Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

ROBIN SWEET
Director and
State Court Administrator

JOHN MCCORMICK
Assistant Court Administrator
Judicial Programs and Services

RICHARD A. STEFANI
Deputy Director
Information Technology

MEETING NOTICE AND AGENDA

Commission on Statewide Rules of Criminal Procedure
Videoconference

Date and Time of Meeting: Monday, June 10, 2019 at Noon
Place of Meeting:

Carson City	Las Vegas	Washoe
Supreme Court Library Room 107 201 S. Carson Street Carson City, Nevada	Nevada Supreme Court Building Conference Room A/B 408 E. Clark Avenue Las Vegas, NV	Second Judicial District Court Room 220A 75 Court Street Reno, NV
Teleconference Access:	Dial-In # 1-408-740-7256	Meeting ID 1110011234

All participants attending via teleconference should mute their lines when not speaking; it is highly recommended that teleconference attendees use a landline and handset in order to reduce background noise.

AGENDA

I. Call to Order
   A. Call of Roll
   B. Determination of a Quorum
   C. Opening Remarks

II. Public Comment

III. Review and Approval of the April 22, 2019 Meeting Summary* **(Tab 1)**

IV. Work Group Updates
   A. Jury Instructions Work Group **(Tab 2)**

V. Nevada Supreme Court's Authority to Adopt Rules
   A. Nevada Jurisprudence Discussion **(Tab 3)**

VI. Statewide Rules Discussion **(Tab 4)**
- A. Local Rules of Practice
  - i. Second Judicial District
  - ii. Eighth Judicial District
- B. Rule 6: Discovery (continued) **(Tab 5)**
- C. Rule 3: Appearance and Withdrawal of Attorneys
- D. Rule 4: Initial Appearance and Arraignment
- E. Rule 4.1: Setting of Cases
- F. Discovery (Private Counsel and Fees)
- G. Preemptory Challenge Rules

VII. Other Items/Discussion

VIII. Next Meeting Date and Location

IX. Adjournment

- Action items are noted by * and typically include review, approval, denial, and/or postponement of specific items. Certain items may be referred to a subcommittee for additional review and action.
- Agenda items may be taken out of order at the discretion of the Chair in order to accommodate persons appearing before the Commission and/or to aid in the time efficiency of the meeting.
- If members of the public participate in the meeting, they must identify themselves when requested. Public comment is welcomed by the Commission but may be limited at the discretion of the Chair.
- The Commission is pleased to provide reasonable accommodations for members of the public who are disabled and wish to attend the meeting. If assistance is required, please notify Commission staff by phone or by email no later than two working days prior to the meeting, as follows: Jamie Gradick, (775) 687-9808 - email: jgradick@nvcourts.nv.gov
- This meeting is exempt from the Nevada Open Meeting Law (NRS 241.030)
- At the discretion of the Chair, topics related to the administration of justice, judicial personnel, and judicial matters that are of a confidential nature may be closed to the public.
- **Notice of this meeting was posted in the following locations**: Nevada Supreme Court website: www.nevadajudiciary.us; Carson City: Supreme Court Building, Administrative Office of the Courts, 201 South Carson Street; Las Vegas: Nevada Supreme Court, 408 East Clark Avenue.

TAB 1

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Commission on Statewide Rules of Criminal Procedure
April 22, 2019
Noon
Summary prepared by: Jamie Gradick

Members Present
Justice James Hardesty, Chair
Justice Abbi Silver, Co-Chair
Justice Lidia Stiglich, Co-Chair
John Arrascada
Chief Judge Scott Freeman
Judge Douglas Herndon
Christopher Hicks
Darin Imlay
Lisa Rasmussen
JoNell Thomas
Steve Wolfson

Guests Present
Sharon Dickinson
Chris Lalli
Robert O'Brien
Steve Owens
John Petty
Luke Prengaman

AOC Staff Present
Vicki Elefante
John McCormick

I. Call to Order
   A. Justice Hardesty called the meeting to order at 12:05 pm.
   B. Ms. Elefante called roll; a quorum was present.

II. There was no public comment.

III. Review and Approval of March 21, 2019 Meeting Summary
   - The March 21, 2019 meeting summary was approved.

IV. Work Group Updates
   - Jury Instructions Work Group
     - Chief Judge Freeman provided attendees with a brief update on the work group's most recent efforts and referred attendees to the work group's meeting summary for additional details.

V. Statewide Rules Discussion

A. Local Rules of Practice

- Attendees discussed the differences in discovery rules between the Second Judicial District (2nd JD) and the Eighth Judicial District (8th JD): Rule 6
  - Mr. O'Brien commented that the 2nd JD's rule 6(A) appears to remove the statutory burden on the defense to move for discovery.
    - Attendees discussed whether the rule is at odds with the statute; Mr. Prengaman commented that the statute requires both parties to make a request of the other in some form in order to trigger the statutory duty.
    - In the 2nd JD, the practice is either both parties signing a reciprocal discovery agreement, or both parties make their formal request in of the other in some form.
    - Attendees discussed the ease of discovery sharing through Justware and how that system has changed discovery request practices.
  - Mr. Lalli explained that, in Clark County, a discovery packet is provided to defense counsel at a first appearance in justice court; there is a receipt that should be signed for. The homicide team handles discovery differently.
    - Mr. Lalli clarified that the district attorney's office does not currently require the public defender to submit a discovery request within 30 days of the arraignment.
  - Ms. Thomas commented that there is an ongoing discovery issue with Metro records; additionally, the standard of review changes under *Roberts* if there is a specific request for discovery.
  - Mr. O'Brien commented that there are instances where the district court judge will not apply any sanctions for discovery issues if there is no request on the record.
  - Attendees discussed whether the 8th judicial district courts "take charge" of timing and manner of discovery.
    - The 2nd JD's rule 6(B) allows for this, but this is not a common practice in the eighth judicial district beyond occasional "readiness" check set by the court.
    - Chief Judge Freeman commented that it is a "different world" in Washoe; the early, discovery sharing practices in Washoe usually prevent the need for court intervention.
    - Justice Silver commented that the practice in the 8th JD is usually done "piecemeal".
  - Mr. Lalli explained that the Clark County District Attorney's office uses a discovery checklist and adheres to best practices in terms or discovery.
    - Justice Silver commented that, at one time, there was an ongoing issue with late discovery handed over at calendar call.
    - Mr. Imlay commented that certain types of discovery are difficult to get; if the defense does not specifically request them, then they lose the opportunity.
  - Justice Hardesty asked for input on whether the 8th JD could adopt an approach similar to that of the 2nd JD.
    - Attendees discussed the feasibility of this approach; Mr. Imlay commented that it would be helpful if there was some sort of record from Metro or the detective confirming that all discovery has been turned over to the district attorney.

    - Mr. Hicks informed attendees that his office sometimes incurs delays in receipt of certain discovery but his office continuously collaborates with the various law enforcement agencies it works with to address issues and delays.
  - Justice Hardesty asked for input on whether there should be any changes made to the 2nd JD's Rule 6?
    - Chief Judge Freeman commented that the rule is rarely invoked and the system works well; Mr. Arrascada agreed with this assessment.
- Justice Hardesty commented that the Commission does not have the ability to address the issues causing discovery delays at the law enforcement level so its focus will be on the development and adoption of a statewide discovery rule that comports with the 2nd JD's Rule 6.
  - Justice Hardesty asked Judge Herndon to review this and provide feedback.
  - Mr. O'Brien commented that the rule would not really alleviate the Clark County concerns.
    - Attendees discussed process challenges; the district court does not see the case until calendar call.
    - Mr. Imlay commented that the defense files the discovery motion on everything just in case something comes in during the middle of trial.
  - Justice Hardesty asked Ms. Dickinson and Mr. O'Brien for input on how to amend the 2nd JD's Rule 6 to address the Clark County concerns.
    - Attendees discussed the possibility of requiring a 30-day status check for certain types of cases.
    - Mr. Lalli explained that there is not one file where law enforcement keeps all evidence for a case; this creates a challenge.
    - A suggestion was made that the status checks be set 10-15 days out in order to allow additional time to locate evidence.
    - Attendees from the 2nd JD were supportive of a status check at the discretion of the parties but the timing would need to be in advance of the statutory 30-day deadline.
  - Justice Hardesty informed attendees that Rule 6 will be modified to include "at the request of either party, an earlier hearing before the district court on the status of discovery or other matters in the case will be required where requested in advance of the statutory time periods for production of discovery" language.
    - This will be reviewed at the next meeting.
- Ms. Rasmussen commented that Clark County is the only jurisdiction charging private counsel for discovery; perhaps this would be the place to address this.
  - Mr. Lalli informed attendees that he has requested that Clark County cease this practice; maintaining this practice requires a significant amount of time and resources.
  - Attendees discussed possible legal consideration associated with this.
  - This will be added to the agenda for the next meeting; there are possible constitutional issues with this.
- Attendees briefly discussed Rule 4: Initial Appearance and Arraignment and discovery beyond NRS Chapter 174.
  - Mr. Prengaman commented that, typically, this does not happen in Washoe County.
  - Attendees discussed a separate, "evolving" set of rules for the homicide practice in the 8th JD.

- Attendees discussed Rule 2: Case Assignments
  - Attendees discussed whether the 8th JD could adopt the 2nd JD's rule.
    - Ms. Dickinson informed attendees that the 8th JD has rules requiring random assignment.
    - Ms. Thomas suggested that Judge Herndon, and possibly others, should be present for this discussion since this could mean a significant disruption to the current system.
    - Justice Hardesty informed attendees that he has reached out to Chief Judge Bell and Judge Herndon about this issue and the Commission will hold off on this discussion until the judges can respond.
  - Attendees discussed case assignment processes in the 2nd JD.
    - Cases follow the department.
    - Justice Hardesty explained that the underlying policy of the process is to prevent forum shopping; Mr. Imlay commented that forum shopping is not a significant tissue in the 8th JD.
    - Mr. Lalli commented on the inefficiencies in the 8th JD and explained that a rule similar to the 2nd JD rule could increase efficiency.
  - A suggestion was made to amend SCR 48.1 to allow for peremptory challenge of the judge in criminal cases.
    - Mr. Lalli expressed concern with "judge shopping".
    - Mr. Arrascada commented that the 2nd judicial district court would, likely, be opposed to this.
    - Justice Stiglich suggested that this issue be tabled until the judges on the Commission could be present to participate in the discussion.
    - Justice Silver commented that this would be problematic with overflow judges.
    - Justice Hardesty commented that this would be a challenge in the rural judicial districts with only one or two sitting judges.
  - Ms. Dickinson commented that there is a law review article that addresses this; Justice Hardesty asked her to forward the article citation to Ms. Gradick.

B. Court's Authority to Adopt Rules
- Attendees discussed the ADKT 0491 first interim report and recommendations recently filed with the Nevada Supreme Court. Justice Hardesty informed attendees that he has requested the Nevada Supreme Court schedule a public hearing for, most likely, June 3.
- Attendees discussed the Boyd School of Law's white paper.
  - During the previous meeting, attendees were asked to review pages 44-53 and footnotes in order to facilitate a discussion on Nevada jurisprudence regarding rules that might be adopted by the Nevada Supreme Court that may conflict with statutes.
  - Attendees discussed the paper's implication that legislative involvement and/or approval may be needed. Justice Hardesty commented that the recommendations presented in the paper are at odds with Nevada jurisprudence that allows rules to be established by the Nevada Supreme Court.
    - The legal authority referenced in the footnotes recognizes the inherent power of the Court to enact procedural rules, regardless of grants from the legislature.

- Attendees discussed the need for a "precise exploration" of where the authority constitutionally lies; Article IV, sections 20-21 contain the provisions in question. Concern was expressed regarding the constitutional authority granted to the legislature to make rules versus the Court's "derived" or "inferred" power.
- Statutory rules do not provide complete guidance or coverage of all areas (like discovery, for example).

➢ Attendees discussed the Nevada Supreme Court's power to adopt local rules of practice.
- There needs to be an "enabling statute" that gives the Court authority to adopt rules of practice; there is a difference between rules of practice and rules of procedure. Inherent authority is primarily on issues of practice; the "dividing line" usually falls between substantive rules and rules of practice.
- Justice Hardesty expressed concern regarding the development of rules that could, ultimately, be challenged because the Court may not have authority to adopt them.

➢ Attendees discussed the creation of discovery rules; Ms. Rasmussen commented that, in other states, the supreme courts have developed discovery rules because the courts have authority to govern lawyers.

➢ Justice Hardesty asked Mr. Prengaman, Mr. Imlay, Mr. Arrascada, and Mr. Wolfson to work together to research these issues and assess the extent of the Court's authority to adopt rules that may conflict with statute, under Nevada's existing jurisprudence. Mr. Prengaman will coordinate the effort.

VI. Other Items/Discussion

VII. Next Meeting

- Justice Hardesty requested that Ms. Gradick survey the Commission membership for availability and then schedule the next meeting.
- Justice Hardesty informed attendees that the next meeting will cover the following rules:
  - Rule 3: Appearance and Withdrawal of Attorneys
  - Rule 4: Initial Appearance and Arraignment
  - Rule 4.1: Setting of Cases (if time allows)

VIII. Adjournment

- The meeting was adjourned at 1:50 p.m.

TAB 2

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*Note: Because this meeting focused on developing/editing a working document, this summary will only include the relevant discussion and action item portions of the meeting. Please see the edited jury instruction sections for work product completed during the meeting.

Commission on Statewide Rules of Criminal Procedure
Jury Instructions Work Group
May 20, 2019
Summary prepared by: Jamie Gradick, AOC

Attendees

Chief Judge Scott Freeman, Chair
Gina Bradley
Scott Coffee
Judge Nancy Porter
Luke Prengaman
Judge Connie Steinheimer
Pierron Tackes
Judge Nathan Tod Young

Meeting Summary

- Chief Judge Freeman welcomed attendees.
- Ms. Gradick called roll; a quorum was present.
- Section 14.03(a) *(Portions of this discussion were inaudible)*
  - Chief Judge Freeman presented the proposed "Forgery by Uttering" instruction. Legal authority for this is NRS 205.110.
  - Attendees discussed whether to break this into separate instructions since it addresses separate crimes.
  - Attendees discussed the inclusion of the statutory presumption; would this be a separate instruction or addressed in the notes?
    - Mr. Coffee questioned whether there is a burden to show no drawer exists and in what situations this presumption would be applicable.
    - Attendees agreed that this should be a separate instruction; it addresses the difficulty of proving someone does not exist and the language comes from the statute.
    - Mr. Coffee suggested including an explanatory footnote on the limited circumstances in which to use this instruction.
    - Chief Judge Freeman suggested giving the instruction its own title to indicate the limited use.
  - Chief Judge Freeman suggested including the definitions in each "broken out" instruction.

- Judge Steinheimer suggested including a separate definition section to cover both instructions as needed. Definitions can be confusing to juries; separating it this way could provide clarity. Attendees agreed to this suggestion, with the inclusion of appropriate bracketing.

- Section 14.01(e)
  - Chief Judge Freeman presented the proposed language and attendees briefly discussed statutory authority (NRS 205.160).
    - Mr. Coffee commented on the archaic language from the statute.
    - Attendees briefly discussed the definition of "bank bill".
    - Attendees approved this instruction.
- Section 14.04 - Out
  - Chief Judge Freeman presented the proposed language.
  - Mr. Prengaman commented that this instruction has already been addressed by sections of 14.01.
- Section 14.05 - Out
  - Attendees agreed that this section has already been addressed.
- Section 14.06 (a-f) - Out
  - Attendees agreed that these sections have already been addressed.
- Section 14.07 and 14.07(A)(a) – Insufficient Checks *(Portions of this discussion were inaudible)*
  - Chief Judge Freeman presented Ms. Westbrook's comments, proposed language, and legal authority.
  - Mr. Prengaman presented his version and Ms. Westbrook's response.
  - Attendees discussed how to format this instruction and where to place the "check or draft held for a period of time… post-dated contract…" paragraph.
    - Chief Judge Freeman commented that this is a "special" instruction; attendees agreed that this does not belong in this book but agreed to include a footnote referencing the legal authority/case law.
- Section 14.07 (B)(b)
  - Chief Judge Freeman presented the proposed language.
    - Mr. Prengaman presented Ms. Westbrook's comments on this section.
    - Attendees discussed the use of Ms. Westbrook's version with the clarification of "may be proven" language instead of "must be shown".
- Section 14.08
  - Chief Judge Freeman presented the proposed language and supporting legal authority.
  - Attendees discussed the definition of the "negating the intent" language
  - Mr. Prengaman commented that there is no burden on the victim to "research as thoroughly as possible" and this is not an affirmative defense, these are factors to consider that may bear upon the intent to defraud.
    - Mr. Prengaman cited the language from the supporting case law; a suggestion was made that the language from the case law be included in the instruction.
    - Attendees discussed "failure to research" language and a suggestion was made to leave "as thoroughly as possible" language out.
    - Mr. Prengaman commented that the standard is actual knowledge, not "reason to believe". The case in question supports this standard but lacks clear language to articulate it.
    - Chief Judge Freeman suggested using Mr. Prengaman's language but bracketing this portion to use in appropriate circumstances.

