

A PERSPECTIVE ON CHANGE IN THE LITIGATION SYSTEM

*Daniel J. Meador**

Perspective implies the big picture, a view of the landscape from 35,000 feet. From that vantage point we can see an array of developments in civil litigation in the United States during the last third of this century, developments that have had a transforming effect. Earlier, there had been two watershed reforms. The first was the Field Code in 1848, a procedural reform that spread through many states in the nineteenth century and permeated practice in the federal courts through the Conformity Act. The second was the Federal Rules of Civil Procedure in 1938, a federal reform widely copied in the state courts. Under those 1938 rules, providing for a unitary, transaction-based civil action with broad party and claim joinder, litigation in the federal district courts—the focus of this Article—was relatively stable and untroubled for some three decades.

Then in the mid-1960s circumstances began to change, the country began to change, the world began to change, and those changes in turn have had a far-reaching impact on the litigation system. Also, in that decade the 1938 rules were significantly amended, setting the stage for some of the later changes. While there has been no one blockbusting event, no single reform of the magnitude of the 1938 rules, numerous interrelated developments since then have fundamentally altered American civil

* James Monroe Professor of Law Emeritus, University of Virginia. Dean, University of Alabama Law School, 1966-70; Assistant Attorney General, Office for Improvements in the Administration of Justice, U.S. Department of Justice, 1977-79; Chair, ABA Standing Committee on Federal Judicial Improvements, 1987-90; Board of Directors, State Justice Institute, 1986-92. This article is a slightly expanded version of the keynote remarks delivered by the author at the ABA's CJRA Implementation Conference at the University of Alabama Law School, March 20, 1997. Appreciation is expressed to my colleagues, Professors Earl C. Dudley, Jr., Graham C. Lilly, and John C. McCoid, for commenting on a draft of the article.

litigation, especially in the federal courts.

The most significant developments and resulting changes can be grouped under the ten headings set out below. Each of these changes has sparked lively debate along the way. Some have been quite controversial, and many battles and rear guard actions continue. My purpose here is to describe, not to take sides or evaluate. I do not address the far-reaching changes in the appellate realm, concentrating instead on the trial level.

1. *Volume of judicial business.* The most obvious development—and the one that underlies most of the others—is the growth in the number of cases. In 1966, 71,000 civil cases were filed in the federal district courts nationwide. (This and all other figures are rounded up or down.) In 1996 the number was 269,000. One need not decide whether this growth amounts to a “litigation explosion” to acknowledge that there is today nearly four times more civil business in the federal courts than there was thirty years ago.

The timely disposition of this business has been made more difficult by the increased burdens of the criminal docket. Criminal cases—48,000 prosecutions last year—impose special demands on the district courts because of the Speedy Trial Act and the sentencing guidelines.

2. *Nature of judicial business.* The nature of civil cases has changed in two ways. One is in the subject matter of the cases, the other is in their complexity.

As to subject matter, some of the large categories of cases filling the dockets today either were not there at all thirty years ago or were small fractions of judicial business. For example, in 1966 the Administrative Office’s statistics did not even list product liability and environmental cases as separate categories of district court business (although there were some product liability cases under other headings). But in 1996, there were 27,500 personal injury product liability cases and over 1,000 environmental cases. Three decades ago there were 1,300 civil rights cases; last year there were 42,000. Over that same period, prisoner petitions grew from 8,500 to 68,000.

Complexity has increased both in party structure and in the issues presented. The most dramatic change in party structure

has come with the blossoming of class actions. Entire governmental programs and agencies have been brought into court and the legality of their operations determined on behalf of hundreds or thousands of persons. Notable among these have been desegregation suits and attacks on prison systems, welfare programs, and mental institutions. In addition, mass tort or mass injury actions—discounted as unlikely and inappropriate in 1966 by the drafters of amended Rule 23—now involve hundreds and thousands and even millions of parties spread coast to coast.

As to issues, the complexities and decisional difficulties they thrust upon the courts have intensified as science, technology, and human understanding have advanced. Courts today confront issues of chemistry, physics, medicine, electronics, and engineering that were unknown thirty years ago, as well as highly complicated financial and commercial transactions and, not least, novel ethical and social questions. The growing use in litigation of other disciplines, such as economics and sociology, and of empirical research have added to the complexities, as have society's heightened mobility and the nationwide and global scope of human activity.

The difficulties of adjudicating such complex issues are compounded by the use of juries. Under the broad right to jury trial resulting from Supreme Court decisions interpreting the Seventh Amendment, juries, often composed of relatively uneducated persons, are called upon to deal with technically complicated evidence that can tax even the experts. A new science of juror selection has arisen, involving expensive research into the backgrounds of prospective jurors.

3. *Judicial personnel.* In both numbers and types, officials in the court system who engage in adjudicatory activity have proliferated. This is the inevitable result of the growth in business and in the complexity of that business. In 1966, there were 343 federal district judgeships. Today there are 648.

