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## The Ethical Worlds of Large-Firm Litigators: Preliminary Observations

### Cover Page Footnote

Johnston Professor of Law and History, Yale University. Like everyone involved with the ABA Section of Litigation's Special Task Force on Ethics: Beyond the Rules, I am enormously indebted to the Section and to the personal enthusiasm and encouragement of Lawrence Fox, the Section leader who initiated this project, which was funded and sustained through his efforts and those of his successor. I am also grateful for the insights and contributions to our Task Force of the Section's leaders and facilitators, Don Hilliker, Peter Glenn, and Douglas Frenkel, and of my fellow academics on the project, especially Austin Sarat, who commented on an earlier draft of this paper.

## ESSAYS

# THE ETHICAL WORLDS OF LARGE-FIRM LITIGATORS: PRELIMINARY OBSERVATIONS\*

Robert W. Gordon\*\*

### INTRODUCTION

**I**N this essay I summarize my preliminary and necessarily tentative observations and conclusions gathered from participating in the ABA's *Ethics: Beyond the Rules* Task Force's project of interview research on the ethics of litigation practice.

In the project's first year, we interviewed large-firm litigation lawyers, both partners and associates, selected from firms in two major cities. In the second year, we interviewed samples of those who most often meet large-firm lawyers in litigation settings: trial judges, including a few magistrates, plaintiffs' lawyers, and in-house counsel, from the same two cities.<sup>1</sup>

We were looking for whatever could be learned, through informal interviews of a sample of the lawyers and judges involved in litigation, about the prevalence and likely causes of, and possible remedies for, ethically inappropriate or problematic behavior in large-firm litigation practice, especially in the area of discovery.<sup>2</sup> I use this vague formulation deliberately, to underscore our interest in areas of problematic

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1. Quotations of statements by study participants are taken from the author's notes or from the transcripts of the study's structured group discussions. The transcripts, which are confidential to protect the identities of study participants, are on file with Professor Robert Nelson of the American Bar Foundation. For a brief description of the study, see Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 *Fordham L. Rev.* 837, 838-42 (1998).

2. The decision was made to focus the study on large-firm litigators because bar-discipline authorities and researchers have tended in the past to concentrate attention on the ethics of small or solo practitioners, and because several well-publicized recent instances of ethical lapses among large-firm litigators have called attention to problems at that level of practice.

conduct “beyond the rules” as well as in plain violations of ethical and practice rules.

We have learned, I think, something about all of these areas from our research so far. Not surprisingly, what we have learned is much more about how lawyers and judges perceive and *talk about* ethical problems or the lack of them than about ethical problems themselves.

## I. THE WORLD ACCORDING TO LARGE-FIRM LAWYERS

I shall begin with the world of litigation practice as it appears to the main objects our study: large-firm lawyers. This part examines these lawyers' views on clear-cut and ambiguous issues, what causes lawyers to commit ethical violations, and what solutions are possible.

### A. *The Standard “Take”*

The lawyers we interviewed generally held a set of attitudes that one could call their dominant, standard, or official position on ethically problematic behavior—the default position or attitude of repose that they usually started with in interview sessions and often settled back upon at the end.

Large-firm lawyers' standard take on ethics is that ethically problematic behavior is very rare at their level of practice for several reasons, the most important of which are that:

1. Ethically inappropriate behavior (in the standard take) is defined narrowly as a violation of the rules.<sup>3</sup> Any eyebrow-raising behavior that is not a rule violation is classified as a matter of questionable “morality” or “bad manners” or “hardball” or “asshole” behavior, a defect or mannerism of *individual* character or personality.

2. Given the basic norm of the adversary system, which is the duty of zealous representation of client interests within the rules, much of what is characterized as aggressive or “hardball” behavior is legitimate and functional in view of valid litigation objectives and the conventional norms of the adversary game. “You stay within the rules; to the extent it's within the rules, you have a duty to do everything you can for the client's interest.” “We accept that adhering to the rules [of an ancient and tested process] does achieve a good [at the system level].”

3. Lawyering is separated from its substantive ends by defining its functions as following the rules of a procedural game. Any given litigation is not a process for vindicating moral claims, discovering truth, achieving just results, or avoiding harmful consequences. Responsibil-

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3. See generally Model Code of Professional Responsibility (1980) (outlining disciplinary rules that specify the minimum level of ethical conduct below which no lawyer may fall without being subject to disciplinary action); Model Rules of Professional Conduct (1995) (stating the standards of professional conduct by which lawyers must abide).

ity for the morality or justice of a claim is ultimately the client's. The lawyer's job begins and ends with advising the client of the likely legal consequences of his decisions and helping him achieve his aims within the limits of applicable legal rules. For example, lawyers stated: "You're not hired to give moral advice." "We're not moral judges of our clients." "We're trained to be an advocate." "There is morality, but it is not the domain of lawyers." "Our system of justice is not established for the purpose of moral judgments, but to determine facts and to apply law to facts." "We are a competitive bunch. Litigation is a zero-sum game; we are not truth-seekers." "If clients are going to lie to me, they are going to lie to me; am I going to try to be a mind-reader? . . . I would hope they would be honest with me; it's not my responsibility to guide them to decision." In speaking of themselves or their clients, the lawyers are much more at ease using the "tough" terms of consequentialist cost-benefit analysis instead of the "soft" and "vague" terms of ethics and morality. "The client doesn't want to have a moral dialogue with me . . . . You have to frame it in other ways, explain the trouble you can get into: 'Looking down the road as your counsel, if you kill people you're going to have liability.'" Moralizing lawyers are not to be trusted: "Sanctimonious lawyers are the first to file Rule 11 motions, accuse you of being unethical."

4. If ethically problematic behavior is limited to rule-violation, thus making it necessarily rare because: (a) the rules are mostly clear, thus it is easy for lawyers (and outside monitors) to tell when they have stepped over the line; and (b) lawyers and their clients, if properly advised by counsel, have a clear self-interest in complying with the rules because the costs of being detected in violations rarely justify either lawyer or client in taking the risk. "Concealment [of material information in discovery] may not be in the best interest of the client in the long run." "The risks [of suppression of relevant matter in discovery] are tremendous." Ethical behavior may also aid the firm's interest in its reputation, which in turn is an asset to clients: "We want to be able to settle [civil tax cases that might turn into criminal prosecutions] on the basis that our representations are in fact the case."

5. Unethical behavior is most uncommon at the level of large-firm law practice, because such firms are likely to have cultures, training procedures, and institutional safeguards (such as firm ethics committees) that promote ethical practices while discouraging and sanctioning unethical practices.

While speaking in this "official" mode, our lawyer-informants treated the actual stories we used of ethically problematic conduct (usually involving suppression or concealment of relevant evidence in discovery) by large-firm lawyers as either not really raising ethical problems at all or else as isolated examples of lawyers being "stupid," that is, failing to take adequate account of the downside risks to themselves and to their clients of rule violations.

B. *Beyond the Standard Take: Gray Areas*

The “standard take,” however, turns out to be an outer wall of defense, which, if breached, gives way to a more shadowy and interesting ethical landscape. Once invited to go into more detail about specific contexts of their practices, our lawyer-informants revealed a considerably more varied and complex ethical world than the standard account of a practice where the rules are clear: violating them is dumb and counterproductive, and any conduct that does not violate the rules is “okay.” Actual litigation practice, not surprisingly, involves many “gray areas” calling for complex discretionary judgment. Our informants described compliance with the ethics rules as a “floor.” They held aspirations for their own conduct or the conduct of other lawyers they worked or dealt with as a higher standard. They distinguished between more and less legitimate aggressive tactics, between savory and unsavory practices, and between civilly cooperative and nastily obstructive practice.

For the most part, because these distinctions are so specific to context, it is hard to generalize about them. One example is the distinction between the defensive tactic of asking for a break in depositions in order to throw off a questioner’s rhythm and give a witness time to think (generally believed legitimate), and asking for a break while a question is pending, continually going off the record, threatening sanctions, and yelling and screaming (not legitimate).

When you get warm, they throw up roadblocks, attack you personally . . . blow up, throw out some smoke, “let’s go talk to the judge, you’re attacking the witnesses,” keep the questioner from getting comfortable. I do this to some extent, but as a matter of personal style, I won’t raise my voice or attack [the adversary’s] integrity . . . Others feel very free to threaten sanctions, [engage in] high-pitched yelling . . . Others do it nicely, but continually go off the record, throw up roadblocks.