- Judge Young commented that he is not in favor of including language that is not articulated in the case law; Judge Young suggested including a footnote to direct practitioners to the case.

➢ Chief Judge Freeman tasked Mr. Prengaman with redrafting the instruction to add in the exact case language; the work group will review this at the next meeting.

Additional Action Items

- Work group members will review through Section 16 for the next meeting; comments will need to be submitted to the drop box a week prior to the next teleconference meeting.
- Ms. Gradick will survey the work group members for availability and will schedule another work group teleconference for next month.

TAB 3

The issue that came up at the April 22, 2019, meeting of the Commission on Statewide Rules of Criminal Procedure was whether, given Nevada Const. Art. 4, Sections 20-21, the Nevada Supreme Court has inherent authority to promulgate rules of criminal procedure that would trump any conflicting statutes regulating criminal procedure.

The Nevada Supreme Court has held that its procedural rules supersede any conflicting statute. *See, e.g., State v. Second Judicial District Court,* 116 Nev. 953, 959, 11 P.3d 1209, 1213 (2000) ("this court's procedural rules supersede any conflicting statutes"); *Berkson v. LePome,* 126 Nev. 492, 499, 245 P.3d 560, 565 (2010) ("Thus, '"the legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers, and ... such a statute is of no effect"'");[1] *State v. Connery*, 99 Nev. 342, 345, 661 P.2d 1298, 1300 (1983) ("the legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers, and that such a statute is of no effect. Furthermore, where, as here, a rule of procedure is promulgated in conflict with a pre-existing procedural statute, the rule supersedes the statute and controls"). The Court has said, however, that its rules cannot conflict with the Nevada Constitution or abridge or modify a substantive right. *See State v. Connery,* 99 Nev. 342, 345, 661 P.2d 1298, 1300 (1983).[2]

Article 4, § 20 of the Nevada Constitution states that "[t]he legislature shall not pass local or special laws in any of the following enumerated cases – that is to say: ... *Regulating the practice of courts of justice*," the "courts of justice" being the courts of Nevada's constitutional judicial branch.[3] Article 4, § 21, then states that: "In *all cases enumerated in the preceding section*, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State."[4]

The plain language import of these provisions is that the Legislature has the constitutional authority to regulate the practice of Nevada's courts – it just can't make special laws when it does so. The Nevada Supreme Court has acknowledged this. *See State v. Second Judicial District Court*, 116 Nev. 953, 960, 11 P.3d 1209, 1213 (2000) ("The Nevada Constitution provides that the Legislature may enact general laws '[r]egulating the practice of courts of justice.' *See* Nev. Const. art. 4, §§ 20 and 21. This court has held that the Legislature has the power to regulate procedure in criminal cases"); *Colwell v. State*, 112 Nev. 807, 813, 919 P.2d 403, 407 (1996)

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[1] (Quoting *State v. Dist Ct. [Marshall]*, 116 Nev. 953, 11 P.3d 1209, 1213 (2000), 116 Nev. at 959, 11 P.3d at 1213 (quoting *State v. Connery,* 99 Nev. 342, 345, 661 P.2d 1298, 1300 (1983))).

[2] *Connery* seems to be Nevada's original case on this point, and the *Connery* court relied upon three out-of-jurisdiction cases for the proposition.

[3] Emphasis added.

[4] Emphasis added.

(Rejecting argument that creation of three-judge panel procedure encroaches on judicial power "because (1) the Nevada Constitution contains no language prohibiting the legislature from providing that district judges must act as a collegial body in the exercise of certain proper judicial functions, such as sentencing, and (2) the legislature clearly has the power to regulate procedure in criminal cases").[5] This authority to "regulat[e] the practice of courts of justice" is not *inferred* authority, nor authority derived by implication from the separation of powers; it is express authority conferred upon the Legislative Branch by the language of Nevada's fundamental law. In other words, if one searches the text of the Nevada Constitution to answer the question "which branch has the authority to make rules of procedure for the courts," a singular answer will be found in the text: the Legislature.

This understanding of the Legislature's authority appears to underlie NRS 2.120,[6] and recognition of the same appears in the *Foreword* to the Nevada Rules of Civil Procedure:

> The vesting of the rule-making power in the Supreme Court by the Forty-Fifth Legislature (1951) was well-advised and forward-looking legislation. It was

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[5] *See also Zamora v. Price*, 213 P.3d 490, 492-496 (2009) ("We note that the enactment of such substantive evidentiary rules is well within the powers conferred upon the Legislature by the Nevada Constitution, and we must defer to the Legislature regarding this statute's validity"); *Cramer v. Peavy,* 116 Nev. 575, 581–82, 3 P.3d 665, 670 (2000) ("Cramer also contends that NRS 616C.215(10) is unconstitutional because the legislatively mandated jury instruction infringes on a judicial function and therefore violates the separation of powers doctrine. . . The legislature has the power to enact rules of evidence. . . We conclude that the legislature did not exceed its authority in enacting NRS 616C.215(10) . . ."); *Barrett v. Baird,* 111 Nev. 1496, 1512, 908 P.2d 689, 700 (1995) ("As to Barrett's contention that the separation of powers is violated because the court is forced to admit the panel findings into evidence, to instruct the jury on those findings, and to award attorney fees if warranted, we hold that it is within the constitutional province of the legislature to create evidentiary rules and to mandate attorney fees. Therefore, the screening panel statute does not violate separation of powers"), *overruled on other grounds by Lioce v. Cohen,* 124 Nev. 1, 174 P.3d 970 (2008).

[6] NRS 2.120, "Adoption of rules for government of courts and State Bar of Nevada; adoption of rules for civil practice and procedure," provides that:

> 1. The Supreme Court may make rules not inconsistent with the Constitution and laws of the State for its own government, the government of the district courts, and the government of the State Bar of Nevada. Such rules shall be published promptly upon adoption and take effect on a date specified by the Supreme Court which in no event shall be less than 30 days after entry of an order adopting such rules.
>
> 2. The Supreme Court, by rules adopted and published from time to time, shall regulate original and appellate civil practice and procedure, including, without limitation, pleadings, motions, writs, notices and forms of process, in judicial proceedings in all courts of the State, for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify any substantive right and shall not be inconsistent with the Constitution of the State of Nevada. Such rules shall be published promptly upon adoption and take effect on a date specified by the Supreme Court which in no event shall be less than 60 days after entry of an order adopting such rules.

> supported by the entire Judiciary Committee of the assembly comprising Wm. G. Coulthard, J. F. McElroy, J. K. Houssels, Farrell L. Seevers, Harold Anderson, A. Primeaux, C. C. Boak, Frank E. Walters and Edward D. Carville, and by the entire Judiciary Committee of the senate comprising Fred C. Horlacher, John H. Murray, Forest B. Lovelock, John E. Robbins and B. Mahlon Brown. It provided the authority under which, by adoption of simplified rules of practice and procedure, the Supreme Court could greatly improve the administration of justice in the state. The adoption of the rules of civil procedure for the district courts, including appellate practice and procedure for review by this court, constitutes perhaps the state's most important advancement of the administration of justice in civil cases.

The Nevada Supreme Court's authority to propound procedural rules, according to its decisions, comes from two sources, "the separation of powers doctrine and the power inherent in a court by virtue of its sheer existence." *Blackjack Bonding v. City of Las Vegas Mun. Court,* 116 Nev. 1213, 1218, 14 P.3d 1275, 1279 (2000).[7] No explicit provision for court rule-making authority appears in the text of the Nevada Constitution – the power is inferred from either the separation of powers or from the creation of the courts. *Id. See also, e.g., Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967) ("Judicial function includes the right to exercise any lesser power that can be subsumed under, or is included as an integral part of, the broader heading of 'Judicial Power'; that is, any power or authority that is inherent or incidental to a judicial function is properly within the realm of judicial power, as described above. The incidental power must relate back and be directly derived from the basic judicial power and the basic judicial function, as described above"); *City of Sparks v. Sparks Mun. Court*, 129 Nev. 348, 363, 302 P.3d 1118, 1128 (2013) ("Each governmental branch also has certain inherent powers, by virtue of its sheer existence and as a coequal branch of government, to carry out its basic functions. This authority is 'broader and more fundamental than the inherent power conferred by separation of powers.' Thus, in addition to the specific powers assigned to the governmental branches, each branch has inherent ministerial powers, which include 'methods of implementation to accomplish or put into effect the basic function' of that branch") (citing *Halverson v. Hardcastle*, 123 Nev. 245, 261, 163 P.3d 428, 439–40 (2007)) (quoting *Blackjack Bonding,* 116 Nev. at 1218, 14 P.3d at 1279); *State v. Sargent*, 122 Nev. 210, 216, 128 P.3d 1052, 1056 (2006) ("The concept of inherent judicial authority originates from two different sources: the separation of powers doctrine and the inherent authority of a court to act so that it may carry out its judicial functions").[8]

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[7] The authority for this proposition in *Blackjack Bonding* was Felix F. Stumpf, *Inherent Powers of the Courts: Sword and Shield of the Judiciary* 6 (The National Judicial College 1994). The author disclaims the label "treatise" for the publication, stating that it should instead be "regarded as a sourcebook on the exercise of inherent powers."

[8] *Cf. Halverson v. Hardcastle,* 123 Nev. 245, 259, 163 P.3d 428, 438 (2007) ("In Nevada, the judiciary's administrative power is both express and implied. Express powers are set forth in the Nevada Constitution, statutes, and rules adopted by this court. Inherent powers are derived from two sources: the separation of powers doctrine and the judiciary's sheer existence by virtue of the judicial functions expressly created under Nevada's Constitution") (citing *Blackjack Bonding v. Las Vegas Municipal Court,*

The Nevada Constitution established our State's government and is the fundamental law to which all other rules and laws must conform. The framers were free to form the government and allocate government powers as they saw fit; they were free, for example, to vary from the traditional allocation of powers among branches of government seen in the federal Constitution or other states' constitutions. *See, e.g.,* 16 C.J.S. Constitutional Law § 276 ("It is for the State to determine whether and to what extent its powers will be kept separate between the three branches of government or whether persons belonging to one department may exert powers which, strictly speaking, pertain to another department of government"); *Dreyer v. Illinois,* 187 U.S. 71, 84, 23 S. Ct. 28, 32, 47 L. Ed. 79 (1902) ("Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state"). In this vein, the Nevada Supreme Court has acknowledged what is self-evident due to the paramount status of the Nevada Constitution, namely that the authority of the State's judiciary is "'subservient . . . to the state constitution,'" and that "because inherent power arises from the constitution's operation, constitutional clauses may remove or modify that power." *Halverson v. Hardcastle*, 123 Nev. 245, 263, 163 P.3d 428, 441 (2007).[9] No branch of government, in other words, can infer a power from the Nevada Constitution that is inconsistent with the Constitution's express provisions.

This presents the question: Since the Nevada Constitution *expressly* places authority over regulation of "the practice of courts of justice" in the Legislature, and the Nevada Constitution is the paramount law, to what extent can rule-making authority be *inferred or derived* (from either the structure of government provided in the Nevada Constitution or from the 'sheer existence' of courts created by the Nevada Constitution) that would trump procedural statutes enacted pursuant to the Legislature's express constitutional authority?

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116 Nev. 1213, 1218, 14 P.3d 1275, 1279 (2000); *State v. Sargent,* 122 Nev. 210, 216, 128 P.3d 1052, 1056 (2006)).

[9] "'The judiciary department in the United States is subservient only to the federal constitution, to the established law of the land, and, if a state judiciary, to the state constitution.'" *Halverson v. Hardcastle,* 123 Nev. 245, 263, 163 P.3d 428, 441 (2007) (quoting 16 C.J.S. Constitutional Law § 305, at 497 (2005)). The *Halverson* court also acknowledged "that inherent power must be exercised in accordance with valid laws." *Id.* See also Bruce L. Dean, *Rule-Making in Texas: Clarifying the Judiciary's Power to Promulgate Rules of Civil Procedure*, 20 St. Mary's L.J. 139, 166 (1988) ("Although inherent power is authority possessed without being explicitly derived from another source of authority, actions taken by a court based on this doctrine are necessarily dependent on the constitution creating the court charging it with the efficient administration of justice"); Spitzer, *Court Rulemaking in Washington State*, 6 U. PUGET SOUND L. REV. 31, 52 (1982) ("Explicit powers also give rise to 'implicit' or 'implied' powers, or 'inherent' powers, which by definition are dependent on explicit powers. In America, these dependent implicit powers are both necessary for a branch's exercise of explicit powers and tightly limited by the scope of those explicit powers").

The Nevada Supreme Court had occasion to deal with Nevada Const. Art. 4, §§ 20 and 21 in relation to its inherent rule-making authority in *State v. Second Judicial District Court (Marshall),* 116 Nev. 953, 11 P.3d 1209 (2000). There, the prosecution asserted that SCR 250 was void to the extent it conflicted with conflicts with NRS 175.552(3), and that the Court lacked authority to promulgate SCR 250 in the first place based upon §§ 20 and 21. Specifically, the prosecution asserted that "only the Legislature can enact rules of criminal procedure and that [the Nevada Supreme Court's] issuance of SCR 250 violates the separation of powers set forth in the Nevada Constitution."[10]

The Court acknowledged that "the Legislature has the power to regulate procedure in criminal cases," but countered that "[e]xtensive case law contradicts the State's position."[11] The contradicting case law cited by the Court included *Whitlock v. Salmon,* 104 Nev. 24, 26, 752 P.2d 210, 211 (1988), *Galloway v. Truesdell*, 83 Nev. 13, 23, 422 P.2d 237, 244 (1967), and *Goldberg v. District Court,* 93 Nev. 614, 617, 572 P.2d 521, 523 (1977). The Court cited these cases for the proposition that Nevada courts have the inherent power to make their own procedural rules, and asserted that "the Legislature may exercise this function *too* only because Sections 20 and 21 of Article 4 permit it to do so."[12] The Court thus asserted that both the Court and the Legislature could promulgate rules of criminal procedure; the Legislature by virtue of its express constitutional authority, and the Court by way of inherent authority.[13] The Court then invoked its case law standing for the proposition that "this court's procedural rules supersede any conflicting statutes."[14] The Court held, in other words, that when it came to the subject of procedures related to the admission of evidence in capital cases, its inherent rule-making authority was superior to the Legislature's express constitutional authority to "[r]egulat[e] the practice of courts of justice."

The *Marshall* decision does not set forth the analysis leading to the conclusion that the Legislature's express authority over procedural law – an authority acknowledged by the *Marshall* court – was determined to be inferior to the Court's inferred rule-making authority. None of the cases cited in *Marshall* in support of the Court's inherent rule-making authority (*Whitlock v. Salmon, Galloway v. Truesdell*, *Goldberg v. District Court*) addressed or dealt with Art. 4, §§ 20 and 21. An assumption underlying those decisions was that inherent court rule-making authority could be assumed in Nevada as a general matter, as it was assumed in the federal and other jurisdictions as a general matter. Those decisions did not, accordingly,

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[10] *Marshall*, 116 Nev. at 957, 11 P.3d at 1211.

[11] *Marshall*, 116 Nev. at 959-960, 11 P.3d at 1212-1213.

[12] *Marshall*, 116 Nev. at 960, 11 P.3d at 1213 (emphasis added).

[13] The Court stated that "[u]nder the Nevada Constitution two departments can in some cases exercise the same power. Article 3, Section 1, provides that persons in one department can exercise functions 'appertaining' to another 'in the cases expressly directed or permitted in this constitution.'" *Marshall*, 116 Nev. at 960, 11 P.3d at 1213. In this context, however, Article 3, Section 1 arguably questions the Court's authority, not the Legislature's. Since the Legislature's authority to regulate court procedure is express, the question presented under Article 3, Section 1 is whether the Nevada Constitution expressly permits the Court to exercise the same function.

[14] *Marshall*, 116 Nev. at 959-960, 11 P.3d at 1212-1213.

address whether inherent authority over procedural law could be validly inferred for the courts from a constitution that expressly placed authority over procedural law in a different branch of government, especially given that constitution's further provision in Art. 3, §1 that "no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution." The same is true of the cases cited in *Marshall* for the proposition that the Supreme Court's procedural rules supersede any conflicting statutes.

