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REAL-WORLD RULES: EASING THE LIFE OF LITIGATION

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The present Rules of Civil and Appellate Procedure¹ are good rules, carefully constructed by committees on rules of the Judicial Conference of the United States² and approved by the Conference,

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¹ The Federal Rules of Civil Procedure were adopted by the United States Supreme Court on December 20, 1937, and became effective on September 16, 1938. The Rules are drawn under the authority of 28 U.S.C. § 2072 (1982). Section 2072 provides in pertinent part:

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice

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 (1982).

Promulgation of the Federal Rules was intended "to reverse the philosophy of *conformity* to local state procedure and establish . . . an approach of uniformity within the whole federal judicial trial system." *Monarch Ins. Co. v. Spach*, 281 F.2d 401, 408 (5th Cir. 1960); *see also* Orders Adopting Revised Rules of the Supreme Court of the United States, 346 U.S. 945, 946 (1954) ("principal function of procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts").

The Federal Rules of Appellate Procedure were adopted by the Supreme Court on December 4, 1967, and became effective on July 1, 1968. These rules are drawn under the authority of 28 U.S.C. §§ 2072, 2075 (1982), and 18 U.S.C. §§ 3771, 3772 (1982), which give the Supreme Court the power to "make rules of practice and procedure for all cases within the jurisdiction of the courts of appeals." FED. R. APP. P. 1 advisory committee's note.

The Rules of Appellate Procedure were "designed as an integrated set of rules to be followed in appeals to the courts of appeals, covering all steps in the appellate process." FED. R. APP. P. 1 advisory committee's note. The purpose of the Rules was to "bring litigation to an end and to discourage dilatory tactics." *McCormack v. Schindler*, 520 F.2d 358, 362 (2d Cir. 1975); *see also* Cramton, *Federal Appellate Justice in an Era of Growing Demand*, 59 CORNELL L. REV. 571 (1974) (discussing problems faced by appellate courts due to mounting number of appeals and possible solutions).

² The Judicial Conference was created in 1958 pursuant to 28 U.S.C. § 331. The Conference is made up of the Chief Justice of the United States Supreme Court, the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge

the Supreme Court, and Congress. Experience being the great teacher, however, and nothing produced by humans being immune from improvement, there may be a few changes worthy of consideration in light of what actually goes on in the courts. The underlying concept of this short Article is that rules of procedure fit to practice should fit the practice.

Discussed in the limited space available here are minimal changes looking toward clarification of complaints, avoidance of unnecessary remands, reduction of appendices, and improvement in oral argument. Other simplifying desiderata, like highlighting of and adherence to burdens of proof, and who-goes-first-on-what in the course of a trial, may not lend themselves to rule making and would, in any event, require prohibitively extensive discussion.

Neither the concepts nor the language set out here is immutable. Neither may survive the gentle ministrations of a rules committee. They are nonetheless set forth as potential grist for the slowly grinding mills employed in the rule making process.

COMPLAINTS

Complaints, cross-claims, and counterclaims are designed to tell the court and the opposing party what the claimants grievances are and what should be done about them.³ That is what is

from each judicial circuit. *Id.* Pursuant to section 331, the Conference is ordered to recommend changes to "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay." *Id.*

The Judicial Conference allows the Supreme Court "to secure the advice and assistance of an existing group which is uniquely qualified to give advice on these matters." S. REP. NO. 1744, 85th Cong., 2d Sess., reprinted in 1958 U.S. CODE CONG. & ADMIN. NEWS 3023, 3024.

³ Federal Rule of Civil Procedure 8 establishes the form and function of the complaint. It provides in pertinent part:

(a) . . . A pleading . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. . . .

(e)

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

FED. R. CIV. P. 8.

The rule "envisions the presentation of factual allegations of sufficient clarity and certainty to enable defendant to determine the basis of plaintiff's claim and to formulate a responsive pleading." *Edwards v. North Am. Rockwell Corp.*, 291 F. Supp. 199, 211 (C.D. Cal. 1968). Rule 8 neither imposes upon the plaintiff the burden of specifying his theory of recovery nor requires such plaintiff to set forth in detail the facts upon which such theory rests. *See Asphaltic Enters. v. Baldwin-Lima-Hamilton Corp.*, 39 F.R.D. 574, 576 (E.D. Pa. 1966). In sum, the purpose of rule 8 "is to eliminate prolixity in pleading and to achieve

meant, and all that is meant, by "notice pleading."⁴ In practice, however, far too many claimants are simply unable to avoid the temptation to include allegations and assertions designed to knock down defenses the pleader anticipates.

