Education and Training Series

The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility

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THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY

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Arthur R. Miller*

INTRODUCTION

The subject I will address is the new Federal Rules of Civil Procedure, the rules that by the thinnest hair you can think of became effective on August 1, 1983. It was one of those death-defying cliff-hangers because a bill to delay their effectiveness was sitting in the well of the Senate on the appropriate morning, but no one hauled it out. I am the reporter to the Federal Rules Advisory Committee and, therefore, had some modest involvement in drafting these rules. I think it is important for you to know that, because I am obviously not uninterested and, therefore, I will speak with an orientation that is probably more positive toward these rules than other speakers might have. You also should know that, as a reporter, I am speaking only for myself.

BACKGROUND OF THE RULES AMENDMENTS

Before I discuss the content of the rules, let me try and put you inside the head of the advisory committee that put this

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package together. There is a natural tendency when one sees a group of new rules to think that they are like a scattergram, a group of separate dots. There is an amendment to rule 7, to rule 11, to rule 16, to rule 26--and very often the reader does not see the forest for the trees.

The most important thing to realize in looking at these new rules is that rules 7, 11, 16, and 26--which are the four I will examine--represent an integrated package. They are not four individual rules, they are four intertwined rules that have a certain global theory in back of them. I will not discuss the truly new rules--rules 72 through 76--on magistrates, because they are nothing more than the magistrate statute.[1] We have simply brought the magistrate statute into the federal rules because the Federal Rules of Civil Procedure, until August 1, 1983, didn't even acknowledge the existence of magistrates. We thought it desirable that the rules contain the gist of the magistrate statute so that lawyers would fully realize that in federal practice the rules are affected by magistrates.

Incentives to Litigation

Rules 7, 11, 16, and 26--that's the field that I want to try to traverse. Let me step back. What is the most common cliche in our business? That we are a litigious society. That Americans are litigating more today than at any other time in our his-

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1. 28 U.S.C. § 636.

tory, that we have a higher litigation rate than any other people on the face of the earth, that we have more lawyers per capita than any other nation on the planet, and that our system is near collapse. You have heard all of that. Did you ever wonder what a man from Mars would say, if he descended in his spacecraft and was asked to go look at our federal courts and at the civil docket and give us his reaction? I want to go employ this metaphor because it is precisely the detached exploration that the advisory committee went through before it put together the amendments to these four rules. I think the person from Mars would say something like this: "Say, look, you folks are victims of your own propaganda. You have this notion, equal access to justice. Everyone has a right to a day in court--equality under the law. So you have created a civil litigation system that tries to live out that truly American dream, and the problem is that it is killing you. The problem is that maybe in the year 1984, you just can't do it the way you used to be able to do it in 1938, when these Federal Rules of Civil Procedure were first promulgated."

Economic Incentives

Now, what might the man from Mars mean by that? First, the economics of litigation are clearly productive of more litigation. Let's face facts, we have a "costs-lie-where-they-fall" rule--the so-called American rule. Litigants don't have to face the incredibly threatening risk that if they lose, they will have

to pay their opponent's expenses, as in many Western European countries, such as Great Britain, where the loser pays both sides. However egalitarian the objective, in a curious way the rule creates an economic incentive to litigate. We justify it in terms of that great American dream--open the courthouse door and say to people: "We are open for business; we do not want to deter you if you think you have a grievance."

Add to that the uniquely American concept known as the contingent fee. We are, after all, almost the only major nation on earth with the contingent fee. In many nations on this planet, the contingent fee not only isn't recognized, but any attempt to work on a contingent basis would be a violation of the canons of ethics of that country, and, in some cases, it would be a crime. We say to people: "If you cannot pay according to the clock, you can work out a deal with a lawyer that, let's face it, makes the lawyer a partner, a co-adventurer in your litigation." We should not be surprised when we realize that this too is a tremendous incentive to litigate claims that in most other nations on earth would not be litigated, simply because of the economics of the situation. When you add the contingent fee to the American rule on costs, you have two doctrines that are consistent with the American dream, but that have produced an explosion of litigation.

As a final element of the economic sphere, add the fact that we now have, depending on what you count, and how you count, between seventy-five and one hundred federal statutes providing

for attorneys' fee awards. It is one of the most stunning revolutions in the law, because this was almost an unknown phenomenon prior to World War II. We justify those attorneys' fee award provisions in terms of effectuating social policy in the antitrust field, the civil rights field, the consumer field, and a host of other fields. But let's face facts, it is like a giant lighthouse that says: "Hey, come on and litigate. We have created this cause of action for you. The federal courthouse doors are open--you can get your lawyer on a contingent fee. If you lose you are not going to have to pay the winner's costs, and if you prevail, you are guaranteed a fee under the statute, a third economic incentive to litigate." I am not saying any of those three is wrong; all I am trying to do is point out that with that kind of an economic structure, for legitimate social policy objectives, none of us should be surprised that federal question litigation is moving up off the charts, year in, year out.

Statutory Rights

Second, to live out the American dream you have to create rights. We all know that in the 1960s and early 1970s, both the Congress and the courts seemed to be engaged in a "right-of-the-month club." Statutes with the fee provision didn't even exist until the 1960s: the consumer statutes, the environmental statutes, the sex discrimination statutes, equal access to credit, the odometer statute. We created new substantive rights in the in the 1960s and early 1970s like a sorcerer's apprentice.

Again, I am not in the slightest suggesting that it was wrong; I am simply trying to put another piece of this jigsaw puzzle in place. In a real sense, the Chief Justice has always been right when he suggested that any time Congress creates a new substantive right, they should prepare a judicial impact statement. You know it has never been done, and you know these statutes have had a staggering impact on your lives. I can't help but remind you that, in a sense, part of it is a self-inflicted wound, because in the 1960s and early 1970s the courts themselves implied private rights of action out of federal regulatory statutes. So it is a combination of the courts and the Congress. It is probably true that we have seen the heyday of that period. Neither the current administration nor any foreseeable future administration is likely to go back to that incredible right creation process of the 1960s.