If the Commission were to embark on the mission of reforming Nevada criminal procedure by the enactment of expansive court rules, and if many or even several of those rules were in conflict with existing criminal procedure statutes, it would bring to the fore and force definitive resolution of the issues of 1) whether, given Art. 4, §§ 20 and 21 (and Art. 3, §1), any inherent rule-making authority over procedural law could be inferred or derived from a constitution that expressly confers authority over procedural laws upon the Legislature, and 2) assuming any such authority can be validly derived, whether that inferred authority can supersede the Legislature's express authority. Applicable canons of construction, such as "'expressio Unius Est Exclusio Alterius,'"[15] might suggest that the answer favors at best very limited inherent court

[15] *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) ("The maxim 'expressio Unius Est Exclusio Alterius', the expression of one thing is the exclusion of another, has been repeatedly confirmed in this State. The language in State ex rel. Keyser v. Hallock, 14 Nev. 202 (1879), is also very important in this regard. There this Court said: 'It is true that the constitution does not expressly inhibit the power which the legislature has assumed to exercise, but an express inhibition is not necessary. The affirmation of a distinct policy upon any specific point in a state constitution implies the negation of any power in the legislature to establish a different policy. 'Every positive direction contains an implication against anything contrary to it which would frustrate or disappoint the purpose of that provision. The frame of the government, the grant of legislative power itself, the organization of the executive authority, the erection of the principal courts of justice, create implied limitations upon the law-making authority as strong as though a negative was expressed in each instance'"). *See also State v. Moran,* 43 Nev. 150, 182 P. 927, 927 (1919) ("We see no way to escape the conclusion that the authority to suspend the collection of a fine can be exercised only in the manner provided in the Constitution. To hold, in the face of the provisions mentioned, that the courts also can suspend the collection of a fine would be to override our Constitution; for while there is nothing in the Constitution which expressly provides that the Legislature may not confer this authority upon the courts, it must necessarily follow that where the Constitution enumerates certain cases in which the collection of a fine may be suspended, or certain methods whereby it may be done, or confers upon a certain official or officials such power, *the power so conferred must be held to be exclusive*. This view is not open to debate") (emphasis added); *State v. Arrington*, 18 Nev. 412, 4 P. 735, 737–38 (1884) ("in seeking for limitations and restrictions, we must not confine ourselves to express prohibitions. Negative words are not indispensable in the creation of limitations to legislative power, and, if the constitution prescribes one method of filling an office, the legislature cannot adopt another. From its nature, a constitution cannot specify in detail, and in terms, every minor limitation obviously intended. It follows that implied as well as express restrictions must be regarded, and that neither the legislature nor any other department of the government can perform any act that is prohibited, either expressly or by fair implication. Prohibitions implied, if they plainly exist in a constitution, have all the force of express prohibitions. For instance, it is declared in section 32 of article 4 that the legislature shall provide for the election by the people of certain officers named. There are no

authority over criminal procedure rules that is subordinate to the Legislature's express authority.

negative words employed to the effect that the legislature shall not elect or appoint them, or provide for their election or appointment in some other way; still no one would claim that a law providing for their election or appointment by a different mode would be constitutional. In fact, counsel for respondents admit that it would not be").

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The Procedural Foundation of Substantive Law

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THE PROCEDURAL FOUNDATION OF SUBSTANTIVE LAW

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ABSTRACT

The substance-procedure dichotomy is a popular target of scholarly criticism because procedural law is inherently substantive. This article argues that substantive law is also inherently procedural. I suggest that the construction of substantive law entails assumptions about the procedures that will apply when that substantive law is ultimately enforced. Those procedures are embedded in the substantive law and, if not applied, will lead to over- or under-enforcement of the substantive mandate. Yet the substance-procedure dichotomy encourages us to treat procedural systems as essentially fungible—leading to a problem of mismatches between substantive law and unanticipated procedures. I locate this argument about the procedural foundation of substantive law within a broader discussion of the origin and status of the substance-procedure dichotomy.

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INTRODUCTION

The substantive implications of procedural law are well understood. Procedure is an instrument of power that can, in a very practical sense, generate or undermine substantive rights. For example, there is no need to change the substantive contours of employment discrimination law when modifications to pleading rules and motion practice can bypass the more arduous substantive law-making process and deliver similar results. Yet even with knowledge of the capacity of procedure to achieve substantive ends, doctrinal reliance upon the dichotomy persists.

To complement the argument that procedure is inherently substantive, I suggest that the converse is also true. Specifically, the construction of substantive law necessarily entails making assumptions about how that law ultimately will be enforced. Many of those assumptions are rooted in the procedures pursuant to which a claim to vindicate that law would be litigated. The construction of substantive law, rather than occurring in a vacuum, is informed by expectations about pleading rules, the availability of a class action, the scope of discovery, case management techniques, rules of evidence, trial practice, and a constellation of other procedures. This contextualization of substantive law within a procedural framework will be subconscious when not deliberate.

Because substantive law is calibrated to achieve some outcome, fidelity to that law may require that it remain hinged to the corresponding procedural law that was presumed its adjunct. If the drafters of some substantive law require proof of defendant's *intent*, for example, that legislation may be predicated on affiliated procedures—say, that plaintiffs would have broad access to defendant's records through discovery, that plaintiffs would be able to introduce expert testimony at trial, and that defendants would be subject to cross-examination under oath. If this substantive law were enforced without these presumed procedures, there could be a mismatch between the desired and achieved levels of deterrence.

Once we see that procedure is embedded in substantive law, we can appreciate the additional strain that this places on the substance-procedure dichotomy and on doctrines that are premised upon the legitimacy of that dichotomy. Consider, in particular, the practice of applying forum procedural law no matter the applicable substantive law. When forum procedure is combined with foreign substantive law, the procedure that was embedded in the foreign substantive law is displaced. Applying forum procedural law to another system's substantive law necessarily distorts the latter.

My argument proceeds in five parts. In Part I, I present the origin of the substance-procedure dichotomy. The origin provides important context because understanding when and how the substance-procedure nomenclature emerged helps explain the fragility of the dichotomy. This dichotomy was neither time- nor battle-tested when it was codified as a foundational precept of our contemporary jurisprudence. Indeed, codification of a substance-procedure dichotomy is something of an accident of history. Appreciating these circumstances helps explain some of the incoherence of the doctrines constructed upon the dichotomy. I summarize that doctrinal incoherence in Part II.

In Part III, I relate the familiar narrative about how procedure is inherently substantive. The narrative presents in two basic forms. In one, procedure is substantive because procedure affects the outcome of cases; in the other, procedural reform is a disguise for the reform of substantive law. Both are demonstrably true.

In Part IV, I argue that procedure is embedded in substantive law. Using a stylized example of a state statute, I demonstrate that substantive law is neither *aprocedural* nor *trans-procedural*. Rather, substantive law has an associated procedure that must be applied by the enforcing court if the substantive law is to achieve the level of deterrence its drafters intended. To apply any other procedure leads to over- or under-enforcement of the substantive mandate.

The consequences of admitting that there is a false dichotomy at the core of our legal system may be substantial. But the magnitude of this problem should influence only the treatment of the condition, not the diagnosis. And in Part V, I consider various conceptual approaches, though all may appear radical to generations conditioned to accept a substance-procedure dichotomy.

One approach would abandon the notion that it is possible to apply some other jurisdiction's law. Instead, a strict lex fori regime would require the application of the forum's substantive and procedural law in all circumstances. In other words, there would be no choice of law doctrine. A second approach posits that, because we have misunderstood the nature of a substantive right, our choice of law doctrines are not robust enough, such that the application of another system's law would include *all* of that law, substance and procedure. A third approach would seek to harmonize all procedural systems and establish a universal procedure to ensure that forum procedure always matched the embedded procedure.

Ultimately, I advance a modest proposal that combines parts of all three approaches. First, choice of law doctrines should express greater humility and skepticism about the ability to apply another jurisdiction's

law. Second, when such application is appropriate and necessary, our choice of law doctrines should apply as much of that law as reasonably possible, without regard to the labels substance and procedure. And finally, procedural conformity efforts should be appreciated for their ability to enhance the integrity of substantive law.

In sum, this Article promotes *realization* of a fundamental rhetorical problem rather than *reformation* of a doctrine. This emphasis reflects both the advantages and the limitations of my Article. But inherent in my argument—in my analysis of the complex and problematic substance-procedure relationship—is the premise and aspiration that refined, meaningful doctrinal change is not possible without a comprehensive understanding of how rhetoric shapes reality. To analyze the rhetoric, then, is to commence the larger and better reform, which requires understanding before action.

I. FROM ANTINOMY TO DICHOTOMY[1]

The history of Anglo-American law, which is typically dated from 1066, is approaching the end of its first millennium.[2] Interestingly, however, the categories of substance and procedure appear only in the last quarter of that historical narrative. One scholar has traced the development of a substance-procedure dichotomy to the waning years of the eighteenth century:

> The dichotomy was fathered by Jeremy Bentham in a 1782 work entitled *Of Laws in General*, *sub nom* the distinction between substantive law and adjective law. Bentham there makes clear that he believes he is drawing a new distinction in the descriptive organization and analysis of the concept of law, and an examination of the leading pre-Bentham sources on English legal theory supports his claim.[3]

As Professor Risinger observes, Bentham located a substance-procedure dichotomy within "an extremely elaborate conceptual analysis of the

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1. For definitions, see *infra* note 43 and accompanying text.
2. A cite for the 1066 proposition is 1 Pollock & Maitland, *infra* note 15, at 79.
3. D. Michael Risinger, *"Substance" and "Procedure" Revisited with Some Afterthoughts on the Constitutional Problems of "Irrebuttable Presumptions,"* 30 UCLA L. REV. 189, 191 (1982) (internal footnotes omitted).

phenomenon of law."[4] And the originality of the dichotomy was "a major point of the entire structure of *Of Laws in General*."[5]

In previous work I have credited (or blamed, as the case may be) Sir William Blackstone for introducing categories of substance and procedure.[6] In his famous *Commentaries on the Laws of England*, Blackstone, using what he called a "solid[,] scientifical method," restated the entire corpus of English law in the form of *substantive* rules.[7] In so doing, he appears to have differentiated substantive rights from the procedural mechanisms to prosecute the wrong, announcing in his *Commentaries*: "I shall, first, define the several injuries cognizable by the courts of common law, with the respective remedies applicable to each particular injury: and shall, secondly, describe the method of pursuing and obtaining these remedies in the several courts."[8]

Blackstone died in 1780, so we do not have the benefit of his response to the claims of originality that fill Bentham's 1782 book.[9] But there is no doubt that Bentham was very familiar with his former professor's work.[10] Bentham was a persistent and often savage critic of Blackstone, and may have been loath to share credit for introducing the substance-procedure paradigm.[11]

More important than attributing the paradigm to a single source is understanding the context of its emergence. Specifically, why would the categories of substance and procedure (or "adjective law"[12]) emerge in the

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4. *Id.* at 191 n.11.

5. *Id.* at 191 nn.12–13 ("A partial list of sources where no [substance-procedure] distinction appears would include M. BACON, A NEW ABRIDGEMENT OF THE LAW (5th ed. 1798); W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765); E. COKE, INSTITUTES OF THE LAW OF ENGLAND (1628); and M HALE, PLEAS OF THE CROWN (1682)."); *see also* Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1231–32 n.10 (2001).

6. *See* Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 459 (2003).

7. 1 WILLIAM BLACKSTONE, COMMENTARIES *34.

8. 3 BLACKSTONE, *supra* note 7, at *115.

9. *See generally* WILFRID PREST, WILLIAM BLACKSTONE: LAW AND LETTERS IN THE EIGHTEENTH CENTURY 303 (2008). Even if Blackstone had been alive, he may well have declined to respond. *See id.* at 8 & n.31 (describing how Blackstone had four years to respond to Bentham's FRAGMENT ON GOVERNMENT, a "scarifying attack" on the COMMENTARIES, yet chose not to answer in any public way).

10. *See* JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES: A CRITICISM OF WILLIAM BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND (Charles W. Everett ed., 1928) (1776).

11. *See generally* Richard A. Posner, *Blackstone and Bentham*, 19 J.L. & ECON. 569, 570 (1976) (discussing Bentham's hostility to Blackstone); PREST, *supra* note 9, at 8–9, 292–98, 306.

12. At that time, the word "adjective law" was more popular than "procedure." Some have argued that procedure is "only a part, though the major part, of adjective law." Risinger, *supra* note 3, at 191 n.11 (citing Bentham). But certainly by the turn of the twentieth century, the terms "procedural law" and "adjective law" were synonymous. *See, e.g.*, United States v. Cadarr, 24 App. D.C. 143, 147

eighteenth century, rather than earlier in the many centuries of English jurisprudence? The answer is that, until then, substance and procedure were "inextricably intertwined" in both the Law courts and in the Equity courts.[13]

First, the Law courts had centuries of experience with writs, forms of action, and single-issue pleading.[14] That system boasted a network of highly technical pleading and practice rules that determined the course and outcome of litigation.[15] These rules earned Common Law the dubious distinction as "the most exact, if the most occult, of the sciences."[16] Importantly, these procedural forms "were the terms in which the law existed and in which lawyers thought."[17] Accordingly, what we might today refer to as "a substantive law of, say, torts, could only be explained through the actions of trespass, case and trover."[18] "[O]ne could say next to nothing about actions in general, while one could discourse at great

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(D.C. 1904) ("What is the legal significance of the word 'procedure?' The law 'defines the rights which it will aid, and specifies the way in which it will aid them. So far as it defines, thereby creating, it is 'substantive law.' So far as it provides a method of aiding and protecting, it is 'adjective law' or procedure.'"); Britton & Mayson v. Criswell, 63 Miss. 394, 399 (Miss. 1885) ("How facts are, or are to be proven, is a matter of adjective, as contradistinguished from substantive, law, is a mere matter of legal procedure."). The term adjective law still enjoys some attention. *See, e.g.*, Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001) (referring to "adjective law" throughout).

13. Main, *Traditional Equity*, *supra* note 6, at 454.

14. *Id.* at 454.

15. *Id.* at 454–55; *see also* 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 190 (1895) (explaining that, within this system, "the whole fate of a law-suit depends upon the exact words that the parties utter when they are before the tribunal").

16. 2 POLLOCK & MAITLAND, *supra* note 15, at 609.

17. S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 59 (2d ed. 1981) ("There was no substantive law to which pleading was adjective."); *see also* JOSEPH H. KOFFLER & ALISON REPPY, COMMON LAW PLEADING 65 (1969) ("The Law was required to express itself through the Limited System of Writs and Forms of Action sanctioned by precedent . . . ."); ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 3 (1952) ("Procedure . . . belongs to the institutions of earliest development. At a time when substantive legal conceptions are visible only in the faintest of outline, procedure meets us as a figure already perfected and exact.") (internal quotations omitted); R. ROSS PERRY, COMMON-LAW PLEADING: ITS HISTORY AND PRINCIPLES 3 (1897) ("It may be thought these are extravagant expressions of men who were educated to see excellence in anything that was technical and abstruse. When Littleton says that the law is proved by the pleading, and when Coke adds, approvingly, 'as if pleading were the living voice of the law itself,' they are not using mere figures of rhetoric."); 2 POLLOCK & MAITLAND, *supra* note 15, at 559 ("Our forms of action are not mere rubrics nor dead categories; they are not the outcome of a classificatory process that has been applied to pre-existing materials. They are institutes of the law; they are—we say it without scruple—living things."); Main, *supra* note 6, at 456 ("The principles of the common law had not been mapped out in the abstract, but instead grew around the forms by which justice was centralized and administered by the law courts.").

18. Main, *Traditional Equity*, *supra* note 6, at 457 (citing KOFFLER & REPPY, *supra* note 17); *see also* Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 21 n.42 (1989).

length about the mode in which an action of this or that sort was to be pursued and defended."[19] The *substantive* law was subsumed within the *procedural* form.[20] Hence the familiar words of Sir Henry Maine that English "substantive law has at first the look of being gradually secreted in the interstices of procedure."[21]

Meanwhile, in the traditional courts of Equity, there were no procedural rules and, instead, an all-encompassing substantive mandate.[22] There were no writs, "forms of action nor emphasis upon the formation of a single issue."[23] "Indeed, animated by the juristic principles of discretion, natural justice, fairness and good conscience, the essence of a jurisprudence of equity [was] somewhat inconsistent with the establishment of formal [procedural] rules."[24] Hence the characterization of Equity as "loose and liberal, large and vague."[25] A broad *substantive* mandate dominated the jurisprudence of Equity in much the same way that *procedure* captured the jurisprudence applied in the Law courts. But in neither Law nor Equity was there meaningful appreciation of the separability of substance and procedure.

For centuries in England the separate systems of Law and Equity had been both rivals and partners.[26] But by the middle of the eighteenth century, a profound transformation was underway: among other changes,

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19. MILLAR, *supra* note 17, at 3–4 (quoting 2 POLLOCK & MAITLAND, *supra* note 15, at 562); *see also* Bone, *supra* note 18, at 20–21.

20. *See* George Palmer Garrett, *The Heel of Achilles*, 11 VA. L. REV. 30, 30–31 (1924–1925) (suggesting that the common law "became so interested in forms that they allowed the substance to escape").

21. HENRY SUMNER MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM 389 (author's ed., Henry Holt 1886).

22. *See* Main, *Traditional Equity*, *supra* note 6, at 454. The word "traditional" is an important qualifier in this discussion. As I have chronicled elsewhere, "Equity began to experience a process of systematization in the early seventeenth century." Thomas O. Main, *ADR: The New Equity*, 74 U. CIN. L. REV. 329, 383 (2005).

23. Main, *Traditional Equity*, *supra* note 6, at 457; *see also* EDWIN B. MEADE, LILE'S EQUITY PLEADING AND PRACTICE § 94, at 59 (3d ed. 1952):

> In the equity procedure one encounters no bewildering rules as to the name or classification of the particular suit, or according to the nomenclature at law, "*forms of action.*" When from an investigation of the law and facts, counsel has determined that the client has a good cause for equitable relief, he is saved the problem of wasting brain-sweat in deciding whether he shall sue in debt, *assumpsit*, or covenant, in trover or repleven, in trespass *vi et armis* or trespass on the case. He simply decides to file a "bill in equity."

24. *See* Main, *Traditional Equity*, *supra* note 6, at 458.

