NOTE

DEFINING THE POWER OF FEDERAL JUDGES IN PRETRIAL LITIGATION: WHERE TO DRAW THE LINE

What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation—Cardozo[1]

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On June 30, 1988, the Seventh Circuit Court of Appeals declared that United States district courts lack the authority to order a party already represented by counsel to appear at a pretrial settlement conference.[2] Six

1. Gully v. First Nat'l Bank, 299 U.S. 109, 117 (1936).
2. *See* G. Heileman Brewing Co. v. Joseph Oat Corp., 848 F.2d 1415 (7th Cir. 1988).

months earlier the Seventh Circuit Court of Appeals had ruled that United States district courts lack the power to order unwilling parties to participate in summary jury trials.[3] These rulings came as a surprise to a federal judiciary that had been strongly encouraged to take a more forceful and active role in pretrial affairs.[4]

The crux of the Seventh Circuit Court of Appeals' holding in both cases was that Federal Rule of Civil Procedure 16 does not *specifically* authorize a district court to compel compliance.[5] In fact, the court argued that the language of Rule 16 prohibited a district courts' actions in both instances by its construction.[6] The court also claimed that the Advisory Committee's Note on the 1983 amendment to Rule 16 sustained its view.[7]

Before proceeding with an analysis of the position of the Seven Circuit Court of Appeals, the background and rationale behind this dispute must be explored.

I. An Overview

A. *The Case load in the Federal Courts*

In the past several years, the federal courts have been inundated by vast amounts of litigation.[8] Congress has created new causes of action.[9] The jurisdiction of the federal courts has widened considerably.[10] The Federal Rules of Civil Procedure have also liberalized pleadings and discovery.[11] In a word, the federal courts are swamped.

Into this situation has stepped what many call a new kind of being: the managerial judge.[12] This type of judge involves himself early in the case by

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3. Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1987).

4. *See* McKay v. Ashland Oil, Inc., 120 F.R.D. 43 (E.D. Ky. 1988); Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448 (M.D. Fla. 1988).

5. G. Heileman Brewing Co. v. Joseph Oat Corp., 848 F.2d at 1420-21; Strandell v. Jackson County, 838 F.2d at 887.

6. G. Heileman Brewing Co. v. Joseph Oat Corp., 848 F.2d at 1420-21; Strandell v. Jackson County, 838 F.2d at 887.

7. Strandell v. Jackson County, 838 F.2d at 887.

8. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. Chi. L. Rev. 440, 440-44 (1986) [hereinafter McGovern]; Miller, *The Adversary System: Dinosaur or Phoenix*, 69 Minn. L. Rev. 1, 2-3 (1984) [hereinafter Miller].

9. Miller, *supra* note 8, at 5-6; Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374, 396 (1982) [hereinafter Resnik].

10. Miller, *supra* note 8, at 6-7.

11. *Id.* at 8-9.

12. Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. Chi. L. Rev. 306, 309 (1986) [hereinafter Elliott]; Resnik, *supra* note 9, at 378. *See also* Peckham, *Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning, and Alternative Dispute Resolution*, 37 Rutgers L. Rev. 253 (1985) [hereinafter Peckham]. The Honorable Robert F. Peckham is Chief Judge for the United States District Court for the Northern District of California. He devotes a large portion of his article to a direct response to the concerns expressed by Prof. Judith Resnik of the University of Southern California Law Center in

bringing the parties together for pretrial conferences, discussing the possibilities for settlement, and narrowing the issues for trial.[13] The judge's discretion in these pretrial procedures traditionally has been quite broad, and the 1983 amendments to Federal Rule of Civil Procedure 16 have considerably strengthened this power. Scheduling orders are mandated and pretrial settlement procedures are encouraged.[14] Of course, the court may not coerce an unwilling party to settle: "Rule 16 of the Fed. R. Civ. P. was not designed as a means for clubbing the parties—or one of them—into an involuntary settlement."[15]

B. *"Classic" Versus Managerial Judge*

This enhancement of the role of the federal judge in the pretrial stages of litigation has not come about without opposition. Indeed, it has been suggested that this type of judicial "interference" includes social costs in terms of judicial impartiality and settlements reached on grounds other than the merits.[16] Necessary public adjudication of important disputes may be lost.[17] "Reasoned" written decisions of precedential value may not be available.[18] Judges may become too involved in their cases, either losing their impartiality[19] or engaging in arbitrary "ad hoc" decision-making.[20] Society's and the litigants' need for a public forum to air disputes may not be fulfilled. The resulting loss of public confidence in our adjudicatory system could far out-

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her article on managerial judges. Judge Peckham calls upon his own and others' extensive hands-on experience in actual judicial management. *See id.* at 260-67.

13. Peckham, *supra* note 12, at 260-67. For an excellent in-depth treatise on both background and pretrial procedures in federal courts, *see* D. PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES (1986) (published by the Federal Judicial Center) [hereinafter Provine].

14. FED. R. CIV. P. 16, Advisory Committee's Notes on the 1983 amendments; Levin & Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 240-41 (1985).

15. Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985).

