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Scott Dodson
UC Hastings College of the Law, dodsons@uchastings.edu

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Cooperativism in the American Adversarial Tradition

Scott Dodson[*]

Adversarial proceedings; Civil procedure; Co-operation; Discovery; Litigation; Pleadings; United States

Abstract

American civil litigation is adversarial—both in the sense of fitting within the adversarial tradition of party-driven litigation followed in most common-law countries, and in the sense of being aggressively combative. Yet within US civil litigation is an undercurrent of cooperativism. This article uncovers cooperativism in the procedural rules and common party practice, and it situates cooperativism within both adversarialism and judicial managerialism. The article argues that cooperativism is a story in its own right, one that should not be overlooked.

Introduction

Litigation drama has provided fodder for some of Hollywood's great successes, from *Kramer v Kramer* to *Dark Waters*, along with television shows from *L.A. Law* to *Boston Legal*. Americans love the spectacle of the courtroom fight.[1] The lawyers do battle under the limelight, while the parties, judges, witnesses—even the facts of the cases—are merely the supporting casts, and often seem more like spectators themselves.

Hollywood is nothing if not stylised hyperbole. Twist endings and surprise zingers almost never happen in a civil trial. But Hollywood's portrayals are based in some truth. US litigation does focus on the lawyers and their combat, arguing before a passive judge who, when the lawyers are done, will decide who is right. The lawyers conduct discovery, hire their own experts, select their own witnesses, and present their own best case, largely (though not exclusively) without judicial oversight or direction. The judge acts primarily as referee to resolve attorney disagreements as they arise and may elect not to meddle in the contest itself. It is true that federal courts have embraced judicial case management, especially in complex litigation, but the default continues to be judicial passivity and attorney

[*] James Edgar Hervey Chair in Litigation, Geoffrey C. Hazard Jr. Distinguished Professor of Law, and Director of the Center for Litigation and Courts, UC Hastings College of the Law. I presented a draft of this article as a lecture to the Japan Association of the Law of Civil Procedure in Tokyo in May 2021, and I am grateful to Professor Koichi Miki for inviting me and for the comments received there. Thanks also to Rick Marcus and an anonymous referee for excellent reactions and suggestions.

[1] As Herbert Kritzer put it, America has a "love affair with law and courts", Herbert M. Kritzer, "Review Essay" (2004) 38 L. & Soc'y Rev. 349, 350.

antagonism, especially as contrasted with civil-law traditions elsewhere in the world.[2]

The combination of default judicial passivity and zealous attorney representation gives special force to the characterisation of the American system as "adversarial", especially in the context of discovery, which is largely conducted outside of court. As one judge recently put it:

> "The traditional paradigm of discovery is a contentious, pugilistic, take-no-prisoners approach where litigants demand extensive, far-reaching, mind-numbing, and overwhelming discovery with no real concern for cost, proportionality or burdensomeness. In fact, one of the goals of propounding discovery in the traditional paradigm is to wear the other side down with a large volume of nearly repetitive discovery requests in an effort to make life as difficult as possible for the opponent… . The responding litigant is often equally diabolical, raising page after page of boilerplate, redundant, picayune, and obscure objections with the goal of frustrating the opponent and producing as little discovery as possible. Under this old paradigm, respondents pride themselves on making as many objections as humanly possible, admitting or saying nothing or next to nothing, and making their opponent's discovery process exceedingly costly and akin to pulling sharks' teeth in the dark."[3]

This picture of US adversarialism is akin to the divorce dispute in *War of the Roses*, in which the parties battle out their differences to mutual destruction.

The idea of the US tradition of adversarialism as a zero-sum game has tended to obscure a cooperative facet of American civil litigation, in which the parties (or, more often, their lawyers) cooperate and collaborate with each other in moving the case forward in a sensible way. Much US civil litigation in the federal district courts actually advances this cooperative model, and some research suggests (though by no means conclusively establishes) that cooperation can pay dividends to both parties—that civil litigation need not always be a zero-sum game after all.

My goal is to highlight and explore this underappreciated cooperative facet of federal civil litigation. Although I refer to empirical studies and evidence of cooperativism and its benefits where available, my main thrust is to situate cooperative elements in an otherwise adversarial system. Appreciating these cooperative elements tends to undermine the major world visions of litigation as categorised as adversarial, managerial or inquisitorial. To be sure, cooperative aspects should not be said to dominate US civil litigation. But nor should those aspects be overlooked, and the role of cooperation in an otherwise adversarial tradition presents nuanced questions of the role of the parties and the judge. Cooperativism thus deserves its own place in the drama of US litigation.

[2] Amalia D. Kessler, "Continuities, Ruptures, and Causation in the History of American Legal Culture" (2017) 70 Stan. L. Rev. Online 48.

[3] William Matthewman, "Towards a New Paradigm for E-Discovery in Civil Litigation: A Judicial Perspective" (2019) 71 Fla. L. Rev. 1261, 1263–164.

American adversarialism

Deep-seated principles of individualism, egalitarianism, populism and laissez-faire have long dominated US culture.[4] These values have helped fuel the peculiar style of civil litigation in the US.[5] US litigation is, in Robert Kagan's words, "a style of legal contestation in which the assertion of claims, the search for controlling legal arguments, and the gathering and submission of evidence are dominated not by judges or government officials but by disputing parties or organizations, acting primarily through lawyers".[6]

This adversarialism exposes two main features of US civil litigation.[7] The first is a party-driven model that contrasts with the judge-driven model in most civil-law countries. The second is the peculiar, sometimes extreme, combativeness of the litigants. This Part discusses both features.

Adversarialism as a party-driven model

Most of the world's civil-litigation systems follow one of two major models generally fitting either a civil-law or common-law tradition.[8] In the civil-law tradition, public rights are largely the purview of governmental enforcement rather than private enforcement; the typical civil case, then, is a dispute between private parties for private rights for a modest sum of money.[9] Civil cases are "structured as an official inquiry"[10] in which the judge takes the lead on ferreting out the truth in the course of adjudication.[11] Because compelling testimony and documentary evidence is a governmental function,[12] there is little, if any, party-driven discovery after a case is filed.[13] Instead, the civil-law judge takes an active role in directing the order and presentation of proof,[14] including by directing the production of evidence, identifying and questioning witnesses, and determining which merits

[4] Seymour Martin Lipset, *American Exceptionalism: A Double-Edged Sword* (New York, NY: W.W. Norton, 1996), p.18.

[5] Oscar G. Chase, "American 'Exceptionalism' and Comparative Procedure" (2002) 50 Am. J. Comp. L. 277, 278.

[6] Robert A. Kagan, *Adversarial Legalism: The American Way of Law*, 2nd edn (Cambridge, MA: Harvard University Press, 2019), p.10. Kagan has a broader vision in mind, which includes adversarial regulation and the impetus to spur social change through litigation on a macro scale. But he also means to reflect the adversarial nature of civil litigation in individual cases. As he points out, "civil litigation and adjudication systems in the United States are structured not via a hierarchical, judge-dominated process but by adversarial legalism—lawyer-and-party dominated litigation, with the added complication of trial by jury", p.118.

