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THE FEDERALIST SOCIETY, CONFERENCE: CIVIL JUSTICE AND THE LITIGATION PROCESS: DO THE MERITS AND THE SEARCH FOR TRUTH MATTER ANYMORE?, CONFERENCE DIALOGUE, DAY ONE, PANEL TWO: MODERN DISCOVERY PRACTICE: SEARCH FOR TRUTH OR MEANS OF ABUSE?

Hon. Royce Lamberth

Diane Cooley

Hon. Frank Easterbrook

John Heaps

PANEL TWO: MODERN DISCOVERY PRACTICE: SEARCH FOR TRUTH OR MEANS OF ABUSE?

OPENING

THE HONORABLE ROYCE LAMBERTH, MODERATOR*

I am Royce Lamberth, and I am glad to have all of you here as we talk about *Modern Discovery Practice: Search for Truth or Means of Abuse?* Discovery is an essential part of the litigation process. There is a widespread perception, however, that discovery abuse continues to be a major problem, and that recent rules changes, such as presumptive limits on the numbers of depositions and interrogatories, have not been sufficient to deal with the problem.

In the District of Columbia, the district court has been eagerly awaiting the report of the D.C. Bar Task Force on Civility in the Profession.[1] The task force conducted a comprehensive study starting with the Seventh Circuit's Committee on Civility, headed by District Judge Marvin Aspen of Chicago, in 1989. The Seventh Circuit's interim report was published in 1991[2] and the final report was published in 1992.[3] The movement and momentum provided by the Seventh Circuit has now led twenty-six state bars and fifty-eight local and voluntary bars to adopt some sort of standards or codes of professional conduct that address civility in the profession.

The D.C. Bar Task Force's report details for each state and each of those voluntary bars what has been done, so it is a very valuable resource as we, the District of Columbia, determine what local rules changes or standards we should adopt.[4] The D.C. Bar task force surveyed almost one thousand lawyers in D.C., as well as all of the trial judges of both the superior court and the district court.[5] There are a couple of things that they found I thought would be interesting to mention here. For example, sixty-nine percent of the lawyers said lack of civility is a very important

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* Judge, United States District Court for the District of Columbia.

1. DISTRICT OF COLUMBIA BAR, FINAL REPORT OF THE DISTRICT OF COLUMBIA BAR TASK FORCE ON CIVILITY IN THE PROFESSION (1996).

2. Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 371 (7th Cir. 1991).

3. Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 441 (7th Cir. 1992).

4. *See* DISTRICT OF COLUMBIA BAR, *supra* note 1, at 5 & app. B (listing the different standards of professional conduct that have been adopted by each state).

5. *See id.* at 10-11.

problem or a somewhat important problem,[6] and seventy-eight percent of those responding said discovery proceedings are the activities in which incivility had most frequently been encountered.[7]

I was somewhat surprised that fifty percent of the lawyers responding reported encountering incivility in the courtroom, either frequently or at least occasionally.[8] I thought that I generally controlled incivility in the courtroom. I know that I have read some unbelievable deposition transcripts about what goes on between lawyers at depositions, but I was a little surprised at the large number of lawyers that complained about incivility even in the courtroom.

Of the approximately sixty judges that the D.C. Bar talked to about civility, eighty-nine percent of the judges reported witnessing incivility between lawyers either frequently or at least occasionally, but only about half of the judges, as opposed to seventy-five percent of the lawyers, thought that civility was either a very serious or a moderately serious problem.[9] I will ask Judge Easterbrook what he thinks the impact, if any, the Seventh Circuit's civility study and standards has had.

I want to mention one other thing, in opening, before I turn it to the primary presentations by each of the panelists. I am going to do something I have never seen a District Judge do before, and I have never done before. I am going to give you citations to two cases in which I was reversed, where I tried to deal with discovery problems and tried to enforce discovery rules.

The first case is *Shepherd v. American Broadcasting Co.*[10] I had entered a default judgment against American Broadcasting Company (ABC) based on document destruction, manufacturing false documents, filing false and misleading affidavits, and other misconduct that I found committed both by the defendant, ABC, and by the major law firm representing the defendant.[11] The Court of Appeals first held that I had to find the misconduct by clear and convincing evidence. They then proceeded to pick apart each of the various factual findings that I had

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6. *See id.* at 10 & app. C.

7. *See id.*

8. *See id.* at 11 & app. C.

9. *See id.* at 11-13 & app. C.

10. 151 F.R.D. 179 (D.D.C. 1992), *opinion vacated in part on reconsideration by* 151 F.R.D. 194 (D.D.C. 1993), *rev'd in part, vacated in part by* 62 F.3d 1469 (D.C. Cir. 1995).

