

# FEDERAL RULES OF CIVIL PROCEDURE IN ACTION: ASSESSING THEIR IMPACT

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## INTRODUCTION

A natural and direct way to evaluate the impact of the fifty-year-old Federal Rules of Civil Procedure would be to ascertain whether they produce the effects they were intended to produce. The intended effects should be discernible from the drafters' theories and goals, as revealed in the Rules and the notes of the Advisory Committee. An impact assessment would seek to determine whether in practice the Rules have validated the drafters' theories and achieved their goals. This would require analyzing the findings produced by plentiful (I hoped) empirical studies of the Rules in action.

Proceeding on that approach, I selected the following as central themes and aims of the Rules:

(1) To make things simple for the litigants. Pleading was to be easy. No longer would technicalities trap the unskilled or unwary litigant. Even if the pleader was guilty of an unfortunate omission or blunder, a freely allowed amendment would cure the flaw. And the pleader need feel no embarrassment in asserting inconsistent claims or defenses. No compelled consistency was to inhibit freedom of allegation.

(2) To make short work of any unsupportable claims or defenses that free-wheeling pleaders might cavalierly assert, two antidotes were made available. Rule 12(b)(6) would allow an opponent to obtain a quick dismissal of a patently insufficient pleading. If the claim or defense looked facially sufficient but turned out when probed to be groundless in fact or law, a Rule 56 motion for summary judgment would dispose of it.

(3) To enable the court to reach the merits of the controversy, Rule 61 told the court explicitly to "disregard any error or defect in the proceeding" that "did not affect the substantial rights of the parties." Rule 1 delivered the more general message that the Rules "shall be

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construed to secure the just, speedy and inexpensive determination of every action.”

(4) To help the parties obtain full mutual knowledge of any available evidence, discovery of broad scope and deep penetration was to be standard. Full access to the evidence would end trial by ambush and surprise. Open discovery would promote settlements; with both sides obliged to turn over all their important cards, secrets would disappear and realistic negotiations would occur.

(5) To allow the trial courts elbow room, the Rules were deliberately brief and open-textured. The judges were to be free to administer the Rules in fair and sensible, rather than technical and mechanical, ways. As a corollary to their brevity, the Rules accorded the judges large areas of discretion—sometimes expressly, more often by implication. While only ten of the 86 rules used the term discretion explicitly, the courts of appeals soon identified at least forty rules that were thought to repose discretion in the district court.<sup>1</sup> The effect of ceding discretion to the district judge is to require the appellate judges to defer to the lower court’s discretionary ruling even when the appellate court disagrees with the ruling.

My efforts to make an empirical evaluation of the Rules’ success in advancing the objectives listed above ran into three formidable obstacles.

The first was an information shortage. Contrary to expectations, there is a disappointing paucity of reliable data on how the Rules have worked. We do not know, for example: how many final dispositions are achieved without trial by the granting of motions to dismiss or for summary judgment; whether vigorous discovery activities produce more frequent, earlier or better settlements than would occur without these activities; or how often the sheer cost of vindicating a claim or defense produces a coerced settlement regardless of how strong one’s legal or factual position is. The list of unknown effects could be lengthened indefinitely.

A second problem is the “moving target” obstacle. As time passed, changes occurred in the goals as well as in the text of the Rules. Trying to assess the Rules’ impact became an exercise in hitting a moving target. Important alterations were made in 1963, 1966, 1970, and 1983. Some of the amendments modified major aspects of federal civil proce-

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<sup>1</sup> See Rosenberg, *Judicial Discretion of the Trial Court Viewed from Above*, 22 SYRACUSE L. REV. 635, 655 (1971) (“Of the eighty-six rules that comprise the Federal Rules of Civil Procedure, the term ‘discretion’ appears in ten or so. Nevertheless, appellate courts have held that review-restraining discretion is implicitly present in thirty other provisions of the Rules.”).

ture. Among them were a substantial revision of multi-party practice, a massive overhaul of pretrial conference purposes and procedures, amendments designed to contain excessive discovery, and provisions for sanctions against litigants and lawyers who file seriously defective papers.<sup>2</sup>

A third obstacle was the presence of a cluster of exogenous factors that seriously complicated the task of isolating the Rules' impacts. Many non-Rules changes since 1938 may well have produced effects on federal litigation, but these are difficult to separate from whatever impact the Rules themselves have had. The contaminating factors include:

(1) A sharp growth in the volume of federal statutes and court-declared norms, creating claims and defenses not previously available. These have contributed to a steep rise in federal court filings, leading to a perceived crisis of volume and to counter-measures that clearly affect federal litigation practice.<sup>3</sup> Among these has been creation of a corps of magistrates, many of whom perform functions formerly discharged by judges. A similar phenomenon has been an increase in the use of court-appointed masters to supervise discovery.

