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Transparency is the Solution, Not the Problem: A Reply to Bruce Green

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TRANSPARENCY IS THE SOLUTION, NOT THE PROBLEM: A REPLY TO BRUCE GREEN

William H. Simon*

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INTRODUCTION

I fear that the diffuse and *ad hominem* tendencies of Bruce Green’s reply will distract attention from the core issues I sought to discuss.

First, I argued that issues of professional and academic integrity and accountability are raised when lawyers give advice with certain third-party effects under conditions of partial or complete secrecy. I proposed a variety of soft norms, including especially a presumptive duty of publicity.

Second, I criticized novel aggregate litigation arrangements applied by Leeds, Morelli & Brown (LM&B) in a series of campaigns involving many hundreds of clients, and I criticized the opinions of academic experts, including Green, who approved them.

Although I believe the discussion of LM&B is interesting in itself as an account of a novel litigation structure, I intended it to amplify my discussion of quasi-third-party opinion practice in two ways. First, it shows the significant role that professional, and especially academic, experts can play in legitimating transactions both before and after the fact. Second, if the reader agrees with my argument that these opinions were egregiously “wrong” (that is, either

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procedurally sloppy or substantively incorrect), then they provide anecdotal evidence that existing norms and practices are not adequate to safeguard the relevant public interests.

I am grateful for the portion of Green's response that engages these issues, and I reply to it here, looking at his discussion of LM&B first, and then his disagreement with my proposal for more transparency.

I. LEEDS, MORELLI & BROWN AND THE NEXTEL SETTLEMENT

Green's response to the substance of my critique of the experts in the Nextel case asserts that I failed to consider pertinent information and that I misstate the facts and the law.

A. Information

Green faults me repeatedly for failing to take account of the Colorado trial transcripts, and protests my failure to discuss a twenty-seven-page report he made and "documents relating to the negotiation of the Dispute Resolution and Settlement Agreement (DRSA) that would have shed light on its meaning."¹ In none of these instances does he say what is in the documents and how it would affect the merits.

In making these arguments, Green is picking up the pieces of a collapsing effort by LM&B to use confidentiality as a shield from accountability for its treatment of its former clients in Nextel and other matters. The lawyers induced the clients to agree not to discuss their cases on pain of serious monetary sanctions. In the subsequent malpractice cases, they have asserted these provisions aggressively against the clients. Various gag orders have been entered. A notorious one in a case arising from an LM&B aggregate settlement with Prudential Insurance seemed to preclude the clients' current lawyers not only from publicizing their claims, but from efforts to recruit professional assistance in preparing their cases. The clients' current lawyer in New Jersey was summoned on criminal contempt charges for violating this order before it was reversed on appeal.²

Since the appellate court reversal in New Jersey, other courts have refused some of the broad confidentiality orders LM&B has sought, but the firm continues to use the legal system to deter discussion of its conduct. As Green notes, a settlement of an Arapahoe County, Colorado class action brought against LM&B by several hundred Nextel claimants is sealed, and a protective

1. Bruce A. Green, *The Market for Bad Legal Scholarship: William H. Simon's Experiment in Professional Regulation*, 60 STAN. L. REV. 1605, 1636 n.140 (2008); see also *id.* at 1605 n.9, 1654, 1656, 1658.

2. *Lederman v. Prudential Life Ins. Co.*, 897 A.2d 362 (N.J. Super. Ct. App. Div. 2006). The case is discussed in TED GUP, *NATION OF SECRETS: THE THREAT TO DEMOCRACY AND THE AMERICAN WAY OF LIFE* 239-41 (2006).

order in the Denver *McNeil* case forbade discussion of its terms. The belligerent stance of LM&B's defenders is well conveyed by Green's statement that, by publishing my views on LM&B's conduct in Nextel, I was "invit[ing] ancillary litigation over whether [I] was violating the court's protective order" (even though he can cite no respect in which such litigation would have been justified).³

I tried to get all the materials I could about the Nextel settlement; I considered all the materials I received, and I discussed all the materials I considered that I thought relevant. I do not have the trial transcript, or Green's twenty-seven-page statement, or some discovery materials. Green and LM&B were at the trial and have all the documents and could, if they wanted, describe or disclose them. While Green does volunteer a variety of information he considers exonerating, his main response on the merits is to appeal to information he will not describe or disclose. His position seems to be that, as long as he or LM&B control material information, they are immune from criticism. Similarly, while Green asks us to give great weight to the trial judgment in the *McNeil* case, which involved two of the Nextel claimants, he tells us nothing about the trial other than that he testified and that I did not, and he reminds us that no one can discuss the class action settlement, which involved hundreds of the Nextel claimants.

