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Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure

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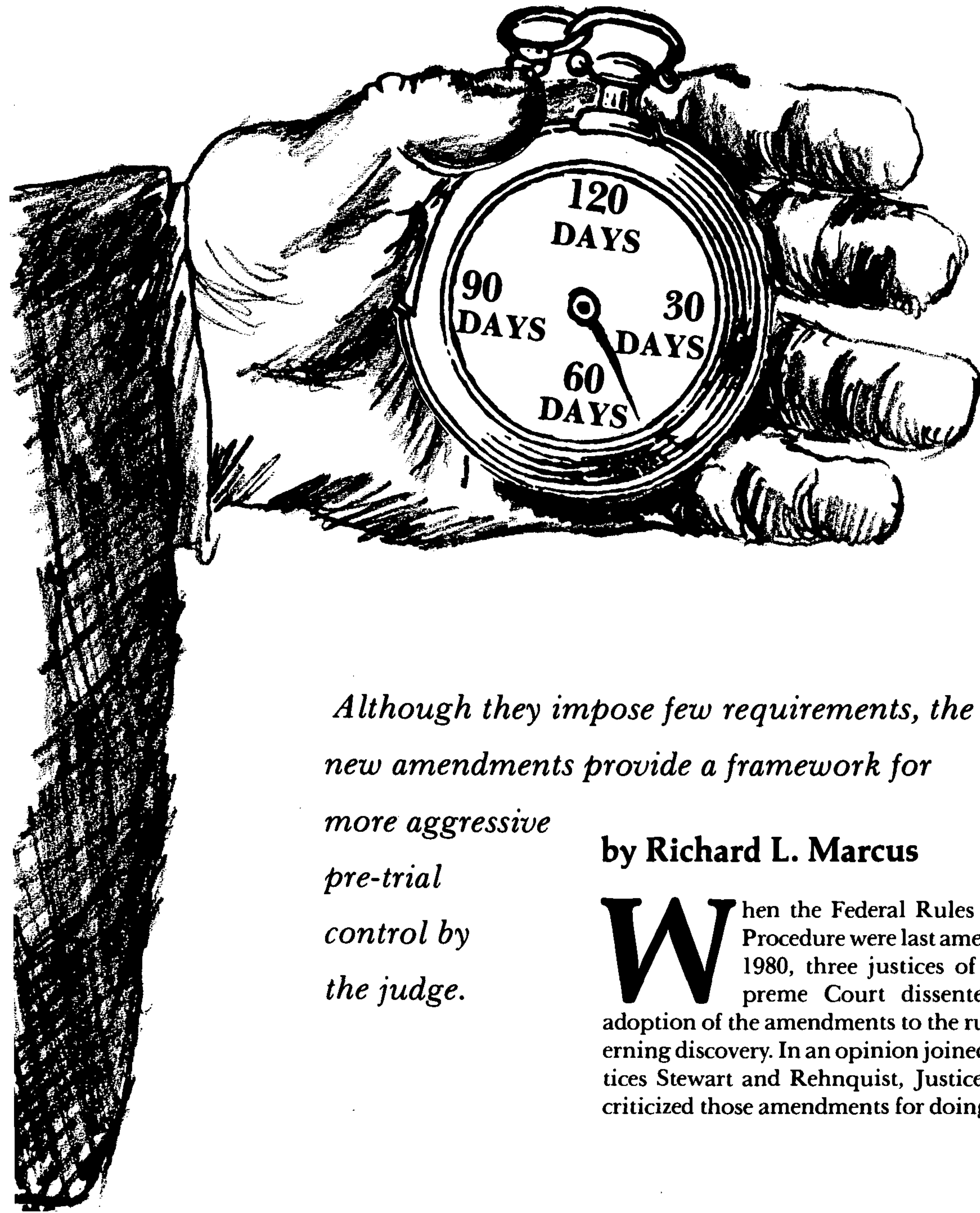
Reducing court costs and delay: the potential impact of the proposed amendments to the federal rules of civil procedure



