Having FUN WITH Rule 1

BY MARK MELTZER

You there! The one with the long list of civil trials, who knows the rules forward, backward, and sideways. What is Rule 2 of the Rules of Civil Procedure? Can you recite it? Summarize it? State the title? Rest assured that only the rare bird can.[1]

But here's a much easier question. What is Rule 1? Every civil litigator knows about Rule 1, right? You can't practice civil litigation and not know about the leader of the pack.

Which brings me to my nightmare scenario. I'm appearing for the pretrial conference.

"Are counsel ready for trial?" the judge inquires.

"No, Your Honor," I respond, "we haven't completed discovery yet."

"Overruled, we start next week," says the judge.

My request for two hours of voir dire is also overruled.

"You have 10 minutes," says the judge, "and how many witnesses are you calling, counsel?"

"Ten," I reply.

"No, five," says the judge.

Summoning my gumption, I ask, "Your honor, what is your authority for these rulings?"

The judge quickly responds: "Rule 1, counsel. Look it up."

By now my face is red with embarrassment. I thought I knew all the rules, except those irrelevant "introductory" ones.

I hurriedly open my briefcase and consult the Arizona Rules of Civil Procedure. I focus on the magic language of Rule 1, which requires that every other rule "be construed to secure the just, speedy, and inexpensive determination of every action."

The room spinning, my head swimming, my mind a total blank: Why didn't I know about this rule?

The nightmare scenario is not quite realistic. Real lawyers and judges, it seems, don't specifically refer to Rule 1 with any regularity or enthusiasm, although perhaps they should. Though Rule 1 is not long forgotten, it is often overlooked. Rule 1 is a nicety, an admonition, a hope, an ideal and an aspiration. But a rule?

Consider this. Whereas there are scores of Arizona case decisions interpreting such heavyweights as Rule 11 or Rule 56, Rule 1 has been the subject of only passing references in Arizona appellate decisions.[2] It is a quiet rule, one not much talked about, like an eccentric relative or an unpleasant odor in an aircraft cabin.

But Rule 1 is a powerful rule. It is the foundation for all the other procedural rules. It sets out the philosophy of the civil system of justice. It tells us to get the case resolved fairly, quickly and cost effectively. It is both the beginning and the end point of the law: that justice be done.[3]

That sounds good, and we all want to do that, but because there is little Arizona decisional guidance, what exactly does the rule mean in practical, everyday terms?

Presented for you here is a short overview about dealing with Rule 1 in court, out of court—and even in social settings.

Fun With Rule 1 in Court

In court, the people having the fun with Rule 1 are the judges. And how could it be otherwise?

Rule 1 can be used to justify an endless number of limits on attorneys in the civil litigation process, often for the sake of reducing the cost of litigation. In what is both an altruistic and practical notion, the courts give life to the idea that judicial resources, like oil and coal, are limited and not endless, and that they must be protected from wasteful consumption.

Accordingly, federal courts in particular use Rule 1 to authorize the imposition of time limits.[4] Those limits include not only such routine issues as pretrial deadlines, but more esoteric ones, as well. One federal district judge, relying in part on Rule 1, precluded a plaintiff from testifying in his native language, which would have required an interpreter and additional time, when the plaintiff was conversant in English also.[5] Rule 1 can be used to require litigants or their representatives to personally appear at conferences.[6] If time is money, Rule 1 is the checkbook.

Having fun with Rule 1 in court means monitoring ourselves before the court does. Have I thoughtfully prepared the trial timeline? Am I going to have a witness ready for the 4 o'clock time slot? Am I going to put the jury to sleep with a cumulative witness?

I learned recently that in the infamous Leo Frank trial in Atlanta in 1913, 100 character witnesses were called. Can you imagine trying to do that today in a Maricopa County courtroom? Rule 1 would put a swift halt to the attempt.

One notable difference between Rule 1 in the Arizona and federal versions is worth noting. In 1993, the words "and administered" were added to the federal Rule 1 after the word "construed." The federal court's mandate is therefore not merely to consider the purpose of the rule ("just, speedy, and inexpensive" disposition of cases), but also to affirmatively and proactively "administer" cases in accordance with the stated principles.

Even without the inclusion of these two

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words, I believe it can be fairly said that in routine practice, state court judges not only "construe" but also "administer" the rules in this fashion.

Fun With Rule 1 Out of Court

Most litigators have blown a deadline or a procedural requirement at some time in their careers, yours truly among them. The experience is anything but fun. However, when seeking relief from the court, remember Rule 1.