11. *See Shepherd*, 151 F.R.D. at 181-90 (finding that defendants, represented by Wilmer, Cutler & Pickering, improperly sent an informer to a protected meeting of minority employees, left information out of an affidavit that was filed with the court, used language to deliberately deceive the court and the plaintiff, and used deception in producing pertinent documents).

made, until they concluded that what remained was insufficient for me to have entered a default judgment against ABC.[12]

The *Shepherd* case was decided by the Court of Appeals on August 25, 1995. Unfortunately for me, on August 9, 1995, I had just entered my final judgment granting sanctions against the District of Columbia in a case in which I was also reversed, *Bonds v. District of Columbia.*[13]

Bonds was a major class action sex discrimination and retaliation case brought against the D.C. Department of Corrections by guards.[14] In the midst of numerous discovery problems, I granted the District of Columbia a second enlargement of time for answering interrogatories, listing witnesses who had knowledge of the case, and briefly describing their knowledge. At the request of the plaintiffs, I made the second enlargement of time conditional that if D.C. failed to respond to the request for answers to interrogatories within the enlarged time period, it would not be able to call any fact witnesses at trial.[15] I entered that order on November 2, 1994. The deadline that D.C. asked for, November 7, was imposed in that order.[16]

November 7 came and went and the defendant did not do anything.[17] They did not move to extend the time. They did not respond at all. They finally responded three days late, and in their response, they said the names of all the witnesses were in the deposition testimony and the documents that had been produced during the course of discovery.[18] I found that response wholly inadequate and said that unless the defendant successfully moved to reconsider and also produce the names, it could not call any witnesses at the trial.[19]

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12. *See Shepherd*, 62 F.3d at 1478-84. The Court of Appeals held that sanctions that are "fundamentally penal," such as default judgments, require the district court to find clear and convincing evidence of the misconduct, not merely a preponderance of the evidence. *See id.* at 1478. Furthermore, the Court of Appeals found that the district court's assertions of abuses regarding document destruction and alterations, harassment of witnesses, and filing of improper affidavits were insufficient to explain why less severe sanctions would not have remedied the misconduct. *See id.* at 1479. Finally, the Court of Appeals held that the findings of misconduct regarding document preservation, interrogatory verification, and harassment of certain witnesses were not sanctionable based on the record. *See id.* at 1484.

13. 93 F.3d 801 (D.C. Cir. 1996).

14. *See id.* at 803.

15. *See id.* at 803 n.3, 806.

16. *See id.* at 806.

17. *See id.*

18. *See id.*

19. *See id.* at 806 & n.10.

Finally, on December 12, D.C. did move to reconsider and they filed a supplemental interrogatory response with one thousand names.[20] D.C. admitted that it prepared the list of one thousand names by having two paralegals spend two weeks pulling out every name that was mentioned, regardless of the context or whether they were dead, in every produced document and deposition testimony.[21] I then had a hearing and found that the defendant was just playing games.[22] Once I found that the one thousand names were produced in bad faith, I refused to reconsider and conducted the trial without the defendant being able to call any fact witnesses. The plaintiffs still had to prove their case, but the defendant was prohibited from calling any fact witnesses.[23]

The Court of Appeals unanimously reversed me.[24] The court held that the one thousand names "may have been over-broad, but it does not follow that the District was not attempting in good faith to comply with an interrogatory requesting it to identify 'all persons' with knowledge of the allegation."[25] Although the court of appeals panel said a district court has broad discretion to impose sanctions for discovery violations, it held that I had abused my discretion by not determining if a lesser sanction was possible without prejudicing the plaintiffs or the court.[26] So the court did not find my November 2 order was improper, per se, but found it an abuse of discretion for me to enforce my order.[27]

So I stand here today, having been reversed twice in one year for imposing sanctions for what I found to be discovery abuses, and I wonder why the Federalist Society invited me here today to speak on this topic of discovery abuse, and probably more significantly, why I accepted? I will admit I accepted before my most recent reversal, but I think with that opening you have an idea of where I stand on the subject.

I want to say that I think we have a great panel to talk about the topics today. First, Diane Cooley, who teaches civil discovery at Georgetown University Law School, will give us the plaintiffs' bar perspective. Judge

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20. *See id.* at 806-07.

21. *See id.*

22. *See id.*

23. *See id.* at 808.

24. *See id.* at 813.

25. *Id.* at 811.

26. *See id.* at 809-11.

27. The Court of Appeals noted that a court has the discretion to impose discovery sanctions by precluding the introduction of witnesses. However, in this case, the Court held that the "district court abused its discretion in not imposing a less harsh sanction." *Id.* at 810, 813.

Frank Easterbrook[28] needs no introduction to the Federalist Society, but I am pleased to have him here, first, because he has been a leader in many areas surrounding discovery abuse and reform, and he also serves on the standing Committee on Rules. Judge Easterbrook's views are instrumental in looking at our overall federal rules that try to make some sense in this area.

We also are very pleased to have a solicitor from England, John Heaps, here with us today.[29] John is a partner in the Eversheds, the second largest legal practice in the United Kingdom. His career has brought him into contact with the United States on many occasions, acting for American companies involved in proceedings in Europe and English companies involved in litigation here in the United States. He is also Vice Chairman of the Civil Litigation Committee of the International Bar Association.

