Law & Inequality: A Journal of Theory and Practice

Volume 4 | Issue 1 Article 9

1986

Taming the Monster Case: Management of Complex Litigation

Christine Durham

Taming the "Monster Case": Management of Complex Litigation

The Honorable Christine Durham*

I hope that my remarks will offer food for thought and technical information that will be helpful in managing trial dockets and the complex cases they increasingly contain. Two themes express my orientation to this subject. The first is "Passive judges are passé." The second is "Fairness does not require laissez faire."

In his famous address at the 1906 meeting of the American Bar Association, Dean Roscoe Pound described this country's judicial system as follows:

> The supporting theory of justice, the "instinct of giving the game fair play," as Professor Wigmore has put it, is so rooted in the profession in America that most of us take it for a fundamental legal tenet. . . . So far from being a fundamental fact of jurisprudence, it is peculiar to Anglo-American law; and it has been strongly curbed in modern English practice. With us, it is not merely in full acceptance, it has been developed and its collateral possibilities have been cultivated to the furthest extent.[1]

I think he was in error; we have found much to cultivate since that time.

In America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules, and that the parties should fight out their game in their own way without judicial interference. We resent such interference and view it as unfair, even when the interference is in the interest of justice. The idea that procedure must of necessity be wholly contentious, however, disfigures our judicial administration at every point. It leaves the most conscientious judge to feel that she is merely to decide the contest as counsel presented it, according to the rules of the game, and not to search independently for truth and justice. It encourages counsel to forget that they are officers of the court.

Dean Pound goes on to summarize that the effect of this ex-

---

* Justice, Utah Supreme Court.

1. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 35 F.R.D. 273, 281 (1964).

aggerated emphasis on contention is not only to irritate parties, witnesses, and jurors, but also to give the whole community a false notion of the purpose and end of law. He ended his famous presentation with a challenge to the American Bar Association to encourage its members to do something about the problem.

For approximately the last thirty years, since sometime in the mid-1950's, American judges and lawyers have been responding to this challenge by trying to develop procedures to resolve enormously complex litigation in a speedy, just, and inexpensive manner without losing in that process any of the protections afforded by the adversarial system of justice.

The second revision of the *Manual for Complex Litigation*, the "bible" for complex cases in the federal courts, was completed in 1985. The manual is an excellent resource for technical information and reference materials. The revised manual contains the following statement of general principles: "Fair and efficient resolution of complex litigation depends upon effective control and supervision by the court, dedication and professionalism of counsel, and the collaboration of the judge and the attorneys in developing, implementing, and monitoring a positive plan for the conduct of pretrial and trial proceedings."[2]

Arthur Miller, who sits on the advisory committee for the Federal Rules of Civil Procedure, once observed that in many ways "[contemporary litigation is analogous to the] dance marathon contests. The object [of the exercise] is to get out on the dance floor, sort of hug your opponent, and move aimlessly and shiftlessly to the music with no objective in mind other than to outlast everybody else."[3] That is precisely what happens in a great deal of civil litigation in our state and federal courts.

The federal courts, as is reflected by the existence of the manual and by the emphasis of the rules committee, have exercised leadership in the development of procedures to respond to this problem. Illustrative of that leadership are four themes that Professor Miller has described as emerging from the work of the advisory committee.[4]

The first theme is the widespread feeling that trial lawyers should be more responsible and professional than they have been in some instances. This means that the judge must deter marginal,

2. Manual for Complex Litigation, Second § 20 (1985).

3. Arthur Miller, The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management & Lawyer Responsibility 9 (Federal Judicial Center 1984).

4. *See generally id.*

let alone frivolous, activity in pleadings, motions, discovery, and trial practice.

The second theme that has emerged from the committee's work is that judges must manage and control litigation in order to restrain lawyer excesses and to move cases toward earlier disposition, whether by settlement or by adjudication.

The third theme is that, since discovery has become the centerpiece of so much of the pretrial process, conduct that amounts to overzealousness and underresponsiveness in the discovery process must be curtailed and controlled.

