

CIVIL LITIGATION IN THE TWENTY-FIRST CENTURY: A PANEL DISCUSSION

*Professor Margaret A. Berger**

Good Morning. My name is Margaret Berger. Welcome to this morning's discussion on the future of the federal courts in federal litigation—a look to the twenty-first century. We're very fortunate, indeed, to have with us today three preeminent members of the legal community who are highly qualified to comment on these issues. Not only has each of our panelists been an articulate, thoughtful observer of federal practice, but each has been an important player in the process itself. Collectively, they have been viewing the litigation process in the federal courts from some of the most illuminating vantage points.

The Honorable Ralph K. Winter has been a United States Circuit Judge in the Second Circuit since 1982. As such he has sat on panels dealing with some of our most troublesome cases, such as Agent Orange and asbestos litigations. Prior to his appointment he was a full-time professor at the Yale Law School. He also has another vantage point, because he was a member of the Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure from 1987-1992, and is now chairman of the Judicial Conference Advisory Committee on the Rules of Evidence.

Kenneth R. Feinberg has recently founded the Washington, D.C. law firm of Kenneth R. Feinberg & Associates and was formerly a lead partner in a major Wall Street firm. Mr. Feinberg, you all know, has frequently served as a special master in some of the most complex litigation around, including the Agent Orange case, the asbestos litigation, and DES litigation. He has also found time to be an academic as an adjunct professor of law at Georgetown.

Judith Resnik is the Orrin B. Evans Professor of Law at

* Professor of Law, Brooklyn Law School.

the University of Southern California. She is a prolific writer in the field of procedure, and has been involved in issues dealing with complex litigation in such capacities as consultant to the Ad Hoc Committee on Asbestos at the Judicial Conference of the United States, and as consultant to RAND's Institute for Civil Justice. She has even at times appeared as an appellate litigator in complex cases. She also is the co-author (with Robert Cover and Owen Fiss) of a casebook, *Procedure*. I have asked her to begin with a brief summary of the themes that have been raised.

Professor Judith Resnik

We have been asked to look forward—to procedure in the twenty-first century. But I think we need to look back first to understand a little bit about where we have been in the last few decades before we can discuss even where we are, let alone where we are going. Much of the commentary over the last day and a half has posited a procedural world that, at least from the vantage point of those who taught civil procedure, appeared—up until very recently—to be fairly tidy. One seemed to know who the “players” were and who made the rules. Reading the Rules Enabling Act of 1934,¹ one spoke of judicial control of rulemaking. One described how the Supreme Court promulgated the Federal Rules of Civil Procedure and how the heart of the drafting occurred within the committees of the Judicial Conference of the United States, particularly the Advisory Committee on the Civil Rules. We also thought we could describe the rulemakers' aspirations—access, efficiency, the focus on the merits—even as we had to acknowledge the invisibility of much of their work. While the 1988 amendments to the Rules Enabling Act² added a window into the process of rulemaking (by making meetings open and enabling spectators to watch procedural rulemaking,) those amendments did not reformulate the process of rulemaking in major respects. Finally, the 1938 rules were “trans-substantive” (one set of rules across a wide variety of

¹ See 28 U.S.C. § 2071 *et seq.* (1988).

² The Judicial Improvements and Access to Justice Act, 28 U.S.C. § 331 *et seq.* (1988).

substantive areas) and uniform (one set of rules for the nation).

Given the assumption of a stable and readily described process, with relatively clear lines of command, and of one set of rules governing all litigation, one can posit that the current world is now quite different. In 1990, Congress enacted the Civil Justice Reform Act of 1990 ("CJRA"),³ which has, in essence, empowered ninety-four amateur Advisory Committees, local groups of lawyers, judges and even an occasional non-litigant, who now have the authority to frame civil rules that might differ, district to district. Given the contrast between the presumably neatly delineated "old regime" and the new, one might perceive a major shift—to a world that is now terribly, and suddenly, messy. With that framing, it is not surprising that, thus far at this Symposium, we have heard words like "disintegration," "chaos," "collision courses" and "balkanization."⁴ Jeff Stempel, somewhat more upbeat, describes us as in a time of "shifting paradigms."⁵

My own sense is that the world was never quite so tidy as it had been described nor is it quite so messy now. The traditional story told is that, since the 1930s, the judiciary has had control of rulemaking. However, that vantage point comes from a somewhat narrow perspective, one focused on the *civil* rulemaking process, rather than on rulemaking as a whole, and further, one predicated on a limited definition of procedural rules. If one looks at rulemaking from a perspective that includes the civil and criminal rules, one sees that Congress never let go of the process as much as has been described by civil proceduralists. Major examples of rulemaking by Congress include in 1972, congressional intervention in and delay of the Federal Rules of Evidence, the Speedy Trial Act of 1974,⁶ congressional revision of Rule 6 of

³ See Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-82 (Supp. II 1990).

⁴ See, e.g., Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841 (1993); Stephen N. Subrin, *Teaching Civil Procedure While You Watch it Disintegrate*, 59 BROOK. L. REV. 1155 (1993); Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659 (1993); see also Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992).

⁵ See Stempel, *supra* note 4, at 688.

⁶ 18 U.S.C. §§ 3161 *et seq.* (1988).

the Federal Rules of Criminal Procedure (addressing disclosure of materials from the Grand Jury), and congressional amendment of Rule 35 of the Civil Rules to authorize psychologists, as well as psychiatrists, to conduct mental examinations.

