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## The Virtues of Complexity: Judge Marrero's Systemic Account of Litigation Abuse

Charles M. Yablon

*Benjamin N. Cardozo School of Law*, [yablon@yu.edu](mailto:yablon@yu.edu)

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# THE VIRTUES OF COMPLEXITY: JUDGE MARRERO’S SYSTEMIC ACCOUNT OF LITIGATION ABUSE

*Charles M. Yablon*<sup>†</sup>

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## INTRODUCTION

At a time when too many are offering simplistic solutions to difficult problems, Judge Marrero has tackled one of the most intractable contemporary legal conundrums in a way that recognizes its multiple dimensions and complex underlying causes. His Essay<sup>1</sup> shows us that a full understanding of litigation abuse can only come from a deep inquiry into the motivations and incentives of all those involved, not just the senior litigators who “run” big cases, but also their partners and associates, their clients, the judges before whom they appear, and the broader legal and social environment in which their actions take place. Judge Marrero analyzes these relationships from numerous perspectives: legal, social, economic, and psychological, and examines the full panoply of current litigation practices, not just the most

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<sup>†</sup> Professor of Law, Benjamin N. Cardozo School of Law.

<sup>1</sup> Victor Marrero, *The Cost of Rules, the Rule of Costs*, 37 CARDOZO L. REV. 1599 (2016). Despite its length, Judge Marrero styles his piece as an “Essay,” and appropriately so in two senses. It is an “assay” or survey of all the complex factors that shape contemporary big case litigation, and also an “essay” (i.e. an attempt, to show how they are systematically related to one another). See *Essay*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/definition/essay> [<https://perma.cc/U4AP-FHGU>] (last visited Aug. 27, 2018).

egregious conduct.<sup>2</sup> The result is an important addition to the literature on litigation abuse and a useful corrective to many previous analyses that have focused too narrowly on small portions of the bigger problem. My contribution to this special issue seeks to explicate the virtues of the complexity of Judge Marrero's analysis in light of ongoing debates over discovery abuse and related topics.

Complaints about lawyers' litigation tactics are hardly new. Nowhere else in American legal practice has there been such a wide and persistent gap between the way members of the judiciary and leaders of the bar say that lawyers *should* conduct their professional activities and the way that those activities are actually conducted.<sup>3</sup> Judges and law reformers have been complaining about litigators' conduct (primarily, but not limited to, pretrial discovery tactics) for at least fifty years.<sup>4</sup> The problem is often described as the penchant of practicing litigators to engage in "gamesmanship" or excessive "adversarial maneuver."<sup>5</sup> This is said to be particularly present in pretrial discovery practice, the most extensive and expensive part of most contemporary litigation. This results in overbroad and unnecessary discovery requests followed by grudging, overly technical responses laced with questionable objections, delay, and sometimes, strategic inundation of the other side with piles of useless information.<sup>6</sup> While there have been many revisions to the Federal Rules of Civil Procedure (Federal Rules) in the past fifty years in efforts to ameliorate this problem, it is generally recognized that none have been particularly successful.<sup>7</sup>

At the heart of the problem is the strange disconnect between the way most judges and many lawyers say that litigation should be

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<sup>2</sup> Marrero, *supra* note 1.

<sup>3</sup> The most striking recent illustration of this disparity between legal norms and contemporary litigation practice is the "Cooperation Proclamation" issued by the prestigious Sedona Conference. THE SEDONA CONFERENCE, THE SEDONA CONFERENCE COOPERATION PROCLAMATION (July 2008), available at [http://www.ncjfcj.org/sites/default/files/Opening\\_Grossman\\_Maura.pdf](http://www.ncjfcj.org/sites/default/files/Opening_Grossman_Maura.pdf) [<https://perma.cc/B458-ZYC6>] [hereinafter SEDONA COOPERATION PROCLAMATION]. The Sedona Proclamation seeks to promote cooperation rather than the "escalating motion practice, overreaching, obstruction, and extensive, but unproductive discovery disputes" it describes as common litigation practice. *Id.* at 1. The Sedona Proclamation asserts that such cooperation is already legally required by the Federal Rules of Civil Procedure (Federal Rules), but also recognizes that, if adopted in practice, it would constitute a "paradigm shift" in contemporary discovery conduct. *Id.* at 3.

<sup>4</sup> Although Roscoe Pound complained about excessive contentiousness in his famous 1906 speech, Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906), until 1970, when the Federal Rules regarding disclosure were substantially expanded, "clamor about overly burdensome discovery was not particularly prominent." Richard Marcus, "Looking Backward" to 1938, 162 U. PA. L. REV. 1691, 1710 (2014).

<sup>5</sup> Marcus, *supra* note 4, at 1710.

<sup>6</sup> See, e.g., SEDONA COOPERATION PROCLAMATION, *supra* note 3.

<sup>7</sup> For a brief history of the Federal Rules amendments regarding discovery practice, see Marcus, *supra* note 4, at 1710-26; see also Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1 (2004).

conducted and what actually occurs in the world of big case litigation, where abusive, wasteful, dilatory, and unnecessary stratagems are said to be extremely common, if not actually the norm.<sup>8</sup> The question, of course, is why. Why do practicing litigators continue to engage in conduct that judges are constantly warning them against, and about which they themselves frequently complain? Much has been written on this critical topic by practicing lawyers, judges, and legal scholars. Even economists and psychologists have had their say.<sup>9</sup> Yet no satisfactory answer has emerged.

Instead, we have many theories, based on many different and frequently contradictory accounts of the motives for lawyer misbehavior, most of which either fail to answer or assume away the most fundamental questions. One such fundamental question is what lawyers actually believe when they engage in contentious litigation. Do they think they are helping their clients win? Or are they instead giving full reign to their own aggressive instincts? Or really seeking to boost firm billings or personal prestige? The ethical rules tell us that lawyers should generally put their clients' interests first,<sup>10</sup> but such ethical norms do not necessarily describe how real lawyers operate in actual litigation practice. Economic theory, in contrast, models a world in which lawyers, like other rational actors, are always seeking to maximize their own pecuniary and non-pecuniary returns. But such models famously oversimplify the complexity of real human interactions and motives.

Judge Marrero presents a more realistic world in which lawyers

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<sup>8</sup> It is important to recognize that, for all that they dominate discussion of contemporary litigation practice, the problems of discovery abuse and dissatisfaction with pretrial practice primarily involve so-called "big case" practice—high stakes lawsuits involving large corporations or other large institutions. Studies by the Federal Judicial Center and others have consistently shown that there is another category of "ordinary" federal litigation involving smaller litigants and smaller amounts in controversy that do not seem to pose the same problems. Thomas E. Willging, Donna Stienstra, John Shapard & Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525 (1998); Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785 (1998). See generally Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 684 (1998); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994). Judge Marrero's concerns also center on big case practice, but unlike many other commentators, he believes the costs and delays associated with such practice have negative effects on the entire judicial system. Marrero, *supra* note 1, at 1607.

<sup>9</sup> See *infra* notes 69–72 and accompanying text.

<sup>10</sup> See, e.g., N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.0 (2018) (Rule 1.3). Lawyers' ethical obligations towards clients have been changed in recent years. The famous requirement of "zealous advocacy" has been dropped, first from the ABA Model Rules, and then in states like New York. See Paul C. Saunders, *Whatever Happened to "Zealous Advocacy"?*, N.Y.L.J. (2011). The current Preamble to the New York Rules expressly requires lawyers to balance their obligations to clients and to the judicial system. See N.Y. RULES OF PROF'L CONDUCT, pmbl. ¶ 1-3 (N.Y. STATE BAR ASS'N 2009). Judge Marrero's Essay, of course, is a powerful reminder that such ethical rules may not be the strongest motivation for actual lawyers' conduct. Marrero, *supra* note 1.

constantly face multiple conflicting constraints and incentives. The desire to maximize revenue from billings constitutes one form of incentive. A desire for status and prestige, both within the firm and beyond, creates another. The professional and legal obligations of contract and fiduciary duty provide incentives of their own, as do lawyers' interactions with judges and opposing counsel. Any of these may constitute the dominant motivation for a particular litigation decision. Different types of clients and different types of cases may also have substantial impact on lawyers' incentives and motivations. A lawyer representing a corporation with an active and sophisticated general counsel will make decisions about litigation strategy differently than one whose client is an injured layperson who has signed a contingency fee agreement or a litigious real estate developer who engages in frequent contractual disputes.

An equally fundamental question is whether lawyers who engage in abusive litigation tactics do so from rational or irrational motives. Both views are plausible, but also raise difficult theoretical problems.<sup>11</sup> Those who view such conduct as rational cannot deny that it is also frequently self-defeating, leading to increased costs and delay for both sides. Moreover, it clearly has the tendency to make judges extremely angry, both at the lawyers who engage in it and their clients. But, if contentious litigation behavior is not rational but merely an unpleasant reflection of lawyers' irrational aggression, ego, and anger at annoying conduct by the other side, why has it been so hard to convince lawyers to abandon such wasteful practices and litigate in more productive and cooperative ways? Given these difficulties in understanding the nature and causes of abusive litigation tactics, it is not surprising that the efforts to combat them have proven to be so ineffective.

Judge Marrero's Essay provides important and productive new ways to think about these issues. Judge Marrero is not a theoretician proposing a new model of lawyer behavior. He is a careful observer and participant in the real world of litigation practice. Like everyone concerned about the problems of cost and delay in abusive litigation, he looks to understand the nature of the problem and its causes. He does this, however, not by focusing on a narrow set of particularly egregious misbehaviors or by seeking the presumed fundamental cause of lawyer

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<sup>11</sup> Various commentators have put forth ingenious theories to explain the strange mixture of motivations that might explain contemporary discovery practices. Some have invoked the complexities of game theory and problems like the prisoners' dilemma. See *infra* notes 69–70 and accompanying text. Others point to potential conflicts between the lawyers' interests and those of their clients. Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994). Still, others maintain that litigation is not, and never has been, a purely rational process, and that a certain sort of aggressive posturing, even if irrational, may provide a strange but unique benefit to the lawyers and parties who engage in it. See, e.g., Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 COLUM. L. REV. 1618 (1996).

misconduct. He looks broadly at all the things that lawyers do in pretrial practice and all the ways they are problematic. He also looks at all the potential causes, conflicts, and concerns that may influence lawyer behavior, both the rational and irrational. What he finds with this refreshing and interesting approach is complexity.

As a general matter, lawyers, more than most professionals, tend to distrust complexity. We like to keep our arguments clear and simple and focused on a few major points. Legal academics also recognize that to understand and effectively teach complicated legal ideas, we frequently need to simplify them, which we do through abstract hypotheticals, economic models, pithy topic sentences, and other well-known tools of the legal trade. There are times, however, when simplification becomes oversimplification, when our hypotheticals and economic models no longer accurately reflect the real-world phenomenon we are seeking to explain. It is in such situations that recognizing and analyzing complexity becomes a virtue, a way to broaden perspectives and shed new light on intractable existing problems.

What Judge Marrero's essay brings to the tired debates over litigation misconduct is a new, broader, and more complex perspective, which views the problem not merely as one of discovery abuse, violation of Federal Rules, or even lack of courtesy and cooperation among counsel. His perspective sweeps in the entire scope of contemporary litigation practice, from complaint drafting to pretrial motions to discovery and post-discovery motions, from billing practices to law firm structure to fee shifting rules. It is a complex and multi-faceted perspective, and one from which no easy answers emerge. But it is also one that potentially leads to promising new ways of thinking about the problem of litigation misconduct and, indeed, about the entire structure of our system of civil justice.

