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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 TWO, LUNCHEON ADDRESS: ACHIEVING MEANINGFUL CIVIL JUSTICE REFORM: IS THE DEFENSE BAR A PROBLEM?

Hon. Ralph Winter

## LUNCHEON ADDRESS

# ACHIEVING MEANINGFUL CIVIL JUSTICE REFORM: IS THE DEFENSE BAR A PROBLEM?

THE HONORABLE RALPH WINTER*

It is always a pleasure to be asked to speak to The Federalist Society. Some of the older members say I am a broken record, but I can remember a day when the entire membership of The Federalist Society was in my office at Yale Law School and there were chairs left vacant. My speech is based on a conversation that I had with Leonard Leo[1] that he later titled, I believe, *Meaningful Change in Our Civil Justice System: Is the Defense Bar a Problem?* Not having seen the title, it turns out that I nevertheless began the conversation with the line, "Meaningful change in our civil justice system will not be easily accomplished." One reason for this has to do with the incentives of the bar and the shaping of that system. Those desiring reform tend to view the plaintiffs' bar, and the control of bar associations by ideologue, as the principal source of opposition to reform.

Several years ago, Judge Silberman wrote an article entitled *Will Lawyering Strangle Democratic Capitalism?*[2] The article pointed out that it is the entire profession, and not a parochial segment, that has an economic interest in the proliferation of legal rules and complex legal proceedings.[3] The jury is still out on whether democratic capitalism will die gasping for air under the weight of litigation. However, time may be proving Judge Silberman right on the mark, that is, in perceiving lawyers as a group that presses its self-interest in shaping our legal system.

I was struck last night by John Stossel referring to the lawyering industry as part of the economic "market."[4] I think that is not entirely wrong, but mostly wrong. The demand for lawyers is not governed by a market where consumers may exercise free choice as to whether to use lawyers at all. Rather, the demand for lawyers is the result of government, and lawyers have every reason to understand this condition. We are a nation where lawyers play a major role in government, and the

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* Circuit Judge, United States Court of Appeals for the Second Circuit and Chair of the Judicial Conference Advisory Committee on the Rules of Evidence.

1. Director, National Lawyers Division, The Federalist Society for Law & Public Policy Studies.

2. Laurence H. Silberman, *Will Lawyering Strangle Democratic Capitalism?*, REGULATION, Mar.-Apr. 1978, at 15.

3. *See id.* at 19-22, 44.

4. *See* John Stossel, *Dinner Address*, 41 N.Y.L. SCH. L. REV. 517 (1997).

result is there for all to see. Some legal rules seem to exist solely because lawyers profit from them. Civil RICO[5] provides treble damages and attorneys' fees in cases that never involve actual racketeering or organized crime,[6] with predicate acts alleged under the broad definition of mail fraud being developed into criminal law,[7] and where enforcement is limited by the exercise of prosecutorial discretion of the resources available.[8]

Civil RICO is now routinely a source of federal jurisdiction in what would otherwise be routine state law claims. Any dispute over a contract that requires periodic performance or communication between the parties can support allegations of a pattern of racketeering activity involving misleading statements or failures to inform. In fact, the first civil RICO case to reach the United States Supreme Court was a garden variety breach of contract action.[9] One result of civil RICO, therefore, is that its treble damages and attorneys' fees provisions have partially displaced ancient common law rules concerning damages for breach of contract. This is truly a bizarre result and suggests that, in enacting RICO, Congress believed that *Hadley v. Baxendale*[10] was the work of La Cosa Nostra.

It is instructive that only a powerful group like the securities industry has gotten political relief, even though it may turn out to be only partial

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5. The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (1994 & Supp. I 1996).

6. *See id.* § 1964(c); *see also* Roger T. Creager, *A Current Guide to Civil RICO in New York Federal Courts*, 66 N.Y. ST. B.J. 18 (1994) (stating that treble damages and attorneys' fees are awarded in cases dealing with ordinary business).

7. *See, e.g.*, Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) (holding that Sedima, a corporation that entered into a contract with Imrex, could maintain a cause of action for civil RICO based on claims of mail and wire fraud, where Sedima believed that Imrex was cheating Sedima out of a portion of its proceeds from the contract by collecting for nonexistent expenses).

8. *See generally* David M. Ludwick, *Restricting RICO: Narrowing the Scope of Enterprise*, 2 CORNELL J.L. & PUB. POL'Y 381, 415-16 (1993) (explaining that prosecutorial discretion is a valuable check on the broad application of RICO due to limited government resources).

9. *See Sedima*, 473 U.S. at 495 (permitting RICO to reach garden variety fraud and breach of contract cases by stating "[i]f the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim").

