AMERICA'S AILING CIVIL JUSTICE SYSTEM

The Diagnosis and Treatment of the Federal Rules of Civil Procedure

INSTITUTE for the ADVANCEMENT
of the AMERICAN LEGAL SYSTEM

America's Ailing Civil Justice System:
The Diagnosis and Treatment of the Federal Rules of Civil Procedure

> [I]t is again time to consider bold reforms to our procedural system. Today our system faces pressures and challenges across numerous fronts, and modest tweaking of this rule or that doctrine cannot address the system's fundamental crisis…. The system [Roscoe] Pound criticized had become stale three centuries earlier. So it is possible to limp along with an outdated system for quite a while. But we shouldn't have to. Some of the pressures on the system will not wait another century before exploding. The time for clear-eyed critique and for imagination about the next procedural moment is now.
>
> – Jay Tidmarsh, 2006

I. Introduction

Roscoe Pound viewed the law as "an organism in need of synthesis and systematization, of diagnosis and prescription."[1] Commentators have taken a similar view toward our current system of civil procedure, frequently likening the Federal Rules of Civil Procedure (FRCP or Rules) to an ailing patient. Although the severity of the maladies plaguing the Rules is heavily debated, the commentary from both academics and practitioners generally suggests that America's civil procedure system is, in fact, in need of urgent attention.

This was not always the case. The Rules were born into a welcoming and nourishing environment in 1938, and for the first few decades afterward enjoyed a relatively drama-free existence. It was not until the 1970s that the health of the Rules became an issue. With unexpected changes in the litigation culture, the FRCP became increasingly vulnerable to infection. With the onset of each problem came various diagnoses, prescriptions for treatment and attempts to cure the FRCP of their ailments. What ensued was a process of continual tinkering that neither killed the Rules nor entirely cured them.

What follows is a very brief overview of the history of the FRCP, the challenges that have plagued American civil procedure over the past seven decades, and the various approaches that have been employed – often unsuccessfully – to remedy those problems. This overview will also describe alternative approaches to procedure and consider the issue of experimentation with inconsistent rules in federal courts, outlining the limitations, highlighting the need and detailing the options.

---

[1] Jay Tidmarsh, *Pound's Century and Ours*, 81 NOTRE DAME L. REV. 513, 518 (2006).

II. The Life & Times of the Federal Rules of Civil Procedure

A. Pre-Conception Climate

At the turn of the twentieth century, American civil procedure was confusing at best, chaotic at worst. As a consequence of the Conformity Act of 1872, an attorney practicing in one state had to learn the procedural rules for state actions in equity, federal actions in equity, and federal and state actions at law.[2] Procedure in many states was further complicated by the rigid and formalistic requirements of the then-ubiquitous Field Code.[3] This complexity led to increased demand for simple, uniform rules of federal civil procedure. In a 1906 speech to the American Bar Association, Roscoe Pound issued the century's first major call for procedural reform.[4] Pound's address highlighted the perceived deficiencies in the system and, to that end, criticized a number of characteristics of American civil procedure and litigation, including the differential treatment between cases in law and equity, rigidity of procedure, and lack of professionalism and independence of the judiciary.[5]

B. Birth of the Rules

Pound's prescriptions, while initially not very popular,[6] nonetheless resonated with an important segment of the legal community. In 1911, Thomas Shelton, the Chairman of the ABA Committee on Uniform Judicial Procedure, along with the Chair of the House Judiciary Committee, Henry Clayton, introduced a bill to streamline procedure by vesting rulemaking power in the Supreme Court.[7] Although unsuccessful at first, its proponents (including then-Chief Justice William Howard Taft) succeeded in launching a redrafting effort in 1923.[8] A version similar to the 1923 draft eventually became the Rules Enabling Act of 1934, which empowered the Supreme Court to promulgate general rules of procedure.[9] With a view towards ensuring uniformity, access and flexibility, an Advisory Committee appointed by the Supreme Court spent 18 months drafting the new rules. Approved by the Court in late 1937 and submitted to Congress the next year, the Federal Rules of Civil Procedure were born on September 16, 1938 – becoming effective by Congressional inaction.

While it was never anticipated that every procedure available in the FRCP would apply to every case, the gist of the new procedural scheme was relatively straightforward: the plaintiff would initiate the case with a short and plain statement sufficient to put the defendant on notice

---

[2] Thomas O. Main, *Reconsidering Procedural Conformity Statutes*, 35 W. ST. U. L. REV. 75, 89-94 (2007).
[3] Pleading of the facts constituting the cause of action, complicated joinder of parties and extremely limited discovery. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 939-40 (1987) [hereinafter Subrin, *How Equity Conquered Common Law*]; *see also* Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 332, 328-33 (1988) [hereinafter Subrin, *The Field Code*]. Twenty-seven states copied the Field Code. Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 696 (1998) [hereinafter Subrin, *Fishing Expeditions Allowed*].
[4] Tidmarsh, *supra* note 1, at 513-14.
[5] *Id*. at 524-25.
[6] *See id*. at 513; Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1045 (1982).
[7] Burbank, *supra* note 6, at 1045-50.
[8] *Id*. at 1050-73.
[9] *See id*. at 1097.

of the nature of the claim. The parties would engage in discovery to collect information relevant to the claims before trial and thus avoid any surprises once trial began. The defendant would have opportunities to test the nature of the plaintiff's claims before trial, either at the pleading stage (Rule 12) or at the summary judgment stage (Rule 56). If disputed issues of material fact remained, the case would proceed to trial for resolution.

