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BOOK REVIEW

This Week on the Talk Shows: The Litigation Explosion

J. ALEXANDER TANFORD*

THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT. BY Walter K. Olson. New York: Truman Talley Books—Dutton, 1991. 388 pp. \$24.95.

For years, legal scholars have carried on an interesting debate within the academy: Is there really a litigation explosion? How should we measure the volume of litigation? If there is a problem with over-litigation, how do we fix it?¹ Although some of this debate has spilled over into the popular press,² there is a need for a comprehensive summary of the problems written for the general public.

When I was asked to review Walter K. Olson's book, *The Litigation Explosion*, I agreed, hoping that this book would fill the void. Unfortunately, it proved to be a disappointment. His book is based on many allegations but little evidence, many half-truths but little context. His treatment of the alleged litigation explosion is far too one-sided. It fails to give

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1. See P.S. Atiyah, *Tort Law and the Alternatives: Some Anglo-American Comparisons*, 1987 *DUKE L.J.* 1002 (1987); Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 *MINN. L. REV.* 1 (1990); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. REV.* 4 (1983); Bayless Manning, *Hyperlexis: Our National Disease*, 71 *NW. U. L. REV.* 767 (1977); Michael J. Saks, *If There Be a Crisis, How Shall We Know It?* 46 *MD. L. REV.* 63 (1986); David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 *UCLA L. REV.* 72 (1983).

2. See, e.g., Jack Anderson, *U.S. Has Become a Nation of Lawsuits*, *WASH. POST*, Jan. 25, 1985, at B8; Thomas Ehrlich, *Legal Pollution*, *N.Y. TIMES MAGAZINE*, Feb. 8, 1976, at 17; *Hold Down Awards to Ease the Crisis*, *USA TODAY*, June 6, 1986, at 12A; David F. Pike, *Why Everybody Is Suing Everybody*, *U.S. NEWS & WORLD REPORT*, Dec. 4, 1978, at 50.

the general public a balanced picture and instead reduces the discussion to the level of talk shows.

Olson takes a complicated modern social issue, and reduces it to a conspiracy among plaintiffs, personal injury lawyers, and liberal judges, ganging up on poor, defenseless doctors and businesses. Olson's rhetorical technique is a familiar one: Label something (Communism, political correctness, the legal profession) as an evil menace, blame society's problems on it, and accuse one's opponents of being in league with evil. This penchant for extremism provides few insights for those seeking to understand the problems of the legal system and likewise adds little meaningful dialogue to the current debate.

Walter K. Olson's writing suggests that he holds strong biases. He appears to be very conservative, strongly pro-business, and vehemently pro-defendant and anti-plaintiff.

His conservative credentials are impressive. Olson is a senior fellow at the Manhattan Institute. He writes for *Barron's*, *Fortune*, *The Wall Street Journal*, and *The National Review*. He participates in the Federalist Society.³

Olson's pro-business bias is apparent from the book itself. He argues that "[c]reative litigation . . . is dragging American business defendants into [ruin]."⁴ For example, in his fourth chapter, he criticizes long-arm jurisdiction because it hurts businesses.

The business world felt the first effects. Courts quickly seized jurisdiction over enterprises that had never entered a state but did ship goods regularly into it The most profound impact was not on the really big companies, . . . but on the typical small to mid-sized firm that serves a nationwide market from a single location. Suddenly these companies found themselves defending suits in Skowhegan and Winnemucca, Kismimmee and Juneau. It mattered not how tiny a share of overall business they had done in a state: an Illinois company was made to go to the U.S. Virgin Islands to be sued though only \$1,800 of its \$35 million in annual sales came from that territory.⁵

Olson thinks it is outrageous to compel a business to defend in states where it conducted business and injured people. He never even mentions the people who were hurt, and how they are supposed to seek compensation.

