal evidence suggests that the officials have wielded even broader discretion informally; they are less likely to be challenged or to be held accountable in that context. Most importantly, the type of enforcement described above has disadvantaged many parties, particularly civil rights plaintiffs, whose active participation in federal civil litigation Congress specifically intended to facilitate.

It is extremely difficult to document the prevalence of this activity among federal judges and magistrates. Nonetheless, the conduct appears sufficiently widespread to warrant scrutiny, sounding a cautionary note, and recommending certain changes in the Rules and in their application. When the Advisory Committee on the Civil Rules announced in August, 1990, that it would consider revising the 1983 amendments during 1991, consideration of judicial enforcement of those provisions and their possible revision became imperative.

The first section of this Article briefly describes the developments which created the perception that the federal courts were experiencing a litigation explosion and which ultimately led to the promulgation of the 1983 amendments as one response to the perceived explosion. It also examines the substantive content of those changes, especially how the revisions enlarged federal judicial discretion. The second section evaluates the courts' implementation of the 1983 amendments and finds that this application has adversely affected numerous litigants, particularly civil rights plaintiffs, while providing some benefits, namely fostering more expeditious dispute resolution.

The third section provides suggestions for the future. Considerable data show that the enforcement of Rule 11 has disadvantaged and chilled the enthusiasm of civil rights plaintiffs and has similarly affected many other litigants. Application of Rule 11 has concomitantly harmed the civil justice system by, for instance, generating extensive, and expensive, satellite litigation. Because

these problems outweigh the benefits of the Rule's enforcement, Congress and the Supreme Court should repeal or amend the provision promptly.

Analogous difficulties apparently have attended implementation of Rules 16 and 26, although the comparative dearth of information on their application complicates accurate assessment. Judicial invocation of the two Rules' sanctioning provisions seems sufficiently troubling to warrant immediate revision. Enforcement of the remaining subdivisions of Rules 16 and 26, which were modified in 1983, apparently has offered certain advantages, such as promoting more efficient disposition of lawsuits. Evaluators should analyze their implementation to ascertain whether those benefits are greater than the disadvantages for civil rights plaintiffs, additional parties and the civil litigation process. If they are not, Congress and the Court should amend these provisions as well.

I. THE LITIGATION EXPLOSION AND THE 1983 AMENDMENTS

The federal judiciary, led by Chief Justice Warren Burger, and certain commentators began insisting in the mid-1970's that the federal courts were experiencing a litigation explosion.[1] The judges and writers argued that there was an increasing quantity of federal civil litigation, too much of which was frivolous or pursued for purposes other than securing decisions on the merits.[2] One important source of difficulty was said to be the Federal Rules of Civil Procedure, because their provisions for flexible pleading, broad discovery, and substantial party and lawyer control of lawsuits enabled attorneys and their clients to abuse the litigation process by, for example, exploiting existing procedural mechanisms for strategic advantage.[3] Some observers contended that certain types of lawsuits, especially pro se civil rights cases,

1. I rely most in this section on Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 287-96 (1989). For examples of Chief Justice Burger's views, see Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 23 (A. Levin & R. Wheeler eds. 1979); *Burger Says Vacancies Add to "Judicial Deficit,"* N.Y. Times, Dec. 30, 1985, at 14, col. A1 (urging the frequent imposition of sanctions); *cf.* Tobias, *supra*, at 287-88 (examples of commentators).

2. *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 345 (1979).

3. *See* Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 440-43 (1986); Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 14-15 (1984).

contributed substantially to mounting caseloads and that a disproportionate number of the lawsuits were frivolous.[4]

Most of these propositions were, and continue to be, controversial. For instance, it is very difficult to define what constitutes a "litigation explosion" or "litigation abuse," much less to prove that there was an explosion or to pinpoint the quantity of abuse.[5] Notwithstanding these problems, including a nearly complete dearth of data, the Supreme Court, at the instigation of the Advisory Committee on Civil Rules, recommended the adoption of sweeping amendments to Federal Rules 11, 16 and 26.[6] Congress acquiesced in the Supreme Court's proposals, in part because it was unclear at the time that the revisions' judicial application would disadvantage litigants whose participation Congress meant to foster, and the changes became effective in August, 1983.[7]

The drafters intended that the revisions transform the process of federal civil litigation.[8] The amendments imposed significant, new responsibilities on parties and lawyers, while the modifications gave district judges substantially more control over litigation and greatly enhanced the discretion that they could exercise.

Rule 16 had not been revised since 1938, when the Federal Rules were initially adopted.[9] Because the original Rule 16 tersely provided for many changes that had occurred in federal civil liti-

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4. *See, e.g.*, Jones v. Community Redevelopment Agency, 733 F.2d 646, 649 (9th Cir. 1984); Rotolo v. Borough of Charleroi, 532 F.2d 920, 922 (3d Cir. 1976); Valley v. Maule, 297 F. Supp. 958, 960 (D. Conn. 1968). *But see Rotolo*, 532 F.2d at 927 (Gibbons, J., concurring and dissenting) (civil rights cases not disproportionately frivolous); Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 642-43 (1987) (image of civil rights litigation explosion overstated and borders on myth).

5. For much of the relevant literature and attempts to resolve certain aspects of the controversy, see Tobias, *supra* note 1, at 288-89 and sources cited therein; Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFFALO L. REV. 485, 522-23 (1988-89). *Cf.* Miller, *supra* note 3, at 5 (25-fold increase in civil rights cases between 1960 and 1972 attributable to Congress' passage of civil rights and voting rights statutes).

6. *See* Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1927-28 (1989); Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2198-2202 (1989).

7. *See* Order Amending Federal Rules of Civil Procedure, 461 U.S. 1097 (1983). *See generally* A. MILLER, THE 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY (1984). Because Rule 7's revision simply subjects motions to Rule 11's requirements, it is treated here in conjunction with Rule 11.

8. *See, e.g., In re* San Juan Dupont Plaza Hotel Fire Litig., 859 F.2d 1007, 1011-13 (1st Cir. 1988); A. MILLER, *supra* note 7; Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648, 1650-52 (1981).

9. *See* Advisory Comm. Note, 97 F.R.D. 165, 205 (1983); *see also* FED. R. CIV. P. 16.

gation, the revisors comprehensively rewrote and expanded the Rule to respond to the challenges which modern litigation presents.[10] The alterations in Rule 16 emphasized the importance of pretrial conferences and the increased ability of courts to manage the pretrial phase.[11] One means of achieving these objectives was to require that judges issue scheduling orders, an innovation which the Advisory Committee characterized as the "most significant change in Rule 16."[12] Another mechanism for stressing the importance of pretrial conferences and for enhancing judicial management during the pretrial stage was prescribing the imposition of sanctions for violations of the Rule's terms, a provision not included in the original Rule 16.[13]

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10. *See* Advisory Comm. Note, *supra* note 9, at 206-07. The magnitude of the revisions in Rules 11, 16 and 26 precludes their reproduction in full here. Nevertheless, those provisions of the revisions that are most important to this paper are reproduced. For a convenient source which includes the Advisory Committee Notes and facilitates comparison of the Rules prior to 1983 and the 1983 amendments, see *id.* at 165-220.

11. *See* FED. R. CIV. P. 16; Tobias, *supra* note 1, at 292. *See generally* A. MILLER, *supra* note 7.

12. Advisory Comm. Note, *supra* note 9, at 207. Rule 16(b) provides in pertinent part:

> (b) SCHEDULING AND PLANNING. [T]he judge . . . shall, after consulting with the attorneys for the parties and any unrepresented parties . . . enter a scheduling order that limits the time
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> (1) to join other parties and to amend the pleadings;
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> (2) to file and hear motions; and
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> (3) to complete discovery.
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> The scheduling order also may include
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> (4) the date or dates for conferences before trial, a final pretrial conference, and trial; and
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> (5) any other matters appropriate in the circumstances of the case.
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> 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 . . . upon a showing of good cause.

FED. R. CIV. P. 16(b).

13. *See* Advisory Comm. Note, *supra* note 9, at 213. Rule 16(f) provides:

> (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 the judge's 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 the party 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.

FED. R. CIV. P. 16(f).