The fourth theme relates to appropriate sanctions. We are seeing an increasing emphasis on and development of the theory and law relating to sanctions as the need for judicial control expands. Appropriate sanctions, according to the committee, should be imposed whenever there is a failure to comply with the rules both as a matter of equity in a particular lawsuit and in order to deter similar behavior in other cases.

Judges from state jurisdictions might think my comments are irrelevant because they have been generated by federal practice and because so many of the references are to the federal rules. State courts, however, frequently use rules of civil procedure modeled after the federal court rules. My most recent informal survey indicates that over thirty states currently have rules modeled after the federal rules with only slight modifications, and another dozen have rules which are so close to the federal rules as to contain the same reference numbers. Thus the federal rules of civil procedure are influential.

The preface from the revised *Manual for Complex Litigation, Second* begins with reference to the fair and efficient resolution of complex litigation. Theorists, lawyers, and certainly many judges perceive some tension between the concept of fairness on the one hand and efficiency on the other. Whether that tension is real and inherent in the litigation process or only supposed or perceived will be, I think, a question for continuing debate. You may be interested in a brief reference to the current status of the debate.

Professor Judith Resnik from the University of Southern California wrote an article a couple of years ago entitled *Managerial Judges*, in which she had the following to say:

> Until recently, the American legal establishment embraced a classical view of the judicial role. Under this view, judges are not supposed to have an involvement or interest in the controversies they adjudicate. Disengagement and dispassion supposedly enable judges to decide cases fairly and impartially. The mythic emblems surrounding the goddess Justice

> illustrate this vision of the proper judicial attitude: Justice carries scales, reflecting the obligation to balance claims fairly; she possesses a sword, giving her great power to enforce decisions; and she wears a blindfold, protecting her from distractions.
>
> Many federal judges have departed from their earlier attitudes; they have dropped the relatively disinterested pose to adopt a more active, "managerial" stance. In growing numbers, judges are not only adjudicating the merits of issues presented to them by litigants, but also are meeting with parties in chambers to encourage settlement of disputes and to supervise case preparation. Both before and after the trial, judges are playing a critical role in shaping litigation and influencing results.[5]

Professor Resnik compares and contrasts post-trial supervision with pretrial management and suggests that both post-trial supervision and pretrial management, to some degree, represent a departure from the American judicial tradition that poses risks for the administration of justice. Her concluding paragraph states:

> I want to take away trial judges' roving commission and to bring back the blindfold. I want judges to balance the scales, not abandon them altogether in the press to dispose of cases quickly. No one has convincingly discredited the virtues of disinterest and disengagement, virtues that form the bases of the judiciary's authority. Our society has not yet openly and deliberately decided to discard the traditional adversarial model in favor of some version of the continental or inquisitorial model. Until we do so, federal judges should remain true to their ancestry and emulate the goddess Justicia. I fear that, as it moves closer to administration, adjudication may be in danger of ceasing to be.[6]

The dimensions of the debate over the proper judicial role are illustrated by Professor Resnik's article and writers who have responded to her. One commentator wrote:

> I wish to reassure Professor Resnik's readers, as well as others who are interested in the direction of the civil litigation system. Resnik exagerates [sic] the extent of any judicial activity that is inconsistent with due process. More important, she confuses genuinely questionable approaches, which have long been understood to be questionable and thus are rare in practice, with established practices that are generally recognized as acceptable and even essential. By muddling almost every managerial technique that a trial judge might use with the special and well-understood concerns that attend an aggressive judi-

5. Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 376, 376-77 (1982) (footnotes omitted).

6. *Id*. at 445 (footnote omitted).

> cial insistence on settlement, Resnik does a disservice . . . .[7]

I agree that Resnik does a disservice in suggesting that "all judicial case management, however unexceptional, is inconsistent with due process or with traditional images of justice."[8] The active judge who is committed to an affirmative role in the conduct of complex trial cases can significantly improve both the process and the product if she shares the absolute conviction that fairness and justice can be served simultaneously by the imposition of controls and manageable boundaries on the case.