Olson is also staunchly pro-defense. He constantly takes the side of defendants, however guilty, evil, immoral or culpable they may be, and he constantly criticizes plaintiffs, however innocent and grievously hurt. He

3. These conclusions are based on a search for his name through NEXIS.

4. WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* 307-08 (1991).

5. *Id.* at 77.

criticizes long-arm jurisdiction by arguing that defendants have an absolute right to appear in their home court, while plaintiffs have no right to ever be in their home court.⁶ He applauds a Massachusetts law that “protected doctors and hospitals from lawsuits in cases arising from less than gross negligence,”⁷ apparently unconcerned that such a rule means that a doctor could negligently maim or kill a patient who could not get compensation. He suggests that we start using a public prosecutor approach in civil cases, in which we deprive plaintiffs of partisan lawyers but, of course, allow defendants to keep theirs.⁸ He wants to raise the burden of proof,⁹ which will result in more defense verdicts regardless of the merits. In two instances in which doctors were sued for malpractice, Olson reports that the defendants did not think they had been negligent, as if this demonstrated that they were not in fact negligent.¹⁰

Throughout the book, Olson criticizes every case in which a defendant has to pay damages, however culpable the defendant, however justified the damage award. For example, he criticizes a case in which a retail film processor lost a customer’s lifetime of filmed memories through its own gross incompetence and had to pay \$7,500 damages despite a disclaimer printed on the receipt stating that it was not liable.¹¹ Olson argues that “freedom of contract” means that a business should have the right simply to tell people they are not liable and that should settle it.¹²

Olson’s most obvious bias, however, is that he hates lawyers. He sees lawyers as the bane of modern civilization. It is time, he asserts, “to make America’s litigators accountable for the hurts they do to those [defendants] who are drawn involuntarily into their power.”¹³ The major thesis of his book seems to be that if we could only get rid of all the lawyers, then the (white male elite) businessmen could get back to the business of running this country properly.

Of course, blaming lawyers for society’s problems is not a new idea.¹⁴ However, never before have I seen it done with such deliberately inflam-

6. *Id.* at 70-73.

7. *Id.* at 178.

8. *Id.* at 272-80.

9. *Id.* at 345-46.

10. *Id.* at 15-16 (criticizing a suit for malpractice in part because the defendant doctor “thought he had [not] done anything wrong”); *id.* at 271-72 (stating that a case was “troubling” simply because the defendant doctor concluded she had done the right thing although an expert testified that failure to medicate or hospitalize a depressed patient who later attempted suicide constituted malpractice).

11. *Id.* at 197-98.

12. *See id.* at 198.

13. *Id.* at 11.

14. “The first thing we do, let’s kill all the lawyers.” WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 4, sc. 2, at 131 (Norman Sanders, ed., Penguin Books 1981) (n.d.).

matory language. Olson accuses lawyers of appealing to emotion instead of facts when they argue to the jury¹⁵—a hypocritical allegation from a person who writes like this:

The unleashing of litigation in its full fury has done cruel, grave harm and little lasting good. It has helped sunder some of the most sensitive and profound relationships of human life: between the parents who have nurtured a child; between the healing profession and those whose life [sic] and well-being are entrusted to their care. . . . It seizes on former love and intimacy as raw materials to be transmuted into hatred and estrangement.¹⁶

Older lawmakers and judges tended to recognize litigation as a wasteful thing, . . . grossly invasive of privacy and destructive of reputation. . . . It corrupted its participants by tempting them to harass each other and to twist, stretch, and hide facts. It was a playground for bullies, an uneven battlefield where the trusting, scrupulous, and plainspoken were no match for the brassy, ruthless, and glib.¹⁷

What is striking and ominous is that the techniques perfected in personal injury lawsuits are fast being rolled out to a hundred other areas of courtroom combat. Inflated damage claims and speculative legal theories, scorched-earth procedural tactics and calculated appeals to emotion over reason, contingency fees and client solicitation—all are being successfully adapted to [other kinds of cases by] . . . [l]awyers who got their start advertising on late-night television¹⁸

Contingency-fee law has made more overnight millionaires than just about any business one could name. . . .

These men (very few are women) seldom seem to favor sober, understated ways of spending their newfound wealth. One has turned lawsuits against doctors into a villa in the south of France and a \$2 million Paris apartment. A list of their known holdings is spangled with the ranches, jets, and very fancy cars that befit tycoons riding a cash wave with no end in sight.¹⁹

America is the litigious society it is because American lawyers wield such unparalleled powers of imposition. No other country gives a private [plaintiff's] lawyer such a free hand to select a victim, tie him up in court on undefined charges, force him to hire lawyers of his own at dire expense, trash his privacy through we-have-ways-of-making-you-talk discovery, wear him down on the perpetual-motions treadmill, libel him grossly in documents that become permanent public records, and keep

15. OLSON, *supra* note 4, at 7.

16. *Id.* at 2.

