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International Society of Barristers Quarterly

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International Society of Barristers Quarterly

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John W. Reed, *Editor*

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FACING THE FUTURE†

Otto R. Skopil, Jr.*

I appreciate the opportunity to talk about Facing the Future. It is a subject in which we all have a direct interest because it will affect each of us. I firmly believe that the public has entrusted the judicial process to the legal profession, and it is the responsibility of both bench and bar to fulfill that trust by looking into the future and determining what long-range plans will meet the needs of society.

Change is coming, whether we accept it or not. It is my hope that we can contribute constructively to the changes and not react in accordance with this vignette: A question was presented to a group of federal judges. "How many judges does it take to change a light bulb?" The immediate and overwhelming response was, "Change? We don't like change!"

I thought I would spend a few minutes discussing the history of the creation of the Long Range Planning Committee for the Federal Courts, after which I will discuss some of the general recommendations of the committee and then get into some specifics. The comments that I will make are purely my own personal reaction to the committee's work and in no way articulate the long range plan of the federal courts. That plan will be finalized only when the United States Judicial Conference specifically approves the recommendations made by the committee.

HISTORY OF THE LONG RANGE PLANNING COMMITTEE

The creation of the Long Range Planning Committee of the United States Judicial Conference was largely attributable to two facts: First, the Federal Courts Study Committee, a committee created by an act of Congress, submitted its report in 1990 and recommended that the federal courts engage in a long range planning process; and, second, the workload of the federal courts has increased substantially over the last fifty years. To illustrate, I mention a few statistics:

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† Manuscript prepared for address delivered at the Annual Convention of the International Society of Barristers, Dorado Beach Resort, Dorado, Puerto Rico, March 7, 1995.

* Senior Judge, United States Court of Appeals, Ninth Circuit; Chairman, Committee on Long Range Planning, Judicial Conference of the United States; Fellow, International Society of Barristers.

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	1940	1994
District Court filings	68,135	235,994
District Court judgeships	191	649
Court of Appeals filings	3,505	48,815
Court of Appeals judgeships	57	167

Straight-line projections based on these numbers would give us over one million district court filings, 2,500 district court judgeships, 325,000 appellate filings, and nearly 1,600 appellate judgeships by the year 2020.

Chief Justice Rehnquist created the Long Range Planning Committee in 1991 and appointed seven members, consisting of four appellate judges and three trial judges. The appellate judges were William Feinberg of the Second Circuit, Edward Becker of the Third Circuit, Harlington Wood of the Seventh Circuit, and Skopil from the Ninth Circuit. The trial judges were Elmo Hunter of Missouri, Larry King of Florida, and Sarah Barker of Indiana.

After its first meeting, the committee requested that Chief Justice Rehnquist appoint two additional members, namely a magistrate judge and a bankruptcy judge. As a result, Magistrate Judge Virginia Morgan of Michigan and Bankruptcy Judge Tom Small of North Carolina joined us. The total combined judicial experience of the members of the committee exceeded one hundred sixty years.

The charge given to the committee was to:

(1) coordinate the planning activities of the judiciary;
(2) promote, encourage, and coordinate the planning activities within the judicial branch;
(3) advise and make recommendations regarding planning mechanisms and strategies, including the establishment of a coordinated judicial planning process;
(4) coordinate, in consultation with and participation by other committees, members of the judiciary, and other interested parties, the identification of emerging trends, the definition of broad issues confronting the judiciary, and the development of strategies and plans for addressing them;
(5) evaluate and report on the planning efforts of the judiciary;
(6) prepare and submit for Judicial Conference approval, a long-range plan for the judiciary and periodic changes to that plan after consultation with other conference committees, judges, and interested parties.

In addition to the limitations inherent in the committee's charge, other limitations on committee action exist. The principal one is that there is no chief executive officer in the federal judiciary. Although one might expect the Chief

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Justice of the Supreme Court to have some authority similar to that of a chief executive officer of a private corporation, such authority does not exist. Each court, each judge, is independent, and the chief justice is powerless to direct any specific action by any judge or court. In addition, as we all know, the federal courts are courts of limited jurisdiction, and Congress determines both the jurisdiction and the resources of these courts.

It becomes obvious: All policy and procedural changes require a consensus, and changes will occur not in a radical manner but in small increments.

FRAMEWORK OF COMMITTEE ACTION

Those of us on the committee immediately recognized our lack of experience in long-range planning and decided to approach our task in four phases: (1) educating ourselves on long-range planning; (2) gathering information from judges, both state and federal, from the bar, and from academics; (3) defining the issues with which the committee should be concerned; and (4) developing a long range plan to be submitted to the United States Judicial Conference.

In the education process, the committee relied upon futurists and long range planning experts in the private sector as well as the volumes of material that have been written on long range planning at the corporate level.

The information gathering phase involved sending inquiries to members of the Senate and House judiciary committees, all of the other United States Judicial Conference committees, every federal judge, many state judges, members of the bar, and people in the academic world, which resulted in the submission of some eight hundred issues for the committee's consideration.

Realizing that we could not consider eight hundred issues, we decided to classify the issues into four main categories—structure, governance, jurisdiction, and size of the federal judiciary.

In our report, we made 101 recommendations.

RECOMMENDATIONS

As we developed our recommendations, the committee was guided by three considerations or principles:

(1) the effect of any recommendation upon the consumers, litigants, and members of the bar;

(2) the cost of litigation and the efficiency of the process in providing timely resolutions of disputes; and

(3) the need to maintain the state and federal courts as an integrated system for the delivery of justice in the United States. The federal courts should complement, not supplant, the state courts.

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In reviewing with you some of the recommendations, I will first describe three of our general recommendations. Then, realizing that you might not be as interested in structure and governance, I will turn to more specific recommendations affecting jurisdiction and trial and appellate procedures. I hope you will offer comments or raise any questions you may have.

General Recommendations

The essence of the general recommendations made by the committee lies in our first recommendation: Congress should commit itself to conserving the federal courts as a distinctive judicial forum of limited jurisdiction in our system of federalism. Civil and criminal jurisdiction should be assigned to the federal courts only to further clearly defined and justified national interests. Congress should leave to the state courts the responsibility for adjudicating all other matters. The goal of limited jurisdiction is doomed unless Congress embraces this fundamental philosophy.

Our second recommendation is closely linked to the first: In principle, criminal activity should be prosecuted in a federal court only in those instances in which state court prosecution is not appropriate or where federal interests are paramount. More specifically, Congress should allocate criminal jurisdiction to the federal courts only in relation to the following five types of offenses:

(1) The proscribed activity constitutes an offense against the federal government itself or against its agents, or against interests unquestionably associated with a national government; or the Congress has evinced a clear preference for uniform federal control over this activity.
(2) The proscribed activity involves substantial multistate or international aspects.
(3) The proscribed activity, even if focused within a single state, involves a complex commercial or institutional enterprise most effectively prosecuted by the use of federal resources or expertise. When the states have obtained sufficient resources and expertise to adequately control this type of crime, this criterion should be reconsidered.
(4) The proscribed activity involves serious, high-level or widespread state or local government corruption, thereby tending to undermine public confidence in the effectiveness of local prosecutors and judicial systems to deal with the matter.
(5) The proscribed activity raises highly sensitive issues in the local community, and federal prosecution within the federal system is perceived as more objective.

Again closely linked to the first recommendation, the committee's sixth recommendation addresses civil jurisdiction in a general way: Congress should

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exercise restraint in the enactment of new statutes that assign civil jurisdiction to the federal courts and should do so only to further clearly defined and justified federal interests. Federal court jurisdiction should extend only to civil matters that meet one of the following criteria: arise under the United States Constitution; deserve adjudication in a federal judicial forum because the issues cannot be dealt with satisfactorily at the state level and involve either a strong need for uniformity or a paramount federal interest; involve the foreign relations of the United States; involve the federal government, its agencies or officials as plaintiffs or defendants; involve disputes between or among the states; or involve substantial interstate or international disputes.

Diversity Jurisdiction

Turning to recommendations that will have some specific effect upon each of us, I begin with one that is sure to interest you, our seventh recommendation: Congress should diminish the impact of diversity jurisdiction on the federal courts' dockets by eliminating diversity jurisdiction, except in actions involving aliens, interpleader actions, and cases in which the petitioner can clearly demonstrate the need for a federal forum. Diversity jurisdiction should also be retained for some consolidated "mass tort" litigation, which will require Congress by statute to relax the traditional "complete diversity" requirement in order to promote effective consolidation of related cases.

Alternatively, Congress should seek to reduce the number of federal court proceedings in which jurisdiction is based on diversity of citizenship through the following measures:

(A) Eliminate diversity jurisdiction for cases in which the plaintiff is a citizen of the state in which the federal district court is located;

(B) Undertake a full-scale study, including pilot projects as appropriate, to determine the desirability and impact of shifting to state courts appellate review in diversity cases in which review primarily involves the interpretation of state law;

(C) Adopt other limitations on diversity jurisdiction such as

(1) requiring the plaintiff to make a more rigorous showing that the amount in controversy requirement has been satisfied;

(2) raising the amount in controversy level and indexing the new level to the rate of inflation; and/or

(3) excluding punitive damages from the calculation of whether the amount in controversy requirement has been satisfied.

Comment: Diversity jurisdiction currently accounts for almost one of every four civil cases filed in the federal district courts, about one of every two civil trials, about one of every ten appeals, and more than one of every

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ten dollars in the federal judicial budget. The committee's recommendation nonetheless does not propose the total elimination of the diversity docket, for a couple of reasons. First, most commentators believe that the federal courts should retain diversity jurisdiction in actions involving aliens or interpleader, and in mass tort litigation. Second, many believe that the historical purpose of diversity jurisdiction still has limited viability. The recommendation seeks to accommodate that purpose by maintaining diversity jurisdiction in those cases in which the petitioner can clearly demonstrate a reasonable need for a federal forum.

Eliminating most of the diversity docket may have to take place gradually over time.

Agency Action

Congress and the agencies concerned should take measures to broaden and strengthen the administrative hearing and review process for disputes assigned to agency jurisdiction, and to facilitate mediation and resolution of disputes at the agency level.

Comment: An example of the effect of this recommendation would be an improvement in the adjudicative process for Social Security disability claims, limiting the scope of appellate review to Article III courts. Social Security cases currently receive more reviews than do capital punishment cases. The present procedure involves a determination by an administrative law judge, a review by the board, with an appeal generally to a magistrate judge, then to the district court, then to the circuit court of appeals, and, at least theoretically, to the Supreme Court. It takes a disability claimant five to seven years to know whether he or she is in fact disabled. The expectation is that our recommendation will result in the elimination of appellate review at the circuit court level on substantial evidence issues, but discretionary review by both the circuit courts and the Supreme Court on legal questions would remain. Also, it is hoped that our recommendation would improve the process for the evaluation of employment discrimination cases by the EEOC, confining judicial determination to the state courts.

State Law Questions and Workplace Injuries

Congress should refrain from providing federal district court jurisdiction over disputes that primarily raise questions of state law or involve workplace injuries where the state courts have substantial experience. Existing federal jurisdiction in these matters should be eliminated in favor of dispute resolution or compensation mechanisms available under state law.

Comment: The underlying thought of the committee was that Federal Em-

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ployer Liability Act and Jones Act cases would be handled more appropriately by the state system, resulting in uniformity in compensation for workplace injuries regardless of where the injury occurs. The processes should not be different simply because a worker broke a leg on a dock or railroad instead of in an industrial plant. This recommendation also would apply to routine claims for benefits under ERISA except when the application or interpretation of federal statutory or regulatory requirements is at issue.

Growth of the Judiciary

The growth of the Article III judiciary should be carefully controlled so that the creation of new judgeships, while not subject to a numerical ceiling, is limited to the number necessary to exercise the jurisdiction conferred on the federal courts.

Comment: In response to an ever-increasing judicial workload, some (including legal scholars, representatives of the bar, and, at times, the federal judiciary itself) have seen additional judgeships as the key to ensuring continued access to federal justice. The potential risks of that approach, however, should not be ignored. A future of unrestrained growth would alter irrevocably the nature of the judicial institution and impose a substantial burden on the federal treasury in terms of additional costs for support personnel, logistical support, and space and facilities. It costs about $800,000 to establish a new judgeship and about $1 million each year to maintain one judgeship. The best strategy for ensuring both access and excellence is to tread a middle path that rejects unlimited expansion yet avoids the inflexibility of a zero growth policy.