Although they impose few requirements, the new amendments provide a framework for more aggressive pre-trial control by the judge.

by Richard L. Marcus

When the Federal Rules of Civil Procedure were last amended, in 1980, three justices of the Supreme Court dissented from adoption of the amendments to the rules governing discovery. In an opinion joined by Justices Stewart and Rehnquist, Justice Powell criticized those amendments for doing too lit-

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tle. He emphasized the tendency of modern liberal discovery to lead to delay and excessive litigation expense—themes familiar to all federal judges—and concluded on a note of pessimism:

> I doubt that many judges or lawyers familiar with the proposed amendments believe they will have an appreciable effect on the acute problems associated with discovery. The Court's adoption of these inadequate changes could postpone effective reform for another decade.[1]

It now appears that Justice Powell's pessimism may prove unwarranted. In June, 1981, the Judicial Conference's Advisory Committee on the Federal Rules of Civil Procedure proposed extensive amendments to the civil rules designed to deal with precisely the problems of delay and expense cited by Justice Powell. Following publication[2] and public hearing, the Advisory Committee made a number of modifications in the initial proposals, and the Judicial Conference, in September, 1982, approved the proposed amendments and forwarded them to the Supreme Court.

Although it remains possible that Congress, or even the Court, may modify or reject the proposed amendments,[3] it is appropriate to examine them now and consider both their purpose and the issues they may raise. Their basic thrust is to remedy problems of expense and delay by imposing greater responsibility on lawyers not to abuse litigation, by promoting early and active judicial management of litigation, particularly discovery, and by stimulating the use of sanctions to shift the cost of litigation onto those who abuse it.[4] While the proposed amendments do make a number of substantive changes, their central aim is to make widespread practices that have been employed by many judges for years. Thus, their tenor is as important as their specific provisions—they seek to stimulate, but do not require, substantially increased activity on the part of judges who have not used their existing power to the utmost.

Attorney responsibility

The proposed amendments expand the responsibility of attorneys to avoid litigation abuse. The main device for this expansion is clarification and enlargement of the certification implied by the attorney's signature on papers filed in court. Rule 11, the principal definition of that responsibility, presently states that such a signature certifies that "to the best of the attorney's knowledge, information and belief there is good ground to support" the pleading, motion or other paper involved. The amendment would expand this certificate to represent a "belief formed after reasonable inquiry that the pleading or motion is well grounded in fact and is warranted by existing law or a good faith argument of the extension, modification or reversal of existing law." In the same vein, the amendments propose the addition of new Rule 26(g) to make the signature on a discovery paper a similar certificate to its *bona fides*.

These are "stop and think" provisions intended to deter attorneys from filing groundless suits or making groundless motions or objections. Violation of these new standards subjects the person who signed the paper to sanctions.

1. 446 U.S. 997, 998 (1980). Professor Friedenthal has argued that Justice Powell's dissent is a "political document... more concerned with providing relief for certain interest groups involved in complex litigation than with curtailing discovery abuse generally." Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806, 813 (1981).

2. 90 F.R.D. 451 (1981). Although changes have been made in the preliminary draft, the proposals actually approved by the Judicial Conference closely resemble the draft.

3. Under 28 U.S.C. §2072, the Supreme Court has authority to prescribe rules of procedure, but such rules do not take effect "until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session but not later than the first day of May, and until the expiration of ninety days after they have been thus reported." Congress has the power to reject part or all of any such proposal.

Unless these proposed amendments are reported to Congress by May 1, 1983, they cannot become effective until sometime in the spring of 1984. In 1980, the Court adopted the discovery amendments on April 29. *See* 446 U.S. 997 (1980). Justice Powell then described the Court's review as "largely formalistic." *Id.* at 997-98, n. 1.

4. In addition to the controversial matters discussed in the text, the Advisory Committee also proposed new Rules 72 to 76 to provide procedures for handling referrals to magistrates and review of magistrates' decisions. For the most part these rules track and implement the provisions of 28 U.S.C. §636. It is worth noting that proposed Rule 72 specifies that the time to object to a magistrate's ruling shall be 10 days, thereby providing a uniform rule for all courts.

