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Paul V. Niemeyer

Former Judge, U.S. District Court, Maryland and U.S. Court of Appeals

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THE MARYLAND RULES — A TIME FOR OVERHAUL

Paul V. Niemeyer†

The Maryland Court of Appeals Standing Committee on Rules of Practice and Procedure has for some time been considering an extensive revision of the Maryland Rules of Procedure. This Article examines the shortcomings of the current rules, and suggests that the Committee has dramatic reorganization and revision under consideration.

Satisfaction with rules of procedure emerges when the resolution of judicial disputes is just, prompt, and inexpensively obtained. Rules, accordingly, should prescribe procedures that are both simple to understand and apply, that resolve both procedural disputes as well as the objects of the litigation with speed and economy, and that effect a just result. Rules must become the facilitators rather than the objects of litigation.

More frequently, the Maryland Rules of Procedure now fail against these standards. The Rules have become a bulging collection, developed piecemeal over many years and scattered throughout several titles in three thick volumes of the Annotated Code of Maryland.¹ Every year, and sometimes more often, new rules are adopted and changes are made. These changes are usually mandated either by demands of the General Assembly or by decisions of the courts.

For example, when attachment on original process, as practiced for years in this state and others, was held to be unconstitutional, an entire rework of the rule was required on short notice.² When the procedures for the establishment and enforcement of mechanic's

† A.B., 1962, Kenyon College; J.D., 1966, University of Notre Dame; Partner, Piper & Marbury, Baltimore, Maryland; Member, Maryland Court of Appeals Standing Committee on Rules of Practice and Procedure; Member of the Maryland Bar.

1. MD. ANN. CODE, vols. 9A, 9B, 9C (1977).

2. See *Roscoe v. Butler*, 367 F. Supp. 574, 579 (D. Md. 1973). The court held that Maryland procedure which permitted attachment in actions *ex contractu* for liquidated damages after two summonses had been returned *non est* and which attached a debtor's property before notice and an opportunity to be heard was not an extraordinary situation under *Fuentes v. Shevin*, 407 U.S. 67 (1972), and therefore was unconstitutional on fourteenth amendment procedural due process grounds. The amended procedures are now contained in MD. CTS. & JUD. PROC. CODE ANN. §§ 3-302 to -304 (1974 & Supp. 1979) and Md. Rules G40-G61.

liens, which had been practiced in Maryland since colonial times, was held unconstitutional in 1976, a crash rewrite followed.³ Similarly, new rules on expungement had to be developed when legislation provided for the expungement of criminal records.⁴ After the General Assembly enacted legislation imposing capital punishment within the permissible guidelines of the Supreme Court, new rules of procedure had to be developed setting forth detailed guidelines.⁵ On another occasion, when the ever expanding caseload in the appellate courts mandated that the legislature diversify the jurisdiction of the Court of Special Appeals of Maryland, the rules for appellate procedure had to be conformed.⁶ Another round of changes was prompted when the Court of Appeals of Maryland held that the right of removal in civil cases guaranteed under the Maryland Constitution was invalid under the Federal Constitution.⁷ The examples continue, but these few are sufficient to convey the image of a system of rules which have become a patchwork.

In addition to mandated changes, judges, lawyers, and professors frequently submit proposals to the Standing Rules Committee for consideration. These proposals are often indisputably meritorious, and many result in changes for improvement.⁸

The combination of required changes and the ever present limitation of time within which to effect them has resulted in a massively disjointed quilt of rules. Consequently, Maryland judges and lawyers are now working under strain with a body of rules that

3. See *Barry Properties, Inc. v. Fick Bros. Roofing Co.*, 277 Md. 15, 33, 353 A.2d 222, 233 (1976). The mechanics lien procedure as proscribed by MD. REAL PROP. CODE ANN. §§ 9-101 to -111 (Supp. 1975) and Md. Rules BG70-BG76 was held to violate article 23 of the Maryland Constitution and the fourteenth amendment of the United States Constitution on procedural due process grounds.