Review of Agency Action and Article I Court Decisions

In general, the actions of administrative agencies and decisions of Article I courts should be reviewable directly in the regional court of appeals. For those cases in which the initial forum for judicial review is the district court, further review in the court of appeals should be available only on a discretionary basis except with respect to constitutional matters and questions of statutory or regulatory interpretation.

Comment: The committee felt that substantial evidence questions regarding the sufficiency of an agency's factual findings should carry only one opportunity for review as a matter of right. Consequently, a party to an agency case that has been considered in a district court should have further review in the court of appeals only with respect to constitutional questions or the interpretation of relevant statutes or regulations unless the court of appeals grants leave to appeal on other issues.

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Pro Se Litigants

Steps must be taken to confront the growing demands pro se litigation places on the federal courts.

Comment: The statistical fact is that pro se cases filed in the district courts represent approximately twenty-three percent of all case filings. These cases place great stress on the resources of the court. The district court is faced with numerous practical difficulties in dealing with unrepresented litigants. A large percentage of cases are without merit, and far too much judicial time is spent on determining which claims are meritorious. The great majority of these cases are civil rights cases brought by state prisoners alleging that conditions of their confinement constitute a deprivation of their civil rights. The states should implement procedures to address these complaints at the administrative level. Some states have made tremendous strides in making such administrative procedural remedies available to prisoners.

Shifting of Litigation Costs

The federal court system should continue to study possible shifting of attorneys' fees and other litigation costs in particular categories of cases.

Comment: The committee discussed at some length the adoption of the "loser pays" or English rule for shifting attorneys' fees for all federal claims. Currently, there appears to be strong opposition to this concept, many feeling that it would deprive a significant number of litigants of access to the courts.

Alternative Dispute Resolution

District courts should be encouraged to make available a variety of alternative dispute resolution techniques, procedures, and resources to facilitate the just, speedy, and inexpensive determination of civil litigation.

Comment: The committee felt that a fair settlement by the parties, with or without court involvement, is the preferable resolution of litigation. Congress, some two years ago, mandated that pilot programs be set up in ten district courts, five of which would be based on voluntary submission to some form of alternative dispute resolution and the other five involving mandatory ADR. Contact with those ten districts indicated an overwhelming approval of ADR programs under the guidance of the courts. Within the next year, the Rand Corporation is to evaluate and report to Congress the result of its study of the ten pilot programs.

Threshold for Considering Additional Changes

If innovations in court procedures and efforts to control jurisdictional expansion do not stem the rise in caseload, more radical changes may be re-

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quired to allow the federal courts to carry out their mission. For these reasons, the Judicial Conference should monitor a wide variety of statistical and other indicators to determine whether trial and appellate court structures remain adequate to meet the stress of increasing caseload. A representative but nonexclusive group of statistical signposts might include the following:

- total number of filings in the courts of appeals and district courts;
- number of judicial circuits and corresponding increases in intercircuit case law conflicts;
- number of appellate judges in an individual circuit and corresponding increases in intracircuit conflicts;
- average number of merits participations per judge in the courts of appeals;
- ratio of criminal to civil trials;
- average number of lengthy trials (civil and criminal) per court;
- number and percentage of cases in which trials are not held;
- average number of trials (civil and criminal) per judge;
- average number of criminal filings per judge;
- rate at which district court judgments are reversed on appeal;
- number and percentage of civil cases pending longer than three years;
- number and percentage of motions pending longer than six months;
- number and percentage of bench trials in which a decision has been pending longer than six months;
- median disposition time for courts of appeals and/or district courts;
- percentage of district or magistrate hours spent on the bench;
- average number of defendants per felony case;
- number of staff assigned to U. S. Attorney's office; and
- number of attorneys in active federal district court practice.

Restructuring Appellate Review

There are three basic approaches to restructuring appellate justice. One would be to increase the number of judicial officers responsible for adjudicating appeals. The second would be to make appellate review discretionary. The third would be to limit the number of judges required to decide an appeal. Within these approaches, we might add to the number of appellate officers by increasing the number of circuit judgeships or by expanding the role of adjunct judicial officers such as appellate commissioners, add a new tier of appellate tribunals between the district and circuit courts and provide for discretionary review in the circuit courts, assign certain appellate functions to district judges through an appellate term or an appellate division at the district level, and/or reduce the size of appellate panels to two judges and allow single judges to review certain types of cases. The committee suggested that certain

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programs be instituted first on a pilot basis and perhaps be limited to certain categories of cases, such as diversity actions and Social Security disability claims.

Limiting the Right to Appeal

If conditions seriously deteriorated in the courts of appeals, it might become necessary to consider some limitations on the right to appeal. The right to appeal could be eliminated completely in certain types of cases, such as administrative cases in which the district court reviews agency action and "federal question" cases in which state law issues predominate. In all (or some) other cases, appellate review could be discretionary. Outright elimination of appellate review should be considered only for cases in which the "law declaration" function of appellate review is not at stake.

Making the Best Use of Trial Court Resources

A drastic increase in the workload of district courts would require significant changes in the use of judicial resources. The committee suggested changes that might include requiring judges to be more readily available for temporary assignments outside their districts and authorizing adjunct judicial officers of the district courts (magistrate judges and bankruptcy judges) to conduct a wider variety of proceedings. For example, magistrate judges who currently conduct civil and non-felony criminal proceedings might play a greater role in felony prosecutions, including the conduct of trials and/or sentencing. Similarly, bankruptcy judges might be assigned cases on the regular district court docket, such as those involving complex commercial transactions in which their background and experience would be particularly relevant.

Limiting Jurisdiction

If case load volume renders the courts of appeals and district courts unable to deliver timely, well-reasoned decisions and speedy trials with procedural fairness, consideration should be given to more extensive reductions in federal court jurisdiction, such as the restoration of a minimum amount in controversy requirement for federal question cases, the elimination or substantial curtailment of the jurisdiction of district courts in categories of cases that may be appropriately resolved in federal administrative or state forums, and granting to the district courts the authority to decline jurisdiction in civil and/or criminal cases in which state courts have concurrent jurisdiction and the federal interest is minimal. The Judicial Conference would develop standards for the district courts to follow in declining jurisdiction.

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Judicial Vacancies

In recent years, the courts have been required to operate with far too many judgeship vacancies. Vacancies at times have reached approximately twenty to twenty-five percent of the authorized positions. If this persists, the political branches may have to consider alternative methods for appointing Article III judges that otherwise would be unacceptable. For example, the President and Senate might each be authorized to act alone in filling judgeships that remain vacant due to inaction by the other branch in confirming or nominating new judges. Judicial nominations might be confirmed automatically or recess appointments continued in effect if the Senate fails to act on nominations within a prescribed time, and the Senate might appoint judges sua sponte if the President fails to submit a nomination within a prescribed period after a vacancy arises. If the President and the Senate fail to act to fill a vacancy within a prescribed period of time, the Judicial Conference might designate a temporary judge if the affected court could demonstrate an urgent need that cannot be met through existing resources.

PERSONAL OBSERVATIONS

I offer a few personal thoughts as to a possible future scenario for our judicial process. From my observation over the last twenty-three years as a federal judge and over the last fifty years as a member of the legal profession, I am convinced that if Congress continues to increase the jurisdiction of the federal courts, in both the criminal and civil areas, our system will not survive as it is now structured. Radical changes will be required to fulfill the needs of our society.

I believe that in the not-too-distant future all circuit courts of appeals will be eliminated and Congress will establish a national court of appeals with geographical divisions. This will permit greater flexibility in allocating the necessary judges to various geographical regions as needs change. Presently, many of the circuits are overburdened while others have per judge workloads far below the national average. The establishment of a single national court of appeals also would eliminate any and all conflicts between the circuits.

It appears to me that if Congress continues to add to the civil and criminal jurisdiction of the federal courts, specialized courts will be required. As the result of recent congressional enactments, the criminal docket occupies about eighty percent of a federal judge's trial time. The civil litigants, who in most instances are the people picking up the tab for the entire system, are receiving second-rate treatment. It seems obvious that the civil litigant is entitled to the same speedy trial as the criminal defendant. In order to provide timely resolu-

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tion of civil litigation, it will become necessary to provide specialized courts for the handling of civil cases alone and separate courts for the criminal cases.

Tort reform is a major topic today, and I will add my views on that. As we all know, Congress is contemplating vast changes in the litigation of tort claims. This obviously has stemmed from the large monetary awards handed down in many cases. On similar facts, the awards vary greatly from one court to another. To overcome this lack of uniformity, I would envision that at some time in the future the jury's deliberations will be limited to liability and the court will determine damages. Also, in view of the many cases that are filed with the hope of settlement on a nuisance value basis, I believe that we will see the adoption of the English rule requiring the loser to pay the costs of litigation. This will eliminate many frivolous suits.

Punitive damages must be reconsidered. As we all know, the purpose of punitive damages is to punish and deter. There is no logical reason why the injured party should receive any more than compensatory damages. For that reason, I suggest that any punitive damages award not be given to the injured party but be paid into the court for distribution to the state. The state would use the funds for education or such other need as is apparent at the time.[1]

In the increasingly important alternative dispute resolution area, I can envision the creation of community alternative dispute resolution centers. Every contemplated civil or criminal case would first proceed through the ADR center as a prerequisite to filing in either the state or federal court. Panel members would come from the local community and would have expertise in various specialized fields.

Technology is opening many new possibilities. The use of videos for arguments on appeal is already in the development stages. At some time in the future, all arguments on appeal will be by video, thus reducing the costs of appeals by eliminating the necessity for attorneys' travel. In addition, I believe that many future trials, particularly court trials without juries, will also employ video.

Trials for injuries resulting from automobile accidents may become a thing of the past. I venture to say that each automobile will be equipped with something similar to the black box used in airplanes and liability will be ascertained and damages awarded in accordance with programmed guidelines.

Our profession will undergo drastic changes within the next fifty years. If we remain objective, we may be able to formulate many of those changes. If we do not assume that responsibility, the legislative branches of our government will control our future.

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[1] *See* Cotchett, *Punitive Damages: They Belong to the Public,* 28 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 445 (1993) [Ed.].

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THE PROLIFERATION OF INDIVIDUAL JUDGES' PRACTICES†

Myron J. Bromberg*
Jonathan M. Korn**

INTRODUCTION

The original purpose of the Federal Rules of Civil Procedure ("Federal Rules") was to promote consistency and efficiency within the federal judicial system. These uniform rules were intended to provide practicing attorneys with consistent procedures for use in federal courts. Since their enactment in 1938, the Federal Rules have been refined to meet the changing needs of the federal court system. In recent years, however, individual judges, rather than local district courts or the Supreme Court, have promulgated their own "rules," "procedures," and "practices."[1]

The Federal Rules of Civil Procedure were intended to be supplemented to adjust to local conditions within the federal court system. However, the goals of the Federal Rules require that individual judges not be allowed to either amend the Rules or adopt their own inconsistent rules. Unfortunately, individual judges have adopted "practices" which lack consonance with either the Federal Rules or local district court rules. Individual judges' procedures in the area of motion practice, specifically pre-motion requirements, make it difficult, expensive, and occasionally impossible for litigants to file pretrial motions, and inherently conflict with the Federal Rules. Moreover, these pre-motion procedures raise serious due process concerns that have been ignored in the inexorable drive toward increased judicial management. Planned and balanced judicial management should be encouraged, but not to the point of either conflict with the Federal Rules or infringement upon procedural due process.

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[1] *Cf.* FED. R. CIV. P. 83. This Rule states in pertinent part: "Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules." *Id.*; FED. R. CIV. P. 83 advisory committee note ("[The Rule] attempts to assure that the expert advice of practitioners and scholars is made available to the district court before local rules are promulgated."). Rule 83 refers only to individual judges' "practices." However, case law and authors use the terms "rules" and "procedures" without differentiation in this context.