Three decades ago the position of magistrate judge did not exist. Today we have 416 full-time magistrate judges and 78 part-timers. These are federal trial judges (although Art. I, not Art. III), and they are now more numerous than district judges were when the position of magistrate was created. Their responsibilities have been constantly expanded. Their duties vary from

one district to another, but they typically include scheduling pre-trial proceedings in civil cases, monitoring discovery, deciding non-dispositive motions of many kinds, presiding over trials of misdemeanors, and, with consent of the parties, conducting trials in civil cases, just as district judges do.

In addition, we now have the bankruptcy courts, an entirely new set of courts with their own judges, attached to the district courts. There are now 326 bankruptcy judgeships. These trial judges exercise an authority vastly larger than that exercised by the old bankruptcy referees.

Considering district judges, magistrate judges, and bankruptcy judges, the federal judicial system now has a total of 1,390 full-time judicial officers performing adjudicatory functions at the trial level. This is more than four times the number of district judges thirty years earlier.

4. *Judicial case management.* The idea that judges should affirmatively manage the conduct of civil cases emerged in the early 1970s, fueled by the pressures of rising caseloads and concern about increasing expense and delay. It rested on two premises, which initially were unverified theories. One was that lawyers, left to their own devices under the traditional adversary process, could not be counted on to move cases along expeditiously. The other was that civil actions did not all need or deserve to be treated procedurally the same, that litigation could be expedited through differentiated processes without loss of fairness. Case management, as a means of reducing cost and delay, became accepted gospel among many district judges, a development that sharply departed from the historical common-law judicial role. It tended to move the American trial courts, albeit unwittingly, toward the inquisitorial style of civil law countries.

The practices developed under this new managerial style were given an official imprimatur by the amendments to Rule 16 in 1983, which doubled the length of the rule. Managerial judging received an even more exalted blessing by the enactment of the Civil Justice Reform Act of 1990 (CJRA), in which Congress codified a wide array of managerial practices that judges had developed and that were already embodied in Rule 16. Federal judges now control the pre-trial process to a high degree, setting

detailed schedules for the discovery process, the filing of motions, and the holding of pre-trial conferences. Many judges engage aggressively in settlement discussions with the parties' lawyers, attempting to dispose of cases without trial. Pre-trial proceedings now overwhelmingly dominate civil litigation. A trial, theoretically the main event toward which the proceedings are aimed, now occurs in well under ten percent of all cases.

5. *Procedural non-uniformity.* The establishment of a nationally uniform set of procedural rules for all district courts, a major objective of the 1938 rules, has been substantially eroded. Although there was no doubt always a measure of non-uniformity in the details of local practice (the "local legal culture"), uniformity began to break down more noticeably with the spread of increasingly detailed local rules in the district courts, no two sets of which were identical. Another breach in uniformity came with the amendments to Rule 16 in 1983, which permitted district courts to avoid the requirement of a scheduling order. Congress struck a body blow to uniformity in 1990 in the CJRA, which, in addition to codifying managerial judging, codified the concept of non-uniformity and legitimated a system of 94 different processes for litigating civil cases in the federal courts. Then the rules drafters themselves joined the non-uniformity bandwagon in their 1993 amendments, allowing districts to opt out of the newly adopted mandatory disclosure provision of Rule 26(a). Thus, the decade of the nineties has seen the chaotic end of any pretension of geographical procedural uniformity. Paul Carrington has gone so far as to say that the Eastern District of Texas has seceded from the system.

In addition to the erosion of geographical uniformity, there are significant departures from the concept of uniform, trans-substantive civil rules. Rule 81 specifies several such exceptions from the general rules. Judges now employ special procedures in complex cases, bolstered by the *Manual for Complex Litigation*. In 1995, Congress by statute created distinctive procedural requirements for securities litigation.

Non-uniformity among districts is only part of the non-uniformity that now besets the federal courts. Active managerial judging has meant that there is often little uniformity even within a single district. Each judge operates in accordance with

his or her own style and notions of sound judicial administration. Because there is a vast amount of discretion available in the management of the pre-trial stage, there will be considerable variation among judges in how cases are processed.

6. *Congressional involvement.* Under the Rules Enabling Act, from the 1930s to the 1970s Congress was willing to let the judiciary have exclusive dominion over making and amending the Federal Rules of Civil Procedure. But that era ended in the early 1970s when Congress refused to acquiesce in the Federal Rules of Evidence, formulated through the judiciary's rule-making process, and instead itself enacted the evidence rules. Since then, Congress has not been reluctant to tinker with procedural rules. It has become clear that Congress is no longer willing to let the courts have free rein on matters of procedure. This shift of mood found its ultimate expression in the CJRA, going beyond ordinary procedural rules deep into details of case management.

7. *ADR.* The phrase "alternative dispute resolution" came upon the American legal scene in the 1970s. It reflected the view that some disputes could be resolved better or less expensively or more quickly by means other than adjudication in the courts. The idea quickly took on the dimensions of a movement, gaining in momentum and given Congressional blessing through the CJRA and statutes on court-annexed arbitration.