4. Md. Rules EX1 to EX11 were promulgated pursuant to the enactment of MD. ANN. CODE art. 27, §§ 735-741 (1976).

5. Md. Rules 772A and 898 were promulgated pursuant to MD. ANN. CODE art. 27, §§ 412-414 (Supp. 1978).

6. See, e.g., Md. Rules 1017 to 1021, 1028, 1065, 1075, 1078.

7. The portion of MD. CONST. art. IV, § 8 that guarantees removal of causes was held unconstitutional in *Davidson v. Miller*, 276 Md. 54, 82, 344 A.2d 422, 439 (1975). The court found that because the Maryland constitutional provision deprived Baltimore City litigants of the equal protection of the laws as guaranteed by the fourteenth amendment to the United States Constitution, those portions of MD. CONST. art. IV, § 8 applicable to automatic removal of civil actions were unenforceable.

The General Assembly tried to rectify the impairment through Act of May 4, 1976, ch. 454, 1976 Md. Laws 1190 (codified at MD. CTS. & JUD. PROC. CODE ANN. § 6-204 (Supp. 1979)). The provision was held unconstitutional, however, in *Perkins v. Eskridge*, 278 Md. 619, 652, 366 A.2d 211, 232 (1976), because it conflicted with MD. CONST. art. IV, § 8. In the meantime Md. Rule 542 had to parallel these changes.

8. All suggestions for rules changes are considered and referred to subcommittees of the Standing Rules Committee for report to the entire Committee. Only upon the recommendation of the entire Committee is the change formally presented to the Court of Appeals of Maryland for promulgation.

has developed organizational problems, gaps, conflicts, and ambiguities. These problems only serve to aggravate the inherent weaknesses in the procedural process.

I. ORGANIZATIONAL PROBLEMS

Organizational deficiencies, while perhaps the most easily corrected, are also the most obvious. For example, consider the rules that govern the conduct of attorneys. Rules for admission to the bar are contained separately in volume 9A of the Maryland Code, along with the United State Constitution, the Maryland Constitution, the Maryland District Rules, and the Executive Orders of the Governor. Volume 9B, on the other hand, contains rules for admission in particular matters.⁹ The conduct of an attorney at the bar is governed by an appendix to volume 9C and by miscellaneous rules contained in chapters 1200 and 300.¹⁰ The right to have an attorney's accounts audited is buried in the disciplinary rules, even though an audit could be unrelated to disciplinary action.¹¹ Procedures for disbarment are classified as a special procedure in chapter 1100.¹² Claims against the Client's Security Trust Fund for defaulting attorneys are contained in chapter 1200.¹³ All of these rules address an attorney's entrance to, conduct at, or departure from the bar. Yet why are they not contained in one location and in a logical order?

Another more obvious example of deficient organization is provided by the arrangement of chapters in the basic rule books, volumes 9B and 9C of the Code. Chapters 100 through 700 deal with procedures in the circuit courts. Chapter 800, the next chapter, deals with procedure in the Court of Appeals of Maryland, but chapter 900 (juvenile procedures) returns to the trial level. Chapter 1000 again addresses appellate procedures (the Court of Special Appeals of Maryland), and chapter 1100 (special proceedings) reverts to the circuit courts, with the exception of the *BV* Rules, which conceptually are rules for procedure in the court of appeals as a forum of original jurisdiction.¹⁴ Chapter 1200 apparently deals with all courts (although this is ambiguous),¹⁵ and finally, chapter 1300 governs

9. Md. Rule 302.

10. The Code of Professional Responsibility is contained in Appendix F, and is incorporated by reference into Md. Rule 1230. Additionally, Md. Rule 1220 (Proscribed Activities — Gratuities, etc.), Md. Rule 1221 (Attorneys and other Officers not to become Sureties), and Md. Rule 302(b) (Effect of Signature — Certificate) proscribe the conduct of attorneys.

11. Md. Rule BV18.

12. Md. Rules BV1-BV18.

13. Md. Rule 1228(i).

14. Md. Rule BV9(b). See also *Bar Ass'n v. Marshall*, 269 Md. 510, 516, 307 A.2d 677, 680 (1973).

15. Although Chapter 1200 of the Maryland Rules deals with "Court Administration," it is not clear whether the District Court is included. See Md. Rule 1(a)(7) that provides: "The Rules in Chapter 1200 (Court Administration) apply

appeals from the District Court to the circuit courts. As mentioned previously the District Court rules are contained in a separate section of volume 9A.¹⁶ The logic of this order is perceived only through historical analysis, which demonstrates that chapters were added sequentially for convenience so as not to disturb the numbering of previously adopted rules.