16. Resnik, *supra* note 9, at 424-34. Prof. Resnik's article is a strong attack against the innovations of managerial judicial procedure. She calls instead for a return to the classic model of adjudication, as symbolized by the blindfolded goddess Justicia, complete with scales and drawn sword. While she does raise some serious considerations, Judge Peckham does an able job of answering her. See Peckham, *supra* note 12.

17. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085-89 (1984). Prof. Owen M. Fiss, Public Law Professor at Yale University, points out important public policy arguments against court mediated settlement:

> [The judge's] job is not to maximize the ends of private parties, nor simply secure the peace, but to explicate and give force to the values embodied in authoritative text such as the constitution and statutes: to interpret those values and to bring reality in accord with them . . . . Civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals.

Id.

18. Elliot, *supra* note 12, at 314; Resnik, *supra* note 9, at 378, 422, 430.

19. Resnik, *supra* note 9, at 426-31.

20. Elliott, *supra* note 12, at 314, 328.

weigh any savings in time or money which increased efficiency would create in the short run.[21]

This dispute originates in two widely divergent points of view. Under one view, the so-called "traditional" judge is the only truly proper and just judicial decision-maker. According to this classic model, the judge remains passive throughout the litigation until called upon by counsel.[22] The opposing view is eminently practical. Looking at—and possibly caught in the middle of—the huge judicial overload, those who espouse the second view emphasize the practicality epitomized in the "managerial judge."[23]

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21. *See* Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986). In this article Prof. Resnik claims there has been a noticeable—and tragic—"loss of faith" in the American adjudicatory process. This "loss of faith" is traceable to the introduction of the Federal Rules of Civil Procedure in 1938. *Id.* at 498-515.

22. Resnik, *supra* note 9, at 442-43. This so-called "traditional" or "classical" judicial model must be examined with some care and skepticism. Traditional by whose standards? By those of the knight-champions who engaged in trial by battle in the early Middle Ages? By the old separated courts of chancery and law? By the old jury of twelve who would swear an oath that the facts as portrayed were true? By the framers of the Constitution? By the standards of today? Or is there some idyllic past model of Justice to which we should return—perhaps that of pre-Federal Rules of Civil Procedure days?

The question is really whether managerial judging is indeed the next step in the evolution of the judicial process. This is the point of Prof. E. Donald Elliott's article *Managerial Judging and the Evolution of Procedure*, *supra* note 12. For an excellent and enlightening overall treatment of the law and the evolutionary process, see Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38 (1985).

23. *See generally* Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 366-68 (1986) [hereinafter Posner]. In what may be the key to the divergence of the two opposing views, the Honorable Richard Posner, United States Circuit Judge for the Seventh Circuit Court of Appeals, explains that he is "a prisoner of [his] academic past." *Id.* at 367. Apparently "those making the proposals [for innovative managerial techniques] are practical rather than theoretical men, and most practical men think they can tell at a glance whether something works,and if it does they pronounce it successful." *Id.*

This statement contains both a sweeping assertion and a veiled apology. The assertion is that practical men are not theoretical, and therefore they are not cognizant of the various factors which theoretical men apply in their theoretical search for the truth. Such a broad generalization conjures up the old fable of the bumblebee: according to aerodynamic structural theory, the bumblebee cannot fly, as his construction and flight break the laws governing the science of aerodynamics. The only problem is that no one ever told the bumblebee. Other examples come readily to mind: the physician in the emergency room executing an innovative technique to save a life, utilizing his practical knowledge of the theoretic interworkings of the human body; thousands of research and development scientists all over the world combining theory with practice; farmers learning more about the physical and chemical make-up of their land and experimenting to find new and better methods of farming. Theory *put to practice* is the way mankind progresses.

The veiled apology alluded to above seems to be for Judge Posner's own lack of practical experience in a largely academic career. This academic mind-set, involving a preoccupation with the theoretical as opposed to the practical, may lie behind the opposition to judicial innovations which some authorities have expressed.

C. *Sources of Managerial Power*

Case law discusses the source and breadth of the district court's power to control its docket in terms of the court's "inherent power."[24] In the seminal case of *Link v. Wabash R.R. Co.*,[25] the United States Supreme Court, Justice Harlan writing, recognized that the "well-acknowledged" inherent power of the district court "is of ancient origin, having its roots in judgments of common law."[26] The Court reaffirmed this holding in *Roadway Express, Inc. v. Piper*[27] and held that a court may impose sanctions even in the absence of congressional authorization.[28] Recently the Supreme Court recognized that "a district court may adopt local rules that are necessary to carry out" its business.[29]

Federal Rule of Civil Procedure 83 (as amended in 1985) explicitly provides that "each district court . . . may . . . make and amend rules governing its practice *not inconsistent* with" the other Federal Rules of Civil Procedure.[30] In addition, "[i]n all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner *not inconsistent* with these rules or those of the district in which they act."[31] The Advisory Committee's Note explains that the district court rules may become effective immediately.[32] These rules remain in effect unless amended by the promulgating court or abrogated by the judicial council.[33] Ideally this mechanism of review by the judicial council for inconsistencies or errors in local rules will result in the desired uniformity.[34]

These two forms of authority—the district courts' inherent power and

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24. Thompson v. Housing Auth., 782 F.2d 829, 831 (9th Cir. 1986). For an excellent discussion of the court's inherent powers, see Eash v. Riggins Trucking Co., 757 F.2d 557 (3d Cir. 1985). *See also* Miller, *supra* note 8 (discussing the use of judicial sanctions and managerial judging); Note, *Civil Procedure—Power of Federal Courts to Discipline Attorneys for Delay in Pre-Trial Procedure*, 38 NOTRE DAME L. REV. 158 (1963) (maintaining the existence of the court's inherent powers) [hereinafter Note].