C. The Golden Age

The FRCP were by most measures a good fit for the civil litigation climate of the 1940s and 1950s. Transcontinental travel was a rare luxury and most cases were handled exclusively by local counsel.[10] Discovery was necessarily limited because computers, copy machines, and e-mail were not yet a part of daily life. And major categories of substantive litigation, such as class actions, mass tort litigation, and civil rights litigation, had not yet appeared in any significant volume.[11] Under these conditions, and especially in comparison to the complicated system that preceded it, the new procedural scheme was largely embraced by the legal community. Indeed, many words have been invoked to describe the first decades following the FRCP's birth, all emphasizing the position and prestige afforded the Rules and the rulemaking process through which they were conceived – a triumph, influential, transformative.[12] It was during this period that the federal rulemaking process was widely replicated at the state level,[13] and the judiciary's primary role in the rulemaking process went largely unchallenged. Furthermore, many states replicated or closely copied the Federal Rules into their own procedural codes.[14] Even in those states where procedural rules were not reflective of their federal counterparts, the effects of the Federal Rules were nonetheless felt.[15] In short, according to Professor Robert Bone, this was a "golden age of court rulemaking."[16]

D. The Onset of Disease

Exactly when the Golden Age ended is a matter of debate, but the general consensus is that by their 40th anniversary in 1978, the FRCP had hit some hard times.[17] The problems began

---

[10] *See* F. Lee Bailey, *Won't You Please Go Home – The Pro Hac Vice Blues*, 1969 UTAH L. REV. 227, 228 (1969).
[11] *See* Richard Marcus, *The Revival of Fact Pleading under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 447-50 (1986); *see also* Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. KAN. L. REV. 347, 398 (2003).
[12] *See* Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2237 (1989); Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229, 233 (1998); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1969 (1989).
[13] Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 897 (1999).
[14] Subrin, *How Equity Conquered Common Law*, *supra* note 3, at 910; Richard Marcus, *Not Dead Yet*, 61 OKLA. L. REV. 299, 301 (2008).
[15] *E.g.*, Marcus, *supra* note 14, at 301 n.20; Subrin, *How Equity Conquered Common Law*, *supra* note 3, at 910.
[16] Bone, *supra* note 13, at 897-98; Richard L. Marcus, *Modes of Procedural Reform*, 31 HASTINGS INT'L & COMP. L. REV. 157, 157 (2008).
[17] For many, this period ended in the late 1960s and early 1970s. *See, e.g.*, Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1973 (2007); *but see* Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 676-77 (1975) (suggesting that the deterioration in the rulemaking process occurred in 1956, after the Supreme Court discharged the Advisory

with greater Congressional involvement in – some might say suspicion about – the rulemaking process. In 1973, for the first time, Congress exercised its veto powers under the Rules Enabling Act to block the proposed Federal Rules of Evidence.[18] This ushered in a new era of increased participation in rule amendments by legislators and public interest groups, and also paved the way for legislation in the 1990s that called into question the uniformity and predictability of the Rules and challenged the judiciary's role in procedural rulemaking.[19]

At the same time that the judiciary's role in the rulemaking process was being questioned, the Rules themselves were increasingly coming under attack. As discussed below, provisions relating to discovery, judicial management, and pleadings, among other things, were blamed for contributing to – or at least failing to stop – a host of growing problems, including cost, complexity, delay, abuse of process and an increasingly hostile litigation culture. Evidence of discontent became manifest in state civil procedure, as states that had once replicated the FRCP began moving away from federal provisions and toward alternative approaches. For example, the 1992 amendments to the Arizona Rules of Civil Procedure introduced mandatory and detailed disclosure and presumptive limits on the tools of discovery[20] and Colorado Rule 16.1 established a simplified procedure for actions under $100,000 that includes early, full and detailed disclosure and presumptively prohibits discovery.[21]

III. The Diagnosis & Treatments

Many of the problems hampering the Rules today have been tied to discovery, which exploded in the 1970s when the volume of available information and the scope of permitted discovery both expanded simultaneously. In at least some cases, this unhappy convergence led to skyrocketing costs, over-discovery, and discovery abuse. The history of Rules amendments since 1970 is largely a history of trying to put the discovery genie back in the bottle, first by increasing judicial control over case management, then by limiting the methods of available discovery, then by mandating disclosures at the outset of the case, and most recently, by installing more stringent judicial gatekeeping at the pleading stage.[22]

A. The Emergence of the Discovery Problem

Some of the earliest criticisms of the FRCP related to the cost and abusive practice of discovery, although those criticisms were not immediately acknowledged. As early as 1968, studies were being undertaken addressing the relationship between discovery practices and cost increases in civil litigation.[23] Influenced by a study *dispelling* the notion that discovery was causing an increase in costs, however, the Supreme Court in 1970 promulgated amendments to the Rules that expanded the practice of discovery by eliminating the "good cause" requirement

---

Committee). *See generally* Marcus, *supra* note 14, at 299-300 (detailing commentator analysis regarding the recent crisis in federal rulemaking).

