ETHICS: BEYOND THE RULES—
QUESTIONS AND POSSIBLE RESPONSES

Douglas N. Frenkel

As with most academic inquiries, audiences will likely read this collection of essays with an eye toward its possible implications for reform. In light of the consistency with which our lawyer-discussants described the legal profession, it is tempting to react by identifying specific institutional solutions to particular problems. Given the preliminary and limited nature of the inquiry here, however, such a search for solutions seems premature. Rather, the greatest contribution that this study offers is to yield exploratory data for the present debates about reform of the legal profession, a fertile agenda for more rigorous empirical inquiry as a prelude to possible change. Nevertheless, to stimulate such discussion, the following paragraphs will treat our researchers' shared observations as "givens" and then discuss potential responses in four major areas, together with attendant questions they may pose for those who regulate, manage, and educate lawyers. This initial exploration should trigger the reader's own reactions, questions, and criticisms.

I. IMPROVING THE LITIGATION PROCESS

Our observers' reports suggest that, barring a wholesale shift from our basic adversary premise, minor changes in the rules of civil procedure or codes governing the litigation conduct of lawyers are unlikely to have much effect to the extent they attempt to address areas like discovery abuse. The entrenched systemic and increasing environmental pressures are too strong. What constitutes a "minor" shift in the context of the voluminous literature on potential reforms in civil procedure is a subject beyond the scope of this study or this essay. Overall, however, "tinkering" will produce little change except, perhaps, for providing new fodder for litigator gaming.

Moreover, given the cross-fire of attacks as to the identity of the culprit in this sphere—for example, harassing plaintiffs versus file-churning, document-concealing defense counsel—any remedy that aims to ameliorate one problem may aggravate another. For example, well-intended rules or judicial initiatives aimed at reducing the volume of discovery, shortening its duration, or imposing and enforcing strict deadlines on the process may exacerbate the main problem we stud-
ied—non-disclosure of key information. In a similar vein, reforms aimed at systemic efficiency, for example, court-imposed early ADR procedures and other settlement pressures, may create new incentives for defense counsel to maintain a strong, competitive, non-disclosing posture in the early stages of litigation in order to maintain the upper hand in settlement processes.

According to our reports, improvements in judicial control of the discovery process hold the promise of considerable positive progress in curbing discovery abuse. This, too, seems problematic; short of a massive infusion of resources, however, appellate court support for tough sanctions and an overall change in judicial mind-set and backbone in policing discovery may have limited effect. Additionally, as with discovery rules, any initiative aimed at solving one problem may have adverse side effects.¹

Given what was said about the shift in litigation roles, the structure of the lawyer-client relationship, and the demise of the outside lawyer’s counseling function occasioned by the rise of in-house counsel, it may be fruitful to examine the way information, especially that contained in documents, is produced in discovery. If such production is, in reality, controlled within client entities rather than by defense firms, should there be a movement to insuring that there be collaborative inside-outside counsel discussion, if not certification, as to what is produced and what is not? Similarly, if large-firm lawyers, especially unmentored juniors, are increasingly working alone on key early round discovery assignments, might the requirement of certification by at least one senior and one junior firm member provide some impetus for intrafirm scrutiny and justification of non-disclosure decisions or tough “default positions” in discovery?²

The litigation system was described as a prisoner’s dilemma characterized by spiraling mutually destructive aggression in matters perceived as one-shot dealings between counsel. Where trust could be earned by prior dealings or aggression tempered by the likelihood of future interactions, however, the cycle might be moderated. Those looking to reform litigation practice might consider ways of creating a greater and more personal sense of a litigating community. This could take the form of the judiciary’s requiring more frequent face-to-face (“corporeal”) encounters of counsel in the course of ongoing individual matters. In a similar vein, it may be fruitful to consider ways of bringing corporate clients more directly, significantly, and continuously into early stages of important case processing. In a world of

¹. See, e.g., James S. Kakalik et al., Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act (1996) (noting that early case management, which cuts case disposition time, may increase party litigation costs).

². This seems to have been the voluntary practice in some firms. See Lloyd N. Cutler, The Role of the Private Law Firm, 33 Bus. Law. 1549, 1550 (1978).
declining nonlegal advice by outside counsel, this could go part of the way to insuring that the principals and counsel understand the stakes and risks and, through direct participation, the strengths and real agendas of all involved.

This line of thinking raises a myriad of questions. Before tackling new discovery rules, for example, one might want harder data concerning the kinds of cases in which discovery abuse is most likely to occur and the form it might take. It would be useful to learn more about the relationship of discovery deadlines, breadth, and monitoring to other systemic goods like the quantity and quality of settlements. In reforming judicial monitoring of litigation, and especially discovery conduct, it would be important to learn, among other things, those discovery control techniques that work best, whether elected judges have weaker backbones in policing discovery than those selected on the basis of merit, and whether and when the personal presence of lawyers and/or parties makes a positive and cost effective difference in curbing destructive adversariness. In regard to corporate conduct in litigation, one would want to better measure whether the new counseling relationship, with in-house counsel screening outside counsel’s decisions, aggravates or moderates problems of hyperaggressiveness. Are in-house counsel able to remain sufficiently independent of their employers so as to be able to offer objective advice? Is client disinterest in moral advice an empirical reality or does the economic insecurity of law firm litigants lead them to assume a technical, non-counseling role without asking?