(2) The new statutes and the court-made substantive rule changes have altered the mix of cases in the federal courts. A growing number of complex, potentially protracted cases make their way to court.<sup>4</sup>

(3) To deal with these changes, multi-judge districts have adopted the individual assignment system, which earmarks each case as the responsibility of a designated judge. This has spurred an increase in active judicial case management by many district judges. Managerial judging introduces extra-Rules dynamics into the litigation process. In the 1983 revision of Rule 16, the word "management" made its first appearance in the Rules. Management to avoid protracting the case was listed expressly as a purpose of the pretrial conference<sup>5</sup> and managerial control was favored implicitly for other purposes, such as discouraging wasteful pretrial activities,<sup>6</sup> improving trial quality,<sup>7</sup> and fa-

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<sup>2</sup> See Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 386-400 (1967); Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 22-24 (1984); Rosenberg, *Changes Ahead in Federal Pretrial Discovery*, 45 F.R.D. 479, 481 (1969).

<sup>3</sup> Annual filings of federal court civil cases almost tripled between 1970 and 1986 (from 87,321 to 254,828). See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 108, table 13 (1970); ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF UNITED STATES COURTS 171, table C-1 (1986).

<sup>4</sup> See Galanter, *The Life and Times of the Big Six; or, The Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921, 954.

<sup>5</sup> See FED. R. CIV. P. 16(a)(2).

<sup>6</sup> See FED. R. CIV. P. 16(a)(3).

<sup>7</sup> See FED. R. CIV. P. 16(a)(4).

cilitating settlement.<sup>8</sup>

The Advisory Committee explained that the revision of Rule 16 responded to the widespread view that it was "necessary to encourage pretrial management that meets the needs of modern litigation."<sup>9</sup> A judge who manages the case vigorously in its early stages frequently changes the course of the litigation.<sup>10</sup>

(4) A significant shift in recent decades from fixed-fee to hourly-fee charging by lawyers also altered the dynamics of the process, especially in the pretrial preparation stages.<sup>11</sup>

(5) The increased cost of legal services<sup>12</sup> has become a factor of unmeasured but manifest significance in litigation practice. The expected cost of pressing or defending a claim to a determination sometimes influences the disposition more than the merits do.

(6) The growing interest in alternative methods of resolving legal disputes has led to adoption by some federal courts of mandatory, non-binding procedures such as arbitration and summary jury trials.<sup>13</sup> As the frequency of use of these procedures increases, so does their influence on the litigation process.

(7) Local rules have proliferated wildly. They often add procedural wrinkles or requirements that affect the course of a lawsuit.<sup>14</sup>

Obviously, the continual amendment of the Rules and the influence of non-Rule factors complicate the task of evaluating the impact of all or any of the Rules. Even so, the poverty of systematic empirical data about the impact of the Rules is disturbing. Civil procedure is a pragmatic enterprise. In evaluating a rule of procedure, the salient

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<sup>8</sup> See FED. R. CIV. P. 16(a)(5).

<sup>9</sup> 97 F.R.D. 165, 206 (1983).

<sup>10</sup> See S. FLANDERS, *CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS* 17-43 (1977).

<sup>11</sup> Cf. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 *RUTGERS L. REV.* 253, 269 (1985) (proposing narrowing the discovery process to streamline costs); Rosenberg, Rient & Rowe, *Expenses: The Roadblock to Justice*, 20 *JUDGES J.*, Summer 1981, at 16, 17 ("[T]he expense of litigation . . . warps the substantive law . . . and, in some cases, essentially bars the courthouse door.").

<sup>12</sup> See Henry, *Alternative Dispute Resolution: Meeting the Legal Needs of the 1980s*, 1 *OHIO ST. J. DISPUTE RESOLUTION* 113, 113 (1985) (noting that American corporations' "billings for outside counsel [are] estimated at thirty-eight billion dollars nationwide").

<sup>13</sup> See Lambros, *Summary Jury Trial*, 37 *FED'N INS. & CORP. COUNS. Q.* 139, 139-48 (1987); Levin, *Court-Annexed Arbitration*, 16 *U. MICH. J.L. REF.* 537, 537-38 (1983); Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 *U. CHI. L. REV.* 366, 366-93 (1986).