In other words, the proposition is overstated that, under the pre-1990 regime governed by the Rules Enabling Act of the 1930s, Congress had sent all rulemaking to the judiciary and left it there, undisturbed for more than fifty years. Over these decades, Congress has kept its hand in. Further, the Executive branch, by way of the Department of Justice, has always been a very significant player in rule drafting. With the relatively recent data-basing on computer fiche of the archival memoranda exchanged in the rules process, those interested in the history of the civil and other rules can read the memos and notes, which I think will require us to tell a different story than the one we have provided thus far.⁷ The Judicial Conference committees were the dominant but not the exclusive makers of procedural rules.

Furthermore, the demise of tran-substantive and uniform rules also predates the 1990 CJRA. In 1968, after Congress authorized multidistrict litigation,⁸ a special set of rules was crafted to apply to such cases.⁹ In 1977, Congress created a discrete set of rules for habeas corpus litigation.¹⁰ In 1986, the second edition of the Manual for Complex Litigation was published, bringing with it not binding rules but a "series of basic principles" for "fair and efficient resolution of complex litigation."¹¹ In 1983, the judiciary amended Rule 16 not only to provide for case management, but also to permit judges to exempt categories of cases, presumptively inappropriate for managerial judges. A research project, sponsored by the

⁷ See, e.g., Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5, 8-16 (1991) (shedding light on the reformation in the 1960s of Rule 23 (class actions) by virtue of memoranda exchanged by members of the Advisory Committee).

⁸ See 28 U.S.C. § 1407 (1988).

⁹ See RULES OF PROCEDURE OF THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION (1993); Patricia D. Howard, *A Guide to Multidistrict Litigation*, 75 F.R.D. 577 (1977) and 124 F.R.D. 479 (1989) ("Clerk of the Panel").

¹⁰ See Rules Governing § 2254 Cases in the United States District Courts, 28 U.S.C. § 2254 (1988).

¹¹ MANUAL FOR COMPLEX LITIGATION 10 (2d ed. 1986).

Judicial Conference to survey local rules in the district courts, documented that by the late 1980s, more than 5000 local rules existed, and that some of them were in substantial variance with the national rules.¹² Meanwhile, those watching the Supreme Court struggle with the meaning of “due process” learned that the concept was flexible and that the amount of process due varied with the private interest at stake, the government’s interest, and the risk of error under one procedural regime as contrasted with another¹³—in short, holding that trans-substantive rules were neither constitutionally mandated nor necessarily wise.

Once one acknowledges this history, one sees an evolution—from the 1930s model of trans-substantivity and uniformity to the creation of different rules for different kinds of cases and to increasing local variations. As a consequence, current procedural innovations seem less like a sudden departure and more continuous with the past.

Further, the continuity runs in the other direction as well. In papers presented in this Symposium, Lauren Robel and Carl Tobias describe work now underway as implementation of the Civil Justice Reform Act proceeds.¹⁴ What is interesting to me is their description of agreement and of uniformity, rather than of great disuniformity among the different districts. We learn from Professors Robel and Tobias that during the early phase of implementation, when some 30 districts had drafted plans, many had similar or identical rules, developing requirements for “differential case management,” for disclosure and exchange of information and for settlement conferences. We learned further that a good many districts were not promulgating new rules but simply codifying rules and practices already in place within a district. In other words, the current rules are not so widely varying as might be assumed. The new world of procedure is not quite so different from the old world; there is a good deal of continuity as well as change.

¹² See Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2020 (1989).

¹³ *Mathews v. Eldridge*, 424 U.S. 319 (1976).

¹⁴ Lauren K. Robel, *Grass Roots Procedure: Local Advisory Groups and the Civil Justice Reform Act of 1990*, 59 BROOK. L. REV. 879 (1993); Carl Tobias, *Silver Linings in Federal Civil Justice Reform*, 59 BROOK. L. REV. 857 (1993).

Let me turn to what we have learned about some of the changes. Both Lauren Robel and Bryant Garth have spoken of a grass roots movement exerting pressure to prompt changes in the rules of litigation.¹⁵ One question I have is about those "roots." If the so-called "grass roots" are comprised of lawyers who are by and large a narrow segment of the bar, who have already been participating in the framing of rules and who have populated committees of the bench and bar for many years, then the metaphor of "branches" from the same "tree" is more apt than that of "grass roots." A second question I have concerns whether, with lawyers and judges and non-lawyers thinking about procedure, we can help to stimulate a creative conversation or whether we will see disintegration to stances defined by narrow assumptions of self-interest. Yet a third problem is about costs: who pays for the inevitable costs of transition? As we do experiment, invent and generate local or national efforts to reframe procedure, how will we protect clients from bearing the costs of these changes? Will lawyers bill clients for time spent learning new procedures? Will judges be forgiving of lawyer and client failures to conform to local variations?

A final problem is the intersection between the financing of litigation and the rules of procedure. The 1930s rules did not directly address this issue. In the 1990s, it is less attractive and plausible not to consider the problems all too obviously before us. As we see numbers of large scale cases (such as those like Agent Orange and the breast implant litigation, which my co-panelists have participated in as either judge or special master), we see that certain forms of litigation offer major economic incentives to lawyers and create opportunities for judges to exercise stunning amounts of power. Therefore, I believe proceduralists need to insist that rules about attorneys' fees and attorney ethics have to be considered when procedural rules are framed. Let me conclude here by pointing out that this convergence of ethics, fee structures (for both plaintiff and defense lawyers) and procedure demonstrates again the need to describe procedure not as stable and fixed, but as fluid, and

¹⁵ See Robel, *supra* note 14, at 884; Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and its Values*, 59 BROOK. L. REV. 931 (1993).

even “messy.”

