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Abstract: The misuse of legal language is both rampant and problematic. This is particularly true with respect to the terminology employed by the Federal Rules of Civil Procedure. This Article begins with a general discussion of the importance of using proper legal terminology (with an emphasis on Rules terminology), followed by a discussion as to why, in spite of the problems caused by the misuse of legal terminology, such misuse persists. The Article then considers six Rules terms that should be familiar to every attorney—*action*, *claim*, *averment*, *paper*, *dismissal*, and *judgment*—and discusses the various ways in which these terms are being misused, and the problems caused thereby. The Article concludes that, in many instances, the cause of the confusion rests in the Rules themselves, suggesting a need for amendment. The Article also proposes a substantial amendment to Rule 58, the rule governing the entry of judgments, in order to allay the numerous problems currently associated with the so-called separate document requirement.

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"Rose is a rose is a rose is a rose."[1]

"Our investigation is therefore a grammatical one. Such an investigation sheds light on our problem by clearing misunderstandings away. Misunderstandings concerning the use of words, caused, among other things, by certain analogies between the forms of expression in different regions of language.—Some of them can be removed by substituting one form of expression for another; this may be called an "analysis" of our forms of expression, for the process is sometimes like one of taking a thing apart.

. . . .

It can also be put like this: we eliminate misunderstandings by making our expressions more exact . . . ."[2]

"Make sure you know the exact meaning of a word before using it in public. You might be caught saying something you didn't mean."[3]

I. INTRODUCTION

Most attorneys[4] probably recall reports of the Arkansas federal district court's April 1, 1998 grant of summary judgment in favor of President Clinton with respect to the remaining claims in the Paula Jones sexual harassment action.[5] Newspaper reporters used a variety of terms to describe the court's decision; many described the action as having been dismissed.[6] That was not surprising, as newspaper reporters should not

1. GERTRUDE STEIN, *Sacred Emily*, *in* WRITINGS 1903–1932, PORTRAITS AND OTHER SHORT WORKS 395 (1998).

2. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 43e (G.E.M. Anscombe trans., Basil Blackwell 1953).

3. Francis Drake, *Horoscope* (for Scorpio), MOSCOW-PULLMAN DAILY NEWS, Mar. 14, 2001, at 6B.

4. Actually, some might prefer *lawyers* (or, depending on the situation, *counselors*), but this is an article about the terminology used in the Federal Rules of Civil Procedure, and the Rules appear to prefer *attorney*. *See, e.g.*, FED. R. CIV. P. 11.

Incidentally, in this Article, I have at times departed from the strict requirements of the *Bluebook* when citing to the Federal Rules of Civil Procedure. In the interest of brevity, whenever the Rule referenced in the text or footnotes is clear, I have not provided a formal citation.

5. *See* Jones v. Clinton, 990 F. Supp. 657 (E.D. Ark. 1998).

6. *E.g.*, Peter Baker, *Jones v. Clinton Suit Dismissed; Judge Finds "No Genuine Issues for Trial,"* WASH. POST, Apr. 2, 1998, at A1; Francis X. Clines, *Testing of a President: The Overview; Paula*

be expected to be familiar with the workings of the Federal Rules of Civil Procedure. But it was surprising (and a little disappointing) that the court *itself*, at the conclusion of its opinion, described the action as having been dismissed.[7] Surprising and disappointing because a grant of summary judgment, even in favor of a defendant, does not result in a dismissal of the underlying claims.[8]

The misuse of legal language—such as the *Jones* court's failure to appreciate the distinctions between summary judgments and dismissals—is a problem. The primary reason it is a problem stems from the unique relationship between law and language. On this subject, Peter Tiersma recently wrote:

> Our law is a law of words. Although there are several major sources of law in the Anglo-American tradition, all consist of words. Morality or custom may be embedded in human behavior, but law—virtually by definition—comes into being through language. Thus, the legal profession focuses intensely on the words that constitute the law, whether in the form of statutes, regulations, or judicial opinions.
>
> Words are also a lawyer's most essential tools. Attorneys use language to discuss what the law means, to advise clients, to argue before a court or jury, and to question witnesses. The legal rights and obligations of their clients are created, modified, and terminated by the language contained in contracts, deeds, and wills. Few professions are as dependent upon language. The average lawyer's daily routine consists almost entirely of reading, speaking, and writing.
>
> . . . .

Jones Case Is Dismissed; Judge Says Even if Tale Is True, Incident Was Not Harrassment, N.Y. TIMES, Apr. 2, 1998, at A1.

7. Actually, the court used the word *case*, rather than *action*. *Jones*, 990 F. Supp. at 679 ("For the foregoing reasons, the Court finds that the President's and Ferguson's motions for summary judgment should both be and hereby are granted. There being no remaining issues, the Court will enter judgment dismissing this case."). *Action* would have been the preferable term. *See infra* Part III.A.

8. *See infra* Part III.E.

In using *Jones* as an example (and this case is used throughout), I mean no disrespect for that court, nor do I have any reason to question the substantive correctness of its decision in that case. The same applies with respect to all of the examples used in this Article. And, certainly, I am no less prone to errors than anyone else.

> . . . Legal language is not merely the most important tool of the average lawyer, or just an interesting research area for linguists. The law and its language affect the daily lives of virtually everyone in our society.[9]

Indeed, as this passage indicates, law and language are not merely related; they are inseparable. As a result, the misuse of legal language can, and often does, lead to legal misunderstanding. In many instances, the consequences are grave.

And yet, as this Article will demonstrate, errors in the employment of procedural terminology such as occurred in *Jones* are relatively common. The reasons why, as well as the reasons why it is important to use proper procedural terminology in the first instance, are discussed in Part II. In Part III of the Article, the focus then shifts to six terms found throughout the Federal Rules of Civil Procedure that should be familiar to every attorney—*action*, *claim*, *averment*, *paper*, *dismissal*, and *judgment*—and the discussion turns to the various ways in which each of these terms, in spite of their seeming familiarity and even their importance, are almost continuously being misused. In some instances, the problem lies in the text of the Rules itself, suggesting a need for reform.[10]

The goals of this Article are several. The first goal is to convince the readers that they should try to reach an understanding of both the terms employed by the Rules and the meanings of those terms. Once those terms and meanings are properly understood, care should be taken to use

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9. PETER M. TIERSMA, LEGAL LANGUAGE 1 (1999); *see also* BRIAN BIX, LAW, LANGUAGE, AND LEGAL DETERMINACY 1 (1993) ("Language is the medium through which law acts. The nature of the medium necessarily has a pervasive effect on what purposes can be achieved through the law and how well those purposes can be forwarded."); DAVID MELLINKOFF, THE LANGUAGE OF THE LAW vii (1963) ("The law is a profession of words."); John Gibbons, *Language Constructing Law*, *in* LANGUAGE AND THE LAW 3, 3–4 (John Gibbons ed., 1994) ("Language is then central to the law, and law as we know it is inconceivable without language. Many lawyers pride themselves upon their mastery of language, and regard such mastery as a critical skill for legal professionals."); Judith N. Levi, *The Study of Language in the Judicial Process*, *in* LANGUAGE IN THE JUDICIAL PROCESS 3, 4 (Judith N. Levi & Anne G. Walker eds., 1990) ("[I]t does not take very extensive reflection to recognize the fact that the outcome of virtually *all* dimensions of the judicial process in its day-to-day applications is at least in part a function of what is said, by whom, to whom, and how."); Brenda Danet, *Language in the Legal Process*, 14 L. & SOC'Y REV. 445, 448 (1980) ("Words are obviously of paramount importance in the law; in a most basic sense, the law would not exist without language."); James B. White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415, 415 (1982) ("Law is in a full sense a language, for it is a way of reading and writing and speaking and, in doing these things, it is a way of maintaining a culture, largely a culture of argument, which has a character of its own.").

10. Though the principal focus of this Article is on the terminology employed by the Federal Rules of Civil Procedure, most of what is said applies as well to those many bodies of state rules of civil procedure that are based on the federal rules.

the correct term (and no other) wherever appropriate. Conversely, that same term should not be used where inappropriate—i.e., it should be reserved for its particular purpose. By using proper procedural terminology, legal communication, and even the development of the law, will be greatly improved, and many serious problems will be avoided.

II. A GENERAL CALL FOR THE UNDERSTANDING AND PROPER USE OF LEGAL TERMINOLOGY

> *"If communication is defined as expression that is clearly and easily understood, much of the written and oral expression of the legal profession simply fails to measure up to the definition. Inability to communicate afflicts all segments of the profession and is now pervasive enough to be classified as a crisis. It deserves our attention because the effective transmission of information, thoughts, ideas, and knowledge is essential to the efficient operation of our legal system. Ineffective expression in legal discourse diminishes the service of the bar, impedes the resolution of disputes, retards legal progress and growth, and, ultimately, undermines the rule of law."*[11]

As with any profession, it is important—sometimes critically important—for attorneys to arrive at a common understanding of the terminology they employ, and then to properly use that terminology. Though the truth of this proposition might seem self-evident, a brief discussion of the reasons why this is so should help underscore the urgency of the situation.

The need for terminological precision has long been recognized by philosophers of language. As summarized by John Hospers:

> Philosophy is full of disagreements. But to clear the decks and make our task simpler, let's first consider one kind of disagreement that, if we're not careful, will get in our way and cause needless confusion. These are *verbal* disagreements, disputes that seem to be about facts but are actually about the words in which the disputes are expressed. The resolution of the dispute depends not on discovering any further facts but only on

11. Roger J. Miner, *Confronting the Communication Crisis in the Legal Profession*, 34 N.Y.L. SCH. L. REV. 1, 1 (1989) (citation omitted).

> coming to agreement about the meanings of the words being used in the dispute.[12]

Similarly, Ernst Mayr, in addressing the problems that arise as a result of imprecision in the use of scientific (and particularly biological) terminology, writes:

> Each branch of science has its own terminology for the facts, processes, and concepts of its field. When a term refers to an object or individual—mitochondria, chromosomes, nucleus, gray wolf, Japanese beetle, dawn redwood—it usually poses no problem. But a large class of terms refer to more heterogeneous phenomena or processes; competition, evolution, species, adaptation, niche, hybridization, variety are some that are encountered in biology. When these terms are understood exactly the same way by all workers, they are helpful and indeed necessary. However, as the history of science has shown, that is often not the case, and the result is misunderstanding and controversy.[13]

Mayr then asserts that "[t]hree kinds of problems with language are encountered by the working scientist."[14]

> First, the meaning of a term may change as our knowledge of the subject grows. Such changes in meaning are not surprising, since scientific terms are usually borrowed from daily language and have all the vagueness and imperfections of this prior usage. Terms like force, field, heat, and so on used in modern physics have distinctly different meanings from earlier periods. The complex gene of the modern molecular biologist, with its flanking sequences, exons and introns, and other elaborations, is utterly different from the early "beads on a string" notion and even from the more sophisticated concept of H.J. Muller; yet the word "gene," which was first introduced by Johannsen in 1909, is still used to describe this entity. Because almost all scientific terms undergo a certain amount of change, it would be most confusing to introduce a new term with every minor change of meaning; new terms should be reserved for truly drastic changes. Indeed, technical terms must have a good deal of "openness" to permit the incorporation of further findings.

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12. JOHN HOSPERS, AN INTRODUCTION TO PHILOSOPHICAL ANALYSIS 6 (4th ed. 1997).

13. ERNST MAYR, THIS IS BIOLOGY 57 (1997) (citation omitted).

14. *Id.*

> The second problem for the working scientist is that some terms have been unwittingly transferred from a given phenomenon or process to an entirely different one. This is well illustrated by T.H. Morgan's application of De Vries's term "mutation" to any sudden change in the genetic material; for De Vries, a mutation was an evolutionary change that would instantaneously make a new species. It was an evolutionary more than a genetic concept. It took the nongeneticists some 30 to 40 years to understand that Morgan's mutations were not the same as De Vries's mutations. It is a basic principle of the language of science that a term which is in more or less universal use as the designation of a particular entity should not be transferred to a different entity. Violation of this principle invariably leads to confusion.
>
> Perhaps most frequent and most confusing is the use of the same term for several different phenomena. In much of the philosophical literature, a great deal of logical sophistication is employed in the analysis of certain terms, but surprisingly little attention is paid to a term's possible basic heterogeneity. Examples are "teleological," a term used for at least four entirely different processes; "group" (as in group selection), which again refers to four different kinds of phenomena; "evolution," which has been applied to three very different processes or concepts; and "Darwinism," a term which has continuously changed its meaning.[15]

Each of the problems identified by Mayr with respect to scientific terminology apply as well to legal terminology, including procedural terminology. As is true of scientific terms, most procedural terms also were taken from everyday language, and many have changed in meaning over time. For example, the word *judgment* originally referred to any "formal utterance or pronouncing of an authoritative opinion after judging."[16] But upon the adoption of the Federal Rules of Civil Procedure in 1937,[17] the legal meaning of the term *judgment* (at least for

15. *Id.* at 57–58 (citations omitted).

16. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1223 (1993). For a discussion as to the selection of this particular dictionary, as well as the seventh edition of *Black's Law Dictionary*, as the sources of the general and legal definitions used in this Article, see *infra* notes 90–95 and accompanying text.

17. *See* Order of Dec. 20, 1937, 302 U.S. 783 (1938).

purposes of the Rules) was limited to those district court orders or decrees "from which an appeal lies."[18]

As with what might be called the "change in meaning" problem, the "transfer" problem described by Mayr likewise is troublesome in the law. For example, *pleading* is a procedural term that, despite a narrow and well-established Rules definition,[19] has been improperly used by some attorneys to refer to a much broader class of papers.[20]

Finally, as with the sciences, the "heterogeneity" problem occurs in the law. One well-known example is the word *case*. *Black's Law Dictionary* lists seven definitions of "case," including (in the civil context alone) "a proceeding, action, suit, or controversy at law or in equity";[21] an "argument";[22] and an "instance, occurrence, or situation."[23] Of course, "case" also refers to a published decision of a court, usually contained in a reporter, that serves as precedent in later actions.[24] Moreover, "case" appears in Article III, Section 2 of the United States Constitution, an application that led to the development of the "case-or-controversy" federal justiciability requirement.[25] And this does not even take into account the various other law-specific usages of *case*, such as "case at bar" (or "instant case"),[26] "case of first impression,"[27] "casebook,"[28] "case-in-chief,"[29] "caseload,"[30] and "prima facie case."[31]

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18. FED. R. CIV. P. 54(a). For a more detailed discussion of the term *judgment*, see *infra* Part III.F.

19. *See infra* note 187 and accompanying text.

20. For a more detailed discussion of the misuse of the term *pleading*, see *infra* Part III.D.

21. BLACK'S LAW DICTIONARY 206 (7th ed. 1999).

22. *Id.* at 207.

23. *Id.*

24. *See id.* at 1195 (defining "precedent" as "a decided case that furnishes a basis for determining later cases involving similar facts or issues").

25. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3.7 (2d ed. 1988).

26. BLACK'S LAW DICTIONARY 206.

27. *Id.*

28. *Id.* at 207.

29. *Id.*

30. *Id.*

31. *Id.* at 1209. Indeed, it is precisely because of its heterogeneity that one legal lexicographer argues that the word *case*

> best refers only to a legal case, a medical case, grammatical case, or a case of wine. In legal writing, avoid such phrases as *in any case* (READ: *in any event*), *in case* (READ: *if*), *in every case* (READ: *always* or *in every instance*), *as is often the case* (READ: *often*), and *as the case may be* (reword the idea).

The terminological problems described by Mayr may be thought of as subsets of the broader problem of ambiguity, or "the use of a word to mean more than one kind of thing."[32] As Larry Wright observes, in many instances, terminological ambiguities are resolved without incident.[33] But Wright cautions: "Ambiguity is not always resolved so completely or easily, of course. Sometimes the context is unclear, or not well specified, and then we may fail to understand, or actually *mis*understand, the job of a crucial word."[34] Similarly, Mayr warns:

> Terminological ambiguity has had dire consequences from time to time in the history of biology. Darwin's failure to realize that the term "variety" was used differently by zoologists and botanists got him completely confused about the nature of species and of speciation. A similar fate befell Gregor Mendel. He was uncertain about the nature of the kinds of peas he crossed and, like most plant breeders, he called heterozygotes "hybrids." When he tried to confirm the laws he had found by using "other" hybrids that were actually real species hybrids, he failed. The use of the same

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BRYAN GARNER, THE ELEMENTS OF LEGAL STYLE 105-06 (1991) (describing this word in a section entitled, "Words and Expressions Confused and Misused") [hereinafter GARNER, ELEMENTS]. The word *case* is discussed again in Part III. *See infra* text accompanying note 123.

32. HOSPERS, *supra* note 12, at 21.

33. LARRY WRIGHT, BETTER REASONING: TECHNIQUES FOR HANDLING ARGUMENT, EVIDENCE, AND ABSTRACTION 175 (1982). As Wright explains:

> A large number of common words in English—and every other natural language—routinely perform several distinct jobs. Some will be related, like the two jobs of "table" in "dinner table" and "table the motion". But some will be wholly unrelated: the "can" in "can of chicken soup" bears no plausible relation to that word in "can I go now?" In each of these cases the different jobs are in different parts of speech, but that is not always the case for a word's different jobs. The word "pen", for instance, is a noun in both "fountain pen" and "pig pen".
>
> A casual look through any competent dictionary reveals that a surprising percentage—perhaps a majority—of the words in our common vocabulary require two or more entries. The different entries nearly always indicate different jobs: sometimes only slightly distinct, but often quite unrelated. Occasionally the proliferation of entries will astonish us—even though we are competent to handle them all. The most striking example is the word "take". My small dictionary lists thirty distinct entries under "take", with as many as seven subheadings under the numbered entries. A look down the list reveals very few exotic jobs; most of them are quite familiar. Yet most of us are surprised to find such a common word doing so many distinct jobs.
>
> We are surprised for the same reason that it is unproblematic: the potential ambiguity is effortlessly resolved by the context in most normal cases.

Id. (citation omitted).

34. *Id.* at 176; *see also id.* at 193 ("Trouble arises from our effortless linguistic skill when we fail to notice that a crucial word has changed from one job to another in a way that undermines our reasoning. This is called equivocation.").

> term "hybrid" for two entirely different biological phenomena thwarted his later research efforts.[35]

Unfortunately, terminological ambiguity has had dire consequences in the law as well. One famous example is found in *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*,[36] a case that turned on the answer to the question, "what is chicken?"[37] There are numerous other examples. Many that relate to the Rules are discussed in later portions of this Article.

So if terminological ambiguity is a problem, what is the solution? According to Mayr:

> By far the most practical solution for such homonymy is the adoption of different terms for the different items. And whenever the possibility of confusing equivocation exists, precise definitions for each term in question should be proposed. . . .
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> . . . .
>
> Without clear-cut definitions at all times, however, no progress in the clarification of concepts and theories is possible.[38]

Thus, in order to communicate clearly and accurately, attorneys must do two things. First, we must reach agreement as to the specific terms to be used for the various concepts being discussed. Second, we must reach agreement as to the precise meaning of those terms.

Fortunately, for procedural matters within their scope, the choice of the appropriate term largely has been dictated by the Rules themselves. Indeed, though the purposes of creating such a body of rules were several, one purpose undoubtedly was the specification of a number of frequently-used procedural terms from amongst all possible such terms. Thus, in this area, the first task for the attorney is not so much to reach agreement as to the terms to be employed. Instead, the first task is to

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35. MAYR, *supra* note 13, at 58–59 (citation omitted).

36. 190 F. Supp. 116 (S.D.N.Y. 1960) (Friendly, J.).

37. *Id.* at 117. For those unfamiliar with this case, *Frigaliment* involved an action for breach of warranty in connection with two contracts for the sale of "chicken." *Id.* The plaintiff buyer argued that "'chicken' means a young chicken, suitable for broiling and frying." *Id.* The defendant seller argued that "'chicken' means any bird of that genus that meets contract specifications on weight and quality, including what it calls 'stewing chicken.'" *Id.* The court found that "the word 'chicken' standing alone is ambiguous" (*id.* at 118), and after considering a number of sources for guidance as to the meaning of "chicken" in this context, concluded that the plaintiff did not meet its burden of persuasion that "chicken" was used in the narrower, rather than the broader, sense. *Id.* at 121.

38. MAYR, *supra* note 13, at 59–60.

ascertain the extent to which the Rules have already made that determination, and to discover which terms already have been specified.

Once it has been determined which terms are specified, agreement still must be reached as to the meanings of those terms. Reaching agreement as to the meaning of a term involves arriving at a common definition of that term.[39] This exercise leads one to consider the distinction between *reportative* and *stipulative* definitions.

As Hospers observes, "most definitions of words already in use are *reports* of how a word is actually used"—in other words, most definitions are simply reportative definitions.[40] Of course, reportative definitions can be found throughout the law; indeed, most legal definitions probably fall into this category. The problem with reportative definitions, though, is that they frequently lack precision, a condition that, in turn, impairs their utility.[41]

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39. *See* HOSPERS, *supra* note 12, at 12–13:

When do we know the meaning of a word or phrase? When we know the *rule for its use*—that is, when we know under what conditions the word is to be used, when the word is applicable to a given situation, and when it is not. Usually when we ask for the rule for the use of a word, we are asking for the *definition* of the word.

. . . .

A definition of a word tells us what characteristics (features, qualities, properties—all these words are used, and philosophers often draw distinctions among them) something has to have in order for the word to apply to it. . . .

. . . .

A word is said to *designate* the sum of the characteristics that something must have in order for the word to be applicable to it.

40. *Id.* at 15. Hospers offers the following example:

The word "father" is used to refer to a male parent. That's what the word "father" means in English. And it's a true definition, in the sense that it's a *true report* of how people in our language group use the word "father." Can a definition then be true or false? Yes, it is true if it correctly reports how a word is used, and false if it does not. Isn't it true (one might ask) that a father is a male parent? Isn't that what a father is? And we can reply, "Yes, that is what the word 'father' is used to mean. We could have used the same word to mean something else, or another word to mean what we mean by this one. But throughout centuries of history the noise 'father' came to mean what it does now, and it's *true* that that's what it means."

Id. at 15–16.

41. *See* TIERSMA, *supra* note 9, at 108–09:

As in many other fields, legal terms of art may arise through usage or convention. Of course, usage can change over time and from place to place. In fact, even at the same time and in the same place, lawyers may use legal terminology in slightly different ways. The result is that technical legal terms are not immune from the vagueness and ambiguity inherent in ordinary English.

. . . Scientific language is often quite precise because the concepts or categories themselves are well defined. The scientific community seems to agree, for the most part, on the definition of

One solution to the imprecision inherent in the reportative definition of a term is the imposition of a stipulative definition.[42] Stipulative definitions are found throughout the law as well; indeed, "[t]he law differs from most other fields in the degree to which technical terms are created not through usage, but by authoritative pronouncements of courts or legislatures."[43] The Federal Rules of Civil Procedure represent just one of many such examples. Not only do the Rules stipulate the use of a number of procedural terms, they also stipulate the meanings of those terms. As with the stipulation of the choice of terms, the stipulation of their meanings has helped the Rules achieve their general purpose of providing a uniform body of procedural rules applicable in every federal

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terms like *centimeter* and *photosynthesis*. Unfortunately, legal vocabulary tends to refer to legal and social institutions that change frequently, which results in the meaning of associated terminology changing as well. The content of a term like *negligence* will change depending on the era, the society, and the norms established by its legal system.

Furthermore, most exact sciences are international in scope, sharing common assumptions and vocabulary that transcend political borders. *Oxygen* can be directly translated into German as *Sauerstoff*, with minimal loss in meaning. Legal systems, by comparison, are highly parochial. Each of the fifty American states is a separate jurisdiction, with its own laws, court system, and bar. Precise language is possible only when there is a unified speech community that consistently uses a term in the same way. With such splintered jurisdictions, attaining agreement on the exact use of legal terminology is close to impossible.

42. On stipulative definitions, Hospers writes:

> We seldom stipulate new meanings for words already in existence. Occasionally someone does so, perhaps because she believes that a word already in existence doesn't have a clear enough meaning, and she stipulates a more precise one. "And *this*," she says, "is what I am going to mean by the term from here on. I stipulate for the sake of clarity." Or she may find no word in existence that carries the shade of meaning that she wants to convey. Since she doesn't use an old word to carry a more precise meaning, she invents a new one. "What would you call the number ten to the tenth power?" the mathematician Edward Kastner [sic] asked his small grandson, and the grandson, who of course didn't understand the question, uttered the noise "googol." And that is what the noise "googol" has since then been used to mean.
>
> A stipulation is neither true nor false. It is like a suggestion—"Let's use the word to mean . . ."—or a statement of intention—"I hereby stipulate that this noise shall be used to mean . . . ."

HOSPERS, *supra* note 12, at 15. Of course, stipulative definitions require strict adherence thereto in order to be effective. For example, Hospers' recitation of Kasner's (not Kastner's) definition of *googol* is erroneous. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 979 (1993) (defining "googol" as ten to the *hundredth* power).

43. TIERSMA, *supra* note 9, at 109. Of course, once stipulative definitions are established, there must be some mechanism for disseminating those definitions to all interested parties. In addition, those interested parties (here, primarily attorneys) must then take steps to discover those definitions and educate themselves as to their meanings. Though one might presume that these processes are self-executing, the reality is that there is a serious lack of understanding with respect to Rules terminology. For more on the reasons why, see *infra* notes 55–84 and accompanying text.

district court,[44] and to an extremely wide variety of civil proceedings.[45] A clear and consistent body of terminology[46] also has contributed to the Rules' stability, which in turn has led to a more consistent interpretation and application thereof, resulting in greater systemic efficiency.[47] Thus, as with the choice of the terms themselves, the primary task for the attorney is to discover those Rules definitions already in place.

Of course, this process of discovering or "reaching agreement" as to the selection and definition of Rules terminology includes more than mere intellectual agreement. It also means that we must consistently use the proper term to describe the concept being communicated. Conversely, when a different concept is being communicated, a different term must be employed.[48] In short, we attorneys must learn to communicate more technically—or at least more carefully.[49] For surely

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44. At least to the extent that they are not eroded by local rules. *See, e.g.*, FED. R. CIV. P. 26 advisory committee notes (2000 amendments) (stating that the purpose of the 2000 amendments to Rule 26(a)(1), which formerly permitted individual districts to "opt out" of certain initial disclosure requirements, was to "establish a nationally uniform practice").

45. *See* FED. R. CIV. P. 1–2, 81.

46. Though the Rules have been amended a number of times since their original promulgation, a general survey reveals that the meanings of many of the more common terms have changed little, if at all. *See, e.g.*, FED. R. CIV. P. 54(a) (defining "judgment").

47. *Cf.* Lawrence M. Friedman, *Law and Its Language*, 33 GEO. WASH. L. REV. 563, 564 (1964):

> One prime and obvious reason for the use of technical language is efficiency. . . . Any group with common problems or interests tends to develop a specialized vocabulary for ease of communication within the group. . . . If the parent language lacks appropriate concepts, concepts will have to be invented for the group to use, if only to save time.

48. *See* HOSPERS, *supra* note 12, at 12 ("When a word is used to name a class of things, the word is like the label on a bottle. The label tells you what's in the bottle, and if two bottles have different kinds of contents, it is important not to use the same label for both of them.").

49. *See, e.g.*, Mary Jane Morrison, *Excursions into the Nature of Legal Language*, 37 CLEV. ST. L. REV. 271, 287–88 (1989):

> Even lawyers who considerately eschew legal terms in speaking with laypersons make those persons uneasy because (good) lawyers speak carefully, listen well, and ask questions. Careful speakers say what they mean and mean what they say. They are aware of their speech and of the speech of others. They know, for example, the difference between what a person knows and what she merely believes, and they recognize when a person implies knowledge in her speech and how to probe linguistically to determine whether she intends to claim knowledge or merely is being careless or colloquial in her speech in expressing belief. Careful speakers similarly hear the difference between "Only rollerskaters may use these lanes" and "Rollerskaters may use only these lanes," and they are apt to query the speaker to discover whether the speaker means what she says and says what she means—or, indeed what she means if she says, "Rollerskaters may only use these lanes."

See also HOSPERS, *supra* note 12, at 3:

> We use ["cause", "purpose", "reason", and "meaning"] in daily conversation, but most people don't use them very carefully or very clearly. In philosophy, we have to use them more

the consequences of disregarding proper terminology are every bit as dire as the consequences of failing to reach agreement as to the identity and meaning of these terms in the first instance.

At this point, some might question whether it makes sense even to attempt to specify precise meanings for certain terms in this context. For to a large extent, language is inherently vague, and certainly this is no less true of legal language.[50] Thus, does what is often referred to as the "indeterminacy of language" problem render any attempt toward terminological precision hopeless?

Admittedly, because of the inherent vagueness of language, one would be naïve to think that the formulation even of stipulative definitions for legal terms is going to solve all communicative problems associated with the various uses of those terms.[51] But having said all of that, it does not

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carefully; if we do not we often just "talk past" one another and engage in pointless back-and-forth arguments that with some care could easily have been avoided.

Whether law properly may be considered to be a "technical" language, or whether the particular terms discussed in this Article may be considered "technical," are subjects that, though interesting, are beyond the scope of this Article (and seemingly of no significant consequence to the points made herein). But for a discussion of the law-as-a-technical-language debate, see Morrison, *supra*, at 290–318.

50. *See, e.g.*, HOSPERS, *supra* note 12, at 21:

> The U.S. Constitution guarantees all of us "due process of law." But what exactly is due process? If you are convicted without a trial, that is clearly not due process; but what if you are tried by a jury that's prejudiced against you? That isn't due process either—but what jury is really impartial (unprejudiced)? If Smith had an expensive defense lawyer, and Jones had only a public defender, is there a difference in due process?
>
> The Constitution prohibits what it calls "cruel and unusual punishment," but doesn't say what this is. Presumably torture and flogging are cruel, and so is a year of solitary confinement. But what about capital punishment? Throughout most of American history, it was not considered cruel, and was surely far from unusual, except for a brief period in the late 1960s when it was outlawed by the Supreme Court. Some consider it exactly the appropriate punishment for murder; others say that since it involves the taking of a life, it is the cruelest of all. There are some punishments we would say are definitely cruel and others that are definitely not, but in between we can't be sure: the word is vague.

Indeed, as most attorneys know, sometimes the meaning of a particular term or phrase is the issue. As explained by Hospers:

> Countless disputes arise because one or more of the terms is vague in a way crucial to the argument. For example, the income tax law requires you to pay taxes in a state if you reside in that state. But what is it to reside or to be a resident? Is he an inhabitant of Montana if he works there? If he owns a home there (even if he owns another home in California)? If he spends more of his time in Montana than in California? If his company's home office is in Montana? In ordinary usage at least, the term "resident" doesn't tell us how to answer these questions.