[7] For a discussion of other strands in the broader scope of US adversarial legalism, see Jeb Barnes and Thomas F. Burke, "Untangling the Concept of Adversarial Legalism" (2020) 16 Ann. Rev. L. & Soc. Sci. 473.

[8] Arthur Engelmann, *A History of Continental Civil Procedure, Translation by Robert Wyness Millar* (New York, NY: Kelley, 1927), pp.3–81; John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition*, 3rd edn (Palo Alto, CA: Stanford University Press, 2007). These categories are imprecise both because countries within a single category exhibit significant differences and because all systems exhibit features of both traditions. See Scott Dodson and James M. Klebba, "Global Civil Procedure Trends in the Twenty-First Century" (2011) 34 B.C. Int'l & Comp. L. Rev. 1, 17. Nevertheless, the two models generalise some useful distinctions. See Chase, "American 'Exceptionalism' and Comparative Procedure" (2002) 50 Am. J. Comp. L. 277; Mirjan R. Damaška, *The Faces of Justice and State Authority* (New Haven, CT: Yale University Press, 1986).

[9] Hein Kötz, "Civil Justice Systems in Europe and the United States" (2003) 13 Duke J. Comp. & Int'l L. 61, 75–77.

[10] Damaška, *The Faces of Justice and State Authority* (1986), p.3.

[11] Kötz, "Civil Justice Systems in Europe and the United States" (2003) 13 Duke J. Comp. & Int'l L. 61, 75–77.

[12] Geoffrey C. Hazard, Jr, "Discovery and the Role of the Judge in Civil Law Jurisdictions" (1998) 73 Notre Dame L. Rev. 1017, 1024.

[13] Scott Dodson, "Presuit Discovery in Comparative Perspective" (2012) 6(2) J. Comp. L. 51, 57.

[14] Ernst C. Stiefel and James R. Maxeiner, "Civil Justice Reform in the United States—Opportunity for Learning from 'Civilized' European Procedure Instead of Continued Isolation?" (1994) 42 Am. J. Comp. L. 147, 157; John H. Langbein, "The German Advantage in Civil Procedure" (1985) 52 U. Chi. L. Rev. 823, 830–41.

issues to develop at any given time.[15] In Germany, for example, the judge actively clarifies the issues, makes suggestions to the parties for strengthening or amplifying their positions, decides whether and when to hear particular witnesses, and leads the questioning of those witnesses.[16]

By contrast, the adversarial model, followed by many common-law countries, features the parties and their lawyers as the drivers of the litigation, with a relatively passive judge available to resolve any disputes presented by the parties.[17] The parties, as they see fit, file their own pleadings, formulate their legal theories and strategies, seek their own discovery and other evidence in support of their claims and defences, order and structure pretrial phase of the dispute, and present the evidence to the trier of fact.[18] If a party elects to forgo a theory of liability or a particular defence or a particular piece of evidence or testimony, that is the party's prerogative, and the judge will not correct it.

In this system, the role of the judge is not primarily to ascertain the truth but rather to resolve any disputes presented by the parties.[19] Generally, the judge pays little attention to the case until the parties raise an issue for decision by filing a motion with the court.[20] Indeed, much of the pretrial process is conducted outside of the presence of the judge; the judge presides over the proof presentation only at trial.[21] The default role of the judge is to remain in the background until needed for adjudication.[22]

The US system of civil justice fits, mostly comfortably, within this adversarial tradition.[23] The literature on American adversarialism has added two somewhat opposing wrinkles, however. The first wrinkle is that the US adversarial system is unique even among its common-law kin.[24] The US Constitution enshrines the right to a trial by jury in many civil cases.[25] US law allows—and even encourages—liberal joinder and aggregation of claims and parties, including in class actions and multidistrict litigation.[26] Pleading standards are lax.[27] The "American Rule" provides that parties, win or lose, generally bear their own

[15] Amalia D. Kessler, "Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial" (2005) 90 Cornell L. Rev. 1181, 1188.

[16] Chase, "American 'Exceptionalism' and Comparative Procedure" (2002) 50 Am. J. Comp. L. 277, 297. This is not to say that the judge is a dictator; in most civil-law countries, including Germany, the judge works with the parties to identify appropriate witnesses and lines of inquiry and often acts on the parties' recommendations. See Damaška, *The Faces of Justice and State Authority* (1986), p.221. The point, instead, is that the civil-law judge takes an active leadership role in the development of the case. See Chase, "American 'Exceptionalism' and Comparative Procedure" (2002) 50 Am. J. Comp. L. 277, 298.

[17] See Stephan Landsman, *The Adversary System: A Description and Defense* (Washington, DC: AEI Press, 1984), p.34; Thomas D. Rowe, Jr, "Authorized Managerialism Under the Federal Rules—and the Extent of Convergence with Civil-Law Judging" (2007) 36 Sw. U. L. Rev. 191, 203–04.

[18] Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 Harv. L. Rev. 1281, 1283.

[19] Judith Resnik, "Managerial Judges" (1982) 97 Harv. L. Rev. 374, 376.

[20] Richard L. Marcus, "Reining in the American Litigator: The New Role of American Judges" (2003) 27 Hastings Int'l & Comp. L. Rev. 3, 27–28.

[21] Marcus, "Reining in the American Litigator: The New Role of American Judges" (2003) 27 Hastings Int'l & Comp. L. Rev. 3, 10.

[22] Marcus, "Reining in the American Litigator: The New Role of American Judges" (2003) 27 Hastings Int'l & Comp. L. Rev. 3, 4.

[23] But see Kessler, "Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial" (2005) 90 Cornell L. Rev. 1181 (arguing that US equity tradition is akin to the judge-directed procedure of civil-law countries).

[24] Scott Dodson, "Comparative Convergences in Pleading Standards" (2010) 158 U. Pa. L. Rev. 441, 442; Stephen N. Subrin, "Discovery in Global Perspective: Are We Nuts?" (2002) 52 DePaul L. Rev. 299, 303.

[25] US Const. amend. XII.

[26] Dodson and Klebba, "Global Civil Procedure Trends in the Twenty-First Century" (2011) 34 B.C. Int'l & Comp. L. Rev. 1, 1–2.

