

# THE COST OF RULES, THE RULE OF COSTS

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I. THE LITIGATION COST DEBATE: THE MORE THINGS CHANGE . . .

Nineteen thirty-eight marked a watershed for American law reform. It was a very good year for the federal judicial system. The Federal Rules of Civil Procedure took effect.<sup>1</sup> The new rules, embodying a far-reaching overhaul of litigation in federal courts, capped a historic movement spanning many years that aimed to improve federal practice and thus realize a high purpose in the administration of justice. Largely because of the ancient rigidity built into previous procedural rules, practitioners and scholars alike considered adjudication of private disputes in federal courts too complicated, too time consuming, and too costly. In consequence, many law reformers felt that federal litigation often produced unjust results for reasons unrelated to the merits of lawsuits.

The new Federal Rules were designed to correct those flaws. Among their central goals, highlighted as a purpose in Federal Rule 1, was “to secure the just, speedy, and inexpensive determination of every action and proceeding.”<sup>2</sup> To these ends, the revisions effected sweeping change. They stripped away and discarded centuries of strict common law formality prescribed by prior procedures that had encrusted onto court pleadings and litigation practices.

As the proponents of reform envisioned the new procedures in practice, essentially all that litigants would have to do to get their day in a federal court was, as specified in Federal Rule 8, file a pleading that contained a showing of court jurisdiction, a “short and plain statement of the claim,” and a demand for relief.<sup>3</sup> Under this simplified test, almost any form of statement of a grievance would do. In theory, even

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<sup>1</sup> 83 CONG. REC. 13 (1938) (Executive Communication 905); HOMER CUMMINGS, LETTER FROM THE ATTORNEY GENERAL TRANSMITTING THE “RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES”, H.R. DOC. NO. 75-460 (1938); ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, NOTES TO THE RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, H.R. DOC. NO. 75-588 (1938).

<sup>2</sup> FED. R. CIV. P. 1.

<sup>3</sup> FED. R. CIV. P. 8(a).

barely coherent ramblings scribbled on the proverbial back of an envelope might pass muster as a court complaint, as long as a judge was able to discern any earnest grievances and pleas for relief expressed in the gist of language bearing enough resemblance to a recognized legal claim. The courthouse doors would then open, along with the court's powers to aid litigants in gaining information about the dispute. By these improvements, as the theory held, the litigants would enjoy equal and speedy access to materials regarding the conflict. If the case advanced to trial, they would be adequately prepared with relevant evidence.

By enabling all parties to obtain ample information early enough, the new Federal Rules would promote efficiency and lower litigation costs and delays in several ways. A fuller factual record would aid litigants in narrowing pretrial preparation to disputed material issues. It would also ease settlement by shedding light on the strengths and weaknesses of the parties' claims and defenses. More exchange of materials relevant to the case would curtail evidentiary disputes and expedite resolution of conflicts by means of cooperation and self-regulation among litigants themselves. By these means, unfair surprise and tactical ambush sprung upon litigants by last-minute disclosures at or on the eve of trial—discredited hallmarks of prior practices—would be eliminated. Hence, the parties would be assured that a resolution of the merits of their disputes through court proceedings would take place sooner and at lesser cost, and, in part for that reason, would yield more just results. That was the vision then.

Skipping ahead to modern times, the full promise of the Federal Rules as it relates to the efficiency and economy of justice is far from realized in federal courts. The extent and significance of this perspective, as well as the intractability of the controversy, are reflected in the frequency with which the prevalence of litigation abuse, cost, and delay has arisen in recent years as a subject of debate and study within legal circles. Typical of that discourse is a joint project (Joint Project) sponsored by the American College of Trial Lawyers (ACTL) Task Force on Discovery and the University of Denver's Institute for the Advancement of the American Legal System (IAALS). That effort was undertaken, according to the report of the study issued in March 2009, "as an outgrowth of increasing concerns that problems in the civil justice system, especially those relating to discovery, have resulted in unacceptable delays and prohibitive expense."<sup>4</sup> A survey of ACTL

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<sup>4</sup> AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 1 (2009) [hereinafter JOINT PROJECT FINAL REPORT].

members performed in connection with the Joint Project confirmed the prevalence of that concern. The survey revealed “widely-held opinions that there are serious problems in the civil justice system generally.”<sup>5</sup> In particular, the procedural rules governing discovery of evidence came under heavy fire in this study. Lawyers depicted discovery proceedings as costing too much and having “become an end in [themselves],” as well as “impractical in that they promote full discovery as a value above almost everything else.”<sup>6</sup>

The Joint Project noted that twenty-five years had elapsed since another major push for reform by the Bar, perhaps the most extensive since 1938. That initiative, known as the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, or the “Pound Conference,” was perceived to have had an insignificant cumulative effect. It was convened in 1976 by Supreme Court Chief Justice Warren Burger, who invited lawyers, academics, Bar leaders, and judges to review various vital questions relating to the administration of justice in the United States. According to a report of the Pound Conference:

Substantial criticism has been leveled at the operation of the rules of discovery. It is alleged that abuse is widespread, serving to escalate the cost of litigation, to delay adjudication unduly and to coerce unfair settlements. Ordeal by pretrial procedures, it has been said, awaits the parties to a civil law suit.<sup>7</sup>

Though many of the proposals that Bar and bench leaders urged at the Pound Conference had been adopted during the intervening years, the Joint Project concluded that “[t]here is substantial opinion that all of those efforts have accomplished little or nothing” to reduce abuses pervasive in litigation discovery.<sup>8</sup>

That perception still underlies much of the criticism of court proceedings that regularly arises nowadays from various segments of the legal profession. Through various expressions, bar associations, law schools, judicial conferences, and in-house counsel find chorus-like harmony in faulting common litigation abuses, and pointing to the ills that excesses in the practice of law inflict upon the administration of justice. As one writer portrayed the intensity and pervasiveness of the controversy:

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<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.* (quoting an unidentified survey respondent).

<sup>7</sup> GRIFFIN B. BELL ET AL., AM. BAR ASS'N, REPORT OF POUND CONFERENCE FOLLOW-UP TASK FORCE 27 (1976) (footnote omitted), *reprinted in* 74 F.R.D. 159.

<sup>8</sup> JOINT PROJECT FINAL REPORT, *supra* note 4, at 10.

The recent outcry in this country over the social costs of civil litigation is unprecedented in its decibel level and sense of urgency, bringing together a coalition of politicians, lawmakers, business people, and scholars that often bridges traditional lines between conservative and liberal ideologies. It has engaged the attention of all three branches of the federal government as well as many state legislatures. In addition, an avalanche of literature, both professional and popular, has addressed the problem and advanced numerous overlapping solutions.<sup>9</sup>

Among widespread complaints, various critics describe litigation practice under existing procedures as “dysfunctional”<sup>10</sup> and a “broken” system in need of “serious overhaul.”<sup>11</sup> Another respondent of the Joint Project survey echoed these sentiments, referring to the rules of civil procedure as “a nightmare. The bigger the case the more the abuse and the bigger the nightmare.”<sup>12</sup>

Such perceptions have engendered responses and proposals from various sources and with shifting focus. The Joint Project, for instance, highlighted the role that discovery practices play among problems litigators encounter in the American justice system. As improvements, it recommended a series of far-reaching principles, among them the concept of “procedures proportionate to the nature, scope and magnitude of the case,” as compared with the “one size fits all” approach that governs the existing Federal Rules.<sup>13</sup> Later in the same year, the American Bar Association’s Section of Litigation released a report (ABA Survey) summarizing the results of a survey of lawyers commenting on civil practice. The poll registered broad dissatisfaction among practitioners over the costs of litigation, as well as doubts about the effectiveness of the current Federal Rules in curtailing the common abusive practices litigators resort to in demanding or withholding evidence. To discourage such tactics, respondents suggested greater professional collaboration among attorneys, and more active roles for lawyers and judges in managing and supervising litigation.<sup>14</sup>

In October of 2009, in the light of the results reported by the Joint Project, the Federal Judicial Center (FJC) prepared a report for the

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<sup>9</sup> Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 986 (2003) (footnote omitted).

<sup>10</sup> John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 (2010).

<sup>11</sup> JOINT PROJECT FINAL REPORT, *supra* note 4, at 9, 2.

<sup>12</sup> *Id.* at 2 (quoting an unidentified survey respondent).

<sup>13</sup> *Id.* at 4.

<sup>14</sup> See SECTION OF LITIG., AM. BAR ASS’N, MEMBER SURVEY ON CIVIL PRACTICE: FULL REPORT (2009) [hereinafter ABA SURVEY], [https://www.americanbar.org/content/dam/aba/migrated/litigation/survey/docs/report\\_aba\\_report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/migrated/litigation/survey/docs/report_aba_report.authcheckdam.pdf).

United States Judicial Conference's Advisory Committee on Civil Rules (the Advisory Committee) reviewing the level of attorney satisfaction with the operation of the Federal Rules. Tellingly, the FJC's study recorded mixed results. On one hand, based on a sample of cases with a median cost ranging from only \$15,000 to \$20,000, over half of the attorneys surveyed stated that the costs of discovery were "just right" relative to their clients' stakes in the dispute.<sup>15</sup> But, in about twenty-five percent of the actions, probably encompassing the larger, more complex litigation, a significant number of respondents reported that the costs of discovery were too high in relation to the stakes in dispute.<sup>16</sup>

Another response recorded in the FJC survey was more revealing and troublesome. Of the attorneys who represented both plaintiffs and defendants, nearly fifty-three percent agreed or strongly agreed that "parties increase the cost and burden of discovery in federal court through delay and avoidance tactics."<sup>17</sup> In those cases, the imbalance of costs and burdens relative to the stakes would stand sharply at odds with the concept of proportionality that Federal Rule 26 embodies as a kind of limiting principle to constrain excessive litigation.<sup>18</sup> The implications of these responses are significant. They suggest a form of acknowledgment by attorneys themselves that a substantial amount of the litigation they pursue is either not supported by the merits of the dispute, or not justified by what their clients stand to gain or lose from counsel's efforts in court.

The questions and concerns raised by the FJC Report captured the attention of members of the national Judicial Conference. To extend the debate and generate proposals to address the underlying procedural issues, the Advisory Committee sponsored a forum held at Duke University Law School in May 2010 (Duke Conference),<sup>19</sup> a sequel to a similar forum the Advisory Committee had convened in 1997 to examine problems regarding costs, delays, and abuses associated with federal court pretrial proceedings.<sup>20</sup> The views participants expressed at the Duke Conference replayed the legal community's debate regarding soaring litigation costs, and highlighted the profession's sharp divisions over these issues. One perspective, generally manifesting the

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<sup>15</sup> EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 2, 28 (2009) [hereinafter CASE-BASED SURVEY].

<sup>16</sup> *Id.* at 28.

<sup>17</sup> *Id.* at 71–72.

<sup>18</sup> See FED. R. CIV. P. 26 (Duty to Disclose; General Provisions Governing Discovery).

<sup>19</sup> See John G. Koeltl, *Progress in the Spirit of Rule 1*, 60 DUKE L.J. 537, 537 (2010) (discussing the conference and the resulting published articles).

<sup>20</sup> Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 519–21 (1998).

impressions of defense counsel, charged that “the pretrial discovery process is broadly viewed as dysfunctional, with litigants utilizing discovery excessively and abusively,” and that “[p]laintiffs’ attorneys routinely burden defendants with costly discovery requests and engage in open-ended ‘fishing expeditions’ in the hope of coercing a quick settlement.”<sup>21</sup> In turn, some plaintiffs’ attorneys countered that the result lawyers advocating for less pretrial discovery would bring about would be harmful: “concealment of the truth.”<sup>22</sup> At the conference, other practitioners, as well as judges and scholars, presented reform ideas ranging from modest tinkering with the Federal Rules to a radical revamping of federal practice through tighter restrictions on discovery, shifting of attorneys’ fees to the losing party, and imposing severe sanctions on litigants and counsel to punish and deter violations of procedures.

At various other events sponsored by private Bar groups and some courts, participants have expressed similar views, further reflecting the legal community’s heightened recognition of the litigation cost problem in its larger dimensions. The federal District Court for the Southern District of New York, for example, conducted a pilot program recommended by a task force of leading practitioners and judges that the Court formed to study the problem of rising litigation expense and delay in complex cases. Finally, as evidence that concern over litigation cost and delay once again reached the highest levels of the federal judicial system, in 2014 the Judicial Conference’s Committee on Rules of Practice and Procedure approved and sent to the Supreme Court for adoption yet another round of revisions to the Federal Rules. Some of the new proposals are designed to further streamline discovery proceedings.<sup>23</sup>

Viewed as a whole, especially in the context of the long history of federal practice reform, these efforts reflect a significant dimension of the debate. Even to the extent that it is merely based on anecdotal horror stories and subjective impressions, what lawyers relate about litigation abuse and attendant costs suggests that the underlying issues are real and substantial, and that their impacts not only reach the front lines of everyday law practice, but penetrate much farther so as to unsettle the very foundation of our justice system. Lawyers’ perceptions also convey that despite the reformers’ periodic attempts to realize change, the offending practices have neither ceased nor abated, let alone improved

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<sup>21</sup> Beisner, *supra* note 10, at 549.

<sup>22</sup> Milberg LLP & Hausfeld LLP, *E-Discovery Today: The Fault Lies Not in Our Rules . . .*, 4 FED. CTS. L. REV. 131, 134 (2011).

<sup>23</sup> See COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (2014).



litigation practice over time. As the discontent resonates within the profession, lawyers' extreme tactics still substantially burden court proceedings and raise legal services costs. That excess exacts a high economic and social price which must be borne by everyone who relies on the justice system to protect and promote vital interests as well as individual and collective values—litigants, attorneys, courts, governments, and society as a whole.

The resurgence of widespread interest and activities throughout the legal profession regarding excessive litigation thus underscores the continuation of the cycles of dissatisfaction and reform described above. A substantial segment of the legal community today perceives litigation practice as raising the same basic concerns that disturbed reformers before 1938. These notions evince that after the passage of over seventy-five years, the underlying dissatisfaction has never been sufficiently quelled, not by the 1938 overhaul of federal civil procedures, nor by a series of substantial modifications of the rules adopted by Congress in 1946, 1970, 1983, 1991, 1993, 2000, and 2006.<sup>24</sup> The troubling paradox has not been lost on some observers of the debate. Commentators have repeatedly noted the persistence of unhappiness and faultfinding with federal procedures despite perennial efforts to address the problem through new rule amendments. As one federal district judge, at that time chair of the United States Judicial Conference's Committee on Rules of Practice and Procedure, remarked:

Since their inception in 1938, the rules of discovery have been revised with what some view as distressing frequency. And yet the rulemakers continue to hear that the rules are inadequate to control discovery costs and burdens. . . . In 2009, the 1930s debates over discovery rules sound both modern and familiar.<sup>25</sup>

Over a decade earlier, Judge Paul Niemeyer, then chair of the Advisory Committee, had made a similar observation, noting that while many changes to the federal rules were adopted “to curtail the expansiveness of discovery, . . . they have either failed or been so diluted as to have little effect.”<sup>26</sup>

In sum, as it related to the speed, cost, and overall efficiency of much litigation, the justice system, like a boat running against a strong current, has been waging a losing battle. So, the issues persist and bedevil federal litigation. But, in the modern world's more complex framework of law practice, these concerns encompass larger dimensions. Today, the fundamental changes that have unsettled the

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<sup>24</sup> Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: 'Twixt the Cup and the Lip*, 87 DENV. U. L. REV. 227, 229 (2010).

<sup>25</sup> *Id.* at 228–29.

<sup>26</sup> Niemeyer, *supra* note 20, at 519.

law profession and profoundly altered the practice of law, embody deeper implications, and thus take on greater meaning and higher urgency.

A. *Of Causes . . .*

Two themes usually occupy stage center in current reenactments of lawyers' litigation cost debate: causes and effects. Typically, the discussion of causes breaks down into circles of finger pointing as a many-sided blame game plays out. Whether or not participants fairly or precisely apportion responsibility, their hunt for causes and culprits reflects common wisdom among lawyers that any inefficiencies, excessive costs, delays, or abusive tactics that occur in litigation are always someone else's fault. As a prominent scholar quipped about abuse and frivolity in court proceedings, "according to the practicing bar, a frivolous lawsuit is any case brought against your client and litigation abuse is anything the opposing lawyer is doing."<sup>27</sup>

In these rounds of lawyer shadow-boxing and recriminations, the usual suspects top the list of responsibility for runaway litigation cost and abuse. One view holds that the fault lies with the Federal Rules in general, and in particular with discovery provisions which, these critics contend, grant litigants a virtually limitless license to cast out widely in search for potential evidence, inviting the proverbial "fishing expeditions" now idiomatic in the practice of law. Other objections lay a share of the blame on the courts. Judges, the accusers say, do not engage actively enough in case management; they are too lenient in allowing burdensome discovery, and take far too long to resolve procedural disputes and decide motions. Modern electronic technologies score high among the most common grievances. Litigators despair about how rapidly-changing communications systems and data-gathering devices have exponentially increased the volume of information stored by various new means, and they uniformly complain that these document storage and search methods give rise to discovery that is ever more massive, at times unmanageable, usually very expensive, and not always truly necessary.

Another perspective accounts for rising legal services costs with more abstract reasons grounded on macroeconomics. In this explanation, the high expense of litigation that generally prevails nowadays derives from free-market forces and is driven by lawyers' open competition for business. The theory stresses the significant

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<sup>27</sup> Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 361 (2013).

influence of commercial pressures that law firms must regularly contend with in the ordinary course of business to protect and enlarge market shares, attract and suitably compensate the best talent available, meet professional and individual financial objectives, and ensure firm and personal profitability goals. By this account, the market not only sets the prices but essentially shapes and guides the business models and practice norms that lawyers adopt in rendering legal services.

At least one basic flaw diminishes the persuasiveness of these theories and holds back their value beyond mere rationalizations. They all deflect the central role played by the leading actor in this drama. While some accusers point fingers at one another in every direction, they overlook what frank self-examination would readily reveal: the share of responsibility for rising litigation excess produced by professional styles and actions of lawyers themselves.

### B. *Effects*

Unlike the attribution of causes, the effects associated with rapidly rising costs of legal services are well known, many of them even undisputed. Perhaps the most pointed consequence is the profound transformation which the legal profession has experienced during roughly the past forty years. This upheaval has brought to an end an era some writers have referred to as the “Golden Age” of big law firm practice prevalent until the 1970s, ushering modern times for the profession.<sup>28</sup> The succeeding age is marked by the spread of what one study termed the “commercialization and the concomitant decline of professionalism” in the character, composition, and operation of law firms in this country.<sup>29</sup> Remarking on this observation, the authors noted that while such concerns were not uncommon in the past, there is something qualitatively different about the magnitude of the shifts that have reshaped law practice and produced the contemporary mode. Specifically, they remarked that: “The present ‘crisis’ is the real thing—not in the sense of marking a decisive break from professional ideals, but in the sense that this discomfort reflects real structural changes over

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<sup>28</sup> MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 20–21 (paperback ed. 1993); Bernard A. Burk & David McGowan, *Big But Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 8.

<sup>29</sup> GALANTER & PALAY, *supra* note 28, at 2.

the past twenty years or so that are transforming big firms and their world in fundamental ways.”<sup>30</sup>

The forces these developments set in motion in the United States have spread profound impacts across various business and social interests, their effects bearing on the practice of law in multiple ways: attorney-client relationships; the economics, structure, operation, and culture of law practice; lawyers’ personal and professional satisfaction with their career and lifestyle choices; legal education; and, most fundamentally, the justice system and larger society.

### 1. Attorney-Client Relationships

During the past four decades or so, more and more business corporations and major institutions reevaluated and altered what were once enduring traditional relationships with outside counsel. In the customary business arrangement widely prevailing through the 1960s, lawyers’ ties to clients were characterized by longstanding mutual allegiances. Generally, in-house counsel departments were small or nonexistent. Accordingly, the bulk of the legal services generated by corporate entities and major business figures was handled for the client almost exclusively by the law firm to which the particular corporation “belonged.”<sup>31</sup> Professionally, the firm as a whole, rather than any one of its partners individually, was associated with the client. In some instances the firms depended on one or a few major clients for a large portion of their revenues. Both the legal work and profits the law firms generated were divided among the partners according to an agreed formula in which lockstep seniority and equal sharing counted heavily.

In recruiting and hiring junior lawyers, the firms drew straight from law schools and promoted associates to partnership entirely from within. Luring associates away and raiding from other firms for lateral partners were extremely rare. For associates who made the grade, partnership meant professional stability and financial security. Partners exited the law firms upon retirement according to partnership rules. The concepts of partners moving laterally to another firm, and of being fired because of law firm economic retrenchment, were virtually unheard of.

By and large, these professional relationships and traditions have broken down under the model of law practice structure and operation

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<sup>30</sup> Marc Galanter & Thomas Palay, *The Transformation of the Big Law Firm*, in *LAWYERS’ IDEALS/LAWYERS’ PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 31, 32 (Robert L. Nelson et al. eds., 1992).

<sup>31</sup> *Id.* at 34.

now dominant. Law firms grew immensely, both in size and locations, after the 1970s. While during the 1960s only a few of the largest firms comprised over fifty lawyers and the biggest consisted of 169, by 2008 almost 700 firms employed fifty or more attorneys, and twenty-three numbered over 1000.<sup>32</sup> Such rapid expansion brought about a far-reaching restructuring of the practice of law. Implicitly highlighting the contrast between the Golden Age firm and the contemporary model, one commentator stated:

[C]ompetition was very much a gentlemanly affair. . . . Protected by their captive relationships, the established practices had no reason to fear competitive assaults and were not, in turn, moved to encroach on their competitors' turf. . . . How cases were staffed and billed, how partners were selected and paid, and how new partners were admitted to the ranks were issues based on internal considerations rather than market factors. Free to conduct their affairs as they saw fit, the established practices could all but ignore such boorish concerns as efficiency, productivity, marketing and competition.<sup>33</sup>

Among the major realignments of the legal services market that gathered speed and momentum during the 1970s, two interrelated economic and structural shifts are particularly notable. One is the dramatic increase that occurred in attorneys' billing rates and compensation. A second is the expansion of the function, size, and power of in-house corporate counsel, perhaps the most consequential development affecting private law practice to occur within the last thirty to forty years.

## 2. The Economics, Structure, Operation, and Culture of Law Practice

### a. Lawyer Compensation

Starting in the late 1960s, lawyers' personal income jumped by large and sudden leaps. The entry-level salaries the big firms paid their associates record these bounds. In 1968, annual compensation for first-year associates stepped up from approximately \$10,000 to \$15,000.<sup>34</sup> By the mid-1980s, lawyers' starting salaries had risen to \$65,000 and continued to climb during the 1990s and 2000s, eventually reaching approximately \$160,000 in 2007 (not including bonuses).<sup>35</sup> Such dramatic growth in lawyers' entry-level annual salaries far outpaced

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<sup>32</sup> Burk & McGowan, *supra* note 28, at 12.

<sup>33</sup> GALANTER & PALAY, *supra* note 28, at 36 (quoting MARK STEVENS, POWER OF ATTORNEY: THE RISE OF THE GIANT LAW FIRMS 8–9 (1987)).

<sup>34</sup> See Burk & McGowan, *supra* note 28, at 20.

<sup>35</sup> *Id.* at 20–21.

upticks in national household income. By the time associate starting salaries at the large firms jumped to \$160,000 in 2007, the disparity with average household income—then reported to be about \$50,000—had more than tripled.<sup>36</sup>

Of course, because pay scales for associates are pegged to seniority by class, as lawyers' entry-level compensation rates spiked, so presumably did the income of the law firms' partners and other associates. Nationwide, for instance, average compensation for senior partners increased from about \$88,500 per year in 1977<sup>37</sup> to \$716,000 in 2014,<sup>38</sup> a growth of more than 700% (unadjusted for inflation).

#### b. Billing Rates

To finance their attorneys' escalating compensation levels, law firms turned to the most likely business expedients: substantially raising both their fees and billable hour expectations.

During the period between 1985 and 2012, the fees lawyers charged for their services increased significantly. Nationwide, average hourly billing rates of law firm partners rose from about \$122 to \$536, or approximately 339%, while that of associates grew even more, from about \$79 to \$370 per hour, or approximately 368%.<sup>39</sup> The increase was considerably more pronounced among big firms in major cities. In New York, for example, a sample of large law firms found that the average hourly billing rate for partners in 2013 was \$882 and for associates \$520.<sup>40</sup> These figures represent a jump of nearly 382% over the \$183

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<sup>36</sup> See *Salaries for New Lawyers: An Update on Where We Are and How We Got Here*, NAT'L ASS'N FOR LAW PLACEMENT (Aug. 2012), <http://www.nalp.org/august2012research>; see also CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2007, at 5 (2008). National household income stood at about \$8600 in 1968 while big firm lawyers' starting salary was \$10,000. By 1988, the gap had widened. Big firm first-year associates were then earning approximately \$71,000 per year, while national average household income had risen by only half of that amount, to about \$32,000. See U.S. CENSUS BUREAU, MONEY INCOME AND POVERTY STATUS IN THE UNITED STATES: 1988, at 11 (1989).

<sup>37</sup> Lisa G. Lerman, *The Slippery Slope from Ambition to Greed to Dishonesty: Lawyers, Money, and Professional Integrity*, 30 HOFSTRA L. REV. 879, 883 (2002) (citing Margaret Cronin Fisk, *Stratospheric Salary Gap Reflects National Trend*, NAT'L L.J., June 1, 1998, at B8).

<sup>38</sup> JEFFREY A. LOWE, MAJOR, LINDSEY & AFRICA, LLC, 2014 PARTNER COMPENSATION SURVEY 6 (2014).