II. GAPS

Gaps are evident from the absence of rules to serve a particular need. Many times these gaps can be filled by interpolation made in the context of other rules, but often a judge is without sufficient guidance to interpolate effectively in the absence of a rule. For example, how does one stay an order of an agency pending appeal? The *B* Rules, which address appeals from the decisions of administrative agencies, are silent. How does one procure further discovery from an expert witness when he submits a written report that may be deficient?¹⁷ Does Rule 1219 not apply to the District Court? Maybe it does not.¹⁸ There are other examples of similar gaps in the rules.

III. INHERENT CONFLICTS

Rules changes made for a wide range of subjects over an extended period of time unwittingly have resulted in inherently conflicting rules. For example, numerous problems have been created by the two types of summonses, one issued under the long arm statute whereby a defendant must respond within a given number of days after service,¹⁹ and the other issued for conventional service which must be answered within fifteen days after a return

generally to the administration of the courts of the State in accordance with the provisions thereof." See note 18 *infra*.

16. See note 9 and accompanying text *supra*.

17. The Rule in question is made up of two sentences. The first sentence provides that the *report* of an expert expected to testify can be obtained. The second sentence provides "[i]f such expert has *not* made a written report" then, and presumably only then, may his deposition be taken. Md. Rule 400(f) (emphasis added). This approach to discovery is unduly niggardly.

18. Md. Rule 1(a)(7) provides that Chapter 1200 applies "generally to the administration of the courts of the State." Md. Rule 1(a)(1) has similar language but specifically excludes the District Court. Therefore, one would conclude that Rule 1(a)(7) applies even to the District Court because there is no specific exclusion in that rule. However, other rules suggest otherwise. Md. Rule 5(i) defines "court" to include only the circuit courts and not the District Court unless expressly provided, or unless necessarily inferred. A review of Md. Rule 1210 suggests that only the circuit courts are considered. Thus, does the requirement of Md. Rule 1219 (Notice of Order) apply to *all* courts, or only to the circuit courts?

19. Md. Rule 107(b). See also Md. Rule 106(e)(3) (Corporation's time for pleading after service); Md. Rule 108(d) (United States' time for pleading after service).

day.²⁰ Service under the long arm statute does not coincide with the concept of a *non est* because there are no return days and the writ remains in force indefinitely. Consequently, Rule 530, which depends on two *non ests*, suffers from the conflict.²¹

Other more obvious conflicts exist. For instance, Rule 417 dealing with interrogatories requires the propounder to file exceptions to the answers within ten days.²² On the other hand, Rule 422 requires him to move to compel further answers, and yet there are no time limits on the motion to compel.²³ The rules also make distinctions without a difference among oaths, affirmations, verifications, and affidavits.²⁴ Rule S74 requires that testimony in a divorce proceeding be taken before a master, and only upon court order can it be taken in court. On the other hand, Rule 581 permits a party to any equity proceeding to require testimony in open court simply upon application.²⁵ Rule 541(a)(1) permits a party in a law proceeding to dismiss his action without leave of court at any time before evidence is taken. Parties to an equity proceeding, on the other hand, need a court order to have an action dismissed.²⁶ While there may be some justifiable basis for the distinction, it probably does not survive intense scrutiny. By comparison the federal rules have worked successfully for years with a consistent rule for both law and equity.²⁷

IV. AMBIGUITIES

The style of many rules is so imprecise that in many instances outright ambiguities result. For example, Rule 5(v) defines the term pleading to mean:

*any paper filed in an action, setting forth a cause of action or ground of defense, or filed with the object of bringing an action to issue or trial or obtaining any decision or act by the court including a . . . petition, motion . . .*²⁸

It is obvious that under this rule a motion for extension of time is a "pleading"; a motion for leave to file more than thirty interrogato-

20. Md. Rule 307(a).

21. See, e.g., Md. Rule 530(a)(1) which provides for dismissal for lack of prosecution within 18 months after the second *non est*.