Kenneth R. Feinberg, Esq.

Is there chaos, is there disruption, or is there calm or something in between? I think it's probably somewhere in-between. I want to give a rather parochial view. The parochial view of not only a special settlement master who gets involved in these mass tort cases, but a political overview of the situation as I see it having spent a good deal of time as a United States Senate staff member, and now practicing law in Washington.

First I think it's very risky to paint with too broad a brush. As I see it with parochial blinders on, the real problem of how the federal courts will deal with mass litigation into the twenty-first century is mass *tort* litigation. That's the real problem. I don't think the complex case is any more a problem today than it was twenty years ago. It's the mass tort problem—the Agent Orange, Dalkon Shield, breast implant, heart valve, asbestos and DES cases. It's the mass tort cases that drive much, maybe not all, but a good deal of the criticism of the rigidity of the existing rules. And in my experience, one has to be very careful about which tail is wagging which dog. I think that the millions of dollars that have been spent by American industry to try to modify substantive rules of tort law in Congress avails the industry of nothing. There will not be such tort reform. Whether there should or should not be is really beyond the subject of my topic today. But I think that the real issue in terms of the availability of flexible civil rules of procedure to deal with a complex case is really in essence a discussion of how we deal with the mass tort case—not the traditional Johnny-got-hurt-by-the-lawn-mower case, but the mass tort case. And when you begin to talk about modifications of the rules to deal with the phenomenon of mass tort, you must ask yourself what is the alternative? What are the available alternatives if one concludes, as I have concluded for the last five years, that there will be no appreciable legislative interference with this process—especially now with the Clinton Administration. There simply will not be a sweeping reform of the mass tort procedural problem or substantive problem coming from the halls of Congress. So in effect the courts must

do what they can with the tools at their disposal. If one agrees with that supposition then one can begin to focus on the real question, which is what can the courts do without legislative interference or administrative agency interference to deal with the phenomenon of the mass case?

Before the courts even begin to act, I think one must deal with the provocative conclusion—and it is provocative—that the consumers of American justice want people compensated. That's very important. When you look at these cases—Agent Orange, DES, asbestos, Dalkon shield—it is a fair reading of the climate in America in 1980 through the end of this century that the American people want to see the alleged victims of these mass tort injuries compensated. Legislatures won't do it. The courts have to. That's what the American people want. It's a provocative point, but I think it's an important one.

So what will you see at the federal level? I think you'll see continued efforts by the judiciary, federal and, I might add, state, to use the flexibility and the discretion that the judges have to try to "do justice." And to my way of thinking that means that we must have more judges. I think arbitrary caps on the number of federal or state judges won't fly as a practical matter. But beyond that, I think that you will see that the following steps will be taken to try to deal with the phenomenon. One, as almost a *sine qua non* for resolving these mass cases, there must be more and more efforts at aggregation. If you don't have all the cases in one forum, woe onto anybody trying to deal nationally with the phenomenon. I mean when you have 192,000 DES cases, 250,000 Agent Orange cases, 130,000 asbestos cases, etc., the idea of trying to deal with that type of phenomenon in a piecemeal way, as asbestos teaches us, is impossible. So if you have the cases and you aggregate the cases in one forum, you can begin to come up with some judicial response to the problem using the rules as best you can in developing consensus law, a national rule and jurisdiction in resolving conflicts disputes. These are issues under the rules that bedevil the judiciary but leave the consumer with no alternative but to look to the judiciary. Aggregation is critical.

The second change or approach as we move to the twenty-first century is increased efforts at developing creative settlement techniques. As you know, it's the choir talking now,

because that's what I do. But the fact of the matter is that there is an increased need for the judiciary, confronting clogged dockets, to develop more flexibility in fashioning mediation, settlement, arbitration, mini trials, summary jury trials and other ways to get the cases resolved. That poses a great problem in terms of tailored individual justice, but the fact of the matter is that it's an essential. It's an essential building block of any solution because the courts are ill equipped to try these cases one at a time. It can't be done.

So if you look at aggregation and settlement you see why Judge Jack B. Weinstein has this almost ideological support for techniques like the class action that will aggregate the cases. There is no alternative. We've got to get rid of the cases. How are we going to do it? One by one? We can't do it one by one. Let's aggregate them. Let's appoint Feinberg or some other special settlement master and let's get rid of the cases.

Now that raises a third problem which is much more difficult problem to grasp: that in these mass cases, what do you do once they're aggregated, and once you have a vehicle to settle, what do you do about *future* claims? That is the substantive problem. But it is a substantive problem that bedevils efforts to settle present cases. Stu Rickerson is here from Keene. Paul Miller is here from Pfizer. I'm sure they will tell you that however aggregated the group may be, settling a whole series of aggregated present claims is throwing good money at the problem if you can't get global peace, if you can't somehow come to grip with future claims that haven't yet manifested themselves because of the latency of the disease, but they're around the corner. You can try to predict in some of these asbestos cases how many claims there will be over the next thirty years. What about those cases? In Agent Orange, as Judge Winter knows, the defendant chemical industry had absolutely no incentive to settle an aggregated class action if they weren't assured of total peace. We don't want a Vietnam Veteran in 1997 coming back trying to reopen the settlement. And that is precisely what has happened. The *Ivy* case in the Second Circuit raises the issue of the ability of judges and lawyers acting today to bind unknown future claims, and *Ivy* says that future claimants can be so bound.¹⁶ And that is the

¹⁶ *Ivy v. Diamond Shamrock Chems. Co.*, 996 F.2d 1425 (2d Cir. 1993), *cert.*

third big problem here in the twenty-first century in dealing with these hosts of as yet unmanifested future injuries—latent claims. How do you deal with that problem.

