

THE RULES OF CIVIL PROCEDURE—AGENDA FOR REFORM

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INTRODUCTION

Dispute settling is a social function of government. At the root, it is of a piece with delivering the mail, controlling traffic, or providing school lunches. That is to say, the people have needs which they cannot serve for themselves and so they look to the group servant, the government, to solve these problems for them.

There are old and new government social services. Dispute settling is very nearly the oldest federal government service, coming into place after national defense but, for the most part, before even such rudimentary social services as roads. For concrete American illustration, the Judiciary Act of 1789 and the court system set up under it, our first national dispute-settling mechanism, is very nearly the oldest social service of the federal system.

This aged dispute-settling social function sometimes works well and sometimes works poorly. Dispute settling through courts should be seen as parallel to the other social services of government. Take, for example, crime control, welfare, or the aspiration to agricultural prosperity. There have been peaks of success in each of these, and depths of failure, too. When these failures become intolerable, movements for reform, alteration, or improvement spring up and new efforts are made for improvement.

America has both legal depths and heights of major reform. Two great reform eras were the spread of what were known as the Field Codes, beginning in the 1840s, and the adoption of the Federal Rules of Civil Procedure in 1938.¹

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¹ The fiftieth anniversary of the Federal Rules of Civil Procedure was noticed spectacularly at Boston University in 1988 in a program commemorated in this issue of the *University of Pennsylvania Law Review*. My particular function was to comment on the paper of Professor Stephen N. Subrin, entitled *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*. This was a

The 1938 Rules of Civil Procedure had two major accomplishments which should bring us close to veneration for the stalwarts of that day. The key Rules are 1, 2, 3, 7, 8, and 12. The composite effect of these Rules is to abolish the basic distinctions between law and equity, and to eliminate common law pleading. Rule 1 made the Rules applicable to all "cases at law or in equity or in admiralty"; Rule 2 provided that there shall be one form of action, to be commenced by following Rule 3; Rule 7 eliminated all common law pleading by providing for a complaint, an answer, and a reply. Rule 8 sets the general rules of pleading. Rule 12 established the basic patterns for motions. If the Rules of Civil Procedure in 1938 had done no more than this, they would have been a revolution; the truth is that in the retrospect of fifty years, if the Rules had done no more than this, plus specifying the law of parties, we would be very nearly as well off as we are now. These were achievements which, in the law, approach the magnitude of revolution.

But there are 86 Rules. Fifty years have passed; this is a quarter of the country's history. There have been amendments to the Rules in the meantime—the most important and comprehensive were the 1966 set which particularly revised the rules as to parties. But just as there was a grand and official conclave leading to the Rules of 1938, so there is opportunity now, fifty years later, for a similar conclave to take a fresh look.

The fact is that, as with other governmental problem-solving, we have come into a slump in civil procedure. The combination of expense and delay make the dominant motif in dispute settling ADR: Alternative Dispute Resolution. The courts are doing so badly that the disputants are running away from them; the people are looking for other ways to settle their disputes whether within the government, as with court-administered ADR, or outside it, with arbitration.

After fifty years there are two general as well as many specific problems.

(1) The Rules, which were intended to be the great simplification, have become cumbersome. The dread irony of today is Rule 84, referring to forms, which "are intended to indicate the simplicity and brevity of statement which the rules contemplate." If bluntness can be ac-

truly splendid historical work on the origins of the Rules which deserves to be regarded as the classic in its field for research, organization, and exposition. I draw on it in the thinking underlying this comment and, at the same time, have chosen to let this little essay be freestanding. *The New York Times*, reporting the conference, drew from my comments on Professor Subrin's work the conclusion that "[i]t is time to start all over." As with synopses generally, the squib overdraws the main thought, but I take it to be a challenge to specify with precision just what does need to be done over.

cepted, "simplicity and brevity," phui! I practice under the Rules of Civil Procedure. The standard references which I keep within reach in my own office total some sixty volumes. The six basic original rules which made 1938 a revolutionary year run approximately fifteen hundred words. With amendments over time to Rule 12, that Rule alone is now close to nine hundred words long. Contemporary Rule 16 on pre-trial conferences, the most overwritten of the Rules, is half as long as all the most vital rules promulgated in 1938. Meanwhile, the notes have become tomes; the practitioner who needs to respond to an inquiry in open court, instead of having a handy reference, will have to plead for a recess simply to read the materials.

Let me stress the point. The revolution of 1938 uniting law and equity and putting an end to three centuries of division consists of three sentences. They are, from the pure standpoint of style, a model worthy of disinterment and emulation.