II. Regulating/Disciplining Lawyers

Our observers’ papers cast doubt on the effectiveness of regulating the climate we studied through new rules for discipline of individual lawyers. Such discipline tends to be rather private, rare in the segment of the bar we studied, limited by the scarce resources of enforcement offices and confined to after-the-fact policing of conduct that has clearly crossed the line. If it produces punishment of the worst “bad apples” only, the discipline will not affect the symptoms our study identified. Drafting meaningful rules for disciplinary purposes is hard enough; codes that have fewer teeth, such as “civility codes,” may have an even weaker chance to make a difference.

3. It is interesting to contrast our observers’ reports with a well-known 1979 study of Chicago litigation departments, which reported that client pressures to block sensitive discovery were usually resisted by outside counsel. See Wayne D. Brazil, Civil Discovery: Lawyers’ Views of Its Effectiveness, Its Principal Problems and Abuses, 1980 Am. B. Found. Res. J. 787. As to lawyers’ tendency to underestimate clients’ desires for lawyer intervention into (non-legal) business issues and to prefer not to engage in non-legal advising, see Edward A. Daver, Role of the Lawyer: Attorneys Underestimate Client’s Desire for Business Involvement, Survey Shows, Preventive L. Rep., Dec. 1988, at 19, 20.

4. Civility codes may be as or more effective than disciplinary rules.
Codes of professional conduct will, of course, continue to occupy a central focus of the profession’s self-regulation.\(^5\) Our observers’ nearly unanimous reporting of the decline or absence of training or mentoring of junior lawyers, the lack of horizontal monitoring of partners, and the increase in large-firm lawyers working on their own indicates that the disciplining of firms—rather than merely individuals—may be worth a serious look in the current debate over rule reform.\(^6\) Current rules are directed at individual lawyers and focus on vertical, supervisory relationships.\(^7\) The “culture” problems we heard about were as much about the partnership level—especially with the advent of laterals—as that of the inexperienced supervisee.\(^8\) Although such rules directed at firms would not be without their limitations and problems, they could have the effect of providing colleague-monitoring incentives to those who wish to avoid vicarious responsibility for unethical behavior of others in the firm.\(^9\)

Robert Nelson, a member of our research team, proposes relocating a locus of responsibility for ethical standard-writing and monitoring to firm or affinity subgroups in which lawyers work or affiliate.\(^10\) This notion is intriguing and poses questions. Essentially, he suggests a model for peer review of lawyers in which organized groups—plaintiffs’ bar, associations of corporate counsel—or employers would create formal standards of practice and evaluate their members for competence and compliance.\(^11\) This method raises a host of questions

---

5. The ABA is currently engaged in a reexamination of the Model Rules of Professional Conduct through its “Ethics 2000” project.


8. Indeed, our reports suggest that it is the junior lawyers who were the more sensitive, if not astute, among our informants, concerning professional responsibility dilemmas. To the extent that this replicates the world of larger firms, it raises questions about whether the current rules serve the ends of encouraging fuller associate communication about—if not responsibility for—decisions in this arena. See Carrie Menkel-Meadow, Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor, 138 U. Pa. L. Rev. 761, 762 n.9 (1990). See generally Carol M. Rice, The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers, 32 Wake Forest L. Rev. 887 (1997) (arguing that “every lawyer should consider and account for his professional conduct”).

9. It is noteworthy that current trends, including the “LLP movement,” seem to be moving in the direction of limiting collective responsibility—at least for civil liability—and, in the process, providing disincentives to police one’s colleagues. See Susan S. Fortney, Seeking Shelter in the Minefield of Unintended Consequences—The Traps of Limited Liability Law Firms, 54 Wash. & Lee L. Rev. 717, 733 (1997).


11. See id. If such groups were composed of large numbers of lawyers who regularly opposed one another in specific substantive areas, such a proposal might have
concerning remedies or sanctions for noncompliance, especially vis-à-vis practice licensure. It also raises the prospect of the escalation of ideological warfare through the exercise of this new function by gatekeeper groups.

Finally, if it is true that financial insecurity leads lawyers to ethical temptation and that "firms that can afford it are ethical," questions are raised about current rules that may impede firms' ability to maximize their financial, managerial, or supervisory strengths. Controversial as they are on other grounds, rules concerning the provision of "law-related" or "ancillary" services, and non-lawyer ownership or control of a law practice may look different when viewed in this light.

The wisdom of using the system of rule-based regulation to impact lawyer conduct turns in part on comparing traditional lawyer discipline, which triggers after-the-fact scrutiny or punishment, to other modes of lawyer regulation. Before considering action in this realm one might want to learn more about how financial insecurity actually impacts individual lawyers' decision-making, how conduct in lower-financial stakes matters compares with the cases we studied, and the possible effectiveness of fines as sanctions.

III. IMPROVING THE MANAGEMENT OF LAW FIRMS AND CLIENT ENTITIES

The most significant theme that runs throughout these papers is the declining impact of the law firm entity as a determinant of its members' conduct. Contrary to assertions concerning the power of firm culture and bureaucracy in recent literature, our observers' papers describe large law firms as loose, shifting, geographically dispersing collections of autonomous individuals and specialized practice groups with little overall firm control of individuals' conduct. While certain functions such as hiring and financial management may be handled

the added beneficial effect of strengthening or reconstituting communities of lawyers through continuous and future interactions. The creation of such ties could counteract tendencies to "defect" in future litigation gaming between fellow subgroup opponents.