17. *Id.*

18. *Id.* at 7.

19. *Id.* at 45-46.

him scrambling to respond to Gyro Gearloose experts and Game of the States conflicts theories.²⁰

Olson's distorted account of the operation of the tort system also is full of "Willie Horton" anecdotes:

The doctor at a large Long Island hospital was still shaking his head in disbelief. He had just been sued over the delivery of a baby more than twenty years earlier. . . . Like many obstetrics lawsuits, this one charged that bad handling of the delivery had caused a birth defect. And like many long-delayed suits it was going to be tough to defend, not because the doctor thought he had done anything wrong, but because the facts would be hard to reconstruct after so long. All he had done was assist at the delivery; the doctor who had actually delivered the baby had died years ago. But as usual the lawyers had sued every doctor in the file.²¹

Judith Haimes, being treated for a brain tumor, underwent a CAT scan at Temple University Hospital in Philadelphia. She sued the hospital and Dr. Judith Hart, a neuroradiologist, claiming she had suffered an allergic reaction to a dye used in the scan. It felt "as if my head was going to explode," she said.

Pain and suffering were only part of the claim. Formerly Ms. Haimes had conducted séances at which such eminences as the poet Milton had spoken through her. Now she said the dye had interfered with the psychic powers that had enabled her to divine persons' past and future [sic]. She could no longer make a living at this trade.

Judge Leon Katz ordered the jury to disregard the psychic-damage claims, but after 45 minutes of deliberation it came back with an award of \$986,000.²²

In 1975 a troubled young woman tried to commit suicide by jumping off the roof of her Chicago apartment building. She survived but was hideously injured. Under the tutelage of a flamboyant trial lawyer, she proceeded to sue her former psychiatrist, Dr. Sara Charles

"My first feelings after being charged with medical malpractice were of being utterly alone," Dr. Charles wrote. . . .

For the four years that the case dragged on, "it swallowed up my own life completely, demanded constant attention and study, multiplied tension and strain, generated a pattern of broken sleep and anxiety" by its challenge to "my integrity as a person and as a physician." . . . [One of the plaintiff's expert witnesses] reviewed her records, and then opined that it had been a mistake not to have ordered her drugged and hospitalized at early signs of trouble. Aghast at the thought that her judgment might somehow have been wrong after all, Dr. Charles went back and

20. *Id.* at 299.

21. *Id.* at 15-16.

22. *Id.* at 152 (paragraph breaks omitted). The damage award was declared excessive by the judge, and a new trial ordered. *Id.* at 152-53.

plunged into the relevant professional literature in great detail, but after long reading concluded that it fully backed up what she had done She vowed to her husband: "If I am found guilty of malpractice over this, I will never practice medicine again."²³

Because of all the vituperative rhetoric, it is difficult to discern Olson's specific complaints about the legal system. It is initially unclear whether he is criticizing just the tort system or the entire legal system. His focus is mostly on personal injury and medical malpractice cases, although he occasionally discusses family law,²⁴ with a few digressions into commercial²⁵ and criminal²⁶ litigation.

His list of specific grievances is long. I will try to summarize it, but probably cannot do it justice:

Olson claims that in the good old days, everyone knew that lawsuits were evil.²⁷ Even "old time lawyers" knew that lawsuits were evil, so they prohibited themselves from advertising or stirring up litigation.²⁸ Such unseemly behavior was so obviously reprehensible and morally bad²⁹ that lawyers helped society keep lawsuits to a minimum. Life was good in those days because we discouraged plaintiffs from bringing lawsuits. Lawyers charged by the hour,³⁰ champerty was punished,³¹ formal pleadings (easily demurred) were required,³² and the defendant was always given the home court advantage.³³

Plaintiffs in Olson's bygone era were good neighbors who preferred to lose their cases rather than "fire off every arrow in [their] quiver of legal rights," forgoing causes of action and eschewing discovery that could lead

23. *Id.* at 271-72.

24. *See, e.g., id.* at 181 (child custody and divorce cases in the conflict-of-law context).

