CARLTON FIELDS

Resolving the Judicial Manager/Judicial Judge Debate: Theories and Fads of Civil Procedure

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Part 3 of a 4-part series

Now consider the fads, the procedural systems for presenting the case to the courts over the last 100 years. **A. Forms Of Action Or Code Pleading.** Pleadings were detailed recitations of the facts the lawyer believed or hoped he could prove, with the arguments leading to the conclusion those facts fit a precedent. They were then contested by a motion that said, "Even if he proves all that, he cannot win under the law." If the pleader has not pled enough, he can add other facts by amendment until he runs out of things he thinks he can prove. Same with defenses. The result is a lot of work on pleading -- the lawyers deciding what they can hope to prove and the judge telling them what will happen if they can. Critics called it cumbersome, form over substance, impeding development of the law, but criticism is to be expected from critics. Cumbersome, maybe, but it sure didn't require a lot of time and money to be spent on discovery. **The big advantage in the system was, after a demurrer was won or lost, the lawyers were in a position to re-evaluate the case and tell their clients more accurately what to expect. The court will have decided a semi-hypothetical question of law, but one that controlled the case, and the stage was set for settlement evaluation based on the probabilities of the appeal and/or the confidence that the facts alleged could be proved. A pretty good system, relatively cheap, with a pretty even playing field when it comes to the expense of getting to this point, although maybe not in terms of access to the facts.** But it had drawbacks. The parties were left to their own devices to a great extent to develop the facts, and were often operating with incomplete information. There were devices for discovery, but they were less than ideal where discovery was really needed. **B. Notice Pleading And Discovery. Circa 1937-1957.**[1] A reform to the form pleading system, over-addressing the access to facts problem. The pleading must allege facts that contain enough to put the opponent on notice of what the pleader was complaining about, accompanied by DISCOVERY devices to allow the parties to learn more completely what the facts were. As with most reforms, a pretty good idea in some circumstances becomes a denomination: the

assumption is that the replaced system is old fashioned and therefore bad – both the good parts and the defects.[2] Both the baby and the bathwater are thrown out to be consistent with the theory. The new doctrine was that the facts should be developed extensively before the court should rule on the law. No longer was the emphasis on ruling first on what the parties expected to prove, rather the court should wait until the parties through discovery developed the facts and rule on undisputed facts, or have a trial. Sure there were vestiges of the old system – motions to dismiss for failure to state a cause of action and summary judgment were in the new rules – but they were soon-enough gutted by the discovery doctrinists so that early definitive rulings on such motions became rare. **The important point is that at the end of discovery, the parties had a pretty good idea of what they can prove, and they are now in a position to advise the clients about the outcome of the trial. But it has cost them an awful lot of money to get to that point, and more often than not the LEGAL rulings on the consequences of those facts has been put off until trial. So at much greater expense the parties are not quite as well positioned as they were where the trial judge's view of the law was made clear by the quasi-hypothetical rulings on demurrers. And they were poorer. Lawyers can analyze the probability of winning or losing fact issues at trial, but they still may be uncertain on the trial court's ruling on the law questions, and less confident on the possible appeal issues. The "access to facts" drawback is removed, but often at not much net value to the parties, and at great expenditure of time and money.** The notice pleading/discovery reform, of course, was like tossing a chair into a pro-wrestling ring. The cost of discovery immediately became a weapon, and the playing field, previously uneven where one party had more access to facts, now became more uneven when one party could not afford the ordeal of discovery. The stronger party might not win on the law but he could at least club his opponent into submission with discovery. The theory had some merit, but the result was often a reversion to trial by combat where disputes were settled with sticks, the damage economic rather than physical.[3] "Scorched earth," "take no prisoners" and other such phrases became discovery terms. Settlements were encouraged not just by the analysis of legal issues but also based on the fear of discovery expense. **C. Judicial Management.** Reform again, not by changing the system so much as by trying to control it. "Let's change Rule 26 and have each side volunteer to the other what they want to know." Good luck with that. "Limit the number of interrogatories to 25, including subparts." What the heck is a subpart? And what if there are 32 counts in the complaint? "Okay, then, 25 interrogatories but you can ask the judge if you can ask another one. And to tell you whether something is a subpart or not. And short depositions, but you can ask the judge to let you run over." Pretend there is nothing wrong with the system, but judges need to control it. Not much wrong with the goal of limiting discovery-as-a-weapon, except judicial management doesn't. Judicial supervision takes time to schedule and prepare for and brief and argue, and while some judges push cases fast enough make it impossible to depose everybody in sight, there are in fact cases where discovery is needed. More important, the parties can weaponize judicial management just as they did discovery, threatening to tattle if they cannot get agreement on something and asking sanctions frequently on the theory that it doesn't hurt to ask, and the opponent will be put to the expense, delay and possible embarrassment of the sideshow. There is a reason there is no "player/referee" sports analogy. There are many drawbacks to requiring the judge

