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Discrete Forces Get in Line for Civil Reform

Judicial Conference, Quayle Committee, Biden Bill Converge

Pilot Programs to Start

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After years of fits and false starts at reforming discovery and other pretrial procedures, suddenly there is an alignment of disparate forces seeking radical changes in the universe of federal civil litigation.

The phenomenon is sort of like what happened in the solar system a few years ago when all the planets lined up and gravity's gravamen was expected to dispatch California to the Pacific depths.

Except this alignment is more likely to have real and lasting effect, and the litigation universe already is changing shape under its sway. Whether it dispatches the elaborate and lengthy ritual that has become big-firm litigation is another matter. The answer is not in our stars, borrowing from the bard, but in our committees.

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The lineup:

- A Judicial Conference of the United States committee recently completed a five-year study of civil justice and is proposing what its reporter describes as "some fairly radical reforms."
- The so-called Biden Bill this year started advisory groups of lawyers percolating ideas from the bottom in each of the 93 federal districts — by order of Congress — to come up with local plans for significant reductions in costs and delays.
- The much-maligned vice president a couple of months ago won his biggest official victory when he dropped a lawyer-bashing bomb in the American Bar Association annual meeting while calling for major, sweeping changes in how and why we sue, complete with blueprints.

At the very least, this convergence of forces is a three-branches-of-government quickening of the issue and has done for litigation reform what the bruising Clarence Thomas/Anita Hill spectacle did for sexual harassment: Everybody's now hyper-aware, looking through a sharply focused lens. And things will never be the same.

With that said, what will become of civil justice?

ABA Litigation Section Meeting

And what will appear in the crystal ball in Chicago this week at the American Bar Association Litigation Section's meeting on "The Adversary System in the 21st Century"?

The four-day gathering amounts to the first plenary session since the Biden Bill — formally, the Civil Justice Reform Act of 1991 — took effect and will include major players riding the three-branch bandwagon.

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Groups to Converge On Reform

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Among them are Vice President Dan Quayle as well as his "smart bomb" on the issue, Solicitor General Kenneth W. Starr, who took the lead in the reform agenda proposed by the President's Council on Competitiveness overseen by Quayle; and the more-radical-than-thou mover and shaker William W. Schwarzer, formerly of the federal bench in the Northern District of California and now director of the Federal Judicial Center.

In the eyes of some, there's a freight train of reform high-balling toward what, since the 1970s, has become a monolith blocking the tracks — the peculiar culture of big-firm litigation, a moneymaking pyramid churning away somewhat in self-defense because of the rules of the game and somewhat in self-enrichment because of the financial rewards.

For others, it's an exciting time for an idea that has come back for the umpteenth time, still seemingly worth little more than a cynical shrug, but this time with just enough taste of inevitability to renew wishes and hopes.

A Train 'Hurtling Along'

"In my wishful point of view, that's right, it may be a freight train now hurtling along," says Walter K. Olson, author of the much-talked-about new book, "The Litigation Explosion: What Happened When America Unleashed the Lawsuit."

"But we may not yet be looking at a consensus on what to do about it," he adds.

That something will be done is foregone. But how much and how far and how soon remain the questions.

"I don't think there has ever been quite this strength of feeling about problems associated with discovery," says Schwarzer, confident in the knowledge that his ideas and writings have fueled and formed much of the debate.

If Schwarzer had it his way, beginning right now the filing of a complaint would include all pertinent names, documents and information known to the plaintiff, and the defendant would respond in kind, with no guessing, no games in voluntary disclosure throughout pretrial proceedings.

It is important to note that the Schwarzer way does include significant safeguards and hurdles to prevent fishing expeditions and abuses.

"Whether it's adopted eventually or not, it's focused attention on the issues of discovery," Schwarzer says of his manifesto. "It is drastic. It would mean changing the culture."

Change is definitely in the wind, if not of Schwarzer magnitude.

"This is an unusual historical circumstance with all three governmental branches pressing for thoughtful improvements," says U.S. Magistrate Judge Wayne Brazil of San Francisco, who in the late 1970s and early 1980s, first at the law school at the University of Missouri in Columbia and then at Hastings School of Law, was the strongest voice among legal scholars for legal reform.

Building on Brazil's diagnosis, Schwarzer came along soon after with specific remedies. "He's been a groundbreaking thinker," says Brazil.

Those studying the issues can't help but hear Schwarzer's footsteps. For one thing, "the truth of it is there isn't much out there in the literature beyond Schwarzer," says Paul D. Carrington, a law professor and former dean at Duke University Law School. "There aren't any other new ideas."

