G. Heileman Brewing Co. v. Joseph Oat Corp.: Expanding Rule 16’s Scope to Compel Represented Parties with Full Settlement Authority to Attend Pretrial Conferences

Tony J. Masciopinto

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Tony J. Masciopinto, G. Heileman Brewing Co. v. Joseph Oat Corp.: Expanding Rule 16’s Scope to Compel Represented Parties with Full Settlement Authority to Attend Pretrial Conferences, 39 DePaul L. Rev. 931 (1990)
Available at: https://via.library.depaul.edu/law-review/vol39/iss3/12

This Notes is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.
G. HEILEMAN BREWING CO. V. JOSEPH OAT CORP.: EXPANDING RULE 16'S SCOPE TO COMPEL REPRESENTED PARTIES WITH FULL SETTLEMENT AUTHORITY TO ATTEND PRETRIAL CONFERENCES

INTRODUCTION

The first significant use of the pretrial conference in the United States took place in Michigan, in 1929. Since then, two controversies regarding the pretrial process have reigned. One conflict involves the proper role of pretrial conferences in litigation, the critical issue revolving around whether pretrial conferences should aim chiefly to delineate issues and shape the case for trial, or promote settlement. The other controversy has served as "a battleground of clashing philosophies about the proper role of the judge in common law litigation."

The pretrial controversies became a procedural concern of the federal courts in 1938 after the promulgation of Rule 16 of the Federal Rules of

4. M. Rosenberg, supra note 2, at 10. Professor Rosenberg further states, "[b]ecause the pretrial conference confronts the judge with so many choices as to the intensity of his participation, and does so in an atmosphere less inhibited than at the trial itself, it is an unmatched ground to test competing views as to the judge's due function in a civil litigation." Id. at 10-11. See also Resnik, Failing Faith: Adjudicatory Procedure in Decline, 53 U. Chi. L. Rev. 494, 496 (1986) (the Federal Rules of Civil Procedure fail to address judges' proper role in shaping settlements).
Civil Procedure.\textsuperscript{5} The Rule, among other things, provided for mandatory pretrial conferences and was designed to provide federal judges with a means to effectively manage their crowded dockets.\textsuperscript{6} Although Rule 16 was viewed as a success, it was substantially revised in 1983.\textsuperscript{7}

The primary goal of the 1983 amendment was to promote active case management by allowing courts to gain greater control over the pretrial process and to facilitate settlement.\textsuperscript{8} Moreover, Rule 16 advocates a more active judicial role in all aspects of the litigation process.\textsuperscript{9} Thus, the 1983 amendment to Rule 16 officially marked the end of an era. No longer would judges be perceived as passive adjudicators or umpires. Rather, Rule 16 catapults each federal district court judge into the role of an active case manager.\textsuperscript{10}

Despite the fact that the drafters clearly advocated the facilitation of settlement and a more active judicial role, the 1983 amendment did not put an end to the pretrial controversies. Arguably, however, the debate has become more refined. The concern no longer focuses on whether settlement should be an objective of pretrial litigation or whether judges should take an active managerial role; instead, the controversy now focuses on the proper interpretation and scope of Rule 16. \textit{G. Heileman Brewing Co. v. Joseph}

\textsuperscript{5} Rule 16 as originally promulgated in 1938 provided in pertinent part:
In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:
(1) The simplification of the issues;
(2) The necessity or desirability of amendments to the pleadings;
(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
(4) The limitation of the number of expert witnesses;
(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
(6) Such other matters as may aid in the disposition of the action.
... The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to nonjury actions or extend it to all actions.

\textsuperscript{6} In an act of desperation, the Circuit Court of Wayne County, Michigan established a system of compulsory pretrial conferences to manage its congested civil calendar, which was forty-five months in arrears. The process appeared to succeed in reducing docket congestion. Thus, the drafters of the Federal Rules of Civil Procedure adopted a similar procedure in 1938 as Rule 16. \textit{See} Oesterle, \textit{supra} note 1, at 7.

\textsuperscript{7} FED. R. CIV. P. 16 advisory committee’s note (Introduction).
\textsuperscript{8} FED. R. CIV. P. 16 (a)(2), (5); \textit{id.} 16 (c)(7).
\textsuperscript{9} FED R. CIV. P. 16 advisory committee’s note (Pretrial Conferences; Objectives).

G. HEILMAN, INC. v. JOSEPH OAT CORP.

Oat Corp., directly addresses this new pretrial controversy. The case attempts to define Rule 16's proper scope in terms of the judicial promotion of pretrial settlement and, more generally, managerial judging.

In Heileman, the Seventh Circuit held that district courts retain the authority to "order litigants [who are] represented by counsel to attend pretrial conferences" and to have "full settlement authority" to discuss settlement. The Seventh Circuit reasoned that such an exercise constituted a valid use of courts' inherent power and furthered Rule 16's spirit and intent.

The Seventh Circuit's decision is significant because it requires represented parties to be actively involved in pretrial settlement negotiations before a judge or magistrate. The decision is also significant because it lends a broad interpretation to the determination of a judge's proper role in the newly established procedural universe of "active judicial management." The Seventh Circuit's legal analysis is also important because the majority transcended Rule 16's language and the Advisory Committee's Note in reaching its decision and relied instead on district courts' inherent power to control and manage their dockets.

This Note will analyze the Seventh Circuit's decision and legal analysis. It will begin with an overview of the relevant federal rules of civil procedure, courts' inherent power, and pertinent case law. The Note will then attempt to demonstrate that the Seventh Circuit inappropriately ignored the plain language of Rule 16. Further, the Note will illustrate that the majority's articulation and reliance on courts' inherent authority fails to support its holding and indeed is inconsistent with Rule 16's underlying objectives. Finally, the Note attempts to offer an alternative holding that better addresses the policy concerns identified by the majority, and examines some of the questions left unanswered in Heileman.

I. BACKGROUND

Heileman ultimately turns on the interpretation of Rule 16 and federal courts' inherent power. The decision, however, also involves Rules 1 and 83 of the Federal Rules of Civil Procedure. Rule 1 requires district courts to construe liberally the federal rules in order to achieve a just, speedy, and inexpensive determination of every action. Rule 16, which is essential in fostering Rule 1's mandate, regulates the substantive aspects of pretrial activities in the federal courts. District courts can, however, rely on local rules in addition to Rule 16, in governing pretrial matters. Moreover, Rule 83 provides district courts with the authority to promulgate these local rules.

11. 871 F.2d 648 (7th Cir. 1989) (en banc).
12. Id. at 656.
13. Id. 652-53.
14. Additionally, Rule 16(b) expressly mandates that judges be cognizant of local rules. It provides, in part, that "[e]xcept in categories of actions exempted by district court rule as inappropriate . . . the judge . . . shall . . . enter a scheduling order." FED. R. CIV. P. 16(b).
While the Heileman decision implicates each of these rules, the Seventh Circuit ultimately relied on courts' inherent power to justify its holding. Although the existence of courts' inherent authority is irrefutable, it is an elusive, ambiguous legal doctrine, the exact scope of which is still undefined.\textsuperscript{15}

\textbf{A. The Rules: 1, 16, 83}

1. Rule 1

\textit{Rule 1} of the Federal Rules of Civil Procedure\textsuperscript{16} states that the federal rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."\textsuperscript{17} In addition to providing federal courts with a basic guideline of construction when applying the Federal Rules of Civil Procedure,\textsuperscript{18} Rule 1 mandates that these courts construe the rules liberally to advance justice, even if in derogation of the common law.\textsuperscript{19} Thus, the federal rules should facilitate, rather than inhibit, the just resolution of

\textsuperscript{15} Judge Crastley, in his book \textit{Inherent Powers of the Courts}, cites a "working definition" of inherent power as "all powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective." J. CRASTLEY, \textit{INHERENT POWERS OF THE COURTS} vi (1980).

\textsuperscript{16} In 1935, the Supreme Court appointed an Advisory Committee to draft the Federal Rules of Civil Procedure. See Order Appointing Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774 (1935). The Rules were promulgated pursuant to the Rules Enabling Act, which provides in pertinent part:

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions . . . .

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.


\textsuperscript{17} FED. R. CIV. P. 1. Rule 1 is entitled "Scope of Rules" and provides:

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Id.

\textsuperscript{18} 2 J. MOORE, J. LUCAS, H. FINK, C. THOMPSON, \textit{MOORE'S FEDERAL PRACTICE} \textsection 1.13[1] (1989) [hereinafter 2 MOORE'S]. One judge, commenting on Rule 1's importance, stated that "'[t]here is probably no more elementary mandate under the Federal Rules than that set forth in the second sentence of Rule 1. The rules have for their primary purpose the securing of speedy and inexpensive justice in a uniform and well ordered manner.'" Davis v. Synhorst, 217 F. Supp. 492, 509 (S.D. Iowa 1963) (McManus, J., dissenting).

\textsuperscript{19} 4 C. WRIGHT & A. MILLER, \textit{FEDERAL PRACTICE AND PROCEDURE} \textsection 1029 (1977) [hereinafter 4 WRIGHT & MILLER]. Cf. Hickman v. Taylor, 329 U.S. 495, 514 (1947) (discovery rules should be liberally construed so as not to reach a harsh and unwarranted result).
disputes and the outcome of cases should turn on their merits rather than on technical issues of pleading and procedure. While the federal rules provide procedural guidance and instruction, they give only general direction to litigants. Commentators have stated that the keystone to the effective functioning of the federal rules lies with the trial courts' discretion. Rule 1, through its goal of a "just, speedy, and inexpensive determination" of litigation, serves as a broad foundation for courts' consideration of all federal procedural matters and exemplifies the discretionary nature of the federal rules.

Federal courts, however, do not have unlimited power to interpret the federal rules. Rather, they must adhere to a rule's plain meaning. Furthermore, in interpreting the rules, the Supreme Court has found the Advisory Committee's Notes to be persuasive. The committee notes, while not conclusive, are analogous to legislative history. Finally, each federal rule should be interpreted in light of its relation to the larger procedural system.

20. See 2 Moore's, supra note 18, at § 1.13[1]. See also Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 373 (1966) ("The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals. . . If rules of procedure work as they should. . . they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits."); Hornell v. Helvering, 312 U.S. 552, 557 (1941) ("Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. . . Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.").

21. See 2 Moore's, supra note 18, at § 1.13[1]; Foman v. Davis, 371 U.S. 178, 181-82 (1962) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.") (quoting Conley v. Gibson, 355 U.S. 41, 48 (1957)). Cf. Davis v. Duplantis, 448 F.2d 918, 921 (5th Cir. 1971) (court permitted witness to testify even though not listed in pretrial order); Fed. R. Civ. P. 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.").

22. See 2 Moore's, supra note 18, at § 1.31[1].

23. Wright & Miller, supra note 19, at § 1029 (trial judges' failure to exercise discretion intelligently on case-by-case basis will have a debilitating effect on entire federal judicial system; Davis, 448 F.2d at 921 (quality of justice will prevail only if district courts apply federal rules with intelligent flexibility).

24. Wright & Miller, supra note 19, at § 1029.


26. See Mississippi Publishing Corp. v. Murphee, 326 U.S. 438, 444 (1946) (committee's construction of rules is "of weight" in ascertaining their meaning). See also United States v. 720 Bottles Labeled 2 Fl. Oz. * * * Plantation Pure Vanilla Extract, 3 F.R.D. 466, 467 (E.D.N.Y. 1944) (drafters' statements must be accorded great respect); 2 Moore's, supra note 18, at § 1.13[2] (advisory notes are persuasive and drafters entitled to respect accorded impartial experts).

27. 2 Moore's, supra note 18, at § 1.13[2].

2. Rule 16

To a great extent, the length of the pretrial process and the actions taken by the parties and judge during the pretrial process will determine whether a resolution is considered to be "just, speedy, [or] inexpensive." Rule 16 plays an important role in furthering Rule 1's mandate and regulates the substantive facets of pretrial procedure.

The settlement of cases has never been an explicit objective of the traditional pretrial conference. The original drafters of Rule 16 intended settlement to be only a natural by-product of the pretrial process. Justice Clark further explained the drafters' omission:

This omission was, however, deliberate, even though such settlements are often the substantial by-product of pre-trial. But it has been felt, and experience supports this, that settlement will come naturally in many cases as the issues are defined and made clear and simple. On the other hand, it is dangerous to the whole purpose of pre-trial to force settlement upon unwilling parties and to make the conference the recognized instrument of compelled negotiations. Pre-trial used as a club to force settlements will destroy its utility as a stage of the trial process itself and will pretty surely lead to its elimination as its potentialities for unfairness become more apparent to litigants and their counsel.

Both courts and scholars have articulated this traditional notion of pretrial practice. Nevertheless, even though the traditional pretrial conference was

29. See, e.g., Shell Oil Co. v. M/T Gilda, 790 F.2d 1209, 1215 (5th Cir. 1985) ("[a] party need not offer proof as to matters not contested in the pretrial-order" because such a holding would "not be consonant" with Rule 1's mandate); Elder-Beerman Stores Corp. v. Federated Dept Stores, 459 F.2d 138, 150 (6th Cir. 1972) ("[F]ormal pretrial orders . . . could have substantially reduced the time required to try the case and might well have eliminated some of the time-consuming testimony which was irrelevant").

30. Clark, Objectives of Pre-Trial Procedures, 17 Ohio St. L.J. 163, 167 (1956) (the primary purpose of the original Rule was to define claims and defenses of parties for the purpose of eliminating unnecessary proof and issues). See also Wallin v. Fuller, 476 F.2d 1204, 1208 (5th Cir. 1973) ("The pretrial conference serves the purposes of expediting litigation and eliminating surprises at trial.").

31. See Clark, supra note 30, at 167 (Justice Clark was reporter to the original advisory committee). See also Comment, Limits of Judicial Authority, supra note 3, at 311 (settlement discussions were viewed as a natural by-product of traditional pretrial conferences).

32. Clark, supra note 30, at 167 (footnote omitted).

33. See, e.g., FDIC v. Glickman, 450 F.2d 416, 419 (9th Cir. 1971) (Rule 16's purpose is "to simplify the issues, amend the pleadings where necessary, and to avoid unnecessary proof of facts at the trial.") (quoting McDonald v. Bowies, 152 F.2d 741, 742-43 (9th Cir. 1945)); Padovani v. Bruchhausen, 293 F.2d 546, 548 (2d Cir. 1961) (Rule 16 "calls for a conference of counsel with the court to prepare for, not to avert, trial.") (emphasis in original); Brennan, Pretrial Procedure in New Jersey—a Demonstration, 28 N.Y.S.B. Bull. 442, 449 (1956) ("[T]he overriding, primary, almost exclusive function of the pretrial conference is to further the disposition of the cases according to right and justice on the merits.").

reprinted in M. Rosenberg, supra note 2, at 7; Handbook for Effective Pretrial Procedure, reprinted in 37 F.R.D. 255, 271 (1964) ("[I]t should never be forgotten that settlement is merely a by-product of the pretrial conference and not its prime purpose.").
deemed a general success, it was completely revised in 1983 to facilitate pretrial management and to meet the "needs of modern litigation." The 1983 drafters desired to make case management an express goal of pretrial procedure. Thus, they shifted the emphasis away from the traditional pretrial conferences, which focused solely on the trial, towards a process of judicial management that embraced the entire pretrial phase. Judicial management was deemed necessary because it had become commonplace for attorneys to abuse the pretrial process. The drafters, therefore,

34. The drafters stated that pretrial conferences improved the quality of justice rendered at trial by sharpening the preparation and presentation of cases, which seemingly eliminated trial surprise, and improved, as well as facilitated the settlement process. FED. R. CIV. P. 16 advisory committee's note (Introduction).

35. Id. A criticism of the original Rule 16 was that it often resulted in over-regulation of the "simple run-of-the-mill" cases and under-administration, due to its highly discretionary character, of complex cases. Id. See also Peckham, The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition, 69 CALIF. L. REV. 770, 774 (1981) (enumerating "crucial issues" not addressed by original Rule 16).

36. Rule 16(a) currently states, in pertinent part:
(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as
   (1) expediting the disposition of the action . . . and[
   (5) facilitating the settlement of the case.
FED. R. CIV. P. 16 (a).

37. FED. R. CIV. P. 16 advisory committee's note (Pretrial Conferences; Objectives). The original Rule 16 made the impending trial the focus of pretrial activity and provided courts with the authority to compel attorneys to appear before them to consider the available means to expedite resolution of the dispute. See supra note 5 (Rule 16 as originally promulgated in 1938). Some of the rule's objectives included simplifying the issues, amending the pleadings, and limiting the number of expert witnesses. The 1983 drafters thought these somewhat limited objectives inadequate tools for purposes of case management. FED. R. CIV. P. 16, advisory committee's note (Introduction). Therefore, they broadened the scope of Rule 16's objectives by allowing courts, in part, to establish early control of the case to properly manage its disposition, to discourage wasteful pretrial activities, and to facilitate settlement. FED. R. CIV. P. 16(a). The drafters also expanded the list of items that may be discussed at the pretrial conference. Id. at 16(c).