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28. Judge, United States Court of Appeals for the Seventh Circuit. Judge Easterbrook is also a Senior Lecturer at the University of Chicago Law School. Only Judge Easterbrook's contribution to the audience discussion is included in this issue. *See Panel Two: Audience Discussion*, 41 N.Y.L. SCH. L. REV. 467 (1997).

29. Partner, Eversheds (Leeds, England). He is also the Head of the Commercial Litigation Group in the Leeds Office and member of the Eversheds National Commercial Litigation Group. Additionally, Mr. Heaps is a Fellow of the Chartered Institute of Arbitrators and Secretary to the Civil Litigation Committee of the International Bar Association. John Heaps's contribution to the panel is not included in this issue, but see John Heaps & Kathryn Taylor, *The Abuser Pays: The Control of Unwarranted Discovery*, 41 N.Y.L. SCH. L. REV. 615 (1997), and *Panel Two: Audience Discussion*, *supra* note 28.

UNCIVIL DISCOVERY

DIANE COOLEY, FIRST PANELIST*

My name is Diane Cooley, and I am a partner to the sometimes infamous, sometimes notorious, and always flamboyant, John Coale. I teach civil discovery at Georgetown. I try to teach a realistic class because it is a practice class. It is like trial practice, and I try to teach the students something they can actually use instead of riparian rights that they will probably never have a chance to use in their lives. I always start the class by sharing something that crushes their little happy souls: civil discovery is the worst part of civil litigation, and, unfortunately, it is also the biggest part. It is the part that takes the most time in a young lawyer's life, particularly since new associates spend close to ninety percent of their time doing discovery. If they are lucky, they will have ten percent of their time to do something else. For two years, I worked for a defense firm in Boston—which shall remain nameless because I might tell you a little story about working there later—and all I did was discovery, that is it, nothing else, just coding, coding, and more coding.

I try to tell the students that this is not going to be fun, and I also try to tell them how to do it, how not to get tripped up, how not to make a game out of it, how to do it right, and how not to let somebody blind-side you. It is hard to walk the line and tell them how to do it, how to do it both ethically and well, without appearing to teach them how to be sneaky.

Why is civil discovery the worst part of the practice? Because it is not civil, it is nasty. It is almost universally nasty. Something about it brings out the worst in people, maybe because it is so boring and onerous. No one wants to do it and everybody is nasty about it. Discovery is abused and it is abused by both plaintiffs and defendants.

It is almost as if by being civil, you reveal a weakness either in yourself or in your case. Some lawyers think that if you are nice and you allow the other side the extra response time that everybody needs to answer those interrogatories, then the other side will somehow perceive you as being weak. But wait until you need that extra time, which you will; you better hope that you were nice to the people on the other side. It is really a shame because at this time in the legal profession, everybody is being attacked from the outside. I think plaintiffs and defendants alike are being attacked by the public. And at this time, when lawyers are being attacked by everyone in society, you would think people would pull

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* Partner, Coale, Cooley, Lietz, McInerny & Broadus. Ms. Cooley is also an Adjunct Professor at Georgetown University Law Center.

together a little bit within the ranks and agree to at least be nice to each other. Unfortunately, no one seems to do that.

My firm practices all over the country, and we have recently done a lot of work in the South. Our firm is one of the members of the Plaintiffs' Legal Committee on *Castano v. American Tobacco Co.*,[1] the big tobacco case in New Orleans. I find it to be a different world in the South. People are still very cagy and are good adversaries in court, but when they are dealing one-on-one, they are very nice to each other, something unlike practicing here. I found the same thing in small towns in the midwest. People are nice to each other, and the practice of law is alive and well. It can be done. It can work that way if people try.

The premise of this discussion seems to be discovery abuse. My law firm does plaintiff work. We do no defense work at all, so I am biased. The question of this discussion is whether plaintiffs are abusing discovery to get settlements or just to get the upper hand. I disagree with that premise for a couple of reasons. The first one is that, in my experience, it is the defendants who are using the discovery for gamesmanship. There are two kinds of abuses in the discovery system: one is sort of a willful denial to turn over information, and the other is a never-ending delay technique.

In my opinion, the first kind of abuse is the kind that defendants engage in more frequently, and the second kind is that which plaintiffs more often engage in because of a lack of economic incentive. Plaintiff attorneys work on a contingent fee basis, so there is not much incentive to spend three weeks drafting answers to interrogatories. The truth is that the incentive to abuse the discovery system by not revealing what they have, I think, is more on the defendants. Our practice is an injury and death practice, so I am not really speaking about securities or corporate litigation. But, the fact is that defendants tend to be people with the resources to fight the protracted discovery battles. And, every week, it seems you can open up a legal newspaper and find an article on some discovery abuse.[2]

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1. 160 F.R.D. 544 (E.D. La. 1995), *rev'd and remanded*, 84 F.3d 734 (5th Cir. 1996).

