

3-1-1993

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### Recommended Citation

Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values*, 59 Brook. L. Rev. 931 (1993).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol59/iss3/9>

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# FROM CIVIL LITIGATION TO PRIVATE JUSTICE: LEGAL PRACTICE AT WAR WITH THE PROFESSION AND ITS VALUES

*Bryant Garth\**

The lawyer tempted by repose should recall the heavy costs paid by his profession when needed legal reform has to be accomplished through the initiative of public-spirited laymen. Where change must be thrust from without upon an unwilling Bar, the public's least flattering picture of the lawyer seems confirmed.

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There are few great figures in the history of the Bar who have not concerned themselves with the reform and improvement of law.<sup>1</sup>

## INTRODUCTION

Legal practice and the legal profession are at odds with one another, and they have been since at least the late 1970s. Aggressive litigation practices reshaped the meaning of litigation, gave rise to new values and brought forth demands for reform that traditional institutions could not handle. Such practices also set the stage for a much more serious crisis in professional values today. The profession has not and may not find a way to blend some variant of a traditional approach to courts and litigation with the emerging world of private justice and entrepreneurial legal competition. Success in that venture requires a switch in professional focus from values based on trials to values based generally on dispute resolution.

This Article addresses the tension—or even contradiction—between the legal profession and legal practice. I develop both a sociological perspective and a suggested line of legal

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\* Director, American Bar Foundation. The author would like to thank Carole Silver and Elizabeth Mertz for very helpful assistance and criticism.

<sup>1</sup> *Professional Responsibility: Report on the Joint Conference of The A.B.A. and the Association of American Law Schools*, 44 A.B.A. J. 1159, 1217 (1958).

analysis. The sociological aspect seeks to give a coherent explanation of where we are in the legal profession and how we got there. The legal aspect offers some suggestions for a legal analysis that might help to confront our dilemmas. In making suggestions for a new ethical approach, I am of course replicating the tension or contradiction just mentioned. I hope to suggest a way that the profession might overcome what the sociological study of practice shows to be a very difficult problem.

This Article approaches these issues in six parts. The first part discusses the sociology of the legal profession, providing an orientation for the following parts. The second part uses the texts of the organized bar to set out the traditional professional values toward civil justice. This part concentrates on what I term the traditional values and traditional crises.

The third part confronts the more recent crisis—the challenge of aggressive litigation practice in the new era of legal innovation unleashed by deregulation in the late 1970s. My thesis is that an escalation in litigation warfare changed the rules, posing great difficulties for the traditional professional approach.

The fourth part discusses recent and current efforts to control these legal practices. The effort by the organized bar and other professional organizations, primarily through exhortations, case management and alternative dispute resolution, has not been very successful. More success has come from developments in the market for legal services and, in particular, from the new power of in-house counsel. In-house counsel have used their economic power to require law firms to offer a variety of services, especially lower-cost forms of alternative dispute resolution. These developments, however, have in turn created other quite serious problems.

The fifth part points to the general problem of remaking professional values in this new era of competition. The sociological dimension, posed powerfully by Judge Posner,<sup>2</sup> questions whether, in an age of increasing professional competition, there is any place to assert professional values against the competitive reality of legal practice. Assuming this problem is somehow avoided or postponed, there is also a legal problem.

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<sup>2</sup> Richard Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1, 1-3 (1993).

We need to find some way in legal doctrine to take professional values built on public court trials and apply them to the competitive private-public field of dispute resolution. In particular, in addition to the profession's traditional values of access, efficiency and quality of *public processes*, we need to focus on the quality of information about the more or less *private* machinery that has gained increasing importance in dispute resolution.

## I. APPROACHES TO THE SOCIOLOGY OF THE LEGAL PROFESSION

The principal issue that comes from legal sociology simply concerns the role of the organized legal profession.<sup>3</sup> One view, promoted forcefully by Richard Abel, is that the organized bar works mainly to protect the incomes and status of lawyers—with varying degrees of success—either by attempting to restrict the supply of lawyers (e.g., through law school accreditation), or by promoting their demand (e.g., through legal aid).<sup>4</sup> Other writers have sought to rehabilitate the organized bar from this narrowly self-interested role, suggesting that professional organizations do at times provide outlets for “public interest” activities.<sup>5</sup> According to this view, lawyers actively promote legal aid not so much because it serves their self-interest but because they are seeking to improve the administration of justice. This suggestion of lawyer idealism leads to findings that in their public, idealistic role as members of the organized bar and in other professional activities, lawyers often seek to clean up the messes they make through a legal practice directed mainly toward maximizing their incomes.<sup>6</sup> From this perspective lawyers are involved in the civil justice debate in

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<sup>3</sup> Because the sociological approach taken in this Article is not common in the literature, I begin with a brief discussion of approaches to the sociology of the legal profession that are relevant to the issues of the profession and legal practice.

<sup>4</sup> See, e.g., RICHARD L. ABEL, *AMERICAN LAWYERS* (1989).

<sup>5</sup> See, e.g., TERENCE C. HALLIDAY, *BEYOND MONOPOLY: LAWYERS, STATE CRISIS PROFESSIONAL EMPOWERMENT* (1987); MICHAEL J. POWELL, *FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION* (1988).

<sup>6</sup> Robert W. Gordon, *The Ideal and the Actual in the Law: Fantasies and Practices of New York City Lawyers, 1870-1910*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* (Gerald W. Gawalt ed., 1984).

two ways: they are responsible for the debate by engaging in selfish practices that promote litigation and delay, and they seek to reform the system that they have led astray.

While lawyers look like villains under either analysis, certain sociological research suggests that practices that promote problems in civil justice are the result mainly of client demands. According to these theorists, lawyers are not "autonomous;"<sup>7</sup> they respond to demand. While lawyers may seek business selfishly, changes in the general social world<sup>8</sup> and the world of business<sup>9</sup> have made the public expect more of, and have more recourse to, the law. The legal profession, we could say, offers a known product. It is the demand that changes.

While this demand-side view should have some appeal to the legal profession, like the account that blames everything on lawyer selfishness or greed, it is much too simple. It leaves out the impact caused by how the legal profession approaches practice and reform. First, lawyers should be seen as neither passive nor all-controlling in the lawyer-client relationship. The way lawyers practice has an inevitable impact on clients and how they use the legal system. The supply side of legal practice interacts with client demands; and the technology of lawyering, as we shall see, is changing rapidly. Second, professional bar activities and other lawyer public service must be *linked* to the private practice—or better, the careers—of lawyers. As the beginning quotation suggests, successful lawyers who aspire to become "great" lawyers—with the prestige and wealth this status typically brings—have been drawn to "public-spirited" civil justice issues, whether their "motives" were self-interested or to further the public interest. This activity is not only a matter of conscience. The activists in organized legal professions undoubtedly defend the basic system that supports their constituency, but they also seek to manage—through self-

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<sup>7</sup> JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1982); ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* (1988).

<sup>8</sup> See, e.g., LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* (1985) (discussing a societal transformation in expectations which leads to more of a willingness to litigate).

<sup>9</sup> See, e.g., MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* (1991) (discussing, in part, the increase in business litigation).

interest or idealism, which for present purposes makes no difference—the work and bring it into line with the more “transcendent” values and interests of the legal profession.<sup>10</sup> Understanding the role of lawyers in civil justice reform thus requires an understanding of the relationship among legal professional approaches to reform, legal practice and legal careers in the profession.<sup>11</sup> This Article seeks to bring these strands together.