The revisors treated problems of excessive discovery and resistance to, or evasion of, reasonable discovery requests by modifying Rule 26 so as to accord judges more control over the discovery process.[14] Courts must restrict discovery if they find that the discovery sought is unreasonably duplicative or cumulative or could be secured more easily from other sources.[15] Judges also are to limit discovery when they determine that the party seeking it "has had ample opportunity" to acquire the information, or if the discovery is unduly expensive or burdensome considering the case's needs, the amount in dispute, restrictions on the litigants' resources, and the significance of the issues at stake in the lawsuit.[16]

Rule 26(g) requires that judges sanction parties or attorneys whose discovery requests, responses or objections are not preceded by reasonable prefiling inquiries into their factual or legal bases or are filed for improper purposes.[17] The Rule also demands

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14. *See* Advisory Comm. Note, *supra* note 9, at 216-17; *see also* FED. R. CIV. P. 26(a), (b), (g). *See generally* Tobias, *supra* note 1, at 292.

15. Rule 26(b) provides in pertinent part:

> The frequency or extent of use of the discovery methods set forth in subdivision (a) [including depositions, interrogatories, document production, physical and mental examinations and requests for admissions] shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive . . . .

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

16. Rule 26(b) provides in pertinent part:

> The frequency or extent of use of the discovery methods set forth in subdivision (a) [including depositions, interrogatories, document production, physical and mental examinations and requests for admissions] shall be limited by the court if it determines that: . . . (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

Id.

17. Rule 26(g) provides in pertinent part:

> (g) SIGNING OF DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS. Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record . . . . A party who is not represented by an attorney shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose,

that courts sanction litigants or lawyers who submit discovery requests, responses or objections which are unreasonable or unduly expensive or burdensome in light of the needs of the lawsuit, prior discovery, the amount in controversy and the importance of the questions at issue in the case.[18] Amended Rule 11 similarly mandates that judges sanction parties or attorneys who fail to conduct reasonable inquiries before filing pleadings, motions or other papers or submit them for improper purposes.[19]

II. JUDICIAL APPLICATION

A substantial number of lower federal courts have broadly exercised the increased discretion that the 1983 amendments afford

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such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . .

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

Id. 26(g).

This language is very similar to that of Rule 11. *See infra* note 19.

18. Rule 26(g) provides in pertinent part:

[The signature] constitutes a certification that the signer has read the request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is: . . . (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 at stake in the litigation.

FED. R. CIV. P. 26(g).

This language is very similar to that of subsection (b) of the Rule. *See supra* note 16.

19. Rule 11 provides in pertinent part:

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's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

FED. R. CIV. P. 11. Although the overall effect of the 1983 amendments is to expand judicial discretion, certain provisions, such as the mandatory sanctioning requirements of Rules 11 and 26, actually limit that discretion.

them. Some judges have applied the revisions in ways which constituted abuses of this discretion and clearly disadvantaged numerous litigants, especially parties who were actively involved in public law litigation, such as civil rights plaintiffs.

A. *Formal Activity Involving the 1983 Amendments*

1. Rule 11

Numerous federal courts have vigorously enforced amended Rule 11 against civil rights plaintiffs.[20] District judges have found these plaintiffs in violation of the Rule's reasonable prefiling inquiry requirements more frequently than any other type of litigant.[21] The Seventh Circuit and a number of district courts within its geographic purview have displayed considerable willingness to apply Rule 11 aggressively against civil rights plaintiffs. For example, one Seventh Circuit panel required five turgid paragraphs to demonstrate that the legal theories which a civil rights plaintiff asserted were "wacky,"[22] thus enabling the court to affirm the trial judge's determination that the plaintiff's pleadings were not grounded in law.[23] Another Seventh Circuit panel upheld a district court's finding that a civil rights plaintiff had conducted a deficient prefiling factual investigation even when the plaintiff could only have secured the information needed for Rule 11 compliance through discovery.[24] Numerous, additional courts have decided that plaintiffs contravened the Rule in civil rights cases which were "close" legally or factually.[25]

Some judges have implemented the mandatory duty to levy appropriate sanctions for Rule 11 violations by exercising their discretion to impose substantial monetary assessments on civil rights

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20. *See* Tobias, *supra* note 1, at 303-04; Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 205, 217 (1988).

21. *See* Tobias, *supra* note 5, at 490; Vairo, *supra* note 20, at 200-01.

22. Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1085 (7th Cir. 1987) (Cudahy J., concurring in part, dissenting in part), *cert. dismissed*, 485 U.S. 901 (1988).

23. *Id.* at 1083-85.

24. *See* Rodgers v. Lincoln Towing Serv., 771 F.2d 194, 205-06 (7th Cir. 1985), *aff'g* 596 F. Supp. 13 (N.D. Ill. 1984).

25. *See* Vairo, *supra* note 20, at 217; *see, e.g.*, Jennings v. Joshua Indep. School Dist., 869 F.2d 870, 878-79, *opinion amended and superseded*, 877 F.2d 313, 320-21 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 3212 (1990); Goldberg v. Weil, 707 F. Supp. 357, 362 (N.D. Ill. 1989). A number of cases also do not appear to be close. *See* Vairo, *supra* note 20, at 217; *see, e.g.*, Bogney v. Jones, 904 F.2d 272, 274 (5th Cir. 1990).

plaintiffs.[26] Courts have levied large financial sanctions, notwithstanding the availability of a broad array of other possible sanctions ranging from reprimands to attorneys' fees.[27] For instance, a public interest organization is currently appealing a $1,000,000 sanction.[28] Different district courts in the Eastern District of North Carolina recently awarded more than $80,000 against lawyers for civil rights plaintiffs in separate controversial cases.[29] Indeed, monetary assessments, often of attorneys' fees, remain the "sanction of choice."[30]

Moreover, the Supreme Court recently held that "an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determinations."[31] Adoption of this very deferential standard enhances the already substantial discretion of trial judges as first tier decision-makers.[32] Circuit courts applying this standard will not closely analyze any dimension of district court Rule 11 jurisprudence; the resulting deference to first-tier decision-makers is evident in recent appellate decisions regarding the Rule. For example, during September, 1990, two Fourth Circuit panels failed to scrutinize, and upheld, trial court determinations that plaintiffs' attorneys had violated Rule 11 in controversial civil rights cases.[33]

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26. For the relevant language of Rule 11, see *supra* note 19.

27. *See infra* text accompanying notes 119-21.

28. *See* Avirgan v. Hull, 705 F. Supp. 1544, *order clarified by* 125 F.R.D. 189 (S.D. Fla.), *appeal filed*, No. 89-5515 (11th Cir. 1989).

29. *See* Harris v. Marsh, 679 F. Supp. 1204, 1384-93 (E.D.N.C. 1987) ($84,000 sanction levied in employment discrimination litigation), *vacated in part on reconsideration*, 123 F.R.D. 204 (E.D.N.C. 1988), *aff'd in part, vacated and remanded in part sub nom.* Blue v. United States Dep't of the Army, 914 F.2d 525 (4th Cir. 1990), *cert. denied*, 59 U.S.L.W. 3701 (1991); Robeson Defense Comm. v. Britt, 132 F.R.D. 650 (E.D.N.C. 1989) ($122,834 sanction imposed in civil rights litigation involving Native Americans and African Americans in Robeson County), *aff'd in part, vacated and remanded in part sub nom. In re* Kunstler, 914 F.2d 505 (4th Cir. 1990), *cert. denied*, 59 U.S.L.W. 3702 (1991). The attorneys probably will be unable to convince the district judges to reduce the sanctions substantially.

30. *See* Tobias, *Reassessing Rule 11 and Civil Rights Cases*, 33 How. L.J. 161, 170 (1990); Tobias, *supra* note 5, at 501. The Federal Judicial Center, in its preliminary analysis of data on Rule 11 activity since 1987 in five district courts which have fully computerized docket information, found that the percentage of rulings that awarded fees to opposing parties ranged from a low of 70% to a high of 93%. Preliminary Report on Rule 11, at 11 (Feb. 27, 1991) ("Summary of Rule 11 Field Study Reports").

31. *See* Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2461 (1990).

32. *See* Resnik, *Tiers*, 57 S. Cal. L. Rev. 837 (1984) (comprehensive analysis of increasing appellate court deference to first tier decisionmakers).

33. *See In re Kunstler*, 914 F.2d at 525; *Blue*, 914 F.2d at 547-48; *see also* White v. General Motors Corp., 908 F.2d 675, 683 (10th Cir. 1990).