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THE FEDERAL RULES OF CIVIL PROCEDURE —THE INTERPRETATION OF RULE 83

The goals of the Federal Rules were to promote decisions on the merits and to eliminate procedural hurdles. The drafters of the Federal Rules allowed a significant degree of judicial discretion in order to accomplish these goals. In recent years, however, exercise of judicial discretion has begun to interfere with deciding cases on the merits, and threatens to undermine the objectives of the Federal Rules of Civil Procedure.

The Federal Rules have accomplished the goals of the drafters, who "sought to air out the courts and let the sunlight of substance shine into them. . . ."[2] Most significantly, the Federal Rules transformed the federal courts into a less imposing place for both attorneys and litigants. However, despite cries of a litigation explosion, the number of civil cases entering the federal courts has decreased in recent years, while the size of the criminal docket has expanded as a result of increased crime and the trend toward the "federalization" of crimes that were formerly state actions. Most district courts cite increases in criminal filings, lack of funds, and judicial vacancies as the main causes of any backlog in their courts.[3]

Despite these factors, a perceived "litigation explosion" has energized a movement advocating increased judicial management—sometimes by restricting access to the federal courts in order to lessen the burden.[4] Instead of expanding the court system or improving its efficiency, advocates of this movement have altered or interpreted the Federal Rules to increase the judicial management of litigation. This trend toward increased judicial management is further evidenced by the recent amendments to the Federal Rules, as well as the district courts' Expense and Delay Reduction Plans, mandated by the Civil Justice Reform Act of 1990. Increased judicial management of the litigation process, however, has created conflicts with both the letter and the spirit of the Federal Rules.

Increased judicial management has to an extent been implemented through amendments to the Federal Rules. The need for amendments was anticipated by the drafters, who realized that the Federal Rules must respond to changes

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[2] Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1906 (1989).

[3] *See* JUDICIAL CONFERENCE OF THE UNITED STATES, CIVIL JUSTICE REFORM ACT REPORT, DEVELOPMENT AND IMPLEMENTATION OF PLANS BY EARLY IMPLEMENTATION DISTRICTS AND PILOT COURTS (1992) (indicating that 17 of 34 district court advisory committees cited failure to promptly fill judicial vacancies as impediment to "expeditious civil case processing").

[4] *See* 12 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 3152 (2d ed. 1987). "At times, district courts have used their power under Rule 83 . . . to escape from the arduous but essential task of case-by-case analysis." *Id.* (quoting Note, *Rule 83 and the Local Federal Rules*, 67 COLUM. L. REV. 1251, 1252 (1967)).

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in the court system. Individual judges, however, by adopting a broad view of the discretion afforded them by the rules, especially Rule 83, have created their own "practices," increasing judicial management, sometimes to the point of inhibiting decisions on the merits.

Individual judges' practices present a threat to the goals of the Federal Rules and to the constitutional rights of litigants. Rule 83 of the Federal Rules permits the promulgation of local rules to respond to conditions in individual district courts. Charles Clark, the reporter for the original Federal Rules, explained Rule 83 as follows: "Some such provision affording flexibility to the rules is necessary if they are to be adjusted easily and without friction to the differing habits and customs of lawyers throughout the country."[5]

Today, however, local district court rules and individual judges' procedures govern far more than "differing habits and customs."[6] The drafters of the Federal Rules never intended that judicially-created rules provided for by Rule 83 do more than regulate the "machinery of running" the court.[7] The drafters never anticipated the proliferation of individual judges' practices and procedures. They assumed that in order to create a local district court rule under Rule 83, a majority of judges of the district would have to approve of such a measure. There was no discussion of "individual judges' rules."

The advent of individual judges' rules can, however, be traced to the 1985 amendment of Rule 83, which now provides:

> Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public. In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.[8]

Under the amended rule, individual judges can promulgate their own "practice," so long as it is not inconsistent with the Federal Rules. Rule 83 also provides that all local rules must be subject to public notice and comment prior to enact-

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[5] 6 Proceedings of Meeting of Advisory Committee on Rules for Civil Procedure 1515 (Feb. 20-25, 1936).
[6] *Id.*
[7] *Id.*
[8] FED R. CIV. P. 83.

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ment.[9] Although the Advisory Committee also noted in its comments to Rule 83 that it "hoped" all district courts would create procedures to monitor individual judges' practices and standing orders,[10] the Rule does not require public notice or an opportunity for comment on individual judges' "practices."[11]

The enactment of the Judicial Improvements and Access to Justice Act of 1988 created a procedure to monitor district court rules and individual judges' practices to ensure compliance with the Federal Rules.[12] The Act amended 28 U.S.C. § 332 to permit existing judicial councils to review district court rules and individual judges' "rules" for consistency with the Federal Rules.[13] In addition, the Act gave judicial councils the power to modify or invalidate nonconforming rules.[14] The procedure was intended to be ongoing; thus, a rule initially accepted by the judicial council could later be rejected by the same council.[15] As a result, rules that could previously be overturned only by appellate action can now be abrogated by the judicial council.

Unfortunately, judicial councils have not taken an active role in reviewing the consistency of either local district court rules or individual judges' standing orders and practices with the Federal Rules. Therefore, despite the new procedure, litigants must still rely upon appellate courts to review the validity of individual judges' rules. A commentary on the 1988 revision of section 332 states:

> With a review procedure in place such as § 332 now enacts for all district court rule making, rules of the kind that it took case law—and a long time—to strike down in the past should find their way into the practice less frequently in the future. And any that do will presumably last only until the judicial council has had a chance to review it.[16]

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[9] *See id.* (Advisory Committee's notes): "The new language subjects local rulemaking to scrutiny similar to that accompanying the Federal Rules, administrative rulemaking, and legislation. It attempts to assure that the expert advice of practitioners and scholars is made available to the district court before local rules are promulgated."

[10] *Id.*

> The practice pursued by some judges of issuing standing orders has been controversial, particularly among members of the practicing bar. The last sentence in Rule 83 has been amended to make certain that standing orders are not inconsistent with the Federal Rules or any local district court rules. Beyond that, *it is hoped* that each district will adopt procedures, perhaps by local rule, for promulgating and reviewing single-judge standing orders.

Id. (emphasis added).

[11] *Id.* "The amended Rule does not detail the procedure for giving notice and an opportunity to be heard since conditions vary from district to district. Thus, there is no explicit requirement for a public hearing, although a district may consider that procedure appropriate in all or some rulemaking situations." *Id.*

[12] *See* Judicial Improvement and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988).

[13] 28 U.S.C. § 332 (Supp. 1993). The statute provides in pertinent part: "Each judicial council shall periodically review the rules which are prescribed under section 2071 of this title by district courts within its circuit for consistency with rules prescribed under section 2072 of this title. Each council may modify or abrogate any such rule found inconsistent . . . ." *Id.* §332(d)(4).

[14] *See id.* § 332.

[15] *See* 28 U.S.C.A. § 332 commentary (West 1993).

[16] *Id.*

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The commentator, David D. Siegel, assumed that the same review process applied to individual judges' rules. Indeed, the enactment of this review structure was motivated in part by a desire to control the proliferation of individual judges' standing orders and practices.[17] Professor Siegel noted that before the 1988 revisions, appellate review was "impossible sometimes, impractical most times, and impolitic always."[18] Although intended to reduce the difficulty of striking down or limiting inconsistent individual judges' rules, the revisions have done little to monitor or eliminate the proliferation of these rules.

Although Rule 83 does not explicitly define "inconsistent," it is clear that an individual judge's rule need not directly contradict the Federal Rules to be deemed "inconsistent." An individual judge's rule is inconsistent with the Federal Rules if it conflicts with the spirit of the Rules, needlessly repeats or restates a Federal Rule, is preempted by the Rules, or provides rigid procedural guidelines in areas deliberately unregulated.[19] Unfortunately, district court judges have interpreted the term "inconsistent" narrowly. As a result, individual judges have promulgated standing orders or practices with apparent disregard for the letter or spirit of the Federal Rules.[20] The impetus for the proliferation of individual judges' rules is the judicially-perceived need for increased management of litigation.

THE IMPACT OF INDIVIDUAL JUDGES' RULES ON MOTION PRACTICE

Individual judges' standing orders and practices have flourished in the area of motion practice. Rules limiting a litigant's right to file a motion demonstrate the problems caused by individual judges' practices. The Federal Rules governing motions invite local innovation. Therefore, it is not surprising that this area has been fertile ground for the proliferation of individual rulemaking. Local innovation has reached the point where almost every district and every judge has a different procedure regulating motion practice.

This sometimes bewildering variety in procedure is generally a consequence of judicial attempts to improve efficiency. Unfortunately, this often occurs at the expense of the original scheme of the Rules. Federal Rules 7,[21]

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[17] *Id*. (maintaining that there is "widespread discontent, communicated to Congress, about a 'proliferation of local rules' ").

[18] *Id.*

[19] REPORT TO THE JUDICIAL CONFERENCE ON LOCAL DISTRICT COURT RULES III (1940).

[20] Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and* Erie, 54 BROOK. L. REV. 1, 27-28 (1988). "[O]ur faith in national uniformity has declined. More local rules are being drafted by more courts to the point that procedure . . . is significantly different [from court to court]. . . . [T]he pressures for local control and initiative are great, and the costs . . . high." *Id.*

[21] FED. R. CIV. P. 7(b)(1). This Rule provides: "[A]n application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." *Id.*

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12,[22] 14,[23] and 56[24] entitle a litigant to file various specific motions. Further, Rules 77 and 78 were enacted to facilitate the ability of any litigant to file a motion.[25]

Despite this mandate, individual judges have regulated motion practice by requiring pre-motion conferences or pre-motion screening procedures prior to filing any motion. This practice is relatively widespread and substantially differs among districts and judges. Some courts consider any motion, regardless of its purpose, to be an inefficient use of judicial time. Individual judges have adopted rules that call for a pre-motion conference for all motions, while others require a conference only for discovery motions or for dispositive motions. Although some judges require a conference between the parties before a motion is filed, others require a conference with a judge before filing.

The effect of these practices is that judges have fewer motions to decide and fewer orders subject to appellate review.[26] From the judges' perspective, they have accomplished their stated objective of discouraging litigants from filing unnecessary motions. Judges contend that these pre-motion practices encourage settlements and create efficiency, and point to a decrease in the number of motions filed before their courts as an indication of increased efficiency and satisfaction among the parties.

Hearing fewer motions does not, however, demonstrate efficiency. Instead of arguing motions, litigants waste time scheduling and attending pre-motion conferences. Further, it seems the judiciary sometimes sacrifices justice for the sake of speed or simplicity, thus conflicting with the mandate that the Federal Rules "be construed to secure the just, speedy, and inexpensive determination of every action."[27] Requiring pre-motion conferences interferes with the goals of the original drafters of the Federal Rules,[28] creates a real risk of judicial co-

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[22] FED. R. CIV. P. 12. This Rule provides for various motions, including a motion for judgment on the pleadings, motion for a more definite statement, motion to strike insufficient defenses, impertinent or scandalous matters, and the consolidation of defenses in a motion.

[23] FED. R. CIV P. 14. This Rule provides for a third party plaintiff's motion to join a third party defendant in the action.

[24] FED. R. CIV. P. 56(a). This Rule provides for a motion for summary judgment, stating that "at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, [a claimant may] move with or without supporting affidavits for a summary judgment in the party's favor . . . ."

[25] *See* FED. R. CIV. P. 77(a) (providing in pertinent part that "district courts shall be deemed always open for the purpose of filing any pleading or other proper paper . . . ."); FED. R. CIV. P. 78 (providing that "each district court shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard").

[26] *See* Richardson Greenshields Sec., Inc. v. Lau, 825 F.2d 647, 652 (2d Cir. 1987). "This . . . may serve the useful purpose of narrowing and resolving conflicts between the parties and preventing the filing of unnecessary papers." *Id.*

[27] FED. R. CIV. P. 1.

[28] "The drafters' commitment was to a civil practice in which all parties would have ready access to the courts and to relevant information, a practice in which the merits would be reached promptly and decided fairly." Weinstein, *supra* note 2, at 1906.

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ercion, raises serious due process concerns, invades an area preempted by the Federal Rules, and obstructs litigants from filing motions in the manner provided in the Rules themselves.