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The purpose of the amendment is to create a higher standard of attorney behavior. The Advisory Committee notes specify that the new standard is "more stringent" than the good faith rule presently employed. Indeed, it appears to go beyond generally accepted ethical guidelines. The American Bar Association's Disciplinary Rule 7-102, for example, prohibits knowingly advancing an invalid claim, but does not impose any affirmative duty to investigate, particularly the factual basis for the claim.

But the notes to amended Rule 11 specify that it requires "some pre-filing inquiry into both the facts and the law" and indicate that the attorney is ordinarily not permitted to rely entirely on the client. Instead, they state that one factor to be considered in determining whether the attorney complied wth the new Rule 11 standard with regard to pleadings and motions is "whether the attorney *had* to rely on a client for information as to the facts underlying the pleading." The clear implication is that the attorney may so rely only if he has to. This implication is confirmed by the statement in the notes to Rule 26(g) that the attorney's signature on discovery responses does not certify the truthfulness of the client's factual responses to discovery, which are thus treated differently from the factual assertions made in pleadings and motions.

The creation of this affirmative duty to investigate will raise some difficult issues for the courts if the amendments are adopted as written. The standard is supposed to be an objective one, but applying it will not be easy. Substantial attorney-client privilege and work product protection problems may arise in connection with review of the attorney's performance. The Advisory Committee notes state that "[t]he rule does not require a party or an attorney to disclose privileged communications or work product in order to show that the signing of the pleading, motion, or other paper is substantially justified." Such materials may, however, be the best or even sole source of information pertinent to the question.

If the attorney based his certification entirely upon consultation with officers and employees of a client corporation, for example, it is difficult to believe that an adequate showing can be made without disclosing the content of such communications. Similarly, where the legal basis for an assertion is called into question some incursion into the area of work product protection would appear inevitable. Seemingly recognizing that such problems will arise, the notes further suggest using *in camera* inspection and protective orders to minimize incursion into protected areas. Despite the Advisory Committee's assurance that the amendment is "not intended to chill an attorney's enthusiasm or creativity," the courts will need to proceed with care to avoid doing just that.

Mandatory scheduling

The heart of the proposed amendments, principally reflected in a number of proposed changes to Rule 16, is their emphasis on early and vigorous involvement of the court in managing litigation. Rule 16 is still in the form originally adopted in 1938; in a rather simple fashion it now provides for pretrial hearings. Operating under the existing provisions, courts have adopted a variety of practices along a spectrum from minimal judicial involvement prior to trial, to active control of all cases from virtually the date the complaint is filed. Thus very substantial involvement is possible whether or not Rule 16 is amended. The goal of the amendments is to require some pretrial control by all courts and, to the extent possible, to encourage vigorous action by all judges.

As proposed, amended Rule 16 *requires* that in every case the court enter a scheduling order within 120 days after the complaint is filed. Originally the Advisory Committee proposed that such an order be entered within 90 days, but that period was extended to 120 days after public comment. The court is not required to hold a hearing before entering the order, but if a hearing is not held the court should consult with the parties or their attorneys by telephone, mail "or other suitable means." As many judges have discovered, telephone pretrial conferences can be quite effective, particularly in cases involving numerous counsel from distant locations.[5] Whatever the preliminaries, the scheduling order *shall*

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limit the time to join parties, amend the pleadings, file motions and complete discovery.

It should be apparent that the scheduling order requirement works a very substantial change in Rule 16, even though it reflects the existing practices of a number of courts. For those who do not customarily impose such schedules early in litigation, some comments are in order. At a minimum, a schedule should move attorneys to put the case at issue and promptly commence discovery, thereby achieving the goal of reducing delay. To a substantial extent, the scheduling requirement will help restrain attorneys from too willingly granting extensions to opposing counsel principally for the completion of discovery.