## II. THE ORGANIZED BAR AND CIVIL JUSTICE: TRADITIONAL VALUES, TRADITIONAL CRISES

The public positions of the organized bar form the background for the story of the legal profession and civil justice. Civil justice debates are bound to involve the organized bar, and the organized bar is where researchers have typically looked for the public-spirited activities of lawyers in civil justice reform. The positions of the organized bar turn out to be instructive, because we can point to a fairly stable set of beliefs found in the texts of the organized bar.

The starting point for the organized bar has been the justice system as currently structured: courts, lawyers, adversaries and litigation. Not surprisingly, the bar's instincts have been to tinker with but not change this general setup. Nevertheless, the bar has a very strong interest in making this structure look good. The bar's moderate reform program, we can say, reacts to what can be termed as the “good old crises,” because these crises do not appear to threaten the general structure.<sup>12</sup>

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<sup>10</sup> See Lauren K. Robel, *Grass Roots Procedure: Local Advisory Groups and the Civil Justice Reform Act of 1990*, 59 BROOK. L. REV. 879 (1993) (showing how lawyers involved in the local committees, which were established to help plan for local federal district courts, assume a “non-political stance”).

<sup>11</sup> This approach comes from the works of Yves Dezalay, including *Marchands de droit* (1992) (forthcoming English translation, Northwestern University Press). See also Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Collective and Workplace Contexts*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* (Robert L. Nelson et al., eds., 1992) [hereinafter *LAWYERS' IDEALS*].

<sup>12</sup> An historical example of a more fundamental crisis from the perspective of the organized bar was the development of administrative agencies in the New Deal period. These agencies appeared to threaten the superiority of courts. See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960*, at 231-38 (1992).

The consensus reform package starts with the basic idea, which goes back at least to the 1908 Canons of Professional Ethics, that lawyers should act to improve the administration of justice.<sup>13</sup> According to the general consensus, the center of attention for the administration of justice is public courts, where laws are to be applied by judges and juries. The public must have faith in the legitimacy of the courts to avoid resort to non-legal, violent or self-help remedies; the ideal image upon which these values are built is that of an individual with access to a relatively quick decision by a judge or jury after a trial on the merits. Thus, the public image of courts is affected by delays or other problems in the operation of the civil justice system.

A second and related idea is that lawyers should work to improve the quality and political independence of judges, yielding a particular enthusiasm for "merit selection."<sup>14</sup> And a third idea, of somewhat more recent vintage, is that the bar has a duty to ensure access to civil justice for those who cannot afford legal services.<sup>15</sup> In the famous words of Judge Learned Hand, "Thou shalt not ration justice."<sup>16</sup>

We can find these concerns in the various codes of professional responsibility;<sup>17</sup> in the report of the ABA's Stanley Commission on "Lawyer Professionalism," issued in 1986;<sup>18</sup> in

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<sup>13</sup> Canon 29 of the ABA *Canons of Professional Ethics*, adopted in 1908, called for efforts to improve the administration of justice. CANONS OF PROFESSIONAL ETHICS Canon 29 (1908). Canon 8 of the ABA Model Code of Professional Responsibility stated that "A lawyer should assist in improving the legal system." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 8 (1980). This idea is now in Rule 6.1 of the Model Rules. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1983).

<sup>14</sup> Canon 2 of the 1908 Canons states, "It is the duty of the Bar to endeavor to prevent political considerations from outweighing judicial fitness in the selection of Judges." CANONS OF PROFESSIONAL ETHICS Canon 2 (1908).

<sup>15</sup> EARL L. JOHNSON, JR., *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM* (1974).

<sup>16</sup> ABA, *Blueprint for Improving the Civil Justice System*, in 1992 ABA WORKING GROUP ON CIVIL JUSTICE SYSTEM PROPOSALS REPORT, iv. (1992) [hereinafter *ABA Blueprint*].

<sup>17</sup> Canon 2 of the *Model Code of Professional Responsibility*, which refers to the "duty to make legal counsel available," cites authorities that go back to the period immediately after World War II. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1980); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1983).

<sup>18</sup> See generally COMMISSION ON PROFESSIONALISM, ABA, *IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR REKINDLING LAWYER PROFESSIONALISM* (1986).

countless reports on court delay and on access problems;<sup>19</sup> in committees and task forces;<sup>20</sup> in the lobbying activities of the ABA in Washington, D.C.; and recently in the official ABA *Blueprint for Improving the Civil Justice System*<sup>21</sup> ("Blueprint") issued in response to Vice President Quayle's criticisms of the legal profession and his recommendations for change made through the President's Council on Competitiveness. The *Blueprint* in particular warrants close consideration.

The initial themes of the *Blueprint* recognize the crucial importance of the justice system, which "provides citizens with a way to resolve disputes peacefully and protects individual rights and property,"<sup>22</sup> and the threat to that system through "overload and underfunding."<sup>23</sup> The *Blueprint* then proceeds through four familiar headings: (1) access to justice;<sup>24</sup> (2) justice system funding;<sup>25</sup> (3) judicial excellence;<sup>26</sup> and (4) improving the management of litigation.<sup>27</sup> It is fair to say that the organized bar is reasonably comfortable with these topics and sincere in the desire to improve the justice system in all four areas. No responsible member of the organized bar would oppose any of these goals in principle. Achieving these aims would comport with the ideal civil justice system from the point of view of the organized bar. The public court system would be available to bring the rule of law efficiently to all those who sought to vindicate their legal rights, and lawyers could represent clients through the adversary system confident that the other side also would be represented.

The organized bar has supported many reforms consistent with the ideals of court efficiency and bringing law to the people, including various programs for legal services for the poor,

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<sup>19</sup> ATTACKING LITIGATION COSTS AND DELAY: FINAL REPORT OF THE ACTION COMMISSION TO REDUCE COURT COSTS AND DELAY (1984); see, e.g., ABA ACTION COMMISSION TO REDUCE COURT COSTS AND DELAY, ABA CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, CIVIL JUSTICE: AN AGENDA FOR THE 1990S (1991) [hereinafter CIVIL JUSTICE].

<sup>20</sup> See, for example, the ABA Special Committee on "Funding the Justice System."

<sup>21</sup> See generally ABA *Blueprint*, *supra* note 16.

<sup>22</sup> *Id.* at iii.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at iv.

<sup>25</sup> *Id.* at v.

<sup>26</sup> *Id.* at vi.

<sup>27</sup> *Id.*



proposals to increase access through attorney fee shifting and efforts to build support for legal services for middle income personnel.<sup>28</sup> The bar largely has welcomed what the ABA has termed "an ever increasing reliance on the justice system to vindicate the rights and claims of all Americans."<sup>29</sup> The studies of "legal needs" commissioned by the bar<sup>30</sup> have also been consistent with this aim. The organized bar supports the principle of inclusiveness within the institution of the legal system. Access is always a major theme.