THE RISKS OF INDIVIDUAL JUDGES' PRACTICES

The Federal Rules were adopted to eliminate procedural traps, ensure decisions upon the merits, and improve the speed and efficiency of litigation. Local rules requiring pre-motion procedures hinder these goals in two ways. First, failure to follow local rules governing such pre-motion procedures has resulted in the dismissal of parties' claims, rather than decisions on the merits.[29] Judicial discretion afforded by the Federal Rules was meant to allow judges to rule upon the merits, while providing needed flexibility to control the procedure of the court. The Federal Rules were not intended to permit judges to create their own pre-motion procedures which prevent decisions upon the merits.

Second, pre-motion procedures often delay the litigation process. In many cases, a judge can dispose of a motion in less time than it takes to schedule and attend a pre-motion conference or similar procedure. Thus, in implementing their pre-motion procedures, some judges have failed to recognize that the goals of the Federal Rules and of our judicial process can be compromised through overzealous judicial management.[30]

Aside from interfering with the goals of the Federal Rules, pre-motion procedures create certain practical problems. In a conference, the judge sometimes takes an active, or even coercive, role, arguably altering the dynamics of the litigation to the combined detriment of the parties. In this posture, the judge exercises an inappropriate amount of influence upon the course of the litigation. This influence is amplified since all conversations at these conferences are not on the record, so that much of the judge's conduct will be difficult, if not impossible, to review. The increased managerial role of judges was meant to facilitate the parties' ability to bring a case to trial,[31] not to permit judges to take a coercive role in the litigation.

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[29] *See*, *e.g.*, Wilson v. City of Zanesville, 954 F.2d 349 (6th Cir. 1992). In *Wilson*, the plaintiff's failure to attach an affidavit to his motion resulted in the denial of his motion to compel production of a tape. *Id.* As a result, the plaintiff was unable to meet his burden of proof and the district court granted the defendant's motion for summary judgment. *Id.* at 350.

[30] *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 431 (1982) (outlining increased role of judges as managers and warning that this brings inherent risk). "Although the sword remains in place, the blindfold and scales have all but disappeared." *Id.*

[31] *See* FED. R. CIV. P. 16(a)(2). The purpose of the pretrial conference is to establish "early and continuing control so that the case will not be protracted because of lack of management. . . ." *Id.*; *see also supra* text accompanying note 4 (discussing increased judicial management).

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This coercive judicial influence threatens a party's due process rights. The Federal Rules provide for litigants to file motions freely. However, litigants are often unable to reach the merits of a motion because of the coercive and overriding influence of the judge. Also, the delay inherent in trying to schedule (and often to reschedule) a conference may inhibit litigants from making just and proper motions. When litigants are not afforded the opportunity to file a motion because of a judge's coercive influence, express prohibition, or unnecessary delay, the litigant's due process rights are violated. As Judge Robert E. Keeton stated: "Trial and preparation for trial should not become a game of moves in which the judge, as umpire, calls players out for not touching bases, and in the right sequence."[32] Furthermore, by promulgating rules that require extensive pre-motion procedures, judges dilute the adversarial nature of litigation and deny the parties the opportunity to aggressively promote their interests. This is in apparent conflict with the "bedrock premise of the federal rules . . . that cases filed in a federal district court are to be resolved through adversarial litigation before the court. . . ."[33]

A judge's ability to limit the filing of motions is also constricted by pre-emption through the Federal Rules. Section 2072(a) of title 28 of the United States Code authorizes the Supreme Court to "prescribe general rules of practice and procedure . . . for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals."[34] Section 2072(b) then states that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."[35] Arguably, some individual judges' rules are therefore pre-empted by the Federal Rules.

CONCLUSION

The role of judge as manager and the goal of promulgating individual judges' rules that are consistent with the Federal Rules can coexist within the federal court system. The Federal Rules encourage judicial discretion in order to achieve decisions upon the merits. Unfortunately, some judges have abused this discretion by raising procedural hurdles, forcing cases off their dockets, and discouraging decisions upon the merits. Judge Jack Weinstein observed that a more appropriate response to the "litigation explosion" was to increase the number of judges and the capacity of the system to handle the cases.[36]

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[32] Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853, 853 (1989).
[33] David M. Roberts, *The Myth of Uniformity in Federal Civil Procedure: Federal Civil Rule 83 and District Court Local Rulemaking Powers*, 8 U. PUGET SOUND L. REV. 537, 545 (1985).
[34] 28 U.S.C.A. § 2072(a) (West 1993).
[35] *Id.* § 2072(b).
[36] Weinstein, *supra* note 2, at 1909-10.

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This has not been the courts' reaction. Instead, courts have discouraged parties from litigating by promulgating rules that distort the adversary system. The elimination of individual judges' rules that are inconsistent with the Federal Rules would be an important step toward restoring the Federal Rules and the system they govern to that which was envisioned by the original drafters.

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ZEN AND THE ART OF HERDING CATS†

Patricia A. Seitz*

Today I offer you the experience of leading the fourth largest bar in the United States without costing you a year of campaigning, a year as president-elect, and a year as president, which translates into about 9,000 billable hours and $150,000 out of pocket. The Florida Bar is a unified bar, which is a euphemism for mandatory bar. We now have 53,000 members, of whom 10,000 live out of state.

Florida, which is the fourth largest state and is rapidly moving toward becoming the third largest, is an interesting amalgamation. It covers two time zones. Pensacola on the western tip is almost as close to Chicago as it is to Miami; Jacksonville on the northeast tip is really part of Georgia; and Key West is actually closer to Havana than anywhere else. The state looks like Georgia and Alabama in the north, transplanted Midwest in the western part of the state, and a combination of northeast United States, Havana, and—recently—all of South America in the south. In between, we have a combination of Mickey Mouse, exotics, scam artists, movie stars, and unassorted normal folks. The bar's 53,000 members roughly reflect this very unusual menagerie of human beings, and all 53,000 of our members get to vote for the president of the Florida Bar.

THE CAMPAIGN

My race for office was somewhat unique, at least for some members of the bar, who feel that women should not yet be allowed to vote, let alone run for president of the bar. One wag was overheard to describe the contest as a race between Darth Vader and Princess Leia. I said that was fine with me as long as I could be Princess Leia; she could shoot straighter.

Campaigning is an exceptional experience, one which I recommend to every lawyer. How better can you learn about your profession, learn about the state, develop your sense of humor, find out who your friends really are, or delight in the ways that language can be used? My clever and talented opponent was far

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better than I in this latter category. Every time we were on the campaign trail talking to sole and small firm practitioners, he would describe himself as a single practitioner. He was the named partner in a forty-lawyer firm. Notwithstanding that fact, his statement was true. At the time he was unmarried.

Campaigns provide other, invaluable intelligence. For example, when you are staying at a Holiday Inn, always ask for a king-size bed and sleep on the side away from the phone. It's less lumpy. The one caveat is that the king-size bed is always on the second floor. You learn other things, such as these: whenever you see a bathroom, use it; at the various and sundry chicken dinners, avoid the chicken and eat only the salad and the vegetables.

It was especially interesting for me to have the experience of being a pioneer. I had not fully appreciated the role model element in the campaign. You see, Florida Bar politics is a contact sport, and it was important that the first woman show that a female could take the punches and give them back with style, grace, humor, and—most importantly—some substance. One thing I had not expected was the women's reaction to my campaign. Women make up twenty percent of the Florida Bar, and they were not automatically in my camp. As in any group, there were two ends of the spectrum. There were those who felt that I wasn't "feminist" enough and those who felt that I was too feminist, and both decided not to get involved. Women who didn't know me were determined to bend over backward to measure the candidates on their substance. They certainly were not going to vote based on gender. Fortunately, I had decided not to mention gender; there wasn't much I could do about it.

I ran on a platform outlining how we could tap our diverse talents and do for ourselves and our profession what we do every day for our clients—namely, solve problems. It was considered a novel approach. Using real-world politics, case organizational skills, a lot of innovation, and a lot of good luck, we turned out fifty-five percent of the bar, the largest voter turnout in twelve years, and I confounded conventional wisdom and won by 913 votes. It was a veritable Texas landslide.

My swearing-in was also historical and colorful, literally as well as figuratively. In keeping with tradition, I had invited a former partner to introduce me to the convention's general assembly. It just so happened that my former partner, Janet Reno, had been appointed Attorney General. When Janet sat down after making the introduction, she leaned over and said to me, "Seitz, what a riot of color!" Unwittingly we had broken the tradition of blue suits. Getting ready to administer the oath was our chief justice, Rosemary Barkett, the first woman chief justice, wearing canary yellow; the Attorney General was in bright melon; and I was wearing my favorite, red. Thus began an equally riotous year.

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DEVELOPING AND IMPLEMENTING A PLAN

For those of you who are not familiar with the Florida Bar, I should mention that we have had the honor and sometimes the misfortune of being truly a leader among bars. Many experiments begin in Florida. As I became president of that organization, we were far from a happy bar. There first was a loudly declared secessionist movement fueled by a myriad of things such as aggressive increased competition, rapid changes in the law, negative public perception, colleagues' acrimonious behavior, dissatisfaction with law as a business, and a wide variety of recent Florida Supreme Court mandates ranging from mandatory reporting of pro bono activities to advertising to the mandatory use of recycled paper. Our members felt that the bar leadership was out of touch, that we had no idea of what their needs were and that we didn't care. They were loudly protesting, "Quit doing *to* us and start doing *for* us."

Our members' ire was matched in volume by the media and the general public, two groups never very supportive of the profession. Their allegations: "You lawyers are simply blood- and money-suckers. You have no interest in public service. You are merely greedy. You are problem-makers, not solvers. You are interested only in legal technicalities [meaning we only ask, 'Is it legally right?' instead of, 'Is it the right thing to do?']." All the while, our supreme court was reminding us that the reason for the bar's existence, first and foremost, was to serve the public, not ourselves.

Into this came little Seitz, female, certified civil trial lawyer from an intimate 180-lawyer firm, to lead this forty-two-year-old institution, eighty percent of which was male and sixty-five percent of which consisted of lawyers either in solo practice or in firms of five or fewer lawyers, all of them financially stressed and also disquieted by the technological, business, and client changes. It was clear that my year as president was not going to be a tea party. To reverse the downward spiral of the negative, "woe-is-me" thinking and to move this intimate group of 53,000 lawyers toward serving our purpose, we needed to make some major changes.

As an institution, we could function only through our members, so it was a simple deduction that we had to align the interests of our members with the needs of the public, or we had no reason for continuing to exist. We could achieve that only by changing our members' outlook so that they could see the situation as an opportunity, albeit a challenging one. To do that, we had to come together as a leadership and develop a plan that would help our members change and show some quick results. A tall order!

The first thing we did was to change the institution's approach, develop a five-year plan, and begin to communicate to our members in ways that demon-

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strated we were what we claimed to be—a changed institution that had a plan and was moving forward. This meant breaking precedent, being innovative and pragmatic, both in the short term and in the long term. This proved to be the easy part.

The next step involved changing our members' attitudes and in some cases their behavior, and developing enough of a buy-in to the plan that we could actually implement it. Here the clichés about "mission impossible" and "easier said than done" rang true because we were working with lawyers. I love lawyers, but as a group we make the political parties look homogeneous, organized, and unified. The combination of our fierce individualism with our unrestrained, dogmatic pontification about all things (whether we know anything about them or not) makes being a bar president a job commonly compared to "herding cats." Serving as a president is an opportunity to grow in patience. I found myself frequently saying under my breath the familiar serenity prayer: "Lord, give me the courage to change that which I can change, the patience to accept that which I cannot, and the wisdom to know the difference." For me, that was a lot more effective, and safer, than punching lights out, as I would like to have done on many occasions. Thus, with unbounded optimism and a lot of divine help we began.

First and foremost, we needed to define where we were going. What was our vision of what we wanted to be? We articulated one. We were a community of principled professionals here to help each other provide a service that the public and our clients valued. There is a lot packed into that statement.

In my year, the first year of the new plan, I focused on providing some credible evidence of the institution's attitudinal change and spent my time creating a sense of community among our members and giving them the confidence that they had what it took to meet the challenges successfully. We reached out to the majority of our bar, those sole and small-firm practitioners that I mentioned. We started with a dedicated issue of *The Bar Journal*. Then we convened "town hall conferences" that were really one day mini-conventions, so that they could come together (they were very isolated) and begin to realize how much they had in common with their fellow practitioners and what benefits could follow—referrals, ideas—if they started working together. They could ventilate at those conventions, and they could brainstorm some solutions. We provided information about some of the services the bar had to help them, and we took suggestions from them. As a result of their suggestions, we began changing and simplifying some of our rules, and we started sole and small-firm committees at all of the local bars around the state and in our bar sections so that we could further build that sense of community and the realization that we have to work together.