Cluttering complaints, cross-complaints, and counterclaims with allegations and assertions designed to defeat anticipated defenses should not have to be forbidden by rule. It is a useless, wasteful, and usually counterproductive practice, having nothing to recommend to any complainant not wedded to obfuscation. Yet, the practice of attempting to meet as-yet-unstated defenses is seen so often as to warrant consideration of a rule designed to bring it to a halt.

The practice is useless and wasteful because the anticipated defense may not have occurred to or been found attractive by the defendant. If, perchance, an opponent has failed to recognize a defense, the practice is not only wasteful, but counterproductive in its potential for suggesting that defense. In all events, the claimant rarely, if ever, gains by playing, right from the start, in defendant's ball park.⁵ Thus, there should be added at the end of Federal Rule of Civil Procedure 8(a) this or a similar sentence: "Assertions designed to meet anticipated defenses shall not be included."

brevery, simplicity, and clarity." *Knox v. First Sec. Bank of Utah*, 196 F.2d 112, 117 (10th Cir. 1952).

⁴ See 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 (1977 & Supp. 1987). At common law, pleadings served several purposes: giving notice of the nature of the claim, stating the facts, narrowing the issues to be litigated, and providing a means of quickly disposing of frivolous claims and meritless defenses. *Id.* Today, under the Federal Rules of Civil Procedure, pleadings are intended only to serve the function of giving notice to the defendant of the nature of the claim. *Id.* "Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957); see also *Lake Shore Nat'l Bank v. Knott Hotels Corp.*, 69 F.R.D. 573, 574 (N.D. Ill. 1975) (pleadings that afford opposing party fair notice are legally sufficient).

⁵ See *Franchise Tax Bd. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 10 (1983) (complaint anticipating federal law defense to state law claim does not confer federal court jurisdiction); *Quiller v. Barclays American/Credit, Inc.*, 727 F.2d 1067, 1069 (11th Cir.) (complaint attempted to negate anticipated defense; district court concluded that on its face it barred claim and dismissed under rule 12(b)(6)), *cert. denied*, 476 U.S. 1124 (1984); *Skippy, Inc. v. CPC Int'l, Inc.*, 674 F.2d 209, 215 (4th Cir.) (complaint alleging fraudulent procurement of release does not necessarily entitle plaintiff to jury trial on that issue), *cert. denied*, 459 U.S. 969 (1982).

REMANDS

When a judgment entered by a district court is for some reason incomplete, remand is often required.⁶ Every avoidable remand is a waste of judicial and client resources; yet there are today too many such remands. The district court may have simply failed to mention a dispositive issue, or failed to make required findings, or failed to rule on a dispositive motion. Whatever may have rendered unreviewable the judgment or critical judgment part, the appellate court is forced to remand the case⁷ and thereby add to an already crowded district court docket.

In so many instances, it is clear that the district court could, with relative ease, have supplied missing findings in response to a motion under Federal Rule of Civil Procedure 52(b)⁸ or could have

⁶ The federal appellate courts may exercise their power to remand for many reasons. For example, an appellate court may remand for a determination on whether the federal courts have jurisdiction over the particular matter. *See Jason's Foods, Inc. v. Peter Eckrich & Sons, Inc.*, 768 F.2d 189, 190 (7th Cir. 1985). The appellate court can then direct the proceedings of the district court while retaining jurisdiction. *See id.* at 191. *See generally* 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 3937 (1977 & Supp. 1987) [hereinafter WRIGHT & MILLER] (discussion of retained jurisdiction). Additionally, the appellate court may exercise a limited remand to the district court requesting the district court to clarify the record so as to enable the appellate court to decide the issues on appeal. *See, e.g., United States v. Wong-Alvarez*, 779 F.2d 583, 585 (11th Cir. 1985) (per curiam) (remand with request that district court judge state his reasons for requiring chosen bond with specified security); *United States v. Theriault*, 526 F.2d 698, 699 (5th Cir.) (per curiam) (remand with request that district court judge supplement record with reasons for requiring defendant to be shackled during trial), *cert. denied*, 429 U.S. 898 (1976). *See generally* 16 WRIGHT & MILLER, *supra*, § 3937, at 272-73 (discussing remands for clarification of action and failure to rule on alternative motion). Finally, remand may also be utilized "to avoid a possibly unnecessary constitutional decision." *United States v. American Tel. & Tel.*, 551 F.2d 384, 385 (D.C. Cir. 1976).