25. Link v. Wabash R.R. Co., 370 U.S. 626 (1962) (speaking of the court's power to dismiss a case for an attorney's failure to appear).

26. *Id.* at 629-30, 632.

27. Roadway Express, Inc. v. Piper, 447 U.S. 752, 765-66 (1980).

28. *Id.* at 765-66, *cited in* Eash v. Riggins Trucking Inc., 757 F.2d at 566-68.

29. Frazier v. Heebe, 107 S. Ct. 2607, 2611 (1987). *See also* Petrol Shipping Corp. v. Kingdom of Greece, 360 F.2d 103, 108 (2d Cir. 1966) ("when there is no Federal Rule, and no local one, the court may fashion one not inconsistent with the Federal Rules"); *In re* United Corp., 283 F.2d 593, 596 (3d Cir. 1960) (a "United States District Court, in all cases not provided for by the Federal Rules of Civil Procedure, 28 U.S.C., or by its local rules, may regulate the practice to be followed in proceedings . . . in any manner not inconsistent with the Federal Rules of Civil Procedure or statute").

30. FED. R. CIV. P. 83.

31. *Id.* (emphasis added)

32. FED. R. CIV. P. 83, Advisory Committee's Notes.

33. *Id.*

34. *Id.*

the power given district courts under Federal Rule of Civil Procedure 83—are inextricably linked. Justice Harlan, writing for the Supreme Court in *Link v. Wabash R.R. Co.*, upheld the inherent power of district courts, declaring:

> Petitioner's contention that the District Court could not act in the conceded absence of any local rule covering the situation here is obviously unsound. Federal Rule of Civil Procedure 83 expressly provides that "in all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."[35]

II. Participation in Pretrial Procedures: The Traditional Practice

Until the Seventh Circuit's recent decisions which were the impetus for this note, ordering litigants to participate in pretrial procedure was a commonly accepted practice in federal courts.[36] As far back as 1974, the Sixth Circuit Court of Appeals stated:

> We perceive no grounds for denying the trial judge the power to require attendance of any party to the case at any session of the court where the judge deems his presence necessary . . . . In short, *we have no doubt* that the District Judge had the right and the power to issue an order to [a party] to attend a pretrial session of the court and, on refusal, to enforce said order by contempt proceedings.[37]

The Sixth Circuit Court of Appeals also sustained a pretrial mandatory arbitration order issued by a lower court,[38] relying in part on a Fourth Circuit Court of Appeals decision upholding a similar order authorized under state law.[39] The court in that case upheld the district court's reasoning that

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35. Link v. Wabash R.R. Co., 370 U.S. at 633 n.8, *cited in* Eash v. Riggins Trucking Co., 757 F.2d at 568-69. *See also In re* Sutter, 543 F.2d 1030, 1037 (2d Cir. 1976).

36. *See* Brazil, *What Lawyers Want from Judges in the Settlement Arena*, 106 F.R.D. 85 (1985) (adopted from the study *Settling Civil Suits* published by the A.B.A. Judicial Administration Division in 1985) [hereinafter Brazil]. *See also* Provine, *supra* note 13, at 30-31.

37. *In re* LaMarre, 494 F.2d 753, 756 (6th Cir. 1974), *rev'd on other grounds*, 494 F.2d 753 (6th Cir. 1974) (emphasis added).

38. Rhea v. Massey-Ferguson, Inc., 767 F.2d 266, 268 (6th Cir. 1985).

39. Davidson v. Sinai Hosp., Inc., 462 F. Supp. 778 (D. Md. 1978), *aff'd*, 617 F.2d 361 (4th Cir. 1980).

Federal law now provides that specific courts may order pretrial arbitration in certain statutorily defined situations. Judicial Improvements and Access to Justice Act of November 19, 1988, Pub. L. No. 100-702, 1988 U.S. Code Cong. & Admin. News (102 Stat.) 4642 (to be codified at 28 U.S.C. §§ 651-658) [hereinafter Judicial Improvements]. The Judicial Improvements and Access to Justice Act contemplates an ongoing experiment in both mandatory and consensual arbitration. *Id.* at 4959-60. The Federal Judicial Center is to submit a summary of its findings, including the "level of satisfaction," to Congress within five years. *Id.* at 4663. In addition, the law empowers the Judicial Conference of the United States to develop model rules for arbitration. *Id.* The Act is prospectively repealed five years after its enactment. *Id.* at 4664.