Carrington is the reporter for the committee that just completed its work for the Judicial Conference. The committee has proposed what he calls "fairly radical reforms" to be put out for public comment next month in Los Angeles and again on the East Coast.

The proposals include limits on the number of depositions and interrogatories, subject to extension by the court, some early disclosure that now comes through interrogatories, and new rules for pinning down the opinions of experts early on.

Further, the Judicial Conference committee proposes a "safe harbor" amendment to Rule 11, requiring prior notice of a possible claim against counsel for sanctions and giving them a chance to withdraw pleadings or other filings at issue.

But the group balked at much of Schwarzer's wide-open scheme of voluntary disclosure.

'A Little Tender'

"The committee's a little tender," Carrington says. "They weren't confident that a rule that went the full distance would be enforceable. There was concern about imposing a full duty of disclosure, where too often a lawyer won't comply with broader requirements. We wanted one they'll perform. We wanted to take that step and then down the line take another one.

"It may be that gradualism is a mistake," he adds.

Schwarzer, in turn, says that both the Judicial Conference and the Biden Bill advisory committees around the country are coming up with "watered down" versions of ideas he's been promulgating.

Under the Biden Bill, the U.S. Southern

It is significant that at this critical juncture Schwarzer was handpicked by the search committee, in general, and Chief Justice William H. Rehnquist, in particular, to run the Federal Judicial Center, the educational and long-range planning arm of the Judicial Conference, the policy-making body of the federal courts.

In the past, the Federal Judicial Center has failed to take a leading role in reforming the judiciary, and the Federal Courts Study Commission, by Rehnquist's hand, made clear two years ago that it should.

So perhaps it's no coincidence that just as the Judicial Center took charge under Schwarzer, the Congress was there with the Biden Bill and the administration followed in kind with the work of the Council on Competitiveness. It goes without saying that within the three-branch admixture looking at reform there are some cross-purposes, resentments and a bit of unattributed name-calling.

Some within the advisory groups carrying out the Biden Bill complain that the administration was just trying to pile on and grab some of the headlines two months ago when it issued the 50-point "Agenda for Reform of the Civil Justice System in America."

As far as discovery and pretrial reform are concerned, it proposes 21 changes to the Federal Rules of Civil Procedure. Among them would be having litigants pay the other side for any discovery production beyond certain core information and ensuring expert witnesses are in the mainstream of opinion in their fields to keep out "junk science."

And there's rumbling within the Judicial Conference that the Biden Bill advisory groups aren't coming up with anything substantive, anything new. "It's a big air ball," says one member of the Judicial Conference.

And many of the advisory groups scrambling to find ways to cut costs and delays feel the Biden Bill has put them in a box by adding what amounts to a "speedy civil trial act" on top of the one already in place for criminal cases. It's no secret that criminal cases have pushed a lot of civil matters off the dockets.

"I have some trepidation that out of all these studies, effort and commotion some changes might be made that might adversely affect the administration of justice in the name of expediency," says Donald C. Smaltz, chairman of the advisory committee in the U.S. Central District of California and a partner in the Los Angeles of Philadelphia's Morgan, Lewis & Bockius. "I'm thinking of the rocket docket."

Magistrate Judge Brazil sees the predominance of other forces during the flux.

"It turns out the discovery amoeba has a wonderful capacity to regroup when you push on it," he says. "I don't think anyone believes we're going to completely solve the problems here or change human nature. But in the next year or so there will be a lot of energy and experimentation, and we'll learn a lot at least about hov dense and mobile the problems are an come up with some ideas that reduc this."

PARTICIPANT — Vice President Dan Quayle is scheduled to attend the American Bar Association Litigation Section's meeting on "The Adversary System in the 21st Century" this week.

District of California is one of 10 "pilot districts" that had to come up with detailed plans for curtailing costs and delays, for implementation by Jan. 1. And, unlike the other 83 federal districts, it had to do so with specific guidelines included in the legislation.

The Northern District of California asked to be an "early implementation district," which may qualify it for some funding to carry out its home-grown experiments, outside the more specific statutory guidelines, and expects to submit a plan in time to implement it Jan. 1.

The variety of experimentation within the federal districts could be no more clearly shown than with what is happening in the Northern and Southern districts of California.

Case Management Stressed

In the Southern District, the advisory group's completed plan does not call for voluntary disclosure in discovery but instead emphasizes greater use of existing rules for case management by judges.

In the Northern District, where Schwarzer was on the bench for 16 years before leaving in May 1990 for the Federal Judicial Center, the advisory group has concluded that one of the biggest problems in pretrial matters is structural, having an adversarial approach, according to Melvin R. Goldman, a partner at Morrison & Foerster who chairs the discovery subcommittee. So that group is advocating voluntary disclosure in the plan being considered.