become a participant. It lays a basis for a tech-savvy judge to make statements such as “The lawyers owe a duty to the court to manage e-discovery whether the client hires them to do it or not.” It not only takes time from the one function ONLY the judge must perform - deciding questions of law - but it also interferes with the lawyers who may be trying to do their jobs as officers of a system for resolving disputes. The judge is charged not only with the task of ruling on the law, and settling real or pretended discovery disputes, but with helping develop discovery plans and the like, which either slows down the pace of decisions on merits issues or requires additional judges or magistrates or other referees to the process, increasing the cost. It is the old story about the inventor in the patent examiner’s office with a machine that will do the work of ten and solve the unemployment problem because it takes fifteen to run it. The goal should not be a well-managed case, but a decision on the merits if the parties do not settle before the decision is reached. Another drawback of judicial management is that the judge doesn’t know what the parties know about what is going on behind the scenes. Privilege obligations and the need to keep intangibles from the opponent prevent parties and their lawyers from sharing their real fears and secrets in the negotiating aspects of the process. A mediator is obliged to keep secret certain things that a party discloses to him. There is no mechanism for a managing judge to be entrusted with confidential information. And when the managing judge, who cannot be fully informed, makes assumptions and asks the questions that the opponent cannot ask, she is really able to complicate the process. An excellent course[4] on negotiations by Professor Craver of University of Illinois College of Law began with an exercise: Participants were paired off, A and B. Each was given written settlement instructions and told they could negotiate only by writing down numbers. No words, no talking, gestures, bluffs, or anything else. The case was a PI case in a contributory negligence jurisdiction where a mother of two was injured by a trucking company. **The instruction to A:** “Plaintiff’s physician has told you that the plaintiff is stressed mainly by the fact she cannot pay her $10,000 doctor bill, and she cares nothing about other damages. She is an emotional wreck, and could not possibly testify coherently, and he fears suicide if the case doesn’t end quickly. Immediate settlement for $10,000 is a matter of life and death.” **To B:** “Insurance carrier has evaluated this case as almost certain to produce a verdict in excess of the $200,000 policy, and a possible bad faith problem if not resolved. The carrier instructs you to settle for limits, as soon as possible, and if you are not able to do so, expect no more work from the carrier.” The settlements reached in the 5 minutes of the exercise involving only written numbers, without the opportunity to suggest reasons for the positions taken were all over the place, from $10k to $200k, the lesson being that the dance performed in the settlement process is necessary because without clues given and read from things said and unsaid, there is no way to make even a halfway assessment of the expectations of the opponent, or to adjust them. Equally, though, I think it illustrates the problem that the managing judge has little clue of the difficulties faced by lawyers on both sides while they try to achieve a modicum of justice while at the same time doing their best for their clients. Client A who cannot testify would lose at trial for that reason, but disclosure of her problem would prevent a settlement that would be a fairer result. A managing judge demanding the best offer for each side using the same facts would provide an extreme advantage to the last to disclose. Most experienced trial lawyers have had a witness emotionally unable to testify

either temporarily or permanently, which does not do anything to the justice of her case, but will eventually dictate a lower settlement. Best leave that to negotiations, whether facilitated by a mediator or not, rather than management by a judge. The assumption that judicial management reform is progress is questionable. The process itself becomes an important feature of the case, adding to expense, maybe shifting the expense from discovery itself to compliance with pretrial requirements, but with no net savings to the parties, and little real progress toward a decision on the merits. **More important, little has been done to put the lawyers and their clients in a better position to analyze the settlement possibilities or change the settlement matrix. Resolution is delayed.**
Read the full series, *Resolving the Judicial Manager/Judicial Judge Debate*:

- Axioms and Elements of a Settlement (Part 1)
- The Effect of Early Issue Resolution (Part 2)
- Theories and Fads of Civil Procedure (Part 3)
- What Would Help? (Part 4)

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[1] The Federal Rules of Civil Procedure were adopted in 1937. Florida adopted its version in 1957. I expect there were, and I hope still are, holdovers, but this is not the kind of article where I look it up.
[2] Two common assumptions that are not true: a. Because my grandfather did it this way, it is bad. b.Because my grandfather did it this way, it is good.
[3] Actually, the physical was involved as well. Lawyers blessed with obnoxious personalities and the stamina to take marathon depositions were now 'discovery specialists' able to charge extra because of the unnecessary stress they can bring to the opponent.
[4] Charles B. Craver, *Fundamentals of Effective Legal Negotiating,* ALI-ABA Professional Development Series Lecture/Workshop 1982.

Authored By

Peter J. Winders

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