This statute was passed to address the growing problem of burgeoning case loads and "to

although the arbitration board's findings were admissible as evidence, the parties' seventh amendment right to a trial by jury was not infringed.[40] The parties were ultimately entitled to a jury trial in both cases since the arbitration was non-binding.[41] The Ninth Circuit Court of Appeals affirmed a district court's dismissal of a party-plaintiff for failure of that *party* to obey a court order to appear at a settlement conference with authority to settle.[42]

A variety of non-binding dispute resolution procedures are listed in the *Manual for Complex Litigation, Second*.[43] The *Manual* advocates active judicial involvement early in the litigation.[44] Judicial participation in settlement conferences is encouraged; this includes *ordering the participation by parties themselves in pretrial settlement conferences*.[45] The *Manual* is edited by a panel of distinguished United States circuit and district judges.[46] In addition, a thorough reading of the cases and scholarly materials indicates that district courts routinely exercise the power to order litigants to participate in pretrial procedures.[47] With that foundation, we now turn to the recent seventh circuit cases denying the existence of that power.

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modernize the statutory framework for the Federal court rule making process." H.R. Rep. No. 889, 100th Cong., 2d Sess., *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 5982, 5983. Congress took note of the controversy surrounding court-ordered pretrial procedures. *Id.* at 5991. Congress concluded that more structured experimentation was needed before definite answers could be given. *Id.* at 5992-94.

40. Davidson v. Sinai Hosp., Inc., 462 F. Supp. at 781.

41. *Id.*; Rhea v. Massey-Ferguson, Inc., 767 F.2d at 268-69.

42. Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 947-51 (9th Cir. 1976).

43. MANUAL FOR COMPLEX LITIGATION, SECOND at § 23.12 (1985) [hereinafter MANUAL]. *See also* Provine, *supra* note 13.

44. MANUAL at § 20.11.

45. *Id.* at §§ 21.23, 23.12.

46. *Id.* at title page.

47. Lockhart v. Patel, 115 F.R.D. 44, 46-47 (E.D. Ky. 1987); G. Heileman Brewing Co. v. Joseph Oat Corp., 107 F.R.D. 275, 277 (W.D. Wis. 1985); Strandell v. Jackson County, 115 F.R.D. 333, 334-35 (S.D. Ill. 1987); Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448, 449 (M.D. Fla. 1988); Federal Reserve Bank v. Carey-Canada, Inc., 123 F.R.D. 603 (D. Minn. 1988). McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 44-49 (E.D. Ky. 1988), contains an excellent discussion of this issue. *See also* Bremer & Simmer, *One Day in Court: Suggestions for Implementing Summary Jury Trials in Iowa*, 36 DRAKE L. REV. 297, 308-09 (1986-87), (local rule of the United States District Court for the Southern District of Iowa, similar to the rule at issue in *McKay v. Ashland Oil*, empowered the judge to set civil cases for alternative dispute resolution procedures).

See also Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 464, 466-71 (1984) (discussing the sources of the court's power to order participation in summary jury trials).

The summary jury trial is a technique in which each side presents a synopsis of its case, usually without witnesses, to a six-person jury. The jury then delivers a consensus verdict. The procedure is designed to facilitate settlement. It usually takes less than a day. The Honorable Thomas D. Lambros, United States District Judge for the Northern District of Ohio, invented the summary jury trial. The technique has received wide acclaim from judges across the country. For more information on summary jury trials, see Lambros, *supra*.

III. The Seventh Circuit Court of Appeals' Restrictive View

A. *Outline of the Seventh Circuit Cases*

The Seventh Circuit Court of Appeals has emphatically rejected the model of the managerial judge and has severely limited the authority of federal judges to order litigants to participate in various pretrial procedures. In *Strandell v. Jackson County*[48] the court banned the use of mandatory summary jury trials.[49] *Strandell* involved a civil rights claim which would have taken five to six weeks to try.[50] The court ignored the district court's reference to the *1984 Judicial Conference Resolution on Summary Jury Trials.* The Judicial Conference, in its endorsement of summary jury trials, deleted the phrase "*only with the voluntary consent of the parties*" from its final draft, clearly connoting approval of mandatory summary jury trials.[51]

Subsequently, in *G. Heileman Brewing Co. v. Joseph Oat Corp.*,[52] the Seventh Circuit Court of Appeals held that the district court lacked jurisdiction to order *represented* parties to appear at pretrial conferences.[53] This move was even more surprising than the banning of mandatory summary jury trials, given the considerable precedent concerning the authority of district courts to order such attendance.[54] In *G. Heileman Brewing Co.*, all the parties but one were actively negotiating a settlement agreement.[55] Since the participation of the non-cooperating party was necessary for negotiations to proceed, the United States magistrate issued an order requiring all parties to send to the pretrial conference not only counsel but also a representative with full authority to settle.[56] The non-cooperating party refused to comply with the order, and sanctions were levied.[57] It must be remembered that, in both *G. Heileman Brewing Co.* and *Strandell*, the pretrial procedures ordered by the court were non-binding. The right to a jury trial remained intact.

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48. Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1987).

49. *Id.* at 886-88.

50. Strandell v. Jackson County, 115 F.R.D. at 336.

51. *Id.* at 335 (quoting from *Report of Judicial Conference Committee on the Operation of the Jury System Agenda G-13*, 4 (Sept. 1984); Report of the Proceedings of the Judicial Conference of the United States, 88 (Sept. 1984)).

