

Book Review

THE RULE OF REASON: A NEW APPROACH TO CORPORATE LITIGATION.
By Milton R. Wessel.* Reading, Massachusetts: Addison-Wesley Publishing Company. 1976. Pp. xvii, 221. \$10.95.

Professor Wessel appeals to corporate executives, management, and counsel to adopt a predisposition of openness and rational presentation in socioscientific litigation, rejecting the "sporting" tactics which have repeatedly reflected corporate defensiveness and which have cost them invaluable credibility. Because of this, corporations are, perhaps needlessly, losing cases or accepting unfavorable settlements. Accordingly, society loses by the inadequate presentation of the merits of the corporation's case. Too often vital decisions which affect society as well as plaintiff and defendant are made on inadequately presented litigation. Scientific complexities integral to understanding "risk/benefit" analysis require proper and thorough exposition, void of the "games" of litigation procedure. The increasing tension between social issues (consumerism, civil rights, environment) and corporations has created a new, less legally defined type of litigation, which demands a more viable approach for properly evaluating the merits of each case. Professor Wessel calls his solution the "rule of reason."

This rule advocates "consistency between litigation procedure and corporate fact and purpose." In order to achieve this all-important consistency, traditional tactics of litigation procedure must bow to a policy of full disclosure of facts and opinions, marked by aggressive attempts to seek trial and decision at the earliest possible time. Furthermore, the corporations must develop arguments by emphasizing affirmative benefits in these "risk/benefit" cases, rather than by seeking favorable verdicts through indirection, ploy, delay, and other defensive maneuvers. The latter attempts have caused corporations great loss of public confidence. The ultimate effect of the use of the "rule of reason" would be a new "corporate credibility," wherein lay arbiters and the public would trust corporate arguments and evidence because of the corporation's willingness to comply honestly and reasonably with its conduct of the case. Simply stated, most facts and opinions will come out sooner or later, so why not create a believable image by proceeding on the actual merits of the case.

Besides an updated procedural mode of litigation, novel by virtue of its aggressive attitude, Wessel calls for a new morality where corporate integrity and legal dignity are keynotes. He condemns: concealment for

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concealment's sake, misleading "tricks," low-level queries into personal background of adversaries and their witnesses, and delaying socially desirable professional disclosure for tactical advantage. He counters these approaches with a denunciation of dogmatism and a call for proper simplification of issues for the purpose of maximum comprehension. He further advocates honorable treatment of opponents and their witnesses. These guidelines may already direct the professional standards of many attorneys, but some elements of Professor Wessel's aggressive pursuit of truth may be new. For example, he states, "Hypothesis, uncertainty, and inadequate knowledge will be stated affirmatively—not conceded only reluctantly or under pressure." He also recommends disclosure of relevant research data to even extremist opposition, though there be no legal obligation. As further affirmation of the power of truth he believes, "Interest in an outcome, relationship to a proponent, and bias, prejudice, and proclivity of any kind will be disclosed voluntarily and as a matter of course."

Actually, the author's thesis does not give direction to this book, but rather the structure of the work comes from a chronologically organized presentation of the litigation procedure from its inception to hearing, trials and appeals. Thus, it reads as a good basic text on litigation with the "rule of reason" superimposed on certain pertinent points.

Great emphasis is given to the corporate counsel as the pivotal party in determining the "rule of reason" attitude in litigation. He must actively participate in all aspects of litigation. He begins by personally investigating the facts early, conducting the initial documents search. He must soon after synthesize corporate resources into a team empowered to manage litigation and authorized to make key executive decisions. Once this is established, corporate counsel should be privy to all aspects of the corporation, which gives him a proper overview.

Most important is his willingness, as surrogate, to accept corporate responsibility. Too often a convenient detachment is created between corporate counsel and trial counsel. In matters of questionable conduct, this provides corporate executives and management with the ready excuse that the matter is in the hands of outside attorneys. Thus, Wessel strongly advises redefining the relationship between corporate counsel and his trial attorney. So that they may act in concert, corporate counsel acts as liaison on all policy matters, conveying the corporate rule-of-reason philosophy to his trial team and insisting on their adherence to it.