[18] Bone, *supra* note 13, at 902-03.

[19] *See id*. at 904-07.

[20] ARIZ. R. CIV. P. 26.1, 30, 33.1.

[21] COLO. R. CIV. P. 16.1.

[22] *See* discussion *infra* Section III.E.

[23] *See* WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM (1968) (presenting the findings of the Columbia Law School's Project for Effective Justice).

for document discovery.[24] The 1970 amendments are widely considered to be the high point of party-controlled discovery in the United States. The rejection of a connection between discovery and litigation costs, however, would not last long, and within a few years dissatisfaction with perceived discovery overuse and abuse led to calls for amendments restricting the scope and volume of permissible discovery.

B. Judicial Management

The first proposed solution was greater judicial case management. Calls for increased judicial management began in earnest with a series of Federal Judicial Center (FJC) studies in the late 1970s that found that the use of court management techniques could help keep discovery under control and decrease time to resolution for a case.[25] Accordingly, amendments to the Rules in 1980 provided for increased judicial control over discovery practices by mandating discovery conferences[26] and in 1983, Rule 16 was amended to make case management an express goal of pretrial procedure by mandating a scheduling conference to enable the judge to manage the entire pretrial phase effectively.[27] In 1993, new amendments granted the courts even more control over discovery processes and other pretrial matters by emphasizing that a major objective of the pretrial conference should be to establish appropriate controls on the extent and timing of discovery.[28] These amendments also encouraged the court to include, in the scheduling order, a timeline relating to initial disclosures.[29]

Calls for differentiated case management schemes also garnered support, and in 1990 Congress mandated specific case management techniques in ten pilot districts as part of the Civil Justice Reform Act (CJRA).[30] These included differential treatment, early and ongoing control of the pretrial process and judicial involvement in the discovery process.[31] While the effectiveness of many CJRA provisions was questionable, those relating to early case management showed the most promise for reducing time to disposition.[32]

C. Limiting Discovery Methods & Scope

Following discussions on discovery abuse during the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, the American Bar Association commissioned a series of reports, the first of which called for narrowing the scope of

---

[24] *See* Richard Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 748 (1998); FED. R. CIV. P. 26 cmt. background (1970).
[25] STEVEN FLANDERS ET AL., CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS (1977); PAUL R. CONNOLLY ET AL., JUDICIAL CONTROLS AND THE CIVIL LITIGATION PROCESS: DISCOVERY (1978).
[26] FED. R. CIV. P. 26(f) cmt. background (1980).
[27] FED. R. CIV. P. 16 cmt. background (1983).
[28] FED. R. CIV. P. 16 cmt. background (1993).
[29] *Id*.
[30] Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 101-105, 104 Stat. 5089-98 (1990) (codified as amended at 28 U.S.C. § 471-482).
[31] 28 U.S.C. § 473(a) (2008).
[32] *See* JAMES A. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996); *see also* Leonidas Ralph Mecham, *Alternative Proposals for Reduction of Cost and Delay: Assessment of Principles, Guidelines and Techniques*, 175 F.R.D. 62 (1997).

discovery.[33] While this proposal was rejected at that time, it would be picked up in later years. In 1993, limits on the numbers of depositions and interrogatories were put in place.[34] In 2000, the scope of discovery was narrowed from information relevant to the subject matter of the action to information that was relevant to the claims and defenses of the parties, and initial disclosures were mandated in all districts.[35] Local Rules in several federal districts have also been introduced to limit the number of interrogatories, depositions, and sets of document requests one party may issue in a case.[36] Even with all these changes, there remains significant concern that abusive discovery and disproportionate discovery costs still exist in some if not many cases.

