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Pamela Rogers Chepiga

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Federal Civil Practice

Cover Page Footnote

Assistant United States Attorney, Southern District of New York. B.A. 1970, Fordham University; J.D. 1973, Fordham Law School.

BOOK REVIEW

Federal Civil Practice. By Kent Sinclair, Jr. New York: Practising Law Institute. 1980. Pp. vii, 1119. \$60.

Members of the federal bench have recently raised a hue and cry about the quality of advocacy in their courts. The Chief Justice of the United States has been most vocal in criticizing the litigation skills, or more accurately the lack of such skills, displayed in the federal courts.¹ The Chief Justice's opinion appears to reflect the thinking of most of his judicial brethren. In a Federal Judicial Center survey, approximately four hundred federal trial judges rated the performances of fully one quarter of the lawyers appearing in federal district courts as less than, or barely, adequate.²

Although much time and energy have been devoted to debating just how far the level of advocacy has fallen, one member of the federal bench has refrained from dialectics and taken a constructive step toward remedying the problem. Kent Sinclair, a magistrate in the Southern District of New York, has provided practitioners with an excellent one volume guide to civil practice in the federal courts. Having an almost unparalleled opportunity to review the daily workings of a large number of lawyers handling a wide variety of matters, he has combined his practical judicial experience with the more theoretical insights he has gained as a professor of civil trial advocacy.³ In *Federal Civil Practice*, Magistrate Sinclair has written a handy, logically presented, and easily understandable guide that can aid the practicing lawyer, even one generally unfamiliar with the federal courts, in skillfully navigating a federal civil action from summons to appeal.

The treatise is divided into three main sections. The first and longest section, covering slightly over five hundred pages, is entitled "Courts and Procedure." It begins with a basic survey of the federal

1. The seminal speech that drew public attention to the problem was delivered by Chief Justice Warren E. Burger as the 1973 John F. Sonnett Memorial Lecture at Fordham Law School, reprinted as *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 Fordham L. Rev. 227 (1973). The Chief Justice has recently reviewed the problem and concluded that although "[c]onsiderable progress has been made since 1973 . . . [m]uch more remains to be done." Burger, *Some Further Reflections on the Problem of Adequacy of Trial Counsel*, 49 Fordham L. Rev. 1, 25 (1980) [hereinafter cited as *Adequacy of Trial Counsel*].

2. A. Partridge & G. Bermant, *The Quality of Advocacy in the Federal Courts* 13 (1978). *But see* Frankel, *Curing Lawyers' Incompetence: Primum Non Nocere*, 10 Creighton L. Rev. 613, 626 (1977); McGowan, *The University Law School and Practical Education*, 65 A.B.A.J. 374, 377 (1979); Weinstein, *Don't Make a Federal Case Out of It*, *Student Law.*, Feb. 1975, at 16.

3. Since 1973, Magistrate Sinclair has taught trial advocacy as an Adjunct Professor of Law at Fordham Law School.

judicial system, reviewing and identifying the functions of the various courts that comprise that system. Also included are short descriptions of certain organizations, such as the Federal Judicial Center⁴ and Circuit Judicial Councils,⁵ whose role in the federal system is significant, but often unrecognized by many members of the bar.

After providing a basic primer on the courts themselves, the introductory chapters of Part One address questions of jurisdiction.⁶ Subsequent chapters are devoted to outlining where to sue,⁷ whom to sue,⁸ and what papers are necessary.⁹ Having successfully guided the practitioner through the processes of instituting or responding to a federally cognizable claim filed against the proper parties in the proper forum, the final chapters of Part One center on pretrial procedure, particularly motion practice¹⁰ and provisional remedies.¹¹

It is difficult to imagine any one volume work presenting a guide to the federal courts and procedure as broad in scope as that contained in Part One of this treatise. Almost implicit in praising the work's breadth, however, is the recognition that the treatment of so many subjects necessarily limits the depth of the analysis. For any particular subject—for example, the usually knotty area of ancillary and pendent jurisdiction—the treatise presents a clear and concise but somewhat cursory statement of the law that does not explore more subtle nuances.¹² This problem is alleviated somewhat by the inclusion of footnotes that contain citations to leading cases and the relevant rules and statutes in each area, which can serve as a basis for more detailed research.

It may be unfair to criticize Part One of this treatise for failing to explore the thornier areas of the law in greater depth because such probing analysis was not the author's aim. Part One succeeds in achieving its goal of presenting the basics of federal civil practice clearly and comprehensively and will thus prove invaluable to novice lawyers or to experienced members of the various state bars who have not specialized in federal practice. Part One of *Federal Civil Practice* serves a different function for experienced litigators whose practice is centered in the federal courts. Rather than a guide and primer, it is a handy refresher and useful checklist of points of prac-

4. K. Sinclair, *Federal Civil Practice* 69 (1980).

5. *Id.* at 63-64.

6. *Id.* at 75-140 (Chapter Two: Jurisdiction).

7. *Id.* at 141-200 (Chapter Three: Venue and Transfer).

8. *Id.* at 269-378 (Chapter Five: Joinder of Claims and Parties).

9. *Id.* at 201-67 (Chapter Four: Pleading).

10. *Id.* at 443-501 (Chapter Eight: Motion Practice).

11. *Id.* at 379-404 (Chapter Six: Provisional Remedies).

12. *Id.* at 118-20.

tice and procedure that if overlooked, can have devastating consequences.¹³

Part Two of the treatise, entitled "Discovery," represents a shift from the more general to the more detailed. At first glance, the more detailed treatment accorded discovery may appear to reflect the author's special expertise as a federal magistrate. On further analysis, however, the featured position given to discovery in this treatise is probably an accurate reflection of the amount of time and energy devoted to the discovery process by federal practitioners. In a system in which only a relatively small percentage of civil cases are tried,¹⁴ the discovery process often consumes the largest portion of a litigator's time.