Judge Marrero's Essay broadens and complicates our understanding of the nature of litigation misconduct in four useful ways. First, he disaggregates the litigation decision-making process. Whereas most analyses assume that there is a single person, generally a senior litigation partner at a large private law firm, making the critical litigation decisions, Judge Marrero recognizes that such decisions are, in fact, the result of systemic pressures, interests, and demands by a number of important actors, not just outside senior litigation counsel, but also the client (frequently in the form of sophisticated in-house corporate counsel), other members of the firm (like billing partners, senior associates, and junior partners), and, increasingly, technical outside firms handling significant matters like electronic discovery. Such a complex and potentially conflicting set of decision-makers is likely to produce unexpected and frequently problematic litigation decisions.

Second, Judge Marrero employs an extremely broad definition of

litigation “abuse.” It encompasses not just the egregious conduct over pretrial discovery that has received most attention (and has been the subject of most of the tinkering with the Federal Rules). Judge Marrero’s conception of litigation abuse includes the entire scope of pretrial practice: pleadings, motions, as well as all forms of discovery. It includes every litigation tactic he finds wasteful, unnecessary, contentious, or dilatory. In effect, Judge Marrero measures contemporary litigation practice against the ideals set forth in Rule 1 of the Federal Rules, that litigation should be “construed, administered, and employed” in order “to secure the just, speedy, and inexpensive determination of every action and proceeding.”<sup>12</sup> Any litigation tactic that falls short of that goal, whether by imposing unnecessary costs or delay, or otherwise preventing fair and speedy resolution of disputes, becomes a subject of his concern.

In certain respects, as I argue later in this piece, I think Judge Marrero may be painting with too broad a brush,<sup>13</sup> yet the usefulness of his broad definition of abusive litigation cannot be denied. He avoids scapegoating any particular category of lawyer as the root of all evil and source of the most egregious pretrial misconduct.<sup>14</sup> Judge Marrero is an equal opportunity accuser, and he spreads the blame around to include defense counsel who file ponderous motions to dismiss or for summary judgment with low probabilities of success, as well as any lawyer who refuses to pick up the phone and talk to opposing counsel before embarking on some costly and unnecessary litigation tactic. His approach also allows us to see that the problem is not overly lenient discovery or complaint drafting rules, but a problem of lawyer motivation, a motivation to impose unnecessary costs and delay that manifests itself throughout various stages of the litigation process.

The complexity of Judge Marrero’s analysis also includes a more sophisticated approach to the psychology of lawyers. He rejects the simplistic dichotomy between rational and irrational motives. The litigators he describes certainly do not act with complete rationality, but their actions do reflect cognizable goals and motivations which can be uncovered and analyzed, even if the lawyers themselves might not admit them. Although far from an economic determinist, Judge Marrero knows that money matters, and that the lawyer who is filing that 100-

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<sup>12</sup> FED. R. CIV. P. 1. It should be noted that Rule 1 places this obligation not only on the Courts interpreting the Rules, but on “the parties.” *Id.*

<sup>13</sup> See *infra* notes 58–64 and accompanying text (arguing that some weak dispositive motions may still be justifiable and appropriate).

<sup>14</sup> In big case litigation with information asymmetries, complaints that focus on “overdiscovery” or “fishing expeditions” usually view plaintiffs’ counsel as the source of such problems. When the concerns allege delay and document destruction, it is usually defense counsel who are identified as the culprits. See generally Joseph L. Ebersole & Barlow Burke, *Discovery Problems in Civil Cases*, FED. JUD. CTR. (1980); Charles Yablon, *Byte Marks: Making Sense of New F.R.C.P. 37(e)*, 69 FLA. L. REV. 571 (2017).

page summary judgment brief based on rather weak arguments, insisting that it is in the client's interest to do so, is surely aware of just how many billable hours and potential revenue that magnum opus represents to her firm. Similarly, Judge Marrero knows that lawyers are human. They get angry. They get frustrated (sometimes even with judges), and when that happens they do and say things that may not be in their or their clients' best long-term interests. The point is that Judge Marrero's approach recognizes that any model of lawyer behavior that excludes self-interested pecuniary motivations or occasional irrational, even self-defeating bursts of anger and aggression would not be an accurate depiction of the way lawyers act in real litigation practice. His broad systemic analysis provides a more complex and accurate account of the way these various motives interact to cause harm to the litigation process.

Finally, Judge Marrero recognizes that there is not just one problem of litigation abuse, but multiple problems<sup>15</sup> engendered by the different ways lawyers' motivations can interact with the possibilities presented in different types of cases, with different adversaries, and before different tribunals. The case that gives rise to burdensome and wasteful discovery may not be the same kind of case in which defendants make weak and unnecessary motions for summary judgment, yet for Judge Marrero these are both troubling instances of litigation abuse.

By taking this approach, Judge Marrero challenges much of the prevailing literature, which has attempted to portray litigation abuse as primarily a problem of pretrial discovery and one that is generally limited to "asymmetric" types of tort litigation, e.g., securities and employment discrimination.<sup>16</sup> By painting with a much broader brush, Judge Marrero enables us to see that the same motivations that can cause excessive and wasteful discovery practices can just as easily lead to waste and excess in other aspects of pretrial litigation conduct. He usefully avoids an overly narrow focus on the misconduct of a particular category of lawyer in favor of an approach which recognizes that existing fee structures create problematic incentives for many different types of lawyers. He also recognizes that different lawyers, in different types of cases, will have different types of problematic incentives. This is

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<sup>15</sup> More precisely, I would say that, while Judge Marrero views the fundamental problem as the skewed incentives that litigators face in conducting big cases, he sees those skewed incentives as a constellation of forces that push and pull litigation in different directions, manifesting as different types of problems in different types of cases. See *infra* notes 72–81 and accompanying text.

<sup>16</sup> See Rodney A. Satterwhite & Matthew J. Quatrara, *Asymmetrical Warfare: The Cost of Electronic Discovery in Employment Litigation*, 14 RICH. J.L. & TECH. 9 (2008); Charles Yablon & Nick Landsman-Roos, *Discovery About Discovery: Sampling Practice and the Resolution of Discovery Disputes in an Age of Ever-Increasing Information*, 34 CARDOZO L. REV. 719, 726–27 (2012).



indeed the virtue of complexity.

The lack of a single overarching problem also implies that there can be no single overarching solution. The complex motivations that lead lawyers to different sorts of abusive litigation tactics in different cases means that no quick fix, no change in fee structures or amendment to the Federal Rules, will have much of an impact on the overall system. Indeed, such changes, if they benefit some types of lawyers in some types of cases over others, may do more harm than good. Rather, the key to improving litigation conduct in contemporary lawsuits is to recognize, as Judge Marrero does, the highly individualized nature of the decisions lawyers make when litigating cases. Every case is indeed different, and every reasonably competent lawyer adjusts their tactics based on many factors, including the amounts at stake, the perceived likelihood of success on the merits, the competence and resources of the adversaries and their lawyers, and the attitudes and preferences of the judges. Judge Marrero's essay expands that list of relevant considerations, proposing that lawyers' conduct is also influenced by their need to generate substantial fees through the litigation, by a felt need to look and be "aggressive" both for psychological reasons and to impress certain types of clients, and by the failure of judges and court procedures to instill in lawyers sufficient appreciation of the social costs of litigation waste and delay.

Undoubtedly, there is lots of room for improvement. However, improvements will come not from one big "silver bullet" solution, but from many smaller adjustments that create many more individual cases in which it is no longer in the client's or the lawyer's interest to seek delay or promote unnecessary conflict or excessive costs. Some of this can be promoted by changes in existing attorney-client fee structures and control of litigation, others by changes in fee shifting rules. Rule changes that give judges and magistrate judges greater control to limit and regulate discovery can play a role, as can greater judicial willingness to supervise such discovery and exercise more of the discretion they already have.

This piece is divided into five Parts. The first four will discuss, analyze, and expand on what I consider the four important ways Judge Marrero's piece adds complexity to our understanding of contemporary litigation practice: (1) the increasing disaggregation of litigation decision-making; (2) the expansion of the conception of what practices constitute litigation abuse; (3) a recognition of the psychological complexity of the motives for litigation tactics; and (4) the disparate ways litigation abuse appears in different types of cases. Then, after a brief interlude to consider what can be learned from the experience of the "rocket dockets" in some federal district courts, the final Part will look at the ways in which Judge Marrero's more complex understanding of the problems of our contemporary litigation system can point the

way to useful improvements.

### I. THE DISAGGREGATION OF LITIGATION

While noting the longevity of the problem of litigation abuse, Judge Marrero's Essay pays considerable attention to the changes in the legal profession during the last few decades, with particular emphasis on changes in big firm practice. The fundamental shift here is that litigation, once a slightly disreputable and relatively insignificant part of big firm practice, maintained primarily as a service to the big corporate clients whose financial work provided the bulk of the firm's revenue stream, had by 1985 become a profit center in itself.<sup>17</sup> He notes that:

Intercorporate litigation was then not only not avoided or frowned upon, but rather broadly and tightly embraced by corporate clients and attorneys as a major part of commercial business strategy and counsel's tactical tools. In fact, litigation became a calculated means for private enterprises—and law firms—to further their competitive ends. . . . Practitioners have employed litigation not only to promote justice and advance the interests of clients, but also, perhaps to a larger degree than was previously the case, to further three self-serving ends: to fill in the law firms' revenue gaps created by corporate work lost both to in-house counsel and to clients' new policies for hiring and monitoring outside attorneys, to enhance law firms' business models now more motivated by attorneys' individualistic impulses, and to survive the more rigorous competition and fiercer Darwinian ends of modern law practice.<sup>18</sup>

The argument here may first appear somewhat counterintuitive. If, as Judge Marrero plausibly suggests, the post-1985 period was one in which corporate general counsel were playing a greater role in "hiring and monitoring outside attorneys," how were those same outside counsel able to indulge their "individualistic impulses" to conduct litigation in a way that drove up costs and thereby "fill[ed] in the law firms' revenue gaps?"<sup>19</sup> After all, a basic role of in-house corporate counsel is to monitor expenditures to outside firms and make sure that money is spent efficiently. As Judge Marrero notes, "[a]s the functions and authority of in-house law departments grew," one result was that "the corporate law business that clients awarded to outside counsel declined."<sup>20</sup> Yet this increased oversight by in-house counsel does not

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<sup>17</sup> Marrero, *supra* note 1 at 1621–22. See also Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values*, 59 BROOK. L. REV. 931, 942 (1993).

<sup>18</sup> Marrero, *supra* note 1, at 1621–22.

<sup>19</sup> *Id.* at 1622.

<sup>20</sup> *Id.* at 1621, 1619 n.63 (quoting studies indicating that firm partners could "bill only time and tasks that would survive in-house counsel's . . . scrutiny," and that "smaller, more routine

seem to have restrained litigation costs but has exacerbated them. How was this possible?

The key is that the increased role of corporate counsel did not have the same impact on all types of big firm legal work, or even all types of litigation. Its primary effect was on transactional work, the negotiation and preparation of financing contracts and securities law disclosures that had dominated big firm practice in the postwar period. Much of this work had become increasingly standardized and repetitive and could therefore be treated by in-house counsel as a commodity to be parceled out on an individual basis to the lowest bidder (or to in-house counsel).<sup>21</sup> Corporate partners whose revenues had once been based on a steady stream of “deals” coming into the firm from loyal clients found that they now had to compete for each new transaction with “dog and pony shows” against other firms, with the work generally going to the lowest bidder.<sup>22</sup> Litigation was different because every case was different, or at least could be presented to clients that way.