<sup>39</sup> The average billing rates in 1985 for partners and associates is derived from Richard L. Schmalbeck & Gary Myers, *A Policy Analysis of Fee-Shifting Rules Under the Internal Revenue Code*, 1986 DUKE L.J. 970, 992 n.93 (citing D. Weston Darby, Jr., *Are You Keeping Up Financially?*, AM. B. ASS'N J., Dec. 1985, at 66). The average billing rates in 2012 for partners and associates is derived from Debra Cassens Weiss, *Average Hourly Billing Rate for Partners Last Year was \$727 in Largest Law Firms*, AM. B. ASS'N J. (July 15, 2013, 6:33 PM), [http://www.abajournal.com/news/article/average\\_hourly\\_billing\\_rate\\_for\\_partners\\_last\\_year\\_was\\_727\\_in\\_largest\\_law\\_f](http://www.abajournal.com/news/article/average_hourly_billing_rate_for_partners_last_year_was_727_in_largest_law_f).

<sup>40</sup> Karen Sloan, *\$1,000 Per Hour Isn't Rare Anymore; Nominal Billing Levels Rise, But Discounts Ease Blow*, NAT'L L.J., Jan. 13, 2014, at 1.

average billing rate for partners prevailing in New York in the mid-1980s,<sup>41</sup> a cumulative growth which, averaged out, would amount to about 3.9% per year. By contrast, the cumulative rise in the national inflation rate recorded during the 1985 to 2012 timeframe was 113.4%, or on average about 2.8% per year.<sup>42</sup>

### c. Billable Hours

Consistent with rising compensation within the legal industry, attorneys' financial results—as reflected by billable hour expectations and reported actual billings of law firm partners and associates—also increased substantially during the last thirty to forty years. In 1958 a committee of the American Bar Association (ABA), noting that lawyers' earnings had failed to keep pace with income levels of other professions, issued a pamphlet suggesting a goal of 1300 billable hours for associates.<sup>43</sup> Since then, numerical targets for hours billed has risen steadily. An ABA survey conducted in 1965 found that associates billed between 1400 to 1600 hours per year.<sup>44</sup> That number increased to between 1600 and 1800 during the 1970s and 1980s.<sup>45</sup> In 2001 the ABA, reflecting the upward trajectory of billing levels, once again revised the billable hour mark that it recommended law firms endorse, to 1900 hours for associates.<sup>46</sup> By 2010, that figure had become the standard reported by most law firms of over 250 attorneys, with the norm trending toward 2000 hours in a greater percentage of the big firms.<sup>47</sup>

Lawyers charging more hours at ever-higher rates, however, is one thing; collecting the bigger bills is another. As attorneys sent out invoices that reflected services under the law firms' higher billable-hour goals, they encountered some client resistance: refusals to pay, in whole or in part. For the economics of law practice, this reaction spotlighted another accounting phenomenon: realization rates. What lawyers bill is not always what clients agree to pay. In recent years the actual collection gap has widened. According to one study, for example, realization rates

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<sup>41</sup> David I. Levine, *Calculating Fees of Special Masters*, 37 HASTINGS L.J. 141, 180 n.231 (1985) (citing *How Firms Bill*, NAT'L L.J., Feb. 27, 1984, at 25, 30–31).

<sup>42</sup> *CPI Inflation Calculator*, BUREAU LAB. STAT., [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm) (last visited Apr. 26, 2016) (indicating that one dollar in 1985 “[h]as the same buying power as” \$2.13 in 2012).

<sup>43</sup> Niki Kuckes, *The Hours: The Short, Unhappy History of How Lawyers Bill Their Clients*, LEGAL AFF., Sept.–Oct. 2002, at 41–42; *The Billable Hours Crunch*, SELTZER FONTAINE BECKWITH, <http://www.sfbsearch.com/content.cfm/ID/20188> (last visited Feb. 27, 2015).

<sup>44</sup> Lerman, *supra* note 37, at 885.

<sup>45</sup> Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 247 (2000).

<sup>46</sup> Kuckes, *supra* note 43, at 42–43.

<sup>47</sup> *A Look at Associate Hours and at Law Firm Pro Bono Programs*, NAT'L ASS'N FOR L. PLACEMENT (Apr. 2010), <http://www.nalp.org/july2009hoursandprobono>.

on hours law firms billed at standard rates and actually collected fell from 89% in 2010 to 83.5% in 2013.<sup>48</sup> By contrast, the collected realization rate reported in 2007 was 92%.<sup>49</sup>

d. Push-Back

The dramatic rise in both attorneys' earnings and hours billed engendered client resistance in other ways, with far-reaching consequences, some perhaps unanticipated. As lawyers' fees swelled, and probably because of it, the size, role, function, and influence of in-house counsel expanded concomitantly during the same time span. Various surveys found a sharp growth in the size of in-house law departments in all business sectors, with some reporting increases as high as 95%.<sup>50</sup> Three major outcomes bearing on private law practice emerged from this phenomenon. First, corporate clients dramatically changed their method of awarding legal work. Rather than adhering to long-term business ties to a specific firm covering major work, they began retaining law firms more broadly, often competitively, as well as hiring particular prominent specialty lawyers for discrete assignments. Second, new corporate policies altered the type and proportion of legal services that clients awarded to outside firms. As clients kept larger portions of legal tasks for in-house staff, the capacity of corporate law departments also expanded, and so the volume of legal work they handled grew to encompass assignments that customarily had been performed by outside firms. In some instances, in-house services grew to comprise as much as two-thirds of the corporation's legal work.<sup>51</sup>

Third, the ascendance of in-house counsel prompted further client push-back in the form of modifications of corporate policies governing billing, budgeting, and oversight of outside counsel's services. In part because of the dissolution of longstanding attorney-client relationships and loyalties, some in-house counsel no longer accepted outside attorneys' invoices on trust and faith alone, but adopted increasingly more assertive billing and auditing practices. In particular, objecting that they should not be charged for on-the-job training of the law firms' junior lawyers with no legal skills or prior experience, in-house counsel began more frequently demanding discounts and more justification for particular expenditures. Finally, resistance to the rising cost of legal services—and fundamental changes for the justice system—took another form as clients pushed to move more disputes from judicial

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<sup>48</sup> Sloan, *supra* note 40.

<sup>49</sup> *See id.*

<sup>50</sup> GALANTER & PALAY, *supra* note 28, at 49.

<sup>51</sup> *See id.* at 49–50.



proceedings into alternative dispute resolution methods, especially arbitration.

For the legal profession and the practice of law, the scope and consequences of these changes were extensive. Underscoring the implications, the authors of one study remarked that:

Long-term retainer relations have given way to comparison shopping for lawyers on an *ad hoc* transactional basis. Corporations that view legal expenses as ordinary costs of doing business rather than singular emergencies have monitored legal costs, set litigation budgets, required periodic reporting, and awarded new business on the basis of competitive presentations from competing outside firms.<sup>52</sup>

e. Internal Affairs

Combined, these internal and external pressures bearing down upon the legal profession within the same timeframe created even more intense stresses on the big firms. Intense pressure to offset revenues lost to client policies and new business competition, as well as to support attorneys' higher billing rates and generous compensation scales, prompted law firms to recalibrate their business models in ways that generated major impacts felt through every corner of the law profession. To these ends, many adopted changes in firm management and operations policies, such as: further raising prices and increasing partner and associate minimum billable hour expectations; lowering operating expenses by personnel reductions including cuts in partnership tiers; dismissing lawyers, decreasing or deferring new hires; lowering partnership openings; creating new rungs of partnership and nonpartnership levels, permanent associates, contract lawyers, and counsel mezzanines; compressing or freezing compensation rates largely in the firms' lower employment ranks; outsourcing tasks to legal services businesses and downsourcing assignments from high-salary full-time associates to lower-paid contract attorneys or nonlawyers. Modifying fee and billing arrangements, restructuring the law firm business model and culture, and expanding legal services into the area of practice growing most rapidly had become the focus of law firms. By virtue of these measures, the duration of associate apprenticeship before promotion to partnership increased from a nationwide average of six years prior to the late 1980s to an average today of up to ten years in a majority of firms.<sup>53</sup> As associates waited longer to gain admission to partnership

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<sup>52</sup> Galanter & Palay, *supra* note 30, at 48 (citation omitted).

<sup>53</sup> Janet Ellen Raasch, *Making Partner—Or Not: Is it in, up or over in the 21st Century?*, LAW PRAC., June 2007, at 33, 35; *The Traditional Law Partnership Track: Does It Still Exist? Quo*

and firms grew in overall attorney ranks by hiring more task-specific contract lawyers, the prevailing ratio of associates to partner, or leverage, rose sharply, almost doubling since the 1960s from an average of about two associates per partner to between 3.5 and four in the largest firms.<sup>54</sup>

But another fundamental economic change, paradoxical in some ways while self-defeating in others, accompanied these law firm structural developments: big firm partners' average earning levels continued to rise rapidly, substantially surpassing percentage increases in the national cost of living.<sup>55</sup> Overall, gauged in the long term and on an industry-wide scale, some of these adjustments proved counterproductive for the practice of law, perhaps even self-destructive for the profession.

Overall, employment in the legal services industry fell, setting in motion other adverse impacts elsewhere within the legal community and substantially altering the composition, economics, and operations of law firm practice and culture.

Whether the legal profession's cost-saving measures prove timely and effective enough to address the profession's underlying concerns over the effects of mounting legal services costs raises important questions. Studies of law firm economics suggest that the impact of attorneys' efforts on this score are probably minimal. At best, the reductions in attorney ranks, insofar as they are well considered and not the result of the sudden collapse of a firm, have been reactive, selective, and sporadic. They have been prompted more by downturns in the national economy affecting business activity in general than by lawyers' systemic self-examination and reform designed to improve law practice efficiency more fundamentally. Moreover, in some respects, lawyers' attempts to reduce their overhead and the expenses they charge to clients reflect substantial disparities. While some of the large firms have shed lawyers and support staff, there are indications that financially the effects of those economies did not touch the billing rates or income scales prevailing at the top echelons of the profession. To the contrary, studies of law firm economics suggest that much of any savings realized by law firms' reductions of staff, freezing of salaries, and expansion of

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*Vadis?*, LAW PRAC. MGMT. PAGE, <http://weilandco.com/new/article6.html> (last visited Feb. 27, 2015).

<sup>54</sup> See Burk & McGowan, *supra* note 28, at 18–19.

<sup>55</sup> Ed Shanahan, *The Am Law 100 2010: Catching Up with the Class of 1985*, AM L. DAILY (May 10, 2010, 6:00 AM), <http://amlawdaily.typepad.com/amlawdaily/2010/05/classof1985.html>.

nonequity partner ranks have been channeled to enhance equity partner income.<sup>56</sup>

Thus, by raising both billing rates and individual compensation at the top tiers of the profession so as to exceed changes in the national averages of consumer prices and household incomes, a large segment of private law practice brought about a counterproductive effect. It continued to overstrain the financial elasticity and relational tolerance of its clients and markets and, in so doing, not only placed its services more and more out of reach of greater numbers of potential clients, but priced some lawyers themselves out of business.

f. Fee and Billing Arrangements

Some attorneys responded to these developments by altering the internal arrangements and personal relations within the law firms and correspondingly departing from the conventional business model that customarily recognized and fostered partnership equality and stability. That approach was perceived as encouraging allegiance to the firm and rewarding not just hard work, but longevity and group loyalty.

In contemporary practice, that traditional mode has disintegrated, largely abandoned as not sufficiently recognizing and recompensing the individual efforts and unique contributions each partner makes or is perceived to make to the firm's profits distribution pot. Law practice today, as the prevailing system's critics often portray it, constitutes much more a business than a profession. This charge goes to the core of the profound shifts that have reordered the practice of law. Commenting on the scope of these structural changes, one authority remarked:

The new aggressiveness of in-house counsel, the breakdown of retainer relationships, and the shift to discrete transactions have made conditions more competitive. Firms have become more openly commercial and profit-oriented, "more like a business." Firms rationalize their operations; they engage professional managers and consultants; firm leaders worry about billable hours, profit centers, and marketing strategies.<sup>57</sup>

In this view, law firms increasingly now function as associations of convenience and expedience serving individual lawyers and practice groups rather than as partnerships with a shared mission geared to further the interests both of the clients and of the firm as whole. Certain

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<sup>56</sup> A recent survey of law firm lawyer compensation, for instance, reports that the earnings gap between equity and nonequity partners continues to grow, with equity partner compensation rising by more than twenty percent since 2010 while the earnings of nonequity partners remained essentially unchanged. See *LOWE*, *supra* note 38, at 6.

<sup>57</sup> *GALANTER & PALAY*, *supra* note 28, at 52 (footnotes omitted).

terms that lawyers often use to describe the extreme competitiveness which characterizes contemporary law practice evoke not civility and cooperation, not professional common ground, but aggressive personal rivalry typically labeled as cutthroat, and tough Rand-styled egoism animated by “eat-what-you-kill” compensation scales that in larger measure esteem and reward particular business generation, productivity, and billable hours over collective effort, seniority, and more equalized distribution of profits. In this individualistic and internecine climate, critics charge, attorneys reportedly vie for business and clients not only with competing firms, but even with their own partners and associates.<sup>58</sup>

Lateral hiring of associates and partners, once exceptional, now approaches the norm, supporting a subspecialty service industry of lawyer “head hunters” that did not exist a generation ago. By 1988, according to a survey of the nation’s 500 largest firms, over one-fourth reported that more than half of their new partners came from other firms rather than from advancement through the partnership track.<sup>59</sup> By such means they acquired prominent “rainmakers” or whole practice groups from other firms by raids or generous enticements.

To adapt to the new practice mode, some firms also began operating as large enterprises composed of multiple loosely-held profit centers, with readily severable and mobile practice modules plugged into high-volume, high-price business generators whose overarching concern is the strength of their individual and practice group billings, rather than the stability and financial security of other partners and the firm as a whole.<sup>60</sup>

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<sup>58</sup> Noam Scheiber, *The Last Days of Big Law*, NEW REPUBLIC (July 21, 2013), <http://www.newrepublic.com/article/113941/big-law-firms-trouble-when-money-dries>.

<sup>59</sup> GALANTER & PALAY, *supra* note 28, at 54.

<sup>60</sup> As one study described this phenomenon:

Competition among firms for profitable partners fueled increasing competition within firms for money and power, backed by the threat of departure for greener pastures. Firms began to pay larger shares of their profits to lawyers with portable books of business. As financial rewards became more concentrated within a given firm, non-financial rewards became less secure. Partnership tenure and benefits became increasingly precarious: firms imposed compensation reductions, “de-equitizations” and outright dismissals on those partners viewed as inadequately “productive,” with productivity measured by the ability to leave the firm and have clients follow.

Burk & McGowan, *supra* note 28, at 16 (footnote omitted).

### 3. Something Personal

Impacts of the fundamental changes in the practice of law also manifest personally, at the individual attorney level. Increasingly, lawyers are reporting not only experiencing the more intense competitive pressures in day-to-day practice, but deriving less satisfaction from their work, and sensing doubts about the wisdom and value of their professional and lifestyle choices.

The exigency for attorneys to expand law firm receipts and individual income by raising billing rates and billable hours goals created some of these counterproductive stresses and strains. Most perversely, attorneys' striving for personal and firm success measured primarily by individual partners profitability set in motion an economic arms race in which too often service to the client took on lesser priority, and, in the words of one critic, "the interests of law firms went from serving the clients to serving themselves."<sup>61</sup> In consequence, even more significant trends indicate that fewer attorneys are remaining in firms long enough to compete in partnership tracks, or indeed in law careers.<sup>62</sup>

Many law firms, large and small, were rocked by these disruptions of the traditional business model.<sup>63</sup> Some could not adapt quickly enough to the more vigorous competitive demands. A substantial number of those firms eventually dissolved, their demise occurring by

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<sup>61</sup> Andrew Ross Sorkin, *Big Law Steps into Uncertain Times*, N.Y. TIMES (Sept. 24, 2012, 5:20 PM), <http://dealbook.nytimes.com/2012/09/24/big-law-steps-into-uncertain-times> (quoting Mark Harris, founder, Axiom Law).

<sup>62</sup> According to one study, during the twenty-five-year period ending in 2011, the percentage of attorneys employed in full-time legal services work dropped from 81.6 to 65.4, and those holding jobs requiring Bar membership declined from 75.9 in 2001 to 65.4 in 2011—data suggesting that higher numbers of lawyers were unable to find employment in the law or shifted to careers outside of their chosen profession. See *Class of 2011 Has Lowest Employment Rate Since Class of 1994*, NAT'L ASS'N FOR L. PLACEMENT (July 2012), <http://www.nalp.org/0712research>.

<sup>63</sup> Depicting the unhappy cycle of tensions and dislocations constricting modern law practice, one study observed that:

[P]artners were under pressure from every direction: greater numbers of associates per partner to oversee; greater pressure to bill more, but bill only time and tasks that would survive in-house counsel's or a fee auditor's scrutiny; greater misgivings from clients as associate rates soared to pay for anything resembling on-the-job training. Associates saw less and less of the experienced practitioners and firm leaders who in past generations had taught by observable example, and, in many cases, by personal tutelage as well. With smaller, more routine transactions and cases more frequently reserved for the client's own less expensive in-house legal staff, junior associates at elite firms were more often forced to find their training (if they found it at all) as deeply subordinated members of crowded "teams" in large, complex matters.

Burk & McGowan, *supra* note 28, at 24–25 (footnotes omitted).

various means: internal dissension that sparked the firm's explosion, financial implosion, merger with equal or smaller practices, or absorption into the expanding legal empires created by global mega firms.

#### 4. The Ripple Effect

##### a. Legal Education

Attorneys' keener competition for declining legal services markets in some sectors of the national economy stirred undertows farther downstream in other vulnerable areas of the legal community. These events, for instance, impacted legal education. Law schools have felt disturbances that have unsettled their operations in recent years in various forms: higher tuition, which on average almost tripled during the past fifteen years; larger student debt, which rose correspondingly; and a decline in placement of graduates in law-related employment.<sup>64</sup> All of these problems intensified as law firms decreased recruitment of recent graduates, increased hiring of laterals and temporary contract lawyers, and outsourced more business in response to clients' refusal to pay for the firms' untrained and inexperienced legal staff.

In consequence, law schools have been turning out larger numbers of heavily indebted graduates unable to land the fewer higher paying jobs available in law practice—or any law-related employment at all.

As an additional ripple, the downturn in legal education accelerated the waning appeal of law careers. The number of law school applicants, even at top tier schools, has declined sharply in recent years: by 27% nationally and 31% in New York State during the five-year period from 2008 to 2013.<sup>65</sup> In turn, these developments elicited more retrenchments in legal education. Some law schools have had to grapple with declining enrollments and lower revenues by raising tuition, increasing student debt, trimming faculties, selling assets, and reducing other services.

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<sup>64</sup> See Press Release, Am. Bar Ass'n, American Bar Association Releases Law Graduate Employment Data for Class of 2014 (Apr. 29, 2015), [http://www.americanbar.org/news/abanews/aba-news-archives/2015/04/american\\_bar\\_associa0.html](http://www.americanbar.org/news/abanews/aba-news-archives/2015/04/american_bar_associa0.html); *Average Amount Borrowed: 2001–2012*, AM. B. ASS'N, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/avg\\_amnt\\_brwd.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/avg_amnt_brwd.authcheckdam.pdf) (last visited Apr. 26, 2016); *Law School Tuition: 1985–2012*, AM. B. ASS'N, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/l\\_s\\_tuition.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/l_s_tuition.authcheckdam.pdf) (last visited Apr. 26, 2016).

<sup>65</sup> Tania Karas, *Facing Drop in Applications, Law Schools Cut Costs*, N.Y.L.J. (Oct. 2, 2013), <http://www.newyorklawjournal.com/id=1202621710322/Facing-Drop-in-Applications-Law-Schools-Cut-Costs>.

b. Saving Grace, Losing Face

Amid a whole generation of gloom and doom distressing the legal profession, and both compressing and depressing lawyers, one bright spot did light up the horizon. During the past four decades, as another marker reflecting the fundamental shifts transforming the practice of law, the nation's courts experienced a considerable upturn in the volume of litigation filed. For the big law firms, this change constituted an economic rescue, in some measure offsetting the heavy blows they had suffered from market forces otherwise impelling internal compression.

As the functions and authority of in-house law departments grew, and the corporate law business that clients awarded to outside counsel declined, litigation practice served law firms as a lifeline. As a practice group, litigation rose significantly in both volume and prestige to take on a greater role and importance in the service of the big firms' reconfigured business models. In that framework, courtroom practice worked as a business generator propelling and sustaining the law industry's modern economics. At the same time, however, the immense growth of litigation, accompanied by the law firms' economic dependence on this reordering of practice, generated a new series of challenges—some of them with adverse consequences—for attorneys and clients, for the practice of law, and for the justice system.

During the Golden Age generation, corporate work dominated the business of the large law firms. Litigation departments did not enjoy the same internal status or professional prestige. Litigators were not regarded as money makers. Indeed, by various accounts, big firm litigation practice was perceived as “the least lucrative branch of the firm,”<sup>66</sup> and a “loss leader.”<sup>67</sup> Quantitatively, one author estimated that litigation then occupied less than ten percent of the time of large firms, some of which avoided the practice altogether.<sup>68</sup> In this respect, the law firms mirrored the prevalent corporate culture. As a leading study expressed this outlook: “Disdain of litigation reflected the prevailing attitude among the corporate establishment that it was not quite nice to sue.”<sup>69</sup>

By 1985, this dim view of litigation had changed dramatically. Intercorporate litigation was then not only not avoided or frowned upon, but rather broadly and tightly embraced by corporate clients and

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<sup>66</sup> GALANTER & PALAY, *supra* note 28, at 32 (quoting BERYL LEVY, CORPORATION LAWYER: SAINT OR SINNER 64 (1961)).

<sup>67</sup> *Id.* (quoting Spencer Klaw, *The Wall Street Lawyers*, FORTUNE, Feb. 1958, at 140, 144).

<sup>68</sup> *Id.* (citing Martin Mayer, *The Wall Street Lawyers, Part I: The Elite Corps of American Business*, HARPER'S MAG., Jan. 1956, at 31, 36).

<sup>69</sup> *Id.* at 33.

attorneys as a major part of commercial business strategy and counsel's tactical tools. In fact, litigation became a calculated means for private enterprises—and law firms—to further their competitive ends. This shift, along with the forces driving it, augmented the role of litigation in the service not only of corporate business but of the legal services industry.<sup>70</sup> The changed perspective that clients and attorneys adopted enhancing the strategic use and value of the courtroom as a competitive arena thus produced an upsurge of both litigation and, concomitantly, of litigators. So reinforced, litigation has manifested its more muscular weight in court proceedings. Practitioners have employed litigation not only to promote justice and advance the interests of clients, but also, perhaps to a larger degree than was previously the case, to further three self-serving ends: to fill in the law firms' revenue gaps created by corporate work lost both to in-house counsel and to clients' new policies for hiring and monitoring outside attorneys, to enhance law firms' business models now more motivated by attorneys' individualistic impulses, and to survive the more rigorous competition and fiercer Darwinian ends of modern law practice.

### C. *The Dot Connection*

In large part by virtue of the burgeoning of litigation and the vital part it played in advancing corporate business interests and hence the practice of law, a strong correlation exists between two issues at the center of the contemporary legal services cost debate: the economic imperatives driving today's litigation practice and the great concern over higher costs and abuses those demands have generated. The business pressures which gave rise to and still propel these

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<sup>70</sup> Describing this outgrowth and its corporate underpinnings, one authority remarked that:

A business environment that is more competitive, more insecure, and more uncertain—in which there are more large risk-prone deals, with higher stakes and more regulation to take into account, amid more volatile fluctuations of interest and exchange rates—generates new demand for intensive lawyering. Such deals spawn satellite litigation as a sideshow or a strategic ingredient. Generally, businesses are less likely to forbear from litigation when things turn out badly, and they are more inclined to use litigation as a business strategy.

*Id.* at 51. Paralleling the rise in corporate disputes that went to court, the number of big firm litigation departments also grew proportionally during the same period. According to a recent report, litigation constituted about thirty-three percent of the nation's overall legal services market, up from the estimate of ten percent prevalent during the 1960s referred to above. See *supra* text accompanying note 68; see also GEORGETOWN LAW CTR. FOR THE STUDY OF THE LEGAL PROFESSION & THOMSON REUTERS PEER MONITOR, 2013 REPORT ON THE STATE OF THE LEGAL MARKET 3 (2013), <https://www.law.georgetown.edu/continuing-legal-education/executive-education/upload/2013-report.pdf>.



developments contributed substantially to the trends, producing the greater duration and higher costs of court proceedings further detailed below, as well as the greater incidence of extreme litigation practices many lawyers report. Working methods that practitioners and judges alike regard as ranging from borderline questionable to outright improper have flourished in the courthouse, to such a degree that certain forms of litigation excess have become routine. This phenomenon has lowered the bar on what passes muster as tactics that may be fairly employed to foster delay, increase cost, and intensify the host of grief and inconvenience that litigation inflicts upon the parties and other interests in a lawsuit.

Abusive litigation practices may have taken a turn for the worse in recent years especially because modern information and communications technology have rendered litigation far more complex and labor-intensive, demanding greater amounts of lawyers' time, and for that reason alone, generating higher expense. In consequence, contemporary litigation has spawned an expanding progeny of unnecessary methods, at best dubious, at worst outrageous. In aggravated forms, this development engenders ever deeper unhappiness as litigators, confronting the rougher world of economics, keener competition, and far bigger stakes that characterize law practice today, vie with one another to achieve a sharper edge in court proceedings.

That litigation as practiced today consumes more time and expense should come as no surprise, especially to lawyers. Perceptions of these effects manifest in attorneys' own bitter accounts relating how the profession has changed. Judges' perspectives, often reflected in court rulings, also lend support to impressions of the higher magnitude of wasted time, energy, and resources that lawyers routinely consume in disproportionate, pointless, or frivolous disputes.