52. G. Heileman Brewing Co. v. Joseph Oat Corp., 848 F.2d 1415 (7th Cir. 1988).

53. *Id.* at 1421-22.

54. *In re* LaMarre, 494 F.2d at 756-57; Van Bronkhorst v. Safeco Corp., 529 F.2d at 946-51; Manual, *supra* note 43, at §§ 21.23, 23.12. *See also* Rhea v. Massey-Ferguson, Inc., 767 F.2d 266, 268-69 (6th Cir. 1985); Davidson v. Sinai Hosp., Inc., 462 F. Supp. 778, 779-81 (D. Md. 1978), *aff'd*, 617 F.2d 361 (4th Cir. 1980).

55. G. Heileman Brewing Co. v. Joseph Oat Corp., 107 F.R.D. at 278-79.

56. *Id.*

57. *Id.* at 282-83.

B. *Rationale Behind the Seventh Circuit's Holdings*

The Seventh Circuit Court of Appeals' reaction against the summary jury procedure and other alternate dispute resolution techniques was forewarned by Seventh Circuit Judge Richard A. Posner.[58] Posner questioned both the fairness and the actual effectiveness of the summary jury trial.[59]

The primary rationale behind both *G. Heileman Brewing Co.* and *Strandell* was that the term "inconsistent" as used in Federal Rule of Civil Procedure 83 meant the district court's actions must be specifically authorized by a rule or statute:

> But nothing in Rule 16(f) specifically authorizes a district court to order a represented party to appear at a settlement conference . . . . But since Rule 16 allows district courts to order *only* attorneys and unrepresented parties to appear, ordering a represented party to appear at a settlement conference *is inconsistent* with Rule 16.[60]

A thorough reading of the two cases reveals the fact that the court considered the facts and merits of these two cases in isolation. For instance, the court attacked the district court's rationale for ordering the attendance of the parties at a pretrial settlement conference[61] without taking into consideration the wealth of materials showing this practice to be widespread and generally accepted throughout the country.[62] This is also true of the court's prohibition of the summary jury trial.[63] Once again there was abundant evidence of the widespread and positive use of the summary jury technique.[64]

C. *Comparable Cases from Other Courts*

In *G. Heileman Brewing Co.*, the court made a weak attempt to distinguish the case at bar from *In re LaMarre*.[65] The court relied on the fact that *In re LaMarre* was not binding precedent in the seventh circuit.[66] *In re LaMarre* involved the refusal of a claims manager of an insurance company (the defendant) to appear as ordered at a pretrial conference.[67] The counsel

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58. *See* Posner, *supra* note 23.

59. *Id.* at 375-86.

60. G. Heileman Brewing Co. v. Joseph Oat Corp., 848 F.2d at 1420-21 (emphasis added); *see also* Strandell v. Jackson County, 838 F.2d at 887-88.

61. G. Heileman Brewing Co. v. Joseph Oat Corp., 848 F.2d at 1421.

62. *See, e.g.*, Brazil, *supra* note 36, at 91.

63. Strandell v. Jackson County, 838 F.2d at 885-86.

64. Lambros, *supra* note 47, at 472-76, App. E-J, 496-518 (1984); McKay v. Ashland Oil, Inc., 120 F.R.D. at 46-48.

65. *In re* LaMarre, 494 F.2d 753 (6th Cir. 1974). *In re LaMarre* is relied on by the editors of MANUAL, *supra* note 43, at § 21.23 n.12, to show the court's authority to order attendance by clients.

66. G. Heileman Brewing Co. v. Joseph Oat Corp., 848 F.2d at 1426.

67. *In re* LaMarre, 494 F.2d at 754-57.

for both plaintiff and defense had agreed on a settlement figure.[68] However, the claims manager refused to approve the figure.[69] The Sixth Circuit Court of Appeals stated: "We perceive no grounds for denying the trial judge the power to require attendance of any party to the case at any session of the court where the judge deems his presence to be necessary."[70]

In a similar case, *Von Bronkhorst v. Safeco Corp.*,[71] the Ninth Circuit Court of Appeals affirmed the power of the district court to order the appearance of a party at a pretrial proceeding.[72] As in *In re LaMarre*, the counsel for both sides reached a stage in the proceedings where the presence of one of the parties was necessary for the case to settle.[73] That party failed to comply with the district court's order to appear.[74] The ninth circuit held:

> Though we are not here dealing with a pretrial conference, this rule [similar to Federal Rule of Civil Procedure 16] clearly demonstrates the authority of the court to respond to noncompliance with its orders . . . . The hands of the District Court *were not fettered by the lack of an explicit rule specifically covering the present issue* because, pursuant to the court's inherent power and Fed. R. Civ. P. 83, "when there is no Federal Rule, and no local rule, the court may fashion one not inconsistent with the Federal Rules."[75]

Both the sixth and ninth circuit cases were factually similar to *G. Heileman Brewing Co.* As Judge Flaum pointed out in his dissenting opinion, the facts of *In re LaMarre* were not distinguishable from the facts of *G. Heileman Brewing Co.*[76] Both cases were on the verge of settlement.[77] In both cases a party with binding authority to settle was deemed necessary to further the settlement process.[78] In both cases the parties ordered to attend contested the district court's power to compel attendance.[79] The factual pattern in *Von Bronkhorst* was also similar. In fact, the only real difference between the three cases is that the sixth and ninth circuit courts strongly affirmed the authority of the district court to compel attendance at pretrial procedures, while the seventh circuit denied that such powers existed.