(2) The fifty years have created a priesthood with its cognoscenti in a world only they can appreciate—"itsy bitsy" little changes that the hundreds of thousands of lawyers out in the practicing universe never will know exist. An example is the proposal recently in circulation to amend Rule 6 as to "time" by cutting three days off certain periods in which the lawyer must act. There are hundreds of thousands of lawyers out there who would miss this. The fundamental precept of rulemaking always ought be that no rule shall be altered unless there is substantial need for the change.²

The 1930s were a period of comprehensive reform in America—agriculture, banking, labor, and securities give examples. By now, fifty years later, all those reforms have been revisited. The great procedural reforms of that period are similarly not immune to reexamination.

I. PARTICULAR RULES

Rules 1 and 2. These Rules, which go a long way to combining the procedures of law and equity, should go farther. At least since Justice Story's treatise on equity, it has been clear that there is no good reason why equitable remedies should be restricted to the cases in which there is no adequate remedy-at-law. This jurisdictional division was necessary in the early 17th century, during the reign of James I, to keep the Lord Chief Justices and the Chancellors out of each other's

² In some of the specific suggestions following, I may be guilty of this same offense. In consequence, some of the suggestions following are positive, reflecting a conviction, while others are tentative, suggesting only examination.

way, but since we now have combined the roles of the Lord Chief Justice and the Chancellor, there is no longer any ground but heredity for the adequate remedy-at-law distinction. The *Restatement of Torts* now has gone a long way to abolishing the difference; the *Restatement of Contracts* has not gone quite as far. There is work to be done revising these rules.

This is not to say that every wronged person is entitled either to an injunction or to specific performance. The traditional equity defenses remain, such as laches, hardship, impossibility of performance, impossibility of supervision, and more. But each of these defenses also should be reconsidered because most of them should be imported into law. I am inclined to think, without final meditative judgment, that if specific performance should be denied because of laches, damages should be denied likewise; we achieve much the same result by the existence of parallel legal defenses to most equitable defenses. But a thoroughgoing reconsideration of the Rules should abolish, with certainty, the adequacy notion, and should reexamine each of the equitable defenses to determine whether they should be limited to cases in which there is better justification than the jurisdictional wars of four centuries ago. This is within the scope of "procedural" reform by virtue of the express purposes of the unification statute.

Rule 4. The great reform of the 1950s and 60s was the extension of long-arm jurisdiction to permit disputes which have an effect in state A to be litigated in that state even though the complained of causes, activities, and parties are in state B. This revolution in the law of process has created a prodigious literature because of its infinite complexity. Perhaps we can do no better today than the great generalizations of *International Shoe*.³ There are few if any rules on which more time is spent than the determinations of the choice of forum. While the test is due process, which the rules cannot establish, they should be able to do a better job of definition. Perhaps it is impossible to do better, but it is time to go back to the drawing board to try.

Rule 9. We have learned to live, and to live well, with notice pleading. Why the provisions in Rule 9(b) requiring that fraud or mistake be pleaded "with particularity?" We need a reexamination of whether such pleading is serving any useful purpose, whether it is seriously burdensome, and whether it might not well be abolished.

Rule 11. The 1983 amendment to this Rule should be repealed. It is the most unfortunate exercise in rulemaking at least of the last twenty years. The issue whether pleadings, put loosely, are signed in

³ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

good faith from the standpoint of the facts and the law has caused a flood of satellite cases, and has added immeasurably to the costs of litigation. The law of the subject is chaotic, the invitation to judicial dictatorship is unlimited, and we should dump it.

Rule 12. Rule 12 on responsive pleadings and motions needs an independent look on two grounds:

(1) Time for filing a "responsive pleading" is extended only by the motions which are listed in Rule 12. Other motions well may warrant a lifting of the command for a responsive pleading.⁴ To take one illustration, as soon as a case is pending in jurisdiction A and the same case is brought in jurisdiction B, the defendant in jurisdiction B ought to be able to move for a stay and should not be required to answer or combine a stay motion with a Rule 12 motion simply to toll time. I confess that on occasion I have done this, frankly acknowledging to the court that the Rule 12 end of the motion is pro forma. But, under present Rule 11, this practice probably is sanctionable. The whole subject of time-tolling motions deserves a fresh look.