2. *See, e.g.*, *A Challenging Discovery Fight*, LEGAL TIMES, Aug. 7, 1995, at 3; *A Petty Way Out*, LEGAL TIMES, Nov. 12, 1990, at 3; Gail Diane Cox, *Skadden Arps: L.A. Icon Sued for 'Cover-Up,'* NAT'L L.J., Dec. 4, 1995, at A4; Marcia Coyle & Marianne Lavelle, *Court Watchers Baffled by O'Connor Dissent: Still Fighting*, NAT'L L.J., Dec. 3, 1990, at 7; Claudia MacLachlan, *Chrysler Corp. Is Sanctioned: Isn't it Ironic?*, NAT'L L.J., Aug. 26, 1996, at A4; Gary Taylor, *$3 Million in Discovery Abuse*, NAT'L L.J., Feb. 4, 1991, at 5; Benjamin Wittes, *Quite a Discovery: Philip Morris' Papers in ABC Libel Case Leave Foes Fuming*, LEGAL TIMES, May 1, 1995, at 1. *But see* Randall Samborn, *Reports: Little Discovery Abuse*, NAT'L L.J., May 31, 1993, at 3.

Recently, there was an article about Chrysler refusing to disclose past incidents where someone had been injured by defective seatbelts, and Chrysler was sanctioned $25,000.[3] Originally, the sanction was greater, but the judge reduced it when it disclosed those incidents.[4] This case involved a woman who was paralyzed.[5] These are not small matters, and the plaintiffs had a right to that information. Lawyers sometimes forget that we are dealing with the lives of real people.

My firm had a similar experience in a case surrounding a water heater explosion, where a child died and another child was severely burned. We asked for other instances of water heater explosions of this same model of water heater, yet we were told that the evidence was not relevant, not calculated to lead to the discovery of admissible evidence, and could not be used at trial; therefore, they would not give it to us. Eventually, our adversaries did give us about ten instances; however, we went out on our own and really did a nationwide canvass of the court system and discovered sixteen extremely similar cases, many involving children under the age of nine. The judge was livid.

As an aside, I don't know if anyone here practices in the eastern district of Virginia, but there is nothing quite like the "Rocket Docket" there. When Judge Williams wants to move a case, the case is going to move. Judge Williams decided to admit almost all of the evidence of these prior explosions, and I think he did so in part because he was furious. He was furious that they had not disclosed; he was furious that the dispute was even before him. That is the kind of experience that my firm and I have had.

As I mentioned earlier, we have also been a part of the *Castano* case.[6] Everyone, I am sure, has been exposed to these documents—that is, these smoking-gun documents that are on the Internet and now on every street corner in every major city in the United States.[7] The documents were stolen from one of the tobacco defendants, apparently by a disgruntled paralegal, and they were just distributed all over the world. The documents were the subject of intense debate because they were stolen. The fact is that in thirty years of discovery, those documents had never ever been turned over even though they were relevant and fell within the requests that plaintiffs had made. In fact, in that case, we have

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3. *See* MacLachlan, *supra* note 2.

4. *See id.*

5. *See id.*

6. 160 F.R.D. 544.

7. *See, e.g., Secret Cigarette Industry Tape Recordings Filed Today with FDA Describe Nicotine Delivery, and Removal of Carcinogens* (visited Feb. 1, 1997) <http://ash.org:80/secret/delivery.html>; *Secret Docs Show Nicotine Factory* (last modified Jan. 15, 1996) <http://ash.org:80/secret/factory.html>.

a list of all of the instances, which we know of, where discovery requests were made that would have captured those documents, yet they were not produced. The discussion has focused on how wrong it is that the documents were stolen, but not on why they were never surrendered before. It is clearly wrong that they were stolen, but the court should still look at what the documents say and where they came from.

The defendant's coding system would code things "work product" that were not actually work product. One document stated that certain information would be labeled "dead wood." Everything labeled "dead wood" would get filed in a special filing system, where it would be stamped "work product," which would keep it out of the hands of the plaintiffs. It literally says in this document, "We have got to keep this stuff away from the plaintiffs." That is abuse. Although it is an extreme example, and I do not think that goes on much, I do believe that gradations of this type of conduct go on all of the time.

Now I will tell you the story about when I used to do defense work. I was a new associate handling a case with a partner, and we had a big corporate client who was a defendant in a pending lawsuit. I will not reveal the client, but it involved a hair product that made the plaintiff's hair fall out and her face swell up like a pumpkin. The partner told me to answer the interrogatories.

I proceeded to do so, and in the process I telephoned the in-house counsel. I started going over them with him, when he began to seem very agitated. He delayed assisting in their completion. Five minutes later, the partner was in my office, and he said, "What the hell are you doing? The client is very upset. You have been calling him, bothering him about the interrogatories." I replied that I was trying to get the answers. I heard in return, "What do you mean you are trying to get the answers? We are not answering those—I only told you to respond. I did not say to answer."

I had never seen interrogatories and I had never seen answers. I really did not know what he meant. He took the papers and scribbled across the pages, "Objection," "That is objectionable," "That is very vague," and "We do not know what that is." After he had gone through and objected to each one, he said, "Have your secretary type it up." She did, I handed them back to him for his signature, and he said, "Oh, you go ahead and take care of these."