25. W.S. Holdsworth, *The Early History of Equity*, 13 MICH. L. REV. 293, 295 (1915) (internal quotations omitted).

26. Main, *ADR: The New Equity*, *supra* note 22, at 375.

both systems were incorporating key components of the other.[27] Law was absorbing "many of the best practices of Equity."[28] Meanwhile, Equity was becoming systematized by rules and processes.[29]

> Very importantly, the words substance and procedure offered a vocabulary for explaining this phenomenon. With each system looking increasingly like the other, "[d]ifferences between the systems were viewed as merely procedural."[30] Blackstone wrote:
>
> Such then being the parity of law and reason which governs both species of courts, wherein (it may be asked) does their essential difference consist? It principally consists in the different modes of administering justice in each; in the mode of proof, the mode of trial, and the mode of relief.[31]

"The perception that parallel court systems were applying substantially similar substantive rules of law under different procedural schemata led inevitably to the [ultimate] merger [of Law and Equity]."[32] The merger of Law and Equity, on one hand, and the emergence of a substance-procedure duality, on the other, thus presented interlocking narratives: a purely *procedural* merger of Law and Equity purported to leave the grand *substantive* jurisprudence of both systems intact.[33] Put another way: the

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27. *Id.* at 375–89; Bryant Smith, *Legal Relief Against the Inadequacies of Equity*, 12 TEX. L. REV. 109, 110–13 (1934) (tracing key elements of reforms in both systems to the middle of the eighteenth century).

28. Main, *ADR: The New Equity*, *supra* note 22, at 386.

29. *Id.* at 384–85.

30. *Id.* at 386.

31. 3 BLACKSTONE, *supra* note 7, at *436.

32. Main, *ADR: The New Equity*, *supra* note 6, at 464.

33. A central theme of the merger of law and equity—in state courts in the mid-nineteenth century and in federal courts in 1938—was this notion of a purely *procedural* merger.

For the rhetoric of reform in the state courts, see, for example, FIRST REPORT OF THE COMMISSION ON PRACTICE AND PLEADINGS 74 (1878) ("The legislative mandate of the Commissioners was reform in procedure—not alteration of the substantive rules of equity or the common law."); PHILEMON BLISS, A TREATISE UPON THE LAW OF PLEADING 15 (3d ed. 1894) (codes "affect modes of procedure.").

For the rhetoric of reform in the federal courts, see, for example, Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 382 & n.26 (1949) ("Notwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive principles of Courts of Chancery remain unaffected."); Percy Bordwell, *The Resurgence of Equity*, 1 U. CHI. L. REV. 741, 750 (1934) ("The abolition of the common-law forms of action was not intended to change the substantive law."); Alexander Holtzoff, *Equitable and Legal Rights and Remedies Under the New Federal Procedure*, 31 CAL. L. REV. 127 (1943) (observing that the new rules abolished the procedural distinctions between law and equity while leaving intact the systems' different rights, remedies, and substantive rules); Ralph A. Newman, *What Light is Cast by History on the Nature of Equity in Modern Law?*, 17 HASTINGS L.J. 677, 679 n.14 (1966) ("'Only procedural distinctions have been abolished.'") (quoting WILLIAM W. BARRON & ALEXANDER HOLTZOFF, FEDERAL PRACTICE § 141 (1950)).

words substance and procedure helped explain how the merger of Law and Equity could be an ambitious yet also safe reform.[34]

It is no coincidence that the categories of substance and procedure surfaced during the Enlightenment, when scientists and philosophers sought to understand all of the world around them by categorizing it. The capacity to distinguish between and among things became an integral part of intelligibility.[35] And the Enlightenment epistemology produced particularly binarist thinking such as subject/object, culture/nature, mind/matter, and rational/irrational.[36] A substance/procedure antinomy likewise resonated, especially for Blackstone, a law professor at Oxford who wrote his *Commentaries* for instructional purposes (as opposed to law reform).[37]

But rather than remaining in the ivory tower for maturation and refinement, the categories of substance and procedure were put to immediate use as foundational legal infrastructure. Quite unfortunately, consciousness of the substance-procedure antinomy happened to coincide with the formation of new systems and courts and methodologies in the nascent United States of America.[38] This apparent distinction between matters substantive and procedural offered a tempting and accessible conceptual structure for a system of jurisprudence that was being built from scratch.[39] The First Congress, for example, passed a statute providing that the new federal courts would, in cases at law, generally follow the

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For discussion of how the merger of law and equity was not, in fact, purely procedural after all, see Main, *Traditional Equity*, *supra* note 6, at 476–95.

34. *See* Main, *Traditional Equity*, *supra* note 6, at 466 n.221.

35. *See generally* ISAIAH BERLIN, THE AGE OF ENLIGHTENMENT: THE 18TH CENTURY PHILOSOPHERS (1984); TOM D. CAMPBELL, LAW AND ENLIGHTENMENT IN BRITAIN (1990).

36. *Id.*

37. *See* PREST, *supra* note 9, at 308–09 (associating Blackstone with other contemporary political philosophers); *see also* Main, *Traditional Equity*, *supra* note 6, at 461 (citing Alan Watson, Comment, *The Structure of Blackstone's Commentaries*, 97 YALE L.J. 795, 810 (1988)).

In stark contrast to Blackstone, Bentham was a reformer. *See* ELIE HALÉVY, THE GROWTH OF PHILOSOPHIC RADICALISM 35 (2d ed. 1948); *see generally* JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT, ii–iii (1776) (criticizing Blackstone's anti-reformist views).

38. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 926 (1986–1987).

For background on the popularity of Blackstone's Commentaries in the United States, see DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 221 (1963) ("It was said that the Commentaries were selling nearly as well in America as in England . . . .").

39. The early courts were unable and unwilling to replicate the English system in full. On the Law side, there were not enough sophisticated lawyers, clerks, and libraries to sustain such a system; and Equity's association with the royal prerogative invited some resistance. *See* Subrin, *supra* note 38, at 927–28; *see also* Millar, *supra* note 17, at 39–42; Paul Samuel Reinsch, *The English Common Law in the Early American Colonies*, *in* 1 SELECTED ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367, 369–70, 410–12 (1907).

"modes of process" of the state in which the court sat.[40] The Second Congress prescribed a distinctive court procedure for equity cases.[41] Other statutes recognizing a substance-procedure distinction soon followed.[42]

This process of codification converted a substance-procedure antinomy into a substance-procedure dichotomy. Before this conversion, substance and procedure represented conceptual opposites—substantive laws detailed the rights and responsibilities of the parties, and procedures prescribed the vindication of those rights and the fulfillment of those responsibilities. That antinomy revealed the diverse purposes and functions that for centuries had been seamlessly integrated (in concept as well as nomenclature) in a corpus of laws. Antinomy is an especially apt descriptor of the relationship between substance and procedure because these concepts are not only counter-terms or antonyms, but are also paradoxically yoked:[43] each is extraordinarily difficult to define without also defining the other.[44] Yet the substance-procedure antinomy invited a more nuanced and sophisticated appreciation for laws' multiple intentions and meanings.

But the law did not codify this new consciousness; it codified a dichotomy. As a dichotomy, substance and procedure were still conceptual opposites, but dichotomies are characterized by mutually exclusive and mutually exhaustive categories. The exclusive disjunction had severe

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40. Act of September 29, 1789, ch. XXI, § 2, 1 Stat. 93, 93.

41. Act of May 8, 1792, ch. XXXVI, § 2, 1 Stat. 275, 276.

42. *See generally* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 56–58 (2d ed. 1985) (chronicling early American civil procedure); 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 509–51 (1971) (discussing the process acts of the 1780s and 1790s); HENRY HART & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 17–18, 581–88 (1953) (discussing the repeated pattern of state law governing unless superseded by federal law in the process and conformity acts of the 1700s and 1800s); JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES (7th ed. 1930) (reprinting and discussing the 1822, 1842, 1866, and 1912 equity rules).

43. To be clear, while antinomy and antonym share an etymological root, they have slightly different meanings. While antonyms are opposites, antinomy captures the more complex idea that the two terms have some relationship that constitutes a paradox or some unresolvable contradiction between two opposing but equally valid conclusions.

44. *See, e.g.*, JOHN SALMOND, JURISPRUDENCE § 172 (9th ed. 1937):

> Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained. The latter regulates the conduct and relations of courts and litigants in respect of the litigation itself; the former determines their conduct and relations in respect of the matters litigated. Procedural law regulates the conduct of affairs in the course of judicial proceedings; substantive law regulates the affairs controlled by such proceedings.

See also Sibbach v. Wilson & Co., Inc., 312 U.S. 1, 14 (1941) (defining rules of procedure as "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them").

consequences: lost was the conceptual possibility for laws that belonged in both categories or in neither category. As antinomy, the counter-terms substance and procedure were more localized, open-ended, and did not contain this sense of closure; laws could be both substantive and procedural, or could be neither substantive nor procedural.[45] But with codification as a dichotomy, this heterogeneity was lost.

Further, a dichotomy is not simply a neutral division of an otherwise all-encompassing descriptive field. "Dichotomous thinking necessarily hierarchizes and ranks the two polarized terms so that one becomes the privileged term and the other its suppressed, subordinated, negative counterpart."[46] Indeed, the inferiority of procedure to substance is a familiar refrain. In the eighteenth century, Bentham "degrade[d] procedure"—suggesting even the term "'adjective law' implied too much influence for procedure."[47] Then, in the nineteenth century, David Dudley Field undertook to refine the machinery of procedure.[48] At the turn of the twentieth century, Thomas Shelton analogized procedure to "a clean pipe, an unclogged artery, a clear viaduct, or a bridge."[49] Decades later, Charles Clark drafted rules to be a "handmaid rather than [a] mistress."[50] And as a contemporary example, one of my colleagues, a property professor, teaches his students that procedure is like the player piano to substantive law's musical compositions.[51] That substance and procedure are frequently defined with metaphors may be some evidence that the terms lack innate definition.[52]

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45. *See generally* RAIA PROKHOVNIK, RATIONAL WOMAN: A FEMINIST CRITIQUE OF DICHOTOMY 24–25 (Manchester Univ. Pr. 2002).

46. ELIZABETH GROSZ, VOLATILE BODIES: TOWARD A CORPOREAL FEMINISM 3 (Allen & Unwin 1994).

47. Kenneth W. Graham, Jr., Book Review, *"There'll Always Be an England": The Instrumental Ideology of Evidence*, 85 MICH. L. REV. 1204, 1213 (1987) (reviewing WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE (1985)).

48. *See* Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311 (1988).

49. Janice Toran, *'Tis a Gift to be Simple: Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352, 374–75 (1990).

50. Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 297 (1938) (quoting *In re Coles*, 1 K.B. 1, 4 (1907)); Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 542 (1925) (same).

51. I don't remember sufficient details of this exchange to satisfy the demands of *The Bluebook*. But I remember the event, and my response: "Shut up!," I carefully explained to this colleague as I ran from our faculty club in tears. This heavily embellished anecdote is inspired by Ring Lardner's humorous novel THE YOUNG IMMIGRUNTS.

52. *See* Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 105 (1998) ("[I]f commentators and the courts can agree on nothing else, they can agree that the terms 'substance' and 'procedure' have no plain meaning.").

II. DICHOTOMY IN DISARRAY

What started as the germ of an idea about different intentions and meanings for laws—substantive mandates, on one hand, and the procedural mechanics of enforcement, on the other—spread like a virus. And the legitimacy of a substance-procedure dichotomy is now largely presumed. Today, for example, a Federal Rule of Civil Procedure is not a valid procedural rule under the Rules Enabling Act if it abridges, enlarges or modifies a substantive right.[53] In diversity cases, the *Erie* doctrine requires federal courts to apply state substantive law and federal procedural law.[54] Closely related to the vertical choice of law context in *Erie* is the horizontal choice of law; a court usually applies the procedural law of the forum even when it applies the substantive law of another jurisdiction.[55] The retroactivity of a congressional statute, administrative regulation, or court ruling can also turn on the substance-procedure classification.[56] And different lines of authority prescribe the process for substantive and procedural lawmaking.[57] Whether fundamental or artificial, the distinction that separates substance from procedure is consequential.

Now, more than two hundred years after it was introduced, the dichotomy is entrenched, if not also reified. But is it—and was it ever—really understood? Because the stakes of litigation are high, and because lawyers are rewarded handsomely for their creativity, there is often much

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53. *See* 28 U.S.C. § 2072 (2006); *see generally* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1018 (1982); Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 26 (2008).

54. *See* Eric R.R. Co. v. Tompkins, 304 U.S. 64 (1938); *see generally* Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for* Erie *and* Klaxon, 72 TEX. L. REV. 79 (1993); John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693 (1974); Paul J. Mishkin, *Some Further Last Words on* Erie*—The Thread*, 87 HARV. L. REV. 1682 (1974).

55. *See, e.g.*, Midwest Grain Products of Illinois, Inc. v. Productization, Inc., 228 F.3d 784, 791–92 (7th Cir. 2000); Morris v. LTV Corp. 725 F.2d 1024, 1027 (5th Cir. 1984); Jones v. Prince George's County, 835 A.2d 632, 640 (Md. 2003); *see generally* Walter W. Cook, *"Characterization" in the Conflict of Laws*, 51 YALE L.J. 191 (1941); Joseph M. Cormack, *Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws: A Study of Problems Involved in Determining Whether or Not the Forum Should Follow Its Own Choice of a Conflicts-of-Laws Principle*, 14 S. CAL. L. REV. 221 (1941); Ernest G. Lorenzen, *The Qualification, Classification, or Characterization Problem in the Conflict of Laws*, 50 YALE L.J. 743 (1941).

56. *See* Hans W. Baade, *Time and Meaning: Notes on the Intertemporal Law of Statutory Construction and Constitutional Interpretation*, 43 AM. J. COMP. L. 319, 323 (1995); Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2104–05 (2008).

57. *See generally* Burbank, *supra* note 53.

debate about whether something is substantive or procedural. Is a law requiring plaintiffs to disclose their names in a complaint substantive or procedural?[58] Is a law requiring certain types of claims to be submitted to non-binding mediation substantive or procedural?[59] (What about compulsory arbitration?[60]) Is prejudgment interest a matter of substance or procedure?[61] (And is it necessarily the same answer for post-judgment interest?[62]) Many doctrines have long been difficult to classify as either substantive or procedural: statutes of limitation,[63] testimonial privileges,[64] fee-shifting statutes,[65] burdens of proof,[66] the availability of equitable

58. *See* Doe v. Provident Life & Accident Ins. Co., 176 F.R.D. 464 (E.D. Pa. 1997); Doe v. Blue Cross & Blue Shield of Rhode Island, 794 F. Supp. 72 (D.R.I. 1992); Jayne S. Ressler, *Privacy, Plaintiffs, and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*, 53 U. KAN. L. REV. 195 (2004); *see generally* Jed Greer, *Plaintiff Pseudonymity and the Alien Tort Claims Act: Questions and Challenges*, 32 COLUM. HUM. RTS. L. REV. 517 (2001); Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential?*, 37 HASTINGS L.J. 1 (1985).

59. *See* Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. ON DISP. RESOL. 239, 297–98 (2002); *see, e.g.*, Johnson v. Fruit Belt Elec., Nos. 93-1932, 93-2442, 1995 WL 6227 at *6 (6th Cir. Jan. 5, 1995); Vest v. St. Albans Psychiatric Hosp. Inc., 387 S.E.2d 282, 283–85 (1989); *see also* Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. DAVIS L. REV. 33, 80–81 (2001).

60. *Compare*, Hum v. Dericks, 162 F.R.D. 628, 635–37 (D. Haw. 1995), *and* Adkins v. Commonwealth of Va. *ex rel.* Univ. of Va. Med. Ctr., 154 F.R.D. 139, 140–41 (W.D. Va. 1994), *with* Feinstein v. Mass. Gen. Hosp., 643 F.2d 880, 885–87 (1st Cir. 1981), *and* Edelson v. Soricelli, 610 F.2d 131, 133–35 (3d Cir. 1979).

61. *See* Dustin K. Palmer, Comment, *Should Prejudgment Interest Be a Matter of Procedural or Substantive Law in Choice-of-Law Disputes?*, 69 U. CHI. L. REV. 705 (2002) (recounting how this is a debated question).

62. *See* Brian P. Miller, Comment, *Statutory Post-Judgment Interest: The Effect of Legislative Changes After Judgment and Suggestions for Construction*, 1994 BYU L. REV. 601 (1994).

63. *See, e.g.*, Sun Oil Co. v. Wortman, 486 U.S. 717, 722–29 (1988); Ernest G. Lorenzen, *The Statute of Limitations and the Conflict of Laws*, 28 YALE L.J. 492 (1919); James A. Martin, *Statutes of Limitations and Rationality in the Conflict of Laws*, 19 WASHBURN L.J. 405 (1980); Richard Henry Seamon, *An* Erie *Obstacle to State Tort Reform*, 43 IDAHO L. REV. 37, 91 (2006) (explaining that statutes of limitations may be substantive for purposes of an *Erie* analysis yet procedural for conflicts analysis); Louise Weinberg, *Choosing Law: The Limitations Debate*, 1991 U. ILL. L. REV. 683 (1991).

64. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 (1971); Steven Bradford, *Conflict of Laws and the Attorney-Client Privilege: A Territorial Solution*, 52 U. PITT. L. REV. 909 (1991); Kenneth S. Broun & Daniel J. Capra, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal for a Federal Rule of Evidence 502*, 58 S.C. L. REV. 211, 244–46 (2006); Stewart E. Sterk, *Testimonial Privileges: An Analysis of Horizontal Choice of Law Problems*, 61 MINN. L. REV. 461 (1977); Robert J. Tepper, *New Mexico's Accountant-Client Privilege*, 37 N.M. L. REV. 387 (2007); Raymond F. Miller, Comment, *Creating Evidentiary Privileges: An Argument for the Judicial Approach*, 31 CONN. L. REV. 771, 795–98 (1999).

65. *See* Jeffrey A. Parness, *Choices About Attorney Fee-Shifting Laws: Further Substance/Procedure Problems Under* Erie *and Elsewhere*, 49 U. PITT. L. REV. 393 (1988).

66. *See, e.g.*, Lea Brilmayer & Ronald D. Lee, *State Sovereignty and the Two Faces of Federalism: A Comparative Study of Federal Jurisdiction and Conflict of Laws*, 60 NOTRE DAME L. REV. 833, 848–49 (1985); Paul A. Freund, *Federal-State Relations in the Opinions of Judge Magruder*, 72 HARV. L. REV. 1204, 1205–13 (1959); Seamon, *supra* note 63, at 91–92 (explaining that

relief, and other remedial matters.[67] Judges forced to characterize these issues as either substantive or procedural are confronted with a choice that is not only vexing, but also consequential. Indeed, the fate of cases can turn on the resolution of each of these. And, for better or worse, the answers to these questions in any one case can be so contextualized that they have little or no precedential effect on subsequent cases.

Two centuries of jurisprudence exploring the substance-procedure dichotomy can be summarized as efforts either to *divine* or to *define* the line of separation. With the former approach, popular in the nineteenth century, the exercise assumed that there was some pre-existing line separating substance from procedure—and that that line could, through careful analysis, be revealed.[68] This was the "brooding omnispresence" theory of law at work.[69] "In its purest manifestation, formalism denied that economics, culture, or psychology played any role in the judicial process of discovering the applicable law and applying it to individual cases. The law, like science, developed and improved as judges made new discoveries and got progressively closer to legal 'truth.'"[70] This approach supplied certainty and formalism for what it lacked in nuance and reason.

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burdens of proof may be substantive for purposes of an *Erie* analysis yet procedural for conflicts analysis).

67. *See, e.g.*, Jack M. Beermann, *Why Do Plaintiffs Sue Private Parties Under Section 1983?*, 26 CARDOZO L. REV. 9, 16–20 (2004); Russell J. Weintraub, *The Choice-of-Law Rules of the European Community Regulation on the Law Applicable to Non-Contractual Obligations: Simple and Predictable, Consequences-Based, or Neither?*, 43 TEX. INT'L L.J. 401 (2008); Russell J. Weintraub, *Choice of Law for Quantification of Damages: A Judgment of the House of Lords Makes a Bad Rule Worse*, 42 TEX. INT'L L.J. 311 (2007).

68. *See, e.g.*, HERBERT F. GOODRICH, HANDBOOK ON THE CONFLICT OF LAWS 160 (1927) (discussing the task of discerning "on which side of the [substance-procedure] line a set of facts falls"); *see generally* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION 79, 181–82 (2000).

69. The term was made famous when quoted by Justice Frankfurter in *Guaranty Trust Co. v. York*:

> [Erie] overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare. . . . Law was conceived as a "brooding omnipresence" of Reason, of which decisions were merely evidence and not themselves the controlling formulations. Accordingly, federal courts deemed themselves free to ascertain what Reason, and therefore Law, required wholly independent of authoritatively declared State law . . . .

326 U.S. 99, 101–02 (1945) (internal citations omitted). In *Southern Pacific Co. v. Jensen*, Justice Holmes wrote: "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact. It always is the law of some State . . . ." 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). *See generally* PURCELL, *supra* note 68, at 181–82.

70. John M. Conley & William M. O'Barr, *A Classic in Spite of Itself:* The Cheyenne Way *and the Case Method in Legal Anthropology*, 29 LAW & SOC. INQUIRY 179, 184 (2004).

Beginning shortly after the turn of the twentieth century, the early legal realist movement suggested that there was no pre-existing line, but rather merely a decision that needed to be made about where the line would be drawn.[71] This realization, in turn, prompted acceptance of the notion that the line could be drawn in different places, depending upon the purpose for drawing it in any given instance.[72] After all, in the language of the 1920s, a word like "substance" or "procedure" is (to borrow from Justice Holmes) but the "skin of a living thought."[73] A functional approach purported to offer sufficient flexibility to consider all of the variables implicated in any particular application of the substance-procedure distinction. But, of course, flexibility cannot be achieved without severely compromising the values of predictability and uniformity.[74]

As Professor John Hart Ely observed, "[w]e were all brought up on sophisticated talk about the fluidity of the line between substance and procedure."[75] Some other characterizations of the state of the doctrine are less forgiving. Professor Risinger has suggested that "organized confusion is the official doctrine."[76] My personal favorite is counsel offered by Professor Herbert Goodrich in his 1927 *Handbook on the Conflict of Laws*: "[T]he distinction is made by courts, and the lawyer must figure it out as best he can."[77] The line between substance and procedure is often described with unflattering adjectives such as "vague," "unpredictable," "imprecise," "amorphous," "unresolvable," "unclear," "chameleon-like," "murky," "blurry," "hazy," and "superbly fuzzy."[78]

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71. *See generally* Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 668 (1993) ("Legal Realism revolutionized the [legal] profession's thinking about law, making it virtually impossible for thoughtful lawyers to regard litigation procedure and policy as completely divorced from the politics of substantive outcomes.").

72. *See* Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 335–37 (1933) (arguing that the line between substance and procedure could only be drawn with knowledge of the purpose of the line-drawing); *see also* Hanna v. Plumer, 380 U.S. 460, 471 (1965) ("The line between 'substance' and 'procedure' shifts as the legal context changes.").

73. Towne v. Eisner, 245 U.S. 418, 425 (1918) ("A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.").

74. Risinger, *supra* note 3, at 190, 201 (suggesting that one commentator's "linguistic relativism" or "an abdication of analysis" is another's "abdication of analysis" or "linguistic relativism" functional definition.").

75. Ely, *supra* note 54, at 724.

76. Risinger, *supra* note 3, at 202.

77. GOODRICH, *supra* note 68, at 158–59 n.2.

78. Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1703–04 (1992) (stating that the distinction between substance and procedure is "vague and unpredictable"); Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615, 618 (1997)

The cause of this instability is no mystery. The assumption that categories of substance and procedure are mutually exclusive and exhaustive simply seems to defy reality. It is quite obvious that certain procedural rules, such as burdens of proof and the class action device, also have a substantive orientation.[79] Likewise, certain substantive statutes, such as the statute of frauds and strict liability, also have something procedural at their core.[80] Even at the macro level, problems are manifest: some laws (e.g., statutes of limitations) are routinely classified as substantive for *Erie* purposes yet are procedural for conflict of laws analyses.[81] "The result can be a federal court deferring to the court of the state in which it sits (because [a doctrine] is substantive) but not then deferring to the state which created the cause of action (because [the same doctrine] is procedural and forum law governs)."[82]

This jurisprudence is largely ad hoc because the categories of substance and procedure were not fully formed when codified and have not

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(line between substance and procedure "is inherently unresolvable"); Brooke D. Coleman, *The* Celotex *Initial Burden Standard and an Opportunity to "Revivify" Rule 56*, 32 S. ILL. U. L.J. 295, 319 (2008) ("[M]ost scholars accept that the line between procedure and substance is superbly fuzzy."); Bradford R. Clark, Erie*'s Constitutional Source*, 95 CAL. L. REV. 1289, 1310 (2007) ("The line between substance and procedure is murky at best."); Michael M. O'Hear, *Localization and Transparency in Sentencing: Reflections on the New Early Disposition Departure*, 27 HAMLINE L. REV. 357, 378 (2004) ("[T]he precise boundaries between substance and procedure are admittedly imprecise."); Kurt M. Saunders, *Plying the* Erie *Waters: Choice of Law in the Deterrence of Frivolous Appeals*, 21 GA. L. REV. 653, 692 (1987) (discussing "amorphous" concepts of substance and procedure); Exxon Corp. v. Burglin, 42 F.3d 948, 951 (5th Cir. 1995) (referring to the "blurry line between substance and procedure"); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 92 (1938) (Reed, J., concurring) ("The line between procedural and substantive law is hazy."); GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 19 (1998) (referring to "the chameleon-like distinction" between substance and procedure); In re Richards, 213 F.3d 773, 784 (3d Cir. 2000) ("[T]he line separating procedure from substance is often unclear.").

79. *See supra* note 66; *see also* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 216 (2004) ("The parol evidence rule has the form of a rule of evidence, but it functions as a substantive rule of law.").

80. *See* Emery v. Burbank, 39 N.E. 1026, 1027 (Mass. 1895) (deeming statute of frauds procedure); 5 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, THE LAW OF TORTS §§ 28.12–28.15 (2d ed. 1986) (a rule of strict liability may be adopted to avoid the complexities of proving fault); William A. Reppy, Jr., *Choice of Law Problems Arising when Unmarried Cohabitants Change Domicile*, 55 SMU L. REV. 273, 284 (2002) (discussing the substantive and procedural nature of statutes of fraud).

81. *See* Wells v. Simonds Abrasive Co., 345 U.S. 514, 516–17 (1953) (recognizing that a state could apply its own statute of limitations to a foreign substantive right, implicitly labeling the statute of limitations as procedural); Guaranty Trust Co. v. York, 326 U.S. 99, 108–09 (1945) (applying state statute of limitations in *Erie* context); *see also* Seamon, *supra* note 63, at 91–92.

82. Brilamyer & Lee, *supra* note 66, at 848–49 & n.90 (citing Sampson v. Channell, 110 F.2d 754 (1st Cir.) (burden of proof a matter of state substantive law under *Erie*), *cert. denied*, 310 U.S. 650 (1940); Levy v. Steiger, 124 N.E. 477 (Mass. 1919) (burden of proof a matter of procedural law for conflict of laws analysis); *cf.* Cent. Vt. Ry v. White, 238 U.S. 507 (1915)).

crystallized since.[83] Of course, some laws are both substantive and procedural, and some laws may be neither. The situation approximates that which might result if, after a couple of decades of appreciating the tension between efficiency and fairness,[84] *all* laws were to be classified as promoting one or the other. Consideration of such a duality (like consideration of a substance-procedure antinomy) could be constructive, stimulating, and revealing. But codifying a dichotomy and forcing one label or the other on all laws—and attaching consequences to that label—would be rash, if not also preposterous and dangerous. Yet that is essentially what occurred with the substance-procedure dichotomy.

Importantly, at the time of its codification, the substance-procedure dichotomy might have appeared more mature and developed than it was. The substance-procedure dichotomy has frequently been confused with the "right-remedy distinction," which has much deeper historical roots.[85] "Perhaps as early as the thirteenth century, the right-remedy distinction was 'developed by continental theorists chiefly in the context of international law.'"[86] The right-remedy distinction separates the underlying substantive right from the range of available remedies to rectify it.[87] In the vernacular of the substance-procedure dichotomy, both the substantive right and the range of remedies typically would be labeled

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83. *See* Gregory Gelfand & Howard B. Abrams, *Putting* Erie *on the Right Track*, 49 U. PITT. L. REV. 937, 940–41 (1988); *see also* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 176–77 (1980) (lower courts exhibit "confusion and inconsistency").

84. *See generally* JULES L. COLEMAN, MARKETS, MORALS AND THE LAW 67–132 (1988); ROBIN PAUL MALLOY, LAW AND THE MARKET ECONOMY: REINTERPRETING THE VALUES OF LAW AND ECONOMICS 108 (2000); ARTHUR M. OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF 88–120 (1975); Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle*, 110 YALE L.J. 173, 175–79 (2000); Richard Craswell, *Kaplow and Shavell on the Substance of Fairness*, 32 J. LEGAL STUD. 245 (2003); Michael B. Dorff, *Why Welfare Depends On Fairness: A Reply to Kaplow and Shavell*, 75 S. CAL. L. REV. 847, 847–50 (2002); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 967–70 (2001); Joseph William Singer, *Something Important in Humanity*, 37 HARV. C.R.-C.L. L. REV. 103 (2002).

85. Risinger, *supra* note 3, at 191–92.

> The difference between the traditional right-remedy distinction and the procedure-substance dichotomy may strike some as subtle, but it is very important. Bentham interpreted the definition of the possible range of remedies that might be accorded for a violation of a right as being part of the substantive law, whereas under traditional right-remedy theory such a determination was clearly part of the remedial law, as were those things Bentham would have called adjective or procedural.

Id.

86. *Id.* at 190–91.

87. On the difference between right-remedy and substance-procedure distinctions generally, see Bone, *supra* note 18, at 14–17.

substantive.[88] And what Blackstone or Bentham labeled adjective or procedural would have been part of the remedy so far as the right-remedy distinction was concerned.[89] The right-remedy distinction had defined "right" so narrowly that there was very little subtlety or nuance to that traditional test.[90] For this reason, a substance-procedure dichotomy may have appeared as a meaningful and obvious, perhaps even timeless, construct when it was codified.[91] But that was a mirage.

Unfortunately, the substance-procedure dichotomy was allocated a heavy jurisprudential load even though it could not bear that structural weight. It should come as no surprise, then, that the contours of the substance-procedure dichotomy remain undefined, if not in outright disarray.

III. PROCEDURE AS SUBSTANCE

This Part could be neatly summarized with the simple declaration: "procedure is power."[92] "[A]ll informed observers of the litigation process" should already understand the substantive capacity of procedure.[93] "Procedure is an instrument of power and social control. Procedures alter the conduct of groups and individuals, and thus can prefer some over others. And procedure can, in a very practical sense, negate, resuscitate, or generate substantive rights."[94]

The argument that procedure is substantive presents in two basic forms. The classic version is that procedure has substantive qualities because it affects the outcome of cases.[95] A more contemporary version is that procedural reformers have a substantive agenda.[96] Both versions are verifiable.

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88. Risinger, *supra* note 3, at 190–92; *see also* Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 166–69 (2008).

89. Risinger, *supra* note 3, at 191–92.

90. *Id.* at 192–94.

91. *Id.* at 198.

92. *See generally* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1442 (2008).

93. *Id.*

94. THOMAS O. MAIN, GLOBAL ISSUES IN CIVIL PROCEDURE 1 (Thomson/West 2006).

95. *See* E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 325 (1986) ("Ultimately, procedure and substance cannot be divorced . . . ."); Solum, *supra* note 79, at 196–202.

96. *See* Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 846 (1993) ("We . . . know the difference between the inevitable non-neutrality of procedure and the notion that the rulemakers are or might as well be animated by an overtly political agenda."); Solum, *supra* note 79, at 196–202.

"[N]o procedural decision can be completely neutral in the sense that it does not affect substance."[97] If procedures are to serve any purpose at all, they will affect litigation behavior and create new winners and new losers. When the discovery rules were adopted in 1938, they were expected to make a trial less about sport and ambush, and more about truth and evidence.[98] "This presupposed that [those rules] would change the results in many cases."[99] In this vein, procedure is *substantive* in that it is *not unimportant*, as the subordinate role assigned to it by the substance-procedure dichotomy would suggest.

Procedural rules can also change how certain substantive laws are (or are not) enforced. To this end, scholars have analyzed the substantive capacity of numerous procedural devices and doctrines including, among many others, pleadings,[100] sanctions,[101] summary judgment,[102] joinder,[103]

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97. Elliott, *supra* note 95, at 325; *see* Solum, *supra* note 79, at 196–202.

98. *See* Edson R. Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737, 739 (1939); Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 865 (1933).

99. Charles Allen Wright, *Procedural Reform: Its Limitations and its Future*, 1 GA. L. REV. 563, 570 (1967).

100. *See, e.g.*, Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 961–74 (1990); Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. (forthcoming 2010), draft *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1467799; Joseph Seiner, *After* Iqbal, 45 WAKE FOREST L. REV. (forthcoming 2010), draft *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1477519; A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1 (2009); Jack B. Weinstein, *The Role of Judges in a Government Of, By, and For the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 107–12 (2008); C. Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 MO. L. REV. 677, 688–90 (1984); Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 371–73 (1990).

101. *See, e.g.*, STEPHEN B. BURBANK, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 (1989); Leslie Griffin, *The Lawyer's Dirty Hands*, 8 GEO. J. LEGAL ETHICS 219, 241 (1995) (noting that civil rights plaintiffs and/or their lawyers were sanctioned "at a rate . . . that is considerably higher than the rate for plaintiffs in non-civil rights cases."); Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 IND. L.J. 171, 172–73 (1994); Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200–01 (1988).

102. *See, e.g.*, Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 75 (1990); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 206–09 (1993); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1073–74 (2003); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 709–11 (2007); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 165 (1988); Weinstein, *supra* note 100, at 112–13.