I do not mean that the legal profession's organizations have ever succeeded in making the civil justice system conform to these ideals. But the legal profession has been able to manage these traditional crises in the litigation system sufficiently to protect the profession's legitimacy. The profession could point to programs that promoted the basic values and make it at least imaginable that the actual could plausibly be measured by the ideal.<sup>31</sup>

### III. THE CHALLENGE OF LITIGATION PRACTICE IN THE NEW ERA OF INNOVATION

The position of the organized bar had a wonderful logic that worked very well when the major challenges to the profession came from outsiders who wanted to get in. New voices in our society could demand their legal rights, and the profession could respond by calling for access, new and better courts and subsidized legal services. The civil rights movement, the consumer movement, the environmental movement and women's groups could be supported in their efforts to use the legal system to claim and expand their legal rights. There were challenges to the legal profession, but the leaders of the profession could operate from a position of some strength, asserting the

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<sup>28</sup> The organized bar, however, did resist group legal services, advertising and price competition, only to have the Supreme Court overrule it in all these areas. The commitment to access was at that time not a commitment to foster overt competition and innovation in the delivery of legal services.

<sup>29</sup> See *ABA Blueprint*, *supra* note 16, at iii.

<sup>30</sup> BARBARA A. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* (1977) (a final report of a national survey by the Special Committee to survey legal needs).

<sup>31</sup> See generally Gordon, *supra* note 6.

unfairness of denials of access.

A set of new challenges, however, has been more difficult to confront. Legal practice itself, in fact, became the problem. The Reagan and Bush administrations' critique had such power because it tapped into criticisms widely shared within the legal profession.<sup>32</sup> This critique was built on the observation that litigation became not only much more adversarial and costly, but also much more frequent in business relationships that had generally stayed away from courts.<sup>33</sup> One indicator of the increased importance of litigation was that in the mid-1970s the ABA formed a "section" on litigation, distinguishing litigation from general practice. The litigation section has grown into the largest practice section in the ABA. The main source of this special focus on litigation, it appears, was the change in business disputing that took place in the 1970s and 1980s.<sup>34</sup>

There are a number of possible explanations for this increase in business litigation. One possibility is that business competition simply intensified,<sup>35</sup> leading to more disputes and more lawsuits. Another is that the homogeneity of the managerial group of very large corporations declined, making resolving disputes informally, for example, over dinner at a club,<sup>36</sup> more difficult. These explanations are consistent with the idea that lawyers mainly respond passively to client demand. Business, according to this explanation, simply called on lawyers to sue other businesses more often. The profession was unable to resist the desires of paying clients. Indeed, there is clearly much to this demand-side story that rings true.

Ronald Gilson, however, offers an account that, while recognizing the increase in demand, blames the change in litigation practice on what might be termed a decline in the morality of legal practice.<sup>37</sup> He attributes the relative lack of

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<sup>32</sup> PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 1-4 (1991).

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

<sup>34</sup> See Marc Galanter & Joel Rogers, *The Transformation of Business Disputing: Some Preliminary Observations* (Paper for Law & Society Association Annual Meeting, Vail, Colo. 1988) (on file with the author); see also NELSON, *supra* note 7; William E. Nelson, *Contract Litigation and the Elite Bar in New York City, 1960-1980*, 39 EMORY L.J. 413, 414-15 (1990).

<sup>35</sup> See generally Galanter & Rogers, *supra* note 34.

<sup>36</sup> See generally Nelson, *supra* note 34.

<sup>37</sup> See Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side*

what he calls strategic litigation—litigation designed merely to gain economic advantage—in the past to the professional role of lawyers as “gatekeepers.”<sup>38</sup> Lawyers, he suggests, were able to use their ethical position and their ability to label a lawsuit as “groundless” to resist their clients’ efforts to engage them for economic warfare.<sup>39</sup> He then posits, however, that the growth of in-house counsel undermined the gatekeeper function.<sup>40</sup> In-house counsel promoted strategic lawsuits by insisting on finding some legal basis for lawsuits that could be brought for other business-related reasons. Law firms were unable to resist because of a structural breakdown in professional morality.<sup>41</sup>

But none of these explanations—increased business conflict, a decline in business networks or a decline in professional morality—is completely satisfactory. Nevertheless, understanding changes in business disputing is very important for the subject of civil justice reform. Adequate explanations of historical change can suggest what kinds of remedies might work and, indeed, just how much of a problem there is. While no one can say for sure at this point what produced this litigation boom, bringing supply and demand side explanations together produces a more inclusive and dynamic account.

A dynamic account starts with the proposition that *both* the world of corporations and legal business became much more competitive in the 1970s and 1980s. Deregulation in the legal profession resulted in part from some of the reforms enacted in the name of access.<sup>42</sup> The legal profession also felt increased competition because of the rise of in-house counsel actively shopping for legal services. Further, there were simply more lawyers available to compete and take advantage of the fewer restrictions on client-getting behavior. Finally, in addition to competition from lawyers, financial and other service

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*Perspective*, 49 MD. L. REV. 869, 872 (1990).

<sup>38</sup> *Id.* at 882.

<sup>39</sup> *Id.* at 887.

<sup>40</sup> See Robert E. Rosen, *The Inside Counsel Movement, Professional Judgment, and Organizational Representation*, 64 IND. L.J. 479, 480 (1989).

<sup>41</sup> Cf. Robert W. Gordon & William H. Simon, *The Redemption of Professionalism*, in *LAWYERS' IDEALS*, *supra* note 11, at 230.

<sup>42</sup> An example is lawyer advertising, which permits much more of a public relations effort by law firms as well.

providers put other pressures on lawyers seeking to maintain their position in advising businesses.

Competition as a matter of course rewards entrepreneurial innovation, and such innovation surely intensified in the 1970s and 1980s. The premium on entrepreneurialism in lawyering, moreover, makes practicing lawyers perhaps more willing to stretch the limits of what the organized profession might prefer. The fact that lawyers innovate to compete has practically gone unnoticed in writing about the legal profession.<sup>43</sup>

Individual lawyers gain a competitive advantage either by offering "better" services, which enable them to charge a premium or attract more business, or by processing a higher volume of cases at a lower cost to the law firm.<sup>44</sup> It is clear that we have seen innovation in the mass production side, with personal injury lawyers becoming much more efficient with relatively small claims, and with the development of multi-office practices such as Hyatt Legal Services and Jacoby and Meyers.<sup>45</sup> It is not clear whether these innovations in fact have increased the number of individual lawsuits, but they have helped some lawyers be successful with relatively small cases. Entrepreneurial innovation, which includes the use of computer and other information technologies, is now part of legal practice for small claims and, as we shall see, for large ones as well.

But the most important change is the rise of what Marc Galanter termed "mega-litigation."<sup>46</sup> Until at least the 1970s,

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<sup>43</sup> Former Governor of Illinois James Thompson, Chair of Winston & Strawn, noted candidly that "[t]here really is a parallel between a successful corporation and a successful law firm in terms of the need to constantly reinvent yourself . . . . If you're just like six other law firms in town, or in the country, why is somebody going to choose you rather than somebody else?" Quoted in William Grady et al., *Chairman Thompson's Theory of Law Firm Evolution*, CHI. TRIB., Aug. 10, 1993, § 3, at 1; see also Michael J. Powell, *Professional Innovation: Corporate Lawyers and Private Law Making*, 18 LAW & SOC. INQUIRY 423 (1993).

<sup>44</sup> For the economic theory of competitive advantage, see JOEL MOKYR, *THE LEVER OF RICHES: TECHNOLOGICAL CREATIVITY AND ECONOMIC PROGRESS* (1990).

<sup>45</sup> See Carroll Seron, *Managing Entrepreneurial Lawyers: A Variation on Traditional Practice*, in *LAWYERS' IDEALS*, *supra* note 11, at 3, 77; J. VAN HOY, *PREPACKAGED LAW: THE POLITICAL ECONOMY AND ORGANIZATION OF ROUTINE WORK AT MULTI-BRAND LEGAL SERVICES FIRMS* (1993).