[27] Dodson, "Comparative Convergences in Pleading Standards" (2010) 158 U. Pa. L. Rev. 441, 445.

expenses of litigation.[28] And US discovery is far more extensive, expansive and expensive than anywhere else in the world.[29] These peculiar features of the US system have helped make US procedure exceptionalist even compared to the systems of other common-law countries that follow the adversarial tradition.[30]

The second wrinkle is that US federal civil litigation has shifted over the last 50 years towards more active judicial management of civil cases, especially complex cases. In the 1950s and 1960s, a proliferation of public-litigation laws covering civil rights, environmental claims, and employment, among others, provided fodder for a sharp increase in case filings in the federal courts.[31] Contemporaneously, the pervasive use of photocopiers dramatically increased the amount of discovery available to requesting parties.[32] The 1970s saw a backlash to litigation, especially to the expense of discovery.[33] The solution, pressed both by judicial experimentation and direct rulemaking, was to encourage more direct and heavy-handed judicial supervision and management of cases.[34] In 1983, the rulemakers amended Rule 16 to require judges to set schedules and to encourage them to hold status conferences and enter management orders covering a range of pretrial matters.[35] In 1993, the rulemakers again amended Rule 16 to require the parties to develop a joint discovery plan and to submit a report to the judge.[36] Additional amendments in 2006 authorised judicial management of e-discovery issues. Meanwhile, the influential *Manual for Complex Litigation* proposed to promote "the exercise of judicial control over complex litigation"[37] by recommending judicial promotion of settlement, extensive use of pretrial conferences, and judicial activism to narrow issues and limit discovery.[38] As Richard Marcus has put it, "these changes in rules and judicial orientation meant that attorneys who had formerly had great latitude before trial to approach things as they pleased could no longer proceed without constraint".[39]

The combination of rule amendment and judicial experimentation shifted judicial culture from extreme passivity to a willingness to be more active. As Arthur Miller has written, "the role of the district judge (or the magistrate judge in many actions) as a case manager generally is accepted today by most practitioners and jurists".[40]

[28] Scott Dodson, "The Challenge of Comparative Civil Procedure" (2008) 60 Ala. L. Rev. 133, 141–42; *Oppenheimer Fund, Inc v Sanders* 437 US 340, 358 (1978).

[29] Geoffrey C. Hazard, Jr., "From Whom No Secrets Are Hid" (1998) 76 Tex. L. Rev. 1665, 1665. As the Supreme Court once intoned: "No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case." *Hickman v Taylor* 329 US 495, 507 (1947).

[30] Richard L. Marcus, "Putting American Procedural Exceptionalism into a Globalized Context" (2005) 53 Am. J. Comp. L. 709.

[31] Arthur R. Miller, "Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure" (2013) 88 N.Y.U. L. Rev. 286, 292–93.

[32] Marcus, "Reining in the American Litigator: The New Role of American Judges" (2003) 27 Hastings Int'l & Comp. L. Rev. 3, 13.

[33] Marcus, "Reining in the American Litigator: The New Role of American Judges" (2003) 27 Hastings Int'l & Comp. L. Rev. 3, 13.

[34] Marcus, "Reining in the American Litigator: The New Role of American Judges" (2003) 27 Hastings Int'l & Comp. L. Rev. 3, 13.

[35] Marcus, "Reining in the American Litigator: The New Role of American Judges" (2003) 27 Hastings Int'l & Comp. L. Rev. 3, 19.

[36] Marcus, "Reining in the American Litigator: The New Role of American Judges" (2003) 27 Hastings Int'l & Comp. L. Rev. 3, 19.

[37] *Manual for Complex Litigation* § 1.10, 4th edn (Washington, DC: Federal Judicial Center, 2004).

[38] *Manual for Complex Litigation* §§ 1.20, 1.30.

[39] Marcus, "Reining in the American Litigator: The New Role of American Judges" (2003) 27 Hastings Int'l & Comp. L. Rev. 3, 19.

[40] Miller, "Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure" (2013) 88 N.Y.U. L. Rev. 286, 295.

Managerialism has its critics, to be sure,[41] but "we have moved for better or worse into an era of authorized managerialism".[42] The "bilateral model has been replaced to some degree by a process that is more akin to a triangulated shared power and functional relationship between the judge and the lawyers".[43] This move towards managerialism appears to be a welcome development for both the bench and the bar.[44]

Comparative literature has watched this development with interest, with many scholars noting some level of convergence between US judicial managerialism and the judge-directed norm in most civil-law countries.[45] There is something to that. But underlying motivational differences remain. In the civil-law tradition, judges manage cases as a way to seek out the truth on the merits. US managerialism is geared primarily for efficiency—to keep the case and the parties on track.[46] It continues to be the very rare case in which a US judge would direct the parties to develop specific testimony or produce specific documents.

Adversarialism as aggressive litigiousness

Despite the growth of judicial managerialism, US civil litigation remains firmly adversarial, both in the sense of the common-law/civil-law dichotomy and in the more colloquial sense of aggressive litigiousness. In this colloquial sense, aggression and antagonism have dominated US civil litigation for more than a century.[47] In 1906, Roscoe Pound bemoaned what he saw as the extreme litigation adversarialism of his times.[48] According to the widely accepted anecdotal picture, aggressive, even counterproductive, adversarialism continues today, despite the promulgation of rules designed to minimise procedural conflicts and despite trends towards judicial management. The American process is "a kind of 'battle-between-the-parties' model".[49]

Several factors fuel this aggression and conflict. The American legal culture of individualism, litigiousness, and zealous advocacy drives parties (and their lawyers) to a more aggressive, combative style.[50] Changes in the legal profession—including the rise of the big national (or international) firm and the market stratification of firms—has spawned a decline in civility among lawyers[51] and has fostered the

[41] See, for example, Lon Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harv. L. Rev. 353; Judith Resnik, "Failing Faith: Adjudicatory Procedure in Decline" (1986) 53 U. Chi. L. Rev. 494.

[42] Rowe, "Authorized Managerialism Under the Federal Rules—and the Extent of Convergence with Civil-Law Judging" (2007) 36 Sw. U. L. Rev. 191, 192–93.

[43] Miller, "Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure" (2013) 88 N.Y.U. L. Rev. 286, 296.

[44] Thomas Willging et al., "An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments" (1998) 39 B.C. L. Rev. 525, 587 tbl 36.

[45] Linda S. Mullenix, "Lessons from Abroad: Complexity and Convergence" (2001) 46 Vill. L. Rev. 1, 13.

[46] Maximo Langer, "The Rise of Managerial Judging in International Criminal Law" (2005) 53 Am. J. Comp. L. 835, 836.

[47] For the definitive history of the origins of American adversarialism, see Amalia D. Kessler, *Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800–1877* (New Haven, CT: Yale University Press, 2017).

[48] See Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice" (1906) 29 A.B.A. Rep. 395, 404–06.

[49] James R. Maxeiner, Gyooho Lee and Armin Weber, *Failures of American Civil Justice in International Perspective* (Cambridge: Cambridge University Press, 2011), p.171.

[50] Chase, "American 'Exceptionalism' and Comparative Procedure" (2002) 50 Am. J. Comp. L. 277.

[51] See Ronald J. Gilson and Robert H. Mnookin, "Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation" (1994) 94 Colum. L. Rev. 509, 511; Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, MA: Harvard University Press, 1993).