(2) The utility of Rule 12(b)(6), the motion to dismiss for failure to state a cause of action, needs to be reviewed. A 12(b)(6) motion, if granted, almost always results in leave to amend; the only practical consequences are to stall a case or to educate an adversary. A motion for judgment on the pleadings under 12(c) would serve the purpose of a 12(b)(6) motion in almost every instance, and since 12(b)(6) motions so frequently merge in any case with Rule 56 motions for summary judgment, the whole procedure might be both shortened and rendered more economical if the 12(b)(6) motion were eliminated.

Rule 13. This Rule deals with compulsory and permissive counterclaims. The most important difference between the two is that if a compulsory counterclaim is not brought, the decision in the case will be res judicata and the compulsory counterclaim then can never be brought as an independent action. On the other hand, since a permissive counterclaim need not be made, the decision on plaintiff's case is not res judicata as to that counterclaim.

This dichotomy of results assumes that one can tell the difference between the two types of counterclaims. The distinction is socially useful insofar as it avoids waste of court time by compelling single matters to be disposed of all at once rather than piecemeal. On the other hand, there can be substantial injustice in hairline distinctions. The last study on this point is thirty-five years old;⁵ the forthcoming new volume 6 of

⁴ See 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1360 (1969-1989) (discussing several motions not mentioned in Rule 12).

⁵ See Wright, *Estoppel by Rule: The Compulsory Counterclaim Under Modern*

*Wright & Miller*⁶ may shed new light on how the Rule is working.

The worst aspect of Rule 13 is arguably beyond the power of the rulemakers to correct. Rule 13(d) forbids counterclaims against the United States because of sovereign immunity, though, within limits too detailed for discussion here, set-off is permitted. If the government can bring suit against a citizen, it ought to be regarded as having waived its freedom from counterclaims. Sovereign immunity, a social evil at best, becomes plain tyranny when the government can hit and the citizen cannot hit back. The issue is whether this inequity must be corrected by an act of Congress or whether it should be left to a courageous rules committee to present to its many tiers of reviewers, including the Congress.

Rule 14. Here the problem is the practice more than the Rule. Third-party cases get longer and longer, more and more costly, and more and more impossible to handle. Take the owner's case against the contractor whose building includes what turns out to be a defective or inadequate steel beam. The contractor brings in the subcontractor who installed the beam. The subcontractor brings in the manufacturer who made the beam. The manufacturer says the beam is perfectly satisfactory and that the trouble is with the architect who specified such a beam for the purpose. The architect, of course, brings in her engineering consultant.

Discovery can be eternal. Meanwhile, the poor owner of the building may find herself without relief and her costs are ever rising as other people's discovery continues. The Rule anticipates these problems by broadly permitting severance, but severance does not occur often enough. Perhaps the concept of disproportion could be written into the Rule so that severance would be mandated where it appears that the cost of litigation will be disproportionate to the values involved for the plaintiff. This concept of proportionality is made express in Rule 26(b)(1)(iii) as a limitation on discovery and the same language might be imported very usefully into the severance provisions of Rule 14.

Rule 15. The principal problems as to amendments are the problems of relation back and of supplemental pleadings as distinguished from amendments. The line of cases giving mechanical tests for relation back should be eradicated by rulemaking, and Rule 15(c) apparently must emphasize even more that the test whether the amendment relates to the original transaction or occurrence.⁷ The distinction

Pleading, 38 MINN. L. REV. 423, 432 n.53 (1954).

⁶ 6 C. WRIGHT & A. MILLER, *supra* note 4, at §§ 1401-40.

⁷ The serious need for amendment of Rule 15 is developed in Brussack, *Outrageous Fortune: The Case for Amending Rule 15(c) Again*, 61 S. CAL. L. REV. 671

between amended and supplemental pleadings should be eliminated as a matter of form so that subsequent events clearly can relate back where there is some later development from the original problem.

Rule 16. This Rule in its present form was adopted in an era of greater-than-warranted enthusiasm for pretrial conferences. By requiring conferences in every case, they become pro forma and indeed are often unnecessary. In an overwhelmingly large percentage of the cases, a simple order setting a schedule open to modification if the parties present good reason would be preferable to the perfunctory conference. Most importantly, Rule 16 should be better correlated to Rule 56, so that when an issue on which there has been fair opportunity for discovery comes up at pretrial conference, the court is free to give partial summary judgment. The Rule as it stands expressly commands that the court may consider the "simplification of the issues," but gives it no power to eliminate issues altogether.