Assuming one is convinced that taking an affirmative and an aggressive approach to complicated cases can serve the litigants and the lawyers as well as the court itself, there are five basic steps in coping with the big case. The first step is early identification. The second step is to ensure that the case is assigned as early as possible to a single judge or hearing officer, and that the judge or hearing officer is able to promptly assume control of the case. The third step is to define, narrow, and refine the issues through the use of extensive pretrial procedures. The fourth step is to confine discovery, that "endless marathon dance," within the boundaries of the defined issues and within the context of applicable discovery rules. The final step is to plan the trial and the hearing procedures, with full utilization of effective trial techniques.

The remainder of my comments will focus primarily on pretrial planning. Although there are a number of things one can do at trial, the bulk of the work of a judge who is committed to managing complex litigation will be done before the trial begins.

The key indicators of a complex case are multiple parties and multiple or unusually complex issues. There are other signs of a big case. A judge may be able to tell from reading the complaint that an unusual record is going to be generated in a particular case, either in terms of voluminous documents, number of expert witnesses, or peculiar complexities associated with the subject matter.

Trial courts operate with either an individual calendar system or a master calendar system. Those on the individual calendar system presumably will have few difficulties setting up procedures for early identification. The judge has, under this system, immediate access to the pleadings, the filings, and the accompanying documents. She can immediately identify the lawyers associated with

---

7. Steven Flanders, *Blind Umpires—A Response to Professor Resnik*, 35 Hastings L.J. 505, 507 (1984).

8. *Id.*

the litigation. She can do whatever she wants in scheduling notices from day one.

Those with master calendar systems have a more complicated problem, and it is one which has to be solved administratively, because under most master calendar systems one will not even see a complaint until an answer has been filed. If the master calendar system assigns pretrial and settlement to one judge or division and motion practice to another, there will be problems. Discovery motions, scheduling motions, substantive motions for summary judgment, and motions in limine may well be heard by a judge, or even several judges, who will not be conducting the trial. Because such a system is inimical to the needs of complex cases, the first step must include a method for docket screening—assigning one judge at a time, for example, for docket screening—and segregating cases that require special management. Complex cases should be promptly assigned to the judge who is going to see them through from filing to disposition.

Coordinating multi-party litigation and multi-complex issue litigation requires special planning from the outset. In a complex case, many of the traditional procedures associated with civil litigation, such as requiring service on all counsel and requiring counsel to appear at all proceedings, may result in an enormous waste of time, energy, and money. The court should take an early lead in such a situation. The judge can institute special procedures to avoid the necessity of service and appearance at many junctures. This may involve the establishment at the outset of a master file with computerized notices or postcard mailings going out to the parties who need notice of the availability of the pleadings in the master file. This shifts the burden onto the parties to check the master file and obtain copies of those pleadings which they need, rather than requiring serving counsel to automatically distribute them.

Another device is to establish a policy on appearances. Counsel representing parties who have a limited interest in particular pretrial motions might be relieved from attending the hearing. Designated counsel might handle functions on behalf of a number of parties at once, thereby saving the time and money involved in those appearances. These policies should be formulated early and communicated promptly to counsel.

Let me turn briefly to a more general discussion about the use of designated counsel in a complex case. When a judge decides to designate counsel for any number of particular functions, it is probably a good idea to specify in some separate document, drafted

by the judge or by counsel or in a court order if the judge thinks counsel requires that kind of protection, what the duties and responsibilities of designated counsel are going to be and particularly what the method of compensation will be. One of the biggest changes I noticed in reviewing the draft revisions for the *Manual of Complex Litigation, Second* is that the earlier version had few, if any, references to the procedures for determining the method and amount of compensation for lawyers in the pretrial stage. This problem has generated as much litigation as anything else in the complex case. The expenses and fees of designated counsel should be shared equitably, preferably by agreement among all the parties, but certainly by some formal set of terms and procedures established by designated counsel. At the very least, a judge should require contemporaneous time records and some form of periodic filing with the court.

It is also a good idea to establish up front that communication in the capacity of designated counsel will not in any setting constitute a waiver of the work product rule or of the attorney-client privilege. Some lawyers may want a specific order from the judge protecting them from that kind of problem before they will agree to serve as designated counsel. They do not really need it, but they worry about it.