Proliferation of Lawyers

Next, consider a very simple demographic fact. The law schools of these United States have been turning out lawyers as if there were some statute of limitations about to run, so that the bar in many parts of this country is overpopulated. When you have overpopulation in the bar, you tend to get a scratching for business that leads to the institution of cases that in a different economic environment would not be brought. I think that has been augmented by what I call a "retread" phenomenon as we have moved to no-fault systems in the matrimonial and automobile acci-

dent fields. I think a lot of litigators have slid into the federal question environment looking for new fields to plow. And, of course, we have had the creation of what is called the public interest bar, a cadre of lawyers who do not dance to the tune of the billable hour, and who are interested in bringing a range of economically unprofitable cases that have important philosophical and ideological ramifications. So everything in our society is working to create a litigation explosion: the economics of litigation, the magnification and development of new substantive rights, and shifts within the bar itself.

Open Access to Courts

And finally, we have a procedural system that was built in 1938 to live out that American dream of equal and easy access to justice, a wonderful system of procedural rules designed to be liberal, to be fair, to get cases resolved on their merits,[2] but which are not efficient or economical as employed in the 1980s. How do you get into federal court? Once you have served process, rule 8(a)(2) requires only "a short and plain statement of the claim."

There is no access barrier; there is no inhibition at the courthouse door in the form of pleading. Just give a short and plain statement of the claim. Oh, you might say, we have motions to dismiss--rule 12(b)(6), the vaunted motion to dismiss for

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2. See, e.g., Conley v. Gibson, 355 U.S. 41 (1957).

failure to state a claim upon which relief can be granted. It is a wonderful tool on paper, but have you ever looked at the batting average of rule 12(b)(6) motions? I think it was last effectively used during the McKinley administration. It is not an effective screen. It is in a sense a revolving door device, rarely dispositive. Indeed it is by most sorts of cost-efficiency tests an artifact at this point.

What about summary judgment? That's not really an effective screen. The Supreme Court has told you people time and time again: "Oh, summary judgment is a wonderful device, but maybe you shouldn't grant it in any serious case." You have got several cases out of the Supreme Court that are distinguishable and containable to their facts, but when you put them together, the message is fairly clear. If it is a serious case, a complicated case, the kind of case that breaks your back, you are swimming upstream against the current if you try to grant the motion.[3] If you are sitting as a district judge, you are always worrying about those people on the court of appeals who, seemingly without any compunction at all, are willing to bounce it back down to you. You have two screens, the rule 12(b)(6) motions and the rule 56 motions; they are toothless tigers. So the whole message is: "Come on in, the litigation is fine." Just find yourself a federal statute, get yourself a contingent fee lawyer, make sure

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3. See, e.g., Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962).

there is an attorneys' fee award provision in the statute, bleed a little on a piece of paper called the complaint, and fend off two childlike motions to get you out of there. Then it's discovery time. With a hop, skip, and a jump into the swamp of discovery. How many people have you known who have gone into the swamp never to be heard of again?

The person from Mars looking down, having described this business through caricature eyes, as I have just done, might say: "You know, I was on Earth fifty years ago, in the 1930s, and you know what contemporary federal civil litigation is like? It's like those dance marathon contests. The object is to get out on the dance floor, sort of hug your opponent, and move aimlessly and shiftlessly to the music with no objective in mind other than to outlast everybody else." That is the image--differently stated, of course--that the advisory committee debated, discussed, and said: "What can we do about this, if anything?"

The Approach of the Advisory Committee

Well, let's face it, more than 90 percent of all federal civil cases settle or are disposed prior to trial. We do not try, in most districts, more than 6 percent of the cases on the civil docket. That little fact tells you instantly that if you are trying to make any meaningful dent in the logjam, it is silly to work on the trial phase. Because the cows, the horses, the pigs, and the sheep have left the barn by the time you reach trial. You could make the most massive efficiency adjustments in

trial and you would achieve virtually nothing because you are only talking about 6 percent of the cases. So meaningful improvement has got to come in that pretrial phase from institution to trial, or from institution to settlement, or from institution to pretrial adjudication in whatever form it might take. That is the only hope. That is what these four rules are all about.

These four rules try to attack the pretrial process through four themes. Theme one is somehow to try and engineer improved or increased lawyer responsibility, to moderate lawyer behavior in litigation so that there is less of the aimless, less of the pavlovian, less of the drifting.

Theme two is then addressed directly to the bench. Every empirical study that we have (and I shouldn't magnify that, because there aren't that many empirical studies and each one has a flaw here or a mole there or a wart elsewhere) is loud and clear on one proposition: increased judicial management--or oversight, or control, or whatever word you want to use for the phenomenon of judicial involvement--in the pretrial process cuts down the time frame from institution to pretrial determination, or resolution. In some of the studies it is quite dramatic. In high-management districts the time frame is half what it is in low-management districts, which gives new meaning to the word anarchy. So theme two is directed at federal judges, and will affect them the most.

Theme three is everybody's entry number one on their personal hit list: discovery. Ten years ago people would shriek

and holler and rant and rave about class actions. That animus now is directed at the discovery process.

Theme four, unfortunately, is a dirty business. Theme four I like to think of as the mortar holding the first three bricks together. Simply put, it is sanctions. How do you achieve themes one, two, and three? One answer chosen by the rulemakers is to impose sanctions.

OBJECTIVES OF THE 1983 RULES AMENDMENTS

Increasing Lawyer Responsibility

There is a widespread feeling that there is a lot of frivolous conduct on the part of lawyers out there, a lot of vexatious conduct, a lot of inefficient conduct. That conduct can take the form of instituting actions that should never have been brought, the frivolous case, the sham defense (I am trying to be absolutely neutral across the board)--a lot of frivolous defenses are interposed just as frivolous cases are interposed. Frivolous motions are made, and there is frivolous or vexatious discovery. Lawyers, it is said, need to be controlled to some degree. I repeat, we do not know how much of this there really is, because what one person would call frivolous, somebody else would call meaningful or substantive. We may be the victims of the phenomenon known as the cosmic anecdote: Somebody tells a war story at one bar association meeting, and it is picked up by ten other lawyers who then tell the same anecdote at ten other bar association meetings, and before you know it people are rioting in the

streets saying the foundations of the republic are crumbling, because this incident, which has only happened once, now appears to have happened a thousand times. We really don't know, but the advisory committee--composed of your colleagues on the district courts, a couple of court of appeals judges, and some distinguished trial lawyers from around the country--felt that there had to be some meaningful restraint put on lawyer behavior to cut out some of this type of conduct.