25. *See, e.g., id.* at 7-8 (floodgates argument about horrors of personal injury system "metastasizing" to commercial litigation).

26. *See, e.g., id.* at 15 (using quotation about a criminal lawyer to illustrate a chapter on tort litigation).

27. *Id.* at 2-3. *See also id.* at 5 (stating that the erosion of the concept "culminated in 1977 with a five-to-four decision by the U.S. Supreme Court officially endorsing the new idea that a lawsuit was no longer to be considered an evil").

28. *See id.* at 27 (quoting Blackstone (1765) for the proposition that advertising is meddling in others' affairs).

29. *Id.* at 2-3, 39-40.

30. *Id.* at 39 (quoting nineteenth-century preacher George Sharswood for the view that contingent fees are evil because they expose a person to temptation).

31. *Id.* at 41-42.

32. *Id.* at 93-94. (citing an English judge in 1723 for the premise that formal pleadings are more "fair to the opponent" in addition to an 1859 case that overturned a judgment because plaintiff rounded the amount of a promissory note down to the next lower whole dollar).

33. *Id.* at 70-73 (citing a case from 1874).

to ill will.³⁴ As a reward, the “bitterest marital fallings-out [could] end in a miraculous reconciliation,” a “new management might take over at the workplace where you were fired and offer you a job instead of a back-pay settlement,” and the magazine that had libelled you “might print your side of the story.”³⁵

Olson asserts that the harmonious balance of this innocent, peaceful era was shattered by changes in laws and legal institutions. First, we invented long-arm jurisdiction that required defendants to answer to charges of tortious conduct in the state where the injury occurred.³⁶ Second, we shifted from formal to notice pleading that made it easier for injured plaintiffs to seek compensation, but made it difficult for defendants to find out why they were being sued.³⁷ Third, we invented discovery, which is an invasion of privacy³⁸ and a big financial burden; depositions often involve thousands of written pages, twenty days, and multiple lawyers.³⁹ Fourth, we changed the rules of professional ethics to permit lawyers to advertise, educate people about their right to sue, and otherwise drum up business.⁴⁰ Fifth, the law changed from cut-and-dried rules to vague principles, so no one knew what their rights were any more.⁴¹ And sixth, the law schools changed from teaching that lawsuits were evil to supporting the use of lawsuits to assert rights and gain a day in court for the common person.⁴²

As a result of these changes in the law, Olson argues, there has been a litigation explosion. He asserts that the number of lawsuits has dramatically increased recently,⁴³ that Americans are more litigious today than ever before,⁴⁴ and that they are “the world’s most litigious people.”⁴⁵ He specifically mentions explosive increases in contingent fee tort cases, child custody, constitutional, and general civil cases.⁴⁶ This deregulation of the legal business has somehow changed lawyers into evil people who charge contingency fees, cheat, stir up litigation, sabotage their own clients’ in-

34. *Id.* at 41.

35. *Id.*

36. *Id.* at 70-73.

37. *Id.* at 89-91, 105-07.

38. *Id.* at 109-13.

39. *Id.* at 115-16.

40. *Id.* at 3, 30.

41. *Id.* at 133-43.

42. *Id.* at 4-5.

43. *Id.* at 5, 87.

44. *Id.* at 151.

45. *Id.* at flyleaf.

46. *Id.* at 39, 132-33, 147-48.

terests,⁴⁷ go after "deep pockets" rather than impoverished defendants,⁴⁸ and keep most of the money for themselves.⁴⁹

Olson then argues that the litigation explosion has had serious social costs. First, he repeats the insurance industry's claim that the litigation explosion has caused liability insurance rates to skyrocket. Specifically, he alleges that payouts for malpractice suits against doctors and hospitals in New York have increased 30,000% in a generation, that New York City's payouts for lawsuits went from \$24 million to \$114 million between 1977 and 1985, and that hairdressers, veterinarians, charity volunteers, social workers, clergy, and judges who "may . . . be sued . . . for handing down wrongful decisions" all now regularly buy liability insurance.⁵⁰ Second, he asserts that Americans now spend too much time and money fighting each other in court.⁵¹ Third, he thinks we now have too many lawyers with too much power and earning too much money.⁵² Fourth, he blames litigation, rather than the underlying acts that give rise to it, for breaking up relationships between husband and wife, doctor and patient, management and labor, and business and customer.⁵³ Fifth, he believes that "[h]onest, careful, competent people" who are completely innocent of the accusations "now get sued in huge numbers, and lose with some frequency."⁵⁴