Nevertheless, some general principles emerged. For example, it is considered fair play to use tactics that throw opponents or their witnesses off balance or that raise costs to the other side, so long as the tactic, even though *mainly* adopted for strategic purposes, has some more-than-minimal relation to an arguably legitimate purpose as well. One may ask the embarrassing question, “Why were you fired from your last job?,” if it has some arguable relevance, but not if it is designed to harass. The general principle guiding discovery requests for documents is that defense counsel may not flatly lie or hide documents, but they are entitled to be “aggressive,” make the plaintiff’s lawyer “work for what he wants,” and withhold from relieving the plaintiffs’ lawyers of the burden of preparing his own case.“ Thus, the defense may not conceal, destroy, or deny the existence of specifically requested documents that they know exist, but is fully entitled to object to such requests as over-broad or unduly burdensome, to attempt

to narrow such requests and take advantage of ambiguity or vagueness in requests to supply only what is specifically asked for.

An inventory of undesirable behaviors (starting with the most serious and descending to the more trivial) would run something like this: (1) plain dishonesty, such as making representations about facts that turn out to be untrue or promises about future conduct that are broken; (2) unjustified "hardball," such as threatening sanctions without plausible cause or constant interruptions of questioning or instructions to witnesses; (3) gratuitous uncooperativeness, such as refusing reasonable requests for rescheduling or sending briefs by ordinary mail instead of messenger; and (4) tactical unpleasantness or bad manners, such as screaming, insulting, patronizing junior or female lawyers, and macho posturing.

Our informants seemed to agree with many of these distinctions. They reported a consensus in the upper echelons of the litigation bar about the kinds of tactics that distinguish ethical, honest, legitimately aggressive, and civil styles of practice from borderline, unscrupulous, sleazy, hyper-aggressive "hardball" and "asshole" practice. There are hard fighting but clean and fair ways of behaving in discovery, and sly, underhanded, dirty ways. In the gray areas, not all cats are gray.

On many other issues, however, our informants did not agree. In all of our interview sessions, we detected major disagreements in the views of even this very high-minded segment of the litigation bar about some of the basic ground rules and limits of litigation practice.<sup>4</sup> A tentative hypothesis is that a fault-line exists between those lawyers who are willing to be relatively *passive* in ethical manners and those lawyers who are somewhat more *active*. Passive lawyers may leave completely up to the client how to exercise discretion in difficult gray-area judgments. Active lawyers, on the one hand, may try to *guide* clients towards relatively more honest, forthcoming, cooperative, and civil strategies, or may adopt those strategies themselves in case of ambiguity or default, unless clients clearly instruct them otherwise. In the very first set of project interviews, for example, our informants described a range of approaches that they might use when establishing whether a document was prepared in anticipation of litigation for the purpose of deciding whether to claim privilege. They could:

1. ask the client open-ended questions without suggesting the answer that will favor the claim of privilege;
2. ask the client leading questions that are designed to produce the favorable response;
3. explain the legal consequences to the client and advise the client to tell the truth, whatever the consequences;
4. explain the legal consequences to the client and leave entirely to the client the decision about whether to tell the truth;

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4. This is an area that I would be very interested in exploring further.

5. explain the legal consequences to the client and advise the client to tell the truth, because if the client does not, other facts that may come to light, or the client's own testimony at a later proceeding, may conflict with what the client says now;

6. explain the legal consequences to the client and try to establish whether the answer, true or false, is likely to be contradicted by anyone at a later time; or

7. assume that this decision is a strategic one that falls within the province of the lawyer, not the client, and either (a) make the decision in the client's interest that, whatever the truth of the matter, short-term withholding of the document is in the client's interest, or (b) make the decision that the long-term interests of the client and the basic goals of the justice system favor turning over the document unless it is clearly privileged; and structure questions about how it was prepared to achieve the chosen end.

Similar dilemmas, calling for a similar discretionary range of decisions, pervade litigation practice. How should counsel phrase instructions or guidance to corporate personnel about what documents to search for or how to respond to questions in depositions? In particular, how much guidance should counsel give on the responses most likely to be inculpatory, on the tacit assumption that the client will take this as a hint to evade responses in those areas? Given in-house counsel's blanket assurance that all relevant documents and the names of all knowledgeable personnel have been produced, should outside counsel probe behind that assurance? If documents are made available in response to requests, will counsel see to it that they are indexed and collated or simply give access to warehouses and put the burden on plaintiffs to find the needle in the haystack?

To a very large extent, as our informants repeatedly emphasized, the choice of approach will be dictated by the instructions or, in the absence of instructions, by the perceived situation, interests, and desires of their clients. A client in a weak position on the law and facts will obviously adopt a different position in discovery from the client who can only gain by frank disclosure; a client who is determined to deter future litigation and resist disclosures that might harm it in later lawsuits is likely to be more obstructive and determined to raise costs for the other side than the client who wants to settle cases quickly to keep within the limits of an insurance reserve. The lawyers defending employment-discrimination cases said that they were much more likely to be forthcoming and try to keep overall costs down than the lawyers defending products liability actions. "In bet-the-company cases, to get to a settlement, you may have to fight the discovery wars."

Importantly, choosing an approach will also depend on the conduct of adversaries: several of our lawyers described their practices as starting out civilly and cooperatively, but eventually responding in



kind to hyper-aggressive conduct from the other side. In other words, their general policy was, "No first strike," but also, "Tit-for-tat." Even so, my impression was that our informants tended to differ considerably, even after taking into account differences in their types of practice, clients, and adversaries, in attitudes towards how active or passive the lawyer should be in making, or guiding clients to make, discretionary gray-area judgments. Some took the position that cooperation was their default stance until or unless plaintiffs demonstrated unreasonableness. Others, by contrast, argued that polite resistance—making the other side work hard for every single document—was simply the obligation of zealous advocacy, that withholding is a rational jockeying for negotiating position: "Disclose as little as possible before the ground rules are established. It's in your interest not to turn anything over but to have some 'integrity'<sup>5</sup> before the court[.] [Y]ou risk dismissal if you don't produce something." Some believed these decisions were primarily tactical and ethical ones for the lawyers to make; others believed that client instructions or the desire to give the client what it apparently wanted determined everything.

### C. *Explanations of Prevalence or Differences in Borderline Conduct*

Once our informants began to talk about differing levels of ethical practice, they speculated in very interesting ways about possible causes. This section outlines some of the major candidates for explanations of variations in borderline conduct.

#### 1. Outsiders

At least while speaking in their "official" voices, our groups of large-firm lawyers insisted that ethical violations and disreputable gray-area tactics were infrequent at their level of practice—large firms with reputations for ethics and civility to maintain. But they thought such violations and tactics were much more common outside that level, chiefly in the plaintiffs' bar but also in some firms (New York City firms were often mentioned) that cultivated reputations for ill-mannered hardball or "scorched earth" practice. When large-firm lawyers did engage in problematic conduct, our informants usually attributed it to outsiders.<sup>6</sup> Some firm lawyers, for example, suggested that when marginal conduct was a problem in their own firms, its source was often "laterals," partners recruited to the firm for their business book and not adequately socialized to the restraints of their firm's culture. Most often, however, partners attributed problematic

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5. Ironic quotation marks.

6. This is the type of explanation that our Task Force colleague Robert Nelson has called the "Circle of Blame." See Robert Nelson, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socioeconomic Factors that Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 *Fordham L. Rev.* 773 (1998).

behavior as resulting from provocations of *adversaries*, pressures brought to bear by *clients*, and inadequate supervision by *judges*. Associates most often located the source of pressure in "overaggressive" *partners*. More on these influences follows below.

## 2. Firm Culture

Although the lawyers generally agreed that ethically dubious practice was not a big problem in firms like theirs, they disagreed to a surprising extent on the importance of the firm as an institution for inculcating or maintaining standards of ethical practice.

Some partners and associates insisted that their firms had strong cultures, which ensured practice standards well above the floor, and mentioned some specific institutional controls: regular feedback from associates on partners' conduct, a requirement that threats of sanctions be cleared through committee, and even (though no one could say how seriously this was taken) adherence to ethical practice as a formal criterion in promotion and compensation. "Firm culture isn't a luxury; it's our bread and butter, our reputation; people come to us for integrity." The most effective institutional control was the original selection of associates. Believers in the strong firm also stressed the firms' insulation from the crudest forms of economic pressure as giving more latitude for ethical and cooperative conduct.