In implementing these theoretical goals, we went to two of the least read rules in the rule book. Rule 11, basically untouched since 1938, requires the lawyer to sign a pleading. It speaks directly to the lawyer. Rule 7 is probably even less read than rule 11. I cannot tell a lie--I didn't realize the weight of rule 7 until we started working on this project. Rule 7 says that the signature requirement in rule 11 is applicable to all motions, and other papers. So the signature requirement, which generally is thought of only in the pleading context, actually applies to any motion, any discovery request, any discovery response, and much more because rule 7 always has applied to "any other paper."

Now, what do rule 11 and rule 7, by incorporation, require of the lawyer? What is that signature requirement all about? Just a pretty flourish on the bottom of the page to take the place of the seal? No. There is a qualitative requirement in that signature. The rule had always required that the signature be treated as a certificate. The lawyer's signature is a certi-

ficate by him that he has read the document. It sounds totally logical, doesn't it? Of course, he has read the document? Are you so sure, in an era of word processing and automatic typewriters, that the sixty-page rule 10(b)(5) complaint has really been read by the senior partner signing off on page 61? Or is it more likely that the complaint in a similar case has been pushed back through the word processor by just changing the name? Let's face it, you would have to be a little crazy to read sixty pages of a 10(b)(5) complaint. I just have doubts that even the reading requirement has had any content to it for forty years. Add to the phenomenon of the word processor and the automatic typewriter the hierarchical structure of major urban law firms that hire twenty-five young drones a year and have litigation teams. (Nobody is a litigator anymore, everybody is part of a litigation team. "I am the document man, what do you do?" "Oh, I handle depositions, west of the Colorado River.") So some summer associates draft the complaint, which then sort of levitates itself up to the senior partner who signs off. You wonder whether anybody in that chain has read it.

The long and the short of that little diatribe is that the reading requirement, in the past, probably has been meaningless, and it probably always will be relatively meaningless. But the rule has always said the signature is a certificate that the lawyer has read the pleading, and that to the best of his knowledge, information, and belief (the English language is a soft language; you really can't do better than "knowledge, information, and be-

lief") there is good ground to support it, and it is not interposed for delay. What does "good ground to support it" mean? Well, if you look at the cases under rule 11 (and you can count the cases under rule 11 on your fingers, and you do not need perfect hands to do it) there is nothing under rule 11. You discover that nobody knows what "good grounds to support it" means--a rumor? something I read in the New York Times? And the courts that have grappled with rule 11 have treated it as subjective, which of course has disparaged any enforcement capabilities instantly. There has been a curious test: first, a subjective, meaningless test and, second, a limitation of malfeasance to delay, which is only one bad motivation. So there are two defects in it instantly.

The final defect in the rule as it existed pre-1983 was the sanction provision. If you sign the pleading or motion with intent to defeat the rule (again, subjectivity) the court could strike it as sham. If the messenger brings you bad news, you shoot the messenger. If the lawyer signs a pleading with intent to defeat, you strike the pleading and shoot the client. I find it difficult to believe that there are federal judges who would apply that sanction, to strike a client's case because the lawyer has been less than perfect. The cases do not reveal any such activity on the part of federal judges. The only other sanction was for willful violations (whatever a willful violation is). The attorney might have been subjected to appropriate disciplinary sanctions (I've never met an appropriate disciplinary sanc-

tion). The cases, such as they are, suggest that an appropriate disciplinary sanction is to write an opinion commenting on the lawyer's behavior and to forward it to the legal publishers for all to read. How many putative clients do you know who read the West reports in picking their lawyers? Therefore the committee said, let's retool rules 7 and 11. The rule is obviously nonfunctional.

Rule 11 (as incorporated in rule 7) still applies to pleadings, motions, discovery requests, discovery responses; to any paper the lawyer signs; the signature is still a certificate that the signing lawyer has read it. We might as well leave that in. But now the rule reads: "to the best of his knowledge, information, and belief" (again, that is as close as you can come to describing some sort of mental state)--but here are the four critical words--"formed after reasonable inquiry." In many ways those four words are the key to rules 7 and 11. As the advisory committee note puts it, "formed after reasonable inquiry" is a stop-and-think obligation. There is now a mandated obligation on the part of an attorney to stop and think about his behavior, whether it is pleadings, motions, discovery, or what have you--to the best of his knowledge, information, and belief formed after reasonable inquiry. Now we have changed the nature of the standard. The combined effect of these words is that the lawyer must stop and think on the basis of the facts and the law. That is a fairly objective approach. It has got some subjective elements to it, but it is an attempt to become more objective. It is an

attempt to say to an attorney: "You have to know your facts and your law before you start shooting paper arrows in the air."

What constitutes a "reasonable inquiry" depends on the circumstances of the case. The committee's note flags such factors as the time available to counsel, whether there had to be reliance on the client, how "plausible" the attorney's view of the law was, and whether the case was forwarded by another attorney.

Next, the advisory committee altered the content of the certification. Instead of simply stating that there is "good ground to support a motion," the new standard is much more precise and more directive by insisting that the paper be "grounded in fact" or "warranted by existing law." Furthermore, the new rule goes on to say: "It is not interposed primarily for any improper purpose," not just delay. "It is not interposed for any improper purpose, such as to harass, to delay, to increase the cost of litigation." So, a broader, deeper signature requirement marks out a wider range of impermissible motivation and conduct. There is no doubt, the words make it clear, the advisory committee's note makes it clear. This formulation should capture a wider range of lawyer conduct and there should be no mistake about the proposition that these words impose a greater presignature obligation on the attorney.