The two hundred and fifty pages comprising the "Discovery" section are well worth setting aside some quiet time to read and think through. Although one would often return to particular sections with specific problems in mind, much can be learned from reading the section in its entirety. All lawyers are aware of the primary purpose of discovery, defined in this treatise as enabling "litigants to obtain a more complete picture of the facts of a case more quickly and less expensively than they could obtain through unaided initiative."¹⁵ In this segment of the work, Magistrate Sinclair also reviews several of the other roles played by discovery,¹⁶ some of which many lawyers are only subliminally aware of and have never actually focused on. Included in this latter group are the opportunity to isolate and emphasize certain issues and the opportunity to observe the demeanor, attitude, and response of opposing counsel.

After thinking through "Discovery," many readers may reevaluate the ways in which they habitually conduct discovery. By subjecting the benefits and limitations of the various discovery devices to some intellectual scrutiny, an attorney can learn to make informed decisions in each particular case regarding not only which discovery tools to use, but also the most profitable order in which to employ them. Furthermore, certain discovery devices, such as depositions by written questions¹⁷ and requests for admissions,¹⁸ are not included in the arsenals of many lawyers for reasons that may deserve reconsidera-

13. Perhaps reflecting the interest and expertise of the author, two areas of growing importance—the role of the federal magistrate and the function of the panel on multidistrict litigation—receive extended discussion in Part One. *See id.* at 43-59 (magistrates); *id.* at 176-99 (multidistrict litigation).

14. In the 12 month period ending June 30, 1979, 154,666 civil cases were filed in the United States district courts. For the same period, only 11,764 civil trials were conducted. Administrative Office of the United States Courts, Annual Report of the Director 62, 113-14 (1979).

15. K. Sinclair, *supra* note 4, at 508.

16. *Id.* at 508-14.

17. Fed. R. Civ. P. 32.

18. Fed. R. Civ. P. 36.

tion, particularly in cases in which optimal strategic advantages must be balanced against economic concerns.

Another strong point of the discovery section is the discussion on preparing witnesses for oral depositions.¹⁹ As Magistrate Sinclair notes, "[h]owever strong one's case, [or] however effective a given witness, exhaustive preparation will improve the results of any deposition."²⁰ Moreover, no matter how many times an attorney has prepared witnesses for oral depositions, it can be most useful to take some time to think about the preparation process itself, removed from the facts and emotions of any particular case. "Discovery" certainly provides the impetus for such thoughtful analysis and reexamination.

The third and final part of this treatise is devoted to "Trial and Appeal." This part covers certain mechanics of trial practice, such as subpoenaing witnesses, submitting trial briefs, and using deposition testimony at trial. An overview of appellate procedures, such as applications for expedited appeals and preparations of appendices, is also included. Although the various segments of a trial, such as openings²¹ and summations,²² are discussed briefly, the focus is clearly procedural. For example, the book addresses the mechanical order of summations and includes a list of "[p]roper subjects for closing argument."²³ Those sections devoted to trial practices, however, are devoid of the great drama and emotion inherent in a trial. The treatise does not convey and, in fairness, does not attempt to convey, the very special feel of a courtroom. "Trial and Appeal" fails to match "Discovery" in its ability to provoke stimulating thought about the material covered. This failure is somewhat ironic because the discovery process often lends itself to much drier and less thoughtful treatment than does trial advocacy.

Although it may be unusual to say that a treatise of this nature has a theme, the important common thread running throughout *Federal Civil Practice* is the overriding importance of the rules governing federal civil practice. Most practitioners, having been educated on the Langdellian case method, turn instinctively to case law for authority.²⁴ This method, however, is often not the most efficient way of finding answers to problems in federal civil practice. As the treatise exhorts, "[f]ar more often than the practitioner would think, the statutes and rules directly address the particular situation being faced. A first recourse in determining how to proceed, therefore, must be to these codified governing principles. Thereafter the cases

19. K. Sinclair, *supra* note 4, at 615-21.

20. *Id.* at 621.

21. *Id.* at 780-81.

22. *Id.* at 828-29.

23. *Id.* at 829.

24. *Adequacy of Trial Counsel*, *supra* note 1, at 2-4.

may be reviewed."²⁵ This emphasis on the critical importance of looking first to the applicable rules is wisely repeated throughout the treatise. Additionally, the practitioner is frequently reminded that the often overlooked local rules of each particular court must be continually referred to during the course of any federal civil action. An examination of *Federal Civil Practice* should drive home the truth of Justice Felix Frankfurter's comment that procedure is far more than "just folderol or noxious moss."²⁶

In conclusion, Magistrate Sinclair has rendered a great service to the bar by devoting his energies and considerable skill to producing this treatise.²⁷ Extremely comprehensive and eminently practical, *Federal Civil Practice* would be a most worthwhile acquisition for any lawyer handling civil cases in the federal courts.

*Pamela Rogers Chepiga**

25. K. Sinclair, *supra* note 4, at 15.

26. *Cook v. Cook*, 342 U.S. 126, 133 (1951) (Frankfurter, J., dissenting).

27. A twenty-seven page Addendum now accompanies the volume to cover the recent revisions to the Rules of the Supreme Court of the United States and to the Federal Rules of Civil Procedure. Should there be substantial revisions to these rules or to the Federal Rules of Evidence, the publisher might be well advised to consider publishing the book in looseleaf form. Another suggestion that might be made is the publication of a paperback edition.

* Assistant United States Attorney, Southern District of New York. B.A. 1970, Fordham University; J.D. 1973, Fordham Law School.