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Essential to creating the sense of community was defining what we stand for. To that end, we began to identify our shared or core values. We launched a campaign to renew our ethical foundation through six simple words called the pillars of character, which we used in contrast to our hundred pages of ethical rules dictating all the things that lawyers should not do. We also revamped the bar's communication systems with our members, with the public, and with the media so that we came into the twentieth century and so that our message was focused, positive, consistent, succinct, and in English rather than legalese. Most importantly, we developed the five-year plan, which will help us stay on track as we move forward and which demonstrated to our members that we can be creative problem-solvers. One of the elements of the plan, which was innovative for a bar association, was to create a research and development component so that our institution would always be on the leading edge and could keep our members aware of changes in the business and on the client side, which we considered important if we were going to provide service that clients and the public would value.

I am pleased to say that we managed to do all of this in one year. We have an $18 million budget. When we began, we faced a $200,000 deficit; we ended with a $600,000 surplus. It's amazing what a positive attitude and our best efforts (and probably a guardian angel) can do. And from this experience, I gleaned some interesting professional and leadership lessons.

LESSONS

Lesson number one: The first job of any bar president is to be the chief complaint desk. You learn quickly that complainers fall into three categories, and it is critical to pigeonhole the complainer correctly within the first five minutes.

One type is the chronic complainer. A chronic complainer is genetically predisposed to fight about everything; he or she can't help it. With this type you have to be polite, acknowledge that you have heard the complaint, and then move on. If you're feeling frisky, you can ask such complainers what they would have you do about their problems and then suggest that they do that. This technique can be useful if you're not quite sure what type of complainer has cornered you.

The next type is the ventilating complainer. The only thing this complainer wants is to voice his or her frustrations. If you try to solve the problems, it means you are not listening. Dealing with this type of complainer requires the social worker approach: You nod your head occasionally, and at the seven-minute mark, you look the person directly in the eye and say, very solicitously, "That is awful. I'm so glad you shared this with me. It's difficult, I know, but I also know you can solve it. Keep me posted." And then you move on.

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The last type of complainer is the one with the real problem. This is the one that gives you a sense of satisfaction because you can actually put that person in touch with someone who can help him solve his problem; the one benefit of being the president is that for one year people return your phone calls and actually are happy to help.

Lesson number two: When you have to create a consensus, which is the second principal job of the leader of cats, remember that thirty percent of the group will be automatically for you, and an equal thirty percent will be automatically against you, so you should concentrate on the middle forty percent. All you need is half of that group plus one to carry your position.

Lesson number three: Keep it simple and keep it focused, or you'll never get anything done. As we grow older we know how time flies. A year zooms by. It goes doubly fast when you are president of the bar, deluged daily with a six- to eight-inch pile of mail and a minimum of forty phone calls on issues as broad-ranging as advertising, sex with clients, lobbying, funding lawyers to handle death penalty cases, long-range planning for the courts, speeches, and public complaints. And all of these issues come into your office attached to human beings. It usually takes at least eighteen months to three years to make a permanent change, and the stress of making changes combined with the slowness of the process invariably ignites frustrations. Thus, to be effective you must limit your dream list to a maximum of four priorities and stick to them. If you accomplish just one of your goals, you can declare yourself a success. You can accomplish much more than that if you learn to delegate, as I did.

This simplicity rule also works with communication. You have to be specific, you have to be short, and you have to repeat your important points a minimum of three times. It's even better if you can do it eight times. Advertisers, the people who run Disney World, and everyone else who has had to move large groups of people realized this long ago. It is time that we, as lawyers in the twelve-second-sound-bite era, realized it and followed suit.

Lesson number four: To no one's surprise, men and women communicate very differently. I became president before the recent *New York Times* story reporting that CAT scans have proved scientifically that men and women think differently. The evidence now shows that women use both sides of their brain, the intuitive and the analytical sides, while men use just the left or the analytical side. When I went to my first executive committee meeting, I was armed only with a 3:00 A.M. reading of Dr. Deborah Tannen's book *You Just Don't Understand*, about the differences between the way men and women communicate. The members of my executive committee were not my handpicked crew. In fact, only three of the eight were my supporters. Thus, wanting to be fair and to build teamwork, I met with the other five individually. They all said they

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wanted participatory democracy. That was great as far as I was concerned. To me, that meant working together, brainstorming a problem, and jointly devising a solution. How mistaken I was! It took me five hours to realize that participatory democracy to them meant that I was to dictate and they were to have the opportunity to veto. Well, if they were more comfortable with a benevolent dictator, I could adapt.

As an aside, I recommend Dr. Tannen's book to all trial lawyers. It is very helpful in communicating with jurors. John Gray's book *Men Are from Mars, and Women Are from Venus* is similarly useful for understanding communications among spouses and significant others. Alan, who was the Florida Bar's first "First Gentleman" and politely endured being introduced as my lovely husband or spouse, came away with a favorite story related to the different styles of communication and the funny things that happen as we adjust to the differences. One of the duties of the Florida Bar's president is to deliver public reprimands. This is a very solemn and almost barbaric way in which we administer our minimum punishment. We bring the miscreant lawyer into the center of the Board of Governors. The fifty-one members of the Board sit in a square surrounding the lawyer and stare darkly at him (or her) as the president delivers the reprimand. Unbeknown to me, some of my board members were concerned, even anxious, about my ability to do this part of the job. However, after my first foray, five different board members went up to Alan and said, in shocked tones, "She was a combination of Ray Ferrero and Rut Liles," two former bar presidents and former Marines. One even went so far as to say, "My God, she was my third grade teacher," apparently a remembered horror. Alan's smiling retort was, "What did you expect from a general's daughter?" The ultimate lesson here is that we may do things differently but the job will get done and it will be done well. We just need to relax and remember that we're dealing with two different cultures.

The last two lessons pertain to us as a profession. *Lesson number five*: In times of crisis or stress, it is very easy to be negative, to be critical, and to blame others, but that is a waste of energy and accomplishes nothing. Things improve only if we take positive action. Right now our profession has three major problems: We have an oversupply of lawyers; we don't provide services to the middle class; and we as a profession seem to contribute, at least orally, to an approach that can be characterized as shooting first and listening second. At this time of stress it is important that we play to our skill, which is that of a wise counselor who uses a commonsense, practical approach to solve problems. We have some creative abilities. We need to use those abilities.

Let's take, for example, the oversupply of lawyers. We, as a profession, cannot sit idly by while the law schools continue to pump out 39,000 new lawyers

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each year, with debts of $40,000 to $80,000 each and no job opportunities. We will not be able to convince law schools to shut their doors or reduce their numbers. They need to fill their seats. Let's think of creative ways to satisfy their need while helping ourselves. There are a lot of lawyers who are unhappy in the practice of law, or at least in their current practices. Why don't we do what the journalism profession does and encourage those lawyers to go back to school and retrain for other uses of the law? Our law schools seem to focus on only two uses: training lawyers to be appellate judges or to work for large law firms serving wealthy corporate clients. Those are two very limited job opportunities. In addition to refocusing or expanding the focus of the training, we could follow the example of dental schools and even beauty schools, and have our third year students provide legal services to the middle class. The middle class could obtain services at a reasonable cost, and the students would learn something about how to translate "thinking like a lawyer" into a useful service.

We also, as a profession, need to restructure the way we price or deliver our legal services if we are going to serve the middle class. Let's face it. If you were earning $40,000 a year—that's about $20 an hour—would you hire someone at $250 an hour on an unlimited basis to solve a problem? No. You would either handle it yourself or find an alternative. Most lawyers are unaware of an incredible phenomenon that has occurred in just the last six years, the rise of the legal technician. These are individuals who print out forms and help non-lawyers gain access to computer technology so they can represent themselves. I will share with you the figures of court filings in the state of Florida. Fifty percent of our filings are not related to tort reform issues. They relate to family law matters—divorce, juvenile dependency, juvenile delinquency. And in those cases, fifty-seven percent of the parties represent themselves. In some states the percentage is much higher. In Dade County young lawyers are setting up legal clinics using paralegals. The world is changing in ways that we as trial lawyers often fail to see. Just look at what the ABA recently did; its award for the creative provision of legal services to the middle class went to a lawyer who came up with a way to provide legal services over the phone for three dollars a minute.

As good trial lawyers, we should understand the military lessons that my father taught me: "When you go into battle, you have limited resources, so you have to have a specific objective because you cannot squander those resources. You use battle only as a last resort; you use diplomacy first." We trial lawyers need to be in the vanguard of suggesting to our clients and to society that mediation should be the first step and litigation the last because, my friends, our value to the public is helping people solve problems quickly and efficiently for the long term. If we don't use our creative talents to solve the problems, in these or other ways, we will become the dinosaurs of the legal services business.

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Lesson number six: In the unsettled times that we now face, both as a profession and as a society, those who have real security are the people who have values, a set of principles that create in them a rock-solid character. That's what used to be valued until about fifty years ago. We measured a person's success by his character. That's where our strength as principled professionals has been.

I'd like to share with you the six pillars of character that we found so beneficial last year. It was a simple six-word message that we used as a litmus test to judge our actions. Those pillars were trustworthiness, respect, responsibility, caring, fairness, and civic responsibility. We believed that those six pillars embodied everything we stood for as a profession.

Under the first pillar, *trustworthiness*, we asked ourselves a series of questions. Am I a dependable person? Do my actions inspire trust? Is my word my bond?

Respect: Do I respect other human beings? Can I separate them as human beings from their actions and their opinions? Do I treat them with courtesy?

Responsibility: This one has two components. The first is accountability, taking responsibility and being accountable for your actions. The second part of responsibility is acting responsibly and using your best efforts in everything you do. If we do those two things, if we are accountable and do our best, we are responsible, and that is usually the sign of personal integrity.

Caring is pillar number four. We as a profession rate rather low on this; it is not unusual for us to be described as downright nasty. As I thought about that, I realized that we have forgotten a lot of our humanness. We treat ourselves as machines, and we expect others to do likewise. Then we fail to see what kind of impact that has on the people around us. We need to take the time to return to the human element and recognize that our lives, the court system, and our society will be a lot better if we remember to treat others—be they secretaries, runners, opposing counsel, or opposing parties—the way we would want to be treated if we were in their shoes.

Pillar number five is *fairness*. It is hard to define what is fair, but everybody knows when something is unfair. The twofold test should be this: If this were being done to me, would I consider it fair? If everybody did this, would it be a good thing for the community and for the common good? If we cannot answer both of those questions affirmatively, we should stop and re-examine what we are doing and ask two more questions: What do I really want to accomplish here? Is this the best way to approach it?

Last but not least is *civic responsibility*, which boils down to simply doing our fair share, in our local communities and in the larger society. We lawyers should not shy away from our historical role as community leaders.

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LEADERSHIP

Our profession and our society need leaders because a lot has changed in the 150 years since Alexis de Tocqueville's *Democracy in America* praised the role lawyers played in American society—but who more than lawyers have the brains, the education, the energy to be the leaders? From my experience as bar president, I know that there are a lot of young lawyers, as there are young people in our society generally, who are looking for leaders who have vision, principles, a sense of humor, an ability to inspire, and the courage to stand up for their principles. This International Society of Barristers embodies that vision, those principles, the courage, and the humor; its members can well be the leaders that we desperately need both as a profession and as a society. The six pillars of character provide for us the moral authority to help us be the leaders for those young people. Together, the experienced leaders and the energetic new kids who want to do what is right will make a difference, both in our profession and in our society.

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WHITHER TORT REFORM?†

Robert L. Clifford*

When I was on the bench, it simply never occurred to me that "tort reform"—whatever that is—could be such a hot topic and could arouse such passions as it appears to have done in some circles. In truth, I suppose a good many things that engage the attention of practicing lawyers did not occur to me during the more than two decades that I sat as a member of my state's highest court, wrestling with cosmic issues, as supreme court justices choose to view their labors. Departure from the bench has introduced me to a quite different world, in many ways, from the one I recall as a lawyer over a quarter of a century ago.

