PANEL TRANSCRIPT:*

CONTROLLING THE HIGH COST OF JUSTICE: PERSPECTIVES FROM THE FEDERAL JUDICIARY

Benjamin N. Cardozo School of Law

April 3, 2017

Dean Melanie Leslie†, Judge Victor Marrero†, Chief Judge Robert A. Katzmann†, Judge Loretta A. Preska†, Judge Jed S. Rakoff†, Judge John G. Koeltl†, Judge Richard M. Berman†

DEAN LESLIE: I am so happy to be able to welcome you to tonight's event, *Controlling the High Cost of Justice: Perspectives from the Federal Judiciary*. We appreciate the sponsors of tonight's event, which include the Federal Bar Counsel, the Federal Court's Committee of the New York City Bar Association, the New York County Lawyer's Association, Federal Court's Committee, the *Cardozo Law Review*, and the Floersheimer Center for Constitutional Democracy. Special thanks to our former dean, and my dear friend and mentor, David Rudenstine, for helping to organize this important and notable panel.

Tonight, we will discuss U.S. District Judge Victor Marrero's Essay, *The Cost of Rules, the Rule of Costs*, which was published in the *Cardozo Law Review*, Volume 37, Issue 5.[1] Judge Marrero's important scholarship recommends significant changes to the Federal Rules of Civil Procedure, and tonight we are honored to have with us Judge Robert Katzmann, Chief Judge of the U.S. Court of Appeals for the Second Circuit, who will serve as our moderator, the Honorable Richard M. Berman, the Honorable Judge John G. Koeltl, the Honorable Loretta

---

* This transcript has been edited for clarity.—Eds.

† Dean and Professor of Law, Benjamin N. Cardozo School of Law.

† United States District Judge, Southern District of New York.

† Chief Judge of the U.S. Court of Appeals for the Second Circuit.

† United States District Judge, Southern District of New York.

† United States District Judge, Southern District of New York.

† United States District Judge, Southern District of New York.

† United States District Judge, Southern District of New York.

1 Victor Marrero, *The Cost of Rules, the Rule of Costs*, 37 CARDOZO L. REV. 1599 (2016).

A. Preska, and the Honorable Jed S. Rakoff, all U.S. District Judges from the Southern District of New York.

JUDGE MARRERO: Thank you, Dean Leslie, for Cardozo Law School's hosting and organizing this program. I also thank former dean, and longtime friend, David Rudenstine, for organizing and coordinating the event. My appreciation, as well, to the *Cardozo Law Review* for the extraordinary privilege of publishing my Essay and the exceptional editorial review that it received. Finally, I am grateful to the co-sponsors and commentators for the event whose vital contributions Judge Katzmann will acknowledge. The organizers suggested that we start the program with a few words from me, explaining how the Essay came about and the primary concerns that it raises. That approach will break with salutary traditions and may pose a risk.

Ordinarily, a call for an offer to face an audience such as this comes after the performance that the patrons came to see. There is a beneficial reason for that custom, as may be the case here, and circumstances involving a controversial topic that raises ideas some may view as heretical, and that are presented before a potentially restive audience. The eruption of catcalls and mushy objects thrown at the stage could interfere with the performance of the other speakers. Fully understanding that danger and, with my colleagues' indulgence, I accepted that invitation.

By way of historical background, in 2010, the United States Judicial Conference Advisory Committee on the Civil Rules sponsored a major conference at Duke University School of Law to address widespread complaints about the rising costs, delays, and abuses in civil litigation. The conference heard from a course of lawyers, judges, and academics expressing concern about the significant incidence of these problems and the serious implications that they present for the administration of justice. Following a bit of research, I noted that, in fact, essentially the same concerns had been the subject of similar debates that had occurred one year earlier and a series of surveys and reports released separately by the Federal Judicial Center, the American Bar Association, the American College of Trial Lawyers, and the University of Denver Institute for the Advancement of the American Legal System. These issues also were central to similar national conferences in 1997 and 1976 and, in fact, in countless occasions going back to the era preceding the adoption of the Federal Rules of Civil Procedure in 1938.

In particular, they arose in connection with amendments to the Federal Rules of Civil Procedure that were enacted in 1946, 1970, 1983, 1991, 1993, 2000, 2006 and 2015. This recurrence prompted one judge, then chair of the Judicial Conferences Advisory Committee on the Federal Rules of Practice, to remark in 2010, "[s]ince their inception in 1938, the rules of discovery have been revised with what some view as distressing frequency. And yet the rule makers 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."[2] These observations raise some obvious questions and challenges. What are the major courses and the facts of the problems and how do they come to bear upon litigants, the practice of law, the courts, law schools, and the general public? What can the legal community as a whole do to address these issues?

To set the stage for the discussion of these questions, consider recent news accounts of some developments, reported since the publication of ISA in 2016, that may represent continuing signs of the trends and themes I touch upon. An article published in the American Lawyer in 2016 headlined, *As Rates Soar, Some Firms Profit by Coming Down to Earth*.[3] The headline in the New York Law Journal in February 2017 read, *Legal Departments Find Value in Keeping Work In-House*.[4] New stories also reported about the demise as separate entities of three more of New York's memorable law firms, Chadbourne and Parke, Kaye Scholer, and Kenyon and Kenyon. The Southern District of New York's pro se office reported that actions involving unrepresented litigants constituted more than 21% of the court's docket, and that's been going on for several years, while the Court's mediation office indicated a success rate averaging about 60% in recent years in cases referred to the Court's mediation program. Finally, the number of applications for admission to law schools declined by over 5% this year, continuing a trend of several previous years and causing major retrenchments in law schools across the country. I maintain that these circumstances are interrelated in various ways that our panel may shed light upon.

To conclude on a lighter note, I quote from a remark from a scholarly article by Professor Arthur R. Miller that encapsulates some of my essay in tonight's discussion. Professor Miller noted that, "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."[5] Thank you. Judge Katzmann?