We are only two-thirds of the way there because we still have to deal with sanctions. I want to deal with sanctions separately. Let me just point out what the model is. It is the same model throughout rules 7, 11, 16, and 26. The rule says if you

violate any of those preconditions to your signature, the court, upon motion or its own initiative, shall impose an appropriate sanction. Let us examine this, phrase by phrase. The rule just says: "If you violate this rule"; notice there are no words like "willful." The rule doesn't require a willful violation. "If you sign in violation of this rule, the court, upon motion or its own initiative . . . ." That speaks to you--you have express initiating power under rules 7 and 11. "The court shall impose . . . ." We know shall often means may; not here--shall means shall here. The advisory committee note says: "If you find a violation of rules 7 and 11, you shall impose an appropriate sanction." Now there is the judge's safety valve; he can't be made out to be Attila the Hun. You shall impose an appropriate sanction, which may include (there may means may) an order to pay the other party the amount of reasonable expenses incurred by the improper signature, including a reasonable attorney's fee. The thinking of the advisory committee was that you should impose a sanction. You and only you know what an appropriate sanction is. It may be a lecture; it may be a wrist slap; it may be something far more serious. And then the committee established this cost-shifting sanction. That is what this is, it is a true cost-shifting sanction. If somebody signs in violation of his or her obligation under rules 7 or 11, what could be more equitable than making that attorney, or that attorney's client, bear the true cost of his misbehavior? This is simply an equitable principle: If you violate the rule, the cost moves over.

Critique of Rules 7 and 11

Although those who drafted new rules 7 and 11 hoped that the changes would be therapeutic in terms of improving attorney behavior, they did have three apprehensions.

First, would anyone pay heed to the message? The success of the new rules depends solely on their invocation by lawyers and judges. It seems likely, however, that the new rules will have effect over time, but it may take several years before the profession adjusts and norms are established.

Second, will vigorous enforcement of the new rules have a chilling effect on lawyers? In addition to eliminating or reducing frivolous pleadings, motions, and discovery, the obligations imposed by the new rules, and the threat of sanctions, might cause some lawyers to think, double-think, and triple-think themselves into paralysis. This might suppress perhaps the greatest attributes of the American bar--its innovativeness, creativity, tenacity, and toughness. The amendments were not designed to frighten lawyers into submissiveness or to make them fearful of signing any document on behalf of their clients. Indeed, the advisory committee note cautions against appraising lawyer behavior with 20-20 hindsight.

Fortunately, those who self-select themselves into law and then into litigation are not likely to lose their advocate's instincts out of a fear of sanctions. Certainly the advisory committee did not intend to dampen the enthusiasm or the adversarial spirit of lawyers; it simply was trying to skim off the frivolous

and improperly motivated lawsuits, motions, and discovery that are polluting the federal system.

There are safety valves. For example, the admonition of rule 11 that the court "shall impose" a sanction for violation of the signing requirement, is qualified by the words, "an appropriate." In some cases, an "appropriate" sanction will be nothing more than an oral reprimand by the court or an expression of disagreement with the lawyer's decision. That would be appropriate when it is clear that the procedural move was overzealous, even misguided, but not malevolent or mischievous.

Ultimately, we have to have confidence that district judges will apply the new rules in ways that carry out their underlying purposes. We must rely on their good judgment to calibrate sanctions according to the character of the conduct and to avoid engaging in overkill.

Third, will the emphasis in new rules 7 and 11 on the availability of sanctions create a pathology of seeking them? Even if the new rules screen out frivolous motions, they also may clog the courts with needless sanction motions--a phenomenon already dubbed the problem of satellite proceedings. The advisory committee note acknowledges this possibility and suggests ways of avoiding it, a theme to be returned to later.

Increased Judicial Oversight

Let me move now to rule 16, which is the one most germane to the day-to-day operation of the judiciary. Rule 16 has always

been part of the Federal Rules of Civil Procedure. Interestingly, as we look back at the literature surrounding the original Federal Rules of Civil Procedure, rule 16, the pretrial conference, was thought to be one of the great innovations of the federal rules. But rule 16 as it has been on the books from 1938 to 1983 had had as its model an eve-of-trial conference. Once you realize that trial will occur in approximately 6 percent of the cases, it is again another case of locking the barn doors after everybody has left. Rule 16 really didn't speak to anybody. It has been apparent for years and years that the concept of holding a conference, if it was to be meaningful at all, had to be brought forward on the time spectrum, toward the institution point, not deferred until trial, and as everyone knows, that is precisely the philosophy underlying the Manual for Complex Litigation. Looking back on it, the Manual for Complex Litigation was spawned because of the vacuum in the federal rules, because of the fact that there was no management rule in the federal rules, rule 16 just didn't cover it.

Now what has been done to rule 16 quite literally is that it has been transformed. The old rule 16 is gone and what you now have in rule 16 is a blueprint for management. Many of the concepts in the new rule are drawn from the Manual for Complex Litigation. Many of the concepts in the new rule are drawn from existing local rules from around the country, and many of the concepts are drawn from existing practices by individual judges. In a real sense, rule 16 as rewritten, for all of its subclauses,

doesn't say anything new. It is a synthesis of what is existing practice for many, many district judges in the United States. In the two years that preceded the promulgation of rule 16 as we now see it, I used to conduct informal surveys in various district judge seminars on these elements and I found that somewhere between one-third and two-thirds of the district judges were already engaging in practices captured in rule 16.

Rule 16 establishes the principle of management. It says that management is a legitimate function for a district judge. It adopts the notion that in a wide spectrum of cases a little management, some management, or a lot of management is going to help move a case to disposition faster than it otherwise might. Although more empirical evidence on this matter would be useful, studies conducted by the Federal Judicial Center indicate that increased management tends to reduce the institution-to-termination time frame.[4]

Many experienced lawyers agree that there is a very close relationship between judicial management and pretrial efficiency. A Southern District of New York study indicates that a very high percentage of the lawyers in that district would like more involvement by the district court.[5] In many ways this seems coun-

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4. S. Flanders, Case Management and Court Management in the United States District Courts (Federal Judicial Center 1977). The study covered five districts. The institution-to-termination time frame was significantly shorter in high-management districts.