Perhaps the greatest advancement towards a pretrial conference that "embraced the entire pretrial phase" was the addition of 16(b), which provides for a mandatory scheduling order. This significant change encourages early judicial involvement in case management. See J. MOORE, FEDERAL PRACTICE 1990 RULES PAMPHLET ¶ 16.2[4] (1990). Unlike the original Rule 16 which made no reference to a scheduling order and left scheduling to the litigants, the amended Rule 16 requires courts to issue, within 120 days after the suit is filed, a scheduling order that articulates a timetable for joining other parties, amending pleadings, filing and hearing motions, and completing discovery. FED. R. CIV. P. 16 (b). In this way, the 1983 drafters provided courts with the responsibility and authority to control the length of the pretrial process.

displaced attorney control over the pretrial process and replaced it with judicial control in order to further the efficiency and integrity of the judicial process. Even though district court judges now have the authority to determine the length of the pretrial process and when and how quickly cases are to be tried, the specific techniques of the individual judges vary.

In addition to making settlement an express objective of the pretrial process, Rule 16(a) also differs from the original Rule 16 in that the 1983 drafters provided district courts with the authority to compel “unrepresented parties” to attend pretrial conferences. While Rule 16 appears to make a consistent distinction between represented and unrepresented parties, the drafters did not explicitly provide district courts with the authority to compel “represented parties” to attend pretrial conferences.

Rule 16(c) expanded the list of items which could be discussed at a pretrial conference to encourage better planning and management of litigation.

39. See Fed. R. Civ. P. 16(b). Rule 16 advocates “judicial management that embraces the entire pretrial phase.” Fed. R. Civ. P. 16 advisory committee’s note (Pretrial Conferences; Objectives). See also Schwarzer, Managing Civil Litigation: The Trial Judge’s Role, 61 Judicature 400, 402 (1978) (case management encourages judges to “intervene in civil litigation and take an appropriately active part in its management from the beginning”); Justice Delayed, supra note 2, at 39 (objective of case management is “the assumption of court responsibility for both the pace and the substantive progress of the pretrial stage of civil litigation”); Cf. Elliott, supra note 10, at 309 (“Managerial judges believe that the system does not work; that something must be done to make it work; and that the only plausible solution to the problem is ad hoc procedural activism by judges.”) (emphasis in original).


41. Compare Fed. R. Civ. P. 16 (original Rule 16 stated that “the court may in its discretion direct the attorneys for the parties to appear before it for a conference”) with Fed. R. Civ. P. 16(a) (amended Rule 16 states that “the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference”) (emphasis added).

42. In addition to Rule 16(a), Rules 16(b), (c), and (d) all distinguish between represented and unrepresented parties. Compare Fed. R. Civ. P. 16(b) (requires judge to “consult[] with the attorneys for the parties and any unrepresented parties”) (emphasis added) and id. 16(c) (“[at least one of the attorneys for each party participating in any conference”) (emphasis added) and id. 16(d) (final pretrial conference “shall be attended by at least one of the attorneys . . . and by any unrepresented parties”) (emphasis added) with id. 16(f) (distinction less clear: “[i]f 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”) (emphasis added).

43. Rule 16(c) states, in part:

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

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

(2) the necessity or desirability of amendments to the pleadings;
and thereby accelerate the processing and termination of cases. Recognizing that discussion of settlement at pretrial conferences had become commonplace, the drafters indicated that "settlement should be facilitated at as early a stage of the litigation as possible." The drafters, however, admonished that Rule 16 was not intended to "impose settlement negotiations on unwilling litigants," but was instead designed to provide a neutral forum which might foster settlement.

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

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

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

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

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

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

(9) the disposition of pending motions;

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

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

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

44. FED. R. CIV. P. 16 advisory committee's note (Subjects to be Discussed at Pretrial Conferences). The 1983 drafters thought the 1938 version's litany of items that courts could consider during pretrial conferences too narrow. Therefore, the 1983 drafters added other items which courts could specifically consider at pretrial conferences. Three of the more significant additions include discussing the possibility of settlement, advocating the use of extrajudicial procedures to resolve the dispute, and adopting special procedures for managing complex litigation. See FED. R. CIV. P. 16(c)(7), (10).

45. FED. R. CIV. P. 16 advisory committee's note (Pretrial Conferences; Objectives). Judge Peckham, in an article that pre-dated the 1983 amendments, stated, "[w]hile few judges wish to force unwilling parties to settle, many judges believe that the promotion of informed and fair settlements is one of the most important aims of pretrial management." Peckham, supra note 35, at 773.

46. FED. R. CIV. P. 16 advisory committee's note (Subjects to be Discussed at Pretrial Conferences).

47. Id. The drafters indicated that the second phrase of (c)(7)—regarding courts exploring the use of procedures other than litigation to resolve disputes—includes urging the litigants to employ adjudicatory techniques outside the courthouse. Id. These alternative techniques include summary jury trials, arbitration, mini-trials, and mediation. For more information on the use of these techniques see Broderick, Compulsory Arbitration: One Better Way, 69 A.B.A. J. 64 (1983); Green, Growth of the Mini-Trial, 9 LITIGATION 12 (1982); Lambros, Summary Jury Trial, 37 FED'N INS. & CORP. COUNS. Q. 139 (1987); Posner, The Summary Jury Trial And Other Methods Of Alternative Dispute Resolution: Some Cautionary Observations, 53 U. CHI. L. REV. 366 (1986); Riskin, Mediation and Lawyers, 43 OHIO SR. L.J. 29 (1982). See also Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, §§ 901-907, 102 Stat. 4642, 4659-64 (1988) (making arbitration an experimental pretrial technique in certain civil actions in specified districts where relief sought does not exceed $100,000).
The 1983 drafters added the last sentence of 16(c) to Rule 16 to prevent pretrial conferences from becoming mere "ceremonial or ritualistic event[s]... The reference to authority [however] is not intended to insist upon the ability to settle the litigation." The drafters warned that the rule should not:

[B]e read to encourage the judge conducting the conference to compel attorneys to enter into stipulations or to make admissions that they consider to be unreasonable, that touch on matters that could not normally have been anticipated to arise at the conference, or on subjects of a dimension that normally require prior consultation with and approval from the client.

This statement expressly acknowledges that Rule 16 was designed neither to require pretrial participants to have settlement authority nor to encourage judges to unduly coerce counsel.

A final addition to Rule 16 involved courts' discretion to impose sanctions. The rationale underlying this addition was twofold: (1) to reflect existing practice; and (2) to obviate courts' reliance on Rule 41(b) or their inherent authority to justify the imposition of sanctions.

48. The sentence states: "[a]t least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed." FED. R. CIV. P. 16 (c).
49. FED. R. CIV. P. 16 advisory committee's note (Subjects to be Discussed at Pretrial Conferences).
50. Id.
52. Id. at ¶ 16.16.1. See also Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985) (courts cannot coerce settlement).
53. Rule 16(f) provides, in part:
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. 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...
FED. R. CIV. P. 16(f).
54. FED. R. CIV. P. 16 advisory committee's note (Sanctions).
55. FED. R. CIV. P. 41(b) states, in pertinent part: "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or any claim against the defendant." Id.
56. FED. R. CIV. P. 16 advisory committee's note (Sanctions). Sanctions have been imposed and upheld in numerous cases. See, e.g., Link v. Wabash R.R., 370 U.S. 626 (1962) (sanction for attorney's failure to attend a pretrial conference); Ikerd v. Lacy, 852 F.2d 1256 (10th Cir. 1988) (same); Price v. McGlathery, 792 F.2d 472 (5th Cir. 1986) (same); Smith v. Rowe, 761 F.2d 360 (7th Cir. 1985) (sanction for attorney's willful noncompliance with court's orders); Flaherty v. Dayton Elec. Mfg. Co., 109 F.R.D. 617 (D. Mass. 1986) (sanction for attorney's
Both Rules 1 and 16, represent an expression on the drafters' part to uphold judicial efficiency and integrity. The drafters displaced attorney control over the pretrial process and required the courts to engage in active case management. The drafters also desired courts to provide a neutral forum for settlement discussions. Nevertheless, settlement negotiations must not be imposed on unwilling litigants. Lastly, the drafters provided sanctions for abuse of the pretrial process.

3. Rule 83

Rule 16 operates in conjunction with Rule 83, which provides district courts with the means to promulgate local rules regarding pretrial procedure. Nevertheless, the original drafters expected district courts to make local rules only on rare occasions. Specifically, local rules were supposed to fill gaps deliberately left by the drafters in the federal rules to allow courts to govern in instances where the subject matter was too variant or of unique local concern. Thus, Rule 83, as promulgated, provided judges a means to decide unusual or minor procedural problems.

Rule 83 also grants district judges two distinct powers: one a "rulemaking" power, the other a "decisionmaking" power. Rule 83 was amended for the
first time in 1985 to respond to critics who questioned the soundness of the local rulemaking process, as well as the validity of some local rules. The amendment attempted to enhance the local rulemaking process by requiring appropriate public notice of proposed rules and an opportunity to comment on them. However, the success of the 1985 amendment has been recently questioned by Congress.

Courts' authority to promulgate local rules pursuant to Rule 83, however, is not unlimited. Rule 83's text prohibits local rules that are inconsistent with the Federal Rules of Civil Procedure. Moreover, local rules must be consistent with the Constitution or any congressional enactments. The Supreme Court has also stated that the nature of the local rulemaking process itself restricts the promulgation of local rules. Thus, federal courts cannot

---

64. FED. R. CIV. P. 83, advisory committee's note.
65. Id. For example, one critic of Rule 83 wrote:

[The majority of district courts have, in promulgating rules, ignored the principles of simplicity, scarcity and uniformity which guided the formulation of the Federal Rules. At times, district courts have used their power under Rule 83 to negat specific requirements of the Federal Rules; more often Rule 83 was used to escape from the arduous but essential task of case-by-case analysis.]

Note, supra note 59, at 1251-52 (footnotes omitted).

Another critic stated: "This power, though hedged with limitations, has been the imprimatur for a plethora of individualized rules which have generally remained unchallenged and untested by subjection to the comprehensive scrutiny of judicial decision or scholarly inquiry." Comment, The Local Rules of Civil Procedure in the Federal District Courts—A Survey, 1966 DUKE L.J. 1011, 1011-12 (footnotes omitted).

Further, the strong interest in developing a uniform federal procedure was thought to be seriously compromised by the proliferation of local rules. 12 WRIGHT & MILLER, supra note 19, at § 3152. Although many local rules, perhaps promulgated by a good faith belief that they would promote the just, speedy, and inexpensive determination of cases, were "either invalid on their face or intruded unwisely into areas that should have been dealt with on a national basis by the Supreme Court." Id. Cf. Kahn, Local Pretrial Procedures Rules in the Federal Courts, 6 LITIGATION 34 (Spring 1980) (attorneys concerned that judges use burdensome pretrial local rules as wedge for settlement not for issue simplification).

66. FED. R. CIV. P. 83 advisory committee's note.

68. FED. R. CIV. P. 83. See McCargo v. Hedrick, 545 F.2d 393, 402 (4th Cir. 1976) (court invalidated local rule requiring counsel to "confer and . . . meaningfully and effectively express and commit themselves in a written statement on matters and issues involved in . . . the action" because it distorted purpose of Rule 16). Cf. Padovani v. Bruchhausen, 293 F.2d 546, 548-49 (2d Cir. 1961) (pretrial orders given to litigants by trial judge pursuant to Rule 16 held improper because at odds with purpose and intent of federal rules).

69. 12 WRIGHT & MILLER, supra note 19, at § 3151.
70. Id. The difference between the national and the local rulemaking processes has been explained as follows:

When the Civil Rules are amended, the process is extremely careful. The Advisory Committee on Civil Rules includes lawyers, judges, and scholars with a national reputation for their expertise on matters of procedure, and it is assisted by a scholar of rank who acts as its Reporter. When it has agreed on a preliminary draft
promulgate local rules that function as "basic" procedural rules in that they may possibly be deemed to interfere with the litigants' substantive rights by affecting the ultimate outcome of litigation.

On its face, Rule 83 appears to give district courts a great deal of discretion in promulgating local rules; as a result numerous and extensive local rules exist. One court, however, has warned that, "local rules are not a source of power but are instead a manifestation of it." Moreover, Rule 83's drafters, Congress, and critics have warned against the proliferation of local rules.

In sum, Federal Rules of Civil Procedure 1, 16, and 83 represent important rules for purposes of pretrial activity. Rule 1 provides a foundation upon which the federal rules are premised and mandates the "just, speedy, and inexpensive determination" of disputes. Rule 16 directly addresses pretrial conferences and activities, and Rule 83 provides a means for district courts to regulate pretrial activity through the promulgation of local rules. While these rules play an important role in shaping courts' authority, they do not provide the sole source from which courts' powers emanate.

**B. Inherent Power of the Federal Courts**

While the Federal Rules of Civil Procedure direct courts in administering their duties, these rules do not completely describe or limit district courts' power. Indeed, it is an undisputed fact that district courts have inherent powers upon which they may rely in their resolution of cases. What is disputed, however, is the exact scope of this inherent authority, which has

---

71. Compare Miner v. Atlass, 363 U.S. 641, 649-50 (1960) (local rule authorizing depositions in admiralty cases invalid because subject was weighty, complex and of "great importance to litigants") and 12 WRIGHT & MILLER, supra note 19, at § 3152 (local rulemaking process is not suited for complex and controversial subjects) with Colgrove v. Battin, 413 U.S. 149, 163-64 (1973) (local rule providing for a six person jury found not to be "basic procedural innovation" and thus consistent with Rule 48).

72. McCargo, 545 F.2d at 402.

73. See supra notes 64-67 and accompanying text.


75. Eash v. Riggins Trucking Inc., 757 F.2d. 557, 561 (3d Cir. 1985) (en banc). The court stated that these inherent powers were those vested in the courts upon their creation and not derived from any statute. Id.
been described as nebulous, and its bounds as “shadowy.” While courts have historically relied on their inherent powers, no express test for determining the validity of such use exists. Three general formulations, however, have emerged. Two approaches attempt to categorize courts’ various uses of their inherent power. A third approach separates the inherent power inquiry into a two-part analysis that focuses on precedent and litigants’ rights. Common to all of these articulations is the recognition that numerous limitations restrict courts’ inherent authority.

1. Third Circuit’s View

The Third Circuit articulated an approach to the inherent power inquiry that focused on courts’ use of their inherent power. It recognized that “the term inherent power has been employed in three general fashions” and labeled them as irreducible inherent authority, functionally necessary authority and functionally useful authority.

The court identified the first use of inherent power, irreducible inherent authority, as encompassing an extremely narrow range of authority involving activity so fundamental to the essence of a court as a constitutional tribunal that to divest the court of absolute command within this sphere is


77. See Eash, 757 F.2d at 561. Past uses of inherent power include the use of contempt sanctions to regulate the conduct of the members of the bar. See Cooke v. United States, 267 U.S. 517 (1925). Other scenarios involving courts’ use of inherent power include: Johnson v. Louisiana, 406 U.S. 356, 380 (1972) (Powell, J., concurring) (inherent power exists to grant changes of venue and to impose restrictions on press coverage) (dicta); Illinois v. Allen, 397 U.S. 337, 343-46 (1970) (inherent power to regulate courtroom decorum and thereby remove disruptive defendant); Bradley v. Fisher, 80 U.S. 335, 355-56 (1871) (inherent power used to disbar attorney); United States v. Schiavo, 504 F.2d 1, 6 (3d Cir. 1974) (inherent power to issue protective order to ensure fair trial); Dorfman v. Meiszner, 430 F.2d 558, 561 (7th Cir. 1970) (inherent power to prohibit courtroom photography); Reid v. Prentice Hall, Inc, 261 F.2d 700, 701 (6th Cir. 1958) (inherent power to punish abuse of its process by dismissal of an action); Wells v. Gilliam, 196 F. Supp. 792, 795 (E.D. Va. 1961) (judge retains control of the courtroom and the conduct of those in it).


(1) as such powers as result from the very nature of a court’s organization and are essential to its existence and protection and to the due administration of justice;
(2) as such power as is essential to the existence, dignity and functions of a court from the very fact that it is a court; and (3) as such powers as are necessary to the orderly and efficient exercise of jurisdiction.

Id. (footnotes omitted).
really to render practically meaningless the terms 'court' and 'judicial power.'”

The irreducible inherent authority of courts arose from the judicial powers vested in the federal judiciary pursuant to article III of the Constitution after Congress “created lower federal courts and demarcated their jurisdiction.” In *Eash v. Riggins Trucking, Inc.*, the Third Circuit recognized that courts must exercise their irreducible inherent authority with great restraint and caution because the “[b]oundaries . . . are not possible to locate with exactitude.”

The Third Circuit also identified a second, more common type of inherent power used by courts: “powers implied from strict functional necessity.” This use of inherent power was thought to arise from the nature of the court, but was “more often thought to be the power necessary to the exercise of all others.” Its uses include the authority to supervise and discipline the conduct of attorneys as court officers, the most prominent example being the contempt sanction. Although the legislature may regulate the exercise of this inherent power “within limits not precisely defined,” this functionally necessary authority can “neither be abrogated nor rendered inoperative” because of the important role it plays in the functioning of the courts.

The Third Circuit identified a “third form of authority subsumed under the general term inherent power [which implicates] powers necessary only in the practical sense of being useful.” This functionally useful inherent power


82. *Id.* at 562.

83. *Id.*

84. *Id.*

85. *Id.* Historically, the contempt power has been noted as “essential to the administration of justice,” *Michaelson v. United States*, 266 U.S. 42, 65 (1924), and “absolutely essential” for the functioning of the judiciary. *Levine v. United States*, 362 U.S. 610, 616 (1959).