13. See id. Rule 5.4(d); see also Michael J. Kelly, Lives of Lawyers: Journeys in the Organizations of Practice (1994) (discussing the changes in professionalism and legal ethics through a compilation of stories). Of course, another option, unlikely though it may be, is for lawyers to lower their sights on profitability in service of other goals, including the satisfaction of being in greater control of one's choices. See Anthony T. Kronman, The Lost Lawyer Failing Ideals of the Legal Profession 294-300 (1993).
14. See David B. Wilkins, Who Should Regulate Lawyers?, 105 Harv. L. Rev. 799, 802-03 (1992) (discussing, in addition to traditional discipline, regulation via liability in litigation, sanctions by courts or regulatory agencies, and legislative controls).
centrally, there is little intra-firm interaction. The firm’s ethos is both difficult to find and expressed in contradictory messages. In the absence of mentoring, the individual is often left to her own perceived self-interest and moral code and, faced with this climate, looks to rules—including those sanctioning the default norms of “tough” adversariness—or outside reference groups for guidance in making decisions.\footnote{16. See Bart Victor & John B. Cullen, The Organizational Bases of Ethical Work Climates, 33 Admin. Sci. Q. 101, 105-08 (1988) (discussing these as, respectively, the individual and cosmopolitan locus of ethical analysis).}

This declining internal cohesion is accompanied by heightened external pressures exerted by clients and changes within the structures of client entities. These pressures on law firms and their corporate clients create new and growing challenges for those responsible for managing such organizations. The questions raised would seem to include:

1. How can large law firms create meaningful supervision systems in the face of firm disaggregation, partner disinclination to supervise or be supervised, and the overall pressure to “bill” rather than manage?

2. Traditional time-based billing arguably creates a fertile environment for over-lawyering and hyper-competition in areas such as resisting discovery.\footnote{17. See, e.g., William G. Ross, The Ethics of Hourly Billing by Attorneys, 44 Rutgers L. Rev. 1, 2-3 (1991) (analyzing the ethical issue posed by time-based billing). It must be noted that our law firm informants, as opposed to judges and plaintiffs’ counsel, minimized the significance of this factor in discussing discovery abuse by defense counsel.} Will client pressures for alternative non-hourly billing and fixed litigation budgets have the opposite effect? Will the resulting efficiency concerns enhance cooperation and reduce incentives for “gaming”? Or will they lead to new, more efficient forms of adversariness like nondisclosure of discoverable material without filing motions or objections, and further reduce the amount of internal law firm discussion of tough calls?

3. How can firms create the reality—as opposed to the mere appearance or reputation—of having safe, hospitable climates for discussion of ethical and moral quandaries? In the discussion and resolution of such dilemmas, how can the firm promote consideration of its organizational interests when such interests are so difficult to discern?\footnote{18. In an early stage of this project, the idea was floated of “rating” law firms annually for their integrity, ethical reputation, etc. In this era of rankings-mania this might be promotive of greater sensitivity to the perception of being an ethical lawyer or firm. On the other hand, given the assertion that clients seek “attack dogs” in litigation as often as they seek to borrow a law firm’s reputation for ethical conduct, the effect of such a system is unclear.}

4. Are corporate business managers—increasingly dealing through in-house counsel—adequately trained to manage the process of litigation, the best use of outside counsel, the assessment of risk, and the
structure and process of decision making during all stages of high stakes matters?

IV. IMPLICATIONS FOR EDUCATING LAWYERS

Given the observers' reports concerning eroding conditions under which practitioners must make difficult ethical judgments, the role of legal education takes on new significance. For example, the notion of a continuum of training of lawyers which starts before law school and continues throughout one's career may be more myth than reality. Our observers note that: post-law school formal training is on the wane, a victim of the economic squeeze on firm budgets and of client unwillingness to invest in the training of lawyers; prolonged mentoring at the inception of a career is largely a relic of the past, if it ever existed; and the conditions for exercising reflective judgment in firms are deteriorating. If these observations are valid, they suggest that the opportunity to develop the ability to make sound ethical judgments may end at the law school level.

The landscape of changing externalities, heightened business pressure, mobile participants, and declining professional autonomy is not limited to the legal profession. Rather, it may be symptomatic of a larger societal phenomenon, the "big picture" which, as Carla Messikomer stresses in her essay, our lawyer-informants failed to see. Given the narrow, lawyer-centric focus of education in most law schools, one wonders whether, regardless of the level of the current problem, future bar leaders will have a sufficiently broad perspective to protect the law firm ethics equilibrium from the further onslaught of societal change or make the changes necessary to protect the legal profession from, much less lead it ahead of, the impact of these larger trends.

19. The "MacCrate Report" urges greater law school teaching of skills and values as part of a continuum of lawyer education in which law firms play a key role. See Taskforce on Law Schools and the Profession: Narrowing the Gap, American Bar Ass'n, Legal Education and Professional Development—An Educational Continuum (1992).

20. Moreover, as several lawyer-discussants noted, the nature of formal training programs offered by law firms and CLE organizations is performance-oriented (how-to-do-it; how to win), and focuses on public settings (e.g., trial, deposition, negotiation). It is thus not aimed at developing the kind of reflective judgment central to steering an ethical course in the gray areas of choice.