22. Md. Rule 417(c)(1).

23. Md. Rule 422(a)(2).

24. Md. Rule 5(c). See text accompanying notes 43-44 *infra*.

25. Md. Rule S74(a) reads in part: "Such testimony shall be taken before an examiner unless the court shall direct otherwise." Md. Rule 581 requires that testimony be taken in court if requested by a party in interest.

26. Compare Md. Rule 541(a) (permitting dismissal in a law matter without a court order) with Md. Rule 582 (prohibiting voluntary dismissal of equity matter without the court's permission).

27. FED. R. CIV. P. 41.

28. Md. Rule 5(v) (emphasis added).

ries is a "pleading"; and a request to place a case on the trial docket is also a "pleading." While this may not shock the conscience, it is broader than many might consider prudent under the traditional notions that pleadings only set forth the claims and defenses that frame the issues for trial. This over-breadth of definition has caused at least the following serious problem.

Rule 307 requires a defendant to file his initial "pleading" within fifteen days after the return day to which he is summoned unless the time is extended or shortened under Rule 309(b) pursuant to a court order.²⁹ Yet, under Rule 309(a) this time is extended automatically by filing a "pleading" which requires compliance by a party or disposition by the court.³⁰ It follows, therefore, that the time for filing the initial "pleading" may be extended by filing another "pleading." Obviously the two "pleading" terms are used differently and are not both used as defined under Rule 5(v). Thus, if the time for "pleading" is extended by any paper seeking court relief, as pleading is defined in Rule 5(v), then the time for "pleading" can be extended indefinitely by filing motions which require action by the court, even if these motions are not addressed to the merits or issues of the case.³¹

More inconsequential weaknesses in style, while not resulting in ambiguity, certainly create bulk. Rule 320(a), which provides for amendment, takes one-half of a page to state what could probably be said more clearly in one sentence. Indeed, the whole rule continues for four pages; it should be written in a page.³²

The rule books presently in use contain annotations to the rules that are outdated and inapplicable. Nevertheless, courts are repeatedly cited to the cases annotated in the Rules themselves even though they are no longer applicable. For example, Rule 419 (discovery of documents) is still annotated by cases requiring the showing of good cause. However, good cause as a requirement was abrogated years ago as a prerequisite to the production of documents.³³

29. Md. Rule 309(b) provides for extension or shortening of the time allowed for filing a pleading "for good cause shown."

30. Md. Rule 309(a) extends automatically to fifteen days the time for "pleading" when the opposing party's "pleading" requires a ruling by the court or compliance by a party.

31. It is important to note that Md. Rule 610(a)(2) (Motion for summary judgment) does not by its own terms extend the time for pleading. The consequences of this are in turn peculiar. Since a demurrer cannot "speak," if one wished to challenge a pleading by referring to a document outside the declaration, he would be required to file a motion for summary judgment. But since the motion for summary judgment does not extend the time for pleading, he would also have to file a demurrer or pleas or some other "pleading" in addition to the motion in order to prevent a default.

32. Md. Rule 320.

33. Before the 1973 amendment, the introductory paragraph of Md. Rule 419 read: "Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 406 (Order to Protect Party

V. INEFFICIENCIES

The most clearly defined aspect of inefficiency in the Maryland Rules is its concept of pleading, which serves as the foundation for all rules. The Maryland Rules are designed to deal with problems one at a time and one after the other, so that resolution of one problem delays consideration of the next. For example, the following pleading sequence is totally conceivable, each step requiring a response, briefs, and a hearing before the next step is taken:

1. A motion raising a preliminary objection under Rule 323.³⁴
2. A demand for particulars under Rule 346.³⁵
3. A Rule 326 motion demanding written instruments.³⁶
4. A demurrer under Rule 345.
5. A dilatory plea with the resulting trial on the issue raised under Rule 341.
6. A plea on the merits under Rule 342.
7. A demand for particulars to the plea on the merits under Rule 346.³⁷

In addition, with the free amendment rule, which requires no leave of court,³⁸ any one of these steps could be invoked anew. It is conceivable that the pleading stages of a case could continue for years before the case is brought to issue. This difficulty is in addition to the problem created by the definition of the term "pleading" discussed above.³⁹

VI. REORGANIZATION PROJECT

Despite the energy and diligence of the Rules Committee, these problems cannot be prevented when amendment continues on a frequent basis to a body of law as large and involved as the Maryland Rules. It is apparent that only an entire revision of the rules for the purpose of making them simpler, more precise, and less susceptible to change will correct these problems.

and Deponent), the court may, at any time in any proceeding" Since its amendment in 1973, the introductory paragraph merely states: "Any party may serve on any other party a request."