So I think that those three points are the points I want to make here at the outset—the absence of available alternatives leading to aggregation, settlement and global peace. And I think that's what the rules and the flexibility of judicial decisionmaking and discretion point to in the absence of the legislature doing anything else.

As a final point, I agree with Professor Resnik that a tremendous problem in this whole area is the skepticism, the suspicion of the trial bar. They know the devil that they confront, and it's not such a devil. They've been taught to deal with the litigation. The idea of the adversary system has been drummed into them in law school, and I think that the trial bar is extremely skeptical of much of what I have suggested will be the essence of the next ten years. I'll tell you exactly how trial lawyers view what I do, and what Judge Weinstein does. I am reminded of the story of Satan. Satan comes to the trial lawyer, a fellow right here in Brooklyn, and he says to the trial lawyer: "I'm going to make you the most famous trial lawyer in America. You're going to make millions of dollars. You're going to be able to retire, and put your children through school. And they'll have a dowry forever. I'm going to make you the head of the City Bar Association. You're going to be the most famous, most prominent lawyer in the United States. And all I want in return is your soul to rot in hell, damnation and fire forever, for eternity. And I want your wife's soul and your children's soul." The lawyer looks at the devil and says, "What's the catch?" That's how the trial bar views the solution I have discussed today.

Honorable Ralph K. Winter

I guess I'm kind of pessimistic about the future. In the trial courts, I find tremendous inefficiencies, costs and delays that seem to me to be needless. I think the likelihood of reform is low. Speaking as a former member of the Advisory Committee on Civil Rules, it is my impression that lawyers

denied, 114 S. Ct. 1125 (1994).

like complicated rules. They like a lot of things in there. Part of it is the individual lawyer's approach to things, which is to think about the odd case. We have this proposal, which is under all kinds of emotional attack from defense lawyers, and which says that at the beginning of a case you will act as though interrogatories that any competent lawyer would have served upon you have been served.¹⁷ And there's been a motion to compel that has been granted. You shall act that way because each of those is inevitable. And the trial bar yells, "Oh my God, we are going to have to turn over things." You know well they inevitably would have to be turned over. I have talked to defense lawyer after defense lawyer about this. And the conversation goes on, "Oh yeah it's awful, it's a bad idea, I mean really it's terrible." I hear this from close friends and former law clerks, and finally I'll get a reason out of them. What's bad about this? Well, the reason is that sometimes you get an incompetent lawyer who wouldn't file those interrogatories. And then we'll drop the subject and just talk about things generally. And they'll say, "Judge, you know most discovery is absolutely useless." But when we try to reform, we're up against this hysteria. There are clients who are paying a lot of money. I mean why insurance companies want lawyers to resist things that are going to be granted so that they pay for paper and everything else to end up where they were going to end up anyway is really beyond me.

Now I'm influenced by my experience as a trial judge. It's not extensive. But I am given routine cases because the routine cases are the cases the district judges don't want. They don't want to try another one of these particular cases because they've been doing them. So I get FELA, police brutality, employment cases and things like that. I can say a couple of things in my experience about this. First, I'm told every time the case is ready for trial that there's been almost no discovery request that has been complied with. But the three years pass and some judge who heard I was coming around declared it ready for trial. I'll discover that the interrogatories haven't been answered and that the documents haven't been turned over. Now these are FELA cases—where everyone knows what

¹⁷ See FED. R. CIV. P. 26. Because Congress failed to modify or eliminate the proposed rule, it became effective on December 1, 1993.

the accident was, and it was reported—and an individual police brutality case, and employment cases about discrete events. Everybody knows what the documents are. I'll come in, and I'll find out discovery hasn't been done and I say, "Oh, we're going to trial in two weeks; you turn over the document six days from now." And once in a while a trial lawyer will tell me what the Federal Rules of Civil Procedure provide for, I will say, "Oh, o.k. mandamus me. Meanwhile, turn it over in six days. And we're ready to go to trial. You mandamus me, maybe the trial will be put off later, and you will come back, and I'll still try the case." And my God it gets done.

I've got to say one reason that I support mandatory disclosure (although I had opposed the earlier versions of the reform before we rewrote it so that it was applicable only to facts) was my experience that people could turn these things over. I talked to a couple judges this weekend—one in the Northern District of California—and they have that rule out there. They had absolutely no trouble with it, no trouble with it whatsoever. And everybody is saving money, but it may get rejected by the Congress.

Second, lawyers don't want to change. They just don't like change. They look at every proposal—and they're right to because a lot of proposals have unintended consequences—but there's never a comparison with what happens now. They always ask "What is it going to be in the future?," but they never put in the balance the things that might be eliminated if you had a simplified easier procedure.

And then there's money. I hate to bring it up, but a lot of firms are geared to long expensive discovery. And if you try and reform them, they resist. It's these big cases with the firms where everybody's charging by the hour that the discovery goes on. Those are millions if not millions and millions of dollars of social waste.

