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RELATIONSHIPS OF THE PARTIES, THE JUDGES AND THE LAWYERS IN THE COMMON LAW. THE CASE OF UNITED STATES

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1. *In addition to their function in the resolution of conflicts, the parties, judges and lawyers play other roles. In the United States the following may be noted.*

Parties. In the United States, plaintiffs sometimes represent the interests of the public in general. They serve, in other words, as private attorneys general (*fiscales privados*). This situation arises when a party seeks to have a statute declared unconstitutional on the ground that it exceeds the power of the government. An example of such a suit would be one in which the plaintiff challenges a law or administrative regulation on the ground that it violates the constitutional against "establishment of religion".[1] Not every person can bring such an action. There are some limiting rules —rules of "standing"— that require that the plaintiff in such an action must be one who has suffered or will suffer some concrete injury as a result of the challenged law or regulation.[2]

Another situation where a plaintiff party may play the role of a "private attorney general" involves what is called a Qui Tam action. Such an action is authorized in some states and in federal courts when a statute imposes a penalty upon the persons who do or fail to do certain specified acts, and provides that a civil action to collect the penalty can be brought by a private party. If the suit is successful, the party bringing the suit in allowed to keep a portion —often half— of the statutory penalty.

[1] See, *e. g. Flast vs. Cohen*, 392 U.S. 83, 1968.

[2] See also *Lujan v. Defenders of Wildlife*, 497 U.S. 871 (1990), where planitiff's challenged governmental action in the interests of wildlife.

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Still another situation in which parties may represent interests other than their own is the "class action". Our law permits an action to be brought by individual persons on behalf of themselves and also on behalf of other persons whose interests in the subject of the suit is similar to that of the named parties in the action. For instance, a group of five or ten persons who have been defrauded in the same way by the same defendant or defendants may sue to recover for their own injuries resulting from the fraud and also for the injuries suffered by all other persons similarly defrauded. The "class" of defrauded persons may have several thousand such persons, but through a "class action" the interests of all can be litigated in a single suit brought by a few parties.

Before a case can proceed as a class action, it is necessary to establish that the number of members of the class is so large that the actual jonider of all of them would be impractical; that the claims of all members of the class involve common questions of law or fact; that the claims of the class representative parties are typical of the claims of all members of the class; and that the named party representatives will adequately and properly represent the absent class members.[3] If the suit is a proper class action, the judgment in the suit will be binding on all claim members even those who were not actual parties.

Judges. The role of the judge in the United States involves more than just presiding over the trial of cases. In modern procedure, the judge keeps general surveillance over the pre-trial activities of the lawyers in preparing their cases. Modern civil procedure provides for one or more "pre-trial conferences" between the attorneys for the parties and the court. At these conferences, judges commonly use their position to encourage the parties to settle the case by agreement. Often the judges are able to convince the parties to settle the case.

In common law countries judges, especially appellate judges, have another special role to play. In the common law system, judicial decisions can be effective sources of law because of the doctrines of precedent, or *stare decisis*. Under that doctrine, once a court has decided a principle of law that was necessary to the judgment in a real case, that ruling becomes an authoritative statement of that principle which must

[3] See Rule 23, federal Rules of Civil Procedure. Most states have very similar procedures.

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be followed by that court and all courts subordinate to it. The judges, thus become sources of law.

Lawyers. In the United States lawyers have a dual role to play. The lawyers are advocates for the parties they represent. They owe special duties of loyalty to their clients. At the same time, however, lawyers are officers of the court, and in that role they owe special duties of loyalty to the court. Sometimes the duties owed to the client and those owed to the court conflict. The rules and canons of legal ethics help the lawyers resolve these conflicts in some situations, but in others the lawyer simply has to choose which loyalty should predominate in cases of conflict.

Lawyers are also expected to serve the public in some cases where they have no claim to remuneration for their services. This is referred to as the lawyer's *pro bono publico* responsibilities. Often such *pro bono* work involves the representation of indigent individuals, but it may also take the form of counseling non-profit organizations.