A bigger picture thus emerges. Its framework encompasses events which have been reshaping this country's legal services world in recent years, linking the fundamental changes that have been occurring in the practice of law to forces at work at two levels—from outside and inside the profession. To the extent that the causes emanate from lawyers' own doings and yield harmful or counterproductive results, attorneys themselves should be best situated to avoid or reverse the attendant ill effects. Regrettably, long experience undercuts this prospect. On one plane, lawyers exhibit due diligence and a fitting sense of urgency, making their internal operations more efficient in order to keep up with the demands of modern commercial markets and protect their practice base and share of revenues.

But on the external front, in the battlegrounds of workaday litigation, a different outlook prevails. Bar and bench efforts to bring about meaningful improvement in traditional strategies and methods

have encountered intense opposition. Typical of that resistance is the volcanic professional battles that erupted in 1983 and 1993 over amendments to Federal Rule 11 that were designed to strengthen judges' power to impose penalties on attorneys and litigants for filing frivolous lawsuits or engaging in practices that delay or increase the cost of court proceedings. Those quarrels sharply divided the legal community, with judges generally backing reinforcement of Rule 11 and practitioners splitting into strident camps of supporters and opponents of further amendment.<sup>71</sup>

These circumstances have created a paradox. The gritty grind of litigation, with all of its inefficiencies that prolong the duration of private disputes and enlarge the grief and expenses of clients, also serves as a hallmark of law practice profitability. In other words, in some circumstances litigation abuse may function as a boon to the bottom line, a financial engine working to sustain a growing share of the legal profession's profitability, which in turn is grounded on a business model that internally embraces the operational and economic efficiency that modern law practice demands.

### 1. Shock Absorbers

Perhaps the most profound and troubling of the adverse impacts associated with a rising volume of litigation and higher costs of legal services are those that come to bear in various forms as clogs on the court system and impediments to the administration of justice: greater litigation inefficiencies, unjustifiable expense, heavier strains on judicial resources, and narrower access to justice for persons of limited means—many of whom, when they need counsel to address a significant legal problem, cannot afford a lawyer because of ever higher legal services fee levels.

Higher legal costs prevailing at the top of the market and longer delays of court proceedings involving wealthy litigants can hinder justice at the bottom of the economic scale. Insofar as some litigants command the best legal talent and inordinately inflate the price of lawsuits, while also unduly congesting the court dockets with costly complex disputes, an increasing volume of cases become economically borderline or too financially unappealing for many more attorneys to consider accepting. In consequence, people who need counsel no less—and often more so—than those able to pay the going rate for lawyers, are

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<sup>71</sup> See, e.g., Jeffrey W. Stempel, *Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing It with Pre-Verdict Dismissal Devices*, 60 *FORDHAM L. REV.* 257, 288 n.157 (1991).

priced out of the legal services market. For those individuals, access to justice and related choices implicating fundamental rights and basic human needs are substantially narrowed. In fact, it is commonplace that an increasing number of people, totaling millions, appear in court every year unrepresented in civil actions, even in proceedings involving essentials of life in which they stand to lose homes, jobs, parental rights, health benefits, immigration status, and even liberty. Typically, these actions, voluminous and labor-intensive as they are, create special case-management challenges and conflicts for the courts, and take disproportionately longer for judges to resolve, than cases in which both sides are represented by attorneys.

To this extent, the effects of higher workloads involving litigation in which parties appear without counsel because lawyers' billing rates are out of reach to them spill over throughout the justice system so as to extend the duration and expense of many other cases. It also increased the number of unrepresented litigants.<sup>72</sup> The larger share of the courts' dockets that these actions occupy delays judicial decisions on motions and adjudications on the merits, raising the attendant costs and inconveniences for other litigants. Hence, many more litigants—the least financially fit—are left to fend for themselves in maneuvering through the justice system. Many other attorneys say they often feel compelled by burdensome delays of court proceedings and mounting litigation costs to acquiesce in another outcome they deem no less perverse: to yield to coercion by settling cases regardless of their merit.

## 2. The Measure of Duration

Empirical data and statistical analysis bear out concerns that federal lawsuits are consuming more time and resources to resolve, that such delays have lengthened in recent years, and that these developments have been detrimental to the justice system. Various economic signposts and trends, viewed together as parts of the larger context depicted above, support these observations.

Data compiled by the Administrative Office of the United States Courts indicate that during the decade from 1985 to 1995, the median duration of civil cases in federal courts, measured from date of filing to disposition, rose from six to eight months, an increase of about 33%, while in the same period the number of federal actions filed decreased

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<sup>72</sup> In the Southern District of New York, for instance, civil lawsuits brought by unrepresented litigants now comprise as much as twenty-five percent of new actions filed in recent years, a growth rate of more than forty percent over the number of such cases in 1990. Data on file with author.

by about 28%.<sup>73</sup> During the succeeding ten years, 1995 to 2005, the median duration climbed to 8.7 months and the number of cases filed increased by approximately 25%.<sup>74</sup> These figures lend empirical backing to lawyers' responses to a 1988 survey expressing the view that the time it took to resolve court proceedings had increased substantially during the preceding decade, and that the resulting delay constituted the most serious problem confronting the court system.<sup>75</sup>

### 3. The Measure of Cost

As to be expected, for practitioners, the combination of a higher number of court filings, longer duration of cases, and greater incidence of motion practice, has an upside: the substantial increase in attorneys' fees that accompanied and correlates with the considerable growth in litigation expense during the past thirty-year timeframe. Various measures, as shown above, viewed in tandem evince the higher costs of court proceedings that could be attributed in large part to increased lawyers' billing rates and individual compensation levels.

Two other economic measures—lawyers' average profitability and individual compensation—also have cause and effect bearing on the growth of litigation costs. During the twenty-five years between 1985 and 2010, average profits per equity partner at the nation's fifty largest firms rose more than five-fold, from about \$309,000 to approximately

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<sup>73</sup> ADMIN. OFFICE OF U.S. COURTS, TABLE C-5: U.S. DISTRICT COURTS—TIME INTERVALS FROM FILING TO DISPOSITION OF CIVIL CASES TERMINATED, BY DISTRICT AND METHOD OF DISPOSITION DURING THE TWELVE-MONTH PERIOD ENDING DECEMBER 31, 1995 (1996) [hereinafter 1995 TIME INTERVALS]; ADMIN. OFFICE OF U.S. COURTS, TABLE C-5: TIME INTERVALS FROM FILING TO DISPOSITION OF CIVIL CASES TERMINATED, BY DISTRICT AND METHOD OF DISPOSITION DURING THE TWELVE MONTH PERIOD ENDED DEC. 31, 1985 (1986).

<sup>74</sup> ADMIN. OFFICE OF U.S. COURTS, TABLE C-5: U.S. DISTRICT COURTS—MEDIAN TIME INTERVALS FROM FILING TO DISPOSITION OF CIVIL CASES TERMINATED, BY DISTRICT AND METHOD OF DISPOSITION DURING THE 12-MONTH PERIOD ENDING DECEMBER 31, 2005 (2006); 1995 TIME INTERVALS, *supra* note 73.

<sup>75</sup> See Miller, *supra* note 9, at 996. The duration and attendant cost of a lawsuit are of course functions of type and complexity of the proceedings that the litigants put into operation. In this regard, the filing of motions to dismiss the complaint and motions for summary judgment rank among the most consequential of such determinants. The briefing, oral argument, and court review of either type of these motions can add as much as six months to a year or more to the disposition of a case. What animates counsel's strategic call to pursue such motion practice despite the substantial increase in the litigation's duration and expense—in the case of summary judgment motions, according to various estimates, by as much as twenty-two to twenty-four percent of total costs—and the extent to which such choices are unwarranted under the circumstances, raises many weighty issues, some detailed below in the Sections discussing these procedures. See EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 6, 8 (2010) [hereinafter LITIGATION COSTS].

\$1.5 million.<sup>76</sup> Relatedly, as noted above, lawyers' average individual earnings nationwide rose by about 156%, while the cost of living increased by 113% during the last thirty years.

a. All Together

For some attorneys, higher legal services costs yield significant gains—professional and financial. But such rewards come at a high price insofar as they also raise broader professional and societal concerns, as well as ethical dilemmas. Some observations made in the report of the ABA Commission on Billable Hours in 2001 call attention to these concerns and highlight their implications. Referring to the law firms' continually rising billable hour minimum requirement, the Commission noted that the trend “can lead to questionable billing practices, ranging from logging hours for doing unnecessary research to outright padding of hours.”<sup>77</sup> The Commission voiced other troublesome issues associated with these financial pressures: disparity between fees generated and the actual value and need for the services lawyers performed, duplication of work, harm to collegial relations among attorneys and to their law firm culture, and diminishing time available for pro bono legal services and other public interest contributions.<sup>78</sup>

b. When “Too Expensive” Is Too Expensive

The substantial rise of legal services costs litigants have actually experienced in federal courts in recent years finds expression in many lawyers' perceptions, reported in a survey for the Duke Conference prepared by the ACTL and IAALS, that the civil justice system is “too expensive.”<sup>79</sup> The concept that litigation may be “too expensive” embodies a relative value judgment. Litigation costs may be excessive merely in relation to the stakes at issue. The expense, even if exceptionally large, may be justified if the amount in controversy is correspondingly high, but disproportionate if it significantly exceeds the value of the issue in dispute, as measured by some objective standard.

There is an undeniable sense, however, in which any court proceeding may be deemed “too expensive” whether the stakes involved are big or small: when the cost is the product of extreme lawyering practices. In general, legal expense crosses that qualitative threshold when the fees attorneys actually bill are not grounded on the needs of

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<sup>76</sup> Shanahan, *supra* note 55.

<sup>77</sup> COMM'N ON BILLABLE HOURS, AM. BAR ASS'N, REPORT: 2001–2002, at 43 (2002).

<sup>78</sup> *See id.*

<sup>79</sup> AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF AM. LEGAL SYS., REPORT FROM THE TASK FORCE ON DISCOVERY AND CIVIL JUSTICE TO THE 2010 CIVIL LITIGATION CONFERENCE 2 (2010).

the case, or on the interests of the client, or on counsel's reasonable and warranted billing expectation. Rather, litigation cost is unjustifiable under such circumstances insofar as it serves any of several improper ends: if it derives from lawyers' demonstrably excessive strategies or grossly deficient practice styles, promotes lawyers' own business or personal interests above those of their clients, or places undue or disproportionate burdens on the justice system or the larger society. In synthesis, as litigation attained greater professional standing and commanded a larger portion of big firm legal services, many attorneys—under pressure to sustain their desired share of law business, profitability, and individual compensation—adopted law practice tactics and business management means that have turned out to be self-defeating in several respects.

Economically, some lawyers overestimated the pliancy of the price they could charge law practice markets and clients, and stretched too high in raising the levels of law firm and personal compensation they derived. In some instances, their earnings and billing goals were pegged beyond what the specific tasks were worth, or what particular industries or clients would bear without resistance and long-term consequences for the practice of law. At the same time, other lawyers, who by virtue of their high professional reputation and uniquely valued skills could command higher charges, continued to push the legal fees envelope to its outer bounds, even at the risk of impairing customary practices, professional bonds, and other societal ends. Such overreaching brought about counterproductive consequences. Perhaps inevitably, it prompted client reactions, as detailed above, that could have been foreseen.

Sharper competition for shrinking legal services markets—which diminished in part because of some attorneys' rising fee rates—yielded an even more perverse vicious cycle. It elevated pressure on attorneys to work longer hours and produce more business and further enhance profits so as to satisfy their higher compensation scales. In turn, raising the bar on business generation and profits induced some practitioners to engage with higher frequency and less restraint in sharper tactical methods that test the limits of what attorneys themselves could tolerate as acceptable professional conduct.

#### D. *Hear No Evil*

Despite rumblings within the legal profession that should be audible to anyone holding even a tin ear to the ground, far too many lawyers apparently have turned a deaf ear to the events that shook the profession as they transpired. Some would even deny that any cause for concern exists. A survey of managing partners of major law firms

conducted during the Great Recession of 2007 to 2010 reported that while almost 60% of those attorneys acknowledged that the economic decline had created a fundamental shift in legal markets, about 70% also responded that the downturn had not produced any fundamental shift in their law firms' business model.<sup>80</sup> Briefly stated, practitioners either ignore or minimize the extent to which forces of their own making have shaped the conditions that are unsettling and eroding the practice of law.<sup>81</sup> As it relates specifically to litigation, those pressures have contributed to: complicating, prolonging, and raising the cost of court proceedings; clogging the courts' dockets; narrowing opportunities for many lawyers to enter and closing the door for others to remain in their chosen profession; and impairing access to justice for larger numbers of people, especially the poor who because of the rising cost of lawyers' services are less able to hire counsel to address basic legal problems.

#### E. *From the Bench*

There is one perspective on excessive lawyering that attorneys would be hard pressed to deny or refute: the view from the bench. Actual disputes that judges regularly see and grapple with up close, involving accusations of counsel charging for excessive services, validate general perceptions about attorneys' abusive methods and overstaffing tasks. Indeed, a massive body of law—arising both from separate lawsuits challenging lawyers' bills and from ancillary disputes over

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<sup>80</sup> Burk & McGowan, *supra* note 28, at 40.

<sup>81</sup> A recent case in point that made national front-page headlines illustrates an aspect of extreme lawyering gone awry. It involved a lawsuit brought by a client against one of the country's biggest law firms that related to the amount of attorneys' fees that the firm had billed. Internal emails that surfaced during discovery recorded communications among three attorneys disclosing that they had performed considerable unnecessary tasks on the assignment—their efforts designed to puff up attorneys' fees. Their correspondence made reference to what the lawyers characterized as the firm's overbilling culture. In the ensuing litigation, the client claimed that this exchange suggested a pattern of purposeful cost inflation by attorneys churning out billable hours through overstaffing the case and conducting extraneous and unnecessary research. The firm sought to explain away the client's claims of wrongdoing as mere inexcusable attempts at humor by junior lawyers. See Peter Lattman, *Suit Offers a Peek at the Practice of Inflating a Legal Bill*, N.Y. TIMES (Mar. 25, 2013, 8:52 PM), <http://dealbook.nytimes.com/2013/03/25/suit-offers-a-peek-at-the-practice-of-padding-a-legal-bill>. Whether it represents an instance of callow levity or serious abuse, this dispute is revealing. Whenever the subject arises, lawyers try to minimize the furor over such allegations of excessive practice and padded bills. Despite those protestations and denials, however, the incident confirms that on some occasions a real basis exists for clients' mounting insistence on tighter oversight of attorneys' charges and alternative fee arrangements. Likewise, the case supports academic studies suggesting that, as one scholar noted, churning bills, whether or not endemic, remains an issue with enduring "insidious problem[s]" for the legal profession. *Id.* (citing William G. Ross, Cumberland School of Law).

applications for awards of counsel fees—stems from extreme or needless lawyering.

Judges function as arbiters presiding over and supervising the progress of court proceedings. That role accords them a unique perch from which not only to view but to assess and pass judgment upon the quality and quantity of litigation embodied in counsel's filings of motions and other papers, as well as in their appearances in court. They thus bear witness daily to the extent to which judicial proceedings are burdened by lawyers' inefficiencies and wasteful strategies that unnecessarily raise cost and delay. Two empirical sources numerically record, and to some extent substantiate, judges' observations of excessive lawyering: motions for sanctions and for awards of attorneys' fees.

The Federal Rules authorize judges to impose penalties on litigants and attorneys when warranted in order to punish and deter, as well as provide compensation for, misconduct grounded on violations of court procedures. Rule 11 penalizes parties and counsel for misrepresentations made in pleadings, motions, and other papers filed in court if they serve to harass, to cause unnecessary delay or needless cost of litigation, or to maintain frivolous or unwarranted legal claims or defenses.<sup>82</sup> Other provisions, in particular Federal Rules 26(g) and 37, authorize the courts, on a party's motion or on their own, to impose sanctions on litigants and counsel for disobeying court orders, as well as for failure to comply adequately with obligations to provide documents and testimony during discovery proceedings.<sup>83</sup> Under another statute, 28 U.S.C. § 1927, judges may require practitioners who multiply judicial proceedings unreasonably and vexatiously to personally pay the excess attorneys' fees and costs that adversaries incur by reason of such misconduct.<sup>84</sup> A large body of litigation involving motions for sanctions based on these and other grounds offers a glimpse of the type and magnitude of extreme law practice that judges witness first hand and are called upon to review and discipline.

During the 1970s, wide concern spread across the Bar, the courts, and academic circles over an upsurge in litigation cost and delay attributable to abusive practices, accompanied by calls for corrective action. Not by coincidence, these rumblings manifested another sign of the larger events discussed above which had begun shaking and fundamentally reshuffling the practice of law at that time. This development prompted the federal court system to adopt an

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<sup>82</sup> FED. R. CIV. P. 11(c).

<sup>83</sup> FED. R. CIV. P. 26(g)(3); FED. R. CIV. P. 37.

<sup>84</sup> 28 U.S.C. § 1927 (2012).



amendment to Rule 11 in 1983 as a means to curtail excessive lawyering by strengthening judges' power to penalize such misconduct.<sup>85</sup>

The amendment ignited a barrage of sanctions motions charging Rule 11 violations. By 1987 the number of Rule 11 applications found in reported cases—a measure that would encompass but a small portion of the actual instances of misconduct to which the rule could apply—had jumped from just a few since the inception of the Federal Rules in 1938, to nearly 680.<sup>86</sup> Of these, about 58% resulted in court findings of violations or the issuance of warnings.<sup>87</sup>

From the adoption of the amended Rule 11, two noteworthy developments emerged bearing on the expanding scope of abusive litigation and the legal community's related debate. First, filings of sanctions motions became routine. This phenomenon reflected invocation of the rule as a two-edged sword. And second, it conveyed both that lawyers themselves perceived a rising incidence of extreme litigation practices and sought to curb them by court-imposed penalties, and at the same time that a portion of those motions themselves constituted litigants' using new-found sanctions proceedings as a weapon to harass adversaries and chill disfavored actions.<sup>88</sup>

Judges encounter and rule upon disputes over excessive lawyering that arise in another context: contested motions for awards of attorneys' fees. In these challenges, counsel opposing the prevailing parties' applications for reimbursement of legal expenses pour through the billing records that the winning attorneys submit in support of the fees they claim. Typically, they urge the judge to reject large portions of the request—often by as much as fifty percent or more. The courts' rulings in these cases supply the most damning proof that the problem of attorneys' fees reflecting litigation excess is real and severe. In a significant number of them the judges agree that substantial amounts of the attorneys' fees the applications request embody unnecessary litigation, unjustifiable charges, and warrant large reductions of the awards.<sup>89</sup>

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<sup>85</sup> FED. R. CIV. P. 11 advisory committee's notes to 1983 amendment.

<sup>86</sup> See Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 199 (1988).

<sup>87</sup> See *id.*

<sup>88</sup> See *id.* at 195, 200–01.

<sup>89</sup> For instance, a review of all reported cases litigated in the Southern District of New York from 2011 to 2014 in which the judges decided contested motions for attorneys' fees revealed that of the actions in which the courts granted the motions, they reduced the awards on average by 33.5%. Data on file with author.

### F. *Full Circle*

In light of the historical and statistical record detailed above, much of the legal profession's hand-wringing, lamentation, and finger-pointing about the burdens that abusive practices and excessive costs impose on litigation takes on a different countenance. Closer examination brings into sharper focus an item, alluded to above, that usually appears blurred in litigators' accounts of the causes underlying their discontent with the practice of law and that brings this analysis full circle: the things many attorneys themselves do, omit to do, or condone in the course of everyday practice that directly produce the excess and magnify the unpleasantness of litigation, and thus that unnecessarily multiply the costs of legal services. In consequence, while most practitioners deplore these ill effects as a sign that abusive lawyering remains pervasive under the existing rules, in basic ways it is not the procedural rules themselves that account for the litigation extremes and inefficiencies they encounter in court proceedings. Rather, it is the interaction of economic and professional forces, combined with lawyers' own practice styles and the methods they employ in applying the rules, that better explain the excess. To some extent, therefore, certain inherent inefficiencies, as well as disincentives for improvement, are fundamentally embedded in the justice system—a dilemma lawyers do not widely acknowledge, perhaps because of the deep discomfiture the implications represent for them.

## II. TO THE SOURCE: SPRINGWELLS OF LITIGATION EXCESS AND ABUSE

This Part identifies two forces that serve as prime movers of the litigation inefficiencies, delays, and high costs. One relates generally to lawyers' personal characteristics. In particular, it encompasses the professional attitudes attorneys adopt and the practice styles they traditionally follow when performing legal services. The second component comprises specific strategies practitioners often employ during the various stages of litigation. A large body of experience has shown that, as commonly applied, some of these means are deficient. Thus, they often prove wasteful.

Typically, these lawyering flaws come to bear in connection with the specific choices of strategies and styles practitioners make in drafting and filing complaints, answers, and various motions, as well as in gathering or responding to discovery. By virtue of these personal qualities and practice methods, a large volume of the court proceedings counsel generate amounts to premature, avoidable, unproductive, or otherwise unnecessary litigation. Whether or not by design, while such

excess may work to promote the lawyers' economics and advance their individual interests and business goals, it does not always serve to foster the efficient administration of justice.

Preliminary analysis of data regarding some of the most prevalent motions filed in federal courts supports this observation. Although the point merits more extensive empirical research, available information suggests that in a substantial amount of common motion practice—which in some types of cases has become somewhat reflexive or viewed by counsel as virtually obligatory—the proponents realize only scant results from their investment of time, expense, and efforts, while imposing disproportionately heavy burdens not only on adversaries, but on the justice system as well.

In all actions commenced in federal courts annually, for example, litigants file motions to dismiss the complaint, entirely or in part, in about 35% of the cases, and summary judgment motions in about 40% of actions that reach the end of pretrial proceedings.<sup>90</sup> In whole numbers, those figures translate into well over 100,000 motions every year. From this practice and the vast allocation of resources it demands, proponents achieve clear, complete victories in only about 20% of the actions. The balance of unsuccessful proceedings encompasses complaints that courts dismiss because the claims are deficient as drafted, or are brought against the wrong party, or in the wrong court, or at the wrong time. Or else the courts find the pleadings premature, pointless, obviously meritless, or frivolous. Not included in this volume of costly, unproductive practice is the large number of lawyers' squabbles that should never escalate into legal disputes brought to court—many of them unsuccessfully—for a judge to resolve.

Moreover, as elaborated below, a significant portion of these proceedings are actually not resolved by the courts. About 45% of motions to dismiss<sup>91</sup> and 30% of motions for summary judgment<sup>92</sup> are withdrawn or abandoned by the parties before the courts take any action on them. Simple arithmetic would yield a glimpse of the magnitude of the resources that this needless litigation consumes. Under any reasonable assumption about the average expense associated with preparing and filing any such motion, the sum would run into billions of dollars annually. On any given day, therefore, a major part of our courts' business entails unnecessary or avoidable proceedings that

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<sup>90</sup> See STATISTICS DIV., ADMIN. OFFICE OF U.S. COURTS, CASES AND MOTIONS TO DISMISS FILED FROM JANUARY 2007 THROUGH FEBRUARY 2010 (2010) [hereinafter STATISTICS DIV., MOTIONS TO DISMISS] (on file with the author); discussion *infra* note 129 and sources cited therein.

<sup>91</sup> STATISTICS DIV., MOTIONS TO DISMISS, *supra* note 90; see also *infra* note 114.

<sup>92</sup> Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 907 (2007); see also *infra* note 129.

cannot be satisfactorily explained nor justified on any ground reasonably related to advancing the needs of the particular case, any legitimate interest of the litigants, or the mission of the justice system.

The existence of such a large and dubiously grounded expenditure of both private and public resources supports another equally troubling inference. A sizable portion of the attorneys' fees and expenses litigants end up paying in connection with unnecessary or avoidable court proceedings are devoted not so much to counsel's preparation of sound claims and reasoned arguments, but to their advancing strategic business, professional gambits, or poor judgment calls insufficiently grounded on the merits of the case. These circumstances are especially prominent and pernicious when litigants set in motion court proceedings that are clearly baseless or frivolous, whose sole purpose is to vex or oppress adversaries, or to extract a nuisance settlement. For the particular lawyer or client, such litigation embodies goals, risks, and tactics that, while bearing only a faint likelihood of success, essentially convert a judicial proceeding into a high-priced, high-stakes gamble, more a lottery ticket or a means of coercion than a legitimate quest for justice.

No one could speak with better eloquence and more inculcating authority than lawyers themselves to substantiate the high incidence and heavy burdens associated with deficient abusive court proceedings. Several recent studies addressing these issues record practitioners' first-hand impressions about these concerns and their implications. The insights they convey confirm the scope and reality of the profession's litigation cost debate and lay bare its deeper roots. A survey by the FJC prepared in March 2010 reported lawyers' comments on how legal costs are shaped by law firm size, billing policies, and economic imperatives. One attorney remarked that some firms, especially those with large overhead, "increase the amount of work needed to resolve a case and settle later, after fees have been billed to the client."<sup>93</sup> Concerning this

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<sup>93</sup> THOMAS E. WILLING & EMERY G. LEE III, FED. JUDICIAL CTR., IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION 10 (2010) [hereinafter ATTORNEY VIEWS] (quoting an unidentified survey respondent). The ABA Survey and the Joint Project recorded similar peeves voiced by other lawyers. Those responses also reinforce the central point the preceding discussion suggests, particularly as it relates to the complexities and expense associated with collecting evidence from electronically stored information—perhaps the most contentious topic dominating recent debates about extreme litigation practices and their high costs. Attorneys and clients alike uniformly condemn this burden as the bane of litigation. Nonetheless, many lawyers perceive the excesses attributed to that form of discovery as commonplace—just another cost of doing business. While 65% of plaintiffs' lawyers and 87% of defense counsel polled in the ABA Survey complained that court proceedings are far too expensive, a significant portion of them—79% of defendants' lawyers and 35% of plaintiffs—said they believed that electronic discovery is routinely abused. Specifically, according to these polls, widespread concern persists that many litigators treat extreme discovery demands as a coercive weapon. See ABA SURVEY, *supra* note 14, at 9, 12. In

practice, a respondent noted that some lawyers “staff up a case beyond its needs.”<sup>94</sup> In a similar vein, according to another comment, some attorneys “do not want to talk [about] settlement until they get their hours in. That’s the system.”<sup>95</sup>

Lawyers’ own candid observations about litigation abuse and attendant costs, considered together with the legal community’s longstanding and unsuccessful struggles to address these concerns, raise the urgency of gaining a better grasp of the forces that contribute most significantly to the underlying problem. That task should entail devising more effective means—through regulation, education, and training—to reorient lawyers’ professional culture and practices in favor of a mode of litigation that is more cooperative, constructive, and cost-conscious. In practice, such an approach should be designed to achieve the purpose of Federal Rule 1: court adjudications that are not only more efficient and inexpensive, but more just.<sup>96</sup> This Essay suggests several areas in which further study and analysis could advance understanding of these issues. Three specific topics may be particularly instructive: the personal practice styles, mental attitudes, and ethical norms attorneys adopt in rendering legal services; lawyers’ training and legal abilities; and the economics of the profession.