Judge Marrero’s close look at the changes in big firm litigation practice reveals a certain level of, if not outright deception, at least informational asymmetry between in-house counsel who monitor and assign litigation and outside litigation partners who actually develop the strategy for the case. As Judge Marrero notes, “intercorporate litigation” had, by 1985, become a “major part of commercial business strategy,” used by businesses to “further their competitive ends.”<sup>23</sup> In such an environment, “winning” the litigation (which in practice usually meant settling the case on what the client deemed acceptable terms<sup>24</sup>) became an important corporate goal, more important even than saving money by hiring a cheaper law firm. From the corporate counsel’s point of view, the more important a case was to the bottom line of the corporation, the more it was worth spending whatever was necessary to achieve the best possible result. Accordingly, when a potential negative

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transactions and cases [were] more frequently reserved for the client’s own less expensive in-house legal staff”).

<sup>21</sup> Bernard A. Burk & David McGowan, *Big but Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 8 (2011).

<sup>22</sup> See Casey Sullivan, *Client Pitches Cost Up to \$70K at Latham & Watkins*, BIG L. BUS. (Jan. 9, 2017), <https://biglawbusiness.com/client-pitches-cost-up-to-70k-at-latham-watkins> [https://perma.cc/U5K2-UMXW].

<sup>23</sup> Marrero, *supra* note 1, at 1621–22.

<sup>24</sup> This, of course, reflects the prevailing belief that “most cases settle.” While the empirical evidence shows this to be basically true, the settlement rate, often stated to be in the high ninetieth percentile, may well be overstated, largely because it fails to account for all of the cases judicially resolved prior to trial. See Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111 (2009); Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339–40 (1994) (“Of-cited figures estimating settlement rates of between 85 and 95 percent are misleading . . .”); Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 706 (2004).

outcome posed a major threat to the well-being of the company (the so-called “bet your company” case),<sup>25</sup> the most prudent thing for in-house counsel to do was to find a litigator with a reputation for toughness and success, and then give them whatever resources they said they needed to win the case.<sup>26</sup>

This dynamic was not lost on the litigation partners themselves, who saw the advantages of developing reputations for toughness and success, and for convincing in-house counsel that every case they handled was one that potentially put the client in grave jeopardy and that needed to be litigated fully and aggressively.<sup>27</sup> Even if, after observing some pointless motion practice or paying for months of useless discovery, the in-house counsel might begin to have doubts, the nature of big case litigation is such that it is rarely advantageous to fire one’s lawyer in the middle of pretrial preparation. Getting a new firm up to speed and ensuring a smooth transition while avoiding additional delays and duplication is quite costly and the benefits are speculative and uncertain.<sup>28</sup>

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<sup>25</sup> See *Bet-The-Company Litigation Definition*, BEST LAW., <https://www.bestlawyers.com/methodology/practice-areas/united-states/bet-the-company-litigation> [<https://perma.cc/5Q66-TBV9>] (last visited Sept. 2, 2018).

<sup>26</sup> The point is aptly made by Dean Garth when he states:

[L]awyers in the ordinary cases have learned how to manage time and expense. They have had to do so, since their clients will not pay for scorched earth tactics. On the other hand, the high-stakes, high-conflict cases involve clients who pay for the services of lawyers as warriors, and that is what they usually get.

Bryant G. Garth, *Two Worlds of Civil Discovery: From Studies of Cost and Delay to the Markets in Legal Services and Legal Reform*, 39 B.C. L. REV. 597, 605 (1998).

<sup>27</sup> As an illustration of the kind of reputation top litigation attorneys seek, consider the following excerpt from the professional profile of Sandra Goldstein from the Kirkland & Ellis website:

During the past five years, Sandra has represented clients in litigation relating to more than 30 contemplated or hostile transactions with a cumulative value of over \$400 billion. During this time, she secured more than 20 pretrial wins, including a major summary judgment victory in a multibillion-dollar securities fraud class action lawsuit. Sandra frequently argues as lead courtroom counsel, winning over a dozen favorable decisions after oral argument in the past five years at both the trial and appellate court levels concerning dispositive motions, motions for preliminary injunctions and expedited discovery. Due to this success, she has repeatedly been recognized as a leading trial lawyer by several professional publications.

*Sandra C. Goldstein, P.C.—Partner*, KIRKLAND & ELLIS, <https://www.kirkland.com/sitecontent.cfm?contentID=220&itemid=12874> [<https://perma.cc/9QN7-W6QF>] (last visited Sept. 2, 2018). Goldstein is a litigation partner who recently moved to Kirkland from Cravath, Swaine & Moore, and is said to be the highest paid female partner at a big law firm. Vivia Chen, *Is Sandra Goldstein the Highest Paid Female Partner in Big Law?*, AM. LAW. (May 29, 2018, 5:05 PM), <https://www.law.com/americanlawyer/2018/05/29/is-sandra-goldstein-the-highest-paid-female-partner-in-big-law> [<https://perma.cc/D76J-4X9K>].

<sup>28</sup> This tendency to avoid short-term costs of changes unless there are strong and clear long-term benefits to be gained is called “path dependency” and has been extensively studied by economists and economic historians. See Armen A. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211 (1950); W. Brian Arthur, *Competing Technologies*,

It should also be noted that during the last few decades there has been substantial growth in the kinds of cases that, if not quite “bet-your-company” litigation, can reasonably be characterized as posing substantial dangers to corporate bottom lines. They include not just suits between large companies on contractual, antitrust, and intellectual property grounds, but also tort claims for products liability,<sup>29</sup> securities and other nondisclosures, and employment discrimination, all frequently brought, or at least attempted to be brought, on a class-wide basis.<sup>30</sup>

Judge Marrero calls this a “paradox.”<sup>31</sup> The very same forces that pushed law firms toward greater cost cutting and efficiency in most areas were also responsible for:

The gritty grind of litigation, with all of its inefficiencies that prolong the duration of private disputes and enlarge the grief and expenses of clients, also serves as a hallmark of law practice profitability. In other words, in some circumstances litigation abuse may function as a boon to the bottom line, a financial engine working to sustain a growing share of the legal profession’s profitability, which in turn is grounded on a business model that internally embraces the operational and economic efficiency that modern law practice demands.<sup>32</sup>

Judge Marrero is able to reach this conclusion by disaggregating the litigation process. He shows us that the litigation partner who ostensibly runs the case does not have total freedom to act in the way he or she thinks best but is subject to strong influences and incentives from other powerful actors within the decision-making structure. The most important such actor is the client, represented by in-house counsel. Judge Marrero tells us that “the expansion of the function, size, and power of in-house corporate counsel” is “perhaps the most

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*Increasing Returns, and Lock-In by Historical Events*, 99 *ECON. J.* 116 (1989). It can lead to “lock-ins” of inefficient technologies like left hand side driving in many countries and qwerty keyboards. See Paul A. David, *Clio and the Economics of QWERTY*, 75 *AM. ECON. REV.* 332 (1985).

<sup>29</sup> Litigation against tobacco companies, for example, posed little threat to such defendants until the early 1990s, when increased involvement by state attorneys general and shifts in legal theories emphasizing nondisclosures regarding the addictive nature of smoking greatly increased plaintiffs’ likelihood of success in such cases. See Barbara Colombo, *Tobacco Regulation: The Convergence of Law, Medicine & Public Health*, 25 *WM. MITCHELL L. REV.* 373 (1999); Richard L. Cupp, Jr., *State Medical Reimbursement Lawsuits After Tobacco: Is the Domino Effect for Lead Paint Manufacturers and Others Fair Game?*, 27 *PEPP L. REV.* 685 (2000); Robert M. Langer, *Symposium Introduction: Regulation by Litigation*, 33 *CONN. L. REV.* 1141 (2001) (describing states’ attorneys general tobacco litigation and the regulation of tobacco by litigation); Francis E. McGovern, *Settlement of Mass Torts in a Federal System*, 36 *WAKE FOREST L. REV.* 871 (2001); Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 *DEPAUL L. REV.* 183 (2001) (including pieces on tobacco litigation).

<sup>30</sup> Marcus, *supra* note 4, at 1703–04.

<sup>31</sup> Marrero, *supra* note 1, at 1624.

<sup>32</sup> *Id.*

consequential development affecting private law practice to occur within the last thirty to forty years.”<sup>33</sup> Yet in-house counsel have not consciously encouraged the “gritty grind” of delay and inefficiency. Rather, the impact of these tactics has been perversely negative. By reducing the inefficiency and profitability of other types of corporate work and routine litigation, they have caused law firms to focus more of their attention and a greater share of their profits on big cases and big case litigators.

Big case litigators and their firms share many incentives. Both have an interest in increasing the billing rates and billable hours attributable to big case litigation. Both have an interest in convincing the client that the case they are handling is sufficiently important and poses sufficient danger to the client that it justifies, indeed requires, the aggressive, no-holds-barred approach with which it is being litigated and the bills that go along with that approach.<sup>34</sup>

In showing how current litigation practice is influenced by lawyers’ concern for maximizing their revenue, I do not think Judge Marrero is necessarily condemning them for being greedy or for failing to act in the best interests of their clients. Rather, Judge Marrero is describing the manifestation in current litigation practice of a phenomenon that legal theorists and economists have long known and worried about: the tendency of agents, all agents—lawyers, corporate officers, personal assistants, etc.—to act in their own self-interest when the constraints and incentives under which they operate permit such wealth maximizing behavior, even at the expense of the person or entity on whose behalf they purport to act. Such “agency costs” have been extensively analyzed in many institutional settings, including the lawyer-client relationship.<sup>35</sup> These studies assume that all complex institutional structures will give rise to some degree of self-benefitting actions by agents and therefore entail some inefficiencies or loss of value to those for whom they are acting. Such agency costs can never be completely eliminated but can be reduced by altering institutional incentives and constraints.

Judge Marrero describes how such agency costs can take the form

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<sup>33</sup> *Id.* at 1611.

<sup>34</sup> Of course, their interests can easily diverge when it comes time to divide the revenues attributable to those big case litigations, leading, as Judge Marrero correctly notes, to a more “cutthroat” and individualistic mode of practice, where “attorneys reportedly vie for business and clients not only with competing firms, but even with their own partners and associates.” *Id.* at 1618.

<sup>35</sup> An important early account of agency costs in the context of corporate governance is Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976). Much of this analysis in the attorney-client context has focused on plaintiffs’ lawyers and entrepreneurial litigation. See, e.g., John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987). See also Michael Klausner, Geoffrey Miller & Richard Painter, *Second Opinions in Litigation*, 84 VA. L. REV. 1411 (1998).

of costly abusive tactics and delay in the litigation process. He then seeks to work backward from effects to possible causes, trying to understand how, in a world of increasing oversight and demands for cost-cutting by in-house counsel, inefficient litigation remains a persistent, even growing problem. His account is an insightful one, consistent with much of what we know about the still somewhat hidden world of law firm governance and billing practices.