22. Law schools generally begin with intensive courses designed to train students to "think like a lawyer," followed by upper-level courses taught in similar fashion. Attempts to focus on other disciplines are usually limited to examinations of how other fields impact the way law is made or administered. Few law schools focus on the role of lawyers in relation to other professions or on the notions of professions in society generally.
The themes in our observers' papers suggest questions about the state of the current operations of most law schools, including:

1. The Socratic mode of teaching and socialization, still prevalent in the formative first year, which involves a process of rewarding the most clever argument made in a competitive setting, with little revealed of the teacher's own values or answers; 23

2. The predominant mode of teaching legal ethics as another law subject in which, like the first-year Socratic socialization, most things are arguable and the teacher does not practice law;

3. Offering its most contextualized method of teaching legal ethics—real or simulated clinical experience under close supervision 24—to only a minority of students and then only rarely, if ever, in ways that replicate the stakes of large firm, private practice, with strong clients, firm economics and competition, and promotion/partnership incentives and pressures;

4. Its almost exclusive focus on training students to learn the law or develop law practice skills, without any serious effort to inculcate broader notions of professions generally or the perspectives of other disciplines on such cross-cutting themes as confidentiality, loyalty, governance/regulation, and the economics of the profession;

5. The practice, especially by elite institutions which feed large firms, of admitting the great majority of its students on the basis of academic achievement alone, without regard for life experience or other personal criteria.

Potential solutions, too complex to explore here, include more collaborative learning, more clinical experience with inspirational mentors 25 on behalf of clients who are neither poor nor sympathetic, more interdisciplinary and interprofessional approaches to law, and a reexamination of the kinds of individuals who gain admission to become future lawyers. 26

This may represent the ultimate addressing of the situation "beyond the rules." Here, too, interesting questions are posed. Can law school


26. On a related note, to the extent that our study raised the problem of substandard lawyering competency, it brings in to question the number of lawyers in practice, the absence of meaningful controls to insure their ability to perform after the bar examination, and the access to services issues that could emanate from elevating competence standards or limiting the number of law graduates.
teaching, no matter how intensive, affect students’ moral development? How lasting are classroom lessons in students’ minds? What standard of post-graduation competency is sufficient to maintain? Would a significant conversion of the law school curriculum produce significant differences in graduates’ reflective qualities? Could such a shift in pedagogy be justified on a cost-benefit basis?

V. DOING NOTHING

Finally, having speculated about a few possible responses to conditions identified in this study, one must acknowledge the option of doing nothing. Inaction could, of course, be justified on several grounds. These grounds include: the notion that the complaints identified in this study are little more than sentimentality over the bygone “Golden Age” of the past when all was good;27 our observers’ sense that the system works pretty well and that most of our informants did not seem overly unhappy with the status quo; or, as Carla Messikomer notes, the notion that these problems are no different from, and actually may reflect, problems confronting the larger society.28 More positively, they would include the sense that the market-driven changes that are threatening professionalism are long-overdue reforms that are in the consumer’s, and thus the public’s interest.29

On the other hand, to the extent that the public’s perception of lawyers in large firms, either directly or by association with their corporate clients, continues to diverge from the view from inside the profession, the call for external regulation of lawyers through legislation, litigation, and even discipline may well increase.30 At a minimum, this may pose an education or public relations challenge of considerable proportions. More importantly, if, as reported here, lawyers are experiencing a loss of autonomy and increased ambivalence and moral dissonance via the reduction of their services to a commodity for sale, this may, over time, begin to diminish the quality of applicants to law school and to this segment of legal practice. That could be the start of a greater long-term problem for the profession than any arguable current “crisis.”

29. See Galanter, supra note 26, at 561-62.
APPENDIX

PROBLEMS PRESENTED TO STUDY PARTICIPANTS*

MEMORANDUM

TO: Participants in “Ethics: Beyond the Rules”

The first of the following hypothetical problems is based on reports about Bogle & Gates’ representation of Fisons Corporation, a drug company, in a recent lawsuit. The second problem is a highly fictionalized account of events in the working lives of large firm lawyers. The third problem reflects excerpts from journalistic accounts of the conduct of various lawyers in the Donovan, Leisure firm in the famed Berkey Photo matter in the late 1970s. Our focus will be on the conduct of the associate, Fortenberry.

As you read these accounts, ask yourselves the following questions:

1. Are there problems and, if so, what are they?
2. How would the issues be resolved in your firm?
3. What are the pressures, incentives, and disincentives in large law firms (and in the external environments in which large law firms practice) that tend to produce behavior exhibited by the lawyers in the Fisons cases in the first problem; by the hypothetical Ms. Chen and Mr. Watson in the second problem; and by Fortenberry in the third problem?

HYPOTHETICAL PROBLEM I**

Fisons Case Synopsis

On January 18, 1986, two-year-old Jennifer Pollack suffered seizures caused by an extensive amount of theophylline in her system. The seizures led to severe and permanent brain damage. Jennifer’s parents sued Dr. Kilcpera, the prescribing pediatrician, and Fisons Corporation, the manufacturer of Somophyllin Oral Liquid, the theophylline-based drug prescribed by Dr. Kilcpera for Jennifer. Dr. Kilcpera cross-claimed against Fisons for damages and attorneys’ fees, pointing to Fisons’ failure to warn that its theophylline-based medications were potentially dangerous when given to children with viral infections. Fisons defended on the ground that it had disclosed all known risks.

* Editor’s note: This material is printed in its original form with minor typographical edits. Reprinted by permission. © 1998 American Bar Association. All rights reserved.