JUDGE KATZMANN: Thank you, Judge Marrero, for your superb Essay and for providing the occasion of this gathering. I also want to thank the co-sponsors of this program and their representatives who, as chair of the relevant bar association committees, served as an advisory

---

2 Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: 'Twixt the Cup and the Lip*, 87 DENV. U. L. REV. 227, 228–29 (2010).

3 Nell Gluckman, *As Rates Soar, Some Firms Profit by Coming Down to Earth*, AM. LAW. (Oct. 18, 2016), https://www.law.com/americanlawyer/almID/1202770204906/?mcode=1202615731542&curindex=401?mcode=1202615731542&curindex=401 [https://perma.cc/L8UL-DUUB].

4 Jennifer Williams-Alvarez, *Legal Departments Find Value in Keeping Work In-House, Report Says*, N.Y.L.J. (Feb. 9, 2017).

5 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).

group of commentators proposing questions and issues for the panel to address. They are: Sarah Cave of the Federal Bar Council, Laura Grossfield Birger of the City Bar, and Arthur Aufses III of the New York County Lawyers Association. They, in turn, were assisted by members of their committees: Harry Rimm, Mary Eden, Caren Decter, Lillian Marquez, and Stewart Riback. Cardozo Law Professor Alex Reinert also served as an advisor. Thanks to one and all.

We are going to have three principal areas of questions. One, looking at the nature of causes and scope of the problem; two, looking at effects; and three, looking at solutions and remedies. What I'm going to do is pose a question to a particular panelist to be followed by whatever comments other panelists wish to make.

So, first, nature, causes, and effects of the problem. Judge Preska: Judge Marrero's Essay describes various concerns associated with rising litigation costs and certain law firm business culture and practice abuses, and the inefficiencies that contribute to that problem. To what extent is there empirical analysis quantifying the difficulties, and are there particular concerns that indicate a need for further study?

JUDGE PRESKA: Thank you, Judge Katzmann. I'll start the ball rolling by opining that it is class actions that generate the most in useless costs to the system. Plaintiffs' counsel have no real client to reign them in, and have no real lodestar. In the mega-cases, perhaps attempting to look diligent but in reality trying to exert the most pressure, plaintiffs' counsel propound massive document requests which, in turn, are litigated to death but still result in the review of twelve zillion gigabytes of information by eighteen trillion defense lawyers. In the smaller cases that are subject to fee shifting, counsel engage in supposed investigation and monitoring to drive up fees. Even in cases of dubious merit, the threat of class certification is virtually extortionate on some defendants, resulting in settlements instead of running the risk of bankruptcy, however slight that risk might be. And, of course, all of this begets more litigation, and more litigation cost.

Now, you think I'm making some of this up. Well, it turns out that there is in fact some empirical evidence, and I would commend to you an article by Professor Sean Griffith of the Fordham Law School called *Private Ordering Post*-Trulia*: Why No Pay Provisions Can Fix the Deal Tax and Forum Selection Provisions Can't*.[6] In it, Professor Griffith notes that a decade ago, only about 39% of the mergers 100 million dollars attracted any litigation.[7] Between 2009 and 2015, however, somewhere between 85% and 95% of those transactions attracted litigation.[8] And, in

---

6 Sean J. Griffith, *Private Ordering Post*-Trulia*: Why No Pay Provisions Can Fix the Deal Tax and Forum Selection Provisions Can't*, *in* THE CORPORATE CONTRACT IN CHANGING TIMES (Steven Davidoff Solomon & Randall Stuart Thomas eds., forthcoming Feb. 2019).

7 *Id.* (manuscript at 3).

8 *Id.*

most cases, the merger claims were resolved for supplemental disclosures,[9] the so-called disclosure-only settlements, and, of course, a big fee for the plaintiff's attorneys. Professor Griffith notes that there is no evidence that these supplemental disclosures affect shareholder voting or in any way affect the outcome of those deals.[10]

Professor Griffith notes also that the Delaware Chancery Court has become very aggressive in policing these disclosure-only settlements, culminating in a decision in *In re Trulia*.[11] There, Chancellor Bouchard announced that disclosure-only settlements would likely be disapproved in Delaware, unless the supplemental disclosure "addresses a plainly material misrepresentation or omission," and he added that it should not be a close call that the supplemental information is material.[12] It sounds like a great advance; right? It's going to cut out a lot of this litigation; right? Not so much. The aftermath of this *Trulia* case illustrates the difficulty in eliminating what has become the merger tax—the litigation and payoff that is attracted by merger litigation. And why is that? That's because of the incentives of the parties.

Professor Griffith notes that in post-*Trulia* cases outside of Delaware, where Delaware law is applicable, the defendant doesn't raise *Trulia* issues. Well, why is that you ask? Once litigation has been commenced, he posits, the defendant corporations essentially run a reverse auction. That is, selling the settlement, with the inevitable attorneys' fees, to the lowest bidder for the broadest relief and the largest class. Plaintiffs' attorneys get fees (the deal tax), and the defendant corporations get a big release and a big tax. Essentially, both sides conspire against the efficiency of the system. Here's the evidence: Professor Griffith notes that in eight of these disclosure-only settlements outside of Delaware after *Trulia*, he raised the *Trulia* issue in four of them—the only party to do so. In the other four, no one raised it. This data seems to confirm the difficulty in wringing the useless costs out of the system and certainly in this particular corner of litigation. There must be other answers to this question, though.

JUDGE RAKOFF: So, if I could add something, and I want to say at the outset that—I'm always very hesitant to disagree with Judge Preska, not only because she's so smart, but because she's a lot bigger than I am—I think Sean Griffith, in that Article, is talking about a very narrow group of cases, mostly in Delaware. Class actions, as a whole, are occasionally extortionate, but often very valuable ways of bringing to light serious problems that no individual litigant could litigate because their individual damages are too small for any lawyer to take them on. So, you have consumer class actions, you have toxic tort class actions,

9 *Id.* (manuscript at 4).
10 *Id.*
11 *In re* Trulia, Inc., 129 A.3d 884 (Del. Ch. 2016).
12 *Id.* at 898.

you have product liability class actions, and many of them expose very serious social and commercial problems that would otherwise not be exposed.

