UNITED STATES DISTRICT COURT

ROBERT C. HEINEMANN
CLERK
JAMES GIOKAS
CHIEF DEPUTY

EASTERN DISTRICT OF NEW YORK

PLEASE REPLY TO:
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February 23, 1995

Mr. Fred Russillo
Court Administration Policy Staff
Court Administration Division
Administrative Office of the
United States Courts
Thurgood Marshall Federal Judiciary Bldg.
One Columbus Circle, N.E.
Washington, D.C. 20544

Fred —

Re: Civil Justice Reform Act

Dear Mr. Russillo:

In response to the February 13, 1995 memo of Abel Mattos and Lydia Pelegrin, please find enclosed the December 13, 1994 "Report of the EDNY Advisory Group on the Relationship of the EDNY CJRA Plan and the Federal Rules of Civil Procedure."

Sincerely yours,

Bob

ROBERT C. HEINEMANN
Clerk of Court

Att.

cc: - Abel J. Mattos
Chief, Court Admin. Policy Staff (w/ att.)
- Lydia Pelegrin
District Court Admin. Div. (w/o att.)

ADVISORY GROUP
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
225 CADMAN PLAZA EAST
BROOKLYN, NY 11201

REPORT OF THE EDNY ADVISORY GROUP ON THE RELATIONSHIP OF THE EDNY CJRA PLAN AND THE FEDERAL RULES OF CIVIL PROCEDURE

December 13, 1994

REPORT OF THE EDNY ADVISORY GROUP ON THE RELATIONSHIP OF THE EDNY CJRA PLAN AND THE FEDERAL RULES OF CIVIL PROCEDURE

Introduction

This sets forth the Report of the EDNY Advisory Group on the Relationship of the EDNY CJRA Plan and the Federal Rules of Civil Procedure. In June 1994, Advisory Group Chair Edwin J. Wesely appointed a subgroup to (1) identify actual and potential conflicts between the Federal Rules of Civil Procedure and the EDNY Plan; and (2) propose how these conflicts should be resolved. The subgroup consisted of Guy Miller Struve, Chair, Edward D. Cavanagh, Reporter, Raymond L. Casey, Anthony Edward Davis, John C. Gray, Jr., J. Christopher Jensen, Peter Reilly and Jennifer L. Rosato.

The subgroup met at the offices of Davis Polk & Wardwell on July 27, 1994.[1] Deliberations at that meeting were facilitated by the following written materials: (1) a preliminary memorandum, prepared by the reporter, identifying potential areas of conflict between the EDNY Plan and the Federal Rules of Civil Procedure; (2) an article by Mr. Wesely entitled The Civil Justice Reform Act: the Rules Enabling Act; the Amended Federal Rules of Civil Procedure; CJRA Plans; Rule 83 -- What Trumps What? 154 F.R.D. 563 (1994); and (3) an article by the reporter entitled The Civil Justice Reform Act of 1990 and the 1993 Amendments to the Federal Rules of Civil Procedure: Can Systemic Ills Afflicting the Federal Courts Be Remedied by Local Rules? 67 St. John's L. Rev. 721 (1993).

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[1] Present at that meeting in addition to Mr. Struve were Edward D. Cavanagh, Reporter, John C. Gray, Jr., Chris Jensen and Jennifer Rosato.

Thereafter, the reporter prepared a draft report for the subgroup. That report was discussed at a second meeting on October 13, 1994 at the offices of Davis Polk.[2]

Thereafter, the report was finalized and transmitted to the chair for circulation to the entire Advisory Group. It was discussed and adopted by the Advisory Group on December 8, 1994.

I. Conforming the Plan to the Federal Rules

The Advisory Group started from the premise that uniformity between the Federal Rules and the EDNY Plan is desirable and that variations are appropriate only when there is good reason for the EDNY Plan to be different.

A. Mandatory Disclosure

The first issue discussed was the desirability of conforming mandatory disclosure provisions of the CJRA Plan to those of the Federal Rules. It was noted that the "bears significantly" language of the Plan is much broader than the "relevant to disputed facts pleaded with particularity" language of the Federal Rules. There was a clear consensus among the Advisory Group members that, if mandatory disclosure is to be retained in the Eastern District, the scope of mandatory disclosure under the Plan should be consistent with the disclosure provisions under the Federal Rules. It was noted that the Advisory Group had intended that the wording of the Plan's disclosure provisions track the wording of the proposed Federal Rules but that the Federal Rules

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[2] Present at that meeting in addition to Mr. Struve were Raymond Casey, John C. Gray, Jr., Robert C. Heinemann, Peter Reilly and Jennifer Rosato.