The broader social stakes in LM&B's information control strategy are not, as Green says, the "tension between the regulatory interest in transparency and client confidentiality, which promotes the private and public interest in obtaining effective legal assistance."⁴ Confidentiality is not being invoked here to protect clients, but to protect lawyers from accountability to clients. The "public and private interest in obtaining effective legal assistance" depends as much on assuring prospective clients that they will not be exploited by their lawyers as on assuring them that their secrets will be kept. LM&B's campaign against transparency does serious injury to that interest.

B. "*Factual Unreliability*"

I continue to believe that my criticisms can be fairly assessed by review of a small number of documents that have been available to anyone who wants to look at them since I first circulated my draft.

The principal focus of my critique is an opinion letter by Geoffrey Hazard expressly based on the DRSA and mentioning no other basis. The DRSA contains a clause stating that it "supersedes all prior and contemporaneous oral and written agreements, understandings, and representations."⁵

3. Green, *supra* note 1, at 1634.

4. *Id.* at 1612.

5. Dispute Resolution and Settlement Agreement ¶ 15(a) (Sept. 28, 2000) (on file with author) [hereinafter DRSA].

I also criticized Green and Roy Simon for giving expert opinions in the *McNeil* litigation that referred to Hazard's letter without noting its deficiencies, that reasserted most of the positions in it, and that supported LM&B's position that the Nextel claimants had given informed consent to the DRSA.

A fair *prima facie* assessment of all of my criticisms except those concerning informed consent can be made with nothing more than the DRSA and the original retainer agreements the DRSA replaced. The issue of informed consent is more complex because it turns in part on conduct of the lawyers that is in dispute. However, I tried to tailor my criticisms to this limitation.

First, I faulted Hazard in his *ex ante* letter for failing to provide any guidance as to what the lawyers should do to obtain informed consent, and I faulted the *ex post* opinions of the litigation experts for failing to note the disadvantages of the DRSA that would have to be discussed in any disclosure adequate for informed consent. In addition, I offered my own example of the type of disclosure of the DRSA that would be required for informed consent.⁶ The reader can make her own assessment of my opinion on required disclosure simply by examination of the DRSA. She is also entitled to draw inferences from the fact that Green makes no response to this argument and does not say what alternative disclosure, consistent with the record, would have been adequate.

Second, although I do not know what oral disclosures the lawyers made, we do have the key document prepared for distribution to claimants, and it is not only materially incomplete, but affirmatively misleading in purporting to describe the "Highlights" of the agreement while omitting key terms about the amounts and conditions of payment.⁷ Perhaps Green is right that this record does not permit a definite conclusion, but it is hard to imagine what kind of purely oral disclosure could compensate for such deception.

Green's charge of factual misstatement is supported by only three specifics:

First, "Simon assumes that a DRSA provision restricted the plaintiffs from discharging LM&B and substituting other counsel. . . . But LM&B, its clients, and its experts did not understand the DRSA to impose this restriction."⁸

Here is what the DRSA says: "[e]ach Claimant agrees that LM&B shall be his/her legal representative throughout DRP [Dispute Resolution Process] (or if he/she elects [an alternative process])."⁹

Here is what Exhibit A, the "Individual Agreement" intended for signature by the claimants, says: "[w]hile I may consult other counsel of my choosing

6. William H. Simon, *The Market for Bad Legal Advice: Academic Professional Responsibility Consulting as an Example*, 60 STAN. L. REV. 1555, 1586-88 (2008).