5. Preliminary Report of the Discovery Committee of the Southern District of New York (Aug. 24, 1983).

terintuitive. Lawyers, trained as adversaries, typically are quite possessive about "their" cases; yet, the study suggests that they are willing to have judges manage "their" cases, acknowledging that litigation is no longer the sole domain of the attorneys.

Reducing the time frame from institution to pretrial termination certainly would be socially desirable. Since the cost of a significant amount of litigation is tax deductible, taxpayers end up footing much of the bill. Moreover, every frivolous or unnecessary motion consumes valuable public resources, such as judges and courtrooms, and drains human resources. Furthermore, many of our most talented young lawyers may spend up to one-fifth of their legal careers on pretrial proceedings in enormous cases that often are competitive wars rather than legitimate legal disputes. By any standard, allowing litigants to play expensive dilatory games in our courts is socially costly. Thus, the advisory committee felt that the expenditure of some judge power to accelerate and improve pretrial proceedings was desirable.

The first part of rule 16 is simply the establishment of the principle of management. Subdivision 16(b) really represents the core of rule 16. It says that except in categories exempted by local rules (a curious provision: 16(b) allows local rules to exempt certain categories of cases) there must be a scheduling order that issues 120 days after institution. Optimally it will issue 60 days or 40 days after institution; the outside limit is 120 days. Now notice a couple of things here. The operative

words are "scheduling order." Nothing in rule 16 mandates any conference; there is no mandatory conference under rule 16. The only mandatory anything is a scheduling order (which isn't even mandated in the exempted cases). We anticipate that prisoner petitions, odometer cases, and certain social security cases will be the exempted categories, and there may be differences from district to district as to what is exempted. But that is the pattern that has already begun to emerge. If you are not in the exempted category, there must be a scheduling order. The rule does not mandate form. A phone call, a boilerplate schedule, or even nothing at all (in exempted cases) may suffice; full-blown in-chambers scheduling conferences need be used only when necessary. Except where local rules allow for the use of magistrates, the order must be the work product of the judge, however. The rule recognizes that there is equal evil in under- and over-management.

The truth is that high-management cases, the cases that benefit the most from significant management, probably represent 5 percent of most civil dockets. There is probably 25 percent of the docket (50 percent of some dockets) that needs nothing and these cases will probably fall within the exempted category. Then there is the middle category of cases requiring a boilerplate or a telephone call scheduling order that probably will not take very much judicial time to put together at all. The top 5 percent will probably get the most attention under the new rule 16(b).

Once you get past the scheduling order, the practice under rule 16 really is not different than it is in most districts of the United States in a complicated case where the judge is following the Manual for Complex Litigation, or not following the Manual. Because every case is different, the judge may or may not call formal conferences. If a conference is called, then rule 16(c) provides a long checklist of the kinds of things that can be discussed. There are some interesting things on that laundry list that are worth special mention. Most of the things are self-evident. Let's begin with rule 16(c)(1), because there is a holy war embedded in that subsection. It says that the judge may consider the formulation and simplification of the issues, including the elimination of frivolous claims or defenses. As you know there has been a very strong attempt by organized segments of the bar (particularly the defense bar) to change the pleading structure and the discovery structure, with an idea of achieving early issue formulation. They say that too many claims brought against their clients are vague, ill-defined, and baseless. They complain of being subjected to discovery that is imprecise, overly broad, intrusive, disruptive, and expensive, making it cheaper to "pay off" unjustified claims than to fight them. This approach is quite a natural, unexceptionable response on the part of defense lawyers. The plaintiffs' bar, of course, responds as one would expect. "We know something is rotten in the State of Denmark; we don't know precisely what it is; we have to get in there and discover until the cows come home before we

can formulate the issues," they say. So a natural antipathy flows across the "v." The defense bar wants early issue formulation; the plaintiffs' bar wants to defer issue formulation. The defense bar's main tactic, which the advisory committee over the years has rejected, is to demand more in the pleadings. This 16(c)(1) is an attempt simply to call everybody's attention to the problem and say: "Look, if you can formulate, try to formulate." And 16(c)(1) ties in very closely to what I'll describe in rule 26, the discovery rule. There is a very strong symbiotic relationship between rules 16 and 26. Rule 16(c)(1) says: "Look, try to formulate, understanding the risks of premature formulation." It is interesting that one of the local district rules promulgated under rule 16 since August 1983 has taken 16(c)(1) and run with it to the point where they practically demand early issue formulation. I refer to an October 1983 order adopted by the United States District Court for the District of South Carolina. There are those who say that the South Carolina local order really violates the spirit of rule 16, by going beyond the bounds of notice pleading (as embodied in rule 8) by demanding much too much, too early. In any event, it is there. If you can frame, try to frame. If you can identify frivolous or sham issues, get them out.[6]

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6. For information on the implementation of rule 16, see N. Weeks, District Court Implementation of Amended Civil Rule 16: A Report on New Local Rules (Federal Judicial Center 1984); see also 6 C. Wright & A. Miller, Federal Practice and Procedure: Civil (1971 & 1984 supp.).

The next provision worth mentioning is rule 16(c)(7), because it says you can consider the possibility of settlement. Realize that this is the first time the word "settlement" has reached the Federal Rules of Civil Procedure. It simply recognizes the fact that settlement is now a fundamental, basic, almost universal aspect of being a judge. We debated long and hard whether we should try to define the ambit of the judge's role in settlement, because there is a great deal of controversy as to what is legitimate for a district judge to do. We spent a lot of time trying to formulate something and decided it was too early to attempt a thorough rule. Because of the wide range of possibilities that came to light under subdivision (c)(7), we just left it on the table.