86. *Eash* 757 F.2d at 563.

87. *Id.* (quoting *Michaelson*, 266 U.S. at 66). See also *DeKrasner v. Boykin*, 54 Ga. App. 29, 35-36, 186 S.E. 701, 704 (1936) (legislature can aid courts with laws but courts have the right to disregard unreasonable statutory regulations).

88. *Eash*, 757 F.2d at 563. The Third Circuit pointed to *Ex parte Peterson*, 253 U.S. 300 (1920), as an example of this power. There, the Supreme Court held that district courts possessed the inherent power to supply themselves with an “auditor” to aid in decisionmaking. *Id.* at
can only be exercised in "the absence of contrary legislative direction." Thus, "[even] a sensible and efficient use of the supervisory [or inherent] power . . . is invalid if it conflicts with constitutional or statutory provisions."

2. Two Alternative Views

A second approach to courts' inherent powers also segregates courts' use of their authority into three classifications: (1) the power to procure buildings, supplies, and personnel, including the power to call upon citizens to serve their public duty as witnesses; (2) the power to make rules for the judicial system, including those governing practice and procedure, the unauthorized practice of law, and decorum; and, (3) the power to hold persons in contempt. This view also articulates three limitations on courts' use of their inherent power. First, courts may use their inherent power only when "reasonably necessary" to function. Second, courts may employ their inherent

312. The Eash court found this to be an example of courts' functionally useful inherent power, reasoning that "it is clear that such power is necessary only in the sense of being highly useful in the pursuit of a just result." Eash, 757 F.2d at 563.

Interestingly, in Peterson, the Supreme Court appeared to be using a functional necessity standard, stating that such authority was necessary to enable courts to process litigation to a just and equitable conclusion. However, the Eash court believed otherwise.

89. Eash, 757 F.2d at 563.

90. Thomas v. Arn, 474 U.S. 140, 148 (1985). The Thomas Court further stated that a contrary result "would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." Id. (quoting United States v. Payner, 447 U.S. 727, 737 (1980)).

The exact meaning of this restriction, however, is not entirely clear. For example, the Seventh Circuit has articulated two different standards for determining whether a use of inherent power is contrary to or inconsistent with legislative direction. In Soo Line R.R. v. Escanaba, 840 F.2d 546 (7th Cir. 1988), the court stated that inherent authority is merely another name for the power of courts to make common law when statutes and rules do not address a particular topic. Id. at 551 (emphasis added). But this restriction appeared to be narrowed in Landau & Clearly, Ltd. v. Hribar Trucking, Inc., 867 F.2d 996 (7th Cir. 1989). There, although the court recognized that inherent authority may not be exercised in a manner inconsistent with the Federal Rules of Civil Procedure, it rearticulated this to mean that "where the rules directly mandate a specific procedure to the exclusion of others, inherent authority is proscribed." Id. at 1002 (emphasis added).


92. Id. at 350.

93. Id. at 351. The test for "reasonable necessity" under the rulemaking category is twofold: (1) whether the inherent rule is necessary for efficient judicial proceedings; and (2) whether the need for the rule of practice and procedure "is apparent and pressing." Id. at 353. Whether the need for the use of inherent power is "apparent and pressing" is important because courts should only "sparingly" use their inherent powers to create new rules of practice and procedure. Id.
powers only to control internal activities of the judicial system. Third, courts’ inherent powers may not be used in violation of the separation of powers doctrine.

A third and final approach to courts’ use of their inherent authority articulates two general considerations. First, before invoking their inherent power, courts should consider whether similar uses have been historically upheld. Second, courts should carefully consider the effect to which the purported use of inherent power would have on litigants’ rights and ask “how close to deeply held rights and privileges of others does the proposed rule or order run?” This second consideration can prevent an unduly expansive interpretation of the inherent power doctrine. Along these same lines, the Supreme Court has expressed concern with respect to the expansion of the courts’ inherent power, stating that “[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion.”

In sum, courts traditionally have used their inherent powers without articulating an explicit or practically functional test. Instead, courts have focused on the limitations on the use of their inherent power. While numerous limitations exist, the most articulated limitation is that the use of inherent power must be consistent with congressional legislation and the Constitution. Another limitation is that courts must use their inherent power sparingly, with great discretion, and only when necessary. Additionally, courts may only exercise their inherent powers over activities and persons within the

94. Id. at 351. This restriction limits the exercise of inherent powers to activities and persons within the judicial system. In the rulemaking category, this limitation means that inherent rules regarding practice, procedure, and courtroom decorum should only regulate the activities of persons involved in a particular case before the court. Id. at 358-59. See also J. Crastley, supra note 15, at 49. Cf. Webster Eisenlohr, Inc. v. Kalodner, 145 F.2d 316, 319 (3d Cir. 1944) (power to appoint special master unavailable without pending litigation).

95. Note, supra note 91, at 353. In terms of the rulemaking category, the separation of powers doctrine limitation prevents the executive or legislative branches from attempting to regulate how cases should be heard or decided. Id. at 363. Likewise, the judiciary must not usurp the roles of the legislative or executive branch. For instance, a court could not compel a United States Attorney to sign an indictment. Id. See also J. Crastley, supra note 15, at 49.


97. Id. Alternatively under this first consideration, courts should determine whether the prospective use of the inherent power can reasonably be viewed as a logical extension of prior accepted uses. See J. Crastley, supra note 15, at 16.

98. See Comment, supra note 96, at 496.


100. Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980). See also Frankfurter & Landis, supra note 81, at 1022-23 (“The accumulated weight of repetition behind such a phrase as ‘inherent powers’ of the lower Federal courts is a constant invitation to think words instead of things. It is imperative, therefore, to subject it to critical scrutiny.”).
judicial system. Lastly, a court may only exercise its inherent power in a manner consistent with the separation of powers doctrine.

The Federal Rules of Civil Procedure, including Rule 1 and 16, do not completely limit district courts' power. Rather, district courts have the means to promulgate procedural rules through Rule 83 and the inherent power doctrine. Promulgation of local rules, pursuant to Rule 83, is limited by the rule's language and the process by which such rules are passed. Similarly, promulgation of procedural rules, pursuant to courts' inherent authority, is closely scrutinized because of the lack of direct democratic controls. The inherent power determination is further complicated by the fact that regardless of general limitations on courts' use of their inherent powers, no exact test exists to determine the validity of the purported use of inherent power.

C. Case Law

The preceding discussion provides an introduction to the federal rules, particularly Rules 1, 16, and 83, and courts' inherent power. The following discussion focuses on some of the relevant case law. The decisions discussed below provide insight to the current dispute regarding courts' proper role in promoting nontraditional settlement techniques pursuant to Rule 16 and on their inherent power. While the decisions do not directly address the issue faced by the Seventh Circuit in Heileman they do provide analogous situations in which courts have determined the scope of Rule 16 as it relates to settlement and judicial involvement during the pretrial stage.

In In re LaMarre,101 for example, the Sixth Circuit held that a district court had the authority to require a party's attendance at any pretrial session to explain his position regarding settlement, so long as the judge deemed the party's presence to be necessary.102 Although the Sixth Circuit recognized that due process requirements prohibited the district court from compelling settlement, the Sixth Circuit believed that "LaMarre could not . . . refuse a lawful order to attend such a conference to discuss the matter."

101. 494 F.2d 753 (6th Cir. 1974). LaMarre worked as the claims manager for Insurance Company of North America (INA), which had insured the defendant, and was principally in charge of INA's defense of the case. Immediately prior to trial, counsel for each side appeared to have agreed on a settlement figure. LaMarre, however, refused his counsel's recommendation. The court then requested that LaMarre attend a conference to explain his position. LaMarre refused this and three subsequent court requests. The court then ordered the United States Marshall to compel Lamarre to appear. Id. at 755.

102. The court found that LaMarre was a "party" to the proceeding, even though Michigan law prohibited naming an insurance company a party defendant. The court reasoned that the insurance company was, in reality, a party because it had retained counsel, was prepared to defend the suit, and was in complete control of the negotiations. Id. at 756.

103. Id.

104. Id.
In a situation similar to LaMarre, the District Court for the Eastern District of Kentucky in Lockhart v. Patel, held that it had the authority to compel the attendance of attorneys, parties, and insurers at a settlement conference and to require those parties to have the power to settle within a set range. In Lockhart, the district court relied primarily upon Rule 16(f) noting that it encourages forceful judicial management. The Lockhart court also stressed the need for having such power, stating that "the drafters of the amended Rule 16 knew of the docket pressures, and knew that to process 400 cases you have to settle 350." Moreover, it noted that "innovative measures are necessary to fulfill the court's duty to provide a just and speedy disposition of every case." Thus, the court concluded that while a district court cannot require settlement, it can require the party "to make reasonable efforts, including attending a settlement conference with an open mind."

Other courts have advocated the Lockhart court's notion of forceful judicial management. For example in Federal Reserve Bank of Minneapolis v. Carey-Canada, the District Court for the District of Minnesota held...
that in light of both a court's inherent power to manage and control its
docket and Rules 1, 16, and Local Rule 3, the court possessed the authority
to compel attendance and participation in a summary jury trial. The Carey-
Canada court reasoned that Rule 16's obvious goal was to promote case
management, of which settlement played a great role. Thus, the district
court found that compelling participation in summary jury trials furthered
Rule 16's underlying objectives. The court also cited to local Rule 3 and
federal Rule 1, both of which it believed provided further support for its
position.

denied. Id. at 603-04.

Each party objected to the summary jury trial because it was estimated that it would cost
each party $50,000. Id. at 604. Also, the parties contested that the summary jury trial would
not be an accurate synopsis of a jury trial because several major evidentiary rulings would not
be made until after the summary jury trial. Finally, the parties believed that settlement was
extremely remote. Id.

112. Local Rule 3 provided that:

Each judge may prescribe such pretrial and discovery procedures as the judge may
determine appropriate . . . [and] each judge on their own initiative, on motion of
any party to an action, or by stipulation of the parties may order the attorneys and
the parties to appear for a pretrial conference to consider the subject specified in
Fed. R. Civ. P. 16 or other matters determined by the judge.

Id. at 607.

113. Id. at 604 (citing Link v. Wabash R.R., 370 U.S. 626 (1962)). Summary jury trials
involve an abbreviated trial before a judge or magistrate and an advisory jury. The jury renders
a nonbinding 'decision after hearing an expedited presentation of the case, which usually lasts
less than a day. American Bar Association, Alternative Dispute Resolution: A Handbook
For Judges 7 (P. Harter ed. 1987) [hereinafter HANDBOOK FOR JUDGES].

For a discussion of summary jury trials see Lambros, The Summary Jury Trial and Other
Alternative Methods of Dispute Resolution: A Report to the Judicial Conference of the United
[hereinafter Lambros, Summary Jury Trial]; Lambros, The Judge's Role in Fostering Voluntary
Settlements, 29 VILL. L. REV. 1363 (1984) [hereinafter Lambros, Judge's Role]; and Posner,
The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary

114. Carey-Canada, 123 F.R.D. at 607. The court recognized that the Supreme Court had
acknowledged the importance of a district court's power to control and manage its docket. Id.
at 604 (citing Link v. Wabash R.R., 370 U.S. 626 (1962)). The court further believed it was
reasonable "to require the parties to engage in settlement efforts with some degree of intensity."
Id.

115. Id. at 607. Moreover, the court stated: "It is hard to imagine that the drafters of the
1983 amendments actually intended to strengthen courts' ability to manage their caseloads while
at the same time intended to deny the court the power to compel participation by the parties
to the litigation." Id. The court also relied on the fact that the Judicial Conference's final
resolution, which endorsed the use of summary jury trials, deleted a phrase which would have
required voluntary participation. Id.

For similar cases finding authority to compel participation in summary jury trials, see McKay
v. Ashland Oil, Inc., 120 F.R.D. 43 (E.D. Ky. 1988) and Arabian American Oil Co. v. Scarfone,
119 F.R.D. 448 (M.D. Fla. 1988).

116. Carey-Canada, 123 F.R.D. at 606-07. See also Fox, Settlement: Helping the Lawyers
to Fulfill Their Responsibility, 53 F.R.D. 129, 131 (1971) (Rules 1, 16, and 83 provide basis
for district court judge's authority to require parties to attempt to reach settlement).
The *Carey-Canada* court also noted policy considerations, stressing the importance of having the authority to compel the parties to engage in a summary jury trial. The court believed that summary jury trials served as useful settlement tools which saved the parties expenditures and conserved judicial resources.\(^{117}\) The court further argued that courts need "to compel the parties to address settlement" in order to effectively manage their dockets.\(^{118}\)

In contrast,\(^{119}\) the Seventh Circuit ruled in *Strandell v. Jackson County*,\(^{120}\) that neither Rule 16 nor the inherent power doctrine authorized a district court to compel a litigant to engage in a summary jury trial.\(^{121}\) In *Strandell*, the Seventh Circuit stated that a court could only exercise its inherent power to control and manage its docket if such use was in harmony with the Federal Rules of Civil Procedure.\(^{122}\) The court further refined its pronouncement to mean that when "the Supreme Court and the Congress, acting together, have addressed the appropriate balance between the needs for judicial efficiency and the rights of the individual litigant, innovation ... must conform to that balance."\(^{123}\) Thus, the Seventh Circuit deemed it necessary to interpret the scope of Rule 16 as it related to mandatory summary jury trials.

The court held that compelling parties to engage in a summary jury trial would be inconsistent with Rule 16 and therefore, constituted an invalid use

---

117. *Carey-Canada*, 123 F.R.D. at 604. The court rejected any notion that summary jury trials were inconsistent with Rule 16's underlying goals. Furthermore, the court found that summary jury trials posed no risk to a party's right to trial since courts could not force settlements. *Id.* at 606. Lastly, the court rejected any notion that a compelled summary jury trial was invalid because it required disclosure of discovery otherwise unobtainable. *Id.* It stressed that "[t]rial by ambush is no longer an accepted method of practice." *Id.*

118. *Id.*

119. The *Carey-Canada* court expressly refused to follow *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1988). *Carey-Canada*, 123 F.R.D. at 605-06.


121. *Strandell*, 838 F.2d at 888. The district court had held that Rule 16 provided courts with authority to compel a summary jury trial. *Strandell v. Jackson County*, 115 F.R.D. 333, 334-35 (S.D. Ill. 1987). The court reasoned that a resolution adopted in 1984 by the Judicial Conference of the United States, in its original draft, endorsed summary jury trial "with the voluntary consent of the parties," even though the resolution's final draft omitted this phrase. *Id.* at 334. Furthermore, the district court relied on 16(a)(1) and (5), and 16(c)(7) and (11). *Id.* The district court also noted that the trial was expected to last five to six weeks, that the parties were poles apart in terms of settlement, and that summary jury trials had been used with great success in similar situations. *Id.* at 334-35.

122. *Strandell*, 838 F.2d. at 886.

123. *Id.* at 886-87. The court stressed that the rules are a product of a careful process designed to take "due cognizance both of the need for expedition of cases and the protection of individual rights." *Id.* at 886.
of the court's inherent power. Further, it stated that while Rule 16 was intended to foster settlement, it was not intended to require an unwilling litigant to be sidetracked from the normal course of litigation. The Seventh Circuit also noted that the drafters admonished using the pretrial conference as a means of imposing settlement negotiations on unwilling litigants. The Strandell court further determined that this interpretation of Rule 16 was consistent with other Seventh Circuit opinions. Therefore, it concluded that compelling litigants to engage in a summary jury trial would usurp the balance that the Rule 16 drafters struck between judicial efficiency and the rights of individual litigant's.

Finally, in Link v. Wabash Railroad Co., the Supreme Court discussed courts' inherent authority to promulgate a procedural rule which reached beyond the clear language of a federal rule of civil procedure. In Link, the Supreme Court held that a district court had the inherent authority to dismiss a case sua sponte for failure to prosecute, notwithstanding the fact that Federal Rule of Civil Procedure 41(b) only authorized defendants to move for such dismissals. The Court determined that courts' sua sponte authority was a long-standing, well-acknowledged power and had "long gone unquestioned." Therefore, the Court required "a much clearer expression of purpose" than set forth in Rule 41(b) before it would abrogate this established judicial authority.

The above-mentioned cases addressed the proper role to be played by courts in the promotion of nontraditional settlement techniques pursuant to

124. Id. at 887.
125. Id. It stressed that "[w]hile the drafters intended that the trial judge 'explore the use of procedures other than litigation to resolve the dispute'—including 'urging the litigants to employ adjudicatory techniques outside the courthouse,'—they clearly did not intend to require the parties to take part in such activities." Id. (emphasis in original).
126. Id. See also Identiseal Corp. v. Positive Identification Systems, Inc., 560 F.2d 298, 301-02 (7th Cir. 1977) (Rule 16 does not provide authority to order party to undertake discovery and extent of court's power is to compel a party to consider the possibility of conducting discovery) (emphasis added); J.F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318, 1323 (7th Cir. 1976) (Rule 16 does not provide authority to compel parties to stipulate to facts to which they could not voluntarily agree).
127. The Strandell court recognized the even though these decisions were issued prior to 1983, nothing in the amendments was intended to make Rule 16 coercive. 838 F.2d at 888.
128. Id.
129. Rule 41(b) states, in pertinent part: "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant." FED. R. CIV. P. 41(b).
130. Link, 370 U.S. at 630. Cf. Peckham, supra note 35, at 790 (Link "initially set the tone for the extremely deferential attitude of the appellate courts toward the district courts' authority to use pretrial procedures to 'achieve the orderly and expeditious disposition of cases.'").
131. Link, 370 U.S. at 631.
132. Id. at 631-32.
Rule 16 and their inherent power. While some cases have given great deference to courts and allowed them to compel attendance of individuals at pretrial conferences to discuss settlement, others, such as Strandell, have rejected this notion as inconsistent with Rule 16 and courts' inherent authority. It is in light of this tension that this Note turns to a discussion of Heileman.