⁷ *See, e.g., Pretty Punch Shoppettes, Inc. v. Hauk*, 844 F.2d 782, 784-85 (Fed. Cir. 1988) (remanding because district court made insufficient findings of fact under rule 52(a)); *see also Louis Vuitton S.A. v. K-Econo Merchandise*, 813 F.2d 133, 134-35 (7th Cir. 1987) (same); *De Medina v. Reinhardt*, 686 F.2d 997, 1011 (D.C. Cir. 1982) ("Because the district court's opinion is bereft of reference to the retaliation claim, we must remand for findings on this issue."); *Ramey Constr. Co. v. Apache Tribe*, 616 F.2d 464, 467-68 (10th Cir. 1980) (case remanded for findings on issues not addressed in district court's findings and conclusions).

⁸ FED. R. CIV. P. 52. Rule 52 provides in pertinent part:

(a) . . . In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon. . . .

(b) . . . Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly.

filled gaps in the judgment in response to a motion under rule 59(e).⁹ Currently, there is no requirement that either party give the district court that opportunity.¹⁰ On the contrary, and all too frequently, the loser at trial races off to complain to the appellate court about the incompleteness of the findings or the judgment.

Thus, something similar to this sentence should be added at the end of rule 52(b): "A party who on appeal obtains a remand to make a missing finding shall pay the costs and attorney fees incurred on remand by the other side, unless the party has, under this rule, requested the court to make that finding."¹¹ Similarly, this or a like sentence should be added at the end of rule 59(e): "A party who on appeal obtains a remand to complete a judgment shall pay the costs and attorney fees incurred on remand on the other side, unless the party has, under this rule, requested the court to cure the incompleteness."

APPENDICES

Appendices have tended to be too massive and too expensive.¹²

The purposes of rule 52 are to enable appellate courts to determine the basis for trial court decisions, to enable a defeated party to determine whether a case presents a question worthy of appeal, and to avoid appellate courts having to search through massive records to supply findings of facts. *See Michener v. United States*, 177 F.2d 422, 424 (8th Cir. 1949); *see also United States v. Merz*, 376 U.S. 192, 199 (1964) (requirement that judges explain basis for findings results in greater care and consideration before reaching decisions).

A motion made under Federal Rule of Civil Procedure 52(b) is intended to "correct manifest errors of law or fact or to present newly discovered evidence," not to "relitigate old matters" or to "allow the parties to present the case under new theories." *Evans, Inc. v. Tiffany & Co.*, 416 F. Supp. 224, 244 (N.D. Ill. 1976).

⁹ FED. R. CIV. P. 59(e). Rule 59(e) provides that "[a] motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." *Id.* Subdivision e was part of the 1946 amendment to rule 59 and was added to "make[] clear that the district court possesses the power . . . to alter or amend a judgment after its entry." FED. R. CIV. P. 59(e) advisory committee's note.

¹⁰ *See* 5A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 52.10 (2d ed. 1988) (rule 52); 6A J. MOORE, J. LUCAS & G. GROTHEER, MOORE'S FEDERAL PRACTICE ¶ 59.14 (2d ed. 1987) (rule 59).

¹¹ It would be well advised to also add "of findings made by the court," after "for purposes of review," in rule 52(a).

¹² In order for the circuit courts of appeals to decide the issues on appeal, it is necessary that they have the relevant portions of the record before them. *See* 16 WRIGHT & MILLER, *supra* note 6, § 3976, at 436-37. Since the federal appellate courts do not have the time to examine the entire official record, however, it is essential that their attention be directed to those parts of the record which support the appellant's claims. The appendix provides the means to achieve this end.

A second, admittedly incidental, benefit provided by the use of appendices is that it decreases costs to the parties. *See Morrison v. Texas Co.*, 289 F.2d 382, 385 (7th Cir. 1961);

Recognizing the difficulty in designating parts of the record before writing the brief, and the consequently frequent over-designation of material never thereafter mentioned, Federal Rule of Appellate Procedure 30 was amended to provide sanctions for including unnecessary material in the appendix, and to provide for deferred preparation of the appendix.¹³ Sanctions were rare, and deferred appendices were not so greatly reduced as to warrant the added time from filing to hearing. With that experience as teacher, the court on which I serve designed, adopted, and found thoroughly workable this portion of its rule 12:

