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Fix The System Through Early Intervention

Tools already exist to reduce cost and time of litigation

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All clients who litigate want certainty. They want to know at the outset what the result of the litigation will be, how long the process will take, and how much it will cost. Yet, after more than two decades of practice, my answers to these questions are still "there are no guarantees," "too long," and "too much."

I doubt any of us will ever be able to predict a jury with Las Vegas odds, but I do think that the litigation bar and the court should be able to reduce the time it takes to bring a case to conclusion and the expense that is incurred along the way. Indeed, the frustration over the cost of resolving business disputes in court and the attendant delays are more acute now than ever before.

The problem was bad enough in a robust economy; it is even worse in a depressed economy.

While we all recognize the issue, we tackle it only at the periphery. We may re-engineer fee structures with alternative billing. We may opt out of the court system and turn to alternative dispute resolution. Instead, we ought to be thinking about how we can fix the system and should first look to the tools that are already in place.

There are at least four forces that increase the expense and time associated with litigation.

First, the ill feelings between the litigants that generated the dispute become exponentially magnified once the litigation starts. There is an immediate sense that every step in the case is an effort to conceal the truth or to drive the opposition into the ground. Occasionally, two lawyers who know and respect each other can overcome this difficulty, but this is rare. Letters beget letters, motions beget motions and what ought to be a relatively easy matter to resolve becomes complicated.

Second, we litigate defensively. We leave no stone unturned, no claim unstated, no defense unmentioned lest our clients second-guess us.

Third, discovery has become increasingly unchecked, and in particular, the electronic discovery pendulum has swung far to the production side. We now must plumb the depths of metadata to search for the proverbial needle in a haystack. The time and expense associated with this single item is enormous.

And, finally, we, like those in every profession, are burdened by inertia and the fear of change. We are chained to our long-standing practices.

Unfulfilled Potential

One idea that was well-conceived and still has great potential is early judge involvement in the proceedings. Rule 16 of the Federal Rules of Civil Procedure is supposed to be the principal means by which federal courts accomplish the objectives set by the first of those rules — securing "the just, speedy, and inexpensive determination of every action and proceeding."

While Rule 16 directs the court's management of a case from start to finish, the process starts with the court conferring with the parties early in the case to determine what truly is at issue and how the case can best be administered.

This allows the court, working with counsel, to eliminate the myriad issues that might otherwise plague the litigation process in avoiding motions and getting to an operative complaint. It permits the court to assist in shaping the scope of discovery, addressing how the parties deal with simple matters like the number of people to be deposed and thorny issues like electronic discovery, document preservation and spoliation concerns.


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It gives the court the opportunity to work with the parties to determine whether facts can be stipulated to and particular issues resolved. And, it provides the court with the ability to discuss settlement before the expense of litigation makes settlement impossible.

The Superior Court also has recognized the value of early intervention.

Some years ago the court experimented with an Early Intervention Program (EIP). While not as detailed as the Rule 16 process, the EIP nonetheless envisioned the court intervening early to help make the litigation more efficient, to focus the pleadings and discovery in a way that resolves the dispute in a faster and less expensive manner.

Unfortunately, neither our District Court nor the Superior Court ever fully embraced early intervention.

In federal court, Rule 16 conferences are rare; the court will generally just endorse the case management schedules the parties propose under Rule 26(f) of the Federal Rules of Civil Procedure, resolving any disagree-

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ments that may be raised on the papers.

In state court, the EIP conferences were not uniformly conducted in each Judicial District and even in the Judicial Districts where they were, they were handled by attorneys and the focus quickly became fixed on settlement.

Meanwhile, pre-trial conferences in Superior Court are not scheduled until after the pleadings are closed, which is far too late in the game for anything meaningful other than settlement to occur. In short, early intervention in Connecticut is a concept, not reality. We continue to litigate the way we have always done it; we factor delay into the equation and expense into a long-term budget.

Commitment Needed

Rule 16 and the EIP, if properly implemented, have tremendous potential to return our courts to their position of prominence in resolving business disputes, but only if the courts and the parties recognize their utility and follow them religiously.

We should not fall victim to the notion that judges lack the time to devote to the effort; two hours invested early in the case will eliminate countless hours spent later on with motion practice, discovery disputes and the like.

Nor should we fall victim to the notion that lawyers do not know enough about their cases early on to make meaningful decisions. In most business disputes, the controversy had been brewing for a long time before it became framed in a complaint. Reasonable decisions can and should be made soon after the case has commenced.

The present iteration of Rule 16 recognizes that when a "trial judge intervenes personally at an early stage to assume judicial control over a case…the case is disposed of by settlement or trial more efficiently with less cost and delay than when the parties are left to their own devices." That is still a truism nearly 30 years later. We should dust off Rule 16 and the EIP and once and for all make them central features of our litigation culture. ■