#### A. *A Functional Approach*

An informed understanding of what determines the duration and expense, and what thus provides a measure of the efficiency and just results litigation produces, should begin with a close review of two subjects: the major stages and principal participants of court proceedings. Here, an outline of such a study examines the types and characteristics of the litigation, the lawyers, and the parties, leaving the role of the courts for another day (and for a more daring scribe).

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the Joint Project survey, 71% of respondents remarked that abusive discovery tactics are commonly used, both by plaintiffs’ and defense counsel, as a tool to compel settlement. See JOINT PROJECT FINAL REPORT, *supra* note 4, at 9.

<sup>94</sup> ATTORNEY VIEWS, *supra* note 93, at 10 (quoting an unidentified survey respondent).

<sup>95</sup> *Id.* (quoting an unidentified survey respondent).

<sup>96</sup> See FED. R. CIV. P. 1 (“These rules . . . should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”).

### 1. Litigation Measures

Lawsuits generally divide into two major categories that bear significantly on the measure of cost, efficiency, and fair results they yield. While most court proceedings entail genuine disputes involving at least arguably meritorious claims and defenses, a substantial portion of litigation consists of cases whose legitimacy ranges from the doubtful at best to outright frivolous. Within the latter class of disputes crowding the courts' dockets are actions, as discussed above, that clients or counsel bring or defend, in part or as a whole, for reasons having little or nothing to do with the real needs or merits of the underlying conflicts, or even with any justifiable legal interests of the parties. Largely for this reason, the pace of litigation in these cases often drags unduly, and correspondingly the costs that the proceedings generate bloat because they are either consciously or unnecessarily fed with counsel's wasteful or inefficient practices.

The challenge that abusive court proceedings present, though formidable, is not insurmountable. One approach to improvement is offered here. The proposal begins by describing the telltale signs of deficient litigation, identified by customary types, patterns, and practices. It then suggests preventive measures to curtail excess before its harms materialize as unsustainable delays, bigger legal expenses, and greater court congestion.

### 2. Lawyers Measure for Measure

Practitioners similarly may be classified by the qualities they possess, both professional and personal. Because deficient litigators make for deficient litigation, lawyers' personal traits and competence—the strengths and weaknesses they bring to bear on court proceedings—can substantially shape the efficiency, costs, and just results from which litigation success or failure emanates. Several aspects of practitioners' personal characteristics can materially affect litigation speed and expense, most notably intelligence, conscientiousness, integrity, sound judgment, common sense, and attitudes towards the performance of professional duties. Lawyers' attributes which shape the efficiency and cost of court proceedings stem from legal proficiency. This concept encompasses the level of competence, training, and experience, as well as the command of legal substance and procedure that attorneys bring to the job. Proficiency thus contributes vitally in determining the level of individual effort attorneys expend on devising litigation strategies and advising clients.

Combinations of these professional and personal qualities shape the individual styles and behavioral patterns that lawyers manifest in the practice of law. These characteristics possess varying capacities and valences—positive and negative—that individual attorneys employ in practice. Hence, a strong correlation should exist between lawyers' personal attributes and the overall efficiency—the duration, total costs, and results—of litigation in any particular case. Proportionately, attorneys who possess high levels of both professional proficiency and positive individual traits are likely, more often than not, to comply with practice rules and employ permissible litigation methods properly and efficiently, and also to avoid the contrary tendencies: the abusive tactics, as well as the strategy and ethical pitfalls, that contribute needlessly to cost and delay in court proceedings.

As a simple illustration of what should be an elementary rule of cost-effective practice, such attorneys, when devising legal arguments and strategies, would be more inclined to weigh carefully and candidly two essential considerations. First is the client's realistic odds of prevailing in court by pursuing a specific course of action in light of known precedent and experience relating to the particular strategy in the particular court. Second is the entire cost consequence associated with every major tactical choice the lawyer considers in carrying out a given course of action.

### B. *Practice Styles and Cost*

Litigation practices, both good and bad, whether effective or burdened by fundamental flaws, do not form in a vacuum or hatch fully grown from a shell. Rather, they ordinarily embody both the attorneys' conscious behavioral patterns over time as well as the means they choose in pursuit of professional ends. To this extent, personal qualities lawyers display in practice reflect conduct and judgment calls. Akin to the role which brand names and trade dress play in commerce, these characteristics manifest how counsel self-style their professional practices and the individual lawyering models they embrace as the suitable self-image they present to clients, peers, and judges—in essence, the imprint they leave of the way they want to be regarded and remembered within the profession.

#### 1. Scorched Earth

Some practice styles readily familiar to litigators follow patterns that illustrate the strong correlation between the strategies lawyers pursue and the costs they generate, large portions of which typically are

excessive, unnecessary, or disproportionate. A case in point is the approach that so-called “scorched-earth” lawyers like to flaunt—much admired and embraced by some, feared and denounced by others. As the label suggests, these attorneys enjoy a reputation for resorting to overt aggression variously portrayed in martial imagery captured in common parlance by terms such as “combative,” “no-holds-barred,” and “take-no-prisoners.” Typically, this brand of practice displays counsel’s excessively zealous, heavy-handed, abrasive, and often impulsive means.

Some lawyers of this brash stripe perceive brazen, brass-knuckled methods as enhancing their professional reputation and promoting their law practice, and hence augmenting their profitability. According to one attorney quoted in the FJC 2010 survey: “[I]t’s the individual hyper-aggressive lawyer who is the primary driving force behind costs. We know who they are. Their clients may also know their character and select them because they know.”<sup>97</sup>

A distinguishing feature of lawyers’ scorched-earth practice style is the tendency of its champions to charge heavy handedly to achieve what they perceive as winning blows, and to regard every move and every stake, however inconsequential, as decisive, all too often undeterred by ethical rules or societal concerns, let alone cost considerations. Lawyers whose practices are not dissuaded by moral or professional qualms from stepping over the line, those who bend, distort, or break the rules in overly zealous pursuit of business and personal ends, potentially command legal fees from some clients commensurate with the dubious, if not impermissible, means they employ. As another lawyer in the same study remarked, the more contentious postures some attorneys adopt “can result in a twofold or threefold increase in the costs of . . . [a] case.”<sup>98</sup>

## 2. The Call to Arms

Two other law practice styles, both also depicting martial imagery, further demonstrate the strong connection between lawyers’ professional outlooks and methods, and the excessive litigation they generate. For one of them, the military equivalent would be the “call-to-arms.” In this approach, as the term implies, from the moment one party fires the initial shot in a legal conflict, litigation mounts at a fast and furious pace to reach a monumental scale. Counsel immediately assume belligerent postures and rush into combat with a potent show of

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<sup>97</sup> ATTORNEY VIEWS, *supra* note 93, at 13 (quoting an unidentified survey respondent).

<sup>98</sup> *Id.* (quoting an unidentified survey respondent).



force, mobilizing lawyer troops and deploying them to review documents, gather evidence, and crank out the paperwork necessary to launch motion practice with reflexive strategies along customary battle grounds.

In the commotion these rapid-fire strikes incite, even a routine encounter between the litigants could generate legal fees amounting to tens of thousands of dollars. One striking by-product of the early call-to-arms litigation style is the magnitude of the potentially unnecessary expense the tactic generates, and what such waste says about the litigators' conscious attitude toward efficiency and expense. It creates the distinct impression that neither minimizing litigation and cost nor avoiding its larger consequences commands high rank among the adversaries' priorities.

### 3. Shoot First, Talk Later

There is a variation of the call-to-arms law practice style some practitioners adopt that, because it is equally trigger-happy and cost-laden, may be called "shoot first, talk later." The role model for litigators' attraction to this instinctive action is the quick-to-the-draw gunslingers of the Old West. A courtroom colloquy between judge and counsel not infrequently heard at case management conferences illustrates how this courthouse manner works in practice to generate substantial avoidable and unnecessary costs. Upon hearing the litigants' summary of the dispute, judges sometimes prod them with a simple question, one that often shouts out from the court's review of the pleadings and the parties' explanations of the case: Did the attorneys engage in any meaningful discussion in an effort to resolve the conflict amicably prior to commencing the lawsuit, filing a particular motion, or requesting a formal ruling on a specific dispute?

This inquiry might sound curiously elementary, perhaps even pointless. But often in a substantial number of cases, counsel report that in fact no communication at all, or at best minimal contact, had occurred between them to explore quicker, more economical means to obtain particular relief before they reflexively raced to court to file litigation papers. In some instances, counsel's impulsive litigation style propels this outcome.

The unproductive costs such proceedings generate usually come clearly to light after the judge probes further and counsel elaborate. While conceding that the court proceedings they commenced might have been a tad precipitous, the hasty lawyers typically offer contrite extenuations. In these circumstances, by the litigants' own admission, much of the substantial time and outlays they expend, especially during

the early phases of the dispute, can amount to a woeful waste of resources that are devoted to the pursuit of unnecessary court proceedings.

Some practitioners, perhaps animated by the belief that a quick draw of a gun and shot to the head is the only effective way to capture an adversary's full attention, apparently consider an immediate resort to the courthouse as the most measured, logical, and justified next step in responding to such rebuff. In consequence, without further communication with opponents, they proceed to serve the complaint, the motion, or the request for a judge's ruling—accompanied by all the formality and costly paper freight ordinarily associated with such court filings.

Yet, precipitous action in court is not the sole alternative open to litigators on these occasions. By a simple letter of two or three pages requesting a court conference or ruling, a practice which many judges not only allow, but encourage, lawyers can seek early judicial intervention that could obviate months and tens of thousands of dollars' worth of wasteful litigation.<sup>99</sup>

#### 4. The Waste of Haste

Empirical analysis supports the proposition that litigation practice modeled on heavy armed conflict, whether of the blitzkrieg or the shootout mode, often entails disproportionate costs and consequences.

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<sup>99</sup> Illustrations of counsel's impulsivity and heedlessness arise most apparently in connection with pre-motion conferences. By common practice, many courts require litigants to request a conference with the judge to review factual and legal issues that form the basis for certain contemplated motions. *See, e.g.*, VICTOR MARRERO, U.S. DIST. COURT, INDIVIDUAL PRACTICES § II(A)(1) (2016), <http://nysd.uscourts.gov/judge/Marrero> ("In the event that a substantive, procedural, or evidentiary dispute arises during pretrial proceedings that the parties, after good faith communication, are unable to resolve, they are encouraged, before resorting to motion practice, to bring the matter to the Court's attention by letter not to exceed three pages seeking a ruling."). These discussions enable the parties and the courts to streamline claims and defenses and narrow issues in disputes, and thus avoid unnecessary court proceedings. Despite the evident value judicial guidance can provide through this procedure, some litigators fail to avail themselves of its benefit. Instead, they seem predisposed to rush into motion practice. Without waiting for a conference to receive the judge's impressions, which might better focus the issues in dispute or avoid the motion altogether, they jump the gun by proceeding with the preparation of the extensive paperwork that typically constitutes the motion, having it ready for filing as soon as the court grants leave. They take a big financial risk if the court denies leave, or provides informal guidance that, if followed, may necessitate major modification of the papers counsel already fully prepared.

Other practitioners, even when the judge offers cautionary insights about the prospects of a motion prevailing under a particular fact pattern or legal theory, exercise what they deem to be their clients' legal prerogative to file a motion and demand its formal consideration and decision by the court. Not surprisingly, experience and judicial anecdotes suggest that only on rare occasions do such motions fully succeed.

The data mentioned above concerning the outcomes of certain types of motions filed in federal court bear out this observation. Those figures indicate that about 45% of all motions to dismiss and 30% of motions for summary judgment filed every year in federal courts are not acted upon by judges.<sup>100</sup> Instead, prior to any consideration by the courts, the proponents abandon or withdraw those motions. Moreover, in an overwhelming number of the cases in which such motions are resolved, the courts deny the relief the movant seeks. This experience supports the suggestion that, at least in part, a substantial portion of those motions may be premature or needless, all the more so to the extent the motion practice is driven by lawyers' impulsive methods not sufficiently mindful of efficiency and cost concerns.

### 5. The Public Dimension

Lawyers' professional outlooks and practice styles often work to drive up legal expense unnecessarily for a larger reason. Most practitioners ignore or downplay a vital facet of their role in the legal system: the public dimension. Litigation as a component of the administration of justice is governed by formal rules charged with the force of law. As such, it serves a weighty public end. Therefore, judicial proceedings, among their primary functions, should aim to foster means of bringing legal conflicts to a speedy, economical, and fair resolution before they impose greater costs on society. The burdens associated with these public concerns typically come to bear in the form of: inconvenience to witnesses and third parties; disruption of business operations and personal affairs; innocent bystanders dragged into the conflict, frequently for inordinate periods of time; and greater demand for judicial resources due to congestion of court dockets, enlargement of judges' workload, and reduction of judicial economy.

Though large responsibility for advancing these public interest objectives must fall upon the courts, the judge's function by itself is not enough to ensure that litigation's larger purposes are achieved to the utmost. How well the courts perform their overarching mission depends in large measure upon the integral function attorneys play in the operation of the justice system, and on how effectively counsel fulfills their role. Regrettably, some practitioners adopt a worldview of litigation much narrower than what the interests of clients or the public demand, or what ethical codes compel, thus undermining their vital role in the effective functioning of the justice system.

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<sup>100</sup> See *supra* text accompanying notes 91–92.

*C. In Brief*

A central point of this analysis can now be driven home more frontally—and bluntly. In most cases, undue legal services, costs, and delays, are not the fault of procedural rules, nor caused by the court. The rules governing court proceedings, in and of themselves, do not generate excessive practice. For instance, when a judge dismisses a lawsuit as entirely unmeritorious, frivolous, or moot, or denies a motion as futile or baseless, or when the amount of litigation and associated costs a case engenders are patently disproportionate to the stakes in dispute, these outcomes do not come to pass because the rules of procedures compelled the litigant and counsel to pursue a strategy highly unlikely to succeed. Rather, more often than not such results constitute the by-product of faulty legal craft, defective pleadings, unnecessary motion practice, or flawed tactics that counsel, in the exercise of professional judgment, chose to adopt in the particular case. Similarly, the rules in the abstract do not command the abusive demands for discovery that lawyers themselves complain are now commonplace, nor do they condone unwarranted withholding of evidence by litigants or counsel. Yet, by critics' accounts, these extreme methods have become virtually obligatory in much litigation today, and comprise the bulk of inordinate delays and high legal expenses practitioners and litigants alike decry.

To be sure, the courts play a vital part in overseeing the progress of cases and enforcing compliance with procedures throughout the various stages of litigation. Judges can and should play a more vigorous role in case management, because a substantial amount of undue litigation delay is attributable to judges taking too long to issue decisions. Nonetheless, those judicial shortcomings do not account for any item of time or expense that attorneys clock as billable hours. In fact, a significant part of litigation delay ascribed to judges occurs because inordinate amounts of the courts' time and resources are devoted to resolving ancillary disputes that counsel should not have escalated to the judge in the first place.

Thus reformers' repeated efforts over many years to reduce litigation cost, delay, and abuse by continual amendments to the Federal Rules, particularly those relating to discovery, have had little success because they fail to recognize that what actually drives perhaps the larger part of the underlying problem is not the court procedures themselves. Rather, the trouble derives from the way litigants and counsel apply the rules—in short, from the professional and business judgment calls they make in the course of pursuing legal proceedings. To address, in a meaningful way, a problem so deeply ingrained in the

system itself, only profound, systemic improvements might begin to make a real difference.

But herein lies the rub. Systemic reform designed to strike at the heart of the problem is unlikely to gain much traction within the Bar. Despite the frustration and discontent practitioners express about modern litigation practice, insofar as any major reform of procedure and counsel's behavior in court proceedings may tamper with lawyers' economic interests and traditional ways of practice, the change is bound to prove immensely difficult and encounter fierce opposition from many of those same attorneys, on that account alone. It would also engender intense objections from practitioners for other reasons: lawyers in denial and their general adversity to change. In some respects, the profession has displayed an ostrich-like attitude, declining to see the long-term implications of the redirection the practice of law has taken in recent years and where that course might be heading.

#### D. *Where Have All the Clients Gone?*

The enduring complaints about excessive litigation costs and abusive practices, and the deep concerns exchanged within the legal community about the harmful effects these circumstances may inflict upon the justice system, raise basic questions about the role and responsibility of the characters most central to the underlying debate: the clients. If in fact court proceedings are unnecessarily prolonged and excessively costly in substantial part because of attorneys' flawed practice styles or doubtful strategies, where are the clients in whose names such deficient lawyering is going, and what are they doing about it? How well-informed are clients at any given stage of a particular action about the management of the litigation? Specifically, how actively involved are they in guiding or approving the lawyers' strategic choices that most significantly determine the proceedings' duration and cost?

Generally, client involvement in overseeing counsel's management of court proceedings follows two major patterns, each in turn generating a host of questions and implications. In one form, clients closely monitor their attorneys' major litigation strategies and endeavor to control expenses. In a second approach, clients essentially hand counsel an open checkbook or a contingency fee agreement, with free rein to litigate at all cost.

In day-to-day practice, it is the judgment calls litigators make, with or without involvement of clients, that shape the full scope and total cost court proceedings attain. Clients who overlook or fail to understand this reality diminish the effectiveness of their efforts to control litigation cost, and effectively end up ratifying the attorneys' strategic choices that

generate the high fees some clients later question. But, when the attorneys' bills come in, how genuine are complaints about skyrocketing litigation costs voiced by clients who indeed are fully aware of each step of their litigation—those who actively monitor the progress of court proceedings and give informed consent to every major strategy their counsel pursue, whether good or bad, however extreme or flawed?

The same question could apply to the reverse side of client oversight policy. If clients take a hands-off attitude and are not meaningfully informed about the form, content, or direction of their litigation, or if they give uncritical consent to whatever strategic course their lawyers pursue, they also play a large—if indirect—role in shaping the cost consequences of their case. By placing unexamined faith in their attorneys' judgment, they essentially grant counsel full discretion over all proceedings they set in motion, and thus tacitly endorse their tactics. This circumstance raises an important question. To what extent does such an unchecked litigation license create temptations and opportunities for attorneys to inflate bills, and thus give the clients a contributory role in the costs the litigation produces?

#### E. *Antidote*

To recap, the legal profession's long-running discourse on what should be done and who is best positioned to control run-away litigation expense has proved largely unproductive. The debate has borne little fruit not so much because of what the profession as a whole says about the problem, but perhaps more so because of what it leaves unsaid, specifically, what many lawyers fail to confront forthrightly and adequately as the crux of the matter: the deep-rooted culture of widespread, routine inefficiencies and condoned extremes that characterizes much litigation. This professional disposition is embedded in many lawyers' practice styles. It is manifested in their seeming indifference to the larger implications of ever-rising costs of court proceedings, and in their clinging to traditional approaches to law practice that are insufficiently sensitive to cost. Combined with law firm economics, and in some instances reflecting particular lawyers' lack of experience or competence, these tendencies generate substantial unnecessary litigation, with attendant large, yet potentially avoidable, legal expense.

An effective response to these problems calls for a comprehensive and focused approach to each of its major components. Concerns about lawyers' litigation inexperience or inadequate competence are not insurmountable. More intensive education and training could ameliorate them. Identifying, inculcating, and promoting better and

best practices by which lawyers should conduct the essential stages of litigation could contribute to reducing much needless court proceedings. Such heuristic methods, though their outcomes are not immediate, can make a difference in the long term.

Among the causes of abusive litigation and accompanying inefficiencies and higher costs, there remains, however, another component that, though relatively small, is deeply ingrained in law practice and arguably constitutes the most controversial and harmful source of excess. This class encompasses litigation strategies usually driven by counsel's own ends and means. Insofar as lawyers place their practice and personal economic motives ahead of the interests of their clients or the merits or needs of the particular case, such methods deliberately cross over permissible boundaries. By resorting to unjustifiable extremes, some attorneys transgress not only practice norms, but also procedural rules and ethical canons.

Such borderline or outright improper practices present unique challenges. They are more difficult to contend with because the depths and shadows in which knowing and purposeful abusive practices operate tend to be impervious to better education and stronger exhortation. Ordinarily they also are unreachable by adjustments of rules. Hence, to ameliorate in a meaningful way the litigation cost problems associated with this shady domain of practice, reform efforts should call for a far more profound reassessment of the premises on which existing procedures are grounded, as well as for an extensive restructuring of their basic framework. Insofar as powerful economic incentives, lax self-policing, and inadequate judicial oversight drive such tactics, productive responses would demand stronger economic disincentives for excess and abuse, and closer monitoring in the form of stiffer financial sanctions, disciplinary actions, and other penalties. Such measures should include ready deployment of the legal community's version of the "nuclear option": shifting the obligation to pay counsel's fees and costs to a client or attorney that a court formally finds has engaged in serious abuse of the rules through frivolous, dilatory, or disproportionately extreme litigation tactics.

### III. PROOF IN THE PUDDING: WASTEFUL LITIGATION CUSTOMS AND STRATEGIES

Litigation comprises a series of interrelated judicial proceedings. The process is designed as a means to resolve private disputes in accordance with the order and timeframes that the judicial system's procedural rules specify. But the rules embody no categorical imperatives. Ordinarily, after a lawsuit commences, plaintiffs could end

it of their own accord at any time up to a deadline, or after that point on consent of both sides and court approval. Or else the action could advance to the next stage of the process.

Once a complaint is filed and answered, the rules generally accord parties, subject to some judicial oversight, substantial flexibility and control over managing the resolution of the dispute. That leeway enables the litigants to shape the content and scale, as well as the pace, duration, and ultimately the total cost of any litigation. In this manner, except in rare instances in which the court intervenes on its own motion to curtail any part of a litigation, the time and resources the case consumes in the end are determined almost entirely by the parties themselves, specifically by virtue of the proceedings and practices they pursue, the strategies they choose, and the judgment calls they make.

Regrettably, in a substantial amount of litigation, counsel's outlook in one respect often stands at odds with the discretion the Federal Rules allow. Impelled by customary practice styles and other professional pressures, some practitioners conceive of litigation as if all or particular court proceedings that the rules permit are in fact essential—even obligatory—in every case. A variety of reasons dispose litigators to embrace this perspective: individual preferences or conventional law practice strategies, inexperience, personal or reputational goals, market forces, economics of law practice, and even perceived fear of malpractice.

A search for procedural reforms meant to improve the efficiency and lower the costs of court proceedings should follow a targeted approach. The inquiry should itemize, step by step, several components: the principal stages that comprise litigation, the relative degree of success or failure the parties might encounter at each step of a court action based on counsel's recorded experience with a given practice, and which particular strategies and tactics that litigants employ generate large legal expenses—and in what specific ways—as a case proceeds (or not) to disposition.

One feature common to all of the procedures examined here emerges from the analysis and becomes a unifying theme weaving through this Essay. As suggested above, deficiencies and unacceptable results derive to a substantial degree not from requirements imposed by the Federal Rules of Civil Procedure, but from professional practices and adversarial strategies counsel themselves adopt in carrying out the rules. Hence, in a considerable amount of litigation, the costs that court proceedings amount to at any of the stages of a lawsuit rise in direct proportion to flaws and inefficiencies practitioners build into their choices of litigation strategies and tactics. Delay and legal expense also increase insofar as those adversarial judgment calls engender needless, premature, impulsive, and therefore unnecessary or unduly prolonged



court proceedings. In consequence, prospects for achieving enduring cost-saving improvements in court proceedings reside perhaps more in instilling greater cost-consciousness and higher value for efficiency in the ways litigators practice than in pursuing a major reconstruction of the rules of procedure.

#### A. *The Complaint: Gone Fishing*

A plaintiff's complaint, marking the commencement of a lawsuit, assumes an embryonic function. Like any beginning, it embodies features that both contain and confine the whole creature that develops from its seminal form. For that reason, the scope and contours of costs that court proceedings eventually attain, as well as the relation they bear to the stakes involved in the underlying dispute, start taking skeletal shape with the first papers the litigants file: the statements of fact that plaintiffs allege in the complaint and the responses those pleadings elicit from defendants. Hence, the formative strategies, both substantive and procedural, by which the litigants stake out the bounds of a legal conflict in their initial court submissions, bear momentous consequences. Those early choices plot out the design and dimensions of the litigation. The course, duration, and final economic and societal toll the action eventually takes all emerge from that preparatory groundwork.