<sup>46</sup> Marc Galanter, *Mega-Law and Mega-Lawyering in the Contemporary United States*, in *THE SOCIOLOGY OF THE PROFESSIONS: LAWYERS, DOCTORS AND OTHERS* 152 (Robert Dingwall & Phillip Lewis eds., 1983).

law firms did not feel any competitive pressure to innovate in developing litigation as a form of economic warfare. But at that time, clients began to shop more for lawyers, aided by the growth of in-house counsel mentioned before. At the same time, the business world's increased competitiveness made businesses eager to take advantage of whatever was available for economic warfare, including the law. Business innovation includes not only new products and marketing strategies, but also using new *tactics* to compete. Conservative law firms found that they had to innovate or they would lose business to new, aggressive entrants into the legal services market, like Skadden, Arps.<sup>47</sup> Law firms were no longer so prepared to assert the ethics of the profession and turn down legal business and litigation once deemed unproductive or frivolous. They had to compete to survive, and clients wanted the benefits that strategic litigation could bring.

Business litigation increased, and there was competition within business litigation. The principal forms of innovation in litigation, it appears, were methods that escalated legal conflicts. Every aspect of lawsuits became contested. Lawyers could make life very difficult for any opposing business by taking advantage of the open-ended nature of discovery under Federal Rule 26, proliferating depositions and requests for documents or fighting aggressively to resist such requests. Discovery practice in the 1970s became the key to the practice of corporate litigation.

Many legal developments of the past two decades can be related to innovations designed to raise the stakes. One prominent example was the use of civil RICO as a way to turn a breach of contract or tort claim into a conspiracy which can result in punitive damages.<sup>48</sup> Proliferating claims for punitive damages increase the pressure on corporate defendants. Another example is the creation of a whole new form of attack through disqualification motions for conflict of interest.<sup>49</sup> And

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<sup>47</sup> See LINCOLN CAPLAN, SKADDEN: POWER, MONEY, AND THE RISE OF A LEGAL EMPIRE (1993).

<sup>48</sup> See, e.g., Petra J. Rodriguez, Note, *The Civil RICO Racket: Fighting Back with Federal Rule of Civil Procedure 11*, 64 ST. JOHN'S L. REV. 931, 936-39 (1990).

<sup>49</sup> See Geoffrey C. Hazard, Jr., *Sources of Delays, Motions to Disqualify Could Be Handled Promptly Through ADR*, 11 ALT. HIGH COST LITIG. 91 (1993); Susan P. Shapiro, *Regulating Conflict of Interest: The Case of the Large Law Firm* (Paper

outside of pure business litigation, the trends in class actions and mass personal injury litigation followed the same approach.<sup>50</sup> Litigation tactics escalate the conflicts by using whatever tools are available to pressure the other side into a favorable settlement.

It has become quite normal now to describe business litigation as strategic in the sense used earlier, and the ethics of those who file such lawsuits and engage in these kinds of legal warfare are now rarely questioned. A recent *New York Times* article noted that "[b]rokerage houses . . . have resorted to suits to try to prevent successful brokers from moving to competitors, and, in high technology and other scientific industries, such suits may become competitive tools to help a company keep its edge—or to blunt others."<sup>51</sup> Similarly, a recent *New York Law Journal* article refers to "infringement suits as a business intimidation strategy."<sup>52</sup> The recognition that litigation is often merely a weapon in business competition has become almost commonplace.<sup>53</sup>

Outside of the high-tech and big business areas, the story of high stakes litigation in David Margolick's *Undue Influence*<sup>54</sup> details the methods and tactics of strategic litigation handled by some of the best lawyers and law firms in the country. The outcome of the estate contest described in the book is also notable. As Margolick states,

[t]he children could never actually *win* their case [against their father's will]; the object had to be settlement. But for that to work, Milbank needed a scorched-earth brand of litigator, someone who

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for Annual Meeting of Law and Society Association, Chicago, Ill., May 1993) (on file with the author).

<sup>50</sup> Janet Cooper Alexander, *Do the Merits Really Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991); Anthony Borden, *The Shareholder Suit Charade*, AM. LAW., Dec. 1989, at 67-71.

<sup>51</sup> James Bennet, *Who Owns Ideas and Papers is Issue in Company Lawsuit*, N.Y. TIMES, May 30, 1993, § 1, at 11.

<sup>52</sup> Victoria Slind-Flor, *High-Tech Needs*, NAT'L. L.J., July 5, 1993, at 1, 34.

<sup>53</sup> See, e.g., Milo Geyelin, *Feuding Firms Cram Courts, Study Says*, WALL ST. J., Dec. 31, 1990, § 1, at 9 ("[B]usinesses have come to think of litigation as a management strategy."). The arbitrator in a dispute between Intel and Advanced Micro Devices wrote in his opinion that he was bothered by the "incessant warfare" and the use of litigation as a "corporate strategy" by both sides. *Arbitral Remedies Must Bear "Rational Relationship" With Contract: Award Remanded*, 4 World Arb. & Med. Rep. (BNA) 153, 154 (June 1993).

<sup>54</sup> DAVID MARGOLICK, *UNDUE INFLUENCE* (1993).

could make life so miserable . . . that they would eventually have to surrender. The more wretched they could be made to be, the higher the price they'd pay.<sup>55</sup>

Settlement out of court is the paradigmatic result of big litigation. Teams of lawyers, working feverishly, use the tools of discovery and motion practice to try to raise the settlement value of their side of the case. The result of the new era of business and professional competition in the 1970s and 1980s, in sum, was scorched earth litigation, undertaken largely for business reasons, which lead to settlements out of court.

It is not at all surprising that we found increased evidence of "Rambo tactics" during this period. Litigators sought to utilize every possible device at their disposal, and their clients at that time were both willing and able to pay. The best litigating firms gained business advantages for themselves and their clients from these very expensive tactics. This aggressive litigation, however, was not helpful to the organized bar as such—even if law firms grew and prospered enormously.<sup>56</sup> The Commission on Professionalism established in late 1984 by the ABA expressed alarm over precisely these developments:

Often, it is clients who ask lawyers to prosecute or defend minor, frivolous, or perhaps not-so-minor cases through 'scorched earth' tactics. The lawyer has an obligation to the legal system in his capacity as an officer to the court to dissuade the client from pursuing matters that should not be in court in the first place, and from using tactics geared primarily to drain the financial resources of the other side.<sup>57</sup>

But while the organized profession and academics concerned with professionalism called for self-restraint and emphasized duties to the court and to the system of justice, the lawyer-as-litigator quite naturally sought to win advantages for clients through whatever tactics would work. It is not a surprise, thus,

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<sup>55</sup> *Id.* at 198.

<sup>56</sup> According to Steven Brill, "[A]t least a third of the lawyer time now spent on a typical litigation is wasted." Stephen Brill, *The Coming Crisis: Lopping Off a Third*, AM. LAW., June 1993, at 5. Brill noted that "One of the overcapacity problems that that group of managing partners and general counsel focused on was litigation." *Id.* See generally GALANTER & PALAY, *supra* note 9; NELSON, *supra* note 7.

<sup>57</sup> COMMISSION ON PROFESSIONALISM, *supra* note 18, at 30.

that litigation seemed to be "out of control."

