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More than a judge, Shadur became a teacher on civil procedure

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After 37 years serving the Northern District of Illinois, retired U.S. District judge Milton I. Shadur died on Jan. 15 at the age of 93. Some of Shadur's high-profile cases dealt with court-ordered school desegregation in Chicago, improving jail conditions in Cook County and addressing the rights of prisoners.

But for some commercial litigators such as ourselves, Shadur was best known for his efforts to educate attorneys about pleadings standards by striking answers and affirmative defenses sua sponte.

In *State Farm Mutual Automobile Insurance Co. v. Riley*, 199 F.R.D. 276 (N.D. Ill. 2001), Shadur drafted an appendix, which he attached to the *State Farm* decision, setting forth a number of the most-often repeated errors that he saw in pleading practices "unfortunately prevalent among significant numbers of members of the defense bar."

Shadur provided the appendix "[a]fter a number of years spent in issuing a distressingly large number of sua sponte opinions dealing with violations of fundamental principles of federal pleading by defense counsel." *Brown v. County of Cook*, No. 06 C 617, 2008 WL 2510185, at *1 (N.D. Ill. June 19, 2008).

For example, the appendix to *State Farm* examines the situation in which "the lawyer who takes it on himself or herself to decline to respond to an allegation because it 'states a legal conclusion' " — explaining that this response is a violation of the express Rule 8(b) requirement that there must be a substantive response to all allegations.

"All too often," Shadur observed, "lawyers seem to forget that the underlying purpose of pleading in federal litigation is to inform rather than to obfuscate — a responsibility imposed on plaintiffs and defendants alike. That is a principal reason for the Federal Rule of Civil Procedure 8(a) emphasis on 'short and plain statement[s]' by plaintiffs and for the correlative mandates directed to defendants by the several subparts of Rule 8(b)." *Gburek v. Litton Loan Servicing LP*, No. 08 C 3188, 2010 WL 4286277, at *1 (N.D. Ill., Oct. 18, 2010).

The multipart appendix was an effort by Shadur "to address a number of venial (not mortal) sins committed by all too many defense lawyers who view pleading as a sort of shell game, rather than as a means for identifying what is or is not at issue between the litigants." *Webb v. Medicredit Inc.*, No. 16 C 11125, 2017 WL 74854, at *1 (N.D. Ill. Jan. 9, 2017).

In *Sonic Industry LLC v. iRobot Corp.*, No. 1-13-cv-09251, order at 1 (N.D. Ill., filed Feb. 28, 2014), the defendant coupled its invocation of the lacking knowledge or information disclaimer available under Federal Rule of Civil Procedure 8(b)(5) with the language "and, therefore, denies those allegations."

Shadur sua sponte struck this quoted language from each paragraph of the defendant's answer because such a denial is at odds with the pleader's obligations under Rule 11(b) Representations to the Court, explaining that "it is of course oxymoronic for a party to assert (presumably in good faith) that it lacks even enough information to form a belief as to the truth of an allegation, then proceed to deny it."

In another case, *Trading Technologies International Inc. v. CQG Inc., et al.*, No. 1-10-cv-00718, order at 1 (N.D. Ill. filed Aug. 12, 2010), defendants' answer asserted that each of the patents in suit "speaks for itself," which Shadur struck as an unacceptable, "unfortunate and uninformative locution."

Shadur explained the unacceptability of the "speaks for itself" response in the appendix: "This court has been attempting to listen to such written materials for years (in the forlorn hope that one will indeed give voice) — but until some such writing does break its silence, this court will continue to require pleaders to employ one of the three alternatives that are permitted by Rule 8(b) in response to all allegations about the contents of documents (or statutes or regulations)."

Under Rule 8(b), these alternatives are admission, denial or a statement that a party lacks knowledge or information sufficient to form a belief about the truth of an allegation.

In his opinions, Shadur addressed pleading defects not covered in his multipart appendix.

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For example, in *Baumann v. Bayer AG*, No. 02 C 2351, 2002 WL 1263987, at *1 (N.D. Ill., June 5, 2002), the defendant's answer used the phrase "to the extent" at the beginning of several responses. Shadur vigorously criticized such language: "Even apart from the specific matters that are addressed in the *State Farm* appendix, it is of course obvious that any purported response that begins with 'to the extent that' is wholly uninformative. How is the reader — whether opposing counsel or this court — to divine just what [defendant's] counsel may view as being encompassed within that ambiguous language?"

In his appendix, Shadur also was critical of defense counsel's fondness of "following the direct responses to a complaint's allegations with a set of purported affirmative defenses ... that don't really fit that concept." There, Shadur explained that "although not identical in scope to the common-law plea in confession and avoidance, the [affirmative defense] essentially takes the same approach of admitting all of the allegations of a complaint, but of then going on to explain other reasons that defendant is not liable to plaintiff anyway."

For example, Shadur was critical of enumerating affirmative defenses in formula-like fashion (e.g., "laches," "estoppel," "statute of limitations"), because "that does not do the job of apprising opposing counsel and this court of the predicate for the claimed defense — which is after all the goal of notice pleading." See, e.g., *Builders Bank v. First Bank & Trust Company of Illinois*, No. 03 C 4959, 2004 WL 626827, at *6 (N.D. Ill., March 25, 2004) (striking several affirmative defenses, observing that "courts have held time and time again that stringing together a long list of legal defenses is not sufficient to satisfy Rule 8(a)'s short and plain statement requirement."); *Robinson v. Hyundai of Matteson LLC*, No. 16 C 5821, 2016 WL 4366601 (N.D. Ill., Aug. 16, 2016) (striking the answer and affirmative defenses in their entirety, and referring counsel to the *State Farm* appendix).

The venial pleading sins criticized by Shadur are common. Pleaders should consider removing the "unfortunate and uninformative" locutions described in the Shadur's appendix to *State Farm*, to improve their responsive pleadings and as a way to honor Shadur and recognize his important teachings.