Other than that, rule 16(c) is really quite straightforward and provides the judge tremendous latitude in terms of a conference, multiple conferences, or no conference. The rest of the rule is basically fairly straightforward, including the content and the effect of the pretrial orders. A number of the items are based on the Manual for Complex Litigation. One or two things are worth highlighting. At the end of 16(c) there is a passage that says: "At least one of the attorneys for each party participating in the conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate." That is designed to avoid the sort of hear-no-evil, see-no-evil, which a lot of people have complained about. Notice it does not say

that the attending attorney must have authority to settle. It just says the attorney must have authority to stipulate and admit. That is a provision that has to be handled with a great deal of sensitivity because it verges on the attorney/client relationship, and there are potential problems there. But it was thought necessary to establish that as a principle.

By the way, the last sentence of 16(d) says that the final pretrial conference (which may be the only conference, or it may be the tenth conference) shall be attended by at least one of the attorneys who will conduct the trial. The anticipation is that if it is the final pretrial conference, that is the conference that will function most like former rule 16, providing a blueprint for the trial. If you are going to blueprint the trial, you should have trial counsel present so you don't get to trial and find the new counsel brought in to try the case suddenly saying: "Oh, I never agreed to that," and wanting to create a new blueprint.

The final thing worth mentioning about rule 16 is the sanction provision. Once again, there is a range of sanctions, and I think it is important to point out that there are various sanctionable acts under rule 16. There is the obvious one: if you fail to attend a pretrial conference or fail to obey the pretrial order. Those are classic violations. Sanctions are also available if a party or attorney fails to participate in good faith, and if an attorney is substantially unprepared to participate in the conference. It is not likely that you are going to invoke

that very frequently, but there is a range of behavior in 16(f) that is sanctionable. Once again, the model is exactly the same as for rules 7 and 11: You can do it on your own initiative; it can be done on motion; and you have a complete range of sanctions. The normative sanction is, once again, cost-shifting. Many people wouldn't even call cost-shifting a sanction; they would call it an equitable principle. But cost-shifting is likely to become the normative sanction under rule 16.

Critique of Rule 16

There are three significant apprehensions regarding new rule 16. The first is the same as one articulated with regard to rules 7 and 11--if a judge is not disposed to manage, will he pay attention to rule 16? Certainly there are federal judges who do not manage their dockets aggressively; they have various reasons for this attitude, which by and large reflect their own style or conception of judging. But since younger judges seem more in tune with the need for management, the number of reluctant judges is dwindling as new judges are elevated to the bench. Newly appointed judges also are heavily encouraged in this direction by the Federal Judicial Center. Moreover, some judges who have not been disposed toward management nonetheless will respond positively to the affirmative obligation imposed on them by rule 16. Thus, there are judges who probably will reject the orientation of rule 16, but they should be relatively few in number.

Another concern about rule 16 is that it says to a heavily

burdened district judge, who may be facing a docket of five hundred cases, "Judge, rule 16 asks for a portion of your valuable work time. That is time that you cannot sit in your courtroom and try cases. But, we honestly believe that time expended in scheduling and management will be offset by time economies you will experience later on in these cases."

Once again, we lack empiric evidence on the subject, but the available data indicate that management conducted early in the action will produce efficiencies later in the proceedings. "Runaway" discovery often results because a judge who knows very little about a case is in no position to limit or terminate the process. Early management forces the judge to acquire a working knowledge of the larger cases on his docket. That can be useful in scheduling, in shaping discovery, and in moving the dispute toward trial. The hope is that by robbing Peter to pay Paul in terms of allocating time, there will be a net savings for all concerned.

But even in light of those criticisms, if anyone were to wake me up in the middle of the night and ask: "Of all the things you worked on in this batch of federal rules, what do you worry about the most?", I would have to say that it is the potential implications of rule 16 coupled with rule 26, which we will get to in a moment. Namely, that these two provisions represent an explicit wrench or departure from the traditional adversary model--the historic notion that cases ought to be handled by attorneys for their clients as they think best, at whatever speed,

using whatever procedures, settling or not settling as they see best. But what rules 16 and 26 do formally is not a tremendous wrench with actual practice; it is simply a formalization of a process of moving from a pure adversary theory of litigation to a shared power relationship between counsel and the bench. The bench now, in a sense, representing the public, is saying you are invoking a public resource. Society has the right to participate in the decision-making process as to how this case is to be handled. It is no longer true that cases are lawyers' cases. There is a triangulated relationship here. Now that may--over time, through attrition and just change in the nature of the bench and in the nature of the bar--represent a very dramatic shift from what we have for a thousand years called the adversary model. I don't know whether that is good; I don't know whether it is bad; all I know is that it is potentially a very high stakes poker game.

Curtailing Abusive Discovery

Let us proceed to the third theme, discovery. We all know that there have been screams of discovery abuse from every corner: plaintiffs' bar, defense bar, the bench. How big a problem is abuse of discovery? The evidence seems to indicate that the number of cases in which there are a significant number of discovery events is statistically very small. Given this fact, it is not surprising that in a recent survey conducted in the Southern District of New York, over 30 percent of the responding

lawyers reported that abuse never had been a problem. Another third reported that abuse was an occasional problem. Less than 10 percent of those polled said abuse was a serious problem.[7]

But when abuse does occur, it can be very significant and frustrating. Thus, it is not surprising that the subject had produced a rip-roaring dog-fight between the people on the left and those on the right of the "v." Yet, it would be wrong to think that abuse is a pervasive problem or that it is easy to define or to identify. Because hard evidence is so scarce, when I became a reporter and started to work on this group of rules, I thought it would be reasonable to go out and try to find out how much abuse there really is out there, and what the abuse was. So I spent a lot of time at judges' meetings, at bar meetings, talking to a wide range of people. What is abuse? It became very clear to me after about six months of doing that, that abuse, quite simply, is what your opponent is doing to you. Abuse lies in the eye of the beholder. What is abuse to one person is essential discovery to another person. It became clear to me that there was no way of getting improvement in discovery by trying to define abuse, or dealing with the problem through the sort of prism of abuse. We came to believe, again based on some data, that most people would agree that there were two types of behavior that were unacceptable in the terms of the system. The first

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7. Preliminary Report of the Discovery Committee of the Southern District of New York (Aug. 24, 1983).

type of behavior might be called overdiscovery, or redundant discovery. Redundancy--the twelfth deposition says nothing more than what you have already got in the first eleven. Redundant discovery is certainly a benchmark of large economic cases. The second type of behavior was disproportionate discovery. In a $10,000 damage case, spending $50,000 on discovery is disproportionate.