D. Mandatory Disclosures

Since 1993, the Rules have incorporated provisions requiring parties to disclose certain information relevant to the case without waiting for a discovery request. These provisions were introduced in optional format in 1993 and made mandatory in every federal district court in 2000.[37] Under these amendments, parties are required to disclose witnesses and documents that the disclosing party may use to support its claims or defenses.[38] Some states had likewise attempted to address discovery problems by implementing strict initial disclosure rules. For example, the 1992 amendments to the Arizona Rules of Civil Procedure added an additional initial disclosure provision, requiring the parties to disclose documents and potential witnesses that may be relevant to the event, not just those that support the parties' claims or defenses.[39]

E. Pleadings

In the last 10-15 years, several efforts to address some of the problems raised by over-discovery have focused on the pleading stage. Because it is conceptually intertwined with discovery, the FRCP's notice pleading requirement has also long been subject to criticism and critique. Unlike the discovery provisions, however, the FRCP's pleading requirements have not been amended via the process set forth in the Rules Enabling Act.[40] Rather, changes to the scope and interpretation of the FRCP's pleading requirements have come directly from Congressional legislation and Supreme Court jurisprudence. In 1995, Congress passed the Private Securities Litigation Reform Act (PSLRA), which established a heightened pleading standard for plaintiffs pleading securities fraud.[41] Because Congress failed to clarify exactly what was required in order for a PSLRA pleading to survive a motion to dismiss, a Supreme Court ruling was

---

[33] *See* American Bar Association, Section of Litigation, Report of the Special Committee for the Study of Discovery Abuse 157-58 (1977), *reprinted in*, American Bar Association, Section of Litigation, Second Report of the Special Committee for the Study of Discovery Abuse, 92 F.R.D. 137 (1980).
[34] FED. R. CIV. P. 30 cmt. background (1993); FED. R. CIV. P. 33 cmt. background (1993).
[35] FED. R. CIV. P. 26 cmt. background (2000).
[36] *See, e.g.*, D. Mass. R. 26.1(c).
[37] FED. R. CIV. P. 26 cmt. background (2000).
[38] FED. R. CIV. P. 26(a)(1).
[39] ARIZ. R. CIV. P. 26.1(a).
[40] Although several attempts were made. *See* ADVISORY COMM. ON CIVIL RULES, CIVIL RULES SUGGESTIONS DOCKET (HISTORICAL) 6 (2009) (last visited Feb. 4, 2009) (detailing prior suggestions for amending federal pleading standards).
[41] 15 U.S.C. § 78u-4(b)(1) (2008).

necessary to resolve a circuit split.[42] The Supreme Court further altered the pleading landscape in 2007 by holding in an antitrust case that in order to survive a motion to dismiss, a complaint must contain allegations that support a "plausible" inference of wrongdoing, one that rises above a "speculative level."[43] The precise meaning of the Court's "plausibility" standard and the scope of its application beyond the realm of antitrust remains subject to debate, but perhaps some clarification will come soon. Currently before the Court is a case questioning the extent to which a plaintiff needs to plead specific facts to overcome a defense of qualified immunity on a motion to dismiss.[44]

F. Two Additional Considerations

1. Electronic Discovery

Over the past decade, the parabolic growth of electronically stored information (ESI) has presented new problems of cost and delay. Much ESI is stored on backup tapes designed to preserve information in the event of catastrophic system failure, and may be "not reasonably accessible" as an ordinary matter, meaning that the cost of restoring the data and producing it may be much higher than the regular cost to produce paper documents or even "reasonably accessible" ESI.[45] In a growing number of cases, the cost of restoring, reviewing and producing relevant ESI may be in the millions of dollars.[46] Not every case will require costly production of ESI, of course, but high costs are evident in enough cases that both litigation and pre-litigation behavior is affected. Amendments to the Rules in 2006 sought to address some of the issues raised specifically by electronic discovery, but deep concerns about the FRCP's ability to keep up with the rapid march of technology remain.[47]

2. Transsubstantive Nature of the Rules

A final issue, stemming less directly from discovery concerns but nevertheless significant, deals with the application of the FRCP to virtually all civil cases. The Rules were designed to be transsubstantive; that is, generally applicable across a broad range of case types. Initially hailed as one of the greatest achievements of the Rules, in recent decades this transsubstantivity has been questioned more openly and with increasing frequency.[48] The

---

[42] Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2504-05 (2007) (requiring that a strong inference of scienter be "more than merely plausible or reasonable – it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent.").

[43] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

[44] Iqbal v. Hasty, 490 F.3d 143, 153 (2nd Cir. 2007).

[45] *See* FED. R. CIV. P. 26(b)(2)(B); Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003).

[46] *See* INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, ELECTRONIC DISCOVERY: A VIEW FROM THE FRONT LINES 5 (2008) (calculating that for a "midsize" case involving the production of 500 GB of data, the cost of production is likely to be $2.5-3.5 million).

[47] *See, e.g.*, Beth Pariseau, *One Year After FRCP, Struggles Continue with E-Discovery*, STORAGE TECH. NEWS, Dec. 19, 2007, http://searchstorage.techtarget.come/news/article/0,289142,sid5_gci1286772,00.html (reporting that 82% of organizational respondents "had not yet started to address the challenges introduced by the amendments").