Id. at 24.

51. *Cf.* TIERSMA, *supra* note 9, at 110:

appear that the indeterminacy of language problem has much relevance to the Rules terms discussed in this Article. Legal terms and phrases such as *due process* indeed appear to be somewhat vague, and subject to a fairly broad interpretation. On the other hand, assume that you are driving a car in, say, Idaho. You approach an intersection. To your right, you see a red, octagonal sign that bears, in white letters, the word "STOP." Exceptional cases aside, is there any real doubt as to what you, the driver, are supposed to do?[52] The question here, then, is whether the terms discussed in this Article are more like the phrase *due process* or the word *stop*. It is submitted that they are much closer to the latter.[53]

Presuming, then, that there can be such things as precise procedural terms and definitions, and given that the Rules themselves provide many such terms and definitions, the question arises, why do so many attorneys fail to use procedural terminology properly? At one level, the answer is simply that attorneys have failed to discover (or recall) that Rules

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The moral of this tale is that it might be possible for the law to have extremely precise technical terms. Law schools could spend more time teaching legal vocabulary. To maintain the clear meaning of those terms, judges would refuse to deviate from them. Yet even if this goal could be achieved, it would elevate form over substance, and legal meaning over the intentions of the speaker. For people who use a legal term of art in a way that differs from its "precise" meaning, it is a very good thing indeed that judges are increasingly willing to deviate from the literal meaning of a word, even though validating the aberrant usage undermines the precision of the term. Ultimately, the legal profession will have to acknowledge that its terminology—while obviously very useful—can never be as exact as it might hope or believe.

52. *Cf.* Kent Greenawalt, *How Law Can Be Determinate*, 38 U.C.L.A. L. REV. 1, 29 (1990) (arguing that "many legal questions have determinate answers that 1) would be arrived at by virtually all those with an understanding of the legal system and 2) are unopposed by powerful arguments, consonant with the premises of the system, for contrary results"); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 520–38 (1988); White, *supra* note 9, at 417:

> [T]here are in both legal and nonlegal texts enough real ambiguities and uncertainties to make it seem to me absurd to speak as if the meaning of a text were always simply there to be observed and demonstrated in some quasi-scientific way. . . .
>
> On the other hand, I think it equally absurd to say that the uncertainties inherent in any text, or the fact of unresolvable disagreement, shows that there is no meaning in the text itself, or that "meaning" is simply a word for what we in our wisdom happen to agree about at the moment.

53. This is not to say that the terms and definitions discussed in Part III of this Article are completely devoid of all vagueness. To the contrary, one of the problems indicated is that the Rules *themselves* are not always entirely clear as to the choice of the appropriate term in certain circumstances. And even where the appropriate term is clearly specified, its meaning under the Rules sometimes leaves much to be desired. Still, it does not seem that the general indeterminacy of language plays a significant role in this analysis.

The indeterminacy of language is just one of several philosophical problems that arise when one starts to talk about the meaning of a word, and undoubtedly some of these other problems arise when one considers the penumbral ranges even of procedural terms. But again, in a wide range of applications that encompass most situations likely to arise, these other problems are unlikely to become relevant when discussing the terms considered in this Article.

terminology already in place and/or to properly use those terms wherever (but only wherever) appropriate. But why, exactly, does this occur? What are the forces that seem to impair the ability of so many attorneys to understand the meaning of Rules terminology, and to use that terminology properly?

Actually, there are probably many reasons why attorneys fail to use proper Rules terminology (or, for that matter, any body of legal terminology). Some of the possible reasons, including many that would apply to any mistake commonly made by attorneys, do not seem particularly interesting, and will not be discussed here in any detail.[54] Yet, many possible reasons remain. The important thing to note with respect to all of these reasons is that, although they might explain the misuse of legal terminology, none justify it.

Perhaps the greatest impediment to the utilization of proper procedural terminology concerns the problems created by legal synonyms, or two or more words perceived as sharing the same or similar legal meanings.[55] Though synonyms are common throughout our language, the use of synonyms is particularly prevalent in the law.[56] One such example is found in the words *action*, *case*, and *suit*, words that undeniably share a common general legal meaning[57] and, as a result, are often used interchangeably.[58]

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54. It is hoped, though, that some consideration will be given to a greater emphasis being placed on the teaching of procedural terminology in law schools.

55. *See, e.g.*, TIERSMA, *supra* note 9, at 113:

> *Synonyms* are different words with the same meaning. For most speakers of English, the words *lawyer* and *attorney* mean exactly the same thing. Whether two words ever have completely identical meanings is debatable, of course; some people feel that *attorney* has a more prestigious ring to it than *lawyer*. My mother insists that I am an *attorney*, in contrast to *lawyers*, who—as everyone knows—chase after ambulances and fleece their clients.

56. *See* MELLINKOFF, *supra* note 9, at 42–45, 345–46, 406, 420 (observing same and discussing the various reasons why this is so).

57. *Compare* BLACK'S LAW DICTIONARY 28 (7th ed. 1999) (defining "action" as a "civil or criminal judicial proceeding") *with id.* at 206 (defining "case" as a "proceeding, action, suit, or controversy at law or in equity") *and id.* at 1448 (defining "suit" as a "proceeding by a party or parties against another in a court of law; CASE. . . . [s]ee ACTION"); *see also* Case of the Sewing Mach. Co., 85 U.S. (18 Wall.) 553, 585 n.‡ (1873) (defining "suit" as "any proceeding in a court of justice in which the plaintiff pursues his remedy to recover a right or claim"); Nolan v. Boeing Co., 919 F.2d 1058, 1066 (5th Cir. 1990) ("In federal practice, the terms 'case' and 'action' refer to the same thing, *i.e.*, the entirety of a civil proceeding . . . ."); 1 AM. JUR. 2D *Actions* § 4, at 726 (1994) ("The terms "action" and "suit" are generally considered to be synonymous . . . ."); 1A C.J.S. *Actions* § 3, at 306–07 (1985) (describing "action," "case," and "suit" as synonymous terms).

58. The synonymy (or apparent synonymy) of these words is discussed in greater detail in Part III.A, *infra*.

There are at least two reasons why the use of synonyms can be problematic. First, in many instances, the meanings of what might be perceived to be synonyms are in fact incongruous, thus rendering the use of those words improper in certain contexts.[59] But even if two or more words do in fact share the same meaning, the use of more than one in the same context still can lead to confusion. This is because there is something of a linguistic presumption that a change in terminology implies a change in meaning, however subtle.[60] Thus, the interchange of synonymous words requires additional work of the reader, who is then forced to recall the meaning of not one, but two (or more) words, and decide whether any difference in meaning was in fact intended. This is particularly true when one deviates from specified terms, such as those found in the Rules.[61]

Another significant impediment to the utilization of proper procedural terminology concerns the matter of context. Words, of course, properly may have a number of meanings depending upon the context in which they are used. Thus, though the meaning of a legal term might be related to the meaning of a non-legal word from which it was derived, often there are important differences. Moreover, just as there can be differences in the meanings of non-legal words, there often are differences in the meanings of many legal terms. Consider, for example, the term *dismissal*. Though the word *dismissal* generally (and perhaps also in some legal contexts) connotes any manner of disposition,[62] for

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59. Indeed, this is the main thrust of much of Parts III.A–C of this Article.

60. *See, e.g.*, GARNER, ELEMENTS, *supra* note 31, at 206–07:

> The rule for undue repetition of words is that you should not repeat a word in the same sentence if it can be felicitously avoided. But this rule is hardly an absolute proscription. The problem is that if you use terms that vary slightly in form, the reader is likely to deduce that you intend the two forms to convey different senses. We see, for example, writers who use *insidious* here and *invidious* there when we know that they intend to distinguish the two; or *presumptive* in one paragraph, *presumptuous* in the next. We intuitively understand that related words with different forms have different meanings.
>
> Thus, you do not write *punitive damages*, *punitory damages*, and *punishment damages* all in the same opinion or brief, lest the reader infer that you intend a distinction. . . .
>
> Finally, do not use two or more unrelated phrases to describe a single thing. We confuse readers by writing *leased property* in one paragraph, *demised premises* in the next, and *realty subject to lease* in the next. To a much greater extent than general style, legal style limits a single meaning to a single phrase. If this constraint hinders your stylistic impulses, then rest assured that they are perverse ones.

See also TIERSMA, *supra* note 9, at 113.

61. *See supra* notes 42–49 and accompanying text and *infra* notes 81–83.

62. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 652 (1993) (defining "dismiss" as "to grant or furnish leave to depart: permit or cause to leave").

purposes of the Rules, this term actually denotes only one type of disposition.[63] Thus, one must always be careful to go beyond whatever non-legal (or even non-Rules) meanings any given word might have and to educate oneself as to the scope of their stipulative Rules definitions.

Another reason why attorneys fail to use proper Rules terminology might relate to the rise of the so-called Plain English Movement in legal writing.[64] Among other things, this movement calls for an end to "legalese" in favor of stating legal concepts in plain English.[65] But even the Plain English Movement acknowledges the need for using "technical" legal terms.[66] Thus, even Plain English (or "plain language") writers will use uncommon or technical words in their writing when "they know the readers will be specialists, who are familiar with the word,"[67] "there is no accurate substitute for the word,"[68] or "the word will be a useful shorthand for a complicated subject matter that crops up more than just once or twice."[69]

A related reason why attorneys fail to use proper terminology might be the continual need of attorneys to discuss legal concepts not only with other legal professionals (judges, attorneys, etc.), but also with non-

63. *See infra* Part III.E.

64. For accounts of the history of the Plain English Movement in the United States, see TIERSMA, *supra* note 9, at 220–21 and Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 T.M. COOLEY L. REV. 1, 1–7 (1992).

65. *See, e.g.*, BRYAN A. GARNER, THE WINNING BRIEF 145–47 (1999) [hereinafter GARNER, BRIEF].

66. *See, e.g.*, MICHELE M. ASPREY, PLAIN LANGUAGE FOR LAWYERS 14 (2d ed. 1996) (asserting that "plain language does not ban all technical terms"); MELLINKOFF, *supra* note 9, at vii:

> To be of any use, the language of the law (as any other language) must not only express but convey thought. With communication the object, the principle of simplicity would dictate that the language used by lawyers agree with the common speech, unless there are reasons for a difference. If there are reasons—old, refurbished, substituted, or brand-new—it is essential that lawyers know those reasons. And this not merely to satisfy an intellectual craving. An ancient and still vital maxim tells us that when the reason ceases, the rule also ceases. When and when not to use particular language is the lawyer's daily decision. If some reason requires special language, the choice is made.

(citation omitted).

67. ASPREY, *supra* note 66, at 14. Of course:

> If the reader is not a specialist, the plain language writer will give an explanation of the technical word—in plain language of course—and then continue to use the technical word as a convenient and accurate shorthand for a complex idea, perhaps even reminding the reader where to find the explanation each time the technical term is used.

Id.

68. *Id.*

69. *Id.*

attorneys (including most clients).[70] In other words, as the audience changes (so goes the argument), the attorney should consider changing the terminology employed.[71] This argument does not seem particularly interesting, though, as virtually every profession faces the same problem.[72] But one might consider that whenever a professional uses nontechnical language for the purported sake of the nonprofessional's comprehension and understanding, the professional is giving up an opportunity to educate the nonprofessional. And if the previously discussed newspaper accounts of the Arkansas federal district court's decision in *Jones*[73] are an example, perhaps that is an opportunity that should not be so easily passed up.

It is conceivable that strategic or other reasons relating to persuasion sometimes might dictate the intentional use of a less appropriate term.[74] For example, one legal writing expert has criticized the use of the same term over and over again within the same work.[75] But though there might

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70. *See, e.g.*, TIERSMA, *supra* note 9, at 3:

> Other aspects of legal language are aimed at promoting clear and precise communication. We will see that certain characteristics of the language of lawyers, especially the legal vocabulary, do indeed tend to enhance precision. Though not as exact as many lawyers claim, technical terminology promotes communication within the profession by allowing lawyers to express in a word or short phrase what would otherwise require a much longer explanation. But this precision comes at a cost. Most importantly, unusual vocabulary may alienate those who are not part of the profession and may be difficult for them to understand.

71. *See, e.g.*, *id.* at 5–6:

> Ultimately, despite gradual and ongoing improvement in legal language, the proverbial man on the street, or even the average juror, will never understand all the intricacies of the law. Lawyers and their distinctive style of speaking and writing will never disappear. But someone bound by a statute should have at least a good general idea of what it prohibits. If judges expect the public to respect their judicial opinions, they should write them so that the public understands the important principles contained in them. Jurors should not be asked to decide critical legal issues without clear instructions. And average consumers should be able to comprehend the legal documents that govern their lives and fortunes. In short, legal language can and should be much less arcane and ponderous, and be much more understandable, than it now is.

72. In a sense, this argument also is beyond the scope of this Article, in that the focus here is on communication by and between legal professionals.

73. Jones v. Clinton, 990 F. Supp. 657, 662, 674 (E.D. Ark. 1998); *see also supra* note 6 and accompanying text.

74. *See, e.g.*, TIERSMA, *supra* note 9, at 3:

> Despite claims about the precision of legal English, we will see that sometimes lawyers prefer not to be precise at all, or opt for deliberate obscurity. . . .
>
> On other occasions, lawyers find themselves in a linguistic dilemma: should they strive to be as precise as possible, or is it better to be more general or even vague? Strategic concerns may dictate one choice over another.

75. *See* GARNER, BRIEF, *supra* note 65, at 111 ("If a word or phrase appears in sentence after sentence, the droning effect will annoy readers.").

be some valid reason to vary word choice with respect to nonlegal concepts, we have already seen the problems that can occur as a result of an inconsistent use of stipulated terms.[76] Thus, it seems unlikely that many occasions will arise when the advantages derived from a legitimate misuse of such terms (or a failure to use such terms where appropriate) will outweigh the costs.

Perhaps the least excusable reason for failing to use proper procedural terminology is prior practice. Like most (if not all) professionals, attorneys (and even judges) have a general tendency to do whatever "worked" (in the sense that the primary goals were accomplished without an awareness of other problems) in the past. For example, just like the *Jones* court, a great many attorneys and judges undoubtedly have referred to dispositions by summary judgment as dismissals.[77] Though such a course of conduct is somewhat understandable (and in many situations makes eminent sense), it can lead to the perpetuation of error. "Successful" prior practice also can result in a great resistance to change (and indeed, one might correctly argue that the "success" of a prior practice often is evidence that it also is the correct practice). But one must recognize that merely because some practice might have "worked" in the past does not necessarily mean that the practice was correct or that it was without problems. One should always search for a theoretical basis for the practice. And when one is confronted with theoretical evidence to the contrary, one should try to be open to the consideration of that evidence, and then to the alteration of prior practices.

This leads to the last reason discussed as to why attorneys fail to use proper procedural terminology (and why they might be reluctant to change what has been done in the past). As noted previously, not all terminological ambiguity leads to serious problems. For example, though the district court in *Jones* might not have properly used the term *dismissal*, we know what it meant (or at least most attorneys would, after

76. Indeed, the same legal writing expert who warns of the droning effect of using the same term over and over (*see id.*) also warns of the problems that can occur when different words are used to represent the same concept (*see supra* note 60). *See also* BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 440 (2d ed. 1995) ("'A draftsman should never be afraid of repeating a word as often as may be necessary in order to avoid ambiguity.'") [hereinafter GARNER, LEGAL USAGE] (quoting ALISON RUSSELL, LEGISLATIVE DRAFTING AND FORMS 103 (1938)); RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS 74 (4th ed. 1998) ("Do not be afraid to repeat a word if it is the right word and if repeating it will avoid confusion.").

77. For more examples of confusion between dismissals and other forms of disposition, *see infra* notes 303–316 and accompanying text.

reading the entire opinion).[78] So if some (and probably most) terminological ambiguity with respect to the Rules does not lead to serious problems, why should we care?

The first answer to this question is, why should we not care? If proper terminology (of whatever type) is readily available and comprehendible, why should one not want to use it? Does one really need a reason for not misusing any word, technical or otherwise? In other words, though many misuses of Rules terminology might not seem to cause serious problems, surely that is not an argument in favor of a disregard of proper Rules terminology, particularly where the cost of using proper terminology is negligible.[79]

The second answer to the question why we should care about the use of proper Rules terminology goes to the cost of using improper terminology even in seemingly trivial contexts. Understanding legal concepts is difficult enough without the confusion created when an inappropriate term is used to represent those concepts. And this is true regardless of how minor the misuse. In some sense, every misuse of legal language impedes the understanding—and, consequently, the progress—of the law.

There are at least two additional reasons, somewhat unique to the law, why one should always strive to use proper Rules terminology. The first reason relates to the nature of the Rules as law (or, as some prefer, a source of law). Many bodies of professional terminology might be considered in some way authoritative, in that reliance thereon not only is widespread, it is almost viewed as compulsory.[80] But the Rules

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78. Indeed, when dealing with federal procedural rules, there are at least two external constraints that help prevent terminological ambiguity from leading to serious problems. The first is Rule 1, which requires that the Rules "be construed and administered to secure the just, speedy, and inexpensive determination of every action." The second is 28 U.S.C. § 2072(b) (1994), which provides that the Rules "shall not abridge, enlarge or modify any substantive right." Of course, those dealing with the Rules usually also have some self-interest in avoiding grave terminological errors, regardless of whether the punishment for committing such errors emanates from the rules themselves (*see infra* note 82) or from more collateral sources.

79. It also seems doubtful that any competent attorney would ever have a legitimate reason for knowingly misusing legal terminology, and for this reason, it is doubtful that this form of misuse occurs with any frequency. For a more detailed discussion of this argument, see *supra* notes 74–76 and accompanying text.

80. One example (borrowed from the sciences) might be the metric system. *See* 15 U.S.C. § 205b (1994) (designating the metric system as the preferred system of weights and measures as a matter of United States policy, but stopping short of requiring its use in all applications, even those involving federal agencies). I suspect that one reason the metric system is so widely (yet voluntarily) used by scientists is because the fundamental building blocks of that system (meter, liter, gram, etc.) are now so well-defined. *See, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1422 (1993)

essentially are of the same character as a federal statute.[81] And despite the fact that there is often no direct penalty for the misuse or disregard of Rules terminology,[82] the Rules, by their nature, nonetheless command respect and, in some sense, obeisance.[83]

Another reason for using proper legal terminology goes to persuasion. As most good attorneys know, using proper procedural terminology is almost as important as using the Rules themselves properly, as the use of proper terminology enhances the perceived credibility and competence of the proponent, and helps convey the image of the proponent as the giver of the truth.[84] Though this is probably true of every profession, the

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(defining "meter" as "1,650,763.73 wavelengths of the orange-red light of excited krypton of mass number 86").

81. *See* Henderson v. United States, 517 U.S. 654, 668 (1996) (holding that Rules supersede conflicting federal statutory authority).

82. *But see* FED. R. CIV. P. 41(b) (providing for the dismissal of an action or of any claim for "failure of the plaintiff . . . to comply with these rules").

83. *See* 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1029, at 121–23 (2d ed. 1987):

> There is no place in the federal civil procedural system for the common-law rule that statutes, and rules having the force of statutes, that are in derogation of the common law are to be strictly construed. Rule 1 requires the judge to construe the rules liberally to further the cause of justice. However, the judge must exercise his discretion soundly and with restraint because a construction that ignores the plain wording of a rule or fails to view it as part of the total procedural system ultimately may prove to be as detrimental to the system as an arbitrary or rigid construction and, in the end, not further the "just, speedy, and inexpensive determination of every action."

(citation omitted). One also might consider the very choice of the word *rules*, as opposed to *guidelines*, *suggestions*, and other, similar terms. *See also* TIERSMA, *supra* note 9, at 3–4:

> Because legal English differs from ordinary language, it is also interpreted differently. For example, we will explore how legal definitions are different from ordinary ones. Normally, a definition is simply an aid in understanding how a word might be used in a particular context. Because an ordinary definition is based on usage, it cannot dictate how we ought to interpret something. Yet we will see that this is exactly what a legal definition does. If a legislature defines *person* to include a corporation or association, that is what it means for purposes of the statute in question. What any dictionary might have to say about *person* becomes irrelevant.

Cf. H.L.A. HART, THE CONCEPT OF LAW 9–10 (1961):

> There is in England no rule, nor is it true, that everyone must or ought to or should go to the cinema each week: it is only true that there is regular resort to the cinema each week. But there *is* a rule that a man must bare his head in church.
>
> What then is the crucial difference between merely convergent habitual behaviour in a social group and the existence of a rule of which the words "must," "should," and "ought to" are often a sign? . . . In the case of legal rules it is very often held that the crucial difference (the element of "must" or "ought") consists in the fact that deviations from certain types of behaviour will probably meet with hostile reaction, and in the case of legal rules be punished by officials.

84. *See* IRWIN ALTERMAN, PLAIN AND ACCURATE STYLE IN COURT PAPERS 1–2 (1987):

stature of argument, and thus of persuasion, in legal discourse magnifies its importance in the law.[85]

In summary, it is important to employ proper Rules terminology. So which terms are most frequently misused? That is the subject of Part III.

III. SIX COMMONLY MISUSED TERMS UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

"We are not studying etymology, but law."[86]

The following discussion focuses on six terms found within the Federal Rules of Civil Procedure: *action*, *claim*, *averment*, *paper*, *dismissal*, and *judgment*. In subparts A through F, each of these terms will be discussed in relation to their meaning under the Rules, followed by a discussion of many of the ways in which these terms are used improperly (or, in some instances, the ways in which other words are improperly substituted therefor). Each subpart also will include some form of critique of the term being discussed. In some instances, the subpart will consider the appropriateness of the particular term specified, and whether that choice itself has inhibited its use. With respect to several of these terms, it will be shown that inconsistencies in the text of the Rules themselves (and accompanying Appendix of Forms) likely contribute to the confusion in this area. Finally, with respect to one—*judgment*—it will be argued that the confusion surrounding the proper usage of this term is due in part to the nature of its Rules-based definition and the interplay between that definition and those other rules that rely thereon.

A few introductory comments are in order. First, though some of the

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Why does form matter? An attorney once told me that he has a volume practice and doesn't have time to worry about form. "As long as I can get by and not get thrown out of court, I am satisfied," he said. He is wrong. Form is the packaging of legal materials. Just as sharp packaging adds to a gift, good form should create a favorable climate for the relief requested in the document. The user of good form will stand out because the overall quality of legal style is so poor.

Alterman adds: "[I]t is just as easy to use good form as bad form. Neither is innate. Both are learned. In fact, good form should be easier; it involves fewer words." *Id.* at 1.

85. *See, e.g.*, Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 382–84 (1978). This is not to say, though, that using proper legal terminology (which includes ascertaining the proper term) is always easy or without some cost, Alterman's comments to the contrary notwithstanding. Rather, the point here is that, as a professional, the competent attorney should strive to use proper legal terminology, particularly when it is cost-effective to do so.

86. OLIVER WENDELL HOLMES, THE COMMON LAW 215 (Dover Publications, Inc. 1991) (1881).

terms specified by the Rules are expressly defined,[87] most are not.[88] Moreover, virtually all of the terms employed by the Rules presume some general knowledge of modern American civil legal practice.[89] Nonetheless, it will be shown that each of the terms discussed herein are, by implication anyway, specified and defined with sufficient clarity so as to leave little doubt that they are in fact the preferred terms for the concepts they represent and that their meanings generally can be discussed among attorneys without confusion.

Second, though the focus of this Article is on Rules terms that are misused, one should keep in mind that there are a number of Rules terms that are rarely, if ever, misused. For example, though the term *interrogatory* is not expressly defined under the Rules, it is difficult to locate examples of any misunderstanding as to the meaning of that term, or of any instances of misuse. One might ask why this is more true of some terms than it is of others.

Finally, a few words on dictionaries: When providing dictionary definitions for the terms discussed in this Article, reliance was made on what appear to be the most recent editions of *Webster's Third New International Dictionary*[90] (for common definitions) and *Black's Law Dictionary*[91] (for legal definitions). These particular dictionaries were selected because they are the general usage and law dictionaries most frequently cited by the Supreme Court of the United States,[92] the body primarily responsible for the promulgation of the Rules.[93] The most recent editions of these dictionaries (rather than, say, editions more contemporaneous with the promulgation of the particular rule in question[94]) were selected because the intended purpose of this Article is

87. *See, e.g.*, FED. R. CIV. P. 54(a) (defining "judgment"), discussed *infra* Part III.F. Incidentally, the "a" in, for example, "Rule 54(a)" is a *subdivision* (*see* FED. R. CIV. P. 54 advisory committee notes (1937 adoption)), not a subsection, as many attorneys (and some courts) apparently believe. *See, e.g.*, Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 206–07 (1958) (referring (erroneously) to the various subdivisions of Rule 37 as subsections).

88. In fact, save *judgment*, none of the six terms featured in this Article are expressly defined.

89. *See infra* note 97.

90. (1993).

91. (7th ed. 1999).

92. *See* Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 263 (1999).

93. *See* 28 U.S.C. § 2072 (1994).

94. *Cf.* Thumma & Kirchmeier, *supra* note 92, at 272 ("In construing statutory provisions, there is some consensus that the Court should look to dictionaries from the time the relevant statute was enacted.").

primarily normative, and thus it is important to understand how the words discussed herein are used by attorneys (and non-attorneys) today.[95]

A. *Action*

By their title, the Federal Rules of Civil Procedure obviously consist of rules governing the procedure to be followed with respect to things both federal (as opposed to state, which, one might correctly presume, are governed by state rules of procedure) and civil (as opposed to criminal, which, one again might correctly presume, are governed by rules of criminal procedure). But what sort of federal, civil things? Fortunately, some guidance is found in Rule 1 ("Scope and Purpose of Rules"), which provides:

> These rules govern the procedure in the United States district courts in all *suits* of a civil nature whether cognizable as *cases* at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every *action.*[96]

Thus, according to Rule 1, the Federal Rules of Civil Procedure generally govern the procedure to be followed in civil "suits," "cases," and "actions" in the United States District Courts.

But Rule 1 raises several additional questions. For what is a "suit"? A "case"? An "action"? Do these terms have different meanings (at least for purposes of the Rules)? Neither "suit," "case," nor "action" is expressly defined by the Rules.[97] Nonetheless, as most attorneys know,

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95. This Article does not address the prescriptive-descriptive debate that has plagued lexicographers for decades—i.e., whether dictionaries should strive to establish the "proper" way to use English, or whether dictionaries instead should simply report how the language is actually being used in current society. *See, e.g.*, Thumma & Kirchmeier, *supra* note 92, at 242–44. Suffice it to say that, despite the normative thrust of this Article, the two dictionaries primarily relied upon (*Webster's Third New International Dictionary* and *Black's Law Dictionary*) clearly fall into the latter camp (*see* Thumma & Kirchmeier, *supra* note 92, at 242–43; *see also* David Mellinkoff, *The Myth of Precision and the Law Dictionary*, 31 UCLA L. REV. 423 (1983)), which only helps to underscore the need to understand and utilize the particular terms utilized by the Rules. Indeed, there is some suggestion that dictionaries are of little use when construing what might be considered to be terms of art. *See* Thumma & Kirchmeier, *supra* note 92, at 280; *see also id.* at 281 (observing that "usage and meaning are not necessarily synonymous").

96. FED. R. CIV. P. 1 (emphasis added).

97. Of course, as discussed previously (*see supra* notes 87–88 and accompanying text), given the lack of express definitions in the Rules generally, it is not surprising that none of these terms are expressly defined. *See also* 1A C.J.S. *Actions* § 2, at 304 (1985) ("Some statutes, however, dealing with or abolishing the distinction between actions at law and suits in equity have left the definition of the word 'action' to the common understanding of the profession.").

each of these terms do in fact have essentially the same general legal meaning (or more precisely, each of these words include among their definitions a legal definition that coincides with at least one of the legal definitions of the other two): namely, a "'judicial proceeding, which, if conducted to a determination, will result in a judgment or decree.'"[98]

But if each of these terms share the same meaning, why did the drafters of Rule 1 use all three? Would not one have sufficed?[99] The answer seems to relate to the historical differences between proceedings at law and proceedings in equity,[100] and the idea (reflected in Rule 1) that the Federal Rules of Civil Procedure were intended to govern in all such proceedings. In other words, it appears that the drafters of Rule 1 wanted to make it clear that the Rules generally were to govern in civil proceedings of virtually every nature,[101] regardless of whether such proceedings were previously termed suits, cases, actions, or (presumedly) any other, similar term.[102]

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98. BLACK'S LAW DICTIONARY 29 (7th ed. 1999) (defining "action") (quoting 1 MORRIS M. ESTEE, ESTEE'S PLEADINGS, PRACTICE, AND FORMS § 3, at 1 (Carter P. Pomeroy ed., 3d ed. 1885)). *See also supra* note 57 (discussing coincident common legal definitions of these words).

99. Certainly, as discussed previously (*see supra* note 76 and accompanying text), the use of more than one word to describe the same concept would seem to be contrary to what we would ordinarily consider to be good legal writing. *See also* WYDICK, *supra* note 76, at 74:

> Elegant variation is practiced by writers whose English teachers told them not to use the same word twice in close proximity. Elegant variation produces sentences like this:
>
> "The first case was settled for $20,000, and the second piece of litigation was disposed of out of court for $30,000, while the price of the amicable accord reached in the third suit was $50,000."
>
> The readers are left to ponder the difference between a *case*, *a piece of litigation*, and a *suit*. By the time they conclude that there is no difference, they have no patience left for *settled*, *disposed of out of court*, and *amicable accord*, much less for what the writer was trying to tell them in the first place.

100. *See, e.g.*, 1A C.J.S. *Actions* § 3, at 307 (1985):

> Sometimes, however, a distinction is made between ["action" and "suit"] upon the ground that the term "action" is more properly applicable to proceedings at law and the term "suit" more appropriately to proceedings in equity; and also on the ground that "action" is less broad and comprehensive than "suit," in that "action" refers only to actions at law, whereas "suit" denotes any legal proceeding of a civil kind and includes both actions at law and suits in equity.

(citations omitted). *See also* BLACK'S LAW DICTIONARY 29 (7th ed. 1999) (explaining the historical distinction between "actions" (as referring to proceedings in courts of law) and "suits" (as referring to proceedings in courts of equity)).

101. As Rule 1 indicates, most (but not all) federal civil proceedings are governed by the Rules. *See* FED. R. CIV. P. 81 ("Applicability in General").

