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Lord's Justice

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BOOK REVIEWS

LORD'S JUSTICE, by Sheldon Engelmayer and Robert Wagman. Garden City, New York: Anchor Press/Doubleday, 1985. Pp. 312. $17.95.

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Lord's Justice provides an enthralling account of several of the Dalkon Shield cases and the judge who presided over them—Miles W. Lord. Judge Lord is a former Chief Judge of the United States District Court for the District of Minnesota. Throughout the book, authors Sheldon Engelmayer and Robert Wagman raise troubling questions for lawyers, judges, and everyone else concerned with fairness and efficiency in complex civil litigation. The book focuses on three principal topics: (1) A. H. Robins's marketing of the Dalkon Shield; (2) the defense and discovery abuses of the Robins attorneys in the ensuing products liability cases; and (3) Judge Lord's scolding of three Robins officials during a settlement hearing.

In 1970, A. H. Robins purchased the rights to the Dalkon Shield, an intra-uterine birth control device (IUD). At that time, evidence suggested that the Dalkon Shield was more effective than other IUDs in that it had a 1.1 percent pregnancy rate compared to 3.0 percent rates for other IUDs. These conclusions, however, were based on a study conducted by Dr. Hugh J. Davis, a developer of the Dalkon Shield and part owner of the company that sold the Dalkon Shield to Robins.[1] As might be expected from one who had such a conflict of interests, Dr. Davis employed questionable research methods. Later experience showed that the Dalkon Shield had a pregnancy rate as high as 5.0 percent. Although it knew of the flaws in Dr. Davis's study before it purchased the manufacturing rights, Robins nevertheless relied heavily on the Davis study in promoting the Dalkon Shield.

The ineffectiveness of the Dalkon Shield as a contraceptive, however, was not the basis for the later products liability suits. The plaintiffs sued Robins because of injuries caused by a string attached to the Dalkon Shield. This string was designed to allow women and their physicians to determine whether the device was properly inserted. The string was composed of many smaller strings, or filaments. Multifilamented strings are capable of transporting bacteria to the normally bacteria-free uterus through a process called "wick-

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1. Dr. Davis later testified that he received more than $500,000 from the sale of the Dalkon Shield to Robins.

ing." These bacteria can cause serious infections, which can result in sterility and even death. For this reason, most IUD manufacturers used monofilament strings, which apparently do not wick bacteria. Within two weeks of the purchase of the Dalkon Shield rights, Robins targeted the string for special attention because of the possibility of wicking. Robins decided to encase most of the string in a nylon sheath. The sheaths, however, did not solve the problem. In time, many of the sheaths ruptured and exposed the filaments to harmful bacteria. Even when the sheaths did not rupture, exposed portions of the strings sometimes became contaminated.

In the years that followed, evidence of the wicking problem became nearly incontrovertible. Government agencies and the Planned Parenthood Association warned that the Dalkon Shield was unsafe. Nevertheless, Robins did not replace the string with a monofilament, though it determined that using new material for the string would cost only 6.1 cents per Shield. Instead, Robins persistently denied that the Dalkon Shield was in any way defective. Ultimately, thousands of users of the Dalkon Shield claimed that they suffered infection. Many of these women became sterile; some died.

Although Robins's marketing of the Dalkon Shield is a notable case study in products liability history, litigators should be especially interested in the authors' portrayal of Robins's defense tactics in the Dalkon Shield products liability cases. According to the authors, counsel for Robins went to extraordinary lengths to deter the filing of suits and to retard the progress of filed cases. It is not unusual, of course, for defendants with large exposure to resort to delaying tactics in order to wear down plaintiffs and thereby produce lower settlements. At the very least, delaying tactics allow defendants the current use of money ultimately awarded to plaintiffs upon resolution of their claims. Engelmayer and Wagman, though, find Robins's behavior especially egregious.