[48] *See* Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L. J. 718, 732-33 (1975) ("It is by no means intuitively apparently that the procedural needs of a complex antitrust action, a simple automobile negligence case, a hard-fought school integration suit, and an environmental class action … are sufficiently identical to be usefully encompassed in a single set of rules which makes virtually no distinctions among

criticism has by no means been unanimous[49]; however, despite their supporters, transsubstantive rules have indirectly come under attack by those calling for procedures that, by their provisions would necessarily entail selective application – *i.e*. would only be applicable to specific types of cases.[50]

Furthermore, the transsubstantive nature of the FRCP has been undermined by Congressional action and recent rulings handed down by the Supreme Court. The CJRA introduced a host of substance-specific procedures, albeit for a limited time, and the PSLRA changed the pleading standards for a specific set of case types. Perhaps unintentionally, recent Supreme Court rulings, by applying a different interpretation of a procedural rule in substance-specific contexts, have further undermined the transsubstantive nature of the FRCP.[51]

IV. Seeking a Second Opinion: Alternative Courses of Treatment

Despite the variety of treatments suggested and implemented over the last 30 years, the FRCP are still viewed by many as unable to fulfill the needs of modern litigation.[52] Alternative approaches, which would go beyond amending the existing rules, are increasingly under discussion.

A. Simplified Procedure Project

During the October 1999 meeting of the Civil Rules Advisory Committee, Judge Paul Niemeyer proposed a simplified rules regime for certain cases in federal court.[53] The suggestion met with a favorable response and the Committee's Reporter, Professor Edward Cooper, developed a draft detailing what a simplified procedure might look like.[54] Professor Cooper's draft was published for comment and discussion in 2002. The project has moved on and off the Committee's agenda since 1999, but has not moved past the discussion stage.[55]

---

such cases in terms of available process."); *see also* Robert G. Bone, *The Role of the Judge in the Twenty-First Century: Securing the Normative Foundations of Litigation Reform*, 88 B.U. L. REV. 1155, 1159-63 (2006); Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 333-34 (2008).

[49] *See, e.g.*, Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067 (1989)

[50] For example, calls for differential case management, simplified procedures, presumptive discovery limits based on case-type, etc.

[51] *See* Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. ___ (forthcoming 2009) (manuscript at 26-27, on file with authors).

[52] *See, e.g.*, Debra Lyn Bassett & Rex R. Perschbacher, *The Revolution of 1938 and Its Discontents*, 61 OKLA. L. REV. 275, 277 (2008).

[53] Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S. 39 (Oct. 14-15, 1999).

[54] Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794 (2002).

[55] Last discussed during the Civil Rules Advisory Committee's May 2008 meeting, at which the Committee considered – as part of its long-range planning – reviving the simplified procedure project; although it was noted that the prospects for success may be more promising if a new approach were identified. Advisory Comm. on Civil Rules, Judicial Conference of the U.S., Report of the Advisory Committee on Civil Rules to the Standing Committee 359 (2008).

As envisioned by Professor Cooper, the simplified procedure would have mandatory application for cases involving damages less than $50,000 and voluntary application for cases between $50,000 and $250,000 and cases otherwise excluded from the simplified procedure, where the parties so elect.[56] Pleadings would be required to state details of the time, place, participants and events that are the subject of the claim and all documents that the pleader may use to support the claim would need to be attached.[57] Disclosure of the names and contact information of individuals likely to have information as well as documents and other evidence that the party knows is relevant to facts disputed in the pleadings would occur within twenty days from the last pleading.[58] The procedure calls for presumptive limits on the tools of discovery and the use of expert witnesses is discouraged.[59] The draft rules also call for the early setting of a firm trial date and the Reporter's Comment suggests the court consider setting trial time limits.[60]

B. Transnational Principles of Civil Procedure

In 1999, the American Law Institute (ALI) and the International Institute for the Unification of Private Law (UNIDROIT) undertook a joint project to develop a set of procedural rules that would be applicable to transnational commercial disputes. The resulting Principles of Transnational Civil Procedure – and an unofficial set of accompanying Rules – seek to combine "the best elements of adversary procedure in the common law tradition with the best elements of judge-centered procedure in the civil law tradition."[61] They specifically reject U.S.-style notice pleading, instead requiring parties to plead relevant facts.[62] With the pleadings, parties must identify the principal documents that constitute the basis of the claim or concisely summarize expected witness testimony that will be relevant.[63] Parties are also directed to disclose any other evidence upon which they intend to rely and may not demand further production until first complying with the disclosure requirements.[64] The scope of discoverable evidence is initially determined by the pleadings and under the Principles the parties are expressly not entitled to disclosure of information that "appears reasonably calculated to lead to the discovery of admissible evidence."[65] Depositions are only allowed with court authorization.[66]

---

[56] For example, cases for interpleader under FRCP 22, cases for condemnation of real or personal property, etc. Draft Rule 102(a)-(c). Cooper, *supra* note 54, at 1805-06. The monetary limits were developed based on the findings of an FJC study that looked at all cases filed in federal courts from 1989 through 1998 for which information about a stated money demand was available. The study found that nearly quarter of a million cases in the ten years reviewed involved $50,000 or less, prompting Professor Cooper to define the simplified procedure's scope around this figure. *Id*. at 1797.