Rule 18. If any rule can claim intellectual paternity of the joinder of state law "pendant" claims, it is Rule 18 on joinder (but probably none can, since the idea of pendant jurisdiction is entirely judicially created). It would be well to examine whether assuming federal jurisdiction for pendant claims is, in truth, a good idea—whether they give parties in our federal/state system the cost and time savings which are their sole justification. I suspect that the disposition of these claims in the federal courts simply slows down the process and increases its costs for too little good. If there is a study on this point, I have not seen it. It is certainly possible that the seminal holding in *United Mine Workers v. Gibbs*⁸ simply has added one more unnecessary burden of dubious value to the federal jurisdiction. This body of procedure originated in patent and copyright cases, and well could be left there.

Rule 19. Once upon a time we had a rule that indispensable parties needed to be included in lawsuits or the case could not proceed. The 1966 amendment to Rule 19 largely eliminated this requirement by providing that in the case of apparently essential but absent parties, "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." Factors follow. It is possible that this is a valuable reform in the interest of justice. It was sponsored by the then Committee Reporter, later Justice Benjamin Kaplan of the Massachusetts Supreme Court, a wise man. But it is also possible that the revision has created a cluster of time-

(1988); Note, *Looking Forward: A Fairer Application of the Relation Back Provisions of Federal Rule of Civil Procedure 15(c)*, 63 N.Y.U. L. REV. 131 (1988).

⁸ 383 U.S. 715 (1966).

consuming decision points which merely add costs to litigation, as judges now must "grapple with the elements of the case that weigh in favor of retention or dismissal."⁹ If there is some study comparing the costs of administration with the justice produced by the 1966 amendment, I have not seen it. After it radically amends a rule—particularly when, as here, the bar acutely resisted the change—the Committee has some duty to assess whether it has done well or ill.

Rule 22. The current status of the Rule on interpleader is a plain plague to lawyers because the Rule interlaces with statutes on interpleader that differ from the Rule in material respects. For example, both venue and service of process are infinitely broader under "statutory interpleader" than under "rule interpleader." A lawyer should be able to find in one place what is required for interpleader and how to proceed with it. Since the lawyer commonly goes first to the Rule, the Rule should be written to encompass the statutory provisions so as to create one source, one law, one interpleader.

Rule 23. Class actions have done much good. They also have become a racket; frequently they do no more than line the pockets of the lawyers who bring the suits. The Committee has not dealt with the lethal criticisms leveled at class action abuses by the American College of Trial Lawyers.¹⁰ Rule 23(b)(3), as originally contemplated, was to be restricted to particular types of fraud, mass accidents, and perhaps some antitrust actions.¹¹ The other day my wife got nine dollars in milk coupons as her share of a settlement of a dairy class action which lasted for years; the lawyers, on the other hand, got rich.

A bad matter has been made infinitely worse by the recent Supreme Court decision in *Evans v. Jeff D.*¹² The Court held that under the Civil Rights Attorney Fee Act, class action settlement could be conditioned upon a waiver of attorneys' fees. If many class actions settlements are base appeals to the financial self-interest of plaintiffs' attorneys, the questions of attorneys' fees ought to be entirely separate from the settlement on the merits. I prefer the opposite solution of the Third Circuit,¹³ which gives meaningful protection against attorney sell-out.

⁹ Rippey v. Denver United States Nat'l Bank, 260 F. Supp. 704, 708 (D. Colo. 1966).

¹⁰ See AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE (1972).

¹¹ See FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 65-66 (West 1988) (containing notes to 1966 amendment of subdivision (b)(3)).

¹² 475 U.S. 717 (1986).

¹³ See *Prandini v. National Tea Co.*, 557 F.2d 1015, 1018 (3d Cir. 1977) (holding that attorney's fees in a class action settlement should be awarded on the basis of the total time expended by the attorney divided by a reasonable hourly rate, adjusted by

Rule 23 should go back to square one.

Rules 26 to 37. The discovery rules need the most work. Here the concept that the Rules are "trans-substantive," or applicable to all matters, is at its worst. As various jurisdictions have shown by experiment, cases need to be classified on intake. It now appears that three categories would be appropriate. First, in relatively small cases each side should be allowed at most one set of interrogatories limited to twenty questions (not necessarily beginning "animal, vegetable, or mineral?") and one deposition. Second, intermediate cases should have the same number of interrogatories, a slightly larger number of depositions, and limited document discovery. Third, in a very few big cases, the full panoply of discovery should be permitted.