That is not to say that everything is entirely unfamiliar, for some things never change, including the low regard in which trial judges hold—and probably always have held—appellate judges, and the equally low opinion that judges on state intermediate courts of appeal have for state supreme court justices. Witness, for example, the explanation by Alex Sanders, the former chief judge of the South Carolina Court of Appeals and now president of the College of Charleston, of the big difference between being a judge on a court of appeals and a justice on a supreme court: "A judge on a court of appeals has to be twice as smart and work twice as hard to get half the respect of a justice on a supreme court. Fortunately, this is not difficult."[1]

Still, I confess to doing a double-take on some novel (to me) features of this post-bench world—some of them obvious, such as the proliferation of areas of substantive law (I probably should have been aware of that, inasmuch as I likely had a hand in the creation or judicial recognition of some of those), or the modern-day lawyers' method of research via electronic devices rather than the books (my law clerks used to think it "quaint" when the old gaffer went to the digest, then to the reporter, then to Shepard's—Shepard's, no less!!—while they tickled their fancy Westlaws or whatever and, with ill-concealed smugness, came up with all the answers in a fraction of the time that it took me), or the emphasis that law firms put on marketing. Some less substantive phenomena are equally surprising.

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[1] Sanders, *A Judge's Swan Song*, JUDGE'S J., Summer 1994, at 23, 24.

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Take, for instance, the new robes that the Chief Justice of the United States is currently sporting, festooned with four gold stripes on each sleeve. The *New York Times* noted that when Chief Justice Rehnquist appeared on the bench in mid-January with his snappy stripes sprucing up the conventional basic black, the folks in the courtroom, doubtless mindful of the solemnity of the occasion, did not point or exclaim; but obviously an explanation was needed, and one was forthcoming in short order from the Court's public-information office. The Chief Justice, it seems, had recently attended a performance of one of his favorites, Gilbert and Sullivan's *Iolanthe*, and had been much taken with the robe worn by the lord chancellor, described in the *Times* article as "an aging fop whose principal juridical duty seemed to be marrying off pretty young orphan girls with whom he had the comic misfortune of continually falling in love."[2] Wishing to duplicate the chancellor's robe, the Chief Justice engaged the services of a local seamstress (the budget crunch apparently having reached even the Supreme Court, which used to have its own seamstress—or is it "seamster" or, more likely, "seamsperson"?), with the result that the Supreme Court's sartorial landscape has been changed, probably for some time to come.[3]

DISTURBING CHANGES

My re-entry into the private sector has awakened me to other features of the practice of law that might generously be described as "disturbing," even "distasteful." I am told that quite unlike the atmosphere in which I practiced law twenty-five, thirty-five, forty years ago, the atmosphere today reminds one of "playing hardball." Professional courtesy and collegiality, I hear, have become endangered species. I say "I am told" and "I hear" because no one has yet been rude to me or treated me unkindly, but that may be traceable to my advanced years or, more likely, my not yet having had to assume an adversarial posture with another lawyer. (I guess being counsel to a law firm is designed to keep one above the fray.) I must assume that when such pillars of the bar as Sol Linowitz are moved to address lawyers' loss of pride in our profession and the need to restore the practice of law to the respected position it once occupied,[4] the concern is real and the deterioration of our standards is cause for alarm.

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[2] Greenhouse, *The Chief Justice Has New Clothes*, N.Y. Times, Jan. 22, 1995, at E4.

[3] This is the same chief justice, mind you, who, as the *Times* article pointed out, "has always displayed a whimsical streak despite his stern public image. As an April Fool's Day prank when he was an Associate Justice, he once mounted a life-sized photographic cut-out of Chief Justice Warren E. Burger on the sidewalk behind the Court and charged passers-by a dollar to have their pictures taken." *Id.*

[4] *See* S. LINOWITZ WITH M. MAYER, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY (1994).

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In his recent book *The Betrayed Profession: Lawyering at the End of the Twentieth Century*, Ambassador Linowitz observes, somewhat wistfully, that in a different era lawyers were not consumed by the winning-at-all-costs or winning-is-everything ethic so prevalent in today's practice. He characterizes litigation today as "'a war of attrition, where the loser is the one whose assets have been exhausted.'"[5] To underscore his point, Ambassador Linowitz refers to the following statement, attributed to a lawyer for R. J. Reynolds Co., who described, in 1988, the tactics that his firm used to discourage plaintiffs from pursuing tobacco suits: "The aggressive posture we have taken regarding depositions [makes] cases extremely burdensome and expensive for plaintiffs' lawyers. To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds' money, but by making that other son of a bitch spend all of his."[6]

The foregoing suggests a crying need for reform in the way law is practiced. We seem, indeed, to be in an era of "reform." Our politicians are reforming government, although that seems to be an ongoing process, one that surfaces every time we have an election. We are importuned to get behind the push for regulatory reform because, according to its advocates, America is being suffocated by governmental regulations. Programs for welfare reform abound. Courts and bar associations have responded to the demand for reform in the area of professional ethics, particularly by opening the process to public scrutiny.

Another area of legal reform is my topic for today—tort reform. Why is it, what is it, and where is it going? I bring to this discussion no novel insights, but I have learned from the experience in my home state of New Jersey, which I suspect is not at all peculiar to that jurisdiction, and I can offer some observations on what is happening at the national level.

THE "WHY" OF TORT REFORM

The "why" of tort reform is, oddly enough, difficult to put one's finger on—oddly, because the public debate has been heating up for about two decades. As one observer has pointed out, in summarizing the arguments for "reform" of our product liability system, the "why" is that the system should be reformed because, as expressed by no lesser authority than former Vice President Quayle, it constitutes a "self-inflicted competitive disadvantage."[7] The

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[5] *Id.* at 14 (citing Pollock, *Divorce Lawyers Often Shortchange, Overcharge Women Clients, Study Finds*, Wall St. J., Mar. 13, 1992, at B3).
[6] *Id*. (citing Cohen & Freedman, *Tobacco Plaintiffs Face a Grilling*, Wall St. J., Feb. 11, 1993, at A6).
[7] Klein, *Will Tort Reform Help U.S. Competitiveness?*, 135 N.J.L.J. 122 (1993).

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argument is that our product liability system increases the cost of doing business in the United States, and therefore the system imposes a "liability tax" on domestic firms that foreign businesses do not suffer.[8] That tax and the unpredictable nature of product liability suits deter domestic companies from experimenting with and introducing new products and technologies, such as vaccines and prescription drugs; and those forces, operating together, have "hobbled the nation's competitiveness in world markets."[9]

The same observer noted, as have many others who have addressed the general subject of tort reform, that public discourse on the issue has been on an undistinguished level, with most of the evidence being anecdotal and the debate consisting largely of slogans and ideology.[10] One author has described the discussion as displaying a "debased style of public debate in which assertions are made about complex matters without any sense of responsibility to some body of reliable information."[11]

From a little different perspective, the "why" of tort reform focuses on what generally parades under the label of an "insurance crisis," a label not of recent origin but one that crops up with unfailing regularity. We are told that "[b]y mid-1985, a nationwide rash of rate hikes and policy cancellations in the property and casualty insurance business had put the heat on lawmakers to address the issue of tort reform," and that "[l]egislative measures designed to reform the tort compensation system have been passed by Congress and at least forty-one state legislatures."[12] The same article informs us that as the various legislatures began investigating the causes of the crisis, they were publicly questioning whether the tort system needed reform at all.[13]

Illustrative of the anecdotal nature of the evidence marshalled in support of tort reform is the case of the lady in New Mexico who was awarded nearly three million dollars in punitive damages because the coffee she had purchased and spilled was supposedly too hot. Plainly excessive, the award was later reduced—a fact overlooked in most of the dozens of stories that you and I have read about that case—but the case has become a symbol of a system that is said to be badly in need of repair. That case is relied on not only by the

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[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] Galanter, *Public View of Lawyers: Quarter-Truths Abound*, TRIAL, Apr. 1992, at 71, 73. Those who wish to pursue their grasp of the subject matter of the debate might consult two recent publications from the Brookings Institution and the American Assembly: THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION (P. Huber & R. Litan eds. 1991); TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION, AND CONSUMER WELFARE (P. Schuck ed. 1991).
[12] Comment, *Rumors of Crisis: Considering the Insurance Crisis and Tort Reform in an Information Vacuum*, 37 EMORY L.J. 401 (1988).
[13] *Id*. at 402.

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instant experts who yammer at us in twenty-second segments of TV talk programs, but by thoughtful commentators such as Tom Kean, former governor of New Jersey and president of Drew University, and Peter G. Verniero, former chief counsel to New Jersey's current governor and now the governor's chief of staff (and my law clerk during the 1985-86 Term.)

However valid—or invalid—the information on which people form their opinions may be, the fact remains, at least in my state, that the general public favors tort reform. A 1994 *Newark Star-Ledger*/Eagleton Institute poll found that seventy-one percent of New Jersey residents would support a law that sets limits on the amount of lawsuit awards, and sixty-seven percent would support a law that creates difficulties in bringing suit. (I am uncertain exactly what the latter means, but that is the thrust of the page-one article reporting the results of the poll in the *Newark Star-Ledger* of March 6, 1994.) As we all know, once the general public becomes agitated, the stage is set for action by the people's representatives in the legislature, presumably justified by the notions that legislatures rather than courts are the appropriate venues for systemic reform, and legislators can consider the larger social issues.

THE "WHAT" OF TORT REFORM

Proposals

When we survey what the legislators see as their mission and what they perceive as the defects in the current system, or at least what they believe their constituents perceive as defects, we start sidling up to the "what" of tort reform. In my state the battle lines began to form shortly after Governor Whitman's election in November 1993, when a coalition of insurance companies, medical societies, and business leaders—probably figuring that they might get someone to pay attention to them with a Republican in the chief executive's slot and Republicans controlling the legislature—put their weight behind seven bills designed to overhaul the tort system. One required a certificate of merit in medical-malpractice actions, another addressed the liability of certain health-care providers in product liability cases, another concerned liability of certain retail sellers in product liability actions, one dealt with joint-and-several liability, another addressed punitive damages, another required an unsuccessful plaintiff to pay defendant's litigation costs and attorneys' fees, and one banned contingent-fee arrangements.

Those bills generated a campaign of opposition from organized groups of trial lawyers and several consumer groups, whereupon the legislators beat a retreat and the governor decided the issue should be subjected to further study. Acting on the governor's instructions, her chief counsel conducted a series of

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four meetings, attended by about a hundred people and given the cozy title of "Round Table Discussions." Those in attendance included representatives of consumer organizations, lawyer groups, the insurance industry, law school deans, business associates, and many legislators. The starting point of the discussions was the package of seven bills that I mentioned before.

Out of those discussions came seven recommendations, which I will summarize in rather general fashion. (I suspect that the subjects addressed have already arisen or will soon arise in your own states.) I will leave out, to the extent possible, the peculiarities of New Jersey law, save in those instances where the peculiarities may become important to the discussion.

The stated purpose of the recommendations that the governor's chief counsel made was "to maintain open access to the courts, and to compensate victims by holding culpable defendants liable for their conduct." The first recommendation is that the legislature enact a system of "apportioned damages" in place of New Jersey's rule of joint-and-several liability. New Jersey already has a wrinkle in this area—a 1987 legislative device that makes a party liable for full economic damages only if that party is determined to have been twenty percent at fault, and for the entire amount of the judgment (regardless of the type of damages) only if that party was sixty percent or more at fault. Complicating the situation just a little more is a provision that retains pure joint-and several-liability for environmental tort actions involving personal injury or death. The recommendation would amend current law by providing that a plaintiff in a case falling outside the special environmental tort category may recover from any defendant only that percentage of the judgment that corresponds to that defendant's degree of fault. The recommendation also politely suggests that the legislature might want to consider whether it would be possible to apportion liability in some categories of environmental cases as well.

The second recommendation deals with our old friend punitive damages. The important feature of this recommendation is that it would cap punitive damages at five times compensatory damages.