7. Highlights of Settlement Agreement With Nextel (on file with author) [hereinafter Highlights].

8. Green, *supra* note 1, at 1656; *see also id.* at 1636.

9. DRSA, *supra* note 5, ¶ 7(a).

with respect to the Dispute Resolution and Settlement Agreement, I agree that LM&B shall be my legal representative throughout the Dispute Resolution Process.”¹⁰

Second, “Simon assumed that the DRSA forbade the claimants from talking to each other about the settlement process, but ignored that this reading was not only disputed but contradicted by the fact that that the *McNeil* plaintiffs ‘talked all the time’ with each other and with other claimants.”¹¹

Here is what the DRSA says:

Claimants and LM&B understand and agree that (i) the terms of this Agreement, (ii) any matters related to any claim alleged by any Claimant, (iii) any statements made by any Party or non-party witness during DRP and (iv) the terms of any resolution reached between the Parties hereunder including pursuant to DRP . . . are confidential, and . . . shall not be disclosed to any person [except a mediator or arbitrator in the DRP or] a Claimant’s personal attorney or financial advisor, or expert retained [in connection with the DRP, but only if such person signs a nondisclosure agreement].¹²

Claimants who breach this provision forfeit all right to relief against Nextel and must disgorge any relief they have received. Unlike the fee provisions, the confidentiality ones were fully and accurately disclosed in the “Highlights”¹³ form distributed to the claimants.

Green points to the fact that, after the DRSA went into effect, some claimants did discuss their cases with each other without reprisal, but this is irrelevant to the question of consentability and to all issues considered by Hazard, which turn on the parties’ understanding of the DRSA at the time it was negotiated.

Third, “Simon assumes that a DRSA provision prohibited LM&B from accepting additional Nextel employees and former employees as clients in the pending dispute However, the facts were otherwise: LM&B . . . reserved the right to take on new claimants”¹⁴

Green does have a small point here. I referred to LM&B’s “agreement” not to represent or refer other claimants against Nextel.¹⁵ In fact, while the DRSA provides explicitly that LM&B “will not refer” other claimants, it says only that LM&B “does not intend” to represent other claimants.¹⁶ Nevertheless, this assertion arguably involves the kind of assurance the rule against restrictions on practice prohibits. Moreover, Hazard, who gave the only opinion I criticized specifically on this issue, interpreted the assertion as tantamount to an agreement. He called it “the contemplated *agreement* whereby Leeds Morelli

10. DRSA, *supra* note 5, Exhibit A ¶ 1 (individual agreement).

11. Green, *supra* note 1, at 1636.

12. DRSA, *supra* note 5, ¶ 4(a).

13. Highlights, *supra* note 7, ¶¶ 3-5.

14. Green, *supra* note 1, at 1656.

15. Simon, *supra* note 6, at 1594.

16. DRSA, *supra* note 5, ¶¶ 1(c), 2(c).

will refrain from undertaking representation of other claimants outside the framework of the Agreement”¹⁷ and argued that it was defensible as an agreement.¹⁸

C. “Legal Unreliability”

Green’s claim of “legal unreliability” focuses on my analysis of consentability. Green says that “the theme of [the relevant legal authority] is that competent, informed clients may generally consent to be represented by a lawyer with a conflict of interest.”¹⁹ This cannot be a complete or useful summary unless all conflicts are consentable, which no one asserts. Green says nothing about what criteria are relevant to identifying the ones that are not consentable.

Although he insists there is “ample authority,” he cites no case resembling *Nextel*. The authority he cites confirms my statement that fixed-fee compensation in the civil sphere “is usually found in situations involving either (1) routine transactions, such as uncontested divorces or consumer bankruptcies, or (2) situations where there is a long-term relation between sophisticated business clients and their lawyers.”²⁰ None of his cases approve

17. Simon, *supra* note 6, app. II, at 1601 (emphasis added).

18. Green also claims that I was mistaken in asserting that he opined that LM&B’s fees were reasonable in amount. Green, *supra* note 1, at 1650 n.194. In fact, the *McNeil* expert disclosures report Green as opining that (1) “the fee provision and the consulting arrangement are ethical.” Defendants Leeds, Morelli & Brown, P.C., Lenard Leeds, Steven Morelli, Jeffrey Brown, James Vagnini and Bryan Mazzola’s Expert Endorsement Pursuant to C.R.C.P. 26(a)(2)(b), at 5, *McNeil v. Leeds Morelli & Brown, P.C.*, No. 03-CV-893 (Colo. Dist. Ct., Denver County Nov. 28, 2005); (2) “the DRSA’s terms, by themselves, are appropriate” *Id.*; and (3) “the DRSA’s fee arrangement is appropriate and ethical [and] inured to the benefit of [the clients].” Defendants Leeds, Morelli & Brown, P.C., Lenard Leeds, Steven Morelli, Jeffrey Brown, James Vagnini and Bryan Mazzola’s Second Supplemental Summary of Expert Opinions Served Pursuant to C.R.C.P. 26(a)(4), at 17, *McNeil v. Leeds Morelli & Brown, P.C.*, No. 03-CV-893 (Colo. Dist. Ct., Denver County Apr. 13, 2005). These statements would not be true if the fees were unreasonable in any respect.