Judicial decisions finding that civil rights plaintiffs and lawyers had contravened the Rule and the resultant imposition of sanctions have had deleterious implications for many of these parties and practitioners, whose lack of resources leave them especially vulnerable to chilling. These litigants, other parties, and the civil justice system have also been detrimentally affected by the inconsistent judicial application of Rule 11 and by the expensive satellite litigation that the provision has engendered. For instance, two respected members of the Maine bar recently spent thousands of dollars appealing a $250 sanction to protect their reputations and as a "matter of principle" in an environmental case.[34] The First Circuit affirmed the lower court ruling, although the appellate panel admitted that the case was close.[35]

2. Rule 16

The federal judiciary's enforcement of revised Rule 16 appears to have created equally problematic difficulties. Numerous district courts have required that litigants participate in summary jury trials.[36] These are half-day proceedings in which counsel for each side have one hour to present "opening and closing arguments [that] are amalgamated with a narrative overview of the trial proofs."[37] The six-person jury hears the presentations, receives a brief charge from the judge and renders a nonbinding verdict which is used to facilitate settlement.[38] Trial judges have demanded the involvement of parties in summary jury trials, despite both increasing criticism of district court authority to compel participation and growing doubt about the efficacy of such trials.

For example, a trial judge recently stated that the summary

34. *See* Maine Audubon Soc'y v. Purslow, 907 F.2d 265, 266 (1st Cir. 1990). *See generally* Tobias, Environmental Litigation and Rule 11, at 8, 18 (1991) (unpublished manuscript) (on file with author).

35. *See Purslow*, 907 F.2d at 266, 269.

36. *See, e.g.*, Home Owners Funding Corp. of Am. v. Century Bank, 695 F. Supp. 1343, 1347 n.3 (D. Mass. 1988); Federal Reserve Bank v. Carey-Canada, Inc., 123 F.R.D. 603, 606 (D. Minn. 1988); McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 44-46 (E.D. Ky. 1988); Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448, 449 (M.D. Fla. 1988). *Cf.* Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900 (6th Cir. 1988), *cert. denied sub nom.* Cincinnati Post v. General Elec. Co., 489 U.S. 1033 (1989) (first amendment right of public access does not apply to summary jury trials).

37. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 471 (1984).

38. *See id.* at 470-71.

jury trial procedure is not authorized by Congress and that federal courts lack power to summon jurors who function as settlement advisors.[39] The judge also questioned the effectiveness of the mechanism because its non-binding character "presents great temptation to strategically withhold crucial evidence and argument [and because] when forced, a party might view it as an unacceptable burden or bludgeon."[40] Judge Posner similarly observed that he could "find nothing in Rule 16 (pretrial conferences) to suggest that judges are authorized to convene juries to assist in settlement" and expressed doubt that Congress had empowered courts to empanel summary jurors.[41] Judge Posner also suggested that summary jury trials might compromise the integrity of the jury system and that the results of his admittedly "crude study" failed to "support a conclusion that the summary jury trial increases judicial efficiency."[42] Professor Wiegand recently found that the procedure was ineffective, principally because its "verdicts do not always reliably indicate what a regular jury would determine"[43] and the technique generally fails to produce settlement efficaciously.[44]

Moreover, mandated summary jury trials disproportionately disadvantage plaintiffs. If a plaintiff participates, that party will be harmed more than the defendant by the revelation of its case during the summary trial.[45] Thus, plaintiffs have stronger reason not to participate; however, if they refuse to participate courts may be unreceptive to their substantive claims or may sanction them.

Indeed, one district court held a lawyer in criminal contempt for refusing to submit his client's civil rights case to a summary

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39. Hume v. M & C Management, 129 F.R.D. 506, 508, 510 (N.D. Ohio 1990).

40. *Id.* at 508 n.3. *See also* Comment, *Mandatory Summary Jury Trials: Playing by the Rules?*, 56 U. CHI. L. REV. 1495 (1989) (criticism of authority and doubt about efficacy).

41. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 385-86 (1986) (doubt about efficacy).

42. *Id.* at 382.

43. Wiegland, *A New Light Bulb or the Work of the Devil? A Current Assessment of Summary Jury Trials*, 69 OR. L. REV. 87, 100 (1990).

44. *Id.* at 103. *But see* Note, *Rule 16 and Pretrial Conferences: Have We Forgotten the Most Important Ingredient?*, 63 S. CAL. L. REV. 1449 (1990) (defense of technique).

45. *See* Strandell v. Jackson County, 115 F.R.D. 333, 334-35 (C.D. Ill.), *vacated*, 830 F.2d 195 (7th Cir. 1987), *as amended*, 838 F.2d 884 (1988). *See generally* Maatman, *The Future of Summary Jury Trials in Federal Courts*: Strandell v. Jackson County, 21 J. MARSHALL L. REV. 455 (1988).

jury trial. A panel of the Seventh Circuit properly determined that Rule 16 does not authorize compulsory summary jury trials and that their use as a pretrial settlement technique would seriously threaten the well-established requirements governing discovery and the work-product privilege.[46] The Seventh Circuit is the only appellate court which has so found, and "no one knows exactly how many judges mandate such a procedure, nor how, nor when."[47]

Furthermore, the Seventh Circuit, en banc, recently held that a trial court could order a corporate officer with settlement authority to attend a settlement conference and might sanction the corporation, which was represented by counsel, for not complying even though the company clearly stated that it would not settle and Rule 16 only prescribes the attendance of counsel and unrepresented parties.[48] One trial court even informed an insurer's attorney that the corporation was "not to send some flunky who has no authority to negotiate [to a settlement conference but rather] someone who can enter into a settlement in [a certain] range without having to call anyone else"; when the company refused, the judge struck its pleadings while permitting the insurer to "purge itself of contempt" with a public apology.[49] Numerous additional trial courts have similarly invoked Rule 16 to pressure litigants or lawyers to settle their cases, while several circuits have felt compelled to admonish some of the district judges that the Rule "was not designed as a means for clubbing the parties

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46. *See* Strandell v. Jackson County, 838 F.2d 884, 886-88 (7th Cir. 1988); *see also* Hume v. M & C Management, 129 F.R.D. 506, 510 (N.D. Ohio 1990) (only Congress by enactment may compel individuals to serve as summary jurors); United States v. Exum, 744 F. Supp. 803, 805 (N.D. Ohio 1990) (same).

47. Wiegand, *supra* note 43, at 114. *Cf.* Caldwell v. Ohio Power Co., 710 F. Supp. 194, 202 (N.D. Ohio 1989) (summary jury trial conducted as part of case's routine pretrial processing); Lambros, *The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era*, 50 U. PITT. L. REV. 789, 802 (1989) (estimating that 100 federal and state judges have used summary jury trials in more than 1000 cases); Maatman, *supra* note 45, at 457 (estimating that more than 65 federal judges had employed the process as of 1988); Comment, *Compelled Participation in Innovative Pretrial Proceedings*, 84 NW. U.L. REV. 290, 309 (1989) (federal courts across nation order summary jury trials).

48. G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 656-57 (7th Cir. 1989). *See also* Dvorak v. Shibata, 123 F.R.D. 608 (D. Neb. 1988); *In re* Air Crash Disaster at Stapleton Int'l Airport, 720 F. Supp. 1433 (D. Colo. 1988); Abney v. Patten, 696 F. Supp. 567 (W.D. Okla. 1987). *See generally* Comment, *supra* note 40, at 1510-13. For a recent example of apparently appropriate sanctioning under Rule 16 in a civil rights case, see John v. Louisiana, 899 F.2d 1441, 1448-49 (5th Cir. 1990).

49. Lockhart v. Patel, 115 F.R.D. 44, 45-46 (E.D. Ky. 1987).

. . . into an involuntary compromise,"[50] as the Advisory Committee Note accompanying amended Rule 16 explicitly provides.[51]

An increasing number of trial courts have exercised their discretion under Rule 16 in civil rights and employment discrimination litigation to levy the ultimate sanction of dismissing the plaintiffs' cases.[52] Although nearly all of the lawsuits involved infractions by attorneys of requirements governing pretrial conferences, relatively few appellate courts have found that the dismissals of the parties' claims constituted abuses of discretion.

Illustrative is an employment discrimination action in which the district judge relied principally on Rule 16(f) to dismiss plaintiff's case with prejudice.[53] The court dismissed the litigant's claim, finding that her counsel failed to comply with a pretrial order which required that both parties file comprehensive information with the court before trial.[54] The Ninth Circuit determined that the dismissal was not an abuse of discretion, because refusal to comply with the order delayed the lawsuit's expeditious resolution, impaired the trial court's management of its docket, and prejudiced defendant and that the district judge had considered less drastic sanctions.[55] Moreover, the panel rejected the argument of plaintiff's counsel that she was not obligated to comply with the pretrial order because it was invalid, describing the order

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50. Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985). *Accord* Newton v. A.C.& S., Inc., 918 F.2d 1121, 1128-29 (3d Cir. 1990); *In re* Ashcroft, 888 F.2d 546, 547 (8th Cir. 1989); *Strandell*, 838 F.2d at 887; *see also* Hess v. New Jersey Transit Rail Operations, 846 F.2d 114, 116 (2d Cir. 1988); Abney v. Patten, 696 F. Supp. 567, 568 (W.D. Okla. 1987); *cf.* National Ass'n of Gov't Employees v. National Fed'n of Fed. Employees, 844 F.2d 216, 222-23 (5th Cir. 1988) (failure to compromise case even pursuant to terms suggested by court is not grounds for sanctions). *See generally* P. SCHUCK, AGENT ORANGE ON TRIAL (1986).

