

**RULES OF CIVIL PROCEDURE**  
**FOR THE**  
**UNITED STATES DISTRICT COURTS**

**Effective September 16, 1938, as amended to December 1, 2019**

TITLE I. SCOPE OF RULES; FORM OF ACTION

**Rule 1. Scope and Purpose**

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 29, 2015, eff. Dec. 1, 2015.)

ALAN B. MORRISON\*

# The Necessity of Tradeoffs in a Properly Functioning Civil Procedure System

## INTRODUCTION

**W**hen judges, lawyers, and law professors discuss tradeoffs, it is usually in the context of debates about substantive policies.

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Will too much environmental regulation make our industries uncompetitive? Will restricting the grounds for which an employee may be fired limit the flexibility of management to control the workplace? Will increasing tort liability for dangerous products stifle innovation? Do certain provisions in the tax code unduly favor one industry over another? In each case there are substantive policies that would be advanced or hindered by taking one position or the other. Sometimes the courts or legislatures are explicit about the tradeoffs; at other times they are not.

But procedure seems different, at least at first blush, perhaps in part because in the federal system the rules are issued by the Supreme Court after a lengthy committee process involving judges and lawyers, rather than elected legislators. How can the form of a complaint or the time to answer or amend involve tradeoffs in any meaningful sense of that word? Discovery rules can be viewed as simply the means by which information is obtained for use at trial, and if there are tradeoffs, they are not apparent on the face of the rules. That impression may explain why procedural rules seem so bland, and why they are so hard to understand unless the tradeoffs are made visible and their bases, along with the reasons why one choice rather than another was made, revealed.

Rule 1 of the *Federal Rules of Civil Procedure* is a perfect illustration of hidden tradeoffs. It directs the courts to do what every litigant, lawyer, and judge would support: to administer the Rules “to secure the just, speedy, and inexpensive determination of every action and proceeding.”<sup>1</sup> The problem is that just results often come slowly or expensively. Or, conversely, a speedy result may not be a just one, and even inexpensive cases are not always speedy. The good news is that courts and parties rarely rely on Rule 1, and when they do, it is generally as window dressing to support a result reached under another Rule. But to be accurate, Rule 1 should be recast to require the courts to provide a “just determination of every action” and to do so with “appropriate speed and without undue expense” under the circumstances. Doing that would bring it in line with one of the relatively few Rules where the tradeoff is explicit, Rule 26(b)(2)(C)(iii). Under that Rule, the court is directed to limit discovery if “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the

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<sup>1</sup> FED. R. CIV. P. 1.

issues at stake in the action, and the importance of the discovery in resolving the issues.”<sup>2</sup> Whether that actually helps judges decide real cases is another question, but the Rule surely frames the tradeoffs that the drafters considered appropriate in resolving discovery disputes.

I try to show my Civil Procedure students that most rules are written to achieve some purpose or to solve some problem that arises in litigation. I then advise them that, unless that purpose or problem can be divined, the meaning and operation of the rule and any exceptions to it cannot be understood. Unfortunately, one purpose can rarely be advanced without some other purpose being set back, or reduced in significance. That means that there must be a tradeoff, hopefully consciously and openly made, even if the evidence of the tradeoff is not apparent to most observers or is generally not something on which lawyers or judges focus in using a rule of procedure. Yet, for the law student trying to grasp the significance of a rule, looking for the tradeoff and appreciating why it was made are the surest ways to master a rule and learn how it should be applied. Put another way, even the most vanilla-sounding rules are not “neutral” because they generally help one side more than the other, even if that is not apparent from the face of the rule. To be sure, some tradeoffs are harder to locate than others, and some rules involve a tradeoff in only the most theoretical application of that term. But, by and large, the search for a tradeoff is far more likely to be a fruitful tool for the student of Civil Procedure than is the assumption that a rule of procedure serves no more purpose than does the rule that the pitcher’s mound in baseball shall be exactly sixty feet, six inches from home plate.

