



Notre Dame Law Review

Volume 63 | Issue 5

Article 13

1-1-1988

Unsteady Triumvirate

John F. Grady

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>

 Part of the [Law Commons](#)

Recommended Citation

John F. Grady, *Unsteady Triumvirate*, 63 Notre Dame L. Rev. 830 (2014).

Available at: <http://scholarship.law.nd.edu/ndlr/vol63/iss5/13>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

The Unsteady Triumvirate

*John F. Grady**

It was a pleasure to be part of the recent conference commemorating the fiftieth anniversary of the adoption of the Federal Rules of Civil Procedure. It is a particular privilege to be chairman of the Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure during this anniversary year. As you know, the Committee is responsible for reporting to the Judicial Conference concerning any need for revision of the rules, a process which has been continuous since their adoption. The success of the rules has been due in no small part to the responsiveness of the rule-making process to the suggestions received from the bench, the bar, and members of the public. The 1983 amendments to Rules 11, 16 and 26, addressed to irresponsible pleading and excessive discovery, are examples of the process at work.

The Advisory Committee, like so many bodies concerned with improvement of the law, is composed of representatives from the three branches of the profession: practicing lawyers, judges and academics. The combination is a happy one, with synergistic results. Law professors bring to the rule-making task a sense of history and a broad conception of the goals we seek to accomplish. The judges offer knowledge as to how the rules work in practice, at least from the judicial perspective, as well as educated predictions as to what results might be expected from proposed changes. The practical experience of the lawyer members of the Committee provides a necessary balance. It is remarkable how often an idea seems attractive in theory, but a judge or lawyer will point out a problem that can best be seen, and sometimes can only be seen, from the perspective of practical experience. Other ideas, apparently new, may seem worth trying, until the professorial contingent points out that the idea is really a very close cousin to something that was tried unsuccessfully long ago.

This triumvirate of lawyers, judges and professors is, then, an ideal group for carrying out the rule-making function. If making rules were all that the administration of justice required, we would be in wonderful shape. But obviously there is more to the process than drafting the rules. The next step, and the really crucial one, is to make the rules work in the manner intended by the drafters. The job of making the rules work is entrusted to the same triumvirate that drafts them—lawyers, judges and academicians. The analogy might be drawn to the coaching staff that carefully devises an imaginative and resourceful game plan. These same coaches will be in charge of “executing” the game plan on Saturday. As any fan knows, there is often a difference between the plan and its execution. Such a difference exists between the drafting and the execution of

* Chief Judge, United States District Court, Northern District of Illinois.

the Federal Rules of Civil Procedure: the legal profession has done a good job of planning, but the execution is disappointing.

It seems fair to judge the performance of the profession by how well the stated purpose of the rules is being realized. That purpose is expressed in Rule 1, which provides that the rules "shall be construed to secure the just, speedy and inexpensive determination of every action." The word "just" in this context probably refers to procedural fairness, and that implies procedures that do not unnecessarily delay the disposition of the case and are not unduly expensive. In short, the rules should operate in a manner that affords the litigants a fair determination of their case within a reasonable time after filing and without more expense than is reasonably necessary. Present-day litigation in the federal courts often falls short of this standard. The failure occurs not only in complex cases but in the relatively simple ones as well. Each branch of the profession bears a significant share of the responsibility.

I. The Lawyers

Part of the problem is illustrated by a conversation I had recently with a partner in a large Chicago law firm. He specializes in real estate matters and has nothing to do with litigation. He shared with me his reaction to a conversation he overheard among several members of the litigation department of his firm. They were joking about the "unfortunate" fact that a major piece of litigation was coming to an end, with the result that the sizeable fees the firm had been receiving would also come to an end. The real estate lawyer was offended by the conversation for two reasons. First, he thought it inappropriate to make a joke about subordinating the interest of the client to the financial interests of the lawyer. But more importantly, he was offended because he believes that litigation is prohibitively expensive, and that a major reason for this is that many of the decisions about the conduct of the litigation are made with an eye toward increasing fees rather than accomplishing something for the client.