But how stable are the relationships he describes? Will clients continue to foot the bill for what Judge Marrero tells us are wasteful and unnecessary litigation practices? Judge Marrero notes that there have already been “client reactions” to the inefficiencies of the present system.<sup>36</sup> Moreover, his analysis clearly presents big case litigation as an outlier in contemporary law firm practice, the one remaining area where clients seem willing to tolerate waste and inefficiencies that they have vigorously sought to eliminate in other practice areas.<sup>37</sup> Can this last forever, or will clients eventually recognize their own self-interest and insist that litigation be conducted with greater efficiency, frugality, and restraint?

As Judge Marrero describes it, the current system relies on litigation counsel convincing the client of two fundamental propositions: (1) that the litigation facing the company poses a serious danger to the future welfare of the corporation; and (2) that the best way to meet that danger is with an extremely aggressive, no-holds-barred litigation strategy. While both propositions appear highly dubious as generalizations about the best way to litigate most corporate disputes, it may be difficult for a client to be sure that they are not applicable to the *particular* litigation in which the client is engaged. After all, the “bet-your-company” case is not a complete fiction. Some litigations really do put the corporation’s future in jeopardy, and the number of such cases may even be growing. Many government antitrust cases fall into this category, particularly those that seek to block mergers or alter the structure of the business,<sup>38</sup> as well as patent cases involving core

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<sup>36</sup> Marrero, *supra* note 1, at 1628. There is some indication that corporate use of large law firms to handle complex financial and securities litigation, such as that arising from the 2007 financial crisis, may have peaked. See Christine Simmons & Gina Passarella, *A Crack in the Wall: Elite Wall Street Firms Are Bring Put to the Test*, AM. LAW. (Aug. 19, 2018, 6:00 AM), <https://www.law.com/americanlawyer/2018/08/19/a-crack-in-the-wall-elite-wall-street-firms-are-being-put-to-the-test> [<https://perma.cc/LQT6-RMXF>].

<sup>37</sup> It should be noted that there are still a few areas of transactional practice, like corporate restructurings and high-end mergers and acquisitions, which also generate enormous fees for a relatively small number of law firms. See Chelsea Naso, *All M&A Attorneys Make Bank, Survey Shows*, LAW360 (May 28, 2014, 8:04 PM), <https://www.law360.com/articles/541045/all-m-a-attorneys-make-bank-survey-shows>.

<sup>38</sup> Although they produced very different ultimate results, the Justice Department’s cases against IBM, AT&T, and Microsoft all fall into this category. See John E. Lopatka, *United States v. IBM: A Monument to Arrogance*, 68 ANTITRUST L.J. 145 (2000); John Pinheiro, *AT&T Divestiture & the Telecommunications Market*, 2 BERKELEY TECH L.J. 303 (1987); Samuel Noah

corporate products,<sup>39</sup> and mass tort lawsuits seeking damages for widespread injuries.<sup>40</sup> Somewhat more complex are tort cases where plaintiffs allege serious physical or reputational injuries, and where the danger of potentially catastrophic damages are increased by allegations seeking class action status or punitive damages.<sup>41</sup> Although big punitive damage awards and massive class action settlements have been few and far between, there have certainly been enough of them to concern a cautious in-house counsel (or big case litigator who is aware that their career can effectively end with a highly publicized loss in a big case). Accordingly, there is generally no need for outright deception to convince the client that a pending lawsuit poses a major danger to corporate conduct. A consistent emphasis on possible negative consequences can be enough.

Tactics, however, are another matter, particularly when the aggressive, spare no expense approach of the contemporary litigator produces big client bills with little to show for them. As previously noted, changing lawyers in the middle of a case is hard and expensive. Settlement, of course, is always theoretically possible, but in complex cases where facts are in dispute and neither side really knows what document discovery will turn up, offering serious settlement terms before discovery is completed may be interpreted as a sign of fear or weakness, or at least the parties may *fear* it will be so interpreted.<sup>42</sup> So the client feels caught between a rock and a hard place, since any change in the status quo might actually increase costs and worsen both the litigation position of the company and the personal position of the in-

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Weinstein, *United States v. Microsoft Corp.*, 17 BERKELEY TECH. L.J. 273 (2002).

<sup>39</sup> See, e.g., *Samsung Elecs. Co. v. Apple Inc.*, 137 S. Ct. 429 (2016).

<sup>40</sup> See, e.g., *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on Apr. 20, 2010, 21 F. Supp. 3d 657 (E.D. La. 2014).

<sup>41</sup> Viewed in the aggregate, most of these claims will turn out not to have been very threatening after all. Larger class actions based on disparate tort claims are increasingly difficult to certify, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), and awards of massive punitive damages are also rare and can frequently be reduced by remittitur. See *Philip Morris USA v. Williams*, 549 U.S. 346 (2007). Still, immense damage awards (generally the result of jury verdicts) are not unknown, and when they do occur, they can have disastrous consequences for the corporate defendant involved. Recent work in behavioral theory has shown that most people tend to overestimate the probability of the occurrence of catastrophic events like airline crashes or terrorist attacks, particularly if previous such events are highly publicized and easy to recall. See Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207 (1973).

<sup>42</sup> Under most economic models of settlement behavior, cases will settle when plaintiff's estimate of the probability of success is equal to or below that of defendant. Problems arise, however, when asymmetric and incomplete information causes the parties to doubt that they have adequate information about the probability of success to justify settlement and need further discovery to deal with that problem. For some recent attempts to model the settlement process with discovery, see Louis Kaplow & Steven Shavell, *Economic Analysis of Law* 49–52 (Nat'l Bureau of Econ. Research, Working Paper No. 6960, 1999), available at <http://www.nber.org/papers/w6960.pdf> [<https://perma.cc/MXQ2-UT79>]; Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889 (2009).



house counsel.

Such dissatisfaction, however, can lead to instability, as clients look to new and better ways to reduce the costs and risks of big case litigation. Increasingly, we see litigation strategy itself becoming disaggregated, as both firms and clients place more of the responsibility for pretrial discovery on e-discovery service providers who have the technical expertise to produce and review the massive amounts of electronically stored information that constitutes the vast majority of discovery in contemporary litigation, and can do so more cheaply and efficiently than most law firms.<sup>43</sup> These e-discovery service providers, whether operating outside the law firm or as an internal e-discovery team, tend to view e-discovery as a task rather than an adversarial contest. Their emphasis is on cost savings, speed, efficiency, and accuracy of production, rather than aggressiveness or an assurance of litigation victories.<sup>44</sup> In the interest of maximizing such efficiency and cost reductions, they are also generally willing to meet and cooperate with representatives of the opposing parties, whether lawyers or information processors, and to cooperate more fully with each other in the discovery process. The prevalence of such firms does seem to be moving the discovery process in the direction of greater cooperation and less adversarialness,<sup>45</sup> and judges seeking to develop reasonable protocols for such discovery often prefer to speak to the “technical experts” rather than to the litigators.<sup>46</sup> Of course, it is still mostly the

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<sup>43</sup> Some of the largest of these firms market proprietary software that can be used to store electronic data and compile, review, and produce it in connection with discovery requests. These firms, as well as many smaller vendors, also provide e-discovery document review and production services, both to law firms and corporate clients. A recent survey by Relativity, one of the largest e-discovery software vendors and service providers, found that 91% of the corporations and law firms surveyed used at least one outside e-discovery service vendor, but found that a majority of such firms also relied substantially on in-house e-discovery teams. Brendan Ryan, *What Clients Want from e-Discovery Solution Providers*, RELATIVITY (Apr. 10, 2018), <https://www.relativity.com/blog/what-clients-want-from-e-discovery-solution-providers> [<https://perma.cc/8U8S-EU6P>].

<sup>44</sup> Most clients utilize outside e-discovery service providers because they believe it reduces costs, but as more sophisticated document review systems like TAR (technology assisted review) become more common, they may also provide technological expertise that further improves the efficiency of the process. See Stephen Wood, *The Rise of Alternative Legal Service Providers*, BIG L. BUS. (May 4, 2018), <https://biglawbusiness.com/the-rise-of-alternative-legal-service-providers> [<https://perma.cc/6LVZ-VFCN>].

<sup>45</sup> See, e.g., William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 136 (S.D.N.Y. 2009) (“Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI. Moreover, where counsel are using keyword searches for retrieval of ESI, they at a minimum must carefully craft the appropriate keywords, with input from the ESI’s custodians as to the words and abbreviations they use, and the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of ‘false positives.’”).

<sup>46</sup> In the seminal case of *Moore v. Publicis Groupe*, 287 F.R.D. 182 (S.D.N.Y. 2012), one of the first to develop a protocol for e-discovery utilizing technology assisted review, the discovery conference at which those protocols were discussed was attended by both sides’ information technology experts as well as by plaintiffs’ e-discovery vendor. A suggested protocol for

litigators' decisions that determine what amount of electronically stored information must initially be processed and reviewed and what claims of privilege, protection, and burdensomeness must be asserted and adjudicated. Still, by removing some of the aggressive adversarialness from the nuts and bolts process of producing documents, the advent of e-discovery service providers appears to many as a useful step in promoting cooperation and cost reduction in litigation.

Newer potential disaggregators of the litigation process, with even greater potential for effecting change in litigation strategies, are litigation financing firms. These are financial entities that are increasingly being permitted, both in the United States and elsewhere, to fund litigation expenses based on a private contractual relationship with the parties involved.<sup>47</sup> With respect to plaintiffs, this generally means agreeing to pay all or part of the expenses of the case, or simply to pay plaintiff a lump sum in exchange for the right to all or part of the proceeds of any litigation result or settlement. Such litigation funders, even more than in-house counsel, have a strong incentive to focus carefully on the relationship between the conduct of the litigation, its costs, and the probable results. Since a plaintiff's litigation funder has paid a fixed amount to participate in plaintiff's claim, the funder knows exactly how much it needs in settlement to recognize a positive return on its investment. It also has a strong interest in reducing litigation costs (since it is paying directly for them), and in obtaining settlement or litigation results more quickly (both because of the time value of money and the need to invest in other litigations). While many view plaintiffs' law firms as "entrepreneurial" because their cases are frequently taken on a contingency fee basis, there is no doubt that many such lawyers feel a personal responsibility for their clients, who may have suffered grievous personal or pecuniary losses, have no familiarity with the litigation process, and put their trust completely in their attorneys.<sup>48</sup> Such attorneys might well feel an obligation to litigate aggressively for such clients—perhaps even beyond the point of cost-effectiveness—and to reject or not seek settlement on terms the client might find

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electronic discovery, recently promulgated by the United States District Court of Maryland, expressly provides that among those who may attend a Rule 26(f) discovery conference are "the designated ESI coordinator for the party; forensic experts; and in-house information system personnel." PAUL W. GRIMM & MICHAEL D. BERMAN, MARYLAND'S DISCOVERY PROTOCOL 25 (2007), <http://www.ediscoveryllc.com/pdf/MarylandProtocol-Lexis%20Nexis-Applied-Disc.pdf> [<https://perma.cc/LZ4D-J7LM>].

<sup>47</sup> Stephanie Russell-Kraft, *Big Law Embraces Litigation Finance*, BIG L. BUS. (Mar. 23, 2018), <https://biglawbusiness.com/big-law-embraces-litigation-finance> [<https://perma.cc/S7DP-3B76>].

<sup>48</sup> Such a story is compellingly told in Jonathan Harr's account of federal litigation against corporate defendants whose mishandling of toxic chemicals allegedly led to a cluster of cancer cases in Woburn, Massachusetts. JONATHAN HARR, *A CIVIL ACTION* (1995). Harr portrays plaintiffs' lead counsel, Jan Schlichtmann, as pursuing the case so aggressively and single-mindedly that he causes severe financial injury to his firm and himself. *Id.*

disappointing. With litigation funders, such concerns have been removed. The funders are litigation-savvy repeat players who have no qualms about cutting their losses by taking small payments to settle claims that seem of little value or of pressing their lawyers to litigate quickly, effectively and at low cost.