2. *Rules for controlling irregularities (or collusions) by the acts of the parties, judges or lawyers that could pervert the goals of the judicial system*

Parties. In the United States there are rules that aim to prevent collusive lawsuits. These are the rules of "justiciability". The jurisdiction (competence) of courts is limited to deciding "justiciable" cases and controversies. To be justiciable, the case must present a real, ripe, concrete controversy between adverse parties.

A plaintiff party must have "standing" to bring the suit. "Standing" means that the plaintiff must have suffered, or is threatened with suffering a concrete injury of some sort, although the injury does not have to pertain to tangible property rights. If the injury has not yet been suffered, it must be threatened with sufficient immediacy that some judicial remedy is needed to prevent it. The controversy must, in other words be "ripe". On the other hand, if the threat of injury, though once real, is no longer a danger the case cannot be entertained by the court. In other words, the case cannot be "moot". If it becomes moot before judgment, the case must be dismissed. Through these rules, most collusive and unnecessary suits are prevented.[4]

[4] For further development of the principles of justicability, see, *e.g*. Mullenix, Redish and Vairo, Understand Federal Courts and Jurisdiction, chapter 2 (Issues of Justicability), pp. 45-109 (1998).

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Judges. Irregularities committed by judges are subject to correction by appellate review of their actions. Appellate courts can overturn rulings by the courts of original jurisdiction.

There are also in most states Rules Judicial Ethics or Conduct.[5] If a judge violates such rules, he or she is subject to some sort of punishment. Punishment is usually imposed by the highest court of the state, and can range from public censure to removal from office, depending on the seriousness of the misconduct.

Lawyer's. All lawyers must be licensed to practice the legal profession. The lawyer's too are bound to follow Rules of Ethics or Professional Conduct.[6] Violations of such rules can cause the lawyers to be subjected to punishment, as in the case of the judges. Serious misconduct can result in the lawyer's "disbarment", meaning the permanent for forfeiture of the lawyer's license to practice the profession.

3. *To what extent can the participants in a legal proceeding be required to comport themselves with a minimum of objectivity, candor, respect and good faith?*

Parties. The rules of procedure require the participants to cooperate in good faith in the proceedings. Parties who are obstructive or non-cooperative can be subjected to sanctions (punishments). The judge has power to control the conduct of the case, and with that power, the court can impose a variety of sanctions, such as refusing to allow certain proof or holding the party in "contempt of court", which can result in the party's being fined or, in extreme cases, even incarcerated.

Modern procedure in the United States includes rules permitting parties to discover information held by the other parties so as to prepare the case for trial. These "discovery rules" require parties to supply on request by the other party, certain types of information or documents. The discovery

[5] See, American Bar Association's Model Rules of Judicial Conduct. All states have similar rules. See *e.g*. Kansas Code of Judicial Conduct, Rules adopted by the Supreme Court of Kansas, pp. 495-552 (2002).

[6] See, American Bar Association, Model Rules of Professional Conduct. States have similar rules. See, *e.g*. Kansas Rules of Professional Conduct Rules adopted by the Supreme Court of Kansas, pp. 309-463 (2002).

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rules even require parties to supply without request by the other parties certain basic information. Failure to participate in good faith in making the required disclosures or in responding to discovery requests can cause a party to be subjected to a variety of sanctions. Thus, good faith and fairplay are required of all parties.[7]

We should also mention rules like Federal Rule of Civil Procedure 11, which requires candor and honesty in all documents submitted in the trial preparation process. Rule 11 and similar state rules are mainly aimed at lawyers but in some situations can apply to parties as well.

Judges. We have previously referred to the methods of controlling conduct of judges. Those same devices some do require judges to act with objectivity, candor, respect and good faith. If a party fears that the judge cannot judge the case objectively, the party can make a motion asking the judge to recuse himself or herself, that is, yield authority over the case to another judge.

Lawyers. We mentioned above the Rules of Professional Ethics which require lawyers to act with candor, honesty and good faith. There are also rules, like Rule 11, Federal Rules of Civil Procedure, that require an attorney to sign every document submitted in pre-trial preparation. The lawyer's signature certifies that the information contained in the document is true to the best of his or her knowledge or belief, formed after a reasonable inquiry, and that there is evidence to support the statements. Violation of the rule may result in the attorney being required to pay a fine, including payment of the other party's attorney's fees.