The authors describe a series of unfortunate practices on the part of Robins's lawyers, including some designed to induce plaintiffs and their lawyers to drop their cases, or at least to settle on favorable terms. Robins's attorneys repeatedly questioned plaintiffs about intimate activities—activities that the authors argue were not relevant to the lawsuits. Some women chose not to sue rather than to endure such interrogation. Additionally, the authors report that Robins's counsel attempted to intimidate one of Judge Lord's law clerks. The attorneys allegedly warned the law clerk against ever accepting a job with any law firm that had a lawsuit pending against Robins. Such conduct is obviously inconsistent with a lawyer's obligations as an officer of the court.[2]

Engelmayer and Wagman also show that Robins repeatedly challenged court orders and failed to comply with court-set deadlines. After losing a motion in a case before one judge, Robins frequently would make the same

2. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-110 (1985).

motion in other cases before other judges. The authors report that in one case Robins objected, generally unsuccessfully, to the introduction into evidence of nearly 570 documents. Adjudication of these objections consumed a great deal of time. One hearing, covering only eight documents, lasted three days. Nevertheless, Robins made the same objections in the very next trial, in the same jurisdiction, and obtained another lengthy hearing. The doctrines of *res judicata* and *stare decisis* should have precluded this waste of judicial resources. Unfortunately, in the Dalkon Shield cases they did not.

Another favorite Robins defense tactic was heavy reliance on out-of-state lawyers who would appear for one hearing and then never reappear. This permitted the lawyer to make representations based on information available to him but which may not have been the best information available to Robins. Judge Lord eventually tired of this device. He asked that all of the Robins lawyers appearing in his courtroom take an oath to abide by the rules of the court and subject themselves to the jurisdiction of the Minnesota State Board on Ethical Practices. After studying the proposal, the Robins attorneys from outside Minnesota refused to sign the oath. Judge Lord then excused the non-Minnesota lawyers from the case. Robins's Minnesota counsel, however, refused to proceed without the other lawyers. Eventually, the out-of-state counsel agreed to sign the oath. This, however, did not completely solve the problem.

Robins also used irregular tactics when it negotiated some of its settlements. For example, Robins sometimes sought to include in settlement agreements a pledge by the plaintiff's lawyer that the lawyer would not accept any future Dalkon Shield cases. In at least one negotiation, Robins's attorneys reportedly claimed that this term was non-negotiable and a "deal breaker."[3] This practice forced new plaintiffs to seek attorneys who were not experienced with Dalkon Shield litigation or Robins's defense practices. Thus, Robins could count on additional delays while new lawyers took time to familiarize themselves with the complicated litigation. Robins used this tactic despite the fact that it clearly violates the Code of Professional Responsibility, which states, "[I]n connection with the settlement of a controversy or suit, a lawyer shall not enter into any agreement that restricts his right to practice law."[4]

Some of the worst abuses occurred in Robins's discovery conduct. The authors report that Robins concealed and destroyed documents and improperly invoked the attorney/client privilege and work product doctrines. Furthermore, Robins's deposition witnesses were remarkable in their inability to remember details. The book includes excerpts from transcripts of depositions of Robins officials in which they repeatedly cannot recall ever learning

3. S. ENGELMAYER & R. WAGMAN, LORD'S JUSTICE 86 (1985).
4. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108(B) (1985).

significant facts. One memorable example concerns a Robins official whose wife used the Dalkon Shield for several years. Two months after her Dalkon Shield was removed, she underwent a hysterectomy. The official testified that he did not know of any problems his wife had had with the Dalkon Shield and that he could not recall whether he had asked his wife if the hysterectomy was related to the Dalkon Shield or if she had the type of infection which the Dalkon Shield commonly caused.

How should the courts deal with these abuses? One response to problems of procedure is to adopt new procedural rules. To this end, the Federal Rules of Civil Procedure have been amended three times in the 1980's alone.[5] Moreover, district courts have engaged in a great deal of procedural rule-making. Commentators have estimated that there are nearly three thousand local rules[6] written in about one-and-a-half-million words.[7] Furthermore, many judges have announced standing or general orders designed to function as their own rules of civil procedure.[8] In addition, many procedural rules are created by case law.

New rules alone will not solve the problem without the appropriate use of judicial sanctions. In the Dalkon Shield cases, Robins's conduct frequently violated existing ethical and procedural rules. The Federal Rules of Civil Procedure authorize judges to impose sanctions on attorneys who disobey certain rules.[9] Nevertheless, Judge Lord did not specifically sanction any of the Robins's attorneys.[10] If he had, he might have saved a great deal of

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5. The Federal Rules of Civil Procedure were amended in 1980, 1983, and again in 1985.