The rules themselves prescribe relatively brief periods for the completion of discovery (e.g., 30 days for answers to interrogatories) but "professional courtesies" ordinarily tend to supplant the rules' provisions. To some extent, the scheduling order takes unlimited power to defer responses to discovery away from attorneys. Similarly, it limits the parties' ability to change the contours of the litigation unilaterally by revising the pleadings or adding parties. Whatever the method by which the schedule is established, then, it represents a significant limitation on the attorneys' freedom of movement.

Devising the schedule, with or without a hearing, could easily become time-consuming. To reduce the drain on the court, the notes suggest that prototype orders will probably be developed for different categories of litigation, but do not suggest what such orders will provide. For purposes of comparison, it is worth noting that a 1977 study by the Federal Judicial Center indicated that in the Southern District of Florida, which has monitored discovery for some time, the time allowed for completion of discovery was often as short as 30 to 45 days and rarely more than 90 days.[6]

Obviously that is a very short tether, and the proposed amendments do not intend the initial scheduling order be engraved in stone. Rule 16 presently provides that a pretrial order may be modified only to avoid "manifest injustice." With respect to scheduling orders, the proposed amendments allow modification upon a showing of good cause. The notes indicate that a formal motion is not necessary for this purpose; telephone contact again seems a useful alternative. No definition of the good cause standard is offered, but one suspects that it will ordinarily require some articulable reason for the change and therefore differs from the "professional courtesy" approach adopted by many lawyers. Unless modified, the order governs the subsequent conduct of the case.

The goal of the amendments is clearly to require more involvement from judges who have not employed some procedure analogous to the scheduling order in the past. Amendments to the local rules may, however, reduce the work a judge will be expected to do in two respects. First, the amended rule provides that certain categories of cases can be exempted from the scheduling order requirement by local rule. The notes suggest that such treatment might be appropriate for social security disability cases, habeas corpus petitions, forfeitures and reviews of administrative actions.[7]

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5. Judge Becker recently described the process he employed in the massive Japanese Antitrust Litigation as follows: "The principal vehicle for getting this case organized for trial is your pretrial conferences. I endorse what has been said about phone conferences. Let me just talk a little bit about the sinews of these telephone conferences. In the *Japanese Electronics* case, we would have twenty-five, twenty-eight or thirty lawyers on the phone. Obviously that saves a lot of travel expense. You should have your conferences recorded. It is very simple. Before the lawyer speaks, the lawyer says, 'This is Higginbotham,' and then he makes his statement; and the opposing lawyers respond, 'this is Schwarzer,' 'this is Grady,' 'this is Barnett,' and, after a while, the court reporter gets to recognize the voices and you don't even have to utter your name. But my recommendation is that you have these conferences recorded, and the transcript will read as if the conference were held in a courtroom." Becker, *Organization for Trial in Antitrust Cases*, 51 ANTITRUST L. J. 239, 241 (1982) (footnote omitted).

6. Flanders, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS 20 (Federal Judicial Center, 1977).

7. The notes cite in this regard Local Rule 12(1) of the Eastern District of Virginia, which deals with pretrial conferences and provides as follows: "Matters involving habeas corpus petitions, motions to vacate sentences, forfeitures, reviews from administrative agencies, and such other cases as may be determined by the active resident judge senior in point of service, are not applicable to this rule [requiring scheduling of an early pretrial conference], but the judge may, in his discretion, follow the procedure outlined herein in any case."

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Second, the proposed amendment allows the scheduling order to be entered by a magistrate if that procedure is authorized by district court rule. The preliminary draft of the amendment allowed only the judge to discharge this scheduling responsibility, but after the period of public comment the proposed amendment was revised to permit the function to be performed by a magistrate. The Committee's strong preference remains, however, that the judge take personal control of the case at an early date.[8]

Pretrial conferencing

Given the mandatory nature of the required scheduling order, the court will inevitably be drawn into the case, to some extent, at an early date. The amendments may not require courts to hold early pretrial conferences, but their obvious goal is to stimulate courts to do so. This differs from the traditional Rule 16 conference held shortly before trial. Many courts presently use such a procedure as a matter of course, under such headings as "status" conferences.[9] The amendments confirm the propriety of this judicial activism, and recommend considering, at that early point in the litigation, the matters enumerated in present Rule 16 along with a few additions that merit comment.