Alright, now Ken Feinberg is right. One of the big problems facing the federal courts are toxic torts. Not to dump on the substantive law of toxic torts but there is one fact that's left out of any discussion that one hears about Agent Orange, particularly where academics are around. In my corporation law class, when I was talking about unlimited liability a couple of months ago, I mentioned the opinion in the Agent Orange case, which essentially said it's totally baseless litigation. And

they all looked at me in surprise, but you know the outstanding fact about Agent Orange is that there was no evidence that it caused the harm alleged when brought and there was no evidence that it caused the harm alleged when settled. \$180,000,000 was paid. Even the New York Times called it "Orange Mail." When the settlement was appealed there was still no evidence that it caused any harm. But it had disrupted federal court business and a lot of money was paid as settlement. Toxic torts I think are more difficult in some ways than Ken says. The easy toxic tort, although a big troublemaker, is asbestos because asbestos causes a harm that is peculiar to asbestos. That is, if somebody has asbestosis, you don't have to worry about whether they were exposed. With Agent Orange, any ailment—sleeplessness, for example—was up for grabs. There were only one or two ailments that were peculiar to exposure to dioxin, if I remember the record correctly, and they were not found in any great incidence in Vietnam veterans. So the Agent Orange-type case is very different. There are tremendous questions about both exposure and causation. There are questions of whether Agent Orange causes injury and, if so, which company is responsible.

I've always had problems with aggregating those cases because each individual comes in with an ailment that is abroad in the population as a whole—there's 300, 400 ailments—and each one has to connect it to exposure to Agent Orange, which is very, very hard to do because each one may have been exposed to dioxin elsewhere. The fact was that there was a lot of dispute as to where Agent Orange was sprayed. It was not sprayed everywhere in Vietnam. And everyone's damages are different. With all of these questions I always had a big problem with aggregation, as I said in the opinion about a class action in this case. I said the class action could be justified for purposes of the military contractor defense, which did apply to all those plaintiffs. But it does seem to me that you've got to have common facts as to liability before you aggregate any kind of tort case. Then of course you have to separate for damages.

Finally, another source of pessimism is the apparent shift of state cases to federal court, through such legislation as the Violence to Women Act and RICO, which has transferred a lot of breach of contract cases, tons of breach of contract cases to

the federal courts with wire fraud as a predicate act. I see no choice but for the federal courts to expand. I do share the view that my colleague Jon Newman has stated that to the extent you reach a certain size as you expand, the job becomes less desirable and I think there is empirical evidence to support that. But my main worry about expansion is just about having a coherent caseload.

Professor Berger

Obviously all of our panelists talked to some extent about a difference between the large and the small case. Let's talk for a moment about the large case, which perhaps drives the system. I'd like to ask you whether you think that the large case is still a classic case of adjudication as it currently exists in the federal system, given the fact that we often have non-Article III personnel engaged in it, such as Ken himself, and that we are dealing with a settlement mode and a suggestion that more and more aggregation will be needed? Is this something that still resembles the adjudication that we have seen in the past, and where do you see the future of this kind of a model going in the twenty-first century? Is this something that we should continue to have in our federal system or do we really have a new ADR model, in which case perhaps the courts are not the best institutions to deal with these kinds of cases at all?

*Dr. Deborah R. Hensler**

I think, obviously, that's a very hard question to answer because there are lots of pieces to it. One of the issues has to do with the way the cases arise. You know it's easy for Ken and me to talk about aggregating these cases, and the problems and incredible social costs of pretending that we're handling the several hundred thousand claims in the system in any individualized fashion. We're either handling them using the kinds of mechanisms Ken talks about or we're handling them in aggregated form, although informally—as I say,

* Senior Social Scientist and Director, RAND Institute for Civil Justice, and Professor of Social Science in Law, University of Southern California Law Center.

pretending that we still have an individualized system. But the cases don't in the first instance appear full blown, you know, out of the head of Zeus as a million cases. And so if we want to think about new models, we do have to think about how these cases arise, assuming we want them to arise. Certainly there are some people who don't. Do we want a system in which somebody can bring a claim and say I think that this product that I used thirty years ago injured me, and by the way I don't remember exactly who manufactured this product? Ken says yes. It appears that the American people agree, given trial verdicts that juries sometimes reach in these cases. We want to compensate people. One hundred dollars, one million dollars, nineteen million dollars, forty-two million dollars—it sounds like a lot of compensation.

So we have the question of how we get these cases in the beginning. What do you do with them? How much discovery do you give them? What are the opportunities for gathering the information? If there is a smoking gun do we want it to be found? Do we not want it to be found? Until we start thinking more seriously about that inception stage, we can't really talk about any sort of real solution.

The second problem is how do you know when you're past the beginning? How do you know you're at the stage where you should aggregate these cases? We now have some considerable evidence that when you aggregate it has a big effect. It can save lots of costs. Maybe that's what we want to focus on. But it may also mean that some people don't get compensation. The biggest problem in this area in the current debate is the search for panaceas. There is no panacea. This is hard stuff. And I think we ought to start confronting all of the hard issues, including the issues, as Judith said, that have to do with huge economic incentives that exist for the lawyers who are involved in this business and who we're asking to craft solutions. They have a tremendous conflict of interests in doing that.

Professor Berger

Well, are we beginning perhaps also to see change in the sense that, for example, the breast implant litigation was handled from the beginning in a way that prior mass tort cases were not handled until years down the line, in terms of

assigning it to a judge, in terms of the orders that are out there. Is that a good model? Is that going to cause us more problems?