Complaints come in many varieties, differing by size and form. Some are too short, some too long, others just right. Judging by the types and frequency with which disputes arise concerning the contents of complaints, perhaps the greatest source of needless costs and extensive delays litigation generates—in both large and small cases—derives from tactical deficiencies and bad judgment calls that practitioners build into the complaints they craft. From the very outset of a lawsuit, those flaws undermine its efficient litigation. Pleadings so impaired range from material absence of details at one extreme to excess of them at the other. To illustrate, this Essay highlights a common pleading form and type of complaint that could be described by various labels: “shotgun,”<sup>101</sup> “scattershot,”<sup>102</sup> or “expeditionary.” These terms all evoke the same image: a somewhat random and undifferentiated aim in targeting wrongs and wrongdoers in a lawsuit, based largely on a plaintiffs' hope that leaving some lasting mark on anything their pleadings strike might validate their selection of claims and culprits,

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<sup>101</sup> See 2 MILTON I. SHADUR, MOORE'S FEDERAL PRACTICE § 12.36(1) (3d ed. 2015).

<sup>102</sup> See, e.g., *Harper v. City of N.Y.*, No. 09-CV-05571 (JG)(SMG), 2010 WL 4788016, at \*10 (E.D.N.Y. Nov. 17, 2010), *aff'd*, 424 F. App'x 36 (2d Cir. 2011); *Ellis v. Long Island R.R. Co.*, No. 05-CV-3847 (FB)(KAM), 2008 WL 838766, at \*6 n.4 (E.D.N.Y. Mar. 31, 2008).

even if only in part. Here, this drafting style is referred to by another symbolic brand: the “dragnet.” This label derives from the practice counsel frequently denounce as a “fishing expedition,” a term of art which litigators borrow from the mariner’s idiom to describe what some lawyers apparently equate to an extreme sport. Though most prevalent in complex litigation such as securities, products liability, and major malpractice cases, the flaws which define dragnet pleadings, and the considerable procedural conflicts they provoke in litigation, are not unique to large-scale actions; they can equally encumber even simple lawsuits.

The hallmark of a dragnet complaint is superabundance. By its very nature, this feature also embodies the style’s basic defect. To simulate the style in general, admittedly hyperbolic terms, dragnet complaints charge misconduct and state claims for relief against every individual, corporation, subsidiary, partnership, agent, affiliate, associate, or thing, animate or inanimate, whether known or unknown, and whether any connection such person, entity, or form may have or have had to the underlying events is real or fancied, substantial or nominal, outright conjectured or entirely unknown.

Equally overstuffed and tangled are the narratives such complaints spin. Typically, they enmesh a large assortment of facts, allegations, beliefs, conclusions, conjectures, speculations, and claims, ranging from the valid to the frivolous, the true to the imagined, and the central to the remote. And as sources of rights, remedies, and jurisdiction, such pleadings invoke a range of legal theories stretching to the limits of any vaguely available system of law—federal, state, local, foreign, international, canonical, or tribal. In sum, the dragnet pleadings reach out to encompass grounds as far as a drafter’s creativity could conceive when inspired by a good cause, a devout hope, or bad faith.

At this early point in legal disputes, plaintiffs ordinarily have not had enough opportunity to conduct a thorough investigation of the facts with the aid of court procedures. In consequence, ordinarily neither the whole cast of characters involved in the wrongs the plaintiffs allege, nor the parties’ interrelationships and connection to the events, are fully known when a complaint is filed—a situation especially prevalent in a complex case. Without the benefit of complete information about the material facts, the plaintiffs might know the identity of some defendants with fair certainty, and may suspect or could make reasonable guesses about the involvement of others. As to the rest, they might not be equipped to do much more than cast nets out far and wide, hoping that a big enough hook would land the big fish.

Anyone encompassed within that lot who in fact is not legally linked to the others, and not involved in the underlying dispute, must then bear the expense to prove it in court, and thus be dismissed from

the action. To seek release from the expansive haul of wrongs and wrongdoers that plaintiffs' oversized pleadings bring into court, defendants, not to be outdone, commonly respond with no less resourcefulness. Often sporting their own brands of excess, their first line of defense is to play a coy, evasive shell game that typically rests on procedural ceremony and niceties featuring one trick: hiding or withholding information essential to the plaintiffs' litigation aims and efforts. Good faith compliance with the spirit of the Federal Rules of Civil Procedure would counsel defendants to provide known and discoverable information to plaintiffs sooner rather than later in the proceedings. But, instead of volunteering disclosures, the customary strategy of many defense counsel veers in the opposite direction: holding back. Defendants' evasive tactics typically leave plaintiffs with two options. Lacking certainty, plaintiffs try to guess which of defendants' shells holds the particulars that they need to identify the necessary actors. Or else, as a protective move, they bring into court the most plentiful battle haul of potential defendants they can catch.

Plaintiffs' dragnet style in these cases produces another set of complications that often engenders significant delay and greater cost in the disposition of a lawsuit, without in any way advancing the resolution of the merits of the disputed issues. Specifically, the overinclusive pleading strategy frequently gives rise to collateral disputes regarding the existence of court jurisdiction over the matter or the parties, as well as over the appropriate venue for the litigation. A choice of improper jurisdiction or venue ranks among the most costly and perilous judgment calls litigants make at the start of a lawsuit, and to this extent represents one of the most wasteful sources of unnecessary litigation.

Plaintiffs seeking to assert legal claims in federal court often labor strenuously to establish jurisdiction. To that end, they enlarge the substantive content of their pleadings so as to state multiple claims under an array of legal theories, some specifically designed to wedge the case within the boundaries of the federal courts' limited jurisdiction. By these means they seek to score a tactical or geographic advantage. Stripped to the core, however, the plaintiffs' claims in many of these lawsuits reduce to plain and routine common law negligence, fraud, or assault—cases that could be readily litigated in state courts. Predictably, plaintiffs' stretching dragnet pleadings designed to gain access to federal court also invites the expected challenges from defendants.<sup>103</sup> Litigants

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<sup>103</sup> For a case illustrating dragnet pleadings encumbered not only by an overabundance of parties, but by an excess of substance, see *Turedi v. Coca Cola Co.*, 460 F. Supp. 2d 507 (S.D.N.Y. 2006), and *Gross v. Waywell*, 628 F. Supp. 2d 475 (S.D.N.Y. 2009). In these cases, the plaintiffs attempted, unsuccessfully and at high expense and delay, to gain federal court jurisdiction by inflating and stretching the pleadings to assert federal law claims concerning conduct and events that arose, essentially, under local or foreign laws.

often assume such high risks even though in many cases what they realistically stand to gain or lose from proceeding under either system, even if proper federal jurisdiction or venue exists, might not differ significantly enough to justify these costly and sidetracking procedural quarrels.

In the muddle wrought by complaints crammed with unnecessary defendants and overstretched legal theories and claims, valid grievances sometimes become needlessly entangled, and so bogged down in pleading excess they remain unresolved for many more months or years than actually necessary. At times, meritorious claims could even fall by the wayside as unintended casualties of counsel's poor choice of litigation strategy or procedure. That fate, for instance, could befall any valid claims the plaintiffs might possess under state or local laws.<sup>104</sup>

In sum, costly outcomes can stem from bad tactical choices lawyers make at the pleading stage that work to the detriment of their clients. That result, however, need not be preordained. In fact, the Federal Rules prescribe specific methods as well as opportunities for litigants to exchange information early on in court proceedings.<sup>105</sup>

Consequently, rather than parsing the conflict and sorting out the pieces among themselves in a matter of hours or days, and for the price of a few phone calls or emails, many litigators instead do what makes them litigators: they create an impasse and go to court. In short, seldom do superabundant pleadings survive the defendants' attacks and the court's scrutiny the first time around. The large number of actions dismissed as legally deficient<sup>106</sup> not only manifests the extent to which much litigation is truly groundless or downright frivolous from the start, and thus justifies dismissal, but is also a testament to how lawsuits often fail not as much for lack of merit but by reason of the litigants' strategic and procedural judgment calls embodied in their flawed drafting of the pleadings. To a substantial degree, therefore, the tactical

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<sup>104</sup> See *Gross*, 628 F. Supp. 2d at 479–80.

<sup>105</sup> Reflecting both hope and contemplation that early face-to-face communication and good faith cooperation among parties and counsel would induce streamlining or even settlement of disputes, Rule 26(f) provides that parties “must confer” as soon as practicable after the commencement of an action. FED. R. CIV. P. 26(f)(1). The rule then directs the litigants to develop a discovery plan and to consider “the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case.” FED. R. CIV. P. 26(f)(2). Too often, however, parties either ignore the potentially beneficial role the Rule 26(f) conference was designed to serve, or treat it perfunctorily, nodding in its direction in what some cynics refer to as a “drive-by” Rule 26(f) conference. See Lee H. Rosenthal, Essay, *Meeting and Confering*, 116 YALE L.J. POCKET PART 167 (2006), <http://www.yalelawjournal.org/forum/meeting-and-confering> (“With conventional discovery, even cases that involve large amounts of paper rarely require more than one Rule 26(f) meet-and-confer or more than one Rule 16 hearing. The problem has been that the meet-and-confer is too often treated as a perfunctory ‘drive-by’ exchange.”).

<sup>106</sup> See *infra* notes 109–11 and accompanying text.

risks, expenses, and slowdowns that many litigants encounter during the complaint stage of court proceedings are self-inflicted. By the same token, though many lawyers may view dragnet pleading as the customary litigation style, the excess with which they overload complaints is neither compelled by any court rule or sound practice, nor inevitable. In fact, effective alternative approaches are available under existing procedures.

Rather than impairing the presentation of their case from the very start of the lawsuit, the plaintiffs could, in effect, turn the dragnet strategy on its head. They could begin prosecuting their actions by launching the litigation with the best-grounded claims against the most definite defendants while holding any other uncertain claims and defendants in reserve. Those other claims could be preserved, for example, by stipulated agreements or by withdrawal without prejudice, putting existing and other potential defendants on notice that any claims the plaintiffs so hold in abeyance may be reasserted subsequently as facts unfold during discovery. If enough evidence does surface to support adding more parties or claims, the plaintiffs could amend the complaint at that point to incorporate the new circumstances as then understood.<sup>107</sup>

In a similar manner, plaintiffs may preserve claims against defendants named in the litigation not necessarily because those actors have any substantive role in the action, but because they serve the plaintiffs' claims primarily for technical, symbolic, harassment, or ransom purposes—in particular, as deep-pocket backups or litigation make-weights. This tactic is evident, for instance, when plaintiffs sue a corporation and separately name all remotely related affiliates, as well as every member of its board of directors individually.

The approaches sketched above as alternative strategies to avoid the excess and pitfalls associated with dragnet pleading do not represent mere hypotheticals. Rather, they derive from common fact patterns arising in actual cases judges routinely encounter while reviewing plaintiffs' complaints and passing upon defendants' motions to dismiss deficient claims.

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<sup>107</sup> If this strategy sounds startlingly simple, it is. More importantly, it is hardly novel. By and large the approach reflects practices permissible under existing rules. The procedure is commonly used, for example, when plaintiffs name John Doe defendants whose identities they do not know and later amend the complaint when the facts reveal the unknown parties. *See, e.g.,* FED. R. CIV. P. 15(c)(1)(C); N.Y. C.P.L.R. 1024 (MCKINNEY 2015) (“A party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known. If the name or remainder of the name becomes known all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly.”).

B. *Motions to Dismiss: The Magic Wand*

The first reaction many defendants register when dragged into court to answer a lawsuit is to indulge a fantasy: they wish the whole thing would simply go away. And they imagine the whole ordeal will vanish right then and there, in one fell swoop. That response, of course, embodies an act of denial-induced wishful thinking. Nonetheless, some defense counsel seem all too eager to indulge their clients' delusion. To this end, they promptly turn to the procedural stratagem which, if it works the marvels of swift justice that litigators are usually confident it will, is sure to dispel the litigation terror and put the defendants out of their misery all at once. That potent device, as spelled out in the Federal Rules, is the motion to dismiss the complaint, the defense bar's illusion of a magic wand.<sup>108</sup> Experience in the real world of law practice reveals, however, that in the long run that expedient often proves as fanciful for defense counsel as it is for their clients. Always costly for clients, if generally lucrative for lawyers, the strategy behind a motion to dismiss is sometimes animated more by lawyerly quick-fix impulse than warranted by the specific case, or by empirical results litigants typically achieve using the procedure.

Ideally, defendants should, early in the proceedings, admit allegations in a complaint and furnish particulars upon request about uncontroversial and undisputable facts, and hence promptly take such issues out of contention rather than prolong the conflict. Regrettably, the most straightforward, speedy, and economical resolution of a dispute is not always what many litigants and counsel—plaintiffs' and defendants'—perceive as advancing their interests. In consequence, when answering complaints, many defendants, rather than disclose facts that in the exercise of candor and good faith they should readily admit, incline instead toward the opposite reaction. They tend to respond formalistically, volunteering as little as possible. Thus, it is not uncommon that even if defendants do possess information regarding facts that may be discoverable and easily disclosed without touching the merits at issue, the answers these defendants file essentially tell the plaintiffs: "Prove it."

Nothing more than a plain and concise answer is necessary in most cases for parties to advance the action speedily and economically into the next stages of litigation, ordinarily fact-finding through discovery procedures. Rather than taking this route, defendants attempt, as with the wave of a hand, to dispose of the lawsuit by motion urging the court to dismiss the complaint in part or in its entirety. In most cases,

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<sup>108</sup> See FED. R. CIV. P. 12(b).

defendants' notion of promptly dispatching of a lawsuit proves illusory, a mirage. Ample experience demonstrates, as detailed below, that the strategy fails far more often than not.

From defense counsel's standpoint, seeking dismissal ostensibly serves speed and economy. In reality, especially in complex cases, motions to dismiss always come laden with both extensive delays and diseconomies. Only rarely do they achieve the magical results defendants envision.<sup>109</sup> All too often, defendants file dismissal motions with little or no prior discussion with plaintiffs' counsel, and without communication with the court (a procedure which unfortunately the Federal Rules allow).

At best, the success rate of defendants' motions to dismiss is mixed, achieving a complete victory in twenty-five to thirty percent of the proceedings.<sup>110</sup> On this analysis, a considerable number of motions to dismiss are unsuccessful because the pleading strategy and motion practice counsel on both sides of the case employ reflect litigation deficiencies of the types described above.<sup>111</sup>

Whether a court tosses out the entire lawsuit or only a portion of it in the first round of the defendants' challenge does not end the story. Under governing procedures the odds still weigh heavily in favor of the

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<sup>109</sup> A statistical report prepared by the Administrative Office of United States Courts indicated that motions asserting any one or more of the grounds that the rule specifies were filed on average in about 35% of all actions commenced in ninety-four federal districts during the three-year period from 2007 to 2009. See STATISTICS DIV., MOTIONS TO DISMISS, *supra* note 90. In most cases these motions seek dismissal of the action in its entirety, by one account in 84% of a large sample of actions surveyed. See INST. FOR ADVANCEMENT OF AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21ST CENTURY ANALYSIS 6 (2009).

<sup>110</sup> The IAALS study referred to above reported that 54% of several categories of motions to dismiss it examined were granted in whole or in part, while 40% were denied in whole or in part. INST. FOR ADVANCEMENT OF AM. LEGAL SYS., *supra* note 109, at 5–6, 47–48. Similarly, an FJC study of motions to dismiss on the ground of failure to state a claim that were filed in federal courts in 2010 indicated that of those on which the courts actually took action, they granted only about 31% in their entirety—in other words, dismissing all claims by one or more plaintiffs—while 45% eliminated some—but not all—claims by one or more plaintiffs, and about 25% were fully denied. See JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*, 17–18 (2011).

<sup>111</sup> Because they equate to the same thing, the numbers relating to motions granted in whole or in part and those denied in whole or in part must be viewed in tandem. The courts' granting of a motion in part also conveys that it denies another part of the same motion. In practice, the court's ruling means that some claims are dismissed from the action as legally insufficient as drafted, while others survive the movant's challenge. When the approximately 25 to 30% of all such motions that are granted in their entirety are separated from the total, the results yield the same figure of approximately 70 to 75% of motions to dismiss that the courts deny in whole or in part. Thus, while in granting the motions, courts dismiss about 70 to 75% of complaints in whole or in part because the plaintiffs' pleadings are defective in some basic way, at the same time they deny about 70 to 75% of defendants' motions in whole or in part because the grounds defendants assert in support of dismissal are insufficient in some basic way. CECIL ET AL., *supra* note 110, at 13–14.

litigation continuing. The rules prescribe that in passing upon the legal sufficiency of a complaint, the judge must accord a large measure of deference to the plaintiffs' account of the facts. As a starting point, courts are obligated to accept the plaintiffs' factual allegations as true. If they find the pleadings defective in some way not entirely fatal, the courts routinely grant the plaintiffs what amounts to a do-over—a second chance to correct legal or procedural flaws in accordance with any guidance the judge's ruling provides—and so rescue the lawsuit in whole or in part. In consequence, the motion to dismiss fails to fulfill the defendants' wishful thinking of ending their litigation woes once and for all.

The entire procedural cycle could then start all over again, and often it does. The plaintiffs, in the light of the court's decision on the motion, amend the complaint, and many defendants, after analyzing the plaintiffs' revised pleadings, renew their motions, arguing that even as modified the plaintiffs' recitations of facts still do not correct all the defects to which the defendants had objected, or that the changes create new flaws.<sup>112</sup> Hence, even if the court rejects the entire complaint without granting the plaintiffs leave to replead, that disposition does not necessarily mean that the defendant is home free. The plaintiffs can appeal the dismissal judgment, and they usually do—however exhaustive and well-grounded the court's decision—at significant additional costs to the litigants.

Some motions to dismiss attack only parts of the complaint. But in many instances those limited motions to dismiss serve no useful purpose in simplifying and expediting resolution of the dispute, and instead could retard disposition. That category of cases encompasses partial motions which seem driven by compulsion on the part of defense counsel that appears motivated more by the litigators' desire to ensure procedural tidiness and formal niceties than by an abiding interest in achieving a quicker and more pragmatic disposition of the litigation. On this approach, practitioners seek dismissal of what they regard as the offending portion of the complaint, even if in the long run that technically neater course of action actually prolongs the litigation and adds to its costs.

Some defendants, for example, move to dismiss claims they consider duplicative of one another—ordinarily a worthy goal.

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<sup>112</sup> In 2010, for instance, according to a study by the FJC of the motions to dismiss that the courts granted on the ground that the complaint failed to state a sufficient claim, the judges gave plaintiffs leave to replead in about 35% of the cases, and the plaintiffs availed themselves of the opportunity 64% of the time. Where defendants followed with a second motion to dismiss, their overall rate of success dropped by about 10%. See JOE S. CECIL ET AL., FED. JUDICIAL CTR., UPDATE ON RESOLUTION OF RULE 12(B)(6) MOTIONS GRANTED WITH LEAVE TO AMEND 1 n.2, 3-4 (2011).



Common illustrations include complaints that assert several closely related claims, for example, both breach of contract and unjust enrichment, breach of fiduciary duty and negligence, misrepresentation and fraud, or, not infrequently, all six of such claims. In some partial motions to dismiss, defendants seek to excise one of these paired claims, but not the other, in essence conceding that the facts as alleged are sufficient to state a plausible claim as to some of the pleadings.

In another common version of the partial motion to dismiss a complaint used as a tidying agent, defendants seek to strike only specific allegations they deem offensive. Motion practice for antiseptic purposes of these kinds is typically unavailing and wasteful. In many instances, the claims the defendants object to are closely related to or arise from the same core events as those that their motions do not challenge. But ordinarily, in cases involving closely-related actions and defenses stemming from the same conduct and events, elements of some of the plaintiffs' claims overlap with elements of their other claims. As a result, to this extent the types and volume of the factual discovery associated with the parts of the pleadings that the defendants challenge may coincide with the scope of discovery related to the claims to which their motions to dismiss do not relate. For this reason, in such instances, whether the allegations to which the defendants object by partial motion to dismiss remain in the complaint during the discovery phase would not alter the magnitude or duration of the litigation.<sup>113</sup> Were defendants to forego seeking partial dismissal under these circumstances, that strategic choice would not be irrevocable nor prejudice them. Means exist at later pretrial stages to streamline the dispute through other suitable motions, in particular, summary judgment procedures.

On a related point shedding more light on litigation waste associated with motions to dismiss, analysis of data regarding all such motions submitted annually in federal courts reveals that in about forty-nine percent of the cases the dockets record no disposition of the motions.<sup>114</sup> The absence of court review of those motions also carries significant implications for litigation strategies and attendant costs. In many cases the courts take no action on those motions because the

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<sup>113</sup> Typically, it requires four to six months, often more, to research, write, and file a fully briefed motion to dismiss. The judge may need another four to six months to conduct oral arguments and issue a ruling, frequently longer in complex litigation. Accordingly, the legal expense to the parties generated by a motion to dismiss can easily exceed tens or even hundreds of thousands of dollars.

<sup>114</sup> See STATISTICS DIV., MOTIONS TO DISMISS, *supra* note 90, at 10. This percentage derives from a computation based on the chart on page ten of the document. The data indicates that on average in each of the three years from 2007 to 2009, of the total number of motions to dismiss filed, about forty-nine percent were neither granted nor denied. A reasonable inference regarding this figure is that the underlying motions were withdrawn or dismissed because of a settlement or other discontinuance of the underlying action.

parties withdraw or abandon them; because the court determines that motion practice in the case is unnecessary, premature, or groundless; or because an opponent takes some corrective measure or agrees to a settlement which rendered the motion moot.

In short, once caught in the web of the plaintiffs' pleadings, there is no easy way out, no sure-bet, fairy tale ending for defendants to extricate themselves from a lawsuit. Contrary to their fervent hopes, defendants' attempts to disentangle from litigation through the fancied wizardry of a motion to dismiss entail significant costs and long delays, much of which may be avoidable, even unnecessary. For this reason, a customary practice of pursuing dismissal of litigation at the pleading stage as a first line of defense is fraught with major risks that frequently raise substantial doubts about its efficacy and wisdom.

### C. *Discovery: Passage to Heaven, Portal to Hell*

#### 1. First Circle

A lawsuit reaches litigation heaven and hell at the same time and through the same passage. A channel called "discovery" serves as an entry point, which features a gilded gateway that attorneys, with ambivalent degrees of affection and loathing, love to hate and hate to love. In some instances, whether the procedure yields fortune or misfortune where the rainbow leads, the same reward may await litigators as amends for the tribulations they typically must endure during modern discovery proceedings. How counsel characterize the ordeal differs widely. It depends from moment to moment on their place on the gauntlet: whether the attorney and client are on the giving or receiving end of the stick (or the checkbook). General agreement among practitioners does exist, however, regarding several characteristics of litigation discovery. When carried to extremes, its costs are not only bountiful attorneys' fees, but also the inordinate time, expense, abuse, and frustration for all concerned. In this controversy, lawyers struggle with two basic points of contention: how much discovery is really necessary in any particular case, and, concomitantly, what levels of these resources and qualities are truly justifiable in the end.

Financially, discovery is unmatched among the major sources of litigation costs; it generates more legal fees and expenses than any other round of court proceedings. According to various estimates, discovery can consume from fifty to as much as ninety percent of total legal costs

in some cases.<sup>115</sup> These appraisals assume special significance and produce more extensive effects in the age of modern technology, a time in which virtually open-ended searches for information electronically stored in multiple devices—producing correspondingly massive commitments of time, labor, and financial resources to retrieve—have become the norm. Thus, greater understanding of how discovery procedures impact litigation today would shed substantial light on the profession’s concerns about the rising cost associated with litigants’ use of the justice system, and the grave implications this development has for the practice of law.

In most routine litigation, the basic structure and specific means permitting discovery work well enough as now designed. According to responses reported in attorney surveys, practitioners generally regard discovery costs in most routine litigation as relatively modest and not far out of line with the stakes and value of the particular case.<sup>116</sup> At the opposite range of the spectrum is the narrower band of complex disputes. In those cases, the stakes can assume immense proportions. Correspondingly, the level of potential liability propels discovery costs that reflect the extraordinary exposure one or both sides of a lawsuit could encounter. That prospect would explain and, from the litigants’ perspective, justify commitments of outsized discovery production and attendant legal fees.

Between these bounds, a substantial volume of litigation exists in which discovery has expanded, in both large and small cases, to disproportionate scales, often taking on a life and added dimension of its own. Within this large frontier of what practitioners’ opposing camps deem too much or too little information, a virtually unpatrolled no-man’s-land of litigation exists in which the dominant force guiding some discovery demands seems to be “anything goes.” In that realm there is discovery and also abuse of discovery, or, as one lawyer put it, “discovery has become an end in itself . . . [in which] we routinely have ‘discovery about discovery.’”<sup>117</sup>

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<sup>115</sup> See Beisner, *supra* note 10, at 549.

<sup>116</sup> CASE-BASED SURVEY, *supra* note 15, at 2; EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 2 (2010) [hereinafter ATTORNEY SATISFACTION].

<sup>117</sup> JOINT PROJECT FINAL REPORT, *supra* note 4, at 11. According to a 2009 survey conducted by the Federal Judicial Center examining closed cases, while about 58% of the lawyers responded that, relative to the clients’ stakes in the litigation, the volume of discovery generated by the proceedings was sufficient, the rest—about 42%, still a significant number—were not satisfied. See CASE-BASED SURVEY, *supra* note 15, at 27–28. About 25% of the lawyers complained that too much information was produced, while 17% said that the amount of discovery turned over was not enough. *Id.*

Critics and commentators differ on what constitutes abusive discovery, some noting that abuse is a relative concept varying with the eye of the beholder.<sup>118</sup> One account, expressing a judge's perspective, examined five forms of abusive discovery practices: imposing costs on an opponent as a means to compel a settlement, using discovery proceedings as a forum for adversaries to vent mutual animosities, lawyers' tendency to overprepare in the absence of authoritative direction to stop, pursuit of unnecessary discovery as a source of raising billable hours, and withholding or destroying information that may be discoverable.<sup>119</sup>

Numerous surveys recording lawyers' views regarding discovery abuse, including those conducted for the reports prepared by IAALS, the ABA, and the FJC, confirm attorneys' perceptions about the prevalence of such practices. Notably, an FJC review of these various polls found broad agreement with the view that the business models in many law firms represented one source of unnecessary expense in discovery.<sup>120</sup> Moreover, entire treatises have been written, and many volumes of court decisions fill the law reports every year, dealing with litigants' disputes about various unreasonable and vexatious discovery practices. And, as discussed above, the incidence of applications for judicial sanctions for abusive discovery tactics has risen sharply in recent years.