I pushed them back, "But they are already in final."

He finally signed them and said to me, "You know, this case is going to settle."

"What if we gave them everything they were looking for," I asked, "how much would it be?" He admitted that the plaintiff would get a boatload of information.

Well, that experience was a huge awakening for me, and it was my introduction to so-called "civil discovery." This is not to say that

plaintiffs are free from blame in the process. Like I said, I am biased and I admit that. My current clients are usually egregiously injured, so we are not talking about something we have to hide. It is usually somebody dead in a plane crash. It is not like we were trying to hide the ball on something they did.

The law firm that I currently work for is in a different situation, and we tend to turn everything over. I know that the plaintiffs' bar is not wearing a halo—always handing over everything that is asked for—but, I do think that plaintiffs' lawyers, for the most part, tend not to respond to discovery mainly because they just forget about it. It falls to the bottom of the priority list. I recognize that this is also frustrating. Most of the lawyers in this room are probably defense attorneys, and I am sure it is frustrating to get your answers and your documents only after you filed a motion to compel. In fact, in the new rules that have been in effect since 1993, a judge can still impose sanctions, even though the desired documents have been turned over.[8] That does not necessarily mean the motion goes away, but the judge is still free to impose sanctions, and he or she probably should.

Another interesting twist happened when Philip Morris became a plaintiff in *Philip Morris v. American Broadcasting Co.*[9] Philip Morris is normally a defendant in court. What is funny is that, as a plaintiff, they did not change their tactics at all. That is, when Philip Morris got a document request from ABC, the first thing it said was that it could not turn everything over because it was all protected by trade secrets. Then, Philip Morris said it would turn the document over, but it had to remain confidential. Philip Morris had four levels of confidentiality: confidential, super confidential, super-super confidential, and secretive. The company eventually turned the documents over. When I talked to the attorney for ABC, he said, "You know, you would not believe it. It is on this red paper and it makes everybody sick. It's like toxic. It smells weird."[10] The paralegals could not work with it very long because they were going home sick from the fumes. It was also impossible to photocopy.[11] I actually thought that it was rather clever; if there was one document in particular that you wanted, what would you do? You would have to call up Philip Morris and specify which document you wanted on plain white paper, which could then be noted on a list that tracks the documents the

8. *See* FED R. CIV. P. 37(a)(4) (providing for an award of expenses of the motion).

9. Philip Morris v. American Broad. Co., No. LX-816-3 (Richmond Cir. Ct. May 5, 1995).

10. *See* Wittes, *supra* note 2.

11. *See id.*

defendant wants. The company then knows exactly which documents are important.[12]

I was working in New Orleans at the time on the *Castano* case, and we were trying to document-share, which we could not do because of the confidentiality. I said, "Well, can you give us some idea of what you have?"

He answered, "All I can tell you is that there are so many it is like a river of documents."

I asked, "Well, is it really confidential stuff?" They seemed very worried about it.

And he replied, "Well, one of the ones I saw was a memo about cockroaches in the bathroom, and it was stamped 'Highly Confidential.'" So it was clearly a needle-in-the-haystack tactic, which often happens. I doubt very much that Philip Morris keeps their "nicotine addiction" documents in with the "cockroach in the bathroom" documents, and I do not think they are kept that way in the regular course of business.

I do not know if anybody saw the movie called *Class Action*,[13] where a father and a daughter are pitted against each other. They are constantly trying to wear each other down. There is this one document that would blow the case wide open, and they produce a truck full of documents, and it is in there somewhere. Eventually they find the document.

That situation in not uncommon. Class actions have leveled the playing field a little bit. What you have now are wealthy plaintiffs or plaintiffs' attorneys, with a lot of manpower and a lot of incentive, simply because in many of these class actions they also bill by the hour. Plaintiffs' lawyers are keeping their billable hours just like the defendants do, because at the end of the case, they might be required to document their hours. I think that as a result many of the same tactics are being used now; that is, the plaintiffs class action lawyers are doing a lot of the same stuff that defendants typically do. In the cases we have been involved in, that actually has not happened.

I read an interesting opinion the other day by Judge Brazil, who is a leader in the field of civil discovery.[14] Judge Brazil, in his opinion for *In re Convergent Technologies Securities Litigation*,[15] basically wrote that

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12. The details of this case and the toxic documents are reported in Wittes, *supra* note 2.

13. CLASS ACTION (Twentieth Century Fox 1991).

14. Judge Wayne D. Brazil is a Magistrate for the United States District Court, N.D. California. Judge Brazil was a member of the Advisory Committee that drafted the Federal Rules of Civil Procedure.

15. 108 F.R.D. 328 (N.D. Cal. 1985).

he had aged ten years in securities litigation and discovery disputes.[16] Both sides in that case had used the discovery process as a means of gaining leverage.[17] I think the stakes are so high in cases like *Convergent Technologies* that abuse is more prevalent. Both sides are fighting for their lives, and it often gets out of hand.