This trend, however, does not mean that *routine* litigation was out of control. There is no real evidence, for example, that private individuals were resorting to the courts more often.<sup>58</sup> Similarly, we cannot document any evidence of routine discovery abuse.<sup>59</sup> It is probably true that some of the aggressive tactics of high stakes litigation became more common throughout the legal profession, but I am unaware of any systematic evidence on that issue. What does seem clear, though, is that lawyers in *high stakes* disputes tended literally to pull out all the stops, pushing ahead with any tactic that offered some prospect for a strategic advantage. *This* litigation was the problem, even if commentary often tended to focus attention elsewhere.<sup>60</sup>

#### IV. CONTROLLING "RUNAWAY" LEGAL PRACTICES

##### A. *The Organized Bar's Response: Case Management and ADR*

Aside from the expressions of alarm and calls for professionalism that continue to echo throughout the organized

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<sup>58</sup> Marc Galanter, *The Life and Times of the Big Six; or, The Federal Court Since the Good Old Days*, 1988 WISC. L. REV. 921, 951-53.

<sup>59</sup> See Randall Samborn, *Reports: Little Discovery Abuse*, NAT'L. L.J., May 31, 1993, at 3 (reporting on two studies by the National Center for State Courts); cf. Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237 (1989):

Discovery of documents in cases involving the conduct of business or government often proceeds by a vicious game in which the respondent has every incentive to trim and cheat. Highly developed dialectical skills have evolved. One skill is that of construing a documents demand so that it does not reach the very smoking gun document that the responding lawyer holds in her hand. Another skill is that of instructing the paralegals, without actually saying so, to bury the important documents in a pile of paper chaff or to fail to find the important documents in the first place. Still another skill is dividing search responsibility with the client so that the latter takes care of documents that can be made to disappear. The prevalence of such underside discovery practice cannot be measured, for evident reasons. It is believed to be pervasive enough, however, to sustain widespread suspicion and cynicism among the trial bar. This effect is itself sufficient cause to question the present discovery rules.

*Id.* at 2240.

<sup>60</sup> See Galanter, *supra* note 58, at 951-52.



bar,<sup>61</sup> case management and alternative dispute resolution ("ADR") are the only real sources of control over practice asserted by the profession. Although each of these approaches was developed for purposes other than to control strategic and scorched-earth litigation, they since have been adapted to combat these new problems.

Case management developed originally with a relatively simple mission: to end delays promoted for the convenience of lawyers at the expense of clients.<sup>62</sup> The idea simply was to overcome problems of delay by encouraging judges to take more control of the timing of the proceedings. For example, judges could impose firm dates for discovery and trial to prevent lawyers from ignoring their cases or engaging in delay tactics. Also, when "complex" cases began to proliferate after some famous antitrust cases in the 1960s, the Judicial Panel on Multidistrict Litigation, created in 1968, published the Manual for Complex Litigation, which encourages case management.<sup>63</sup> Moreover, every book and article produced by the organized bar about the problem of delay emphasizes active case management by judges.<sup>64</sup>

ADR had a similarly low-key entrance into the bar's approach to civil justice reform. ADR became a part of the vocabulary of civil justice reform in the mid-1970s, gaining attention with the Pound Revisited Conference in 1976.<sup>65</sup> Co-sponsored by the Judicial Conference, the Conference of Chief Justices and the ABA, the Pound-Conference in part was a response to a perceived litigation explosion. But the primary emphasis was

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<sup>61</sup> An example would be the movement to establish "Inns of Court" to civilize litigation practice.

<sup>62</sup> On the history of case management, see generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982). See also CARROLL SERON & WOLF HEYDEBRAND, *RATIONALIZING JUSTICE: THE POLITICAL ECONOMY OF FEDERAL DISTRICT COURTS* (1990).

<sup>63</sup> *MANUAL FOR COMPLEX LITIGATION* (2d ed. 1985). The concerns developed in the 1960s after the price fixing convictions of manufacturers of electrical equipment, which led to "nearly 2000 private treble damage actions involving 25,000 claims." RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION* 3 (1985).

<sup>64</sup> See, e.g., MAUREEN SOLOMON & DOUGLAS K. SOMERLOT, *CASEFLOW MANAGEMENT IN THE TRIAL COURT* (1987).

<sup>65</sup> See JERALD S. AUERBACH, *JUSTICE WITHOUT LAW?* (1983); CHRISTINE B. HARRINGTON, *SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT* (1985).

on access: "the delivery of justice to all."<sup>66</sup> What was new was the focus not only on access to courts, but also on access to other "varieties of dispute processing," such as those outlined by Frank Sander at the Conference.<sup>67</sup> For the ABA at the time, the major concern was small claims and "minor" criminal matters, which lawyers typically did not wish to handle. As Chief Justice Burger stated at the conference, "Ways must be found to resolve minor disputes more fairly and more swiftly than any present judicial mechanisms make possible."<sup>68</sup> Accordingly, in 1977 the ABA established a Committee on Minor Disputes. ADR became part of the agenda, although largely from the emphasis on access.

ADR has grown astronomically and changed dramatically in its importance to the ABA and to lawyers generally. The ABA Committee on Minor Disputes quickly became the Committee on Alternative Dispute Resolution and, in 1987, became the Committee on Dispute Resolution. In 1989, dispute resolution was the major theme of the annual meeting of the ABA. And in early 1993, the ABA established a formal "section" on dispute resolution, thus giving ADR equal status with the section on litigation. In addition, nearly every local and state bar association has taken up the cause of ADR. According to one recent source, the number of dispute resolution committees in bar associations went from zero in 1980 to at least 157 in 1992.<sup>69</sup> Moreover, President Bush's Council on Competitiveness was a staunch supporter of ADR. Indeed, ADR certainly receives as much attention today as does litigation.

The current emphasis on ADR is reflected in the ABA *Blueprint*, which makes a very strong presentation on behalf of ADR and especially the Multi-Door Courthouse proposed by Professor Sander. In fact, the *Blueprint* diverges from the Council on Competitiveness *Agenda* only where the *Agenda* seems to threaten the general value of access to courts. That

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<sup>66</sup> ABA, *Report of the Pound Conference Follow-Up Task Force*, 74 F.R.D. 159, 166 (1976).

<sup>67</sup> Frank E. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976) (promoting especially the "multi-door courthouse").

<sup>68</sup> Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83, 93 (1976).

<sup>69</sup> Madeline Crohn, *The State of Dispute Resolution*, NIDR FORUM, Summer 1992, at 3.

is, the ABA supports ADR, but as a matter of choice and not formal coercion: "ADR should not be used to close access to the courts."<sup>70</sup>

The new focus on ADR parallels the new focus on case management. As noted above, even litigation is geared less toward trials and more toward settlement through various strategic tactics. To a very great extent, the legal profession, including the judiciary and the organized bar, has embraced this shift.<sup>71</sup> We speak now of settlement as the norm, and trial as the exception. Case management thus evolved from a tool designed to combat lawyer *inertia* into an effort to take on lawyer *aggressiveness*. Similarly, many of the forms of ADR promoted within the courts, including court-annexed arbitration, early neutral evaluations and mini-trials, were promoted as ways to foster settlement before the expenses of pretrial skirmishing.<sup>72</sup>

This shift in emphasis has been reflected in significant changes in the Federal Rules, which are completely consistent with both of these responses to perceived abuses in litigation and with the new paradigm of dispute resolution generally. Yet, none of the major reforms has solved the problems that were associated with high-stakes litigation. For example, the revisions of Rule 11 in 1983 sought to deter lawsuits weakly grounded in law or fact. Similarly, Rule 16 was amended in 1983 to direct judges to manage cases through pretrial conferences. Revised Rule 11 was thus supposed to deter strategic litigation, and revised Rule 16 was supposed to control pretrial skirmishing.<sup>73</sup> The rules promoting the use of federal magistrates also show concern for discovery matters.