Other lawyers were more skeptical. They pointed, again, to the fragmentation of firm culture as firms have become larger and more heterogeneous, and to the decentralized organization of litigation practice: autonomous work teams not monitored by other partners. "You can't mentor partners. We had a partner who misbehaved in many situations, before opposing counsel and even judges; eventually he left the firm." Lateral partners brought in to the firm "are tolerated if they don't stay within the bounds of proper conduct for a longer time; they are treated differently." Partners rarely observe one another at work; if feedback comes at all, it is from lawyers at other firms or judges. Associates also felt that they were working mostly on their own in discovery practice and that they were under pressure to work quickly and not to make mistakes, but received little supervision and feedback from their partners. One partner offered a compromise view: large law firms generally are too big and fragmented to have a culture, but litigation departments are still often cohesive enough to have and impart strong cultures.

Above all, there were few positive incentives, other than self-respect and the good opinion of judges and of lawyers from other firms to practice ethically. Partners said clients exerted pressures toward hardball and borderline behavior; associates said such pressures came from both clients and partners, but particularly from partners. As one associate said, "There is no . . . market for ethical practice." Associates felt that virtually all their incentives were to play the discovery

game so as to disclose as little as possible. There was no reward for cooperative behavior, only the serious risk of premature disclosure of facts that some partner would conclude had compromised the client's settlement or litigation position.

### 3. Structural Causes

In all of our sessions, lawyers tended to point to aspects of the changing character of practice as a source of structural incentives to ethical violations and gray-area stretches. An attempt to generalize and summarize these structural factors follows:

1. The increasing competition among firms for clients, and of lawyers within firms for rewards based on attracting clients, has a dampening effect on ethical scrupulousness. This is especially so because clients often are over-impressed by hyper-aggressive lawyering and regard cooperative behavior or the attempt to establish mutual trust relations in litigation as a betrayal of their interests.

2. The dilution of cultures or conventions of trust, cooperation, and mutual restraint by growth in firm size, specialization, and cultural heterogeneity within firms (from increasing recruitment of laterals) and the litigation bar generally, except in smaller towns or cities or very specialized practices (like Delaware corporate practice), which are still controlled by repeat-player insiders who all know each other and have to deal with each other all the time.

3. Clients are demanding more service at lower cost and are scrutinizing costs more clearly. They are much less willing to subsidize training and mentoring of associates, who increasingly run discovery practice in their own autonomous, unsupervised void. Everyone in the firm feels the pressures of overburdened time and the need to make snap decisions on insufficient sleep and reflection: "There's too much to do and no time to think," and in any case there is no standard billing category for such things as, "Time for consultation and deliberation on ethical issues."

4. It is harder to counsel clients to avoid illegitimate or borderline tactics because it is less likely that lawyers will have established relations of trust and confidence with clients who hire them by the case, rather than the whole firm as its outside general counsel. In any event, in-house counsel often wants to dictate litigation strategy, budget, and even tactics. This division of responsibility can lead to ethical problems. There is a constant potential of an adversary relationship with a client. "You have to be skeptical about the accuracy of information [a client provides]. It's very frightening to me—business people sometimes have bad facts that they don't want to share with you."

5. Because firms are no longer loyal to their lawyers, or their lawyers to them, lawyers are more likely to engage in ethically marginal behavior to impress clients in order to ensure that the clients will be

portable if the lawyer leaves the firm. To put it another way, insecurity and mobility lead to lack of firm cohesion; in turn, lawyers have some incentive to favor marginal behavior over the firm's professional standing or reputational interest, because they cannot be sure over time that whatever benefits the firm will benefit them individually. At the same time, ethically marginal conduct is more likely to be overlooked by partners who are also big business-getters.

6. Firms are less likely to regard associates as lawyers in training for a lifetime membership in the firm than as a transient labor pool, only a few of whom will make partner. Those few will have to demonstrate client-getting and client-pleasing skills as well as professional competence. An associate who raises an ethical objection, or even just a question, about what a partner or client wants is taking a risk of being perceived as a difficult or obstructive person (or, as one associate who raised such a question told us he was labeled in a partner's evaluation, "argumentative"). An associate whose ethical fastidiousness poses the risk of displeasing or even losing a client will not last long.

7. Without the discipline of the informal sanctions of face-to-face communities, litigation practice is a classic prisoner's dilemma: in many cases both sides would gain more from cooperation, but each stands to lose if he or she cooperates and the other side doesn't.

This structural account is, then, a story of the weakening of bonds, and with them interests in reputation and continuing relations. Clients have less commitment to lawyers; lawyers have less commitment to firms; lawyers have no bonds or reputational stake with a community of lawyers; and (the associates expressed this somewhat bitterly) partners have no commitment to associates. A partial dissent from this view came from some of the women lawyers among our informants, who felt that the old solidarities had excluded them, and that the new conditions of practice opened up more opportunities for them to cultivate valuable long-term relations, both with partners and with in-house counsel, often staffed by other women.

The most interesting, but much disputed, especially by the partners, structural account we heard from several of the associates was the generational hypothesis that pressure for borderline ethical behavior or hardball comes mostly from mid-level partners. Mid-level partners "will fight on every document" and "are much more difficult to deal with on discovery . . . . Older lawyers have more trial experience; they have seen OBSTRUCTION blown up on poster board." Some lawyers speculated that this generational difference, if it exists at all, has some relation to changes in billing practices—that hardball lawyering, especially obstructiveness in discovery, is a particularly important part or function of hourly billing.

In sum, we cannot claim to have found out anything reliable about the actual *incidence* of ethical violations or ethically dubious borderline gray-area behavior (even if we had a clear operational definition

of the latter, which we do not have). In any case, incidents would be hard to establish because most of it would be unreported, and a rise in reports might say more about reporting or enforcement than about underlying behavior. Our method has been focused more on trying to elicit our informants' perceptions of problems and their sources. And it is striking that once the discussion gets past the standard take—the initial position of denial that there *are* any problems—our informants do, by and large, seem to think that ethically dubious practices have been increasing, and are inclined to attribute that increase first to heterogeneity—growing numbers of “outsiders”—and, second, to structural features of the new practice: larger firms, more competition, more bottom-line orientation, more pressure and less time, more client control, fewer bonds of continuing relationships among members of the litigation bar, partners in firms, partners and associates, and lawyers and clients.

#### D. Remedies

On the subject of remedies the lawyers in our groups genuinely tried to be helpful, though they were not very hopeful. Suggestions for remedies from inside firms included: regular associate feedback on partners' behavior (to correct for the fact that partners don't monitor one another); limiting lateral recruitment (growing slowly from the bottom up); instituting some auditing mechanisms (some sort of peer review); and reducing associates' incentives to overstate time spent and “leave no stone unturned” in discovery by reducing reliance on billable hours as a criteria for promotion. More radical proposals included tying compensation of partners more closely to complaints about their ethical behavior and becoming more discriminating in accepting clients who bring pressures for ethical violations: “Stop catering to clients who want one-stop service.” By far the most frequent suggestions for reform was more outside monitoring by judges: for more judges, smarter judges, and judges more involved with cases from the beginning.

There was, however, considerable skepticism about these remedies from lawyers who felt the main sources of pressure to hyper-adversary conduct came from the plaintiffs' bar and from clients and competition for clients rather than from within the firm, and that judges could realistically only monitor lawyers immediately in front of them.

Additionally, according to the standard take, there is not much of a problem to be remedied anyway. “Worrying about these issues at all is a luxury of the top ten to twenty percent; lawyers with a high-volume practice don't worry about them.” “Ethical behavior ‘beyond the rules’ is fuzzy and vague . . . [describing someone as] ‘hardball’ or ‘aggressive,’ it's really a matter of style and personalities. Is it a problem to be an aggressive lawyer? It's hard to find fault with these things.”

## II. THE WORLD AS IT LOOKS TO OTHERS: JUDGES, PLAINTIFFS' LAWYERS, AND IN-HOUSE COUNSEL

In order to get a check, or at least some varying perspectives, on what the large-firm lawyers told us about their practices, we interviewed samples of groups of those who most often had dealings with them in litigation settings: judges (including some magistrates), members of the plaintiffs' bar, and inside counsel (general counsel or other senior in-house counsel).