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68. *Id.* at 755.
69. *Id.*
70. *Id.* at 756.
71. Van Bronkhorst v. Safeco Corp., 529 F.2d 943 (9th Cir. 1976).
72. *Id.* at 945-51.
73. *Id.* at 945-46.
74. *Id.*
75. *Id.* at 951 (emphasis added).
76. G. Heileman Brewing Co. v. Joseph Oat Corp., 848 F.2d at 1426 (Flaum, J., dissenting).
77. *Id.* (Flaum, J., dissenting).
78. *In re* LaMarre, 494 F.2d at 754-55; G. Heileman Brewing Co. v. Joseph Oat Corp., 848 F.2d at 1417-18.
79. *In re* LaMarre, 494 F.2d at 756; G. Heileman Brewing Co. v. Joseph Oat Corp., 848 F.2d at 1419.

In addition, the seventh circuit specifically rejected the reasoning in *Lockhart v. Patel*,[80] another factually similar case in which the judge dealt firmly with an arrogant party.[81]

D. *Flexibility Under the Federal Rules*

Although the seventh circuit opinions are aimed primarily at Federal Rules of Civil Procedure 16 and 83,[82] their overall restrictive, formalistic tone suggests a departure from the broad flexibility normally associated with the Federal Rules of Civil Procedure.[83] For example, in *Colgrove v. Battin*,[84] the United States Supreme Court affirmed the use of six-member juries in civil cases at a time when this was still an innovation.[85] As Judge William O. Bertelsman pointed out, the six-member jury is a greater intrusion into the autonomy of the attorney and the seventh amendment right to a trial by jury than are the pretrial procedures at issue here.[86]

In *Eash v. Riggins Trucking, Inc.*,[87] the Third Circuit Court of Appeals, sitting *en banc*, upheld the authority of the district courts to act in the absence of rules specifically authorizing the chosen course of action.[88] In so holding, the court *explicitly repudiated* the rationale that the simple absence of a specific rule or statute authorizing the district court's action does not necessarily invalidate that action.[89] The court emphatically rejected *Gamble v. Pope & Talbot, Inc.*[90] In that case the third circuit had previously held that the court lacked inherent power, in the absence of specific authorization, to impose sanctions on an attorney.[91] In *Eash* the court pointed out

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80. Lockhart v. Patel, 115 F.R.D. 44 (E.D. Ky. 1987).

81. *Id.* at 45-47.

82. Strandell v. Jackson County, 838 F.2d at 887; G. Heileman Brewing Co. v. Joseph Oat Corp., 848 F.2d at 1420-22.

83. *See, e.g.*, Societe Internationale v. Rogers, 357 U.S. 197, 208 (1958) ("the Rule allows a court all the flexibility it might need in framing an order appropriate to a particular situation").

84. Colgrove v. Battin, 413 U.S. 149 (1973).

85. *Id.* at 161-64.

86. McKay v. Ashland Oil, Inc., 120 F.R.D. at 45-46. (William O. Bertelsman is a United States District Judge for the Eastern District of Kentucky.)

87. Eash v. Riggins Trucking Inc., 757 F.2d 557 (3d Cir. 1985).

88. *Id.* at 564-69.

89. In doing so, the Third Circuit Court of Appeals essentially repudiated the rationale of the Seventh Circuit Court of Appeals. *See* G. Heileman Brewing Co. v. Joseph Oat Corp., 848 F.2d at 1420-21; Strandell v. Jackson County, 838 F.2d at 887-88.

90. Gamble v. Pope & Talbot, Inc., 307 F.2d 729 (3d Cir.), *cert. denied*, 371 U.S. 888 (1962).

91. *Id.* at 730-33. *Gamble v. Pope & Talbot, Inc.* came under immediate fire. *See id.* at 733-37 (Biggs, C.J., and Goodrich, J., dissenting). *See also* Note, *supra* note 24; Eash v. Riggins Trucking, Inc., 757 F.2d at 565 (citing Miranda v. Southern Pac. Transp. Co., 710 F.2d 516, 520 (9th Cir. 1983); Martinez v. Thrifty Drug & Discount Co., 593 F.2d 992, 993 (10th Cir. 1979); *In re* Sutter; 543 F.2d 1030, 1037 (2d Cir. 1976); Richman v. General Motors Corp., 437 F.2d 196, 200 (1st Cir. 1971)).

that the United States Supreme Court had previously upheld the authority of the district court to act, even though not specifically authorized by Congress.[92]

Thus, the seventh circuit is in relative isolation in its restrictive holding. The circuit has rejected the clear reasoning of the United States Supreme Court and other circuit and district courts.[93] Significantly, the seventh circuit's recent decisions in *G. Heileman Brewing Co.* and *Strandell* directly contradict the rationale of another of its recent opinions.