51. "It is not the purpose of Rule 16(b)(7) to impose settlement negotiations on unwilling litigants." Advisory Comm. Note, *supra* note 9, at 210.

52. *See, e.g.*, Dukes v. Ward, 129 F.R.D. 478, 482 (S.D.N.Y. 1990). District court dismissal orders were upheld in both Thompson v. Housing Auth., 782 F.2d 829 (9th Cir.), *cert. denied*, 479 U.S. 829 (1986), and Callip v. Harris County Child Welfare Dep't, 757 F.2d 1513, 1522 (5th Cir. 1985).

53. *See* Malone v. United States Postal Serv., 833 F.2d 128 (9th Cir. 1987), *cert. denied*, 488 U.S. 819 (1988).

54. *Id.* at 129-30.

55. *Id.* at 131-33. The Ninth Circuit, thus, considered four of the five factors that courts are to examine in deciding whether to dismiss a claim for non-compliance with a court order. *Id.* at 130. The Ninth Circuit failed to discuss the fifth factor, the public policy which favors merits-based disposition of litigation, because the factor did not outweigh the others, even though it weighed against dismissal. *Id.* at 133 n.2.

as a legitimate mechanism for improving court efficiency.[56] The circuit court also concluded that the district judge had not abused his discretion by refusing to excuse plaintiff for her lawyer's omission, in light of the egregious character of the attorney's malfeasance.[57] One member of the panel dissented, however, stating that the sanction of dismissal was harsh and improperly imposed in this instance.[58] The dissent believed that dismissal was inappropriate, because merit-based dispositions should be promoted, particularly when, in the dissent's opinion, the trial court had neither considered the feasibility of levying less extreme sanctions nor warned plaintiffs of the impending dismissal.[59]

3. Rule 26

Judges have taken formal action less frequently under amended Rule 26 than revised Rule 11 or amended Rule 16. Indeed, the Advisory Committee, in its August 1990 announcement, observed that sanction provisions adopted in 1983 have been employed principally in "connection with alleged pleading abuses," even though the 1983 drafters and the American Bar Association "were at least as concerned with discovery abuses."[60] The Committee

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56. *Id.* at 133-34.

57. *Id.* at 134.

58. *Id.* at 134 (Tang, J., dissenting).

59. *Id.* at 134-35 (Tang, J., dissenting). The dissent disagreed with the majority's assertion that certain actions of the trial judge "were attempts at less drastic alternatives," *id.* at 134, and emphasized the fifth factor, which the majority did not discuss. *See supra* note 55. Additional examples of cases not finding abuses of discretion are Ikerd v. Lacy, 852 F.2d 1256, 1258-59 (10th Cir. 1988); Brinkmann v. Abner, 813 F.2d 744, 749-57 (5th Cir. 1987). *But see* John v. State of Louisiana, 828 F.2d 1129 (5th Cir. 1987) (reversing dismissal with prejudice under Rule 16 because no clear record of delay or contumacious conduct and lesser sanctions would have been fairer); Salahuddin v. Harris, 782 F.2d 1127, 1133 (2d Cir. 1986) (failure to obey "implied" pretrial order does not justify sanctions under Rule 16(f)); Williams v. Georgia Dep't of Human Resources, 789 F.2d 881, 883 (11th Cir. 1986) (reversing district judge's reliance on Rule 16 to dismiss case considered meritless). My primary concerns are that the lawyers' mistakes not be visited on the clients and that pro se litigants not be disadvantaged unduly. *Cf.* Woodmore v. Git-N-Go, 790 F.2d 1497, 1498-99 (10th Cir. 1986) (punishment must be imposed on person at fault). Some courts are sensitive to these concerns; they may impose monetary sanctions only on the attorney or dismiss without prejudice or affirm such disposition on appeal. *See, e.g., Ikerd*, 852 F.2d at 1258; Dukes v. Ward, 129 F.R.D. 478, 482 n.1 (S.D.N.Y. 1990).

60. *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Call For Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules*, 131 F.R.D. 344, 345 (1990) [hereinafter *Call for Comments*]. Although the Advisory Committee's announcement spoke of the 1983 amendments, it did not mention Rule 16 specifically.

speculated that the problem of discovery abuse may have been overstated or been rectified by Rule 26(g)'s prophylactic effect or that the bar has yet to realize the Rule's potential.[61] Another apparent explanation for the comparative dearth of formal Rule 26 activity is that lawyers are accustomed to resolving many discovery disputes with additional discovery rules, such as Rule 37. A number of discovery controversies under Rule 26 also may have been so insignificant that they did not warrant resolution in writing, much less in reported opinions.

It is difficult to glean an accurate "feel" for the facts of those Rule 26 discovery disputes which courts have resolved in writing. Furthermore, many federal judges apparently remain committed to the idea—reflected in the 1938 Federal Rules and in numerous substantive statutes—that discovery should be rather freely permitted, especially in civil rights and employment discrimination litigation.[62] These factors complicate the assessment of formal Rule 26 decisionmaking. Courts have, however, taken some relevant action pursuant to Rule 26 or in conjunction with Rules 11 or 16.

The First Circuit has upheld the exercise of broad district court discretion to enter "case management orders" under Rules 16 and 26 in a case involving a large number of parties.[63] The appellate court approved the trial court's finding that the need to manage complex litigation efficaciously overrode the claims of the plaintiffs' attorneys to privacy under the work product doctrine.[64]

There also have been some close cases in which district courts denied the discovery requests of civil rights plaintiffs or appellate courts deferred to those decisions. For instance, in an employment discrimination suit, the magistrate and the trial judge determined that plaintiff's interrogatories were overbroad and unduly burdensome under Rule 26(b)(1).[65] The First Circuit, stating that it would intervene only if plaintiff clearly demonstrated that the

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61. *Id.*

62. *See, e.g.*, Orbovich v. Macalester College, 119 F.R.D. 411, 412, 416 (D. Minn. 1988); Youngblood v. Gates, 112 F.R.D. 342, 344, 348 (C.D. Cal. 1985). *See generally* Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 922 (1987) (Federal Rules exceeded even equity's significant permissiveness and flexibility in discovery); Tobias, *supra* note 1, at 284-85 (substantive statutes).

63. *In re* San Juan Dupont Plaza Hotel Fire Litig., 859 F.2d 1007, 1013 (1st Cir. 1988).

64. *Id.* at 1013-21.

65. *See* Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179, 186 (1st Cir. 1989).

district court's discovery ruling was "plainly wrong and resulted in substantial prejudice," ruled that plaintiff had shown no abuse of discretion.[66] Nonetheless, the panel remarked that the trial "court could possibly have allowed [plaintiff's interrogatories], but it was certainly free to call the shot the other way," while making several similar observations which indicated that the case was close.[67]

4. Inherent Judicial Authority

Some judges apparently believe that their considerable discretion, even as substantially enhanced by the 1983 amendments, remains inadequate, especially to remedy the litigation explosion. Courts, thus, have found additional ways of augmenting that discretion. The quintessential example of the phenomenon is the ever-broadening ambit that courts have claimed for the exercise of inherent judicial authority.[68]

Inherent judicial authority is power that the Constitution, statutes and Federal Rules do not specifically provide courts; it is authority which is implied or is required to effectuate those powers expressly prescribed or the power necessary for a court to function as a court.[69] The authority traditionally was considered to be quite narrow, and the Supreme Court stated as recently as 1980 that "[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and

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66. *Id.*

67. *Id.* at 187. "[I]t seems to us that the interrogatories at best fell into, and quite probably beyond, the gray area at the discovery margin." *Id.* Other examples of cases that seem close are Santiago v. Fenton, 891 F.2d 373, 379-81 (1st Cir. 1989) and Gomez v. City of Nashau, 126 F.R.D. 432, 434-37 (D.N.H. 1989).