With respect to corporate defense counsel, litigation finance can play a different but potentially equally important role. It can provide what are effectively “reverse contingent fees.” Defense counsel and the financing firm agree on an expected value for the case against defendant. The finance firm then funds the litigation costs in exchange for a percentage of any savings the client obtains from a judgment or settlement below that expected value.<sup>49</sup> This removes the cost of the litigation as a source of concern for in-house corporate counsel and also removes any need to monitor the litigation, since the litigation financing firm has both a strong incentive and the expertise to do that. While many corporations carry liability insurance that includes legal fees and other litigation-related expenses, the funding offered by the litigation finance firm is case-specific with respect to a lawsuit that has already been initiated.<sup>50</sup> At the very least, this means that a knowledgeable, objective observer has examined the case and believes it can be resolved for an amount less than corporate counsel has estimated. More importantly, the funding firm’s financial stake in the outcome gives it strong incentives to adopt a measured cost-benefit approach to how the litigation is conducted. This could make them a useful counterbalance to the over-aggressiveness and costly litigation strategies Judge Marrero sees currently being followed by defense counsel. While litigation funding is quite new and remains controversial,<sup>51</sup> as a potential

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<sup>49</sup> While defendant-side litigation financing is “still in the early stages of development,” it is both theoretically possible and actively being offered by some investment advisory firms. WESTFLEET ADVISORS, GUIDE TO LITIGATION FINANCING 3 (May 2014), [https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015\\_spring\\_leadership\\_meeting/guide\\_to\\_litigation\\_financing\\_may\\_2014\\_charles\\_agee.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015_spring_leadership_meeting/guide_to_litigation_financing_may_2014_charles_agee.authcheckdam.pdf) [<https://perma.cc/N8E6-T4PS>]; Michael McDonald, *Litigation Finance for Defendants*, ABOVE L. (Mar. 28, 2017, 5:31 PM), <https://abovethelaw.com/2017/03/litigation-finance-for-defendants> [<https://perma.cc/QGX4-HDRA>].

<sup>50</sup> Many corporations today tend to self-insure, at least with respect to some levels of liability, creating additional anxiety for general counsel that litigation finance can help solve.

<sup>51</sup> One such controversy is whether traditional ethical rules against maintenance and champerty should be modified or abolished, since lawyers using litigation finance firms clearly violate such prohibitions. See, e.g., Susan Lorde Martin, *Financing Litigation On-Line: Obstacles Usury and Other Obstacles*, 1 DEPPAUL BUS. & COM. L.J. 85 (2002); Susan Lorde Martin, *Litigation Financing: Another Subprime Industry That Has a Place in the United States Market*, 53 VILL. L. REV. 83 (2008); Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55 (2004); Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615 (2007); James E. Moliterno, *Broad Prohibition, Thin Rationale: The “Acquisition of an Interest and Financial Assistance in Litigation” Rules*, 16 GEO. J. LEGAL ETHICS 223 (2003); Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367 (2009); Douglas R. Richmond, *Other People’s Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649

ameliorative to the “gritty grind” Judge Marrero describes, it is a trend worth watching.

## II. AN EXPANSIVE CONCEPTION OF LITIGATION ABUSE

Too much recent writing about problems with the litigation process have been exercises in allocation of blame.<sup>52</sup> Plaintiffs’ lawyers blame defense counsel for delay and increased costs, usually through dilatory discovery practices.<sup>53</sup> Defense lawyers blame plaintiffs’ counsel for similar cost and delay, mostly due to unnecessary and overbroad discovery requests.<sup>54</sup> Judges and academics cite both sorts of problems and blame litigators generally for what has come to be called “discovery abuse.”<sup>55</sup> For Judge Marrero, however, even discovery abuse is just a subset of the broader dysfunction in contemporary litigation procedure.<sup>56</sup> As he sees it, lawyers are increasing costs and delay in

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(2005); Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61 (2011); Maya Steinitz, *Whose Claim is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268 (2011); Courtney R. Barksdale, Note, *All That Glitters Isn’t Gold: Analyzing the Costs and Benefits of Litigation Finance*, 26 REV. LITIG. 707 (2007); Paul Bond, Comment, *Making Champerty Work: An Invitation to State Action*, 150 U. PA. L. REV. 1297 (2002); Andrew Hananel & David Staubitz, *The Ethics of Law Loans in the Post-Rancman Era*, 17 GEO. J. LEGAL ETHICS 795 (2004); Jason Lyon, Comment, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571 (2010); Mariel Rodak, Comment, *It’s About Time: A Systems Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement*, 155 U. PA. L. REV. 503 (2006).

<sup>52</sup> Indeed, a recent survey of discovery abuse cases attempted to study judicial allocation of blame. David J. Kessler, Andrea D’Ambra & Alex Altman, *Quantitative Analysis of Courts’ Application of Cooperation in Discovery Disputes from July 1, 2008 to November 1, 2016* (2017), <http://www.nortonrosefulbright.com/files/20170126-courts-and-cooperation-a-quantitative-study-of-how-courts-are-considering-parties-failures-to-cooperate-146092.pdf> [https://perma.cc/Y427-3UUU]. It found that sanctions for non-cooperation in discovery were overwhelmingly applied against responding, rather than requesting, parties. *Id.* at 2.

<sup>53</sup> They also complain, as does Judge Marrero, that this penchant for delay is augmented by defense counsel’s ability to bill by the hour. See Comments of Michael R. Hugo, First Vice-Chair, Am. Ass’n for Justice’s Section on Toxic, Env’tl. and Pharm. Litig. 9–10 (Feb. 18, 2014) (on file with author) (“It was not the plaintiff that was driving the litigation costs through the roof—it was the counsel for the vaccine manufacturers. They were getting paid by the hour; I was getting paid perhaps. It was in defense counsel’s interest to generate mountains of paperwork, to fight discovery that had already been produced in other cases, to keep me running across the continent for generally identical motions filed in 10 to 30 different courts, and to try to win a war of attrition.”).

<sup>54</sup> In the era of e-discovery, these concerns have been broadened to also include “over-preservation” of potentially discoverable ESI and spoliation motions relating to nonpreservation. See Lawyers for Civil Justice, *Public Comment to the Advisory Committee on Civil Rules 3–4* (Aug. 30, 2013), [http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj\\_comment\\_to\\_advisory\\_committee\\_on\\_civil\\_rules\\_8.30.13.pdf](http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_to_advisory_committee_on_civil_rules_8.30.13.pdf) [https://perma.cc/MJS5-B4T9]. See also Yablon, *supra* note 14, at 574–77.

<sup>55</sup> See, e.g., SEDONA COOPERATION PROCLAMATION, *supra* note 3, at 1.

<sup>56</sup> It should be noted, however, that, like most careful commentators, Judge Marrero describes problems that primarily characterize “big case” litigation, high stakes lawsuits against large entities. As a judge in the United States District Court for the Southern District of New York, Judge Marrero undoubtedly sees a disproportionate number of such cases. Yet, I believe

virtually all aspects of pretrial practice, from complaint drafting to discovery to dispositive motions. One interesting consequence of this broad critique of the entire system is that it tends to reduce the culpability of any particular participant in the system, making virtually everyone both a victim and perpetrator of some level of abusive conduct. It also implies that there is no easy fix to the widespread problems he describes, no federal rule change, judicial sanction, or ethical exhortation that can bring about the changes he desires.

Judge Marrero evaluates litigation practices against an ambitious, perhaps even idealized standard—that litigation should be as “just, speedy, and inexpensive” as possible.<sup>57</sup> Measured against that standard, contemporary litigation practice falls woefully short. Among the litigation practices he critiques are: complaints that are too vague; complaints that are too long; complaints that are “scattershot” or constitute a “fishing expedition;” answers that are coy, evasive, or withhold relevant information; lawsuits filed in an improper jurisdiction or venue; lawsuits naming unnecessary defendants or “overstretched” claims; motions to dismiss based on “wishful thinking;” partial motions to dismiss that serve “no useful purpose;” motions to dismiss that are later abandoned or withdrawn; disproportionate discovery; “discovery about discovery;” excessive discovery; overbroad document requests; unnecessary depositions, interrogatories, and requests for admissions; aggravated discovery (mostly electronic); and premature, unproductive, or baseless motions for summary judgment.<sup>58</sup>

As a Civil Procedure teacher, I find Judge Marrero’s list quite edifying. He condemns all of the sloppy procedural practices I warn my students against. As a litigator, or even a scholarly observer of litigation, however, I fear that Judge Marrero is painting with too broad a brush. Viewed from the perspective of hindsight, unsuccessful litigation strategies will almost always look wasteful and unnecessary, particularly to a judge who has ruled against them. Yet from the *ex ante* perspective of the lawyer considering such strategies, there may be strong reasons for adopting them. The major reason for this is the uncertainty of the litigation process itself.

Consider motions to dismiss and for summary judgment, which Judge Marrero condemns as wasteful and unnecessary because in the aggregate they have relatively low rates of success. From one perspective, they are a perfect illustration of the insights available from

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he would agree with Professor Marcus that, “careful research by the Federal Judicial Center Research Division in the late twentieth and early twenty-first centuries has shown that discovery does not seem to be a significant problem in ‘normal’ litigation, probably of the sort the framers would have anticipated.” Marcus, *supra* note 4, at 1709. Judge Marrero expressly argues, however, that the costs and burdens imposed by big case litigation abuse adversely impact the entire civil justice system. Marrero, *supra* note 1, at 1607.

<sup>57</sup> Fed. R. Civ. P. 1.

<sup>58</sup> See Marrero, *supra* note 1, at 1645–70.

Judge Marrero's approach. Such motions are clearly permitted by the Federal Rules and, except in the most egregious cases, can hardly be considered abusive. Yet it is precisely because they have become such a standard part of defense counsel's strategy, made virtually by rote in every large case, that Judge Marrero sees them as problematic. Moreover, such motions can justify enormous hours of partner and associate time in getting all the arguments just right, finding all the potentially relevant cases, and making sure they are all cited correctly, even for a motion that everyone understands the client is very likely to lose. Judge Marrero condemns this as wasteful and perhaps even self-interested action by defense counsel, and he certainly has a point.<sup>59</sup>

From the point of view of defense counsel, however, that same low probability motion to dismiss can look like a risk worth taking.<sup>60</sup> It represents a twenty-five to thirty percent chance of a clear and complete victory,<sup>61</sup> a victory that will enhance their reputation and endear them to the client. The only downside risk is the added cost and delay of the motion, and, as Judge Marrero suggests, that will be viewed by most defense counsel with mixed emotions. The calculus might change if defense counsel knew with virtual certainty that the motion would be denied, but the legal authorities themselves rarely provide such certainty. Indeed, the standard for deciding motions to dismiss has itself been a subject of substantial litigation uncertainty recently, and appears to have shifted somewhat in favor of defendants.<sup>62</sup> Moreover, different judges and different circuits are known to take somewhat varying views on how weak a claim must appear before it is dismissed at the pretrial stage. Given such uncertainty, it is not difficult for a good litigator to formulate an argument for dismissal or summary judgment which appears to them to be at least as good as arguments that have been accepted by courts in other cases. Lawyers, of course, are not immune to their own arguments, and frequently manage to convince themselves that their motion has merit even if it subsequently fails to convince the judge.<sup>63</sup>

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<sup>59</sup> *Id.* at 1652–53.