At a minimum a schedule will move attorneys to begin discovery and reduce delay.

First, the amended rule proposes using such conferences as an opportunity to "formulate issues," a task comparable to a Rule 26(f) discovery conference and reminiscent of the *Manual for Complex Litigation*. The Manual's issue formulation approach has been criticized, and courts should take account of experiences under the Manual and proceed carefully.[10]

Second, the amendment recommends that the opportunity be used to eliminate "frivolous claims or defenses." The Advisory Committee notes suggest that "there is no reason to require that this await a formal motion for summary judgment," but disposition of claims or defenses that have been properly plead in such an informal fashion may be appropriate only rarely. Where it is appropriate, of course, there is substantial reason to question whether the attorney who signed the pleading involved complied with the new standard of pre-filing inquiry set forth in the proposed amendment to Rule 11.

Third, beyond exploring settlement possibilities, the amendment suggests considering "the use of extrajudicial procedures to resolve the dispute." The notes make clear the Advisory Committee's intention that the court consider "urging the litigants to employ adjudicatory techniques outside the courthouse," referring in particular to recent development of the "mini-trial." This invitation stands in

8. In his memorandum to Judge Gignoux transmitting the revised proposed amendments for consideration by the Judicial Conference, Judge Mansfield, the Chairman of the Advisory Committee, explained that the change was based on a recognition that "in some districts it may be impractical or difficult for the judge personally to handle the scheduling of every case on his calendar." It seems clear that the Committee felt that such circumstances would be rare; in the same memorandum Judge Mansfield emphasized that "our Committee is satisfied that early intervention and management by a judge is important to the prompt and efficient movement and disposition of litigation on his calendar, since only an Article III judge possesses the crucial powers necessary to insure that a case will proceed rapidly toward settlement or trial...."

9. For an excellent discussion of the use of the status conference system in the Northern District of California by Chief Judge Peckham of that court, *see* Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case From Filing to Disposition*, 69 CALIF. L. REV. 770 (1981).

10. Judge Schwartzer's recent book on complex litigation devotes an entire chapter to managing the issues. Schwarzer, MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION 17-53 (Charlottesville, Va.: Michie, 1982).

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some contrast to the prohibition in the Magistrates Act against pressuring parties to stipulate to trial before a magistrate;[11] as a general matter it would seem appropriate for the courts to proceed with caution.

Finally, the proposed amendments to Rule 16 retain the traditional pretrial conference, renamed the final pretrial conference, in essentially the same form. The amended rule does specify that the parties "shall formulate a plan for trial, including a program for facilitating the admission of evidence." Unlike earlier scheduling orders, the final pretrial order may be modified only for "manifest injustice," the existing standard specified in Rule 16.

In sum, the goal of the amendments is to stimulate all courts to begin doing what the activist courts have already been doing for some time. Except for the mandatory scheduling order, however, amended Rule 16 only provides general guidance for those judges who desire to exercise greater control over their cases.

Discovery restrictions

In the recent debate over litigation delay and cost, discovery has been the most frequent target of criticism. In view of the variety of proposals for controlling discovery that have been made, it is worth noting at the outset what the proposed amendments do not do. First, they do not attempt to narrow the definition of discoverable material. Second, they do not specify precise numerical limits for certain types of discovery like the "20 questions" rules adopted in some courts with respect to interrogatories. The amendments do, however, signal a very significant shift in the rules' attitude toward discovery by proposing to delete the last sentence of Rule 26(a) which provides that "the frequency of use of these methods of discovery is not limited." Thus, the invitation to unfettered discovery is slated to be eliminated.