There will be mistakes in classification and some cases in categories one and two, as a matter of justice, will need more discovery. This should be obtainable, on motion, by express court order, but exceptions should be grudging. The Rule moved in this direction in 1983; 26(b)(1)(iii) as amended permits the court to limit discovery where it will be "unduly burdensome or expensive, taking into account 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." This was an extremely valuable suggestion to the courts, but it has proved too subtle to do the job. The scalpel having been attempted unsuccessfully, it is now time for the axe.

Rule 47. The series of Rules from 38 through 53 deal basically with trial and do not need serious reexamination. Rule 43 on evidence is now essentially superfluous because of the existence of the Federal Rules of Evidence. Rule 47 on selection of jurors is a problem. Rule 47(a) permits either the court, the attorneys, or both to examine prospective jurors. There are times when it is useful to have the examination conducted by the attorneys. This practice, however, can be abused horribly, becoming a means of trying the case by rhetorical questioning.¹⁴

The Rule should be amended to suggest sharp limitations on examination by attorneys if they are to participate at all. I would not abolish that practice; there are too many superficial or pro forma examinations by judges. But there ought to be very sharp limits, either in terms of the number of questions or the time to be taken if attorneys are to have their opportunity.

such factors as "quality of the work, benefit to the client, and contingency of the result").

¹⁴ For general discussion, see 2 C. WRIGHT & A. MILLER, *supra* note 4, § 381, at 333 n.4.

Rule 48. This Rule on juries should be rewritten in light of *Colgrove v. Battin*¹⁵ having approved six-member juries in civil cases. The oracle having spoken, this is more a matter of a cosmetic than a substantive change, but it should be made.

Rule 49. This Rule, allowing a general verdict, general verdicts accompanied by answers to interrogatories, or both, was an experiment when it was undertaken and the experiment should be reappraised. It may be that interrogatories should be limited to particular kinds of cases; it may be that they should be abolished altogether; it may be that substantial justice in fact is being achieved without excessive administrative costs by the Rule precisely as it is. My hunch is that substantial justice would be served better by abolishing the interrogatories. In any case, this is a question worth asking.

Rule 50. This Rule on the motion for directed verdict and for judgment notwithstanding the verdict is a great success. The provision compelling conditional rulings on the new trial motion where there is a grant of a motion for judgment n.o.v. avoids enormous waste. But the provision limiting the right to make a motion for a judgment n.o.v. to one who, at the end of plaintiff's case, has moved for a directed verdict deserves reexamination. By now Rule 50 has been on the books in this respect long enough that perhaps the bar is fully acquainted with it. I do not know how many attorneys lose the right to make a motion for judgment n.o.v. because they have failed to make a motion for directed verdict, and it may well be that the motion for directed verdict is so automatic that requiring it as a precondition to the post-trial motion in fact does no injustice. But if this provision of the Rule simply operates as a trap for the ignorant or the unwary, it should go.¹⁶

Rule 51. This Rule permits the court to instruct the jury before or after the argument, or both. The practice of giving the instructions before oral argument should be encouraged because it permits the arguments to be focused more directly on particular instructions.

The Rule also requires that all objections to instructions be made "before the jury retires." This practice at least superficially is highly desirable, but on occasion it degenerates into little more than a time-consuming legal fiction. Instructions are forged in chambers. Thus, prior to charging the jury, the judge generally knows the attitude of

¹⁵ 413 U.S. 149 (1973).

¹⁶ For instances of strict application of the present Rule, see *Johnson v. Armored Transp. of California, Inc.*, 813 F.2d 1041, 1043 (9th Cir. 1987) ("[A] strict application of Rule 50(b) obviates the necessity for a court 'to engage in a difficult and subjective case-by-case determination of whether a failure to renew a motion for directed verdict . . . has resulted in . . . prejudice to the opposing party.'" (quoting *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 786 F.2d 1342, 1346 (9th Cir. 1985))).

counsel on each side. There is adequate opportunity, if the judge wishes, to alter the instructions. At the same time, careful counsel often make elaborate and perfected objections to judgments involving instructions. If these objections were made in chambers while the instructions were being settled, needless time would be taken. Hence there is the alternative practice in some of the states of making the formal objections to the court reporter after the jury has retired and, indeed, without having the judge on the bench. I know of no instance in which this procedure has operated as a trap for the judge, and its time-saving aspects hold some attraction. At a minimum, objections should be allowed with the judge on the bench immediately after the jury has left the courtroom to begin its deliberations.¹⁷

Rule 52. This Rule on findings of fact needs a substantial change. The Rule expressly provides that “[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).” Intellectually this is sound because, presumably, neither a Rule 12(b)(6) motion nor a Rule 56 motion involves determination of facts. Nevertheless, in complicated cases it is an immense aid to the appellate court to see, in some organized way, the thought processes of the trial judge. Many of the courts of appeal in fact do strongly encourage findings in such cases. That encouragement should be carried into the Rule.