Remind the trial court, as Justice Antonin Scalia noted, that, "By definition, all rules of procedure are technicalities."[7] One of the overriding principles of the law—and of Rule 1—is that cases should be decided on the merits rather than on technicalities.[8] The rules of procedure should be liberally construed, a notion that is repeated throughout the rules.

Where, you ask? See, for example, Rule 8f, requiring pleadings to be construed "as to do substantial justice," or Rule 15a, allowing leave to amend to be "freely given when justice so requires." And don't overlook Rule 102 of the Rules of Evidence, which has the expressed noble purposes "that the truth may be ascertained" while eliminating "unjustifiable expense and delay." Just resolution of cases requires an opportunity for each party's voice to be fairly if not completely heard.

Be mindful that Rule 1 is a door that swings both ways. It does not allow the other rules to be disregarded. Procedural rules are not by any means merely leverage for obtaining the trial court's "vague sympathy for particular litigants."[9] Rules are made to be followed, not broken. Remember that there is an opposing scale of justice, one that requires "strict adherence to the procedural requirements" as being "the best guarantee of evenhanded administration of the law."[10] Rule 1 is subjective and flexible, but it does have its standards and limits.

You may have noticed that Rule 1, for all its virtues, also has its contradictions. Just, speedy and inexpensive are not always harmonious concepts. If speed is paramount, kangaroo courts will flourish. Inexpensive proceedings may lead to failure to develop facts. Justice, like reasonableness, may be solely in the eye of the beholder.

No one was more eloquent on this point than Sen. George W. Pepper, in 1937. Senator Pepper postulated whether "Amen" should be added to the end of proposed Rule 12f, which provided that every pleading should be construed as to do "substantial justice."[11] Like many propositions in the law, faith in the system as well as perspective on the human experience are helpful for a satisfactory understanding.

Fun With Rule 1 in Social Settings

Rule 1 has absolutely no application in social situations, regardless of how much fun you are having.[12] If you thought, even for a moment, that Rule 1 did apply, you've been spending too many hours in the law library. Get out of there and get a life!

Conclusion: Rule 1 can be your last chance to save your day in court. Be aware of the rule and mindful that it can be used by lawyers as well as judges. When the other rules fail you, remember Rule 1.

endnotes

1. For those of you quizmeisters who may be keeping score, Rule 2 is titled "One form of action" and states simply: "There shall be one form of action to be known as 'civil action'."
2. In *Kerr-McGee Oil Indus. Inc. v. McCray,* 361 P.2d 734 (Ariz. 1961), the language of Rule 1 was used to accept a notice of appeal that met actual though not technical requirements. Justice Struckmeyer noted that "No one was misled." But in *Union Interchange Inc. v. Benton,* 410 P.2d 477 (Ariz. 1966), virtually the same members of the Supreme Court, specifically citing Rule 1, found no abuse of discretion by the trial court in refusing to set aside a dismissal because plaintiff was a few days late in complying with an order to file security for costs.
3. *See further* the ARIZ. CONST. art. 2, § 11: "Justice in all cases shall be administered openly, and without unnecessary delay."
4. *E.g., MCI Commc'n Corp. v. AT&T,* 708 F.2d 1081, 1171 (7th Cir. 1983), *cert. denied,* 464 U.S. 891 (1983) ("Litigants are not entitled to burden the court with an unending stream of cumulative evidence"); *Duquesne Light Co. v Westinghouse Elec. Corp.,* 66 F.3d 604, 610 (3rd Cir. 1995) ("Thus, while courts certainly should have flexibility in reassessing imposed time limits, they ordinarily should allow a party to fill its allotment with whatever evidence that party deems appropriate, subject, of course, to rules of admissibility independent of the overall time limitation for the case being tried").
5. *Tagupa v. Odo,* 843 F. Supp. 630 (D. Haw. 1994).
6. *See* Rule 16f, which adopts this principle with specific regard to pretrial and settlement conferences.
7. *See* the concurring opinion in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988).
8. *See Schiavone v. Fortune,* 477 U.S. 21, 27 (1986): "Spirit and inclination of rules favor[s] decisions on the merits."
9. *Baldwin County Welcome Ctr. v. Brown,* 466 U.S. 147, 152 (1984).
10. *Id.*
11. *Problems in Raising Prayers to the Level of Rule: The Example of Federal Rule of Procedure 1,* 75 B.U. L. REV. 1325, 1344 (1995).
12. Especially social situations with other lawyers.