In addition to eliminating the open-ended invitation of Rule 26(a), the amendments propose adding the following new paragraph in Rule 26(b)(1):

> The frequency or extent of use of the discovery methods set forth in subdivision (a) may be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or obtainable from some other source that is either more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, given the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

Taken as a guideline, the above amendment is an important adjunct to the general case management approach endorsed by the Advisory Committee, but there are reasons for caution in a literal application of the above language. A brief analysis of these criteria shows that they are not precise tools, and points up difficult questions about the extent to which judges, rather than litigants or their lawyers, should make decisions about how to prepare a case.

To begin with, it may prove difficult for even an active court to determine whether proposed discovery is cumulative or otherwise obtainable. Despite great familiarity with their cases, judges cannot know as much about them as the lawyers. As Judge Patrick Higginbotham put it recently in an address to a group of lawyers:

> It's very difficult for the judge to ask, "Well, you're spending too much time with John Jones, Sales Vice-President of the Company. Why are you spending so much time with a salesman?" He can't know why you're spending so much time with him; he can't know that much about your case.[12]

For the same reasons, judges will often have difficulty appreciating the legitimate reasons why a lawyer wants to take a deposition that his opponent says is unreasonably duplica-

11. 28 U.S.C. §636(c) (1976), authorizing trial before magistrates by consent of the parties, carefully insulates the parties from judicial pressure to give their consent. §636(c)(2) specifically provides that "neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent."

12. Higginbotham, *Discovery Management Considerations in Antitrust Cases*, 51 ANTITRUST L. J. 231, 236 (1982). Judge Higginbotham's solution is to set a limit on the number of depositions and leave it to the lawyers to decide how to allocate their limited opportunities.

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tive. Even "duplication," therefore, is at best a general guideline and not a strict standard for allowing or denying discovery.

The other principal standard—deciding whether the proposed discovery suits "the needs of the case"—calls for judgments that pose similar but possibly more significant difficulties. In applying this criterion the court is going beyond questions of duplication and determining whether discovery, that would otherwise be allowed, should be denied because the claim is for a small amount of money or one of the parties is strapped for money. It does not appear that this criterion is intended to vest courts with authority to curtail litigation they view as unimportant by denying discovery, or to second-guess parties and attorneys about how much effort their litigation deserves. Instead, as the notes explain, the goal is to "prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent."

Concern about the temptation judges may feel to substitute their own views for those of the litigants and lawyers is reflected in the final consideration—"the importance of the issues at stake in the litigation." In the amendments' preliminary draft this provision directed judges to consider "the values at stake." However phrased, the message is that judges are to worry about more than dollars in evaluating the discovery needs in a variety of cases. The notes suggest that this category of "public policy" cases includes, at least, those cases involving employment practices and free speech. The evident difficulty encountered by the Advisory Committee in putting this criterion into words suggests the difficulty judges will encounter in applying it. More generally, the inclusion of this consideration shows that there is uneasiness about unfettered judicial disregard of litigation decisions made by the parties and their lawyers.

The proposed amendments to Rule 26 thus illuminate an unresolved tension about who should make tactical decisions about discovery. On the one hand, the notes explain that the goal of the new Rule 26(b) is "to encourage judges to be more aggressive in identifying and discouraging discovery overuse." On the other hand, the notes regarding the addition of Rule 26(g), which makes the attorney's signature on a discovery request a certificate in part that it is not unreasonable or unduly burdensome, begin with a telling qualification: "*If* primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse."

On balance it appears that primary responsibility continues to rest with the litigants under the amendments, but the area of potential involvement by the court is greatly expanded. Judges will have to decide for themselves whether they feel it is appropriate to restrain the lawyer who, in good faith, feels that to prepare his case adequately he must leave no stone unturned. The amendments provide a general framework for judicial intervention, an important step forward, but the focus appears to be more on reducing abuse than taking control of litigation away from parties who are not trying to abuse the system.