** This problem is based on the case of Washington State Physicians Insurance Exchange & Ass’n v. Fisons Corp., 858 P.2d 1054 (Wash. 1993).
In October 1986, Dr. Kilcpera’s attorneys requested from Fisons “copies of any letters sent by your company to physicians concerning theophylline toxicity in children.” Fisons responded: “Such letters, if any, regarding Somophyllin Oral liquid will be produced at a reasonable time and place convenient to Fisons and its counsel of record.”

In November 1986, attorneys for the Pollacks sent an interrogatory seeking the names of “all persons known to Fisons who have expressed their opinions or beliefs that the risks of harmful or serious side effects outweigh the potential benefits of Somophyllin Oral Liquid.” Fisons responded: “Assuming proper medical supervision and proper use of the product, none known.”

In March 1987, Fisons’ attorneys, Bogle & Gates, acquired actual knowledge that documents responsive to the October 1986 request from Dr. Kilcpera existed in Fisons’ files for the drug Intal and that such documents raised questions about the proper use of theophylline with respect to pediatric asthmatics who contract viral infections.

In June 1987, lawyers for the Pollacks requested “all documents pertaining to any warning letters including ‘Dear Doctor Letters’ or warning correspondence to the medical professions regarding the use of the drug Somophyllin Oral Liquid.” Fisons responded: “Fisons objects to this request as overbroad in time and scope . . . without waiver of these objections and subject to these limitations, Fisons will produce documents responsive to this request at plaintiff’s expense at a mutually agreeable time at Fisons’ headquarters.”

Also in June 1987, Pollack’s attorneys requested: “all documents of any clinical investigators who at any time stated or recommended to Fisons that the use of the drug Somophyllin Oral Liquid might prove dangerous.” Fisons responded: “Without waiver of these objections and subject to these limitations, Fisons will produce documents responsive to this interrogatory.”

Fisons also had made general objections at various points to “all discovery requests regarding products other than Somophyllin Oral Liquid, as overly broad, unduly burdensome, harassing, and not reasonably calculated to lead to the discovery of admissible evidence.”

In an August 10, 1988, affidavit, filed in opposition to a motion to compel, a Bogle & Gates attorney asserted that Fisons had agreed to make available documents “reasonably related to the claims asserted by plaintiffs.” At this time, Fisons’ attorneys were aware that documents raising questions about the “proper use” of theophylline-based drugs were contained in Fisons’ files related to Intal and would not be produced.

Finally, in January 1989, after nearly three years of discovery, Dr. Kilcpera settled with the Pollacks. More than a year later, in March 1990, the Pollacks’ attorney received from an anonymous source a copy of a letter dated June 30, 1981. The letter was from Fisons’ manager of marketing to 2000 selected physicians. Addressed “Dear Doc-
tor” and entitled “Re: Theophylline and Viral Infections,” the letter warned that theophylline “can be a capricious drug” and stressed a study showing “life-threatening theophylline toxicity when pediatric asthmatics on previously well-tolerated doses of theophylline contract viral infections.”

The Pollacks’ attorney forwarded this document to Dr. Kilcpera’s attorney, who then alerted the Court. The Pollacks and Dr. Kilcpera argued that their discovery requests should have produced the letter and moved for sanctions against Fisons and its counsel. A special master was appointed, who denied the motion, but *sua sponte* expanded the scope of discovery, thus requiring Fisons to deliver all requested documents which related to theophylline, whether or not contained in files related to Somophyllin Oral Liquid.

Among the 10,000 documents produced pursuant to the special master’s order was a July 1985 internal Fisons memo that began: “an alarming trend seems to be surfacing in the medical literature, and as a manufacturer of theophylline products, we need to be aware of it . . . there has been a dramatic increase in reports of serious toxicity to theophylline in 1985 medical journals.” The memo warned that doctors “may not be aware of this alarming increase in adverse reactions such as seizures, permanent brain damage, and deaths,” and called the standard dosage “a significant mistake.” The memo concluded that the “epidemic of theophylline toxicity provides strong justification for our corporate decision to cease promotional activities with regard to the line of theophylline products.”

Shortly after the documents were produced, Fisons settled with the Pollacks for $6.9 million. Litigation then ensued about whether Bogle & Gates should be sanctioned for its original discovery responses.

**Hypothetical Problem II**

Hi-Tech Manufacturing Co. of Palo Alto, California, produces sophisticated lenses and optical equipment for a variety of scientific, medical, industrial, and military applications. Hi-Tech has a small sales force of its own. In addition, Hi-Tech has a “Re-Sale Agreement” with Supplies Unlimited, Inc., a Maryland corporation with its principal offices in Bethesda, Maryland.

The Re-Sale Agreement, signed October 1, 1990, provides that Supplies Unlimited will act as distributor for Hi-Tech Manufacturing with respect to sales of Hi-Tech’s products to governments. Under the Agreement, Supplies Unlimited purchases goods from Hi-Tech and resells them at a mark-up to Government purchasers.

In February, 1992, the French Defense Ministry issued a Request for Quotation for two million lenses of various types of military applications.
Mr. John Jones, President and CEO of Supplies Unlimited, discussed this 1992 French opportunity with Ms. Sally Sharp, Hi-Tech’s Vice-President of Sales. According to Ms. Sharp, Mr. Jones said that Supplies Unlimited would not be able to handle financing for the potential French business and therefore was not likely to submit a proposal to the French Defense Ministry.