A judge needs special talents to identify attorneys who will act as designated counsel to help her in a complex case. Many of us have a great deal of experience, from other types of activities, in dealing with egos and personalities. There is no better forum for those skills than complex civil litigation. A judge needs to recognize which attorneys are able to maintain appropriate communication with other attorneys. She needs to identify lawyers who will be capable of communicating effectively and readily without stepping on the toes of other counsel in the case.

The judge also needs attorneys who have sound judgment, who have a gift for persuasion and a gift for compromise, because mutual persuasion and compromise are two phenomena that will be absolutely essential to management. Whenever the judge gets to the point in the proceedings where she will be dealing with settlement, she particularly needs to be sensitive to making designated counsel understand that they are on the hook for the whole case, even if a portion of it is settled.

It is not at all unusual for designated counsel to find themselves representing parties who stipulate out or settle at some early stage of trial preparation. In this situation, designated counsel may feel they are therefore entitled to be released, leaving the

judge "high and dry" for purposes of continuing pretrial management. A judge should think at the outset about what she is going to do if designated counsel want out of the case—whether she is going to require them to stay in or let them out.

A judge must make an independent assessment of the functions, the identities, and the organization of designated counsel. I would also like to add one final caveat: any attempt to detail the functions of designated counsel precisely or draw any indelible line separating those decisions that can be made unilaterally by designated counsel from those that can be made only with the concurrence of an affected party may be impractical and unwise. A judge certainly wants to leave herself enough flexibility to work with the duties of designated counsel.

The question of disqualification and recusal in complex litigation should be addressed very early in the pretrial stage. It is amazing how much litigation and how much expense has been generated by disqualification and recusal disputes in complex litigation. In a case coming out of Arizona a couple of years ago, a federal trial judge was forced to recuse himself in a piece of complex litigation which was in active pretrial and trial procedures for over five years and which involved 200,000 corporate class members. It was discovered that the judge's wife owned a few shares of stock in several of the 200,000 corporate parties. If a judge has a spouse in that kind of business, she might be better off trying to completely insulate herself from any information about the holdings so that she can legitimately claim never to be exposed to bias. She should, however, consider the feasibility of this approach by first researching the question, finding out what her obligations are under the rules that apply to her court or agency and the canons applicable in her jurisdiction. Second, she should do whatever is necessary to protect herself. I suspect, in most instances, it is really going to be a question of discovering the existence of the problem, but the judge should make that discovery as soon as possible. Obviously, if one is dealing with 200,000 parties in a piece of litigation, even a personal visual review of the parties is going to be a problem, so one needs to look for some technical assistance or, at the very least, some clerical assistance. Those judges who have access to computer docketing systems can use their software, if it is sophisticated enough, to help them with the disqualification problem. In addition, a judge must insist that the lawyers, especially in large firms, have within their firms very sophisticated means of detecting any potential conflict.

There are some other preliminary matters related to early

pretrial planning. A judge should read the complaint. I hope that would be obvious. She should find out, through researching her own docket and the complete docket of her court, if there are any related cases pending, and should start thinking about the best management techniques available to her in this case. If reassignment is necessary or if transfer of any other related cases is necessary, that should be accomplished immediately. The judge needs to make such a scheduling decision up front, certainly within the 120 days provided under Rule 16(b) of the Federal Rules of Civil Procedure. Within that 120 days, she should have established a projected time frame for the first pretrial conference, the initial status conference. This must be done with care, however, because if the judge schedules the conference too soon, counsel for some of the parties may not have read far enough into the case to know what is going on. On the other hand, if the judge schedules the conference too late, she may find the parties have already generated discovery problems.

As soon as the complaint is filed, the judge should encourage plaintiff's counsel to notify the judge respecting counsel's plans for service, the timing of service, and the identity of all potential parties and counsel in the case. I recommend the judge develop a standard notice form to request this information. As part of this initial notice, or when she schedules the first status conference, the judge may want to issue some preliminary orders to stay continuing discovery proceedings or other pretrial procedures until she gets the case in shape. The idea is not to let the lawyers plow too much ground until the fences are put up.