Advisory Committee revised the Rule 26(a)(1) disclosure provisions in the spring of 1992, after the Plan had been adopted by the Eastern District. Accordingly, there was no good reason for the present inconsistencies. The Advisory Group agreed, however, that categories of cases excluded from mandatory disclosure under the Plan should remain as is.[3]

B. Timing of Discovery

The Advisory Group then discussed the question of the timing of discovery in relation to mandatory disclosure, specifically whether discovery may precede disclosure. The Plan does not explicitly address this issue. Nevertheless, it clearly contemplates that discovery must await disclosure; indeed, the disclosure provisions of the Plan are entitled "Automatic Disclosure Prior to Discovery." The Federal Rules are more explicit. They state that disclosure shall be made "at or within 10 days after the meeting of the parties under [Rule 26(f)]." Rule 26(f), in turn, requires that the parties meet and confer regarding discovery issues at least 14 days prior to the initial pretrial conference. The timing of disclosures under the Plan is different; the Plan does not require disclosure until 30 days after the filing of the answer.

In the view of the Advisory Group, discovery should await disclosure. The Advisory Group also believes that the timing of

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[3] At least two members felt that the language of the Plan with respect to mandatory disclosure was superior to that of the Federal Rules and cautioned against adopting uniformity for uniformity's sake.

disclosure should be the same under the Plan and the Federal Rules and that the schedule set forth in the Federal Rules is preferable.

C. Pretrial Disclosures After Initial Disclosure

There are no significant conflicts between the Plan and the Federal Rules in this area. The Federal Rules are, at times, more explicit in their requirements than the Plan. The consensus of the Advisory Group is that the Federal Rules should govern in this area. We point out that, in proposing the Plan, the Advisory Group had sought to conform procedures for pretrial disclosure after initial disclosure to the 1991 draft of the Federal Rules. Thus, there is no good reason for any variation between the Plan and the Federal Rules in this area.

D. Expert Disclosure

In the area of expert disclosure, the Advisory Group notes that the Plan is essentially the same with respect to the content of the disclosures but deliberately different from the Federal Rules regarding the timing of disclosures. Here, there is good reason for the difference. As pointed out by Judge Sifton at the initial Feedback Conference, the requirement that experts' reports in this district be submitted 90 days before trial -- in most cases far in advance of any serious settlement negotiations -- is likely to prove wasteful and inefficient. This is especially true in negligence, products liability and medical malpractice cases requiring expert testimony by doctors. Leaving the timing of the expert disclosures to the court will provide needed flexibility to the parties and is likely to generate significant cost savings.

Accordingly, the Advisory Group is of the view that the Plan should not be changed.

E. Discovery Limitations

Both the Plan and the Federal Rules impose presumptive limits on the number of depositions (10 per side under both the Plan and the Federal Rules) and interrogatories (15 under the Plan and 25 under the Federal Rules). In the view of the Advisory Group, the Plan limits on interrogatories should be conformed to the limits under the Federal Rules. Members recognize that interrogatories may serve as "poor person's depositions" and may provide the most cost-efficient mode of discovery in smaller cases. Thus, a 15-interrogatory limit could result in frequent and unnecessary motion practice. Moreover, the Advisory Group does not view a 15-interrogatory limitation as achieving a significant savings over a 25-interrogatory limit.

F. Non-Stenographic Recording of Depositions

The Advisory Group feels strongly that the question of non-stenographic recording should be governed by the Federal Rules. The Plan provides, consistent with EDNY Standing Order 7, that applications for non-stenographic recording of depositions be "presumptively granted." Federal Rule 30(b)(3), adopted in 1993, allows non-stenographic recording as of right. The Advisory Group has consistently favored liberal use of non-stenographic means of recording and sees no good reason to vary from the more permissive approach authorized by the Federal Rules.