We were all struck by how *very* different litigation practice and the role of large firm litigators within it looks to these other actors in the system. We expected *some* differences. Differences in social and institutional roles, in self-interest and the interests of clienteles, are bound to translate into differences in ideology and perceptions of reality. Because all of our informants also were lawyers, we also expected to find some similarities among people trained and socialized into the same profession, even a profession as stratified and balkanized as the legal profession. We did find some similarities in the way that all the groups perceived current problems, diagnosed their causes, and suggested remedies, but we were most struck by the differences. Law is not a unified profession. These lawyers inhabit very different social and cultural worlds, live under very different regimes of pressures and incentives, and interpret reality very differently from one another.

### A. Judges

The judges' general reaction to discovery tactics in litigation might best be described as exasperated impatience with what they see as wasteful, pointless, inefficient game-playing that devours scarce time and judicial resources and interferes with settlement on the merits. Unlike the large-firm lawyers who see discovery abuse, at least by the defense bar, as sporadic and marginal, judges see it as frequent and pervasive. As one judge observed, "In practice [the discovery rules] have become a cash cow in which people vigorously create discovery fights; a lesson in hiding the pea." Asked what the main causes are, judges pointed to many of the same factors as firm lawyers do. Some discovery gaming, they think, results from lawyers running the meter to churn fees; some from hyper-cautious associates, "young attorneys afraid to release documents they think might be damaging"; and some from the culture of law firms that fighting everything has a value for its own sake, regardless of results. For the most part, the judges emphasized the perceived need to impress clients.

[Defense counsel] is under a lot of pressure. In-house counsel is the master. . . . "I want the toughest SOB in your firm." "Tough" is good. The message is very clear: scorched earth. The lawyer is thinking, "if I want to keep this client, I'm going to have to show what a macho guy I am." Pressure is coming from clients. There's very little interest in saying, "Let it all hang out."

Pressure to impress clients has increased with the decline of continuous relationships between lawyer and client, the increase in one-shot hiring, and the need for repeat business. "In the old days, you were connected to the client, firm to principal." Some judges also pointed to the attenuation of responsibility that comes with two tiers of representation, in-house and outside counsel. Lawyers are pictured as obstructions to rational cooperation.

Sometimes we'll go over the lawyers' heads, order the principals in, talk to clients: "Are you tired of paying bills?" We have to get around this Byzantine system, to get to the merits of the cases.

We have inherent powers. In mass torts, CEOs would come down with lawyers; they asked if they could sit and talk. Recently in a business case, parties asked if they could work without lawyers, forget motions and discovery. We settled it, the parties and me.

Who's the client? If in the General Counsel's office, that's one thing; if the CEO you get a different perspective. The trick is to find [people] who will authorize settlement; [we] can treat them like statesmen.

The plaintiffs' lawyers we talked to thought that judges, particularly federal judges, were biased against plaintiffs' lawyers and blamed the judges for discovery disputes. That may be so, but possibly because of the judges selected or the directing of questioning toward defense conduct, we saw little sign of it. "The main problem with [the defense bar] is hiding the pea; a couple of very large law firms do that as a matter of practice." "Withholding of documents is where you get the most misconduct." "There is a built-in reluctance to turn over something that's against interest." "Who's getting paid by the hour? Who has got the documents and the money?"

The judges also attributed problems to more general causes such as the deterioration of cultural values and professional standards. Of all the groups, the judges were the ones most frequent to believe that ethical behavior had declined.<sup>7</sup> Again, they place some of the blame on competitive pressures within firms. "In the 1970s, [partners] had the time to get involved [in supervision of ethics of younger lawyers]." Now, the partners' attitude is: "Produce billable hours or you're out on your butt. If you want loyalty, buy a dog." "The standard has become, 'What can I get away with and still be within the rules.'"

The judges are aware that their active participation is essential to resolving discovery disputes. "It's hard for lawyers to give in without [a judicial order]." "It's easier for a lawyer to explain to a client that [discovery has been] ordered by a judge." Nonetheless, they intensely dislike getting involved in such disputes. "None of us wants to spend more time on discovery." One judge lamented that

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7. This perception may, of course, simply reflect the change in perspectives that resulted when they shifted roles from litigator to judge.

Discovery disputes are a nuisance. . . . If a lawyer seeking to compel seeks sanctions, there's a litigation within the litigation, cross-motions for sanctions. We [judges] have different interests; we want to get to the truth. We want to resolve cases on the merits. If we award sanctions, we are saying, let's keep this pettifogging game going.

Moreover, the judges say, other authorities will not support their sanctions of lawyers. The state judges, in the jurisdictions where we interviewed, said that state appellate courts will not uphold sanctions. Disciplinary boards are reluctant to proceed against even plain and gross violations. State judges facing re-election have to be wary of sanctioning members of powerful bar associations whose endorsement is important.

Some of the judges were experimenting with improvements in managing discovery that they believed would be useful. In mass tort cases, judges could take an active role in setting up document depositories and systems by which documents could be transferred in an orderly way. Most agreed that, whether or not the new Rule 26 had been adopted (it had not, in the jurisdictions we studied), discovery conferences should be scheduled early, possible sanctions should be made clear in advance, and firm deadlines should be set.<sup>8</sup> Where feasible, sanctions should take the form of preclusion of claims or defenses or of instructions to the jury that documents were not produced because of tactical advantages of not producing them.

### B. *Plaintiffs' Lawyers*

It is important to mention that the plaintiffs' lawyers we interviewed represented, like the defense lawyers, a special cut of the bar: successful lawyers who can, to a large extent, pick their clients and their cases. Our primary focus in interviews was, once again, their experiences with our study's main object of interest, large-firm defense lawyers and their conduct in litigation, especially discovery. On this subject, there was a major division of opinion among the plaintiffs' lawyers. Some (a minority) felt strongly that actual dishonesty, "lying, cheating and obstruction" were all pervasive in the defense bar. Some (also a minority) argued to the contrary that the adversary system usually worked as it was supposed to, that if plaintiffs played the game skillfully they could in fact extract relevant documents from firm lawyers. These lawyers thought the main problem with *Fisons*,<sup>9</sup> a case

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8. See Fed. R. Civ. P. 26 (stating the general provisions governing discovery and the duty of disclosure).

9. *Washington St. Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 858 P.2d 1054, 1074-85 (Wash. 1993) (holding, in part, that the trial court abused its discretion when it refused to apply sanctions for discovery abuses). Study participants were presented with a fact pattern based on *Fisons*. See Report, *Ethics: Beyond the Rules*, 67 *Fordham L. Rev.* 691, app. at 885-87 (1998).



involving deceptive responses to discovery requests that the research team used to prompt discussion, was the plaintiff's incompetence at not responding to the fairly clear "red flag" sent up by the defense.

Most of the plaintiffs' lawyers, I think, were in the middle. They believed that actual dishonesty, such as outright lying and deliberate destruction of documents, does occur, though it is relatively infrequent, but that ethically problematic evasiveness, obstructionism, and delay were pervasive. Defense lawyers will not tell deposition witnesses to lie, but will tell them to evade and spin stories, and will instruct them in what an exculpatory story should sound like. Also, plaintiffs' lawyers will give all requests the narrowest possible interpretation; if they are asked to search for "letters," they will fail to produce "memoranda." Plaintiffs have to ask for the same documents "six to seven times" to get them. They must carefully build a record to seek a motion to compel and to seek sanctions, if necessary. Some plaintiffs' lawyers accept this behavior as a normal feature of the adversary process; most, however, are more critical, seeing it as a perversion of the spirit and purpose of the discovery rules. They attribute it primarily to the economics of large-firm practice, the need to bill hours and to impress clients: "The firm has 100-150 litigators that it can't support if it did what it's supposed to."

Asked whether in-house or outside counsel were better to deal with in discovery, our informants related different experiences. Some preferred dealing with outside counsel law firms because outside counsel were less personally invested in outcomes, less ideological, and (especially if frequent adversaries) were more likely to have continuing relations leading to mutual trust. Others would rather deal with in-house counsel directly because inside counsel had less incentive to simply "keep the case going," were more interested in the substance or merits of the claim, and had no other client to impress by being unreasonable. Most lawyers agreed that the two-tiered system of representation, in-house and out-house, made it easier for corporations to hide documents. All the lawyers could preserve deniability and save themselves the necessity of outright lying by "layering" responsibility for discovery.