The common law in fields such as torts, contracts, and property was developed on a case-by-case basis, which meant that the substantive law was often determined by the facts (which may be more favorable for one side than the other). A major downside of the common law is that the outcome is never certain, making compliance and planning more difficult for all. For most procedural rules, the value of at least a reasonable degree of certainty is often seen as an overriding consideration on the theory that generally a party can comply with whatever rule there is, so long as it is known in advance. That explains why the procedures by which cases are handled are found in rules or statutes rather than developed on a case-by-case

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<sup>2</sup> *Id.* 26(b)(2)(C)(iii).

basis, as is the common law, although the presence of rules does not eliminate disputes over their meaning.

Before illustrating some of the most significant tradeoffs in the *Federal Rules of Civil Procedure*, a few other points are worth noting because they apply to a number of the specific rules that will be discussed. First, the Rules are supposed to be trans-substantive, which is a fancy way of saying that they are supposed to be applicable to all the different types of substantive-law claims that are litigated in the federal courts. There are some exceptions in the Rules themselves, such as the requirement for greater specificity in pleading fraud or mistake in Rule 9(b), and Congress has introduced a heightened pleading requirement in complaints alleging violations of the federal securities acts. In some respects the one-size-fits-all approach seems odd given the very different substantive policies involved and the substantive tradeoffs made in different substantive areas of law. But the goal of having trans-substantive rules can be defended as itself a form of tradeoff: it is simpler to have a single set of procedural rules for all areas of the law and, therefore, the label attached to a cause of action will not have great significance, even if the rules work better for some types of claims than others.

Second, the tradeoffs in the Rules are not fixed, but have been recalibrated as circumstances change. As discussed below, discovery may be the clearest example of how the Rules have evolved as discovery has become much more significant over the decades. Most recently, electronic record keeping made it possible to discover the previously undiscoverable—albeit at considerable burdens of time and expense—thereby suggesting a need for a different balancing among the competing interests in discovery.

One of the most dramatic examples of the changing nature of the tradeoffs made in the Rules is found in Rule 26(a), which imposes on each party the duty to make certain affirmative disclosures. This obligation, first instituted in 1993 on an optional basis for each district, was added in an effort to reduce costs and lessen delays, and in doing so altered the adversary system so that parties became obligated to do more than simply respond to requests made by the other side. Those obligations were lessened in 2000 and made uniform for all district courts, as the Rules Committee sought to find the proper balance. Even with those changes, the new Rule represents a significantly different tradeoff than did the original version.

Third, there are tradeoffs in the type of procedural rule that is chosen between those that create bright lines and those that instruct

the judge to decide the question based on the specific facts of the case before her. Consider two alternative approaches that different rules involving time actually embrace. A defendant is given a specific number of days to answer the complaint or to respond to a motion for summary judgment, whereas a plaintiff may amend her complaint after the initial grace period in Rule 15(a)(2) “when justice so requires.”<sup>3</sup> Similarly, Rule 15(c)(1)(C)(i) allows relation back of an amended complaint to add a defendant in certain circumstances, provided that the defendant “will not be prejudiced” thereby. And a motion to intervene under Rule 24 will be granted if it is “timely,” which has been held to include intervention even after a final judgment has been entered.<sup>4</sup>

The type of rule chosen itself contains a tradeoff between greater certainty and greater fairness, which some might call greater flexibility. And, while lawyers are capable of finding grounds to litigate the meaning of even those Rules in which the time is set in a precise number of days, the decision to focus on prejudice or timeliness is almost certain to generate more litigation than one that provides a fixed number of days within which some action must be taken, but with a greater likelihood of achieving a just result in a particular situation.<sup>5</sup>

This Article focuses mainly on tradeoffs contained in the *Federal Rules of Civil Procedure*, which are issued by the U.S. Supreme Court, with most of the work done by committees of judges, practicing lawyers, and law professors as part of a very public and open process. It also discusses statutes enacted by Congress, mainly as they affect the jurisdiction of the courts. Those statutes also have significant impacts on the outcome of disputes and, not surprisingly, contain tradeoffs as well. And finally, Article III of the Constitution, which creates limited jurisdiction for the federal courts, is the most fundamental tradeoff because it denies the vast majority of lawsuits a federal forum and instead prefers state courts as the basic locus for litigation.