"well-articulated and widely accepted norms of adversariness and aggressiveness that many lawyers take to define what it means to be a lawyer—especially a 'litigator'—and also what it means to represent a client loyally".[52] The hourly-fee arrangement typical among American lawyers incentivises work over results, and thus adversarialism over conciliation.[53] Even some contingency-fee arrangements—such as in class actions or claims under fee-shifting statutes—can be keyed to hours worked.[54] Worse, because each party bears its own costs and attorney's fees, each side has an incentive to impose cost and attorney work on the other.[55] Even clients may be part of the problem: some prefer "bulldog" lawyers.[56] Wal-Mart, for example, once touted an infamous "no settlement" litigation policy[57] that no doubt incentivised aggressive representation.

All these factors likely play powerful roles in influencing aggressive attorney behavior. The net result is that some zealous advocacy for the client can spill into excessive adversarialism and manipulative tactics, which has led some observers to describe some American civil litigation as "Rambo" litigation,[58] involving "attorneys who employ whatever tactics necessary for victory, no matter how repugnant".[59] As one commentator defined it:

> "Rambo litigation is the logical conclusion of partisan zealous advocacy unrestrained by supervening obligations to society or the justice system. It is the attorney's willingness—indeed, perceived obligation—to seize every advantage for a client by any tactic not explicitly outlawed, no matter how nasty or unpleasant the means, regardless whether the client is entitled to it or not."[60]

To say that all US civil litigation is Rambo litigation is undoubtedly hyperbole. But the conventional picture of US litigation as excessively adversarial has underpinnings of truth. Highly aggressive tactics are common.[61] As Marvin Frankel

[52] John S. Beckerman, "Confronting Civil Discovery's Fatal Flaws" (2000) 85 Minn. L. Rev. 505, 517. See also Carrie Menkel-Meadow, "The Evolving Complexity of Dispute Resolution Ethics" (2017) 30 Geo. J. Legal Ethics 389, 397 ("The seminal idea that the lawyer knows but one side in his representations, that of his own client, and owes no duty to any other person, is now the classic 'meme,' cultural theme, or DNA of the modern legal profession"). Although the ABA Model Rules of Professional Conduct insist that a lawyer's duty to their client does not require the lawyer to press for every client advantage, Model R. Prof'l Conduct 1.3 cmt (2006), the Model Rules do not discourage it, either, see Deborah L. Rhode, "Ethical Perspectives on Legal Practice" (1985) 37 Stan. L. Rev. 589, 601 ("[T]he Model Rules do little more than incorporate general prohibitions on crime and fraud").

[53] Deborah L. Rhode, "Institutionalizing Ethics" (1994) 44 Case W. Res. L. Rev. 665, 679–80.

[54] 10 Charles Alan Wright et al., *Federal Practice and Procedure*, 4th edn (New York, NY: Thomson West, 2021), § 2675.2.

[55] See, for example, Paul W. Grimm and Heather Leigh Williams, "'The [Judicial] Beatings Will Continue Until Morale Improves': The Prisoner's Dilemma of Cooperative Discovery and Proposals for Improved Morale" (2013) 43 U. Balt. L. Rev. 107, 116.

[56] See Gilson and Mnookin, "Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation" (1994) 94 Colum. L. Rev. 509, 512 n.13 (quoting Sullivan & Cromwell chairman that "clients like a law firm that's aggressive"). See also Richard Marcus, "Cooperation and Litigation: Thoughts on the American Experience" (2013) 61 U. Kan. L. Rev. 821 (painting a picture, with some scepticism, of "the client does not want to hire a 'cooperator,' but rather a bulldog").

[57] *Shedden v Wal-Mart Stores, Inc* 196 FRD 484, 486 (E.D. Mich. 2000).

[58] Thomas M. Reavley, "Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics" (1990) 17 Pepp. L. Rev. 637.

[59] Joseph R. Wilbert, Note, "Muzzling Rambo Attorneys: Preventing Abusive Witness Coaching by Banning Attorney-Initiated Consultations with Deponent" (2008) 21 Geo. J. Legal Ethics 1129.

[60] Beckerman, "Confronting Civil Discovery's Fatal Flaws" (2000) 85 Minn. L. Rev. 505, 579.

[61] Bryant Garth, "From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values" (1993) 59 Brook. L. Rev. 931, 939–49.

once said, "[I]t is the rare case in which either side yearns to have the witnesses, or anyone, give *the whole truth*."[62]

Cooperativism in Federal Litigation

Both strands of US adversarialism—adversarialism in contrast with the judge-directed culture of the civil-law tradition, and adversarialism as aggressive litigiousness—are dominant motifs in the picture of US civil litigation. But these pictures overlook a feature of US civil litigation that complicates both strands. That feature is a pervasive undercurrent of mostly litigant cooperativism, in which the adversaries—the opposing lawyers and their litigants—come together to collaborate on the best way forward for the litigation.

A definition of cooperativism is in order at the outset. The social-science literature defines cooperation as a common or combined effort to achieve a shared objective.[63] In the legal context, shared objectives include, principally, the mutual reduction of costs, even if independently or asymmetrically borne.

Importantly, not everything that is anti-adversarial is necessarily cooperative. Self-restraint, though clearly anti-adversarial, is not cooperation without some degree of agreement or collaboration. Additionally, cooperation requires some party volition. By way of illustration, the 1993 amendment to Rule 26(a) that requires parties to disclose certain central information to adversaries without waiting for a discovery request is surely anti-adversarial because it forces parties to reveal their cards.[64] But these mandatory disclosures lack any voluntary agency of the parties that would manifest cooperation between them. Puppets have no agency independent of the puppeteer. Cooperation, by contrast, requires some degree of volition.

Unfettered voluntariness is impossible, however, because party conduct is subordinate to what the law allows.[65] But as long as the law gives the litigants *some* agency, then litigants cooperate whenever they use common efforts to achieve a shared objective. The degree of agency can vary. At one end, the law or the judge might direct the parties to confer about an issue, but what the parties choose to agree to is within their own agency, and so parties can cooperate within the legal mandate.[66] At the other end, a rule might authorise parties to cooperate with more freedom or breadth, such as setting different discovery parameters for themselves.[67] Both ends of the spectrum allow cooperation within the ambit of the law.

Because cooperativism, as I have defined it, is bilateral between the adversaries, the judge will usually take a back seat to, and even defer to, the adversaries' cooperative outcomes. Thus, cooperativism is mostly orthogonal both to the

[62] Marvin Frankel, "The Search for Truth: An Umpireal View" (1975) 123 U. Pa. L. Rev. 1031, 1038.

[63] David G. Rand and Martin A. Nowak, "Human Cooperation" (2013) 17 Trends in Cognitive Sci. 413. Cooperation between adversaries has been coined "coopetition" in the organisational literature. See Maria Bengtsson and Sören Kock, "'Coopetition' in Business Networks—To Cooperate and Compete Simultaneously" (2000) 29 Indus. Mktg. Mgmt. 311.

[64] Fed. R. Civ. P. 26(a). Studies have shown widespread attorney satisfaction with the amendment, see Willging et al., "An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments" (1998) 39 B.C. L. Rev. 525, 585, and that it is likely to, in many cases, reduce cost and delay while enhancing the efficacy of settlement negotiations, see Emery G. Lee III and Jason A. Cantone, *Report on the Mandatory Initial Discovery Pilot* (Washington, DC: Federal Judicial Center, 2019).