[57] Draft Rule 103(b). *Id*. at 1808.

[58] Draft Rule 105(b). *Id*. at 1813-14.

[59] No discovery requests may be made until after a pretrial conference or by either stipulation of both parties or court order. Where discovery is allowed, depositions are limited to three per party, each limited to three hours. Parties are only entitled to ten requests for admission and interrogatories and requests for production or inspection must specifically identify the things requested. Draft Rule 106(b)-(g), 108. *Id*. at 1815-17.

[60] Draft Rule 109(a). *Id*. at 1818-20.

[61] ALI/UNIDROIT, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE 11 (2007) [hereinafter ALI/UNIDROIT].

[62] PRINC. TRANSNAT'L CIV. P. 11.3.

[63] PRINC. TRANSNAT'L CIV. P. 11 cmt. P-11A-B.

[64] R. TRANSNAT'L CIV. P. 21.1 cmt. R 22-F.

[65] R. TRANSNAT'L CIV. P. 22 cmt. R-22H (quoting FRCP 26).

[66] PRINC. TRANSNAT'L CIV. P. 16.3; R. TRANSNAT'L CIV. P. 21.3.

Though crafted for very different types of cases, there are a number of common themes that run through the Simplified Procedure project and the Transnational Principles and Rules.[67] Both procedural systems employ a fact-based pleading standard, some mandatory document exchange, and limited discovery.[68] These same components have been, and are increasingly being, implemented in foreign common law jurisdictions in response to problems of cost, complexity and delay in the civil justice system.

C. Comparative Overview

There is a growing trend in foreign common law jurisdictions towards more stringent fact pleading, active case management and limited discovery. Recent rule changes in Nova Scotia and draft rule amendments in British Columbia require parties to plead the legal basis of their claims.[69] In Australia, efforts are underway to heighten the pleading standard.[70] Foreign jurisdictions are also narrowing their definition of relevant subject matter for discovery purposes – e.g., British Columbia, Alberta and Ontario in Canada;[71] the Australian territories of New South Wales, Queensland and South Australia;[72] and England and Wales.[73] There have also been calls in New Zealand to do the same.[74]

In these jurisdictions, limits on the tools of discovery and the individuals subject to discovery are the norm.[75] Furthermore, in the United Kingdom, New Zealand, the Australian Federal Court and throughout Canada, differentiated case management systems have been established, usually based on the monetary value of the claim, that limit discovery and scope of applicable procedures for cases.[76] In no other common law jurisdiction is discovery as expansive as it is in the United States.[77]

---

[67] *See* Stephen N. Subrin, *Reflections on the Twin Dreams of Simplified Procedure and Useful Empiricism*, 35 W. ST. U. L. REV. 173, 174-77 (2007) (finding that the Federal simplified procedure project, the Transnational Rules and state experiments with simplified procedure all share, at a minimum, some combination of detailed pleading and/or mandatory disclosure and limits on discovery).
[68] *See* Bassett & Perschbacher, *supra* note 52, at 285.
[69] SUP. CT. R. CIV. P. 2-1 (Proposed Official Draft 2008) (B.C.); R. CIV. P. 38.02 (N.S.).
[70] An increasing number of commentators are criticizing the pleading system as not being "sufficiently rigorous." BERNARD CAIRNS, AUSTRALIAN CIVIL PROCEDURE 158 (2007).
[71] *See* SUP. CT. R. CIV. P. 6-1(2)(a)(ii) (Proposed Official Draft 2008) (B.C.); R. CT. 186.1 (Alta.); Hon. Colin Campbell, Civil Rules Committee Decision on Osborne Recommendations 10 (Mar. 27, 2008) (unpublished collection, on file with the Institute for the Advancement of the American Legal System) (detailing the recent work of the Ontario Civil Rules Committee in replacing the "semblance of relevance" test with a "simple relevance test").
[72] CAIRNS, *supra* note 70, at 277.
[73] J.A. JOLOWICZ, ON CIVIL PROCEDURE 57 (2000).
[74] NEW ZEALAND LAW COMMISSION, REPORT NO. 78, GENERAL DISCOVERY (2002), *available at* http://www.austlii.edu.au/nz/other/nzlc/report/R78.
[75] *See, e.g.*, S.C. ORDINARY CAUSE R. 28.10-28.13 (Scot.); FED. CT. R. 24 (Austl.); HIGH CT. R. 369-81 (N.Z.).
[76] *See, e.g.*, FED. CT. R. 296-97 (Can.); R. OF CT. 659-73 (Alta.); CPR (26.8(2)) (Eng.); HIGH CT. R. 426(1), 426(3)(a)-(b) (N.Z.).
[77] *See* Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 309-12 (2002) (recognizing the extensive discovery in U.S. civil litigation but highlighting the role of civil litigation, lawyers, judges and juries in the U.S. governmental and societal structure); *see also* Marcus, *supra* note 14, at 304-05 (noting that the American litigation arrangement, particularly the broad discovery provisions were "not received with enthusiasm in all quarters …. One noteworthy quarter is the rest of the world.").