In the securities area, Congress and the Supreme Court have steadily erected barriers to frivolous lawsuits, such as the Private Securities Litigation Reform Act (PSLRA) from Congress,[13] and the various decisions like *Wal-Mart*[14] and *Concepcion*[15] from the Supreme Court, which make it both difficult to bring class actions, period, and certainly raise the high likelihood that frivolous class action lawsuits will be dismissed at an earlier stage. But the most important point I would like to raise is that if lawyers' fees, what we are so concerned with in tonight's program, are being made excessive in class actions, the fault is largely, in my view, with the judge. Rule 23 of the Federal Rules of Civil Procedure gives the judge the opportunity to set the lawyers' fees.[16] And many judges do not take advantage of that, but that is their fault. A judge who is doing his or her job, in my view, will look at those fees. Our colleague, Judge Pauley, for example, in many, many prominent cases has cut those fees very substantially, finding that they were examples of the sort of problems that Judge Preska was mentioning. So, I don't think the problem is so much with class actions, but with the failure of the judges to police those actions.

JUDGE KOELTL: Let me weigh in. The number of disclosure-only class actions is, at least in my experience, fairly small. And it is an area of abuse that can be regulated by the determination that the fee that is given in a disclosure-only class action will be less than the attorneys' lodestar fee for bringing the class action. So that, ultimately, if the benefit to the class is, in fact, very small, the benefit to the lawyer may actually be negative. Class actions do serve an important purpose. There are many, many class actions that survive, and rightfully so, and are eventually settled. They do bring, of course, the possibility of enormous pressure on the defendant to settle without going to trial. In fact, over forty years ago when I was clerking on the court, the judges of the Southern District and the Second Circuit were talking about the hydraulic effect of a class action on the settlement of the case.

Judge Friendly talked about it, Judge Pollack talked about it—so it is out there and it has been out there. What is the consequence of that? There are class actions that really do serve a purpose and that should be certified; they almost surely will settle without going to trial. Though some, a small amount, do go to trial. The pressure to settle is inherently greater. Judge Rakoff is absolutely right that a way of controlling it is to

---

13 Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.)

14 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

15 AT&T Mobility L.L.C. v. Concepcion, 563 U.S. 333 (2011).

16 FED. R. CIV. P. 23.

look carefully at the issue of attorneys' fees, and the economics of this is something that Judge Marrero was trying to focus on in his Essay.

So a judge looks at the attorneys' fee at the end of the case and then the question is, what's the standard? What's the guide that the judge uses in determining what the attorneys' fee should be? Obviously, there is the percentage of recovery, which the judge can look at, and then there is the lodestar which is still used, whether it is the first step or the check against the percentage of recovery. And then the question is: what are the fees that the judge uses as reasonable fees as the starting point for the determinations of a reasonable lodestar? Well, the attorneys' fees have crept up and up and up so that now, the way in which you begin the lodestar, is fees of close to or over a thousand dollars for the lawyers certainly eight—

JUDGE RAKOFF: Per hour.

JUDGE KOELTL: Per hour. Then you multiply by the number of hours. Well, where does that come from? It comes from what other lawyers are charging. It is not only the plaintiffs' lawyers who are getting those fees; it is the defendants' lawyers who are getting those fees. And so you look at the constant drumbeat of financial information that is out there about law firms. Not only plaintiffs' law firms, but also defendants' law firms, and you wonder, as judges, where is it written that lawyers have to make as much as lawyers make? The legal fees in our community are astronomical.

The income that lawyers take home is astronomical so that lawyers can continue to compete among themselves to hire other lawyers from other law firms by paying more and more money. And all of that gets baked into the fees that the plaintiffs' lawyers seek and the fees that the defendants' lawyers charge their clients. And I have wondered whether or not there is not some way that a brake will be placed on all of that, but so far there is no such brake.

JUDGE BERMAN: So, in this regard, I just commend to your attention—and you all probably have seen it—there was a page one, front-page article in the New York Times in 2015 by Jessica Silver-Greenberg and Robert Gebeloff and the title, which you may have glazed over when you read the title, was, *Arbitration Everywhere, Stacking the Deck of Justice*.[17] And I will probably talk a little more about arbitration later, but within this Essay is a discussion of efforts for an attempt that goes back well over a decade. And, according to this Essay, of lawyers—Park Avenue lawyers no less—actually sitting around a room and trying to come up with a way to eliminate class actions.[18] Seriously.

---

17 Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html.

18 *Id.*

Page one of the New York Times. I will give you a quote from the Article. It says,

> More than a decade in the making, the move to block class actions was engineered by a Wall Street-led coalition of credit card companies and retailers, according to interviews with coalition members and court records. Strategizing from law offices on Park Avenue and in Washington, members of the group came up with a plan to insulate themselves from the costly lawsuits.[19]

And the plan that they came up with was to embed arbitration clauses, which are commonplace provisions that say arbitration is mandatory and is your only vehicle to claim resolution, and they banned class actions.[20] So—and this has been a troublesome, I think, development—the Supreme Court has approved in recent cases, in 2010 and 2013, these exclusive mandatory arbitration provisions which happen to have class action bans.

So, I am a little bit troubled by that development. I sort of have been taking another look at class actions. I agree that they, in some ways, can be abusive, but remember that their purpose was to provide a vehicle for small people, individuals, who, on their own, would probably never have brought a lawsuit, and it is a mechanism, after all, to achieve some sort of justice for them. And the statistics are that this coalition has been successful. The Supreme Court has issued a series of rulings that are challenged by many authoritative professors, mostly. So, anyway, the bottom line is: I am not so antagonistic to class actions, and I think that we should take another look at how to regulate them through the court.