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<sup>3</sup> *Id.* 15(a)(2).

<sup>4</sup> *Id.* 24(a); *Smuck v. Hobson*, 408 F.2d 175, 182 (D.C. Cir. 1969).

<sup>5</sup> Similar choices apply in substantive areas where Congress has chosen to make the tax laws very specific and the antitrust laws much more general.

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION**

**AVISTA MANAGEMENT, INC.,  
d/b/a Avista Plex, Inc.,**

**Plaintiff,**

**-vs-**

**Case No. 6:05-cv-1430-Orl-31JGG  
(Consolidated)**

**WAUSAU UNDERWRITERS INSURANCE  
COMPANY,**

**Defendant.**

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**ORDER**

This matter comes before the Court on Plaintiff's Motion to designate location of a Rule 30(b)(6) deposition (Doc. 105). Upon consideration of the Motion – the latest in a series of Gordian knots that the parties have been unable to untangle without enlisting the assistance of the federal courts – it is

**ORDERED** that said Motion is DENIED. Instead, the Court will fashion a new form of alternative dispute resolution, to wit: at 4:00 P.M. on Friday, June 30, 2006, counsel shall convene at a neutral site agreeable to both parties. If counsel cannot agree on a neutral site, they shall meet on the front steps of the Sam M. Gibbons U.S. Courthouse, 801 North Florida Ave., Tampa, Florida 33602. Each lawyer shall be entitled to be accompanied by one paralegal who shall act as an attendant and witness. At that time and location, counsel shall engage in one (1) game of “rock, paper, scissors.” The winner of this engagement shall be entitled to select the location for the 30(b)(6) deposition to be held somewhere in Hillsborough County during the

period July 11-12, 2006. If either party disputes the outcome of this engagement, an appeal may be filed and a hearing will be held at 8:30 A.M. on Friday, July 7, 2006 before the undersigned in Courtroom 3, George C. Young United States Courthouse and Federal Building, 80 North Hughey Avenue, Orlando, Florida 32801.

**DONE** and **ORDERED** in Chambers, Orlando, Florida on June 6, 2006.

Copies furnished to:



**GREGORY A. PRESNELL**  
**UNITED STATES DISTRICT JUDGE**

Counsel of Record  
Unrepresented Party

# Judge Rules Dispute to Be Settled By 'Rock, Paper, Scissors' Match

By MATT SOKOLOFF

June 7, 2006, 7:07 PM • 2 min read

June 7, 2006 — -- A federal judge ordered two attorneys to settle their dispute by using the children's playground game "rock, paper, scissors."

The ruling yesterday by Judge Gregory Presnell of the U.S. District Court in Orlando, Fla., stated that he was so dissatisfied with the case's "latest in a series of Gordian knots" that he is fashioning "a new form of alternative dispute resolution."

In the dispute at hand, the two attorneys could not agree about where to take the sworn statement of a witness in a case concerning payment of insurance claims.

The judge's order states that the game will take place on June 20, 2006, at 4 p.m. at a "neutral site." If the two attorneys can't agree on a neutral site, the judge said they will have to meet on the courthouse steps.

If one of the lawyers disputes the outcome of the game, he can appeal it, Presnell added. Presnell wouldn't comment on his unusual ruling, but he isn't the only one taking it seriously.

"When someone uses rock, paper, scissors to adjudicate any kind of dispute that is a positive moment for the world," said Matti Leshem, co-commissioner for the USA Rock Paper Scissors League.

Leshem says that he does have some concerns about the rules they will use. He wants to know the number of pumps before the throw or if "illegal" throws will be allowed. To make sure official USARPS rules are followed, Leshem said he and his staff are willing to fly down to Florida to oversee the match.

"We will make sure that rock, paper scissors is not made a mockery by the legal system. When people take rock, paper, scissors into their own hands, mayhem can occur," he said.