Rule 54. Rule 54(b), involving judgments on multiple claims or multiple parties that become appealable upon an appropriate determination by the trial court, has been immensely successful. That success is being tarnished to the extent that appellate courts are examining on appeal whether there was a “just reason for delay.” In the interest of economy of procedure and to avoid making the case into a yo-yo, bouncing back and forth between the trial and the appellate court, review should be confined to whether the case involves a decision as to one or more, but fewer than all, of the claims or the parties.¹⁸ It is true that some trial judges may not give sufficient attention to whether there is or is not a just reason for delay, but on balance it would be better to

¹⁷ See 2 C. WRIGHT & A. MILLER, *supra* note 4, § 484, at 703 n.11 (noting that some courts have allowed objections to be made immediately after the jury left the courtroom); see also *Doucet v. Gulf Oil Corp.*, 783 F.2d 518, 523 (5th Cir.) (allowing objection to jury charge even though it was made after jury retired), *cert. denied*, 479 U.S. 883 (1986).

¹⁸ An example of unwise circuit second-guessing is *Cullen v. Margiotta*, 618 F.2d 226, 228 (2d Cir. 1980), *cert. denied sub nom. Nassau County Republican Comm. v. Cullen*, 483 U.S. 1021 (1987) (holding that a trial court’s dismissal of some of the multiple claims was abuse of discretion because postponement presented no danger of prejudice to the parties).

provide the certainty which Rule 54(b) was intended to give as to the appropriateness of the appeal.

Rule 55. The default Rule is unduly lethal. A judgment on the default may be entered by the clerk when the claim is for a sum certain. In any other case, the judgment must be entered by the court, but if there has been an appearance, then at least three days' notice must be given to the party or its representative so that appropriate defense action can be taken. At a minimum, the same requirement should apply to judgments entered by the clerk. Arizona, generally in conformity with the Federal Rules, has amended its Rule 55 to require that where a default is sought and the party seeking it knows the whereabouts of the party claimed to be in default or her representative, notice of the application must be sent to one or the other and an added ten days is given for pleading.¹⁹ While there is a downside to extending the time for pleading, on balance the Arizona system appears to be working well in avoiding defaults and Rule 60 motions. The plan deserves consideration by the federal committee.

Rule 56. The summary judgment Rule is working superbly at the Supreme Court level, where the law now is established that after a reasonable time for discovery, the party against which summary judgment is sought must not raise merely any fact question, but rather a fact question which goes to whether it will be capable of carrying its burden of proof.²⁰ Many of the lower courts and some states, however, still are caught in the "any factual dispute" notion as a reason for denying summary judgment without evaluating whether the factual dispute really is of any legal consequence.²¹ It is imperative that the summary judgment remedy be used to the hilt, and some rewriting to make it clearly contemporary with current Supreme Court standards is of the highest importance.

There is afloat a draft for a total and radical rewrite of the Rule.²² I have doubt, but not certainty, about the wisdom of this transmutation; Rule 56 is so universally familiar to the bar that a basic but simple change may be preferable. However it is to be done, an important

¹⁹ See 16 ARIZ. REV. STAT. ANN. § 55(a) (1987).

²⁰ See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

²¹ See, e.g., *Hill v. Jenkins*, 620 F. Supp. 272, 275 (N.D. Ill. 1985) (denying summary judgment in a civil rights action brought by a robbery suspect against a police officer because there was a factual issue over whether suspect threatened police officer with a gun); *Berlin Dev. Assocs. v. Department of Social Welfare*, 142 Vt. 107, 110, 453 A.2d 397, 399 (1982) (stating that "when the controversy includes disputed facts, the trier of fact must hear and resolve those controversial issues" (citation omitted)).

²² See Schwarzer, *Summary Judgment: A Proposed Revision of Rule 56*, 110 F.R.D. 213 (1986).

change urgently needs making.

Rule 58. This Rule provides that submission of forms of judgment by attorneys shall not be directed by the court "as a matter of course." It is common practice, despite this Rule, for attorneys to submit findings, conclusions, and a judgment. I see nothing wrong with this practice and, where appropriate, there could be a hearing on any objections. It is true that such drafting could encourage overreaching by counsel, especially if the judge is careless with the signature. On the other hand, greedy attorneys may be checked by the prospect of judges finding facts that, in truth, are not supported by the evidence at all. On the whole it would be better to bring the lawyers into this process.