103. Phyllis Tropper Baumann, Judith Olans Brown & Stephen N. Subrin, *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C.

evidence (e.g., *Daubert*),[104] discovery,[105] case management,[106] bifurcation,[107] and class actions.[108] The bulk of this literature has documented how so-called procedural reforms have intentionally, relentlessly, and quite successfully weakened civil rights and discrimination laws.[109] Other substantive areas that have been examined in

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L. REV. 211, 252–53 (1992); Irwin A. Horowitz & Kenneth S. Bordens, *The Consolidation of Plaintiffs: The Effects of Number of Plaintiffs on Jurors' Liability Decisions, Damage Awards, and Cognitive Processing of Evidence*, 85 J. APPLIED PSYCHOL. 909, 914 (2000); Pamela J. Stephens, *Manipulation of Procedural Rules in Pursuit of Substantive Goals: A Reconsideration of the Impermissible Collateral Attack Doctrine*, 24 ARIZ. ST. L.J. 1109, 1128–34 (1992); Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 533–34 (2006).

104. *See, e.g.*, Margaret A. Berger, *Upsetting the Balance Between Adverse Interests: The Impact of the Supreme Court's Trilogy On Expert Testimony in Toxic Tort Litigation*, 64 LAW & CONTEMP. PROBS. 289, 308–24 (2001); Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges are Using Their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 DEPAUL L. REV. 335, 347–76 (1999); Edward J. Imwinkelried, *Trial Judges—Gatekeepers or Usurpers? Can the Trial Judge Critically Assess the Admissibility of Expert Testimony Without Invading the Jury's Province to Evaluate the Credibility and Weight of the Testimony?*, 84 MARQ. L. REV. 1, 6–7 (2000); John V. Jansonius & Andrew M. Gould, *Expert Witnesses in Employment Litigation: The Role of Reliability in Assessing Admissibility*, 50 BAYLOR L. REV. 267, 310–17 (1988); Frank M. McClellan, *Bendectin Revisited: Is There a Right to a Jury Trial in an Age of Judicial Gatekeeping?*, 37 WASHBURN L.J. 261, 264, 279–80 (1998); Weinstein, *supra* note 100, at 112–16; Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. (forthcoming 2010) (on file with author).

105. *See, e.g.*, Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1988–96 (2007); Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1210–16 (2005) (discussing "discovery regimes" and how "state procedure has fragmented in an area where procedural differences can have major substantive effects"); Redish & Murashko, *supra* note 53, at 39.

106. *See, e.g.*, Irwin A. Horowitz & Kenneth S. Bordens, *An Experimental Investigation of Procedural Issues in Complex Tort Trials*, 14 LAW & HUM. BEHAV. 269, 271 (1990); Tidmarsh, *supra* note 103, at 533–34; *see generally* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (expressing concern over potential for judges to abuse their discretionary power).

107. *See* Steven S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 705 (2000) (suggesting bifurcation affects outcomes); Horowitz & Bordens, *supra* note 106 (reporting empirics on consequences of bifurcation); Hans Zeisel & Thomas Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606, 1612 (1963) (suggesting bifurcation can increase likelihood of defense verdicts); *see also* Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining* Monell *in Police Brutality Cases*, 44 HASTINGS L.J. 499, 536 (1993).

108. *See, e.g.*, Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1305 (2002); Burbank, *supra* note 93; Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1928 (2006) (arguing that it is "difficult to conclude" that "the advent of the small claims (negative value) class action did not 'alter substantive law.'") (quoting Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1877 (2006)); Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823 (2008); Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71 (2003).

109. *See, e.g.*, Baumann et al., *supra* note 103, at 296; Schneider, *supra* note 104, at 140–43.

some depth include antitrust,[110] corporate law and securities regulation,[111] racketeering,[112] and environmental protection.[113]

The perception that procedure is relatively insignificant can be exploited. Indeed, "[s]ubstantive decisions can be 'disguised as process' and process decisions can operate as a proxy for substantive impacts."[114] This subterfuge is dangerous because procedural reforms can have the effect of denying substantive rights without the transparency, safeguards and accountability that attend public and legislative decision-making.[115] And procedural laws can be applied retroactively.[116] All this literature is aptly, if crudely, captured in a nutshell by Representative John Dingell, who said in a Congressional hearing: "I'll let you write the substance . . . you let me write the procedure, and I'll screw you every time."[117] I do not mean to suggest that procedure is the tool only of scoundrels. Indeed, the Federal Rules of the Civil Procedure themselves were the product of New Deal legislation that promised access to courts for immigrants, women, labor and others who would be able to take advantage of its liberal measures.[118] And, of course, not all procedural changes with substantive consequences are part of some broader political agenda.[119]

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110. Max Huffman, *The Necessity of Pleading Elements in Private Antitrust Conspiracy Claims*, 10 U. PA. J. BUS. & EMP. L. 627 (2008); Mark D. Robins, *The Resurgence and Limits of the Demurrer*, 27 SUFFOLK U. L. REV. 637, 674 (1993).

111. Franklin A. Gevurtz, *Who Represents the Corporation? In Search of a Better Method for Determining the Corporate Interest in Derivative Suits*, 46 U. PITT. L. REV. 265, 280–81 (1985); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 447–49 (1986); Miller, *supra* note 102, at 1052, 1065–66, 1125–26; Carl Tobias, *Reforming Common Sense Legal Reforms*, 30 CONN. L. REV. 537, 550–53 (1998); Weinstein, *supra* note 100, at 26.

112. Lisa A. Huestis, *RICO: The Meaning of "Pattern" Since* Sedima, 54 BROOK. L. REV. 621, 623 & n.9 (1988); Robins, *supra* note 110, at 677.

113. Robins, *supra* note 110, at 679.

114. Schneider, *supra* note 104, at 141 (citing Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1017 (2008)).

115. *See generally* Jack B. Weinstein, *After Fifty Years of Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901 (1989).

116. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 275 (1994).

117. *Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law and Governmental Regulations of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983) (testimony of Rep. John Dingell).

118. *See* Subrin, *supra* note 38, at 944–48, 973–74 (documenting the Federal Rules' reliance on New Deal principles, including access to the legal system); Stephen N. Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648, 1649–51 (1981) (arguing that the creation of uniform federal rules with liberal pleading requirements and discovery provisions expanded the role of the federal government and facilitated public litigation); Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1272–80 (1997).

119. *See generally* Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761 (1993).

All this is a familiar story. And only the broadest summary of this literature is necessary to remind that procedural means can achieve substantive ends, whether or not intended. As the substance-procedure metaphors mentioned above imply: adjectives can pervert the meaning of sentences, pipes can leak or pollute, handmaids can become mistresses, and player pianos can be so out of tune that the music is unrecognizable.

IV. PROCEDURE IN SUBSTANCE

In this Part, I expose more fissures in the substance-procedure dichotomy. I demonstrate that substantive law is neither *aprocedural* nor *trans-procedural*, but rather is constructed with a specific procedural apparatus in mind to vindicate the rights created or the responsibilities assigned by that substantive law. Whether consciously or subconsciously, the drafters of substantive law embed an associated procedure.

Substantive law relies on procedure to effectuate the substantive mandate. Substantive law without any procedure at all would be a "vain and hollow thing."[120] Although some substantive laws may be merely aspirational or symbolic,[121] it is surely true that generally speaking "[t]he best laws in the world are meaningless unless they can be meaningfully enforced."[122] To borrow a useful phrase often invoked in another procedural context, substantive law without procedural law would be a "castle in the air."[123] As castles in the air are seldom built, substantive law would seldom be constructed without some procedure to vindicate that law.[124] Because substantive law requires procedure, it is not aprocedural.

Nor is substantive law trans-procedural. Substantive law would be trans-procedural only if the rights established and responsibilities assigned in the substantive law could be fulfilled and realized in any procedural

120. Edgard H. Ailes, *Substance and Procedure in the Conflict of Laws*, 39 MICH. L. REV. 392, 404 (1941) (referring to a right without a remedy).

121. *See generally* LON L. FULLER, THE MORALITY OF LAW 5–7 (rev. ed. 1969); John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233 (1990); James N. Henderson, Jr. & Richard N. Pearson, *Implementing Federal Environmental Policies: The Limits of Aspirational Commands*, 78 COLUM. L. REV. 1429 (1978); *see also* Bone, *supra* note 18, at 14–15.

122. Jean R. Sternlight, *Dispute Resolution and the Quest for Justice*, 14:4 DISP. RESOL. MAG. 12, 12 (2008).

123. FREDERIC WILLIAM MAITLAND, EQUITY AND THE FORMS OF ACTION 19 (A.H. Chaytor ed. 1909) (referring to a system of Equity without a complementary system of Law).

124. *See* Mauro Cappelletti & Bryant G. Garth, *Policies, Trends and Ideas in Civil Procedure*, *in* XVI INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 14 (Mauro Cappelletti & Bryant G. Garth eds., 1987) ("Procedural law therefore is necessarily interdependent with substantive law, and neither is of much value without the other.").

system. Consideration of a simple, stylized example will illustrate how substantive law cannot be trans-procedural.

Assume that the legislature of the State of Maine has promulgated a statute to protect vulnerable franchisees from abuse by franchisors. This is a simple statute, nicknamed the FPA (Franchisee Protection Act), with four elements constituting a new private cause of action. Imagine that the FPA is unequivocally "substantive" as that term is ordinarily used—the FPA does not prescribe any special pleading, joinder, discovery, or other procedural rules within its text.

When drafting legislation like the FPA, legislators must balance a number of competing priorities. Of course, more protections for franchisees can discourage franchisors from investing in Maine businesses. The legislation would reflect these compromises and the desired level of deterrence.[125] The substantive core of that legislation would be embodied in the four elements of the cause of action, and those elements could be more or less exacting in their terms. By exacting, I mean that the wording of each substantive element of a cause of action can be calibrated—dialed up or dialed down—to require more or less of a showing in order for the plaintiff ultimately to prevail. For example, under the FPA, franchisee plaintiffs might have to demonstrate an injury that is ("dialing" from high to low): severe, significant, substantial, or actual; or the statute could presume injury and require no showing whatsoever.

Each substantive element of the cause of action under the FPA constitutes another "dial." An element of scienter, for example, could impose liability when the defendant franchisor acts intentionally, wrongfully, in bad faith, negligently, or not in good faith. A third element could enumerate the prohibited acts in more or less detail. And fourth, an element of causation could be more or less demanding.

The calibration of all four of these substantive elements would reflect the desired level of deterrence. But the level of deterrence, in fact, achieved will be influenced by the procedural system that hosts litigation filed under that statute. To identify just a few examples:

- Onerous filing fees, complex pre-filing requirements, and heightened pleading standards can discourage the filing of even meritorious claims.[126]

125. My assumption is only that the legislation has some objective. Whether the goal is ambitious or mere window-dressing doesn't change the analysis at all; either way, there is some desired outcome.

126. *See supra* note 100.

- Class actions will facilitate the filing of claims that would not otherwise be pursued.[127]
- The availability vel non of discovery will determine the evidence available to the parties, and thus potentially influence the outcome of the suit.[128]
- Rules of evidence will determine what factfinders consider when evaluating the merits of the substantive claim.[129]

Procedural systems can vary in important ways, including the amount of time between filing and trial, a judge's authority to enforce court orders (through contempt or otherwise), and the availability of appeals. These and countless other procedures associated with enforcement will affect the level of deterrence, in fact, achieved.

If the FPA is *drafted* in contemplation of a procedural system with onerous filing fees, complex pre-filing requirements, and heightened pleading standards, the elements of the cause of action will incorporate that assumption. And if that law is *enforced* instead in a procedural system with easy access, simple filing requirements, and a liberal pleading standard, there will be over-enforcement of the intended mandate.

If the FPA is drafted in contemplation of a procedural system that does not have a class action device, the elements of the cause of action will incorporate that assumption. For example, to ensure the desired amount of litigation, the statute might provide for presumed or punitive damages. But if that law is enforced instead in a procedural system with a class action device, then again, there would be over-enforcement of the intended mandate.

If the FPA is drafted in contemplation of a procedural system that facilitates broad discovery, the elements of the cause of action will incorporate that assumption. If plaintiff must prove the defendant's *intent*, for example, the assumption that plaintiff would have access to the defendant's employees for questioning and defendant's documents for inspection would be essential. If the same proof were required in a procedural system with no discovery, then of course the substantive mandate would be under-enforced.

To compensate for these procedural differentials and to achieve the desired enforcement, the elements of the cause of action would be

127. *See supra* note 108.
128. *See supra* note 105.
129. *See supra* note 104.

calibrated differently. "Substance and process are intimately related. The procedures one uses determine how much substance is achieved . . . ."[130] And because there are procedures (or combinations of procedures) that would require different substantive law to achieve the same net result, substantive law is not trans-procedural.

Because substantive law is neither aprocedural nor trans-procedural, exactly which procedural system(s), then, is the Maine legislature presuming when it drafts the FPA? One possible answer would be Maine's state court procedure; a second would be Maine's federal court procedure; a third answer could be some composite of these (and/or other familiar, perhaps even anticipated, procedures). We would not know the answer, and of course that answer could vary not only from legislature to legislature and legislation to legislation, but even from legislator to legislator. Moreover, the answer is further obscured because the contextualization of substantive law within a procedural framework would often be subconscious.

Whichever of these assumptions informs the legislative drafting, the substantive law is not drafted in a vacuum. Whatever this built-in procedural expectation, it would be some parochial assumption. And parochial it should be; the situs of most of the litigation under the FPA would be Maine state and federal courts.

In most cases, a parochial assumption will be either correct or "close enough." Often, a Maine state court would be both the presumed and the actual forum for litigation under the FPA. If instead the parochial assumption was some composite of Maine federal and state procedures, there will be some mismatch between the presumed and the actual because no forum with such procedures exists; however, if the actual forum was a Maine federal court, then presumably any mismatch under these circumstances would be modest. Substantial differences between state and federal procedures of course would exacerbate the consequences of a mismatch.[131]

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130. Frank H. Easterbrook, *Substantive Due Process*, 1982 SUP. CT. REV. 85, 112–13 (1982).

131. For a discussion of efforts that would encourage states to deviate more dramatically from the federal model, see Koppel, *supra* note 105; Symposium Journal on State Civil Procedure, 35 W. ST. U. L. REV. 1, 1–304 (2007). For broader context on this phenomenon, see EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958 177–99 (Oxford 1992) (discussing the history of forum shopping).

But see Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 329–33 (2001) (proving substantial conformity between federal and state practice in fact even when the textual rules are substantially different).

Occasionally, the parochial assumption will be spectacularly wrong: when the substantive law is litigated in a forum with procedures dramatically different than those contemplated by the drafters of the substantive law. The FPA could be applied by a French court, for example, in litigation involving The Body Shop, a franchise of L'Oreal, a French company.[132] Or the FPA could be applied by a Japanese court in litigation involving the Japanese franchisor Kumon Math & Reading Centers.[133] Importantly, differences in procedural law from country to country are "much greater" even than differences in substantive law.[134] And these procedural differences can dramatically affect the enforcement calculus.[135]

Critical mismatches are not limited to cases involving the application of foreign substantive law by domestic courts. Procedural variation even among American state courts could be—and historically has, at times, been[136]—significant. "Procedural diversity is built into the federal structure of fifty state judicial systems, which are natural laboratories for . . . experimentation."[137] For example, "most states have charted their own paths toward civil discovery reform, paths that diverge from each other and from the federal rules."[138] Different discovery rules alone can affect the outcome of a case.[139] But state procedures can also vary as to

132. For an overview of the French legal system generally and civil procedure in particular, see CHRISTIAN DODD, THE FRENCH CODE OF CIVIL PROCEDURE IN ENGLISH (Oxford 2006); Peter F. Schlosser, *Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems*, 45 U. KAN. L. REV. 9 (1996).

133. For an overview of the Japanese legal system generally and civil procedure in particular, see CARL F. GOODMAN, JUSTICE AND CIVIL PROCEDURE IN JAPAN 189–249 (2004); Takeshi Kojima, *Japanese Civil Procedure in Comparative Law Perspective*, 46 U. KAN. L. REV. 687, 697 (1998).

134. Andreas F. Lowenfeld, *Introduction: The Elements of Procedure: Are They Separately Portable?*, 45 AM. J. COMP. L. 649, 652 (1997).

135. *See supra* notes 126–29 and accompanying text.

136. One of the most significant procedural reforms in American procedural history started in the state courts. *See* MILLAR, *supra* note 17, at 52 ("The first quarter of the nineteenth century had not long passed before a pronounced movement for reform on a wide scale had made its appearance. . . . Its principal theater was the State of New York."); *see also* Subrin, *supra* note 38, at 931–43; Subrin, *supra* note 48, at 316–19.

137. Koppel, *supra* note 105, at 1175.

138. *Id.* at 1173; *see also* Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 RUTGERS L. REV. 595, 613 (2002): "Justice Brandeis praised the ability of states to be 'laboratories' in which experiments in the law might be conducted. Procedural rules illustrate this. Analysis of the changes in the discovery provisions of the fifty state rules of civil procedure over the past fifteen years reveals a very complex situation."