The USA Rock Paper Scissors League is getting ready for its national championship on June 12, 2006, where the winner will receive \$50,000. The tournament will air on A&E.

💬 Comments (0)

LEE CRAIG  
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June 8, 2006

**VIA FACSIMILE  
AND U.S. MAIL**

David J. Pettinato, Esquire  
Merlin Law Group, P.A.  
777 S. Harbour Island Boulevard  
Suite 950  
Tampa, FL 33602

Re: Avista Management, Inc., d/b/a Avista Plex, Inc. v.  
Wausau Underwriters Insurance Company  
Consolidated Case No.: 6:05-cv-1430-GAP-JGG  
Our File No.: 0430-0512082

Dear Mr. Pettinato:

I guess we had better confirm in writing our agreement made yesterday about the location of the Rule 30(b)(6) witnesses in this case. On July 10, 2006, I will take the deposition of your clients' 30(b)(6) witness (probably Mr. Fortson) in your office. On July 11 and 12 you will take the deposition of my client's 30(b)(6) witness in my office. On July 13, I will take the deposition of your clients' other 30(b)(6) witness (probably Mr. Nana) in Orlando. That deposition will take place in Mr. Nana's office, or in the office of a court reporter, whichever you prefer. Also, you agreed to advise me, in advance, which areas of testimony will be handled specifically by Mr. Fortson and which by Mr. Nana.

On June 30, at 4:00 p.m. I will come upstairs to your office so we can comply with Judge Presnell's "rock, paper, scissors" order. Honestly, I do not think it is necessary since we have resolved our disagreement on the location of my client's (b)(6) witness. However, you are concerned about possible contempt if we do not do exactly as the order says. Regardless, we have agreed that, whoever wins will elect to proceed

**BUTLER PAPPAS WEIHMULLER KATZ CRAIG LLP**

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David J. Pettinato, Esquire  
June 8, 2006  
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as outlined above. I think we said also there will be no media present at, or notified about, our meeting on June 30. I am sure you will have no objection to that restriction in any event.

I am glad we were able to work this out. Please let me know if the above does not precisely state our agreement. Thank you for your consideration.

Sincerely yours,

BUTLER PAPPAS WEIHMULLER KATZ CRAIG LLP

A handwritten signature in black ink, appearing to read "Lee Craig". The signature is written in a cursive, flowing style.

Lee Craig

LC/lar

LEE CRAIG  
Partner  
Tampa  
lcraig@butlerpappas.com



June 20, 2006

**VIA FACSIMILE  
AND U.S. MAIL**

David J. Pettinato, Esquire  
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777 S. Harbour Island Boulevard  
Suite 950  
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Wausau Underwriters Insurance Company  
Consolidated Case No.: 6:05-cv-1430-GAP-JGG  
Our File No.: 0430-0512082

Dear Mr. Pettinato:

I called earlier because I want to ask Judge Presnell to abate the "rock/paper/scissors" Order. As you know, the day after the Court issued the Order, you and I settled our dispute over deposition locations that had led to the Order in the first place. Thus there is no need to play a game. You told me you are worried that we might be in contempt if we do not do exactly as the Order says, even though it may be unnecessary. I do not agree, but I respect your concerns.

Here are my thoughts. There has been a lot of media coverage of these cases because the Order was unusual therefore interesting. I have not welcomed this attention. I do not think it shows the case, or the attorneys, in a good light. I do not think it benefits my client either. Accordingly I have declined comment to all reporters.

I would like to avoid any further publicity about the Order. Will you stipulate with me that the Order can be abated? If the Judge abates the Order, you will have no

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David J. Pettinato, Esquire  
June 20, 2006  
Page 2

worry about being in contempt. And I should think you are satisfied that the Merlin Law Group has gotten plenty enough publicity out of this already.

Will you stipulate? Please let me know.

Sincerely yours,

BUTLER PAPPAS WEIHMULLER KATZ CRAIG LLP

A handwritten signature in black ink that reads "Lee Craig". The signature is written in a cursive, flowing style.