While some nonjudicial procedures such as arbitration had been on the scene for many decades, there was not the array of alternatives we have today, and the concept did not have the broad connotation, the popularity, the semi-official status, and the coalescence as a movement that it has acquired over the last two decades. The panoply of "alternatives" now used in widely varying degrees in the federal courts includes arbitration, mediation, early neutral evaluation, and summary and mini-trials. The procedures range from formal to informal, from court-annexed to private, from binding to non-binding, from mandatory to voluntary.

8. *Technology.* Technological developments have altered the ways courts function, in addition to technology's effect on the complexities of litigated issues. Computers and word processors

are now almost universal in the trial courts. Clerks' offices maintain records and manage dockets through computers. Trial judges have direct access to case data on computers, both on the bench and in chambers. Opinions and orders are now prepared on word processors. E-mail and fax, in addition to the telephone, provide instant communication among judges and other court personnel, and between lawyers and courts. Videotaping provides a means for presenting testimony of absent witnesses and of preserving a record of trial. Closed circuit television permits judicial proceedings to be conducted with participants in different locations. All of this means that courts can handle more business in less time than previously possible.

9. *Federal-state duplication.* Litigation in the state and federal courts today involves an ever-increasing amount of duplicating and overlapping business. While there has always been some duplication—diversity of citizenship cases being a notable example—its extent has grown substantially in the last third of this century. Congress has enacted numerous statutes creating rights of action for conduct already actionable in state courts under state law; under most of these statutes, the action can be brought in either state or federal court. Similarly, in the criminal field, Congress has enacted numerous statutes creating federal crimes for conduct already criminal under state law. The upshot is that federal and state courts are increasingly adjudicating the same issues and types of cases, sometimes simultaneously litigating cases arising out of the same transaction. This overlapping jurisdictional arrangement gives rise to wasteful litigation over the appropriate forum and results in duplicating use of judicial and administrative resources, all of which adds to expense and delay.

10. *Lawyers and law practice.* The changes here are obvious and striking. In sheer size, the profession has tripled—from 313,500 lawyers in 1966 to 946,500 today. Many law firms have become mega-firms, national and international in scope. Specialization has markedly advanced. With the relaxing of restrictions on advertising and solicitation, much of law practice has become commercialized, making law firms appear to be just another business. Canons of ethics have been converted into codes of

professional responsibility. While the effect of all this on civil litigation may not be clear, it does seem clear that incentives to litigate and aggressiveness in litigating have magnified. Statutes of recent times that provide for plaintiffs' recovery of attorneys' fees bring into the courts cases that otherwise would not be brought. Pressures on billable hours in order to meet huge overheads and to increase lawyers' incomes fuel litigation beyond what may be necessary. Word processors and photocopying machines facilitate the mass production of interrogatories, motions, and other papers. So-called Rambo lawyers have appeared on the scene, making litigation nastier and more protracted.

To sum up, the litigation world in which we live today is quite different from that of thirty years ago. The developments and changes sketched above have radically altered the American litigation landscape. They were not the product of an overall, well thought out, and coordinated plan; rather, they crept into the system as ad hoc responses to particular problems or were the unanticipated consequences of reform efforts. But what we see around us is not fixed terrain. Events and new circumstances continue to press upon the system. It may be that in this closing decade of the twentieth century we are coming to one of those times in the evolution of procedure where the system undergoes comprehensive and fundamental reworking, as it did in 1938. But I would not confidently predict it. As yet, there is little consensus as to many of the changes that have taken place or as to where we should go. A colleague of mine says that he who lives by the crystal ball is destined to eat crushed glass.

Although predictions are difficult, we can realistically make a few assumptions. We can assume, for example, that the volume of civil litigation will not substantially diminish, that the cases and the issues will not get less complex, and that the number of judicial personnel will not be reduced. Indeed, for planning purposes, it would be prudent to assume that volume, complexity, and personnel in the justice system will all grow. Moreover, technology will continue to advance in ways that can only be dimly imagined. Empirical research is here to stay and will likely become more important in devising procedural reforms.

Under these circumstances, and given all the changes of the

last thirty years, we have a daunting task to make the dispute resolution system more "just, speedy, and inexpensive." By comparison, the task of the 1938 rule drafters seems easy. In the bench, the bar, and the academy we have the requisite intellectual muscle and procedural expertise to do whatever needs to be done. But the extent to which the job actually gets done will depend on the convergence of at least three elements: leadership, subordination of client-interest and self-interest, and a good faith willingness to compose views and work toward a consensus. The history of judicial reform efforts over the last couple of decades does not provide much basis for optimism. There seems to be little incentive among lawyers, judges, and members of Congress to support significant measures that would really accomplish something constructive. But hope lives on, and I like to think that the ABA's convening of this conference, and the array of talent gathered here, are hopeful signs for the future of civil dispute resolution.