In the end, however, Olson is hard pressed to come up with specific proposals for changing the litigation system. He suggests replacing contingent fees with hourly rates paid for by the losing party,⁵⁵ a cap on punitive damages,⁵⁶ and the vigorous enforcement of Rule 11 sanctions,⁵⁷ but none of these proposals is new. He proposes a return to formal, bright-line legal rules that will give citizens notice of what their rights are, arguing that simple, formal rules lie well within our reach in most areas of law.⁵⁸ But mostly he just criticizes all alternatives—government payments or social insurance, alternative dispute resolution, and no-fault insurance.⁵⁹

47. *Id.* at 34-35, 39-40.

48. *Id.* at 69-70.

49. *Id.* at 10 (stating that clients receive as little as 15% of the damage awards).

50. *Id.* at 6-8.

51. *Id.* at 1.

52. *Id.* at 1, 9, 45-46.

53. *Id.* at 2. See *supra* note 35 and accompanying text.

54. *Id.* at 9.

55. *Id.* at 35-39.

56. *Id.* at 313-14.

57. *Id.* at 323-29.

58. *Id.* at 148-49. He can be forgiven for his naivety about the law because he is not a lawyer. Perhaps he should have taken his own advice when he asserts that we should only listen to those experts who have actual experience in the field, *id.* at 314.

59. *Id.* at 299-312.

The problem with Olson's argument is that much of what he says is not true, is taken out of context, or is not representative of the ordinary lawsuit.

His central claim is that America is too litigious. This assertion has two factual premises: (1) We are the most litigious people in the world, and (2) There has been a recent dramatic increase in the amount of litigation. Neither is correct.

According to statistics compiled by Marc Galanter, the United States is not the most litigious country. Although Galanter points out that differences in reporting methods make accurate country-to-country comparisons impossible, he estimates that Australia, Canada, New Zealand, Yugoslavia and parts of East Africa all have higher rates of civil litigation per capita. Denmark, England, Sweden and France have similar litigation rates.⁶⁰ These data are summarized in Table 1.

Table 1
Estimated Litigation Rates for Selected Countries

<u>Country</u>	<u>Estimated Number of Civil Cases Per Thousand Population</u>
Yugoslavia	227.27
Tanzania (Arusha district)	100.00
Australia	62.06
New Zealand	52.32
Canada	46.58
United States	44.00
England/Wales	41.10
Denmark	41.04
Sweden	35.00
France	30.67

Nor is there any evidence that we are in the midst of a litigation explosion. Galanter examined litigation rates in the United States back to colonial times, and found that the modern era is hardly the most litigious in our history.⁶¹ In colonial times, the litigation rate was up to six times as high as it is now. In the first half of the 19th century, the rate was twice what it is now. Since 1920, the rate has held relatively steady. These data are summarized in Table 2.

The major differences in civil cases in this century concern the types of cases being filed, not the numbers: domestic relations, tort cases, and

60. Galanter, *supra* note 1, at 52-62.

61. *Id.* at 37-52.

cases filed in federal court have increased, while commercial, contract, and property cases have declined.⁶²

Nor is there any evidence of a recent boom in litigation rates. Data from the National Center for State Courts shows that after correcting for population increases, overall litigation rates rose only 4% from 1978-84, a far cry from any notion of an "explosion."⁶³ Most of that increase is accounted for in *small claims* actions, which do not usually involve lawyers.

Olson singles out several kinds of cases as special objects of his wrath. Two of the leading offenders are the personal injury tort case and the class action suit. He calls the contingent-fee personal injury case the "Big Rock Candy Mountain of today's American law."⁶⁴ He attacks the class action suit,⁶⁵ and states that after *Eisen v. Carlisle & Jaquelin*⁶⁶ in 1974, class action suits "began to burgeon."⁶⁷ Again, neither allegation is true. According to statistics on actual court filings, tort cases filed in state courts rose only 1% between 1978 and 1984 when the figure is adjusted for the increase in population.⁶⁸ Class action suits filed in federal district courts declined 67.7% between 1975 and 1984.⁶⁹