On two particular points, the plaintiffs' lawyers were especially intense. They were more critical of judges than of the defense bar. Their view is clear: the discovery rules (on the whole) favor plaintiffs; judges are supposed to enforce the rules, but they do not, partially because (as all the lawyers and the judges agree) they dislike discovery disputes, treating them as quarrels between bickering children, but also because judges, especially federal judges, are strongly biased against plaintiffs' lawyers. Defense lawyers are able to stall indefinitely and count on non-enforcement of the rules because of this bias. Some plaintiffs' lawyers believe they rarely get more than thirty percent of the relevant documents, even after years of trying, though

others say that if they are patient and carefully build a record, even biased judges will eventually compel production. Federal judges do not like personal injury disputes. Rather, they prefer commercial cases, and, most of all, dealing with law-firm lawyers with whom they share a common class background and cultural style.

Differences of class and style between the plaintiffs' bar, on the one hand, and corporate lawyers and judges on the other, was a theme to which these lawyers repeatedly returned.

Judges look at the plaintiffs' bar and are a little jealous. We're making too much money. We have to file fee applications; at the end of the day we have to genuflect and kiss their ring. Judges see us as pariahs; they come out of backgrounds with two serfs doing their work. We take tremendous risks, like an entrepreneur.

Judges enforce a double standard. If a plaintiff[s' lawyer] screws up, he's on the carpet. Defendants are just admonished.

In their minds, these factors accounted not only for judicial bias against them, and in favor of representations of their adversaries, but also accounted for a good deal of the gratuitous incivility and misbehavior in civil litigation. The plaintiffs' lawyers believe that their adversaries unduly personalize disputes and are hyper-aggressive in discovery and depositions because their adversaries fundamentally suspect the motives and trustworthiness of plaintiffs' lawyers. According to the plaintiffs' lawyers, defense lawyers view plaintiffs' suits to be extortionate strike suits and the lawyers to be greedy and unethical. "Law firms are bloody, really bloody." Plaintiffs' lawyers agree that their style, background, and ideology differ from those of the defense bar—plaintiffs are more flamboyant in dress, quicker to doubt the integrity of the business world, etc.—but also insist that, at least at their level of practice, most of their cases have merit.

Plaintiffs' lawyers are critical of many of the remedies for discovery abuse. Those that have had experience with the new Rule 26<sup>10</sup> do not believe it has changed much. They are suspicious of sped up calendars, believing they work in defendants' favor in cases requiring lengthy discovery. They are ambivalent about special discovery judges or magistrates. They like the fact that special magistrates have more experience, but dislike their inclination "to cut the baby in half," believing that it encourages plaintiffs in the wrong direction, to be more broad in their requests. They would like to see more vigorous enforcement by judges, and real consequences for repeated failures to produce, such as dismissal or preclusion of defenses or issues.

### C. *In-House Counsel*

In-house counsel occupy a dual role as lawyers-for-a-client, the management, and as part of that management. Their views of litiga-

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10. See Fed. R. Civ. P. 26; *supra* note 8 and accompanying text.

tion, the adversary process, and the discovery game are naturally conditioned by that duality. As lawyers, they embrace the norms of the adversary system: plaintiffs have to ask the right questions, the defense does not have to put together the plaintiff's case, it is legitimate to try to narrow requests, seek protective orders, and present plaintiffs with masses of data to sort through, so long as one has a colorable, legitimate basis for doing so.

As managers, however, the priorities of in-house counsel are somewhat different: they worry about cost and reputation. "The discovery game has more to do with generating fees . . . . Plaintiffs ask for overly-broad discovery so they can trap us into not producing so they can ask for sanctions. I hate to get into these awful games." "Outside counsel want to play these \$100,000 games. Inside counsel say, 'Let's focus on the issue and get it *done*, resolved.'" "If I have someone who's in a fight at every deposition, I don't want to be paying for that; have plaintiff go running to the judge." Inside counsel's primary concern is efficient case management, which is cost-effective litigation.

They are most likely to pull out all the stops to resist discovery, to take the pure litigator's view, is when exposure is the greatest. As one in-house counselor explained, "Where we have a document we don't want to produce, we cast about for reasons not to produce" or seek quick settlement before discovery proceeds further. The hardest-fought cases, one lawyer suggested, are those in which a document is not strictly relevant to the plaintiff's claim, but is powerful nonetheless. If such a document saw the light of day, it could injure the company's reputation or litigating position.

In-house counsel are, or at least report themselves to be, as concerned about their company's public image. They base defense strategy as much on the merits, real or apparent, of cases as on exposure; they repeatedly speak of wanting to "do the right thing" if there is a valid case against their company; and they certainly do not want to see their company written up "in *The Wall Street Journal*" as a corporate malefactor. "You're representing an institution, you can't afford a perception that you're cutting corners."

For our special purposes, the in-house counsel were probably most revealing when they spoke what they were looking for hiring outside counsel. They understood the *perception* that they always want counsel who will be as aggressive as possible, but believed that it was often a misperception. "People get scared, they get panicked: 'I'm going to get fired if we lose this case.'" Inside counsel are very instrumental; they want results, as cost-effectively as they can.

We asked about firm lawyers' belief that "there's no market for ethical practice." Our outside counsel agreed that this belief was generally accurate, that a reputation for dealing "in the utmost good faith" was not a criterion for selecting firms. On the other hand, in-house counsel did not want a firm known to be *unethical* because such a firm

might get them into trouble. There was, however, a niche market for highly ethical counsel, where a client needs to restore its good name with judges or regulators (Fisons, it was suggested during our conversations, might want to hire such lawyers after its debacle);<sup>11</sup> there was also a niche market for “junkyard dogs” when all-out scorched-earth resistance was needed to save the company. Sometimes, according to our participants, outside firms were fired because they were not aggressive enough, or were not aggressive in the right way; they were more interested in churning paper and filing motions than in winning. For routine litigation, several of the general counsel said they were turning to lower-cost, smaller firms to handle all work of a certain type on a fixed annual budget. Law firms who will not negotiate lower rates, they suggested, are “shooting themselves in the foot.”

On the whole, the in-house lawyers were extremely unsympathetic to outside lawyers’ claims that increasing competition and pressure from clients are eroding valuable components of professionalism. If “professionalism” means craftsmanship or “quality work,” outside counsel see it as wasteful or, at any rate, unaffordable luxury. It is the complaint of partners who want to maintain \$400,000 incomes in the face of increasing competition. “One of our objectives is to lower [outside counsel] incomes.” “I’m required to live within a budget; I have no sympathy for a lawyer who’s earning a lot more than I am.” If professionalism means autonomy in work conditions, this has to be sacrificed in favor of clients’ needs to keep costs down, to scrutinize bills, and to refuse to pay for items like “reorganizing our files.” “Law firms are so unresponsive to forward thinking; if you set a limit, they take it as beating up on them.”

How about the loss of the role of the “independent counselor” to business clients? Outside counsel see that role as having been taken over by themselves. “Lots of senior partners are disappointed with diminished access to senior executives,” but they don’t see much social loss as a result. They view the outside lawyer as ethical guide to the corporation as a myth. “It was a lie then; it’s a lie now.” Although there are times when they find it useful to solicit outside counsel for an “objective view” of corporate conduct, inside counsel can be more independent than outside because “it’s easier to get rid of a law firm than the lawyers in the company.”

Like all the other lawyers, in-house counsel believe that judges are too unwilling to get involved in policing discovery and sanctioning misbehavior. A mirror image of the plaintiffs’ bar, they believe that judges (in their case state-court judges who are more likely to come from the plaintiffs’ bar) are biased against them.

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11. See *Fisons*, 858 P.2d at 1074-85; see also Report, *supra* note 9, at 885-87 (reprinting the fact pattern given to our informants).