4. *What is the level of relations among the parties, judges and lawyer's? Do they all pursue the same objectives?*

In the United States once litigation has been initiated, the judges occupy the dominant position in the litigation process. The plaintiff parties determine whether or not a lawsuit will be commenced, but once commenced, the judge has the position of ultimate strength.

[7] For discovery rules, see, *e. g*. Federal Rules of Civil Procedure Rules 26-37. Rule 37 is the one prescribing the sanctions for non-compliance with discovery orders.

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The judge, will not, however, prepare the case for trial. That function is entirely left to the parties, although it is the lawyers who normally actually do the work preparing and submitting the case. The parties have the ultimate right to decide what is to be done, but normally the parties follow their lawyer's advice.

The three "estates" do not have the same objectives. The judge's objective is to see to it that the proceeding is conducted fairly and according to law. The judge is a non-partisan referee in the matter. The parties and lawyers, on the other hand, seek to win the case. They are definitely partisans. The plaintiff's goal is to win a judgment awarding him or her the remedy sought. The defendant's goal course is to defeat the plaintiff's claim.

5. *What are the crisis elements that afflict the administration of justice that are attributed to the parties, the judges and the lawyer's. How much collaboration should there be among the participants to alleriate procedure complications?*

In the United States, if there is a crisis in the administration of justice, it would be in the excessive case-loads that many courts have to bear. In civil cases, the plaintiff parties are the ones most responsible for bringing lawsuits, although their lawyers share the responsibility, of course. In some courts, so many cases are filed that a case may not come to trial for years after it is initially filed.

To lessen the load on the courts there are various methods of disposing of cases without trial. Frivolous cases can generally be detected as soon as the lawsuit is commenced, and can be dismissed without further proceedings. In some states, parties who bring frivolous suits may be required to pay the other party's costs, including attorney's fees. Even if the case cannot be dismissed on the face of the pleadings, if there is no evidence to support the position of either the plaintiff or the defendant, the case can be disposed of without trial. It can be dismissed if the defendant can show that the plaintiff will be unable to prove an essential element of the case. Or summary judgment can sometimes be given for the plaintiff if the plaintiff's there is evidence to support the plaintiff's claim, and no evidence to counter it.

In the United States, the same judges may hear both civil and criminal cases. We do not have separate courts for civil, criminal, commercial, labor, or contentious administrative proceedings, as is commonly the case in civil law countries. Accordingly, in courts with a backlog of cases, some

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priorities have to be established to determine which cases are to be heard first. Normally criminal cases have some priority, in view of the accused's constitutional right to a speedy trial. The cost litigation is another factor that affects the judicial system.

To relieve some of the pressure on the system caused by the excessive caseloads and high cost of litigation, alternative methods of dispute resolution are becoming more and more popular. Arbitration and mediation are now quite commonly used by parties and lawyers to settle civil cases without following the full procedure of the judicial system. These devices, of course, require cooperation between the parties and lawyers, although the judges are rarely involved.

6. *To what extent do the material resources of the parties, the infrastructure and the place of trial affect the relations among the parties, the judges and the lawyers?*

The material resources of the parties are, unfortunately, a very influential factor in access to justice in the United States. Under our law, each party must pay his or her own litigation expenses, except where some statute permits fee shifting to the losing party. Unless a plaintiff has access to sufficient money to pay the expenses of the lawsuit, no action will be brought, no matter how meritorious the case. Similarly, if a defendant in the action lacks resources sufficient to pay the costs of defense, he or she will simply have to default, letting the plaintiff win, even though there may be a valid defense.

To alleviate to some extent the inequity inherent in this system, various measures have developed. One is the establishment of legal aid clinics where indigent persons can obtain legal representation. Unfortunately, the criteria for eligibility for legal aid, even where such clinics exist, are such that a great many persons who really are too poor to afford litigation cannot get it from legal aid. Moreover legal aid clinics do not exist in every community, so many persons simply have no legal aid available.

In criminal cases, most states and the federal courts do provide legal representation or indigent defendants, either through a state public defender's office or through a system of appointing private practioners to represent poor defendants.