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<sup>70</sup> CIVIL JUSTICE, *supra* note 19, at 41.

<sup>71</sup> See generally SERON & HEYDEBRAND, *supra* note 62; Marc Galanter, *Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States*, 12 J. OF L. & SOC. 1 (1985); D. Marie Provine, *Managing Negotiated Justice: Settlement Procedures in the Courts*, 12 JUST. SYS. J. 91, 91-92 (1987); Judith Resnick, *Failing Faith: Adjudication Procedure in Decline*, 53 U. CHI. L. REV. 494, 535-39 (1986).

<sup>72</sup> See Marc Galanter & John Lande, *Private Courts and Public Authority*, in 12 STUDIES IN LAW, POLITICS, AND SOCIETY (Susan Silbey & Austin Sarat eds., 1992); Bryant Garth, *Privatization and the New Market for Disputes: A Framework for Analysis and a Preliminary Assessment*, 12 STUD. IN L., POL. & SOC'Y 367 (1992); .

<sup>73</sup> See David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1985 (1989).

These reforms, however, had at best a mixed success. Once placed in the context of adversarial practice, the new Rule 11, like perhaps other reforms, provided yet one more tactic to be used in litigation warfare. Adversarial lawyers can run up the costs, generate delays and multiply the pressures to settle by, for example, charging the other side with a frivolous filing or motion. The evidence suggests that strategic litigation continues when the stakes justify it and the clients support it, such as in the high-tech industry.<sup>74</sup> Thus, the professional reform efforts have not succeeded in civilizing the disputing process.

There are now other pressures for reform from outside the traditional professional networks. A coalition of in-house lawyers, legislators and a few others has begun to work together against the interests of big litigation. The Civil Justice Reform Act of 1990, which short-circuited the normal reform processes, is one example.<sup>75</sup> The recently proposed rule of mandatory disclosure is another one that has been opposed both by plaintiffs and defense lawyers.<sup>76</sup> If taken seriously, mandatory disclosure could reduce pretrial skirmishing about matters to be discovered and the discovery tools to be used. It thus appears that a newly powerful and organized sector of the bar has said that the approach of the mainstream has not gone far enough. Nevertheless, it is difficult to know whether even these more dramatic changes would affect the practice of high-stakes litigation.

Indeed, the organized efforts of the legal profession so far have not been able to control the market-generated litigation explosion and concomitant adversariness. The failure of controls from the professional side, however, contrasts with powerful controls that have begun to come from *within the market* for legal services. It is this new market that is making radical changes in how lawyers and business resolve disputes.

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<sup>74</sup> See *supra* notes 50-52 and accompanying text.

<sup>75</sup> Jeffrey J. Peck, *Users United: The Civil Justice Reform Act of 1990*, 54 L. & CONTEMP. PROBS. 105, 109 (1991); Robel, *supra* note 10, at 879-80.

<sup>76</sup> See Carl Tobias, *Collision Course in Federal Civil Discovery*, 145 F.R.D. 139, 142-43 (1993).

## B. *Market Innovations and Solutions*

The increased emphasis on ADR did not result only from generalized criticisms within the legal profession. Leading business clients began to worry about the arms race in business litigation, which they found expensive and time-consuming. They also realized that as in arms races generally, the real advantages come only when one side is ahead, which tends to be a temporary phenomenon. But, as noted previously, in-house counsel had helped fuel the competition in legal services and, perhaps, the escalation in litigation as a tactic in economic warfare. In-house counsel have not, as Gilson hoped, revived a particularly "professional" role as new gatekeepers.<sup>77</sup> They have not prevented through ethics the use of strategic litigation (or strategic litigation tactics).<sup>78</sup> Gilson's prediction, however, comes very close to describing a related, market-generated phenomenon. The cost-saving rather than professionally oriented actions of in-house counsel have encouraged an effort to halt the legal arms race.

The Center for Public Resources ("CPR"), established in 1979, is a major embodiment of the corporate effort to bring order to the arms race.<sup>79</sup> According to a recent brochure, "as the nation's principal consumer of legal services, the corporation has the greatest incentive to demand change. Thus, the corporate counsel is the motivating force behind the CPR Legal Program."<sup>80</sup> The centerpiece of the CPR program is a pledge to seek resolution of disputes short of litigation, and it was quickly endorsed by many of the most powerful corporations. The number of endorsements has now reached over 600. Corporate counsel, with a new prestige in the 1980s and the ability to shop for legal services, had the power and the incentive to see that the basic elements of the pledge were followed—even endorsed—by the law firms they favored with legal business. CPR's publication, *Alternatives to the High Cost of Litigation*, provides a forum to mobilize opinion and diffuse information about techniques to avoid litigation. Indeed, the CPR's role is

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<sup>77</sup> Gilson, *supra* note 37, at 915.

<sup>78</sup> *Id.* at 903-09.

<sup>79</sup> CENTER FOR PUBLIC RESOURCES, CORPORATE DISPUTE MANAGEMENT (1982).

<sup>80</sup> CENTER FOR PUBLIC RESOURCES, CPR AGENDA (1992).

part of a dramatic change in the incentives that law firms face with respect to litigation and ADR.<sup>81</sup>

Moreover, the criticisms of litigation and litigation tactics came not only from the key players in the national economy, but, as noted at the Pound Conference, also from a variety of legal and non-legal critics of the "adversariness" of other kinds of litigation, especially divorce.<sup>82</sup> As the language and approach of psychologists became more prevalent in American life generally, not surprisingly they promoted criticisms of the conflict engendered by contentious divorce proceedings. ADR thus became a potential slogan and marketing tool for lawyers providing services to individuals as well as to corporations. In the new era of legal entrepreneurialism, competition again fueled innovation in legal practice.

Solo and small-firm lawyers competed for clients by becoming expert in mediation. They naturally emphasized their legal skills and differentiated themselves from mediators without legal training.<sup>83</sup> Indeed, there is some evidence that lawyers in effect colonized this area of ADR, gradually gaining ascendancy over the lay persons who entered this field during the past two decades.<sup>84</sup> Lawyers responded to the critiques and to the competition of non-lawyers, offering somewhat different products in divorce and in other areas of personal practice as well. The organized bar certainly promoted ADR in response to criticisms of adversariness, but lawyers used those criticisms as opportunities to gain competitive advantages.

More striking, however, are the changes caused by competition for the bigger business of business and some regulatory disputes. The stakes are higher, and the clientele is more sophisticated and able to make informed decisions about the best legal products. A large law firm's litigation department increasingly must respond to the attitudes embodied in CPR.

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<sup>81</sup> An example is an agreement within the food industry, akin to an arms agreement, to try ADR for 90 days prior to filing lawsuits. See *Major Food Companies Agree to CPR Plan to Try ADR for 90 Days Before Filing Lawsuits*, 16 ALTS. TO THE HIGH COST OF LITIG. 23 (1993).

<sup>82</sup> See, e.g., Sander, *supra* note 67, at 123; ABA, *supra* note 66, at 176.

<sup>83</sup> See generally ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* (1988).

<sup>84</sup> Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 14 (1991).