Redundancy and disproportionality, most people would agree, should be excised. Now, how are you going to do that? Can you rely, as the rules have relied since 1938, on attorney self-regulation? No. One of Charles Clark's great dreams in drafting the original Federal Rules of Civil Procedure was to create equal access to all relevant information principal in the discovery regime and have it operate on a self-executing basis. The lawyers just did it, with no imposition on the bench. The problem is that it has grown like a weed. Once again it is like the sorcerer's apprentice, it is out of control. There is only one way to reduce redundancy and disproportionality, and that way is through the federal judiciary. So we have sold the judges into slavery. It is as simple as that. They are now the gatekeepers. Until last August, the last sentence in rule 26(a) said: "Unless [notice the perspective there] the court orders otherwise, the frequency and use of discovery is not limited." Unless the court says otherwise, get ye forth and discover. That had been the message of the last sentence of rule 26(a). In 1984, we decided it was a lousy message. That sentence has been stricken and re-

placed, quite literally, by the reverse message, which you now find in rule 26(b). Rule 26(b) now says that the frequency and extent of use of discovery shall be limited by the court if certain conditions become manifest. Just realize the 180-degree shift between the last sentence of the old rule 26(a) and the new sentence. Judges now have the obligation to limit discovery if certain things become manifest. The things that are then listed in that paragraph are basically the evils of redundancy and disproportionality. Because one says that if discovery is unreasonably cumulative, or duplicative, or obtainable from some other source, that is redundancy. If you can get it more cheaply, or if you already have got it--stop asking the same questions. You shall limit discovery if you find that the discovery has become cumulative or duplicative or that the party seeking it has had ample opportunity. This is the eve-of-trial caper: You are six years into the case; you have a trial date scheduled, and somebody says: "Wait, I have fourteen more depositions to take." Now the court shall limit that if you find that that attorney had ample opportunity earlier. And finally, discovery is disproportionate if it is unduly burdensome or expensive given the needs of the case, the amount in controversy, the available resources, and the values at stake in the litigation. Everybody understands you can have a case where the values at stake transcend the economics of the case, so this is not a pure dollar test. Nobody would accept a pure dollar test in determining disproportionality. So it falls to the judge to limit if you find redundancy,

if you find there has been ample opportunity earlier, or if you find disproportionality.

Now, I mentioned before that there is a nexus between rules 16 and 26. Under rule 16, the judge becomes a more effective participant in settlement, because the judge knows the case, the lawyers know he knows the case, and just by demonstrating presence and command over the case the lawyer becomes a living deterrent to sanctionable behavior. Most lawyers are not fools, most lawyers do not want to shoot themselves in the foot. Lawyers who understand that the judge was assigned to the case for all purposes are less likely to engage in fringe behavior, because they know that the judge is informed, is managing, is limiting, is scheduling, is trying to move the settlement dynamics forward. The constant objection to rules 16 and 26 during its period of formulation came from a lot of district judges who said: "This will consume hours of my time." The answer to that was the answer of our five district judges and our practitioner: "Yes, early intervention will cost you time at the front end, but it should save you time at the back end." Because if the empirical data is right, the pretrial process compresses through management. That means that the activity that used to go on at the back end of the spectrum isn't going on any more. You may be able to get settlement earlier. You may be able to limit discovery and have fewer discovery motions on your bench on Monday morning. You may find that there is less misbehavior.

So, there is a notion of prophylactics here. Yes, judge,

spend the time up front, and we believe it will save you double time or triple time down the line. Certainly that is going to be true if you can cut the discovery process down. Along with current practice in discovery process is the notion that when lawyers go into that discovery swamp, nobody cares about them. It is the clients who are paying, and we don't care about them. That is wrong. First of all, it is wrong from a philosophical point of view, but we know that this swamp behavior simply generates motion practice, or sanction motions, or woolier cases, or longer trials, and that is a social cost that we are trying to cut down. The discovery regime is reinforced by placing a special certification requirement on the lawyers. We didn't want to leave the judges twisting in the breeze, required to enforce these anti-redundancy and anti-disproportionality principles. So the lawyer now, when he makes a discovery request, response, or objection, must sign the documents. And that signature is (as in rules 7 and 11) in effect a special certificate that the discovery is warranted under the facts and law, and that the discovery is not redundant or disproportionate. So we try to tell the bar: "Don't do this or you are vulnerable to sanctions," and we also try to tell the bench: "If you see it, stop it." So it is sort of a double whammy--we are trying to get it from both ends.

There is an important interrelationship between the management philosophy of rule 16 and the anti-redundancy and anti-disproportionality policies of rule 26. The latter can be effectuated only if judges educate themselves about their cases and

attempt to manage them throughout the discovery process. The two rules must be utilized together. Perhaps the greatest by-product of increased management under rule 16 will be increased judicial capacity to scope, sequence, and limit discovery under rule 26(b). An argument to a judge who is not conversant with the case that a particular interrogatory, deposition, or production request is disproportionate, or that a response is insufficient, is not likely to be successful. But a judge who is informed is in a much better position to deal with motions to limit or terminate discovery procedures or to compel responses.