JUDGE KATZMANN: We are off to a very good start. I want to turn now to discovery and motion practice specifically. Judge Marrero suggests that the costs of discovery and motion practice of civil litigation have reached levels that may be rendering court proceedings prohibitive in many cases. Judge Koeltl, what is your experience as it relates to that proposition?

JUDGE KOELTL: Costs of discovery, staggering proportions in some cases, yes. In most cases, no. But it really depends on the lens that you are using. Let me give you some background following up on what Judge Marrero said at the outset. There was a conference at Duke in May of 2010. The conference was actually a year and a half in the making. It began in January of 2009 to develop the empirical work that would go into the conference. In that connection, there was the study by the Federal Judicial Center (FJC) of closed cases from 2008. There were also surveys done by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System in Denver,

---

19 *Id.*

20 *Id.*

the Litigation Section of the ABA, and the National Employment Lawyers Association, which is a group of plaintiff employment lawyers. The FJC study found that over 25% of the lawyers who had litigated those closed cases believed that the costs of discovery were disproportionate to the amounts that were at stake in the litigation. That was the low end of the surveys.

The other surveys, by all of the other organizations, found that over 50% of the respondents believed that the costs of litigation, which were primarily the costs of discovery, were disproportionate to the stakes involved in litigation. And the consequences of that, obviously, are that some people are discouraged from even pursuing litigation. When you are in litigation, people enter into uneconomic settlements in order to avoid further costs. If you are a defendant, you settle; if you are a plaintiff, you settle; and, either way, the settlement may not be the optimal amount, based upon what the optimal result of the litigation should be, determined by the amount at stake and the risks of the litigation. But how much is really involved in the average litigation? The FJC study found that the mean for federal litigation, the middle point, was somewhere between two and three depositions taken by the plaintiff and between two and three taken by the defendant.[21] A relatively small number. And the cost of the litigation, the mean, for the plaintiff is—I could ask you for your estimates, but I will not—the amount for the plaintiff was a mean of $15,000.[22]

The mean cost of all of those cases for the defendant was $20,000.[23] In New York that is laughably low. But the New York Times ran a front-page article after that study was done decrying the cost of litigation. And rightfully so. Because what the Times argued in the front-page article was that the average middle-class American family is not prepared to spend $20,000 on litigation—when they are earning $50,000 or less. So people are priced out of the litigation market. And those costs, over ten years, had risen by $5,000. Those figures were $5,000 lower when the FJC did their study for the Boston College conference ten years before. Obviously, at the high end of the spectrum, the costs are much higher. When you get up to the top 5% of litigation that the FJC studied, the cost for the plaintiffs was $850,000 and for the defendants, $991,000.[24] And obviously, when you get up to the 1%, which we often see, you are into millions of dollars, millions and millions of dollars. And all of us can confirm that based on the size of the attorneys' fees applications that we see, which run into the substantial millions of dollars.

---

21 EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 9–10 (2009), https://www.fjc.gov/sites/default/files/materials/08/CivilRulesSurvey2009.pdf [https://perma.cc/KFB6-HSNJ].

22 *Id.* at 35–36

23 *Id.*

24 *Id.* at 35, 37.

The sunk costs in the litigation are millions and millions of dollars when you get to the top 1% of litigation. What does that tell us? It tells us that the costs of litigation, particularly at the high end, are, in fact, staggering. It tells us that the cost for the great bulk of the litigation that actually comes to us is far, far, far less but is still a problem. It is a problem for the average person who wants to bring a lawsuit. It is reflected in the fact that over 20% of our cases in our court are pro se cases. It is reflected in the fact that we have attorneys' fee statutes to assist parties in bringing cases and we have contingency fee arrangements to attempt to make litigation affordable to people who otherwise could not afford it on the plaintiff side.

We also see—and I think increasingly so—people on the defendant's side who are sued who cannot afford to defend themselves. And people sometimes have a misperception about what our caseload is like. The fact that we have 20% pro se litigation, you add the number of Fair Labor Standards Act cases that we have, which is substantial and I think the most substantial category of cases that we have today, you add our civil rights cases, our Title VII cases, our Section 1983 cases, and you have a substantial amount of our docket. The docket that consists of our securities cases, antitrust cases, class actions is, in fact, a relatively small slice of our docket, which is surely less than 10% but consumes a lot of our time.

JUDGE BERMAN: I would like to pick up a little bit on what Judge Koeltl just said. By looking at state cases—because we are very privileged in the federal court to have more modest dockets than the state courts—they have often overwhelming dockets. But nationally, there is an organization of the state courts that keeps statistics on how many cases involve people who are unrepresented by counsel, either as plaintiffs or defendants. In 1970, and for many years previously, less than 1% of the parties in state cases were—these are only civil cases—unrepresented.

In the year for which the state court set up the most recent data, which is 2015, 60% of all the parties were unrepresented. Let us talk about, more specifically, New York. In New York, by far, the largest number of state cases are in housing court, family court, and related types of disputes in state supreme court. In 2015, the single largest group of cases in New York state courts were foreclosure actions. An outgrowth perhaps of the financial crisis but still going on as late as 2015, the last year we have statistics. Of those, 40% of the defendants were unrepresented by counsel and, of course, that should not surprise us.[25] If you can't pay your mortgage how can you afford a lawyer? The City and State of New York and the Bar Association has done a good deal to try to help out the worst, most indigent people in those

[25] *See generally* LAWRENCE K. MARKS, 2015 REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS (2015), http://www.nycourts.gov/publications/pdfs/2015ForeclosureReport.pdf [https://perma.cc/K5G6-T6MU].

situations, but even with their help, 40% are still unrepresented. The same statistics show that the likelihood of an unrepresented party in the State of New York prevailing is only half as good when you're unrepresented than when you are represented by a lawyer. So, it makes a huge difference.