102. Indeed, one might wonder why the drafters of Rule 1 drew the line where they did, as *suit*, *case*, and *action* are not the only words that share this same general legal meaning. *See, e.g.*, BLACK'S LAW DICTIONARY 213 (7th ed. 1999) (defining "cause" as a "[a] lawsuit; a case"); *id.* at 944 (defining "litigation" as "a lawsuit"); *id.* at 992 (defining "matter" as a "case"). But even assuming that such other words existed at the time of the drafting of Rules, the drafters presumedly

Now to the main point of this discussion: Aside from the fact that, in Rule 1 (for historical and perhaps other reasons), "suit," "case," and "action" are all used to describe what now might be perceived to be the same thing, do the Rules otherwise specify (or at least seem to favor) the use of any one of these terms (or even some other term with the same meaning) over the others? The answer to this question is yes. For purposes of the Rules, the proper term for a civil judicial proceeding is *action*.

How do we know that *action* is the proper term? The answer lies primarily in Rule 2 ("One Form of Action"), which provides: "There shall be one form of action to be known as 'civil action'." In other words, Rule 2 specifies that, whatever an "action" is, it is to be referred to as an *action*.[103] The conclusion that *action* is the term specified by the Rules for the concept of a civil judicial proceeding is further buttressed by the numerous references to this term in this context in other, later rules.[104]

Now that it has been established that *action* is the proper term, the next step is to ascertain the meaning of this term, for when dealing with

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determined that by using the words *suit*, *case*, and *action*, a wide enough net had been cast to make their point regarding the intended breadth of the Rules' scope.

103. *Accord* 1 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 2.02[2][a], at 2–8 (3d ed. 1999) (concluding that "any action within the scope of the Rules must be brought as a civil action"); 4 WRIGHT & MILLER, *supra* note 83, § 1029, at 116–18 ("The primary purpose of procedural rules is to promote the ends of justice; the federal rules reflect the view that this goal can best be accomplished by the establishment of a single form of action, known as a 'civil action,' thereby uniting the procedure in law, equity, and admiralty cases . . . .") (citations omitted); *see also* Fanchon & Marco, Inc. v. Paramount Pictures, Inc., 202 F.2d 731, 734 (2d Cir. 1953) (Clark, J.) ("For, as is well understood, the one civil action under the rules is used to vindicate any civil power the district court has . . . ."); ALTERMAN, *supra* note 84, at 172 ("The federal rules at the outset state that there shall be one form of action, known as 'civil action.' FRCP 2. Therefore, a lawsuit is an 'action.' It is not a cause.").

104. *See* FED. R. CIV. P. 3; 4(d)–(g), (i), (m)–(n); 5(a), (c); 10(a); 12(a), (h); 13(a), (g)–(h); 14(a), (c); 15(a)–(c); 16(a)–(c); 17(a), (c); 18(b); 19(a)–(b), (d); 20(a); 21; 22(2); 23–23.2; 24(a)–(c); 25(a)–(d); 26(a)–(b), (f); 27(a)–(c); 28(a), (c); 30(b), (d), (f); 32(a); 34(c); 35(a)–(b); 36(a)–(b); 37(a)–(b); 38(b)–(c); 39(a)–(c); 40; 41(a)–(b), (d); 42(a); 45(a); 50(b); 52(a)–(b); 53(a)–(c), (e); 54(b), (d); 55(b); 56(a), (d); 57; 59(a); 60(b); 62(a), (f); 65(a), (d)–(e); 65.1–67; 69(b); 71; 71A(b)–(d), (i), (k); 78; 79(a), (c); 81(a)–(c); 82; 86(a)–(b), (d)–(e); *see also* Sullivan v. Hudson, 490 U.S. 877, 894 (1989) (White, J., dissenting) ("The plain meaning of 'civil action' is a proceeding in a court . . . .") (citing Rules 2 and 3).

This is not to say that the Rules are entirely consistent on this point. *See infra* notes 137–140 and accompanying text (describing the numerous instances where other words are substituted for the term *action*). Some might argue that this supports a conclusion that there is no proper term for a civil judicial proceeding under the Rules. But the overwhelming weight of the evidence suggests that *action* has, in fact, been specified, and thus that these various uses of other terms are erroneous.

Incidentally, *case* appears to be the analog to *action* under the Federal Rules of Criminal Procedure. *See, e.g.*, FED. R. CRIM. P. 50(b) ("Plans for Achieving Prompt Disposition of Criminal Cases").

terms specified by the Rules, it is equally important to be clear as to their scope.[105] The first aspect of this discussion relates to what might be referred to as the spatial scope of this term. As the authorities previously referenced suggest, an *action* generally represents the concept of an entire civil judicial proceeding; that is, it is the sum of all the claims[106] by and between the parties to any given proceeding.[107]

Admittedly, some courts have held, and some legal scholars have argued, that the term *action* instead should be interpreted as meaning only those claims pleaded against any particular *party*, at least for purposes of Rule 41(a), which governs the procedure with respect to voluntary dismissals.[108] For example, Wright and Miller argue:

> The power to drop some plaintiffs or some defendants from the suit plainly exists, either in the Civil Rules or in the inherent

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105. *Cf.* HOSPERS, *supra* note 12, at 14:

> If you defined "telephone" as an instrument for communication, this definition would be too broad to fit our actual usage of the word: there are many instruments for communication besides telephones. But if you defined "tree" as a plant with green leaves and a trunk, this definition would include only deciduous trees and would exclude evergreen trees—and we do use the word "tree" so as to include evergreens; thus the definition would be too narrow. We want to get into the definition all those features that we take to be defining, and none that are not defining.

106. The term *claim* is discussed in greater detail *infra* Part III.B.

107. *See* Harvey Aluminum v. Am. Cyanamid Co., 203 F.2d 105, 108 (2d Cir. 1953) (Augustus N. Hand, J.) (holding that "the word 'action' as used in the Rules denotes the entire controversy"); 1 MOORE ET AL., *supra* note 103, § 1.20[1][a], at 1-37 ("For purposes of the Rules, the word *action* refers not only to a single claim or cause of action, but to the entire civil proceeding.").

108. Rule 41 ("Dismissal of Actions"), subdivision (a) ("Voluntary Dismissal: Effect Thereof"), is divided between paragraphs (1) ("By Plaintiff; by Stipulation") and (2) ("By Order of Court"). Paragraph (1) currently provides:

> Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an *action* may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the *action*. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an *action* based on or including the same claim.

(emphasis added). And paragraph (2) provides:

> Except as provided in paragraph (1) of this subdivision of this rule, an *action* shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the *action* shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(emphasis added).

> power of the district court. Nevertheless it seems undesirable and unnecessary to invoke inherent power to avoid a limit on Rule 41(a) that is reached only by an overly literal reading of that rule.[109]

But such an interpretation of *action*, even for purposes of this rule, seems erroneous. Certainly, the inherent power of a district court should rarely, if ever, be invoked to override the plain language of a federal rule of civil procedure. There is also little question but that it would be more convenient (and probably more in conformity with the Rules generally) if Rule 41(a) expressly permitted the voluntary dismissal of all claims (or perhaps even of any particular claim) against any particular party, even if other claims against other parties remain.[110] (Indeed, the fact that Rule 41(a) does not so provide is probably due to oversight—an oversight that might be related to the fact that this subdivision has not substantially changed since first adopted in 1937, when actions presumedly were less complex.) But an interpretation of *action* as meaning only the claims pleaded against a particular party—which apparently would mean that there are as many "actions" contained within a given proceeding as there are such parties—is clearly at odds with the manner in which this term is used elsewhere in the Rules.[111] Accordingly, until Rule 41(a) is amended (and it probably should be), it seems that the soundest approach for seeking the voluntary dismissal of less than all of the defending parties would be to proceed either under Rule 15 ("Amended and Supplemental Pleadings") or Rule 21 ("Misjoinder and Non-Joinder of Parties").[112]

The second aspect of the meaning of the term *action* that should be considered relates to its temporal scope. The Rules expressly specify when an action starts (or "commences"). According to Rule 3 ("Commencement of Action"): "A civil action is commenced by filing a

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109. 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2362, at 251–52 (2d ed. 1995) (citation omitted); *accord* 8 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 41.21[3][a], at 41-35 (3d ed. 2000) ("A voluntary dismissal may be taken against fewer than all defendants, as long as all claims are dismissed as against each one affected . . . .") (citation omitted).

110. *Cf.* FED. R. CIV. P. 41(b) ("Involuntary Dismissal: Effect Thereof") (providing for the dismissal "of an action or of any claim against the defendant").

111. *Cf.* Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993) ("Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.").

112. *Cf.* Johnston v. Cartwright, 355 F.2d 32, 39 (8th Cir. 1966) (Blackmun, J.) (recognizing Rules 15 and 21 as appropriate alternative means of proceeding in this context).

complaint with the court." The obvious implication of this language is that what we commonly think of as an action does not become an action (as that term is defined in the Rules) until a complaint has been filed.[113]

Of course, if an action has a beginning, one might logically ask whether an action has an end, and if so, what marks the end? Somewhat surprisingly, the Rules are not at all clear on this.[114] But what little the Rules do say seems to imply that, at least for purposes of the Rules themselves, an action ends upon the entry of a final judgment as to all claims.[115]

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113. At least for purposes of the Rules. *Cf.* Walker v. Armco Steel Co., 446 U.S. 740, 752–53 (1980) (holding that Rule 3 definition of commencement is inapplicable for purposes of determining effect of state statute of limitations in diversity action).

114. Nor are the leading legal encyclopedias. *See* 1A C.J.S. *Actions* § 259, at 754–55 (1985):

> Where an action is duly prosecuted, the time when it terminates differs in different jurisdictions, some of which regard it as terminated on rendition of the judgment. In other jurisdictions, however, an action does not terminate on rendition of the judgment, and is not regarded as terminated until the judgment is satisfied, until fully certified, or until the time for taking an appeal has expired, unless the judgment is sooner satisfied.
>
> Furthermore, under some authority, a suit is not legally terminated until it has been finally decided by the court of appeals to which it is finally submitted, and its opinion certified in the trial court.

(citations omitted); 1 AM. JUR. 2D *Actions* § 74 (1994) (providing a similarly ambiguous summary). Perhaps the reason is that "the determination of pendency depends upon the purpose of an applicable rule or statute and the results it would have in a specific case, in order to achieve a sensible and practical result." 1A C.J.S. *Actions* § 258, at 754 (1985) (citing *In re* Mackey, 416 P.2d 823, 849 (Alaska 1966)).

115. The only real hints in this regard are found in Rules 27(b) and 54(b). Rule 27(b) (which relates to the taking of perpetuation depositions) provides (in part):

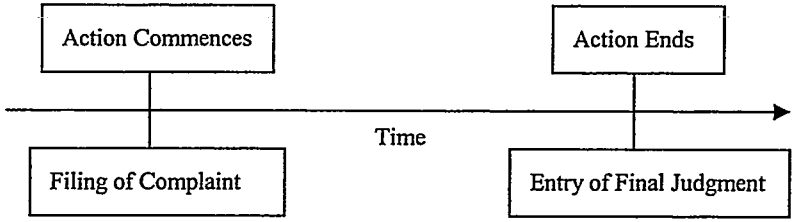
> If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof *as if the action was pending in the district court.*

(emphasis added). Implicit in this rule is the notion that an action is no longer considered "pending" following the entry of what must be a final judgment, which in turn suggests that the entry of such a judgment marks the end of the action. To the same effect is Rule 54(b) ("Judgment Upon Multiple Claims or Involving Multiple Parties"), which provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties *shall not terminate the action* as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

The life of an action may be represented graphically by the timeline described below as Figure 1.

Figure 1—The Life of an Action



The foregoing discussion raises one final question. As every attorney knows, any number of acts and events can and do occur in the course of civil litigation prior to the filing of a complaint with the court and subsequent to the entry of a final judgment. Indeed, even the Rules themselves contemplate the occurrence of such acts and events.[116] What, then, are we to call this thing otherwise termed an "action" before it becomes an action and after it ceases to be an action? The Rules do not provide the answer, and there does not appear to be a consensus among other authorities that any particular term is dictated. It seems, though, that one could reasonably choose any of several words that includes among its familiar definitions a meaning that is closely akin to that of *action* (such as (taking a cue from Rule 1) *case* or *suit*)—at least so long as one is consistent in the use of that term (excepting the situation where

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(emphasis added). As the language of this rule similarly implies, an action is considered "terminated" with respect to any claim only upon the entry of a final judgment as to that claim.

Though not unanimous, the consensus among other authorities seems to be in accord. *See, e.g.*, Catlin v. United States, 324 U.S. 229, 236 (1945) ("Had [defendant's] motion [to dismiss] been granted and judgment of dismissal been entered, clearly there would have been an end of the litigation and appeal would lie...."); 10 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2651, at 10 (3d ed. 1998) ("A judgment is the final determination of an action and thus has the effect of terminating the litigation."); BLACK'S LAW DICTIONARY 29 (7th ed. 1999) ("'The action is said to terminate at judgment.'" (quoting 1 MORRIS M. ESTEE, ESTEE'S PLEADINGS, PRACTICE, AND FORMS § 3, at 1 (Carter P. Pomeroy ed., 3d ed. 1885)).

116. For example, the Rules themselves not only presuppose the preparation of the complaint that must be filed to commence the action, they expressly provide the procedures that are to govern that preparation. *See* FED. R. CIV. P. 8–11. Similarly, the Rules expressly provide the procedures to be followed with respect to the amendment of judgments (*see* FED. R. CIV. P. 59(e)) and the manner by which to obtain relief from a judgment (*see* FED. R. CIV. P. 60). *See also* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 395 (1990) ("It is well established that a federal court may consider collateral issues after an action is no longer pending.").

there is a further need to draw some form of distinction) and careful to distinguish the use of that term from that of one's use of *action*.

To summarize: Once a complaint is filed with the court, the civil judicial proceedings underlying that complaint should be referred to as an *action*, and nothing else, until a final judgment is entered. Conversely, at any other time—i.e., prior to the filing of the complaint, and subsequent to the entry of a final judgment—the thing otherwise termed an *action* should be referred to as something else.

But why? After all, if *case* and *suit* (and perhaps other words) have essentially the same meaning, does it really matter?[117] The first answer to this question is that the Rules specify the use of the term *action* where appropriate.[118] And as discussed previously,[119] that a particular body of enacted law (such as the Rules) specifies the use of a particular term is a sufficient reason for using that term in those contexts where it applies. Other reasons for exercising care in the use of *action* have been discussed previously as well.[120]

But there is at least one other reason for using the term *action* where called for under the Rules that has not already been discussed. This further reason has to do with the relatively less common usage of this particular definition of that term. It appears that all of the words used to express the general legal concept represented by the term *action*, for whatever historical reasons, happen to be extremely common words with

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117. Indeed, one legal scholar specifically criticizes the use of *action* in this context:

> [*A*]*ction* is interchangeable with *case*, *lawsuit*, and *suit* and has no more technicality than any of them. As the mood strikes them, lawyers use all four, *action* unconsciously favored as the an in-word picked up in law school. For most nonlawyers, this sense of *action* is a nonword, and the lawyer who wants to get through to a client doesn't use it. Dropping this sense of *action* from the legal vocabulary would also be a step in the direction of precision, limiting *action* to ["a right to sue"], which has no one-word equivalent in ordinary English.

MELLINKOFF'S DICTIONARY OF AMERICAN LEGAL USAGE 9 (1992) (examples omitted). It is true that *action* might not be the best word to use when communicating with a non-attorney client, as its legal meaning is probably less well understood than is that of *case* or *suit*. *See infra* notes 121–126 and accompanying text. *But see supra* notes 70–73 and accompanying text (urging attorneys to consider educating non-attorneys as to proper legal terminology). But, for the reasons discussed previously (*see supra* notes 103–104 and accompanying text), it is not true that *action* is no more technically correct when communicating among attorneys than any of these other terms for purposes of the Federal Rules of Civil Procedure. One also might question whether there is no one-word equivalent to *action* that means "a right to sue," as *claim* also seems to share that meaning. *See infra* Part III.B.

118. *See supra* notes 103–104 and accompanying text.

119. *See supra* notes 81–83 and accompanying text.

120. *See generally* Part II.

numerous nonlegal meanings.[121] The word *action* is, of course, no exception.[122] But it also seems that the *legal* usage of the word *action*, by both attorneys and non-attorneys, is less common than the legal usage of most, if not all, of the words that have roughly the same general meaning. Certainly, this is true of the word *case*,[123] and it also seems true of the word *suit* (or *lawsuit*).[124] And when one goes about the task of selecting specific words for denoting concepts with fairly well-defined meanings (which would include many of the concepts found in the Rules), that is probably a good thing. In other words, if the drafters of the Rules wanted to assure that the terms used in the Rules would not be misused, the best approach might have been to select terms with little or no pre-defined meaning, such as the mathematician's *googol*.[125] Such an approach would have helped demarcate the distinctions between the precise meanings of those terms and the similar (but not identical) meanings of various other non-Rule words. Of course, for a number of reasons, this approach (even if considered) probably would not have been regarded as practicable, meaning the drafters were left with little choice but to choose that word (or here, a word from among those words) with a preexisting meaning roughly analogous to this newly-defined concept we now term *action*. But if one of the goals is to demarcate the meaning of a concept as defined under the Rules and other, similar (e.g., pre-Rules) concepts, it makes some sense to select a word whose usage is less widespread—such as *action*.[126]

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121. For example, *Webster's Third New International Dictionary* includes three entries for "case." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 345–46 (1993). The definitions for this word include, "a special set of circumstances or conditions"; "an instance of disease"; and "a box or receptacle to contain or hold something." *Id.* "Suit" is given two entries in *Webster's*, and includes among its definitions, "a set of garments"; "all the cards in a pack of playing cards bearing the same spot or symbol"; and "to be proper or right for." *Id.* at 2286.

122. *Webster's Third New International Dictionary* includes two entries for "action." *Id. at* 21. The first entry lists nine senses of this word, and includes definitions ranging from "the process of doing," to "combat in war," to "the entire process of betting." *Id.* Interestingly, though, the first sense (and therefore the original sense; *see id.* at 17a) of "action" defines this word as "a deliberative or authorized proceeding," and particularly "a legal proceeding by which one demands or enforces one's right in a court of justice." *Id.* at 21. Similarly, the second entry for "action" defines this word as a verb meaning "to bring a legal action against." *Id.*

123. *See supra* notes 21–31 and accompanying text, and note 117.

124. *See supra* note 117.

125. *See supra* note 42 and accompanying text.

126. There does not appear to be any evidence, though, that the initial drafters of the Rules had this in mind when they selected *action* as the word to be used to represent the concept now associated with this term. In fact, there does not appear to be any evidence that the choice of this term was a considered decision at all. Instead, it appears that the choice of this term was simply an

Regrettably, many attorneys, as well as many judges, are careless in their use of the term *action* and related words. Consider, for example, the opening paragraph of the district court's opinion in *Jones v. Clinton*:[127]

> The plaintiff in this *lawsuit*, Paula Corbin Jones, seeks civil damages from William Jefferson Clinton, President of the United States, and Danny Ferguson, a former Arkansas State Police Officer, for alleged *actions* beginning with an incident in a hotel suite in Little Rock, Arkansas. This *case* was previously before the Supreme Court of the United States to resolve the issue of Presidential immunity but was remanded to this Court following the Supreme Court's determination that there is no constitutional impediment to allowing plaintiff's *case* to proceed while the President is in office. Following remand, the President filed a motion for judgment on the pleadings and dismissal of the complaint pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. Ferguson joined in the President's motion. By Memorandum Opinion and Order dated August 22, 1997, this Court granted in part and denied in part the President's motion. The Court dismissed plaintiff's defamation claim against the President, dismissed her due process claim for deprivation of a liberty interest based on false imprisonment and injury to reputation, but concluded that the remaining claims in plaintiff's complaint stated viable *causes of action*. Plaintiff subsequently obtained new counsel and filed a motion for leave to file a first amended complaint, which the Court granted, albeit with several qualifications. The *matter* is now before the Court on motion of both the President and Ferguson for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff has responded in opposition to these motions, and the President and

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historical accident emanating from the enactment of the Rules Enabling Act of 1934. That Act, which led to the promulgation of the Federal Rules of Civil Procedure, provided:

> [§ 1] Be it enacted . . . [t]hat the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. . . .
>
> [§ 2] The court may at any time unite the general rules prescribed for it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both . . . .

Act of June 19, 1934, Ch. 651, §§ 1–2, 48 Stat. 1064 (codified at 28 U.S.C. §§ 723b, 723c (1940), recodified at 28 U.S.C. § 2072 (1994)). In other words, the Act enabled the drafters of the Rules to prescribe a new set of procedural rules for civil "actions at law" that also could encompass "cases in equity"—though with the former being the conceptual (or at least terminological) starting point.

127. 990 F. Supp. 657 (E.D. Ark. 1998).

> Ferguson have each filed a reply to plaintiff's response to their motions. For the reasons that follow, the Court finds that the President's and Ferguson's motions for summary judgment should both be and hereby are granted.[128]

As used in this passage, the words "lawsuit," "case," and "matter" refer to what would be properly termed an *action*. Conversely, though variations of the word "action" appear twice, in neither instance is this word used in the sense defined by the Rules. Instead, the court uses "action" first in reference to President Clinton's and Officer Ferguson's alleged "actions," and later as part of the phrase "causes of action."[129] Perhaps the average attorney would not be confused by these various uses (and non-uses) of the word *action*. But the court's curious avoidance of this term where appropriate (as well as its equally curious failure to use any other particular term with any consistency), coupled with its use of this word in other, unrelated contexts, certainly does not make understanding its opinion any easier.

An example of actual confusion caused by a district court's failure to properly use this term occurred in *Ramirez v. Fox Television Station, Inc.*[130] *Ramirez* involved a racial discrimination claim initially pleaded in state court.[131] Following the removal of the action to the federal district court, the action was dismissed for failure to exhaust the grievance procedures specified in the parties' collective-bargaining agreement.[132] On appeal, the defendant argued that the district court's dismissal order did not constitute a "final decision" for purposes of establishing appellate court jurisdiction.[133] In the course of discussing its analysis on this issue, a frustrated United States Court of Appeals for the Ninth Circuit chided:

> The terminology employed by the district court in this case is confusing. There was no mention of dismissing the action or dismissing the complaint. Rather, at different times, the court stated that it was dismissing Ramirez's "claim," dismissing the "matter," and dismissing the "case." In each instance the court indicated that the dismissal was "without prejudice." The district

128. *Id.* at 662 (emphasis added and citations and citations omitted).

129. *Id.* at 662. The impropriety of the phrase "cause of action" is dealt with in Part III.B *infra*.

130. 998 F.2d 743 (9th Cir. 1993).

131. *Id.* at 746.

132. *Id.*

133. *Id.*

court's intentions are difficult, if not impossible, to discern from these phrases.[134]

Though one might question whether there was anything improper about the district court's reference to the dismissal of the plaintiff's "claim"[135] (not to mention whether it is ever proper to refer to the dismissal of a "complaint"[136]), the district court's references to "matter" and "case" were inappropriate, and certainly the court of appeals would have been much less confused had the district court simply dismissed the *action*.

Of course, the word choices by the district courts in *Jones* and *Ramirez* would have been less excusable had the Rules been more consistent on this point. Regrettably (and somewhat surprisingly), even the Rules *themselves* very often fail to use the term *action* where appropriate. The most serious such misuses occur with respect to those rules that utilize other words where *action* would be correct. For example, the very title of Rule 40 is "Assignment of *Cases* for Trial."[137] And reminiscent of *Jones* is official Form 1B ("Waiver of Service of Summons"),[138] which not only uses the word "action," but also (with no apparent change in meaning) "case" and "lawsuit."[139] There are numerous other examples.[140]

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134. *Id.* at 746–47.

135. *See infra* note 317 and accompanying text.

136. For more on the impropriety of dismissals of *complaints*, *see infra* notes 318–320 and accompanying text.

137. (emphasis added). Ironically, the text of this rule refers not to cases, but only to "actions."

138. The forms contained in the Appendix of Forms are intended to be "sufficient under the rules." FED. R. CIV. P. 84.

139. *See also* recently amended FED. R. CIV. P. 26(b)(2) (using "action," "case," and "litigation"); Form 1A ("Notice of Lawsuit and Request for Waiver of Service of Summons"). Though "case" as used in Rule 26(b)(2) arguably bears a meaning somewhat separable from "action" or "litigation," the easy confusion of the former with the latter would seem to call for a different word choice here. Similarly, though the use of "lawsuit" in the title of Form 1A (however inadvertent) might be defensible in that this form is frequently served on persons not yet represented by counsel, any such purpose is thwarted by the form's later use of the word "action."

140. Instances (beyond Rule 1) where *case* is used in a manner where *action* would not only be appropriate, but preferred, include Rules 9(h); 14(c); 16(a)–(c); 26(a), (f)–(g); 30(a), (f); 31(a); 32(c); 50(a); 55(b), (d); 56(d); 57; 63; 65(e); 71A(h), (j); 72(b); 73(a)–(b); 81(a), (c); and Forms 2; 33–34; 35. Again, some might argue that the use of the word "case" in Form 33 ("Notice of Availability of a Magistrate Judge to Exercise Jurisdiction"), a form that might be sent by a court to unrepresented parties, might be more understandable to those less learned in the law. Regrettably, Form 34 ("Consent to Exercise of Jurisdiction by a United States Magistrate Judge"), a form that often accompanies Form 33, instead uses the phrase "civil matter," thereby defeating much of the benefit that might have otherwise inured; see also Form 34A (similarly using "matter" where *action* would be more appropriate). Finally, new Rule 26(a)(1)(E) provides:

More subtle are those instances in which *action* is used in a sense other than as meaning a civil judicial proceeding. Particularly troubling in this regard are instances where *action* is used in more than one sense in the same passage. One such example is found in Rule 26(c) ("Protective Orders"), which provides:

> Upon motion by a party or by the person from whom discovery is sought, accompanied by a certificate that the movant in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court *action*, and for good cause shown, the court in which the *action* is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from

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The following categories of *proceedings* are exempt from initial disclosure under Rule 26(a)(1):

. . . .

(ii) a petition for habeas corpus *or other proceeding* to challenge a criminal conviction or sentence;

. . . .

(vii) a *proceeding* ancillary to proceedings in other courts . . . .

(emphasis added). Though actions challenging a criminal conviction or sentence and actions ancillary to proceedings in other courts undoubtedly are somewhat different from the more typical civil action, one might question why these differences call for a change in terminology, particularly given the use of this term elsewhere in the Rules. *See, e.g.*, FED. R. CIV. P. 62 ("Stay of Proceedings to Enforce a Judgment").

There are a number of other instances in which *case* appears to be used in different contexts. *See, e.g.*, FED. R. CIV. P. 14(a) ("The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, *in which case* references in this rule to the summons include the warrant of arrest . . . .") (emphasis added). Similarly, of the few instances (beyond Rule 1) in which *suit* is used, all occur in other contexts. *See* FED. R. CIV. P. 4(h), (j)(2) (referring to foreign persons "subject to suit"); 59(a)(2) (providing for a new trial "in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States"). Though these usages do not cause the same problems as do substitutions for the term *action*, perhaps, for the sake of clarity, other words might be used where no loss of meaning would result.

One might observe that a great many of the errors identified above (as well as many of the others identified in this Article) were inserted into the Rules relatively recently, particularly in conjunction with the 1993 amendments. *See* Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 401 (1993). This might be due in part to the accelerating rate of rule changes. For example, though the Rules have been amended by order of the Supreme Court 26 times since their promulgation in 1937, nine of those orders have been issued since 1990. In fact (and somewhat reminiscent of the federal tax code), the Rules have now been amended every year since 1995, and appear destined to be amended again in 2002 (*see infra* notes 387–388 and accompanying text).

> annoyance, embarrassment, oppression, or undue burden or expense . . . .[141]

Besides being a ridiculously long sentence, this subdivision is made confusing by its various uses of the word "action." Its meaning would be clarified by substituting another word (such as *order*) for the first use of "action," as that would help solidify the meaning of the second use of "action," a use for which no other word properly could be substituted.

In order to avoid further misunderstanding, the Rules should be amended in a manner that ensures that *action* is used wherever (but only wherever) appropriate, and that related words are used only where a different meaning is intended and then only where necessary.[142] Meanwhile, particular care should be exercised by attorneys and judges to use these various terms properly.

B. *Claim*

According to Rule 3, the filing of a complaint results in the commencement of what the Rules refer to as an "action." But what is a *complaint*? Though the Rules describe a "complaint" as a type of "pleading,"[143] this term otherwise is not expressly defined. Nonetheless, the Rules do state what an affirmative pleading (which a complaint surely is) is to "contain." In pertinent part, Federal Rule of Civil Procedure 8 ("General Rules of Pleading"), subdivision (a) ("Claims for Relief"), provides: "A pleading which sets forth a *claim* for relief, whether an original *claim*, counter*claim*, cross-*claim*, or third-party *claim*, shall contain . . . (2) a short and plain statement of the *claim* showing that the pleader is entitled to relief . . . ."[144] Thus, Rule 8(a) is clear that the thing that is to be stated in an affirmative pleading showing that the pleader is entitled to the relief sought is a *claim*. And the Rules are consistent on this point. As with the term *action*, *claim* is further

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141. (emphasis added). Other instances in which the Rules employ non-technical uses of the word *action* can be found in Rules 6(b); 12(a); 16(c), (e); 37(a), (c)(1), (d); 51; 53(e)(2); 54(d)(1); 61; 71A(h); 77(c). Regrettably, most of these examples occur in rules that also include proper uses of the term *action*, including at least two—Rules 37(d) and 53(e)(2)—that, like Rule 26(c), employ multiple senses of this word within the same subdivision.

142. There is, of course, precedent for such technical amendments. *See, e.g.*, *Amendments to Federal Rules of Civil Procedure*, 113 F.R.D. 189, 272 (1987) (describing 1987 "gender-neutralizing" amendments).

143. FED. R. CIV. P. 7(a).

144. (emphasis added).

referred to on numerous occasions throughout the Rules in this same context.[145]

The phrase most often confused with the term *claim* is *cause of action*. For example, in *Jones*, the court appears to use *claim* and *cause of action* interchangeably at least twice.[146] But although *claim* and *cause of action* might share a similar general legal meaning,[147] the phrase *cause of action* cannot be found anywhere in the Rules.[148] Indeed, the history of the promulgation of the Rules indicates that the choice of the term *claim* rather than *cause of action* was quite intentional.[149] Moreover, though

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145. *See, e.g.*, FED. R. CIV. P. 12(b)(6) (describing motion to dismiss for "failure to state a claim upon which relief can be granted").

146. *See* Jones v. Clinton, 990 F. Supp. 657, 662, 674 (E.D. Ark. 1998). The *Jones* court is not alone in its use of the phrase *cause of action*. A WESTLAW search conducted on February 21, 2001, in the ALLFEDS database, yielded 167,469 decisions dated after 1944 (well after the date the Rules came into effect) containing this phrase.