16. *See id.* at 330-32 (stating how Judge Brazil was "frustrated" at the inability of both plaintiff and defendant to resolve their disputes themselves).

17. *See id.* at 332.

PANEL TWO:
AUDIENCE DISCUSSION

QUESTION: Do you have data dealing with special masters? In federal court, the use of a special master seems to resolve discovery disputes in three to five days. A special master might even sit in on a deposition if the parties are getting cantankerous. Since both parties have to pay, there is incentive to use the special master less. Once you realize the master is going to take an active role in settling these disputes, the disputes seem to go away. I have seen no data about the extent to which federal judges are using them. The cost-sharing at a high hourly rate is a disincentive to use the special master; instead the parties seem to prefer to solve the disputes themselves.

THE HONORABLE FRANK EASTERBROOK: I do not have any data, but, I would love to see data on the utility of special masters and the extent to which they have actually succeeded in reducing costs. I am aware of good anecdotes and bad anecdotes about them, but I am not aware of good data.

QUESTION: There is a draft available of the *RAND* report[1] and it does confirm what you suspected, that the discovery reforms were basically a non-starter.[2]

JUDGE EASTERBROOK: I am not entirely sure yet that the draft is where we wind up. I do not want to get too technical. There is an open tail on the sample. Approximately seven percent of the cases in the sample are unresolved. The cases that took the longest are the ones that had the most problems. So although I could have said that the draft backs me up, I will be more than happy when it is all done, and we have got all the data and the final version.

QUESTION: I sense a consensus, at least where I am from, that there are too many lawsuits and that discovery is too expensive. Now, the economists tell us that if you make something cheaper, you will get more of it. The effect of limiting discovery and making it cheaper will undoubtedly end up in more lawsuits.

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1. Since this conference occurred, the final report has been published. JAMES S. KAKALIK ET AL., THE RAND INST. FOR CIVIL JUSTICE, AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996).

2. *See id.* at 61-69.

JUDGE EASTERBROOK: You did not hear from me that there were too many lawsuits. You heard from me that lawsuits are too expensive. Everyone thinks that there are too many lawsuits except for the lawsuit in which you are a plaintiff. What the optimal number of lawsuits is, is extremely difficult to figure out. The best number of lawsuits would plainly be zero. We could achieve that in a world where no one broke his contract or where no one was negligent—the visions are limitless. That cannot and will not be achieved. A positive number of lawsuits is needed to get the rules enforced properly, assuming that judges and legislators are properly defining the rules that need to be enforced. I really do not know what the optimal number of lawsuits is, although my whole point was that they are too expensive.

QUESTION: If we lower litigation costs, there probably will be more lawsuits.

JUDGE EASTERBROOK: It is extremely difficult to predict. If you both lower anticipated costs and engage in cost-shifting, there will be fewer weak lawsuits filed and more meritorious lawsuits filed, because there will be more small-stakes, meritorious lawsuits that people can afford to bring. What the aggregate effect will be is very difficult to say. There is a large amount of theoretical literature on this that does not reach a firm conclusion on whether the numbers will go up or down,[3] and the cross-boundary studies are influenced by so many other things that they do not really reach any conclusions.

Arizona has instituted regular cost-shifting.[4] The number of business lawsuits in Arizona has risen as a result of cost-shifting. The more meritorious lawsuits, in fact, dominate.

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3. *See, e.g.*, John C. Hause, *Indemnity, Settlement, and Litigation, or I'll Be Suing You*, 18 J. LEGAL STUD. 157 (1989) (arguing fee-shifting will result in fewer claims, and more settlements); Avery Katz, *Measuring the Demand for Litigation: Is the English Rule Really Cheaper?*, 3 J.L. ECON. & ORG. 143 (1987) (arguing fee-shifting will simply result in more expensive trials); Philip J. Mause, *Winner Takes All: A Re-examination of the Indemnity System*, 55 IOWA L. REV. 26 (1969); A. Mitchell Polinsky & Daniel L. Rubinfeld, *Sanctioning Frivolous Suits: An Economic Analysis*, 82 GEO. L.J. 397 (1993) (arguing that the English Rule is not a strong deterrent to frivolous claims); Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139 (arguing that we will never know whether cost-shifting is good or bad, or what the real effect of it will be); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982) (arguing that attorney fee-shifting will result in increased litigation).

4. *See* ARIZ. REV. STAT. ANN. §§ 12-341, 12-341.01 (West 1992).

QUESTION: Even before the Federal Rules and the Field Code in New York, there was discovery, although there were no discovery rules and the lawyers carried the discovery out voluntarily. The sanction that made litigants carry out discovery voluntarily was the fear that they would be accused of surprise at trial. Although this system would not work in its pristine form today, there is an element in it that was very good: you determined whether people had made fair discovery by the results.

When we gave up that system, abusive discovery was what we were left with. Discovery has always had an abusive element. Is there not a way that we could return to the concept of determining whether discovery is adequately made by the results at trial, and of making discovery voluntary as long as it is complete, the way it was at common law?