[65] See Scott Dodson, "Party Subordinance in Federal Litigation" (2016) 83 Geo. Wash. L. Rev. 1.

[66] See, for example, Fed. R. Civ. P. 26(f) (directing the parties to "confer" about a discovery plan).

[67] See, for example, Fed. R. Civ. P. 29 (authorising parties to stipulate to modified discovery procedures).

common-law tradition of the judge as umpire and to the modern development of US judicial managerialism. And cooperativism is antipodal to the idea of US civil litigation as a zero-sum contest between aggressive, win-at-all-costs adversaries.

With that definition in mind, this Part explores cooperative features of US civil litigation by setting out some specific examples of cooperativism.

Rule 1

Rule 1, the "master rule", sets guiding policy for the rest of the rules.[68] It states that the Federal Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding".[69] Of course, both in individual cases and in the aggregate of cases, these goals are irreconcilably in conflict.[70] But achievement of those goals is not mandatory but aspirational. The directive in Rule 1 is for the parties and the court to conduct the case in furtherance of those goals, and the history of the 2015 amendments to Rule 1 suggests that cooperativism underlies its aims.

Prior to 2015, the text of Rule 1 stated that the three goals should be construed and administered *by the court*; it gave no directive to the parties.[71] In 2008, the Sedona Conference issued its *Cooperation Proclamation*,[72] whose purpose was to launch "a coordinated effort to promote cooperation by all parties ... to achieve [Rule 1 goals]".[73] The *Cooperation Proclamation* asserted that litigant cooperation is both consistent with zealous advocacy and required by the Rules.[74] Subsequently, hundreds of judges endorsed the *Cooperation Proclamation* in written opinions.[75]

In 2010, Duke Law School hosted a major conference on civil procedure, at which litigant cooperation was a major theme.[76] The Chair of the Civil Rules Advisory Committee wrote, "The consensus in favor of promoting cooperation is widespread and fervent. Cooperation founded on mutual trust can do more than rules or judicial management to achieve the purposes of Rule 1."[77] Although the Rules Committees declined to add the word cooperation or its derivatives into Rule 1, they did amend Rule 1 to direct the *parties* to implement the rules in ways that would implement its goals.[78] The Committee Notes to the 2015 amendment point out: "Most lawyers and parties cooperate to achieve these ends... . Effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure."[79]

[68] Robert G. Bone, "Improving Rule 1: A Master Rule for the Federal Rules" (2010) 87 Denv. U. L. Rev. 287.

[69] Fed. R. Civ. P. 1.

[70] George Rutherglen, "The Problem with Procedure. Some Inconvenient Truths About Aspirational Goals" (2019) 56 San Diego L. Rev. 1, 4.

[71] Fed. R. Civ. P. 1 (2014). The Advisory Committee Note in operative effect at the time, however, stated that "attorneys share this responsibility" to conduct the litigation "fairly [and] without undue cost or delay". Fed. R. Civ. P. 1, 1993 Committee Note.

[72] The Sedona Conference, "Cooperation Proclamation" (2009) 10 Sedona Conf. J. 331.

[73] The Sedona Conference, "Cooperation Proclamation" (2009) 10 Sedona Conf. J. 331.

[74] The Sedona Conference, "Cooperation Proclamation" (2009) 10 Sedona Conf. J. 331.

[75] Henry J. Kelston, "The Next Phase in the Evolution of Cooperation" (2014) 37 Am. J. Trial Advoc. 577, 578.

[76] Paul W. Grimm, "Are We Insane? The Quest for Proportionality in the Discovery Rules of the Federal Rules of Civil Procedure" (2017) 36 Rev. Litig. 117, 130; David J. Waxse, "Cooperation—What Is It and Why Do It?" (2012) 18 Rich. J.L. & Tech. 8.

[77] Memorandum from Mark. R. Kravitz, Chair, Civil Rules Advisory Committee, to Lee H. Rosenthal, Chair, Standing Committee (17 May 2010), p.11.

[78] Fed. R. Civ. P. 1 (2015).

[79] Fed. R. Civ. P. 1, 2015 Committee Note.

Although litigant cooperation is not among Rule 1's goals, neither are aggression and adversarialism. The Rule 1 goals are "just, speedy, and inexpensive", and it is hard to see how litigants can implement the rules to further those goals without some cooperation.[80] That does not mean that Rule 1 creates a new affirmative duty of cooperation[81]; the rulemakers considered, and rejected, using such language.[82] Instead, the obligation to cooperate arises in the practicalities of complying with Rule 1. How will a litigant, wanting to request documents from an adversary, be able to implement Rule 1's directive to implement the discovery rules to produce inexpensive justice without first consulting with the adversary to understand better the content of the relevant documents and the burden in producing them, and then working with the adversary to make requests that maximise the relevance to the requester while minimising the adversary's burden of production?[83] As courts have recognised in the wake of the 2015 amendments, Rule 1 thus sets out a clever master plan that induces parties into cooperativism despite their oppositional tendencies.[84] Just two years after the 2015 amendment, one commentator reported "anecdotal evidence that the Rule 1 amendment is beginning to have its intended effects", in that reported decisions were citing to the language of Rule 1 and incidents of cooperativism in opinions.[85]

Discovery

Discovery is the phase of US civil litigation in which the parties must produce to their adversaries witness and party testimony, documents and written answers. This peculiar US tradition sits uncomfortably in the tradition of adversarialism as combat.[86] Each party must, upon request, share all its evidence—the good, the bad and the ugly—with the opponent. Discovery is like a rule of poker in which each person must play an open hand, or like a rule of gladiatorial combat, in which gladiators must point out the chinks in their own armour. Of course, litigation is neither a game of bluffing nor a fight to the death. But the tradition of adversarialism that looks to, even aspires to, such analogies would resist the more collaborative enterprise of discovery. And the common-law style of adversarialism that leaves discovery largely to the unsupervised whims of the parties gives ample freedom to resist collaboration.[87]

Motive and opportunity are compelling. And so adversarial excesses in discovery are both legion and legendary. These excesses become especially nefarious under

[80] Grimm, "Are We Insane? The Quest for Proportionality in the Discovery Rules of the Federal Rules of Civil Procedure" (2017) 36 Rev. Litig. 117, 149.

[81] Other countries have imposed a duty of cooperation. See, for example, Takeshi Kojima, "Japanese Civil Procedure in Comparative Law Perspective" (1998) 46 U. Kan. L. Rev. 687, 717 (Japan); Maxeiner, Lee and Weber, *Failures of American Civil Justice in International Perspective* (2011), pp.177–78 (Germany and Korea).

[82] Advisory Committee Meeting Minutes at 616–22 (2 November 2012). But see US Supreme Court, 2015 Year-End Report on the Federal Judiciary (2015), p.6 (stating that the Rule 1 amendment creates "an affirmative duty [for parties] to work together, and with the court, to achieve prompt and efficient resolutions").