V. Experimental Treatment

A. Empirical Evidence in Rulemaking

In recent years, empirical data has played an increased role in Advisory Committee decisions on proposed rule amendments.[78] Since 1988, the Advisory Committee on Civil Rules has requested empirical research from the FJC for consideration in deciding on a number of proposed rule amendments, including amendments to Rules 11, 12(b)(6), 23, 26-37, 56 and 68.[79] The type of research provided by the FJC primarily consists of observational field studies, what Thomas Willging calls nonexperimental observational research. Unlike experimental research, nonexperimental research does not take place under conditions that the researcher controls.[80]

Despite the increased use of empirical research, commentators continue to point out the deficiencies in the nonexperimental observational research approach. It is the general consensus that a controlled experiment provides the most powerful and reliable way to generate casual inferences relating to the impact of a legal rule or procedure.[81] According to Carl Tobias, "[n]o individual or institution … can know exactly how the new provisions will in fact operate until judges have employed them, lawyers and litigants have attempted to comply with the measures, and the devices have received careful scrutiny."[82] Based on the limited benefit produced by the use of surveys and quasi-experimental designs, Laurens Walker calls for restricted field experiments to study every proposed change to the Rules.[83] Leo Levin points out that with the increased emphasis on ensuring procedural uniformity and eliminating inconsistencies, it becomes all the more important to "consider the need for a safety valve, a system for tolerating, and perhaps even fostering, inconsistent alternatives."[84]

B. Guidelines for Experimentation

1. Present & Future Use of Empirical Data

The absence of experimental research in rulemaking is not illustrative of an absence of interest to conduct such research. Rather, it suggests a "disconnect between the calls for empirical research and the range of designs available to researchers."[85] This disconnect is attributable in part to statutory design. The judiciary's rulemaking authority under the Rules

---

[78] *See* Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121, 1141-87 (2002).
[79] *See id.*
[80] *Id*. at 1143-44.
[81] *Id*. at 1130.
[82] Carl Tobias, *Complex Litigation at the Millennium: A Modest Reform for Federal Procedural Rulemaking*, 64 LAW & CONTEMP. PROB. 283, 286 (2001); *see also* Maurice Rosenberg, *The Impact of Procedure-Impact Studies in the Administration of Justice*, 51 LAW & CONTEMP. PROBS. 13, 14 (1988) ("The strength of this method lies in its ability to isolate the impact of the legal intervention under investigation by excluding all other factors that may account for the observed effects or relationships.").
[83] Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, 51 LAW & CONTEMP. PROBS. 67, 72-77 (1988).
[84] A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1578-79 (1991).
[85] Willging, *supra* note 78, at 1140.

Enabling Act is limited to rules of practice and procedure as opposed to those relating to substantive law, which are within the exclusive ambit of Congress.[86] Further, the Supreme Court is only authorized to prescribe "general rules" of practice and procedure, a term that has been understood to mean not inconsistent across federal judicial districts.[87] Rule 83 authorizes districts to promulgate local rules of practice and procedure, with the restriction that such local rules be consistent with federal statues and rules adopted under the Rules Enabling Act.[88]

The effect of these limitations is to preclude even limited and controlled experimentation with inconsistent rules in federal district courts. The standard for determining whether a rule is "not inconsistent" with the FRCP is somewhat ambiguous; however, at least one commentator has identified three distinct types of inconsistency that are proscribed by Rule 83 – provisions in direct contradiction, provisions inconsistent with the spirit of the rules, and provisions inconsistent with the basic scheme of the general rules.[89] Courts have held that local rules establishing heightened pleading requirements are inconsistent with the spirit of the rules and the Civil Rules Advisory Committee has previously characterized local rules establishing numerical limits on interrogatories as in conflict with the national rules.[90] Therefore, while Rule 83 and the Rules Enabling Act do not bar all experimentation, they may forbid experimentation with many of the procedural approaches detailed in Section IV above.

2. Blueprints for Experimentation

There were two previous attempts to amend Rule 83 to allow for experimentation with inconsistent rules. While both attempts were ultimately unsuccessful, they may provide a template for future proposals. The first attempt would have protected a local inconsistent rule from challenge on the basis of inconsistency for a period of two years.[91] The second attempt would have authorized a district to adopt an experimental local rule, inconsistent with the FRCP, for a period of five years or less with approval of the Judicial Conference.[92] Of the two approaches, the latter met with the most success within the Advisory Committee meetings as, rather than being rejected outright, the proposal was deferred by unanimous motion until local plans under the CJRA had been evaluated.[93] Discussion, however, has yet to be renewed.