E. DiCaro *and the Federal Rules of Evidence*

In 1985 the Seventh Circuit Court of Appeals decided *United States v. DiCaro*.[94] In that case the court condemned "formalistic" interpretations of Federal Rule of Evidence 801(d)(1)(A), which would render grand jury testimony by a reluctant witness (falsely claiming amnesia) inadmissible at trial.[95] The court held that Rule 801(d)(1)(A) should be construed broadly, *specifically rejecting the narrow use of the statutory word "inconsistent."*[96] The court stated: "[W]e do not read the word 'inconsistent' in Rule 801(d)(1)(A) to include only statements diametrically opposed or logically incompatible."[97]

Thus, a dilemma: either the seventh circuit has inconsistent definitions of the word "inconsistent," or the court applies to the Federal Rules of Evidence a rationale different from the one it utilizes when construing the Federal Rules of Civil Procedure. There does not appear to be a rational basis for the difference in definition.

IV. Attorneys' Reactions to Managerial Judging

A. *Requiring Attendance of Counsel*

This note would not be complete without an examination of attorneys' reactions to the newly perceived role of managerial judges. Professor Brazil,

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92. Eash v. Riggins Trucking, Inc., 757 F.2d at 565-68, (citing Roadway Express, Inc. v. Piper, 447 U.S. at 765-66 (citing Link v. Wabash R.R. Co., 370 U.S. at 630-31)). *See also* Eash v. Riggins Trucking, Inc., 757 F.2d at 568-69 (citing Link v. Wabash R.R. Co., 370 U.S. at 633 n.8).

93. G. Heileman Brewing Co. v. Joseph Oat Corp., 848 F.2d at 1420-22.

94. United States v. DiCaro, 772 F.2d 1314 (7th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986). *DiCaro* is utilized in C. Mueller & L. Kirkpatrick, Evidence under the Rules, *Hearsay Exceptions* 191 (1988).

95. United States v. DiCaro, 772 F.2d at 1321-25.

96. *Id.* at 1321 (quoting from United States v. Williams, 737 F.2d 594, 608 (7th Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985)).

97. *Id.* at 1321. It is interesting to note that Judge Joel M. Flaum, the author of *United States v. DiCaro*, emphatically dissented from *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 848 F.2d at 1423-27. Judge Flaum is a former United States District Judge from the Northern District of Illinois.

acting under the auspices of the Lawyers' Conference and the National Conference of Federal Trial Judges of the A.B.A.'s Judicial Administrative Division, published a survey of the reactions of trial attorneys to strong judicial management.[98] Brazil observed:

> [I]n overwhelming numbers, litigators say judges should get *actively* involved in settlement negotiations in most cases in federal court. Lawyers clearly believe that federal judges can make important contributions to the settlement dynamic and can significantly improve the prospects that the parties will reach an agreement.
>
> A staggering 85% of the 1,886 lawyers who responded to the questionnaire feel that involvement by federal judges in settlement discussions is likely to improve significantly the prospects for achieving settlement. Nearly three of every four of the lawyers polled feel strongly enough about what judges have to offer to endorse the view that a settlement conference hosted by a judge should be *mandatory* in most cases in federal court. And virtually the same percentage say they prefer a settlement judge who actively offers suggestions and observations to one who simply facilitates communication between the parties.[99]

The article goes on to describe some regional differences in opinion. For example, Florida attorneys had not been much exposed to judicial management.[100] Consequently, they were not as likely to endorse mandatory settlement conferences as attorneys from northern California, where such procedures are more common.[101]

B. *Requiring Attendance of Parties*

An even more interesting finding from the study is that fifty-five percent of those responding believed that settlement conferences were "significantly more likely to be productive *if the clients [were] required to attend.*"[102] Northern California attorneys were again most likely to prefer this policy, perhaps because settlement conferences are commonplace in that part of the country.[103]

The critical position portrayed here is that *requiring* clients to attend appears to be a widespread and well-accepted method of court operation. The questionnaires used in Brazil's survey were sent to attorneys in the districts of northern California, western Missouri, western Texas, and northern Florida.[104] Thus, the practice appears to be much broader than seems appar-

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98. Brazil, *supra* note 36.

99. *Id.* at 85 (emphasis original).

100. *Id.* at 88.

101. *Id.* Additionally, the A.B.A. Action Commission Report advocates judicial case-flow management. Peckham, *supra* note 12, at 259.

102. Brazil, *supra* note 36, at 91 (emphasis added).

103. *Id.*

104. *Id.* at 86.

ent in *G. Heileman Brewing Co. v. Joseph Oat Corp.* As the third circuit pointed out " 'courts have exercised vastly similar powers . . . for centuries,' and the failure of many 'courts to use this particular penalty does not prove the absence of the power to levy it.' "[105]

V. Judges' Attitudes Toward Managerial Judging

Judges by and large appear to be stepping willingly into the role of active judicial management.[106] Judges are encouraged to take over processing of cases early and follow through on docket control.[107] The Federal Judicial Center conducts workshops and seminars for federal judges, and advocates a pro-management philosophy.[108] The 1983 amendments to the Federal Rules of Civil Procedure were designed to further this goal.[109] In fact, the Federal Judicial Center reported that twenty-five federal judges were utilizing the summary jury trial by 1986.[110] Further, the judges themselves have praised the use of techniques such as the summary jury trial in select cases.[111]

VI. Proposal: Judicial Experimentation

Former Chief Justice Warren Burger has called for careful study and experimentation in the field of judicial management.[112] Judge Posner has also suggested an empirical study of judicial management techniques.[113] This call has been echoed in both the academic and the judicial world.[114]

The best strategy would be for each circuit to undertake controlled experiments individually. Each circuit could tailor the study and techniques to its unique needs. Each would be responsible for the collection and evaluation of data, and could implement procedures based on such findings. These

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105. Eash v. Riggins Trucking, Inc., 757 F.2d at 567 (quoting Note, *supra* note 24, at 165).