For abuses in the litigation system, inside counsel are most inclined to blame the tort system and the plaintiffs' bar. They say that lawsuits, especially discovery, place enormous burdens on corporate defendants to turn over warehouses of documents, so that plaintiffs can (1) go fishing around for something that might possibly influence a jury; (2) provoke the adversary into a defensive move that might trigger a request for sanctions; or (3) pose the threat that the defense will be put to vast expense searching for documents and will pay off to avoid it. "Plaintiff walks in on an entitlement theory; 'I'm a plaintiff and I'm entitled to damages; [let's] negotiate the number.'" "It's laziness; 'you produce and index and at some point I'll figure out what my claim is.'" In-house counsel tend to paint a very unfavorable picture of the plaintiffs' bar, one full of opportunists out for their own profit who often do not represent seriously injured people. They are critical of what they consider to be a general popular culture of "entitlement," the notion that for every injury there must be a deep pocket who will supply the remedy (if there's serious injury, the jury will "gloss over" issues of causation and whether the product could have been designed differently). When asked to suggest reforms, they called for reforms in the tort system. Most frequently, they suggested some sort of "loser pays" regime for attorney's fees, appointment rather than election of state court judges, reform of class actions, and changes in damages rules (eliminate the collateral source rule and joint- and several-liability, pain and suffering, and punitive damages) to reduce incentives to sue. "We have a cowboy system in the U.S. . . . [There are] no incentives to make a sensible early demand."

### III. SOME PRELIMINARY GENERAL REFLECTIONS

I end with some general thoughts about what we have learned from our project thus far. Specifically, I focus on the general shift among lawyers from an internal ethics to an external concern for satisfying the expectations of third parties.

#### A. *Perhaps the Most Basic Problem: Adversary Practice and Ideology*

Our lawyer informants were usually exceptionally sharp and perceptive observers of their own practices, with one significant blind spot. With the limited exception of some of the judges, they were not inclined to entertain the hypothesis that seemed to strike several of the outside observers as the most plausible: to the extent lawyers engage in ethically problematic conduct, the adversary system itself and the ideology of adversary advocacy that goes along with it, i.e., the master norm of zealous representation, significantly contributes to such conduct.

This is a blind spot because the adversary system and master norm of zealous representation are the unquestioned core religion of lawyers, litigators in particular. If a set of institutional practices and norms fundamentally define your job, your role in society, or your identity as a professional, you will find it difficult to admit that just doing your job in the way it is supposed to be done may, in itself, be the source of serious problems and adverse social consequences. You will assume that if everyone plays the game according to the rules, the results will be socially optimal, or, at least, acceptable most of the time.

Civil discovery is one of the areas of current practice that raises problems for this assumption. The discovery rules attempt to achieve that what is, to some extent, unachievable: install a cooperative process into the heart of adversary proceedings staffed by people trained in adversary culture. Our justice system—as my colleague John Langbein likes to point out<sup>12</sup>—is designed so that the accurate development of facts in civil suits is not *any* person's or institution's final responsibility; an approximation of truth is assumed to emerge from mutual checking and canceling-out of one-sided adversary presentations and distortions, with judges given only a weak role as umpires within the procedural game. Even judges can only effectively monitor the game as it is played in open court. They cannot hope to do more than superficial spot-checks of overreaching in requests for discovery and depositions or of deceptions and withholding in responses to requests for discovery. To the limited extent they can monitor, they do not want to tie up scarce judicial time with collateral litigation over claimed discovery abuse. Thus, lawyers should provide the mutual cooperation required by the discovery rules. Almost everything in lawyers' training, ideology, self-interest and clients' interest, however, permits a lawyer to resist doing so.

For example, take a look at adversary ideology, the master norm of zealous advocacy. At one time (in theory, anyway; what happened in actual practice is obscure), lawyers generally understood that this norm was constrained by, and had to be balanced against, other norms, namely those general duties owed by lawyers as "officers of the court" to the framework of substantive and procedural rules that structure the adversary system. But over the course of this century, especially in recent years, those general countervailing norms have been both weakened and reduced to rules. Instead of being confronted with two general obligations in permanent tension, which must constantly be balanced against one another, lawyers face only one dominant master norm: a client's interest is to be zealously advanced, qualified only by particular positive rules. "Ethics" has come

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12. See John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823, 841-48 (1985).

to be defined primarily as following rules rather than making complex judgments and applying internalized professional standards to particular situations. Lawyers believe that the rules of restraint, like any other rules that restrict the client's interest, may be legitimately "gamed," that is, narrowed, manipulated, and qualified by interpretation.

It seems to me that our inquiries into specific practice contexts revealed that there is more to the story than this. In actual practice, conscientious and fastidious lawyers acknowledge and try to live up to conventions of conduct over and above the floor minimum of obedience to rules. Rather, they try to remain faithful to higher principles or standards of practice within the "gray areas." In other words, they try to give some content beyond bare, narrow, reluctant rule following to the public-professional norms of obligations to the integrity of the legal system and its processes. But these conventions are very weak. There is nothing to bind lawyers to them except a desire for self-respect and reputation for admirable practice among other lawyers and judges.<sup>13</sup> The adversary ideology justifies successful or rainmaking partners who do not respect these conventions or carry with them clients who devalue them.

It seems obvious that if deviations from ethical conduct are not only tolerated but also positively justified in certain situations, even ethically inclined lawyers will sometimes end up practicing very close to the line (the floor set by the formal ethical rules). If that practice is routinely close to the line, it should not be surprising that in situations where the pressures and stakes are great, and detection seems unlikely, lawyers should be tempted to cross it.

This is especially so because, for all their praise of the adversary system, each side believes that the process, as presently structured, gives opponents illegitimate advantages, which might require overreaching tactics to correct. Plaintiffs believe that defendants routinely conceal documents, lie, evade questions on discovery, and delay for no valid purpose other than to raise costs to adversaries and make them go away. Defendants believe that plaintiffs often file actions with no clue as to whether they are justified, ask for time-consuming and expensive discovery in the wild hope that it may turn up something inculpatory, or attempt to force the settlement through the nuisance value of discovery. Plaintiffs are inclined to believe that almost every business has nasty secrets that it will do anything to conceal. Defendants think that this kind of "smoking gun" evidence is usually just a single employee's (such as an engineer's) hypercritical assessment of a problem, which a jury might read out of context as much more significant than it is. Plaintiffs believe defendants have an unfair advantage

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13. Although, as a number of lawyers pointed out, there are niche markets for integrity, as well as situations in which the client has reason to value a lawyer with a reputation for fair, honest, and cooperative dealing.

in federal court, where judges are pro-defendant; defendants believe plaintiffs have an equivalent converse advantage in state court. Both sides believe that they have to put up a convincing show of preliminary fighting over discovery in order to get the other side to see that they are not pushovers and to consider reasonable settlement. To all these justifications must be added the "law-has-become-a-business, and we have to adjust to that" justification for overriding what may seem to be hyper-fastidious professional scruples or prissy moralizing. I take up this topic next.

B. *The Erosion of Professional Moralism and the Rise of Economistic Realism*

Our interviews also shed some light on a basic shift in the ways that lawyers have come to think and talk about ethical issues. This might be called a trend away from "moralism" and towards "realist economism." I should make clear that these are "ideal-types." Most real people combine moralist and realist styles of thought, applying different mixtures of the styles to different contexts.

"Moralists" believe that people are variable along a spectrum of character traits, more or less self-regarding or attentive to the welfare of others; more or less honest, fair-dealing, and trustworthy or sneaky, dishonest, and unreliable. To some extent, these are variations in individual personality, in the legal profession as well as in other places that one would expect a mix of types. But these traits are also cultural and social. There are historical conditions, cultural environments, organizations, and methods of education and training that influence the production of character. To a moralist, the way someone such as a lawyer behaves in a particular situation is significantly a function of the greater or lesser extent to which that person has learned and internalized a conception of himself as a moral being and a conception of his practice as an ethical way of life. The stronger and more habitual that self-conception, the more resistant it will be to outside incentives and pressures to vary it.

"Realists"—I put this in quotes to indicate that I do not necessarily accept this view as an actually more realistic picture of human nature and conduct than the moralists'—tend to adopt the economist's or "rational-choice" theorist's view that people are naturally self-seeking and will simply respond to pains and penalties, incentives, rewards and sanctions. "These are facts of life," as one of our informants said, "we have to accept people [as they are]; if they go beyond the pale, they should be sanctioned."