II. G. HEILEMAN BREWING CO. v. JOSEPH OAT CORP.

In Heileman, the Seventh Circuit addressed the issue of whether a district court judge or magistrate could compel a represented party to attend a pretrial settlement conference and require that party to have full settlement authority. In addressing that issue, the court found it necessary to interpret the Federal Rules of Civil Procedure, in particular Rule 16, and district courts' inherent power to control and manage their docket.

Originally, the federal District Court for the Western District of Wisconsin found that Rule 16 authorized a district court to compel a represented party with full settlement authority to attend a pretrial settlement conference. On appeal, a panel of the Seventh Circuit reversed, finding that neither Rule 16 nor courts' inherent power authorized such a practice. The Seventh Circuit sitting en banc reversed the panel decision.

A. Facts and Procedure

In Heileman, a federal magistrate ordered Joseph Oat Corporation ("Oat") to send a "corporate representative with full authority to settle"

---

133. 871 F.2d 648 (7th Cir. 1989) (en banc).
135. 848 F.2d 1415, 1420-21 (7th Cir. 1988).
138. The following facts preceded the magistrate's order. First, the magistrate had ordered a settlement conference for December 14, 1984. The magistrate's order stated, inter alia, "[i]n addition to counsel, each party shall be represented at the conference by a representative having full authority to settle the case." Heileman, 848 F.2d at 1417. Oat's counsel, John Possi,
to a pretrial settlement conference in Madison, Wisconsin. The outside corporate counsel was authorized to speak on behalf of Oat's senior executives, who had instructed him to inform the magistrate that Oat was not willing, at that time, to pay any money to settle. Deciding that Oat had violated his order, the magistrate sanctioned Oat pursuant to Federal Rule of Civil Procedure 16(f) and ordered Oat to pay $5,860.01 which represented the costs and attorneys' fees of the opposing parties attending the conference.

The district court upheld the sanctions, relying on Rule 16. Chief Judge Crabb noted that the clear intent of the 1983 amendment to Rule 16 was to provide courts with the tools required to manage their caseloads effectively.
and efficiently;\textsuperscript{144} one such tool included a productive settlement conference.\textsuperscript{145} The court found that a settlement conference attended by parties who did not have authority to settle could not be productive. Stressing the important policy considerations at issue, the court noted that "it [was] a misuse of . . . [public] resources for any party to refuse even to meet personally with the opposing party or its counsel to attempt to resolve their disputes prior to trial."\textsuperscript{146} Thus, Judge Crabb concluded that Rule 16 authorized district courts, in appropriate circumstances, to require a represented party to attend a settlement conference and to possess full settlement authority.\textsuperscript{147}

On appeal, the Seventh Circuit reversed the district court's decision.\textsuperscript{148} The Seventh Circuit reasoned that Rule 16, on its face, did not authorize a court to compel a client who has full settlement authority to attend a pretrial settlement conference.\textsuperscript{149} Rather, the Seventh Circuit believed that Rule 16's plain language led "to the opposite conclusion."\textsuperscript{150} The Seventh Circuit further held that any reliance on courts' inherent power to manage a docket was misplaced and the district court's holding was inconsistent with Rule 16's carefully struck balance between judicial efficiency and litigants' rights.\textsuperscript{151} Additionally, the Seventh Circuit rejected the notion that attendance of a represented party who has full settlement authority at a settlement conference was necessary for productive settlement conferences,\textsuperscript{152} recognizing instead that other effective case management tools were available.\textsuperscript{153} Furthermore,

\textsuperscript{144} Id. at 277. Judge Crabb adopted the magistrate's conclusions of law, holding that the 1983 amendments, particularly 16(a)(5) and 16(c)(7), provide that facilitation of settlement is an appropriate pretrial function. This view is reinforced by the advisory notes. \textit{Id.} at 280.

\textsuperscript{145} Id. at 277.

\textsuperscript{146} Id. CSM, RME, and Heileman eventually settled. After RME assigned its claims against Oat to Heileman as part of the settlement, the magistrate substituted Heileman for RME in the proceedings. Later, after the magistrate entered sanctions against Oat but before the district court affirmed that order, the district court dismissed CSM with prejudice pursuant to the terms of the settlement. \textit{Heileman}, 848 F.2d at 1418.

\textsuperscript{147} \textit{Heileman}, 107 F.R.D. at 281. The court further stated that:

Rule 16 is a hollow authority indeed if the power is lacking to require the presence at [a settlement] conference of the parties themselves. Only in that way may proposals and counter-proposals be advanced and responded to without delay. The presence of the parties, who are, of course, the most familiar with their claims and the nature of their businesses, also opens opportunities to explore the existence of other common grounds for agreement which may involve matters outside the litigation.

\textit{Id.} at 281.

\textsuperscript{148} G. Heileman Brewing Co. v. Joseph Oat Corp., 848 F.2d 1415 (7th Cir. 1988). Judge Manion wrote the opinion and was joined by Judge Easterbrook. Judge Flaum dissented.

\textsuperscript{149} Id. at 1419-20.

\textsuperscript{150} Id. at 1420.

\textsuperscript{151} Id. at 1421.

\textsuperscript{152} Id.

\textsuperscript{153} Id. These alternatives included urging the parties to resolve their disputes outside the court room, conducting settlement conferences with the represented parties on a voluntary basis,
the court noted that litigants hired lawyers to take advantage of their training and skill, which includes evaluating the case and advising on settlement. Judge Flaum dissented. He believed that in appropriate circumstances the Federal Rules of Civil Procedure authorized district courts to require represented parties to attend pretrial settlement conferences. In addition to relying on Rule 1 and Rule 83, Judge Flaum relied on the 1983 amendments to Rule 16. He believed that the “clear import” of the amendments was to provide courts with a means to effectively and actively manage their “ever burgeoning caseloads.” He also found that the amendments encourage settlement and that Rule 16 was specifically designed to provide the necessary tools for docket management. Therefore, Judge Flaum would have upheld the sanctions.

A rehearing, before an en banc Seventh Circuit, was granted on July 22, 1988.

B. The Majority Opinion

In a 6-5 decision, the Seventh Circuit sitting en banc reversed the panel

sanctioning parties and attorneys who litigate frivolously or vexatiously, dismissing cases for failure to prosecute, and setting aggressive time limitations for the parties, including pushing the case to trial. Id. at 1421-22.

154. Id. at 1422. The panel opinion recognized Heileman’s contention that attorneys may “filter” information but did not find this to be a concern. Rather, it reasoned that part of an attorney’s job is to separate the “wheat from chaff.” Furthermore, the court believed that an attorney had a strong self-interest, which included being sued for malpractice, and duty to realistically convey to the client a case’s strengths and weaknesses. Id. at 1422.

155. Id. at 1423 (Flaum, J., dissenting).

156. Id. Judge Flaum reiterated the magistrate’s words that “[t]he authority to convene a settlement conference under Rule 16 is a hollow authority indeed if the power is lacking to require the presence at the conference of the parties themselves.” Id. (citing Heileman, 107 F.R.D. at 281).

157. Rule 1 requires the “just, speedy, and inexpensive determination of every action.” FED. R. CIV. P. 1. See supra notes 16-28 and accompanying text.

158. Rule 83 allows courts to regulate their practice and promulgate local rules. FED. R. CIV. P. 83. See supra notes 57-73 and accompanying text.

159. Heileman, 848 F.2d.

160. Id.

161. Id. Judge Flaum relied on Rules 16(a)(5) and 16(c)(7) as examples. Rule 16(a)(5) makes facilitating settlement an express objective of Rule 16, while Rule 16(c)(7) provides that the possibility of settlement may be a subject discussed at a pretrial conference. He also noted that the drafters of the 1983 amendments, as demonstrated through 16(f), endorsed forceful judicial management and open-minded participation by the litigants. Id.

Judge Flaum also reiterated Judge Crabb’s contentions that a party who refuses to meet personally with the opposing side to discuss the possibility of settlement misuses an expensive public resource and that settlement conferences are often unproductive if none of the parties present have full authority to settle. Id. at 1423. Therefore, both Judge Flaum and Judge Crabb believed that depriving courts of this authority would remove one of their most valuable docket management tools—“the ability to conduct productive settlement conferences.” Id.

162. The opinion was written by Judge Kanne, who was joined by Chief Judge Bauer and Judges Cummings, Wood, Jr., Cudahy, and Flaum. The dissenters included Judges Posner, Coffey, Easterbrook, Ripple, and Manion.
The majority segregated its opinion into three distinct issues. First, it considered whether a federal district court possessed the authority to compel a represented party to attend a settlement conference and require that party to have full authority to settle the case. Finding such a power existed, the court next considered whether the district court abused its discretion in exercising this power. Finally, the court determined whether the district court abused its discretion when it entered sanctions against Oat.

With respect to the first issue, the majority held that a federal district court has the inherent authority to compel a represented party who has full authority to settle the case to appear at a pretrial settlement conference. In making this determination, the majority dismissed a Rule 16 analysis on the grounds that Rule 16 merely refers to the participation of attorneys and pro se litigants. The court concluded that "Rule 16 does not give any direction upon the issue of a court's authority to order litigants who are represented by counsel to appear for pretrial proceedings." Moreover, the majority stated that district courts have the inherent power to create procedural techniques designed to preserve the efficiency and integrity of the judicial process so long as that power was "exercised in a manner that [was] in harmony with the Federal Rules of Civil Procedure."

The majority held that compelling a represented party who has full settlement authority to attend a settlement conference was not inconsistent with Rule 16. The majority reasoned that Rule 1 requires the federal rules to be liberally construed to secure the "just, speedy, and inexpensive determination of every action." Furthermore, the court interpreted Rule 16's purpose as "broadly remedial, allowing courts to actively manage the preparation of cases for trial." Thus, the majority concluded that allowing district courts to order represented parties to appear at pretrial settlement

164. Id. at 650-53.
165. Id. at 653-55.
166. Id. at 655-56.
167. Id. at 653.
168. Id. at 651.
170. Id. at 652 (quoting Strandell v. Jackson County, 838 F.2d 884, 886 (7th Cir. 1988)).
171. Id.
172. Id. (quoting Fed. R. Civ. P. 1). See also Hickman v. Taylor, 329 U.S. 495, 507 (1947) ("[D]eposition-discovery rules are to be accorded broad and liberal treatment.").
173. Heileman, 871 F.2d at 652 (quoting In re Baker, 744 F.2d 1438, 1440 (10th Cir. 1984) (en banc), cert. denied, 471 U.S. 1014 (1985)).
conferences "merely represents another application of a district judge's inherent authority to preserve the efficiency, and more importantly the integrity, of the judicial process" in furtherance of Rule 16's purpose and intent. Therefore, the magistrate's order was a proper exercise of the district court's inherent authority.

The majority then addressed and rejected Oat's contention that the magistrate abused his discretion in issuing the order. With respect to Oat's first argument, the majority held that the magistrate neither coerced settlement nor imposed settlement negotiations on Oat. The magistrate's order requiring "corporate representatives with authority to settle" to attend a pretrial settlement conference meant that the corporate representative was "required to hold a position within the corporate entity allowing him to speak definitely and to commit the corporation to a particular position in the litigation." The majority stressed that "authority to settle" did not mean that the representatives had to attend the settlement conference willing to settle. Rather, the order merely required the represented party to attend and consider the possibility of settlement. Therefore, the magistrate's actions were not coercive. The majority also found that the magistrate's order did not impose settlement negotiations on unwilling litigants. The majority found a distinction between being required to attend a settlement conference and being required to participate in settlement negotiations. Thus, the majority found it an appropriate practice to require a corporate representative to propose terms of settlement before a judge or magistrate at a pretrial settlement conference.

174. Id.
175. Id. at 655.
176. The court noted that in addition to not being permitted to coerce settlement, a court cannot compel parties to stipulate to facts. Id. at 653 n.8 (citing J.F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318, 1322 (7th Cir. 1976) (per curiam)). Similarly, a court cannot compel litigants to participate in a nonbinding summary jury trial. Id. (citing Strandell v. Jackson County, 838 F.2d 884, 887 (7th Cir. 1988)). Likewise, a court cannot force a party to engage in discovery. Id. (citing Identiseal Corp. v. Positive Identification Sys. Inc., 560 F.2d 298, 301 (7th Cir. 1977)).
177. 871 F.2d at 653. The Advisory Committee's Note to Rule 16 states that "'[a]lthough it is not the purpose of Rule 16(b)(7) to impose settlement negotiations on unwilling litigants, it is believed that providing a neutral forum for discussing [settlement] might foster it.'" FED. R. CIV. P. 16 advisory committee's note (Subjects to be Discussed at Pretrial Conferences).
178. Heileman, 871 F.2d at 653.
179. Id. The majority quoted Judge Crabb who had stated previously in Heileman, 107 F.R.D. 275, 276-77 (1985):

There is no indication . . . that the magistrate's order contemplated requiring Joseph Oat . . . to agree to any particular form of settlement or even to agree to settlement at all. The only requirement imposed by the magistrate was that the representative [of Oat Corporation] be present with full authority to settle, should terms for settlement be proposed that were acceptable to [Oat Corporation].

Id.
180. Heileman, 871 F.2d at 653.
181. Id.
With respect to Oat's second argument that the magistrate abused his discretion, the majority held that the magistrate's order was not unduly burdensome. The majority recognized that circumstances could arise which would make the appearance of a represented party at a pretrial settlement conference clearly onerous and unproductive, or expensive in relation to the size, value, and complexity of the case. Recognizing that "all parties stood to incur substantial legal fees and trial expenses," the majority, therefore, concluded that the benefits to be gained from the settlement conference outweighed the burden of requiring a corporate representative to attend the pretrial conference and thus did not constitute an abuse of discretion.

Finally, with respect to the third issue, the majority held that the district court did not abuse its discretion in sanctioning Oat. It determined that Oat was well aware of what the magistrate expected, and was thus properly sanctioned pursuant to Rule 16 (f).

C. The Dissents

1. Judge Posner's Dissent

In his dissent, Judge Posner found that the "narrowly 'legal' considerations bearing on the question whether district courts have the power asserted by the magistrate in this case [were] sufficiently equivocal to authorize—indeed compel—us to consider the practical consequences for settlement before deciding what the answer should be." Judge Posner articulated two
First, he believed that there was insufficient information regarding the consequences of compelling a represented party to a settlement conference. Second, he found that the magistrate clearly abused his discretion. Thus, for Judge Posner it was unnecessary to decide the critical issue of the magistrate's authority.

With respect to the second issue, Judge Posner found that the magistrate had abused his discretion, reasoning that compelling a represented party with settlement authority to attend a settlement conference would be defensible only if the litigants had a duty to bargain in good faith. He noted that no such duty exists. Thus, once the magistrate was made aware of Oat's position to not settle on any terms that required it to pay money, his continued insistence became "arbitrary, unreasonable, willful, and indeed petulant."

In light of the insufficient evidence concerning the consequences of compulsory attendance at pretrial settlement conferences and the magistrate's unreasonable actions, therefore, Judge Posner would have vacated the magistrate's sanctions.

2. Judge Coffey's Dissent

Judge Coffey dissented from the majority’s view on the grounds that Rule 16 "mandate[d] in clear and unambiguous terms that only an unrepresented party litigant and attorneys may be ordered to appear" at a pretrial conference. Therefore, it could not further Rule 16's intent to require a represented party to appear at a pretrial settlement conference.

their own investment of time in resolving disputes. Indeed, he pointed out that Oat was a defendant in this case and did not want its executives' time occupied with the instant litigation. Id.

Nevertheless, Judge Posner recognized that such a practice might serve as a necessary and valuable management tool. He noted attorney abuse and crowded federal dockets and that Rule 16(a)'s purpose is to prepare for trial. Therefore, it was not necessary to infer that the draftsmen meant to forbid the summoning of represented parties for purposes of exploring settlement. Judge Posner cautioned, "[w]e should hesitate to infer inadvertent prohibitions." Id.

189. Judge Posner stated that the majority's underlying concern was that the panel opinion had stripped district courts of a valuable settlement tool which was necessary in light of the unwillingness or inability of attorneys in conveying adequate information regarding settlement. Id. at 657.

190. Id. at 657-58.

191. Id. at 658. Judge Posner distinguished the magistrate's demand from one which would require a represented party who had not closed the door to settlement to send an executive to discuss possible terms. Id.

192. Id. Judge Posner also recognized that the magistrate's demand might have required Oat to ship its entire board of directors to Madison. Id.

193. Heileman, 871 F.2d at 658 (Coffey, J., dissenting) (emphasis in original).

194. Id.
Judge Coffey held that the majority improperly extended courts' inherent authority, by disturbing Rule 16's delicate balance. He noted that Rule 16 is a "product of a careful process of study and reflection designed to take 'due cognizance of both of the need for expedition of cases and the protection of individual rights.'" Judge Coffey commented that the Rule's drafters, the Supreme Court, and Congress had addressed the appropriate balance for Rule 16 in 1983, deciding to add only unrepresented parties, and not represented parties to the group of persons that a district court could require to attend a pretrial conference. Therefore, he concluded that the majority improperly relied on courts' inherent authority to support its decision because the majority's holding was otherwise inconsistent with Rule 16.