[83] Paul B. Radvany, "Recent Trends in Discovery in Arbitration and in the Federal Rules of Civil Procedure" (2015) 34 Rev. Litig. 705, 718; Brian Morris, "The 2015 Proposals to the Federal Rules of Civil Procedure: Preparing for the Future of Discovery" (2014) 41 N. Ky. L. Rev. 133, 140.

[84] See, for example, *Greer v Wal-Mart Stores East LP*, No.4:15-CV-0199-HLM, 2015 WL 12976116 at *3 (N.D. Ga. Dec. 16, 2015) ("direct[ing] the parties to cooperate to conduct discovery in the interest of expediency and fairness").

[85] Morris A. Ratner, "Restraining Lawyers: From 'Cases' to 'Tasks'" (2017) 85 Fordham L. Rev. 2151, 2167.

[86] Chase, "American 'Exceptionalism' and Comparative Procedure" (2002) 50 Am. J. Comp. L. 277, 295.

[87] Chase, "American 'Exceptionalism' and Comparative Procedure" (2002) 50 Am. J. Comp. L. 277, 295.

the American Rule, under which each party generally bears its own costs and fees of litigation. Thus, a party requesting millions of documents can impose the cost of finding and producing those documents in their opponent, even if the party thinks those documents are of only marginal relevance.[88] Less nefariously, parties may simply not know what information is held by the other side and so cannot tailor their requests with optimal efficiency.[89]

Given these circumstances, some have posited that the "incentives to adversarial excess in discovery are simply too great in complex and high-stakes cases to yield, in the absence of effective sanctions, to high-minded exhortations about civil behavior among professionals".[90] But the data and experience on the ground aren't clear. In 1997, the Federal Judicial Center conducted a study and concluded that discovery generally worked well and was proportional in most cases.[91] A RAND study conducted in 1998 concluded similarly.[92]

Some of the temperance might be due to rules that require the parties to come together to cooperate on certain facets of discovery. Rule 26(f), for example, directs the parties to confer in good faith about a discovery plan and makes parties "jointly responsible" for "attempting in good faith to agree on the proposed discovery plan".[93] Rule 37, titled "Failure to Make Disclosures or to Cooperate in Discovery", allows the court to impose sanctions on "a party or its attorney" who "fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f)".[94]

Another example is Rule 29, which authorises parties to modify discovery procedures by agreement.[95] As the Advisory Committee Notes state: "Counsel are encouraged to agree on less expensive and time-consuming methods of obtain information".[96] Rule 29 imposes no obligation; rather, it authorises voluntary cooperation and agreement by the parties to "save time and expense" based on the circumstances of the case and the needs of the parties.[97] The evidence suggests that parties routinely use Rule 29 to enter into discovery stipulations.[98]

Finally, Rule 26(g) imposes on parties a duty to consider proportionality—including cost and relevance—when making, responding to and objecting to discovery requests.[99] Cooperation is thus necessary for complying

[88] John K. Setear, "The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse" (1989) 69 B.U. L. Rev. 569, 580–81.

[89] The Supreme Court's recent tightening of pleading standards makes it more difficult for parties to even get to discovery in this circumstance. See Scott Dodson, "New Pleading, New Discovery" (2010) 109 Mich. L. Rev. 53.

[90] Beckerman, "Confronting Civil Discovery's Fatal Flaws" (2000) 85 Minn. L. Rev. 505, 511.

[91] Thomas E. Willging et al., *Discovery and Disclosure Practice, Problems and Proposals for Change: A Case-Based National Survey of Counsel in Closed Federal Civil Cases* (Washington, DC: Federal Judicial Center, 1997), p.2.

[92] James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data* (Washington, DC: Federal Judicial Center, 1998), p.xxii.

[93] Fed. R. Civ. P. 26(f)(2).

[94] Fed. R. Civ. P. 37(f). But see Beckerman, "Confronting Civil Discovery's Fatal Flaws" (2000) 85 Minn. L. Rev. 505, 518 ("[M]otions to compel discovery and motions for protective orders result in sanctions for losers too paltry to provide sufficient inducements in complex or high-stakes cases to make the discovery process cooperative or truly self-regulating").

[95] Fed. R. Civ. P. 29.

[96] Fed. R. Civ. P. 29, 1993 Committee Note.

[97] Charles Alan Wright et al., *Federal Practice and Procedure*, 3rd edn (New York, NY: Thompson West, 2021), Vol.8A, § 2091.

[98] Fed. R. Civ. P. 29, 1970 Committee Note ("It is common practice for parties to agree on such variations, and the amendment recognizes such agreements and provides a formal mechanism in the rules for giving them effect").

[99] Fed. R. Civ. P. 26(g), 1983 Committee Note.

with Rule 26(g).[100] As Judge Paul Grimm wrote in *Mancia v Mayflower Textile Services Co*:

> "It cannot seriously be disputed that compliance with the 'spirit and purposes' of these discovery rules requires cooperation by counsel to identify and fulfill legitimate discovery needs, yet avoid seeking discovery the cost and burden of which is disproportionately large to what is at stake in the litigation."[101]

When disputes about discovery do arise, the discovery and sanctions rules impose on the parties an obligation to confer in good faith to attempt to resolve the discovery dispute before filing a motion for a protective order or a motion to compel with the court.[102] In these meet-and-confers, litigants regularly agree to narrow the scope of discovery requests, allocate the cost or burden of discovery production in more equitable ways, agree upon samples or search terms, and the like.[103] For example, parties regularly cooperate in drafting agreements regarding the discovery of electronically stored information and agreements regarding claims of privilege or work-product protection.[104] Such issues present problems and uncertainties that can disrupt the discovery process for both sides, and thus parties routinely cooperate in drafting and consenting to such agreements.

Another specific area of cooperation is in confidentiality orders, in which the parties draft an agreement for maintaining the confidentiality of certain information exchanged in discovery. Although the agreement need not be ordered by the court, courts often do enter them, under their powers to issue protective orders under Rule 26(c).[105] But the status of a court order masks the reality that confidentiality agreements are largely negotiated and agreed by the parties outside of the court, in a cooperative spirit to ease the burdens of discovery.[106] Such agreements are widespread in civil cases.[107]

Finally, some litigants simply inculcate the broader virtues of cooperativism. In *City of Rockford v Mallinckrodt ARD Inc*,[108] for example, plaintiffs brought contract, racketeering and antitrust claims against a pharmaceutical company. Despite the information and cost asymmetries between the parties, which often generate the most difficult and contentious problems of aggressive adversarialism in discovery, the district court reported that:

[100] Grimm, "Are We Insane? The Quest for Proportionality in the Discovery Rules of the Federal Rules of Civil Procedure" (2017) 36 Rev. Litig. 117, 133. See also Jaclyn Faulds and Rhonda Wasserman, "Cooperative Justice: Proportionality and Cooperation Under the New Rule 26(b)(1)" (2016) 18 Law. J. 6 ("[N]ow that proportionality is central to the discovery analysis, cooperation between counsel both inside and outside the courtroom is more important than ever").

