The 2015 Amendment to Federal Rule of Civil Procedure 1 Has Some Bite

by Arturo V. Bauermeister

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It's been a while since December 2015, when the Federal Rules of Civil Procedure underwent their last overhaul. And much has been said about these 2015 Amendments. (Consider, for example, the new "proportionality" requirement that upended discovery procedure.[1]) But, while drafting a motion to stay, it occurred to me that little has been said about the 2015 Amendment to Rule 1, which my motion had invoked. My invocation of this often-overlooked rule led me to investigate how federal courts have interpreted it. I found that Rule 1 has considerable more bite than I had thought.

It bears mentioning at the outset that the Federal Rules of Civil Procedure make no provision for "many … standard procedural devices [that] trial courts around the country use every day in service of Rule 1's paramount command: the just, speedy, and inexpensive resolution of disputes."[2] A motion to stay is one such unregulated device.

Confirming that the Rules "are not all encompassing," the Supreme Court recently highlighted Rule 1's importance.[3] And for good reason. Rule 1 contains a paramount mandate: The Rules "should be construed, administered, *and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding."[4] (The italicized text represents the language added by the 2015 Amendment.) It is unsurprising, then, that the Advisory Committee Notes on the 2015 Amendments "emphasize[d] that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way."[5] It's hard to quarrel with this noble goal. "There probably is no provision in the federal rules," says a leading commentator, "that is more important than this mandate."[6]

But does this new language have any teeth? The Advisory Committee Notes, after all, made it clear that this amendment "does not create a new or independent source of sanctions. Neither does it abridge the scope of any other of these rules."[7] Is this new duty on the parties and their counsel symbolic?

Although it might be too early to call it a trend, some federal judges have made a point to highlight this newfound responsibility on the parties. Most lower courts, then, have held or implied that the 2015 Amendment added considerable bite to Rule 1. In one of the earliest cases interpreting this amendment, a district court remarked that an attorney's "rhetorical antics and commentary in this litigation do a distinct disservice to … [Rule 1's] goal."[8] The court emphasized that the "*parties*" are now "obligated to [en]sure the 'just, speedy, and inexpensive' resolution of all matters."[9] Another district court interpreted the amended Rule 1 as outright "direct[ing] the parties to cooperate to conduct discovery in the interest of expediency and fairness."[10] Meanwhile, one appellate court invoked Rule 1 to support its holding that "when a defense or objection is futile in the sense that the law bars the district court from adopting it to dismiss, to require the assertion of the defense or objection in an initial motion to dismiss, on pain of waiver, would generally be to require the waste of resources, contrary to Rule 1."[11]

These decisions make perfect sense. For one thing, they comport with the Advisory Committee Notes, which recognize that "the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure."[12] For another, they recognize that, in this era of "congested dockets,"[13] Rule 1's new duty on the parties must take an added force. And lower courts have required the parties to live up to the end of their bargain, holding counsel responsible, too.[14]

The upshot is that federal litigators might want to take note of these developments. Again, it is true that Rule 1 is not a sword with which to cut down a rule of civil procedure. But it cannot be said that it lacks teeth. It may make all the difference when it comes to those devices that are unregulated by the rules. Perhaps those attorneys and parties who comport with

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Rule 1's "paramount command" will reap the rewards of promoting efficiency. But those that violate it—say, by engaging in gamesmanship and invoking unregulated procedural devices at the last minute and in bad faith[15]—will be discouraged and ultimately deterred from doing so. ☉

Endnotes

[1]Federal Rule of Civil Procedure 26(b)(1) no longer allows discovery that "appears reasonably calculated to lead to the discovery of admissible evidence"; it now requires that it be "proportional to the needs of the case." *See, e.g.*, *United States ex rel. Customs Fraud Investigations LLC v. Victaulic Co.*, 839 F.3d 242, 258-59 (3d Cir. 2016).

[2]*Dietz v. Bouldin*, 136 S. Ct. 1885, 1891 (2016) (mentioning—among other such examples—motions *in limine*).

