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Perspectives: The Federal Rules' Quest for Efficiency

by Susan J. Becker, *Associate Editor*

As lawyers celebrate (or mourn) the first anniversary of the new Federal Rules of Civil Procedure, it is worth noting that last year's amendments marked a major philosophical metamorphosis in our theory of civil justice. They reflect an attempt to move away from a system aptly suited to war analogies and toward increased cooperation between the parties and "hands-on" management by the judiciary. This, in turn, is supposed to encourage efficiency—the oft-cited yet elusive goal of civil justice reform.

In fact, the premier rule of federal civil procedure—Rule 1—now mandates that the rules be "construed and administered to secure the just, speedy and inexpensive determination of every action (emphasis added)." The addition of the words "and administered" signals a heightened expectancy of the judges' role in resolving lawsuits, and creates at least a ray of hope for litigators long frustrated by what they perceive as the judicial reluctance to keep cases moving or to impose sanctions on recalcitrant counsel.

Of course, the benefits or burdens of the highest-profile change—the mandatory disclosure provisions of new Rule 26(a)—remain highly controversial. But setting these aside, many of the more modest amendments may help increase litigation efficiency through cooperation, preplanning, and judicial management.

At the very outset of litigation, Rule 4(d) authorizes the plaintiff to seek a "waiver of service" from the defendant. It provides a carrot for the defendant to agree (substantial additional time to respond to the complaint)—and a small stick in the event that she doesn't (liability to pay the cost of traditional service). At first glance, the mechanics set forth in Rule 4(d) for obtaining waiver of service appear cumbersome and thus counterproductive to the goal of efficiency, but they are significantly streamlined by the mandatory use of new Form 1 (Notice of Lawsuit and Request for Waiver of Service of Summons) and Form 1B (Waiver of Service of Summons).

Other 1993 amendments that directly seek increased efficiency are in the rules governing pretrial practice, specifically Rule 16 and Rules 26 through 37. For the most part, these amendments apply even in districts that have opted out of the mandatory disclosure provisions of Rule 26(a). The revised discovery rules not only impose mechanical limitations on the number of interrogatories and depositions available to each side, but also substantially redefine the respective roles of and relationships between counsel and judges.

Indeed, the amended discovery rules inspire, if not compel, all of the characters in the litigation drama to think before they act, thus deterring litigators and judges from handling dockets by rote (at least in theory). For example, Rule 26(f) prohibits attorneys from initiating discovery until a proposed discovery plan is negotiated with opposing counsel. The plan results in the completion of a "Report of the Parties' Planning Meeting" (New Form 35) and is intended to preemptively address common discovery disputes, such as the appropriate limits and timing of interrogatories, requests for production of documents, and depositions of parties.

Recurring difficulties regarding expert witnesses are lessened by new Rule 26(a)(2), which commands exchange of information on the expert's qualifications and litigation experience as well as a report detailing the expert's methodology and conclusions.

Rule 37(g) allows impositions of costs and attorneys' fees on litigators or parties who fail to cooperate in discovery planning. In addition to risking financial sanctions and the wrath of the court, the uncooperative attorney also forgoes a golden opportunity to alter by agreement the 10-deposition and 25-interrogatory limits otherwise imposed by the rules as amended.

At the same time, substantial revisions to Rule 16 mandate extensive, early intervention by the courts in case planning. Rule 16(b) requires judges to meet with counsel (who must arrive with a completed Form 35 in hand) and issue a scheduling order within three to four months of service of the complaint. Even if resolution of certain issues would be premature at the initial management conference, alerting the court to potentially troublesome areas at this early date may pay off later.

If fully implemented and observed, the 1993 amendments, such as those discussed above, could indeed help achieve the laudable goal of a more efficient system. But in the final analysis, the efficiency issue will be decided—as it always has been—not on the letter of the rules but upon the spirit of the lawyers utilizing them.

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