147. *Compare* BLACK'S LAW DICTIONARY 240 (7th ed. 1999) (defining "claim" as an "interest or remedy recognized at law; the means by which a person can obtain a privilege, possession, or enjoyment of a right or thing; CAUSE OF ACTION") *with id.* at 214 (defining "cause of action" as a "group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person; CLAIM"); *see also* Keene Corp. v. United States, 508 U.S. 200, 210 (1993) (similarly observing that *claim* and *cause of action* have essentially the same meaning); Harvey Aluminum, Inc. v. Am. Cynamid Co., 203 F.2d 105, 108 (2d Cir. 1953) (recognizing that "'claim' refers [in the Rules] to what has traditionally been termed 'cause of action'").

148. *But cf.* Form 20 ("Answer Presenting Defenses Under Rule 12(b)") (referring to a "right of action").

149. As explained by Wright and Miller:

> Conspicuously absent from Rule 8(a)(2) is the requirement found in the codes that the pleader set forth the "facts" constituting a "cause of action." The substitution of "claim showing that the pleader is entitled to relief" for the code formulation of the "facts" constituting a "cause of action" was intended to avoid the distinctions drawn under the codes among "evidentiary facts," "ultimate facts," and "conclusions" and eliminate the unfortunate rigidity and confusion surrounding the words "cause of action" that had developed under the codes. The draftsmen of the federal rules obviously felt that the use of a new formulation would emphasize the modern philosophy of procedure espoused by the federal rules, destroy the viability of the old code precedents, and encourage a more flexible approach by the courts in defining the concept of claim for relief.

5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216, at 148–49 (2d ed. 1990) (citations omitted); *accord* FLEMING JAMES, JR., CIVIL PROCEDURE 84 (1965):

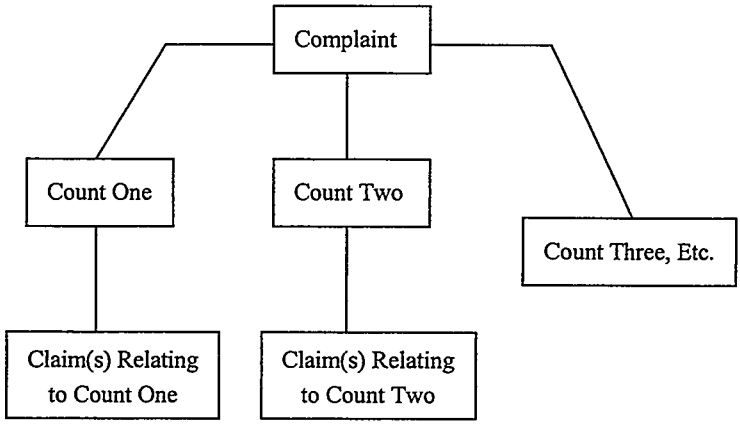
> When the federal rules were drafted in the 1930's, the provision for the content of pleadings contained neither the word "facts," nor the term "cause of action." It provided instead that a claim for relief should contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The omissions were quite deliberate.... The intention was to repudiate the gloss which some courts had put on the omitted words and thereby to avoid the trouble which had resulted from what were probably misconceptions of the original purpose.

(citations omitted); *see also* GARNER, LEGAL USAGE *supra* note 76, at 140 (defining "cause of action" alternatively as: "(1) a group of operative facts, such as a harmful act, giving rise to one or

there was a later attempt to amend Rule 8 to include reference to "causes of action," that attempt was rejected.[150]

Another word that sometimes is confused with *claim* is *count*, a word that also shares a similar general legal meaning.[151] But although *count* is used three times in the Rules,[152] this term actually refers to a means of organizing and distinguishing groups of one or more claims related by transaction or occurrence.[153] The relationship between *complaint*, *count*, and *claim* is illustrated below in Figure 2.

Figure 2—The Relationship Between Complaint, Count, and Claim



more rights of action" or "(2) a legal theory of a lawsuit," and observing: "Writers on civil procedure prefer that the term be confined to sense (1). The acceptance of sense (2) by some courts actually caused the drafters of the Federal Rules of Civil Procedure to avoid the term altogether."); Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849, 871 (1992) (observing that the phrase "cause of action" was abandoned with the adoption of the Federal Rules of Civil Procedure in 1938); Rhynette N. Hurd, Note, *The Propriety of Permitting Affirmative Defenses To Be Raised by Motions To Dismiss*, 20 MEM. ST. U. L. REV. 411, 441 n.176 (1990) (observing same).

150. 5 WRIGHT & MILLER, *supra* note 149, § 1216, at 164–65.

151. *See* BLACK'S LAW DICTIONARY 353 (7th ed. 1999) (defining "count" as "the statement of a distinct claim" in "a complaint or similar pleading").

Incidentally, *count* appears to be the analogous term (for *claim*) used under the Federal Rules of Criminal Procedure. *See, e.g.*, FED. R. CRIM. P. 7 ("The Indictment and the Information"), subdivision (c) ("Nature and Contents").

152. *See* FED. R. CIV. P. 8(e)(2), 9(h), 10(b).

153. *See* FED. R. CIV. P. 10(b) ("Each claim founded upon a separate transaction or occurrence . . . shall be stated in a separate count . . . whenever a separation facilitates the clear presentation of the matters set forth."); *see also* FED. R. CIV. P. 8(e)(2) ("A party may set forth two or more statements of a claim . . . alternatively or hypothetically, either in one count . . . or in separate counts . . . .").

On occasion, the confusion of these terms leads to problems. Consider, for example, the case of *Nunley v. Kloehn*.[154] In *Nunley*, the plaintiff averred (through Counts I–V) that a lip augmentation procedure and four subsequent remedial procedures were negligently performed by the defendant.[155] The defendant moved to dismiss Counts II–V for failure to state a claim upon which relief can be granted on the ground that Counts I–V constitute only one cause of action.[156] The district court denied the defendant's motion "because he confuses the theoretical underpinnings of a 'cause of action' with a 'claim' or 'count.'"[157] The court explained:

> While often times used interchangeably, the terms "cause of action" and "claim" or "count" are more accurately understood to mean two different things. . . . A "cause of action" . . . is the sequence of factual events giving rise to a lawsuit, while a "claim" (or "count") is the legal theory under which relief is sought.
>
> In many lawsuits, or causes of action, the plaintiff only brings one claim, or legal theory, for relief; in such cases, the terms "cause of action" and "claim" are often used interchangeably as labels for the parties' legal proceedings. In other actions, however, a single cause of action, or lawsuit, may consist of many different claims, or legal theories of relief . . . . Under these circumstances, it would indeed be misleading to equate these terms; the sequence of factual occurrences gives rise to a single cause of action which, in turn, is comprised of several claims, or legal theories of recovery. A cause of action, then, may contain numerous claims, while a single claim may or may not constitute a single cause of action.
>
> . . . .
>
> Perhaps the plaintiff could have better organized her Amended Complaint by first grouping all of the factual allegations underlying her claims and then listing each of her legal theories, or claims, in numerical order, referencing the factual statements to which they apply; this would have saved her the trouble of making repeated claims of negligence and, perhaps, precluded her from captioning the sections of her complaint as "Counts," a term better

154. 158 F.R.D. 614 (E.D. Wis. 1994).

155. *Id.* at 616.

156. *Id.*

157. *Id.* at 617.

> understood and utilized in the criminal context. Nevertheless, courts generally look to the substance of pleadings, rather than their form, when determining whether or not . . . legal theories have been properly alleged. In this case, Counts I through V of the plaintiff's Amended Complaint, while perhaps not a model of clarity, adequately present her negligence claims based on the defendant's alleged continuum of wrongful medical treatment. For this reason, the defendant's request for dismissal as to these counts must be denied.[158]

While the substitution of *cause of action* or *count* for *claim* can lead to problems, also problematic in legal writing are uses of the word *claim* other than as representing the concept described in Rule 8(a). Consider, for example, the arguably confusing manner in which the term *claim* is used in *Jones*. Though the court does, on occasion, use this word in its proper Rules sense,[159] it also uses this word (or variations thereof) as a substitute for *argument*[160] and *allegation* (or *averment*).[161] Because of the confusion that can result from such homonymous usage, one leading legal lexicographer cautions that the use of *claim* "in different senses in a single context" is "[t]o be avoided at all costs."[162] I would go farther, and suggest that, in legal writing, *claim* should only be used in its Rules sense unless some other usage is unavoidable. Besides being confusing, *claim* serves as a weak substitute for other words that better convey the concepts being expressed.

Does all of this homonymity mean that the word *claim* was a poor choice for use as a Rule term? Perhaps.[163] But it was a better choice than

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158. *Id.* at 617–18. For another example of a case involving confusion between the meanings of *claim* and *cause of action*, see Nagler v. Admiral Corp., 248 F.2d 319, 324 (2d Cir. 1957) (Clark, C.J.).

159. *See, e.g.*, Jones v. Clinton, 990 F. Supp. 657, 662 (E.D. Ark. 1998).

160. *See, e.g., id.* at 671.

161. *See id.* at 672 n.16. On the meaning and use of *allegation* and *averment*, see *infra* Part III.C.

162. GARNER, LEGAL USAGE, *supra* note 76, at 159.

163. *Cf.* GARNER, ELEMENTS, *supra* note 31, at 106, which includes the following passage under the heading, "Words and Expressions Confused and Misused":

> The verb originally meant "to lay claim to," but it is now often used in the sense "to allege, assert."
>
> "She claimed that the contract had been rescinded."
>
> In this sense, *claim* often suggests an unsubstantiated assertion:
>
> "She claimed . . . , but the evidence was against her."
>
> Avoid using the word merely as a substitute for *say* or *state*.

cause of action, if that is the next best alternative. Even aside from the historical baggage that accompanies that phrase,[164] *cause of action* represents legalese at its worst.[165]

C. *Averment*

Rule 8(a) states that affirmative pleadings are to consist principally of claims. But what does a claim consist of? Most attorneys would say, *allegations*.[166] But that would be incorrect. The proper term for the facts[167] pleaded in an affirmative pleading is *averments*.[168] This is probably best demonstrated by Rule 8(b) ("Defenses; Form of Denials"), which provides:

> A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the *averments* upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an *averment*, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the *averments* denied. When a pleader intends in good faith to deny only a part

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As a noun, *claim* properly denotes either "a demand for something" (a patent claim) or "that which is demanded" (her claim was 40 acres). Using the noun as an equivalent of *assertion* is now acceptable:

> "The defendant cannot support his claim that the plaintiff's case is time-barred."

(omission in original).

164. *See supra* notes 149–150 and accompanying text.

165. *See* MELLINKOFF, *supra* note 9, at 17:

> Not everything that has the sound of the law is a term of art. A large group of law words fail to qualify because not specific. For example, *cause of action* is unadulterated law talk, incomprehensible to laymen and often to lawyers. The first words categorizing the expression in *Black's Law Dictionary* are: "A 'cause of action' may mean one thing for one purpose and something different for another."

166. Certainly, *allegations* holds this common legal (and even non-legal) meaning. *See* BLACK'S LAW DICTIONARY 74 (7th ed. 1999) (defining "allegation" as "[s]omething declared or asserted as a matter of fact, esp. in a legal pleading"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 55 (1993) (defining "allegation" as "the act of alleging or asserting positively often before a court"). Part of the confusion here also might be due to the fact that *allegation* appears to be the analogous term used in the Federal Rules of Criminal Procedure. *See, e.g.*, FED. R. CRIM. P. 7 ("The Indictment and the Information"), subdivision (c) ("Nature and Contents").

167. Actually, for historical reasons, Rule 8(a) does not use the word *facts*. *See supra* note 149. Nonetheless, in practice, it is principally facts that are pleaded.

168. Incidentally, for those who might be unfamiliar with this word, an "averment" is a "positive declaration or affirmation of fact; esp., an assertion or allegation in a pleading." BLACK'S LAW DICTIONARY 131–32 (7th ed. 1999). The verb form of averment is "aver." *Id.* at 131.

> or a qualification of an *averment*, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the *averments* of the preceding pleading, the pleader may make denials as specific denials of designated *averments* . . . except such designated *averments* or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its *averments*, including *averments* of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.[169]

There is probably no term found in the Rules that is more misused, through non-use, than *averment*. For example, in one page of the *Jones* opinion alone, the court refers to Ms. Jones' averments as "allegations" (or variations thereof) 10 times.[170] This is common.[171] Regrettably, the Rules themselves do little better, as *allegation* is used repeatedly in contexts where *averment* would be appropriate.[172]

This rampant substitution of *allegation* for *averment* has caused one legal scholar to observe that *allege*, *alleged*, and *allegation* "have largely supplanted their older synonyms *aver*, *averred*, and *averment*."[173] Perhaps, even for purposes of the Rules, *averment* should be done away with. After all, what sense does it make to retain a term that is all but

169. (emphasis added). *See also* FED. R. CIV. P. 8(d) ("Effect of Failure to Deny") ("*Averments* in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. *Averments* in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided." (emphasis added)); 8(e) ("Pleading to be Concise and Direct; Consistency"), paragraph (1) ("Each *averment* of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." (emphasis added)); 9(a)–(f); 10(b); 22(1); 55(b)(2).

170. *See* Jones v. Clinton, 990 F. Supp. 657, 666 (E.D. Ark. 1998). On this same page, the court also refers to Ms. Jones' averments as *statements* and *assertions*. *Id.* No reference is made to any variation of the term *aver*.

171. A WESTLAW search conducted on February 21, 2001, in the ALLFEDS database turned up 35,763 decisions dated after 1944 containing variations of the word *aver*. By contrast, a similar search (which, admittedly, included criminal cases as well) of variations of the word *allege* resulted in 537,698 decisions.

172. *See* FED. R. CIV. P. 11(b)(3), (c)(1)(A); 23(d); 23.1 (using "allege"); 56(e); *see also* Form 2 ("Allegation of Jurisdiction"); Forms 3–18; 20–21; 23; 26.

173. MELLINKOFF'S DICTIONARY OF AMERICAN LEGAL USAGE 25 (1992). As *Jones* indicates (*see supra* note 170), other words are substituted as well.

ignored by (and, despite its repeated reference in the Rules, virtually unknown to) those who might have reason to use it?[174]

Actually, there are at least two reasons why *averment* should be retained. First, there are some lexicographical indications that *allegation* and *averment* do not mean precisely the same thing. Though both words refer to assertions of fact, an *averment* seems to require more in the way of substantiation, whereas *allegation* seems to suggest something lacking the same degree of support.[175] This common (nonlegal) understanding of the meaning of *averment* seems to comport more closely to the standard for pleadings contemplated by the Rules.[176]

But even if the meanings of these words were essentially inseparable, there might still be reason to embrace the more arcane for use in this context. For just as there are lots of *cases* in the world, we know which are more likely to be civil cases by use of the term *action*. Similarly, though there are lots of *allegations* (or *contentions*, etc.), we know which are more likely to be facts set forth in a civil complaint by use of the term *averment*.

Accordingly, the Rules should be amended and *averment* substituted for *allegation* wherever appropriate.

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174. *Cf.* Davis v. Ruby Foods, Inc., 269 F.3d 818, 819 (7th Cir. 2001) (Posner, J.) (questioning whether "'averment,' an archaic word of no clear meaning," is itself consistent with Rule 8(e)(1)'s command that pleadings be simple, concise, and direct).

175. *Compare* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 151 (1993) (defining "averment" as "a positive statement of facts: an allegation made with an offer to justify or prove what is alleged: VERIFICATION") *with id.* at 55 (defining "allege" as "to state or declare as if under oath positively and assuredly but without offering complete proof," and "allegation" as "an assertion unsupported and by implication regarded as unsupportable").

176. Specifically (the regrettable use of the word *allegation* notwithstanding), Rule 11(b) ("Representations to Court") provides:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

D. *Paper*

What is the proper Rules term for a paper that is filed and/or served in an action? The proper term for such a paper actually is *paper*. For example, Rule 5 ("Service and Filing of Pleadings and Other Papers"), subdivision (a) ("Service: When required"), provides:

> Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every *paper* relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, *and similar paper* shall be served upon each of the parties.[177]

Similarly, Rule 5(e) ("Filing With the Court Defined") provides:

> The filing of *papers* with the court as required by these rules shall be made by filing them with the clerk of court, except that the judge may permit the *papers* to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. A court may by local rule permit *papers* to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A *paper* filed by electronic means in compliance with a local rule constitutes a written *paper* for purposes of applying these rules. The clerk shall not refuse to accept for filing any *paper* presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.[178]

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177. (emphasis added). *See also* 4A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1143, at 413 (2d ed. 1987) ("The words 'similar paper' [in Rule 5(a)] evidence an attempt by the draftsmen to avoid a restrictive interpretation of the rule's specific list of papers, which is not intended to be exhaustive. In fact, these residuary words suggest an expansive application of the rule . . . .").

178. (emphasis added). The Rule meaning of the term *paper* appears to be in accord with pre-Rule and common law meanings of this word. *See, e.g.*, United States v. Lombardo, 241 U.S. 73, 76 (1916) ("A paper is filed when it is delivered to the proper official and by him received and filed."); BLACK'S LAW DICTIONARY 368 (7th ed. 1999) (defining "court papers" as "[a]ll documents that a party files with the court, including pleadings, motions, notices, and the like—Often shortened to *papers*.").

Finally, Rule 7(b) ("Motions and Other Papers"), paragraph (2), provides: "The rules applicable to captions and other matters of form of pleadings apply to all motions *and other papers* provided for by these rules."[179] Many other Rules are in accord.[180]

A few observations regarding the scope of this term are necessary. First, it appears that the term "papers" is limited to those items required under the Rules to be filed and/or served.[181] Thus (to take two examples), it appears that neither a letter sent by one party to another, nor a document produced in response to a discovery request, would be considered "papers" for purposes of the Rules.[182] But it also appears that the term "papers" encompasses more than just documents filed and/or served by the *parties*. For example, district court orders generally appear to be included.[183] Moreover, even documents filed and/or served by *non-parties* to an action presumedly would be counted as "papers" if done so in accordance with the Rules.[184]

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179. (emphasis added).

180. *See* FED. R. CIV. P. 5(d); 6(a), (e); 11(a)–(c)(1)(A); 65.1; 77(a), (d); 79(a); *see also* 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 7.04, at 7–19 (3d ed. 1999) ("Besides pleadings and motions, Rule 7(b)(2) recognizes that there are other types of papers provided for by the civil procedure rules, but does not define them.").

Incidentally, "papers" seems to have essentially the same meaning under the Federal Rules of Criminal Procedure. Indeed, FED. R. CRIM. P. 49(d) expressly states: "Papers shall be filed in the manner provided in civil actions."

181. *See supra* notes 178–180 and accompanying text.

182. Almost certainly, such documents also would not bear a caption. *See* FED. R. CIV. P. 7(b)(2). Of course, if any such documents were to be incorporated into a "paper" (for example, as exhibits to an affidavit), their character presumedly would change. *See, e.g.*, FED. R. CIV. P. 56(e).

Incidentally, though the foregoing discussion only addresses the meaning of "paper" for purposes of the Rules, that meaning might transcend the Rules in some regards. For example, 28 U.S.C. § 1446(b) (1994) provides in part:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable . . . .

It seems that a strong argument could be made that the meaning of "paper" for purposes of this statute is no different from the meaning of "paper" under the Rules. For a recent discussion of this issue (including citations to cases that have held to the contrary), see Georgene M. Vairo, *Removal Traps*, NAT'L L.J., July 9, 2001, at A14.

183. *See* FED. R. CIV. P. 5(a).

184. *See, e.g.*, FED. R. CIV. P. 24 (providing the procedure governing intervention). A contrary result was reached in *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 709 (7th Cir. 1979), in which the court held that the "similar paper" language of Rule 5(a) does not include a trial brief. In light of the foregoing authorities, though, the *Photovest* court's holding seems questionable.

Regrettably, many lawyers believe that the proper term for the various papers filed and/or served in an action is *pleadings*.[185] But such usages of the term *pleadings* are incorrect.[186] In fact, *pleadings* is one of the few terms expressly defined by the Rules. Rule 7(a) ("Pleadings") provides:

> There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

Thus: "No other paper will be considered a pleading except those specifically named in Rule 7(a)."[187] Moreover, there is no instance in the

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185. *See* ALTERMAN, *supra* note 84, at 171 ("Attorneys frequently have a file folder they call 'Pleadings.' In courtroom corridors you often hear attorneys refer to their motion papers as 'pleadings.' Unfortunately, even the judges have succumbed."); GARNER, LEGAL USAGE, *supra* note 76, at 233 ("American lawyers frequently use *pleadings* loosely as if it were synonymous with *court papers* . . . ."); CAROL ANN WILSON, PLAIN LANGUAGE PLEADINGS 66 (1996) ("As a matter of practice, . . . lawyers have come to put all documents filed in a lawsuit into files marked 'Pleadings,' and to refer to all of them as 'pleadings.' Some court rules even state now that motions shall be considered pleadings.").

186. Indeed, one legal scholar says that *pleadings* "receives my vote as the most misused word in lawsuits." ALTERMAN, *supra* note 84, at 171.

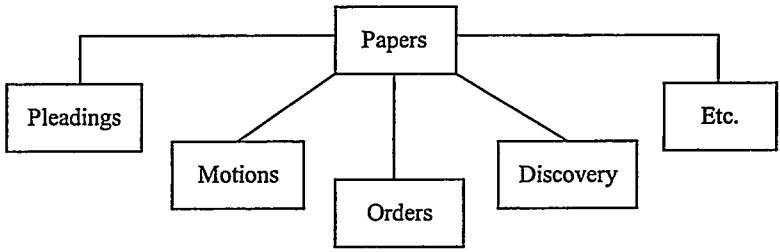
187. 2 MOORE ET AL., *supra* note 180, at § 7.02[1][b], at 7-7; *see also* Burns v. Lawther, 53 F.3d 1237, 1241 (11th Cir. 1995) (observing that "the Rules themselves provide a clear and precise meaning of 'pleadings' in Rule 7"). More general legal dictionary definitions are in accord. *See* BLACK'S LAW DICTIONARY 1173 (7th Ed. 1999) (defining "pleading" as a "formal document in which a party to a legal proceeding (esp. a civil lawsuit) sets forth or responds to allegations, claims, denials, or defenses"); GARNER, LEGAL USAGE, *supra* note 76, at 233 (2d ed. 1995) ("Technically, *pleadings* has a restricted sense—referring to complaints, answers, counterclaims, cross-claims, and the like, but not to motions, notices, petitions for leave, and other court papers."). As Garner also points out, this meaning of the word *pleadings* is "time-honored." *Id.* at 667–68 (further recognizing that "*pleading* should be distinguished from *court paper*, which is a broader term. Motions, briefs, and affidavits are *court papers*, not *pleadings*."); *see also* ALTERMAN, *supra* note 84, at 172 ("If other documents are not 'pleadings,' then what should we call them? The federal rules call them 'motions and other papers,' and they may simply be referred to as 'papers' . . . .").

Again, though the foregoing discussion relates to the meaning of "pleading" for purposes of the Rules, it seems that this meaning might be transferable to other contexts as well. For example, Bankruptcy Rule 9027(a) requires that a notice of removal "be accompanied by a copy of all process and pleadings." A strong argument could be made that "pleadings" for purposes of this rule bears the same meaning as this term bears under the Federal Rules of Civil Procedure. (This seems particularly true in view of Bankruptcy Rule 9027(e)(2), which further provides that, following removal, the court may require the removing party to file "copies of all records and proceedings relating to the claim . . . in the court from which the claim . . . was removed." *Cf.* 28 U.S.C. § 1446(a) (1994) (requiring that a notice of removal filed in a United States District Court be

Rules in which the word "pleading" is used where the term "paper" was intended.[188]

Thus, though all "pleadings" are "papers," not all "papers" are "pleadings." Other types of "papers" include motions, discovery requests, and orders.[189] The universe of "papers," as well as the relationship between "papers" and "pleadings," is represented below in Figure 3.

Figure 3—The Universe of Papers



There are a number of cases in which the confusion of the term *pleading* with the term *paper* led to problems. In *Albany Insurance Co. v. Almacenadora Somex, S.A.*,[190] the plaintiff commenced an action against several foreign corporations over a contract to purchase coffee.[191] Several of the defendants filed a motion to dismiss for lack of personal jurisdiction, and nine days later, filed a motion to dismiss based on a forum selection clause.[192] The district court granted the latter motion.[193]

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accompanied by "a copy of all process, pleadings, and orders").) Alas, not all courts have so held. *See, e.g.*, Careertrack Seminars, Inc. v. Lomasney, 150 B.R. 257, 258 (D. Colo. 1992) (interpreting "pleadings" for purposes of Bankruptcy Rule 9027(a) as including "all papers, including orders, generated by the state court action").

188. Though probably less troublesome, another word that sometimes is improperly substituted for *paper* is *document*, and regrettably, there is some confusion within the Rules themselves in this regard. *See, e.g.*, FED. R. CIV. P. 58 ("Every judgment shall be set forth on a separate document."). Nonetheless, there are other, stronger indications in the Rules that *document* actually is a term with its own unique and separable Rule meaning. *See, e.g.*, FED. R. CIV. P. 34 ("Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes"). Indeed, there are at least two provisions in the Rules where "papers" and "documents" are distinguished (*see* FED. R. CIV. P. 45(c)(2)(A); 53(c)), though whether "papers" as used in these provisions bears the same meaning as that discussed previously is (regrettably) debatable.

189. *See* FED. R. CIV. P. 5(a), (e); 7(b).

190. 5 F.3d 907 (5th Cir. 1993).

191. *Id.* at 908.

192. *Id.*

193. *Id.*

The Court of Appeals for the Fifth Circuit reversed on the ground that the forum selection motion should have been joined with the personal jurisdiction motion pursuant to Rule 12(g).[194] Seeking to avoid this result, some of the defendants argued "that since their second motion was served within 20 days of service of their first motion, their second may be construed as a timely amendment of their first under Federal Rule of Civil Procedure 15(a)."[195] But after interpreting the term "pleading" in conjunction with Rule 7(a),[196] the court of appeals held "that a motion to dismiss is not a 'pleading' for purposes of Rule 15(a)," and thus that the defendants' "second motion cannot be considered an amendment of their first."[197]

A related problem arose in *Duda v. Board of Education*.[198] In *Duda*, the plaintiff filed an amended complaint in response to the defendants' motion to dismiss for failure to state a claim upon which relief can be granted.[199] The district court struck the amended complaint and, on the basis of the initial complaint, granted the defendants' motion.[200] The Court of Appeals for the Seventh Circuit reversed.[201] The court of appeals concluded that Rule 15(a) gives a plaintiff a nearly absolute right to amend his or her complaint before a responsive pleading is served and that a motion to dismiss is not a responsive pleading.[202] Accordingly: "The amended complaint became, upon its submission, the operative complaint in the case; the original filing no longer controlled the litigation. The district court's assessment of that original pleading therefore cannot control the disposition of the defendants' motion."[203]

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194. *Id.* at 909–10.

195. *Id.* at 910. The first sentence of Rule 15(a) provides:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served.

196. *Albany Ins.*, 5 F.3d at 910.

197. *Id.* at 911. *But see* Jones v. City of Buffalo, 867 F. Supp. 1155, 1166–67 (W.D.N.Y. 1994) (holding that a petition for removal constituted a "pleading" for purposes of Rule 15(a)). In light of the foregoing discussion, though, the *City of Buffalo* court's interpretation seems questionable, and arguably, that court could have achieved the result it sought without invoking Rule 15(a).

198. 133 F.3d 1054 (7th Cir. 1998).

199. *Id.* at 1056.

200. *Id.*

201. *Id.* at 1062.

202. *Id.* at 1056–57.

203. *Id.* at 1057.

Other types of problems come to mind as well. For example, Rule 7(b)(1) provides that motions "shall state with particularity the grounds therefor." What if the moving party were to state only that the motion is grounded on the "pleadings," when in fact the entire record was intended? Would a court deciding the motion be entitled to consider any other papers?[204] Or what if an adverse party responding to a motion for summary judgment were to ground its response only on the "pleadings"? By rule, such a response would not be sufficient to withstand the motion.[205]

One interesting facet of this expansive use of the term *pleadings* concerns the matter of how we ever started down this road in the first instance. Perhaps, in an earlier era, the sum of the papers in an action *was* the pleadings. Perhaps the reason is that *pleadings* just sounds legal, whereas *papers*, despite its several legal meanings,[206] does not. In fact, there are few words more common than *paper*,[207] and admittedly, *pleading files* and *pleading paper* sound better than *paper files* and *paper paper*. (Though perhaps not practicable, it is probably here more than anywhere that the drafters of the Rules might have selected a more unique word to represent a particular concept.) In any event, a Rule-based distinction remains between *paper* and *pleading*, and it is a useful distinction. Accordingly, calls for the merger of these terms notwithstanding,[208] we must continue to use care in the employment of these terms.

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204. *Cf.* FED. R. CIV. P. 12(b) (providing for the conversion of a motion to dismiss for failure to state a claim upon which relief can be granted to a motion for summary judgment if "matters outside the pleading are presented to and not excluded by the court").

205. *See* FED. R. CIV. P. 56(e). For further examples of problems associated with the confusion of these terms, see 3 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 15.11, at 15-13 to 15-15 (3d ed. 2001); 5 WRIGHT & MILLER, *supra* note 149, § 1183.

206. For example, in addition to "court papers," *Black's Law Dictionary* includes among its definitions of "paper" a "negotiable document or instrument evidencing a debt; esp., commercial documents or negotiable instruments considered as a group." BLACK'S LAW DICTIONARY 1135 (7th ed. 1999).

207. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1633 (1993) (including, in its definition of "paper," three different entries and twenty-eight total senses). Perhaps adding to the confusion is the fact that, under the Rules, "papers" today need not even be written on paper. *See* FED. R. CIV. P. 5(e) (providing for the filing of papers electronically, if permitted by local rule).

208. Though acknowledging the formal distinction between "pleadings" and "other papers," one legal professional writes: "It is well known that trends become the norm (just as plain language will do some day), so it's just a matter of time before the archaic 'motions are not *pleadings*' will fall by the wayside." WILSON, *supra* note 185, at 66. Ms. Wilson might be correct as a predictive matter. But that would be regrettable, as we would then be left with no single term that bears the current Rule meaning of the term *pleadings*, a meaning that seems worth preserving.