When resolving discovery controversies, numerous trial judges have struck a fair balance between the interests of civil rights plaintiffs and defendants. *See, e.g.*, Dinkins v. Ohio, 116 F.R.D. 270, 272-74 (N.D. Ohio 1987); Burke v. New York City Police Dep't, 115 F.R.D. 220 (S.D.N.Y. 1987). Moreover, a few courts have been sensitive to the litigants' resource disparities. *See, e.g.*, Bills v. Kennecott Corp., 108 F.R.D. 459, 464 (D. Utah 1985) (denying defendant's motion for discovery costs); Wigler v. Electronic Data Sys. Corp., 108 F.R.D. 204, 206 (D. Md. 1985) (defendant's requests for admissions imposed undue burden on plaintiff, considering "circumstances of this single-plaintiff employment discrimination case"); *see also* Isaac v. Harvard Univ., 769 F.2d 817, 828 (1st Cir. 1985).

68. *See generally* Comment, *supra* note 40, at 1510-13.

69. This description is derived from three circuit court opinions that comprehensively discuss the concept. *See* Nasco, Inc. v. Calcasieu Television & Radio, 894 F.2d 696, 702-06 (5th Cir.), *cert. granted sub nom.* Chambers v. Nasco, Inc., 111 S. Ct. 38 (1990); G. Heileman Brewing Co. v. Joseph Oat Co., 871 F.2d 648, 650-53 (7th Cir. 1989); Eash v. Riggins Trucking Co., 757 F.2d 557, 561-64 (3d Cir. 1985).

discretion."[70]

Nevertheless, the federal judiciary, especially since the mid-1980's, has increasingly relied upon this essentially uncabined power when applying the 1983 amendments, other Federal Rules, and additional procedural provisions to enlarge its discretion. Most of the courts that decided the cases analyzed in the subsection on Rule 16's enforcement also invoked inherent judicial authority. For example, many of the judges who relied on Rule 16 to mandate summary jury trials[71] or to dismiss plaintiffs' cases[72] premised their determinations on inherent power as well. Moreover, some courts have relied on inherent authority to assess the costs of empaneling juries against litigants that settled cases on the eve of trial.[73]

Indeed, the Supreme Court recently accorded the inherent power doctrine one of its broadest articulations in *Hoffman-La Roche v. Sperling*.[74] The Court, proclaiming that "courts traditionally have exercised considerable authority to manage their own affairs so as to achieve the orderly and expeditious resolution of cases"[75] extended the reach of the inherent powers concept further than in earlier cases.[76] The Court recognized that inherent authority reinforced Rule 83's endorsement of district court power to facilitate the provision of notice in cases with numerous potential plaintiffs, where written consent is statutorily required for multiple plaintiffs to join in one suit.[77]

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70. Roadway Express v. Piper, 447 U.S. 752, 764 (1980).

71. *See, e.g.*, Federal Reserve Bank v. Carey-Canada, Inc., 123 F.R.D. 603, 604 (D. Minn. 1988); McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 48 (E.D. Ky. 1988).

72. *See, e.g.*, Thompson v. Housing Auth., 782 F.2d 829, 831 (9th Cir.), *cert. denied*, 479 U.S. 829 (1986); Callip v. Harris County Child Welfare Dep't, 757 F.2d 1513, 1518 (5th Cir. 1985).

73. *See, e.g.*, White v. Raymark Indus., 783 F.2d 1175 (4th Cir. 1986); Eash v. Riggins Trucking Co., 757 F.2d 557 (3d Cir. 1985).

74. 110 S. Ct. 482 (1989).

75. *Id.* at 487 (citing Link v. Wabash R.R., 370 U.S. 626, 630-31 (1962)).

76. *See, e.g., supra* text accompanying note 69.

77. *See Sperling*, 110 S. Ct. at 487; *see also* Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1988). The majority's invocation of inherent authority in *Sperling* appears to be dicta and may be limited. Nonetheless, Justice Scalia's stinging dissent, essentially accusing the majority of exceeding constitutional bounds, does not leave that impression. *See Sperling*, 110 S. Ct. at 488-92 (Scalia, J., dissenting). The Supreme Court may extend the inherent powers idea further when it decides *Nasco*. *See* Nasco, Inc. v. Calcasieu Television & Radio, 894 F.2d 696, 702-06 (5th Cir.), *cert. granted sub nom.* Chambers v. Nasco, Inc., 111 S. Ct. 38 (1990); *see also* Business Guides v. Chromatic Communications Enters., 111 S. Ct. 922, 935, 940-42 (1991) (Kennedy, J., dissenting).

B. *Informal Activity Involving the 1983 Amendments*

There is considerable and increasing evidence of informal activity involving the 1983 amendments that has disadvantaged many litigants, particularly those whose active participation in lawsuits Congress intended to encourage. For instance, judges have threatened to impose Rule 11 sanctions on civil rights parties and lawyers who refused to withdraw counts that the courts believed were frivolous or have levied large assessments in unpublished opinions.[78] There have been analogous threats under Rule 16 where parties or attorneys displayed reluctance to participate in certain forms of alternative dispute resolution, such as summary jury trials.[79] Judges have lodged similar threats when they thought that the litigants or their counsel had not made good faith efforts to settle cases or that lawyers were inadequately prepared for pretrial conferences.[80] Courts also have relied on Rule 26 to pressure litigants and practitioners who filed discovery papers that judges deemed inappropriate.[81]

This anecdotal evidence comports with reasonable inferences that may be drawn from formal judicial decisionmaking under the 1983 amendments. If courts, in print, have enforced the Rules so broadly and have exercised such expansive discretion, they would be more likely to do so in informal settings, because the prospects for being questioned or being held accountable are significantly diminished.[82] Thus, the informal application of the amendments and the informal exercise of judicial discretion may well be more problematic than their formal counterparts.

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78. *See* Tobias, *Recalibrating Rule 11 in Civil Rights Litigation*, 36 VILL. L. REV. 105, 117 (1991) (threats); Tobias, *supra* note 5, at 501-02, 505-06 (same); Tobias, *supra* note 34, at 10 n.61 (same). *Cf.* A. MILLER, *supra* note 7, at 38 (discovery sanctions frequently unreported).

79. These ideas are premised on conversations with lawyers who represent public interest litigants and civil rights plaintiffs. *See generally supra* text accompanying notes 36-47.

80. These ideas are premised on conversations with lawyers who represent public interest litigants and civil rights plaintiffs. *See generally supra* notes 48-70 and accompanying text.

81. These ideas are premised on conversations with litigants and lawyers who pursue public interest and civil rights litigation.

82. By this, I mean that the possibilities for abuse in informal settings seem substantially greater because of the lack of accountability that published decisionmaking in some measure provides.

C. *Implications*

The judicial activity analyzed above has had numerous important consequences. It apparently has dampened the enthusiasm of public interest litigants and attorneys, particularly civil rights plaintiffs and practitioners.[83] These parties and lawyers have experienced chilling effects primarily because their relative lack of power and resources makes them risk averse.[84] This phenomenon is especially troubling. Congress has clearly stated in much substantive, procedural and fee-shifting legislation that the federal judiciary should facilitate the litigants' and attorneys' participation in federal civil litigation so that they may vindicate constitutional rights and statutory interests, such as the right to be free from racial or gender discrimination.[85] Thus, to the extent that judges exercise their discretion in ways which discourage the involvement of these parties and lawyers, the courts are frustrating congressional intent of those statutes enacted by Congress.[86]

In short, numerous federal judges have exercised their discretion in problematic ways. Moreover, there is much evidence that application of the 1983 amendments has seriously disadvantaged

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83. Civil rights plaintiffs have experienced considerably more chilling than other public interest litigants, such as plaintiffs in environmental litigation. *See* Tobias, *supra* note 78, at 109; Tobias, *supra* note 5, at 503-06; Tobias, *supra* note 34, at 17-18. *See generally* Vairo, *supra* note 20, at 200-02. *But cf.* Maine Audubon Soc'y v. Purslow, 907 F.2d 265, 268-69 (1st Cir. 1990) (recent example affirming imposition of sanctions on plaintiff in environmental case).

84. *See* Tobias, *supra* note 78, at 109. *See generally* Tobias, *supra* note 5, at 495-98. Of course, I am concerned when judicial discretion is improperly exercised against any federal court litigant; however, the superior resources of some litigants, such as large corporations, better enable them to protect their interests. Even those litigants may be unwilling to commit substantial resources to appeals, especially on "questions of principle." For example, two corporations which lost very important inherent authority cases did not file certiorari petitions. *See* G. Heileman Brewing Co. v. Joseph Oat Co., 871 F.2d 648 (7th Cir. 1989); Eash v. Riggins Trucking Co., 757 F.2d 557 (3d Cir. 1985).

85. *See, e.g.*, Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988); Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982).