106. Miller, *supra* note 8, at 21. *See, e.g.*, Peckham, *supra* note 12, at 253-59.

107. Manual, *supra* note 43, at §§ 20.1, 20.11.

108. Miller, *supra* note 8, at 30.

109. *Id.*, Peckham, *supra* note 12, at 258. *See* Advisory Committee's Note to 1983 amendments to Fed. R. Civ. P. 16.

110. McKay v. Ashland Oil, Inc., 120 F.R.D. at 50 n.21.

111. *Id.* at 46. *See* Lambros, *supra* note 47; Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. at 449.

112. Burger, *Symposium: Reducing the Costs of Civil Litigation; Introduction*, 37 Rutgers L. Rev. 217 (1985) [hereinafter Burger].

113. Posner, *supra* note 23, at 393.

114. McKay v. Ashland Oil, Inc., 120 F.R.D. at 49-51; McGovern, *supra* note 8, at 451-52. *See also* Elliott, *supra* note 12. Elliott urges a comprehensive approach including, if necessary, studying and redesigning pretrial procedural rules. Elliott writes:

> Reforming procedural incentives to promote just settlements requires a fundamental change in the way that we view civil procedure. Before such changes can be made, we will have to stop thinking of the 'pretrial' process as a prelude to trial, and start thinking of it as the 'main event' . . . .

Id. at 335.

data should be collected and carefully analyzed by the Federal Judicial Center. Recommended applications could then be compiled and published in a format similar to the *Manual for Complex Litigation*. Amendments to the Federal Rules of Civil Procedure could be adopted if necessary. Of course, the Seventh Circuit has effectively frustrated any attempts at active experimentation in that circuit.[115]

VII. Conclusion

It appears that the Seventh Circuit has been unduly hasty. Instead of deciding the two cases on their individual facts, the circuit has produced a sweeping condemnation of innovative judicial management. This attitude is in direct conflict with both common practice and the case law.

There is an overload of cases in the federal courts. Judges are called upon to expedite the flow of cases.[116] They are encouraged to initiate settlements.[117] In short, they are called upon to grow from passive observers, only acting when requested to do so, into active participants in the litigation process.[118]

A strong reaction has arisen, due to the fear that many judicial and societal values will be lost if this trend continues.[119] Other more thoughtful voices have urged controlled studies of various judicial and case management techniques to evaluate effectiveness and fairness.[120]

The Seventh Circuit Court of Appeals has cut off this growth in its infancy.[121] It has neglected to consider the vast and growing amount of material on this subject. It has also refused to listen to those judges who do the day-to-day trial work in the federal courts—the district judges. Instead, by utilizing the "formalistic" reasoning repudiated in *DiCaro*, the Seventh Circuit concluded that the techniques employed by the district judges in *G. Heileman Brewing Co.* and *Strandell* were "inconsistent" with the Federal Rules of Civil Procedure *because the techniques were not specifically provided for in the rules.*[122] The Seventh Circuit has in effect ruled that future judicial experimentation is prohibited unless specifically provided for by the rules.[123]

Judicial management must—and will—go on. However, it must be stud-

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115. McKay v. Ashland Oil, Inc., 120 F.R.D. at 50 (Bertelsman, J.).
116. Manual, *supra* note 43, at § 20.13.
117. *Id.* at § 23.11.
118. Miller, *supra* note 8, at 14.
119. Resnik, *supra* note 9; Posner, *supra* note 23.
120. Elliott, *supra* note 12, at 451-52; McKay v. Ashland Oil, Inc., 120 F.R.D. at 49-51; Burger, *supra* note 111, at 217.
121. McKay v. Ashland Oil, Inc., 120 F.R.D. at 50.
122. *See* G. Heileman Brewing Co. v. Joseph Oat Corp., 848 F.2d at 1420-22; Strandell v. Jackson County, 838 F.2d at 886-888.
123. McKay v. Ashland Oil, Inc., 120 F.R.D. at 50.

ied and applied with care. The other circuits should organize controlled studies of judicial management techniques.[124] Individual courts should keep track of techniques that are used and their relative effectiveness. The Federal Judicial Center should coordinate, collect, and analyze the data from the various studies. Federal judges should—and will—continue to conscientiously experiment and innovate. In the end, society's confidence in the justice system is really the measure of confidence it has in its judges.[125]

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124. Congress has already provided the initiative for judicial experimentation. *See* Judicial Improvements, *supra* note 39, at 4659-63. This congressional bill should be seen as a signal to move ahead, albeit with caution, into the realm of pretrial procedures aimed at settlement.

125. *See* Miller, *supra* note 8, at 33-35.