34. Md. Rule 323 states ten different defenses in addition to charitable immunity that constitute grounds for a motion raising preliminary objection.

35. Md. Rule 346 allows a party to "demand in writing, a bill of particulars whenever a pleading is so general as not to give sufficient notice to him of the claim or defense asserted by such pleading."

36. Md. Rule 326 provides that when an action or defense is founded on a written instrument, the opposing party may require that it be filed in the proceedings and incorporated in the pleading setting forth the claim or defense.

37. Md. Rule 346(a) appears by its terms to permit the disclosure of a defense incorporated in a general issue plea. "A party may demand, in writing, a bill of particulars whenever a *pleading* is so general as not to give sufficient notice to him of the claim or *defense* asserted by such pleading." *Id.* (emphasis added).

38. Md. Rule 320(d)(1).

39. See text accompanying notes 28-31 *supra*.

The Standing Committee on Rules of Practice and Procedure proposed to the Court of Appeals of Maryland that a complete reorganization be undertaken, and, after discussing an outline of the concept with the court, the project has been approved to proceed under the mandates that the problems be corrected and the bar be kept informed.⁴⁰

Reorganization and rework of the rules is now underway with numerous subcommittees each concentrating on special areas of the reconstruction. The subcommittees, in conjunction with experts and consultants from broad geographical and disciplinary fields, are addressing the recognized problems and, to be sure, are probably creating new ones.⁴¹ But the effort to date has been gratifying and will probably be welcomed by both the bench and the bar.

Addressing the organizational problems, the Rules Committee will propose the adoption of six titles as follows:

- Title 1. *General Provisions*. These rules will be applicable to all courts and all proceedings.
- Title 2. *Civil Procedure*. These rules will govern the procedure in all civil courts, including the District Court.
- Title 3. *Evidence*. A special committee on new evidentiary rules has proposed a draft based on the codification of Maryland evidentiary decisions and the Federal Rules of Evidence. Whether this title will be proposed as a part of the reorganization will be decided at a later time.
- Title 4. *Criminal Procedure*. This title will contain an integration of the newly rewritten rules of the District Court and the circuit courts into a single body.
- Title 5. *Appellate Procedure*. These rules will govern the procedure in the Court of Special Appeals of Maryland and the Court of Appeals of Maryland.
- Title 6. *Judicial Administration*. These rules, as those in Title 1, will be applicable to all courts and all proceedings and relate to the supervision of judges, lawyers, clerks, sheriffs, masters, and other court personnel.

The six titles will be grouped, with indices, in smaller volumes so that practitioners will have to carry a minimum of bulk to court.

40. The former chairman of the Rules Committee, Judge Kenneth C. Proctor, has written an article about the reorganization. Proctor, *Maryland Rules of Practice and Procedure Brief History — Pending and Projected Changes*, MD. B.J., December 1976, at 24. Presentations have been made to the Maryland Board of Governors, the Maryland State Bar Association, and various bar associations around the state by members of the Rules Committee. The Maryland State Bar Association has formed a liaison committee whose members have access to and who will participate in the dissemination of the reorganization process.

41. See Sykes, *Of Men and Laws: Murphy, Confurd, Arnold, Potter, Parkinson, Peter, MacCoby, and Gall*, 38 MD. L. REV. 37, 65-66 (1978), wherein the author concludes "recodification will necessarily produce new mistakes and ambiguities all its own" by reason of the GUP (the Generalized Uncertainty Principle) which tells us: "Any complex system will always have unpredicted side effects." *Id.* at 53.