The book is riddled with factual inaccuracies of all kinds. Olson claims that "only around 15 percent of the cost of injury litigation goes to compensate claimants," attributing this statement to Professor Jeffrey O'Connell.⁷⁰ The figure is not even close to being accurate, and Professor O'Connell says no such thing of which I am aware. O'Connell once studied where the money paid in *insurance premiums* goes, and found that 56% goes to the insurance company as overhead and administrative costs and 44% to compensate victims.⁷¹ In that article, he mentions a figure of 15% as representing one of three kinds of payments to victims, but not as the total compensation, and not as a percentage of the costs of litigation.⁷² According to a RAND Institute study, plaintiffs in tort cases re-

62. *Id.* at 42-44.

63. Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 6-7 (1986).

64. OLSON, *supra* note 4, at 9.

65. *Id.* at 57-66.

66. 417 U.S. 156 (1974).

67. OLSON, *supra* note 4, at 57.

68. Galanter, *supra* note 63, at 7.

69. *Id.* at 16.

70. OLSON, *supra* note 4, at 10. Olson fails to provide a citation to any of O'Connell's published works to support this claim.

71. Jeffrey O'Connell, *An Alternative to Abandoning Tort Liability: Elective No-Fault Insurance for Many Kinds of Injuries*, 60 MINN. L. REV. 501, 504-06 (1976).

72. *Id.* at 507.

ceive an average of 70% of damage awards; their legal fees and expenses amount to only 30% of damage awards.⁷³

Olson also makes inaccurate statements about the law. As one basis for his criticism of long-arm jurisdiction, Olson states that "[t]he right . . . to be sued . . . at home was . . . a full-fledged constitutional right, one that has never been rolled back by any constitutional amendment."⁷⁴ The Constitution, of course, says no such thing. Article III provides for diversity jurisdiction but says nothing about in whose home state the suit

Table 2
Estimated Litigation Rates, United States

<u>Years</u>	<u>Jurisdiction</u>	<u>Estimated Number of Civil Cases Per Thousand Population</u>
1639	Virginia	240.0
1683	Massachusetts	110.0
1820s	St. Louis	31.3
1830s	St. Louis	28.3
1840s	St. Louis	35.9
1850s	St. Louis	13.9
1860s	St. Louis	10.5
1870s	Menard Co., IL	16.4
	St. Louis	10.5
1880s	St. Louis	7.3
1890s	St. Louis	6.9
	Alameda Co., CA	7.6
1900s	St. Louis	7.7
1910s	Alameda Co, CA	13.5
	St. Louis	9.1
1920s	St. Louis	14.9
1930s	St. Louis	12.5
	Alameda Co., CA	10.8
1940s	St. Louis	12.4
1950s	St. Louis	12.8
	Alameda Co., CA	9.5
1960s	St. Louis	16.0
Since 1970	St. Louis	16.9
	Alameda Co., CA	11.0

73. JAMES S. KAKALIK & NICHOLAS M. PACE, THE RAND INSTITUTE FOR CIVIL JUSTICE, COSTS AND COMPENSATION PAID IN TORT LITIGATION at x-xii (1986).

74. OLSON, *supra* note 4, at 73.

shall be litigated. The only statements made in the Constitution about venue provide that proper venue (in criminal cases) shall be in the state where the *injury* occurred.⁷⁵

Olson attacks notice pleading by asserting that defendants do not know why they are being sued and cannot find out.⁷⁶ Again, this is a ridiculous allegation. Federal Rule of Civil Procedure 12(e) provides that “[i]f a pleading . . . is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement” before it even has to file an answer. If the plaintiff fails to supply a more definite statement “within 10 days, . . . the court may strike the pleading to which the motion was directed.”