G. Rule 11

With respect to Rule 11 sanctions, the Advisory Group is of the view that the 1993 Amendments to Rule 11 should prevail over the Plan. The Plan had addressed two specific concerns about Rule 11 practice: (1) that the party seeking sanctions give the adversary fair notice of any sanctions motion so as to give the adversary an opportunity to withdraw its claim; and (2) that sanctions motions be made separately and not simply tacked on to other motions. The 1993 Amendments to Rule 11 make these changes but go much further and provide a comprehensive overhaul of Rule 11 sanctions that is likely to generate a fundamental change in sanctions practice. Most notably, Rule 11 sanctions are no longer mandatory but rather are now discretionary with the Court. In light of the significant changes to Rule 11 and in light of the potential impact of a sanctions ruling on attorneys and their clients, the Advisory Group believes that the Plan should conform to the new Federal Rules.

H. Pretrial Conferences

The 1993 Amendments to the Federal Rules of Civil Procedure make significant changes in 16(c) regarding agenda items for pretrial conferences. In proposing the Plan, the Advisory Group made a conscious effort to incorporate each of these changes. Nevertheless, the EDNY Plan has one requirement, rooted in the CJRA, in addition to those set forth in amended Rule 16(c). That requirement is that all requests for extensions of deadlines for the completion of discovery or a trial date be signed by counsel

and communicated to the client, except where impracticable. EDNY Plan II.F.5(xi); see 28 U.S.C. § 473(b)(3). It is the Advisory Group's view that this additional Plan provision was specifically tailored to the needs of this district and should remain.

II. Timing of Conformity

It is the sense of the Advisory Group that conforming the Plan to the Federal Rules, except in the instances noted above, would be in the best interest of the bench, bar and litigants; however, the Advisory Group also feels that now is not the time to make those changes. We are concerned that a new round of amendments to the Plan may serve to compound the confusion now existing about the Plan and its relationship to the Federal Rules. The Advisory Group believes that changes would be appropriate when the comfort level with the Plan and the 1993 Amendments to the Federal Rules is higher among bench and bar.

At the same time, we recognize the merits of the opposite argument that if changes are going to be made, then the sooner the better so that practitioners are not learning procedures that will soon be changed. On balance, we think that the best course is to implement conforming amendments later rather than sooner.

III. Philosophical Question

Finally, the Advisory Group identified, but did not resolve, an important philosophical question: How does the federal civil justice system attain uniformity?

The Federal Rules of Civil Procedure are in force throughout the federal system, but their existence does not assure

uniformity. First, the Federal Rules deal only with big picture items and do not purport to deal with nitty-gritty matters, such as the form and timing of motions, the availability of oral argument or the necessity of pre-motion conferences. These matters have been left to local custom (often codified in local rules) and the practices of individual judges. These factors tend to create differences among various districts and among chambers within districts.

Second, Rule 83 has always allowed districts leeway to create local governing standards, provided those standards do not conflict with the Federal Rules. In recent years there has been much debate as to whether districts should be permitted to adopt local rules that are at odds with the Federal Rules in order to encourage innovation and more efficient procedures in federal litigation.

Third, the Civil Justice Reform Act has encouraged experimentation and has led to even greater diversity among districts in the short-run. The goal of the CJRA is long-run uniformity for rules, following this short-run period of experimentation. Nevertheless, plans vary widely in content and in the procedures that they have spawned.

To achieve uniformity of procedures in the face of the foregoing facts is an Herculean task. The Advisory Group must explore how much uniformity is desirable and weigh that against how much uniformity can actually be achieved in the real world. Conversely, the Advisory Group must decide the extent to which

experimentation with differing standards is useful in expediting civil litigation. The Advisory Group must also explore the most effective ways to encourage uniformity in practices among judges. Ultimately, the problem of conflict between CJRA Plans and the Federal Rules must be resolved on a nation-wide basis. We expect that the RAND Corporation study of practices under the CJRA Plans in 20 different federal courts, conducted under the aegis of the Judicial Conference of the United States and due for completion at the end of 1995, will shed light on the uniformity question. Nevertheless, there is much that the Eastern District can do now right in its own home to reduce pointless proliferation of inconsistent rules.

None of these questions is susceptible to an easy solution. A focused discussion, which brings to bear the wisdom and experience of the Advisory Group, is the first step in the process. We will continue to explore ways to achieve procedural uniformity within the federal system.

Dated: December 13, 1994

Respectfully submitted,

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