Finally, Green complains that a prior draft of my article erroneously attributed to him the view that “it was sufficient disclosure simply to permit the claimants to examine a copy of the . . . DRSA.” Green, *supra* note 1, at 1650 n.193. The basis for this attribution was the following sentence from the expert disclosures: “Professor Green will opine that the fact that Plaintiffs personally received a copy of the DRSA that they were able to review before they attended their mediations, depositions, prepared for arbitrations, and before they executed their general releases, amounts to full disclosure.” Defendants Leeds, Morelli & Brown, P.C., Lenard Leeds, Steven Morelli, Jeffrey Brown, James Vagnini, and Bryan Mazzola’s Supplemental Summary of Expert Opinions Served Pursuant to C.R.C.P. 26(a) (4), at 17, No. 03-CV-893 (Colo. Dist. Ct., Denver County Apr. 13, 2005).

19. Green, *supra* note 1, at 1663.

20. Simon, *supra* note 6, at 1588 n.137. In the insurance defense cases, the long-term relation is with the insurance company, which is usually not considered a co-client of the insured. However, since the interests of the company and the insured are aligned across a

fixed fees for plaintiffs' lawyers in tort cases, much less fixed fees to be paid *by the clients' adversary* prior to negotiation of relief for the clients. The only relevant proposition his citations establish is that fixed-fee arrangements are not *per se* non-consentable, a proposition I never disputed.

My argument did not rest on categorical generalities of the sort Green wrestles with. It rested on a contextual inquiry involving eight factors of which Green discusses only one. In particular, Green evades the critical question of what benefits a Nextel claimant could reasonably have expected from the shift from contingent to fixed compensation that would have justified accepting the worse incentives the shift entailed.

Green's criticism that "Simon never explains . . . why [we should assume that there were better available alternatives to the DRSA] and has no factual basis for this assumption"²¹ involves a misunderstanding of the conflicts rule. Under Model Rule 1.7, once we have a conflict, the proposed representation can proceed only when there is a reasonable basis for concluding that it will "not be adversely affected."²² To the extent that uncertainty precludes such a conclusion, the rule prohibits the representation. The conflicted lawyer thus bears the burden to provide reasons for believing there are no better alternatives.²³ Of course, the burden is only to provide a reasonable basis, not a conclusive determination. But the lawyer who seeks to justify a highly unusual and intensely conflicted arrangement like the DRSA on the basis of the unavailability of other alternatives must do more than appeal to speculative possibility. It would have been incumbent on LM&B to provide some reasons for believing that more conventional and less conflicted alternatives were not available, and Green does not suggest that it did so or could have done so.

II. THE ROLE OF THE EXPERT WITNESS

My argument applied to nonacademic as well as academic experts and to experts both outside and inside litigation, but in the interests of concision, I will focus on the role of academic lawyers as litigation experts.²⁴

fairly broad range, the company's monitoring affords substantial protection to the insured. Even here, however, as Green acknowledges, authority is divided. *See Green, supra* note 1, at 1665 n.265.

21. *See Green, supra* note 1, at 1668 n.273.

22. MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (1996). I quote the pre-2002 language. The current version requires a reasonable finding that the representation of each client will be "competent and diligent." MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2002).

23. *See Borden v. Borden*, 277 A.2d 89, 92 (D.C. Ct. App. 1971) (disqualifying on conflicts grounds a legal aid organization from representation of an indigent client after concluding the lawyer had failed to show that less conflicted alternatives were not available); MODEL RULES OF PROF'L CONDUCT R. 1.0 (2002) (defining "informed consent" to require explanation of "reasonably available alternatives to the proposed course of conduct").