[101] *Mancia v Mayflower Textile Services Co* 253 FRD 354, 357–58 (D. Md. 2008).

[102] Fed. R. Civ. P. 26(c)(1), 37(a)(1).

[103] The meet-and-confer requirement was added in 1993 "based on successful experience with similar local rules of court", Fed. R. Civ. P. 37, 1993 Committee Note, and the plethora of court opinions reveal that "[m]oving parties have made substantial efforts to confer" to meet that obligation, see Wright et al., *Federal Practice and Procedure* (2021), Vol.8B, § 2285.

[104] Such agreements are encouraged, though not specifically required, in the federal rules. See Fed. R. Civ. P. 16(b)(3)(B)(iv).

[105] Fed. R. Civ. P. 26(c).

[106] See generally Seth Katsuya Endo, "Contracting for Confidential Discovery" (2020) 53 U.C. Davis L. Rev. 1249. To be sure, confidentiality orders present downsides, including to the nonparty public, at 1252–54. See also Richard L. Marcus, "Myth and Reality in Protective Order Litigation" (1983) 69 Cornell L. Rev. 1; Arthur R. Miller, "Confidentiality, Protective Orders, and Public Access to the Courts" (1991) 105 Harv. L. Rev. 427. My focus here is to highlight them as illustrative of adversarial cooperativism.

[107] Endo, "Contracting for Confidential Discovery" (2020) 53 U.C. Davis L. Rev. 1249, 1253 ("Stipulated protective orders have long been an important part of civil litigation and are used in a wide range of cases").

[108] 326 FRD 489 (ND Ill. 2018).

> "the parties have generally worked cooperatively on discovery issues, including ESI issues, and have only raised legitimate discovery disputes that they were unable to resolve on their own. The attorneys are commended for this cooperation, and their clients should appreciate their efforts in this regard. The Court certainly does. The litigation so far is a solid example that zealous advocacy is not necessarily incompatible with cooperation."[109]

Specifically, the parties agreed to a protocol for using technology-assisted review, or predictive coding, to use keyword searches to identify relevant documents to be produced. The protocol entailed the parties discussing and attempting to agree on search methodologies, terms, date restrictions and custodian restrictions; discussing the "hit report" of documents generated by the search technology; reviewing a statistically valid sample of documents on the hit report to determine the responsiveness and relevance of the document set; and consider modifications to the search parameters upon review of the sample.[110] As the court observed, "That is all reasonable and fulfills the goals of Federal Rule of Civil Procedure 1; namely, to achieve a just, speedy, and inexpensive determination of this case."[111]

As these examples show, cooperativism is inherent in the discovery rules. The rules do not choose to make cooperativism an affirmative duty in the abstract, but they set up directives and obligations that, as a practical matter, force the parties to engage and, often, to cooperate. And, in at least some cases, parties *do* engage in cooperativism, even when the stakes are high and the information and costs are asymmetric.

Pleadings

Pleadings rules also require cooperativism as a practical matter. Rule 11 imposes on litigants a good-faith requirement that the litigant's representations in a filing are "formed after an inquiry reasonable under the circumstances" and "not ... presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation".[112] As the Committee Notes explain, Rule 11 contains "the principle that attorneys and pro se litigants have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1".[113]

Although Rule 11 imposes these substantive obligations on each party unilaterally,[114] the mechanism for calling violations of these obligations to the court's attention involves a bilateral mechanism that fosters communication and, indeed, cooperation in preventing the persistence of Rule 11 violations in court filings. A party who wishes to bring a Rule 11 violation to the court's attention must first serve a motion for sanctions on the opposing party, specifically describe the violation, and give the opposing party 21 days to correct the violation.[115] This "safe harbour" provision is designed to force the parties into a conversation about the representation at issue and to attempt to resolve disagreements about it in a

[109] *City of Rockford* 326 FRD 489 (ND Ill. 2018) at 491.
[110] *City of Rockford* 326 FRD 489 (ND Ill. 2018) at 491.
[111] *City of Rockford* 326 FRD 489 (ND Ill. 2018) at 491.
[112] Fed. R. Civ. P. 11(b).
[113] Fed. R. Civ. P. 11, 1993 Committee Note.
[114] The Committee Notes characterise the imposition as a "stop-and-think" requirement or a "duty of candor". Fed. R. Civ. P. 11, 1993 Committee Note.
[115] Fed. R. Civ. P. 11(c)(2).

cooperative spirit.[116] The available empirical data on the safe-harbour provision of Rule 11 suggest that parties and judges support the provision, use it, and think that the cooperation it fosters reduces Rule 11 litigation significantly.[117] Commentators have reported that the 1993 amendments to Rule 11, including the safe-harbour provision, have "rais[ed] the profession's ethical consciousness and in improving the standards of practice."[118]

Other pleadings rules also require some litigant cooperativism. Rule 15 allows a party to amend its pleadings with written consent of the opposing parties,[119] and written consent is often granted even when the pleading amendment could potentially be detrimental to a consenting party.[120] It is true that consent is considered in the shadow of Rule 15's admonition that the court is likely to permit the amendment even without consent,[121] but nothing prevents a party from refusing to grant consent and forcing the party wishing to amend to spend the cost, time and effort to file a motion with the court. The fact that many pleading amendments are made by party consent suggests that parties can, and often do, choose cooperation instead of no-holds-barred antagonism.

Local rules

Congressional statute and the Federal Rules authorise each district to promulgate its own local rules, so long as they are not inconsistent with federal law.[122] A few districts' local rules and guidelines expressly require cooperativism. The Northern District of California's *Guidelines for the Discovery of Electronically Stored Information* provide:

> "The Court expects cooperation on issues relating to the preservation, collection, search, review, and production of ESI. The Court notes that an attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. Cooperation in reasonably limiting ESI discovery requests on the one hand, and in reasonably responding to ESI discovery requests on the other hand, tends to reduce litigation costs and delay. The Court emphasizes the particular importance of cooperative exchanges of information at the earliest possible stage of discovery, including during the parties' Fed. R. Civ. P. 26(f) conference."[123]

Similarly, Local Civil Rule 26.4 for the Southern and Eastern Districts of New York, titled "Cooperation Among Counsel in Discovery", states: "Counsel are

[116] Fed. R. Civ. P. 11, 1993 Committee Note ("In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion").

[117] See David E. Rauma and Thomas E. Willging, *Report of a Survey of United States District Judges' Experiences and Views Concerning Rule 11* (Washington, DC: Federal Judicial Center, 2005), pp.2, 7; John E. Shapard et al., *Report of a Survey Concerning Rule 11* (Washington, DC: Federal Judicial Center, 1995), p.4.

[118] Georgine Vairo, "Rule 11 and the Profession" (1998) 67 Fordham L. Rev. 589, 647.

[119] Fed. R. Civ. P. 15(a)(2).

[120] See Brooke D. Coleman, Jeffrey W. Stempel, Steven Baicker-McKee, David F. Herr and Michael J. Kaufman, *Learning Civil Procedure*, 3rd edn (New York, NY: West Academic, 2018), p.433.