In June 1992, Ms. Sharp traveled to Paris and presented a written quotation for direct sale by Hi-Tech of one million of the lenses covered by the French invitation to bid. In November 1992, Hi-Tech’s bid was accepted; the resultant sales contract produced $40,000,000 in gross income to Hi-Tech.

In early 1993, Supplies Unlimited learned about Hi-Tech’s direct sale of one million lenses to the French Ministry of Defense. John Jones, Supplies Unlimited’s President, was angry. His demands to Hi-Tech for a “commission” on that sale were rejected. His grievance and several others boiled up into a lawsuit filed by Supplies Unlimited against Hi-Tech in the United States District Court for the Northern District of California. One of the several claims in the lawsuit was that: (i) Supplies Unlimited was Hi-Tech’s “exclusive” distributor with respect to sales to governments; (ii) Supplies Unlimited was ready, willing, and able to bid on the 1992 French Ministry of Defense business and had in fact delivered a series of bids to the French purchasing authorities; and (iii) Hi-Tech had violated the Distributor Agreement by mailing the direct sale to France.

Hi-Tech’s lawyers submitted interrogatories and a request for the production of documents. One of the interrogatories asked for the identification of “all documents related to the averments in paragraphs 24 and 25 of the Complaint that Plaintiff was ready, willing and able to respond to the 1992 French request for quotations and that Plaintiff submitted quotations to the French purchasing authorities.”

Supplies Unlimited was represented by the San Francisco firm of Leland & Stanford. Partner Douglas Watson, assisted by associate Paula Chen, did most of the work on the case for Supplies Unlimited.

Supplies Unlimited responded to Hi-Tech’s interrogatories. The interrogatory concerning the identification of documents related to the averments of Complaint paragraphs 24 and 25 (related to the 1992 French business) was answered as follows:

The Following documents, inter alia, relate to the averments of paragraphs 24 and 25 of the Complaint:


Supplies Unlimited's responses to Interrogatories were signed by John Jones, President of Supplies Unlimited and by Ms. Chen, as counsel for the company.

Documents produced by Supplies Unlimited included documents numbered SU1022, SU1023 and SU1024, all appearing to be letters on the letterhead of California Supplies, Inc., a wholly-owned, San Francisco-based subsidiary of Supplies Unlimited, signed by Paul Jones and addressed to M. Max Richard at the French Ministry of Defense. Each of these documents contained quotations for the sale of Hi-Tech's lenses to the French Ministry of Defense.

Several months of pre-trial activity ensued. Counsel for Supplies Unlimited took depositions of a few Hi-Tech personnel. Hi-Tech's counsel noticed depositions of Mr. John Jones, Mr. Paul Jones, and Mr. David Moore, the 27-year-old office manager of Supplies Unlimited. Mr. Moore was thought by Hi-Tech to be the person with primary responsibility for maintaining Supplies Unlimited's files and for transmitting communications to prospective ultimate purchasers.

Depositions were scheduled and rescheduled. Hi-Tech's lawyers indicated that they wanted to take Mr. Moore's first. His deposition was scheduled and then postponed (by Supplies Unlimited) three times. By agreement, the deposition was to be held in Bethesda, Maryland. Finally, the deposition day, a Friday, arrived.

On the evening before Mr. Moore's deposition, Ms. Chen met with Mr. Moore in Bethesda to prepare him for the deposition. Late that evening Mr. Moore told Ms. Chen that he was bothered by the fact that some of the documents "are phony." Mr. Moore explained that documents SU1022, SU1023, and SU1024 had been fabricated by Messrs. John and Paul Jones of Supplies Unlimited after Hi-Tech had served its document production request in 1994. Mr. Moore told Ms. Chen that he later had been told about the alleged forgery operation. Upon closer examination of the documents, Ms. Chen realized that California Supplies, Inc., the California subsidiary on whose letterhead the documents had been written, had not been incorporated until July 1993, months after the purported dates of the letters; she was unsure, however, whether Hi-Tech was, or even could have been, aware of this discrepancy.

Ms. Chen immediately telephoned Mr. Watson but failed to reach him because he was on the "red-eye" on his way to Maryland for the next day's deposition. The next morning Ms. Chen met with Mr. Watson and brought him up to date. Watson and Chen realized that both John and Paul Jones were travelling in Asia and probably could not be reached before the 10:00 a.m. deposition of Mr. Moore. Ms. Chen suggested that they unilaterally postpone the Moore deposition, without explanation, and that they then try to persuade their client to ac-
cept an outstanding Hi-Tech settlement offer of $1,000,000, thus ending the matter without any further discovery or exchanges of information. Mr. Watson disagreed and said that the Moore deposition should go forward, as scheduled.

Immediately before the deposition, Mr. Watson spoke with Mr. Moore. Moore repeated the story he had told Ms. Chen. Mr. Watson said, “Well, you will be under oath. We expect you will give truthful responses.” At 10:00 a.m., the deposition began. The “right” questions were asked. By noon, Mr. Moore had testified to his version of the forged documents story, consistent with what he had told Ms. Chen the night before and Mr. Watson that morning.

At 2:00 p.m., Hi-Tech’s lawyer suspended the deposition and asked for a stay of all other discovery for two weeks, in order to “absorb and respond to the significance of Mr. Moore’s testimony.” Mr. Watson agreed to the requested stay.