The typical aim of excessive discovery tactics is to overwhelm an adversary with serial requests to disclose documents of massive proportions or questionable value, or to meet burdensome production schedules. In either event, the design of the demand, as one court observed in a commercial dispute, is to drive the inconvenience and costs of litigation so high as to force the opponent to abandon the fight.<sup>121</sup>

Two notable concerns emerge from recorded cases, augmented by the hundreds of undocumented similar instances that arise daily in

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<sup>118</sup> See Jack B. Weinstein, Comment, *What Discovery Abuse? A Comment on John Setear's The Barrister and the Bomb*, 69 B.U. L. REV. 649, 654 (1989).

<sup>119</sup> See *id.* at 654-55.

<sup>120</sup> See ATTORNEY SATISFACTION, *supra* note 116, at 1; see also JOINT PROJECT FINAL REPORT, *supra* note 4, at 2, 9 (claiming that the discovery system is in disrepair).

<sup>121</sup> See *Chapman & Cole v. ITEL Container Int'l B.V.*, 865 F.2d 676, 683-84 (5th Cir. 1989); see also *Sattar v. Motorola, Inc.*, 138 F.3d 1164, 1171 (7th Cir. 1998) (plaintiff in an employment discrimination case requested that the defendant, at its own expense, turn over in hard copy some 210,000 pages of emails); *Imperial Chems. Indus., PLC v. Barr Labs., Inc.*, 126 F.R.D. 467, 471 (S.D.N.Y. 1989) (after the defendant in a patent litigation demanded that the plaintiff produce, with only three weeks' notice, six expert witnesses located in different parts of the world for simultaneous depositions in New York on the same date, the court noted that the schedule was arbitrarily dictated by the defendant and that, as should have been obvious, there was no practical way for the parties to complete all those depositions on the same day, particularly on relatively short notice).

many courthouses throughout the country. One is that the litigants resorted to discovery tactics that, as they should have recognized immediately, a court would in all probability find excessive on their face. Perhaps of even graver consequence is that in each instance the parties actually required intervention by a judge to end the abusive practice.

The cases in which the cost of the discovery the litigants produced relative to the stakes at issue is grossly out of line generate much of the general discontent and persistent criticism within the legal community about spiraling costs and delays of court proceedings. This experience also fosters the widely held impression that abusive tactics remain both pervasive and ingrained as the customary way many practitioners carry out the obligations that discovery procedures impose upon them. Extreme methods, however, are not encoded anywhere in the rules; when litigators do resort to excessive means in the course of everyday practice, whether by ignoring, distorting, or outright breaking the rules, their conduct ordinarily stems from conscious acts.

Historically, four procedures recognized by the Federal Rules have given rise to the loudest, most consistent and enduring charges of litigators' abuse of discovery rules, accompanied by periodic calls for greater reform: demands for production of documents, depositions, written interrogatories, and admission of facts.

## 2. Document Requests

Requests for documents generate common disputes triggered by litigators' aggressive discovery demands, which are in turn countered by their adversaries' passive-aggressive, oppositional, or retaliatory responses. The time and cost consequences these contests produce are especially extraordinary in the modern age of virtually limitless electronic records. One side sends overbroad demands for information. Not infrequently, to comply with such requests nowadays requires the recipient to designate a task force of employees and consultants to work full-time with counsel on retrieving communications and files maintained by many more persons and entities in numerous electronic forms—computers, telephones, BlackBerry smartphones, tablets. The potential costs of such information retrieval measure not only the millions of dollars litigants spend, but the extensive unquantifiable disruptions of normal business operations and personal affairs.

## 3. Depositions

Depositions serve as a record of testimony by witnesses and litigants taken for prospective use at trial of a lawsuit. In reality, only a

minuscule number of lawsuits proceed to trial—less than two percent of federal cases in recent years.<sup>122</sup> For that reason, most of the depositions that litigators take in any given case tend to serve only a contingency purpose since the testimony they record is geared for trials that rarely take place. Viewed in this context, the procedure becomes an expensive and wasteful end in itself to the extent practitioners employ depositions to transcribe the testimony of unnecessary, duplicative, or marginal witnesses, or to create a massive formal record for the purpose of court proceedings that are highly improbable to happen. Yet, litigants often complain that even with the presumptive limit of ten depositions that the Federal Rules allow to each party<sup>123</sup>—any one of which could occupy an entire day—lawyers are still taking many more or longer depositions than the needs of the particular case, the importance of the witness, or the materiality of the issue in contention could reasonably justify.

In consequence, insofar as litigators as a matter of course take far more deposition testimony than they reasonably need to achieve the most probable disposition of the action, the time and expense the parties devote to that extra endeavor may not square with reality, with the true needs of the case, or the most efficient resolution of the conflict.

#### 4. Interrogatories and Admissions

Discovery by means of interrogatories and requests for admissions is similarly the subject of widespread, longstanding complaints by litigants and counsel portraying these procedures as prime sources of excessive lawyering and abusive tactics. Some critics charge that these forms of discovery are not worth the great time and effort counsel spend preparing them, relative to the calculated, maximally evasive, minimally useful responses the procedures often elicit. It is commonplace, as lawyers' grievances depict the practices, that in preparing interrogatories and requests for admissions from litigants, counsel often occupy long hours minutely (and expensively) crafting and honing hundreds of written questions, some purposely arranged with subparts and parts of subparts that resemble an outline of the tax code. Not infrequently, the

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<sup>122</sup> John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524, 542 (2012) (“By the year 2002, only 1.8% of federal civil filings terminated in trials of any sort . . . . The more candid term—in a system that takes only one or two percent of its cases to trial—would be nontrial procedure.” (footnote omitted)).

<sup>123</sup> See FED. R. CIV. P. 30(a)(2)(A)(i) (“A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2) . . . if the parties have not stipulated to the deposition and . . . the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants.”); FED. R. CIV. P. 31(a)(2)(A)(i).

inquiries seek information and documentation spanning long times past, present, and future, from any party possessing potentially relevant knowledge about the events in a dispute. One disgruntled lawyer, for example, in a presentation to the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, submitted for the participants' consideration as an illustration of abusive discovery, a sample of certain interrogatories from an actual litigation—that critic's entry as Exhibit A in the controversy about abusive interrogatories. He characterized the request as "only the first preliminary wave of discovery," which "call[s], among other things, for a description of hundreds of millions of documents in the files of hundreds of companies in this country and in foreign countries on every inhabited Continent of the Globe."<sup>124</sup>

### 5. Aggravated Discovery

In complex litigation, many occasions arise for substantial costs and delays to occur at any stage over the long course of a lawsuit. Their effects accumulate during the several years that the parties spend laboring in the grinding enterprise of discovery. In the good old days of litigation, not so long ago, the yield of a lawyer's quest for discovery would be measured in bankers' boxes. As delivered to court, the entire haul would translate, at the upper limits, into documents compiling tens of thousands of pages, an output that in many instances serves more to feed the shredders than to advance the needs of the case.

In the digital age, with as much as ninety-five percent of all information now stored in computers and by other electronic means, discovery generates records occupying storage space measured in gigabytes, and even terabytes. These metrics equate to tens or hundreds of thousands of documents consisting of hundreds of *millions* of pages that could fill up not merely cardboard boxes, but whole warehouses. By corresponding measures, the prevailing costs necessary to gather, copy, and turn over that output are equally formidable—now often counted not in thousands, but millions of dollars.<sup>125</sup> The magnitude of such outsize discovery records, the time and resources their production consumes, and the impediments they raise to achieving acceptable terms

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<sup>124</sup> Francis R. Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 209, 213 (A. Leo Levin & Russell R. Wheeler eds., 1979).

<sup>125</sup> In one example cited by a court as intimating the outer reaches of modern discovery, the judge noted that the volume of electronic documents the parties produced in discovery, if converted to hard copy and stacked up, would rise to a pile 137 miles high. See *In re Intel Corp. Microprocessor Antitrust Litig.*, 258 F.R.D. 280, 283 (D. Del. 2008).

for resolving lawsuits, all contribute grounds for the growing perception among attorneys and clients that this part of the justice system has reached extreme, nightmarish proportions and needs major overhaul.

## 6. In Theory

One justification for the enormous discovery of today is that it is a blessing for litigation. Modern technology's vast capacity to record and store information is an unprecedented opportunity for parties and courts to pinpoint "the Truth" underlying conflicting versions of a dispute, and to achieve a degree of precision and certainty which would explain events, and so prove claims and defenses, beyond doubt. Another explanation of today's typical mega-scale demands for discovery is that it is moved by practical and business considerations, including the industry's standards, professional canons, and financial risks.

Neither of these notions offers sufficiently persuasive grounds to justify the colossal volumes of discovery that many litigators now deem necessary to resolve a lawsuit. Taking account of real-world limitations and practicalities, is it conceivable that enough time exists in any day or year, or even in a human lifespan, to enable anyone to conduct a meaningful review of even a small fraction of such an immense volume of documents, or that enough litigants possess and should devote the resources necessary to pursue such a task to a productive end?

A resolution to ending discovery costs would begin with an observation that in most private litigation only small portions of the massive records counsel nowadays routinely gather, especially in complex cases, are truly essential to resolve the underlying dispute on mutually satisfactory terms. Hence, any substantially larger volume of production represents a waste of effort, time, and resources. A second proposition to take into account is that trials are extremely rare in litigation; settlement is the norm. As stressed above, less than two percent of all civil cases filed in federal courts annually reach the stage of trial<sup>126</sup>—a number probably even more negligible in complex litigation. For what trials, then, are litigants conducting such extraordinary discovery proceedings as a matter of customary practice?

The law, just like science, aspires to an optimal quest for truth, a goal codified in discovery rules such as those permitting introduction of evidence from reports and opinions of experts. But an unrestrained impulse to search too broadly, to turn the results of discovery into production of excess, without giving more acutely-honed attention to

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<sup>126</sup> See *supra* text accompanying note 122.



what realistic level of information is enough to meet the needs of the particular case, is bound to engender unnecessary costs and delays.

This outlook adopts a more practical course. It argues that to fulfill its societal goals—to bring private disputes to a satisfactory end—the law does not demand dispositions embodying scientific certitude or mathematical absolutes. Rather, a litigation record adequate for a court to adjudicate a civil dispute, and thus reflect a sufficient measure of law, should need no more than a reasonable and defensible approximation of the whole truth, not the ideal, but in its vital details a fair impression of it, even if hazy in some unessential points. Those evidentiary ends—fair enough if sometimes imperfect—could be attained, even in complex litigation, by compilation of discovery records comprising considerably fewer than billions of documents that, stacked end to end, would stretch to the moon.

#### D. *Motions for Summary Judgment: Back to School*

Summary judgment practice serves as a telltale proving ground for lawyers. The procedure provides litigators real-world cases on which to apply and master the most elementary skills they drill and hone from day one in law school, and thus to sharpen the essential talents defining the art of lawyering: issue spotting, analyzing basic legal concepts, sorting out material and collateral facts, distilling legal reasoning, and explaining textual ambiguity. In litigation, these arts form the crux of effective summary judgment practice. Yet, in actual experience, the results lawyers achieve from summary judgment motions tell another story. Their scores in those elementary skills fall short of satisfactory. To place this assessment in context, apply the law professors' familiar pedagogical method to a hypothetical from the medical context.

What if, to treat a common illness, surgeons routinely perform an invasive operation during which, in about seventy to eighty-five percent of the cases, the patients' condition worsens, and many even die, a substantial number of them because of physician errors or bad medical judgment calls. Suppose also that meanwhile, by means of an alternative treatment for the same condition consisting of health care counseling, diet, and preventive medicine, the rate of fully-cured patients reaches over ninety percent.

What conclusions might be drawn about medical practice from these experiences, and should anything be done about the dismal outcomes? As applied to law practice, such meager results and their larger implications should give not only attorneys, but clients, the justice system, and society, reason, at the very least, for profound discomfort and grave concern.

The anomalies this analogy presents highlights some peculiarities and mysteries associated with litigators' hefty reliance on summary judgment procedure, a practice that renders the lean outcomes they achieve all the more incongruous and offers instructive insight into the modern litigation cost debate.

### 1. The Moment of Truth

Litigation reaches a crucial turning point, a veritable moment of truth, when discovery is complete. By then, through the evidentiary record they have gathered, the parties presumably know all there is to know about the important facts underlying the dispute. At this point, the adversaries have a strategic choice either to end the conflict by amicable means—the course which the parties choose in the bulk of all cases—or to move it into the next arena: the trial, a jury's verdict, the court's final judgment. But, in a substantial number of the cases still unresolved at the completion of discovery, neither peace with adversaries, repose for the conflict, nor closure of court proceedings and the finality that a trial would render, embodies the strategy of choice for many litigants. Instead, they opt for digging bigger trenches and going deeper into the hole at this juncture, for summary judgment motion practice.

Though designed to curtail litigation and achieve speedier and more economical resolution of legal disputes, in operation the procedure serves none of these purposes in a substantial volume of court proceedings. Rather, far too many summary judgment motions filed are premature, unproductive, or simply baseless—more often than not occasioning delays and higher costs for the parties and counsel, and heavier dockets for the courts that prolong resolution of other cases and impose a greater drain on public resources.

### 2. By the Numbers

Among pretrial proceedings, summary judgment motion practice stands next to discovery as the most time-consuming and costly phase of litigation. The procedure frequently elicits the most intense disagreements among the parties and counsel concerning the facts in dispute. It also raises the thorniest questions of law for judges to ponder and resolve. The documents filed with such motions produce hefty court records. In complex cases they typically comprise several boxes of binders whose bulk would nearly match the volume of paperwork the litigants would generate for a full trial of the case itself.

Quantitatively, the legal fees and costs that a typical summary judgment motion generates in a complex case are likely to range in the hundreds of thousands of dollars. According to a 2010 survey of attorneys conducted by the Federal Judicial Center, summary judgment motion practice increases the costs of litigation by between twenty-two and twenty-four percent.<sup>127</sup> Valued in time, such motions typically consume from four to six months for the litigants to prepare and file the various rounds of papers. Then the courts spend from five to nine months to hold a hearing and issue a decision.<sup>128</sup> In complex litigation, even longer timeframes are not uncommon.

The large outpouring of resources and confidence litigants invest in summary judgment motions stands at odds with the major drawbacks that diminish the value of the procedure, a disparity which calls into question the exaggerated faith litigators place in its use and effectiveness, and lays bare the actual results they achieve by it. In reality, large numbers of summary judgment motions play doubtful roles in advancing the resolution of court proceedings. Moreover, quite often what the strategy actually accomplishes turns out counterproductive. In fact, as shown below, the vast majority of summary judgment motions are either unsuccessful or unnecessary, calling into question why the practice holds enormous charm and favor among litigators as a first line strategy.<sup>129</sup>

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<sup>127</sup> See LITIGATION COSTS, *supra* note 75, at 6, 8.

<sup>128</sup> See Cecil et al., *supra* note 92, at 907.

<sup>129</sup> Statistical reports documenting the high incidence of summary judgment filings confirm both how much litigators are drawn to the procedure and the limited success rate these motions produce. One FJC study of actions terminated in 2006, for example, found seventeen summary judgment motions for every 100 cases. Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Michael Baylson, Judge, U.S. Dist. Court for the E. Dist. of Pa. 1 (Apr. 12, 2007, rev. June 15, 2007) (on file with author). Another review of 139,247 federal court dockets reported at least one such motion in 23,332 cases, again a ratio of about 17%. See Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Michael Baylson, Judge, U.S. Dist. Court for the E. Dist. of Pa. 2, 5 (Aug. 13, 2008) [hereinafter 2008 FJC Memo] (on file with author). For comparative purposes here, however, the more informative test is not the number of summary judgment motions filed as a percentage of the total number of cases closed in a given year. A much more apt measure of the incidence of summary judgment motions is the rate of filings from among the pool of cases that advance through pretrial proceedings up to the close of discovery, and thus presumably become trial ready at that point. This figure constitutes a much narrower universe. According to Cecil et al., *supra* note 92, at 879, in approximately 29% of summary judgment motions filed, there was no indication of further action on the motion. A reasonable inference is that these motions were withdrawn by the movant because of settlement or other disposition. Of the smaller base remaining, complex cases, which generally remain active through pretrial proceedings, probably make up a large proportion. On this analysis, in about 40% of federal cases that reach the end of pretrial litigation, the adversaries—71% of defendants and 26% of plaintiffs—rather than settling the dispute, file motions for summary judgment. See 2008 FJC Memo, *supra*, at 6; see also JOE S. CECIL ET AL., FED. JUDICIAL CTR., TRENDS IN SUMMARY JUDGMENT PRACTICE: 1975–2000, at 14 (2007) [hereinafter CECIL ET AL., TRENDS IN SUMMARY JUDGMENT PRACTICE] (indicating that in the categories of cases generally

a. Crystal Ball Practice

Though ordinarily the most timely occasion for proponents to file summary judgment motions arises at the end of discovery proceedings, litigators' first expression of intent regarding the procedure often occurs much sooner, at the very start of the pretrial phase. Typically, litigators lay down a marker for such motion practice as early as the case management schedule they propose to the judge during their first encounter in the courtroom at the initial conference. At that appearance, one or both sides customarily makes a prediction. They flag their intention to file motions for summary judgment at the conclusion of discovery, a milestone that the litigation schedule in complex cases places many months or even years into the future. That projection records a crystal ball prophecy. In effect, the lawyers, even without the benefit of all the relevant facts that the full record will reveal through discovery, look far ahead and one or the other side, or both, inform the judge of their assessment that the evidentiary record that they will compile during discovery will establish that no real disputes exist regarding any material fact, and that no trial will be necessary because the court can resolve the action as a matter of law.

3. Detachment

As judges process such summary judgment arguments, with convictions so intensely held and so vigorously argued by seasoned counsel, they are often taken aback by the parties' unshakeable insistence on pursuing summary judgment practice. In many cases, a close reading of the parties' submissions evinces three telling points: the magnitude of the effort and resources the adversaries have devoted to litigate their dispute up to that point; the dubiousness of the conclusions the two sides so categorically draw from the vast and costly factual record they have created; and the immense waste to which the endeavor reduces, as it so often does, when either the court or the adversaries themselves find that the motion was unwarranted, premature, or even unnecessary.

Only rarely is a court's decision on a summary judgment motion as speedy and summary as the name implies. In the typical case, to decide whether any issue in dispute requires a trial, the judge must spend months pouring over the generally massive motion papers and conducting oral arguments. Consequently, on occasion, upon hearing counsel advocating for summary judgment in litigation that has

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encompassing complex litigation, courts granted defendants' summary judgment motions in about 30% of tort and 35% of contract cases).

generated an immense record replete with conflicting factual accounts, judges' reactions, if put into words, would say to the litigants: "you've got to be kidding."<sup>130</sup>

#### 4. Boomerangs

As it impacts on litigation costs, summary judgment practice is fraught with potentially adverse consequences. Frequently the procedure backfires. Rather than expediting disposition and reducing legal expense, it brings about counterproductive results, in the end harming rather than helping the litigants. In about sixty-five to seventy percent of defendants' summary judgment filings in complex litigation, judges deny the motions in whole or in part or take no action.<sup>131</sup> That determination would require the adversaries, if they do proceed to trial, to marshal and present through live testimony much of the same evidence they amassed to support and oppose summary judgment. Thus, on a final accounting, in some circumstances a procedure that the rules designed to avoid a trial could produce no net gains, and in fact could result in a calamitous setback for the summary judgment motion proponents.

Summary judgment practice inflicts great expense as well on the opponents who must either respond to the motions or face liability by default. As an economic and practical consequence, when the court denies summary judgment and sets the case down for trial, the result substantially alters the financial and negotiating calculus of out-of-court resolution. In two respects the proponents encounter less favorable prospects at that point than they faced from the litigation hand they held prior to filing their motion. If the motion fails, the outcome emboldens the successful opponents' stance. Typically, they augment settlement demands. Bolstered by the court's ruling, from which the parties can draw guidance and piece together a more informed evaluation of their likelihood of success at trial, the opponents can materially shift their negotiating posture. The court's review of the issues enables them to raise the stakes by incorporating into their

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<sup>130</sup> The judicial lore of a federal court in New York records an instance in which one judge, by reputation among the most crusty, voiced such dismay in open court. At oral argument on summary judgment motions, the proponents presented their formulaic contentions declaring that nowhere in the prodigious record the parties had compiled was there a trace of evidence demonstrating the existence of a real factual dispute. Upon hearing counsel's conclusion, the incredulous judge pointed to the shelves of binders and boxes stacked in rows several feet high along the bench and blared: "Really? Well, somewhere in that pile of papers there must be disputed issue of fact. Motion denied!"

<sup>131</sup> See *supra* note 129.

calculations a potentially higher value added to their assessment of the case. As part of modified settlement demands, they might also seek to recoup the legal fees and costs they had to expend to defeat the summary judgment motion.

Even when a court grants a summary judgment motion in its entirety and dismisses the action, the outcome does not always translate into a complete triumph that ends the burgeoning commitment of time and resources for the adversaries and the courts. In about ten to eleven percent of the cases, the losers of the summary judgment motions appeal,<sup>132</sup> in some instances first moving for reconsideration of the judge's summary judgment ruling before seeking appellate review. In those situations, the parties are subjected to the sizable additional expenses associated with the reconsideration and appeals court proceedings—further rounds of motion practice that courts almost always deny. While more empirical study is needed to prove this cost analysis, in some cases it is possible that the legal fees and other costs that proponents of summary judgment practice undertake in preparing and arguing an unsuccessful motion at the trial court, when added to the sums they spend responding to a motion for reconsideration and an appeal of the lower court's decision, could substantially offset the savings associated with avoiding a trial that the movants hoped to realize by means of summary judgment practice.

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<sup>132</sup> In 2014, the total number of civil appellate proceedings filed in the U.S. Courts of Appeals was approximately ten percent of the total number of civil cases commenced in all district courts for the same year. In 2015, the total number of civil appellate proceedings filed in the U.S. Courts of Appeals was approximately eleven percent of the total number of civil cases commenced in all district courts for the same year. See ADMIN. OFFICE OF U.S. COURTS, TABLE B-7: U.S. COURTS OF APPEALS—CIVIL AND CRIMINAL CASES COMMENCED, BY CIRCUIT AND NATURE OF SUIT OR OFFENSE, DURING THE 12-MONTH PERIOD ENDING MARCH 31, 2015 (2015); ADMIN. OFFICE OF U.S. COURTS, TABLE B-7: U.S. COURTS OF APPEALS—CIVIL AND CRIMINAL CASES COMMENCED, BY CIRCUIT AND NATURE OF SUIT OR OFFENSE, DURING THE 12-MONTH PERIOD ENDING MARCH 31, 2014 (2014); ADMIN. OFFICE OF U.S. COURTS, TABLE C-1: U.S. DISTRICT COURTS—CIVIL CASES COMMENCED, TERMINATED, AND PENDING, DURING THE 12-MONTH PERIOD ENDING MARCH 31, 2015 (2015); ADMIN. OFFICE OF U.S. COURTS, TABLE C-1: U.S. DISTRICT COURTS—CIVIL CASES COMMENCED, TERMINATED, AND PENDING, DURING THE 12-MONTH PERIOD ENDING MARCH 31, 2014 (2014). Therefore, assuming that the percentage of cases appealed after summary judgment conforms to the overall percentage of civil appellate proceedings filed in the U.S. Courts of Appeals, in approximately ten to eleven percent of cases, the losers of the summary judgment motions will appeal. However, the same logic described in note 129, *supra*, regarding the incidence of summary judgment motions filed applies here so as to render the actual percentage of summary judgment motions appealed substantially higher. For comparative purposes, the number that should be used as the base is not the total of all actions commenced, but rather the cases that have advanced through all pretrial proceedings. That pool is considerably smaller. Thus, using that number to determine the percentage of appeals filed would yield a higher rate.

## 5. The Other Side of the Coin

The other portion of the summary judgment motions which parties file annually—the approximately seventy-one percent that courts do resolve<sup>133</sup>—demonstrate even more compellingly the staggering costs that such motion practice imposes on the parties and on the resources of the justice system. Yet, for all the effort and expense litigants devote to this procedural strategy in attempts to end or curtail lawsuits, the results the motions produce are decidedly unimpressive. In most cases the judges disagree with the proponents' contention that, on the facts and the law on which their motions rely, the case presents no triable issues. Thus, a large majority of the summary judgment motions the courts review result in denials.<sup>134</sup>

Viewed simply from the standpoint of the motions' litigation impact relative to the parties' allocation of resources for this purpose, these figures suggest at best meager, if not grim, outputs.<sup>135</sup> In sum, in the approximately seventy-one percent of summary judgment motions that the courts decide, the enormous legal fees and costs the proponents invest, hoping to achieve decisive success and avert a trial through this strategy, overwhelmingly produce a flat denial of their motions.<sup>136</sup> But that economic blow does not end the analysis. Even when they prevail on summary judgment practice, movants still suffer a net financial loss from litigating the motions, a cost that is sometimes further compounded, as described above, when the losers—the opponents of the motions—appeal the decision.

The enigma of summary judgment practice embodies some threshold questions central to understanding why the incidence of such motions is so high. Do the outcomes litigants attain from summary judgment proceedings, relative both to the economies they hope to gain

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<sup>133</sup> See Cecil et al., *supra* note 92, at 879.

<sup>134</sup> An FJC study indicated, for example, that the summary judgment motions filed by defendants in the categories of federal actions involving claims of unlawful commercial transactions of the type that generally comprise complex litigation, the courts granted only about 30% in tort and 35% in contract cases. CECIL ET AL., TRENDS IN SUMMARY JUDGMENT PRACTICE, *supra* note 129, at 14. Regarding plaintiffs' summary judgment motions within those categories, the rates of those granted were approximately 20 and 30%, respectively. *Id.* at 16.