Judge Coffey believed that the majority's expansion of courts' inherent authority also contravened Rule 45 of the Federal Rules of Civil Procedure. He explained that Rule 45 authorized the issuance of subpoenas for hearings and trials but not for pretrial conferences. Furthermore, the judge raised a due process concern because a district court's order to attend a pretrial conference was not subject to a motion to quash as was a subpoena. Thus, an unwilling litigant had no means of challenging the court's use of its alleged inherent power.

Finally, Judge Coffey indicated numerous problems that would arise from the majority's holding. He stated that the authority to compel represented parties to attend settlement conferences would "continue to pose substantial invitation for judicial abuse." He warned that "[o]ur trial judges must never fall prey to becoming part of a process that even subliminally suggests"

---

195. Id. at 658-59. Judge Coffey referred to numerous cases that limited courts' use of their inherent power. See, e.g., Bank of Nova Scotia v. United States, 108 S. Ct. 2369, 2374 (1988) ("The balance struck by [Federal Rule of Criminal Procedure 52(a)] between societal costs and the rights of the accused may not casually be overlooked because a court has elected to analyze the question under the supervisory [or inherent] power."); United States v. Widgery, 778 F.2d 325, 328-29 (7th Cir. 1985) ("Inherent authority is not a substitute for good reason . . . [it] is just another name for the power of courts to make common law when statutes and rules do not address a particular topic."); United States v. Payner, 447 U.S. 727, 737 (1980) ("Even a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions").

196. Heileman, 871 F.2d at 659 (Coffey, J., dissenting) (quoting Strandell v. Jackson County, 838 F.2d 884, 886 (7th Cir. 1988)).

197. Id. at 659-60. Judge Coffey noted that courts have "historically assumed that Congress intended what it enacted." Id. at 660 (quoting United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980)).

Judge Coffey also pointed to the consistent distinction in Rule 16 between represented and unrepresented parties. Id. at 660. See generally supra notes 41-42 and accompanying text (comparison of various distinctions between represented and unrepresented parties in Rule 16).


199. Heileman, 871 F.2d at 660 (Coffey, J., dissenting).

200. Id.

201. Id. at 661.
a pressure to forego the essential right of trial." Furthermore, Judge Coffey foresaw a risk that a represented party might make a damaging admission at a pretrial settlement conference that had not been elicited in prior discovery proceedings.

Most important to Judge Coffey, however, was his fear that the judiciary's appearance of impartiality would be sacrificed if a litigant were forced to sit at a "command appearance before a judge who injects himself into an adversarial role." He stressed that "the appearance of fairness, impartiality and justice is all imperative" if judges were "to maintain the appearance of fairness and impartiality that is so important to the preservation of confidence and respect for our cherished judicial system."

3. Judge Easterbrook's Dissent

Judge Easterbrook viewed the Heileman case as presenting three logically separate issues: first, whether a district court may demand the attendance of someone other than the party's counsel of record; second, whether the court may insist that this additional person be an employee rather than an agent selected for the occasion; and third, whether the court may insist that the representative have "full settlement authority." He conceded that even if the first issue were answered affirmatively, it did not follow that the

202. Id. As an example of such potential abuse, Judge Coffey referenced the incident involving the Secretary of Labor that Judge Posner had referred to earlier. See id. at 657 (Posner, J., dissenting). Judge Coffey quoted the trial court, which had sought to compel the attendance of the Secretary of Labor to discuss settlement after the Department of Labor's attorney refused to agree to a settlement proposal suggested by the district court:

I will tell you now that I am through with the Department of Labor's waltzing around, taking ridiculous positions, and saying that this is the Government. The Government is the Secretary of Labor, so far as I'm concerned. And I want to see him at 10:00 o'clock on the 23rd of April in this courtroom to tell me why the Secretary of Labor is taking these idiotic positions.

No. 85-1640, unpublished order at 2-3 (7th Cir. Apr. 23, 1985), reprinted in Heileman 871 F.2d at 661 (Coffey, J., dissenting).

203. Heileman, 871 F.2d at 662 (Coffey, J., dissenting).

204. Id. Judge Coffey stated:

We may express in grandiose terms all sorts of theory and postulation about being careful not to influence, intimidate and/or coerce a settlement, but under the pressure that our trial judges experience today from their ever-burgeoning caseloads, we would be foolhardy not to anticipate an undesirable and unnecessary psychological impact upon the litigant in circumstances of this nature. The difficulties associated with active judicial participation in settlement negotiations is expressly exacerbated when the trial is scheduled before the court rather than a jury of one's peers. The appearance of partiality and impropriety must be avoided at all lengths if our nation is to continue to show respect for its judicial judgments.

Id.

205. Id.

206. Heileman, 871 F.2d at 663. (Easterbrook, J., dissenting). Judge Easterbrook believed "full settlement authority" to mean the "authority to agree to pay cash in settlement." He was uncertain, however, whether this meant "authority without cap." Id.
second and third powers existed or that the magistrate had acted prudently. sup 207

Addressing the second issue, Judge Easterbrook was puzzled that a magistrate could require a corporation to send an employee rather than a representative to a pretrial conference. He noted that corporate “employees” are simply agents of the firm, and an agent’s authority depends on which powers the corporation chooses to bestow on the agent. Judge Easterbrook also referred to the common use of outside attorneys as negotiators. Thus, he found it understandable that Oat preferred to send a skilled negotiator, rather than its management team, to explore settlement. sup 208

Judge Easterbrook also took exception to the majority’s conclusion that Oat was merely required to attend the settlement conference and not negotiate. He concluded that the magistrate abused his discretion by attempting to “facilitate settlement then and there.” sup 209 He believed that Oat was charged with contempt because its representative did not command the company’s treasury, sup 210 and the magistrate was afraid that he “might say something like ‘I’ll relay that suggestion to the Board of Directors,’ which might say no.” sup 211 Judge Easterbrook stated, “[w]e close our eyes to reality in pretending that Oat was required only to be present while others ‘voluntarily’ discussed settlement.” sup 212

Judge Easterbrook, like Judge Posner, stressed that civil defendants have no legal obligation to bargain in good faith. sup 213 He criticized the majority as authorizing a power “unknown even in labor law, where there is a duty to bargain in good faith,” since negotiators in labor disputes generally have the authority to discuss but not to agree. sup 214 Therefore, he found it impermissible to require a defendant, who has no legal duty to negotiate in good faith, to attend a settlement conference with the authority to settle then and there, especially since this authority was not required even of labor and union agents sup 215 who do have a legal obligation to bargain in good faith. sup 216

sup 207. Id. at 663.
sup 208. Id.
sup 209. Id.
sup 210. Id. at 664. This, according to Judge Easterbrook, was evidenced by the fact that the magistrate, upon learning that Fitzpatrick did not have the authority to make a monetary offer, ejected him from the conference even though Fitzpatrick claimed to have authority to speak for Oat. Moreover, the magistrate ejected Fitzpatrick without listening to what he had to say on Oat’s behalf or learning whether Fitzpatrick would be receptive to the others proposals. Id. at 665.
sup 211. Id. at 665.
sup 212. Id.
sup 213. Id. at 664. Judge Easterbrook noted that a defendant who is convinced it did no wrong may insist on total vindication. Id. (citing Hess v. New Jersey Transit Rail Operations, Inc., 846 F.2d 114 (2d Cir. 1988)). He further stated that Rule 16 clearly was not intended to require parties to have authority to settle the litigation. See Fed. R. Civ. P. 16 advisory committee’s note (Subjects to be Discussed at Pretrial Conferences) (reference to “authority” in final sentence of subsection (c) does not mean attorneys must have authority to settle the case).
sup 214. Heileman, 871 F.2d at 663 (Easterbrook, J., dissenting).
sup 215. Judge Easterbrook rejected the notion that settlement of civil litigation is more valuable than the settlement of labor disputes. He believed that the statutory requirement, which compels
4. Judge Ripple’s Dissent

Judge Ripple dissented and wrote separately only to emphasize what in his view was “the most enduring—and dangerous—impact of the majority’s opinion.” He opined that the “broad, amorphous, definition of the ‘inherent power of a district judge’” violated the premise of the Rules Enabling Act and “[b]efore long . . . [would be] used to justify far more questionable ‘innovations.’” He believed that the Rules Enabling Act was designed to foster a uniform system of procedure throughout the federal system which could be supplemented, but not altered by local rules designed to address local concerns. Therefore, Judge Ripple viewed the majority’s decision as the first significant step in encouraging “the individual district court to march to its own drummer.”

5. Judge Manion’s Dissent

Judge Manion believed that Rule 16’s language excluded any use of inherent power by a court to order represented parties to attend pretrial settlement conferences. He stated that the purpose of courts’ inherent power to order any party to attend a pretrial conference is to cause such party to bargain in good faith, and the absence of such a legislative command for civil litigants, implied that the opposite was true. Id.

Judge Easterbrook also raised a more pragmatic argument. He held that the magistrate’s order required either: (1) changing the allocation of responsibility within the corporation; or (2) sending a quorum of Oat’s Board of Directors. He reasoned that while most corporations provide their senior managers with the authority to agree, as distinct from the power to discuss, this case involved a $4 million claim. Moreover, the authority to settle for such a great sum would generally require the approval of a corporation’s board of directors. Therefore, the magistrate’s order required a quorum of the board of directors to attend the settlement conference or a change in allocation of power within the corporation. Id.

Furthermore, Judge Easterbrook noted that while reallocation of authority might not appear, on its face, to cause many problems, such problems do exist. Id. at 665. For example, the United States Assistant Attorney General for the Civil Division has authority to settle, but only up to $750,000, while the Deputy Attorney General has the authority to settle for higher sums. Id. (citing 28 C.F.R. §§ 0.160(a)(2), 0.161). The issue then becomes whether the magistrate can compel the Deputy Attorney General to attend a settlement conference or require a delegation of this authority. Id. Judge Easterbrook concluded that if the delegation would be improper for the Department of Justice, the delegation should be improper as it related to Oat. Id.

Judge Ripple joined the dissenting opinions of Judge Coffey and Judge Manion. Heileman, 871 F.2d at 658 (Ripple, J., joining in Judge Coffey’s dissent); id. at 666 (Ripple, J., joining in Judge Manion’s dissent).


Judge Ripple also disagreed with Judge Easterbrook’s conclusion that the magistrate had committed error in requiring a quorum of Oat’s Board of Directors to attend the pretrial conference. Heileman, 871 F.2d at 666 (Ripple, J., dissenting).

Judge Manion, 871 F.2d at 666 (Manion, J., dissenting).
authority was to fill gaps in the law, and when a statute or rule specifically addressed a particular area it was inappropriate to invoke the courts' inherent authority to overstep the bounds of that statute or rule. Judge Manion concluded that both the Rule's text and advisory notes prohibited the majority's invocation of inherent power. Like Judge Coffey, he stressed the language of Rule 16(a) and Rule 16's consistent distinction between represented and unrepresented parties. Judge Manion also found the Advisory Committee's Notes supportive of his position. Thus, any use of inherent power here failed.

Judge Manion also warned that the "substantial costs" which arose from the majority's decision outweighed its benefits. He reiterated Judge Posner's concern of judicial high-handedness and stressed Judge Coffey's concern that federal courts' appearance of fairness and image of providing a neutral form were essential to the proper functioning of the courts. Further, he recognized a third cost, that of "denigration of the attorney's role in litigation." Finally, Judge Manion also observed that the majority's hold-

225. Id. (Coffey, J., dissenting).
226. Rule 16(a) defines who the court may require to appear at and participate in a pretrial conference. See generally supra notes 29-42 and accompanying text (discussion of Rule 16(a)).
227. Heileman, 871 F.2d at 667 (Manion, J., dissenting). Judge Manion also pointed to Rule 16(f) which allows for sanctions if "no appearance is made on behalf of a party." Id. (emphasis in original). He also refused to disregard the drafters language as a result of "sloppy draftsman ship." Id. at 668. Judge Manion thought the distinction in the Rule consistent with a litigant's statutory right to representation by an attorney. Id. at 667 (citing 28 U.S.C. § 1654 (1982)). Also, he found the distinction consistent with the attorney's traditional role in litigation. Id. See also id. at 657 (Posner, J., dissenting) (litigants hire attorneys "to economize on their own investment of time in resolving disputes" and to take advantage of an attorney's training and skill).

Judge Manion recognized that lawyers sometimes convey inadequate information regarding settlement; he noted, however, that a lawyer has a strong self-interest and ethical duty to relay accurate settlement information. Id. at 667 (Manion, J., dissenting).

228. Id. at 668-69. He focused upon the drafters' statement that, "it is not the purpose of Rule 16(b)(7) to impose settlement negotiations on unwilling litigants [instead] it is believed that providing a neutral forum for discussing the subject might foster it." Id. at 669 (citing Fed. R. Crv. P. 16 advisory committee's note (Scheduling and Planning)). Judge Manion also noted that "Rule 16 'was not intended to require that an unwilling litigant be sidetracked from the normal course of litigation.'" Id. at 669 (quoting Strandell v. Jackson County, 838 F.2d 884, 887 (7th Cir. 1988)).

He rejected the majority's distinction between "being required to negotiate" and "being required to attend." He reasoned that the magistrate clearly required the represented party to attend the conference, state his position regarding settlement, and listen to other parties, perhaps including the court's proposals. Thus, Judge Manion found the magistrate was requiring the parties to discuss settlement. Id. Moreover, he reasoned that even if a distinction can be found between "discussion" and "negotiation," the kind of coerced participation here was close enough to forced negotiation to come within the advisory committee proscription. Id. at 669-70.

229. Id. at 670.
230. Id.
ing would effectively impose litigation expenses on litigants that they had attempted to avoid in the first instance by hiring an attorney.\textsuperscript{231}

Judge Manion rejected the majority's underlying premise that the necessity of effective docket management justified its holding. He indicated numerous alternatives which he believed would effectively deal with litigants who "unreasonably refuse to settle."\textsuperscript{232} He also stated that courts have substantial power to punish frivolous litigation and undue delay through aggressive scheduling techniques and Rule 11, and he recognized "the time-honored method of pushing cases to early trials."\textsuperscript{233}

III. Analysis

The Heileman opinion presents two issues worthy of discussion: first, whether the majority properly interpreted the law involving Rule 16 and courts' inherent authority; and second, whether policy considerations justified the majority's legal analysis. This Note contends that the majority erred in cursorily analyzing Rule 16's text and advisory notes and in disregarding the earlier view set forth in Strandell. Perhaps more significantly, however, the majority erred in extending the boundaries of courts' inherent authority. Finally, it will be argued that the majority could have adequately addressed the policy considerations presented by the Heileman case with a more narrow and less restrictive holding.

A. The Majority's Legal Analysis

1. Rule 16 Analysis

The majority failed to properly interpret Rule 16 in light of its text and the Advisory Committee's Note. In interpreting Rule 16, the Seventh Circuit was faced with four alternatives. Rule 16 could be viewed as either: (1) authorizing the magistrate's actions; (2) prohibiting the magistrate's actions; (3) providing some insight as to the question presented; or (4) failing to provide an answer to the issue. The Heileman majority determined that the last alternative was appropriate. It opined that Rule 16 did "not give any direction to the district court upon the issue of the court's authority to order litigants who are represented by counsel to appear at settlement conferences."\textsuperscript{234} The majority argued that Rule 16(a) only requires attorneys and

\textsuperscript{231} Id.

\textsuperscript{232} Id. He noted procedures such as judgment on the pleadings, Rule 12(b) dismissal, and summary judgment. Id.

\textsuperscript{233} Id. Judge Manion also distinguished In re LaMarre, 494 F.2d 753 (6th Cir. 1974). He found LaMarre inapplicable because "it simply does not address whether Rule 16, as it now stands, limits the district court's power to order represented parties to appear at settlement conferences." Heileman, 871 F.2d at 671 (Manion, J., dissenting).

\textsuperscript{234} 871 F.2d at 651 (en banc) (emphasis added).
unrepresented parties to attend pretrial conferences.\textsuperscript{235} The majority further stated that "the mere absence of language in the federal rules specifically authorizing or describing a particular judicial procedure should not, and does not, give rise to a negative implication of prohibition."\textsuperscript{236} Thus, in concluding that Rule 16 provided no direction regarding the issue before it, the majority catapulted itself into the murky waters surrounding courts' use of their inherent power to determine the validity of the magistrate's order. A closer analysis of Rule 16's plain language and its underlying purposes would have precluded an inherent power analysis.

While the majority failed to adequately analyze the scope of Rule 16 in light of its language and advisory notes, the dissents scrutinized the rule. Therefore, the dissents' arguments that Rule 16's scope does not authorize compelling represented parties with full settlement authority to attend pretrial conferences will be briefly reiterated here as a premise upon which to build.

Before 1983, Rule 16 provided district courts with the authority to compel attorneys to attend pretrial conferences. In 1983, the drafters explicitly provided district courts with the added ability to require "unrepresented parties" to attend pretrial conferences.\textsuperscript{237} There is no mention anywhere, however, of the drafters' intent to provide courts with the authority to compel represented parties to attend pretrial conferences.\textsuperscript{238} Additionally, the dissents noted that Rule 16 consistently distinguishes between "represented" and "unrepresented" parties.\textsuperscript{239} These reasons support the proposition that the 1983 drafters desired that district courts not have the authority to compel represented parties to attend pretrial conferences.