139. *See* Elizabeth A. Rowe, *When Trade Secrets Become Shackles: Fairness and the Inevitable Disclosure Doctrine*, 7 TUL. J. TECH. & INTELL. PROP. 167, 202 (2005) ("One of the important ways in which the process can affect the outcome is through discovery."). This is not to suggest that more discovery necessarily helps plaintiffs. *See* Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 796 (1998) (discussing empirical studies finding that "the more days plaintiff spent in discovery, the lower their recovery relative to expectations[, and

pleadings,[140] class actions,[141] juries,[142] summary judgments,[143] alternative dispute resolution,[144] early incentives for settlement,[145] case management,[146] and every other conceivable device.[147] Because procedure matters, these mismatches, which lurk in all situations where the procedure that is applied varies from that which was contemplated by the drafters of the substantive law, matter too.[148] Procedural systems are not fungible.[149]

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f]or defendants the number of days spent in discovery was independent of the amount they were ultimately liable to pay"); David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 110–16 (1983) (finding that increased lawyer time spent on discovery was associated with decreased measures of success for plaintiffs).

140. *See* John G. Culhane & Jean Macchiaroli Eggen, *Defining a Proper Role for Public Nuisance Law in Municipal Suits Against Gun Sellers: Beyond Rhetoric and Expedience*, 52 S.C. L. REV. 287, 315 n.172 (2001) (citing state cases); Main, *supra* note 131, at 329–59; John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1377–79 (1986); Adam N. Steinman, *What is the* Erie *Doctrine? (And What Does it Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 282, 293–94 (2008); Christine L. Childers, Note, *Keep on Pleading: The Co-Existence of Notice Pleading and the New Scope of Discovery Standard of Federal Rule of Civil Procedure 26(b)(1)*, 36 VAL. U. L. REV. 677, 701 n.146 (2002) (citing state rules of procedure).

141. *See* Sue-Yun Ahn, *CAFA, Choice-of-Law, and the Problem of Legal Maturity in Nationwide Class Actions*, 76 U. CIN. L. REV. 105, 113–15 (2007); Burbank, *supra* note 93, at 1523; Alan B. Morrison, *Removing Class Actions to Federal Court: A Better Way to Handle the Problem of Overlapping Class Actions*, 57 STAN. L. REV. 1521, 1528 (2005); Steinman, *supra* note 140, at 279–80, 295–97.

142. *See, e.g.*, Neal P. Cohen & Daniel R. Cohen, *Jury Reform in Tennessee*, 34 U. MEM. L. REV. 1 (2003) (discussing the history of jury reform in U.S. and, specifically, efforts in Tennessee); Valerie P. Hans, *Inside the Black Box: Comment on Diamond and Vidmar*, 87 VA. L. REV. 1917, 1920–21 (2001) (discussing the Arizona Jury Project).

143. *See* Michael P. Allen, *A Survey and Some Commentary on Federal "Tort Reform,"* 39 AKRON L. REV. 909, 926 & 926–27 n.70 (2006); JoEllen Lind, *"Procedural* Swift*": Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 769–71 (2004); Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 418–19 (1992); Steinman, *supra* note 140, at 278–79, 288–93.

144. Edward F. Sherman, *A Process Model and Agenda for Civil Justice Reforms in the States*, 46 STAN. L. REV. 1553, 1570–83 (1994).

145. *See id.* at 1583–87.

146. *See id.* at 1555–56, 1562–70.

147. *See* Paul D. Carrington, *Teaching Civil Procedure: A Retrospective View*, 49 J. LEGAL EDUC. 311, 329–30 (1999) (urging law teachers and lawyers to take advantage of states as laboratories for procedural experimentation).

148. *See supra* notes 92–119 and accompanying text. The dependent relationship between substantive rights and anticipated procedures is reflected also in administrative law where it is oft mentioned that plaintiffs "must take the bitter with the sweet." Arnett v. Kennedy, 416 U.S. 134, 153–54 (1974).

149. International efforts to harmonize various substantive laws could suggest otherwise. After all, these model acts purport to work with the procedures of civil law, common law, or even radically different legal systems. The Convention on the International Sale of Goods (CISG)—one of the most successful harmonization initiatives—is in force in more than 70 very different countries, including Argentina, China, France, Israel, Syria, the U.S., Uzbekistan, and Zambia. United Nations Comm. on

Mismatch scenarios are commonplace. In virtually every instance of alternative dispute resolution, for example, there is a mismatch because the substantive law is applied in a setting with different procedural accoutrements. For example, there would be no jury, discovery may be restricted, written testimony may substitute for oral, and the joinder of additional parties may be infeasible.[150]

Moreover, there is a mismatch with every diversity case in federal court (where federal procedure is applied to state substantive law),[151] every federal law action that proceeds in state court (where, typically, state procedure is applied to federal substantive law),[152] and with every application by one court of any other jurisdiction's substantive law.[153] Even when litigation takes place in the very forum anticipated by the

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Int'l Trade Law, Status: 1980—United Nations Convention on Contracts for the International Sale of Goods, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited Jan. 11, 2010) [hereinafter "UNCITRAL"]; *see* Peter Huber, *Some Introductory Remarks on the CISG*, 6 INTERNATIONALES HANDELSRECHT 228, 228 (2006) ("It is therefore fair to say that the CISG has in fact been one of the success stories in the field of the international unification of private law.").

Importantly, however, these model laws tend to focus exclusively on transnational relationships. The CISG, for example, alters only the domestic law governing transnational contracts. *See* United Nations Convention on Contracts for the Sale of Goods art. 1, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter "CISG"]. The narrow focus is significant because the forum for the resolution of a transnational dispute is most likely an international arbitral forum. Thus the anticipated procedural forum, while not parochial, is no less predictable. *See* Avery W. Katz, *Remedies for Breach of Contract Under the CISG*, 25 INT'L REV. L. & ECON. 378, 384 (2006) ("Most CISG disputes . . . are heard by private arbitral tribunals . . . ."); Joseph M. Lookofsky, *Consequential Damages in CISG Context*, 19 PACE INT'L L. REV. 63, 86–87 (2007) ("[M]ost CISG cases are decided by arbitrators . . . .").

Further, many unification initiatives have modest substantive consequences in practice. First, the text of the CISG, for example, allows nations to make reservations, and about thirty percent of the signatories have opted out of certain provisions. *See* CISG, *supra*, art. 92 et seq.; *see also* UNCITRAL, *supra* (status table documenting reservations). Second, because "the CISG uses general standards rather than precise rules," there is much variation in how subsequent interpreters apply its terms. Paul B. Stephan, *Does the CISG Fill a Much-Needed Gap?*, 101 AM. SOC'Y INT'L L. PROC. 414, 415 (2007); *see also* Larry A. DiMatteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NW. J. INT'L L. & BUS. 299 (2004); Ole Lando, *CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law*, 53 AM. J. COMP. L. 379 (2005). And finally, the CISG expressly allows contracting parties to opt out of its specific provisions. CISG, art. 6. Accordingly, the entire domain of the CISG is contracts voluntarily entered into by parties *with alternatives*. *See also infra* note 190.

150. *See* Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 31–33 (1987); Alan S. Rau, *Resolving Disputes Over Attorneys' Fees: The Role of ADR*, 46 SMU L. REV. 2005, 2027–28 (1993).

151. *See, e.g.*, Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938): *see also supra* note 54 and accompanying text.

152. *See, e.g.*, Felder v. Casey, 487 U.S. 131, 138 (1988); Wolfe v. North Carolina, 364 U.S. 177, 195 (1960); Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211, 217–21 (1916).

153. *See, e.g.*, Sun Oil Co. v. Wortman, 486 U.S. 717 (1988); *see also supra* note 55 and accompanying text.

drafters of the substantive law, there would be a chronologic mismatch if the procedure has changed since the substantive law was promulgated.[154]

This argument echoes many of the themes introduced by the scholars whose "procedure-as-substance" work is summarized in Part III *supra.* Like them, I am illustrating the power of procedure. But it is also important to see how my point differs from theirs. Those scholars focus on how procedure is *introduced* at the enforcement stage to undermine substantive rights. I am emphasizing that an anticipated procedure may *not be introduced* at the enforcement stage, and that its absence could affect substantive rights.[155] The associated procedure should remain hinged to the substantive law.

To a very limited extent, my argument is something of a rejoinder to theirs. After all, in circumstances where the procedure applied by the enforcing court *matches* the procedure anticipated by the drafters of the substantive law, then the substantive mandate would not be undermined by it—even when those procedures appear to dilute the substantive mandate. For example, a heightened pleading standard for civil rights cases does not undermine substantive law that was drafted in anticipation of a heightened pleading standard. Indeed, to apply a liberal pleading standard to that law instead could lead to over-enforcement of the substantive mandate.

But this rejoinder is of little consequence because (1) most of their procedure-as-substance criticism, in fact, targets genuine mismatches (with new procedures applied to older substantive laws); and (2) even if the enforcement procedure in fact matches what was anticipated, there is still a manipulation of "procedure" to achieve a substantive goal. So long as there is some sense that procedure is less significant than substance (again, a byproduct of the substance-procedure dichotomy), procedural reforms can be implemented without the scrutiny and attention that are an integral part of substantive law-making.[156] Accordingly, rather than allaying any of the concerns identified in the preceding part, the arguments

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154. For a similar argument recognizing the evolving nature of language, see generally Brian G. Slocum, *Overlooked Temporal Issues in Statutory Interpretation*, 81 TEMP. L. REV. 635 (2008).

155. Professor Adam Steinman has made a similar argument in suggesting that federal courts respect state summary judgment, class certification, and pleading standards. *See* Steinman, *supra* note 140, at 282–301.

156. Janet Cooper Alexander, *Judges' Self-Interest and Procedural Rules: Comment on Macey*, 23 J. LEGAL STUD. 647, 647 (1994) ("Because procedural rules are so important to substantive rights, and because non-specialists usually pay little attention to procedural rules . . . it is important to be alert to the possibility that the people who 'write the procedure' may be acting in their own self-interest . . . .") (citing Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627 (1993)).

asserted in this part complement and feed the basic critique: the substance-procedure dichotomy is fundamentally flawed.

A return to the player piano metaphor may be helpful here. The musical compositions that are substantive law are not written for *all* player pianos. A paper music roll prepared for the pneumatically-operated Pianola cannot be read by a Yamaha, which reads only magnetic tape. Other contemporary player pianos read computer disks. Your mother's player piano is almost certainly not your son's player piano. While one could always try to convert one format into another, we also know that even the most earnest translation will introduce variation.[157] Substantive law is likewise being applied on unfamiliar platforms, but without even the effort to translate.

V. CONCEPTUAL POSSIBILITIES

A. Apply Only Forum Law

The first conceptual possibility is for us to admit that, because we have misunderstood the nature of a substantive right, it is impossible to faithfully apply some other jurisdiction's substantive law. Accordingly, we would abandon all of our choice of law doctrines. A strict lex fori regime, instead, would require the application of forum substantive and procedural law in all circumstances. Doing so would prevent the sort of geographic mismatch that can result when one court undertakes to apply the substantive law of some other state or country.

It is a tall order to expect a Maine court meaningfully to apply French law—or even Florida law. Perhaps "courts should not presume to speak for other jurisdictions in this manner" nor ignore the "express will" of their own legislature by applying some other law.[158] Of course judges are also more familiar with forum law, making its application easier, less time-consuming, and much more efficient.[159] Although a lex fori approach may seem radical, it has long been among the approaches in the conflict of laws canon,[160] and it was the law in diversity cases in federal court for

157. This metaphor also evokes appreciation for the orchestral use of period instruments. See Academy of Ancient Music, http://www.aam.co.uk/ (last visited Dec. 1, 2008).

158. *See* Sutherland v. Kennington Truck Serv., Ltd., 562 N.W.2d 466, 474 (Mich. 1997) (Brickley, J., concurring in part and dissenting in part).

159. *See* Amos Shapira, *"Grasp All, Lose All": On Restraint and Moderation in the Reformulation of Choice of Law Policy*, 77 COLUM. L. REV. 248, 257–58 (1977).

160. *See* CRAMTON, CURRIE & KAY, CONFLICT OF LAWS 303–05 (2d ed. 1975); STEPHEN C. MCCAFFREY & THOMAS O. MAIN, TRANSNATIONAL LITIGATION IN COMPARATIVE PERSPECTIVE 482–89 (Oxford Univ. Press 2010). *But see* EUGENE F. SCOLES, PETER HAY, PATRICK J. BORCHERS &

nearly a century before *Erie Railroad Co. v. Tompkins*.[161] Even today, the administration of criminal law largely avoids conflict of laws analyses and substance-procedure mismatches.[162]

Yet several doctrinal obstacles would thwart a strict lex fori approach. For example, this approach could not (without major reform) address the mismatches that occur when state-law cases are in federal court,[163] nor when federal-law cases are in state court.[164] Moreover, this approach provides no solution for the mismatches that occur in ADR, where there is

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SYMEON C. SYMEONIDES, CONFLICT OF LAWS 42 (3d ed. 2000) ("Ehrenzweig's dream of *lex propria in foro proprio* is as remote today as it was during Ehrenzweig's time."). The most passionate advocate of a lex fori approach in conflicts doctrines was Albert Ehrenzweig. *See generally* Albert A. Ehrenzweig, *A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori Approach,"* 18 OKLA. L. REV. 340 (1965); Albert A. Ehrenzweig, *The Lex Fori—Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637 (1960); Shapira, *supra* note 159.

161. *Compare* Swift v. Tyson, 41 U.S. 1 (1842), *with* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). Nevertheless, there were mismatches under *Swift* because federal procedure was controlled by the Conformity Acts, which required federal court procedure to conform to state court procedures. *See* Thomas O. Main, Symposium, *Reconsidering Procedural Conformity Statutes*, 35 W. ST. U. L. REV. 75, 85–87 (2007). Accordingly, even with a uniform substantive law for diversity cases, federal procedure varied from state to state.

162. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 cmt. c (1971) (clarifying that criminal law not addressed in the Restatement). It would be an overstatement to say that there are no conflicts issues in criminal law or that courts apply only forum law. Many of the problems of *international* criminal law are essentially matters of conflicts. *See* LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES (Oxford 2006) (2003). State courts would also need to apply controlling federal law. Also, there are some secondary and collateral issues in criminal law, such as the construction of a defendant's criminal history and evidentiary privileges, that involve conflicts analyses. *Compare* Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, 260 (2005) (discussing relevance of out-of-state sanctions on sentencing determinations), *with* Dan Markel, *Connectedness and its Discontents: The Difficulties of Federalism and Criminal Law*, 4 OHIO ST. J. CRIM. L. 573 (2007) (discussing Logan's approach). *See also* Gonzalez v. State, 45 S.W.3d 101 (Tx. Crim. App. 2001).

163. State cases are filed in federal court under the federal court's diversity jurisdiction. Section 1332 of Title 28 provides federal jurisdiction over non-federal-law claims when there is diversity between the parties. *See* 28 U.S.C. § 1332 (2000). And *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) reads (an unspecified provision of) the U.S. Constitution to require courts to apply state substantive law in diversity cases. If one were committed to a comprehensive lex fori model the possible revisions to address this hurdle would include (1) eliminating diversity jurisdiction (which could be accomplished by legislative enactment alone); or (2) reversing *Erie* and reinstating the pre-*Erie* jurisprudence that allowed the application of federal (common) law in diversity cases. *See* Swift v. Tyson, 41 U.S. 1 (1842).

164. Except when there is exclusive federal subject matter jurisdiction, federal causes of action can be filed in state court. *See* Anthony J. Bellia, Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1505 n.10 (2006). In cases with federal causes of action filed in state court, the Supremacy Clause prevents a state from applying state law. U.S. Const. art. VI, cl. 2. If one were committed to a comprehensive lex fori model, the possible revision to address this hurdle (absent constitutional amendment) would be to give exclusive jurisdiction over all federal causes of action to federal courts.

no forum substantive law for neutrals to apply.[165] Nor would it address the sort of chronologic mismatches that can occur when new procedure is applied retroactively to vintage substantive law.

Even in that small subset of cases where it would be doctrinally feasible to undertake a strict lex fori approach,[166] the new litigation dynamic could be problematic. Defendants would be particularly vulnerable to plaintiffs' forum-shopping for favorable law.[167] And while a court could dismiss the case in circumstances where it was unwilling to apply its own law to the facts presented, a dismissal, in turn, could result in unfairness to plaintiffs who may be unable to file suit in the more appropriate forum.[168] Indeed, forum non conveniens dismissals are "outcome-determinative in a high percentage of . . . cases."[169]

B. Apply All of Foreign Law

A second conceptual possibility prescribes essentially the opposite of the first. Again we would admit that we have misunderstood the nature of a substantive right. But rather than retreat from our choice of law doctrines, we would expand them so that when courts apply another

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165. Lex mercatoria could be an exception. *See generally* Michael Douglas, *The Lex Mercatoria and the Culture of Transnational Industry*, 13 U. MIAMI INT'L & COMP. L. REV. 367 (2006). For a description of the uneasy relationship between ADR and substantive law generally, see Main, *supra* note 22, at 366–72.

166. This would include only the basic conflict of laws cases and, even among those, only those filed in state court. With a reversal of the Court's holding in *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941) (requiring federal courts to apply state conflicts principles), the scope could include basic conflict of laws cases in federal and state courts.