86. The most recent indication of congressional recognition of this dynamic is introduction of the Civil Rights Act of 1990 in response to six decisions of the Supreme Court's 1988 Term which many members of Congress believed violated congressional intent. *See* H.R. 4000, 101st Cong., 2d Sess. (1990); S. 2104, 101st Cong., 2d Sess. (1990). *See generally* Comment, *Reconstruction, Deconstruction and Legislative Response: The 1988 Supreme Court Term and the Civil Rights Act of 1990*, 25 HARV. C.R.-C.L. L. REV. 475 (1990). That legislation did not pass because the Senate failed to override President Bush's veto by one vote. Lewis, *President's Veto of Rights Measure Survives By One Vote*, N.Y. Times, Oct. 25, 1990, at A1, col. 3. Strong, new legislation has been introduced in the 102d Congress. *See* H.R. 1, 102d Cong., 1st Sess. (1991); *New Battle Looming as Democrats Reintroduce Civil Rights Measure*, N.Y. Times, Jan. 4, 1991, at A12, col. 2.

many litigants, especially parties whose participation Congress specifically intended to promote. The third section, accordingly, offers recommendations for the future.

III. Suggestions for the Future

The course of action that should be pursued remains quite controversial. Perhaps the most disputed questions are whether any of the provisions in amended Rules 11, 16 and 26 should be repealed or revised. Recent developments have made the issues more controversial. In August 1990, the Advisory Committee issued a call for written comments on the operation of the 1983 amendments, scheduled a hearing for February, 1991, to receive oral submissions on their application, and stated that the Committee would consider revision thereafter.[87]

A. *Possible Revision*

1. Rule 11

Numerous observers have argued that Rule 11 should not be repealed or amended in the near future. Both the Third Circuit Task Force on Rule 11, which analyzed all Rule 11 activity in that geographic area during a recent one-year period,[88] and Judge Schwarzer, a long-time advocate of vigorous Rule 11 enforcement and a jurist to whom many judges look for guidance in applying the Rule,[89] have stated that Rule 11's benefits, namely forcing lawyers to "stop and think" before they file papers, and reducing litigation abuse, substantially outweigh its disadvantages, such as chilling civil rights plaintiffs and necessitating expensive satellite litigation.[90]

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87. *See Call for Comments*, *supra* note 60. *See also* Labaton, *Courts Rethinking Rule Intended To Slow Frivolous Lawsuits*, N.Y. Times, Sept. 14, 1990, at B18, col. 1.

88. *See* S. Burbank, Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11 (American Judicature Soc'y 1989).

89. *See* Schwarzer, *Rule 11 Revisited*, 101 Harv. L. Rev. 1013 (1988) [hereinafter Schwarzer, *Rule 11 Revisited*]; *see also* Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124 (N.D. Cal. 1984), *rev'd*, 801 F.2d 1531 (9th Cir. 1986); Schwarzer, *Sanctions Under the New Rule 11: A Closer Look*, 104 F.R.D. 181 (1985) [hereinafter Schwarzer, *A Closer Look*]. Judge Schwarzer is now the Executive Director of the Federal Judicial Center. Recent examples of cases in which courts have cited Judge Schwarzer's work include Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2454 (1990); Lancellotte v. Fay, 909 F.2d 15, 18, 19 (1st Cir. 1990); Allen v. Utley, 129 F.R.D. 1, 11 (D.D.C. 1990).

90. *See* S. Burbank, *supra* note 88, at 95; Schwarzer, *Rule 11 Revisited*, *supra* note 89, at 1014.

Professor Arthur Miller, who was the Reporter for the Advisory Committee when the 1983 amendments were promulgated, stated in July, 1990, that "[i]t would be unfortunate if the decibel level of the debate over Rule 11 led to its precipitous revision before sufficient experience accumulated."[91] Professor Miller claimed that "considerable progress has been made" but urged that "patience is needed," acknowledging that the process of refining Rule 11's application "will take many more years."[92] Moreover, Professor Melissa Nelken, who has undertaken considerable analysis of the Rule, recommended in early 1990 that it not be repealed, offering instead valuable suggestions for amendment that would be responsive to the needs of civil rights plaintiffs.[93] More recently, she found that Rule 11 activity in the Northern District of California apparently had numerous positive effects, which accorded with the rulemakers' expectations, but also had some negative impacts, particularly a "chilling effect on developments in the law."[94]

Furthermore, Judge Grady, then-Chair of the Advisory Committee, observed in February, 1990, that there must be additional study of Rule 11 before modification could be seriously examined.[95] Moreover, formal Rule 11 judicial decisionmaking has been improving generally and for civil rights plaintiffs in particular since approximately the beginning of 1989.[96]

Most of the developments above have led me to be more optimistic about Rule 11's application than I was several years ago when I recommended expeditious repeal.[97] Nevertheless, certain aspects of Rule 11 enforcement remain sufficiently problematic

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91. Miller, *The New Certification Standard Under Rule 11*, 130 F.R.D. 479, 505 (1990) (footnote omitted). He found this to be "especially true since there are signs that the practice under the rule has begun to stabilize and the overly enthusiastic hyperactivity of the first few years following its promulgation has begun to subside." *Id.* at 506.

92. *Id.* at 505.

93. *See* Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383 (1990).

94. Nelken, *The Impact of Federal Rule 11 on Lawyers and Judges in the Northern District of California*, 74 JUDICATURE 148, 150 (1990). "[T]he sample was too small to make any generalizations about the rule's impact" on civil rights lawyers. *Id.* at 152. Professor Nelken's findings are especially important, because many judges in the Northern District of California have vigorously enforced Rule 11.

95. *See* Letter from Judge John Grady to Representative Robert Kastenmeier, Chair, House of Representatives Judiciary Committee, Subcommittee on Courts, Intellectual Property and the Administration of Justice (Feb. 9, 1990) (copy on file with author).

96. *See* Tobias, *supra* note 78, at 110-16.

97. *See* Tobias, *supra* note 5, at 513-15, 522-24.

for civil rights plaintiffs, other litigants and the civil justice system, particularly in contrast with the Rule's rather limited benefits, to warrant prompt amendment of the provision.

Informal Rule 11 activity, such as judicial threats made in chambers to sanction civil rights plaintiffs, remains especially troubling.[98] It apparently comprises much of the activity that significantly disadvantages civil rights plaintiffs, and it is the most difficult to detect. Furthermore, unwarranted and expensive satellite litigation, inconsistent judicial application, and the occasional imposition of large sanctions continue to plague other parties, including some public interest litigants, as well as the civil litigation process.[99]

There currently is ample information to support rational determinations about revision of the Rule. For instance, the new version could require a finding that parties or lawyers abused the litigation process before Rule 11 is contravened or monetary sanctions are imposed.[100]

2. Rule 16 and Rule 26

Rule 16's application has generated less debate than Rule 11, while Rule 26's enforcement has provoked little controversy. Several elements of Rule 16's implementation have afforded benefits, such as expediting the resolution of disputes. These benefits, however, are outweighed by several negative factors. Important considerations are the disadvantages created by formal and informal Rule 16 activity, principally the chilling of parties whose involvement in federal civil litigation Congress sought to foster. Another factor is the possibility of applying measures, such as civil contempt, which would be less problematic but as effective.

Consequently, those responsible for rule amendment should now consider some changes. For example, Rule 16 violations might be limited to serious misbehavior of litigants or lawyers, while the sanction of attorneys fees could be levied only for egregious misconduct.[101] An example of conduct which would contravene a revised Rule 16 is the refusal to heed multiple court or-

98. *See supra* text accompanying notes 78-82.

99. *See supra* text accompanying notes 27-30 and text accompanying notes 34-35.

100. *See* Tobias, *supra* note 5, at 515-17 (these and additional suggestions for Rule 11 amendment).

101. These recommendations are somewhat similar to suggestions I have made for revising Rule 11. *See* Tobias, *supra* note 5, at 515-17.

ders, even after judges have granted extensions or issued warnings that sanctions might be imposed for failure to comply.[102]

The enforcement of Rule 26 has yielded benefits similar to Rule 16, namely facilitating discovery and the prompt conclusion of lawsuits. The problems enumerated in the second section, such as the relatively small number of reported Rule 26 decisions and the rather limited information on informal Rule 26 activity, complicate analysis of the Rule's detrimental impact. Nonetheless, Rule 26's implementation has significantly disadvantaged civil rights plaintiffs while affording comparatively minimal benefits. It is appropriate, therefore, to examine revision. The similarity between the provisions governing rule violations and the imposition of sanctions under Rule 26 and Rule 11 mean that the Advisory Committee should consider changes like those recommended for Rule 11 and, at least ought to make Rule 26 sanctioning discretionary.