The dissents also found support in other advisory comments for this contention. The drafters designed Rule 16 to provide neutral forums to foster settlement in the pretrial context.\textsuperscript{240} Further, the dissents noted that Rule 16 was not meant to impose settlement negotiations on unwilling litigants.\textsuperscript{241}

\textsuperscript{235.} Id.

\textsuperscript{236.} Id. at 652 (citing Link v. Wabash R.R., 370 U.S. 626, 629-30 (1962) and FED. R. CIV. P. Rule 83). Judge Manion argued that the majority read Link too broadly. Id. at 667 n.1 (Manion, J., dissenting). Judge Manion argued that Link did not hold that negative implication is always an inappropriate interpretation tool. While negative implication might not by itself conclusively answer what the exact scope of a particular rule is, it furnished a good starting point. Id.

The majority's reliance upon Rule 83, arguably, also proves too much. As pointed out above, Rule 83 drafters did not intend its language to have the expansive interpretation that the majority bestowed upon it. See supra notes 68-73 and accompanying text.

\textsuperscript{237.} FED. R. CIV. P. 16(a).

\textsuperscript{238.} The drafters added unrepresented parties, according to Judge Coffey, only after the "the Supreme Court and Congress took a good hard look at Rule 16 in hopes of improving judicial efficiency." Heileman, 871 F.2d at 659-60 (Coffey, J., dissenting).

\textsuperscript{239.} Id. (Coffey, J., dissenting); id. at 667-68 (Manion, J., dissenting).

\textsuperscript{240.} FED. R. CIV. P. 16 advisory committee's note (Subjects to be Discussed at Pretrial Conferences) (emphasis added). See Heileman, 871 F.2d at 662 (Coffey, J., dissenting).

\textsuperscript{241.} Id. at 661 (Coffey, J., dissenting). The majority avoided this argument by drawing a distinction between negotiation and attendance. As Judge Manion indicated in his dissent,
and it was "dead set against any coercive settlement practices." Thus, both the text and advisory notes support the proposition that Rule 16 does not provide district courts with the authority to compel represented parties to attend pretrial conferences.

Further, in determining that Rule 16 did not provide any direction to the issue at hand, the majority disregarded the earlier, and better view set forth in Strandell. There, the Seventh Circuit held that district courts lacked the inherent authority to compel litigants to participate in a nonbinding summary jury trial. Heileman, on the other hand, held that district courts have the inherent authority to compel a represented party who has full settlement authority to attend a settlement conference.

The decisions are difficult to reconcile. A summary jury trial, like a pretrial settlement conference, serves as a means to facilitate settlement. In some respects, however, a summary jury trial is less intrusive to litigants' rights than a mandatory settlement conference. For example, a summary jury trial is nonbinding and affords the parties time to consider a jury's holding. In contrast, any decision made in a pretrial settlement conference is binding. Furthermore, the determination of an appropriate settlement figure or assessment of damages at the pretrial conference is not determined by a disinterested jury, but rather by parties who have a significant, and in some districts, perhaps an overbearing interest in seeing the case settled. Moreover, an active judge may afford a represented party little time to thoroughly contemplate a settlement offer. By requiring the represented party to have full settlement authority, the court effectively places the primary responsibility of determining the propriety of a settlement offer in the hands of the client, a situation which in many cases, can result in an inadequate and unjust result. Additionally, the risk of offending a judge may be quite great. And, in certain circumstances, a represented party who is unfamiliar with judicial settlement techniques may be overwhelmed and thereby forced to accept what he or his attorney may otherwise believe to be an imprudent offer. These concerns, on the other hand, are not present with compulsory summary jury trials.

however, the distinction is specious:

It appears that the court is saying that a district court may order a represented party to appear in court both to talk and listen about settlement—in other words, to actually discuss settlement. I cannot see any meaningful distinction between this kind of activity and 'negotiation;' after all, negotiation in large measure simply involves discussion.

Id. at 669 (Manion, J., dissenting) (emphasis in original).

242. Id. at 669 (Manion, J., dissenting).
243. Strandell v. Jackson County, 838 F.2d 884, 887 (7th Cir. 1988).
244. Heileman, 871 F.2d at 887.
245. See Lambros, Judge's Role, supra note 113, at 1375 (summary jury trial was designed to foster Rule 16(c)(7)'s mandate, which encourages extrajudicial procedures to foster settlement and resolve disputes).
246. See HANDBOOK FOR JUDGES, supra note 113, at 7.
247. See infra notes 330-32 and accompanying text.
Any contention that summary jury trials involve unique concerns regarding premature disclosure of discovery must fail. Just as the *Strandell* court expressed concern regarding the revelation of privileged information during the summary jury trial,\(^{248}\) there is a similar risk that a represented party may inadvertently reveal damaging information during the settlement conference that was previously undisclosed.\(^{249}\)

Furthermore, any contention that *Strandell*, unlike *Heileman*, risks infringing a litigant's right to a jury trial fails. The risk of infringing upon a party's right to a jury trial is greater with mandatory settlement conferences. While a jury renders its decision in a summary jury trial after hearing evidence produced during a simulated trial,\(^{250}\) in contrast, no jury determination exists with mandatory settlement conferences. Additionally, pretrial settlement offers may be made without knowledge of all the facts and evidence.\(^{251}\)

The *Heileman* decision also fails to acknowledge *Strandell*'s articulation of the nature and scope of Rule 16. In *Strandell*, the Seventh Circuit determined that Rule 16 was not coercive in nature. While recognizing that Rule 16 was intended to foster settlement, the Seventh Circuit also noted that "it was not intended to require that an unwilling litigant be sidetracked from the normal course of litigation."\(^{252}\) Moreover, Rule 16 required pretrial conferences to be "neutral forum[s]" in which to facilitate settlement,\(^{253}\) and it "was not designed as a means for clubbing the parties—or one of them—into an involuntary compromise."\(^{254}\) Finally, the court found that while Rule 16 encourages courts to *explore* innovative procedures, it does not mandate that parties be *required* to engage in such procedures.\(^{255}\)

The majority in *Heileman*, however, ignored these admonitions. Oat was not provided with a neutral forum;\(^{256}\) in fact, the pretrial settlement conference could well be categorized as coercive. The magistrate's actions demonstrate that the risk of clubbing a party into involuntary compromise is

\(^{248}\) *Strandell* v. Jackson County, 838 F.2d 884, 888 (7th Cir. 1988).

\(^{249}\) Judge Coffey commented that "among other problems, the litigant [may] make an admission of some type which would be damaging to the case and which had not previously been elicited in discovery proceedings." *Heileman*, 871 F.2d at 662 (Coffey, J., dissenting).


\(^{251}\) See Justice Delayed, supra note 2, at 76 n.17 ("Overzealous judges may exercise undue influence on a final settlement, often without adequate knowledge or understanding of the facts of the case."); Elliott, supra note 10, at 317 ("It seems beyond serious debate, then, that discretionary managerial decisions may influence the outcome of litigation in ways that are arbitrary because judges act without . . . procedural safeguards").

\(^{252}\) *Strandell*, 838 F.2d at 887.

\(^{253}\) Id. (quoting Fed. R. Civ. P. 16 advisory committee's note).

\(^{254}\) Id. (quoting Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985)).

\(^{255}\) Id. (emphasis in original).

\(^{256}\) Oat had no intention to settle. Indeed, its insurance carrier made clear its intention not to attend the settlement conference. Therefore, the principals of Oat felt they could not settle even if they had wanted to. *Heileman*, 848 F.2d at 1417-18. See also id. at 662 (Coffey, J., dissenting) (doubting that a litigant would not feel pressured if forced to sit before a judge "who injects himself into an adversarial role").
Therefore, the Heileman majority also erred by advocating a potentially coercive procedural innovation, purportedly in furtherance of Rule 16's spirit and intent, but in direct contradiction to the court's discussion in Strandell.

While it is true that the 1983 amendment to Rule 16 was designed to increase judicial management and control over pretrial activities, the Rule also was meant to prevent overstepping by the courts. The advisory notes are replete with warnings and limitations regarding judicial overreaching. It is also recognized that Rule 16 is not coercive in nature and strikes a careful balance between judicial efficiency and litigants' rights. Requiring parties to attend pretrial settlement conferences against their will and requiring them to possess full settlement authority oversteps these limitations.

Even if one accepts the contention in Heileman that Rule 16 does not prevent a judge from compelling a represented party to attend a pretrial settlement conference, the majority erred when it also required the represented party to have full settlement authority. Rule 16 provides that full settlement authority is not required for pretrial conferences. The final sentence in Rule 16(c) was added to prevent pretrial conferences from becoming mere "ceremonial or ritualistic event[s]." The drafters stated:

The reference to "authority" is not intended to insist upon the ability to settle the litigation. Nor should the rule be read to encourage the judge conducting the conference to compel attorneys to enter into stipulations or to make admissions that they consider to be unreasonable, that touch on matters that could not normally have been anticipated to arise at the conference, or on subjects of a dimension that normally require prior consultation with and approval from the client.

While the drafters' statement only discusses settlement authority for attorneys, it does signify the drafters' belief that full settlement authority was not necessary for effective case management. Thus, the majority's rationale that authority to settle is necessary for meaningful settlement conferences directly contradicts the drafters' intent and belief.

257. See id. at 663 (Easterbrook, J., dissenting) (magistrate's desire to settle the case "then and there"); id. at 658 (Posner, J., dissenting) (after Oat informed magistrate it did not wish to settle, magistrate's "continued insistence on Oat's sending an executive to Madison [was] arbitrary, unreasonable, willful, and indeed petulant").
258. See supra notes 47-52 and accompanying text.
259. Strandell, 838 F.2d at 886-87.
260. This sentence reads, "At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed." Fed. R. Civ. P. 16(c).
261. Fed. R. Civ. P. 16 advisory committee's note (Subjects to be Discussed at Pretrial Conferences).
262. Id. (emphasis added).
263. See Heileman, 871 F.2d at 657 (Posner, J., dissenting). Judge Posner stated that the core of the majority's decision was the concern for "meaningful settlement conferences." Id.
The advisory comment above, also indicates that the drafters desired attorneys to report back to their clients regarding subjects "of a dimension that normally require consultation with and approval from the client." Thus, the majority's dismay with the delay inherent in such a process did not trouble the drafters, Congress, or the Supreme Court, and therefore, is also contradictory to Rule 16's clear language and intent.

In sum, the majority in Heileman failed to interpret properly the purpose and policy underlying Rule 16. Such an analysis would have demonstrated that Rule 16 does address and prohibit a magistrate from compelling a represented party with full settlement authority, against his will, to attend a pretrial settlement conference. Furthermore, Rule 16 explicitly rejects the notion that full settlement authority is required to conduct a meaningful pretrial conference. Even if one accepts the majority's position regarding Rule 16, however, the decision still fails because its reliance on courts' inherent authority was misplaced.

2. Inherent Power Analysis

The Heileman majority's own articulation of courts' inherent power fails to support its holding. The majority merely stated in a conclusory fashion that its reliance on courts' inherent power was proper because it furthered Rule 16's spirit and intent by promoting pretrial efficiency and judicial integrity. The Heileman holding neither promotes efficiency nor judicial integrity and, indeed, the decision may cause the opposite result.

The majority articulated the well-established limitation that a court's use of its inherent power, in a civil procedural context, must be exercised "in a manner that is in harmony with the Federal Rules of Civil Procedure." Thus, any procedural technique, promulgated pursuant to a court's inherent power must preserve the efficiency and integrity of the judicial process.

Judge Posner stated that "[s]ome district judges and magistrates distrust the willingness or ability of attorneys to convey to their clients adequate [settlement] information . . . [which] is what lies behind the concern that the panel opinion has stripped the district courts of a valuable settlement tool." Id.

264. Fed. R. Civ. P. 16 advisory committee's note (Subjects to be Discussed at Pretrial Conferences).

265. The majority speaks generally of efficiency. Heileman, 871 F.2d at 652 (en banc). A more explicit articulation concerning the delay inherent in attorneys reporting settlement information back to their clients after pretrial conferences can be found in the lower court's decision. See Heileman, 107 F.R.D. at 277.

There, Judge Crabb opined "[a] settlement conference without all of the necessary parties present is not productive. Neither is a conference of persons who have no authority to settle." Id. at 277. Only in that way may proposals and counter-proposals be advanced and responded to without delay." Id. at 281. See also Heileman, 848 F.2d at 1423 (Flaum, J., dissenting) (settlement conferences without parties are "often unproductive").

266. Heileman, 871 F.2d at 652-53.

267. Id. at 652 (quoting Strandell v. Jackson County, 838 F.2d 884, 886 (7th Cir. 1988)).

268. Id. at 651.
In applying this limitation, the majority held that compelling the attendance of a represented party who had full settlement authority furthered Rule 16’s spirit, intent, and purpose, premising its argument by stating that Rule 1 requires the Federal Rules of Civil Procedure to be liberally construed to promote the just, speedy, and inexpensive determination of every action.\textsuperscript{269} The majority then stated that Rule 16’s “spirit, intent, and purpose” was broadly remedial.\textsuperscript{270} It also argued that the “entire thrust of the amendment . . . was to urge judges to make wider use of their powers and to manage actively their dockets from an early stage.”\textsuperscript{271} Therefore, the court concluded that compelling a represented party’s attendance and requiring that party to have full settlement authority was “merely . . . another application of a district judge’s inherent authority to preserve the efficiency, and more importantly the integrity, of the judicial process.”\textsuperscript{272}

The majority neglected to point to any evidence to support its conclusion even though it had an obligation to do so.\textsuperscript{273} A closer analysis by the majority would have revealed that the magistrate’s purported use of inherent authority was inconsistent with Rule 16.

a. Insufficient evidence

The primary goal of the Rule 16 drafters was to promote active case management.\textsuperscript{274} To accomplish this goal the drafters displaced attorney control over the pretrial process.\textsuperscript{275} The drafters desired that district courts control the speed at which cases would be tried, rather than attorneys, who

\textsuperscript{269} Id. at 652 (citing Hickman v. Taylor, 329 U.S. 495, 507 (1947)).
\textsuperscript{270} Id. (citing In re Baker, 744 F.2d 1438, 1440 (10th Cir. 1984) (en banc), cert. denied, 471 U.S. 1014 (1985)). The majority also cited Baker for the proposition that “the spirit and purpose of the amendments to Rule 16 always have been within the inherent power of the courts to manage their affairs as an independent constitutional branch of government.” Id. (quoting Baker, 744 F.2d at 1441).
\textsuperscript{271} Id.
\textsuperscript{272} Id.
\textsuperscript{273} See, e.g., Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980) (“Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion.”). \textit{See also} Frankfurter & Landis, supra note 81, at 1022-23 (“The accumulated weight of repetition behind such a phrase as ‘inherent power’ of the lower Federal courts is a constant invitation to think words instead of things. It is imperative, therefore, to subject it to critical scrutiny.”).
\textsuperscript{274} Rule 16 advocates “judicial management that embraces the entire pretrial phase.” \textit{Fed. R. Civ. P. 16} advisory committee’s note (Pretrial Conferences; Objectives). \textit{See} Schwarzer, supra note 39, at 402 (judges should intervene in civil litigation and actively manage it from the time of filing).
\textsuperscript{275} \textit{See} Heileman, 871 F.2d at 652. (“[T]he entire thrust of the amendment to Rule 16 was to urge judges to make wider use of their powers and to manage their dockets from an early stage.”). \textit{See also} JUSTICE DELAYED, supra note 2, at 66. (“The basic tenet of case management philosophy is that the court, not the attorneys, should control the progress of cases in the pretrial period.”). \textit{See supra} notes 36-40 and accompanying text.
often abused the process. Therefore, the majority correctly held that any use of inherent power, to be consistent with Rule 16, must preserve the efficiency and integrity of the pretrial process.

Nevertheless, the *Heileman* majority pointed to no evidence that would indicate that its holding would preserve pretrial efficiency. In his dissent, Judge Posner recognized the majority's lack of support and stated that, "we have insufficient information about those consequences to be able to give a confident answer." Furthermore, the existing empirical evidence regarding extensive judicial participation in civil case settlement, which the majority's holding implicitly advocates, indicates that it is nonproductive. One study states:

> Those courts that exert the most effort in settling cases do not necessarily dispose of more cases per judge than those courts where less judicial settlement effort is expended. The only obvious relationship is the perfect inverse relationship between amount of court settlement activity and median disposition time. The most settlement-intensive courts are the slowest courts.

---

276. See *Fed. R. Civ. P. 16(b)* (requiring a scheduling order from the court). *Cf. Justice Delayed*, supra note 2, at 40 ("Civil case management is most in evidence in the federal courts and its effect there on the pace of litigation is pronounced. . . . Elsewhere the pace of litigation is left almost entirely in the hands of the attorneys.").