Reorganization within the six titles will be equally dramatic. Special proceedings, that cannot be justified as "special," will be incorporated into the general rules of procedure. For example, a divorce suit is an equity proceeding that applies normal equity procedure. While the substantive law applied in divorces may be special, there is no reason why the procedure cannot be the same as in other equity cases. On the other hand, a foreclosure proceeding, when pursued under a power of sale or consent to a decree, does not run the traditional equity course, but is a specialized *in rem* proceeding against property. Because its procedures are unique, foreclosure will remain under the revised rules as a special proceeding.

Other aspects of the reorganization of the rules will involve the elimination of duplicative procedure. For instance, procedure in law and equity will be the same wherever possible. Within the judicial administration section, all rules dealing with particular categories of court personnel, including attorneys, will be grouped in one location. Principal definitions and rules of construction will not be restated within each of the titles but will be collected in the initial title relating to general provisions.

Far more important than the physical reorganization of the rules is the attention that will be given to important concepts in pleading and discovery. For example, with respect to pleading, a simple two-step pleading procedure is being considered which is similar in structure to that used in the federal courts.⁴² The defendant under this procedure will file motions as one step and answers as the second. In the alternative, the defendant can file an answer together with the points which otherwise would have been raised by motion. Perhaps, the current laborious one-step-at-a-time pleading can be discarded. Obviously many desirable aspects of the present Maryland Rules ought to be retained, such as the general issue plea and the specifically enumerated defenses, which should probably even be expanded.

The style and form of the reworked rules will be noticeably better. Clarity of both style and concept is being sought. By way of example consider the present rules that make distinctions in the definitions of the terms "oath," "affirmation," "verification," and "affidavit" but nevertheless incorporate one definition into the other. The present rule reads:

Affidavit — Oath — Verification.

"Affidavit" means an oath that the matters and facts set forth in the paper writing to which it pertains are true to the best of the affiant's knowledge, information and belief.

42. See FED. R. CIV. P. 12-14.

An "oath" means a declaration or affirmation made under penalties of perjury, that a certain statement of fact is true. An oath may be made before an officer or other person authorized to administer an oath, or may instead be made by signing the paper containing the statement required to be under oath and including therein the following representation: "I do solemnly declare and affirm under the penalties of perjury that the contents of the foregoing document are true and correct." Whenever under these Rules a pleading or other paper is required to be "verified," this means that an affidavit must be made thereto.⁴³

The rule is followed by a committee note that is longer than the text.⁴⁴ While the committee note is not considered part of the rule, it is almost necessary to read it in order to understand the rule or its application.

As the product of the reorganization effort, a new definition of "affidavit" will be proposed returning to the essential concepts of the term. The new definition reads:

Affidavit.

"Affidavit" means a written statement the contents of which are affirmed under the penalties of perjury to be true. Unless the applicable rule expressly requires the affidavit to be made on personal knowledge, the statement may be made to the best of the affiant's knowledge, information and belief.

It is hoped that all the proposed rules will be shorter, more precise, and simpler in concept than the current ones. It is also hoped that the quality of the reorganization will minimize future changes so

43. Md. Rule 5(c).

44. The Committee note reads:

The verification, before a notary or other officer, of pleadings and other papers in court actions has become an empty form. Various statutes have dispensed with this requirement and have permitted a signed declaration or affirmation under penalties of perjury instead. See Code, CA, §1-302 (acknowledgements and verifications required by corporation statute); ET, §1-102 (verification required under testamentary laws); ET, §13-103 (verification required in proceedings for protection of minors and disabled persons). This policy is now adopted for all verification required by the Maryland Rules. The acknowledgment of conveyances and other documents is unaffected by this change. The change relates only to the form necessary to constitute verification, and does not relax specific requirements as to the substance of affidavits, e.g., Rule 610 b (Summary Judgment — Form of Affidavit — Further Evidence).

"Oath" as used in the Maryland Rules is a word of art and means essentially a form of declaration which subjects the affiant or witness to penalties for any wilful false statement.

that new enactments of the General Assembly will fit within the structure of existing rules.

The end product will have to be the result of a continuing dialogue between members of the bar and the bench and among the various disciplines at the bar. The Maryland State Bar Association has taken important steps in this direction by establishing a special standing committee. That committee, working with the Rules Committee, will design the means by which the rework can be disseminated on a gradual basis for comment, criticism, and constructive improvement.