<sup>135</sup> That assessment may be quantified by using a formula that takes into account the various considerations described above: the total number of defendants' summary judgment motions filed in a given year in complex litigation, subtracting the approximately 30% of such motions that are not acted upon, then further reducing by the 70% of such motions that the courts decide but deny, and finally deducting the approximately ten percent of the motions granted that are appealed. This analysis yields what may be declared clear and decisive victories—summary judgment motions that the courts grant and the parties do not appeal—in only about 19% of the cases.

<sup>136</sup> See Cecil et al., *supra* note 92, at 879.

if they prevail and to the resources they expend pursuing the strategy, outweigh the rate of denial and other known time and expense risks the procedure poses? And does the balance tip compellingly enough to justify litigators' manifest zeal for such practice? More fundamentally, are litigators in a substantial number of cases failing to make candid, prudent, and keen enough professional assessments of the factual and legal underpinnings of their clients' claims and defenses? To what extent is counsel's professional judgment being pulled, like iron filings to a magnet, by some other attraction—business or professional or otherwise?

## 6. The Riddle Within

In deciding when a summary judgment may be warranted, litigants—clients and counsel—should perform a task that admittedly may be fraught with contradiction. Showing respectful regard for the statistical record and common experience, they should conduct sober pre-motion due diligence, starting with a dispassionate forecast of the motion's likelihood of success in the light of any guidance the judge may have provided and prior summary judgment motion results other litigants may have experienced in the particular court and type of action. They should also perform a fuller appraisal of the economic effects of other options available. Of special value in specific cases would be an analysis of the prospect of foregoing summary judgment practice and proceeding to trial on a record streamlined by agreement among the parties with close guidance from the court.

In this endeavor, the clients' involvement should be particularly active, vigilant, and open-minded. Lawyers who might be inclined to resist the customary knee-jerk motion strategy should not be suspected of heresy or perceived as not fighting hard enough for their clients' interests. In the long run, litigants are better served by prudent avoidance than by wasteful confrontation. By the same token, zealous advocacy worthy of the lawyers' professional canon need not be impulsive or foolhardy, nor should the self-interest of counsel—or indeed even of a client—serve as the sole criterion to justify summary judgment motion practice.



## IV. THE ENIGMA OF EXCESSIVE LITIGATION: HIGH COSTS, DIMINISHING RETURNS

A. *Gambling: Jokers Wild*

The paltry success rates litigants consistently experience in court proceedings such as those examined raises fundamental issues. Notably, in a substantial amount of litigation, as the case advances through its various procedural stages, net results seem to diminish and turn counterproductive as the scale of inputs and outputs tilts, recording few tangible gains for any side that would sufficiently justify further prolonging the conflict. This phenomenon is not only enigmatic but also problematic. Behind it is a central theme running through this Essay: whether some force beyond an abiding search for truth and justice gives pulse and purse to some of the extravagant conflicts that litigants and counsel continue to wage in the courthouse well past the point of sustainable returns. The ABA Section of Litigation's 2009 *Report on Civil Practice* contains a brief paragraph on "law firm economics" which sheds light on this question.<sup>137</sup>

Commendable for its candor, and instructive and valuable for what it suggests, the ABA survey of members recorded that "defense lawyers, who most often shoulder the burden of discovery and who complain most about its being excessive and costly, also stand to gain the most economically from these circumstances."<sup>138</sup> A substantial majority (fifty-six percent) of the respondents, including both plaintiffs' and defense counsel, agreed that "economic models in law firms encourage more discovery than necessary."<sup>139</sup>

These sentiments were echoed, with equally sobering frankness, by lawyers who responded to the 2010 survey conducted by the Federal Judicial Center. The answers touch upon similar questions. One attorney remarked that "the tendency to run up costs is part of the internal dynamic of large law-firm practice."<sup>140</sup> Another complained that to meet overhead expenses some practitioners "do more than necessary. They staff up a case beyond its needs . . . ."<sup>141</sup>

If accurate and representative, these observations shed light on some of the unknowns that shape much litigation cost analysis and elucidates the debate. At bottom, they reflect unstated economic realities lawyers recognize in their fee-billing practices, and demonstrate how fee

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<sup>137</sup> See ABA SURVEY, *supra* note 14, at 9–13.

<sup>138</sup> *Id.* at 10.

<sup>139</sup> *Id.*

<sup>140</sup> ATTORNEY VIEWS, *supra* note 93, at 10 (quoting an unidentified survey respondent).

<sup>141</sup> *Id.* (quoting an unidentified survey respondent).

arrangements can materially determine litigation costs. Ninety-eight percent of defense counsel, compared to only twenty percent of plaintiffs' lawyers, charge by the hour, and over seventy-five percent of them maintain billable hour quotas.<sup>142</sup> Lawyers themselves acknowledge the impacts that different billing methods produce on legal expenses. Addressing hourly fees, for example, one view respondent expressed in the Federal Judicial Center survey noted that "[t]hey are being paid by the hour and are incentivized to spend time on a case."<sup>143</sup> To the same effect, another response commented that some attorneys "litigate contentiously to keep their billing hours up."<sup>144</sup> Summarizing how billing arrangements translate into the costs of court proceedings, one attorney noted that "[w]hen there are hourly lawyers at both ends of the litigation, that litigation is likely to be the most expensive."<sup>145</sup>

The forces that govern law firm economics and billing practices, akin to the free market's invisible hand, profoundly guide litigation strategies and shape total costs. Those effects come into play most noticeably in litigators' strategic posturing during settlement negotiations in some lawsuits. At times, occurring especially in class actions and other types of cases in which by statute prevailing parties could recover attorneys' fees and costs, events combine to reveal the tension at a unique point in the proceedings: when the dispute over the liability at issue has been resolved, either consensually by the parties, or determinatively by the court's rulings on motions, but the amount of attorneys' fees and expenses remains in contention constituting the entire stakes still undecided. In such situations, the border between clients and counsel begins to blur—on some occasions the two merging into one for all practical purposes—and transforming the remaining proceedings into a form of high-stakes gambling.

On this portrayal, the litigation cost model turns on its head. More litigation, rather than less, defines the norm. For both sides, increasing leverage, draining more capital, raising financial risk and public exposure, and inflicting deeper wounds and heavier losses become imperatives. Those confrontations serve to prolong a final disposition of the conflict until one or both opponents can no longer take the heat, and the opportune moment arrives for one or the other to fold.

When these circumstances prevail, counsel not only serve as their clients' legal representatives, but also essentially become complicit in litigation and business gambles of the parties that higher legal expense and delay serve to promote. Practitioners then stand to win big from the

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<sup>142</sup> ABA SURVEY, *supra* note 14, at 10.

<sup>143</sup> ATTORNEY VIEWS, *supra* note 93, at 11 (quoting an unidentified survey respondent).

<sup>144</sup> *Id.* at 12 (quoting an unidentified survey respondent).

<sup>145</sup> *Id.* at 11 (quoting an unidentified survey respondent).

litigants' financial strategies in ways that nicely mesh with their own law firm and personal economics. Thus, during the end-game phase of much hardcore litigation, this happy confluence of interests becomes an enabler of abuse, an accomplice that helps further feed the familiar dilatory and costly methods which practitioners otherwise so openly deplore. As one lawyer quoted in the Federal Judicial Center survey remarked, some attorneys "increase the amount of work needed to resolve a case and settle later, after fees have been billed."<sup>146</sup> In a similar vein, another respondent remarked: "You have to feed the tiger first before defendant attorneys will settle a case."<sup>147</sup>

### B. *Enigma Variations*

The search for effective reforms to address the various concerns—economic, societal, professional, ethical—raised by excessive litigation and higher legal services costs bumps up against a complication, a significant distinction. Existing rules already strongly discourage or outright prohibit extreme litigation practices that constitute deliberate abuse and improper billing. But what functions as perhaps the most powerful engine driving excess lawyering and burgeoning costs operates inside rather than beyond the bounds of litigation strategy permissible under current procedures. Lawyers, therefore, would be quick to point out that this large domain would encompass the professional discretion and zealous representation that their ethical duties as advocates and adversaries compel. For instance, if a litigator, in the good faith exercise of strategic judgment, files a motion to dismiss that the court finds premature—a common enough experience—though that professional call could needlessly add considerable cost and delay to the action, it would not necessarily contravene any procedure.

Insofar as the rules permit specific court proceedings and litigation strategies, practitioners will pursue them as a matter of course. In some instances they may even adopt a particular course of action regardless of its overall economic effects. The point here is that there is no practical way either to preemptively police lawyers' procedural moves, or to second-guess their motives on every occasion after they set in motion

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<sup>146</sup> *Id.* at 10 (quoting an unidentified survey respondent).

<sup>147</sup> *Id.* (quoting an unidentified survey respondent). In the ABA Survey, more than 94% of plaintiffs' and 98% of defense lawyers agreed that discovery costs represent an important consideration in decisions to settle. See ABA SURVEY, *supra* note 14, at 9. And the Joint Project reported that 71% of trial lawyers surveyed believe that litigators use discovery as a tool to force settlement—many cases involving claims or defenses the respondents considered meritless. See JOINT PROJECT FINAL REPORT, *supra* note 4, at 9.

permissible court proceedings they believe foster their clients' interests and their own as well.

Just as a want is not a need, however, what is allowed does not always define what is necessary or desirable. Hence, it is not the case that under any and all circumstances it is necessary for lawyers to set in motion the litigation practices and proceedings known to produce the bulk of excessive costs and that the needs of the case so warrant even if the rules of procedure do not prohibit for those courses of action.

In consequence, efforts to deal with this component of the litigation cost problem should refocus. Specifically, they should zoom in on the overall structure of the Federal Rules and consider reforms designed to pare down unnecessary litigation through strategies that would diminish the many permissible opportunities and temptations now available to practitioners, around the margins of strategies and practices that the rules do not expressly proscribe, to engage in excessive lawyering and potential abuse in the first place. On this reading, some concerns about outsize litigation costs are both much more fundamental and more nuanced. Upon closer inspection, perhaps the moving force behind much of the problem is a function not of particular rules as they now exist, but of the larger framework of the civil justice system itself as now structured. Hence, absent a more far-reaching overhaul of the major components of civil practice from which the biggest sources of wasteful litigation arise, more tinkering at the edges of the system now in place is unlikely to rise to the challenge, let alone adequately address the need.

As a starting point, a more forthright and effective approach to litigation reform would explore whether any of the court procedures that the rules now permit can be significantly curtailed or dispensed with, either altogether or in a given case or type of action. Specifically, such an examination would systematically evaluate two threshold issues: first, whether any practices that empirical measures identify as particularly cost-intensive are not needed at all, or not required in every lawsuit, or not called for to the same extent in all cases; and second, whether abuse of the rules, where clearly demonstrable, could be deterred through stiffer penalties or other strong disincentives—for example, shifting of attorneys' fees and costs to the losing party or its counsel if the severity of the circumstances warrant.

Conceptually, this analysis derives its force from a basic premise. When strong professional pressures combine with powerful economic self-interests to create incentives for practitioners to behave one way, and by longstanding custom their impulses become so ingrained that by custom and habit discretionary practices become virtually obligatory, only correspondingly strong countermeasures are likely to make them do things differently.

### C. Remedies: First Aid

To make a difference on the scale that both the magnitude of the issues and the gravity of their effects demand, some measures can be taken by the courts. Exercising equitable power, and inherent authority to manage their dockets, judges can adopt stop-gaps designed to curb case-by-case as well as systemic instances of abusive, unnecessary, or inefficient lawyering. Other reforms would entail promulgating new procedures embodying more far-reaching restructuring of prevailing practices, in particular the customary and costly deficiencies—of both the low-grade and the high-octane varieties—which the current rules’ disincentives and penalties do not reach. Guided by this general framework, legal reformers’ energies should aim to eradicate the most perverse and abundant sources of needless waste in court proceedings and avoidable legal expense. At the forefront of this initiative, as elaborated below in the discussion on fee shifting, should be a genuine review and overhaul of the rules governing how the obligation to pay litigants’ attorney’s fees and costs should be apportioned.

#### 1. Excessive and Deficient Pleadings

A substantial volume of unnecessary and avoidable litigation, as manifested by the various styles and patterns detailed above, is generated by faulty pleadings and surprise tactics.<sup>148</sup> The considerable incidence and resulting harm of hasty and sudden-attack litigation could be substantially reduced. To this end, an easy, cost-free courtesy would go a long way: early communication among the parties. A simple procedural fix can fill that gap. Before commencing a lawsuit, plaintiffs should file a verified statement, either as part of the complaint or in an accompanying declaration, detailing their efforts to communicate with the defendants to discuss the dispute. In particular, such disclosure should describe: any notice they gave about the substance of their claims

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<sup>148</sup> A simple case in point illustrates the harms that ambush litigation creates. In *Sahyers v. Prugh, Holliday & Karatinos, P.L.*, 560 F.3d 1241 (11th Cir. 2009), the plaintiff, a paralegal, brought an action against her former employer—a law firm and its partners—seeking payment of overtime. The case was promptly settled for \$3500. The plaintiff then requested an award of counsel’s fees, permitted by statute to the prevailing party. Affirming a judgment of forfeiture of attorneys’ fees, the circuit court remarked that “[p]laintiff’s lawyer slavishly followed his client’s instructions and—without a word to Defendants in advance—just sued his fellow lawyers.” *Id.* at 1245. Further, “a lawyer’s duties as a member of the bar—an officer of the court—are generally greater than a lawyer’s duties to the client.” *Id.* at 1245 n.7. “[T]he conscious indifference to lawyer-to-lawyer collegiality and civility exhibited by Plaintiff’s lawyer (per his client’s request) amounted to harassing Defendants’ lawyers by causing them unnecessary trouble and expense and satisfied the bad-faith standard.” *Id.* at 1246 n.9.

before resorting to litigation; the defendants' response; and whether there is any action the defendants should take or information or documents they should produce prior to the parties' appearance in court at the initial conference, that might induce the plaintiffs to resolve all or part of the lawsuit. Similarly, in connection with the answer, defendants should state whether there is any action plaintiffs should take or information or documents they should produce, that might persuade the defendants to drop all or parts of their responses or counterclaims.

Providing advance notice and information prior to turning to the courts serves several purposes. The exchange enables parties to undertake investigations that may reveal misconduct and corrective actions they could take to obviate judicial proceedings. It could permit disclosure of documents, which may confirm the existence or nonexistence of a claim or defense, or clarify misunderstandings about the terms and conditions defining underlying relationships and transactions. Early communication could provide a cooling-off period to lower the emotional heat that legal conflicts often generate. It may open lines of communication and help create an interpersonal climate conducive to constructive discussion, thus allowing the adversaries to formulate and negotiate settlement terms. Finally, in some cases it could create a clear record signaling the start of a party's obligation to preserve and begin to gather evidence potentially relevant to a lawsuit.

The two elements of this proposal, prior notice and opportunity for amicable out-of-court resolution, draw from common practice prescribed by various laws. Several federal statutes, for example, contain "citizen suit" provisions authorizing claimants to commence actions against certain United States agencies, but requiring them to serve notice on the defendants before to filing lawsuits.<sup>149</sup> Other laws establish jurisdictional bars or administrative conditions that litigants must satisfy as prerequisites for instituting judicial proceedings. As one example, plaintiffs bringing employment discrimination actions in federal courts pursuant to the Civil Rights Act of 1964 must first pursue and exhaust administrative remedies, including reconciliation efforts under the auspices of the Equal Employment Opportunity Commission.<sup>150</sup> Moreover, as applied to laws and standard practice governing claims of patents, copyrights, trademarks, and other intellectual property rights, certain substantive and procedural rules create incentives for claimants to give alleged violators and other

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<sup>149</sup> See, e.g., Endangered Species Act of 1973 § 11(g)(1)(A), 16 U.S.C. § 1540(g)(1)(A) (2012); Clean Water Act § 505(a)(2), 33 U.S.C. § 1365 (2012); Clean Air Act § 304, 42 U.S.C. § 7604(b) (2012).

<sup>150</sup> See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

potentially affected parties advance notice of the particular infringement and the prospect of legal proceedings.<sup>151</sup>

Notice prior to the commencement of litigation is also required by various state and local laws.<sup>152</sup>

## 2. Motions to Dismiss

In a similar vein, the parties' failure to communicate before filing motions to dismiss claims or defenses produces considerable litigation waste at high cost. In consequence, a procedure that was designed to promptly end, shorten, or simplify legal disputes too often proves ill-considered and unnecessary because it is overused or improperly used, yielding counterproductive results.

To correct these inefficiencies would entail a major departure from the automatic, as-of-right filing rule which now governs motions to dismiss. Under a new approach, litigants should not have leave to file such motions without giving each other prior notice and exchanging information intended to clarify and narrow the meritorious issues in dispute and potentially discard unfounded claims. Before filing such motions, defendants would alert plaintiffs about the specific defects in the pleadings—whether procedural, jurisdictional, or substantive—that constitute the grounds that the defendants contend would warrant dismissal of the action. Plaintiffs should then have an opportunity to respond to the defendants' objections, either by retaining the complaint as originally drafted or by amending it in an effort to cure the

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<sup>151</sup> Generally, notice in this context takes the form of cease-and-desist letters claimants serve before proceeding with a lawsuit. A defendant's failure to comply with the demands of a cease-and-desist letter can serve as grounds for the plaintiff in the ensuing litigation to establish willful or contributory infringement. *See, e.g., Janel Russell Designs, Inc. v. Mendelson & Assocs., Inc.*, 114 F. Supp. 2d 856, 862 n.2 (D. Minn. 2000).

<sup>152</sup> In New York, civil actions brought against the state, the City of New York, or other municipal entities cannot be maintained unless the plaintiff serves a notice of claim upon the defendant, generally at least thirty days before starting an action in court. *See, e.g., N.Y. CT. CL. ACT § 10* (McKinney 1989); *N.Y. GEN. MUN. LAW § 50-i* (McKinney 2007). A number of states similarly require plaintiffs to provide prior notice, ranging from sixty to 180 days, prior to filing medical malpractice claims. *See, e.g., D.C. CODE § 16-2802(a)* (2016); *MICH. COMP. LAWS ANN. § 600.2912b* (West 2010); *TENN. CODE ANN. § 29-26-121* (2015); *WASH. REV. CODE § 7.70.100(1)* (2015) (requiring notice vis-a-vis mandatory mediation provisions). In a related application of these principles, some states, specifically in divorce and domestic relations laws, establish a waiting period after the start of certain legal proceedings before the court can consider the complaint and during which it may require the parties to pursue conciliation. *See, e.g., CONN. GEN. STAT. § 46b-67* (2015) (requiring, in divorce proceedings, the expiration of ninety days after the complaint for dissolution or legal separation before the court may proceed on the complaint); *WIS. STAT. § 767.335* (2016) (requiring, in the case of divorce proceedings, the expiration of 120 days after service of the summons and petition upon the respondent or the expiration of 120 days after the filing of the joint petition before final hearing or trial).

deficiencies the defendants raised. The parties would then notify the court, most effectively by joint letter, about the outcome of those discussions, specifically stating the parties' respective positions, areas of agreement, and remaining disagreements.

So informed, the court should schedule an early conference to enable the parties to further air their differences. It could also ask the plaintiffs for clarification or more particulars about their claims, or arrange for early disclosures of documents necessary to address threshold issues such as defects regarding jurisdiction, venue, the appropriateness of parties involved in the litigation—whether named or not named—or the timeliness of the lawsuit.

If the defendants' proposed motion seeks dismissal of only parts of the complaint but the scope of discovery associated with the challenged claims would not materially differ from the evidentiary production that would be generated by the portion of the case that would proceed in any event, the court should discourage the contemplated motion or deny it without prejudice. In addition, the court should stay discovery proceedings if it finds, based on its initial assessment of the defendants' objections, that the contemplated dismissal motion's prospects of success are sufficiently high.

### 3. Motions for Summary Judgment

Cost and delay of court proceedings peak when litigants pursue what is perhaps the justice system's biggest single source of excessive litigation: unnecessary, premature, or unfounded motions for summary judgment.

Consistent with the proposal regarding motions to dismiss suggested above, the filing of summary judgment motions should not be a prerogative of the litigants, and should not be allowed prior to the outcome of a conference among the parties and the court scheduled to discuss the basis and timing of the prospective motion. Before approving a request for such a conference, the judge should direct both sides to spell out in a concise letter the factual and legal support they argue would warrant granting or denying of summary judgment.

In some instances, depending on the type of litigation and the issues in contention, the court should encourage the parties to forego summary judgment practice and proceed directly to a trial on an expedited schedule. In that event, after the presentation of the plaintiff's direct case, the court on its own initiative, or upon a party's motion, can apply what amounts to a trial equivalent of summary judgment



procedure by means of a motion for a judgment as a matter of law under Federal Rule 50.<sup>153</sup> This procedure, though rarely used, finds some grounding in Federal Rule 52, which authorizes the court to conduct trials of actions on the facts without a jury or with an advisory jury, and to issue findings of fact and conclusions of law.<sup>154</sup>

Alternatively, with the parties' consent, the court could consider the pre-motion submissions as constituting a summary judgment motion and response, and enter the correspondence and accompanying documents into the record in that simplified form. On these occasions the court could resolve legal disputes more expeditiously and economically than by allowing the litigants to prepare and file the typically ponderous motion papers they would otherwise submit. Even if the litigants choose not to convert the exchange of pre-motion letters into a formal summary judgment motion, in most instances communication through this abbreviated procedure can help parties, counsel, and the court to streamline and expedite the litigation.

Apprised by the litigants' versions of the dispute in capsule form at the end stages of the proceedings, the court could respond promptly with guidance that may facilitate an earlier disposition of the case. A side-by-side comparison of competing letter-briefs could assist the judge in spotting essential factual and legal issues as to which the litigants agree or disagree. At either a pre-motion conference or oral arguments the court could call those matters to the parties' attention in an effort to discourage an unnecessary motion in whole or in part. In the long run, in specific categories of cases where informal practice of this kind would be appropriate, the rules should provide for the simplified procedure as a substitute for the uniform summary judgment rule that in most cases, large and small, now regularly generates monumental motion papers and attendant cost and delay—often prematurely or needlessly so.

In some circumstances judges could discourage unnecessary summary judgment practice by two other means. The court could deny a party's request to schedule a pre-motion conference. That course would be appropriate, for example, in a case where such a motion would be clearly premature or futile, as when discovery is incomplete or the motion would raise issues already decided by the court in its previous rulings in the case.

Or else, if a motion already filed presents novel, complicated questions, the judge could postpone ruling on all or parts of it and proceed to trial—thereby effectively denying the motion without

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<sup>153</sup> See FED. R. CIV. P. 50.

<sup>154</sup> See FED. R. CIV. P. 52.

prejudice. This course, for which case law precedent exists,<sup>155</sup> is most appropriate in complex litigation. As the Supreme Court declared in a case involving intricate questions of fact and law that had been resolved by the lower courts on a summary judgment record:

[S]ummary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import . . . . We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts.<sup>156</sup>

Where these circumstances arise, a procedure based on the approach adopted by the courts that have addressed them would offer effective guidance. The court should flag for the parties its inclination to deny or reserve decision on a summary judgment motion, proceed to trial, and rule at the trial or afterwards on any such motion pending, or on a motion made at trial under Rule 50 seeking judgment as a matter of law.<sup>157</sup> In some cases such judicial signals might dissuade parties from pursuing unnecessary or unproductive summary judgment practice and facilitate a pretrial settlement.

Procedures such as these which provide alternatives to summary judgment practice should be detailed and codified by rule amendment. This reform would grant courts larger discretion to preemptively mitigate a major contributor to litigation excess.

#### 4. Unnecessary Motions and Wasteful Discovery Disputes

Motions that should never have been filed and discovery disputes that should never have been brought to court account for another fertile and thriving source of excessive practice—hence a staple of wasted effort, unnecessary expense, and delay. Such harmful results could be relieved, and litigants' abusive conduct deterred, if judges imposed broader, more robust sanctions designed to place the cost of excessive practices on the party or counsel whose behavior yields such adverse

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<sup>155</sup> See, e.g., *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256–57 (1948); see also *Westmoreland v. CBS Inc.*, 596 F. Supp. 1170, 1171 (S.D.N.Y. 1984) (denying parts of defendants' summary judgment motions with leave to renew at the conclusion of trial, and stating: "I consider it inappropriate to rule in advance of trial on these novel contentions. The consideration of such far reaching changes in law, not only in the district court but in higher courts on review, is better based on the experience of a full trial record"); *Park W. Radiology v. CareCore Nat'l LLC*, 675 F. Supp. 2d 314 (S.D.N.Y. 2009).

<sup>156</sup> *Kennedy*, 334 U.S. at 256–57 (footnote omitted).

<sup>157</sup> See FED. R. CIV. P. 50.

consequences. Penalties would be especially apt in circumstances in which excessive litigation practices aggravate cost and delay. For instance, in some cases, before the parties file a motion seeking a final disposition of a case in part or as a whole, the judge offers informal guidance as to issues that could be resolved to enhance litigation efficiency. In these circumstances, the court's preliminary assessment could aid the parties in narrowing the focus of questions in dispute, in refining litigation strategies and proceedings, and consequently in minimizing cost or delay. Because some litigants and attorneys are more hard nosed (and hard headed and profligate) than others, despite compelling objections from opponents and against the grain of the judge's informal guidance, the hardy ones choose to proceed with motion practice.