<sup>14</sup> See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *JUDICIAL CONFERENCE OF THE UNITED STATES, LOCAL RULES PROJECT*, pt. I, at 1 (Tent. Draft June 30, 1988) [hereinafter *LOCAL RULES PROJECT*].

questions usually are "Does it work? If so, how?" This is in contrast to common tests of the worth of a value-laden substantive rule, namely, "Is it a good rule? Does it apply fairly and equally to similarly-situated persons?"<sup>15</sup>

One would expect academic observers and others who take a close interest in the functioning of the most important procedural system in the country to devote significant efforts to measuring the impact of major Rules. In fact, empirical investigations in the field comprise only a small part of the reported research on the Rules. The library, not the field, provides the great bulk of the cases and commentaries that comprise the raw materials for the main scholarly research on the Rules. The meager quantity of most of the empirical efforts is matched by their indifferent quality. More specifically:

(1) Available empirical studies are spotty and fragmentary. Only the research efforts targeting discovery practice and, quite recently, surveying the operation of Rule 11 have produced respectable sets of empirical studies.<sup>16</sup> Even these touch the subject only lightly.

(2) The chief deficiency of the existing studies is in method. There are barely a handful of efforts that attempt to control for the impact of non-Rule variables. Of course, the best way to do this is by a controlled experiment. The obstacles to experimental research in law are formidable but not insuperable. Even without using a true experimental design, knowledgeable investigators could do far better by careful surveys that employ acceptable second-best methods of impact research (such as side-by-side and before-and-after surveys) and replications of those types of studies.<sup>17</sup>

(3) A major conceptual problem is the failure of investigators to come to grips with the question of the quality impact of the rule of procedure being studied. They have been concerned almost exclusively with the efficiency of the rule, as if the only test of whether a rule works well is whether it helps dispose of cases quickly. Drawing straws

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<sup>15</sup> See, e.g., *Brown v. Merlo*, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973) (declaring the State's guest statute unconstitutional as a denial of the equal protection clauses of the California and United States Constitutions because, unlike all other social guests and recipients of "generosity," guests in a car had to prove a higher degree of their host's fault than simple negligence to recover for injuries).

<sup>16</sup> See W. GLASER, *PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM* (1968); S. KASSIN, *AN EMPIRICAL STUDY OF RULE 11 SANCTIONS* (1985); COMMITTEE ON FEDERAL COURTS, N.Y. STATE BAR ASS'N, *SANCTIONS AND ATTORNEYS' FEES* (1987); Field Survey of Federal Pretrial Discovery (Feb. 1965) (unpublished draft) (available in University of Pennsylvania Law School Library).

<sup>17</sup> See Campbell, *Reforms as Experiments*, 24 AM. PSYCHOLOGIST 409, 410-12 (1969); Lempert, *Strategies of Research Design in the Legal Impact Study: The Control of Plausible Rural Hypotheses*, 1 LAW & SOC. REV. 111, 111-32 (1966).

to pick a winner would do that, but no one would want lawsuits determined by the length of the straw. Why not? What attributes should a decent and desirable procedure normally have? Few of the available empirical studies of the Rules address that question. Happily, the Advisory Committee's Note on the 1983 overhaul of Rule 16 disclosed a sensitivity to the procedural-quality dimension. It declared:

[T]here is evidence that pretrial conferences may improve the quality of justice rendered in the federal courts by sharpening the preparation and presentation of cases, tending to eliminate trial surprise, and improving, as well as facilitating, the settlement process.<sup>18</sup>

Evaluating the quality of a civil litigation process is even more difficult than evaluating its efficiency. Clearly, the place to begin is with a definition of the concept. In addition to the factors identified by the Advisory Committee in 1983, performance attributes such as accessibility, inexpensiveness, dispatch, and low stress are worth considering.<sup>19</sup>

## I. THE IMPACT OF THE MATURING RULES ON FEDERAL LITIGATION PRACTICE

Because of the fragmentary nature and erratic methodology of the empirical studies of the Rules in action during 1938-88, my main reliance in this paper is on archival and impressionistic materials. Even this less rigorous approach to assessing the Rules' impact encounters the two problems mentioned at the start. One is the moving-target difficulty; it is hard to gauge the impact of the Rules because they have undergone such large changes over time. This problem I propose to handle by invoking a presumption that the Rules in their present form are a more mature version of the original ones, embodying their basic aims and themes. The presumption is probably accurate in the main. Today's Rules still aim to keep pleading simple, allow before-trial disposition of meritless claims and defenses, permit liberal discovery, pro-

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<sup>18</sup> 97 F.R.D. 165, 205-06 (1983); *see also* M. ROSENBERG, *THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE* 30 (1964) (stating that the quality of a trial should be measured by "whether the attorneys were well prepared, whether the issues were advanced with clarity, whether the evidence was well presented, and whether 'surprise' and maneuvering were avoided at trial"); *THE ROLE OF COURTS IN AMERICAN SOCIETY* 123 (J. Lieberman ed. 1984) (asserting that indicators of the quality of trial process include: "Did the issues and theories of the case emerge sharply and clearly for the trier of the facts? Were both sides prepared? Were there gaps or redundancies in the evidence? Was the trial free of tactical surprise?").