In our study the lawyers who spoke in moralist terms were likely to express disapproval or outrage at the conduct of some or even most other lawyers in litigation practice. They complain that these lawyers are "pervasively dishonest and utterly fraudulent," prone to wholesale "lying, cheating and obstruction" (a plaintiffs' lawyer on defense law-



yers); that there has been a “general deterioration, a lot of intellectually incapable people getting to be lawyers . . . interested only in the bottom line” (a judge on the litigation bar generally), or that “Sammy Glick is now the model of every MBA school, most everybody is getting closer to used-car salesmen; nobody gives a damn about anything but the bottom line.” As another observed:

If you're representing [a corporate defendant] and have an unpleasant document, the responsibility you have is determined by how you see yourself—as a member of a learned profession and officer of the court—or see yourself as someone in commerce, who's there to feed the overhead and keep the machine going.

Lawyers, in their realist, mode are by contrast hard to scandalize; to them, interest in the “bottom line” is not a special cultural or character trait, but normal and predictable. Lawyers are businessmen operating in an adversary system; they will naturally serve their own interests first, their clients' second, and anyone else's only to the extent of the risk that they will be caught and sanctioned if they don't:

I don't hold out much prospect that [we could convince most lawyers that they] owe a higher duty to the profession and the court. We could educate people more to rules and risks; in any bureaucracies, people will risk their own future for the sake of advancement. . . . We've constructed a system where people behave rationally; we have to change incentives or educate to risks. . . . The risk is: are you going to be the one holding the bag?

Lawyers are acting “rationally” in the Adam Smith sense.<sup>14</sup> How can a judge change the economics? . . . We change economic man's analysis if a judge says, “You're not discharging the responsibilities of lawyers-you're off the case.”

Few of the lawyers we talked to are pure moralists or realists. Those inclined to moralism recognize that profit incentives are likely to encourage, and the threat of sanctions to discourage, some forms of behavior in most people; they also recognized that different people will respond more or less honestly or selfishly, depending on their values as well as their assessment of risks, costs and benefits, to exactly the same incentives. Further, even lawyers who are thoroughly realist about their own group's practices do not hesitate to express moral disapproval or even outrage about another group's practices: plaintiffs' lawyers about the defense bar, or defense lawyers about the plaintiffs' bar.

Nonetheless, I think all of the observers were struck by the prevalence of realist modes of analysis and explanation in the lawyers we interviewed. They were not, for the most part, cynics about the world

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14. This particular judge used the term “rational” ironically. He added: “It's only ‘rational’ if the lawyer is willing to put aside [the role of] counselor, officer of the court, professional responsibility.”

or the profession, and they did not wholly discount the importance of moral and ethical concerns either in their own lives or those of others. But even when alluding to moral and ethical concerns, they spoke as realists do, about risks of possible damage to reputation. To put this another way, the expressed ethics of most of these lawyers were external and instrumental. When they spoke of "doing the right thing," they tended to define this term as respecting some external source of authority or opinion: the civil discovery rules, ethics codes, judges' orders, clients' orders and preferences. They clearly preferred utilitarian (cost-benefit) analysis to normative reasoning, and they exhibited a positive allergy to moral language and an inclination to express even the norms of basic truth telling and fairness in compliance with the standard of some external standard or group. According to our study, lawyers pondering a course of action will ask themselves, or each other, how a description of it would sound in front of a spectator, how it would sound to a judge, (often-mentioned) how it would look "in the newspaper," "in the right hand column of *The Wall Street Journal*," or to their "mother." "You're going to be arguing to a judge in front of your friends and family." Moral judgment, in other words, is something that others possess and may bring to bear; the lawyer's task is to anticipate that judgment. He does not consult some internalized set of ethical or professional norms, such as what would be fair, honest, and just, in this situation, or what is most consistent with the kind of person or lawyer I would like to be. Rather, one asks, what would *others* think?

What explains this behavior? The explanation is clearly not (much popular opinion about lawyers to the contrary) that we are dealing here with a bunch of amoral monsters or sociopaths who themselves have no feelings or moral sense but a cunning instinct for maneuvering around and manipulating the scruples of others. Nor, for that matter, is it plausible that lawyers are an abnormally humble group of people who have so little faith in their own judgments that they cannot take action without considering what other more confident folks might think. On the contrary, most of the lawyers we talked to impressed us as an exceptionally conscientious, honest and reflective group of persons, men and women with well-developed internal ethical monitors. Some hypotheses follow.

Lawyers, through training and temperament, are suspicious of overt moral discourse. They are used to the fact that disputes have many different sides and plausible points of view, and they tend to believe that moral language is usually a mask for hypocrisy or partisan ideology. Clearly there is something to this—as illustrated by our lawyer-informants themselves, who were ready to denounce the "greed" or "dishonesty" of others belonging to outsider groups, but to interpret their own behavior as rational response to incentives.

Lawyers believe, usually with good reason, that clients (at least business clients) are generally unresponsive, if not downright hostile, to moral argument and persuasion, which is experienced as preaching. Therefore, even if they have what is basically a moral point to make, they will couch it in the instrumental terms of risk analysis: "If we do this, there is a risk the judge will sanction us by dismissing our cross-complaint." "Do you want to wake up in the morning and see the headline in the *New York Times*, 'C. Co. Concealed Data on Poisoned Baby Food'?"

More fundamentally, as I said before, the basic, overriding, dominant norm of the legal profession, especially among litigators, is the norm of zealous advocacy of clients' interests: a specialized role—morality of fidelity to the goals and interests of clients that absolves the lawyer of personal accountability for their service.<sup>15</sup> In recent decades, non-accountability-economism and business rationality have risen to prominence alongside the traditional norm of zealous advocacy as co-equal or dominant norms of the legal profession. This is in large part due to an effect of rapidly increasing competition in the legal profession,<sup>16</sup> but it is also related to more general cultural trends that have spread into the traditional professions like law and medicine. In purely economic modes of thought, ethical and moral choices are only "preferences," like the choice of fish over meat; thus, the only way they can be discussed is in external terms. Business rationality is economic reasoning of a special kind—cost-benefit analysis that counts costs and benefits, profits and losses, to a particular business actor but not to anyone else; in this mode of reasoning, the moral responses of others, such as approval or outrage at someone's conduct, are only relevant if and to the extent that they translate into effects on profits.

The spread of economic and business rationality has surely brought with them many benefits to the profession. Notably, this is manifested in a livelier concern with squeezing out waste and providing more cost-effective service. Of course, the business rationality of law firms produces incentives to drive up the costs of litigation, but the countervailing business rationality of their corporate clients, which is increasingly dominant, acts as a control on uninhibited aggression in litigation by reminding parties that the costs of keeping a cause going can easily exceed any likely benefits. That is the positive side of the recognition that law is, and must be conducted as, a "business." But economic has also brought some costs. The down-side effects include the addition of yet another set of reasons, besides the adversary

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15. This by itself is not enough of an explanation; for as we have seen, there are lots of different ways of being a zealous-advocate-within-the-bounds-of-the-law. See *supra* Part III.A.

16. See generally *supra* Part I (discussing the effect large firms have in advancing these new norms).

ideology, to discount or ignore entirely those aspects of professional ethics that constitute the lawyer as a public officer with higher-than-ordinary obligations to serve the public purposes of the legal system.

The evident public purposes of civil litigation, for example, are to ensure that persons claiming violations of their legal rights will have access to an efficient and affordable process that will adjudicate such claims on their merits, to adequately compensate those with just claims and to deter future violations by defendants and meritless suits by plaintiffs. For anyone who has at heart the goal of promoting the system's public purposes, the important question to ask about any litigation practice like discovery tactics is: "What would happen to the system if everyone did this? Would this practice, if repeatedly engaged in, and unmonitored (or incapable of being monitored) by any referee, seriously interfere with efficient and accurate fact-finding, resolution on the merits, access to justice, or deterrence of injurious practices or frivolous claims?" Generally, the lawyers we talked to treated these questions as the proper concern of someone else—public actors such as judges, legislators, and those with authority to enact practice and ethical rules—rather than the day-to-day concern of the practicing bar. Yet clearly, it is those very practitioners, most of whose conduct in litigation is necessarily unsupervised by any public authority, whose day-to-day behavior will, in the last instance, determine whether the system serves or disservices its public functions.