Increased attorney sanctions

In addition to promoting case management, the amendments invite greater use of sanctions, which are expressly defined to include attorney's fees. Thus, they contemplate frequently shifting the cost of litigation to the "wrongdoer." Beyond that, the proposed changes have two principal features.

First, they greatly expand the express authorization for imposing penalties directly on attorneys. Under the present rules the only express authority for acting directly against attorneys, except for failure to provide discovery, is Rule 11's provision that for a wilful violation of the signature rule an attorney would be subject to "appropriate disciplinary action."

Consistent with the new emphasis on attorney responsibility, and the expanded importance of the certification requirement, the amendments stress sanctions against the person who signed the offending paper, ordinarily the attorney. While the notes make it clear that sanctions against the party should still be employed, the thrust of the amendments is to place heavy reliance on sanctions against attorneys. Thus the power to strike pleadings

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presently provided in Rule 11 is to be deleted because it visits the sins of the lawyer on the client. Sanctions are intended to become an important tool to enforce the court's case management power, which is directed principally towards attorneys.

The second noteworthy feature of the sanctions provisions is that the amendments seem to make sanctions mandatory in a variety of situations. Thus, amended Rules 11 and 26(f) say that upon finding a violation of the certification requirement the court *shall* impose sanctions. Similarly mandatory language in the amendments to Rule 16 requires a sanction in the event an attorney fails to appear at a pretrial conference or is "substantially unprepared to participate in the conference." Moreover, the court is expressly invited to impose such sanctions on its own initiative even if no party requests them.

Despite the mandatory language, the amendments are not designed to force unwilling judges to impose sanctions. Rather, the Advisory Committee notes explain that the amendments are "intended to reduce the reluctance of courts to impose sanctions." Courts retain a good deal of maneuvering room. To begin with, the mandatory language comes into play only if the court finds a violation of the certification requirement or failure to participate properly in the pretrial process. That determination is hardly automatic, and courts may well have the seemingly inevitable consequence of sanctions in mind when they decide whether the rules have been violated. Assuming a violation is found, the court also has great latitude in selecting the appropriate sanction. Judges will therefore not be compelled to punish anyone in a way they feel is inappropriate.

The prospect of increased imposition of sanctions raises the further question of how sanction decisions are to be made. The amendments provide few answers. On the one hand, the Advisory Committee notes emphasize that the procedure employed must comport with due process requirements but exactly what is required is not spelled out. On the other hand, the notes propose further that "the court must to the extent possible limit the scope of sanction proceedings to the record," allowing discovery only in extraordinary circumstances, and suggest that "[i]n many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary." It is evident that the procedures to be employed depend somewhat on the particular circumstances confronting the court, and the amendments do preserve flexibility in selecting appropriate procedures.

The amendments and effective reform

Only time will tell whether Justice Powell's pessimism about "effective reform" will prove justified, but it is likely that such reform will depend more on the actions of individual judges than on amendments to the rules. The proposed amendments do clarify and amplify the power of judges to control litigation. Indeed, they may tempt judges to take too much control away from the parties and their lawyers, but the basic goal is to curb abuse. If the Court or Congress substantially water down the proposed amendments, that action may slow the trend toward greater judicial control of litigation. Even if the proposed amendments are adopted verbatim, however, the only additional action judges will *have* to take will be entering scheduling orders within 120 days of filing of the complaint.

But consistent with the spirit of the amendments, judges who have not to date employed aggressive pretrial control may be moved to do so; the amendments clearly provide a more comprehensive framework for such efforts than do the existing rules. On the other hand, even if none of the proposed amendments is adopted, judges may still utilize most of the procedures advocated by the Advisory Committee within the confines of the existing rules. Effective reform, therefore, depends on wide acceptance of the tenor, not just the letter, of the proposed amendments.[13] □

13. For criticisms of the proposed amendments to the Federal Rules of Civil Procedure, *see* Schroeder and Frank, *Discovery Reform: Long Road to Nowheresville* 68 A.B.A.J. 572 (May, 1982).

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