Indeed, the CPR challenge represents an opportunity to be "out front." Attractive products can win new clients and make the litigation department more competitive. ADR can represent a growth industry for large law firms and especially for litigators under siege.<sup>85</sup> ADR here, too, represents more than a bar response to criticisms. It has evolved into a highly competitive practice of law where lawyer skills are used. "Beauty contests" for legal business increasingly require the contestants to show talent and experience in ADR.

This emphasis on ADR can be integrated into the huge litigation departments of large law firms, the legacy of the litigation boom. The large law firm's litigation department now offers mediation, arbitration, mediation-arbitration, mini-trials and the like, and lawyers advise clients on when each of these variations is desirable. At the same time, the litigator can suggest the importance of litigation as a weapon held in reserve—for deterrence purposes—while stressing the usefulness of litigator skills within ADR. It no doubt also helps to gain clients by suggesting ways to "win" in ADR, even if this may sometimes undermine the pure, non-legal ADR system.<sup>86</sup> It is no surprise that the menu of alternatives tends to favor some advocacy and some presentation of legal arguments. Lawyers seek to impress clients with the skills they have worked so hard to develop.

Innovation in law firms is not the only example of the results of competition for corporate business. There has been a tremendous proliferation of private (and some public) providers of dispute resolution services.<sup>87</sup> Some of the key features that are emerging in a very competitive market are precisely what we would expect: a full range of private services depending on what clients are willing to pay. Clients can shop for dispute resolution by very high-priced private judges selected by them

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<sup>85</sup> According to James Wilber of Altman Weil, a consulting firm, "The smartest firms proactively are anticipating that ADR's going to be a fact of life and are offering . . . this to clients rather than waiting for clients to scream and yell about the cost of litigation." Carolyn Colwell, *Mediators Keep Companies Out of Court*, NEWSDAY, Dec. 21, 1992, at 25; see also Thomas F. Gibbons, *When the Firm Goes Soft: Recession Injects "Value" into the Legal Lexicon*, CHI. ENTERPRISE, Jan.-Feb. 1983, at 14.

<sup>86</sup> Menkel-Meadow, *supra* note 84 at 35-36.

<sup>87</sup> See generally Garth, *supra* note 72.

or their lawyers. They can move through increasingly adversarial stages—negotiation, mediation, mini-trials or arbitration—to try to resolve disputes. The private trend includes products ranging from custom justice to mass production justice masquerading as the “choice” of a client.<sup>88</sup> Legal entrepreneurs have turned ADR from an idea to improve access for small claims and minor disputes into an almost unrestrained legal competition. Lawyers seek to use their tools of legal reasoning and adversarial argument, and legal practice is leading the way to private justice.

Private justice, as we shall see, does not necessarily provide a place for the traditional values of equal access, public courts and independent judges that have informed the activities of the legal profession as a profession. Indeed, this is one of the central problems that the profession must confront while it struggles with how to respond to the many changes that are occurring in the litigation system.

## V. REMAKING PROFESSIONAL VALUES FOR THE NEW WORLD OF PRIVATE AND PUBLIC DISPUTE RESOLUTION

The legal profession confronts two issues relating to private justice and its failure to reflect professional values. The first is whether the organized bar even has a role to play in seeking to bring such trends in civil justice in line with general legal principles. As noted before, professional organizations seek to improve the administration of justice, even where the problems tend to have been the result of lawyers' practices on behalf of their clients. Thus, the organized bar and many lawyers sought to reassert “professional values” to stop the arms race in litigation. Yet, while the bar was active, client demands and market innovation have been far more effective in containing the explosion in business litigation. We shall therefore explore whether the legal profession can have anything to say as a serious counterweight to pure market values. The second issue is how the profession might remake professional values.

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<sup>88</sup> Cf. Christine B. Harrington & Sally Engle Merry, *Ideological Production: The Making of Community Mediation*, 22 L. & SOC'Y REV. 709 (1988); Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin*, 1993 J. DISP. RESOL. 1 (“With the growth of ADR has come a strong element of compulsion and coercion.”).



### A. *The Sociology of Professional Values: A Pessimistic View*

Privatization and deregulation pose a major challenge to the legal profession. The threshold question is whether the competitive pressures in fact preclude professional responses. Busy lawyers at the competitive margins may not have the time, energy or will to bother with the kinds of public service that have traditionally served as a counterweight to practice. Can the profession any longer discipline practice?

A recent article by Richard Posner poses the issue in very striking terms. He argues that "professional" values require a particular material basis—namely a cartel—and that a cartel once existed.<sup>89</sup> Open competition, however, eliminates cartels and, therefore, the emphasis on what is "professional." In his words, "The increasingly competitive character of the legal-services market makes lawyers feel like hucksters rather than the proud professionals they once were, and brings forward to positions of leadership in the profession persons whose talents, for example, for marketing ("rainmaking"), are those of competitive business rather than of professionalism."<sup>90</sup>

Competing lawyers, according to Posner, are less likely to embrace the values of the profession, and indeed they will increasingly compete with non-lawyers as well as lawyers for business. If this is the case, we cannot expect much of a role for bar associations and the like in restraining the tendencies that undermine traditional professional values. The commercial side of practice, we could suggest, will overwhelm the professional side of the organized profession. Under this analysis, there is simply no place for professional values. They are the product of a particular cartel, and when the cartel is gone, gone also will be these professional values. The only value is what sells.

### B. *A More Optimistic View*

Before accepting such outcomes as the logical result of the transformation of law from a "cartel-ized" profession to a competitive business, however, we should consider a somewhat

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<sup>89</sup> Posner, *supra* note 2, at 23.

<sup>90</sup> *Id.* at 29.

different interpretation of the relationship between practice and professional organizational activity. Most practitioners active in bar association and legal reform activity will define their activity as unremunerated public service. They will insist that it goes unrewarded through referrals or new business. Such a perspective suggests that competition will eliminate this kind of activity. Sometimes, however, a lawyer will respond to an inquiry about professional activity in the following manner:

You might ask why a busy litigator will spend so much time in bar activities and in committees on alternative dispute resolution. My reform work was the reason I was invited by the state Supreme Court to address the judges on ADR. I think that I will be taken more seriously as a lawyer by opponents, by judges, and by my clients because they know that I have sufficient authority to be invited to lecture to the court on these matters.<sup>91</sup>

There are many ways to acquire stature in the profession.<sup>92</sup> One way traditionally has been through law reform and bar activities, which tend to relate. The quotation at the beginning of this essay suggests the importance of such work in the career of a notable lawyer. As suggested above, many lawyers will participate in such work because they have internalized the values of the profession in favor of accessible, well-operating courts and ADR that does not clash with such values. Others, however, may decide to participate in order to "make their careers" and enhance their stature. The point here is that it does not matter what the particular motives are as long as this career pattern continues to work well as a lawyer's path for success. Success here comes from prestige and income, which relate but are not linked in all cases. Posner looks only at short-term economic reward and, thus, he sees no reason for a rational lawyer to waste time on professional ideology.

We thus have two models of how the organized legal profession can react to civil justice trends. Under one, the increasingly competitive practice simply makes the "professional" work of the organized bar increasingly irrelevant unless it contributes narrowly to obtaining legal business. The

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<sup>91</sup> Interview with litigator, May, 1992 (on file with the author).

<sup>92</sup> DONALD D. LANDON, *COUNTRY LAWYERS: THE IMPACT OF CONTEXT ON PROFESSIONAL PRACTICE* 86, 135 (1990).

schizophrenic aspect—bringing the excesses of practice within the domain of the profession's universal values—would be lost for better or worse.