On these occasions, if the court does formally deny the motion for the reasons it had previously articulated and entered on the record, the litigants' pursuit of needless proceedings should constitute grounds for sanctions against the losing party or its counsel, as warranted in the exercise of the courts' equitable or inherent power, or under 28 U.S.C. § 1927.<sup>158</sup> For the purposes of appellate review, where appropriate the court should certify as part of its ruling that under the circumstances it considered the particular motion or practice as needless, frivolous, meritless, or filed in bad faith to harass, delay, or increase litigation cost. Fitting sanctions might then include a compensatory award of attorneys' fees and costs against the losing party or its counsel to cover the expense the opponents incurred by reason of the excessive practice or in opposing the unsuccessful motion during pretrial as well as any appellate proceedings.

Judges should similarly dispatch discovery disputes that litigants bring to court involving clearly excessive demands for information or outrageous withholding of evidence.

Admittedly, this procedure potentially would enhance the power of judges over the conduct of litigation, in some instances enabling them to resolve disputes with less formality. But it might also produce corresponding benefits that could offset concerns about enlarging judicial discretion in these circumstances. Such intervention by the court earlier in the dispute, however, would address frequent criticism and resentment voiced by practitioners who complain that judges are not adequately involved in case management, not well-informed enough about the merits of disputes over which they preside, and thus too tolerant of frivolous lawsuits and abusive practices.

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<sup>158</sup> See 28 U.S.C. § 1927 (2012).

## 5. Disproportionate Litigation

In certain types of cases the stakes, as quantified on the face of the complaint, are modest relative to the cost associated with adjudicating the litigants' full basket of claims and defenses. Legal disputes of this kind represent disproportionate drains on the financial and human resources of the parties and the courts. These concerns could be relieved by another early warning system supplemented by preemptive judicial intervention. Where it clearly appears to the court from the litigants' pleadings, or from discussion with the parties at or prior to the initial conference, that the actual amount in controversy is grossly disproportionate to the costs that full scale litigation of the dispute would likely generate, the judge should promptly refer the case for settlement, at the parties' choice either to a magistrate judge, or to mediation—court-appointed or private.<sup>159</sup> The referral may be limited in time and scope to a specified duration or particular issues, and, where appropriate, should be accompanied by a stay of further court proceedings until the alternative dispute resolution efforts are exhausted.<sup>160</sup>

### D. *Invasive Surgery*

To be sure, procedural improvements such as those suggested above are relatively constrained, and their impacts perhaps limited and hard to measure. Modest proposals are unlikely to pierce deeply enough

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<sup>159</sup> There is compelling empirical evidence demonstrating that early referral of litigation to alternative dispute resolution methods works effectively to expedite disposition of lawsuits and lower cost, especially in actions involving relatively straightforward issues and modest stakes. In the District Court for the Southern District of New York, for instance, the 2014 Annual Report of the court's mediation program documented an impressive record of successful results statistically measured by full or partial settlements. Of 828 civil cases judges referred to mediation and closed that year, the rate of settlement the parties achieved was: 68% in employment cases brought by self-represented plaintiffs; 50% in other employment actions which, under the court's rules, were subject to automatic referral to mediation; 76% in civil rights litigation against local governments; and 65% in a category composed of several other types of cases. On average, the time from case referral to its disposition upon the mediator's filing a report was approximately 100 days. See REBECCA PRICE, U.S. DIST. COURT S. DIST. N.Y., MEDIATION PROGRAM ANNUAL REPORT: JANUARY 1, 2014–DECEMBER 31, 2014 (2015).

<sup>160</sup> The average duration of mediation reported in the Southern District of New York represents a dramatic difference in time consumed, and thus cost. The median duration from filing to disposition of all civil cases in the district terminated before pretrial proceedings, was 7.1 months, compared to 11.3 months for cases closed by court action during or after full pretrial litigation. See ADMIN. OFFICE OF U.S. COURTS, TABLE C-5: U.S. DISTRICT COURTS—MEDIAN TIME INTERVALS FROM FILING TO DISPOSITION OF CIVIL CASES TERMINATED, BY DISTRICT AND METHOD OF DISPOSITION, DURING THE 12-MONTH PERIOD ENDING MARCH 31, 2014 (2014), <http://www.uscourts.gov/file/10322/download>.

to the crux of the professional culture in which, unwittingly and not, so much of the needless inefficiencies and abusive strategies now prevalent in civil litigation practice are embedded and continue to thrive. Rather, to have an effective impact, remedies designed to address this concern should recognize two essential points stressed above. These observations underscore how a large array of circumstances affecting contemporary litigation practice have materially altered the dimensions of the cost and delay problem so as to raise the urgency of adopting effective reforms.

One of the central points relates to the source and scope of the underlying concerns. The objectionable litigation strategies that have engendered the widespread, consistent, and enduring concerns troubling the legal community, are impelled by different forces and take on various forms. In its most extreme manifestation, litigation excess is a product of practitioners' knowing and bad faith violations of procedural rules and professional norms. But, to deter and punish such extreme misconduct, numerous sanctions already exist under longstanding rules, for example, Federal Rules 11, 26, and 37, as well as 28 U.S.C. § 1927.<sup>161</sup> The efficacy of these punitive measures, however, has been doubtful at best, as the persistence and exacerbation of the attendant harms amply attest. For this reason, new remedial responses should be more specifically targeted, as well as uniquely designed to address current circumstances for which existing procedures and penalties do not make adequate provision.

More important, deliberate professional misbehavior by lawyers constitutes only one aspect of prevalent litigation cost concerns, perhaps even the lesser part of it. On the view presented here, the bulk of excessive lawyering plays out at a different level, and on a different scale. It pervades the justice system as unnecessary and wasteful proceedings that counsel routinely set in motion because governing rules do not necessarily forbid them. In fact, like all other legal services, that element of litigation is animated by what lawyers would expansively characterize and justify as "zealous advocacy"—practices counsel carry out through strategies they would fiercely defend as compelled by professional and ethical canons and warranted by malpractice concerns.

The second point which bears reemphasis here entails the greater complexities and larger compass of litigation today, especially discovery proceedings significantly expanded by modern communications and information storage technology. The higher costs and longer delays that litigants experience in resolving court proceedings rank among the major effects of these developments. In this context, excessive litigation and abusive practices take on far greater dimensions, exacerbating the

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<sup>161</sup> See 28 U.S.C. § 1927 (2012); FED. R. CIV. P. 11; FED. R. CIV. P. 26; FED. R. CIV. P. 37.

magnitude of associated cost and delay, and producing more extensive harms to the justice system that correspondingly demand remedies equal to prevailing conditions.

Hence, meaningful improvements on a lasting scale commensurate with the need and implications of the real problem, demand more invasive judicial and regulatory interventions. Bluntly stated, an effective approach to relief in this body of inefficient law practice should carve much closer to sinew and bone of litigation waste and abuse.

### E. *Fee Shifting*

Debates about reforms to abate abusive means and reduce litigation cost and delay typically come around to a delicate and contentious topic: Who should bear the financial burden of paying for attorneys' fees and costs? Related to this question is another threshold issue: whether shifting the obligation to defray the prevailing party's legal expenses to the loser would dissuade the incidence of frivolous cases or diminish excessive lawyering and encourage settlements of lawsuits. In terms of remedial action, two legal doctrines dominate this controversy. Under the "American rule," parties are responsible for compensating their own attorneys regardless of the outcome of the case.<sup>162</sup> By contrast, the "English rule" imposes liability on the loser, whether plaintiff or defendant, for the prevailing litigant's legal services bill.<sup>163</sup>

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<sup>162</sup> See, e.g., *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247-50 (1975).

<sup>163</sup> As the lawyers' discourse on attorney fee shifting plays out, it offers diverse perspectives of the rationales and effects of the two doctrines. Critics argue that the American rule engenders unfairness and excessive cost. One commentator contends, for instance, that "[t]he American rule is perhaps the greatest single catalyst of discovery abuse, because it allows plaintiffs to impose tremendous costs on defendants at virtually no cost to themselves." See Beisner, *supra* note 10, at 587. This contention holds that the American rule creates economic incentives for litigants to demand virtually limitless information from opponents, rather than conducting their own investigations, and that it further encourages practitioners to embark upon fishing expeditions in search of discovery, the huge expense of which one side then imposes upon the other. See *id.* For opponents of the American rule, this point raises equitable concerns. As another authority expressed these implications: "[A] party can have as much discovery as it wants by paying only the costs of *seeking* that discovery; the costs of compliance are generally borne without recompense by the opposing party." Abraham D. Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment*, 57 ST. JOHN'S L. REV. 680, 726 (1983).

The English rule, on the other hand, according to its proponents, serves several beneficial ends. It has an equitable underpinning insofar as it vindicates the rightfulness of the winner's position and requires the loser to pay the winner's legal costs, thus promoting a sense of fairness. Economically, the doctrine also performs a compensatory function; it makes prevailing parties monetarily whole for the wrong these litigants suffer by being forced to resort to court to validate the justice of a claim or defense by proving that they were right, and thus to have been subjected to the myriad other personal and financial travails that typically accompany

This debate suffers from a major shortcoming: it is outmoded, overtaken by events that define modern law practice. Though heavy on abstract game theory, economic modeling, and mathematical analysis, the discussion is light on empirical grounding and relevance to the excessive lawyering and immense litigation cost problems such as they exist and bedevil the law profession today. Three observations support this point.

First, as presented in the literature and other professional discourse, attorney fee shifting arguments relate primarily to concerns stemming from the more extreme litigation abuses—generally deliberate practices deemed frivolous, coercive, vexatious, or otherwise exhibiting bad faith.<sup>164</sup> Because typically the behavior of litigants and counsel manifesting such excess tends to be knowing and purposeful, it of course falls outside the bounds of what existing procedural rules consider permissible. Such tactics are thus already subject to sanctions. Second, patently frivolous or coercive actions, soon after they are filed,

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litigation. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 142–43 (2d ed. 1977); Philip J. Mause, *Winner Takes All: A Re-Examination of the Indemnity System*, 55 IOWA L. REV. 26, 31 (1969); Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 653 [hereinafter Rowe, *A Critical Overview*]. This fee shifting scheme embodies punitive and deterrent purposes as well to the extent it penalizes excessive litigation, especially misconduct by means of filing frivolous or nuisance claims or defenses intended to extract settlements, and by engaging in abusive tactics during the course of a lawsuit. See Rowe, *A Critical Overview*, *supra*, at 654. Conversely, the English rule purportedly encourages meritorious litigation by parties who appraise their claims and defenses as having a high probability of success, especially those bearing modest monetary value. See Mause, *supra*, at 31–32. Finally, supporters argue that by encouraging more expeditious court proceedings and inducing settlement, the English rule promotes litigation efficiency and relieves the burden on the justice system. See, e.g., Lucian Arye Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437 (1988); Don L. Coursey & Linda R. Stanley, *Pretrial Bargaining Behavior Within the Shadow of the Law: Theory and Experimental Evidence*, 8 INT'L REV. L. & ECON. 161 (1988); A. Mitchell Polinsky & Daniel L. Rubinfeld, *Sanctioning Frivolous Suits: An Economic Analysis*, 82 GEO. L.J. 397, 422–23 (1993); Rowe, *A Critical Overview*, *supra*, at 653; Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, LAW & CONTEMP. PROBS., Winter 1984, at 139.

Champions of the American rule counter the purported advantages of the English rule with their own equitable economic and practical arguments. They point out that under a two-way fee shifting system, the prospect of having to pay an adversary's legal expenses in the event of defeat deters litigants, especially those of modest means, from pursuing plausible even if not clear-cut claims and defenses, thus limiting access to the courts and chilling creativity in the development of substantive law and novel legal theory. See Rowe, *A Critical Overview*, *supra*, at 655–56. Moreover, this view charges that the English rule is founded on a fundamental fallacy. It is not always the case, the argument goes, that a loser's conduct in commencing or defending an action in court is necessarily blameworthy. Even if a litigant's position is ultimately unsuccessful, the loser may have brought or refused to settle a claim or defense based on a reasonable belief that its legal basis was sufficiently strong, or the factual dispute genuine, or the action fairly plausible or based on unsettled law. See Mause, *supra*, at 28; Rowe, *A Critical Overview*, *supra*, at 655.

<sup>164</sup> See generally Mause, *supra* note 163, at 31; Polinsky & Rubinfeld, *supra* note 163, at 423; Rowe, *A Critical Overview*, *supra* note 163, at 655.

ordinarily elicit opponents' motions seeking a court order to dismiss the lawsuit or to impose sanctions. On these occasions, at least in the most egregious instances, the courts tend to grant relief, a result that lessens the import of frivolous or coercive cases as a component of overall excessive litigation cost concerns. Consequently, insofar as the attorney fee shifting arguments are grounded on an inapposite conception of the problem, they are largely inconclusive.<sup>165</sup>

Third, and most compellingly to the point, as suggested earlier, the greater impetus generating the burgeoning litigation cost and abuse concerns at the heart of the controversy today derives not so much from deliberate misconduct by practitioners—practices that are already unlawful—but from less visible though more extensive and pivotal forces: counsel's subterranean actions that governing rules do not explicitly proscribe. Specifically, the prime movers of excessive and abusive lawyering and resulting higher cost and delay are fueled by various economic, professional, and business realities driving modern litigation. Though these pressures come to bear heavily in court proceedings, the penalties and disincentives built into attorney fee shifting rules are not equal to the actual task.

In other words, as now applied, fee shifting systems fail to take account of the changes in circumstances that reflect the types and scope of lawyers' extreme methods and needless proceedings that characterize much litigation now commonly practiced in American courts. In consequence, the prevailing analysis of the problem does not recognize the manifold leaps and bounds by which the dimensions of the issues today have expanded. In the modern age of digital communication, electronically stored information, commercial globalization, and Big Law, the problem as it really exists exceeds by many orders of magnitude the concerns over the types and incidence of offensive conduct that underlie the attorney fee shifting regimes now in place and that initially prompted their adoption.

More specifically, the expansive conception of discovery that practitioners regard as the norm today generates correspondingly higher costs to comply with existing rules. Magnified as it is by the massive capacity for electronic information storage and records retrieval that contemporary technology enables, the expense engendered by present-day litigation discovery and motion practice has reached levels of such staggering proportions as to render many court proceedings prohibitive and even inaccessible in many cases, especially in lawsuits involving

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<sup>165</sup> See, e.g., Coursey & Stanley, *supra* note 163; James W. Hughes & Edward A. Snyder, *Litigation and Settlement Under the English and American Rules: Theory and Evidence*, 38 J.L. & ECON. 225 (1995); Eric Talley, *Liability-Based Fee-Shifting Rules and Settlement Mechanisms Under Incomplete Information*, 71 CHI.-KENT L. REV. 461 (1995).



modest stakes and parties of small means. Even in routine cases, discovery costs nowadays potentially can run into the hundreds of thousands and even millions of dollars.

From the standpoint of the fairness rationale that favors equitable apportioning of the parties' obligation to pay attorneys' fees, the exponential rise of those legal costs, and their punishing effects on persons forced to bear them, are far greater than the impacts that the framers of the fee shifting rules could have contemplated centuries ago as reasonably tolerable. Litigants and the justice system today should not be obliged to accept the ensuing consequences with a resigned shrug as by-products of ordinary litigation practices. By the same token, to achieve more effective disincentives in deterring excessive practices, modern litigation's big picture cries out for a revision of the premises justifying fee shifting, as well as for drafting and applying an updated fee shifting doctrine.

In several vital respects the American rule falls short of recognizing these state-of-the-art realities. Conceptually, obligating litigants to pay their own attorney's fees is based on general attitudes that, as one commentator observed, "tend to regard litigation as everyone's right and to emphasize the importance of not excessively hindering access to justice."<sup>166</sup> For this reason, under the American rule, allocating to each party the expense of commencing or defending a lawsuit is not perceived, as it is under the English rule, as causing a compensable legal injury.<sup>167</sup>

But while theoretically fitting and laudable in some circumstances, there comes a point at which the doctrinal framework buttressing the rule begins to fracture and crumble. Certainly, litigants who have colorable if not sure-bet claims or defenses should not be inhibited from pressing them because of fear of incurring liability to pay their opponents' legal costs in the event they ultimately do not prevail. At the same time, however, under the American rule the worthiness of a lawsuit or defense does not serve as an inhibitor of abusive practices. Many litigants, whether or not their claims have merit, and whether or not they ultimately succeed, nonetheless can and do commonly engage in unnecessary or excessive litigation, running up huge expenses that must be borne by their opponents. Except for instances involving outrageous misconduct, which must be addressed case-by-case as exceptions to the rule, effective means do not exist to diminish the predominant sources of needless litigation that not only constitute the most prevalent abuses but generate the highest avoidable costs.

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<sup>166</sup> See Rowe, *A Critical Overview*, *supra* note 163, at 656.

<sup>167</sup> See *id.* at 659.

When the time and expense required to litigate the many instances of wasteful and pointless court proceedings common today—for example, to comply with excessive discovery demands, or respond to an oppressive or baseless lawsuit, or oppose an unnecessary motion, or challenge grossly deficient pleadings—and when the burdens accompanying these practices reach breathtaking or disproportionate magnitudes, compelling the winning party to bear the whole consequential expense of establishing a rightful position becomes concomitantly more inequitable. Somewhere along the continuum where rising cost and consequential harm to a prevailing party intersect, that financial imposition peaks and then takes on a fundamentally different character. At that point the burden materially shifts; it becomes more and more disproportionate and unjust insofar as its weight alters from constituting an inconvenient though tolerable and not necessarily wrongful demand, to exacting an unfair obligation that inflicts extensive injury, in monetary and other values, on a prevailing party. As it assumes these detrimental qualities, the onus should justify compensating the prevailing party as appropriate, both to make the winner whole and to penalize and deter similar harmful litigation conduct by the loser.

In the context of modern legal practice, the implications of litigation excess and abuse loom much higher and their consequences inflict far more extensive harms—for the parties, the courts, and the public. The evident injustice that the higher legal expense burden now embodies for any litigant—winner or loser—thus weighs in favor of adopting the English rule more widely, at least in modified form. Generally supporting this equity argument, one author remarked, for instance, that

A party subjected to a baseless suit, forced to run up legal fees to overcome a groundless defense, or subjected to unjustified tactics in litigation, has an appealing claim for recompense of the legal fees he should not have had to spend, whether or not his claim is treated as a separate cause of action.<sup>168</sup>

From the standpoint of countering the element of litigation excess and abuse that these circumstances embody, and that governing rules do not

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<sup>168</sup> See *id.* at 657. In an earlier articulation of the same concern, the Judicial Council of Massachusetts raised the question from the vantage point of each side of the litigation table:

On what principle of justice can a plaintiff wrongfully run down on a public highway recover his doctor's bill but not his lawyer's bill? And on what principle of justice is a defendant who has been wrongfully haled into court made to pay out of his own pocket the expense of showing that he was wrongfully sued?

*First Report of the Judicial Council of Massachusetts*, MASS. L.Q., Nov. 1925, at 64.

adequately address, the English rule may represent a more systematic and perhaps more effective means to do so.<sup>169</sup>

To address the real need which constitutes the crux of today's litigation cost problem, reform measures must answer broader inquiries: Have excessive and needless court proceedings, as driven largely by lawyers' business demands, professional and personal imperatives, and modern technologies, risen to unacceptable levels—by forms and degrees that wreak intolerable harms on litigants and the courts? To what extent are the deleterious consequences such litigation brings to bear on the justice system now different and severe enough to warrant adopting stronger disincentives to check lawyering excess and abuse? Should remedies for adverse practices be designed to recompense financial injuries that counsel's excessive strategies and competitive pressures impose on litigants, and thus to deter burdensome litigation methods? Fitting answers to these questions would take due account of the larger context and complex causes that define and impel the modern crisis of excessive litigation and lawyers' abusive practices in court proceedings.

Though these forces operate in the grey areas of the law, they do not necessarily arise outside permissible bounds. In consequence, their workings are neither readily subject to regulation nor responsive to exhortation. Yet, they persist, and reach a scale pervasive enough to encourage practitioners to embrace them as customary and profitable norms, inured to the inconveniences and harmful effects such practices produce, and while drawing in the more abundant fees this wellspring yields.

Perhaps reflecting some recognition that over time the policy supporting the attorney fee rules have changed, the trend in the United States manifests a variable approach that has substantially eroded the uniformity of the American rule. This development has occurred through exceptions created by statutes. Dozens of attorney fee shifting schemes now exist under federal laws.<sup>170</sup> Similarly, state legislatures have enacted statutes—by one account numbering nearly 2000—designed to achieve the various purposes of attorney fee shifting.<sup>171</sup> Some of these statutes authorize attorney fee shifting to the prevailing party, whether it

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<sup>169</sup> See, e.g., Mause, *supra* note 163, at 36–37; Rowe, *A Critical Overview*, *supra* note 163, at 660–61.

<sup>170</sup> See, e.g., *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260–61, 260 n.33 (1975) (listing a number of “specific and explicit provisions for the allowance of attorneys’ fees under selected statutes”).

<sup>171</sup> See, e.g., Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 *LAW & CONTEMP. PROBS.* 321, 344–45 (1984).

is the plaintiff or the defendant.<sup>172</sup> But most of them allow fee shifting only one way—when the prevailing party is the plaintiff.<sup>173</sup>

The one-way scheme evinces a clear statutory purpose to encourage certain plaintiffs, as individuals or classes, to pursue certain types of litigation that the lawmakers deemed as serving the public interest. A prominent example comprises actions seeking to enforce and protect basic civil rights that are brought by persons of modest means and public interest organizations representing disadvantaged groups. The theory underlying these statutes is that some litigants might be deterred from prosecuting meritorious or colorable claims if, were plaintiffs to lose, they risked the prospect of incurring liability for paying the defendants' legal expenses. In defense of this system, proponents argue that altering the arrangement so as to require the losing plaintiffs to pay the prevailing defendants' litigation costs would discourage litigation that serves a public purpose. Several points respond to these concerns.

As noted above, that particular plaintiffs may have a worthy or arguable case does not mean that their litigation is either more or less likely to produce litigation abuse. The relative merit of a case does not necessarily deter counsel from engaging in overlawying. To the contrary, strong incentives for excessive lawyering arise precisely when plaintiffs have a fair chance to prevail and know not only that if they lose they cannot be obligated to pay their opponent's legal fees, but that if they win they have no financial exposure even for their own lawyers' bills—a prospect that typically comes to pass in cases in which contingency fee agreements exist. Except for misconduct on the most deplorable scale, there is no downside, no accountability for practitioners inflicting litigation abuse and generating waste under these circumstances.

Moreover, an award of attorneys' fees to a prevailing party, even to only plaintiffs under a one-way regime, does not have to constitute an all-or-nothing proposition. A reasonable middle ground exists to achieve the desirable societal value of encouraging public interest litigation but without writing a blank check or issuing counsel a license to pursue excessive or needless lawyering. Under the fee shifting statutes and the courts' inherent power, even if plaintiffs prevail, they can forfeit recovery of attorneys' fees from the defendants, or be obligated to pay for the defendants' attorneys' fees. This outcome extends at least to any portion of the litigation expenses that the court finds attributable to

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<sup>172</sup> See, e.g., 15 U.S.C. § 77k(e) (2012); 42 U.S.C. § 2000a-3(b) (2012).

<sup>173</sup> See, e.g., 29 U.S.C. § 216(b) (2012); 42 U.S.C. § 1983 (2012).

abusive practices, or to an entire lawsuit it dismisses as frivolous or otherwise filed in bad faith.<sup>174</sup>

If this result could strike as unduly harsh as applied to particular litigants, the courts can mitigate its effects by placing the financial burden where it actually belongs in cases where it is clear that it was counsel's extreme or unnecessary practices that exceeded proper litigation bounds—misdeeds that should not be visited upon innocent clients. Nonetheless, instances of such vigorous judicial enforcement are rare, largely because the dominant American rule scheme discourages it.

Hence, the existence of so many statutory exceptions and availability of other means to depart from uniform application of the American rule, has moved attorney fee shifting practice in the United States closer to the English rule in substantial ways. Yet, there is no empirical evidence that in the jurisdictions that authorize fee shifting to the prevailing party this development has diminished access to justice or chilled lawyer creativity.

Viewing this phenomenon in the light of the immense scale and implications associated with today's problem of litigation cost and abusive practices, the circumstances point logically in one direction. The time has come for American legislatures and courts to accord even broader recognition to the English rule. At minimum, that reform should be considered in connection with attorneys' fees generated by the losers in connection with discovery disputes,<sup>175</sup> as well as by motions that the presiding judge finds were needlessly, prematurely, or improvidently filed.

This course would serve several major objectives. It recognizes that times and conditions have changed so as to create more drastic problems that demand measures equal to current circumstances. It acknowledges as well that in the context of attorneys' prevailing business models, competitive pressures, enhanced by expansive modern technological capacity, much greater occasion exists for lawyers' abusive practices to take root and spread. Under these circumstances, such overlawyering can generate costs of staggering proportions that, when unnecessary or unjustified, raise far greater equitable concerns, perhaps constituting a wrong to obligate a prevailing party to absorb them. The combination of these conditions should warrant developing remedies embodying greater force as recompense, deterrence, and penalty.

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<sup>174</sup> See, e.g., *Sahyers v. Prugh, Holliday & Karatinos, P.L.*, 560 F.3d 1241, 1245–46 (11th Cir. 2009).

<sup>175</sup> See, e.g., *Beisner*, *supra* note 10, at 587–88.

## CONCLUSION

Costs, delays, and inefficiencies in court proceedings, while matters of longstanding concern among members of the legal community and the general public, have risen substantially in recent years, contributing to profound changes in the practice of law, and intensifying calls for remedial action. Efforts to relieve the problem by amendments of procedural rules have failed to achieve meaningful improvement largely because they do not address major sources underlying the problem: inefficiencies embedded in court proceedings that the rules permit, that are ingrained in the practice styles and traditions many lawyers follow in applying the rules, and that have been exacerbated by external and internal pressures coming to bear on the legal profession more heavily under prevailing market conditions of a global economy. Effective reform should adopt a functional approach specifically tailored to remove inefficiencies associated with the most significant sources of rising litigation costs and delays, and ultimately should be designed to remove particular practices and incentives that account for much of the rising costs and delays of court proceedings.