There is nothing new about this concern expressed by the real estate lawyer. Whether the motive is entirely greed or partially a misguided desire to take every possible step to protect the interest of the client, there is no doubt that the number of "billable hours" spent on federal litigation is a multiple of what it should be. The excessiveness takes two forms. One is the improvident use of the procedural devices permitted by the rules. The other is the assignment of more lawyers to a task than are necessary to perform it.

Examples of misuse are well known to every litigator. Motions to dismiss are made routinely without adequate basis. Motions for summary judgment are filed in cases that fairly bristle with contested issues of material fact. The 1983 amendment of Rule 11 has done much to curb these filings, but the number of dispositive motions is still far in excess of the number warranted and, of course, Rule 11 litigation itself is becoming a major industry. Depositions—the closest most lawyers get to the trial of a case—are probably the most frequent occasion of unnecessary

fees and expenses. Too often, the deposition of everyone connected with the case is taken, regardless of whether the deposition can reasonably be expected to improve the client's position in the case. Distance and transportation expenses are often not considered. Witnesses whose testimony is altogether predictable will be deposed so as to "nail down" their testimony for a trial that everyone knows is almost certain not to occur. (In the Northern District of Illinois, for instance, trial is commenced in less than three percent of our civil cases.) Witnesses whose testimony is not known are deposed in order to find out what it is; less expensive means of investigation, such as using a private investigator or simply picking up the telephone to call the witness, are unknown to many modern litigators.

Unnecessary projects are only part of the problem. Perhaps the major aspect of excessive cost is the duplication of services. Two, three, or even four lawyers will participate in the drafting and "review" of even fairly simple motions. Briefs are usually a group project. Two or even three lawyers may attend a deposition on behalf of a single party. Two or three lawyers may represent the same party at a routine court appearance. If an argument is made, one will make the argument and two will sit and watch. And everything they do is discussed with each other in frequent "conferences," which are the major item in most bills to the client.

All of this would not be so bad if appropriate allowance were made for unproductive and duplicative hours. But it is not; the client is usually billed for every hour spent by every lawyer and paralegal who participates in the case, with no consideration at all for what was accomplished.

The extent to which this has become an accepted, uncriticized way of life in much of the legal community was illustrated recently when it was discovered that a litigation partner in a large Chicago law firm had never graduated from law school, taken the bar examination, or obtained a license to practice law. Notwithstanding these omissions, he had been a well-regarded litigator for ten years. When his lack of credentials was discovered, he was immediately discharged by the law firm and questions arose as to whether former clients of the firm would be able to recover for any deficiency in his performance over the years. The discharged lawyer retained a lawyer himself, and that lawyer, when interviewed by the press, expressed the opinion that there would be no professional liability, because his client ". . . never handled a case to my knowledge alone. He was always with other lawyers from the firm."¹ Significantly, the lengthy and detailed newspaper article raised no eyebrow as to why, in ten years, a lawyer would not handle even one legal matter alone.

I see the results of these excessive costs most dramatically when, in conferring with lawyers about the possibility of settlement, they tell me their clients have spent so much money prosecuting or defending the case that they cannot afford to settle. I have seen \$15,000 cases in which the parties have spent more than that in pretrial motions and discovery.

¹ Chicago Tribune, May 6, 1988, § 1 at 18.

Sometimes the only way a settlement can be accomplished is for the attorneys to reduce their fees.

Excessive costs are no more defensible in a "big" case, but they are much less obvious, and they tend to fall on clients who are better able to afford them or to pass them on to the public. But despite the impression created by the publicity given big cases, most federal cases are not big. The vast majority involve far less than \$50,000, and most are settled for a fraction of that. For one thing, the anachronistic \$10,000 threshold for diversity cases ensures that a large number of small contract and tort cases will be filed in federal court.

Overuse of procedures and duplication of effort are not the only reasons the Bar has fallen short in using the Federal Rules to bring about the just, speedy and inexpensive determination of every action. There is also the matter of competence. Ignorance of the available procedures and ineptitude in their use contribute enormously to the expense and delay in the disposition of cases.

It is not uncommon for complaints to be repeatedly amended before a simple claim is stated. The questions asked at depositions are sometimes incomprehensible, so that the answer given by the witness is also necessarily incomprehensible or at least ambiguous. I tried a lengthy case recently in which some of the deposition testimony the parties offered had to be refused because the questions were so badly phrased the answers could not be understood. The jury, therefore, did not have the benefit of the testimony, because the witnesses were unavailable for trial.