There is substantial need to modify certain aspects of Rules 11, 16 and 26 immediately. Nevertheless, the Advisory Committee will not seriously explore amendment until it has evaluated the results of several Rule 11 studies, the material that was tendered in response to the Committee's call for written comments on the Rules' implementation, and the oral testimony and data submitted at the February, 1991 hearing. It is important, therefore, to consider the prospect of more study.

B. *Additional Study*

Additional study of Rule 11's implementation is not a prerequisite to reasoned decisionmaking about the provision's revision.[103] Considerable data to support informed judgments already exist. New Rule 11 analyses will require the commitment of significant resources. While such assessments are being conducted, Rule 11 enforcement that is insufficiently solicitous of civil rights plaintiffs will continue to disadvantage them. Moreover, the information that is collected will not substantially advance present understanding of the Rule's application.

The Federal Judicial Center, at the Advisory Committee's re-

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102. *See, e.g.*, Thompson v. Housing Auth., 782 F.2d 829, 830-31 (9th Cir.), *cert. denied*, 479 U.S. 829 (1986); Callip v. Harris County Child Welfare Dep't, 757 F.2d 1513, 1516-17, 1522 (5th Cir. 1985); Dukes v. Ward, 129 F.R.D. 478, 481-82 (S.D.N.Y. 1990); *cf.* Minotti v. Lensink, 895 F.2d 100, 102-03 (2d Cir. 1990) (same as to Rule 37).

103. *See* T. WILLGING, THE RULE 11 SANCTIONING PROCESS (1988).

quest, however, has recently finished gathering data on Rule 11 activity since 1987 in five district courts which have fully computerized docket information. This effort, which involved a questionnaire on Rule 11 which was circulated to all district judges in the participating districts, will supplement the relatively recent evaluation conducted under its auspices.[104] Moreover, the American Judicature Society has commenced an empirical study of Rule 11 activity in the Fifth, Seventh and Ninth Circuits which apparently will be modeled on the earlier work of the Third Circuit Task Force.[105] These new endeavors, as well as the information submitted in response to the Advisory Committee's call for comments, should yield additional valuable material for the use of the rule revisors as they contemplate Rule 11's amendment.

All of this work and numerous other Rule 11 assessments should also inform analyses of activity involving Rules 16 and 26. The Advisory Committee's recent announcement that it may soon revise Rule 26 and its failure to mention Rule 16, increase the compelling need to collect, evaluate, and synthesize as much data as feasible on the courts' enforcement of the 1983 amendments to Rule 16 and Rule 26. It is especially important to assemble information on informal implementation and enforcement which has adversely affected the parties whose involvement Congress meant to encourage. Certain aspects of these studies, such as precisely identifying chilling effects and pinpointing litigation and discovery abuses, are quite difficult to complete with the desired accuracy.[106] Nonetheless, it is possible to offer numerous suggestions for future assessments, particularly by drawing on prior evalua-

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104. *See Studies Examine Rule 11's Impact*, Nat'l L.J., July 30, 1990, at 32, col. 4; *see also Call for Comments*, *supra* note 60. The Center has conducted a preliminary analysis of the data, and the Advisory Committee asked for refinement of that assessment during the February 21, 1991 public hearing on Rule 11. Telephone conversation with Thomas Willging, Deputy Research Director, Federal Judicial Center (Feb. 26, 1991). *See generally* PRELIMINARY REPORT, *supra* note 30. Professor Erwin Chemerinsky of the University of Southern California Law Center also has recently commenced a study of Rule 11 activity in the Ninth Circuit.

105. *See* American Judicature Society Rule 11 Project (1990) (copy on file with author); American Judicature Society Rule 11 Study (Questionnaire) (copy on file with author); telephone conversation with Professor Bert Kritzer, Department of Political Science, University of Wisconsin, and Co-Director of Rule 11 Project (Mar. 7, 1991).

106. For example, "there are problems of definition, detection and measurement because chilling effects themselves are intangible and amorphous." Tobias, *supra* note 30, at 177. *See also id.* at 177-79.

tions and recommendations for study.[107]

Future work should be as comprehensive and rigorous as possible, focusing on the consequences for civil rights plaintiffs and other public interest litigants of judicial implementation of Rules 16 and 26. Analysts should systematically gather, assess and synthesize information in enough geographic locales, having sufficiently diverse legal cultures and judicial perspectives on the two Rules, over adequate time to provide substantial assurance of validity.[108] Efforts should be undertaken to determine how many sanctions requests have been filed and granted against civil rights plaintiffs and other public interest litigants, the exact amount of informal Rule 16 and Rule 26 activity that has implicated these litigants, and the quantity of satellite litigation which has resulted.

Evaluators should attempt to ascertain whether courts have enforced the two Rules against civil rights plaintiffs with the same vigor as Rule 11. For example, analogies between Rules 11 and 26 warrant scrutinizing judicial application of Rule 26's requirements governing violations and mandatory sanctions.[109] Assessors should determine how often courts found that civil rights plaintiffs had contravened Rule 26's reasonable prefiling inquiry command, how many of these cases were close, whether the courts imposed monetary sanctions, and if so, their magnitude. These figures should be compared with similar data compiled on Rule 11.

Correspondingly, evaluators examining Rule 16's judicial implementation might attempt to ascertain the relative frequency and strength with which courts have pressured unwilling litigants and lawyers, especially civil rights plaintiffs and attorneys, to participate in summary jury trials, settlement negotiations and other types of alternative dispute resolution. Rule 16, unlike Rules 11 and 26, does not mandate the imposition of sanctions when it is violated. Accordingly, how often judges have exercised their discretion in levying sanctions and the assessments imposed should

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107. *See, e.g.*, S. BURBANK, *supra* note 88; Tobias, *supra* note 5; Tobias, *supra* note 30; T. WILLGING, *supra* note 103; *see also* Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REF. 647, 686-91 (1988) (difficulties of gathering empirical data).

108. *See* Tobias, *supra* note 30, at 178.

109. A LEXIS search conducted on May 1, 1991 indicated that judges had issued 10 published opinions involving civil rights and rule 26(g).

yield helpful insights.[110]

Rules 16 and 26 provide courts with numerous opportunities to take informal action, the type of behavior that can most harm civil rights plaintiffs.[111] It is, therefore, crucial to evaluate this informal activity, which may be more significant than corresponding conduct under Rule 11. For instance, judges can disadvantage litigants with limited resources when drafting scheduling orders or encouraging settlement pursuant to Rule 16 or when tailoring discovery to the needs of the case or to the importance of the issues at stake under Rule 26. Evaluators should attempt to ascertain how substantially these and similar types of informal activity have discouraged civil rights plaintiffs.

Significant to many of the suggestions presented here will be the systematic collection, analysis and documentation of information on the informal application of Rules 16 and 26.[112] An important means of assembling these data is to seek the perspectives of persons, groups and attorneys who contemplated filing, or actually have brought, civil rights actions. After evaluators have gathered and assessed this information, they should be able to ascertain with considerable certainty how extensively courts' enforcement of Rule 16 and Rule 26 has disadvantaged civil rights plaintiffs and their counsel as well as other litigants, attorneys and the civil justice system.

Assessors should then calculate the advantages of the two Rules' implementation. For instance, there might be estimates of how much Rule 26's application has reduced discovery abuse and the extent to which Rule 16's enforcement has expedited dispute resolution. Evaluators also should compute the value of the decreased discovery abuse and the more prompt dispute disposition which have been afforded civil rights plaintiffs, other parties and the civil litigation process.

Once the benefits and disadvantages above have been compiled, they should be assigned values. Next, several additional factors that are not actually benefits or disadvantages should be consulted. One important consideration is Congress' express intent that civil rights plaintiffs' active involvement in litigation be fa-

110. A LEXIS search conducted on May 1, 1991 indicated that judges had issued 37 published opinions involving civil rights and rule 16(f).

111. *See* Tobias, *supra* note 30, at 178-79; Tobias, *supra* note 78, at 117.

112. *See* Tobias; *supra* note 78, at 124-26.

cilitated.[113] This means, for example, that the systemic benefits of the two Rules' application would have to be substantial before they could outweigh any significant disadvantages to these plaintiffs. Correspondingly, there should be thorough exploration of alternatives to Rules 16 and 26 that might be equally efficacious but which have less detrimental impacts on civil rights plaintiffs. These measures might include state bar ethics requirements and judicial reliance on civil contempt and case management, or invocation of other sanctioning power under 28 U.S.C. section 1927 or courts' inherent authority.[114] It also would be helpful to know exactly how much responsibility civil rights plaintiffs bear for discovery abuse and for the delayed disposition of lawsuits.