Professor Resnik

I think we should sort out two different issues. I do not share Ken Feinberg's theory that mass torts are the only example of the real problem. Twenty-five years ago, many conferences on "the courts" and the problems of procedure focused on institutional reform cases. Much attention was paid to the remedial problems: how to respond to segregation and to horrific conditions at hospitals and prisons? The remedial focus now has shifted to the mass tort, but we should not lose sight of the many other large scale cases and the problems of aggregate litigation in them as well. One example comes from a recent essay by Professor Nancy Morawetz about the difficulties of group representation in the context of social security class actions.¹⁸ Issues of conflict, bargaining, allocation of resources, and lawyers' ethics are plentiful whenever groups are involved, of whatever kind. Further, one finds examples of aggregation in other areas; the Sentencing Guidelines are a vehicle of aggregation, as we make grids to systematize decisionmaking across a category of cases.

Issue one, then, is aggregation of cases, claims, and parties into larger amalgams and the need to respond to the difficulties created by those amalgams.¹⁹ Issue two is about a related but distinct problem: a declining interest in fact finding. The rise in managerial judging and the interest in alternative dispute resolution brings with it a declining interest in fact finding. While not all forms of alternative dispute resolution involve disregarding facts (indeed, some like court-annexed arbitration are interested in facts), a popular mode of ADR in the federal courts is judicially run settlement conferences. Ralph Winter has commented here that no one talks about the *facts* of Agent Orange. Recall that Judge Weinstein dismissed some of the cases of those who had "opted

¹⁸ Nancy Morawetz, *Bargaining, Class Representation, and Fairness*, 54 OHIO ST. L.J. 1 (1993).

¹⁹ See Resnik, *supra* note 7.

out” because he found they had no cause of action (no claim based on then-available evidence that dioxin caused harm). Therefore, the settlement that involved the defendants paying plaintiffs \$180 million seems in tension with the legal/factual posture of the case.

If settlements are to be desired, no matter what the “facts,” then we may find ourselves in a world in which responsibility is not relevant, and the focus is only on the transfer of funds. Some of the proponents of ADR are going to find out that ADR is turning around to bite them because if one does not care about who’s really responsible, then the people who have the resources to pay in a world in which people want payment are going to have to pay something. Whereas, if you try to say it matters what happened—and that caring about what “happened” requires some decisionmaking, some reconstruction of “facts” and their intersection with “law” to produce some decision with authority—then we must figure out a way to esteem and to constrain those with the hard job of fact finding. I think a real motif of the last two decades has been a move away from an interest in fact finding.

Judge Winter

I want to say something about the big case. I teach corporate law at Yale, and I have to deal with the class action in that context. I am really struck by the literature on the class-action derivative suit. The literature portrays it as the opposite of what is taught at the Yale Law School, which is that the class action is the greatest thing since sliced bread, and all kinds of public rights are going to be enforced, and the population will be lifted out of poverty and ignorance, and we will go to the sunlit uplands. What you apparently see when you look at the cases is a lot of lawyers making money, and that’s it. The interests of the attorneys and the interests of the class are not aligned. The attorneys want fees. The class is something distant, something that has to be in the caption of the complaint. I don’t want to overstate this, but there are two scholars, Roberta Romano of Yale and Janet Cooper Alexander of Stanford who have studied class and derivative actions,

made empirical studies, and the results are shocking.²⁰ They shocked me. I had always thought that the derivative action was more or less an unqualified good. But what they found was the vast majority of law suits are frivolous. They are brought, and they're frivolous. Almost none ever go to trial and judgment. Some get dismissed early and the rest are settled. Roberta Romano found that ninety percent of the settlements involve counsel fees. But only fifty percent of the settlements involved any monetary return to the class. You know I guess that's usually paid by insurance. Alexander took a set of cases in which there were suits because the price of a share of stock twelve months later was lower than the initial offering price. That is, they issued the stock at \$100 and twelve months later it was trading at less than \$100. She found that any time there was a financially able defendant and the gap in the price was large enough to afford a counsel fee, then in every such case a lawsuit was brought. Now since without fraud some stocks, I hate to tell you, trade at less than their offering price twelve months later, that's some evidence that these cases are brought without regard to the merits.

Another interesting thing about these cases is these are cases where damages can be calculated with precision. The stock sold initially at 100, traded twelve months later at seventy-five, you multiply twenty-five dollars times the number of shares that were sold so you get a precise damage claim. It's not pain and suffering. Alexander found that the majority of settlements fell within a three percent range of about twenty-five percent, and that the vast majority were between twenty-one percent and twenty-eight percent which seems to suggest either that all the suits were frivolous or that the settlement was without regard to the merits. It may mean that as long as you get a certain amount of money on the table, class counsel has an incentive to settle. The defendant has an incentive to settle. And that's what happens. The class may or may not benefit. Usually the money is paid by insurance. And corporations pay premiums. Or you have one group of investors paying another group of investors.

²⁰ Janet C. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991); Roberta Romano, *The Shareholder Suit: Litigation without Foundation?*, 7 J.L. ECON. & ORG. 55 (1991).

Professor Berger

Well, I think that certainly a central issue that emerges from all of this is what is going to be the future of attorneys fees? An issue that is certainly not talked about much in law school is what is it appropriate for attorneys to earn. I think we all tend to think that we are sending out our students to earn money and that's the end of any obligation to talk about ethical or other implications.