To be fair, many of the lawyers we interviewed did see beyond the bread-and-butter of their practices to larger problems of the legal process and the ends that it serves. Most of their complaints and ideas for reform seemed, however, disappointingly partisan and ideological—an agenda that favored their particular group of practitioners and its clientele. For example, the plaintiffs' lawyers believe judges should do more to sanction defense delays in producing documents, but they had little to say about deterring frivolous litigation or providing access to justice for many small claimants whose injuries will not yield a contingent fee. In-house counsel want "tort reform" imposing new barriers to lawsuits but do not propose more efficient alternatives for ensuring that injuries are compensated, deterring the marketing of unsafe products, and assessing moral blame against corporate defendants in appropriate cases. It is natural that practitioners should have points of view conditioned by their interests but unfortunate that the views should be so completely determined by their interests.

#### CONCLUSION

The basic themes emerging from our study are that a combination of adversary system norms and operating assumptions, client demands, and economic incentives are all inducements for corporate defense lawyers—the special object of this Task Force's study—to prolong and abuse discovery. Most of the norms of professionalism

that might, and to some extent still do, contain these temptations have been weakened in recent years by structural changes: growing competition of firms for clients, firms for lawyers, and associates for partnership. These changes have increased heterogeneity in firms (lateral recruitment) and in the litigation bar generally. Further, these changes have eroded interests in avoiding unethical behavior in order to preserve continuing good relations with adversaries and judges. Most of the new incentives for lawyers, such as attracting and retaining clients, push toward stretching ethical concerns to the limit (though not over the limit if likely to be caught). We also gathered some evidence from in-house counsel, however, that firm lawyers may exaggerate the fear that they will lose clients if they do not put a show of being hyper-aggressive in every litigation. The pressure on firm lawyers to cut costs produces incentives in two directions. On the one hand, it squeezes out discovery abuse motivated simply by a desire to run up hourly billings to the client. Indeed, in much routine litigation, discovery abuse in the form of meter-running is probably on its way out as inside counsel increasingly audit bills and switch to fixed-priced contracts. Cost-cutting, however, also squeezes out time for complex qualitative judgments and money for training and supervising associates, while associates, who are left increasingly on their own to manage discovery, tend to reduce risks to their own careers by disclosing as little as possible. The disposition towards adversary excess in discovery also is reinforced by perceptions (based perhaps in part on judgments about class and cultural style) that the other side is wholly unscrupulous, so that escalation is justified.

Thus, the only checks on potential discovery abuse are outside monitoring, firm monitoring, and internalized norms of professional self-restraint. There is a general consensus that outside monitoring by judges and magistrates is ineffective. Some lawyers and judges believe it can be improved and have provided specific suggestions; others are more skeptical. Monitoring by firms could also probably be improved, but probably will not be, given the pressures on partnership time, deference to partners with big business books, and the very decentralized organization of litigation into small work-teams, at least without very determined professional leadership. The norms of professional self-restraint in the interests of the integrity of the justice system are quite weak and residual, and they are simply no match for the countervailing norms of adversary ideology and business rationality and the economic interests that those norms reinforce.

In the end, are the ethics of the conduct of litigation, especially discovery abuse or overreaching, a serious problem? On this issue, our informants were quite divided. The official line of large-firm litigators, what I have labeled the "standard take,"<sup>17</sup> is that unethical

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17. See discussion *supra* Part I.A.

behavior (defined narrowly as violations of the rules) is rare, that it is engaged in mostly by plaintiffs' lawyers and a few rogue defense counsel, and that it would cease to be much of a problem if judges would take a more active role in monitoring. Further, large-firm litigators suggested that "inappropriate" behavior falling short of rule-violations is a normal incident of the adversary process, sometimes justifiable as simply aggressive advocacy. The views of other participants—judges, plaintiffs' lawyers and in-house counsel—are less benign, as indeed are those of large-firm lawyers themselves when probed for specifics beyond the official line. Though perceptions differ, there seems to be some consensus that adversary excess is frequent, often not by any standard justifiable as zealous representation, and that many lawyers will indeed cross ethical lines when they think they can get away with it, which, because of the weakness of monitoring agents, they usually do. Though opinions differ about this too, most of our informants seemed to think that ethically inappropriate conduct is on the increase.<sup>18</sup>

Even so, is this a "problem"? My own sense is that high-level litigation is far from the *most* ethically problematic area of current law practice, and that discovery abuse is far from the worst problem with litigation practice. It is completely dwarfed, for example, by the ethical dilemmas posed for the plaintiffs' and defense bars by collusive settlements and confidentiality agreements in mass-tort class action litigation, which sell out the public's interest to the lawyers. Nevertheless, dishonest and hyper-aggressive behavior in discovery that raises the costs of litigation and reduces the likelihood of disclosure of material facts is certainly a "problem" for those who have to bear its costs,

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18. Professor Linda Mullenix, one of the most careful and perceptive analysts of the civil justice system and proposals for its reform, has analyzed many of the reports calling for reform of the civil justice system on the ground that pervasive "discovery abuse" has inflated the costs and delays of civil litigation. She finds that (a) the reports rest almost entirely on anecdote, hearsay, or grossly unreliable survey evidence of lawyers' and judges' opinions; (b) the most reliable empirical studies of civil litigation, such as the Federal Judicial Center study of 1978, have not found discovery abuse to be a serious problem; and (c) that the movement for "reform" of discovery is part of the general political agenda ("tort reform") of business defendants and their insurers to limit their exposure to civil liability. See Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 Stan. L. Rev. 1393 (1994). Mullenix's caution is well-taken. Our little study, based on the reports of informants, a sample of lawyers whose representativeness is unknown, and who were not given any operational definitions of misconduct to work with, is pretty nearly meaningless as a measure of actual incidence of or increase in, "ethically inappropriate conduct." It may, however, be of some value as evidence that well-placed lawyers and judges who are experienced repeat players at litigation *perceive* a problem—and perceive it among the lawyers whom the "tort reform" movement does not usually point to as its source, large firm corporate defense litigators—and as suggestive of the institutional and ideological causes of the problem, to the (necessarily uncertain) extent that it does exist. Such perceptions ought to stimulate, but can never substitute, serious empirical studies of the civil justice system.

including the clients who have to pay for adversary maneuvering, the judges who have to pay in scarce time and attention, and the justice system and the public at large, which suffer the loss of cost-effective fact-finding and the resolution of disputes on the merits. The civil justice system remains the chief method we have for vindicating injuries to the rights of plaintiffs and protecting defendants from harassing and extortionate claims. It is a commons, like the water we drink and the air we breathe. If its quality steadily deteriorates from pollution by the lawyers who staff it as to make it too expensive to use and too arbitrary to trust, it will become useless.

What can be done about it? We received many specific suggestions from the lawyers we talked to for trying to change incentives and monitoring mechanisms to raise the risks and costs of discovery abuse. Many of these suggestions, like the recently (selectively) implemented Rule 26 reforms in federal procedure, are well worth further experiment and study. But all such reforms (as experience under Rule 11 showed all too convincingly) can be "gamed": evaded, worked around, narrowed by interpretation, turned into another occasion for adversary maneuvers, by a profession whose basic normative commitments make it natural and legitimate to do so. It is those normative commitments themselves—zealous representation of clients and business rationality working in combination to reinforce economic self-interest—that need to be made the subject of critical scrutiny. There are countervailing values of professionalism, which, among the lawyers we interviewed, only the judges were still willing to voice unequivocally. They stressed that lawyers have obligations to the framework of justice, the purposes of the laws and procedural systems, obligations that sometimes trump those of loyalty to their clients and the profitability of their firms. How do we reinvigorate those professional ideals, how do we institutionalize them and make them effective in concrete practical ways? How do we get lawyers to internalize them as they have internalized the norms of fidelity to clients, secrecy of client confidences, and candor to tribunals? The lessons of experience are that successful systems of norms depend on shared understandings and informal sanctions of communities. Externally imposed rules and sanctions of regulatory regimes can reinforce, but cannot substitute, for such informal norms and sanctions. This in turn suggests that the task for lawyers has to be the reconstitution of professional communities—this time around, without the ethnic, gender, and class exclusions that disfigured the old communities. The attempt to do this at the national level, through activities such as revising the ABA's ethics rules, has backfired. I suspect that if this project is to succeed, it will have to work through local bar committees and specialized subgroups. These subgroups can associations of products liability, employment, or securities litigators, which bring together plaintiffs' lawyers, defense lawyers, judges, law professors and client

groups in the search for practice standards that will help overcome the prisoner's dilemmas of litigation and further the integrity of the justice system. That is the challenge to the legal profession, and it is a colossal one.