The third recommendation speaks sternly of the need to review the rules governing frivolous lawsuits, with the observation that New Jersey would be well served by adoption of its own version of Federal Rule 11, expressly allowing judges to sanction attorneys and, under certain circumstances, parties who file frivolous pleadings. Unlike many other jurisdictions, New Jersey, by constitution, vests authority over the conduct of lawyers and of litigation practice and procedure in the supreme court, not in the legislature or the bar association. Therefore, the governor's counsel could not recommend that the governor support legislation to address the frivolous-lawsuit issue. Instead, the recommendation was that the governor "ask the Attorney General to request the Supreme

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Court to consider these [frivolous lawsuit and summary judgment] issues through its committee process or however it deems appropriate." On receipt of the request, the court did its part by promptly referring the problem to the Civil Practice Committee, and I have been informed that the committee has completed its deliberations and is in the process of preparing its report.

The fourth recommendation is that we immunize health-care providers from liability for harm allegedly caused by manufacturing or design defects in medical devices or for harm caused by failure to warn about dangers related to the use of medical devices. The effect of the proposal would be to hold health-care providers to a negligence standard. Similarly, the fifth proposal effectively would hold retail sellers to a negligence standard rather than to strict liability.

The sixth proposal is one I find especially intriguing. It would require plaintiffs in medical malpractice actions to file a certification demonstrating the meritorious nature of their claims. The bill that was drafted to implement this proposal would require that within sixty days of filing a medical malpractice complaint, the plaintiff must provide the defendant with an affidavit from a practicing physician or surgeon that a reasonable probability exists that the medical treatment at issue fell outside acceptable professional standards or treatment practices. Failure to produce the affidavit would entitle the defendant to move for summary dismissal. The physician or surgeon signing the affidavit must be neutral, with no financial interest in the case; must be currently licensed to practice, in New Jersey or in some other state; must have expertise in the area involved in the litigation, including board certification and devotion of practice substantially to that area; and must be actively involved in the practice of medicine. The governor's counsel liked the bill but astutely observed that it should be rewritten to withstand judicial scrutiny—whatever that means. (I assume he is thinking about an expert's qualifications being the exclusive province of the courts.)

The seventh and final recommendation was that New Jersey should maintain contingent fee arrangements between plaintiffs and their attorneys and should reject the so-called "English Rule" requiring the losing party to pay counsel fees. The proposal therefore was to reject pending bills that provided that the loser pays and eliminated contingent fees.

Reactions

Reaction to those proposals was, as you might imagine, quick and forceful. The New Jersey chapter of the Association of Trial Lawyers of America attacked the recommendations on the ground that they would sharply restrict access to the legal system. The cap on punitive damages came in for a heavy drubbing. The president of the A.T.L.A. chapter said, "Establishing a ceiling

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on punitive damages treats death and injury as nothing more than a bottom-line consideration between profit and loss." Opponents of the recommendations have characterized them as promoting "a package of wrongdoer protection legislation that would substantially impair the rights enjoyed by all New Jersey consumers. These special interests are the same companies that brought us asbestos in our children's schools and target our children as potential cigarette smokers."[14]

Reflecting a point that I sought to make at the beginning of these remarks, an article in *N.J. Lawyer—The Magazine* points out that most of the proposals focus on product liability and toxic tort cases; yet, the author continues:

> [T]here is no empirical evidence to justify this legislation. In fact, to the contrary, the evidence indicates that the number of product liability and toxic-tort filings in the State of New Jersey is minimal in comparison to other litigation and has in fact decreased over time. Since 1991, all product liability and toxic-tort cases combined constitute less than two percent of the total civil case filings in New Jersey. While the asbestos and tobacco companies argue that the laws concerning punitive damages should be altered, since 1980, less than ten product liability cases have resulted in an award of punitive damages in this State. There is simply no empirical evidence that the rather dramatic changes to the law of joint-and-several liability enacted in 1987 need any further revision to fairly balance the equitable interests of all concerned.[15]

Joining the opposition is M.A.D.D. (Mothers Against Drunk Driving) and the A.A.R.P. (American Association of Retired Persons). Those organizations object to the ceiling on punitive damages and the proposed changes in joint-and-several liability.

Not surprisingly, the business community has come out in favor of the governor's counsel's recommendations, on the ground that tort reform would serve the interests of the citizens of New Jersey by helping to make the state more attractive to business and industry. The supporters point to a National Center for State Courts report that New Jersey had 865 tort filings per 100,000 population in 1992. Massachusetts was the only state with a greater number, 1139.

The situation "continues to develop," as we say. In December, after eleven months of debate, the New Jersey Senate passed a compromise package that imposes no cap on punitive damages and retains the current law under which a defendant found partly at fault for causing an environmental health problem can be held fully responsible. A defendant found to be at fault for causing seventy percent or more of non-environmental damages can be held liable for the

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[14] Placitella, *Tort Reform Measures: "Unjustified,"* 166 N.J. LAW.—THE MAG. 18 (Jan. 1995).
[15] *Id*. at 18, 23.

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entire judgment. Another bill requires a plaintiff in a medical malpractice action to file the affidavit of an expert, about which I spoke before, and extends the requirement to suits against all licensed professionals except lawyers. Still another bill passed by the state senate provides that a retailer will be held responsible for a defective product only for the retailer's role in causing the defect or if the manufacturer is bankrupt or out of reach of the courts.

There surely will be fights about the removal of the cap on punitive damages and the joint-and-several liability issue. The "loser pays" provision and the limits on contingent fees seem to have died, although those issues are alive and well in other jurisdictions, particularly given the Manhattan Institute's fee limitation proposal favored by such luminaries as Robert Bork, Roger Cramton, Norman Dorsen, Walter Gellhorn, the late Erwin Griswold, Rex Lee, Jeffrey O'Connell, and William Barr. That Judge Bork and Mr. Dorsen could agree on such a proposal—indeed, on *any* proposal—lends substance to the position even though it is generally opposed by plaintiffs' lawyers and defense lawyers, whose views were so stoutly defended by Edward Nevin in a compelling article entitled "The Role of the Advocate in a Free Society," published in this journal a couple of years ago.[16]

If this kind of skirmishing has not yet made its way into your state's legislative corridors, just be patient. It will, just as it is gaining support at the federal level. Republicans in the House of Representatives have introduced a measure that would overhaul the nation's product liability laws as part of their "Contract with America." The "Common-Sense Legal Reforms Act" puts a cap on punitive damages, adopts a "loser pays" rule for attorneys' fees, excludes testimony based on "junk science," and imposes sanctions on attorneys who file "frivolous" lawsuits and motions. That bill, drafted by Congressman Ramstad of Minnesota, differs from the "Fairness in Product Liability" bill that will be introduced in the Senate shortly under the sponsorship of Senators Rockefeller and Gorton. Those who know more about these things than do I say that the Senate bill probably stands a better chance of enactment because it is more moderate. Any prediction, however, is fraught with hazard, and the current pace of development at the federal level will probably render this portion of my remarks ancient history by the time they are published.

EXPECTATIONS FOR THE FUTURE

So where does all this leave us? The catchy title that I had the nerve to put on these remarks, "Whither Tort Reform?", implies that I have some vision of

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[16] Nevin, *The Role of the Advocate in a Free Society*, 28 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 323 (1993).

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the outcome. The only thing of which I am certain is that "tort reform," no matter how we define it, is not going to go away. I suspect that reform efforts will expand to address problems of discovery abuse, to deal with alternative dispute resolution, to fuss with statutes of repose so that manufacturers of products will not be subject to product liability suits in perpetuity, to chip away at worker's compensation immunity, and to grapple with the problems of "mass torts."[17]

And finally, although I enjoyed his op-ed submission, I caution against taking too much comfort in the article by Russell F. Moran, publisher of the *New York Jury Verdict Reporter*, in the *New York Times* of January 16, 1995, entitled "Juries Are Just Saying No." The thrust of the article is that the federal legislation is too late.

> The tort reform movement has already been heard, loud and clear, by its target audience: the jury. Jurors have listened attentively to the argument that American business, staggering under the burden of giant verdicts, is losing its competitiveness. If you are a doctor or a homeowner, the reformers have argued for years, insurance premiums will keep skyrocketing because greedy trial lawyers and their clients are out to get you.
>
> Well, the jury is in, and the verdict is for the defendant—and his insurance company. Civil juries are finding for the defendant as never before. In New York (where litigation is so intense it could use a musical score), there is a clear pattern, and it is most dramatic in product liability lawsuits. From 1981 to 1987, 51 percent of the verdicts in these cases were in favor of the defendant. In the next seven-year period, 1988 to 1994, that rate rose to 62 percent. The trend is mirrored nationally, and it flies in the face of the conventional wisdom that product liability verdicts are strangling American industry.

After referring to the decrease in the number of cases filed (product liability cases, excluding asbestos claims) in the federal courts and to similar developments in the area of medical malpractice, Mr. Moran makes this observation: "The tort system has grown with the accumulated wisdom of centuries of common law. Just as the criminal justice system is society's way of expressing disapproval of certain behavior, the civil justice system is society's way of righting a wrong by compensating the victim." He then ends on this note, on which I too will end because it captures one of my basic convictions: "To the extent that we tamper with the right to a day in court, we risk leaving that victim with nothing but anger and feelings of revenge, emotions that our society already has in superabundance."[18]

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[17] *See* Levine, TORT REFORM MEASURES: "AN IMPROVEMENT," 166 N.J. LAW.—THE MAG. 19, 21 (Jan. 1995).

[18] Moran, *Juries Are Just Saying No*, N.Y. Times, Jan. 16, 1995, at A17.

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A LAWYER'S VIEW FROM THE SENATE†

Alan K. Simpson*

Obviously, Washington, D.C., has changed dramatically since the elections in November. I could see it coming in October, as I campaigned around the country, working to gain a Republican majority in the Senate; the tone was set by a fellow who got up at a meeting and said, "Two terms for you guys, one in Congress and one in prison." Another day, when I was paying my bill at a hotel in Cody, a guy came up and said, "Did anybody ever tell you you look like Al Simpson?" I said, "Yes, they do." He said, "It makes you kinda mad, don't it?" For those of you who follow politics—and lawyers do or should—these are new times, and they are new times for me.

The activity in the House is amazing. I haven't seen anything like it in my time. They are in session until ten o'clock at night; they have an agenda and a zealotry that come from the fervor of their constituents. They are taking on things that have not been taken on, at least in the House, for thirty or forty years. And I have much to do because I chair some lively committees and subcommittees—the immigration subcommittee, which deals with issues laden with emotion, fear, guilt, and racism; the Veterans' Affairs Committee (if I weren't a veteran, they would have played taps over me long ago); the Social Security subcommittee (this sent a paroxysm through the national headquarters of the AARP).

A quick listing of what we have done and what we are doing will show how swift and significant the changes are: We have subjected ourselves to all the laws we imposed on others, such as OSHA, ADA, civil rights. We tackled the balanced budget amendment, which failed by one vote. We have undone the unfunded federal mandates. We'll do term limits within a few days and line-item veto within a few days, and then we'll turn to the capital gains tax. We're reviewing risk assessment, and we're going to take up superfund liability, in an attempt to throw out the retroactive liability. We'll do budget reform and congressional reform. We'll do a farm bill, and we'll try to put some sense into the Endangered Species Act. I'm not talking about dismantling those laws, I assure you, but we can make them work better. Then there's the crime bill, welfare reform, and tort reform. We're going to stay busy!

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†Address delivered at the Annual Convention of the International Society of Barristers, Hyatt Dorado Beach Resort, Dorado, Puerto Rico, March 10, 1995.

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ENTITLEMENTS

The one major area that we won't deal with except incrementally is health care—but I do want to spend a few minutes on the curse we face here. I served on the "entitlements commission." There were thirty-two of us, and it was a real suicide mission because we talked about things like Social Security and Medicare and Medicaid and federal retirement. Thirty out of the thirty-two of us have accepted the following figures, which come from the government and from private sources: In the year 2012—not very far away—if there is no increase in revenue and if we have done a "perfect health care bill," funds in the federal treasury will be sufficient to cover only Social Security, Medicare, Medicaid, federal retirement, and the interest on the debt. There will be nothing to pay for education, defense, transportation, Headstart, NEA, or any other discretionary function of the government. Also, Social Security will be broke in the year 2029. Who is telling us that? The trustees. The doomsday date has moved up seven years in one year; only a year ago we were told it would go broke in 2036. It will start going downhill in 2012, oddly enough coinciding with that other date.