I wanted to give one other statistic, which is on a little different point, which is that the World Bank rates all the legal systems in the world—over 180 countries—in terms of how quickly they handle commercial disputes at the trial level. And this is very much affected by discovery. Discovery is not just a question of cost, it is also a question of delay. So number one in the world in terms of this ranking by the World Bank is Singapore. And these statistics are overall, so they, of course, some cases settle, you know, a week after they have been brought and other cases go on longer, but the average in Singapore is six months at the trial level. The average in the United States—we are twenty-first on the list—is a year and a half. And by the way, they carve out—that is the only country for which they carve out—a separate listing for the Southern District of New York because we have so many international cases, and we do much better than the rest of the United States. Our average is ten months. Again, a lot of those are settlements, but also it reflects, of course, the great efficiency of our judges and—

JUDGE KOELTL: And the efforts of our Chief Judges.

JUDGE BERMAN: Absolutely. And Canada, interestingly enough, is worse than the United States, considerably worse—a little over two years. And the worst, by far, of the major countries is India, which is over six years just at the trial level, and they also have a quite lengthy appellate process. So we are doing okay, but not nearly as well, perhaps, as we could, and I do think discovery, perhaps excessive discovery, is part of the reason for the delay.[26]

JUDGE KATZMANN: Let me move from nature of causes to effects. And this question is for Judge Berman: Judge Marrero suggests that because of the rising cost of litigation, there has been a shift toward alternative dispute resolution mechanisms, such as mediation and arbitration. What is your take on those mechanisms? I know you are a real expert on abuses of the arbitrator's authority.

JUDGE BERMAN: Let me start by saying the order in which I think it is most desirable for an individual to resolve a grievance or a claim. And then with that in order, then figure out costs and what impact cost has. So first, I think beyond any doubt, that an American person living in this country who has a case and wants to litigate in the United States courts should be able to do that. I mean in federal and state courts. That

26 *See, e.g.*, *Efficiency of Legal Framework in Settling Disputes*, WORLD BANK, https://govdata360.worldbank.org/indicators/h075d0fde?country=USA&indicator=686&viz=line_chart&years=2009,2017&compareBy=region [https://perma.cc/M2YC-HLZ3] (last visited Sept. 21, 2018).

is our system. That is the American system. Most often, it is my opinion that the person will get the best shake—a fair shake—in the courts and this also has the added advantage of being everybody's constitutional right.

So I am saying, first, we litigate. Second, in my opinion, I would suggest that either alone or in tandem with litigation, I would welcome the assistance of trained mediators—not arbitrators, but mediators to help resolve many, perhaps any, kinds of cases. So mediation would be my second choice, my second preference in dispute resolution. And it is been mentioned, you should know, that volunteer mediators are active in the Southern District of New York, as well as the Eastern District of New York, through their mediation program, as well as in the Second Circuit Court of Appeals now. So it is my personal experience that mediators are particularly valuable in some kinds of cases; other people would probably pick other kinds of cases. In my experience, they do very well in employment cases, in matrimonial cases, in so-called 1983 Act cases, for example, a case against the City of New York, et cetera. But obviously with the backstop of litigation if the mediation is not successful.

And then, third, and it is last because I do not know of any other ways to resolve disputes institutionally, third is arbitration. My personal views about arbitration have evolved, I think, these days. Arbitration and, especially what I was to referring to before, mandatory arbitration, can be very, very tricky. For one thing, individuals sometimes knowingly, but more often than not, not really knowingly, are agreeing to arbitration as their exclusive remedy in all sorts of ways: when they sign up for cable service, for phone service, or when they get a new job and enter into an employment contract. When they become a franchisee, for example, and when they get a credit card, and there are probably hundreds of other examples of places where you enter into an agreement and you commit to arbitration as your exclusive remedy. You do this either in writing or, as Judge Rakoff will tell you, you do it on the internet, and individuals contract, or agree, to rely on arbitration if they get into a dispute. And indeed, if and when such customers and employees try to sue in court, they will likely be met with a motion to dismiss, because of their preexisting arbitration clause, and that motion is most often successful.

So one problem I have is, obviously, with a mandatory and exclusive arbitration. For another thing, I think that I have arbitration third in my list of three because as I said before, these arbitration clauses very often ban a collective action, such as class actions, and for another thing, these mandatory arbitration clauses increasingly contain their own statutes of limitations and caps on damages. So, it does not directly answer your question about which is the most cost-effective way, that is my priority for dispute resolution and I think that litigation has cost

drawbacks. I think we should try and focus on them, as some of my co-panelists have suggested, and see if we cannot resolve those if other people think, as I do, that litigation is the American way.

JUDGE KATZMANN: Judge Preska?

JUDGE PRESKA: Two quick observations. We have had very good success, as you have heard earlier, in the Southern District in mediating employment cases and Section 1983 cases against the City. Indeed, some of our mediators are here tonight. But it has worked very efficiently. I think it is good for the parties, good for the system. Secondly, there is one additional consideration in these extra-judicial types of resolutions, and that is the issue of confidentiality: some parties are interested in keeping their disputes confidential, and arbitration and mediation often offer that advantage.

JUDGE BERMAN: The other side of that coin, however, is that there is very little transparency in arbitration and mediation. So it is a trade-off and I think we should not forget that litigation serves important public purposes, as well as purposes in resolving disputes between the parties. And one important purpose that litigation serves is to allow the public to become aware of important disputes that often are very much concerned with the public interest. So there are cases, obviously, that you would not want to send to mediation, and there are other cases, though, where litigation, I think, has significant benefits in a democracy and in our system over arbitration, for example.

JUDGE RAKOFF: I just want to add: we try to help pro se litigants in mediation, for example, by appointing counsel for purposes of discovery, by working with law schools to have law schools represent pro se plaintiffs in mediation, particularly in employment discrimination cases, and the Bar can serve a great function by assisting us that way.