JUDGE EASTERBROOK: I am not sure it was really even voluntary at common law. There were legally obligatory elements. These days, we have a system that is very similar. We call it criminal law, where the prosecutor may or may not open his files, and if the prosecutor does not open his files and something comes up at trial, the defense lawyer will raise his hand and say, "Your Honor, I want a continuance." Fear of any disruption of the case causes the prosecutor to disclose more. If we are at the level of anecdotes—I do not know of good data on this one—you will have a lot of defense lawyers who say, even at the end of the case, that the prosecutors are sitting on *Brady* information that they have not turned over.[5] At the conclusion of many cases, defense lawyers make an assessment about the adequacy of discovery without all of the necessary information.

THE HONORABLE ROYCE LAMBERTH: When I became a judge, I had only a civil background. However, I tried only drug trials for my first several years on the bench, so it was a rude awakening to see the difference between civil and criminal discovery. Yet, I do not know of any studies that provide data about the differences in how civil and criminal discovery are conducted.

JOHN HEAPS: What probably concerns most lawyers in England is that which was reported by Lord Woolf,[6] that hard evidence about the problems of the English system is indeed very difficult to find. There is no empirical evidence. The evidence is anecdotal and is much like a

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5. "Brady information" is evidence that may be exculpatory but is suppressed by the prosecution. *See* Brady v. Maryland, 373 U.S. 83 (1963).

6. *See* LORD WOOLF, ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (1996) [hereinafter WOOLF FINAL REPORT].

leading international bank telling the Woolf Inquiry that it has considered changing the venue for resolving its legal disputes from London to New York.[7]

QUESTION: Mr. Heaps, sir, would you tell us if Woolf's recommendations dealt with contingency claims or class actions. And, what will happen to the taxing masters?

MR. HEAPS: I think the taxing masters are going to be very busy, indeed. I will explain what a taxing master is. One of the features of the cost-shifting system is that the lawyers' costs have to be assessed by the court.[8] The person who assesses the costs is the taxing master. So the lawyer must go in front of the taxing master in London, with all the files on a massive case, and for days on end has to justify every telephone call, every attendance at every meeting, and all time spent preparing documents. It is an extremely painful exercise.

As far as contingency fee litigation is concerned, it has been introduced into England.[9] We call it "conditional fee litigation," but it is a much more modest version of what is in place in the United States.[10] The maximum cap, I think, is the equivalent of 100% of what you would have earned as the lawyer on the case had you been worth your allowed rate.[11]

The problems of class actions are on the way over the Atlantic as we speak. We have not had as much experience with class actions in England as you have had here in the United States, but, certainly, class actions are as intractable a problem in England as they are in this country, and I do not pretend to have any answers for that.

QUESTION: Here is a very non-quantitative question. The comment that struck me the most in listening to this discussion had to do with people apparently willfully withholding documents from discovery requests in the tobacco litigation cases.[12] It reminded me of the comments that

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7. *See* LORD WOOLF, ACCESS TO JUSTICE: INTERIM REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES 12 (1995) [hereinafter WOOLF INTERIM REPORT].

8. *See* John Heaps & Kathryn Taylor, *The Abuser Pays: The Control of Unwarranted Discovery*, 41 N.Y.L. SCH. L. REV. 615, 618-19 (1997).

9. *See id.* at 619-21.

10. *See id.*

11. *See id.* at n.15.

12. *See* Diane Cooley, *Uncivil Discovery*, 41 N.Y.L. SCH. L. REV. 459, 463-64 (1997).

have been made by people like Mary Ann Glendon about the decline in ethics of the profession.[13] Do you feel that the profession comes down hard enough on things of that nature?

It sounds as though you produce a warehouse full of documents, yet only one box contains relevant material. Could one also say, after the fact, that it really looks like willful abuse of the process? It should not be something that generates a $25,000 fine, but an awareness that it is flat-out unethical, and people should have their legal licenses in the dock. Does the profession come down hard enough? Is there anything more that could, or should, be done?

DIANE COOLEY: I think that much of the time these problems are client directed. As has been pointed out, people are not really inherently mean, but the client is telling their lawyer not to turn certain things over to the other side. Your client pays your bills so you want to do what makes your client happy. But, if you thought you would really get into a lot of trouble, if you thought you might lose your license, might be disciplined, or might be paying $25,000 out of your own pocket, I do not think the abuse would go on as often. I agree that something more should be done ethically when things like that happen, but at the end of the case when everybody is tired, nobody is running to the bar to complain about the discovery abuse.

JUDGE EASTERBROOK: I must say that I agree completely with that. The bench should do much more to police these things; the bench is not nearly hard enough on discovery violations. I think that if you took a poll of the Seventh Circuit Bar Association, you would get a different answer about the Seventh Circuit on this question. The usual complaint of the bar is that we are much too hard and micro-technical regarding discovery. There is a very large gulf in that respect between how people feel after being on the wrong end of it in a given case and how people feel about the general riskiness of the practice. If a sudden change were made to the English practice, where the lawyers were on the hook for all discovery costs personally, I think you would find many people telling us that it was not consistent with justice, along with other complaints.