[121] See Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave when justice so requires"). A cooperativist approach in the Rule 15 circumstance may encourage additional tit-for-tat cooperativism throughout the lawsuit. For game-theory analysis of the tit-for-tat strategy, see Robert M. Axelrod, *The Evolution of Cooperation* (New York, NY: Basic Books, 1984).

[122] 28 USC § 2071(a); Fed. R. Civ. P. 83.

[123] *Guidelines for the Discovery of Electronically Stored Information* § 1.02 (ND Cal. 2015).

expected to cooperate with each other, consistent with the interests of their clients, in all phases of the discovery process."[124] Likewise, the District of Maryland Local Rules state: "The parties and counsel have an obligation to cooperate in planning and conducting discovery to tailor the discovery to ensure that it meets these objectives [in Rule 1]."[125] In *Mancia v Mayflower Textile Services Co*, the District Court of Maryland interpreted this language as imposing a duty on the part of counsel to cooperate with each other in all phases of discovery.[126]

To be sure, these few examples of cooperativism in local rules do not make a trend. They do, however, illustrate the real possibility of cooperativism at the local level, even within an overarching system of adversarialism, and they manifest yet another way that litigants (in particular jurisdictions) can and do cooperate.

As these examples show, cooperativism plays a nontrivial role in US federal civil litigation.[127] I do not, however, mean to overstate its importance. Cooperativism remains a countercurrent in the primary flow of US adversarialism. American legal culture's history of adversarialism and structural incentives, documented in Part I, are powerfully ingrained. But cooperativism does persist, and it both presents features quite different from the typical story of US adversarialism, and complicates the story of judicial managerialism.

The future of cooperativism

Cooperativism thus is a pervasive feature of the US federal civil-litigation model otherwise dominated by its antithesis, adversarialism. What might that portend for the future?

One confident prediction is that some undercurrent of cooperativism is here to stay. The top-down encouragement of cooperativism in the rules, as described above, is more likely to be expanded than contracted. Cooperativism is also likely to continue to be encouraged by managerial judges. The idea that more active judicial intervention can help assuage adversarialism has been around for a long time,[128] and it has taken root in the rules and norms of practice in the last 50 years.[129] Some judges go so far as to mandate cooperativism in individual cases,[130] but parties may more often choose cooperativism in the shadow of judicial oversight.[131] These top-down controls assure that cooperativism will persist in American litigation.

[124] Local Civ. R. 26.4 (SDNY and EDNY).
[125] D. Md. R. app. A.
[126] *Mancia v Mayflower Textile Services Co* 253 FRD 354, 357–58 (D. Md. 2008).
[127] Two other areas of potential cooperativism are alternative-dispute-resolution agreements and settlement. Those areas involve cooperation between the parties, but they do so in ways fairly removed from the formal adversarial litigation structure. I therefore note them here but do not discuss them further. A third area, at the other end of the spectrum, involves stipulations and admissions under Rule 16(c), but those typically occur in the context of a status conference with the judge, in which the judge's presence may mask any voluntary aspect of party cooperativism. To be sure, cooperativism may occur at pretrial conferences, but more focused study is needed to explore the cooperative and managerial elements of these interactions.
[128] Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice" (1906) 29 A.B.A. Rep. 395, 405.
[129] Marcus, "Reining in the American Litigator: The New Role of American Judges" (2003) 27 Hastings Int'l & Comp. L. Rev. 3.
[130] David L. Noll, "MDL as Public Administration" (2019) 118 Mich. L. Rev. 403, 423.
[131] Marcus, "Cooperation and Litigation: Thoughts on the American Experience" (2013) 61 U. Kan. L. Rev. 821, 843.

Some evidence suggests that greater cooperativism may experience ground-up momentum as well. On the lawyer side, the need to cultivate reputations as skilled but not abusive advocates can induce some cooperativism among lawyers who are repeat players in a small field.[132] On the client side, some clients may lose their preference for "bulldog" lawyers and instead prefer lawyers who are more sensitive to costs.[133] The recent Covid-19 pandemic, with its pressures on cooperative adaptability in civil litigation, has made clear that some mutual collaboration is necessary for even an adversarial system to function effectively.[134] To be sure, the pressures to prefer antagonism to cooperativism will still win out much of the time, but the legal system is dynamic, and its evolution may bring countervailing pressures to the fore.

The future of cooperativism in American adversarialism may be entrenched by norm-building through the development of best practices by respected legal associations. The Sedona Conference has implemented its *Cooperation Proclamation*[135] in a set of best-practice principles that include cooperation as an animating value.[136] It remains to be seen whether the top-down efforts of the rules and of judges, combined with any ground-up efforts, cause the seeds of cooperativism to germinate into something more than what currently exists.

Conclusion

Cooperativism thus appears in a variety of contexts and as part of a variety of mechanisms within US civil litigation. How widespread cooperativism is in practice, and how successful it is in achieving civility and efficiency, are still poorly understood.[137] But that the story remains unclear does not mean the story should not be told. The fact that cooperativism persists should be a call for further study and exploration of this peculiar facet of US adversarialism.

Anonymous Peer Review

Editor's Note: This article was reviewed under the CJQ's new peer review pilot in which reviewers are advised that, if accepted for publication, their anonymous review will be published alongside the article. Please note this review relates to an earlier version of the article, which the author/s subsequently revised including to take account of the reviewer's comments. Comments in the review identifying typographical errors have been removed.

[132] Marcus, "Cooperation and Litigation: Thoughts on the American Experience" (2013) 61 U. Kan. L. Rev. 821, 844 ("Perhaps that [cooperative] behavior is more prominent in litigation in which the lawyers deal with one another regularly than litigation involving lawyers who have no track record with one another"). See also Gilson and Mnookin, "Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation" (1994) 94 Colum. L. Rev. 509, 511 (theorising that self-interested cooperation can exist, particularly among lawyers who are repeat adversaries in a reputation marketplace).

[133] Joyce S. Meyers, "Focusing: When Less is More" (2002) 28 Litig. 6, 10 ("Clients are also losing patience with protracted litigation. It takes too long and costs too much. They want the process streamlined, and they want quick results").

[134] For more on the pandemic effects on federal civil litigation, see Scott Dodson, Lee H. Rosenthal and Christopher Dodson, "The Zooming of Federal Civil Litigation" (2020) 104(3) Judicature 13.

[135] The Sedona Conference, "Cooperation Proclamation" (2009) 10 Sedona Conf. J. 331.

[136] See, for example, "The Sedona Principles, Third Edition" (2018) 19 Sedona Conf. J. 1, Principle 3 cmt 3b ("Cooperation among counsel can enhance the meet and confer process, reduce unnecessary delay and expense associated with non-merit issues, and foster the overriding objectives of Rule 1").

[137] For a somewhat sceptical view, see Marcus, "Cooperation and Litigation: Thoughts on the American Experience" (2013) 61 U. Kan. L. Rev. 821, 823, 839

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