Lee Craig

LC/lar

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UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

AVISTA MANAGEMENT, INC.,  
d/b/a Avista Plex, Inc.,

Plaintiff

vs.

WAUSAU UNDERWRITERS  
INSURANCE COMPANY,

Defendant.

Case No. 6:05-cv-1430-GAP-JGG

Consolidated with Case Nos.

6:05-cv-1510-GAP-JGG

6:05-cv-1731-GAP-JGG

6:05-cv-1732-GAP-JGG

6:05-cv-1883-GAP-JGG

6:05-cv-1884-GAP-JGG

6:06-cv-00054-GAP-JGG

6:06-cv-00055-GAP-JGG

6:06-cv-00081-GAP-JGG

6:06-cv-119-GAP-JGG

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**AMENDED MOTION TO VACATE COURT ORDER (AGREED)**

Defendant, WAUSAU UNDERWRITERS INSURANCE COMPANY (“Wausau”), files this amended, agreed motion to vacate this Court’s Order dated June 6, 2006, as follows:

1. On June 5, 2006, Plaintiffs filed a Motion to Designate Location of the Rule 30(b)(6) Deposition of Defendant’s Corporate Representative. (Doc. 105).
2. On June 6, 2006, this Court entered an Order denying the Motion but ordering counsel to engage in a game of “rock, paper, scissors” to settle the location for the Rule 30(b)(6) deposition. (Doc. 106).
3. The next day, on June 7, 2006, the attorneys met and resolved by agreement the dispute over the location of the deposition.
4. Thus, the purpose of the June 6 Order was met without need for a game of “rock, paper, scissors.”

5. On June 23, 2006, Wausau filed a Motion To Vacate Court Order which, pursuant to Local Rule 3.01(g), certified that counsel had conferred and that Plaintiffs' counsel did not agree with the motion. (Doc. 107).

6. Plaintiffs' counsel has advised he now is in agreement with the Motion To Vacate Court Order.

7. For these reasons, Wausau files this amended, agreed, motion.

WHEREFORE, Wausau moves the Court to vacate the requirement in the June 6, 2006, Order that counsel meet on June 30, 2006, for a game of rock, paper, scissors.

Respectfully submitted,

BUTLER PAPPAS WEIHMULLER KATZ CRAIG LLP

/s/ Lee Craig

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Counsel for Defendant

**CERTIFICATE OF CONFERENCE**

In accordance with Rule 3.01 (g), I hereby certify that I conferred with Plaintiffs' counsel and he agrees to the matters set forth herein.

/s/ Lee Craig  
LEE CRAIG, ESQUIRE

**CERTIFICATE OF SERVICE**

I hereby certify that on June 23, 2006, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

David J. Pettinato, Esquire  
Merlin Law Group, P.A.  
777 S. Harbour Island Boulevard  
Suite 950  
Tampa, FL 33602

/s/ Lee Craig  
LEE CRAIG, ESQUIRE

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
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**AVISTA MANAGEMENT, INC.,  
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**Plaintiff,**

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**WAUSAU UNDERWRITERS INSURANCE  
COMPANY,**

**Defendant.**

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**ORDER**

Defendant, Wausau Underwriters Insurance Company (“Wausau”) has filed an Amended Motion (Doc. 108) to vacate this Court’s Order of June 6, 2006 (Doc. 106). Apparently, the parties have now reached agreement on the location of the subject deposition. Plaintiff concurs with this Motion.

Since the dispute underlying this Court’s Order has been resolved, there is no need to engage in the ADR contest ordered by the Court. With civility restored (at least for now), it is

**ORDERED** that the Motion is GRANTED. The Court’s Order at Doc. 106 is VACATED.

**DONE** and **ORDERED** in Chambers, Orlando, Florida on June 26, 2006.

Copies furnished to:

Counsel of Record  
Unrepresented Party

  
**GREGORY A. PRESNELL**  
UNITED STATES DISTRICT JUDGE