*Professor Stephen N. Subrin**

I taught the Agent Orange case five or six times to students in two schools. And these are students who would be prone to admire Jack Weinstein. Yet almost invariably they agree that maybe we should actually let these things be found like a normal case with facts and law applied. The students say that from the Veterans' point of view, they lost; the fact is that the peanuts that the award came out to per person didn't really help anybody. So maybe it is a good idea to view this as a case that has some elements, you try it, like it was done in the Fifth Circuit—where, by the way, it came out the other way. What do you think about that now? Are the students right that in retrospect let the case run its course, see what happens?

Mr. Feinberg

I don't know whether the students are right or wrong. I know that the judiciary and the parties in that case don't agree with the students. I assure you that the arguments that Judge Winter has made today about the lack of merit of the case notwithstanding—and he does cite a very important treatise in that regard, the New York Times Editorial page—the seven chemical companies in the court room were unwilling to run the risk over a two year period perhaps, especially if they had insurance, they were unwilling to run the risk that the students' perception that the case was without merit was wrong.

* Professor of Law, Northeastern University School of Law.

Professor Subrin

The students didn't say it was without merit. They wanted to hear what happened.

Mr. Feinberg

I happen to agree with Judge Winter. I think it's hard not to agree with Judge Winter about the causal connection at that time up to the present day between Agent Orange and the alleged maladies. But you know Davis Polk, Cravath, Sullivan & Cromwell were all there representing the seven companies. The Vietnam Veterans, represented by able plaintiff lawyers, I assure you, were willing to cut that deal. Now Judge Weinstein should say no? Let's try the case and see who's right? Not realistic.

Judge Winter

I said in the opinion that I thought that the settlement in that case was as certain as the sunrise once you had the class certified. I mean you would reach a settlement in the early morning, but you were going to have a settlement. But the chemical companies resisted certification until they had some real assurance that all the plaintiffs were in and everyone else was going to be barred. And then what happens is as soon as you get a critical amount of money on the table, the chemical companies know there's going to be a settlement. Now \$180 million was the largest ever paid at the time. Right? But if you divide the number of possible plaintiffs into \$180 million and you think that a good case is worth \$500,000, it was a nuisance value settlement. But there are things to be learned from *Agent Orange* about how these things operate. And the students may well be right. The problem with the students' argument is the cost of the individual litigation. When you add it all up, 90% will go to lawyers and 10% to the injured.

Unidentified Questioner

You might want to consider the role that lawyers' fees play in significant litigation. I'm not going to use the word mass

tort or mass litigation because mass tort is just a number of actions, most of which probably should not be in the court. If we were to decide as a society that we are going to deal with injuries today and not deal with potential future or fear of injuries tomorrow, the mass tort would not be there. We'd have just a small number of cases that we can deal with. Lawyers' fees today in massive litigation or complex litigation are the tip of the iceberg. Not only have the law schools trained lawyers, so have business schools. Business schools have developed significant bodies of consultants who enter the law firms, and teach the law firms that there are massive profit centers, such as xeroxing, which is a massive opportunity for income. Fax machines are massive income opportunities. And discovery is one of the most beautiful opportunities that you can ever find. In fact, to a large extent discovery is people-driven within the law firms. It is conceivable that someday we will develop a way to do it through computers, as we begin to cut down on the number of associates, paralegals and junior partners, who all get involved in discovery and produce a profit for the firm. I commend the court out in Cincinnati that tried the paperless trial. It was all done through computers. They tried the case and found out whether there was injury or non-injury, who was right, who was wrong, and they didn't have a lot of paper in the courtroom.

I'm not here to knock trial lawyers or their fees. I've paid some whopping hourly rates to people willingly. On the other hand the fee issue is going to be coming up I think in the next few years because one way or another they have gone through the roof in some instances. We talked about Rule 23 and how in that situation there is opportunity for the court to review the fees. And under local rules or ethical standards, we must require a judge to look at what the fees on both sides are. The two judges that have written most compellingly on this are Judge Weinstein, who has argued that in the mass litigation, the standard 1/3 contingent fee no longer makes any sense, and Judge Shadur of Northern District of Illinois, who has actually called on the plaintiffs' lawyer to bring his fees in, and when he refused to do so, the judge said no fees. I submitted a brief on that issue because we tried to cut down the costs so that more money can go to claimants. Only five or ten cents of every dollar spent goes to sick people, but then you see lawyers

that make \$5,000,000, \$10,000,000, and one last year made \$125,000,000 (\$1,000,000 per day) in a case that lasted about 5 months. And he's now trying to buy the Baltimore Orioles to reinvest some of that money.

Michael Jordan makes a lot of money playing basketball. You can debate whether he's worth it or not. But I don't think I could justify and I don't think anybody here can justify a lawyer making \$1,000,000 a day when his clients maybe will get \$20,000 each.

Dr. Hensler

I want to come back to Steve's comment a moment ago about the students' reaction to the Agent Orange trial and relate it to the discussion earlier this morning about teaching civil procedure. Because it seems to me that it is that kind of question that offers up an opportunity to pull together our notions about class actions, our notions about factfinding and the realities of these kinds of cases. I have also taught that case, and it seems to me the issue it raises is how would you get this type of case to trial. The risks of going to trial, a class action trial, in that case on both sides were humongous. With that kind of risk profile, the notion that the parties would move forward if they can reach a settlement and the notion that any judge would not take advantage of this is just unrealistic. And so you have the alternative, the individual trials—250,000 individual trials. The reality is that there isn't any system in this country that can try those cases individually so the challenge is determining what factfinding means in that kind of context. It's not good enough to say well we should have had a trial, because you're not going to get that trial. And it's not good enough to say well, we should do it individually, because we can't. I think we must start asking how do we do factfinding in this kind of context?