Olson also plays the old Joe McCarthy insinuation game, reporting accusations as if they were truth. For example, he reports that a personal injury law firm was indicted for bribery and manufacturing evidence. He then quotes the U.S. attorney who details the charges as if they had already been proved: “They [the lawyers] produced an eyewitness to two automobile accidents . . . [who] was never at either accident”⁷⁷ How horrible—lawyers manufacturing evidence! However, these are just charges; no one has proved there is a shred of truth to them. Buried away in the notes at the back of the book, Olson admits that at the time the book went to press, the trial to determine whether any of these charges were true “began in November 1990 and was expected to last several months.”⁷⁸

Many of the emotional anecdotes used to illustrate Olson’s book are taken out of context and distorted. One of his most powerful illustrations of the supposed evils of tort law is the case of the poor widow, ninety-two-year-old Luella Wilson. Olson asserts that a 1989 Vermont case “provoked something of a public outcry” when Luella Wilson almost lost her house when a jury returned a huge verdict against her; her only offense had been “to lend her great-nephew the money to buy a car that he later crashed.”⁷⁹ Olson fails to point out that Wilson bought her nephew a car to drive knowing that he had no operator’s license, had failed the driving test several times, and had drug and alcohol abuse problems.⁸⁰ He also fails to point out that the “ninety-two-year-old Vermont widow” was a millionaire, that the decision holding her primarily liable for the accident

75. U.S. CONST. art. III, § 2 (“such Trial shall be held in the State where the said Crimes shall have been committed”); U.S. CONST. amend. VI (“a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed”).

76. OLSON, *supra* note 4, at 89-91.

77. *Id.* at 33.

78. *Id.* at 353.

79. *Id.* at 70.

80. *Vince v. Wilson*, 561 A.2d 103 (Vt. 1989).

was reversed, that her insurance company eventually paid part of a \$300,000 settlement, and that it cost Ms. Wilson nothing.⁸¹

Another example is Olson's use of a Harvard study of medical malpractice. Throughout the book, Olson constantly harps on the huge numbers of innocent physicians who are being wrongly sued for malpractice.⁸² He supports this position with the claim that a Harvard study of New York hospitals showed that 80% of lawsuits filed against doctors were proven to be unfounded.⁸³ The claim is dubious,⁸⁴ and Olson fails to mention that the primary finding of the study was that most victims of malpractice *never* bring suits at all. According to a UPI wire service summary of the report, fewer than one in ten legitimate victims of medical negligence ever file suit.⁸⁵

If Olson's illustrations are not distorted and taken out of context, they often are not representative of the usual lawsuit. The most obvious example of this is his constant use of isolated sensational big-money cases as anecdotes. For example, Olson asserts that discovery depositions are a big burden, often comprising thousands of pages, twenty days, and multiple lawyers.⁸⁶ Although this undoubtedly happens occasionally in the multi-million dollar lawsuits, it is a far cry from the ordinary case. A 1974 study of Oregon lawyers revealed that in the average case, lawyers spent \$368 to take two short depositions.⁸⁷ The Civil Litigation Research Project revealed that lawyers spend a total of only five hours in the discovery process in the average case.⁸⁸

Olson's assertions about lawyers' income similarly distort the true picture. Olson cites a case in which lawyers billed for 97,000 hours of work,⁸⁹ as if this were routine. According to the Civil Litigation Research Project, the median time lawyers spend on cases is 30.4 hours; in the overwhelming majority of cases, lawyers invest eighty hours or less, and

81. *Settlement Ends Negligence Suit: Woman Won't Lose Home Because of Relative's Wreck*, CHICAGO TRIBUNE, Feb. 21, 1990, at C5.

82. See, e.g., OLSON, *supra* note 4, at 15-16.

83. *Id.* at 6.

84. In the majority of cases, a settlement is reached, plaintiffs receive compensation, and doctors do not contest negligence. If the complaint goes to trial, plaintiffs win verdicts in as many as 49% of cases. 3A JURY VERDICT RESEARCH, PERSONAL INJURY VALUATION HANDBOOKS, DOCTOR'S MALPRACTICE 1 (release no. 4.41.1, 1987).

85. *Study Shows 10 Times More Medical Malpractice Than Lawsuits*, UPI, Jan. 29, 1990, available in LEXIS, Nexis Library, UPI File.

86. OLSON, *supra* note 4, at 115-16.

87. F.R. Lacy, *Discovery Costs in State Court Litigation*, 57 OR. L. REV. 289, 297 (1978).

88. Trubek et al., *supra* note 1, at 90-91 (noting that the median time spent was 30.4 hours per case, with 16.7% of attorney time spent in discovery).