Judgments are not to be held up for taxing of costs. The widespread authorization for allowance of attorneys' fees since the Rule was drafted leaves the question of whether appeal time should be held up until attorneys' fees are settled in order to avoid a second appeal regarding fees. On the one hand, there is the hazard of delay; on the other, the hazard of duplication. On this subject I have no abiding conviction beyond the belief that the matter deserve serious consideration. The judgment rule may have to be adjusted to fit the radical alteration of the placing of the real costs of litigation on the losing party.

Rule 59. This Rule, and its time restriction, is an illustration of how hard cases make bad law. The Rule says explicitly that the motion for new trial should be served not later than ten days after the entry of the judgment. In a hardship case, the Supreme Court found "unique circumstances" that justified extending the time within which to take an appeal.²³ But given this opening, "unique circumstances" tend to grow.²⁴ The objective fact is that motions for new trial are granted approximately as often as grass grows in the Sahara.²⁵

With rare exceptions, motions for new trial are simply earnest but dilatory proceedings, adding to the costs of litigation. The further added cost comes into play when there is a later argument as to the timeliness of the appeal by agitating whether the motion was "unique." This is an instance in which the Rules should be re-hardened into an absolute. The Rule also should make explicit that if the appeal is taken from the denial of the motion for new trial rather than from the judgment, this should be regarded as if it had been on appeal from the judgment, as-

²³ See *Thompson v. INS*, 375 U.S. 384, 387 (1964).

²⁴ See 11 C. WRIGHT & A. MILLER, *supra* note 4, § 2812, at 84 n.51 (collecting cases).

²⁵ Motions to alter or amend judgments are in a slightly different category and when a court amends a judgment upon a proper Rule 59 motion, appeal time under Rule 59 should start over for the other party. See *Barry v. Bowen*, 825 F.2d 1324, 1329 (9th Cir. 1987).

suming that the new trial motion was timely made.²⁶

Rule 60. Unlike Rule 59, Rule 60 has great vitality. The major problem arising under it is the correlation of 60(b)(6), allowing vacation of a judgment for "any other reason justifying relief." Should this be regarded as wholly separate from the other grounds or, rather, as something of a duplicate? This becomes vital because motions for mistake, newly discovered evidence, or fraud must be brought within a year, while the remaining grounds, including part six, need be brought only "within a reasonable time."

While the general rule is that subsection (b)(6) and the other subsections of the Rule are mutually exclusive, there are situations in which they should not be. For example, if a judgment is taken by default in a clearly erroneous case and it is concealed from the defendant until after the year has run, there well may be the excusable neglect for which time should be extended simply because of the highly equitable nature of subsection (b)(6). In any case, the question deserves review as to whether the various subdivisions of the Rule invite mere switches of labels.

Rule 64. This Rule permits attachments and other seizures of persons or property in the district court pursuant to the state law. If, as may be the case, the state law requires a hearing on an attachment which may not be held for a certain period of time, then there ought to be express authority under Rule 64 for injunctive relief to hold the situation in status quo, so that the property cannot be sold, pending the running of the time required under the state law. The *Fuentes* Court clearly put a high premium on a hearing before provisional remedies could be effective,²⁷ but the Rules should make clear that there is effective opportunity for a hearing for the claimant as well as the owner.

Rule 65. The injunction Rule continues to admit of the possibility of three stages of injunction: the temporary restraining order, the preliminary injunction, and the permanent injunction. The 1966 amendment permitted the merging of the hearing on the permanent injunction with that of the preliminary injunction. This simplification now should be carried a step farther; it should be presumed that the hearing on the preliminary injunction is also a hearing on the permanent injunction, unless an order to the contrary is made in advance of the hearing.

The tripartite system of injunctions is based on practices, now largely obsolete, of the temporary restraining order without notice, the preliminary injunction on affidavits but with notice, and the permanent

²⁶ See J. MOORE, MOORE'S FEDERAL PRACTICE, 1988 RULES PAMPHLET pt. 1, at 671.

²⁷ See *Fuentes v. Shevin*, 407 U.S. 67, 80-84 (1972).

injunction on live testimony after an actual trial. Today the preliminary injunction commonly is determined on the basis of witnesses and there is no longer a function in most cases for the later trial proceedings. There will remain instances, of course, when, either because the court does not have time or because the parties are not ready, the court cannot hold as full a hearing as is needed at the preliminary injunction stage to make the ultimate determination. These cases, however, are rare and should be identified in advance. In a lifetime of innumerable injunction actions, I have seen only one in which there was any real function for the third stage. The collapsing of the two procedures into one would remove the current requirement of a bond pending the permanent injunction. The present procedure inhibits the use of injunctive remedy where the bond is a limitation on the capacity to ask for relief, and there is no good in the present attenuated procedure.