24. Some of Green's arguments are aimed at targets of his own creation. My suggestion of a duty to "update" statements that are known to have become misleading

The differences between Green and me arise from a collision between the normal academic practice of public discussion and peer review and a litigation culture preoccupied with secrecy and personal credibility. The practice of making one's professional views available to public scrutiny, which is a basic normative foundation of the academy, is subversive of the established practices of the high-stakes litigation bar. These practices, however, are more the product of a tacit and insular subculture than of legal principle. For the most part, they are not supported by judicial authority, and it is possible that they are dysfunctional from the point of view, not only of the academy, but of the broader goals of the legal system.

Here I respond, first, to Green's argument that experts who intend to open their opinions to public scrutiny should be disqualified from testifying, and second, to his argument that established litigation norms are sufficient to safeguard the reliability of expert witness opinion-giving without academic-style transparency.

A. *Publicity and Credibility*

On the authority of a motion by LM&B's defense counsel that was never ruled on, Green argues that experts who intend to make their litigation opinions publicly accessible should not be permitted to testify. The reason is that publicity creates pressure to shade one's views in ways likely to win professional glory. Green also appears to endorse the defense lawyers' contention that, since academic glory is most readily achieved by harsh criticism of colleagues, publicity biases an academic expert in favor of strong criticism of opposing experts.²⁵ As a long-shot litigator's tactic, the argument reflects a certain desperate ingenuity, but it is frivolous.

Expert witnesses are virtually never disqualified on the grounds of bias.²⁶ According to the doctrine, bias goes to credibility, not to admissibility. How does the doctrine suggest publication bears on credibility? I cannot find any cases discussing the relevance of an expert's contemporaneous or intended

becomes in his hands a duty to revise whenever "new facts" come to one's attention. See Green, *supra* note 1, at 1638; Simon, *supra* note 6, at 1565-67. Green has me proposing an exceptionally demanding duty of "due diligence" for litigation experts, when I suggested that such duties should be relaxed for litigation experts. Green, *supra* note 1, at 1636-38; Simon, *supra* note 6, at 1566 n.36.

25. Green, *supra* note 1, at 1633, 1642-44. After I wrote this response, Green added a footnote to his article asserting that he was not taking a position on the merits of the defendants' motion to exclude my testimony. Green, *supra* note 1, at 1644 n.175. His argument now appears to be that I acted irresponsibly in provoking the defendants' motion even if it was meritless. This is like telling the victim of a neighborhood bully that he was "asking for it" by exercising his right to walk down the street.

26. See, e.g., *In re Unisys Savings Plan Litigation*, 173 F.3d 145, 166 n.11 (3d Cir. 1996) (stating that "expert witnesses cannot be excluded on the basis of bias"); 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 702.04[5] n.38 (Joseph M. McLaughlin ed., 2d ed. 2008).

future publication, but there are dozens of cases referring to past publication, and they invariably refer to publication as bearing *favorably* on credibility.²⁷

A plausible comparison for the kind of bias Green attributes to me is his own bias as a frequent paid expert witness.²⁸ Obviously, Green has an economic incentive to satisfy his client in this case and to maintain a reputation as an expert who reliably delivers helpful testimony. No one suggests that this bias disqualifies Green, nor denies that he has other motivations that might neutralize it. But even assuming, as Green alleges, that I damaged my credibility as an expert by writing about the case, surely Green did more damage to his credibility by charging a large fee for his testimony. (I declined to take a fee for my work in the case and rarely consult for pay.²⁹) It was perfectly legitimate for Green to charge for his opinions, but that fact shows that experts may have valid reason for doing things that impair their effectiveness.

The academic bias is in fact less distortive than the economic one. The reason is not that the quest for peer esteem is less powerful than the desire for wealth. The reason is that the selfish desire for glory is much more convergent in the expert witness situation with public interests than the desire for wealth. The academic's best strategy for attaining professional glory is to take positions on important issues that are convincing to the relevant professional community. I do not ignore the fact that the academy sometimes rewards charlatanism and vulgarity, but for most of us, they are less promising even as purely selfish strategies than well-grounded analysis.

Green's argument becomes positively bizarre when he asserts that I violated the rule prohibiting a lawyer from negotiating "media rights" with respect to a "representation" before its conclusion.³⁰ The rationale for the rule is that such rights might tempt the lawyer to conduct the representation in ways that enhance the value of the media rights to the detriment of the client (for example, by discouraging a plea bargain that would obviate a high-profile trial).³¹

The rule, however, applies to lawyers in an attorney-client relation with the subjects of the media rights, not to expert witnesses.³² I had no power to shape

27. A key source of this theme is *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593 (1993) ("[S]ubmission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected."). For the more general proposition that on balance publicity enhances responsibility, see *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884) (Holmes, J.) ("[T]rial[s] . . . should take place under the public eye . . . because . . . those who administer justice should always act under the sense of public responsibility . . .").