E. *Dismissal*

> *"The definitions of, and the distinctions between, the various methods of terminating a case are important to bear in mind, there often being differences having to do with how and where the various terms are used, the overall context of the language employed, the purpose sought to be accomplished, or other considerations."*[209]

Many attorneys (and some judges) believe that the disposition of every action (particularly when the defendant prevails) results in the *dismissal* of the underlying claim or claims.[210] This belief is somewhat understandable, in that it arguably is consistent with the common meaning of this word.[211] But this belief is incorrect, at least under the Rules. Under the Rules, the term *dismissal* has a much narrower meaning. Specifically, a *dismissal* is a nonadjudicatory (in the sense that there is no actual adjudication on the merits) disposition by motion, notice, or stipulation (rather than by trial) in favor of a defending party.

The foregoing definition is not expressly found within the Rules. Nonetheless, this narrower meaning of the term *dismissal* is supported both by the text of the Rules and by the historical development thereof.

Perhaps the strongest indication as to the meaning of *dismissal* is found in the way this term is used in the Rules. Contrary to what many

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209. 24 AM. JUR. 2D *Dismissal, Discontinuance, and Nonsuit* § 1, at 8 (1998).

210. Certainly, the *Jones* court believed that the grant of summary judgment in favor of President Clinton resulted in the dismissal of the underlying claims in that action. *See supra* note 7 and accompanying text; *see also* 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.30[3][a], at 56-217 (3d ed. 2000) ("Summary judgment is often conflated with Rule 12(b)(6) motions to dismiss for failure to state a claim on which relief may be granted, because both motions when granted result in dismissal of a claim or case.") (citation omitted).

Of course, when dealing with case law (and perhaps, by analogy, other authorities as well), one must keep in mind the distinction between what a court *says* and what it *holds*. For example, the *Jones* court did not actually *decide* that a grant of summary judgment resulted in a dismissal, in the sense that the precise issue before the court was whether summary judgment should be granted, and not whether a summary judgment constituted a dismissal. Accordingly, such statements probably are properly characterized as dicta, and that is true of many of the cases in which misstatements of this nature occur. (One result of all of this is that there are very few authorities that actually decide that all dispositions constitute dismissals, and even fewer that explain why.) Still, as we know, even the inclusion of such language in court opinions contributes to the problem, particularly when it is incorporated into a later judgment.

211. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 652 (1993) (defining "dismiss" as "to grant or furnish leave to depart: permit or cause to leave"). Former versions of Rule 41(b) (*see infra* notes 235–247 and accompanying text) probably contributed to this belief as well, as do current Forms 31 and 32 (*see infra* note 303 and accompanying text).

attorneys might believe, a survey of the Rules reveals that *dismissal* is not used in relation to every form of disposition. Instead, *dismissal* is used only in a few, discrete instances. Specifically, the Rules provide for what is referred to as an "involuntary dismissal"[212] only upon the granting of a motion (usually brought by a defendant, but in some instances by the court itself) based on the following:

1. a failure to timely serve the summons and complaint;[213]
2. the following defenses:
   a. lack of subject matter jurisdiction;[214]
   b. lack of personal jurisdiction;[215]
   c. improper venue;[216]
   d. insufficiency of process;[217]
   e. insufficiency of service of process;[218]
   f. failure to state a claim upon which relief can be granted;[219] and
   g. failure to join a party under Rule 19;[220]
3. failure to prosecute the action in the name of the real party in interest;[221]
4. failure to timely move for substitution following a party's death;[222]
5. failure to "obey an order to provide or permit discovery," or to "obey an order entered under Rule 26(f);"[223]

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212. FED. R. CIV. P. 41 ("Dismissal of Actions"), subdivision (b) ("Involuntary Dismissal: Effect Thereof").

213. FED. R. CIV. P. 4(m).

214. FED. R. CIV. P. 12(b)(1).

215. FED. R. CIV. P. 12(b)(2).

216. FED. R. CIV. P. 12(b)(3); *see also* FED. R. CIV. P. 19(a) ("If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action."). For more on the dismissal of *parties*, see *infra* note 317 and accompanying text.

217. FED. R. CIV. P. 12(b)(4).

218. FED. R. CIV. P. 12(b)(5).

219. FED. R. CIV. P. 12(b)(6).

220. FED. R. CIV. P. 12(b)(7); *see also* FED. R. CIV. P. 19(b).

221. FED. R. CIV. P. 17(a).

222. FED. R. CIV. P. 25(a)(1).

223. FED. R. CIV. P. 37(b)(2)(C); *see also* FED. R. CIV. P. 16(f) (cross-referencing the penalties described in Rule 37(b)(2)(C) as among those that may be imposed for pretrial conference-related

6. "failure of the plaintiff to prosecute or to comply with these rules or any order of court;"[224] or
7. certain circumstances (analogous to those described in Rule 41) arising in connection with proceedings relating to the condemnation of property.[225]

In addition, the Rules provide for what is referred to as a "voluntary dismissal"[226] by a *plaintiff* following the filing of a timely notice or of a stipulation signed by all parties,[227] or (if the time limit for dismissal by notice has passed) upon the granting of a plaintiff's motion for the same.[228]

Conversely, though the Rules provide for many other types of dispositive motions,[229] nowhere are they referred to as *dismissals*. Instead, with respect to each of these other dispositive motions, the moving party seeks the entry of some other form of judgment.[230] The same is true of the Rules governing trial; nowhere is the result of a trial referred to as a "dismissal," even in those instances when the defendant prevails.

Moreover, there are at least two provisions in the Rules where a direct distinction is drawn between "dismissals" and other forms of disposition.

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misconduct); FED. R. CIV. P. 37(c)(1), (d) (cross-referencing the penalties described in Rule 37(b)(2)(C) as among those that may be imposed for other discovery-related misconduct).

224. FED. R. CIV. P. 41(b).

225. FED. R. CIV. P. 71A(i).

226. FED. R. CIV. P. 41(a) ("Voluntary Dismissal: Effect Thereof").

227. FED. R. CIV. P. 41(a)(1).

228. FED. R. CIV. P. 41(a)(2).

229. For purposes of this Article, a "dispositive motion" is a motion that, if granted, results in the disposition of one or more claims, counterclaims, cross-claims, or third-party claims. *Cf.* FED. R. CIV. P. 72(b) (providing procedure to be followed by a "magistrate judge assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party").

230. *See* FED. R. CIV. P. 12(c) ("Motion for Judgment on the Pleadings"); 50(a) ("Judgment as a Matter of Law"); 52(c) ("Judgment on Partial Findings"); 55 ("Default"), subdivision (b) ("Judgment"); 56 ("Summary Judgment"); *see also* 27A FEDERAL PROCEDURE *Pleadings and Motions* § 62:464, at 235–36 (1996):

> A "motion to dismiss" in federal practice is somewhat of a generic phrase, describing a wide variety of types of accelerated judgments. While other types of accelerated judgments are available, such as the motion for summary judgment, and while other provisions of the Federal Rules of Civil Procedure authorize the dismissal of an action in particular circumstances, the phrase "motion to dismiss" in federal practice most commonly refers to dismissals under two Federal Rules: FRCP 12(b) and FRCP 41.

(citations omitted). Incidentally, one should not necessarily conclude from the foregoing discussion that the *only* motions to dismiss are those expressly provided for under the Rules; indeed, there might well be others. Rather, the point is simply that not every dispositive motion results in a dismissal, and certainly not those motions for some other form of judgment.

One is found in Rule 13(i) ("Separate Trials; Separate Judgments"), which provides:

> If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been *dismissed or otherwise disposed of*.[231]

Presumedly, if the term "dismissal" encompassed all forms of disposition under the Rules, there would be no need to draw this distinction.

Similarly, Rule 37(b)(2)(C), which deals with the penalties that may be imposed for failures to comply with discovery orders, provides that such penalties may include orders "dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."[232] Again, if "dismissal" were intended to cover all dispositions, the alternative reference to judgments by default would be superfluous. Conversely, once one considers that "dismissals" are always entered in favor of defending parties, whereas default judgments are always entered in favor of claimants,[233] the distinction drawn in Rule 37(b)(2)(C) makes eminent sense.[234]

Additional evidence that the drafters of the Rules intended a distinction between those motions formally denominated dismissals and other dispositive motions (as well as actions disposed of by trial) can be found in the historical development of Rule 41(b) ("Involuntary Dismissal: Effect Thereof"). As originally promulgated in 1937, Rule 41(b) included the following sentence:

> After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.[235]

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231. (emphasis added).

232. *See also* FED. R. CIV. P. 16(f), 37(c)(1), (d) (cross-referencing Rule 37(b)(2)(C)).

233. *See infra* notes 253–255 and accompanying text.

234. *Accord* 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 37.51[6], at 37-98 (3d ed. 2000) ("If a plaintiff violates a discovery order, the court may dismiss the case, in whole or in part, with prejudice, and if a defendant violates a discovery order, the court may enter a default judgment against the defendant.").

235. 1 F.R.D. LXIII, CXII (1940).

Regarding the purpose of this provision, the Advisory Committee Notes explained:

> This provides for the equivalent of a nonsuit on motion by the defendant after the completion of the presentation of the evidence by the plaintiff. Also, for actions tried without a jury, it provides the equivalent of the directed verdict practice for jury actions which is regulated by Rule 50.[236]

Given the Rules' inclusion (in Rule 50) of procedures governing directed verdict practice for actions tried by a jury,[237] coupled with the Rules' merger of the procedure governing actions at law and suits in equity,[238] it is not surprising that the Rules also would include analogous procedures for use in nonjury trials.[239] Nonetheless, viewing the Rules as

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236. FED. R. CIV. P. 41 advisory committee notes (1937 adoption).

237. *See id.* at CXIX.

Incidentally, there does not appear to have been a significant difference (at least for these purposes) between an involuntary nonsuit and the precursor of the judgment as a matter of law, a directed verdict. *See* Bach v. Friden Calculating Mach. Co., 148 F.2d 407, 409 (6th Cir. 1945) ("Prior to the adoption of the Rules, a motion for an involuntary non-suit in actions at law tried by a jury was treated as the equivalent of a motion for a directed verdict. The rules retain this concept in jury cases . . . .") (citations omitted); 75A AM. JUR. 2D *Trial* § 857, at 455 (1991) (concluding that "the differences between a nonsuit and a directed verdict are of form rather than of substance").

238. *See supra* note 103 and accompanying text.

239. Historically, the involuntary nonsuit/directed verdict procedure was reserved for actions at law tried by a jury. As explained in 27 C.J.S. *Dismissal and Nonsuit* § 4, at 230–31 (1999):

> [A]n involuntary or compulsory nonsuit often occurs where the plaintiff neglects to appear when the case is called for trial, or when the plaintiff has given no evidence on which a jury could find a verdict. A judgment of nonsuit thus may be entered against a plaintiff who is unable to prove his or her case, or who refuses or neglects to proceed to the trial of a cause after it has been put at issue.

(citation omitted). *Accord* 24 AM. JUR. 2D *Dismissal, Discontinuance, and Nonsuit* § 4, at 10 (1998). Prior to the promulgation of the Rules, there apparently was no analogous procedure applicable to suits in equity. As summarized by one legal encyclopedia:

> In the absence of statutory authorization, nonsuit has been restricted to actions at law. The procedure has been considered inappropriate to equity in view of the fact that the object of the nonsuit is to withdraw the case from the jury upon a question of law to be decided by the trial judge.

Id. (citation omitted); *see also Bach*, 148 F.2d at 409:

> In equity, dismissal of a bill at the close of plaintiff's case before defendant presented his evidence, was not correct practice in the absence of express provision of a statute or rule to the contrary. The case being set down for hearing on the bill, answer and proof, if defendant was willing to risk his case upon the failure of plaintiff to prove his case, the rule prevailed that defendant submitted to the court for final hearing.

But, "statutory provisions establishing a uniform mode of procedure in civil suits and abolishing separate courts of equity have served to overcome [the historical restriction of nonsuit procedure to

a whole, and in light of the foregoing discussion, Rule 41(b) (as originally promulgated) might strike one as anomalous for at least two reasons. The first and most obvious reason concerns the apparent overlap with the directed verdict procedure described in former Rule 50 for use in jury trials. For the procedure described in Rule 41(b) (which according to the Advisory Committee Notes, clearly applied in the nonjury trial context) also appeared to apply in the jury trial context.[240] The second, more subtle, reason why this provision might be considered anomalous concerned its placement in a rule relating to dismissals, rather than, for example, Rule 52 (relating to nonjury trials).[241] In one regard, the

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actions at law] as a practical matter." 24 AM. JUR. 2D, *Dismissal, Discontinuance, and Nonsuit* § 4, at 10 (1998).

240. Perhaps it is more accurate to say that this portion of Rule 41(b) arguably applied in the jury context, for this portion of former Rule 41(b), when viewed in concert with former Rule 50, and in light of the original advisory committee notes, certainly did not compel this conclusion. Indeed, if one interprets the phrase, "equivalent of a nonsuit" that is found in the first sentence of the 1937 advisory committee notes to the adoption of Rule 41(b), as referring only to the procedure to be followed in (what were formerly known as) suits in equity, and interprets the phrase, "equivalent of the directed verdict practice" that is found in the second sentence of those notes, as referring only to (what were formerly known as) actions at law tried without a jury, one could reach the conclusion that this portion of Rule 41(b) was intended from the beginning to refer only to nonjury trials. Such an interpretation would not only avoid the Rule 50 overlap problem, it would also render the second sentence of the notes non-superfluous. Some federal courts apparently interpreted the interplay between these rules in this manner. *See, e.g.*, *Bach*, 148 F.2d at 409:

> Rule 41(b) provides the equivalent of a non-suit in an action at law on motion by the defendant after the completion of evidence by the plaintiff, and applies to all actions tried without a jury. . . . The rules abolished the distinction theretofore existing between law and equity practice and left a distinction only between jury and non-jury actions.

United States v. U.S. Gypsum Co., 67 F. Supp. 397, 419 (D.D.C. 1946):

> Motions under Rules 41(b) and 50(a) are similar in that a motion under either rule leaves the defendant with a right to present his own case if the decision on his motion goes against him; and the motions under the two rules are similar in that both provide a defendant with a method of midtrial attack upon the plaintiff's case, and a means of determining whether or not the defendant must present his evidence. But beyond these likenesses, motions under Rule 41(b) and Rule 50(a) should be assimilated only so far as is consonant with reason and with the spirit of the Federal Rules of Civil Procedure. To say that Rule 41(b), applying to non-jury cases, provides the equivalent in all respects of motions for a directed verdict in jury trials under Rule 50(a) is to ignore the difference between the functions of the judge in jury cases where the judge is not the trier of the facts and in non-jury cases where he is the trier of the facts.

Rev'd on other grounds, 333 U.S. 364 (1948). Nonetheless, as the advisory committee notes to the 1963 amendments indicate, *see infra* notes 245–247 and accompanying text, many other courts did not interpret Rule 41(b) in this manner, and confusion ensued.

241. The initial failure to include this language within Rule 52 also caused confusion as to whether Rule 52(a) (requiring the making of findings of fact and conclusions of law in nonjury trials) applied to the granting of a motion of this nature. *See, e.g.*, *Bach*, 148 F.2d at 411 (holding that Rule 52(a) did apply, though recognizing the disagreement among federal courts). The first attempt to rectify this problem occurred in 1946, when Rule 41(b) was amended to include an express reference to Rule 52(a). *See* 6 F.R.D. 229, 239 (1947).

inclusion of this provision in a rule relating to dismissals was understandable, as *dismissal* was an equitable procedure,[242] and (as discussed previously) the primary purpose of this provision appears to have been the establishment of a procedure for use in nonjury trials that was akin to the involuntary nonsuit (directed verdict) procedure used in jury trials for use in nonjury trials.[243] But the inclusion of this language also was problematic, in that it blurred other common law distinctions between dismissals and nonsuits.[244]

In 1963, the first of these anomalies was resolved, in that this portion of Rule 41(b) was amended to expressly limit its effect to nonjury trials.[245] Thus, following certain 1987 technical amendments to this subdivision,[246] this portion of Rule 41(b) read as follows:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant,

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242. "'Dismissal' is a term borrowed from early chancery practice, in which a plaintiff "dismissed" an action without prejudice when the plaintiff intended not to preclude himself or herself from bringing a new suit." 24 AM. JUR. 2D, *Dismissal, Discontinuance, and Nonsuit* § 1, at 8 (1998). This is not to say, though, that it was an equitable procedure considered appropriate in this context. *See supra* note 239.

243. *See supra* notes 237–239 and accompanying text.

244. *See* 27 C.J.S. *Dismissal and Nonsuit* § 2, at 229 (1999):

> Dismissal signifies the final ending of a suit, resulting in an end of that proceeding, but not a final judgment on the controversy. A dismissal is, in effect, equivalent to a nonsuit; however, a distinction exists between the two, in that a motion to nonsuit is intended to test the sufficiency of the evidence, while a motion to dismiss is aimed at fatal defects in the pleadings.

(citations omitted); *see also id.* § 4, at 231 (observing that "a nonsuit may be considered to be a judgment on the merits, where it is peremptorily ordered for failure or insufficiency of evidence").

245. *See* FED. R. CIV. P. 41 advisory committee notes (1963 amendments). Regarding the reasons for this amendment, the Advisory Committee explained:

> Under the present text of the second sentence of this subdivision, the motion for dismissal at the close of the plaintiff's evidence may be made in a case tried to a jury as well as in a case tried without a jury. But, when made in a jury-tried case, this motion overlaps the motion for a directed verdict under Rule 50(a), which is also available in the same situation. It has been held that the standard to be applied in deciding the Rule 41(b) motion at the close of the plaintiff's evidence in a jury-tried case is the same as that used upon a motion for a directed verdict made at the same stage; and, just as the court need not make findings pursuant to Rule 52(a) when it directs a verdict, so in a jury-tried case it may omit these findings in granting the Rule 41(b) motion.
>
> . . . [T]he overlap has caused confusion. Accordingly, the second and third sentences of Rule 41(b) are amended to provide that the motion for dismissal at the close of the plaintiff's evidence shall apply only to nonjury cases (including cases tried with an advisory jury). Hereafter the correct motion in jury-tried cases will be the motion for a directed verdict. This involves no change of substance.

Id.

246. 113 F.R.D. 189, 234–35 (1987).

> without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).[247]

Despite these changes, the continued inclusion of a directed verdict-type procedure in Rule 41(b), a rule governing dismissals, not to mention the continued characterization of this procedure as a dismissal, caused confusion.[248] Accordingly, effective December 1, 1991, Rule 41(b) was amended again.[249] As a result of the 1991 amendment, the above-quoted language was removed in its entirety from Rule 41(b) and transferred (in substance anyway) to Rule 52, the rule governing nonjury trials, in the form of a new subdivision (c) ("Judgment on Partial Findings").[250] As originally promulgated, this new Rule 52(c) provided:

> If during a trial without a jury a party has been fully heard with respect to an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party on any claim, counterclaim, cross-claim or third-party claim that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.[251]

Though there are several differences between the language removed from former Rule 41(b) and that which became Rule 52(c), conspicuous is the deletion of any reference to the term "dismissal." As explained in the Advisory Committee Notes that accompanied these amendments, new Rule 52(c)

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247. *Id.*

248. For an example of what appears to be a representative case, see *Weissinger v. United States*, 423 F.2d 795 (5th Cir. 1970) (en banc).

249. *See* 134 F.R.D. 525, 533–34 (1991).

250. *See id.* at 550.

251. *Id.* Incidentally, in 1993, Rule 52(c) was further amended to "make[] clear that judgments as a matter of law in nonjury trials may be entered against both plaintiffs and defendants and with respect to issues or defenses that may not be wholly dispositive of a claim or defense." 146 F.R.D. 410, 695 (1993) (advisory committee notes).

> parallels the revised Rule 50(a), but is applicable to non-jury trials. It authorizes the court to enter judgment at any time that it can appropriately make a dispositive finding of fact on the evidence.
>
> The new subdivision replaces part of Rule 41(b), which formerly authorized a dismissal at the close of the plaintiff's case if the plaintiff had failed to carry an essential burden of proof. Accordingly, the reference to Rule 41 formerly made in subdivision (a) of this rule is deleted.[252]

Similarly, the Advisory Committee Notes to the 1991 amendment to Rule 41(b) explained:

> Language is deleted that authorized the use of this rule as a means of terminating a non-jury action on the merits when the plaintiff has failed to carry a burden of proof in presenting the plaintiff's case. The device is replaced by the new provisions of Rule 52(c), which authorize entry of judgment against the defendant as well as the plaintiff, and earlier than the close of the case of the party against whom judgment is rendered. A motion to dismiss under Rule 41 on the ground that a plaintiff's evidence is legally insufficient should now be treated as a motion for judgment on partial findings as provided in Rule 52(c).

Taken together, the Advisory Committee Notes suggest that the purposes of these 1991 rule changes were several. Certainly, one purpose was to more closely conform the procedure found in Rule 50 (now referred to as "judgments as a matter of law") that is used in jury trials with the parallel procedure applicable to nonjury trials. But there were also structural purposes, including a purpose that went beyond simply moving language from a rule dealing with dismissals to the rule dealing specifically with nonjury trials. There was a clear change of terminology emanating from the conceptual realization that the type of disposition described in what is now Rule 52(c) was not a dismissal at all, and therefore that the inclusion of that procedure within a rule (Rule 41) that expressly deals only with dismissals was inappropriate.

As a result of the removal of this language, Rule 41(b) now provides (in its entirety):

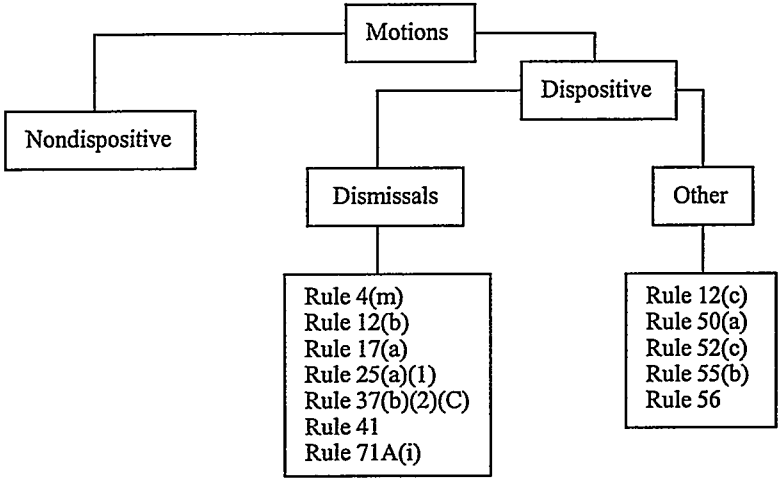
> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of

252. FED. R. CIV. P. 52 advisory committee notes (1991 amendments).

> an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Based on the foregoing discussion, one can begin to draw some distinctions, not only between dispositive and nondispositive motions, but also between the various forms of dispositive motions, and particularly between dismissals and nondismissals. These distinctions are illustrated below in Figure 4.

Figure 4—The Universe of Motions



In addition to the terminological distinctions drawn within the Rules themselves, there are the many substantive distinctions (if that is an appropriate word to use in connection with a procedural concept) between motions to dismiss and other dispositive motions. Though these distinctions, of themselves, might not compel the conclusion that *dismissal* is a separable concept, they serve to highlight the usefulness of this term, and help to differentiate between disparate forms of dispositions and the effects thereof.

For example, one big difference between motions to dismiss and other dispositive motions relates to the identity of the moving party. A motion to dismiss, being in some sense adverse to the interests of the claimant, is

almost always brought by a party against whom some form of claim has been pleaded.[253] Thus, an order granting a motion to dismiss is always entered in favor of the defending party.[254] On the other hand, with only one exception, each of the other types of dispositive motions expressly provided for in the Rules can be brought by either party, plaintiff or defendant.[255] Thus, an order granting some other type of dispositive motion generally may be entered in favor of either party—just as a verdict or decision can be entered in favor of either party following trial.[256]

The relationship between dispositive motions and the identity of the moving party can thus be represented as in below.

253. *See supra* notes 213–225 and accompanying text. *See also* 11 MOORE ET AL., *supra* note 210, § 56.30[1], at 56-209 ("Rule 12 motions may be brought only by a party defending a claim."). The only express exceptions consist of those few motions to dismiss that may be made on the court's own motion (*see, e.g.*, FED. R. CIV. P. 12(h)(3)), and a voluntary motion to dismiss, which may be made by a claimant alone or by stipulation of the parties (*see supra* notes 227–228 and accompanying text).

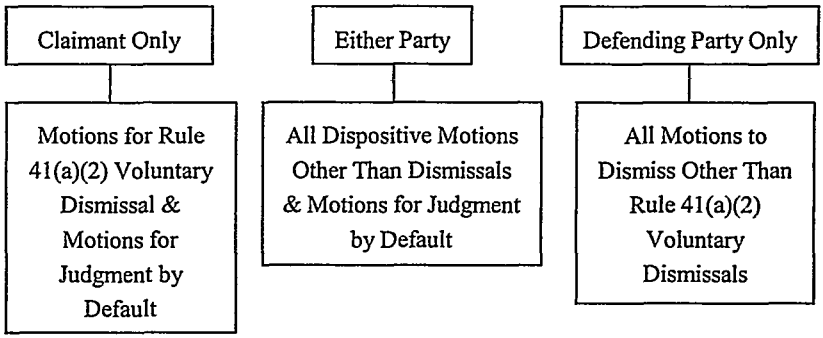
254. This is true even where the motion is brought by the claimant and where, in exchange for the dismissal, the claimant obtains some or all of the relief sought in its pleading.

Indeed, because Rule 41(b) expressly applies only with respect to plaintiffs, one might observe that, excepting those penalties specified in connection with pretrial conferences (*see* FED. R. CIV. P. 16(f)) or discovery (*see* FED. R. CIV. P. 37(b)–(d)), there is no analogous provision under the Rules for dealing with failures to comply with "these rules or any order of court" by *defendants*. Though the district courts undoubtedly possess such powers inherently, perhaps the Rules should be amended to correct this apparent oversight.

255. *See* FED. R. CIV. P. 12(c) (providing that "any party may move for judgment on the pleadings"); FED. R. CIV. P. 50(a) (providing same with respect to judgment as a matter of law); FED. R. CIV. P. 52(c) (providing same with respect to judgments on partial findings); FED. R. CIV. P. 56 ("Summary Judgment"), subdivisions (a) ("For Claimant") and (b) ("For Defending Party"). The lone exception appears to be motions for judgments by default, which are always brought by the claimant. *See* FED. R. CIV. P. 55(b). But given the reason behind the making of such motions (that "a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules" (FED. R. CIV. P. 55(a)), this result could hardly be otherwise.

256. *See* FED. R. CIV. P. 58.

Figure 5—The Relationship Between Dispositive Motions and the Identity of the Moving Party



Another difference between the various forms of dispositive motions concerns their timing. Though the correlation is far from perfect, motions to dismiss, which tend to relate to what might be termed procedural defects, usually are brought earlier in the proceedings. For example, Rule 4(m) provides that an action shall be dismissed "[i]f service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint." Rule 12(b) generally provides that the motions to dismiss described therein "shall be made before pleading if a further pleading is permitted."[257] Similarly, a voluntary dismissal by notice may be effected only if the notice is filed "before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs."[258] And even though a motion for voluntary dismissal apparently may be made at any time, it is more likely to be granted if made "at an early stage of the case, before much has happened and only limited resources have been invested."[259]

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257. *See also* 2 MOORE ET AL., *supra* note 180, § 12.50, at 12-104 ("Because most of the defenses in Rule 12(b) that can be addressed by a preliminary hearing affect the court's jurisdiction, it is advisable to dispose of them before trial if at all possible, regardless of the court's power to defer them."); 11 MOORE ET AL., *supra* note 210, § 56.30[3][b], at 56-219 (describing the "ordinarily early juncture of the motion to dismiss for failure to state a claim").

258. FED. R. CIV. P. 41(a)(1)(i).

259. 9 WRIGHT & MILLER, *supra* note 109, § 2364, at 290. The same is generally true of those other, less common dismissals specified under the Rules. *See, e.g.*, (with respect to Rule 17(a)) 6A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1554, at 406–07 (1990):

> [I]t probably is appropriate to include the objection [for failure to prosecute the action in the name of the real party in interest] in the answer to the complaint, thereby treating it as something in the nature of an affirmative defense under Rule 8(c). It also seems logical to allow the objection to be raised by a preliminary motion when it may result in a dismissal of the action

Conversely, the other types of dispositive motions usually are made later in the proceedings. For example (and in contrast to a Rule 12(b) motion to dismiss), a motion for judgment on the pleadings may not be made until "[a]fter the pleadings are closed,"[260] and otherwise need only be made "within such time as not to delay the trial."[261] Similarly, a motion for judgment by default is predicated on a defending party's failure "to plead or otherwise defend,"[262] something that can be determined only after the expiration of the deadlines therefor.[263] Moreover, though a motion for summary judgment may be made relatively early in the proceedings,[264] summary judgment motions tend to be made later, following the completion of at least some discovery.[265]

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if the real party in interest cannot be joined or substituted. . . . Regardless of what vehicle is used for presenting the objection, it should be done with reasonable promptness. Otherwise, the court may conclude that the point has been waived by the delay . . . .

(citations omitted); FED. R. CIV. P. 25(a)(1) ("Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record . . . the action shall be dismissed as to the deceased party.").

260. FED. R. CIV. P. 12(c).

261. *Id.*

262. FED. R. CIV. P. 55(a).

263. *See* 10A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2682, at 13 (3d ed. 1998).

264. Federal Rule of Civil Procedure 56(a) ("For Claimant") provides:

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

And Federal Rule of Civil Procedure 56(b) ("For Defending Party") provides:

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

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

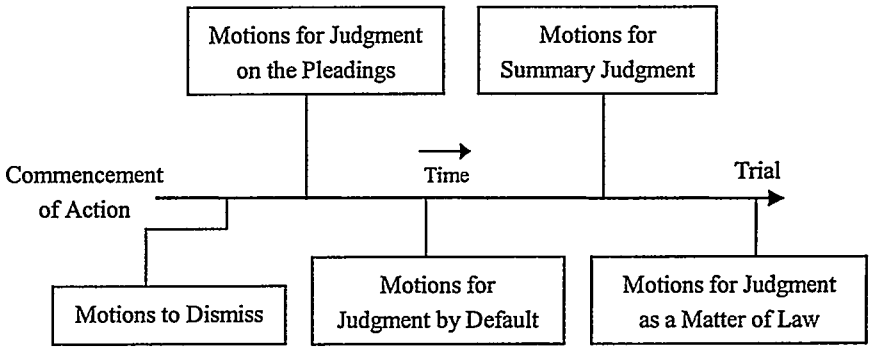
Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In our view, the plain language of rule 56(c) mandates the entry of summary judgment, *after adequate time for discovery* and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

(emphasis added); 11 MOORE ET AL., *supra* note 210, § 56.10[1], at 56-45 to 56-46 (discussing timing issues relating to motions for summary judgment generally); *see also* FED. R. CIV. P. 16(c)(5) (empowering the district courts, during the initial pretrial conference, to consider and take appropriate action with respect to "the appropriateness and timing of summary adjudication under Rule 56"); FED. R. CIV. P. 56(f):

And arising even later are motions for judgment as a matter of law, a motion that may only be made "during a trial"[266] but "before submission of the case to the jury."[267]

The relationship between the more common dispositive motions and the time in the life of an action at which they are typically made is represented below in Figure 6.