Another option for experimentation would be to amend the Rules Enabling Act to allow the Supreme Court, Judicial Conference or Standing Committee to promulgate rules inconsistent

---

[86] "Such rules shall not abridge, enlarge or modify any substantive rule. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072(b) (2008).
[87] Willging, *supra* note 78, at 1201.
[88] FED. R. CIV. P. 83(a)(1).
[89] Levin, *supra* note 84, at 1573-75.
[90] *Id*. at 1574-75. *See also* Report on Local Rules, COMM. ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., REPORT ON LOCAL RULES TO THE CHIEF JUSTICE OF THE U.S. AND TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 10 (Feb. 1, 2004) (finding an "arguable conflict" with a local rule limiting the number of requests for production that can be served without court permission).
[91] This first attempt came about as a result of a 9-5 vote by the Civil Rules Advisory Committee in favor of asking the Standing Committee for permission to allow district courts to experiment with inconsistent rules. Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S. 6 (May 27-28, 1982).
[92] *See* ADVISORY COMM. ON CIVIL RULES, JUDICIAL CONFERENCE OF THE U.S., PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE 133 (May 3, 1991).
[93] Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S. 2 (Nov. 12-14, 1992).

with the Federal Rules for a limited period of time. A proposed amendment that would have vested rulemaking authority in the Judicial Conference – although not for the purposes of experimentation – was unsuccessful in 1985.[94] For the purposes of experimentation, there is debate as to whether the Judicial Conference or the Standing Committee would be the most appropriate body in which to vest authority to create experimental rules – the merits of the debate center on the Standing Committee's perceived superior expertise and resources to commit to rulemaking and monitoring experimentation.[95]

Last, in the spirit of the Judicial Improvements and Access to Justice Act[96] and the Civil Justice Reform Act, a further possibility would be to secure stand-alone legislation authorizing experimentation with inconsistent rules.

C. The Future of Experimentation

In recent years, there appears to be an increased willingness on behalf of rulemakers, courts, academics and practitioners to reconsider the merits of heightened pleading, limited discovery and other procedures inconsistent with existing rules and statutes. As previously discussed, the Supreme Court and Congress have bypassed experimentation completely in their imposition of heightened pleading standards in certain types of cases. In light of these developments and in recognition of the increasing strain on the system, the Civil Rules Advisory Committee has committed to a renewed discussion on the interplay between notice pleading and discovery, specifically considering the strains imposed by electronic discovery.[97] Vital to this discussion is "disinterested and expert empirical research" that "will be invaluable even if the conclusion is that there is no need to consider reform again before 2020."[98]

VI. Conclusion

From a practical perspective, two potential fates await the FRCP. The first, as Professor Jay Tidmarsh fears, is that the Rules will eventually succumb to the pressures of modern civil litigation. If a regular course of minor amendments does not sufficiently deal with the problems of modern litigation, the civil justice process – as embodied in the Rules – will continue to decline.

For those not wishing to witness the further decline of the Rules, there is another possible outcome – one that would revive the FRCP. Data collection about existing rules schemes, such

---

[94] *See Proposed Amendments to the Rules Enabling Act: Hearings Before Subcommittee on Courts, Civil Liberties, and the Administration of Justice* 32-33, 40 (testimony of Alan Morrison) Apr. 21, 1983 [hereinafter *Hearings*].
[95] *See* Willging, *supra* note 78, at 1197, 1204; *see also Hearings*, *supra* note 94, at 32 (testimony of Alan Morrison) (expressing concern regarding a perceived lack of expertise and resources that the Judicial Conference would be able to dedicate to rulemaking); *but cf. id*. at 83 (testimony of James Holderman) (commenting that it would be more appropriate to vest rulemaking authority in the statutorily created body – the Judicial Conference – rather than a committee created by that body).
[96] Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4642 (codified as amended at 28 U.S.C. 332(d)(4), 2071-2074 (1994)).
[97] Memorandum from the Civil Rules Advisory Committee to the Standing Committee on Rules of Practice and Procedure 117-18 (Dec. 9, 2008), *reprinted in* Agenda, Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S. 112-18 (Jan. 2009).
[98] *Id*. at 118.

as that in Arizona state courts, that offer different approaches to these problems would provide grist for the Rules decision-makers. Additionally, a more robust program of controlled and monitored experimentation would ensure that future treatments have been rigorously tested and their effectiveness backed by empirical data.

The FRCP were drafted for a time and litigation culture vastly different than the one today. What has remained consistent, however, for the past 70 years is the idea that a set of rules and procedures can work together to ensure "the just, speedy, and inexpensive determination of every action and proceeding."[99] Though specific rules may be failing to meet this goal, the idea and potential are still very much alive.[100]

[99] FED. R. CIV. P. 1.

[100] *See* Steven S. Gensler, *Justness! Speed! Inexpense! An Introduction to "The Revolution of 1938 Revisited: The Role and Future of the Federal Rules,"* 61 OKLA. L. REV. 257, 273 (2008) ("If there is agreement among our contributors, it may be that the future of federal rulemaking depends not on finding new ideals but on fidelity to the ones we have.").