6. Roberts, *The Myth of Uniformity in Federal Civil Procedure: Federal Civil Rule 83 and District Court Local Rulemaking Powers,* 8 U. PUGET SOUND L. REV. 537, 538 (1985) (Rule 83 of the Federal Rules of Civil Procedure, which gives district courts the authority to promulgate local practice rules "not inconsistent" with the federal rules, has created a threat to the integrity and the uniformity of the Federal Rules of Civil Procedure).

7. Flanders, *Local Rules in Federal District Courts: Usurpation, Legislation, or Information?* 14 LOY. L.A.L. REV. 213, 261 (1981) (while the creation of local rules by district courts has led to some abuses, the sum total of errors is slight and their effects insignificant in relation to the advantages the local rules offer).

8. Kahn, *Local Pretrial Rules in Federal Courts,* 6 LITIGATION 14 (1980) (there is no guarantee that local rules will be followed in a particular jurisdiction because judges can ignore or supplement them with their own standing orders; therefore, a case in federal district court may be governed by a unique set of local rules and standing orders, in addition to the Federal Rules of Civil Procedure).

9. FED. R. CIV. P. 11. In one case, Robins failed to provide complete answers to interrogatories in violation of three successive court orders. The judge (not Judge Lord) struck Robins's defense and entered a directed verdict for the plaintiff. The book does not suggest, however, that this sanction had any impact upon Robins's conduct before other judges, including Judge Lord.

10. The magistrate in the case later held a hearing to determine whether sanctions should be imposed for destruction of documents in violation of the settlement agreement.

subsequent pain and effort.[11] Judge Lord, however, is not unique among federal judges in his reluctance to impose sanctions on attorneys.[12]

If rules alone are insufficient to ensure that cases are properly resolved, what will accomplish that end? The authors of *Lord's Justice* clearly approve of the method chosen by Judge Lord. An activist judge,[13] Judge Lord closely supervised his cases, even flying from Minnesota to Virginia to preside over depositions. His efforts apparently worked. Robins eventually chose to settle the cases rather than continue the discovery process under Judge Lord. The clear implication is that Robins preferred to take its chances with other judges.

The authors laud Judge Lord's behavior and appear to believe that judges should play a stronger supervisory role in the discovery process. But this approach has costs of its own. First, it takes a great deal of time for judges to umpire discovery. The book quotes one plaintiff's attorney as saying that Judge Lord put in eighteen to twenty hours a day on the Dalkon Shield cases. At the same time, Judge Lord had to manage his other cases and his administrative responsibilities as Chief Judge. The drafters of the Federal Rules of Civil Procedure recognized this problem and permitted judges to establish schedules through local rules.[14] Additionally, there is statutory authority for judges to delegate the supervision of discovery to magistrates.[15] Even so, day-to-day supervision of discovery in every case by a judge or magistrate would be very expensive. Other solutions to discovery abuse should be utilized when available.

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11. Ironically, Judge Lord later defended his conduct by arguing that his reprimand of Robins was intended as a sanction for discovery abuse. The Eighth Circuit rejected this argument, stating that if Judge Lord had sought to punish Robins for abusive litigation practices, he should have used the judicial procedures established for that purpose. Gardiner v. A. H. Robins Co., 747 F.2d 1180, 1193 (8th Cir. 1984).

12. *See, e.g.*, Cavanagh, *The August 1, 1983 Amendments to the Federal Rules of Civil Procedure: A Critical Evaluation and a Proposal for More Effective Discovery Through Local Rules,* 30 VILL. L. REV. 767, 795 (1985) ("It is unlikely that courts will impose sanctions for discovery abuse under the new rules with any greater enthusiasm than they did prior to the 1983 amendments"). *See generally* Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment,* 57 ST. JOHN'S L. REV. 680 (1983) (judges do not sanction because federal rule enforcement provisions are inadequate); Weinstein, *Reflections on 1983 Amendments to U.S. Rules of Civil Procedure,* N.Y.L.J., Nov. 14, 1983, at 1 (federal judge expresses reluctance to impose sanctions).

13. An activist judge is a judge less concerned with the application of the right rules than with reaching a result consistent with his or her sense of justice.

14. FED. R. CIV. P. 16(b) ("Except in categories of actions exempted by district court rule as inappropriate, the judge, or a magistrate when authorized by district court rule, shall . . . enter a scheduling order . . . ."). *See also* FED. R. CIV. P. 26(f) ("the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters . . . as are necessary for the proper management of discovery in the action"); FED. R. CIV. P. 83 (permitting judges to make local rules not inconsistent with Federal Rules of Civil Procedure).