10. 156 Eng. Rep. 341 (1854) (holding that in a breach of contract case, damages should be such that were reasonably in the contemplation of both parties when the contract was made).

relief from civil RICO.[11] Otherwise, civil RICO is alive and well and threatening the less powerful, such as ordinary individual proprietors or the construction business, and, at the same time, profiting lawyers. Additionally, there is considerable evidence that derivative and class actions in the corporate area profit lawyers while imposing a net loss on investors—the very class they are supposed to protect.[12] Even the most favorable studies suggest that in a large number of such cases investors receive no benefit, even though paying the legal fees of all the parties.[13] In other cases, wealth is transferred from one group of investors to another, with the first group of investors paying all legal fees. Or, some investors may benefit, but the benefit comes from insurance that most sizeable corporations purchase.[14] In these cases, the insurance pays all legal fees, but the cost of the insurance is ultimately borne by the investors, so, overall, the investors have a net loss.[15]

Even in the small number of cases in which there is a net return to investors, the settlement may often be, at best, only roughly related to the merits of the underlying claims, resulting in the over-compensation of weak claims and the under-compensation of strong claims.[16] The only constant is the benefit reaped by both the plaintiffs' and defendants' lawyers. Therefore, it is a misperception to single out plaintiffs' lawyers, or lawyers with particular ideological beliefs, as having the sole incentives

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11. *See generally* Richard M. Phillips & Gilbert C. Miller, *The Private Securities Litigation Reform Act of 1995: Rebalancing Litigation Risks and Rewards for Class Action Plaintiffs, Defendants and Lawyers*, 51 BUS. LAW. 1009 (1996). The Private Securities Litigation Reform Act of 1995 "amend[ed] RICO to eliminate securities fraud as a predicate act of racketeering under civil RICO." *Id.* at 1061 (citing 18 U.S.C. § 1964(c) (1994 & Supp. I 1996)).

12. *See id.* at 1029-39 (discussing how the use of security class action suits may be abused by lawyers).

13. *See id.* at 1030 (commenting that in securities litigation the expenses of lawsuits are most often borne by the shareholders).

14. *See* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 550 (1991) (explaining that insurance, most often in the form of directors' and officers' liability insurance, is a significant source of funds in most securities class actions and is present in approximately 80% of shareholder litigation).

15. *See* Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?* 7 J.L. ECON. & ORG. 55, 57 (1991) (explaining that if a corporation's directors' and officers' liability insurance reimburses the costs of a securities claim, this may result in increased insurance premiums which is a cost ultimately borne by all of the shareholders).

16. *See* Alexander, *supra* note 14, at 577 (arguing that in a non-merit based system, investors with strong cases are under-rewarded while those with weak cases are over-rewarded).

to provide political support for unnecessary and inefficient rules of law that increase the cost of litigation. This is a somewhat unusual misperception because it comes from sources that understand economic incentives in the political and economic marketplace, and that expect that an industry will act politically to maximize returns to that industry.

The fact is that the economic incentives of defense lawyers regarding rules that proliferate litigation do not significantly differ from those of plaintiffs' lawyers. Lawyers, as a group, including the defense bar, have an interest in maximizing the demand for legal services. This is particularly the case at a time when practitioners must deal with the high cost of support services, the instability of law firms, and the understandably increasing restlessness of clients. It is because the demand for legal services is affected by the nature of substantive and procedural rules that reform in those rules, which may reduce the cost of litigation, will often be met by powerful opposition from the lawyering industry, including lawyers whose clients might actually be aided by the reforms.

Members of the defense bar may not always be vocal in opposing reform, but they are not likely to zealously support reform that may result in a reduced demand for their services. Indeed, the defense bar sometimes openly opposes measures that seek promising methods of reducing litigation costs to their clients. For example, a couple of years ago, a proposal was made to limit contingency fees in personal injury cases to that portion of a settlement or judgment to which the plaintiff's lawyer had added value.[17] Under this proposal, if the defendant accepted the plaintiff's early demand for settlement, fees of the plaintiff's counsel would be capped at ten percent of the first one hundred thousand dollars and five percent of any greater amounts.[18] If rejected, contingency fees could later be charged only against net recoveries in excess of the offer.[19] Moreover, the plaintiff's demand for settlement would have to be accompanied by basic, routinely discoverable information to allow the defendant to evaluate the claim.[20]

I am unsure of this proposal's validity. It was stridently attacked by some members of the defense bar,[21] although I see nothing in it that would compel their clients to make an offer of settlement or otherwise weaken their case. It is difficult to see how any of the defense bar's

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17. *See generally* Michael Horowitz, *Making Ethics Real, Making Ethics Work: A Proposal for Contingency Fee Reform*, 44 EMORY L.J. 173 (1995) (discussing the contingency fee reform proposal and the criticism it received from the defense bar).