After the trial of a recent patent case, the prevailing defendant moved for fees and costs pursuant to Rule 37(c) on the ground that much of what was proved at trial should have been admitted by the plaintiff in response to defendant's Rule 36 requests for admissions. The trial had been a lengthy one, and the amount requested came to several hundred thousand dollars, most of which was probably reasonable. I had to deny the motion, however, because upon examining the requests for admission I found they were so ambiguously worded as to permit the denials the plaintiff had made.

Similar problems occur every day with Rule 33 interrogatories. Motions are sometimes necessary to clarify what they mean. Often what they mean is not very important: it is commonplace to shower the opponent with interrogatories calling for information already known or which is immaterial, omitting interrogatories on matters that are material and peculiarly susceptible of discovery by this means. This is true even when, in response to the practice of propounding oppressive numbers of interrogatories, district courts have adopted local rules limiting the permissible number. Rule 36 requests for admissions, despite their obvious economy and capacity for shortening the litigation, are almost never used. When they are, as likely as not they will be frittered away on immaterial matters.

There is, as far as I can tell, very little formal training of new lawyers by the more experienced practitioners in the firms that employ them. One goes directly from law school to the drafting of interrogatories or

sitting in on depositions. To learn what an interrogatory should look like, one refers to a "form" used in another case by someone who probably did the same thing. Mistakes tend to become grooved. The word processor does nothing to encourage innovation. Young lawyers are encouraged to attend trial practice seminars, and there is even in-house instruction concerning trial practice. However, there are very few trials, and the students at these seminars are unlikely to play a significant role in any trial for many years to come. But they will be engaged in preparation of pleadings, motions, interrogatories and the other expensive "pre-trial" paperwork on a daily basis. These are the areas where instruction is needed, but the practicing Bar does not provide it.

II. The Judges

It is only fair to point out that some of the unnecessary work lawyers do, albeit usually without objection, is imposed upon them by federal district judges. The elaborate pretrial order is a prime example. This document, which sometimes takes days or even weeks to prepare, is supposed to enhance settlement prospects or in any event facilitate the trial. A desire to avoid the expense does occasionally cause parties to settle rather than prepare the order, but the justice of a settlement reached under that kind of duress is suspect at best. In the majority of cases where these pretrial orders are required by the court, the lawyers do spend the time necessary to put the material together—statements of contested issues, statements of uncontested issues, lists of witnesses, summaries of their testimony, lists of documents, lists of objections to documents, and so on—at enormous expense and with no perceptible benefit to the clients. Formal stipulations can accomplish, in a fraction of the time, everything useful that might be found in such a pretrial order.

There seems to be a growing tendency of federal trial judges to require briefing of motions instead of hearing oral argument. Many motions do require briefing, to be sure. But many can be handled with much less expense by a short oral argument. This inclination to take everything on briefs, aside from causing unnecessary expense to the parties, has another unfortunate consequence: lawyers have fewer opportunities to develop and practice the art of oral argument, and this, it seems to me, must diminish the attraction and the effectiveness of our profession in some unmeasurable degree.

Federal judges have played a major role in shaping the fee structure that makes federal litigation so expensive. Their participation in the fee-setting process is mandated by the plethora of federal statutes which require the court to determine and award reasonable fees to the prevailing party. The theory of these statutes is that courts will award fees based on market rates for similar work. The "market" is supposedly the universe of fees paid by willing clients in comparable situations. That universe, however, is difficult to find. The reality is that the "market" value of legal services in federal cases is usually determined by reference to the fees awarded by judges in other federal cases.

Deciding fee petitions is perhaps the most onerous part of a federal district judge's job. The number of petitions is escalating, because of the increasing number of cases brought under fee-shifting statutes as well as frequent Rule 11 fee petitions. It is difficult to find the time to make the detailed analysis necessary to determine what part of the work described in the petition was necessary and what part was excessive or duplicative. However, an unwillingness to spend this time will often result in approval of fees which are far in excess of the reasonable value of the services reasonably required in the case.