15. 28 U.S.C. § 636 (1968).

Second, activist judges sometimes step beyond appropriate limits. Judge Lord risked just that when he scolded Robins in his speech at the settlement hearing. Hence, an activist judiciary may not be the solution. Indeed, if the rules intended to solve the problems are ignored by activist judges, then these judges are contributing to the problem rather than curing it.

The problem of discovery abuse may not be susceptible to an easy solution. As long as the choice is between the use of unattractive procedural rules providing for the imposition of sanctions and the enormous amount of time required for the proper supervision of discovery, the possibility remains that some litigators will abuse the discovery process. It is frustrating to know that rules exist which may help prevent discovery abuse, but that judges ignore them. The solution simply may be to force judges to obey the rules, but who will bell that cat?

The third focus of the book is Judge Lord's speech during the settlement hearing. Judge Lord apparently directed his remarks to three Robins officers who were present at the hearing. He criticized their behavior in connection with the Dalkon Shield and urged them to make amends for their actions. Judge Lord also castigated the officers for, among other things, engaging in "corporate irresponsibility at its meanest,"[16] and for proving that "it pays to delay compensating victims, and to intimidate, harass and shame your victims."[17] In response, Robins complained to the Judicial Council of the Eighth Circuit under the Judicial Conduct and Disability Act of 1980.[18] The Eighth Circuit expunged Judge Lord's remarks from the record of the settlement hearing and criticized his conduct. In keeping with the traditional reluctance of courts to sanction judges, the court of appeals imposed no other penalties.

Judge Lord's comments go to the heart of a judge's obligation to litigants in cases other than those directly before him. Judge Lord, while on the bench and after his own cases had terminated through settlement, called upon Robins to settle, or at least view more favorably, the claims of other Dalkon Shield plaintiffs. This seems improper. Judges, when on the bench, may act only in the context of specific cases. For example, federal judges may not render advisory opinions.[19] The Constitution limits the role of federal judges to deciding cases or controversies.[20] Once the cases before him had been settled, Judge Lord, while acting in his judicial capacity, lacked constitutional authority to give advice on the conduct of other Dalkon Shield litigation.

There are, of course, deviations from the strict case or controversy rule. When judges pen their decisions, they are undoubtedly influenced by the

16. S. ENGELMAYER & R. WAGMAN, *supra* note 4, at 259.
17. *Id.*
18. 28 U.S.C. § 372 (1968).
19. C. WRIGHT, LAW OF FEDERAL COURTS § 12, at 57-59 (4th ed. 1983).
20. U.S. CONST. art. III.

knowledge that their opinions may be used to decide later cases under the doctrine of *stare decisis*. Indeed, some appellate courts plainly recognize their duty to indicate what the law is and publish only those opinions which may provide such guidance.[21] These courts generally explain their decisions in published opinions at much greater length than in unpublished opinions. The clear implication is that some judges take special pains to educate lawyers other than those representing the parties in the case. If judges did no more than decide disputes before them, this expanded treatment would be unnecessary.[22]

Perhaps Judge Lord felt he had to protect the interests of the plaintiffs in the other Dalkon Shield cases because Robins's agreement to settle was obviously made in light of its interests in other cases. But that justification is unsatisfactory. It appears that the only aid Judge Lord intended to provide other plaintiffs was to try to persuade the Robins officials to settle their cases. The need for a lecture does not justify an exception to the constitutionally-mandated case or controversy rule. Even assuming that it was necessary to deliver his message, Judge Lord could have accomplished that end by expressing his views to the Robins officials and their counsel privately or in writing, as he initially did. He overstepped his judicial bounds when he exposed Robins to public scolding. Moreover, many of the other Dalkon Shield plaintiffs had already retained counsel. In our adversary system, it is for counsel to assert a client's rights, not a judge. Were the other plaintiffs' interests implicated, they could have sought to intervene before the cases heard by Judge Lord were settled.[23] Indeed, if Judge Lord felt that the rights of persons not parties to the cases before him were involved, he could have asked these non-parties to intervene and assert their own interests. That would have provided the plaintiffs with greater protection without exposing Judge Lord to criticism for acting improperly.