Figure 6—The Relationship Between Dispositive Motions and the Timing of Such Motions



Yet another distinction between motions to dismiss and other dispositive motions is the nature of the evidence that may be considered, and how it is considered, in deciding the motion. With one exception, the resolution of motions to dismiss involve facts other than those going to

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Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

266. FED. R. CIV. P. 50(a)(1).

267. FED. R. CIV. P. 50(a)(2). Of course, if denied, a renewed motion for judgment as a matter of law may be made "no later than 10 days after entry of judgment." FED. R. CIV. P. 50(b); *see also* FED. R. CIV. P. 52(c) (describing parallel procedure in nonjury trial context).

the merits of the action.[268] Conversely, other dispositive motions are solely concerned with facts going to the merits.[269]

Moreover, because the facts that underlie motions to dismiss generally do not go to the merits, it is the court, not a jury, that typically decides those facts.[270] By contrast, motions for judgment on the pleadings, for summary judgment, for judgment as a matter of law, for judgment on partial findings, and even for a default judgment may be granted only where the material facts are essentially undisputed.[271]

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268. *See, e.g.*, 11 MOORE ET AL., *supra* note 210, § 56.30[1], at 56-211 ("Rule 12 is also distinct from summary judgment in that Rule 12 rulings are ordinarily decisions made . . . on the basis of examination of facts other than those bearing on the merits of the instant dispute."). The one exception is the motion to dismiss for failure to state a claim upon which relief can be granted. *See* FED. R. CIV. P. 12(b)(6).

269. *See, e.g.*, Albany Ins. Co. v. Almacenadora Somex, S.A., 5 F.3d 907, 909 n.3 (5th Cir. 1993):

> Although [Defendant] called it a motion for summary judgment, the motion did not raise an objection or defense to the merits of [Plaintiff's] complaint, nor did it attack the factual basis of the allegations contained therein. Moreover, at the time of its motion, [Defendant] had no defensive pleading on file. The motion simply requested the court to enforce the forum clauses and dismiss [Plaintiff's] suit without prejudice to refile in Mexico.

See also 27A FEDERAL PROCEDURE *Pleadings and Motions* § 62:625, at 371 (1996):

> There is authority that an FRCP 56 motion is not a proper means to raise matters in abatement not going to the merits of the claim, such as the lack of federal jurisdiction, improper venue, failure to exhaust nonjudicial remedies, or failure to join an indispensable party, which are properly raised by means of a motion to dismiss; although, such an issue, if improperly raised by a motion for summary judgment, can be treated as a motion to dismiss.

(citations omitted).

270. *See, e.g.*, Land v. Dollar, 330 U.S. 731, 735 n.4 (1947) (holding that "when a question of the District Court's jurisdiction is raised, either by a party or by the court on its own motion, the court may inquire, by affidavits or otherwise, into the facts as they exist") (citations omitted); *see also* 11 MOORE ET AL., *supra* note 210, § 56.30[6], at 56-230 ("Rule 12 motions attacking service, venue, or joinder of parties may entail the court's determination of certain factual disputes.") (citations omitted).

An "exception" occurs where the facts relevant to deciding the motion are intertwined with the merits of the underlying claims. As one treatise author states (in the context of a motion to dismiss for lack of subject matter jurisdiction): "When the jurisdictional facts are too intertwined with the merits to permit the determination to be made independently, the court should either employ the standard applicable to a motion for summary judgment (if the material jurisdictional facts are undisputed) or leave the jurisdictional determination to trial." 2 MOORE ET AL., *supra* note 180, § 12.30[3], at 12-36.1 to 12-37 (3d ed. 2000).

271. In particular, Federal Rule of Civil Procedure 12(c) provides that

> [i]f, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

With respect to a motion for summary judgment, the standard is familiar: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

Perhaps the most important distinction between most motions to dismiss and other dispositive motions is the preclusive effect[272] of the orders granting such motions. As stated previously, motions to dismiss generally relate to what might be termed procedural defects involving facts other than those going to the merits underlying the action.[273] As a result, their resolution ordinarily does not involve a final adjudication of the underlying claims.[274] Accordingly, orders granting motions to dismiss

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and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see also* 11 MOORE ET AL., *supra* note 210, § 56.30[6], at 56-231 ("In deciding a summary judgment motion, the court may not resolve reasonably debated questions of fact such as the existence of a fact, the credibility of witnesses, or a preference among two or more reasonable inferences.").

Similarly, a judgment as a matter of law may be rendered only if "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." FED. R. CIV. P. 50(a)(1); *see also* Weisgram v. Marley Co., 528 U.S. 440, 448 (2000) (recognizing that Rule 50 "allows the trial court to remove cases or issues from the jury's consideration 'when the facts are sufficiently clear that the law requires a particular result'") (quoting 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2521, at 240 (2d ed. 1995)).

Likewise,

> If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue . . . .

FED. R. CIV. P. 52(c).

Finally, with respect to a judgment by default, Rule 55(b)(1) provides that such a judgment may be entered by the clerk only "[w]hen the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain."

Conversely, where the material facts going to the merits are disputed and the parties are entitled to a jury trial, an action may be adjudicated by the court only if the parties have failed to demand a jury trial, or have waived that right following a timely demand. *See* FED. R. CIV. P. 38(d); *see also* (with respect to judgments by default) FED. R. CIV. P. 55(b)(2):

> If, in order to enable the court to enter judgment [by default] or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

272. By "preclusive effect," deference is made to the definition of that phrase found in the RESTATEMENT (SECOND) OF JUDGMENTS 1–2 (1982): "'Preclusive effect' refers to limitations on the opportunity in a second action to litigate claims or issues that were litigated, or could have been litigated, in a prior action."

273. *See supra* notes 257–259, 268 and accompanying text.

274. *See, e.g.*, BLACK'S LAW DICTIONARY (7th ed. 1999) (defining "dismissal" (at 482) as a "[t]ermination of an action or claim without further hearing, esp. before the trial of the issues involved," and "judgment of dismissal" (at 847) as "[a] final determination of a case without a trial on its merits"). *Compare id.* at 848 (defining "judgment on the merits" as "[a] judgment based on the evidence rather than on technical or procedural grounds").

almost always are entered without prejudice, as such orders generally do not preclude the prosecution of the same claims in a later action.[275] This includes dismissals for failure to timely serve a defendant with process,[276] as well as most Rule 12(b) dismissals[277] (and, in particular,

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275. Such orders generally would preclude the relitigation of the particular issues decided, though. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 20 cmt. b (1982).

276. M.K. v. Tenet, 99 F. Supp. 2d 12, 18 (D.D.C. 2000).

Actually, whether a dismissal for failure to timely serve a defendant with process is with or without prejudice might depend upon the precise basis for the dismissal sought. According to David D. Siegel, *Supplementary Practice Commentaries*, Rule 4, 28 U.S.C.A. (Supp. 1999), at 98–99:

> *Smith-Bey v. Cripe*, noted earlier, recognizes that a delay in service of such a nature as to provide a dismissal under what is now Rule 4(m) may additionally, or alternatively, amount to a failure to prosecute under Rule 41(b) of the Federal Rules of Civil Procedure and warrant a dismissal under that provision. But the court says that a Rule 41(b) dismissal is appropriate "only when there is no reasonable probability that service can be obtained" or when there has been "[a] lengthy period of inactivity."
>
> Ordinarily it should make no difference to a dismissed plaintiff whether the dismissal is captioned under the one or the other of the two provisions. If the statute of limitations is dead, a dismissal under either provision would be fatal.
>
> And it should make no difference even if the statute of limitations is still alive: which provision grounds the dismissal should be irrelevant because a dismissal is "without prejudice", which is a shorthand way of saying that it's not on the merits. And a dismissal for a delay in service under Rule 41(b) is a dismissal "for lack of jurisdiction" and under the explicit terms of 41(b) does not operate as "an adjudication upon the merits" for that reason. See, e.g., Compagnie des Bauxites de Guinee v. L'Union Atlantique S.A. d'Assurances, ("a dismissal for want of in personam jurisdiction is not a judgment on the merits of the cause of action itself"). In either instance a new action would presumably be allowed as long as the statute of limitations is still alive.
>
> But there may indeed be a difference based on another of Rule 41(b)'s explicit provisions. In prescribing that a jurisdictional dismissal is not on the merits, Rule 41(b) empowers the court to specify "otherwise". If such a power does not exist under Rule 4(m), but exists and is exercised under Rule 41(b) in a case in which the statute of limitations is still alive, a Rule 41(b) dismissal specifying that it is "with prejudice", or "on the merits", or using any other term to the same effect, can indeed mean an end to a case even though the case might have survived for a new day in court had Rule 4 alone grounded the dismissal.

(citations omitted).

277. *See* 11 MOORE ET AL., *supra* note 210, § 56.30[1], at 56-209:

> [M]ost Rule 12 motions are decided without prejudice to the losing party. Rule 12(b)(6) motions for failure to state a claim and Rule 12(c) motions for judgment on the pleadings are ordinarily the only Rule 12 motions resulting in a final adjudication of a case or claim. The litigant against whom any other Rule 12 motion is granted can usually act without prejudice to continue the case, either by correcting defective service, dropping parties, amending the complaint, or pursuing the litigation in a different forum to cure jurisdiction or venue problems. In addition, courts routinely permit cases dismissed pursuant to Rule 12 because of service, process, or extraneous pleading defects to be refiled.

(citations omitted).

dismissals for lack of subject-matter jurisdiction,[278] for lack of personal jurisdiction,[279] for improper venue,[280] for insufficiency of process or insufficiency of service of process,[281] and for failure to join a party under Rule 19[282]). Voluntary dismissals under Rule 41(a) expressly are without prejudice,[283] unless the notice, stipulation, or order specifies otherwise,[284] or unless the notice filed by a plaintiff "who has once dismissed in any court of the United States or of any state an action based on or including the same claim."[285]

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278. FED. R. CIV. P. 41(b); Voison's Oyster House, Inc. v. Guidry, 799 F.2d 183, 188–89 (5th Cir. 1986); 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.30[2], at 56-215 (3d ed. 1999) ("[T]he grant of the Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction will not preclude plaintiff from seeking relief in state court. Neither claim nor issue preclusion will prevent a state court with proper jurisdiction from hearing the lawsuit that was dismissed from federal court due to lack of federal jurisdiction . . . .").

279. FED. R. CIV. P. 41(b); Orange Theater Corp. v. Rayherstz Amusement Corp., 139 F.2d 871, 875 (3d Cir. 1944):

> The dismissal of the complaint [for lack of personal jurisdiction], however, results solely from the lack of jurisdiction of the court and is, therefore, not an adjudication of the merits of the cause of action. Consequently such a dismissal does not prejudice the right of the plaintiff to file another complaint when and if it appears that the court may obtain jurisdiction of the person of the defendant.

See also 11 MOORE ET AL., *supra* note 210, § 56.30[2], at 56-216 to 56-217 ("[G]rant of a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction does not operate as an adjudication on the merits or bar the claim if timely brought in a proper forum.").

280. FED. R. CIV. P. 41(b); Offshore Sportswear Inc. v. Vuarnet Int'l B.V., 114 F.3d 848, 851 (9th Cir. 1997) ("We treat dismissal based on a forum selection clause like a dismissal for improper venue under Rule 12(b)(3). In such a case, dismissal is without prejudice to refiling in the proper venue.") (citation omitted).

281. Thomas v. Furness Ltd., 171 F.2d 434, 435 (9th Cir. 1948); Sweeney v. Greenwood Index-Journal Co., 37 F. Supp. 484, 486 (W.D.S.C. 1941) (holding motions, if granted, "destroys the pending suit but does not prevent the plaintiff from commencing it again").

282. FED. R. CIV. P. 41(b); Dredge Corp. v. Penny, 338 F.2d 456, 463–64 (9th Cir. 1964).

283. *See also* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 396 (1990) (recognizing that a dismissal without prejudice under Rule 41(a)(1) does not operate as an adjudication on the merits, "thus does not have a res judicata effect").

284. FED. R. CIV. P. 41(a)(1)–(2).

285. FED. R. CIV. P. 41(a)(1). The only other exceptions are those spelled out in Federal Rule of Civil Procedure 41(b) ("Involuntary Dismissal; Effect Thereof"), which again provides (in part):

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Thus, unless the court otherwise specifies, a dismissal for failure to state a claim upon relief can be granted is with prejudice. *See* Baker v. Carr, 369 U.S. 186, 200 (1962); Bell v. Hood, 327 U.S. 678, 682 (1946) ("[I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits . . . ."). It might be observed that motions to dismiss for failure to state a claim are unique among Rule 12(b) motions to dismiss as it is the only such motion where, if

On the other hand, the granting of other dispositive motions (like trials) *do* result in final adjudications of the underlying claims.[286] Accordingly, such orders, being "on the merits,"[287] are always entered

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matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

FED. R. CIV. P. 12(b). *Compare* FED. R. CIV. P. 12(c) (employing virtually identical language with respect to motions for judgment on the pleadings). Thus, in a sense anyway, a motion to dismiss for failure to state a claim is almost like a pre-answer motion for judgment on the pleadings (and in this respect, it might be more properly characterized as such).

In passing, one might note that some authorities have suggested that even a motion to dismiss for failure to state a claim might not result in a dismissal with prejudice in all contexts. As explained in 11 MOORE ET AL., *supra* note 210, § 56.30[1], at 56-210 to 56-211:

> There is even some complexity to the question of whether a Rule 12(b)(6) dismissal for failure to state a claim operates as an adjudication on the merits with prejudice. A court's determination that even as pleaded by the plaintiff the facts of the case permit no legal recovery ordinarily results in a dismissal with prejudice. However, where a claim or even the entire complaint is dismissed for failure to state a claim due to a technical but curable pleading defect, this should not operate as a final adjudication on the merits of the claim and bar subsequent refiling.

(citations omitted). It appears, though, that the circumstance referred to have more to do with assuring that an action is not dismissed unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," Conley v. Gibson, 355 U.S. 41, 45–46 (1957), than to the question whether a Rule 12(b)(6) dismissal is on the merits. *See, e.g.*, Ballou v. Gen. Elec. Co., 393 F.2d 398, 399–400 (1st Cir. 1968).

Of course, if granted with prejudice, a dismissal generally "has the effect of a final adjudication on the merits favorable to defendant and bars future suits brought by plaintiff upon the same cause of action. Such a dismissal constitutes a final judgment with the preclusive effect of '*res judicata* not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit.'" Nemaizer v. Baker, 793 F.2d 58, 60–61 (2d Cir. 1986) (citations omitted) (quoting Heiser v. Woodruff, 327 U.S. 726, 735 (1946)). *But see* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001), discussed *infra* at notes 293–298 and accompanying text.

286. *See* 11 MOORE ET AL., *supra* note 210, § 56.30[5], at 56-230:

> Although Rule 12(c) motions for judgment on the pleadings are similar to Rule 12(b)(6) motions to dismiss and therefore have many of the same distinctions when compared to summary judgment, a Rule 12(c) motion also differs from a Rule 12(b)(6) motion in that the grant of judgment on the pleadings, like a grant of summary judgment, constitutes entry of *judgment* and always operates as an adjudication on the merits.

Id. § 56.30[2], at 56-212 to 56-213:

> Summary judgment motions differ from Rule 12 jurisdictional motions to dismiss for lack of personal or subject matter jurisdiction, in that these jurisdictional motions determine only the existence or nonexistence of jurisdiction. Jurisdictional motions to dismiss at most result in the dismissal of the claim, while summary judgment motions, if granted, result in a final adjudication of a fact, claim, issue, or case.

287. *See* BLACK'S LAW DICTIONARY 1117 (7th ed. 1999) (defining a judgment "on the merits" as a judgment "delivered after the court has heard and evaluated the evidence and the parties' substantive arguments").

with prejudice, and have preclusive effect with respect to later claims of a similar nature. Examples include judgments on the pleadings,[288] default judgments,[289] summary judgments,[290] judgments as a matter of law,[291] and judgments on partial findings.[292]

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288. *See* Herbert Abstract Co. v. Touchstone Props., 914 F.2d 74, 76 (5th Cir. 1990) ("A motion brought pursuant to Fed. R. Civ. P. 12(c) is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts.").

289. *See* Billmeyer v. Del Mar News Agency (*In re* Universal Display & Sign Co.), 541 F.2d 142, 144 (3d Cir. 1976).

290. *See* Martucci v. Mayer, 210 F.2d 259, 260 (3d Cir. 1954) ("A judgment under Rule 56 goes to the merits and operates in bar of the cause of action, not in abatement."); 11 MOORE ET AL., *supra* note 210, § 56.30[2], at 56-211 to 56-212:

> In addition to reviewing a greater scope of material, the court that grants summary judgment formally enters a judgment in the matter rather than a mere dismissal. The grant of a summary judgment motion therefore always operates as a judgment on the merits of the matter decided (although a denial of summary judgment obviously does not). Summary judgment grants, unless partial, therefore trigger judgment-related case law concerning the preclusive effect of the court's decision and the timing and methods of obtaining review. Although a partial summary judgment does not automatically trigger the time for taking an appeal, it may have preclusive effect regarding the particular issue or fact determined by the court according to the rules applicable to issue preclusion or collateral estoppel, which generally refuse to re-examine prior judicial determination of a fact if the fact was actually litigated and necessarily decided in the prior case.

(citations omitted).

291. *See* 18 CHARLES A. WRIGHT & ARTHUR R. MILLER., FEDERAL PRACTICE AND PROCEDURE § 4427, at 271 (1981) (recognizing preclusive effect with respect to directed verdicts).

292. *See* Lamarca v. United States, 31 F. Supp. 2d 110, 124 (E.D.N.Y. 1999).

The foregoing is consistent with the rules set forth in the *Restatement (Second) of Judgments*, which "deals with the preclusive effects of judgments in civil actions." RESTATEMENT (SECOND) OF JUDGMENTS 1 (1982). According to the *Restatement*, if a judgment is entered in favor of a *plaintiff*, that plaintiff thereafter cannot maintain an action on the underlying claims, regardless of the manner by which the judgment was obtained. *Id.* § 18 ("Judgment for Plaintiff—The General Rule of Merger") cmt. a. But the general rule for judgments entered in favor of *defendants* is somewhat different:

> It is frequently said that a valid and final personal judgment for the defendant will bar another action on the same claim only if the judgment was rendered "on the merits." The prototype case continues to be one in which the merits of the claim are in fact adjudicated against the plaintiff after trial of the substantive issues. Increasingly, however, by statute, rule, or court decision, judgments not passing directly on the substance of the claim have come to operate as a bar.

Id. § 19 ("Judgment for Defendant—The General Rule of Bar") cmt. a; *see also id.* § 19 cmt. b ("In determining the scope of the general rule (and the exceptions to it) in a particular jurisdiction, it is essential to consult the relevant statutes and rules of court in that jurisdiction.") (citing Federal Rule of Civil Procedure 41). In particular: "The rule stated in this Section is applicable to a judgment for the defendant on demurrer or motion to dismiss for failure to state a claim." *Id.* § 19 cmt. d. In addition: "The rule stated in this Section is applicable to a judgment for defendant based on the failure of the plaintiff to prosecute his claim with diligence, to obey an order of the court, or to appear at the appointed time. This result is explicitly provided for in Rule 41 . . . ." *Id.* § 19 cmt. e. Moreover:

In fact, even a dismissal "upon the merits" might not have the same preclusive effect as some more adjudicatory types of dispositions. Illustrative of this distinction is the Supreme Court's recent decision in *Semtek International Inc. v. Lockheed Martin Corp.*[293] In *Semtek*, a unanimous Court (led by Justice Scalia) held that the claim-preclusive effect of a federal court's dismissal of a diversity action on statute-of-limitations grounds is determined by the law of the State in which the federal court sits.[294] In that case, the district court had dismissed the action "'on the merits and with prejudice.'"[295] Nonetheless, the Court concluded that the phrase "adjudication on the merits" found in Rule 41(b) does not necessarily mean that such dispositions are entitled to claim-preclusive effect.[296] Rather, the Court concluded that this phrase means no more than the opposite of a dismissal without prejudice.[297] Thus,

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The rule stated in this Section is applicable to a case in which it is determined before trial that there is no genuine dispute with respect to any material fact and that, as a matter of law, the defendant is entitled to judgment. See, for example, Rule 56 of the Federal Rules of Civil Procedure.

Id. § 19 cmt. g. And finally: "The rule stated in this Section is applicable to a judgment for defendant based on a direct verdict, on a jury verdict, on a judgment notwithstanding the verdict, or on any other determination during or after trial." *Id.* § 19 cmt. h. By contrast:

A personal judgment for the defendant, although valid and final, does not bar another action by the plaintiff on the same claim:

(a) When the judgment is one of dismissal for lack of jurisdiction, for improper venue, or for nonjoinder or misjoinder of parties; or

(b) When the plaintiff agrees to or elects a nonsuit (or voluntary dismissal) without prejudice or the court directs that the plaintiff be nonsuited (or that the action be otherwise dismissed) without prejudice; or

(c) When by statute or rule of court the judgment does not operate as a bar to another action on the same claim, or does not so operate unless the court specifies, and no such specification is made.

Id. § 20 ("Judgment for Defendant—Exceptions to the General Rule of Bar"), subsection (1).

And as will be discussed in greater detail in the next subpart, there is as least one further distinction between the various forms of dispositions. A disposition that involves an adjudication of the underlying claims (whether by motion or by trial) is appealable, meaning that the order reflecting the disposition constitutes a "judgment" (at least for purposes of Rule 54(a)). *See infra* notes 360–364 and accompanying text. By contrast, some dismissals are not appealable. *See infra* notes 366–367 and accompanying text. In fact, as mentioned previously, some dismissals do not even involve the issuance of an order by the district court. *See supra* note 227 and accompanying text.

293. 531 U.S. 497 (2001).

294. *Id.* at 509.

295. *Id.* at 499.

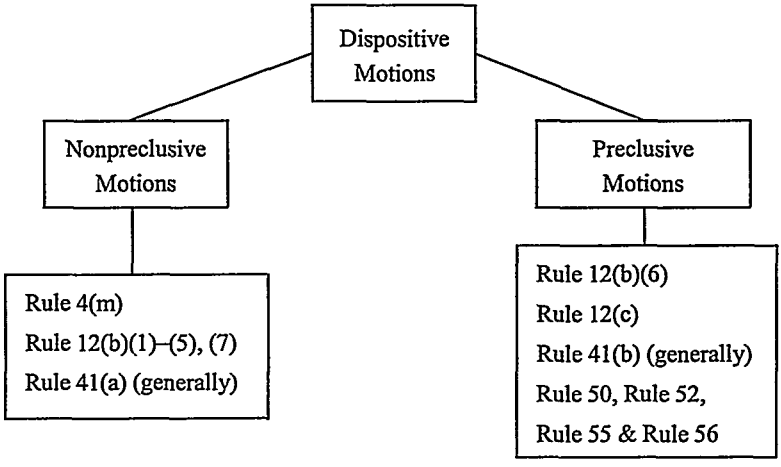
296. *Id.* at 503.

297. *Id.* at 505.

> the effect of the "adjudication upon the merits" default provision of Rule 41(b)—and, presumably, of the explicit order in the present case that used the language of that default provision—is simply that, unlike a dismissal "without prejudice," the dismissal in the present case barred refiling of the same claim in the United States District Court for the Central District of California. That is undoubtedly a necessary condition, but it is not a sufficient one, for claim-preclusive effect in other courts.[298]

The preclusive (or non-preclusive) effect of the more common dispositive motions is illustrated below in Figure 7. Note again, though, that "preclusive" can have a more limited meaning in the dismissal (versus non-dismissal) context, particularly as it relates to the effect of a judgment in another court.

Figure 7—The Preclusive and Non-Preclusive Effect of Dispositive Motions



As suggested previously, the failure to properly distinguish between the various forms of dispositive Fmotions is widespread.[299] For example, the failure to appreciate the distinction between motions to dismiss and motions for summary judgment led to the mischaracterization of the

298. *Id.* at 506.

299. *See supra* note 210 and accompanying text.

disposition in *Jones* discussed at the beginning of this Article.[300] Again, in its April 1, 1998 opinion, the court unquestionably granted summary judgment in favor of President Clinton with respect to all of Jones' remaining claims.[301] Yet the court then stated (improperly) that, as a result, judgment would be entered in favor of President Clinton "dismissing this case."[302]

Regrettably, similar errors can be found within the official Forms that follow the Rules. Form 31 ("Judgment on Jury Verdict") and Form 32 ("Judgment on Decision by the Court") both provide (in the event the defendant wins) "that the plaintiff take nothing, *that the action be dismissed on the merits*, and that the defendant C.D. recover of the plaintiff A.B. his costs of action."[303] Neither form makes sense, for though a trial might result in the disposition of an action, it does not result in a dismissal. Obviously, each of these forms are in need of amendment.[304]

Besides leading to conceptual confusion, the failure to appreciate the distinction between motions to dismiss and other dispositive motions has, on numerous occasions, led to more serious problems.[305] Consider, for example, the case of *Capitol Leasing Co. v. F.D.I.C.*[306] In *Capitol Leasing*, the plaintiff (Capitol) argued that the defendant (FDIC)

> in essence requested the district court to treat its motion [to dismiss for lack of subject matter jurisdiction] as one for summary judgment pursuant to Federal Rule of Civil Procedure 56—that is, to make a determination as a matter of law. Capitol further asserts that the district court converted the motion for dismissal into one for summary judgment by considering and relying upon affidavits

300. *See supra* note 7 and accompanying text.

301. Jones v. Clinton, 990 F. Supp. 657, 679 (E.D. Ark. 1998).

302. *Id.*

303. (emphasis added).

304. *See also* 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 58.05[4][a], at 58-22 (3d ed. 2000) ("The official form of judgment may not suffice in the case of a judgment dismissing an action based on lack of jurisdiction, since the court should not purport to decide the merits.").

305. The most common form of confusion might be that involving the distinctions between Rule 12 dismissals and motions for summary judgment. *See* 11 MOORE ET AL., *supra* note 210, § 56.30[1], at 56-207 ("Summary judgment motions are occasionally conflated with—or even confused with—various motions made pursuant to Rule 12, which provides for a variety of motions designed to facilitate dismissal of claims or cases.").

306. 999 F.2d 188 (7th Cir. 1993).

> and documents submitted by the FDIC to show that it issued a notice of disallowance on December 17, 1991.[307]

The Court of Appeals for the Seventh Circuit found this argument "unavailing because Capitol misconstrues the relationship between Rule 12(b)(1) and summary judgment."[308]

> Indisputably, a district court can transform a motion for dismissal under Federal Rule 12(b)(6) into one for summary judgment when "matters outside the pleading are presented to and not excluded by the court . . . ." Capitol's argument notwithstanding, the Federal Rules of Civil Procedure contain no analogous recognition that a 12(b)(1) motion can evolve into dismissal pursuant to Rule 56. Whereas a grant of summary judgment is a decision on the merits, a court must dismiss the case without ever reaching the merits if it concludes that it has no jurisdiction. In short, the question of jurisdiction is inappropriate for summary judgment, and discussing the interplay of Rule 12(b)(1) and Rule 56 verges on non sequitur. The FDIC did not request summary judgment. Nor could the district court have transformed the motion to dismiss into one for summary judgment.
>
> Even if the district court did consider affidavits and other documentary evidence in granting the FDIC's motion, it did as it should have. "The district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists."[309]

An example of how the failure to understand the differences between dispositive motions can affect a party's right to appeal is found in *EF Operating Corp. v. American Buildings*.[310] As explained by the Court of Appeals for the Third Circuit:

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307. *Id.* at 191.

308. *Id.*

309. *Id.* (citations omitted) (quoting Grafon Corp. v. Hausermann, 602 F.2d 781, 783 (7th Cir. 1979)); *see also* 11 MOORE ET AL., *supra* note 210, § 56.30[2], at 56-212:

> Although courts usually catch mistakenly labeled motions, counsel should always assess whether the objective sought by counsel warrants a summary judgment motion or is better served by another type of motion that superficially resembles summary judgment. This avoids both the remote possibility that a mislabeled motion will actually affect the outcome of a dispute, and the possibility that counsel will lose stature before the court for perceived failure to appreciate the distinctions between summary judgment and other motions.

310. 993 F.2d 1046 (3d Cir. 1993).

> Before we reach the merits of the summary judgment, we must confront a jurisdictional matter. Along with its summary judgment motion Flaherty also moved the district court to dismiss the complaint for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2). The district court did not explicitly rule on this motion. Instead, it ruled in favor of Flaherty on the merits .... The logical conclusion to be derived from this is that the district court decided against Flaherty on the jurisdictional issue, albeit implicitly.
>
> Although EF Operating appeals from the final order granting summary judgment for the appellees, Flaherty did not file a cross-appeal to contest the personal jurisdiction issue. Rather, it contests the issue in response to EF Operating's appeal. Unlike subject matter jurisdiction, which may be raised by any party or court at any time, parties must affirmatively raise a personal jurisdiction defense in a timely manner under Federal Rules of Civil Procedure 12(g) and 12(h)(1), lest it will be deemed waived.
>
> It is axiomatic that any party contesting an unfavorable order or judgment below must file an appeal. It is also well established that an appellee may, without taking a cross-appeal, support the judgment as entered through any matter appearing in the record, though his argument may attack the lower court's reasoning or bring forth a matter overlooked or ignored by the court. This is simply a corollary to the rule that a reviewing court may affirm the lower court's decision on any basis. A grant of summary judgment and a dismissal for lack of personal jurisdiction, however, are wholly different forms of relief. The latter is a dismissal without prejudice, whereas the former is a ruling on the merits which if affirmed would have preclusive effect. By seeking dismissal of the complaint for lack of personal jurisdiction, Flaherty is not seeking to support the summary judgment on different grounds. Rather, it seeks to vacate the summary judgment. Thus, where an appellant files an appeal seeking review of a summary judgment for the appellee, the appellee must cross-appeal to contest the district court's adverse ruling on his motion to dismiss for lack of personal jurisdiction. Since Flaherty did not cross-appeal, we have jurisdiction to review the district court's summary judgment ruling only.[311]

311. *Id.* at 1048–49 (citations omitted).