I recommend the initial notice also contain a request that lawyers submit a proposed agenda for the first status conference. Ask them to write down those matters they think should be addressed and any major problems they see in managing the case. Specify in the notice that this will be nonbinding because there may still be amendments to the pleadings and shaping of the issues. This device has several obvious advantages. The attorney's proposed agenda will educate the judge about the case and will be useful when she prepares the agenda for the first conference. The request for a proposed agenda will educate the lawyers about the judge's management style. In some jurisdictions it may immediately generate requests for another judge, but I hope not. These procedures, if implemented in the proper spirit and with the right kind of skill, generate respect among lawyers, not concern.

In organizing the initial status conference, I would certainly recommend that the judge bring in everybody remotely connected

with the case who is currently identified. After that meeting, the judge may want to relieve some counsel of an obligation to attend. She may at later pretrial conferences want to invite magistrates, masters, parties, or attorneys who are representing any of the parties in related litigation. She may, on occasion, even wish to invite the parties in the instant litigation and insist on their attendance.

The initial conference is going to set the tone for the rest of the proceeding. A tentative agenda should be prepared before it is conducted. The judge should remember at all times that this initial status conference is going to be the first opportunity to assume control over the management of the case. It should be conducted with firmness and fairness, curtailing undue repetition. In this respect it is noteworthy that there is a strong similarity in tone between "parenting" manuals and the literature on managing complex litigation. Further, in addition to fairness and firmness, consistency and courtesy are extremely important. Thus, one needs to curtail undue contentiousness at every hearing and must insist on professional courtesy and prompt responses to the court.

There are some very specific and important planning details which the judge must consider in relation to the initial conference. It is necessary to think about where the conference will be. Will it be conducted in the courtroom with a court reporter, for example, with counsel standing to make all comments to the court? Will it be conducted in the judge's chambers around a big square table, or even better, a round table?

The presence of a reporter is not necessarily an unduly formal thing that will inhibit counsel, but the judge may believe a reporter will have that effect. If she conducts a pretrial proceeding off the record, however, a judge must never forget to record, preferably at the hearing and preferably by calling her reporter in or by dictating while all parties are still present in chambers or the courtroom, all decisions and rulings made as a result of the conference. It is essential to get down the results of the conference while everybody is there so that everyone understands what his or her obligations are before the next event in the trial.

Once an agenda for an initial status conference is completed, it is important not to miss anything significant and therefore one should schedule plenty of time. This kind of an initial status conference cannot be conducted in thirty minutes. It probably cannot be conducted in an hour. I suspect that in a substantial case the conference will take most of the day, assuming the parties are prepared. In some instances, however, the conference can be conducted in half a day. Every effort should be made to allow

sufficient time, but if there is not enough time to get through the agenda, a follow-up conference should be scheduled immediately.

Once the judge has conducted her first pretrial conference, she has in fact completed the "first stage" of planning for the big case. The next stage of planning encompasses the period from the end of the first status conference to the commencement of trial itself. This period includes all the motion practice, all the discovery, all substantive rulings by way of motions in limine and summary judgments, and all trial preparations.

In connection with the kind of work that goes on at this stage, let me refer back to my introductory remarks about attitudes. Many lawyers worry that managing judges result in passive lawyers, that lawyers are going to lose control of the litigation and lose their role as advocates and adversaries in the litigation. A judge must do as much as she can to allay those fears and to make it clear that the management process is a collaborative one. Rather than making lawyers into passive nonadvocates, a management-oriented judge must depend on lawyers to function more as officers of the court than as mere advocates as is true in traditional approaches to litigation. That will make some lawyers very anxious. They will worry that they have obligations to the court that will conflict with their obligations to their clients. The judge should let them know she understands their plight and that she is sympathetic to it, but her sympathy is nevertheless not going to let them off the hook. They must function as officers of the court in the administrative and management aspects of the case. With respect to the substantive rulings and disposition of the case, however, they operate solely as adversarial advocates and the judge operates solely as impartial decision maker. If the judge can draw those lines carefully at the outset, she can soften some of the resistance that she will otherwise encounter from some counsel.