<sup>60</sup> There is substantial academic literature on why lawyers bring cases with low probabilities of success. See, e.g., Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191 (2014); Charles M. Yablon, *A Dangerous Supplement? Longshot Claims and Private Securities Litigation*, 94 NW. U. L. REV. 567 (2000); Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 UCLA L. REV. 65 (1996).

<sup>61</sup> This is Judge Marrero's estimate, based on data from the Administrative Office of the United States Courts, of the overall rate at which motions to dismiss are granted in their entirety in federal civil cases. See Marrero, *supra* note 1, at 1653 nn.109–11.

<sup>62</sup> *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). See also Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117 (2015).

<sup>63</sup> See Andrew J. Wistrich & Jeffrey J. Rachlinski, *How Lawyers' Intuitions Prolong Litigation*, 86 S. CAL. L. REV. 571, 579–80 (2013) (discussion of the cognitive bias of over-

Moreover, even when lawyers know their motion is weak and likely to be denied, they may still have what appear to them to be good reasons to make it. The client might demand it, expect it, or at least strongly encourage it. Defense counsel may convince themselves, as well as the client, that even if the motion is unsuccessful, it will have corollary benefits like “educating the judge” concerning the nature of defendant’s arguments, or demonstrating to opposing counsel the strength of their cases and their intent to litigate aggressively.

Such questionable grounds for making questionable motions, of course, grow out of precisely the lawyer-client dynamic Judge Marrero describes. In critiquing them, I don’t think Judge Marrero is calling for the abolition of dispositive motions or a stricter standard for sanctioning lawyers who make such losing motions. He is simply showing that the perverse incentives of the present litigation system result in too many weak motions being made, with too much money, time, and energy expended on them. That is why he critiques not just the motions themselves, but the overwritten, overbroad way they are made and supported with extraneous exhibits,<sup>64</sup> as well as the useless motions that seek to dismiss irrelevant parts of a lawsuit,<sup>65</sup> or are withdrawn without adjudication.<sup>66</sup> He conjoins the problem of too many dispositive motions with the problem of too much time and energy spent on dispositive motion practice, the problem of too much discovery with the problem of disproportionate discovery and the problem of discovery delay. To Judge Marrero, they are all manifestations of the skewed incentives under which much contemporary litigation takes place.

By focusing on the complex incentives that cause lawyers to litigate expensively and ineffectively, Judge Marrero effectively lessens the distinction, frequently found in the literature, between the “ethical” lawyer who advocates zealously within the scope of the rules and the unethical one who abuses and violates those rules. Judge Marrero’s expansive list of litigation abuses shows that it is possible to advocate vigorously within the rules, still do so in a wasteful and ill-advised manner, and that such advocacy has a deleterious impact on the parties involved and on the system as a whole.<sup>67</sup> For Judge Marrero, the problem is not a few bad actors, or even a few categories of lawyers he views as sleazy or unprincipled. Rather, it is the system itself that presents lawyers with powerful incentives to not only do what is

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optimism among lawyers).

<sup>64</sup> Marrero, *supra* note 1, at 1664–65.

<sup>65</sup> Marrero, *supra* note 1, at 1654.

<sup>66</sup> Marrero, *supra* note 1, at 1655–56.

<sup>67</sup> In this respect, Judge Marrero’s position is close to that of the Sedona Cooperation Proclamation, which also argued that “zealous advocacy” does not require litigation of unnecessary discovery disputes. See SEDONA COOPERATION PROCLAMATION, *supra* note 3, at 1.

necessary to present their clients' case in a clear and convincing manner, but also do far more than is necessary, to leave no stone unturned, no case uncited, no argument unmade, to present to the client a vision of aggressive advocacy, as well as an extremely expensive legal bill. An analogy might be made to the medical doctor who, seeking to provide their patient with the best possible care, orders an immense battery of expensive tests to rule out a whole series of potential maladies. This is not malpractice. All the tests are justifiable, if not strictly required, and there is no doubt that the fact the doctors' office makes a profit on every test has an impact on whether they are ordered. Still, medical costs soar, and the system as a whole is damaged.<sup>68</sup>

By focusing on systemic problems, Judge Marrero not only avoids placing too much blame on any single group of individuals, but also suggests that the solution to the problem cannot come from any single source or change in the way litigation is conducted, supervised, or funded. Rather, Judge Marrero's broad systemic approach to the problem also implies that the problem cannot be solved but can, at best, be gradually improved, and that such improvement cannot come from one or a few big changes, but from a much larger number of smaller changes. Lawyers cannot and should not, as a general matter, be prevented from or sanctioned for making dispositive motions or seeking extensive discovery. Rather, the incentives lawyers face when considering such strategies must be changed more subtly, so that the decision to litigate more aggressively and spend more client money does not always appear to litigators as the safest, most lucrative, and most obvious choice.

### III. RATIONAL VS. IRRATIONAL INCENTIVES TO LITIGATE

Most writing about litigation misconduct starts from one of two assumptions about the lawyers who engage in it. Some portray these lawyers as rational actors who, in an effort to maximize positive

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<sup>68</sup> Judge Marrero's Essay includes his own medical analogy, in which he compares weak summary judgment motions to a "common illness" for which "surgeons routinely perform an invasive operation during which, in about seventy to eighty-five percent of the cases, the patients' condition worsens, and many even die . . ." Marrero, *supra* note 1, at 1663. He contrasts that with an "alternative treatment" for the same condition with a success rate of over ninety percent. *Id.* The legal procedure that corresponds to that "alternative treatment" is not entirely clear, but it presumably involves preparing for trial and probable settlement. The analogy is not a bad one, although losing summary judgment defendants do not risk death, just a depleted pocket book, and are still free to subsequently seek settlement. Judge Marrero's argument is that everyone would be better off if the time wasted on summary judgment motions was spent on settling cases quickly and efficiently. As a general statement about the health of the entire civil justice system, this is probably true, but, for the reasons stated above, it is still hard to envision that such an argument will convince litigators not to make potentially dispositive motions in a particular case.



litigation outcomes for their client, take rational actions designed to improve their litigation position. Sometimes this works, but frequently it is met by similar actions by their opponents that result in a “prisoner’s dilemma” or other game theoretic conclusion in which abusive conduct by both sides makes everybody worse off.<sup>69</sup> The alternative assumption is that litigators, even if they start out acting rationally, frequently get caught up in the combative, aggressive nature of adversarial litigation, particularly without effective judicial oversight.<sup>70</sup> They may view their opponents as stubborn, hostile, or even evil (not so hard when the opponent is a large corporation), and such dislike can grow into the irrational “scorched earth” tactics that characterize the abusive conduct found in some contemporary lawsuits. Each approach implies its own preferred solution. For those adopting a rational game-theoretic approach, it is usually a change in the rules of the “game” that presents the parties with more information about the other side’s actions, thereby promoting more optimal benefit-maximizing behavior by both sides. This is generally done by promoting or even mandating more meetings and conferences between the parties and their lawyers. Those who view the problem as primarily one of lawyer irrationality tend to see the solution as a combination of exhortations pointing out the far greater benefits of cooperation over conflict, coupled with closer case management and the threat of severe sanctions for the most egregious wrongdoers.<sup>71</sup> Neither solution has been very effective thus far, raising doubts as to whether either of the analyses of lawyer conduct on which

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<sup>69</sup> The classic example of this form of analysis is John K. Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. REV. 569 (1989). Written by a defense analyst for the RAND Corporation (who also had a J.D. from Yale), it used game-theoretic models to analyze under what circumstances it was a winning strategy for adversarial lawyers to engage in discovery abuse and when it would lead to a disadvantageous prisoner’s dilemma. In developing his arguments, he drew on theories of nuclear deterrence. While his models made varying assumptions about the relative wealth and information available to the parties involved, they always assumed that the participants acted in strictly rational ways. *Id.* Other authors also make the strict rationality assumption. See Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 452–54 (1994); Robert D. Cooter & Daniel L. Rubinfeld, *Reforming the New Discovery Rules*, 84 GEO. L.J. 61, 63–65 (1995); Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 641 (1989).

<sup>70</sup> See John S. Beckerman, *Confronting Civil Discovery’s Fatal Flaws*, 84 MINN. L. REV. 505, 517 (2000) (“[T]he cooperative ethos of discovery clashes directly and irreconcilably with the oppositional character and partisan norms of all other phases and attributes of adversarial litigation.”); Gilson & Mnookin, *supra* note 11 (rejecting prisoner’s dilemma in favor of a model stressing agency theory and reputational concerns); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 16 (1984) (“Attorneys, steeped in the grand tradition of the litigator, are trained to be aggressive, adversarial animals and to employ every weapon in their arsenal to achieve the aims of their clients and to frustrate those of their opponents. It is unrealistic to expect them to act in a cooperative spirit or adhere to Marquess of Queensberry rules on what has become the central battlefield of modern litigation.”); see also Yablon, *supra* note 11.

<sup>71</sup> For a game-theoretic argument that closer case management cannot generally be effective in applying proportionality review, see Moss, *supra* note 42.

they are based is completely accurate.<sup>72</sup>

Judge Marrero does not begin with behavioral assumptions, but with observations. He observes that lawyers engaged in litigation do not act freely, but are constrained. They are constrained by the Federal Rules and fiduciary duties but, even more importantly, by expectations and demands of their clients, partners, associates, adversaries, and the decision-makers before whom they appear. The lawyers he sees do not adopt long term litigation strategies, or, if they do, those strategies are constantly being interrupted by demands placed on them by clients who seek better results for lower costs, partners who seek better results for higher billable hours, associates who must be induced to help produce those better results and higher billable hours, adversaries who seek to prevent any positive result but do not care much about billable hours, and decision-makers who want the rules followed and litigation conducted in the most just, speedy, and inexpensive possible way. With all those constraints and demands, the question whether lawyers will act rationally or irrationally seems somewhat beside the point. They will not so much act as react, reflecting the pressures and constraints placed on them. How they will act in any particular situation is hard to predict, since the constellation of forces acting on them will be different for different cases and even at different times and stages in the litigation process.<sup>73</sup>

Accordingly, in Judge Marrero's account of litigation conduct, although lawyers do engage in mostly rational cost-benefit analyses in deciding on a course of action, no theoretical model can predict what that action will be in any given instance. That is because the constellation of demands and constraints those lawyers face at any given moment are so complex and varied that they cannot be reduced to any theoretical model. Consider, for example, a motion to dismiss, one with a very small chance of success, the kind Judge Marrero considers wasteful and abusive. Assume the lawyer contemplating making such a motion shares Judge Marrero's view of the merits. That does not mean her only "rational" decision is to forego the motion, or that if she makes it she is acting irrationally. She also must consider how the client will

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<sup>72</sup> With the advent of e-discovery and its potential for production of massive amounts of potentially unreviewable documents, it was suggested that the need for cooperation and coordination would become apparent to all litigators, rational or not, and lead to a reduction in abusive practices. See Robert Douglas Brownstone, *Collaborative Navigation of the Stormy e-Discovery Seas*, 10 RICH. J.L. & TECH. 53, Section III.A (2004). The fact that this has not apparently occurred strongly supports the view of current litigation pressures Judge Marrero presents in his Essay.