18. *See id.* at 175.

19. *See id.* at 176.

20. *See id.*

21. *See id.* at 183-92 (criticizing the defense bar, including Stephen J. Paris, a leading spokesperson for the defense bar, for opposing the proposal).

clients could have been adversely affected by this proposal. The opposition from this quarter also seems peculiar because the defense bar does not generally oppose caps on contingency fees. While some of those who made this proposal have stated it openly, I only speculate that what actually troubled the critics was that the proposal would have given plaintiffs and defendants a great incentive to reach an early settlement without incurring substantial legal bills.[22]

Similarly, the defense bar abstractly supports the need to find ways to reduce the large resources that go into civil discovery, but mounts ferocious and often unprincipled opposition to concrete measures that will actually reduce that cost. I will speak at length on this because I was a member of the Advisory Committee on Civil Rules when that Committee took up complaints about excessive discovery, which I perceived as coming from defendants and their lawyers.

To briefly summarize the situation, over the course of several years, the Committee discussed the problem and, in its judgment, decided that one partial remedy would be to require automatic disclosure, without a request by the other party, of core information that any competent lawyer would otherwise have requested and that any competent judge would have ordered disclosed. In requiring the automatic provision of such materials, the Committee thought that the costs of formal requests and often frivolous opposition would be eliminated and cases could progress quickly. The Committee proposed an amendment to Rule 26 that required the disclosure of the names of witnesses and locations,[23] and categories of documents "likely to bear significantly on any claim or defense."[24] I favored the general venture of looking for ways to reduce discovery costs. However, I had great doubts about this particular proposal and, indeed, voted against it. I believe I was the only member of the Committee to vote against it at this early stage, because I thought it was entirely too ambiguous.

When the proposal went out for comment, criticism quickly appeared in great quantity. There was an organized campaign that sent the

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22. *See id.* at 184 (stating that the proposal was "attacked by members of the defense bar, in part because its early settlement mechanisms would radically reduce the cost of defense counsel").

23. COMMITTEE ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE 14-15 (Aug. 1991) [hereinafer 1991 PROPOSAL] (proposing FED. R. CIV. P. 26(a)(1)(A)). For a discussion of the proposed Rule 26, see *id.* advisory committee's note, at 26. Also, for a discussion of the history of the amendments to Rule 26(a), see generally Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—"Much Ado About Nothing?,"* 46 HASTINGS L.J. 679 (1995).

24. 1991 PROPOSAL, *supra* note 23, at 15 (proposing FED. R. CIV. P. 26(a)(1)(B)).

Committee a barrage of letters and presented oral testimony from lawyers throughout the country. Although the lawyers were widely dispersed geographically, many of the letters used virtually identical language. I see nothing wrong with this method of lobbying, so long as the person signing the letter verifies the merits of the criticism that has been provided for retransmission. Disturbingly, much of the correspondence had not done that. We received a large number of letters and heard oral testimony that asserted the entirely false claim that privileged and work product materials would have to be automatically disclosed under the proposed rule. Yet the proposal specifically allowed parties to assert and get a ruling on any work product or privilege claim before materials subject to such a claim needed to be disclosed.[25]

However, I thought the criticism was, for the most part, well taken. As drafted, the proposal seemed to require disclosure of all materials relevant to any legal theory the answer or complaint might support. If a party failed to anticipate the legal theory of its adversary, the disclosure might be deemed inadequate and violate Rule 26. Moreover, as proposed, the Rule would cause a party to alert the adversary to legal theories of which it was ignorant. All this is quite beyond the other problems associated with the expectation that discovery might be massive for little purpose.

After receiving the commentary, the committee revised the proposal to only require automatic disclosure of materials that were "relevant to disputed facts alleged with particularity in the pleadings."[26] This language was taken from Rule 9(b)[27] and had a body of case law interpreting it.[28] Under the revised rule, a general allegation that a product injured a person through a design defect would not trigger any disclosure, because it does not involve facts alleged with particularity but, instead, facts that are only conclusory.[29] On the other hand, an allegation that a railroad crossing at a particular location was unattended, and that a plaintiff's car was struck by a particular Amtrak locomotive on a certain day, at 2:15 p.m., would trigger disclosure. There is an inevitable area of ambiguity, but it is no more than the irreducible

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25. *See id.* at 21 (proposing FED. R. CIV. P. 26(b)(5)).