**Hypothetical Problem III**

Berkey Photo, Inc. began in the 1930s as a small photo-finishing concern. It is still small, with 1977 sales of $203 million, compared to Kodak’s $6 billion. In the early Seventies, while the little Manhattan-based company sought to develop products competitive with Kodak’s, the Rochester behemoth introduced a flurry of new cameras, films, and photo finishing systems. According to Berkey and other Kodak competitors, these new products were designed to be incompatible with the products of Kodak’s competitors.

Berkey came to view the situation as a case of monopoly power in violation of sections 1 and 2 of the Sherman Act. In January 1973, Berkey sued. The small company retained the Manhattan law firm of Parker, Chapin, Flattau & Klimpi to represent it, with the firm’s seasoned litigator, Alvin M. Stein, as its chief trial counsel.

**Old Ties with General Donovan**

Kodak took a very different view of both the facts and the law. The company’s undisputed market success sprang not from predatory acts designed to undercut competitors, but rather from an impressive history of technological innovation. Its new products had “brought quality, reliability, simplicity, and cost benefits to countless customers.” In Kodak’s opinion, Berkey would have to go beyond market dominance

---

*** This problem was excerpted in the original study materials from Walter Kiechel III, The Strange Case of Kodak’s Lawyers, Fortune, May 8, 1978, at 188. It is reprinted here by permission. © 1978 Time Inc. All rights reserved. The text in italics is quoted from James B. Stewart, The Partners: Inside America’s Most Powerful Law Firms (1983). Editor’s notes in the text are from the material given to study participants.
to show that the Rochester company had engaged in anti-competitive behavior.

To counsel the company in this and other private antitrust actions then pending against it, Kodak turned to Donovan Leisure. Their association went back a long way, to the Forties when Kodak sought out the help of General William Donovan and his partners in defending an antitrust suit brought by the government. (Donovan, of OSS fame, had founded the firm in 1929). Now in the early Seventies, the effort required to prepare for the various suits promised to be Herculean.

* * *

[The case was assigned to John Doar who had] developed a reputation as one of the most upright public men of our time. In February 1975, he became a senior partner in the Donovan Leisure firm. He was put in charge of Kodak's defense against Berkey and given responsibility for supervising twenty or so Donovan Leisure lawyers.

Berkey waived a jury from the outset, but Kodak insisted upon one. Some observers of the litigation speculate that Kodak decided upon the jury route after the case was assigned to Judge Marvin E. Frankel, a renowned federal jurist thought by some to be a “liberal.” Might not this “liberal” judge incline to the side of Berkey in the little company's struggle with a corporate giant? What lawyers call “the better view” is that Kodak simply thought that it had the kind of case that would appeal to a jury's sympathies. As borne out in the opening and closing statements, emphasis was to be placed on the notion that “you can trust Kodak.”

Enter Exhibit 666

* * *

Early in the Kodak case, 59-year-old senior partner Mahlon Perkins, Jr. had been given the assignment of selecting and preparing Kodak’s expert witnesses. It was an assignment that appealed to the scholarly side of Perkins' nature, and to assist him, he asked that associate Joseph Fortenberry be assigned to work with him.¹

Some of Kodak's evidence came from the hand of Yale Professor Merton J. Peck. Kodak commissioned Peck, a former chairman of the Yale economics department and former member of the President's Council of Economic Advisors, to serve as the company's principal expert witness on economies. For a fee totaling $60,000 to $70,000, he was to study the history of the photography industry and, it was hoped, develop an expert opinion as to why Kodak's innovation had been the cause of the company's market dominance. Berkey was going to argue that Kodak's acquisition of early competitors had also been a factor in achieving its present market position. Such acquisi-

tions, a form of anti-competitive conduct, were the subject of a 1915 court decision against Kodak. A copy of this decision was furnished to Peck.

On November 25, 1974, Professor Peck wrote the six-page, single spaced letter that was ultimately to become Exhibit 666, the first of two “smoking guns” at the trial. The letter responded to two questions posed to Peck by a Donovan Leisure partner, both questions in effect asking how acquisition as covered in the 1915 decision could be rejected as irrelevant to Kodak’s present dominant position. At the beginning of the letter, Peck confessed, “I am unconvinced I have as yet a persuasive answer, to either question . . . .” Later, he apparently to find such answers, for at the trial he championed Kodak’s “innovation rather than acquisition” theory.

Peck’s letter represents precisely the sort of document opposing counsel hope to find in the course of discovery; an early wavering that casts some doubt on the unassailability of what a witness subsequently says upon the stand. In this instance, however, the letter was not produced in discovery, despite the formal request by Berkey’s lawyers for all of Peck’s documents. At an April 1977 hearing on what evidence should be discoverable, a magistrate ruled that Berkey should be furnished all “interim reports” prepared by Peck and the commented upon by Kodak counsel. As Judge Frankel stated when he finally saw the document, “I will tell you, if I ever saw anything that looked like an interim report, that’s it . . . .”

But Mahlon Perkins, the Donovan Leisure partner responsible for delivering the evidence, did not produce the letter. Apparently he judged it to be part of Peck’s correspondence that, as he told Berkey counsel, would not be furnished because it did not constitute a report. All of Peck’s reports that were turned over dated from after March 1975. When Berkey’s lawyers renewed the request for papers prepared by Peck before them, whatever their status under the magistrate’s ruling, Perkins told them that he would “take the matter under advisement.” He never got back to them, or they to him—the latter is a point that Donovan Leisure now underlines. Yet Peck may have lulled Berkey’s counsel into making the mistake: before trial, he testified that he did not recall preparing any memoranda prior to April 1975.