<sup>73</sup> Judge Marrero spends many pages of his Essay noting the human toll that changes in big firm practice have had on lawyers at those firms. Among the changes he notes are higher fees and salaries, but also greater disparities in compensation, greater difficulty collecting on bills, more willingness to hire lateral associates and lateral partners, and an overall culture of "extreme competitiveness which characterizes contemporary law practice." Marrero, *supra* note 1, at 1613–18.

react to her decision. Will general counsel be pleased by the judicious cost savings or disturbed by the lack of aggression? Will her partners be upset by the loss of potential billings? How angry will the judge be over what is likely to be perceived as a weak, unnecessary motion? How much damage will it do to defendant's overall litigation position? Is plaintiff likely to move for sanctions under Rule 11? Might they win? All of these and other considerations will vary from issue to issue, from case to case, and from lawyer to lawyer.<sup>74</sup>

While Judge Marrero's analysis does not permit us to create a model to predict litigation behavior, it does permit us to isolate and distinguish various constraints and incentives that are acting on lawyers and to analyze the relative strength of those constraints and incentives in most cases. Indeed, it is his critique of many of those incentives, particularly those imposed by contemporary big firm practice, that constitutes the heart of his Essay. Equally important, however, is Judge Marrero's systemic approach to litigation abuse, the way he sees every part of the problem as related to every other part.

#### IV. IS LITIGATION ABUSE ONE PROBLEM OR MANY PROBLEMS?

This brings us to a final innovative aspect of Judge Marrero's Essay, the way it simultaneously permits us to analyze litigation abuse as both one problem and as many interrelated problems. Again, this is a subject on which prior literature has divided. From one perspective, the entire history of Federal Rules revisions was seen as a prolonged attempt to deal with litigation abuse as a series of piecemeal problems (e.g., frivolous complaints, excessive discovery demands, intentional destruction of evidence) whose solutions were sought in specific Rule changes.<sup>75</sup> Another school of thought, however, saw one fundamental problem in the way lawyers conducted litigation,<sup>76</sup> and sought to solve

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<sup>74</sup> Consider this account of contemporary lawyer conduct by Judge Marrero:

[C]ontemporary litigation has spawned an expanding progeny of unnecessary methods, at best dubious, at worst outrageous. In aggravated forms, this development engenders ever deeper unhappiness as litigators, confronting the rougher world of economics, keener competition, and far bigger stakes that characterize law practice today, vie with one another to achieve a sharper edge in court proceedings.

Marrero, *supra* note 1, at 1623. I would submit that the "deeply unhappy litigators" he describes here are acting neither fully rationally nor irrationally, but are just trying to cope, as best they can, with an increasingly pressured and competitive environment.

<sup>75</sup> Marcus, *supra* note 4, at 1710–26.

<sup>76</sup> Another attempt at a fairly radical change in the way parties obtained information in litigation was the introduction of mandatory initial disclosures in 1993 pursuant to Federal Rule of Civil Procedure 26(a), a Rule whose scope was sharply limited by amendments in 2000. See Emily C. Gainor, *Initial Disclosures and Discovery Reform in the Wake of Plausible Pleading Standards*, 52 B.C. L. REV. 1441, 1469 (2011) (noting that presently "initial disclosures assume a relatively minor role in document discovery in the American judicial system"); William W.

that problem through greater information exchange among lawyers, more extensive judicial supervision of the pretrial process,<sup>77</sup> or exhortations for greater cooperation among litigators.<sup>78</sup>

Judge Marrero's analysis combines both of these approaches. On one hand, he sees virtually all contemporary procedural issues as interrelated manifestations of a single systemic problem: the skewed incentives that litigators face in big case litigation. By the same token, however, those skewed incentives are presented not so much as a single problem, but as a constellation of forces that push and pull litigation in different directions at different times and in different cases. It is this systemic complexity that makes it so hard to bring about significant changes, either by amending specific Federal Rules or by broader but more subtle attempts to influence lawyer behavior.

It is not that Rule amendments and other procedural changes fail to have an impact. Rather, it is that the effect of those changes will be unpredictable and may be hard to discern if other changes in the system are happening at the same time that are either pushing lawyers to act in contrary ways or in ways different than those anticipated by the rule drafters.<sup>79</sup> For example, consider the recent changes in the Federal Rules designed to reduce discovery costs by imposing proportionality limits on the general obligation to produce all relevant information. Other things being equal, one would expect this to reduce the amount of

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Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 721–22 (1989) (proposing a comprehensive initial disclosure scheme).

<sup>77</sup> Calls for more effective case management have also been a persistent theme in the debates over discovery abuse. In 1990, Congress passed the Civil Justice Reform Act of 1990, 28 U.S.C. § 471 (1992), which required all federal district courts to develop “civil justice expense and delay reduction plans,” which were periodically evaluated and led to changes in both district court practices and in the Federal Rules. See JUDICIAL CONFERENCE OF THE U.S., CIVIL JUSTICE REFORM ACT OF 1990: FINAL REPORT 11 (May 1997), <https://www.fjc.gov/sites/default/files/2017/CJRA-6-2-%20Civil%20Justice%20Reform%20Act%20Final%20Report%205-97.pdf> [<https://perma.cc/A92L-99EF>]. Yet, with the possible exception of the “rocket docket,” discussed *infra* at Section IV.A, the impact of such changes appears to have been marginal at best.

<sup>78</sup> The Sedona Conference Cooperation Proclamation is the most ambitious recent attempt at such exhortation. Its drafters did not rely on the Proclamation alone, but, as they state:

The *Cooperation Proclamation* acknowledged that what is required is a “paradigm shift for the discovery process” and that The Sedona Conference envisioned a three-part process: (1) awareness (the *Proclamation* itself), (2) commitment (the writing of a Brandeis brief-style “The Case for Cooperation” developing a detailed understanding and full articulation of the issues and changes needed to obtain cooperative fact-finding, and (3) tools—“developing and distributing practical ‘tool kits’ to train and support lawyers . . . in techniques of discovery cooperation, collaboration, and transparency.”

SEDONA COOPERATION PROCLAMATION, *supra* note 3 (Guidance for Litigators & In-House Counsel).

<sup>79</sup> This seems to be Judge Marrero's view. He spends twenty-four pages of his Essay describing recent changes in the structure of law firms and nature of big firm practice. Marrero, *supra* note 1, at 1608–32. He mentions amendments to the Federal Rules designed to curb discovery abuse only once and states that they have “had little success.” *Id.* at 1642.

discovery taken in federal cases. But it is highly unlikely that other systemic inputs have stayed equal. If greater amounts of potentially relevant electronically stored information have become available (through smart phones, social media, etc.),<sup>80</sup> and if law firms are increasingly looking to e-discovery as both a source of billable hours and a profit center for the firm, then any reduction in e-discovery costs due to the rule change may be small and will be overshadowed by other systemic factors that cause e-discovery costs to increase.<sup>81</sup> Similarly, if the pleading standards are heightened in an effort to eliminate cases with little or no evidentiary support at an early stage in the proceedings, but client and other financial pressure to bring such cases remains strong, the effect may not be so much to reduce the number of pleadings, but to incentivize plaintiffs' lawyers to make them longer and more complicated. The complexity of the system means that the incentives and constraints under which lawyers operate are many and constantly changing, and the most important motivations in a given case are not necessarily the ones most obvious to outside observers.

#### A. *A Brief Interlude to Discuss the "Rocket Dockets"*

Before proceeding to the final Section of this Comment, we should take a few moments to consider one of the most ambitious attempts at procedural reforms in recent years: the advent of so-called "rocket dockets" in the Eastern District of Virginia and some other federal courts. These represent conscious attempts to shake up the status quo by focusing all participants in the litigation process on a single measurable and attainable goal, a substantial reduction in the time between filing and final disposition of civil cases.<sup>82</sup> This generally requires a substantial increase in case management, the degree of oversight of the pretrial

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<sup>80</sup> See, e.g., George A. Zimmerman & Giyoung Song, *Eliminating Asymmetrical Discovery to Resolve Disputes on the Merits*, N.Y.L.J. (Oct. 6, 2014) (arguing that technological changes in the amount of potential discoverable ESI render contemplated Rule changes inadequate.)

<sup>81</sup> Judge Marrero does not appear to be a big fan of sanctions, apparently because he sees lawyer misconduct as not something lawyers freely choose, but something imposed on them by economic and competitive pressure. Accordingly, he doubts "the efficacy of these punitive measures," like Rules 11, 26, and 37, and would favor instead "new remedial responses . . . more specifically targeted" and "uniquely designed to address current circumstances." Marrero, *supra* note 1, at 1683.

<sup>82</sup> The reforms in the Eastern District of Virginia, for example, as well as the term "rocket docket" itself, were developed by then-Chief Judge Albert Vickers Bryan Jr. of that court. Heather Russell Koenig, *The Eastern District of Virginia: A Working Solution for Civil Justice Reform*, 32 U. RICH. L. REV. 799, 800 (1998); Saurabh Vishnubhakat, *Reconceiving the Patent Rocket Docket: An Empirical Study of Infringement Litigation 1985-2010*, 11 J. MARSHALL REV. INTELL. PROP. L. 58, 60 (2011); Jerry Markon, *A Double Dose of Molasses in the Rocket Docket*, WASH. POST, Oct. 3, 2004, at C04, available at <http://www.washingtonpost.com/wp-dyn/articles/A3007-2004Oct2.html> [<https://perma.cc/UX22-UZ46>].

process exercised by judges and magistrate judges.<sup>83</sup> In “rocket docket” courts, judges set strict deadlines for completion of discovery,<sup>84</sup> limit the number of witnesses and exhibits, and very rarely grant extensions or modifications once these limitations are established.<sup>85</sup> Lawyers who litigate before these courts are well aware of those requirements and adjust their litigation strategies accordingly. The result is that these districts are always among the leaders in the country in the speed at which cases are concluded, generally posting median times of only a little over twelve months from filing to disposition.<sup>86</sup>

This success in reducing litigation delay, however, has not come without controversy. Many argue that it has increased the cost of litigation, since “[i]t is expected that litigants will allocate trial-sized teams from the outset, as the high volume of work and the limited period of time does not permit incrementalism.”<sup>87</sup> Firms that have extensive experience in practicing in the rocket dockets market that to clients as a unique and desirable expertise, one for which they presumably charge a premium. Such firms may also benefit from the fact that the Eastern District of Virginia and other rocket dockets very rarely grant motions to transfer venue to other districts that tolerate more leisurely litigation styles.<sup>88</sup> The result is to limit the law firm options available to clients who are sued in such districts, which presumably also increases their costs.

Fairness concerns have also been raised regarding the procedural constraints imposed by the rocket dockets. Some have argued that they favor plaintiffs, particularly in litigation like patent cases, where plaintiffs can take as long as they like developing a case prior to filing, but defendants are then presented with a very limited window of time to complete pretrial discovery and develop a defense. Indeed, there is some empirical evidence that plaintiffs are choosing to file patent cases in districts with rocket dockets based on this perceived procedural advantage. Others criticize the potential injustice of firm trial dates and pretrial deadlines with limited opportunities for extensions as failing to

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<sup>83</sup> Vishnubhakat, *supra* note 82, at 61–62. Jeffrey Kelley, *A District Court That’s in High Demand*, RICH. TIMES DISPATCH, June 25, 2006, at D1.

<sup>84</sup> In case management studies unrelated to rocket dockets, a district court’s “median days to discovery cutoff” was found to be a “statistically significant predictor of time to disposition.” James S. Kakalik, Deborah R. Hensler, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace & Mary E. Vaiana, *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 667 (1998).