<sup>19</sup> *See* *THE ROLE OF COURTS IN AMERICAN SOCIETY*, *supra* note 18, at 124.

mote decision of cases on their merits, and prefer provisions marked by brevity and generality.

On the other hand, the 1983 revisions have modified to some extent several of the original themes. Amended Rule 11 lays a new burden of accuracy and responsibility on litigants and their lawyers who file court papers. Revised Rule 16 introduces a new emphasis on the judge's duty to manage the litigation and to promote settlement. Amended Rule 26 allows the court to curb discovery that becomes redundant or disproportionately voluminous. These shifts in emphasis are surely significant, yet they do not alter the main themes of the original Rules.

The other problem is the confounding effect of the numerous non-Rules factors that also affect the federal litigation process. These extraneous factors will be taken into account as carefully as feasible whenever analysis, speculation or common sense suggest the need to do so.

Viewed globally and with deference to the complexity of the effort, some of the Rules' major effects might be summarized as follows.

#### A. *Discovery: A Lodestar is Born*

No change in litigation practice resulting from the Rules has had as great an impact as the liberalization of pretrial discovery. In the half century since the Rules gave discovery its modern look, this procedure for gathering information before trial has expanded from a useful tool to a combination lawyer's industry and litigator's religion. Discovery practice in federal litigation has taken on a life of its own. The first principle is "when in doubt, discover!"<sup>20</sup>

In the run of significant lawsuits, federal discovery has helped shift the center of gravity from the trial to the pretrial stages. For countering surprise at trial, it has given discovery-aided pretrial preparation as high a priority as skillful use of the lawyer's wits. Discovery has seeped into the mind and marrow of the profession so thoroughly that practitioners who once were referred to as trial lawyers are now more comfortable being called litigators. A lawyer who neglects to discover often feels naked before the enemy. So much is this true that in arbitration proceedings, which are supposed to be attractive because they avoid the major procedural skirmishes that are characteristic of the in-court

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<sup>20</sup> Miller, *supra* note 2, at 17. "The Federal Rules of Civil Procedure have altered dramatically the natural cost-benefit calculation that once had imposed some restraint on the seeker of information, encouraging instead a better-safe-than-sorry approach to discovery decisions that makes the cardinal rule: when in doubt, discover." *Id.*

litigation process, discovery is used increasingly.<sup>21</sup>

A study in the 1960s by the Columbia Project for Effective Justice found that discovery occurred in 76% of the cases sampled.<sup>22</sup> While a 1978 report by the Federal Judicial Center found that discovery occurred in only about half the sample (drawn from six districts compared to 43 in the Columbia survey), the percentage of cases using discovery would have risen markedly if unorthodox areas of litigation such as prisoner cases and administrative appeals were excluded.<sup>23</sup> On the other hand, the Columbia Project's sampling purposely omitted certain types of cases that seemed to use little discovery. Up-to-date studies of the incidence and types of discovery in various categories of cases are clearly needed.

According to the Columbia Project study and contrary to the common belief and the drafters' design, discovery probably does not produce a higher proportion of settlements than would occur without discovery.<sup>24</sup> This result is apparently due to a "churning" phenomenon: some factual disputes are indeed resolved by discovery and drop out of the case, but others surface for the first time.

Costs of discovery can be so high that they force settlements that would not occur or, more likely, force settlements on different terms than would otherwise have been reached.<sup>25</sup> One reason discovery is so expensive is that when fees are paid on the basis of time charges, discovery practice marries the lawyer's professional instinct to leave no stone unturned to the financial advantage of doing so. Before the 1983 amendments neither exhortation to lawyers to be reasonable nor the court's flabby exercise of its sanctioning powers under Rule 37 proved effective to curb excessive discovery. The situation reflected the truth of the adage that getting people to act against their economic interest requires more than just saying "please." It is not clear that the 1983

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<sup>21</sup> See, e.g., Houck, *Complex Commercial Arbitration: Designing a Process to Suit the Case*, ARB. J., Sept. 1988, at 3-5 ("The arbitrators were given ample means to . . . prevent any discovery abuses."); Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 464 (1988) (survey showing that arbitrators desire broader discovery power).

<sup>22</sup> See W. GLASER, *supra* note 16, at 53, table 1.

<sup>23</sup> See P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 38, figure 2 (1978).

<sup>24</sup> See Field Survey of Federal Pretrial Discovery, *supra* note 16, at II-8; see also Rosenberg, *Changes Ahead in Federal Pretrial Discovery*, 45 F.R.D. 481, 488-89 (1968).