26. FED. R. CIV. P. 26(a)(1)(B).

27. FED. R. CIV. P. 9(b).

28. *See, e.g.*, Buckley v. Altheimer, 2 F.R.D. 285 (N.D. Ill. 1942); United States v. Dittrich, 3 F.R.D. 475 (E.D. Ky. 1943); Sorenson, Jr., *supra* note 23, at 732-43 (comparing the language of Rule 26(a) with the text of other rules, including Rule 9(b)). *See generally* 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2053 (2d ed. 1994) (supporting the proposition that Rule 26 borrowed language from Rule 9(b)).

29. *See* FED. R. CIV. P. 26(a) advisory committee's note.

ambiguity that exists with any rule. Furthermore, there will be judges who will make decisions that do not seem right, as is often the case with other rules. I suggest that the present rules, when interpreted by those same judges, would lead to exactly the same result, but only after a great deal of papers have been filed. The Committee regarded it in good faith as having responded to the criticism. Under the Rule, no one had to disclose anything, and no one had to concern themselves with what the adversary's legal theories were. If there was a fact that was alleged with which you disagreed, you could move under Rule 12(f) to strike it as irrelevant.[30] I, as well as others, thought that the revised proposal met most of the legitimate criticism; nevertheless, the outrage of the bar continued.

One charge that I really do not understand—and, therefore, will make some light of—is that the rule would interfere with the relationship between attorneys and their clients. This idea is based on the premise that a legal obligation to disclose unhelpful, not to say negative, materials should not be imposed because lawyers do not want to have to tell their clients that they have an obligation to disclose. That is a very peculiar view of the lawyer's role. It seems to posit that a would-be lawyer for Willy Sutton should not have to tell him that he had an obligation not to rob banks, because that would interfere with their attorney-client relationship. However, once the bank was robbed and Willy Sutton was convicted, then it was acceptable. This argument also reflected the troubling notion that the attorney-client relationship is enhanced by charging substantial sums to a client for the fruitless defense of a discovery motion, resulting in an inevitable order of disclosure. Indeed, it seemed to me the very argument that costless, but useless, proceedings are desirable is, in itself, an admission that wasteful civil discovery routinely occurs, largely for the benefit of lawyers.

Finally, it was charged that automatic disclosure was inconsistent with the adversary system. However, most discovery in the criminal law area is in the nature of automatic disclosure; in particular, the obligation of the government to disclose exculpatory material to the defendant.[31]

Just recently, the Judicial Conference of the United States killed a proposal that would have introduced more limited formal discovery in criminal law similar to civil discovery. It would not be nearly as extensive as civil discovery, but it would still be formal discovery. To my knowledge, no one argued to the Conference that we have to have formal

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30. FED. R. CIV. P. 12(f) ("Upon motion made by a party . . . the court may order stricken from any pleading any insufficient defense or any redundant, immaterial [or] impertinent . . . matter.").

31. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that the suppression of exculpatory evidence by the prosecution upon request violates due process).

discovery in order to make criminal proceedings adversarial. Although I disagree with the concept that automatic disclosure was inconsistent with the adversary system, numerous people, including Justices Scalia, Thomas, and Souter agreed with it to one degree or another.[32]

Several of the critics simply ignored the new language requiring disclosure only of materials relevant to disputed facts alleged with particularity and continued to attack the original proposal, even though it had been redrafted.[33] For example, at a symposium on procedure, I encountered an executive of a drug company who was organizing opposition to the Rule, but who had not been informed that the Rule had been rewritten. Moreover, some of the articles and critics continued to assert that the Rule purported to eliminate the attorney-client privilege and work product immunity.[34]

The most troubling thing, however, was what did not appear. What did not appear was any rebuttal to the argument that costly proceedings should not attend disclosure of materials that any competent lawyer will ask for and any competent judge will grant. No constructive alternatives that would reduce the costs of civil discovery were offered, nor was the status quo defended. Any possibilities for change were simply denounced.

In watching this entirely misleading debate unfold, I became convinced that the defense bar's failure to address the merits was, in part,

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32. *See* Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 507, 511 (1993) (Scalia, J., dissenting, joined by Justices Souter and Thomas) (stating that the changes to Rule 26(a) "[do] not fit comfortably within the American judicial system, which relies on adversarial litigation" and "place intolerable stress upon lawyers' ethical duty to represent their clients and not to assist the opposing side").