Defining the scope of discovery will be a constant process thoughout this second stage of planning. In discovery, as with everything else, early identification of the issues is essential. The judge should try to lop off every conceivable issue for early disposition in order to limit the scope of discovery and get the case into manageable proportions before the trial. For those purposes, she will use and encourage motions for summary judgment, bifurcation of the issues for separate trial, rulings on offers of proof where the evidence becomes fairly well established and can be submitted to her in writing, judicial notice of any material that is remotely susceptible to that kind of treatment, motions in limine, interlocutory appeals, stipulations from counsel, etc.

A judge needs to be sensitive to the burdens of discovery. The judge can encourage the use of informal discovery procedures and conferences to minimize the time and expense associated with discovery. She needs to minimize all unnecessary burdens for lawyers and watch out for such things as boiler plate interrogatories—absolutely forbidden in a well-managed piece of complex litigation.

The judge might want to consider staying discovery until all amendments to the pleadings are completed and all preliminary legal affirmative defenses are asserted. If the statute of limitations is going to be interposed or a motion to dismiss filed, she might want to consider staying discovery until disposition of such issues.

Before concluding my comments I would like to mention a general rule about pretrial sanctions: they should be sparingly applied. If the judge thinks about why she wants to use pretrial sanctions and what she hopes to accomplish, she will be less likely to make misjudgments in their application. Sanctions are disruptive, costly, time-consuming, and far less satisfactory than persuasion. The goal is judicial management, not coercion.

One should always remember, particularly in connection with discovery, not to make demands that are beyond the capabilities of the parties. That seems logical and fair. Obligations should be reasonable and spelled out, and fair warning given whenever contemplating sanctions.

Some purposes of sanctions include enhancing control of the litigation, neutralizing prejudice to opponents that has been created by wrongdoing on the part of one side, deterrence (specific and general), and finally, the punishment of willful violations of court orders. It is important to do research on sanctions before imposing them in order to have a clear understanding of the difference between civil and criminal contempt and the difference between indirect and direct contempt.

The types of sanctions a judge can consider are: deeming designated facts established where requests for admissions are not answered (actually, that is accomplished by the rule itself in the federal system); disallowing proof of designated facts where discovery is not produced with respect to such facts; striking pleadings or parts of the pleadings; dismissing the action itself or entering a default judgment for failure to prosecute or failure to appear; staying the proceedings pending compliance; holding up somebody's discovery efforts until he or she has complied with orders; assessing expenses, including attorneys fees for opposing counsel; and finally, what we hope is the last resort, treating it as contempt.

The judge should always state the reasons for imposing sanctions, even when it is a summary disposition of direct contempt. Put your reasons on the record and make a record of all proceedings relevant to the sanction.

The judge's primary objective throughout the pretrial planning stage is to develop and refine a plan, including schedules and procedures, for identifying and resolving all disputed issues of fact and law in this particular piece of litigation. Judge Prettyman once wrote the following about preparing a case for trial:

> The physical material of a trial ought to be completely organized—segregated, copied, counted, numbered, labeled and arranged. The program of procedure ought to be organized—where, when, how, by whom. The participants ought to be organized—who leads, who keeps records, who examines, who cross-examines, who does research, who argues, who does each task which must be done. The presentation of witnesses ought to be organized. Every foreseeable point of law ought to be briefed. The final argument ought to be in draft before the opening statement is made. The intended ultimate proposal of findings of fact ought to be the guide for the presentation of testimony. A completely organized case proceeding to trial is a joy to behold.[9]

Let me underscore that the most important change in moving from a passive stance as a trial judge to an active one is really a change in attitude. Until a judge begins thinking in a different way about what she can do to shape the litigation so that it can reach a speedy, just, and efficient end, half of the things that she could do with a particular case will not occur to her. Creativeness and innovation are the hallmarks of good management practices.

---

9. E. Barrett Prettyman, *Reducing the Delay in Administrative Hearings: Suggestions for Officers and Counsel*, 39 A.B.A.J. 966, 968 (1953).