89. OLSON, *supra* note 4, at 250-54.

no lawyer reported billing more than 2200 hours.⁹⁰ Olson reports that "two dozen elite lawyers . . . took home \$4 million or more apiece in 1988 . . . [and one] bagged an estimated \$450 million," and that even beginning lawyers in New York earn over \$80,000!⁹¹ The Civil Litigation Research Project showed that this is a far cry from the real picture. The median income for all lawyers in 1983 was a modest \$45,000. Only 5% of all lawyers earned in excess of \$100,000 a year.⁹² Fees in individual cases do not routinely run into the millions, as Olson suggests, but are usually under \$5,000. In almost half of all cases, the legal fees are under \$1,000.⁹³

The book also contains numerous ridiculous assertions that are unsupported by any evidence at all. Olson opines that the litigation explosion is somehow responsible for rending apart relationships between husband and wife, doctor and patient, management and labor, and businesses and customers.⁹⁴ He asserts that "[h]onest, careful, competent people now get sued in large numbers, and lose with some frequency."⁹⁵ He argues that contingent fees stir up litigation, encourage lawyers to cheat, and make lawyers rich; whereas hourly rates do not.⁹⁶ And my personal favorite:

Visiting European lawyers are often dumbfounded to learn that in this country most experts are recruited, sent into courtroom battle, and paid by the contending litigants themselves. Credentials are nice, but partisan reliability usually has to come first. . . . Frequently the lawyer writes the testimony for the expert to deliver on the stand.⁹⁷

90. Trubek et al., *supra* note 1, at 91.

91. OLSON, *supra* note 4, at 9-10. *See also id.* at 45 (reporting additional cases of lawyers earning millions).

92. Trubek et al., *supra* note 1, at 93.

93. *Id.* at 92.

94. OLSON, *supra* note 4, at 2.

95. *Id.* at 9.

96. *Id.* at 39-40. Presumably, he thinks that hourly-rate lawyers have no interest in drumming up business, but prefer to starve. The implicit claim that there is a major difference between hourly rates and percentage contingency fees in terms of income is not supportable. According to the RAND Institute for Civil Justice, in the average tort case, the plaintiff's attorney on a contingent fee makes about \$5000 per case; the defense attorney on an hourly rate makes about \$4000. KAKALIK & PACE, *supra* note 73, at xi. According to the Civil Litigation Research Project, the average case occupies 30-72 hours. At a conservative rate of compensation of \$100 per hour, that means a plaintiff's lawyer paid by the hour would get \$3000-\$7000 per case. DAVID M. TRUBEK ET AL., PART A, CIVIL LITIGATION RESEARCH PROJECT, UNIVERSITY OF WISCONSIN S-24 (1983).

97. OLSON, *supra* note 4, at 157. None of the leading works on trial tactics supports his suggestion. *See, e.g.*, ROBERT KEETON, TRIAL TACTICS AND METHODS 320 (2d ed. 1973); ROBERT McCULLOUGH & JAMES UNDERWOOD, CIVIL TRIAL MANUAL 393-96 (2d ed. 1980); J. ALEXANDER TANFORD, THE TRIAL PROCESS: LAW, TACTICS AND ETHICS 440-42 (1983).

This book reads as if Olson is an angry man with a specific axe to grind. He set out to write a great, conservative exposé of the evil litigation system and was willing to let nothing stand in his way—especially not the truth. He has consistently chosen the most outrageous, non-representative cases to discuss. When he couldn't find one, he took half-truths out of context. If he couldn't even find that, he simply made things up.

If Olson had been a little more even-handed and a little less shrill, if he had acknowledged that the problems of our court system are deep and complex, and if he had taken more time to separate fact from fantasy, then he might have succeeded. Olson probably has a contribution to make to the dialogue about judicial reform, but his constructive criticisms are lost amid fear-mongering, name-calling, and McCarthyist rhetoric about the evils of lawyers.

In his rush to make lawyers the scapegoats, he ignores the fact that the litigation system society vilifies is a system of its own creation. It is not lawyers who award the million dollar verdicts Olson criticizes, it is people like Olson himself sitting on juries. It is not greedy plaintiffs' attorneys who are responsible for the million-dollar settlements Olson criticizes, it is the defendants themselves who offer and accept them. He seems unable to grasp the simple truth stated by Pogo, "We have met the enemy and it is us."