JUDGE KATZMANN: Judge Preska, did you want to say anything more about pro se cases?

JUDGE PRESKA: I will just summarize. In the Southern District, we have decided that it is much more efficient to have a pro se office that is very robust, rather than initially reeling all of the cases out to the individual judges. So, there are a couple of pro se clerks at an intake window who receive hard copy pleadings, help with procedural advice, give forms, help the pro se with the PACER system, and the like. Then we have a staff of nine attorneys who review every pro se filing at the front end and essentially try to clean up the pleadings.

For example, substituting the correct defendant—the City of New York for the NYPD—or assisting the pro se plaintiff in figuring out who the persons involved in the supposed assault on the person or the deprivation of civil rights was. They clean up the complaint by sending draft orders to the Chief Judge so that the result is that we have as good a complaint as we are going to have and then we figure out whether or

not it should be dismissed or should not be. But we think it is a much more efficient method.

The second thing we have done very recently is put together, with non-appropriated funds, a pro se legal clinic staffed by two lawyers and a paralegal, and those individuals are there to give legal advice to the pro se litigants. Interestingly, they can also help the litigant decide what the proper forum is. In the last quarter, the pro se clinic has helped 224 client consultations and diverted 26 of those cases to different fora, which is a big help. Interestingly, some 36% of the clinic cases were employment discrimination cases; another 25% were civil rights cases. And, talking about the high cost of lawyers, 73% of the individuals counselled at the clinic had vocational school, some college, or above by way of education. Almost half of them were unemployed, however. So this is very helpful. We pride ourselves on helping our pro se litigants.

JUDGE KATZMANN: In the half hour remaining, let us address solutions. We have got just the panel to do it. Let me start with Judge Koeltl. What is the solution?

JUDGE KOELTL: There are abuses in the system, as Judge Marrero has said. We have recognized over the decades that there are abuses in the system. We have attempted to amend the rules to deal with the abuses. Most recently, the amendments that went into effect in December of 2015.[27] There can be abuses at both ends of the spectrum, the large cases and the small cases. Abuses are associated with some characteristics, such as the inability of lawyers to get along or lawyers who hate each other and want to fight every fight with the lawyer on the other side. That increases the cost of litigation. Sometimes the fact that you will never see that lawyer again will increase the ability to abuse discovery to get at that lawyer, because the principle of what goes around comes around does not exist. There are some areas of the bar that are distinctly cooperative—they are smaller, they deal with cases together all the time, they often see each other. They get along. Sometimes larger firms, the statistics tell us, do not get along so well with each other. Maybe it is because the stakes involved in the litigation are high and the tensions are correspondingly high.

At the other end of the spectrum, there are lawyers who do not have sufficient experience and do not have sufficient confidence, so they have to turn over every rock, because they are so afraid not to turn over that rock, and they are afraid simply to put the case down for trial. If they did decide to go to trial, the case would most likely settle, and settle without all of the discovery that otherwise could have taken place. So, when I set out those issues at both ends of the spectrum, what the 2015 amendments attempted to do was to deal with that situation in at least

---

[27] *See, e.g.*, Supreme Court of the United States, Order of April 29, 2015, https://www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf [https://perma.cc/W37G-S5C8].

four ways.

One, to encourage cooperation among lawyers and to explain that there is, in fact, an obligation of lawyers to cooperate and that is contained in the advisory committee notes to Rule 1.[28] In order to effectuate that, cooperation has to be taught. It has to be taught in law schools; it has to be taught in law firms when lawyers begin to practice. Cooperation is the responsibility of the Bar, and clients should demand it. We are told by general counsel of large corporations that they do not want lawyers who increase the fees by fighting every battle. They really do want their lawyers to cooperate and that reduces the costs of litigation, which is what clients demand.

Second, proportionality in discovery is now included, specifically in the scope of discovery, and there have been some other changes in the scope of discovery to attempt to make it more reasonable.[29] The problem, of course, is that not all lawyers read the rules. And it is, I have come to learn, the unusual course in law school that teaches the scope of discovery. So, we change the rules and people do not always know about the changes. I have people quoting the rules before the amendments all the time. It is a responsibility of law schools to teach practically what lawyers should be doing, not simply at a theoretical level. It is fine to know *Erie* against *Tompkins*,[30] but it is still important to know how to practice law.

We have also, for a third point, changed the responses to Rule 34 for requests to documents in several ways.[31] To prevent lawyers from hiding the ball, such things as if you are withholding documents on the basis of an objection, you have to say that you are withholding documents. You cannot simply say, "to the extent not otherwise objected, responsive documents, if any, will be produced." That tells you nothing. You cannot do that anymore, but lawyers have to read the rules.

And finally, we have changed the rules for remedies for not preserving electronically stored information, so that we have tried to get away from a regime where the object of discovery is to determine if the clerk in Kathmandu did not keep the same invoices that are being kept in the New York office and where that will result in sanctions because you did not preserve that information. So there is a whole new regime, which attempts to make the preservation of electronically stored information and remedies much more reasonable. But none of this will really have an important effect unless law schools teach it, the Bar reads the rules, and the Bar attempts to internalize them. I am a big fan, as you can tell, of the most recent amendments, and I think that, if people

28 FED. R. CIV. P. 1 advisory committee's note to 2015 amendment.
29 FED. R. CIV. P. 26(b)(1).
30 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
31 FED. R. CIV. P. 34(b)(2).

follow them, they can have an important impact.

JUDGE PRESKA: One way that practitioners can help is, I think, the proportionality is one of the most important changes that we have seen and the way practitioners can help the court is by trying to figure that out. Sometimes proportionality might be the number of depositions but, you know, what if it is cost? What if it is, let us just say, a big case? What if it is that the cost of our ESM vendor should be no more than X, who knows, but that is a way where good lawyers can help judges figure out what is correct, and what is appropriate and what is proportional in any particular case.