When all of these considerations have been assembled and valued, it should be possible to achieve some resolution which accommodates the respective needs of civil rights plaintiffs, other types of litigants and the civil justice system. Congress, the Supreme Court and the Advisory Committee should be able, in turn, to determine whether additional revision of the 1983 changes in Rules 16 and 26 that do not govern sanctions is appropriate, and, if so, how amendment could best be accomplished.

C. *Judicial Application of the 1983 Amendments*

While the data on Rule 16 and Rule 26 are being gathered and analyzed, and until Rule 11 is revised, federal courts should enforce the 1983 amendments to all three rules more judiciously. For example, judges should apply Rule 11 with greater solicitude for civil rights plaintiffs who are peculiarly susceptible to being chilled,[115] a phenomenon that numerous appellate courts have recently recognized.[116]

Judges should consider limiting enforcement of the Rule. Courts could confine Rule 11 violations to instances of litigation

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113. *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 28 U.S.C. § 1477 (1982)). *See generally* Tobias, *supra* note 1, at 284-85.

114. For examination of these alternatives, see Thomas v. Capital Sec. Servs., 836 F.2d 866, 870 n.3 (5th Cir. 1988); SANCTIONS: RULE 11 AND OTHER POWERS (G. Joseph, P. Sandler & C. Shaffer 2d ed. 1988); Vairo, *supra* note 20, at 233.

115. *See* Tobias, *supra* note 5, at 513-22.

116. *See, e.g.*, Simpson v. Welch, 900 F.2d 33, 36 (4th Cir. 1990) (vacating Rule 11 sanction against title VII plaintiff); Kraemer v. Grant County, 892 F.2d 686, 690 (7th Cir. 1990) (acknowledging Rule 11's chilling effect in civil rights cases involving unpopular clients). *See generally* Tobias, *supra* note 78, at 109.

abuse, as some members of the Third Circuit have suggested.[117] Correspondingly, judges may wish to assess sanctions of attorneys' fees only when parties or lawyers have engaged in egregious misbehavior.[118]

Courts choosing to apply Rule 11 more broadly should remember that civil rights plaintiffs usually lack access to material important for conducting prefiling factual inquiries which appear reasonable and often plead legal theories which are not traditional. Concomitantly, if judges find that these parties have contravened Rule 11, the courts should levy the "least severe sanction" necessary.[119] They also should keep in mind numerous nonmonetary options, which include a "warm, friendly discussion on the record, a hard-nosed reprimand in open court [and] compulsory legal education."[120]

All of these suggestions pertain equally to Rule 26 provisions analogous to those in Rule 11, and to parts of Rule 26 which are dissimilar. For instance, judges applying the Rule 26(b)(1) criteria to requests that civil rights plaintiffs' discovery be limited as unduly burdensome should remember that these plaintiffs typically seek non-monetary, declaratory or injunctive relief, frequently attempt to vindicate significant constitutional rights and statutory interests of many non-parties, and generally have limited resources for doing so.[121]

Correspondingly, courts enforcing Rule 16 should not invoke it to demand that unwilling litigants participate in summary jury trials, settlement negotiations, or additional alternatives to dispute resolution, especially in lawsuits implicating important public values.[122] Moreover, when civil rights plaintiffs have violated the Rule, judges should seriously consider exercising their discre-

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117. *See, e.g.*, Doering v. Union County Bd. of Chosen Freeholders, 857 F.2d 191, 194 (3d Cir. 1988); Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 94-95 (3d Cir. 1988).

118. Egregious misconduct is activity that exceeds serious misbehavior. *See, e.g., supra* note 102 and accompanying text.

119. *See, e.g.*, Schwarzer, *A Closer Look*, *supra* note 89, at 201; Thomas v. Capital Sec. Servs., 836 F.2d 866, 878 (5th Cir. 1988); Cabell v. Petty, 810 F.2d 463, 466-67 (4th Cir. 1987).

120. *Thomas*, 836 F.2d at 878.

121. The court shall limit discovery if it is "unduly burdensome or expensive" considering the "needs of the case . . . limitations on the parties' resources, and the importance of the issues at stake in the litigation." FED. R. CIV. P. 26(b)(1). *See generally supra* text accompanying notes 81-84.

122. *See* Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668, 679-80 (1986); Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

tion not to sanction. Courts also must avoid applying either Rule 16 or 26 informally in ways that dampen these litigants' enthusiasm.

Courts should keep in mind as well that many observers, including numerous members of Congress, consider the public values that civil rights plaintiffs attempt to vindicate more important than the prompt resolution of lawsuits.[123] Indeed, the federal judiciary must temper its concerns about case dispositions to the apparent exclusion of practically all else, including congressional intent. If the courts fail to do so, the litigation explosion appears destined to drive all discretionary procedural decisionmaking in ways that promise to impoverish procedural discourse and which could lead to a confrontation with Congress.

D. *Congress, the Supreme Court and the Advisory Committee*

Ample, troubling evidence regarding Rule 11's enforcement warrants its immediate repeal or modification. The Advisory Committee, with the information gleaned from responses to its call for comments, the February, 1991 hearing and the data derived from the Rule 11 studies which have recently been completed, should be able to expeditiously draft proposed language repealing or altering Rule 11 for Supreme Court and congressional consideration. If the Committee and the Court do not suggest the repeal or modification of the provision, Congress may want to change the Rule independently. Congress, however, has been relatively reluctant to act independently, apparently out of deference to Advisory Committee expertise and concern for the inter-branch, cooperative nature of the rules revision process, involving delicate relationships between Congress and the Court.[124]

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123. *See, e.g.*, Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302-04 (1976); Fiss, *supra* note 122, at 1086-87; Tobias, *supra* note 1, at 337. Congress has recently evinced increased interest in expediting dispute resolution. *See, e.g.*, The Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (provision of Judicial Improvement Act of 1990 calling for civil justice expense and delay reduction plans); 28 U.S.C. §§ 651-658 (1988) (provisions of Judicial Improvements and Access to Justice Act of 1988 calling for court-annexed arbitration).

124. *See* Tobias, *supra* note 1, at 293, 337-40. *But cf.* Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1018-20 (1982) (documenting increased congressional willingness since 1973 to intercept proposed rules and amendments governing evidence and civil, criminal, and appellate procedure). *See generally* Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975).

The rule-amending authorities should explore the possibility of revising certain aspects of the sanctioning provision included in Rule 26, particularly its mandatory character, as well as the sanctioning provision in Rule 16. The amendment of additional portions of the two Rules that were changed in 1983 may have to await the collection, analysis, and synthesis of more data on their application.

Congress should do everything possible to promote the necessary studies of Rules 16 and 26. It should provide the requisite resources and encourage assessments by governmental organizations, such as the Federal Judicial Center, and expert, impartial entities outside the government, such as the American Judicature Society.

Congress should also consider exploring whether the 1983 amendments have ceded excessive discretion to the judiciary, discretion that has been exercised in ways which frustrate congressional intent. Insofar as courts' enforcement of the 1983 revisions has chilled civil rights plaintiffs, the implementation has undermined congressional intent evidenced in substantive, procedural, and fee-shifting legislation that such parties' participation be facilitated. If Congress finds that judicial application has eroded this intent, as it did with numerous Supreme Court rulings of the 1988 Term, Congress could pass remedial procedural legislation analogous to the Civil Rights Act of 1990.[125] Indeed, Congress should broadly analyze whether the courts have invoked procedural provisions in a manner that frustrates its intent in substantive civil rights, and other, laws. Were Congress to conduct such a survey, it would discover that many judges implement procedures in ways which frustrate congressional intent and that this application requires correction.[126]

CONCLUSION

The 1983 amendments to Federal Rules 11, 16 and 26 were an experiment that considerably enhanced the federal judiciary's discretion. Numerous courts have enforced the new provisions in ways which detrimentally affect many litigants, especially civil

125. *See* Tobias, Civil Rights Procedural Legislation (1991) (unpublished manuscript) (on file with author); *supra* note 86 and accompanying text for discussion of recent congressional efforts.

126. *See* Tobias, Access, Excess, Congress (1991) (unpublished manuscript) (on file with author).

rights plaintiffs whose involvement in federal civil litigation Congress clearly intended to promote. Judicial application of revised Rule 11 has been sufficiently problematic to warrant prompt repeal or amendment. Moreover, the sanctioning requirements included in revised Rules 16 and 26 should be changed soon. It is unclear whether the remaining provisions of the two Rules that were amended in 1983 should be modified. Consequently, collection, analysis and synthesis of additional data on their implementation ought to proceed. Once that work is concluded, the Advisory Committee, the Supreme Court and Congress should be able to ascertain whether amendment is indicated.