33. *See* Randall Samborn, *Rules for Discovery Uncertain: Opposition Lingers to Mandatory Disclosure*, NAT'L L.J., Dec. 20, 1993, at 1 (discussing the opposition and criticism the proposed amendments to Rule 26 of the Federal Rules of Civil Procedure received since first proposed in 1991 and failing to recognize that the proposal was redrafted since it was first proposed); *see also ABA Denounces New Discovery Rule, Accredits Lawyer Specialization Agencies*, 62 U.S.L.W. 2095 (1993) (criticizing the Rule's wording as likely to result in more litigation, without addressing the fact that the language in dispute was in fact added to reduce the Rule's ambiguity). *But see* Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 39 (1992) (characterizing the proposal to Rule 26(a)(1) as being fundamentally flawed because the new language "relevant to disputed facts" is overly broad and vague).

34. *See, e.g.*, Laura A. Kaster & Kenneth A. Wittenberg, *Rulemakers Should Be Litigators*, NAT'L L.J., Aug. 17, 1992, at 15; Leslie M. Kelleher, *The December 1993 Amendments to the Federal Rules of Civil Procedure—A Critical Analysis*, 12 TOURO L. REV. 7, 103-04 (1995). *But see* Sorenson, Jr., *supra* note 23, at 761 (stating that such arguments "represent a visceral response based on some general, vague notion of the way the system is supposed to work, rather than a carefully reasoned or substantiated analysis based on actual doctrines").

a strategy to mislead its clients, as well as to persuade Congress to reject the Rule. For all of the protests by the defense bar, the plaintiffs' bar also was not enthusiastic about the proposal.[35]

In conversation with plaintiffs' lawyers, and from some remarks quoted in the press, I gather that many in the plaintiffs' bar did not share the view that the amendments to Rule 26 disadvantaged defendants. They viewed automatic disclosure as a device that might expose weaknesses in their case before they had an opportunity for discovery. I am in no position to judge whether they were right or wrong, but the widely held view that defendants will be terribly disadvantaged was simply not shared by all the plaintiffs' groups.

I want to emphasize that I do not mean to say that automatic disclosure, or the Rule, is a panacea, or that it may not be misused or cannot be improved upon. I am also not saying that there are not legitimate arguments against it. I am not saying any of those things. Indeed, I once described the Rule in print as barely non-trivial, because any wrongs it causes will all occur anyway under the present Rule, but at greater expense to the clients. In my opinion, on the merits, it simply did not justify all of the resistance and controversy generated.

I will say that experience with automatic disclosure, as I understand it, can be described as positive. There are other jurisdictions that do not use it. There are also some jurisdictions where it is in the Rules, but the lawyers do not use it, either because they are ignorant of it, they do not like it on principle, or they would rather bill their clients. I understand that a preliminary draft of a survey under the Biden bill[36] indicates that where automatic disclosure has been used, there has not been a feared increase in satellite litigation.

Nevertheless, I think further discovery reform may well be dead. I originally thought that automatic disclosure might come as a first step followed by a rule that said that all further discovery would be by leave of court, thereby preventing these enormous fishing expeditions. However, I think further discovery reform is a corpse with a contagious disease; as for who killed it, I do not know. If the lawyers killed it, it was the perfect crime because they left their clients' fingerprints on the body.

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35. *See* Samborn, *supra* note 33, at 26 (discussing how plaintiffs' and civil rights lawyers argue the proposed amendment to Rule 26 would give an unfair advantage to defendants, and the defense bar contends that the amendment impinges on the attorney-client privilege); Sorenson, Jr., *supra* note 23, at 731 (explaining that opposition to the new disclosure rule was widespread across the defense bar, the plaintiffs' bar and academia).

36. Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-82 (1995).

I have described this controversy, first, because I was familiar with it, and, second, because I am the most skeptical person involved in this whole venture; but I also think it illustrates the enormous political difficulties inherent in any reform that lessens the cost of litigation. Many of the areas where reform has been suggested, such as discovery, are really central to the profit centers that are at the heart of the staffing and organization of law firms. With many mouths to feed, those who run firms necessarily view these proposals with great disquiet because they might disrupt their business, their way of life, and their standard of living. Not only are these firms powerful institutions, but they are run by persons of influence, great ability, and great learning. They are also the principal source of information to clients as to how reforms will affect them. It is to be expected that any proposal that reduces the cost of litigation to clients will be portrayed by some as disadvantaging the clients in litigation and increasing the amounts, judgments, and settlements to be paid. As for some types of changes, that portrayal may well be entirely accurate.

However, at least in my view, the history of Rule 26 suggests that often it will not. So the principal organized constituency for reform is partially disabled by having access only to flawed information, while the ultimate beneficiary, the public, is diffuse and disinterested. Reformers face a long lonely road in even getting the attention of those whose self-interest lies in reform.