<sup>25</sup> Of course, not every federal case involves heavy discovery costs—not even in the fifty percent or more in which discovery is used. See Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 219, 222-30; Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 84 (1983) [hereinafter Trubek].



revisions have changed things materially. In a recent Harris survey of 200 federal and 800 state judges, abusive discovery was rated highest among the reasons for the high cost of litigation.<sup>26</sup>

The drafters of the Rules calculated that the discovery provisions would help the parties reach settlements or, at least, avoid trial by surprise and involve no great cost or burden to the system. Their premises were: (1) "More is better" and (2) discovery should be a lawyer's pursuit, with the judges taking as little part as possible.<sup>27</sup> As a result, if their clients could afford the fee, litigators commonly would spend years on pretrial maneuvering designed to dredge up every scrap of paper and every trace of human memory on relevant matters. In one federal judge's much-quoted observation (unsupported by statistics): "The average litigant is over-discovered, over-interrogated, and over-deposed; as a result he is over-charged, over-expensed, and over-wrought."<sup>28</sup> That indictment is doubtless over-stated. It is probably true, however, that for purposes of awarding fees under numerous federal statutes, discovery has become the polestar as well as the main ingredient of the "lodestar" and has replaced trial as the modal outcome for most significant categories of federal litigation.<sup>29</sup> Whether the 1983 "proportionality" and "anti-redundancy" restrictions eventually will improve matters remains to be seen.

### B. *Easy Pleading: "Allege now, discover the basis later."*

In evaluating the Rules that have made the greatest difference in modern federal litigation, some would award first place to those that allow simplified pleading. Rule 8(a) is, of course, everyone's prime example of easy pleading, for it asks merely that the plaintiff's pleading contain "a short and plain statement of the claim showing that the

<sup>26</sup> See *Judges Polled*, 6 ALTERNATIVES 149 (Sept. 1988).

<sup>27</sup> See Rosenberg & King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 B.Y.U. L. REV. 579, 581-82.

<sup>28</sup> Aldisert, *An American View of the Judicial Function*, in LEGAL INSTITUTIONS TODAY: ENGLISH AND AMERICAN APPROACHES COMPARED 31, 68 (H. Jones ed. 1977); see also Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CALIF. L. REV. 264, 264-65 (1979) ("Abuse of the judicial process occurs most often in connection with discovery. Unjustified demands for and refusals to provide discovery prolong litigation and drive up its costs. Fabrication and suppression of material facts are regrettably common occurrences, although lawyers and judges are often reluctant to admit it. Because the overwhelming percentage of civil cases settle before trial, pretrial costs constitute the largest portion of litigation expenses. . . ." (footnotes omitted)).

<sup>29</sup> In the state courts both the stakes and the scale of discovery are generally smaller. See Oakley & Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1377 (1986); Trubek, *supra* note 25, at 89.

pleader is entitled to relief." There is no insistence that only "facts" be pleaded or that "evidence" and "conclusions" be avoided. Rule 8(b) echoes this approach with regard to defenses, requiring only that they be stated in "short and plain terms."

By implication Rule 9 suggests that the "statement" and "terms" required by Rule 8 may be couched in general phrases. Rule 9 does this by deliberately selecting a dozen or so matters and providing that they must be pleaded "with particularity" or in some other specified manner. Matters not specifically targeted by Rule 9 are under no such constraint.

The importance of easy pleading rules is not just that they make claiming or defending a simpler exercise in drafting or one that is less vulnerable to technical pitfalls. These consequences are magnified by labeling the procedure "notice pleading," a term that has become attached to the non-technical federal way of setting forth claims or defenses. Some judges, lawyers, and professors take the "notice pleading" label to mean that the premise of the Rules' pleading provisions is that in filing a complaint seeking relief, the plaintiff need not have in mind any particular view of the facts or any coherent legal position. This school is fond of putting its position in the pungent phrase: "No cause of action is necessary." *Mutatis mutandis*, defendants are said to be similarly unencumbered—except as Rule 9 may selectively specify otherwise. In this view, pretrial discovery will supply any missing factual basis for a claim or defense and the legal theory will emerge from the discovered facts.

Others in the profession disagree with that sense of the pleading rules. They argue that the purpose of discovery is not to find out whether the pleader *has* any supportable claim or defense of whatever kind. Rather, it is to develop support for a position that at the time of pleading already has some tenable basis in fact and law. That is my own understanding of the tenor of the pleading rules. I do not read the Supreme Court's cryptic references to simplified "notice" pleading in *Conley v. Gibson*<sup>30</sup> as meaning that a complaint that gives notice of an identifiable claim is *ipso facto* sufficient.