It is not enough simply to monitor fees and to protect the losing party from an unreasonable assessment. Anything not paid by the losing party will still be billed to the prevailing client. Moreover, many cases do not involve fee shifting, and the court has no role whatever in establishing fees. If judges are to do their part in bringing about a just, speedy and inexpensive determination of every action, they must enter into the process at an early stage, before the unnecessary time has been spent and the excessive fees have been incurred. This was the intent of the 1983 amendment of Rule 16, providing for a conference between court and counsel within 120 days of the filing of the complaint, for the purpose of expediting and simplifying the case. I find that an early conference with counsel, often before the defendant has even filed a responsive pleading, is almost always rewarding in terms of simplifying the case, eliminating issues not genuinely in dispute, limiting discovery and sometimes even settling the case. Such conferences take time, of course, and many judges believe their time is better spent trying cases and writing opinions, leaving pretrial management to the lawyers. This attitude is a major part of the problem.

III. The Professors

When I hold Rule 16 conferences with young lawyers and ask what can be done to eliminate work and save costs in the case, the reaction I sometimes get is a puzzled look. It is apparent that no one has talked to them this way before. Their view of the case is often that discovery must run its course, then the issues can be identified and the possibility of settlement explored. When I suggest that the issues should be identified *before* discovery is undertaken, so as to eliminate unnecessary discovery, they are usually skeptical. A few minutes' discussion will often demonstrate the feasibility of this approach, and I sometimes make a convert.

What I carry away from experiences like this is a strong impression that the law schools do not have the teaching of professional responsibility as a high priority. It is possible to take a course in federal civil procedure without once having heard any emphasis placed on the goals of Rule 1. Students learn what complaints and answers are, what motions to dismiss and motions for summary judgment are, and when and where depositions may be taken. They emerge from the course with a desire to use these tools, but little sense of whose interest the tools are meant to serve. Who is to teach them the answer to that question? Who is even to pose the question for them? Most law offices will not do it. Experienced

practitioners may or may not use the rules in a way that is consistently in the best interest of their clients, but they are unlikely, in any event, to articulate the ethical decision that is implicit in their conduct. If there is to be any such discussion, some sponsor other than the practicing lawyer must be found. The number of logical candidates is obviously limited. Specifically, there seems to be one. And it would be difficult to imagine a more suitable environment for the discussion of ethical questions than the law school classroom, distant from any mundane concerns about meeting the overhead or the mortgage on the summer home. The subject of economy in the handling of cases does not have to become the principal item in the curriculum in order to get the point across; I am not suggesting that professors become evangelists or that the line between Rule 12(b)(6) and the Seventh Commandment be erased. But I do not see how one can be an adequate professor while abstaining from consideration of the underlying purpose of the subject under study. A rough analogy would be a professor of surgery who simply taught the technique of cutting, with no reference to the question of whether the cutting will be of value to the patient. (The reason the analogy is rough is that, as I will mention shortly, the law professors generally do not even teach technique.)

For a long time, I have agreed with the view that, to make an impression upon law students, professional responsibility must be taught not as a separate course (which implies that it is a subject distinct from the study of contracts, torts, and civil procedure), but as an integral part of each of the substantive courses. In my remarks at this very conference, I suggested that the obligation of the lawyer to use the rules of procedure in a way that avoids unnecessary expense and delay should be taught as part of the civil procedure course. I do not mean that the professor would stand in front of the class and pontificate, but rather, that Rule 1 considerations would be a part of the class discussion and be included in the Socratic dialogue of which professors are so fond. It should be fun. One of the exasperating things about the almost universal failure to teach law in this way is that it would be so easy.

During the discussion period following my remarks, one of the conference participants, a former dean of a prestigious law school, said that his school had tried incorporating ethical instruction in the substantive courses but that it had not worked and the effort had to be abandoned. He did not say why it had not worked, and I regret that we moved on to other things and did not develop the thought. Interestingly, however, two other conference participants approached me at the close of the session and said they agreed with my suggestion entirely and, in fact, are covering ethical questions in the civil procedure courses they teach.

There are, of course, those who question whether the attitudes of law students can really be affected by the kind of discourse I propose. However, law schools are already teaching courses in professional responsibility. Even though the inclusion of these courses has sometimes been a response to requirements imposed by state bar examiners, the premise is nonetheless that the courses will do some good. One answer

to the skeptics, then, is that if the course does some good when taught separately, it would be even more useful to make professional responsibility an integral part of each course in the curriculum. My own answer, based partly on intuition, is that law students can indeed be motivated by the inspiration of ethics taught in a meaningful way.