28. Green billed at least \$46,000 for his work in the *McNeil* case. He had testified seventeen times in the four years that preceded his expert disclosure in that case.

29. Prior to *McNeil*, I had testified twice in my twenty-seven-year academic career.

30. Green, *supra* note 1, at 1634.

31. MODEL RULES OF PROF'L RESPONSIBILITY R. 1.8 cmt. ¶ 9 (2004).

32. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-407 (1997)

any part of the case other than my own testimony. Outside the attorney-client relation, “media rights” are rights to commercially exploit personal information.³³ I was not using any information commercially, and all the information I used was in the public domain.³⁴

Although there is no dispute that an expert should have a clear understanding with the client about publication and confidentiality, Green’s characterization of my arrangement with the *McNeil* plaintiffs as “secur[ing] plaintiffs’ waiver of confidentiality” or testifying “in exchange for” the right to discuss the case publicly is tendentious.³⁵ I viewed myself not as bargaining for some special right, but as retaining the right I always had to discuss my opinions on matters of public interest.

This brings me to a final point about publicity. The key issue between Green and me is not about whether expert witness views should be publicized. Nextel went public with Hazard’s endorsement as soon as its conduct was questioned.³⁶ Kaye Scholer went public with Hazard’s exoneration.³⁷ No doubt Hazard would have been a witness in both cases had these clients gone to trial. The Nextel claimants first came to me in the course of trying to publicize their claims; they asked me to talk to ABC News. In doing so, they were simply following the example of LM&B, which launched its campaign against Nextel with a publicity barrage.³⁸ (Does Green think that, in doing so, the firm violated the “media rights” rule?) What Green really objects to seems to be, not that my views were made public, but that I did not surrender to the clients my *independence* to decide when and how to do so. Yet, surely independence is precisely what is supposed to distinguish the expert from the advocate.

(stating that lawyer serving as expert witness for a party “does not thereby establish a client-lawyer relationship with the party”).

Green’s assertion that I have had an attorney-client or advocacy relation with some claimants against LM&B is false. Green, *supra* note 1, at 1652-53. I have given my views to lawyers representing claimants but have not helped them develop positions or opinions with which I disagree. I have never accepted a duty of loyalty to any Nextel claimant, and in the *McNeil* deposition, I disclosed my communications with plaintiffs’ counsel without reservation.

33. See 3 & 4 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 17-20 (3d ed. 2005). Even within the attorney-client relation, the “media rights” rule may apply only to agreements for commercial exploitation. See 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 36 cmt. d (2000) (interpreting the “media rights” rule as applying to “contracts in which the lawyer acquires the right to sell or share in future profits from descriptions of events covered by the representation”).

34. See *In re* “Agent Orange” Product Liability Litigation, 104 F.R.D. 559, 567 (E.D.N.Y. 1985) (holding that discovery materials are presumptively “open to the public”).

35. Green, *supra* note 1, at 1607, 1644.

36. See Story by Sarah Wallace (ABC television broadcast Nov. 4, 2003) (on file with author).

37. Susan Beck & Michael Orey, *They Got What They Deserved*, AM. LAW., May 1992, at 68.

38. Seth Schiesel, *Workers Plan Bias Lawsuits Against Nextel*, N.Y. TIMES, June 20, 2000, at C1 (reporting on an interview with an LM&B lawyer about Nextel claims).

B. *Litigation Process and Accountability*

Green argues that the kind of diffuse public accountability I call for is unnecessary because the litigation process generates sufficient pressures that hold experts accountable. Experts are subject to discovery before trial and cross-examination at trial. Their testimony will be assessed at trial in critical comparison with that of opposing experts. Green thinks that, as a general matter, such processes are adequate to ensure reliability, and as a specific matter, that they warrant giving strong or conclusive weight to the Denver trial court's decision in favor of LM&B.³⁹

However, the legal process and the sphere of public and academic debate function in different ways. Although their purposes overlap, they are not co-extensive. As a mechanism of public accountability, litigation is not a plausible substitute for public review and criticism. At best, it is a complement. The courts are better able to impose practical solutions to specific problems when they are needed and to deal with people who act in bad faith. However, they are less well equipped to settle matters of principle, and their processes often induce bad faith.