Though the discussion up to this point has focused primarily on the differences between dismissals and other dispositive motions, the same distinctions should be drawn between dismissals and actions disposed of by trial. Though actions (or claims) adjudicated by trial often are later referred to as having been dismissed, in fact they have not. As explained by the Supreme Court of Minnesota (a state that employs a system of civil procedural rules that closely parallel the Federal Rules) in *Lampert Lumber Co. v. Joyce*[312]:

> Often, in cases submitted for decision on the merits, the trial court's conclusions of law and order for judgment will state that the claim is "dismissed" on the merits or with prejudice. . . . This is just a colloquial way of saying that the claimant, having failed to prove her claim under the law and the evidence adduced, is not entitled to recover on her claim from the other party. This kind of "dismissal" should not be confused with Rule [41] dismissals with prejudice which, while they also finally dispose of the claim, do so for nonsubstantive reasons, such as on stipulation of the parties to conclude a settlement or, as earlier discussed, for failure of claimant to comply with the rules or a court order or for a failure to prosecute.[313]

In *Lampert Lumber*, the trial court, following a nonjury trial, ordered Defendant Joyce's cross-claim against Defendant Nolde "dismissed without prejudice."[314] The Supreme Court of Minnesota reversed the judgment of dismissal, and remanded the case to the trial court "for an adjudication on the merits."[315] Because the trial court had "already concluded that Joyce failed to establish her cross-claim," the supreme court exhorted that, "[p]resumably, on remand, the trial court, in deciding the cross-claim on its merits, will order judgment that defendant Joyce does not recover on her cross-claim against defendant Nolde."[316]

One last point on dismissals: When a court does order a dismissal, it is the *claim* or (if as to all claims) the *action* that is dismissed.[317] The court

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312. 405 N.W.2d 423 (Minn. 1987).

313. *Id.* at 427; *accord* 75A AM. JUR. 2D *Trial* § 855 (1991).

314. *Lampert Lumber*, 405 N.W.2d at 424.

315. *Id.* at 427.

316. *Id.*

317. With one exception, the Rules speak only of the dismissal of *actions* (or parts thereof; *see* FED. R. CIV. P. 37(b)(2)(C); 71A(i)(2)), or *claims*.

The one exception occurs in connection with Federal Rule of Civil Procedure 19(a), which provides (in part): "If the joined party objects to venue and joinder of that party would render the

does not dismiss the *complaint*.[318] (Nor indeed could it, seeing as how a complaint, being a "paper,"[319] is quite corporeal.[320])

An analogous context that helps illustrate this distinction recently arose in *Artuz v. Bennett*.[321] In *Artuz*, the issue before the Supreme Court was whether an application for state postconviction relief containing claims that are procedurally barred may be considered "properly filed" for purposes of a federal statute that tolled a one-year statute of limitations on habeas corpus applications.[322] In rejecting the petitioner's argument that such applications could not be considered as "properly filed," the Court (again through Justice Scalia) explained:

> By construing "properly filed application" to mean "application raising claims that are not mandatorily procedurally barred," petitioner elides the difference between an "application" and a "claim." *Only individual claims, and not the application containing those claims, can be procedurally defaulted under state law* . . . . Ignoring this distinction would require judges to engage in verbal gymnastics when an application contains some claims that are procedurally barred and some that are not. Presumably a court would have to say that the application is "properly filed" as to the nonbarred claims, and not "properly filed" as to the rest. The statute, however, refers only to "properly filed" applications and does not contain the peculiar suggestion

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venue of the action improper, that *party* shall be dismissed from the action." (emphasis added). Of course, if a person is no longer a party to an action in this context, it is only because all claims have been dismissed as to that party. *Compare* FED. R. CIV. P. 25(a)(1) ("Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed *as to* the deceased party.") (emphasis added). Perhaps Rule 19(a) could be reworded in a similar manner.

318. Nowhere do the Rules speak of the dismissal of complaints. *Cf.* Bankers Trust Co. v. Mallis, 435 U.S. 381, 382 (1978) (describing the district court's decision as a dismissal of the *action*, in spite of the fact that the district court described its own decision as a dismissal of the *complaint*). *But see, e.g.*, Ramirez v. Fox Television Station, Inc., 998 F.2d 743, 746–47 (9th Cir. 1993) (discussed in the text accompanying notes 130–136 *supra*).

Some of the confusion here might be due to the terminology employed by the Federal Rules of Criminal Procedure. *See* FED. R. CRIM. P. 48 ("Dismissal") (describing the dismissal of the "indictment, information or complaint").

319. *See supra* Part III.D.

320. The complaint, being a paper (in the common and technical senses), is part of the court's file for the action to which it corresponds. It has been this author's experience that the complaint remains in that file even following the dismissal of the corresponding action, at least until the entire file is destroyed.

321. 531 U.S. 4 (2000) (unanimous decision).

322. *Id.* at 5.

> that a single application can be both "properly filed" and not "properly filed." Ordinary English would refer to certain claims as having been properly presented or raised, irrespective of whether the application containing those claims was properly filed.[323]

Following this reasoning, one could conclude that just as only claims, and not the applications that contain those claims, can be "procedurally defaulted," only claims, and not the complaints that contain those claims, can be dismissed.

Regrettably, like many of the other errors identified in this Article, references to the dismissal of complaints are legion in legal writing. For example, in the course of reciting the procedural history in *Jones*, the court stated: "Following remand, the President filed a motion for judgment on the pleadings and dismissal of the complaint pursuant to Rule 12(c) of the Federal Rules of Civil Procedure."[324] This example is all the more objectionable because (as we now know) a motion for judgment on the pleadings, even if granted, does not lead to a dismissal of anything.[325]

In the appellate area, references to the dismissal of complaints (in contrast to the dismissal of actions) have resulted in considerable confusion. As one treatise explains:

> Terminology issues can complicate the resolution of issues involving the finality of dismissals. When dealing with "dismissals," one should be careful to know whether a dismissal order applies to the "action," or the "complaint," or both. For example, where a complaint has been dismissed with leave to amend, the action itself may be deemed to continue, at least for a time, although the complaint has been dismissed. Likewise, the existence of the term "without prejudice" in a dismissal order, or an appeal court's determination that the order embodied the equivalent of that term, can have important effects depending on the issue involved. For example, a voluntary dismissal "without prejudice" can mean that the action is definitively concluded, but the plaintiff is free to start another action involving the same claim. In comparison, an appeals court may determine that a

323. *Id.* at 9–10 (citations and italics omitted; emphasis added).

324. Jones v. Clinton, 990 F. Supp. 657, 662 (E.D. Ark. 1998).

325. *See supra* notes 229–230 and accompanying text. In all fairness, it should be observed that the President indeed filed precisely the motion described. *See* President Clinton's Motion for Judgment on the Pleadings and Dismissal of the Complaint, *Jones* (No. LR-C-94-290). Thus, perhaps the district court should not be criticized for merely reporting that fact.

> dismissal of a complaint with leave to amend is a dismissal "without prejudice," which is significant for determining the appealability of the order.[326]

Obviously, such attempts to distinguish dismissals of complaints from dismissals of actions (as well as the respective results that supposedly flow therefrom) only serve to obfuscate the real issue usually underlying these cases: namely, whether the district court has (or may be deemed to have) entered a final judgment in the action, thus rendering it appealable.[327] A non-final decision (such as an order purporting to grant a dismissal, but permitting the plaintiff to cure the deficiencies through an amendment of the complaint by a certain date), however termed, generally is considered interlocutory and therefore not appealable, at least absent further order of the court, the expiration of the specified time period, or some express indication by the plaintiff that the opportunity to amend is being waived.[328] Much confusion would be avoided if courts were to discontinue references to the dismissal of complaints, and to delay the dismissal of actions or claims until after the expiration of all deadlines for the curing of any supposed deficiencies.

A concrete example of some of the problems caused by conditional dismissals, as well as support for the preferred approach outlined above, can be found in *Otis v. City of Chicago*.[329] In *Otis*, the district court entered the following order:

> Defendant's continued motion to dismiss case for failure of plaintiff to comply with court's order is granted. Order cause dismissed with leave to plaintiff to move on properly noticed

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326. 9 CORA M. THOMPSON & KEVIN F. DUERINCK, CYCLOPEDIA OF FEDERAL PROCEDURE § 29.01, at 7 (3d ed. Supp. 2000) (citations omitted); *see also* 19 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 202.11[1], at 202-38 to 202-40 (evidencing similar confusion). For a discussion of the inter-circuit (and intra-circuit) conflicts that have arisen as a result of this confusion, see *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1135–37 (9th Cir. 1997) (en banc).

327. *See, e.g.*, Ramirez v. Fox Television Station, Inc., 998 F.2d 743, 747 (9th Cir. 1993) ("In order to solve this unnecessary but fairly frequent problem, we are required to 'focus on the effect of the ruling rather than the label placed on it.'") (quoting United States v. Lee, 786 F.2d 951, 955 (9th Cir. 1986)).

328. *See* 3 MOORE ET AL., *supra* note 205, § 15.12[1], at 15-17:

> In determining whether dismissal of the complaint constitutes intent to dismiss the entire action, a court may consider the following: whether the order clearly states that no amendment is possible, whether the complaint was dismissed with prejudice, whether the complaint was dismissed with an express denial of leave to amend, whether the statute of limitations has expired, and whether other circumstances exist that establish that no amendment is possible.

See also WMX Techs., 104 F.3d at 1135–37.

329. 29 F.3d 1159 (7th Cir. 1994) (en banc).

> motion for leave to reinstate case provided that plaintiff has delivered to defendant signed answers to outstanding discovery requests. Motion for leave to reinstate case must be noticed for hearing on or before January 11, 1992.[330]

According to the Court of Appeals for the Seventh Circuit, "Otis did not file any papers between July 15, 1991, and January 11, 1992. When January 12 arrived, the district court took no action. It did not then enter a judgment under Fed.R.Civ.P. 58 and has not done so since. On February 10, 1992, Otis filed a notice of appeal."[331]

Regarding the appealability of the district court's order, the en banc court (through Judge Easterbrook) began:

> Unfortunately, this case became dormant in the district court without the benefit of a final judgment under Rule 58. Two factors jointly produced this.
>
> First, the district court dismissed the case with leave to reinstate. Dismissal with leave to reinstate is rare outside the Northern District of Illinois. Because the conditional ability to revive the case renders the dismissal a disposition without prejudice, neither side may appeal immediately. Jurisdictional problems often ensue. If the case cannot be appealed now, when may it be appealed? Does either side need to obtain an additional order from the district judge, or does the dismissal convert to one "with prejudice" once the time to fulfil the condition has expired? If an additional order is required, what if the district judge neglects to enter it? Does this cast the case into limbo, from which the loser has no escape? If a conditional dismissal eventually becomes appealable, when? What of the possibility . . . that when the decision becomes "final" on expiration of the time to reinstate, the time to appeal has already expired, because it ran from entry of the order?
>
> Pitfalls and imponderables of this kind—this catalog is not exclusive—make the use of conditional dismissals problematic.[332]

What should the district court have done? The court of appeals suggested:

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330. *Id.* at 1162.

331. *Id.*

332. *Id.* at 1162–63 (citations omitted).

> On rare occasions dismissal with leave to reinstate may serve a legitimate purpose, but most of the time both litigants and courts would be better off if the judge announced a plan to dismiss in the future unless something happened. Here, for example, the judge could have said that unless by January 11, 1992, Otis answered the defendant's interrogatories, he would dismiss the case with prejudice. Casting the order in this fashion would have induced the court to schedule a status conference for January 12, which would have led to the entry of a proper final judgment if Otis had not satisfied her obligations by then.[333]

F. *Judgment*

The last term discussed in this Article is *judgment*. This subpart will begin with a discussion of the meaning of this term under the Rules, followed by a critique of that definition and a discussion of some of the problems it has caused (particularly in relation to the requirement that a judgment be set forth in a separate document). There will then be a discussion and critique of the amendments currently being proposed to the rules relating to judgments, followed by the presentation of an alternative solution.[334]

So what is a *judgment*? Actually, *judgment* is one of those rare Rules terms that has an express (though in some ways vague) definition. Rule 54(a) ("Definition; Form") provides: "'Judgment'" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings." Thus, though all "judgments" are orders,[335]

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333. *Id.* at 1163.

334. In passing, it is noted that, in addition to being misunderstood, the term *judgment* very often is misspelled. *See* GARNER, ELEMENTS *supra* note 31, at 122 (observing, under the heading "Words and Expressions Confused and Misused", that "judgment" is "[s]o spelled in American English and in British legal writing—not *judgement*, as in most British writing.").

335. Or decrees, though the term *decree* is rarely used today and arguably has been replaced by other Rule terms. As one treatise explains:

> The first sentence of Rule 54(a) defines "judgment," for purposes of the federal rules, to include a decree and any appealable order. Prior to the fusion of law and equity by the civil rules in 1938, a federal court in an equity suit rendered a "decree" and an action at law resulted in the entry of a "judgment." However, since there is now only one form of action in the federal courts, there is no purpose in preserving any technical distinction between a "decree" and a "judgment." Therefore, Rule 54(a), in effect, indicates that a judgment at law and a decree in equity are to be treated in the same fashion.

the critical aspect of a "judgment" that distinguishes it from other court orders (matters of form aside) is its appealability.[336] As one leading treatise summarizes: "The reference to an appealable order at the end of the first sentence in Rule 54(a) embraces two different types of orders. The first is any 'final decision' from which an appeal is permitted under Section 1291 of Title 28 and the second is any appealable interlocutory order."[337] In other words, if an order is appealable, it constitutes a "judgment,"[338] and "all of the provisions of the federal rules relating to judgments are applicable to the order."[339]

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10 WRIGHT & MILLER, *supra* note 115, § 2651, at 7–8 (citations omitted); *accord* 10 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 54.02[1], at 54-26 (3d ed. 2000).

336. Apparently, anyway. Perhaps the most intriguing aspect of the definition of "judgment" found in Rule 54(a) is the choice of the word "includes." For the drafters of the Rules could have simply said that a "judgment" *is* any appealable order. Instead, by using "includes," the possibility is raised (theoretically, anyway) that there might exist "judgments" that do not consist of orders, or of things appealable (or perhaps both). As we shall see, though, the great weight of authority has interpreted this term as being limited to appealable orders. *See infra* notes 337–339 and accompanying text. This interpretation also conforms with the general conception of a *judgment* as implying both some form of judicial decision-making and the thing from which an appeal lies. On the judicial decision-making aspect of *judgment*, see *United States v. Hark*, 320 U.S. 531, 534 (1944) ("The judgment of a court is the judicial determination or sentence of the court upon a matter within its jurisdiction."); Ex Parte Morgan, 114 U.S. 174, 175 (1885) ("The judgment is the act of the court."); *see also* BLACK'S LAW DICTIONARY 847 (7th ed. 1999) (defining "final judgment" as "[a] court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney's fees) and enforcement of the judgment"); GARNER, LEGAL USAGE, *supra* note 76, at 481 (defining "judgment" as "the final decisive act of a court in defining the rights of the parties"). On the appellate aspect of *judgment*, see *infra* notes 340–347 and accompanying text.

337. 10 WRIGHT & MILLER, *supra* note 115, § 2651, at 8 (citation omitted); *accord* 10 MOORE ET AL., *supra* note 335, § 54.02[2], at 54-26.

One question that sometimes arises in this context is whether the phrase "final judgment" as might be used in reference to the Rules is coterminous with the phrase "final decision" as used in 28 U.S.C. § 1291. The answer appears to be yes. *See* Bankers Trust Co. v. Mallis, 435 U.S. 381, 384 n.4 (1978); *see also* Rebecca A. Cochran, *Gaining Appellate Review by "Manufacturing" a Final Judgment Through Voluntary Dismissal of Peripheral Claims*, 48 MERCER L. REV. 979, 997 n.91 (1997) ("The final judgment rule is incorporated into the federal system through 28 U.S.C. § 1291, which grants the courts of appeals jurisdiction of appeals from all final determinations of the district courts.").

338. To the contrary is *Hewlett-Packard Co. v. Berg*, 61 F.3d 101, 104 (1st Cir. 1995), which includes the following passage:

> [T]he Federal Rules of Civil Procedure do not say that appeals can only be taken from judgments; on the contrary, they contemplate that, subject to the complex rules that determine what is immediately appealable, there may be such a thing as an "appealable order" that is not a judgment.

The only authority cited by the court for this proposition was Rule 79(b) ("Civil Judgments and Orders"), which provides:

> The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States may

One brief aside concerning the appealability aspect of judgments: In part because a judgment is an appealable order, and in part because of what a judgment consists of (essentially, a brief summary of "who has won and what relief has been awarded"[340]), it is actually the district court's *judgment* that is appealed. Current practice notwithstanding, a party does not appeal a court's decision, holding, opinion, ruling, or any other, similar terms,[341] nor does it appeal the action (or case, etc.) itself.[342] Accordingly, it is a district court's *judgment* that is affirmed or reversed by a court of appeals[343] (or, if a judgment of the court of appeals, by the Supreme Court[344]). For even if an appellate court agrees with the result reached by a lower court, it still might disagree with its reasoning.[345] The concept of the judgment as the thing being appealed

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prescribe, a correct copy of *every final judgment or appealable order*, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept.

(emphasis added). But Rule 79(b) appears to distinguish only between *final* (appealable) orders (or "judgments") and orders that, though not final, are nonetheless appealable (and therefore, under Rule 54(a), also constitute "judgments"). Thus, Rule 79(b) does not seem to stand for the proposition (quite contrary to the language of Rule 54(a)) that there exists some class of appealable orders that are not judgments.

339. 10 MOORE ET AL., *supra* note 335, § 54.02[2], at 54-26. "Accordingly, Rule 54(a)'s definition of 'judgment' affects the interpretation of several other rules, most notably Rule 50, Rule 52, and Rule 59." *Id.*

In some contexts, however, the term "judgment" is used in such a way that the definition of Rule 54(a) is inapplicable. For example, Rule 56(c) permits entry of a "summary judgment, interlocutory in character" on the issue of liability when damages are yet to be resolved; Rule 54(a)'s definition of "judgment" does not apply to this rule. *Id.* at 54-26 to -27.

340. Otis v. City of Chicago, 29 F.3d 1159, 1163 (7th Cir. 1994).

341. A "decision" is simply any "judicial determination after consideration of the facts and the law." BLACK'S LAW DICTIONARY 414 (7th ed. 1999). A "holding" is a "court's determination of a matter of law pivotal to its decision; a principle drawn from such a decision." *Id.* at 737. An "opinion" is a "court's written statement explaining its decision in a given case, usu. including the statement of facts, points of law, rationale, and dicta." *Id.* at 1119. Finally, a "ruling" is the "outcome of a court's decision either on some point of law or on the case as a whole." *Id.* at 1334.

342. *See supra* Part III.A (explaining the meaning of "action" and related terms).

343. *See, e.g.*, FED. R. CIV. P. 50(c)(1), (d); FED. R. APP. P. 3(c)(1)(B), 4(a)(1); Appellate Form 1.

344. *See, e.g.*, S. CT. R. 14.1(e)(i).

345. As summarized by one legal scholar:

Judgment . . . means the final decree of an appellate court that acts upon a lower-court judgment, whether affirming, reversing, vacating, or whatever. British lawyers ordinarily use *judgment* synonymously with *opinion*, whereas Americans distinguish between the *opinion* (which sets out the reasons for the disposition) and the judgment (the pronouncement of the disposition itself). . . .

A cardinal principle of judgment-drafting is that appellate opinions should make explicit how the court is disposing of the judgment or order below. . . .

also permits the concept of the concurring opinion,[346] and makes more sense of the concept of the dissenting opinion.[347]

It is important to realize, though, that, under the Rules, the mere fact that an appealable order *constitutes* a judgment is not sufficient to make that judgment "effective." Instead, one must read Rule 54(a) in concert with Rule 58 ("Entry of Judgment"), which provides:

> Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a).

Thus, as summarized by one district court:

> Rule 58 requires the clerk of the court to do two things before a judgment becomes effective. First, the clerk must set forth the judgment on a separate document. Then, the clerk must enter the judgment on the civil docket pursuant to Rule 79(a).
>
> Although Rule 58(a) says nothing about finality, and thus does not on its own make a non-final judgment final, a court order or jury verdict cannot become an effective judgment, and thus ipso facto cannot become an effective final judgment, until the clerk complies with the rules.[348]

A second important point is that judges should almost make a fetish of the following distinctions: an appeals court affirms, reverses, or modifies *judgments* or *orders*; it agrees with, approves, or disapproves *opinions* or *decisions*; and it remands *cases* (or *causes*) and *actions*.

GARNER, LEGAL USAGE, supra note 76, at 482.

346. A "concurring opinion" is a "separate written opinion explaining" a "vote cast by a judge in favor of the judgment reached, often on grounds differing from those expressed in the opinion or opinions explaining the judgment." BLACK'S LAW DICTIONARY 286 (7th ed. 1999).

347. A "dissenting opinion" is an "opinion by one or more judges who disagree with the decision [and therefore the judgment] reached by the majority." *Id.* at 1119.

348. Jones v. Jones Bros. Constr. Corp., 126 F.R.D. 54, 55–56 (N.D. Ill. 1989) (citations omitted); *see also* 10 MOORE ET AL., *supra* note 335, § 54.03[2], at 54-31 ("Rule 54(a) defines the term

Whether a judgment is "effective"—which usually turns on whether it was "set forth on a separate document"[349]—is important for a number of reasons. For one thing, it is the entry of an "effective" judgment that fixes the deadline for the filing of a number of post-judgment motions,[350] as well as a notice of appeal.[351] The entry of an "effective" judgment also serves an important administrative purpose, for it results in the creation of "self-contained document" that provides (at least with respect to final judgments) "a distinct indication that the case is at an end, coupled with a precise statement of the terms on which it has ended."[352]

Because of the importance of rendering "effective" judgments, it is easy to see how the failure to render such judgments would lead to problems.[353] Yet, and "[i]n spite of [Rule 58's] simplicity, courts too often fail to fulfill its requirements."[354] Why? There are probably several reasons. But before addressing those reasons, it might be helpful to back up a bit and consider the application of Rules 54(a) and 58 more generally to the various manners by which actions may reach disposition.

'judgment' as used in Rule 58, so the separate document requirement applies to every judgment or order that is appealable . . . .") (citation omitted).

349. Perhaps "separate *paper*" would have been more appropriate. *See supra* Part III.D. Alas, that is not what Rule 58 provides.

350. *See* FED. R. CIV. P. 50, 52, 54, 59, 60, 62.

351. *See* Bankers Trust Co. v. Mallis, 435 U.S. 381, 384–85 (1978); PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE 101 (2000) (observing that the separate document requirement "was added to the rules to provide a clear signal for the running of appeal time") [hereinafter PRELIMINARY DRAFT].

352. Otis v. City of Chicago, 29 F.3d 1159, 1163 (7th Cir. 1994). Other than the finality aspect, these same purposes are achieved with respect to "effective" nonfinal judgments.

353. *See, e.g.*, PRELIMINARY DRAFT, *supra* note 351, at 101:

> Failure to enter the final judgment on a separate document means that appeal time never starts to run. The Appellate Rules Advisory Committee is concerned that the judicial landscape is littered with many "time bombs" in the form of years-old judgments that at any time could explode into an appeal, shattering the victors' repose and potentially burdening the courts with further proceedings in disputes that have become stale if not petrified.

See also id. at 111 ("The result of failure to enter judgment is that the time for making motions under Rules 50, 52, 54(d)(2)(B), 59, and some motions under Rule 60, never begins to run.").

354. 12 MOORE ET AL., *supra* note 304, § 58.05[4][a], at 58-23; *accord* PRELIMINARY DRAFT, *supra* note 351, at 100–01 (observing that "district courts frequently ignore the separate document requirement"). On occasion, courts also mischaracterize nonappealable orders as judgments. *See infra* note 375. *See generally* Scott L. Cagan, *Rule 58 of the Federal Rules of Civil Procedure: An Appealing Alternative*, 21 STETSON L. REV. 311, 311 (1992) ("Federal Rule of Civil Procedure 58 has been a source of unnecessary appellate litigation recently.").

As discussed previously, actions may be disposed of in a variety of ways, depending on the circumstances.[355] Actions may be tried (either to a jury or to the court).[356] Actions may be disposed of by motion (either through a motion to dismiss or some other form of dispositive motion).[357] And actions may be settled (which, presumedly, leads to some form of voluntary dismissal).[358]

Take first the simple example of an action involving two parties and only a single claim for some particular form of relief. If the action is tried to a verdict (by a jury) or decision (by the court), either the plaintiff will win and thereby be entitled to the relief requested, or the defendant will win, resulting in the denial of that relief.[359] In either situation, an order to this effect that otherwise conforms with Rule 54(a) unquestionably would be appealable,[360] meaning such an order would constitute a "judgment,"[361] and would become "effective" upon being "set forth on a separate document" and entered pursuant to Rule 79(a).[362]

Similarly, if a dispositive motion is granted in favor of a plaintiff, and the resulting order is appealable, a corresponding judgment should be entered in favor of that plaintiff. Conversely, if such a motion is granted in favor of the defendant, and if the resulting order (even if made with respect to a dismissal without prejudice) is appealable, an appropriate judgment should be entered in favor of the defendant. In other words, Rules 54(a) and 58 make no distinctions depending upon the manner by which the action is disposed; rather, the result is the same whether the action was tried or was disposed of by motion.[363] Thus, as one leading treatise broadly (overbroadly, as it turns out) states: "The requirement that a judgment be on a separate document and that it be entered in the docket should be regarded as mandatory in all cases."[364]

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355. *See supra* note 209 and accompanying text.

356. *See* FED. R. CIV. P. 39.

357. *See supra* Part III.E.

358. *See* FED. R. CIV. P. 41(a).

359. *See, e.g.*, FED. R. CIV. P. 58.

360. *See, e.g.*, Wharton-Thomas v. United States, 721 F.2d 922, 924 (3d Cir. 1983).

361. FED. R. CIV. P. 54(a).

362. FED. R. CIV. P. 58.

363. *See* United States v. Indrelunas, 411 U.S. 216, 220–22 (1973).

364. 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2785, at 25 (2d ed. 1995); *see also* Michael Zachery, *Rules 58 and 79(a) of the Federal Rules of Civil Procedure: Appellate Jurisdiction and the Separate Judgment and Docket Entry Requirements*, 40 N.Y.L. SCH. L. REV. 409, 409–10 (1996) (concluding that "the district courts are generally required, under Civil Procedure Rule 58, to file a judgment as a separate document at the conclusion of an action").

So far so good. But the world is not always so simple. For one must keep in mind that a court order that, though perhaps in some sense "dispositive," is not appealable (because it is not truly a "final" decision and not the sort of interlocutory order that may be appealed) cannot constitute a judgment.[365] Moreover, even some dismissal orders, which might appear to be "final decisions" in the sense that they certainly bring an end to the action, are not appealable,[366] and therefore cannot constitute judgments.[367] On the other hand, there exist a number of orders that are appealable on an interlocutory basis.[368] Such orders, though not final, should lead to the entry of a judgment.[369] Similarly, there currently exist a number of means by which orders that are not technically final may be deemed final for purposes of appeal.[370] Presumedly, such collateral orders also would call for the entry of a judgment.

Thus, though all "judgments" share the common trait of appealability, it should now be clear that not all judgments are of the same *type*. For

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365. *See, e.g.*, 12 MOORE ET AL., *supra* note 304, § 58.02[1], at 58-7 to -8:

> A final order is one that is meant to dispose of all issues in dispute. For example, a denial of relief "at this time" is not final and therefore is not appealable, nor is dismissal of a complaint if the plaintiff may, under proper circumstances, be entitled to replead.
>
> Similarly, an order determining liability or awarding fees or damages but failing to specify the amount due does not dispose of all issues, and is therefore not a final, appealable, order. An order denying a motion for summary judgment is not a final, appealable, order.

(citations omitted).

366. Actually, the issue whether an order of dismissal is appealable can be quite complicated, and often is not entirely dependent upon the preclusive effect of the order. For recent discussions of this issue, see *State Treasurer v. Barry*, 168 F.3d 8, 11–16 (11th Cir. 1999), and *Chappelle v. Beacon Communications Corp.*, 84 F.3d 652, 653–55 (2d Cir. 1996). *See also* Cochran, *supra* note 337, at 984 ("The district courts' use of voluntary dismissals to tie up loose ends of litigation and thus appeal an earlier adjudication as a final decision has, however, split the circuit courts and divided three circuits within themselves.") (citations omitted).

367. For this reason, and because they do not lead to a court order, voluntary dismissals by notice or by stipulation of the parties also do not constitute "judgments." Again, the fact that some dismissals, though dispositive, do not constitute judgments is yet another distinction between dismissals and other forms of dispositions.

368. *See* 28 U.S.C. § 1292 (1994).

369. 12 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3103, at 457 (2d ed. 1997).

370. *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712 (1996):

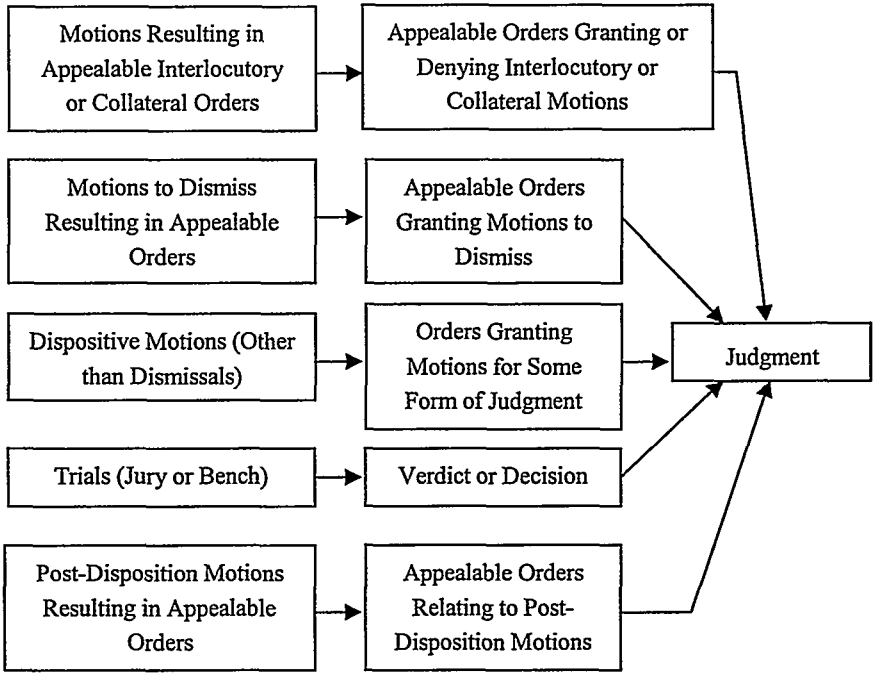
> We have also recognized, however, a narrow class of collateral orders which do not meet [the *Catlin*] definition of finality, but which are nevertheless immediately appealable under § 1291 because they conclusively determine a disputed question that is completely separate from the merits of the action, effectively unreviewable on appeal from a final judgment, and too important to be denied review.