The Suitcase Shuttle

The origins of the second “smoking gun” go back to July 1976, almost a year before the trial began. Someone had become apprehensive about Peck’s holding the materials he had reviewed in preparing to testify. Peck claims it was the lawyers at Donovan Leisure who were worried; Perkins maintains it was Peck himself. Whoever originated the idea, Peck started shipping documents from New Ha-
ven to the law firm. One shipment, packed in a suitcase that arrived early in 1977, was to become the ruin of Mahlon Perkins.

The other shipments seem to have found their way into the discovery process. The contents of that suitcase did not. On April 20, 1977, Berkey's lawyer conducted a deposition of Professor Peck. Doar assigned Perkins and Fortenberry to the task of defending his deposition. While it was a logical extension of his work in developing Peck's testimony, Perkins was not looking forward to the deposition. As hard as he had tried, Perkins had never delighted in this kind of tough litigating tactics . . . that might be called for in the deposition by the opponents' lead counsel of Kodak's single most important witness. But the need to prove himself was weighing heavily on Perkins since Doar's arrival and he went into the deposition determined to take a hard line.²

Upon finding that Peck had shipped documents to Donovan Leisure, Stein asked Perkins what happened to the material. Perkins lied. He told Stein that he had discarded the documents, thinking them to be duplicates of material still available.

* * *

In fact, the suitcase and the materials it contained were travelling back and forth between Perkins' Rockefeller Center office and his office downtown in the spaces Donovan Leisure had leased near the courthouse for purposes of trial. Perkins knew of their existence, as did at least two others in the law firm. At some point early on, Fortenberry, acting on his own volition, brought the suitcase from downtown to Perkins' uptown office. Later, a Donovan Leisure paralegal inventoried the contents.

Fortenberry was seated next to the senior partner at the deposition where Perkins first lied. When Perkins announced that he had discarded the shipped materials, the associate whispered in Perkins' ear that he had forgotten the suitcase. Perkins ignored him.

The contents of the suitcase remained hidden in a cupboard in Perkins' uptown office until the final days of the trial. He now maintains that, during the entire period, he never examined the documents. The bitter irony is that, as it later came out, the material contained nothing particularly damaging to Kodak. The contents of the suitcase became "smoking gun No. 2," not because of anything revealed in the documents, but rather because their mere existence indicated that Perkins had lied under oath.

[Ed. Note: Fortenberry did nothing further concerning the suitcase or Perkins' lie. Two weeks after the deposition, Perkins prepared an affidavit repeating the substance of his deposition statement concerning what had happened to the suitcase.]

² Stewart, supra note 1, at 340.
Where Was Doar?

What was Doar doing while his partner was handling the evidence? * * * He was troubled by Perkins’ statement that the material returned by Peck had been destroyed. When Perkins submitted to Doar a preliminary draft of the affidavit attesting to the destruction, Doar told his partner that its language was not strong enough, that it would not satisfy the judge. Perkins beefed up the affidavit, Doar conducted no further investigation, and there the matter rested for the remainder of 1977, a time bomb waiting to explode. One of the maxims of leadership in complex, drawn-out litigation is “you have to delegate.” The conventional wisdom in the Wall Street legal community also holds that “you’ve got to trust your partner.”

* * *

[Ed. Note: The trial proceeded through both sides’ case to the testimony of Professor Peck. In his cross examination, Peck revealed that he had written a report in letter form (Exhibit 666) that pre-dated April 1975. It was a document that Perkins had not produced in discovery and which Doar had continued to conceal during trial. When now produced at trial it became “smoking gun No. 1,” hurting Kodak’s case in the jury’s eyes.]

Doar worked through the weekend in formal sessions with the judge and with Berkey counsel to prepare the case to be sent to the jury the following week. Sunday evening Doar returned from the courthouse to his office. Mahlon Perkins came in and closed the door behind him. Visibly upset, Perkins proceeded to tell Doar that he hadn’t destroyed any documents after all. Perkins couldn’t give a very good account of his conduct, other than to say that once he had lied, he couldn’t undo it. . . . [Doar] advised Perkins that he should retain a lawyer, and called . . . the firm’s executive committee to report what Perkins had confessed. Led to the suitcase documents by Perkins, Doar confiscated them and established a security system to be sure none would be mislaid. Doar then spent most of the night indexing and inventorying the material in preparation for turning it over to Berkey in the morning. He advised Kodak’s general counsel, Kendall Cole, who couldn’t believe what had happened. At 6:45 the next morning, Doar telephoned Stein with the news. By 8:30 the documents, in two boxes, were in the courtroom ready for Stein’s inspection.

Summing up their cases on Wednesday and Thursday, both sides alluded to the dramatic events of the preceding days. Doar spoke only of the uncovering of the suitcase documents—“an unfortunate circumstance, an uncontradicted circumstance, a simply incredible circumstance.”
[Ed. Note: Berkey was awarded $113 million by the jury. Kodak had apparently been harmed by appearing to have tried to conceal documents. Donovan Leisure was fired by Kodak. After the verdict was overturned on appeal, Kodak settled the matter for $6.75 million.]
Notes & Observations