One thing that may account for the reluctance of academics to explore the ethical problems associated with their substantive courses—and this is merely a hunch—is that this kind of inquiry may not be considered “intellectual” enough. Commitment to ethical positions may not be consistent with the “detachment” thought necessary for professorial respectability. I hope this suggestion is without basis, and that law professors are willing to share with the great philosophers a fascination with ethical questions.

I think the problem of incompetence is also partially due to a failure of the law schools to perform their proper teaching function. I know the attitude of most law schools is that they should not be places where “how to do it” courses are taught. That should be left to practical experience after graduation, with the emphasis in law school placed on the teaching of legal principles and legal analysis. I have no argument at all with this proposition in the abstract. Indeed, I think many young lawyers are entering practice today from law schools where there has been too little emphasis on the theoretical aspects of the law. But I also think that here, as in most things, there is a range of accommodation between the extremes. Most law schools, for instance, have instituted trial practice courses and have legal clinics that afford students the opportunity for hands-on experience with clients and their concrete problems. This is apparently not seen as unduly pedestrian. I believe that civil procedure courses fall short in not requiring students to develop skills in the use of the procedures they are studying. Instead of simply learning that a complaint is the way to begin a case, students should be taught to draft complaints in a concise, understandable manner as required by Rule 8. What good does it do to know that Rule 8(e) contains such a requirement if the student is unable to fulfill it? Can it reasonably be argued that a student who is taught what he should do, but is unable to do it, has learned the course? I can think of no other discipline where such a proposition would be suggested. I do not think it is suggested by the law schools. The problem, it seems to me, is that they have not thought about the matter one way or the other.

There is nothing revolutionary about the idea that a civil procedure student should not simply learn that there are such things as interrogatories and requests for admissions, but should also learn to draft such instruments in a way that will force the disclosure of relevant facts concerning material issues in the case. Learning about depositions, if it is to be of any use, should include learning how to ask questions that will not waste time and will elicit relevant and usable responses from the witness.

I do not pretend to know the best mixture of the “practical” and the “theoretical,” if, for convenience, we can use those terms. That is best

left to the judgment of those whose calling it is to teach. I do believe, however, that it should be possible to turn out a law school graduate who both understands the legal principles underlying the rules of procedure and has demonstrated a proficiency in the use of those procedures, without losing anything that is valuable in the current approach to teaching the subject.

What I propose is nothing that present teachers of civil procedure are incapable of doing. It will involve work, to be sure; it is much more pleasurable to pace the front of the classroom lecturing on theoretical subjects than it is to evaluate a student draft of a complaint for a securities violation, just as it is more pleasant for a judge to try a case than to struggle with a fee petition. In any event, it would be a mistake to assume that practicing lawyers are best suited to take over the job of teaching civil procedure. There is no reason to think the practicing bar would set a better example in the classroom than it does in the practice.

IV. The Next Fifty Years

The cost of litigating in the federal courts is now beyond the reach of all but wealthy clients or those whose cases can be handled on a contingent fee basis. Part of the problem is that lawyers' hourly rates have risen above the level most people are able to pay. But a more important reason for this financial barrier to the courts is the failure of the legal profession to deliver legal services, whatever the hourly rates might be, in a manner that is cost effective for the client. People will continue to have disputes with each other, and our society will continue its quest for effective and economical ways of resolving them. The desire for justice is a preoccupation of the democratic mind. Legal institutions which do not satisfy that desire must ultimately lose their relevance. Litigation in the federal courts is certainly not the only conceivable way of resolving the kinds of disputes that are presently litigated there. Arbitration, mediation and other alternate means of dispute resolution are being tried, sometimes with remarkable success. If the performance of the triumvirate improves substantially, the federal courts will continue their important role in the administration of civil justice. Otherwise, any conference held to commemorate the 100th anniversary of the Federal Rules of Civil Procedure could be devoted to a discussion of how the federal courts fell into disuse, and why the promise of Rule 1 was not fulfilled.