Sanctions

The last theme is sanctions. I will basically describe what we have done. We have put in about eight new sanctions in these rules. Now, were we mad people? The common assumption, the word out on the professional rialto is: "Don't worry about sanctions, they never happen." I have to tell you, each summer I go through this unbelievably miserable process of doing the pocket parts for the Wright & Miller treatise. There comes a time in late July when I come into the office, I look down at my desk, I smile, I close the book, and I go to the beach because I have hit rule 37, the sanction rule. There is nothing there. Now that contributes to this mythology that there are no sanctions out there. So why would rational people write up all this sanction stuff? Well, before we did it, I went out as I did on the abuse question, and I talked to lawyers and judges, sort of like Diogenes with the

lamp, trying to find out why there are no sanctions out there. And I talked to lawyers and they said: "We don't ask for sanctions because judges never give them." So then I spoke to a group of judges; I said: "Look, I hear you are outraged by lawyer behavior, why don't you impose sanctions?" And they said: "We don't impose sanctions because the lawyers never ask for them." A perfect circle. Now let us face facts, if lawyers don't ask for sanctions, they don't ask for sanctions because of the golden rule. Do unto others as you would have others do unto you. The behavior you want to sanction today is what you want to do tomorrow. So you can't speak out of both sides of your mouth. Lawyers don't ask for sanctions because economically they have been meaningless in the few cases in which they have been applied. Judges don't like sanctions, in part because they are self-inflicted wounds. Who wants the extra work of a sanction proceeding? Let's face it, all judges practiced law, and maybe some judges used to engage in that kind of behavior. So it is a sort of "well, boys will be boys" kind of thing. So they don't sanction it. That has been the traditional view.

Now, those days have gone. I think those days are gone in some places in these United States and are going in other places. Why do I say that? The first reason I would offer you as a reason for a shifting attitude on sanctions is, sadly, the growing incivility within our profession. I have observed the shift during my twenty-five years in this profession. In some parts of the nation and in some segments of the bar, it is more uncivil-

ized in terms of lawyer behavior and ideology today than at any other time. People are angry. Second, judges are angry. And judges, I think, are psychologically more willing to mete out sanctions today. And I think lawyers are psychologically more willing to ask for sanctions today. Third, the truth of the matter is that there are more sanctions being awarded out there than ever before.[8] It is just that I have been looking in the wrong place for them. They do not show up in the West reporter system. Several judges have told me that they now almost routinely cost-shift in their orders. But they are never published. It is like the iceberg; you don't get a sense of the shift in attitude, particularly with regard to cost-shifting. There are judges I have met who say on a discovery request, or response, or objection, they routinely impose a dollar sanction by way of cost-shifting. There are a lot of reasons to believe that we are entering an era in which cost-shifting sanctions are going to become more and more normative. So I think it is a mistake for anyone to believe that sanctions really can't be. They may prove to be ineffective, but the case for their ineffectiveness has not been made by the disuse of sanctions from 1938 to the present. I sense that there is a snowball coming down the side of the hill. We are not talking about throwing people in jail, or dismissing too many cases, but we are talking about an increased recognition of the

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8. See generally Note, Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process, 44 U. Chi. L. Rev. 619 (1977).

equitable notion that if you foul the nest, you should clean it up. And the sanctions increasingly--all of the ones that were written in August 1983--are true cost sanctions. They are at least potentially economically significant.

Let me also point out that the United States Supreme Court on three occasions in the last decade has written opinions that suggest that a little bit of sanctioning never hurt anybody, and that sanctioning as a deterrent to lawyer misbehavior is acceptable. You had it in the Roadway Express case,[9] you had it in the National Hockey League case,[10] and you had it in Hall v. Cole.[11] So it is no longer the taboo it used to be. Finally, I do believe that increased management control, particularly over the discovery regime, will reduce the incidence of lawyer misbehavior. I mentioned earlier the great evils or risks that you run from writing all of these provisions in. Number one is the risk that nobody will pay any attention to them, that life will go on in its cheery, old-fashioned, blissful, nonsanctionable way. I really believe that is not likely to happen, just by keeping my ear to the ground and listening to what judges are doing. Second, there is the risk that we are robbing Peter to pay Paul. There is the risk that if class actions were the great cottage

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9. Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980).

10. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976).

11. Hall v. Cole, 412 U.S. 1 (1973).

industry of the 1960s and 70s, the great cottage industry of the 1980s will be sanction proceedings--which, of course, means satellite proceedings and more work for the judges, which arguably may completely chew up the efficiencies and the economies that these rules might have produced. That was the great experiment; we didn't write these rules with no recognition that that was plausible. But the truth of the matter is that in most sanction situations, a judge who has managed and who is on top of a case can cost-shift, using that again as normative, with relative ease in terms of time expenditure.

Now I say that with full recognition that there are some due process implications to lawyer sanctions. The Ninth Circuit has already spoken to that in Miranda v. Southern Pacific.[12] There are notice and opportunity-to-be-heard implications when you sanction a lawyer. But by and large, if you've got a sanction and if you've got to run a sanction procedure, it can be done reasonably efficiently. There probably will be reasonably high volume in sanction applications for three years, maybe five years. You can hear lawyers now: "I have a professional obligation to seek sanctions. I owe it to my client to recoup some of his expenses by seeking sanctions." That will be the cliche, and there will be three to five years of relatively heavy activity here. But I think like everything else, including the class ac-

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12. Miranda v. Southern Pacific Transportation Co., 710 F.2d 516 (9th Cir. 1983).

tion (I think the class action is a perfect illustration of something that skyrockets and just eases back and achieves some level of equilibrium), that with sensible, restrained application of sanctions, that practice will stabilize in a few years.

CONCLUSION

I must tell you in closing, though, that I do have a recurrent nightmare. I wake up in the middle of the night and what I have dreamed is that in a complicated case one of the parties has made a gigantic discovery request, and the other party leaps up and says: "I move to sanction my opponent for violation of the certification requirement in rule 26, because that discovery request is disproportionate, it is redundant, it violates this or that." The judge holds a hearing. At the end of the hearing the court rules that it was an enormously complex and detailed discovery request, but it did not violate rule 26. The sanction motion is denied, at which point the discovering party leaps up and says: "Your Honor, I hereby move to sanction the sanction motion." As Kurt Vonnegut would say, and so it might go.

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