Rule 8(a)(2) does, after all, not only make known that a short, plain statement will suffice, but goes on to declare that it is to be one "showing the pleader is entitled to relief." To show that, the pleading must contain the predicates that the substantive law makes prerequisites for recovery. In support of that thesis, one should note that the Supreme Court in *Conley* said the Rules require not only that the com-

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<sup>30</sup> 355 U.S. 41, 47 (1957).

plaint "give the defendant fair notice of what the plaintiff's claim is," but also "the grounds upon which it rests."<sup>31</sup>

To be sure, the plaintiff may write the complaint on the back of an old envelope and presumably the defendant may then put the answer on the back of the envelope's flap. But that is a long way from concluding that the pleader is not required to set out all the elements the substantive law requires for a successful recovery or defense in the action. If "notice" alone were enough, a sufficient complaint against a delicatessen owner could be phrased in these terms: "You are hereby notified that I claim your product, a sliced salami sandwich, was spoiled when I ate it and I demand that you pay me \$100,000 in damages." That pleading gives notice of what the plaintiff is claiming, but it ought not be upheld as sufficient, since it fails to allege any wrongful act by the defendant or any injury to the plaintiff. Thus, it fails to meet Rule 8(a)'s requirement of "showing the pleader is entitled to relief" or *Conley's* requirement that it state "the grounds upon which it rests."<sup>32</sup>

In sum, with regard to pleading, the great reform the Rules achieved was to free the parties from the need to state their case in the language of "ultimate facts" or any other prescribed rhetorical form. Easy pleading did not free pleaders from responsibility to meet the substantive requirements applicable to their case; it simply emancipated them from enslavement to rigid semantic requirements.

### C. *The Rise of Judicial Case Management*

Running through the Rules originally adopted and persisting through all amendments until the 1983 revision of Rule 16 has been an unwavering focus on the individual case as the central object of concern in the administration of civil justice. Systemic problems did not com-

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<sup>31</sup> *Id.*; see also J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 274 (1985) ("Although courts differ as to how detailed allegations must be and the form in which they must be phrased, under every pleading system the plaintiff . . . must set forth sufficient information to allege a right to relief. To do so the pleader first must know the essential elements upon which his claim or claims will be based."(footnote omitted)); cf. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806, 815-16 (1981) ("The modern form of notice pleading has been challenged primarily on behalf of defendants in civil actions. It is always to a defendant's advantage to require the plaintiff to pinpoint its case specifically and in detail."); Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 436 (1986) ("Although they rarely acknowledge the shift, federal courts are insisting on detailed factual allegations more and more often, particularly in securities fraud and civil rights cases." (footnote omitted)).

<sup>32</sup> A few of the illustrative forms are sparse in respect to "grounds," but inferences like those used in *Garcia v. Hilton Hotel Int'l, Inc.*, 97 F. Supp. 5 (D.P.R. 1951), may fill the gap.

mand the attention of the drafters and the Rules did not address them.

The original case-by-case focus of the Rules is understandable. In the 1930s, when the Rules were conceived and written, and for decades afterward, the stewards of civil litigation had the luxury of being preoccupied with how best to achieve justice in each case. There was by today's standards no crisis of volume to draw their attention to systemic problems. A "retail" view of the administration of justice was a natural approach. And because large, complex, protracted cases were uncommon, the monolithic, uniformly-applicable Rules often did not appear inadequate for purposes of controlling the movement of large, complicated law suits through the courts. That picture has changed, with consequences for our sense of fairness that Judge Jon Newman has described well:

A broadened concept of fairness — one that includes fairness not only toward litigants in an individual case but also to all who use or wish to use the litigation system and to all who are affected by it — can lead to changes that directly confront the challenges of delay and expense.<sup>33</sup>

By the end of the 1950s, as the number of filings began to increase sharply and as the number of complex cases began to grow, some districts started taking special steps to deal with problems of volume and to give distinctive treatment to certain types of cases. To control the complex cases, a special manual was developed having as its main theme close judicial management of the case.<sup>34</sup>

In the 1960s some multi-judge districts and some judges on an individual basis perceived problems with a laissez-faire attitude towards their dockets and started taking early control of cases in order to move them to an end with greater expedition, efficiency, and fairness. In recent years there has been criticism of these management efforts, dramatically characterized by Professor Judith Resnik as evidence of judges' "failing faith" in adjudication as the aim of their efforts:

As federal judges self-consciously shift roles from adjudicator to case-manager to settler, as judges call for the increased use of summary judgment and for other quick solutions, judges demonstrate their own sense of the marginal utility—and perhaps of the futility—of full-blown adjudication. There are many examples of this failing faith.<sup>35</sup>

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<sup>33</sup> Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1644 (1985).

<sup>34</sup> See MANUAL FOR COMPLEX LITIGATION (1969).

<sup>35</sup> Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L.