The second model assumes that many lawyers in practice will feel called upon to make a career in "professional" service not merely as pro bono, but also as part of an effort to build their status for effective private practice and, more generally, for a prestigious legal career. To advance in professional circles, they must advance the universal principles upon which the profession is based. Of course the choice is not all or nothing. Both models can be found operating at the same time. What we do not know, however, is how much increased competition will focus all energy on a "business" as opposed to a "legal" career. There is some truth to Judge Posner's materialist characterization, but I believe we are a long way from what he contemplates. There is still some life in "professional values," but whether there is enough to assert control over what the market is doing to practice is very much in doubt.

C. *The Legal Problem in Remaking Professional Values: From Trials to Dispute Resolution*

My contention in this Article is that the legal profession has not yet come to grips with the trends that have developed from the intensified competition and privatization of justice. I will now focus on the responses of the legal profession. Much of the literature points to the potential horrors of privatization. Owen Fiss's often-cited article on "against settlement"<sup>93</sup> is an example of this literature. Many of the articles critical of ADR fall in the same category.<sup>94</sup> Other articles seeking to reassert constitutional values that authors feel are violated by some form of ADR, suggest bringing arbitration results under closer scrutiny by the courts.<sup>95</sup> But much of the literature on alternative dispute resolution simply notes that parties have always had the right to settle out of court, and private ADR must

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<sup>93</sup> Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

<sup>94</sup> Marry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668 (1986).

<sup>95</sup> See, e.g., IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION-NATIONALIZATION-INTERNATIONALIZATION* (1992); Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81 (1992).

simply recognize that right.<sup>96</sup> Indeed, most cases are settled out of court if they ever reach the stage of filing, and most disputes never reach the stage of a law suit.

It is impossible to harmonize these various literatures. One side sounds positively nostalgic, invoking a romantic ideal of litigation culminating in a public trial with an authoritative pronouncement of public law. This ideal was useful when settlements were viewed as avoided trials. It is not so useful when trials are viewed as failed settlements, and when there is a thriving market of public and private products to produce settlements. The other side, however, is no better. It asserts that private dispute resolution does not implicate the values of the legal profession. The only values that are applied are those of the marketplace. What sells is good enough.

There is a need to develop professional values and corresponding legal principles that can be applied to dispute resolution generally. It is not enough to argue that there should be access to court, that judges should be independent and that courts should be efficient. These values do remain important, but they no longer suffice. The key is to develop the public interest in private as well as public dispute resolution. There have so far been only a few efforts in this direction, growing out of concern with public access to private settlements in court cases, and with the publicly supported private judging in California.<sup>97</sup>

No one is going to turn the clock back to the old paradigm of public trials. The question, therefore, is what responsibility does the legal profession owe to the public in order for the public to determine that the *dispute resolution* system is legitimate, even-handed and accountable. The public must have information.<sup>98</sup> The legal profession must develop an approach to the critical information that the public needs about particu-

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<sup>96</sup> See, e.g., Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424 (1986); Richard Chernick, *What's Wrong With Private Judging?*, L.A. LAW., Nov. 1989, at 19, 21.

<sup>97</sup> See, e.g., CAL. JUDICIAL COUNCIL, REPORT AND RECOMMENDATIONS OF THE JUDICIAL COUNCIL ADVISORY COMMITTEE ON PRIVATE JUDGES (1991); Carrie Menkel-Meadow, *Public Access to Private Settlements: Conflicting Legal Policies*, 111 ALT. HIGH COST LITIG. 85 (1993); Symposium, *Behind Closed Doors: Confidential Settlements and Sealed Court Records*, 76 JUDICATURE 303 (1993).

<sup>98</sup> See generally Garth, *supra* note 72.

lar cases in private dispute resolution and about private dispute resolution generally. The courts have problems, but at least in principle a party has access to a judge's public record and some ability to hold the judge accountable.

The key to this approach, I believe, is fourfold. First, there must be some reporting requirements on services that sell private dispute resolution and on individual providers like retired judges. They need to disclose, for example, who runs the service, potential conflicts of interest, repeated client users and how the public can assess their overall record. Second, there must be disclosure requirements on mediators, arbitrators and other third-party providers so that consumers will know what kind of work they do and which clientele they typically serve. One of the key elements of private justice is "choice" of decisionmakers, and it is the responsibility of the profession to ensure that choice is informed. Both parties should have an idea of the "track record" of those called upon to be a third party, whether arbitrator or mediator.<sup>99</sup> At present there is a dramatic inequality in access to information in favor of repeated users. This requirement is parallel to the long tradition of ensuring that public judges are impartial and independent. Third, the legal profession must work on a balance between privacy and disclosure in individual cases. The struggles that take place now concerning what to disclose about dangerously defective products that are the subject of settlements in litigation should be generalized to apply to private forms of dispute resolution.<sup>100</sup> Finally, it is essential to encourage systematic evaluations of providers and the services that they offer. It would be possible to apply some minimal licensing scheme or accreditation to programs that submitted to systematic evaluations periodically. Again, this would allow for better protection of the public users.

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<sup>99</sup> It is arguable that the track record of the mediator is less important, since the parties must accept the result for it to be binding, but experienced lawyers know that the choice of mediator eventually has an impact on what sort of agreement the parties will reach.

<sup>100</sup> See *supra* note 96.

## CONCLUSION

I have sought to develop a method of examining the role of lawyers and legal practice in civil justice. It may be useful to state some practical conclusions which necessarily follow, but which have not all been stated explicitly.

First, lawyers are far from shameless apologists for excessive litigation, delay or scorched-earth tactics. Reformers should not imagine that the organized bar will simply defend legal practices contrary to the public interest if they result in private gain. The wrong way to understand the legal profession is to see it as a knee-jerk protectionist.

Second, legal practices are a moving target in an era of increasing competition. Entrepreneurial lawyers respond to criticism and crises by offering different products, which can have the effect of transforming the civil justice system. Even as we learn of abusive litigation practices, market-generated antidotes may make some criticisms moot. The market may of course revive such practices as well as curb them.

But third, lawyers will not abandon lightly the tools of their trade, especially legal reasoning and adversarial presentations. When lawyers compete, they sell *legal* practices. The practices may and indeed do change, partly in response to changing social and market conditions, but lawyers cannot be expected to offer civil justice products that put their own skills aside (unless they no longer can make a living using legal skills).

Next, the organized profession has acted as a restraint on its own membership, not merely because it has historically been a cartel, but also because lawyers have become eminent through professional service. That drive for distinction leads to work on behalf of the universal principles of the profession—the principles which legitimate the profession and the rule of law. As competition in practice increases, however, it is not clear how much of a counterweight can be expected. From one perspective, this is good. The bar can get out of the way of efficient competition between lawyers and between lawyers and non-lawyers for services that clients want. From another perspective, a decline in some of the universal principles embraced by the legal profession, such as the special importance of public courts and access thereto, is not necessarily to be fa-

vored.

Finally, if we are to assert professional values over the new world of private and public dispute resolution, we need to rethink the model upon which those values are based. We must confront the fact that focusing on access, the independence of judges and case management is inadequate today. At a minimum, the new model requires particular attention to the need for information that will enable individuals and the public to use the services without severe handicaps and to evaluate the services and the providers. The basic challenge to the profession is to promote these and other professional values which will protect the public interest in the new world of private justice.