Rule 66. The appointment of receivers provides that the administration "shall be in accordance with the practice heretofore followed in the courts of the United States" References to what practice was more than fifty years ago are not very helpful and are needlessly obscure. Some examination is warranted as to whether this creates any problems or whether by now the entire subject is covered by the alternative 1966 provision which leaves the matter to local rules.

Rule 67. This Rule deals with deposits in court. It does not provide expressly for the interests on those deposits. For a discussion of the issue (one which I find inconclusive), see *Bank of China v. Wells Fargo Bank & Union Trust Co.*²⁸

Rule 68. This Rule has become a disaster and it is more good luck than good management that it is not a worse one. The bitter lament of the civil rights bar is that the Rules either are being written or construed to the extreme detriment of civil rights claimants. Rule 11 and Rule 68 are the principal offenders. The Supreme Court has construed "costs" in this Rule to cover attorneys' fees authorized under specific statutes.²⁹ This ruling nullifies congressional intent as expressed in the more than one hundred fee-shifting statutes.³⁰ The Rules should not be allowed to frustrate congressional policy and thus should be revised to make explicit that attorneys' fees are not "costs" for purposes of this rule. In the whole group of suggestions contained in this list, the revision of Rule 68 is one of the most major in its social and legal import.

Rule 73. I testified in behalf of the bill to expand the magistrate system and in retrospect regard it as one of the mistakes of a lifetime.

²⁸ 209 F.2d 467, 475-76 (9th Cir. 1953).

²⁹ See *Marek v. Chesny*, 473 U.S. 1, 9 (1985).

³⁰ See *id.* at 14-15 (Brennan, J., dissenting).

The power, for practical purposes largely uncontrolled, which has drifted in magistrates' direction seems to me excessive. The power of magistrates to enter consent judgments seems to me unconstitutional as a delegation of judicial power to non-Article III judges.³¹ "Consent" in this context is likely to be phony, another illustration of the judicial "velvet blackjack" which must be yielded to or the case will be put on hold indefinitely. I would revise the Rule to eliminate this power.

Rule 81. Habeas corpus now is covered by a wholly different rule.³²

Rule 83. The provision authorizing local rules has proved to be one of the most unsatisfactory aspects of existing procedure. The plethora of local rules has become a gross affliction and is completely incompatible with the fundamental thesis that there shall be a single and simple method of procedure. A 1985 amendment requiring public notice and opportunity to comment is an improvement, but not enough. One of the most useful of the current experiments is the effort in some places to unify the federal and state local rules as much as possible. The federal Standing Committee on Rules has secured a complete study on this subject recently, and I hope it will give leadership against this plague.

II. CONCLUSION

A. *The Big Picture*

Discussing a rule at a time risks getting lost in detail. The major matters which deserve attention are:

- First, the true merger of law and equity and the compression of injunction procedure;³³
- Second, the restoration of Rule 11 to its pre-1983 state;
- Third, the total linkage between Rules 16 and 56 by increasing the authority to give partial or total summary judgments at the pretrial conference;
- Fourth, the reconstruction of discovery under Rules 26 to 37;
- Fifth, the reconstruction of the class action rule;
- Sixth, the updating of Rule 56 to bring summary judgment practice squarely into accord with the recent Supreme Court decisions;
- Seventh, a revision of Rule 68.

³¹ See *Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 550 (9th Cir.) (en banc) (Schroeder, J., dissenting), *cert. denied*, 469 U.S. 824 (1984).

³² See 17A C. WRIGHT & A. MILLER, *supra* note 4, § 4268, at 486 n.7.

³³ See *supra* text following notes 2 & 27 (discussions of Rules 1, 2 and 65).

B. *Outside the System*

The foregoing brief commentary is within the structure of the Rules, but we cannot assume that the structure itself is necessarily adequate. It may be that with fifty years of change and experience, whole new matters need to be taken up, as for example the problems of settlement, mediation, or alternative dispute resolution.³⁴ As we review the successes and failures of the past fifty years, our minds must be bold and we should not be confined by the structure we have inherited any more than by the particular rules.

³⁴ For a rewarding discussion of changes outside the system, see Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986).