JUDGE KATZMANN: Judge Rakoff, let me ask you also, as you think about what to do: Judge Marrero discusses cost-shifting and proposes that a British rule should replace the American rule. Any thoughts?

JUDGE RAKOFF: Well, I have one narrow thought and one broader thought. First, you should realize that this has already happened to a remarkable extent. There are no fewer than 120 federal statutes that allow cost-shifting. These include the Civil Rights Act of 1964,[32] the Fair Housing Act,[33] the Fair Labor Standards Act,[34] the Age Discrimination Act,[35] the Voting Rights Act,[36] the Americans with Disabilities Act,[37] the Freedom of Information Act,[38] the Clean Air Act,[39] virtually all whistleblower protection acts,[40] the Foreign Intelligence Surveillance Act,[41] and so forth.

So, this has been tried and I do not have a strong feeling one way or the other, but I would suggest that it is a small part of the solution. It may be a good idea, but I do not think it will really get at the heart of the problem. In Judge Marrero's really fantastic Essay—I think I have the highest compliment I could give, it is the only law review article I have read in about twenty years—he gives, among other statistics, the following very disturbing statistic: between 1985 and 2012, the average billing rate for law firm partners, nationwide, increased from $122 per hour to $536 per hour.[42] Much, much greater than the inflation rate

---

32 Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C. (2012)).

33 42 U.S.C. §§ 3601–19 (2012).

34 29 U.S.C. §§ 201–19 (2012).

35 42 U.S.C. §§ 6101–07 (2012).

36 Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

37 Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)).

38 5 U.S.C. § 552 (2023)

39 42 U.S.C. §§ 7401–7671q (2012).

40 *See, e.g.*, Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified at 5 U.S.C. §§ 1201–22 (2012)); Intelligence Community Whistleblower Protection Act of 1988, Pub. L. 105-272, 112 Stat. 2413 (codified as amended in scattered sections of 5 U.S.C. and 50 U.S.C.); Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat.1465 (codified as amended in scattered sections of 5 U.S.C.).

41 50 U.S.C. §§ 1801–63 (2012).

42 Marrero, *supra* note 1, at 1612.

during that period and similarly for associate lawyers, it went from $79 an hour to $370 per hour.[43] So what is wrong with this picture is why is the free market not operating? And the answer is that our profession is also a guild with very substantial barriers to entry.

So, and looking right at David Rudenstine, you will forgive me, but one of the biggest barriers to entry is the cost of law schools, but there are many others as well. I went back to look at some, prompted by Judge Marrero's Essay, earlier statistics and, in 1950, the percentage of Fortune 500 company budgets devoted to legal services was 1%. By 1980, it was 3%. Now, that is a huge increase. And what did the big firms do? They did not do what would be permissible in a truly competitive market and that is get the firms by bringing competitors to lower their fees. Instead what they did, because it was the only alternative available, was to bring a great deal of the work in-house; all of the routine work came in-house. This, in turn, led the big firms to become ever more specialized, and specialists could charge even more.

So, it became a sort of vicious cycle instead of a real solution. So my own view, which I throw out with very great hesitation because I know it will not attract the support of many people, is that we need to have in the legal profession what we have in the medical profession in the form of nurse practitioners. And we need in the legal profession a group of lower paid people who maybe only go to law school or its equivalent for a year, who get certified in practice after maybe a year or two of practice, and who can charge a great deal less and bring more competitive pressures to bear even on the lawyers who are charging even more.

Now, this was actually tried by statute in the State of Washington, and it got shot down because it was held to be the unauthorized practice of law. And that, of course, is one of the great barriers. And it is an easy fallback for all of us lawyers to say, oh, you know, we cannot have these poorly trained people going through, but I think it is, in fact, one solution. Another solution that has some currency, and I think the two are not incompatible, is much more legal services offered over the internet. You see there is now service for tax returns and wills and stuff like that—the stuff that everyday folks need. They do not need a lawyer who charges $1,200 an hour to make a simple will or do other basic legal services, and they cannot afford at all what even average lawyers now charge. So, my own view is that is the path to go.

JUDGE KATZMANN: I am tempted to ask our two deans. Do you have any responses to that?

PROFESSOR RUDENSTINE: I think the current dean should answer that.

JUDGE PRESKA: I am not a dean but I have a response. We have the most danger in non-lawyers practicing law when someone makes a

43 *Id.*

mistake. With small claims settled by non-lawyer judges, you are going to have many claims left.

JUDGE RAKOFF: Well—it is a different issue, it is not directed at the economic problem. But I think the small claims court is a good example of a court that really is a people's court. And that has been very successful. It has limits, of course, as you know, and you can only have a claim up to such and such an amount.

JUDGE PRESKA: Right—

JUDGE RAKOFF: But if any of you have ever had a matter in small claims court, it takes an evening to get resolved. You are given the choice of either going before an arbitrator, who is usually a lawyer but not a judge, or going before a judge. The difference is that the judge cannot see you until, like, ten o'clock at night, and the arbitrator can see you now. And, of course, a lot of the cases there get settled right there on the courthouse steps, so to speak. I am not suggesting that the kind of junior lawyers, or would-be lawyers, will not make mistakes and I am sure there will be a nice industry of malpractice, but, of course, we have a nice industry of malpractice even with lawyers who have their full legal degree. I do think it would make a huge difference for everyday folks who literally cannot afford any kind of lawyer and yet have genuine legal problems.

JUDGE PRESKA: One other quick comment.

JUDGE KATZMANN: Sure.

JUDGE PRESKA: Very future looking, I was surprised to learn that, particularly, California has used various programs to help pro se litigants file complaints. As you go in, it is almost a decision tree, asking what is the subject matter of your claim? What are you complaining about? And it assists the pro se litigant in preparing a complaint and there are apparently all sorts of vendors out there doing it in California. Who knew?