This is not the place for a full-scale consideration of the matter, but I can suggest some basic differences between litigation practices on the one hand and the more informal processes of civil society debate on the other that indicate why, without the kind of transparency I recommend, the former are unlikely to afford sufficient safeguards of professional accountability.

Finality. The courts deal with claims for coercive state intervention, and there is a social interest in limiting the pendency of such claims. Thus, the courts declare their decisions final at some point. But to the extent cases involve matters of public principle, such declarations are often arbitrary and they do not bind public discussion. Anyone who finds the Nextel issues interesting has no more reason to regard the Denver trial verdict as conclusive than she does to refuse to consider whether the Triangle Shirtwaist Company was negligent because it was exonerated by a jury. (The *McNeil* trial verdict says little about the issues even as a matter of civil procedure. If and when it becomes final, it will be binding on only two of the nearly six-hundred Nextel claimants. Most of them participated in the settlement of another case, and some are involved in a pending one.)

Incomplete alignment of process and substance. Most cases are settled rather than tried, and many are settled without significant discovery. In such cases, experts can give opinions that have influence without being subjected to extensive challenge or scrutiny. Some prominent experts charge large retainers on the premise that the mere announcement that they are testifying will give

39. In view of the importance he attaches to the deposition as a mechanism of expert accountability, Green, *supra* note 1, at 1622, 1640, 1648, it is worth noting that Green's deposition was never taken in the *McNeil* case.

their client a settlement advantage. In many cases, the parties have highly unequal resources. (That was strikingly true of *McNeil*, which pitted a sole practitioner working on contingency against three law firms well funded by insurance money.) And the skill of an advocate or a witness can often make more difference than the underlying merits. (Lawyers like to think both that the litigation process routinely generates correct results and that an exceptionally good lawyer can dramatically increase a client's chance of winning. But to the extent that the second proposition is true, the first cannot be.)

Compression and credibility. The public phase of the trial process is strongly and artificially compressed. The parties prepare more or less in secret for a long period and they must execute a highly orchestrated performance in a very short time. The performance places very high demands on the concentration and memory of the trier, especially when it is a jury.

For this reason, litigators strive for simplification and dramatization. The trial has a tendency to evolve toward a war of sound bites—small dramatic dialogue moments—that the lawyers hope to assemble into a coherent picture in closing argument. With expert witnesses, these tendencies lead to an emphasis on credibility over substance. It is easy to show on cross-examination that an expert made a prior inconsistent statement or a minor factual mistake or that her brother-in-law works for the party she is testifying for. It often takes much more skill and time to show that she made an error of logic, failed to gather adequate data, or misapplied an analytical method. Thus, the discovery process is often more preoccupied with a search for prior inconsistent statements or embarrassing background facts about the expert than for the factors that a peer would consider most important to assessing her credibility.

Adversarial information control. As Green emphasizes, conventional litigation practices require the expert to give her client control over the people she talks to about the case. Usually, this means that she will refrain from discussing her ideas with disinterested colleagues and will talk only to people with a single partisan view of the case. In the academic world, on the other hand, engagement with people of different views is considered essential to sound understanding. The divergence between litigation and academic norms is illustrated by Green's portrayal of my sending him a draft of my article, a routine requirement of academic fairness, as a sinister act.⁴⁰

Publicity. The attitude of the court system to transparency is more complex and qualified than that of the academy. As between the parties, the court system gives each the right to demand any material information from the other that she

40. See Green, *supra* note 1, at 1643. The value of this practice does not depend, as Green suggests, on whether the sender is acting from "collegial" or strategic motives. If Green had responded with material information or compelling arguments, I would have been obliged to take account of his response even if it changed or weakened my position. The inference from Green's silence that I drew was rational and revealing. The most important function of the practice of sending drafts to people we criticize lies in its tendency to engender more reliable understanding, not in the subjective dispositions it expresses.