To critics of judicial case management, Judge Alvin H. Rubin has offered this compelling reply:

The judicial role is not a passive one. A purely adversarial system, uncontrolled by the judiciary, is not an automatic guarantee that justice will be done. It is impossible to consider seriously the vital elements of a fair trial without considering that it is the duty of the judge, and the judge alone, as the sole representative of the public interest, to step in at any stage of the litigation where his intervention is necessary in the interests of justice. Judge Learned Hand wrote, “[a] judge is more than a moderator; he is charged to see that the law is properly administered, and it is a duty which he cannot discharge by remaining inert.”<sup>36</sup>

In the 1983 overhaul of Rule 16, the Advisory Committee adopted this view. The Rule’s title, “Pretrial Conference,” became plural. The stated purpose of the conferences was changed from trial-shaping to focusing on the early pretrial stages. This change reflected the shift of the center of gravity of civil litigation from trial to pretrial.

#### D. Local Rules

Another way to fill gaps in the national rules to take account of special needs, tastes, and conditions, including distinctive caseloads, was the adoption of local rules. These often were designed to fill empty spaces in the nationwide procedures and did so by promulgating a special rule for the district. By now local rules have grown so numerous and detailed that they raise serious problems of their own. The main threat they pose is balkanization of federal practice. The Standing Committee on Rules of Procedure of the United States Judicial Confer-

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REV. 494, 529-30 (1986) (footnote omitted).

<sup>36</sup> Rubin, *The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy, and Inexpensive Determination of Civil Cases in Federal Courts*, 4 JUST. SYS. J. 135, 136 (1979) (footnote omitted); see also Elliot, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 326-34 (1986) (suggesting reasons why managerial judging may not only reduce expenses and delay, but also yield results that are more “just” to litigants); Peckham, *The Federal Judge as Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981) (arguing that the judge’s new role as case manager has significantly improved productivity). But see Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (arguing that little empirical evidence supports the claim that judicial management provides cheaper, quicker, or fairer dispositions, and that it may actually be redefining *sub silentio* our standard for what constitutes fair, rational and impartial adjudication). For a rebuttal to Resnik, see Flanders, *Blind Umpires—A Response to Professor Resnik*, 35 HASTINGS L.J. 505 (1984).

ence has sponsored a large-scale investigation of the nature, contents, and significance of the countless local rules in the 94 districts of the federal judicial system.<sup>37</sup>

## II. WHICH WAY TO PROCEDURAL IMPROVEMENT?

A decades-old personal experience has provided an example that may suggest a model by which reform-minded legislatures and rule-makers may obtain the information they need. In 1962, Chief Justice Earl Warren supported a research program mounted on behalf of the Advisory Committee on Civil Rules to recanvass the entire subject of pretrial discovery:

Since [1938], there have developed wide differences in the profession as to the merit of discovery. On the one side, it has been claimed that discovery improves the fact-finding process by eliminating surprise and removing advantages allegedly held by wealthy litigants; that it encourages settlements; and that it speeds up the process of trial when trial becomes necessary. On the other side, critics have doubted whether these benefits are being substantially attained, and they have charged that broad discovery is itself unduly expensive; that it encourages false testimony; and that it promotes delay and harassment by allowing extensive inquiry into fringe matters.

Because of these conflicting views—and after nearly 25 years of experience with the existing rule—the Committee believes that there is now need for a basic and systematic study to determine the efficiency of the procedures and to identify any modifications which may be needed.

Mr. [Dean] Acheson [Chairman of the Committee] has enlisted the cooperation of the Project for Effective Justice of the Law School of Columbia University, . . . to [do] a full-scale examination of the actual operation [of the rules] in the district courts. [The investigators] will go directly to a selected number of the courts, to the United States Attorneys' offices, and to the offices of private practitioners and seek their cooperation in pinpointing the experience with discovery in a representative set of cases over a representative period.<sup>38</sup>

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<sup>37</sup> See LOCAL RULES PROJECT, *supra* note 14, pt. I, at 1-13.

<sup>38</sup> Warren, *Address by the Chief Justice of the United States*, 39 A.L.I. PROC. 23, 32-33 (1963).

With the support of Chief Justice Warren, the Project completed the field work and in 1965 reported its findings to the Civil Rules Committee.<sup>39</sup> The Report addressed four central questions of concern to the Committee and offered a large number of findings, some of which were the basis for substantial revision of the discovery rules in 1970.<sup>40</sup>

Regrettably, relatively few systematic empirical studies of the Rules in action have been carried out since 1970. None of them has had the benefit of the kind of close working relationship between the researchers and the Rules Committee that the discovery project had. For the most productive results, that type of relationship is essential.