(d) *Designation of Material.* Designation of material from which the appendix will be prepared shall be in accord with FRAP 30(b), except that the time for such designation shall run from the date of docketing. Within 10 days after the parties have designated that material, the appellant or petitioner shall assign consecutive page numbers to the designated material and shall serve upon all the parties a table reflecting the page number(s) of each item designated. The first page numbers shall be assigned to the judgment or order appealed from and any opinion, memorandum, or findings and conclusions supporting it. One copy (which may be in micrographic format) of a physical compilation of the designated material with the assigned page numbers shown thereon may be served upon all the parties in lieu of the table, at the option of the appellant or petitioner. The compilation of designated materials is not the appendix and shall not be filed with the court. (e) *Preparation of Appendix.* The appellant or petitioner shall prepare the appendix to be filed with the court from

see also *Oliver v. Michigan State Bd. of Educ.*, 519 F.2d 619, 622 (6th Cir. 1975) ("It behooves . . . lawyers . . . to be careful not to designate portions of a transcript for printing which are not necessary Otherwise their clients may be forced to pay large sums of money which they can ill afford to pay."). In addition to avoiding unnecessary expenses for the client, Federal Rule of Appellate Procedure 30 also provides a second incentive for the attorney to use care in selecting appendix materials, as "the inclusion of unnecessary material in the appendix" may subject the attorney himself to the imposition of sanctions. See *infra* note 13 (text of rule 30(b)).

¹³ FED. R. APP. P. 30. Rule 30 provides in pertinent part:

(a) . . . The appellant shall prepare and file an appendix to the briefs

(b) . . . The parties are encouraged to agree as to the contents of the appendix. . . . Each circuit shall provide by local rule for the imposition of sanctions against attorneys who unreasonably and vexatiously increase the costs of litigation through the inclusion of unnecessary material in the appendix.

(c) . . . If the court shall so provide by rule for classes of cases or by order in specific cases, preparation of the appendix may be deferred until after the briefs have been filed

Id.

the designated material by selecting therefrom mandatory items and pages specifically referred to in the briefs of the parties. Pages of the designated material which are not referenced in the briefs (other than the mandatory items) shall be omitted from the appendix filed with the court. If a transcript of the proceedings is required before the material can be designated and if the transcript has been ordered but not completed within the time periods prescribed by this rule and FRAP 30(b), a party may request an extension of time within which to designate the material.¹⁴

The appendices filed since adoption of the foregoing rule have been uniformly shorter and, thus, less expensive than those earlier seen. The minimal delay has proven a small price to pay for that benefit. As further assurance, the court reminds counsel that it can always order up the record or parts of the record, though the need to do so has rarely surfaced.

ORAL ARGUMENT

Having sat with many different panels on every one of the federal appellate courts, I can attest that each is a "hot bench." The judges have read the briefs and conferred with their law clerks before the hearing. At the same time, oral arguments run fifteen to twenty minutes per side.¹⁵ It is simply unfair to counsel for appel-

¹⁴ FED. CIR. R. 8.

¹⁵ Federal Rule of Appellate Procedure 34 governs the procedure regarding oral argument. It provides in pertinent part:

(a) . . . Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard:

Oral argument will be allowed unless

(1) the appeal is frivolous; or

(2) the dispositive issue or set of issues has been recently authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

FED. R. APP. P. 34; *see also* SUP. CT. R. 38 (governing oral argument before United States Supreme Court).

Although necessarily subject to many limitations, oral argument in an appropriate case may prove invaluable. As the Commission on Revision of the Federal Court Appellate System has noted, oral argument "contributes to judicial accountability, . . . guards against

lant to require devotion of even a few of those precious minutes to telling the court what it already knows, and counsel should be free to devote the entirety of his or her limited time to the merits of the appeal. Thus, the middle sentence of Federal Rule of Appellate Procedure 34(c), stating that "[t]he opening argument shall include a fair statement of the case,"¹⁶ should be deleted.

CONCLUSION

A thorough exploration and explication of the effects on other rules that the changes in rules 8, 52(b), and 52(e) of the Federal Rules of Civil Procedure, and rule 34(c) of the Federal Rules of Appellate Procedure may have remains to be undertaken. To say whether the evils the changes are designed to cure occur often enough would require study beyond the capacity at hand. It will be enough if these four suggestions result in a dialogue looking to ease the lives of litigants, lawyers, and courts.

undue reliance upon staff work, and . . . promotes understanding in ways that cannot be matched by written communication." Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, reprinted in 67 F.R.D. 195, 254-55 (1975).

¹⁶ FED. R. APP. P. 34(c). Federal Rule of Appellate Procedure 34(c) provides that "[t]he appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Counsel will not be permitted to read at length from briefs, records or authorities." *Id.*