can describe with reasonable particularity, and this right is more readily enforceable against a person in bad faith than academic norms, which rely mostly on soft sanctions. On the other hand, there is usually no duty in litigation to volunteer information that is not requested, and lawyers sometimes have an ethical duty to withhold material information. With respect to public disclosure, the court system pays lip service to values of public access, but it compromises these values in two ways. First, it (too) readily allows parties to seal records or obtain gag orders. Second, even to the extent information is public in principle, the courts often do not make it practically accessible.⁴¹

Privacy. Confidentiality, in essence, is the private right to control information even when it is material to resolution of a public controversy. Privacy is the right to withhold information that is both personal and not material to public issues. In the academic world, confidentiality is weak, but privacy is strong. Scholars are generally honor-bound to disclose material information but, aside from a few basic concerns like financial relationships, are not subject to compulsory disclosure of private information.

By contrast, in the litigation culture, confidentiality is strong, but privacy is weak. Because the culture is preoccupied with motivation and bad faith, witnesses are subject to broad interrogation on personal background information. Expert witnesses, for example, are routinely asked to disclose all the conversations they have had with anyone about the substance of their testimony. Such discovery includes both tentative statements that are later discarded, and the kind of casual personal remarks that are routinely made in private conversation but look embarrassing when made public. The absence of privacy in the litigation sphere has some perverse effects. It causes some experts to refuse to participate. It reinforces the tendency I have already mentioned to avoid discussion with peers or committing tentative thoughts to paper. And it seems to encourage an artificial projection of confidence in court.

Reputation. An academic who takes a position publicly on some issue in her field puts her reputation at risk. Reputations are constructed diffusely and incrementally. There is a good deal of “noise” in the process, but most academics believe that there is a correlation between good practice and good reputation, and that, overall, reputation creates incentives for disinterestedness and intellectual rigor.

Reputational forces cannot operate strongly in the litigation area. Under current practice, the positions an academic takes as a witness are rarely subject to scrutiny in her own field. These opinions are addressed to a judge or jury, but the judge rarely sees the expert more than once and the jury never does. The

41. Green repeats Paul Gordon's assertion that “the Denver District Court public record . . . speaks for itself” as to whether Gordon or I was responsible for any delays in the disclosure of my anticipated testimony. Green, *supra* note 1, at 143 n.186. Yet, Green knows that hardly any readers outside of Colorado will have access to the record. (Although I have only limited access myself, I know of nothing that indicates I was responsible, and something tells me that, if Green did, he would not have hesitated to report it.)

only repeat players in the litigation process who are in a position to keep track of expert reputations are the litigators. Even they have only incomplete information about the expert's prior litigation opinions, but they are in a position to take account of the information they have in deciding whom to engage. However, their incentives are quite different from those of academic peers. They value experts in terms of how helpful their testimony is to their clients' claims. The most desirable quality for them is a combination of discreet partisanship and strategic cleverness. Thus, reputational forces in the litigation realm do not encourage disinterestedness or professional rigor in the way they do in the world of public discourse.

CONCLUSION

Green's Article exceeds the combined length of my original Article and this Reply. In all that space, he is unable to point to a single material error or omission in my account of the Nextel record (and only one nonmaterial one). The evidence needed to assess my criticisms is fully available to any reader willing to make the effort.

Much of Green's article is devoted to accusations of impropriety on my part that have no bearing on the issues I raised. Some of this discussion illustrates that preoccupation with credibility and bias is, in words of mine that Green quotes, "paralyzing and trivializing."⁴² Some of it is more ugly than tedious. Green is oblivious to the distinction between a critique of publicly expressed opinions based on an incomplete record and an accusation of private misconduct based on no evidence at all. The former, exemplified by my critique of Green's Nextel opinions, is legitimate and necessary in a world of scarce information. The latter, exemplified by Green's speculation that I did not get adequate consent from the *McNeil* plaintiffs, is McCarthyism. It is true that "there is no indication that the plaintiffs understood" my intentions⁴³ only in the sense that it is true that "there is no indication" that Green is not embezzling from Fordham Law School or assisting Al Qaeda.

Green is correct that the norms of the litigation culture differ from those of the academic one. It is arguable (though doubtful to me) that that the former are optimal for dispute resolution purposes. However, they are inimical to effective public resolution of controversies. To that extent, Green's confidence in the capacity of conventional litigation practices to neutralize the perverse pressures of the market for bad legal advice seems misplaced.

42. *Id.* at 1646 n.181.

43. *Id.* at 1633.