Judge Winter

I'm not sure it would be better to have individual trials, but I'll tell you one thing, the number of plaintiffs in the case was a result of certifying the class, because then you could get money just by joining in. If there were individual trials the

strong ones would have been pursued perhaps. But there would be a kind of rationing. What happens when you certify the class with facts like *Agent Orange*—with more or less unlimited number of people who may have been exposed—the weak claims swamp the strong claims. You've got a big class. The money on the table is enough to support the fees the plaintiffs will want and then you come up with a settlement that disperses money and weak claims get overcompensated and strong claims get undercompensated.

Mr. Feinberg

With all due respect, it's not that easy. You look at asbestos, where the weak claims have overwhelmed the strong claims. Even in asbestos with asbestosis and known causal connections, in the New York State courts an individual pleural thickening case is worth \$42,000. I don't think that certification of a class compels settlement, I don't think certification of a class is the difference between a flood of claims and the absence of claims. When you look at the optimistic title of this program, *Reinventing Civil Litigation*, what I really heard the last hour and a half is that nothing will cure the problem better than getting a better handle on legal fees and getting judges with backbone. That's what I really hear—that if judges are tougher throwing out bogus claims, and they've got the tools to do it, and if we get a handle and drive the system so that it's not as profitable then this problem will likely at least be diminished and maybe disappear. I don't think that's right, but maybe.

Professor Resnik

Actually I'd like to expand our options and not only think of the problem as a tension between aggregation and disaggregation. Rather than consider the inability to try 250,000 cases and consequently the need to settle, consider the many positions in between: try some cases, then talk settlement, try smaller subsets, try alternative forms of dispute resolution for some and then others. This comment returns to a point Deborah Hensler made earlier about the timing of aggregation. When we aggregate immediately, as

seems to be the current approach in the breast implant cases, we then end up with potentially very powerful lawyers and very powerful judges, relatively little public information, and very few mechanisms of control over the principal actors. In these aggregate cases, we've thrown a huge amount of power to a very small number of lawyers who will gain great money and judges who may gain great fame. How are we going to constrain that power that we are thus creating?

*Professor Elizabeth M. Schneider**

The range of options in the cases that we're talking about can be very considerable. I do think that what we are talking about is "reinvention," because there is substantial discomfort with dichotomized options, and need for exploration of what Judge Weinstein called yesterday "the evolving substantive nature of the law." We're not talking about separating the "good" cases from the "bad" cases; the whole point is we don't know that until way along in the litigation process. The substantive law is evolving in such a way that what may have been the "good" cases 10 years ago look worse now, where the "bad" ones 10 years ago look better now. It is important to include a wider range of cases in our discussion.

The point that Judith Resnik made before about enlarging our picture of large cases to include more than tort cases is important. Fewer civil rights and Title VII cases are now in the federal courts because it is difficult for individual litigants to get counsel, to do discovery and to finance those cases. The reason we're into a mass tort paradigm is because of the particular context of the financing and the circumstances of those cases. There's a whole other world of civil litigation that has been largely shunted from the federal courts because of deep problems that have not been addressed.

Professor Resnik

One of the poignancies I see is the extent to which the focus on large scale cases brings us, not inappropriately, to discovery reform, but less explored is its impact on the other

* Professor of Law, Brooklyn Law School.

cases. Further, I wish we would not call large scale litigation “complex” because that label then brings with it the assumption that the rest of the docket is “simple” and therefore less interesting. And then, Ralph Winter, willing to volunteer as a trial judge, is assigned the cases other judges do not want, which include claims of police brutality and violations of other civil rights.

Judge Winter

I think you're right. I always viewed the proposal for this automatic discovery as something that would help the small cases. In ninety percent of the small cases, you would at that first meeting exchange all of the discovery there had to be except for one defendant or agent of defendant and the plaintiff and maybe the plaintiff's doctor. And I always thought that this would do that. And I don't see why you cannot work out a system in which the average case in a federal district court would be settled or tried within six months of its being brought. I mean we really set our sights too low. This kind of delay is intolerable, but I worry that the organized bar is not going to let you change it.

*Professor Jeffrey W. Stempel**

Something that concerns me is that there's this notion in so much of our debate and certainly in other quarters that these things are self-executing. Congress may not give us a chance to test this. But I place a wager with Judge Winter that mandatory disclosure isn't going to be any panacea without judicial enforcement. Those same people who come to you and haven't done their discovery won't have done their disclosure, and you're going to have to give that same “give it to me in six days or get ready to mandamus me” ultimatum in order to get the kind of attorney behavior you want. Additionally, looking at counsel fees, and this obviously relates to what we teach our students, and how they practice and how the public perceives lawyers, maybe we need to lobotomize lawyers away from their adversarialism. But I think that without strong judicial

* Professor of Law, Brooklyn Law School.

enforcement, a lot of these proposals are going to be doomed to failure. More rules can make for more work, a danger we saw with Robert Moses building the Long Island Expressway. You build a road. It gets more traffic. And I'm just not sure that we're not doing some de facto rationing of access to law by being afraid to devote the resources to opening it up any further in the light of what we've seen in the last twenty years.