(citations and quotation marks omitted).

one thing, not all "judgments" are "final" judgments. And even among "final" judgments, not all are judgments "of dismissal."[371]

The general relationship between the various types of judgments is demonstrated below in Figure 8.

Figure 8 – The Relationship Between Judgments[372]



371. Indeed, the standard "Judgment in a Civil Case" form that is prescribed for use in all United States District Courts (AO 450) does not even use the term "dismissal." Rather, the form includes only the following two options:

> Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
>
> Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

The form then includes some space below these two options that the court may use to describe in more detail the precise nature of the particular type of judgment rendered.

372. Of course, if the action involves more than one claim (of any type), it is quite possible to end up with some sort of hybrid judgment, if some claims are dismissed and some are disposed of in some other fashion. This also means that the disposition of only a single claim in a multi-claim action might not immediately lead to the entry of a judgment. It also is quite possible to end up with more than one "judgment" in an action, even as to the same claim. Finally, note (again) that this figure only purports to be a *general* summary of the types of events that result in the issuance of what, by Rule, constitutes a judgment.

The universe of orders constituting judgments thus is in some sense smaller, though in another sense larger, than many attorneys (and some judges) imagine. The source of this confusion lies in their failure to heed the definition of "judgment" found in Rule 54(a). For if they did, they would realize that the answer to the question whether an order constitutes a judgment depends not on finality, but rather on appealability. This basic misunderstanding as to the Rule meaning of the term "judgment" undoubtedly contributes to the failure to enter "effective" judgments in many actions (and undoubtedly also results in the entry of what purport to be judgments but are not).

Another reason district courts have so much difficulty complying with the Rule 58 "effective" judgment requirements relates to the *nature* of appealability. Simply knowing that appealability is the touchstone of a judgment is not enough. One also must be able to determine *whether* any particular order is appealable. Though this determination might be simple in many instances (e.g., following a trial of all claims), in some instances, it can be surprisingly difficult.[373] The appealability of any given order also is an issue that the district courts are not in a good position to decide. Like most courts, district courts are in the business of deciding the cases before them. They are generally not (for good reasons) in the business of declaring the *consequences* of those decisions.[374] It is for these (and other) reasons that federal appellate courts have, in fact,

373. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974) ("No verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future."); Cagan, *supra* note 354, at 324 ("The confusion surrounding [Rule 58] primarily stems from the fact that the parties, clerk, and court do not always agree that a particular order is a final judgment."); Cochran, *supra* note 337, at 1001 ("Although the statute and case law interpreting it appear to state the final judgment rule rigidly, it has been constantly open to judicial interpretation . . . ."); Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 90 (1975) ("Adoption and application of the final judgment rule in the federal courts, however, has not been free from difficulty."); *see also supra* note 366 (discussing the confusion as to the appealability of dismissal orders); *see generally* FEDERAL COURTS STUDY COMM., JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FED. COURTS STUDY COMM. 95 (1990).

374. *See* PRELIMINARY DRAFT, *supra* note 351, at 113 ("[T]here is little reason to force trial judges to speculate about the potential appealability of every order, and there is no means to ensure that the trial judge will always reach the same conclusion as the court of appeals.").

more or less disregarded district court determinations as to appealability, the burdens imposed by Rule 58 notwithstanding.[375]

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375. The Supreme Court in particular has repeatedly disregarded district court determinations of this nature. *See, e.g.*, Sullivan v. Finkelstein, 496 U.S. 617, 628 n.7 (1990):

> It is true, as respondent maintains, that the District Court did not caption its order as a "judgment," much less a "final judgment." The label used by the District Court of course cannot control the order's appealability in this case, any more than it could when a district court labeled a nonappealable interlocutory order as a "final judgment."

(citing Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976)); Bankers Trust Co. v. Mallis, 435 U.S. 381, 385–86 n.6 (1978):

> Nor would strict compliance with the separate-judgment requirement aid the court of appeals' determination of whether the decision of the District Court was "final" for purposes of § 1291. Even if a separate judgment is filed, the courts of appeals must still determine whether the district court intended the judgment to represent the final decision in the case.

United States v. Hark, 320 U.S. 531, 534 (1944) (recognizing, with respect to the "judgment of a court," that "[n]o form or words and no peculiar formal act is necessary to evince its rendition or to mature the right of appeal"); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 295 (1943) ("The formal judgment ordered dismissal of the suit, but it is to be interpreted in the light of the court's opinion, findings and conclusions of law."); *see also* PRELIMINARY DRAFT, *supra* note 351, at 113 ("Drastic surgery on Rules 54(a) and 58 would be required to address this and related issues, however, and it is better to leave this conundrum to the pragmatic disregard that seems its present fate."); Zachary, *supra* note 364, at 442:

> While entry of judgment on the docket, like the separate judgment document, evidences the existence of a final decision, it is not an element of finality. Finality is determined by the nature of the court's ruling—if there is nothing more to be done in a case and the court has rendered a disposition formally ending it, the disposition is final.

In fact, the Supreme Court further has held that the fulfillment of the requirements of Rule 58 is not a prerequisite for appealing an otherwise appealable order. *Mallis*, 435 U.S. at 384; *accord* Shalala v. Schaefer, 509 U.S. 292, 303 (1993) ("a formal 'separate document' of judgment is not needed for an order of a district court to *become* appealable"). As a result, for purposes of appeal, the only real effect of the Rule 58 "effective" judgment requirements is "to clarify when the time for appeal . . . begins to run," *Mallis*, 435 U.S. at 384—and more specifically, to make "clear that a party need not file a notice of appeal until a separate judgment has been filed and entered" (*id.* at 385).

Similarly, the Supreme Court has held that Federal Rule of Appellate Procedure 4(a)(2) (which provides that a "notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry") "permits a notice of appeal from a *nonfinal* decision to operate as a notice of appeal from the final judgment . . . when a district court announces a decision that *would be* appealable if immediately followed by the entry of judgment." FirsTier Mortgage Co. v. Investors Mortgage Ins. Co., 498 U.S. 269, 276 (1991) (unanimous decision) (first emphasis added). In so holding, the Court distinguished such decisions from those that were "clearly interlocutory." *Id.* Nonetheless, in a concurring opinion, Justice Kennedy wrote:

> The Court determines that the announcement by the trial court, though not necessarily a final decision within the meaning of 28 U.S.C. § 1291, had sufficient attributes of finality to be a "decision" under the saving provision of Rule 4(a)(2) of the Federal Rules of Appellate Procedure. It is appropriate to talk in terms of finality in the case before us because "the bench ruling did announce a decision purporting to dispose of all of FirsTier's claims." I would add, however, that the saving provision of Rule 4(a)(2) applies as well to the announcement of an

Further contributing to the problems surrounding the entry of judgments relates to the provision in Rule 58 that directs the *clerk* (rather than the district court judge) to prepare the judgment in certain instances, including those instances in which the court has ordered that all relief be denied.[376] As discussed above, such orders (which include dismissals) frequently lead to some of the more difficult questions as to appealability,[377] and it seems certain that questions considered difficult for judges would be even more so for clerks.[378]

The foregoing concerns may be illustrated by the district court's failure to enter an "effective" judgment in *Otis v. City of Chicago*.[379] In *Otis*, the precise issue before the court of appeals was "whether an order dismissing the suit, but allowing the litigant an option of reinstatement, becomes a 'final decision,' and therefore may be appealed under 28 U.S.C. § 1291, once the time to use the option has expired."[380] The court held that it was,[381] though not without discussing the difficulties caused by the fact that "after the time to reinstate the case had expired, the district court did not enter a judgment."[382] With respect to this oversight, the en banc court (again through Judge Easterbrook) opined:

> Rule 58 provides that every case must end with a formal judgment on a separate document. For some years, the Northern District of Illinois has been less than punctilious in observing this requirement. Although minute orders pepper the record, cases often peter out without the clarity that a Rule 58 judgment produces. Rule 58 is designed to produce a distinct indication that the case is at an end, coupled with a precise statement of the terms on which it has ended. It should be a self-contained document, saying who has won and what relief has been awarded, but

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"order," and that some orders are appealable even though they do not possess attributes of finality. See 28 U.S.C. § 1292(a). In such cases, operation of the saving provision would not be controlled by whether the trial court's announcement was in the nature of a final judgment.

Id. at 278 (Kennedy, J., concurring) (citation omitted).

376. FED. R. CIV. P. 58(1).

377. *See supra* note 366 and accompanying text.

378. *See* Cagan, *supra* note 354, at 324 ("[C]ourt clerks cannot always discern which orders should be docketed as final judgments, or whether the court intends to prepare the final judgment itself or expects the clerk to do so.").

379. 29 F.3d 1159 (7th Cir. 1994). This case is also discussed in Part III.E. *See supra* notes 329–333 and accompanying text.

380. *Otis*, 29 F.3d at 1161. In *Otis*, the plaintiff filed nothing between the time the conditional dismissal order was entered and the expiration of the deadline for reinstatement. *Id.* at 1162.

381. *Id.* at 1161.

382. *Id.* at 1163.

> omitting the reasons for the disposition, which should appear in the court's opinion. In this case the district court should have entered a judgment on January 12, 1992, stating something like: "The suit is dismissed with prejudice, and plaintiff shall take nothing by her complaint." See Fed.R.Civ.P. Form 32. That would have prepared the way for an appeal, marking the time and terms of the litigation's end.[383]

Presumedly, the district court in *Otis* did not intentionally disregard the requirements of Rule 58. Why, then, was a judgment not entered in that action? According to the court of appeals, much of the confusion was caused by the questions surrounding the appealability of conditional dismissal orders.[384] The inability of the district court *clerk* to comply with the duties imposed by Rule 58 almost certainly contributed to the failure to enter a proper judgment in that action as well.[385]

The apparent inability of district courts to regularly comply with the requirements of Rule 58 suggests a need for reform.[386] In response to many of these problems, the Advisory Committee on the Federal Rules of Civil Procedure in fact recently proposed a substantial amendment to

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383. *Id.* (citations omitted).

384. *See id.* at 1162–63 (recited in pertinent part in the text accompanying *supra notes* 332–333).

385. *See id.* at 1163–64:

> Rule 58 puts the onus of preparing a judgment squarely on the shoulders of the clerk of the district court. When docketing the minute order on July 15, 1991, the clerk should have entered into the court's automated docket system a tickler marking January 11, 1992, as an important date. If by then Otis had filed nothing, the clerk should have followed Rule 58(1):
>
> > Upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court.
>
> By January 12, 1992, it had become clear that "all relief shall be denied", so the clerk should have entered a take-nothing judgment "without awaiting any direction by the court". Complying with Rule 58(1) when the court contemplates a deferred judgment is of course harder than complying when the court orders immediate entry of judgment; this is yet another reason why district judges should be leery of conditional dismissals. Nonetheless, the advent of automated docket-tracking systems should permit courts to produce proper judgments even when cases follow unusual paths, and we hope that the judges and staff of the Northern District of Illinois will take steps to ensure compliance with Rule 58.

386. *Accord* Zachary, *supra* note 364, at 409 ("While it cannot be said that [district court failures to render effective judgments] occur on a daily basis, their regularity, the mischief they may cause, and the inconsistent treatment they have received by the courts and commentators, suggest that a clear and cogent resolution is needed.").

Rule 58.[387] This proposed amendment would eliminate the current text of Rule 58 and substitute the following:

(a) Separate Document.

(1) Every judgment and amended judgment must be set forth on a separate document, but a separate document is not required for an order disposing of a motion:

(A) for judgment under Rule 50(b);

(B) to amend or make additional findings of fact under Rule 52(b);

(C) for attorney fees under Rule 54;

(D) for a new trial, or to alter or amend the judgment, under Rule 59; or

(E) for relief under Rule 60.

(2) Subject to Rule 54(b):

(A) unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

(i) the jury returns a general verdict,

(ii) the court awards only costs or a sum certain, or

(iii) the court denies all relief;

(B) the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

(i) the jury returns a special verdict or a general verdict accompanied by interrogatories, or

(ii) the court grants other relief not described in Rule 58(a)(2).

(b) Time of Entry. Judgment is entered for purposes of these rules:

(1) if Rule 58(a)(1) does not require a separate document, when it is entered in the civil docket under Rule 79(a), and

387. *See* PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 4–7 (Sept. 2001), *available at* http://www.uscourts.gov/rules/supct1101/CVRulesJC.pdf (last visited Jan. 31, 2002) [hereinafter PROPOSED AMENDMENTS].

(2) if Rule 58(a)(1) requires a separate document, when it is entered in the civil docket under Rule 79(a) and when the earlier of these events occurs:

(A) when it is set forth on a separate document, or

(B) when 150 days have run from entry in the civil docket under Rule 79(a).

(c) Cost or Fee Awards.

(1) Entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except as provided in Rule 58(c)(2).

(2) When a timely motion for attorney fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

(d) Request for Entry. A party may request that judgment be set forth on a separate document as required by Rule 58(a)(1).[388]

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388. *Id.* The Advisory Committee also proposes amending Rule 54(d) ("Costs; Attorneys' Fees") to delete the requirement that the court's order thereon be set forth in a separate document as provided in current Rule 58. *Id.* at 103. Moreover, the Advisory Committee on Appellate Rules proposes amending the definition of "entry" found in Federal Rule of Appellate Procedure 4(a)(7), a definition that is used to establish the deadlines for filing a timely notice of appeal (*see* FED. R. APP. P. 4(a)(1)–(6)). Appellate Rule 4(a)(7) currently reads: "A judgment or order is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure." If adopted, the proposed rule would read as follows:

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a)(1) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.

PROPOSED AMENDMENTS 3–4 (Sept. 2001), *available at* http://www.uscourts.gov/rules/supct1101/APRulesJC.pdf (last visited Jan. 31, 2002). Each of these proposed amendments

were transmitted to the Supreme Court for its consideration in November 2001. The rules will take effect by operation of law December 1, 2002 if the Supreme Court approves them and

The Advisory Committee should be applauded for attempting to deal with the problems presented by current Rule 58. But, for a number of reasons, this proposed amendment to Rule 58 (as well as amendments proposed to related rules) seems inadequate. For one thing, no attempt has been made to change the definition of "judgment" found in Rule 54(a) from that of an appealable order, or at least to change the relevant paper referred to in Rule 58 to something other than a "judgment."[389] Moreover, the proposed amendment to Rule 58 continues to put the onus of preparing and entering a number of difficult judgments on the district court clerk.[390]

Indeed, in some respects, the proposed amendments to Rule 58 seem to make matters worse. By removing a number of possibly appealable orders from its purview,[391] the benefits derived from a bright-line separate document requirement are lost.[392] In addition, by creating something of a "safe harbor" provision,[393] it would seem that district courts would have little incentive to comply with the other "requirements" of this rule.[394]

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transmits them to Congress by May 1, 2002, and if Congress takes no action otherwise by December 1, 2002.

Federal Rulemaking (Nov. 2001), *available at* http://www.uscourts.gov/rules/ (last visited Jan. 31, 2002).

389. The Advisory Committee actually considered the possibility of amending the definition of "judgment" found in Rule 54(a), but "put this approach aside with little discussion because the Rule 54(a) definition presents many horrid theoretical problems that in practice seem to have caused no real difficulty." PROPOSED AMENDMENTS, *supra* note 387, at 101. But while the current Rule 54(a) definition indeed presents many horrid theoretical problems, one also might conclude that the practical problems caused by this definition (at least in relation to Rule 58) are equally horrid. *See also id.* at 113 (acknowledging that "the amendment does not resolve all of the perplexities that arise from the literal interplay of Rule 54(a) with Rule 58").

390. *See* Proposed FED. R. CIV. P. 58(a)(2)(A).

391. *See* Proposed FED. R. CIV. P. 58(a)(1).

392. On the virtues of bright-line rules, see generally Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

393. *See* Proposed FED. R. CIV. P. 58(b)(2)(B).

394. That there is perceived to be a need for such a provision (not to mention a provision that expressly permits a party to request that the court do what already should have been done, see Proposed FED. R. CIV. P. 58(d)) further indicates that the district courts are incapable of fully implementing the requirements of these rules. And that is a sorry concession. *Cf.* Comm'r v. Estate of Bedford, 325 U.S. 283, 288 (1945) (Frankfurter, J.):

> In these days of rapid communication, the statutory allowance . . . is more than ample for an unsuccessful litigant to determine whether to seek further review. So long a period ought not to be extended by delay in entering a judgment nor should the burden of securing such entry be put upon the successful litigant.

As an alternative, I propose the following: Taking the easiest problem first, district court clerks should be taken out of the business of preparing and signing judgments. Instead, Rule 58 should be amended to require the court *itself* to prepare and sign all judgments, regardless of how simple they might appear. Requiring that all judgments be rendered by district court judges, rather than clerks, would go a long way toward rectifying many of the problems associated with the entry of judgments.[395]

Second—and this is a much more fundamental change—the paper required by Rule 58 to be set forth in a "separate document" should be changed from a "judgment" to a "final order."[396] This "final order," which also would be prepared at the conclusion of literally every action, regardless of how it is disposed, would summarize, as to each claim, who won; how they won; and what relief was awarded.[397] Stated another way, for purposes of Rule 58, the impetus for the separate paper requirement should not be *appealability*; rather, it should be *finality*.[398]

The benefits that would result from such an amendment would be several. First and foremost, basing the Rule 58 separate document requirement on finality would get district court judges out of the business of determining appealability—a difficult determination they are ill-equipped to make—and into the business of determining finality—a

395. *Accord* Cagan, *supra* note 354, at 324–25 (suggesting same, and observing that, "as a practical matter, it is often the court—and not the clerk—which prepares Rule 58 judgments").

396. Another possible solution would be to amend the definition of "judgment" found in Rule 54(a). For a number of reasons, though, it seems that the better course would be to retain the concept of appealability inherent in that definition, and instead divorce that concept from the separate document requirement found in Rule 58.

397. Of course, if a district court later does something contrary or supplemental to what is set forth in its "final order" (such as a subsequent award of attorney's fees and costs) or if the "final order" otherwise does not properly summarize the disposition of the underlying claims, it could easily be amended.

398. This change would necessitate some minor changes in those other rules that currently refer to the entry of *judgments*, at least to the extent those other rules also would be better served by a reference to the entry of a *final order*. For example, Federal Rule of Civil Procedure 59(b) currently provides: "Any motion for a new trial shall be filed no later than 10 days after entry of the judgment." If Rule 58 were to be amended to refer to the entry of final orders, Rule 59(b) should be amended accordingly, as the primary purpose of the "entry of judgment" reference in Rule 59(b) (and all rules governing post-trial motions) is the incorporation of the (theoretically) bright-line standard established by Rule 58. (In fact, a reference to the entry of a final order arguably would make more sense, for surely Rule 59(b) does not refer to interlocutory, pretrial judgments.) By contrast, those rules (including appellate rules) that are truly dependent upon the appealability of a district court's order (such as Federal Rule of Appellate Procedure 4(a)(1)) should retain their current reference to the entry of judgments (realizing, of course, that interlocutory judgments no longer would be set forth on a separate document in accordance with Rule 58).

determination for which they are well-equipped. A separate document requirement based on finality, rather than appealability, also would solve (in large part) what might be viewed as something of a redundancy problem, as the "final order" (in contrast to the current Rule 58 judgment) is more likely to be unlike any court order that preceded it.

Moreover, many administrative benefits would inure as a result of a finality-based separate document requirement. For one thing, a requirement that such a paper be prepared in *every* action would almost guarantee compliance therewith, as there would be no question as to whether such a paper should be prepared.[399] There also would be little question as to *when* such a paper should be prepared, thus eliminating many of the delays that currently occur.[400] Third, there would be considerable "housekeeping" benefits, as district court judges would be required to take inventory and assure that all claims have been accounted for.[401] Surely, there would be some utility in having a single document

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399. *Cf.* Bankers Trust Co. v. Mallis, 435 U.S. 381, 382 (1978) ("We find ourselves initially confronted, however, by a difficult question of federal appellate jurisdiction. As the Court of Appeals noted in its opinion, a search of the District Court record fails to uncover 'any document that looks like a judgment.'").

In this regard, this proposed amendment would be quite similar to the rules governing judgments in the criminal arena. Specifically, Federal Rule of Criminal Procedure 32(d)(1) provides:

> A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment must be entered accordingly. The judgment must be signed by the judge and entered by the clerk.

Whether, in practice, this rule is applied as written might be an open question. Still, this rule serves as a good theoretical model.

400. *See, e.g.*, United States v. Indrelunas, 411 U.S. 216, 219–22 (1973) (allowing as timely an appeal from a judgment not prepared in conformity with Rule 58 until 22 months after the return of the jury's verdict).

The imposition of a final order requirement also would answer the question raised previously (*see supra* notes 114–115 and accompanying text) of when an action ends. For though it is at least conceivable that an action could be deemed to be commenced upon the occurrence of any one of several different events, Rule 3 provides that an action is commenced upon the filing of a complaint. As a result, questions such as whether an action has been commenced, and when, are fairly easily determinable. Why should the Rules not provide a similar, bright-line rule for determining when an action ends? A universal final order requirement would do precisely that.

401. This sort of oversight might prove particularly helpful in those actions where some or all of the claims are dismissed by notice or by stipulation, especially where the terms of such dismissals are less than clear from the parties' papers. Moreover, it seems somewhat anomalous that an action could come to an end, without the entry of some judicially-prepared paper proclaiming that it has in fact come to an end and summarizing the relief to which each party is entitled (including whether that relief is granted with or without prejudice), merely because the action was voluntarily dismissed by notice or by stipulation of the parties or because the dismissal was not appealable. These "exceptions" to current Rule 58 represent a large number of actions, resulting in what is in some ways a curious lack of uniformity.

that precisely and succinctly summarizes the disposition of all claims, and not just those that resulted in the final disposition of the action. Similarly, the preparation and entry of a "final order" would provide a clear signal to the clerk's office that the action indeed has come to an end, and therefore that it should be removed from the court's "system."[402]

To a large extent, the preparation and entry of a separate "final order" rather than a "judgment" would work very little change from current practice, as the vast majority of judgments are final judgments, and the vast majority of "final orders" would be entered following appealable determinations. Thus, in most actions, the "final order" would closely resemble what is now entered as a final "judgment."[403] But the universe of "final orders" would be in one way smaller, and in another way larger, than the universe of separately prepared and entered "judgments." The "final order" would not encompass those judgments currently prepared (in theory, anyway) following the rendering of an appealable, but interlocutory, order. Conversely, the "final order" would be prepared and entered even in those actions in which there are no appealable orders (or perhaps (in the case of certain voluntary dismissals) no other orders of any type).

Some might object to the underinclusive aspect of "final orders," in that we would no longer have whatever benefits are derived from the preparation and entry of a separate document following the rendering of an appealable interlocutory or collateral order. This objection does not seem to constitute a substantial criticism, though. For one thing, such orders are relatively rare, and I have some doubt as to the current rate of compliance with Rule 58 in this context.[404] Second, though counsel might not be immediately aware of its possible appealability, certainly he or she would be aware of the existence of the order itself, at which point the question of appealability always should be considered. Indeed, assuming appellate jurisdiction ultimately inures, there is no penalty for appealing early,[405] meaning the prudent course always would be to file a notice of

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402. *Cf. Mallis*, 435 U.S. at 384 n.4 (observing that the Rule 79(a) judgment entry requirement serves a "public recordkeeping function over and above the giving of notice to the losing party that a final decision has been entered against it").

403. Indeed, for those still yearning for a bright-line standard with respect to judgments, I recommend that the "final order" be deemed as constituting the "final judgment" of the district court, at least to the extent those events that led to the entry of a "final order" resulted in something that would be appealable. *Compare* Proposed FED. R. APP. P. 4(a)(7) (recited in note 388 *supra*).

404. The Advisory Committee on the Federal Rules of Civil Procedure harbors similar doubts. *See* PRELIMINARY REPORT, *supra* note 354, at 113.

405. *See* FED. R. APP. P. 4(a)(2).

appeal as soon as possible, and without awaiting district court compliance with Rule 58. Finally, one should keep in mind that a failure to immediately appeal an interlocutory order generally results only in a delay, and not a waiver, of such an appeal.[406]

Some also might object to the overinclusive aspect of "final orders," in that some might be confused into thinking that the entry of such an order might transform nonappealable events into an appealable judgment. This likewise does not seem to constitute a substantial criticism. For one thing, the nonappealable events most likely to lead to the entry of a "final order"—the voluntary dismissal by notice and the stipulated dismissal—ordinarily do not inspire appeals, and it is doubtful that the entry of this new form of order would inspire any more. In any event, as discussed previously, federal appellate courts already are adept at disregarding orders characterized as "judgments" that, in fact, are not.[407]

IV. CONCLUSION

> *"[I]n many respects language is a fragile tool. Lazy, cavalier, careless, or arrogant performance can damage it. Especially in an era of easy mass communication, insensitive bastardizations can crush subtlety, blur valuable distinctions, make useful things difficult to say. The language simply is what is written and spoken. . . . So the erosion of performance skills—in general, but especially among journalists—results directly in the erosion of the language itself. When headlines repeatedly use "refute" to mean a particularly spunky denial, it blurs the worthwhile distinction between refutation and denial. When "parameters" is used as an exotic-sounding synonym for "limits" it robs us of the more subtle job "parameters" was formerly commissioned to do in nearly identical contexts. We end up with two words for the same job and make it increasingly difficult for "parameters" ever to do its earlier, distinctive job.*
>
> *"The richness and value of a natural language in communication depend on the stability of its major components. For the subtlety and precision with which we can speak to each other is limited by*

406. *See* Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994) (recognizing that, as a "general rule," "a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated").

407. *See supra* note 375 and accompanying text.

our grasp of the linguistic devices and institutions required to do so. And the only plausible way to improve the general level of competence in this regard—even in a relatively small linguistic community—is by mastering the currently available institutions, which have survived a tough evolutionary winnowing, and by building on them where required. It is hopeless to try to rebuild basic linguistic institutions from the ground up every generation or every season or every conversation. Whenever we blunder into a discipline of even slightly unfamiliar jargon, we feel vaguely lost. It is difficult to understand anything but the broad outline of what is being said. Time and familiarity are required before the finer points may be grasped. At every level, linguistic patterns take time to develop and more time to sink in; and the more refined they are the longer they take.

"Rapid linguistic turnover does not just limit communication among different age groups. It limits the capacity of the language itself. The parts that are late to develop or hard to learn simply never disseminate. It is accordingly in the interest of all members of a linguistic community to nurture and refine their performance skills, to become familiar with the rich panoply of existing linguistic institutions—not just because it gives them greater access to a valuable tool, although it does that too, but because it is required to maintain the tool itself."[408]

In 1919, Arthur Corbin wrote *Legal Analysis and Terminology*,[409] an article "chiefly for the benefit of beginning students of the law, in order to assist in establishing an exact terminology and a definiteness and accuracy of mental concept."[410] The article begins:

> Every student of the law must be equipped with certain fundamental concepts and with certain terms in which to express them. Let him read the federal Constitution or the opinion of any court or any legal treatise, or let him listen to the lecture of any law professor, and every sentence will be likely to bristle with rights and duties, powers, privileges, liabilities, and immunities. He will gradually realize also that these terms are frequently used loosely, each term often being used to express several distinct concepts, and he will find that our dictionaries merely record this

408. WRIGHT, *supra* note 33, at 196–97.

409. Arthur L. Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163 (1919).

410. *Id.* at 163.

> wide and variable usage and aid little toward the clear expression essential to exact reasoning.
>
> No doubt the beginner cannot be made to realize at once the disadvantages attendant upon variableness of terms and uncertainty of concept. But it is quite possible at the very outset to master a number of fundamental legal concepts and to acquire a single definite meaning for each of the terms used to express them. With such simple concepts and definite phraseology the student can more easily analyze a complex problem, arrive at a correct solution, and explain it clearly to others. He can thus be led to avoid much unnecessary obscurity and difficulty. As his experience increases he must test for himself the accuracy and usefulness of the analysis and terminology.[411]

Some of the terms discussed by Corbin in that article (such as "right," "duty," and "privilege"[412]) have proven more difficult to define than he might have imagined. This is not to say, though, that there do not exist words—even legal words—whose meanings are much more concrete, much more identifiable. Language is flexible, but there are limits.

Hopefully, this Article will convince the heretofore unconvinced that, at least with respect to enacted bodies of law (such as the Federal Rules of Civil Procedure), there exist identifiable terms with fairly precise meanings commanding proper usage. Hopefully, this Article also will help educate the bar and the bench as to the identity of those terms and meanings. Perhaps this Article will even convince law professors, those most skeptical of arguments espousing the determinacy of legal language, that there might be a place in the law school curriculum for some of the ideas discussed herein.[413]

Hopefully, this Article will also convince the Advisory Committee on the Federal Rules of Civil Procedure that there is a great need for reform. At a minimum, the Advisory Committee should consider technical amendments to the Federal Rules of Civil Procedure (and related Official

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411. *Id.*

412. *Id.* at 167.

413. This goal is consistent with what Edwin W. Patterson said nearly a half-century ago:

> The effort to increase the technical precision of legal terms is a worthy effort of constructive legal scholarship; and while such effort should have other worthy objectives, such as the introduction of new legal norms (or, what is logically the same, of new meanings of old ones) into a legal system, its job is only half done if it does not indicate the meanings of its terms in the legal system.

EDWIN W. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 254 (1953).

Forms) to eliminate references to *case* where *action* was intended; to substitute *averment* for *allegation* where appropriate; and to otherwise ensure that the terminology employed is, to the extent possible, consistent throughout.[414] More significant amendments also should be considered. In particular, a major overhaul is needed of the Rule 58 separate document requirement, at least as it relates to judgments—and not along the lines currently being proposed.[415]

414. Similar amendments were made to the Federal Rules of Appellate Procedure in 1998, see FED. R. APP. P. 1 advisory committee note, and similar amendments have been proposed for the Federal Rules of Criminal Procedure. *See* Excerpt from the Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States, AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE 1 (Sept. 2001), *available at* http://www.uscourts.gov/rules/supct1101/CRExcerptsSC.pdf (last visited Jan. 31, 2002).

415. As intimated previously (*see supra* note 140), I am not a proponent of annual amendments to the Federal Rules of Civil Procedure. Instead, if the Rules were to be amended as suggested, I would hope that the amendment process could be completed in a single year, followed by some period of repose.