The tendency of legally-trained minds to prefer thinking to counting is legendary. So is the lawyer's preference for learning by watching for the vivid case rather than tabulating the mine-run cases. The problem is not that watching this case or that is useless. A dramatic case or anecdote may be more informative and more memorable than a tubful of printouts. But the rub is that good anecdotes do not care if they are not representative; they can be badly misleading if generalized.

Nor does the problem end with the misleading anecdote. No matter how carefully the facts or data are gathered to respond to the pivotal questions, there will be great trouble in penetrating made-up minds. Commonly, lawyers, lawmakers, and judges treat systematic data with casual disdain, preferring individualized experience and intuition that they can encapsulate in a war story. Their reaction to systematically gathered data is very often either "It's obvious!" or "It's wrong!" depending on whether it squares with their own viewpoint or experience. As I have said, they prefer anecdotes to tables.

What lies ahead for procedural improvement—or should lie ahead? My candidates are these:

1. More attention to the *quality* of procedural justice, as affected by the requirements of significant provisions of the Rules and by other factors. Among the main probable influences on process quality are discovery, pleading, sanctions, and management.

2. There should be less reliance on a single set of monolithic Rules of universal applicability. The channeling of cases by their needs and probable litigation careers to differentiated procedural treatments that reflect those factors is long overdue. "Trans-substantive" is a less than helpful concept in this connection. Many *simple* cases, some involving substantive issues drawn from contract law, others from tort law, and

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<sup>39</sup> See Field Survey of Federal Pretrial Discovery, *supra* note 16.

<sup>40</sup> See Advisory Committee's Explanatory Statement Concerning Amendments to the Discovery Rules, 48 F.R.D. 487, 489 (1970).

still others from the civil rights field, all require the same kind of pre-trial processing despite their diverse substantive sources. On the other hand, complex cases often require vastly different processing from simple ones even though drawn from the same substantive sources. They accordingly belong on different procedural tracks.<sup>41</sup>

3. Tracking and differentiated processing will require skillful judicial case management. Since not all judges are competent managers, training in teachable techniques of management will be essential.

4. Sanctions of the Rule 11 type have reached the end of their usefulness as spurs to desired behavior by counsel. While unpersuaded that Rule 11 should revert to its pre-1983 text, I think it provides another example of a truism: positive incentives are much preferable to punishments, though by no means as easy to devise.

5. Court-annexed alternative mechanisms must be used more widely where they give promise of producing resolutions that better serve the preferences of the disputants and better satisfy the needs of the disputes.

6. Trade-offs should be accepted as inevitable in designing improved procedures. For example, unrestrained discovery may be too much of a good thing in certain categories of cases. Once these categories are identified, appropriate limits on the volume of discovery in them may be the best way of achieving resolutions that are reasonable in time and expense.

7. Since settlement, not trial, is the probable destiny of a majority of the cases, the rule makers should try to design procedures tailored to that reality. Instead of preparing cases routinely for the unlikely event of trial, the courts should process most cases for a prompt, informed settlement. This will require devising procedures to help identify cases in each category.

## CONCLUSION

In seeking to improve the administration of justice by procedural reform, we need to keep in mind two cautions. The first is that systematic inquiry into how procedures function in practice has revealed time and again that the chief effect of many reforms is not so much to change the flow of cases through the courts as to change their results.

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<sup>41</sup> See McMillan & Siegel, *Creating a Fast-Track Alternative Under the Federal Rules of Civil Procedure*, 60 NOTRE DAME L. REV. 431, 431-55 (1985) (proposing to give the litigants the option of putting the case on a fast track that assures them a trial date of their selection within 12 months. In return they agree to sharply limited pretrial motions and discovery).



The other is that justice is most unlikely to be realized, even granted the best of procedures, as long as the substantive rules are unjust. It is not a good idea to use procedural rules to overcome or compensate for substantive-law deficiencies. Despite their noble aspirations, even the Federal Rules cannot escape those imperatives.

Although the complexity of the task of assessing the Rules' impact makes it unlikely we shall ever obtain thoroughly precise readings, I have no hesitation in concluding that in their first half century, the Federal Rules have served the American society well. Their wide emulation in the states is strong evidence that in general they are well conceived and sound in practice; that their impact has been, in a word, helpful in the pursuit of justice.

Not long ago the *New York Times* carried a feature story on the obstetrics crisis in New York. More and more obstetricians are abandoning the practice, allegedly because of malpractice suits. A female obstetrician was pictured at the top of the story, saying: "When people come to the hospital to have their baby delivered, they expect a perfect baby. But we don't always deliver a perfect baby."

Perhaps that thought suggests a similar message for those who look to the Federal Rules to deliver perfect outcomes. They cannot do it all. They have been doing a fine job. They can be improved. To do that we need to know as accurately as possible how they work and what their impact is.