In civil cases, the problem of the plaintiff who lacks the resources to litigate is relieved somewhat through the institution of "contingent fee"

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contracts. Under that system, a lawyer may agree to represent the client and advance the necessary costs in return for a share in the proceeds of the judgment of the case is successful. If the case is not successful, the attorney collects nothing.

Of course, even if poor parties are able to obtain legal representation, rich parties who are able to afford more expensive attorneys may obtain better representation so potential inequality still exists.

The geographical location of the seat of the litigation is also an important consideration. In criminal cases the place of the litigation will be where the crime was committed. In civil cases, however, the plaintiff who initiates the suit determines where the place of trial will be. There are rules, of course, that limit the choice to only a few places: rules of venue and rules of territorial jurisdiction. A plaintiff may be able to choose from among two or more states as the site of the suit. This gives rise to the practice of "forum shopping". The plaintiff will seek the place of trial that is most advantageous to the plaintiff. In making the choice, the plaintiff's lawyer will consider the ease and convenience of access to evidence and witnesses, and to consideration relating to the infrastructure of the chosen state.

Infrastructure can include consideration of the law that courts of the chosen state will apply. This involves consideration of the choice-of-law law of the chosen state. In the United States today there is considerable variation among the states in how their courts determine what state's law should apply in cases having connections with more than one state. Other infrastructure considerations include the rules of procedure and of evidence that will apply in trials in that state. The quality of judges and the rules governing trial by jury are also significant infrastructure considerations. These factors can vary from state to state.

If the defendant believe the location chosen by the plaintiff is too disadvantageous, the defendant may have some ways to influence the place of trial. It maybe possible to get the venue changed to a more convenient place. Federal law makes provision for such venue transfer.[8] If the parties to the case are citizens of different states, and more than $75,000 is in controversy, the plaintiff brings the case in a state court the defendant may remove it to a federal court in that state.[9]

[8] 28 USC 1404(a).
[9] 28 USC 1332.

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Some states and the federal courts also recognize a doctrine called "forum non conveniens". Under that doctrine a court that has proper jurisdiction and where venue is proper may nevertheless decline to exercise jurisdiction and dismiss the case if the forum chosen is seriously inconvenient.[10]

7. *How important are the formalities of judicial procedure with respect to the relations of the parties, the judges and the lawyers?*

The formalities of procedure are very important in framing the roles of the parties, the lawyers and the judges in litigation. They establish the rules of pleading that determine which party is responsible for raising the issues are to be tried and who will have the burden of proof on those issues. The rules of evidence determine how the parties must prove their positions. The discovery and pre-trial rules require the parties to cooperate in preparing the case for trial.

If the case is to be tried to a jury, the rules of procedure determine what the role of the jury and vis a vis the judge is to be.

In short, the relations the parties, judges and lawyers are largely dictated by the rules of procedure in allocating, to each its respective role in the litigation process.

8. *Other considerations*

The method of trial in the United States and other common law countries is, of course, different from that in civil law countries. Ours is an adversarial, not an inquisitorial, system. It is up to the parties and their lawyers to discover and produce the evidence to be used to prove their positions in the case. There are elaborate rules of "discovery" in modern procedure, but the responsibility for framing and presenting the case remains with the parties and their lawyers. The judge is merely a supervisor and referee.

Our system provides for trial by the live presentation of witnesses and other evidence in open court in a single continuous proceeding. In most

[10] On forum selection in general, see Casad, *Jurisdiction and Forum Selection*, 2a. ed., 1999.

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kinds of cases, the evidence is presented to a jury in both criminal and civil cases, unless the right of jury trial is waived. The jury decides which side is correct on the disputed fact issues in the case. In cases where there is no jury, the judge decides the issues of fact as well as the questions of law. In jury cases, however, the judge's role is subordinate to that of the jury on matters of fact.

The judge does have some control over the fact finding process, however. It is the judge who determines what evidence can be admitted at trial. Also, if the judge finds that there is no evidence to support the position of the party with the burden of proof on an issue, the judge can take the case from the jury on that point, and if it is a critical point, the judge can direct a verdict for the opposite party.

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