QUESTION: I want to start with another comment or two about Florida, because it is more complicated than we have been hearing here. Florida enacted loser-pays statutes only for medical malpractice claims[14]

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13. *See* MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY (1994); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

14. *See* FLA. STAT. ANN. § 768.595 (West 1986).

and there were several problems that eventuated in practice, of which I will mention only one. There was, indeed, a substantial rise in the number of what appeared to be strong small claims.[15] So far, so good, you might conclude, except that the manner in which they were prosecuted turned out to be very perverse. Because the law guaranteed the lawyer a full fee shift at the conclusion of a winning case, regardless of where the damage award came in, the lawyers would get the meritorious small claims and then refuse to settle them, carry them all the way to trial, and get a fee award that was often proportionally very large; but, the actual award in many cases was lower than the early settlement offers. Any loser-pays system in other countries would wind up defining this as a defense victory, either through the British Offer of Settlement Rule[16] or through the various continental systems. Florida did not. Florida had a very freakish blueprint that should not be seen as a proposal for trial of the loser-pay system.

JUDGE EASTERBROOK: Jurisdictions that have real loser-pays systems require the plaintiff, at the outset of the case, to say, "Here is what I demand," and require the defendant to say, "Here is what I want." They define as the real stakes of the case only the difference between those two numbers. And if that number is negative at the end of the case, the defendant has won it.[17]

MR. HEAPS: That is absolutely right. Effectively, what happens is that if the plaintiff simply succeeded as to ten dollars, he would obviously win and, therefore, recover his costs. What is desperately important to the defendant is to make an offer to the other side which you know he is not going to be able to beat. And if he does not beat it, then the cost rule is reversed, and that is what will really drive the settlements home.

However, until recently, such an arrangement could only be made by the defendant actually paying a sum of money into court.[18] Woolf believes that this rule should be relaxed, so that without prejudice

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15. This is backed up by the theories presented in Rowe, Jr., supra note 3, at 148-53.

16. *See* WOOLF FINAL REPORT, supra note 6, at 112-15.

17. *See, e.g.*, ALASKA STAT. § .09.60.010 (1996 Michie); ALASKA R. CIV. P. 68 (Michie 1996). When a party fails to better a rejected settlement offer at trial, the "real loser-pays systems" do not view such a party as the prevailing one. As a result, in *Miklautsch v. Dominick*, 452 P.2d 438 (Alaska 1969), the Alaska Supreme Court held that where a party rejects an offer of settlement before trial of $2500 and who, despite receiving a directed verdict on liability was awarded no damages, Rule 68 (Alaska's offer of judgment rule) precludes such a party from being the prevailing party. *See id.* at 440.

18. See R.S.C., 1995, O.22, r.1 (Eng.).

correspondence—which obviously would not be referred to the judge at any stage before he reached his decision—could have a major impact on the costs if the case ran its full length.[19]

QUESTION: My question, a simple factual one, is does the Woolf proposal actually do away with your current stricter pleading in favor of this early conference or is the early conference interdistant to continuing a relevant and detailed pleading?

MR. HEAPS: The pleading will be detailed, but not as formal and more discursive in nature.[20] You may actually get a proper description of what the case is all about. When the case conference occurs with the judge, the parties can genuinely start getting down to business and working out what the issues really are.

QUESTION: Judge Easterbrook mentioned the need for more data, and the issue came up particularly with the differences between civil cases and criminal cases and the effects of discovery in the two systems. The question then arises, how is such data to be gathered, and what sorts of measurements are you going to use to decide on the effectiveness of these different systems?

JUDGE EASTERBROOK: I have not had much of an opportunity to think about it in criminal cases, but there are obviously differences across state borders. We have a very large federal system, and those differences create the ability to gather data and compare how they effect litigation. We have at least fifty-five jurisdictions: states, territories, federal government, and the District of Columbia. So we have a large enough number to make some sophisticated inferences.

This is what RAND has done, where we have ninety-four district courts.[21] It gathered the differences in their rules and then gathered data about the cases and how long it took to resolve them. Then, the researchers ran a fairly sophisticated mathematical model in order to discover which differences in rules accounted for which differences in cost, delay, and other variables. The statistical tools exist if you have enough variance across jurisdictions. Getting enough variance is the key to doing a study like this.

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19. *See* WOOLF FINAL REPORT, *supra* note 6, at 112-15.

20. *See* WOOLF INTERIM REPORT, *supra* note 7, at 153-58.

21. *See* TERENCE DUNWORTH & NICHOLAS PACE, THE RAND INST. FOR CIVIL JUSTICE, STATISTICAL OVERVIEW OF CIVIL LITIGATION IN THE FEDERAL COURTS (1990).

QUESTION: The difficulty is that the study could only measure things like the length of time needed to resolve cases. It does not measure the quality of the resolution.

JUDGE EASTERBROOK: It can only measure what you can count, I am afraid.