Yet, in the face of figures like these, we are nearly helpless because we are cowed by the senior citizens of this country, or at least their lobbying arm, the AARP. The AARP is a group of thirty-three million people over fifty, who are bound together by a common love of airline discounts, automobile discounts, pharmacy discounts, insurance discounts, and investment discounts. The organization has a cash flow of $8 billion. The yield on its investments is $36 million. (You can estimate what the investments are worth if the yield is $36 million.) The AARP gets three percent of every premium from Prudential, three percent of every premium from New York Life—and its lobbyists killed the balanced budget amendment and fight every attempt to rein in Social Security and Medicare.

Here's how the AARP lobbyists operate. They say, "We've already taken our hits, we poor, ragged, old people." (The AARP magazine is full of ads featuring sleek-looking, gray-haired ladies and gentlemen playing tennis and golf and taking cruises, but the editorial comment makes it sound as if all those over sixty-five are foraging in alleys for their basic sustenance.) The lobbyists say, "Two hundred billion dollars have been cut from Medicare already. You can't take any more." Well, I must say that it takes a twisted type of logic to say that there has been a $200 billion cut. In 1980 Medicare was $37 billion, and today it's $160 billion. They find the "cut" with reasoning such as this: Medicare is going to go up ten-and-a-half percent. Congress will say "We can't handle that; we'll limit the growth to five percent." The AARP and the media will describe that as a fifty percent cut in Medicare.

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Let me illustrate the Social Security problem another way. Inevitably, at campaign stops or hearings on Social Security, a gray-haired gentleman, with a copy of *Modern Maturity* under his arm, will say, "I put into it from the beginning, and I want it all out. Quit robbing the trust fund." The response should be, "All right, let's review what you have paid in. If you were in it from the beginning, you did not pay over $30 a year for the first eight years. Then you did not pay more than $174 a year for the next eighteen years. There were limits. Remember?" I practiced law for eighteen years and never paid over $1,000 a year because of the limits. Now I'm paying in $350 a month on my Senate salary and have been told that if I retire at 65, I will receive $1,150 a month. If I wait until I'm 70, I'll get $1,510 a month.

One final point: All the recommendations of the entitlements commission would not affect anyone who is now over fifty. But if *any* change is proposed—phasing up the date, changing the consumer price index, making people pay more premiums for voluntary Part B coverage—senior citizens and the AARP pull out all the stops. They killed catastrophic health care years ago, and that was fascinating when you looked at the details. All that would have happened was that about eighty percent of the people covered would have had to pay $10 more a month, the next fifteen percent would have had to pay $17 a month, and the top five percent would have had to pay $1200 to $1500 a year. That last group killed it. The richest people in America killed it. These are people who have a home in Sun City and a cabin in the Bighorns, and they go to the senior citizens center (where they pay $1 for lunch) and rant and rave about their unfair treatment. The AARP wants long-term health care for every senior in the country, regardless of net worth or income, and regardless of the fact that it will break the country.

TORT REFORM

What the House is doing to lawyers is devastating, and I will tell you why they're doing it. They're doing it because this is a partisan group. They have read the FEC reports, and they know that all the campaign contributions from trial lawyers went to the Democrats. It's that simple. The trial lawyers put their money on the losing horse, and the horse that won is a bronco. The cheeriest adjective to describe the relationship between lawyers and Congress at the present time would be "strained."

JUDICIARY COMMITTEE

My work on the Judiciary Committee has been very satisfying. In my first session as a young legislator, I served on a judiciary committee, in the minority.

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That's where you really learn, by the way. You can't function well as a legislator unless you have served in the minority. That's why—whatever your political position is—the recent turnover is the greatest thing that has happened in forty years. The Democrats need to experience being in the minority.

Regarding the Judiciary Committee and Clarence Thomas, who has been mentioned, I want to make two points. The Thomas hearings were not my finest hour. They were terrible for me, anguishing. But an important factor for me was that they came in the wake of the Bork hearings. I had to sit there during the trial and execution of Robert Bork. Regardless of whether you like Bork, you have to respect his record. In five and a half years on the federal bench, he wrote 104 opinions, not one of which was ever overturned; and six of his dissents became majority opinions of the United States Supreme Court. Before my eyes, they turned him into a sexist, a racist, a defiler of the bedroom, a sterilizer of women. I could not believe it, and I thought, "This could happen to anybody." (I also thought, "The people of America just deprived themselves of people like Robert Bork and Lawrence Tribe on the Supreme Court." Because Tribe writes yeasty, provocative stuff, he could never get through the process. How sad. The best thing for the country would be to have a Robert Bork and a Lawrence Tribe on the same court. Then we'd see exciting things.)

Against this painful background, along came Clarence Thomas whom we had already reviewed and approved three separate times. During the three previous reviews, no one ever heard of Anita Hill. Suddenly, after the Supreme Court appointment was well on its way, everybody heard about Anita Hill, and I couldn't help but wonder where she had been for ten years while we were considering the man the three other times. It looked like the Bork travesty all over again.

The other problem for me was the lack of corroborating evidence on Ms. Hill's side. As trial lawyers, you know that corroborating evidence is the key in many an issue. We were as surprised as you were by her three days of dramatic and horrifying testimony because we had never seen a word of it. None of it appeared in her FBI report or in any of her statements (statements and then a revised statement—not an affidavit). Not only was there a lack of corroboration and history, but I had negative information about Ms. Hill. A woman attorney in Tulsa, Oklahoma, wrote to me on behalf of herself and two young black lawyers. They said they had been Ms. Hill's students and that she was totally incapable of teaching anybody anything and had disrupted the entire faculty. I received an affidavit from her former law partners stating that they had skipped over her because she was incompetent. And, according to a news report that most of America apparently missed, two black lawyers in Atlanta said separately that she had said to them, "I think it's great about Clarence. He was a great colleague and it's going to be a great thing for him to be on the bench."

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Now both of them are fairly well destroyed, and every year the media will pick them both apart on the anniversary of the hearings, just as they did this year.

QUESTIONS AND ANSWERS

Q: What are your views on term limits?

A: I was not a believer in term limits, especially when I was running for my third; but after being whip of the U.S. Senate for ten years, I'm all for them. Twice a month I would go to a Senator and say, "This is a critical vote. We need your help," and the response would be, "No, if I vote for that, I'm history." I would say, "Don't you have a little higher sense of duty than that? This is a critical national issue." He would say, "I just can't do it." We need term limits because, with them, at least one-third of the Senate would be voting on the basis of what was right. Then all a leader would have to do is find eighteen more votes out of the pool of forty people, Democrats and Republicans, who are willing to cast tough votes. If you have a good position, you should be able to get the thirty-three who are not facing reelection plus eighteen more, and we might begin to move on the tough issues.

Q: Don't you think the politicization of the Supreme Court appointment process has discouraged good people from submitting their names?

A: Yes, I think we have discouraged good people from submitting their names, and I also think the current state of our campaign system has discouraged good people from running for public office.

Q: What is your assessment of how the Senate will react to the tort reform going through the House?

A: There are new people in the Senate, too, and they are vigorous in their denunciation of lawyers. I really don't have a reading on what the Senate will do. To some extent, we're just stunned by everything that is coming out of the House. I do know this: You're going to have to watch more than the tort reform bills. One of the health care bills includes malpractice reform, and there are caps in there. The House just took those caps and stretched them to the whole civil system; they're not being very discriminating.

Q: Don't they understand that what they do under the guise of tort reform isn't going to do away with lawyers but is going to destroy rights and protections of our people?

A: I understand that, and I've always given that argument to my colleagues, but now the response is, "Why can't we even have Little League without lawyers? Why should somebody sue McDonald's because the coffee is hot?"

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There are so many of those bad examples that they overwhelm our good and valid arguments.

The other point I need to make is that you can't just talk to us about what the changes will do to "the people" or even your clients. When teachers come in, they always talk about the kids; the AARP people come in and talk about the poor, wretched seniors; others come in and talk about the veterans. (There are twenty-seven million veterans, and only three million of them ever saw or heard a live shell go past their heads. You can become a "service-connected disabled veteran" by tearing up your knee playing special services basketball at Heidelberg.) I'm not a cynic but I am a skeptic. Don't come in and talk about your clients or the kids or the seniors. Talk about yourself. Say, "I work my butt off but I help a lot of people, and if I couldn't give them a contingency fee, I couldn't even get them started. Sure I'm in this, but there have been a lot of cases where I never got a nickel and even paid the expenses out of my own pocket." If you tell us you're just worried about your clients or "the people," not yourselves, we aren't going to listen. We've heard it so often that we just tune it out.

Q: If they're going to make it impossible for us to bring product liability suits and similar actions, by eliminating contingency fees, what is their plan for policing consumer safety? Who is going to fill that role?

A: I guess they believe that younger, less greedy lawyers will do it, but I really don't know. All I know is that it makes me sad to see this happen to my cherished profession. Greed and ego have sometimes overcome the system, and the doctrine of exhaustion of remedies has become the doctrine of exhausting the client's assets. As they say in Washington, it's the land of the fee and the home of the knave. That is not the law I know, and I hope we can return to that practice of law.

Q: You talked a lot about entitlements and wealthy seniors—and there are wealthy seniors who could pay more or do without Social Security—but there really are seniors who are hungry and children who are beneficiaries of death benefits. Why have those death benefits been cut so drastically, and why is the Social Security money not going to those who need it?

A: I get a little carried away when I talk about these entitlements because the problem is so enormous. I don't mean to suggest that all seniors are wealthy, and I'm not talking about cutting the safety net on anyone who needs it. With respect to children, we've received a lot of criticism for taking their food away. Well, the House is doing something dramatic, but let's be clear about what they're doing. They're saying to each state, "You received a total of $*X* last year. We're going to increase that by 5.4 percent and let you administer it your-

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self." They are increasing the funding and taking the federal government out of it. I don't know what the states will do, but I do know this: If they don't use the funds the right way, the feds will return. I do not consider that to be turning our backs on children.

Let's return to seniors one more time. As I said, I'm not talking about pulling the safety net out from under anyone who needs it, but we have to find a way to trim the excesses and slow the increases in systems that are gobbling us up. Another example: premiums on Medicare Part B. Part B is voluntary, so this is not a situation where anyone can say, "We had a contract and you broke it." Right now, even though this is voluntary, only twenty-five percent of the premium is paid by the beneficiary, regardless of the beneficiary's assets or income; seventy-five percent is paid by Joe Sixpack. That's wrong. We also tried to eliminate COLA, the cost of living allowance, for those who make over $50,000 in retirement. They fought that on the ground that it would break the contract; but the COLA was never part of the contract, and it runs between $7–$22 billion a year, depending on the consumer price index.

It's absurd that the entitlements go to people regardless of their net worth or their income, but when we try to impose limits, we get torn to ribbons. One change we should be able to make is an updating of the consumer price index. It is so antique that it still refers to typewriters, not word processors. Changing the consumer price index would have a tremendous impact in a lot of areas, including the COLA for veterans and COLA in Social Security. We couldn't even get the consumer price index updated! If we don't do something, in the year 2010 sixty percent of the domestic budget of the United States will be going to people over sixty. Then you'll want to talk about children because children will be left out completely due to the greed of seniors.

Q: Does it make sense to do tax cuts?

A: When I was a member of the leadership, I was a loyal soldier on that, but I'm not going to vote for a tax cut for anybody at this time. I'll look at the capital gains tax very carefully because I do think a change there could generate capital, but I'm not going to vote for a middle class tax cut. It's minuscule anyway, on a per-family basis, and won't really help anyone, and I simply cannot support a tax cut at the same time we're voting on a debt limit of $5 trillion with a deficit this year of $200 billion. The unfunded liability of federal retirement is $600 billion, and there are only 2.9 million retirees.

Q: Has it gotten to the point where, if you want to get the truth out, you have to hire a PR person to package it into twenty-second sound bites?

A: I think it has. In Washington, it has even gotten to the point where you go to a lawyer first, and he chooses the PR person for you. I think lawyers should

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do that to improve their image and get their message across. You have to tell your story. The hard part, of course, is having to tell it in twenty or thirty seconds. There's no way to describe the problems of this country in thirty seconds; but we all have to do the best we can with the best help we can get.

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