

FRCP 1 and COVID-19: Litigating Through a Pandemic

By Brian A. Zemil, *Litigation News* Associate Editor

It is early April. The birds are chirping, the leaves are sprouting, and the grass is a vibrant green. Nature this spring looks just like springs in the past; meanwhile COVID-19 has changed everything else, including how we practice law. This pandemic has forced attorneys, clients, and many judicial officers out of their offices and into uncharted legal territory. These substantial disruptions and uncertainties have required a re-examination of the American legal system, including whether and when courthouses should remain open, litigants may access courtrooms, trials should proceed, and proceedings occur via remote technology.

COVID-19 has triggered a judicial watershed moment, and we are reevaluating how we do justice. Technology has empowered courts and parties to find new ways to cooperate, while attorneys' esprit de corps has breathed new life into the Federal Rules of Civil Procedure. When this column is published, many COVID-19-related changes will likely reflect our new normal and reveal our commitment, or lack thereof, to Rule 1 of the Federal Rules of Civil Procedure.

The December 2015 amendment to Rule 1 was prescient in emphasizing the principle of collaboration and creating an obligation for courts and parties to work together toward the goal of a just conclusion. The Rule 1 committee notes explain that the amendment seeks to emphasize the foundational charge that the court and parties now “share the responsibility to employ the rules” in order “to secure the just, speedy, and inexpensive determination of every action.” The notes further explain that we cooperate to improve the “administration of civil justice” by avoiding “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,” the notes conclude. The collaboration principle is more pressing now than ever and provides a lens through which the rules should be interpreted and applied during and after COVID-19.

Attorneys who fail to apply the fundamental principle of cooperation during COVID-19 will likely face censure or sanctions from a court system desperately trying to prioritize justice.

Judge Drummond's column in this issue (see p. 28) discusses a decision calling out an attorney's failure to appreciate the cooperation and reasonableness necessary during these challenging times. The decision highlights that, at least during COVID-19, Rule 1 requires and courts expect greater cooperation than ever before.

Parties must, therefore, carefully evaluate every court filing and litigation request based on the needs of the litigation, time remaining for discovery or motions practice, and

expectations of the specific court in which their case is pending. Demanding that courts compel an opposing party to collect and produce particularly critical electronically stored information might be reasonable; trying to compel that same party to gather hard-copy documents from a currently shuttered office might not. Routine matters, such as scheduling, can be handled by telephone or videoconference.

While the U.S. Supreme Court is now conducting oral arguments telephonically, counsel should anticipate the same in other courts nationwide, even if the case appears not amenable to online judging. Before requesting a different method of argument, consider if the reasons are compelling and weigh them against the strain that COVID-19 has placed on the judicial system, acute demand for more critical in-person hearings, and threats that delay might pose to court-set deadlines. Working remotely at home heightens confidentiality-related concerns as basic attorney-client communications require care: the presence of family members or home smart speakers that can record your conversations could threaten the confidentiality of your advice.

You also should consult Federal Rules 28, 29, 30, and 32, as well as court-specific local rules and standing orders, to evaluate when depositions through remote means should proceed. If any problems arise, preserve your objection in the event future court intervention is necessary and subject to the requirements of the jurisdiction in which the deponent—not the questioner—sits. The remote administration of the oath also poses special considerations, as some jurisdictions require that a court reporter be a notary and physically present while a witness testifies. A stipulation to accept an oath administered remotely by a specific reporter or express waiver of any objections to such proceedings should address any concerns.

COVID-19 has changed how we fulfill our Rule 1 promise. Our present challenges force us to consciously put Rule 1 in the front seat of our calculus rather than in the backseat, as too frequently practiced in the past. Many disciplines—science, philosophy, psychology, faith—have much to say about what we should be doing in this unprecedented moment, and Rule 1 offers a lot of wisdom to help our practice during COVID-19. When we reach the other side of this pandemic, history will reflect how technology enabled the safe administration of justice and, hopefully, how well we respected the administration of justice and one another as sisters and brothers of the bar. [LN](#)

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