Corporate counsel must also participate in the trial firm's management regarding selection of work, assignment of personnel, and billing. He should be fully aware of the different perspectives from which each view the case. Since trial counsel's priorities for trying a given case vary, the corporate counsel must impress upon his colleague the affirmative merits of the corporation's case.

This shift from corporate counsel's role as supervisor to participant in the litigation process is open to personality conflicts, especially since

Wessel recommends that corporate counsel maintain primary responsibility for settlement and even negotiations.

The rule-of-reason approach has a number of advantages. One of the most frustrating features in evaluating litigation is listening to expert witnesses, each party having selected authorities who are predisposed to its line of thinking. Wessel's method of not only letting all the facts out at once, but also voluntarily allowing the adversary to have access to them, would aid in reducing absolutism in scientific testimony, thus reducing the credibility gap. It shows a good faith attempt to reach the truth, allowing witnesses to appear in a more trusting context. Also, credibility is enhanced through the consistency established by staying with the facts as originally presented.

The drive for early settlement, a rule-of-reason attitude, also has many benefits. Obviously, it saves litigation fees. Aggressively pursuing the progress of litigation also usually affords the corporation the chance to maintain control by establishing the framework of the case from which the adversary will have to comply. Furthermore, such pursuit encourages thorough preparation. Most significantly, this posture helps to enhance corporate credibility by affirming its desire to resolve the issue.

Wessel's policy of total honesty for purposes of establishing corporate credibility poses the possibility of controversial situations arising, particularly with regard to his recommendation to disclose the full facts of the case at the beginning of settlement. This early presentation would help to avoid the damaging effects of inconsistency of evidence. He does not see this as a defensive position but merely states that it is up to the corporation representatives to make it clear that it "means business." He would not advise withholding new substantiated research until it becomes crucial in the trial. The corporation should sublimate all selfish motives for the higher cause of truth. Wessel contends that the only disadvantage of this good faith is tactical, for the material would have to be presented eventually anyway. One questions the impact of such gestures on public opinion. Will the corporate image really change and the public be aware of this noblesse oblige with regard to disclosure of evidence during a trial?

With regard to corporate witnesses, the author draws a fine distinction between predisposing a corporate witness, especially a scientific specialist, and merely explaining the corporate position to him. He rejects biasing the witness to become a corporate advocate, yet stresses the importance of conveying the corporate affirmative position. Too much enthusiastic emphasis on the latter could certainly influence a witness, even indirectly.

A potentially controversial tactical procedure is Wessel's concern that the major perspective for trying corporate litigation be the affirmative approach, which avoids delay and stresses the merits of the corporate argument. Too often corporations defend risk rather than emphasize benefits. The author so strongly believes in arguing the positive instead of defending the negative that if a corporation can show "no possible ver-

sion of the facts which will evoke public sympathy or appear in the public interest," he would recommend a retreat from litigation.

In conclusion, Professor Wessel offers a refreshing outlook on dealing with corporate litigation; this provides a needed contrast with the cynicism that characterizes much of the public attitude toward corporate motivation. He shows faith in the good will of many companies and stresses the obligation of top corporate executives (not corporate counsel) to initiate his rule of reason. His enthusiasm should be countered by remembering that by nature corporations are not altruistic public service organizations, nor does the public expect them to be.

This is not a book on litigation tactics and strategy; instead the work expounds basically on the simple principle of honesty. Though the advice on corporate litigation is helpful and his reasoning seemingly sound, Wessel does not take enough into account regarding human nature. Pragmatism governs the conduct of a cross-section of all categories of people, lawyers and executives included. Certainly there are rational arguments against all sorts of misconduct, including war, yet the human element, emotional and subjective, tips reason's equation and the most reasonable course of action is not always adhered to. Without reciprocity, such an attitude toward litigation could create an imbalance between adversaries. Wessel does state that it will take years of consistent behavior to build trust in corporate testimony. He also cautions corporations to begin with government agencies and then with responsible organizations. But beyond that in the myriad cases to be tried, uncertain of the opponent's litigation procedures, is such virtue to be expected? This is not to suggest that the rule should not be aspired to; a man's grasp should exceed his reach, and ideals and models ultimately will continue to elevate right conduct in the legal profession.

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