277. *Heileman*, 871 F.2d at 652. This articulation justifies treating cases such as *In re LaMarre*, 494 F.2d 753 (6th Cir. 1974), and *Van Bronkhorst v. SAFECO Corp.*, 529 F.2d 943 (9th Cir. 1976), differently from the *Heileman* case. In both *LaMarre* and *Van Bronkhorst*, the courts were presented with a situation where one party, the claims manager or EEOC, unreasonably refused to state its reasons for refusing a settlement offer that was otherwise acceptable to the primary parties involved. Thus, these parties were attempting to abuse the pretrial process. In contrast, in *Heileman* the primary party, Oat, in good faith, did not want to settle and desired a trial upon the merits. This has never been considered an abuse of the pretrial process. Therefore *Heileman* is distinguishable from *LaMarre* and *Van Bronkhorst*. See *Heileman*, 848 F.2d at 1422 (distinguishing *LaMarre* because, among other things, it represented an "extraordinary situation").

278. Unfortunately, the day has not arrived "when courts and legislatures . . . regularly turn to empirical research to answer questions" related to pretrial. M. Rosenberg, supra note 2, at viii.

279. *Heileman*, 871 F.2d at 657-58 (Posner, J., dissenting). *See also Resnik*, supra note 10, at 417-24 (examination of available information reveals little support for proposition that judicial management is responsible for efficiency gains, if they even exist, and instead intimates that purported gains are illusory).

280. The extensive nature of settlement activity that the majority condones was reflected in the magistrate's actions. The magistrate spent a great amount of time with the parties and engaged in two settlement conferences. *Heileman*, 871 F.2d at 655-56.

Moreover, if a party has authority to settle, there will be a natural predisposition to engage in active discussion over the prospect of settlement, certainly more extensive than if the party had no settlement authority. Indeed some judges separate the parties and discuss settlement with each one individually.

281. *See, e.g.*. *Justice Delayed*, supra note 2, at 31-33, 75-76.

282. Id. at 33.
While the authors of this study stated that they were not in a position to assert a causal connection, they did note that "fast courts on civil case processing need not be 'settling' courts."

Another study found that limited judicial participation in settlement may be valuable but "a large expenditure of judicial time is fruitless." Yet another study revealed that, "[a] court with lengthy procrastination of most cases, but few ultimately going to trial, could absorb more total judge time than a court having more cases going to trial but with the pretrial settlements being achieved quickly and with little expenditure of judge time." Thus, not only is it questionable whether increased judicial involvement in civil case settlement promotes efficiency, there is empirical evidence indicating the opposite to be true.

b. Compromising judicial integrity

More importantly, perhaps, is the majority's contention that its holding will preserve the integrity of the judicial process. Preservation of judicial integrity does not necessarily follow from increased efficiency, even assuming that such would occur. A concern focused primarily on speedy dispositions can lead to injustice. As one commentary stated, "[a] sacrifice of justice to obtain speedy dispositions could hardly be termed a reform." Moreover, Rule 1 does not equate justice with efficiency; instead it requires a just and speedy determination of every action.

The majority's holding "compromises, rather than furthers, the 'protection of the integrity of the court.'" It is well established that respect for the judicial system is dependent upon the "appearance of fairness, impartiality and justice." Commentators have noted that judicial abuses

283. Id. The authors of this study questioned whether settlement conferences actually lower the proportion of cases that require trial. Furthermore, they stated, "even if conferences do settle cases that would otherwise have resulted in trial, it is not clear that a change in trial utilization will necessarily increase total court output." Id. at 76. Cf. Peckham, supra note 35, at 778 (recognizing "a point of diminishing returns is reached when the time and expense saved by pretrial is less than the time and expense spent on it").

284. See S. Flanders, supra note 2, at 37.


286. See Justice Delayed, supra note 2, at 65; Link v. Wabash R.R. 370 U.S. 626, 648-49 (Black, J., dissenting) ("When we allow the desire to reduce court congestion to justify the sacrifice of substantial rights of the litigants . . . we attempt to promote speed in administration, which is desirable, at the expense of justice, which is indispensable to any court system worthy of its name.").

287. FED. R. CIV. P. 1.


289. Id. at 662. See also Public Util. Comm'n v. Pollack, 343 U.S. 451, 467 (1952) (Frankfurter, J.) ("The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact."); See also Comment, State Court Assertion
and coercive activities during pretrial settlement conferences do exist.\textsuperscript{290} Moreover, as Judge Coffey commented:

We may express in grandiose terms all sorts of theory and postulation about being careful not to influence, intimidate and/or coerce a settlement, but under the pressure that our trial judges experience today from their ever-burgeoning caseloads, we would be foolhardy not to anticipate an undesirable and unnecessary psychological impact upon the litigant...\textsuperscript{291}

The majority's failure to provide for procedural safeguards exacerbates the concern that the majority's holding will compromise the integrity of the judicial process. Authorizing settlement conferences to be attended by represented parties who have full settlement authority, without providing procedural safeguards, will encourage arbitrary judicial activities and decisions.\textsuperscript{292}

One risk is that judges or magistrates who lack full knowledge of all the issues, may pressure a represented party to accept an inadequate settlement...
figure early on in the pretrial process. One commentator states:

[Un]less established guidelines delineate the role of the trial judge in settlement negotiations, the judge has the propensity to abuse his expanding authority. Despite his best efforts to the contrary, a judge's human nature prohibits him from remaining totally neutral and objective under the pressure of settlement negotiations. The judge’s human shortcomings are of most concern in cases involving unrestricted judicial involvement in settlement proceedings.

Thus, the majority's holding presents a very real risk of tarnishing the appearance of judicial fairness and impartiality which is crucial for the continuing viability of the judicial system itself.

In sum, the majority failed to present any evidence to support its proposition that compelling a represented party who has full settlement authority to attend a pretrial conference would preserve the efficiency or integrity of the judicial system. Indeed, little evidence exists, and the empirical evidence that is available indicates that judges who actively pursue settlement through the use of pretrial conferences may actually hinder both efficiency and the integrity of the judicial process. Rule 16's drafters displaced attorney control over pretrial so as to promote judicial efficiency and integrity—that is, they desired effective case management. Because the majority's holding does neither, it is inconsistent with Rule 16's underlying objective. Therefore, the majority's use of the inherent power doctrine was improper.

c. Alternative inherent power analysis

Even if one disregards the empirical evidence regarding pretrial efficiency as inconclusive and the concerns over judicial integrity as misplaced, the majority's legal foundation is still specious because it neglected to examine other established limitations on courts' inherent authority which would have prevented its use. The Supreme Court has warned that “[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion.” This admonition, along with established precedent, gives rise to two general limitations. First, courts should be cautious in attempting to use their inherent power so as not to unreasonably infringe upon litigants' rights. Second, a court must demonstrate the

---

293. See JUSTICE DELAYED, supra note 2, at 76 n.17 (“Overzealous judges may exercise undue influence on a final settlement, often without adequate knowledge or understanding of the facts of the case.”).


296. See supra notes 98-99 and accompanying text. See also Heileman, 871 F.2d at 658-60 (Coffey, J., dissenting) (use of inherent power must not usurp carefully struck balance in Rule 16 between court efficiency and litigants' rights); Strandell v. Jackson County, 838 F.2d 884, 886-87 (7th Cir. 1987) (same). Additionally, one court has stated:

A pre-trial conference is primarily a technique to promote the disposition of litigation
“necessity” of using its inherent power. Case law and scholarly commentary demonstrate that courts have required different degrees of necessity to justify different uses of inherent power. As a general rule, however, it appears that to the extent that a court’s use of its inherent power infringes upon litigants’ rights, a corresponding demonstration of “necessity” must also be shown. Not only does the majority’s decision significantly infringe upon the rights of both the hired attorney and the represented party, it also fails to prove the degree of necessity required to justify its invocation of the court’s inherent power, because effective, less restrictive means of controlling docket congestion exist.

Compelling a represented party who has full settlement authority to attend a settlement conference significantly impinges attorneys’ and represented parties’ rights. Not only does the majority’s decision encroach on attorney autonomy and the traditional role of attorneys, it also cuts to the heart of the adversarial system. As Judge Posner stated, “[o]ne reason people hire lawyers is to economize on their own investment of time,” and it is not entirely implausible that “judges may ignore the value of other people’s time.” Clients’ rights are similarly harmed. Parties to litigation often rely on attorneys’ skill and expertise in resolving disputes. The majority’s decision requires a lay person to make a legal conclusion as to the propriety of settlement, arguably, in a coercive atmosphere. Moreover, there is a con-
tinual risk of coerced settlement with few, if any, procedural safeguards.\textsuperscript{304} Lastly, the decision arguably imputes a legal duty on the litigants to bargain in good faith prior to trial.\textsuperscript{305}

Since compelling a represented party who has full settlement authority to attend a settlement conference significantly infringes upon the litigants' rights and requires invoking courts' inherent rulemaking authority, the majority should be required to show that the practice it advocates is more than merely reasonably necessary.\textsuperscript{306} Because well-established and effective docket management alternatives already exist, the authority to compel a represented party who has full settlement authority to attend a settlement conference is not necessary to the extent required to justify invoking an inherent power analysis.

Currently, two general categories of docket management tools exist: pre-trial streamlining techniques,\textsuperscript{307} and diversion techniques.\textsuperscript{308} Streamlining procedures usually demand a firm scheduling policy, which may include strict discovery deadlines and granting continuances of trial dates only for good cause.\textsuperscript{309} Other streamlining measures include assigning cases to a mandatory tracking system based on their complexity,\textsuperscript{310} using mail and telephone conferencing to expedite the processing of motions,\textsuperscript{311} and penalizing parties for last-minute settlements after court-rooms and juries have been assigned.\textsuperscript{312} Additionally, established diversion techniques, or alternative dispute resolution techniques exist.\textsuperscript{313}

\begin{footnotes}
\item[304] See generally Resnik, supra note 10, at 432-40.
\item[305] See Heileman, 871 F.2d at 658 (Posner, J., dissenting); id. at 664-65 (Easterbrook, J., dissenting).
\item[306] Note, supra note 91, at 353 (the use of inherent rulemaking authority should be made "sparingly and when need is apparent and pressing").
\item[307] See P. Ebener, Court Efforts To Reduce Pretrial Delay ix (1981).
\item[308] Id.
\item[309] See, e.g., Handbook for Effective Pretrial Procedure, reprinted in 37 F.R.D. 255, 271 (1964) ("The selection of an early trial date has proven conducive to and, for the most part, essential to a successful pretrial conference . . . for it is well known that nothing settles law suits like setting them for trial."); Elliott, supra note 10, at 313 ("[P]erhaps the most important single element of effective managerial judging is to set a firm trial date."); Peckham, supra note 290, at 258 n.13 ("Firm dates motivate the parties to establish proper priorities rather than to pursue all potential arguments."); Report to the President and Attorney General of the National Commission for the Review of Antitrust Laws and Procedures, 80 F.R.D. 509, 535 (1979) ("It is desirable to establish time limits . . . so that . . . the litigants are motivated to exercise self-discipline and creative choices between alternatives.").
\item[310] See Justice For All, supra note 2, at 11.
\item[311] P. Ebener, supra note 307, at xi.
\item[312] Id. at xi. Other alternatives include: judgment on the pleadings, Rule 12(b) dismissal, summary judgment, voluntary arbitration, voluntary summary jury trials, and simply encouraging attorneys to engage in settlement discussions with each other. District court judges can also request represented parties to attend a settlement conference, either in the presence of the judge or otherwise.
\item[313] Examples include summary jury trials, private arbitration, court-annexed arbitration, mediation, private judging, and the mini trial. See, e.g., Lambros, Summary Jury Trial, supra
\end{footnotes}
The *Heileman* majority neither addressed these alternatives nor made any showing that these alternatives were ineffective docket management tools. Studies have revealed, and practice has demonstrated, that firm scheduling policies are the most efficient way to control docket congestion.314 Even if a "docket crisis" does in fact exist, this does not necessarily establish that these alternative docket management tools are inadequate. Rather, it appears that district court judges, at least to some degree, are either unfamiliar with all the possible alternatives available to them or are unwilling to use them.315

In sum, the *Heileman* majority's own articulation of the courts' inherent authority does not support its holding. The majority failed to adequately support its conclusion that its decision would preserve judicial efficiency or integrity. As numerous studies indicate, the majority's holding may, in fact, hinder pretrial efficiency and the integrity of the judicial process. Furthermore, the majority's holding significantly infringes upon litigants' rights. Moreover, because established and effective alternatives currently exist to control crowded court dockets, the majority, arguably, did not meet the showing of "necessity" required to justify its use of the inherent power doctrine.

B. Policy Considerations

It would be disingenuous to focus solely on the majority's legal foundations without also closely examining the policy considerations that the *Heileman* decision presents. As the dissenting opinions indicate, the majority ultimately appears to be concerned with the ability to hold meaningful settlement conferences with attorneys who often are unwilling to convey to their clients adequate settlement information.316 Thus, there appears to be two general policy concerns: (1) the ability to hold meaningful settlement conferences,317 and (2) attorneys' unwillingness to communicate complete settlement infor-

---

314. See *Justise Delayed*, *supra* note 2, at 76.
315. See, e.g., *Justice For All*, *supra* note 2, at 66-69 (call for education and training programs to transmit better to courts the accumulated learning on how best to reduce docket congestion and increase judicial efficiency); *Justice Delayed*, *supra* note 2, at 5, 54 (evidence strongly suggests the "local legal culture," including courts' and attorneys' expectations, practices, informal rules of behavior, and apathy to change causes significant delay in case disposition).
316. Judge Posner commented, "[s]ome district judges and magistrates distrust the willingness or ability of attorneys to convey to their clients adequate information bearing on the desirability and terms of settling a case in lieu of pressing forward to trial." *Heileman*, 871 F.2d at 657 (Posner, J., dissenting). Judge Manion also noted that the majority's concern was "that to effectively manage their case loads, district courts need the power to order represented parties to appear at settlement conferences." *Id.* at 670 (Manion, J., dissenting).
317. *Id.* at 663 (Easterbrook, J., dissenting).
This Note contends, however, that the majority had an alternative less draconian than that of sanctioning district courts to compel represented parties who retain full settlement authority to attend pretrial settlement conferences.

As demonstrated above, extensive personal judicial involvement in facilitating settlement may not be desirable. There is little, if any, evidence of increased efficiency in requiring a represented party who has full settlement authority to attend a pretrial settlement conference. A judge may be more efficient by only playing a minimum role in personally overseeing and encouraging settlement discussions. Furthermore, as Justice Clark warned, there is a significant risk in making settlement the courts’ overriding concern during the pretrial process. Thus, the majority’s concern over “meaningful” settlement conferences is misplaced.

On the other hand, the concern over attorney reluctance to relay all relevant settlement information is valid. Nevertheless, requiring a representative party with full settlement authority to attend a pretrial settlement conference as a means of preventing attorney misconduct is problematic in that it will neither promote efficiency nor preserve judicial integrity. Furthermore, requiring full settlement authority causes definitional problems and may prove unduly burdensome to many parties. The majority should have chosen a less restrictive alternative to protect against attorney misconduct, one consistent with Rule 16 and the Federal Rules of Civil Procedure.

A less restrictive alternative would require a client to attend the pretrial conference, or designate another agent to represent itself, in addition to its hired attorney. Although the client, or agent would not be required to possess settlement authority, that person attending the conference should have a significant self-interest in seeing the case disposed of quickly and justly. Thus, the party must not have a financial interest in the continuance of the case. Furthermore, any agent sent in a party’s stead, must have easy access to the ultimate decisionmaker, for instance, a vice president or in-house counsel.

This alternative avoids many of the problems encountered when a represented party with full settlement authority is required to attend a settlement conference. Efficiency will be preserved in that a magistrate or judge will not be tempted to engage in extensive discussions concerning settlement because neither party will have ultimate authority to settle. If courts are concerned with the inherent delay arising from the relay of settlement proposals, they can impose reasonable deadlines on the parties. The integrity

318. Id. at 657 (Posner, J., dissenting).
319. See supra notes 283-91 and accompanying text.
320. See supra text accompanying note 32.
321. See Clark, supra note 30, at 167. See also Comment, Pretrial in Maine, supra note 3, at 111 (emphasis on disposition rather than preparation in pretrial conferences may be too strong, thereby replacing the litigation process itself by making the pretrial conference an end rather than a means to resolve disputes).
of the judicial process is also preserved since there is no reason to entice "settlement then and there." The problem of imputing a new legal obligation to negotiate in good faith is also avoided. Moreover, the litigants' rights are only minimally infringed upon. Hired attorneys might take offense, but they still would retain ultimate control over their cases. Furthermore, clients will only incur the added expense of sending another party to a settlement conference. This cost is outweighed by the fact that the client can avoid the opportunity cost of having to attend the conference personally, and also avoid the risk of making a hurried and uninformed decision regarding the propriety of settling its case.

While one may argue that this ideal provides no guarantee that settlement will be entered into, it does provide assurance that clients will receive adequate information regarding the other side's settlement proposals. Additionally, this less restrictive approach preserves judicial integrity and efficiency by appropriately limiting the judicial role in settlement activities.

IV. IMPACT

As already noted, Heileman imposes a potentially detrimental effect on the efficiency and integrity of the judicial process. The Heileman decision also significantly affects the role that judges and settlement will play in future pretrial conferences. While the decision encourages district court judges and magistrates to compel represented parties who have full settlement authority to attend pretrial settlement conferences, it does little to clarify the "new pretrial controversy" by leaving unanswered many questions regarding the proper role that judges and settlement should play in future pretrial conferences. Furthermore, the decision fails to provide future litigants with appropriate guidance regarding their new role. In particular, the opinion raises two interpretive questions which will perplex both future litigants and courts: (1) what is the exact meaning of "full settlement authority"; and (2) who qualifies as a "represented party."