JUDGE KATZMANN: Let me turn now to Judge Berman. Looking at the solutions and remedies, one proposal that has been offered is this idea of specialization. That judges have a wealth of experience in particular areas and that case assignments should reflect that specialization. What is your view of that proposal?

JUDGE BERMAN: So I am personally, although not strongly, not really inclined to be in favor of judge specialization. I know other people will disagree, and I am easily open to being persuaded on this subject. But here is my principal concern. My fear is that the litigants will, or might, get the idea or have the perception that the judge does these cases maybe on the other side as it were, so here is an example. Suppose somebody comes to the Southern District of New York as a federal judge and that person has thirty years of experience in defending corporations and securities law cases. And so, suppose further that we specialize and we say, okay, this judge is going to do our securities cases

because no doubt he or she will have a lot of experience and knowledge in that field. So, I am not sure that the plaintiffs' class action or plaintiffs' counsel is going to be particularly comfortable about that. Not to say that, you know, judges are not fair and do not go out of their way to be fair, but there is a perception, I think, in the specialized part that you might get stuck.

So, having said that, as I was leaving family court to come to federal court, specialization was the rage. We had about seven or eight categories of cases to do as family court judges and for the longest time—this is about 1998, 1999—the judge did all of those cases. So, the judge did the criminal cases, which were the juvenile crime cases; the judge did abuse and neglect; the judge did orders of protection, adoption, and whatever else we did. And then they decided. And this was less, I think, a financial expense than a docket problem. The dockets in state court and in family court in particular explode exponentially, so they thought this might be a way of getting a handle on the docket and they went to specialization. So the jury, I have to say, is out on whether that really is the way to go. And here are some practical problems.

First of all, some judges want to do the criminal cases and if you specialize, only one or two in Queens Family Court is going to do them. So you have other judges not as happy doing some of the other categories of cases. And I think that is kind of the principal problem. Incidentally, how they have decided to overcome that is to rotate. So, you are a juvenile crime judge for two years, then you become an abuse and neglect judge for the next two years, et cetera, et cetera. So, you know, I would be happy to hear, I am eager to hear what people's opinions are about specialization. I tend toward the negative, but not the strong negative. Maybe someone has had a different experience.

JUDGE KATZMANN: We have five minutes left. Let us have a lightning round and you can offer any comment on Judge Berman's views. I will keep each of you to a minute and a quarter. Judge Rakoff first.

JUDGE RAKOFF: I agree with Judge Burman, and I think there is also a serious jurisprudential problem in specialization. What is the most reversed circuit in the United States? It is the Federal Circuit. It used to be the Ninth Circuit, but they have been completely outdone now by the Federal Circuit, which is the court, the only specialized, or one of the very few specialized federal courts that deals with all patent appeals. And, if you look at the reversals by the Supreme Court, most of them have been because the Federal Circuit has created some doctrine that is totally at war with the development of the law generally.

Putting it in terms that we all will remember from law school: the law is a seamless web, and I think there is a lot of truth to that, and ideas that carry over from one area to another are the way the law advances. A specialized court has tunnel vision by definition, and the result is that

they go off on their own frolics and they really do not often accord with where the law as a whole is moving. So, in addition to the very practical problems that Judge Berman referred to, I think there is a serious jurisprudential problem as well.

JUDGE KATZMANN: Judge Preska?

JUDGE PRESKA: I would like to, on behalf of my colleagues, admit that we are indeed, as it has been pointed out by Judge Rakoff, part of the problem here. In my view, both the Congress and the Supreme Court, through cases and rules, have been trying to tell us for a very long time that we need to get a handle on these costs. Now, of course, the Supreme Court said that *Twombly*[44] and *Iqbal*[45] were not about the discovery costs, they were about the costs, as far as I can tell, and the new idea of prepared—it is not new—proportionality. But putting proportionality right up front and center is another message to us that we have got to get on top of it. It started with the initial requirement of initial pre-trial conferences. So, we need to get on top of it, but we really need the practitioners' help. If we do it, it is going to be with a meat cleaver. But you know your cases and you can do it in a far more nuanced fashion and that is what we look to you for.

JUDGE KATZMANN: Judge Koeltl?

JUDGE KOELTL: I am opposed to specialization. I think that part of our pride as judges is our ability to decide across different areas of expertise. Judge Weinfeld used to say that every case is interesting, every case is important. If you have specialization what it comes down to is you are going to tell some litigants that some cases are more important than others. That sends a very bad message.

We do have a patent pilot program that Congress set up, and we are one of the participating courts. There are some judges who will take patent cases if a judge who is not a patent pilot judge wants to give it to a patent pilot judge. We will see how that comes out after ten years. That is the time frame.

I could not agree more with what Judge Preska said. One of the other messages from the Duke conference was that lawyers wanted early and active judicial case management. They wanted to see a judge; they wanted a judge who would help them to manage the case early and often. Some of the rules changes were meant to encourage that. We have a responsibility to do that and you all can help us.

JUDGE KATZMANN: Judge Berman?

JUDGE BERMAN: So, my final word has to do with arbitration. I do not want to leave you with the impression that I do not think arbitration is valuable. I think it is very valuable in our system in this way—I think, fundamentally, arbitration should be voluntary. And I think it should be

---

44 Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

45 Ashcroft v. Iqbal, 556 U.S. 662 (2009).

voluntarily entered into between parties of equal power; so to speak. I think, in that context, we have some terrific arbitrators in New York and in the country. In that context, if parties want to resolve their grievances separately, outside the judicial system, be my guest. There are reasons that they may want to do that. But I think it is when you make it mandatory that you have this imbalance between the strong and the weak, and that is what I was objecting to.

JUDGE KATZMANN: Thank you. I want to thank the panel. We are done exactly on time. Just a wonderful panel and most of all, I want to thank Judge Marrero for his extraordinary Essay, which was really the reason for all of us getting together. So, thank you.