[3]*See id.*

[4]Fed. R. Civ. P. 1.

[5]*See* Fed. R. Civ. P. 1, 2015 comm. note.

[6]Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1029 (4th ed., Apr. 2017 update) (footnote omitted).

[7]Fed. R. Civ. P. 1, 2015 comm. note; *see Harper v. City of Dallas, Texas*, No. 3:14-CV-2647-M, 2017 WL 3674830, at *15 (N.D. Tex. Aug. 25, 2017) ("Rule 1's general direction on how to construe, administer, and apply the Federal Rules … is not a license to ignore the more specific rules' commands or routinely excuse parties' noncompliance.") (citing Fed. R. Civ. P. 1, 2015 comm. note); *Obesity Research Inst. LLC v. Fiber Research Int'l LLC*, No. 15-CV-595, 2017 WL 2705425, at *3 (S.D. Cal. June 23, 2017) (rejecting argument that Rule 1 can invalidate a magistrate judge's standing order regulating discovery disputes) (quoting *Hon. Mitchell D. Dembin's Civil Pretrial Procedures* § IV(C)(2)); *Espinosa v. Stevens Tanker Div. LLC*, No. SA-15-CV-879-XR, 2017 WL 1718443, at *2 (W.D. Tex. Apr. 27, 2017) (refusing to sanction counsel for violating Rule 1).

[8]*Wagner v. Holtzapple*, No. 4:13-CV-3051, 2016 WL 7042964, at *3 (M.D. Pa. Jan. 15, 2016).

[9]*Id.* (footnote omitted).

[10]*Greer v. Wal-Mart Stores E. LP*, No. 4:15-CV-0199-HLM, 2015 WL 12976116, at *3 (N.D. Ga. Dec. 16, 2015) (citation omitted).

[11]*In re Micron Tech. Inc.*, 875 F.3d 1091, 1097 (Fed. Cir. 2017); *accord Allsop Inc. v. Ambient Lighting Inc.*, No. C17-549 RAJ, 2018 WL 828225, at *2 (W.D. Wash. Feb. 12, 2018) (finding that, although a defendant's initial responsive pleading omitted asserting its defense of improper venue, it did not "unreasonably delay[]" the assertion, thus making it "appropriate under the Rule 1 to find that [the] defendant has not waived its right to challenge venue in this forum").

[12]Fed. R. Civ. P. 1, 2015 comm. note.

[13]*See, e.g., Mills v. State of Ala.*, 384 U.S. 214, 218 (1966); *United States v. Tigano*, 880 F.3d 602, 615, 2018 (2d Cir. 2018) ("It is clear that court congestion … contributed to the substantial delay faced by Tigano.").

[14]*See, e.g.*, *EP Henry Corp. v. Cambridge Pavers Inc.*, No. CV 17-1538, 2017 WL 4948064, at *4 n. 4 (D.N.J. Oct. 31, 2017) (making clear that the "recent amendment" to Rule 1 now imposes "obligations" on counsel); *Wesby v. Globe Mfg. Co. LLC,* No. 3:16-CV-235-DPM, 2017 WL 2267269, at *1 (E.D. Ark. May 23, 2017) (encouraging "more collaboration and reasonable compromise—and reminding counsel of their Rule 1 obligation to work together, using the Rules to promote fairness and efficiency") (citation omitted).

[15]*See generally, e.g.,* Arturo V. Bauermeister, *Are Rule 12(b)(6) Motions Still Appropriate Mechanisms for Enforcing Forum-Selection Clauses?*, Fed. Law.(Dec. 2015), at 17 & n. 15 (so noting in the context of motions to enforce forum-selection clauses).

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[25]*See, e.g.,* U.N. High Comm'r for Refugees, UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers From Honduras (July 27, 2016), http://www.refworld.org/docid/579767434.html.

[26]*L-E-A-*, 27 I. & N. Dec. at 47.