<sup>85</sup> It was said of Judge Bryan that “the only grounds for [which he would permit] a delay were a death in the family—your own.” Vishnubhakat, *supra* note 82, at 62. Markon, *supra* note 82.

<sup>86</sup> See Robert M. Tata, *Virginia’s ‘Rocket Docket’ Continues to Roar*, LAW360 (Apr. 17, 2015, 10:13 AM), <https://www.law360.com/articles/644064/virginia-s-rocket-docket-continues-to-roar>.

<sup>87</sup> Vishnubhakat, *supra* note 82, at 62.

<sup>88</sup> *Id.* at 65.

meet the fundamental requirement that procedural rules should be modified to meet the needs of the individual case. They argue that, with all the emphasis placed on speedy resolution of disputes, the other two aspects of the Rule 1 triumvirate, expense reduction and justice, may be getting short shrift.

To be sure, there are counterarguments, and rocket dockets have many defenders. Delay, of course, can also increase expenses, and justice delayed can be justice denied. Clogged dockets may benefit defendants at least as much as speedy ones benefit plaintiffs. Moreover, the rocket docket is not an all-or-nothing proposition. The standing rules and procedural innovations that constitute it can be adopted to various degrees, and many other districts have done precisely that. The appropriate resolution of these questions is well beyond the scope of this Comment.

Still, what this interlude has shown is the basic validity of Judge Marrero's complex systemic approach to litigation abuse and litigation reform. It shows that even a highly focused effort to change just one aspect of the litigation system will necessarily have significant and largely unpredictable effects on other aspects of the system. So, reducing delay has implications for law firm structure and competition, necessitates changing standards for venue transfers and extensions of time limits, and may well affect the fundamental fairness of the adversarial relationship between plaintiffs and defendants. To be sure, changes can be made and can even be effective, but they should be made with caution and careful consideration of all of their potential effects. This is worth keeping in mind as we move to the final Section of this piece.

## V. A CONSIDERATION OF REMEDIES

It may seem a strange thing to say about Judge Marrero's 93-page Essay, but I wish it were a little longer. Although he gives us an exhaustive account of the deficiencies of current big case litigation practice and its complex relationship to law firm growth and fee structures, he has relatively little to say about potential remedies for the problems he describes. In some respects, this is not surprising. Judge Marrero is not talking about a particular problem or defect in the litigation system. He is talking about the system itself and the way it currently operates. Indeed, it may even be slightly misleading to describe his piece, as I have consistently done here, as an essay on "litigation abuse." Judge Marrero makes it clear that he is not focused exclusively, or even primarily, on "abuses" of the system, but on the system itself in its current ordinary operation. As he notes, "the burgeoning litigation cost and abuse concerns at the heart of the

controversy today derives not so much from deliberate misconduct by practitioners—practices that are already unlawful—but from less visible though more extensive and pivotal forces: counsel’s subterranean actions that governing rules do not explicitly proscribe.”<sup>89</sup>

This makes the question of sanctions or punishments for abusive conduct somewhat beside the point, since it is hard to justify penalizing attorney conduct that is not expressly forbidden.<sup>90</sup> Accordingly, Judge Marrero’s systemic approach requires consideration of more systemic reforms, not to deter particularly egregious conduct, but to change the way lawyers approach the decision-making process, to alter the complex calculus of considerations that increase the costs and delays endemic in the current system.<sup>91</sup> As we noted on our brief prior consideration of rocket docket courts, such changes are possible, and can have immediate and profound effects on the way litigation is conducted. The challenge is to make sure that such changes are both effective in accomplishing their goals and do not distort or impair the litigation process in other ways.<sup>92</sup>

Judge Marrero extensively discusses only one serious reform of the current system—a change in the fee shifting rules to encourage greater use of the English rule, allocating all or part of the winning party’s legal fees to the losing party, or perhaps the losing party’s law firm. This proposal is consistent with Judge Marrero’s general approach. It focuses directly on the financial incentives lawyers and clients face in conducting litigation and seeks to alter those incentives to make lawyers think twice about pursuing unnecessary litigation tactics by increasing the probability that the costs of such tactics may be imposed on them or their clients.

Yet Judge Marrero’s proposal for additional fee shifting is offered tentatively and incrementally, not as a wholesale, across-the-board rule change applicable in every case.<sup>93</sup> It would apparently function as a rebuttable presumption even in the limited group of cases to which it

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<sup>89</sup> See Marrero, *supra* note 1, at 1686.

<sup>90</sup> Judge Marrero also thinks the efficacy of the existing sanctions in the Federal Rules is “doubtful at best.” *Id.* at 1683.

<sup>91</sup> Judge Marrero seeks “new remedial responses” that are “more specifically targeted, as well as uniquely designed to address current circumstances for which existing procedures and penalties do not make adequate provision.” *Id.*

<sup>92</sup> It is also worth noting that, from an economic perspective, the social cost of litigation abuse (which also includes waste of public resources like the courts) will always be higher than just the costs it imposes on the parties. See Kaplow & Shavell, *supra* note 42, at 46–48, 52.

<sup>93</sup> Judge Marrero recognizes the legitimacy of the policy underlying the American Rule, that “litigants who have colorable if not sure-bet claims or defenses should not be inhibited from pressing them because of fear of incurring liability to pay their opponents’ legal costs in the event they ultimately do not prevail.” Marrero, *supra* note 1, at 1687. He proposes to limit fee shifting to those particular cases where the costs of litigation change from being “an inconvenient though tolerable and not necessarily wrongful demand” to those cases where it becomes “more and more disproportionate and unjust” and thereby “inflicts extensive injury, in monetary and other values, on a prevailing party.” *Id.* at 1688.



would potentially be applicable.<sup>94</sup> The desire to focus on the financial incentives for excessive litigation tactics is consistent with Judge Marrero's overall analysis, which convincingly shows how an increase in such incentives in recent years has exacerbated litigation problems. It makes sense to try to limit those incentives through fee shifting, but also to recognize that the incentives and constraints under which lawyers operate in different cases require that fee shifting be utilized both judiciously and where it will be most effective.

This is where I wish Judge Marrero's piece had been just a little bit longer, because I fear that the need to apply an expanded fee shifting policy equitably and judiciously may also undercut its effectiveness in big case litigation.<sup>95</sup> Consider first the vexing question of the relationship between winning and litigating excessively. As Judge Marrero notes, there is no guarantee that the party that loses in the litigation will exclusively or even primarily be the one who used costly and unnecessary tactics.<sup>96</sup> If so, why utilize the English Rule, which entitles whichever party ultimately prevails to recover fees, rather than an expanded version of Rule 11 or other existing Federal Rules that shift the costs of responding to unwarranted motions, abusive discovery requests, or other specific pretrial practices? Wouldn't greater deterrent effect be achieved if it is the excessive tactic itself that triggers the fee shifting, irrespective of who prevails? This also has the advantage of allowing the issue to be addressed by the court during pretrial proceedings themselves, rather than wait for an ultimate resolution of the merits. It also permits fee shifting to be utilized in the large number of cases that will terminate in settlement, where there will be no prevailing party with a right to seek legal fees.

Judge Marrero also notes that, in the appropriate case, costs for unnecessary and wasteful litigation expenses should be imposed on the lawyers or law firms rather than on the clients. But how is such a determination to be made, other than in cases of plaintiffs in contingency fee litigation, where it is probably least necessary?<sup>97</sup> With

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<sup>94</sup> Judge Marrero says that, as the injury imposed by litigation costs rises, the "onus" should shift and "should justify compensating the prevailing party as appropriate." Marrero, *supra* note 1, at 1688. Presumably, the "appropriateness" of cost shifting would still be a matter for determination in each individual case.

<sup>95</sup> Judge Marrero presumably likes the somewhat automatic nature of the English Rule, which imposes costs without assigning blame and also therefore functions as a useful *ex ante* deterrent against abusive tactics like spoliation, which may increase a lawyer's chance of losing the case. *See id.* at 1684 n.163. Unfortunately, a selective case-by-case application of the English Rule would undercut those effects. The current structure of Rules 26(c) and 37(a), which expressly provide for a presumption of fee shifting with respect to certain types of discovery motions, would seem to provide a more useful template for the kind of deterrence desired.

<sup>96</sup> *Id.* at 1690.

<sup>97</sup> If such cases do not settle, the inability or unwillingness of plaintiffs' counsel to recover legal fees (or even court costs) from their own clients already represents a considerable disincentive to engage in wasteful pretrial tactics.

respect to wasteful tactics initiated by large law firms supervised by corporate counsel, a major focus of Judge Marrero's attention, it is hard to see how blame for such tactics can be allocated without an extensive inquiry into the law firm decision-making process, which might well intrude on attorney-client communications and would certainly constitute extraneous "discovery about discovery."<sup>98</sup>

Finally, will a greater willingness to impose legal fees on either the losing or the more wastefully litigious party actually deter the kind of conduct that is the subject of Judge Marrero's concern? Here, I'm afraid, Judge Marrero's own analysis can give us little comfort. He has shown how the increasingly expensive and time-consuming strategies of contemporary big case litigation grow out of complex social, economic, and technological changes in law firm structure, corporate governance, information processing, and other systemic developments. It is hard to imagine that greater judicial willingness to shift fees in some portion of such cases will stop big firm litigators from seeking to maximize their revenues, corporations from seeking competitive advantages in the courts, or litigants from conducting exhaustive inquiries into electronically stored information in the hopes of finding "smoking guns."

Judge Marrero's complex analysis suggests that positive change can only come incrementally from many subtle shifts in the incentives and constraints that operate in contemporary litigation practice.<sup>99</sup> Greater judicial willingness to shift costs in the appropriate case might well be one such factor. Equally important, however, is the recognition, central to Judge Marrero's approach, that litigation abuse and excess are not just problems for the parties involved but have deleterious effects on the justice system as a whole. Judges supervising pretrial proceedings, motivated by that fundamental insight, can surely find many techniques for altering the cost-benefit analysis under which lawyers too frequently choose strategies that add cost and delay. They might adopt some of the techniques of the rocket dockets, as well as the expanded approach to fee shifting Judge Marrero advocates. Following on Judge Marrero's analysis, it might also be possible to encourage greater participation by other actors in the system who have incentives to reduce costs. In-house counsel can be asked to participate in pretrial and discovery conferences

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<sup>98</sup> On a related topic, I believe Judge Marrero was too hasty in rejecting all "discovery about discovery" as wasteful. I have argued elsewhere that certain techniques, like sampling of a selected portion of a large amount of requested and discoverable information, may enable the court to achieve a faster and more informed resolution of the matter, often by shifting discovery costs in a manner similar to the one envisioned by Judge Marrero. It allows the court to make a more informed decision about whether to permit or deny the entire request, or to shift, all or some of the costs related to it. Yablon & Landsman-Roos, *supra* note 16.

<sup>99</sup> For a similar approach, see Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery*, 64 S.C. L. REV. 495 (2013).

and technical e-discovery experts can be involved and can be helpful in drafting new protocols to reduce costs with respect to innovations like technology assisted document review. The possibility of litigation funding firms to reduce costs and restrain unnecessary litigation expenses should also be explored.

As Judge Marrero has shown us, the practice of litigation has changed enormously in recent years. It is changing still, in ways that are obvious, and in others that are hard to detect. But as his valuable contribution reminds us, we must try to see the system whole, in all its complexity, if we are to achieve meaningful improvements.