The authors conclude that Judge Lord was not successful in his attempt to persuade the Robins officials to treat the Dalkon Shield cases more sympathetically. It is likely, however, that Judge Lord had another goal in

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21. *See* Reynolds & Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978) (federal courts have promulgated rules designed to reduce the time spent on preparing opinions by limiting the number of decisions that are published and by forbidding the citation of unpublished opinions); Seligson & Warnlof, *The Use of Unreported Cases in California*, 24 HASTINGS L.J. 37 (1972) (dramatic curtailment in publication of California appellate court opinions is direct result of California Supreme Court's adoption of Rule 976 of California Rules of Court, which limits types of opinions that may be published).

22. Similarly, federal courts may hear moot cases when the question presented is "capable of repetition, yet evading review." DeFunis v. Odegaard, 416 U.S. 312 (1974). The classic example is a case involving the termination of pregnancy, because appellate review is rarely possible within the normal gestation period. *See* Roe v. Wade, 410 U.S. 125 (1973). Courts recognize such an exception because such cases might otherwise be insulated from appellate review.

23. FED. R. CIV. P. 24.

mind—that of punishing the Robins officials. The authors make much of Judge Lord's belief that corporate officials often escape punishment for engaging in acts which ultimately cause severe injuries. Certainly, Judge Lord's speech was reminiscent of that given by a judge when sentencing a criminal. If punishment was Judge Lord's goal, his tongue-lashing was improper. Righteous anger does not warrant a departure from the case or controversy requirement. When Judge Lord uttered his remarks on the bench, and on the record, he cloaked his views with the authority of a federal court. For this reason, the Eighth Circuit acted properly in expunging Judge Lord's words from the record of the settlement conference.

It is difficult to resist the book's conclusion that Robins's lawyers often acted improperly, or at least out of improper motives. Nevertheless, that conclusion would be more compelling if the authors had presented Robins's side of the story. Admittedly, the authors were hampered in any attempt to do so by the refusal of Robins and its lead counsel to speak to them. However, Engelmayer and Wagman present a decidedly one-sided account. They present Robins as so evil that it is surprising to learn that as of August, 1985, some two months after *Lord's Justice* went to press, Robins had won twenty-seven, or nearly half, of the sixty Dalkon Shield cases that had gone to judgment.[24]

The authors' bias is most apparent in the handling of the Eighth Circuit's review of Judge Lord's remarks. To be sure, the authors do not disguise their feelings. Writing of Judge Lord's diatribe against Robins at the settlement hearing, they state that he was "doing what had to be done and saying what had to be said."[25] However, the authors do not tell the full story of the Eighth Circuit opinion. To the contrary, the authors quote only a single phrase criticizing Judge Lord's behavior: that his remarks had "crossed the line separating permissible judicial comments from impermissible public accusation."[26] The Eighth Circuit was much more critical of Judge Lord than that passage would lead readers to believe. In a part of the opinion not referred to in the book, the Eighth Circuit wrote of Judge Lord's behavior, "Such intimidation of private citizens who are not parties to proceedings before the district court is antithetical to our notions of fundamental fairness and the proper functioning of our judicial system. These procedures constitute a clear violation of the three [Robins's] officers' due process rights."[27] Nor do the authors report that the Eighth Circuit called Judge Lord's comments "highly injudicious."[28] These omissions make one wonder what else the authors may have left out of their account.

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24. Spragins & Glaberson, Searle: *Staring at Some Long Days in Court,* BUS. WK., Feb. 17, 1986, at 35.

25. S. ENGELMAYER & R. WAGMAN, *supra* note 4, at 272.

26. *Id.* at 286.

27. Gardiner v. A. H. Robins Co., 747 F.2d 1180, 1191 (8th Cir. 1984).

28. *Id.* at 1192.

The book contains other omissions. While it mentions that the Dalkon Shield cases were once consolidated before a single judge for purposes of discovery, it does not fully discuss what that judge did. In light of the authors' approval of Judge Lord's re-opening of the discovery process, it is difficult to escape the conclusion that the authors feel that the original judge erred in his supervision of discovery. However, the authors do not explain in what way the judge erred. One could also question the authors' failure to discuss more completely the Dalkon Shield cases that were not before Judge Lord. Nevertheless, the book sets out an important indictment of civil procedure which would serve well as a teaching device for students of procedure. The book is a case study of what not to do and of how to respond to intransigent adversaries. This book tells an important story. Although it presents only one viewpoint, it deserves to be read.