A. The Future Role of Judges

The Heileman decision clearly encourages judges to actively pursue settlement with both counsel and, in particular, clients. The decision, however, does little to provide future judges with guidance in using their new settlement tool of compelling represented parties to attend settlement conferences. Moreover, while the majority attempted to establish an outer boundary that future judges would not encroach in pursuing settlement, it is a mere skeleton that neither provides adequate guidance to future judges nor protects future litigants' rights.

The majority in Heileman sanctioned a new settlement tool for district court judges but provided little instruction as to its proper use. The majority,

322. Heileman, 871 F.2d at 663 (Easterbrook, J., dissenting).
323. See supra notes 272-91 and accompanying text.
however, did provide one admonition to future judges with respect to compelling represented parties to settlement conferences. It stated that a judge abuses his discretion if compelling a represented party to attend a pretrial conference would be clearly onerous, unproductive or expensive in relation to the size, value, and complexity of the case.\(324\) This balancing test, while providing some guidance, is likely to prove too malleable and unpredictable. More importantly, it is unclear as to how effective the test will be in controlling the discretion of future judges and magistrates unless appellate courts permit interlocutory appeals.\(325\) A party would be unable to appeal a magistrate’s or judge’s decision if it settles its case, even if the magistrate or judge clearly violated the party’s rights by compelling its attendance or coercing settlement. Also, it is unlikely that the party would appeal its mandatory attendance after a verdict.\(326\) While a party can refuse to attend the settlement conference and thereby appeal immediately its sanctions, this is drastic conduct which many attorneys may not wish to pursue. Moreover, a client might frown upon such a tactical move that might cause the client to incur an added expense. Thus, unless appellate courts allow for interlocutory appeals, it is unclear how effective the abuse of discretion test will be.

The opinion also leaves many questions unanswered regarding the proper role that judges and magistrates should play while engaged in settlement conferences. The majority did attempt to provide some guidance in this respect. Its articulated limitations provided that judges can neither compel settlement\(327\) nor compel settlement negotiations.\(328\) Beyond these two statements, however, the role for future judges and magistrates in settlement conferences is undefined. The new settlement tool sanctioned by the Seventh Circuit requires the promulgation of additional procedural safeguards in order to control judicial discretion and protect litigants’ rights and the integrity of the judicial process. Although such safeguards may be difficult to draft and implement, some suggestions exist.\(329\)

324. *Heileman*, 871 F.2d at 654.

325. 28 U.S.C. § 1292(b) provides,

> When a district judge . . . in a civil action . . . shall be of the opinion that [an order not otherwise appealable] involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination the litigation, he shall so state in writing in such order. The Court of Appeals . . . may thereupon, in its discretion, permit an appeal to be taken from such order . . .

*Id.*

326. A party who received an unfavorable verdict would not appeal the order compelling it to attend the pretrial conference since in all likelihood it would have little to do with the merits of the case and would not be grounds, in the vast majority of cases, for reversing the decision. Obviously, a party who received a favorable verdict would not appeal the order that compelled it to attend a pretrial conference since it would be irrelevant, or harmless.

327. *Heileman*, 871 F.2d at 653 (citing Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985)).

328. *Id.*

329. *See* Resnik, *supra* note 10, at 432-33 (suggesting that settlement conferences attended
B. The Future Role of Settlement

While the two limitations articulated above may help guide the future conduct of judges, they more appropriately address the role that settlement will play in future pretrial settlement conferences. The first limitation, that judges cannot compel settlement, is clear and requires no comment. The second limitation that future judges cannot compel settlement negotiations, however, is more nebulous. Whether future courts will be able to compel settlement negotiations is confusing because the majority articulated a distinction between being compelled to attend a settlement conference and being compelled to participate in settlement negotiations.\textsuperscript{330} It appears, however, that the majority's opinion requires more than mere attendance. In addition to stating that a party can be compelled to attend a settlement conference to "consider the possibility of settlement," it also stated that the representative may be required to propose its terms of settlement in a pretrial conference before a judge.\textsuperscript{331} Therefore, as Judge Manion stated in his dissent, "[i]t appears that the court is saying that a district court may order a represented party to appear in court both to talk and listen about settlement—in other words, to actually discuss settlement. I cannot see any meaningful distinction between this kind of activity and 'negotiation.'"\textsuperscript{332} Thus, it appears that \textit{Heileman} will soon stand for the proposition, if it does not do so already, that civil litigants have a \textit{de facto}, if not \textit{de jure}, obligation to bargain in good faith regarding settlement prior to trial if a judge or magistrate so desires.

Another implication of the decision with respect to settlement is more far reaching. The opinion, arguably, represents a major step toward what commentators have labeled as a conscious transformation of the meaning of managerial judging. The \textit{Heileman} case furthers the misconception that managerial judging is synonymous with facilitating settlement. Commentators have noted that the notion of managerial judging is taking a new shape.\textsuperscript{333} One commentator has stated:

\begin{quote}
by parties be on the record, ex parte communications by judge or magistrate be prohibited, authoritative manual outlining acceptable management and settlement-inducing techniques be created, and title 28 be amended to permit appellate review of various types of judicial management decisions).

\textsuperscript{330} \textit{Heileman}, 871 F.2d at 653 (citing \textit{FED. R. CIV. P.} P. 16, advisory committee's note (Subjects to be Discussed at Pretrial Conferences)).

\textsuperscript{331} \textit{Id.} at 653-54.

\textsuperscript{332} \textit{Id.} at 669 (Manion, J., dissenting) (emphasis in original). \textit{See also id.} at 664-65 (Easterbrook, J., dissenting) (majority's opinion requires civil litigants to have greater authority than parties to labor disputes, where there is a duty to bargain in good faith).

\textsuperscript{333} \textit{See, e.g.,} Elliott, \textit{supra} note 10, at 308 ("Originally created as a set of techniques to narrow issues for trial, managerial judging has recently become a set of techniques for inducing settlements."); Resnik, \textit{supra} note 4, at 529 (federal judges are self-consciously shifting roles from "adjudicator to case-manager to settler"); \textit{id.} at 528 ("Many federal judges have begun to perceive themselves as being in the business of settlement as much as (sometimes more than) in the business of adjudication.").
Only shortly after it achieved undisputed legitimacy, the institution of managerial judging... is evolving rapidly from a set of techniques for narrowing issues to a set of techniques for settling cases. 

... What makes the shift in the functions of managerial judging particularly interesting is that the outcome is still 'up for grabs.' In terms of evolutionary metaphors, a new 'mutant' has just appeared on the scene, but it is unclear whether it will die, survive, or become dominant and crowd out its predecessors.114

Another commentator has criticized this transformation, believing it threatens our traditional notions of due process.335 Thus, Heileman, in addition to affecting the future role of judges and settlement, may also impinge upon our traditional notions of the adjudication system itself.

C. The Future Role of Litigants

In addition to affecting the role of judges and settlement, Heileman significantly impacts upon the role of future litigants without providing adequate guidance as to their new legal responsibilities. Two interpretive questions, in particular, prove troublesome: (1) what is the exact meaning of "full settlement authority"; and (2) who qualifies as a "represented party."

1. Full Settlement Authority

While the Seventh Circuit opinion does lend some guidance with respect to the definition of full settlement authority, this articulation is not very helpful. The majority stated that authority to settle "means that the 'corporate representative' attending the pretrial conference [is] required to hold a position within the corporate entity allowing him to speak definitively and to commit the corporation to a particular position in the litigation."336 This statement is ambiguous and subject to two interpretations.

An expansive view provides that the representative must have the authority to pay a cash settlement without limit. Corporate litigants, for example, would be obligated to send a representative who had unrestrained

334. Elliott, supra note 10, at 323 (footnote omitted).
335. Resnik, supra note 10, at 430-31 (footnotes omitted). Professor Resnik states:
[T]he literature of managerial judging refers only occasionally to the values of due process: the accuracy of decisionmaking, the adequacy of reasoning, and the quality of adjudication. Instead, commentators and the training sessions for district judges emphasize speed, control, and quantity. District court chief judges boast of vast statistics. . . . The accumulation of such data may cause—or reflect—a subtle shift in the values that shape the judiciary's comprehension of its own mission. Case processing is no longer viewed as a means to an end; instead, it appears to have become the desired goal. Quantity has become all important; quality is occasionally mentioned and then ignored. Indeed, some commentators regard deliberation as an obstacle to efficiency.
336. Heileman, 871 F.2d at 653.
control over the corporate treasury. A more restrictive reading would require the representative to have settlement authority equal to that amount in which the client would reasonably settle the litigation. Under this interpretation, however, a party who reasonably and in good faith has decided not to settle must still attend the settlement conference with the authority to settle for a certain amount. This was precisely the situation in Heileman where Oat's representative was sanctioned for not having full settlement authority because he only had authority to speak on behalf of the corporation and reiterate that the company was not willing to settle. Thus, the majority's decision, even interpreted narrowly, requires a defendant, who in good faith does not want to settle the litigation, to send a representative who can settle the litigation for a specific dollar amount. What this amount should be, however, is unclear.

The typical problem that will be encountered by a future corporate litigant because of the inherent ambiguity in the definition of full settlement authority can be illustrated best by a hypothetical. Assume that Corporation H files suit against Corporation O, claiming damages of $4 million. Although Corporation O does not wish to settle the case for $4 million, its board of directors is willing to settle the case for $2 million. Assume further that believing settlement would be in the best interest of the parties, a magistrate orders that the corporations attend a pretrial settlement conference with their hired counsel and a represented party who has full settlement authority.

Corporation O's board of directors' decision as to who to send to the settlement conference will be greatly influenced by how much authority its representative at the settlement conference must have. If the broad interpretation of full settlement authority applied, Corporation O's representative would be required to have the authority to settle the litigation for $4 million. Conversely, if the narrow interpretation applied, Corporation O's representative would be required to attend the settlement conference with the ability to settle the litigation for $2 million. The difference is significant because Corporation O's board may be more willing to delegate the authority to settle for $2 million than it would for $4 million, especially since the board has already determined that it would settle the litigation.

337. Id. at 663-64 (Easterbrook, J., dissenting) (majority's "full settlement authority" seemed to mean parties had "to come to court with open checkbooks on pain of being held in contempt").


339. This ambiguity will present important problems for future corporate litigants. Corporations must send an agent to pretrial settlement conferences since the actual party—the corporation—is a legal fiction and obviously cannot attend the conference. Thus, a corporation's board of directors, which ultimately possesses the authority to settle litigation on behalf of the corporation, would presumably have to attend the settlement conference or delegate this authority to an individual.

340. For purposes of this hypothetical assume that Corporation O is not insured against the potential liability.
for $2 million. Under the broader interpretation, however, the board may have reservations in providing one person with the authority to settle the litigation for potentially $4 million. Theoretically, to maintain control over the corporate purse strings, Corporation O’s board might find it more prudent to send a quorum of its members to attend the conference; such a decision, however, would be highly unlikely. But the alternative—presumably delegating the authority to a senior executive—involves the risk of giving one individual the important responsibility of making a command decision regarding settlement before a magistrate or judge. Yet, not to send either an individual or a group with the authority to settle for the full amount could result in sanctions.

The issue of full settlement authority also raises more subtle problems. Corporation O might not want to risk sanctions for sending a representative who has authority to settle for only $2 million. Therefore, it might authorize its agent to settle for $4 million, but explicitly direct the agent to refuse any settlement offer requiring Corporation O to pay more than $2 million. Thus, the representative would have the authority to bind Corporation O to a $4 million settlement, but, in fact, would not do so. It is unclear as to how a court could sanction Corporation O for this type of behavior without imposing on the entity a duty to bargain in good faith, something the majority in *Heileman* denied that it was doing.

2. Represented Party

The *Heileman* opinion also presents another definitional problem. The majority, unlike the situation with respect to defining full settlement authority, did not provide any guidance as to who could or could not be a represented party. The possibilities are numerous. Corporation O may desire to send its hired counsel to attend the conference with “full settlement authority.” Presumably, however, no court would allow such a manipulation of the *Heileman* holding, especially if the magistrate specifically requested a represented party in addition to counsel. But the term represented party itself is ambiguous, as Judge Easterbrook pointed out in his dissent.

In the aforementioned hypothetical, the defendant is a corporation. Presumably, Corporation O’s board of directors would be the ideal representative. Because in a substantial number of cases a corporation will deem it wasteful to send a quorum of its board to a settlement conference,

341. Judge Easterbrook noted that this alternative might contravene state laws that provide corporate boards of directors with the ultimate authority to settle litigation. Additionally, the majority’s holding might also have repercussions for the Department of Justice by requiring the Assistant Attorney General or Deputy Attorney General to attend pretrial settlement conferences upon demand. *Heileman*, 871 F.2d at 665 (Easterbrook, J., dissenting).
342. *Heileman*, 871 F.2d at 653 (en banc).
343. See id. at 663 (Easterbrook, J., dissenting).
the issue then becomes to whom may the board delegate this status. The possibilities include: attorneys, either outside or in-house counsel, senior executives, and other employees.

The majority’s opinion does not expressly prohibit an outside attorney from being a representative at a settlement conference. However, this would denigrate the majority’s concern that attorneys are often imperfect agents. Nevertheless, if outside counsel were prohibited from acting as representatives, then, presumably, only corporations that employ in-house counsel could attain the benefit and expertise of an attorney in pretrial settlement conferences. In-house counsel would be more acceptable representatives because they lack the financial interest in long, protracted cases evinced by outside counsel. If no attorneys could qualify as represented parties, however, one must decide who has the appropriate background in training and skill to make such command decisions regarding settlement before a magistrate or judge. A possible, and most likely solution is to rely on senior executives such as the corporate CEOs, presidents, or senior vice presidents. These people, however, while skilled professionals, may be unfamiliar with the legal aspects of the case or with judicial settlement-inducement techniques and therefore be generally unprepared to make the best choice regarding settlement. Moreover, as Judge Posner stated in his dissent, one reason why corporations hire attorneys “is to economize on their own investment of time in resolving disputes.” Nevertheless, it appears that both corporate litigants and other private litigants will be obligated to make time for settlement conferences, regardless of the cost or burden.

In sum, Heileman will have an important impact on future litigation. The decision expands both the role that judges and settlement will have in pretrial settlement conferences. The opinion, however, raises many questions regarding the extent that judges can partake in settlement-inducing techniques. Moreover, the decision appears to be a significant step in the transformation of the meaning of managerial judging. Lastly, future litigants, in particular corporations, are also affected and left with important questions, with respect to their responsibilities, unresolved.

V. Conclusion

Judges today are active managers—executives in our system of justice. This new status became readily apparent in 1983 when many of the Federal Rules of Civil Procedure, and in particular Rule 16, were substantially amended. Today, Rule 16 advocates active case management and the facilitation of settlement as express objectives of pretrial conferences. Despite this guidance, however, the proper role that district court judges and settlement play in the pretrial process is anything but settled.

344. See id. at 657 (Posner, J., dissenting); id. at 670 (Manion, J., dissenting).
345. Id. at 657 (Posner, J., dissenting).
G. Heileman Brewing Co. v. Joseph Oat Corp. represents an attempt to provide direction regarding the role that settlement and the judiciary should play during the pretrial process. The majority's conclusion to expand the role of judges and settlement, however, is unsatisfactory. Moreover, the majority's analysis is equally problematic. The majority concluded that it was within a court's inherent power, in furtherance of Rule 16's spirit, intent and purpose, to compel a represented party who has full settlement authority to attend a pretrial settlement conference because such a practice would preserve pretrial efficiency and judicial integrity. It is entirely likely, however, that the decision will have an opposite result.

The majority's deferential analysis also provides dangerous precedent. The majority's expansive use of the already nebulous inherent authority of the courts will promote future procedural innovations in the name of managerial judging that may well hinder pretrial efficiency and judicial credibility, if not carefully scrutinized.

Further, the decision will have a significant impact on future litigants. The opinion dramatically expands the role that judges and settlement play in the pretrial process. Moreover, the majority's opinion is representative of current courts' propensity to cling to settlement as a talisman for managing their dockets without closely analyzing the implications that increased settlement efforts will have on the system's efficiency, integrity, and indeed, continued viability. Additionally, the decision leaves important questions regarding the future role of litigants unanswered.

Without a clearer articulation than is provided in Rule 16 regarding the meaning of "active case management," the "mutant" will continue to evolve and grow. This unguided evolution presents problems. The issues prevalent since the inception of the pretrial conference need to be addressed by the Judicial Committee, Congress, and the legal community in general. The uninformed decisions made by courts simply has proven, and will continue to prove, too costly.

Tony J. Masciopinto

346. Compare Resnik, supra note 4, at 547 ("Given the problems of contemporary litigation, the Rules need reworking in several respects.") with Elliott, supra note 10, at 322 (call to fill the "gaping hole" surrounding the "essentially standardless procedures of managerial judging"). Some of these concerns include the following issues. What is the proper role of settlement in pretrial? What does case management/managerial judging entail? Are procedural safeguards needed/possible to prevent arbitrary managerial judging? Are there tradeoffs between efficiency in dispute resolution and the equity of dispute outcomes, and if so, what are they? P. Ebener, supra note 307, at xix. At what point does court intervention to expedite litigation become court management of case development? How far should the goal of settling cases extend? Id. at xix.