167. For a discussion of the supposed evils of forum shopping, see AMOS SHAPIRA, THE INTEREST APPROACH TO CHOICE OF LAW WITH SPECIAL REFERENCE TO TORT PROBLEMS 45–46 (1970); Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333 (2006); Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evils of Forum-Shopping*, 80 CORNELL L. REV. 1507 (1995); James E. Pfander, *Forum Shopping and the Infrastructure of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 355 (2008). For cases invoking this theme, see *Neumeier v. Kuehner*, 286 N.E.2d 454, 458 (N.Y. 1972); *Chaplin v. Boys* [1969] 2 All E.R. 1085 (H.L.).

168. Presumably, the grounds for such a dismissal would be forum non conveniens. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947). *See generally* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 356–58 (1963) (discussing the invocation of forum non conveniens to avoid the application of unfamiliar foreign law). Many plaintiffs whose claims are dismissed on grounds of forum non conveniens never file another suit. *See* David W. Robertson, Forum Non Conveniens *in America and England: "A Rather Fantastic Fiction,"* 103 LAW Q. REV. 398, 418–20 (1987). "[O]nly an outright dismissal with prejudice could be more 'outcome determinative' than a [forum non conveniens] dismissal to a distant forum in a foreign land." In re Air Crash Disaster near New Orleans, La., 821 F.2d 1147, 1156 (5th Cir. 1987) (en banc), *vacated on other grounds sub nom.* Pan Am. World Airways, Inc. v. Lopez, 490 U.S. 1032 (1989). *See generally* Kevin M. Clermont, *The Story of* Piper, in CIVIL PROCEDURE STORIES 222–23 (2d ed. Foundation Press ed., 2008).

169. Robertson, *supra* note 168, at 409.

system's law, the courts would apply *all* of that other law—substance and procedure. This would prevent the sort of geographic mismatch that can result when a court combines the substantive law of some other state or country with its own procedural law.[170]

This approach has fewer doctrinal complications than the first,[171] but even greater practical obstacles. Applying foreign substantive and procedural law with limited judicial resources, partial comprehension, and the vagaries of translation could lead to extreme inefficiencies, delays, and errors.[172] There could be tremendous complexity in trying to distill another procedural system's requirements about commencing an action, service, joinder, pre-trial dispositions, interim remedies, the scope of discovery, experts, evidence, sanctions, burdens of production, and fee-shifting.[173] Imagine the task of replicating another system's modes of case assignment, court management, trial with specialized courts and judges, and so forth. Given the complexity, we would expect many courts to exercise their discretion to dismiss these cases on grounds of forum non conveniens.[174] And as already explained, such dismissals, in turn, could result in unfairness to plaintiffs who may be unable to file suit in the other forum.[175]

A more modest version of this second approach could find inspiration in the forms of action of the ancient Law courts. In a contemporary version

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170. And the approach would prevent chronologic mismatches, provided courts applied the procedural schemata that corresponds with the applicable substantive law.

171. Some "procedural" law from another system could exceed the judicial authority of the forum court. That aside, the principal doctrinal hurdle regards the authority over court procedures. While most state constitutions give that authority to the courts, some include a role for the legislative branch. *Compare* ARIZ. CONST. art. VI, § 5(5) ("The supreme court shall have . . . Power to make rules relative to all procedural matters in any court."), *with* VT. CONST., ch. II, § 37 ("The Supreme Court shall make and promulgate rules. . . . Any rule adopted by the Supreme Court may be revised by the General Assembly."). Authority over procedural rulemaking in federal court is likely an inherent judicial power under Article III of the U.S. Constitution, even though Congress has also purported to confer authority over procedural rulemaking to the courts. 28 U.S.C. § 2072 (2006); *see* Burbank, *supra* note 93, at 1452–53. If one were truly to pursue this line of reform, another issue to investigate would be whether a rule or statute directing the application of foreign procedural law would be an impermissible delegation. *See generally* Main, *supra* note 161, at 85–87. For a discussion of state sovereignty over procedure, see Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 976–83 (2001).

172. *See generally* RICHARD FENTIMAN, FOREIGN LAW IN ENGLISH COURTS: PLEADING, PROOF AND CHOICE OF LAW (1998) (discussing the difficulty of applying foreign law); Richard Fentiman, *Foreign Law and the* Forum Conveniens, *in* LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN 275–76 (James A.R. Nafziger & Symeon C. Symeonides eds., 2002) (discussing the difficulty of applying foreign law as a factor in identifying the forum conveniens).

173. Shapira, *supra* note 159, at 257.

174. *See supra* note 168 and accompanying text.

175. *Id.*

of the forms of action, legislation could integrate the substantive mandate with procedures tailored for that claim.[176] For example, when the Maine legislature drafts the FPA it could include within the statutory text a prescription for a heightened pleading standard, no class actions, limited and accelerated discovery, and any other "procedural" mandates. Other statutes would prescribe different tailored procedures. To avoid mismatches, courts would apply all of a statute without regard to the labels "substance" and "procedure."

To a limited extent, this sort of integrated law-making is already happening.[177] For example, many state statutes require plaintiffs asserting malpractice claims to submit, at a very early stage in the case, an admissible expert opinion to support the allegation of negligence.[178] Other statutes require certain plaintiffs to go through methods of ADR or to submit to review boards before filing suit.[179] Through legislation, the U.S. Congress has modified pleading standards and imposed exhaustion requirements for plaintiffs asserting certain types of claims.[180] And many legislatures have enacted statutes to override or restore certain procedures.[181] But most of these are examples of "statutory procedural

176. For example, when the Maine legislature drafted the FPA it could have included within the text a prescription for a heightened pleading standard, no class actions, limited and accelerated discovery, and other "procedural" mandates.

177. *See* Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2040 (1989) (detailing various efforts by states "to better mesh process and substance").

178. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2602 (2009); MINN. STAT. ANN. § 544.42 (West 2009); N.J. STAT. ANN. § 2A:53A-27 (West 2007); PA. R. CIV. P. 1042.3 (2008); TEX. CIV-PRAC & REM. CODE ANN. § 150.002 (Vernon Supp. 2008). *Compare* Chamberlain v. Giampapa, 210 F.3d 154, 156 (3d Cir. 2000) (applying New Jersey affidavit of merit statute), *with* Serocki v. Meritcare Health System, 312 F. Supp. 2d 1201, 1205–11 (2004) (refusing to apply North Dakota's expert affidavit statute).

179. *See, e.g.*, IDAHO CODE ANN. §§ 6-1001 (2006); LA. REV. STAT. ANN. § 40:1299.47 (2001 & Supp. 2007); WIS. STAT. ANN. §§ 655.42 (West 2004); Bledsoe v. Crowley, 849 F.2d 639 (D.C. Cir. 1988); Seoane v. Ortho Pharm., Inc., 660 F.2d 146 (5th Cir. 1981).

180. The Y2K Act, for example, imposed strict pleading requirements. 15 U.S.C. § 6607 (2006). The Prison Litigation Reform Act of 1995 imposed exhaustion requirements. Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended in scattered sections of 11, 18, and 28 U.S.C.). The Private Securities Litigation Reform Act of 1995 also contained a number of procedural components. Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.).

181. *See generally* JEB BARNES, OVERRULED? LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS (2004); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991). For two recent examples, see Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111-2, Jan. 29, 2009, 123 Stat. 5 (codified in scattered sections of 29 and 42 U.S.C.); Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009) (unenacted); *see also* Civil Rights Restoration Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.).

law"[182] that do not *integrate* substance and procedure. Contemporary forms of action would require statutes that integrate procedure within legislation establishing or acknowledging the substantive right of action. Maitland warned (promised?) that the forms of action would "rule us from their graves."[183]

However, neither contemporary forms of action, nor the most earnest effort to apply another jurisdiction's procedural law could fully resolve the mismatch problem. Indeed, the more accurate the basic contention of this Article—that substantive law incorporates parochial assumptions—the more complicated and incomplete this particular approach. After all, legislative drafting incorporates assumptions not only about formal, stated procedures, but also non-formal procedures,[184] and many other litigation realities—access (to courts and administrative agencies), cost (both the time and expense), the availability of legal representation (including legal aid, the contingency fee, and legal insurance), the quality of the decision-maker (the independence of the judiciary and elected judges), even the culture (social, political, and economic circumstances; history; language).[185] Undertaking to apply another's "procedural" law could never replicate the actual experience.

C. Normalize Procedure

The third conceptual possibility involves a different approach: procedure would be converted into a universal constant. If all procedural systems were identical, there would be no geographic mismatch when legislation drafted in one jurisdiction was enforced elsewhere—the embedded procedure would be a shared platform. Realizing these benefits would require a long horizon, however, as adoption of the universal approach would introduce widespread chronologic mismatches in the short term.

The obvious obstacle to this approach is that "procedural systems [may be] too different and too deeply embedded in local political history and

182. *See* Burbank, *supra* note 92, at 1699–03.

183. Maitland, *supra* note 123, at 296 ("The forms of action we have buried, but they still rule us from their graves.").

184. For discussion of the relationship between formal and non-formal procedure, see Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Parallel Procedural Universe*, 79 NOTRE DAME L. REV. 1981 (2004).

185. *See generally* OSCAR G. CHASE, LAW, CULTURE, AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT (2005); Andrew J. Cappel, *Bringing Cultural Practice into Law: Ritual and Social Norms Jurisprudence*, 43 SANTA CLARA L. REV. 389, 389–90 nn.1–2 (2003) (collecting scholarship).

cultural tradition" to expect anything resembling harmonization.[186] As stated above, differences in procedural law from country to country are "much greater" even than differences in substantive law.[187] That point deserves emphasis because it resonates with the themes presented here about the power of procedure.[188] Remarkably, societies may be more likely to consider abandoning their own substantive regimes of commercial law or intellectual property,[189] for example, than they would surrender their own procedure.[190]

That said, there is evidence of progressive procedural convergence.[191] Outside the United States we have seen some countries broaden discovery,[192] adopt class actions,[193] and more vigorously promote

186. Geoffrey C. Hazard, Jr., *From Whom No Secrets are Hid*, 76 TEX. L. REV. 1665, 1666–1669 (1998); *see also* Kevin Clermont, *Why Comparative Civil Procedure?*, *Foreword* to KUO-CHANG HUANG, INTRODUCING CIVIL DISCOVERY INTO CIVIL LAW, at ix, xvi (2003) ("Procedure is surprisingly culture-bound, reflecting the fundamental values, sensibilities, and beliefs of the society."); Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMP. L. 277, 278 (2002) ("[C]ourt procedures reflect the fundamental values, sensibilities and beliefs (the 'culture') of the collectivity that employs them."); Hein Kotz, *Civil Justice Systems in Europe and the United States*, 13 DUKE J. COMP. & INT'L L. 61, 71 (2003) ("[R]ules organizing constitutional, legislative, administrative, or judicial procedures are deeply rooted in a country's peculiar features of history, social structure, and political consensus . . . ."); Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 AM. J. COMP. L. 709, 710 (2005) ("[P]rocedure is peculiarly parochial. Procedural characteristics and development may be singularly tied to 'cultural' or governmental characteristics of a given nation . . . ."); Thomas D. Rowe, Jr., *Authorized Managerialism Under the Federal Rules—and the Extent of Convergence with Civil-Law Judging*, 36 SW. U. L. REV. 191, 211–12 (2007).

187. Lowenfeld, *supra* note 134, at 652.

188. *See supra* note 92 and accompanying text.

189. *See supra* note 149; *see also* World Trade Organization, Trade Related Aspects of Intellectual Property Rights Agreement, http://www.wto.org/english/tratop_e/TRIPS_e/TRIPS_e.htm (last visited December 1, 2008). TRIPS "has achieved impressive accomplishments in harmonizing and setting minimum rights around the world." Roberto Garza Barbosa, *International Copyright Law and Litigation: A Mechanism for Improvement*, 11 MARQ. INTELL. PROP. L. REV. 77, 79 (2007) (internal footnote omitted).

190. *See supra* notes 134 and 186. To be clear, there are Principles of Transnational Civil Procedure that are the product of an effort for a universal set of procedures. *See* ALI/UNIDROIT Principles of Transnational Civil Procedure, 4 UNIFORM L. REV. 758 (2004). To my knowledge, no nation has adopted them. Importantly, however, even if adopted, these principles and rules would apply only to *transnational* commercial disputes. For the significance of such a narrow focus, see *supra* note 149. Cornelis D. van Boeschoten, *Hague Conference Conventions and the United States: A European View*, 57:3 LAW & CONTEMP. PROBS. 47, 47 (1994) (explaining isolationist point of view).

191. *See* ALI/UNIDROIT PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE 3 (Cambridge 2006) (expressing confidence in harmonization of procedures regarding formulation of claims, development of evidence and decision procedure); Rowe, *supra* note 186, at 204–05; *see generally* CHASE, *supra* note 186; Scott Dodson, Book Review, *The Challenge of Comparative Civil Procedure*, 60 ALA. L. REV. 133 (2008) (reviewing OSCAR G. CHASE ET AL., CIVIL LITIGATION IN COMPARATIVE CONTEXT (West 2007)); Hazard, *supra* note 186, at 1666–68.

192. *See* Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TUL. J. INT'L & COMP. L. 153, 164–97 (1999); *see also* Peter F. Schlosser,

settlements.[194] Meanwhile, American procedure's evolution moves toward heightened pleading standards,[195] more limited discovery,[196] more judicial involvement,[197] and fewer jury trials[198]—evocative of traditional civil law systems. Indeed, differences between the civil law and common law systems are often caricatured and exaggerated.[199] Yet procedural exceptionalism generally, and American exceptionalism in particular, will surely endure.[200] Nevertheless, this conceptual possibility reminds us that the elimination of idiosyncratic and exceptional procedures can reduce the number and consequences of mismatches that can distort substantive law at the enforcement stage.[201]

Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems, 45 U. KAN. L. REV. 9, 17 (1996).

193. *See* WARD K. BRANCH, CLASS ACTIONS IN CANADA (1996); Samuel P. Baumgartner, *Class Actions and Group Litigation in Switzerland*, 27 NW. J. INT'L L. & BUS. 301 (2007); S. Stuart Clark & Christina Harris, *Multi-Plaintiff Litigation in Australia: A Comparative Perspective*, 11 DUKE J. COMP. & INT'L L. 289 (2001); Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311 (2003); Thomas D. Rowe, Jr., *Debates Over Group Litigation in Comparative Perspective: What Can We Learn from Each Other?*, 11 DUKE J. COMP. & INT'L L. 157 (2001); Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401, 402–03 (2002); Linda Silberman, *The Vicissitudes of the American Class Action—With a Comparative Eye*, 7 TUL. J. INT'L & COMP. L. 201 (1999); Michele Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, 11 DUKE J. COMP. & INT'L L. 405, 411–14 (2001).

194. *See* Marcus, *supra* note 186, at 729–31; Rowe, *supra* note 186, at 209–10.

195. *See* Dodson, *supra* note 191, at 144–45; Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1021–59 (2003).

196. *See* Marcus, *supra* note 192, at 164–97; Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 301 (2002).

197. *See* Alfred W. Cortese, Jr. & Kathleen L. Blaner, *Civil Justice Reform in America: A Question of Parity With Our International Rivals*, 13 U. PA. J. INT'L BUS. L. 1, 20 (1992); Dodson, *supra* note 191, at 148–50; Linda S. Mullenix, *Lessons from Abroad: Complexity and Convergence*, 46 VILL. L. REV. 1, 13 (2001) ("[P]articularly in the realm of complex litigation, the American managerial judge has undertaken roles that are indeed converging with the civil law inquisitorial judge."); Rowe, *supra* note 186, at 195–96; Tidmarsh, *supra* note 103, at 568–69; *see generally* Resnik, *supra* note 106.

198. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 506–15 (2004) (indicating a drop in civil jury trials from 1.8 percent to 0.6 percent of all case dispositions between 1976 and 2002); Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMPIRICAL LEGAL STUD. 755 (2004).

199. *See* Marcus, *supra* note 186, at 712 (suggesting that the "effigies" of the common law and civil law systems "have always been overdrawn"); Edward F. Sherman, *Transnational Perspectives Regarding the Federal Rules of Civil Procedure*, 56 J. LEGAL EDUC. 510 (2006) (describing an evolution of convergence); *see generally* HERBERT JACOB ET AL., COURTS, LAW & POLITICS IN COMPARATIVE PERSPECTIVE 3–6 (1996); Louis F. Del Duca, *Developing Global Transnational Harmonization Procedures for the Twenty-First Century: The Accelerating Pace of Common and Civil Law Convergence*, 42 TEX. INT'L L.J. 625 (2007).

200. *See generally* Chase, *supra* note 186.

201. For an argument in favor of procedural conformity between federal and state courts, see Main, *supra* note 171 and accompanying text.

D. A Hybrid Solution

None of the three conceptual possibilities is immediately practicable nor even, as it turns out, a complete solution to the mismatch problem. The only realistic solution may be some combination of the three. And to that end, I offer three overlapping suggestions.

First, we should express much greater humility and skepticism about our ability to apply another jurisdiction's substantive law. Substantive law has an embedded procedure that informed its construction. To unhinge that substantive law from its associated procedure risks mismatch.

To be sure, one person's humility and skepticism will be another's "chauvinism"[202] or "provincialism"[203] when thoughtful restraint leads to the application of forum law rather than foreign law.[204] The suggestion here is only that when exercising the broad discretion to apply domestic or instead some other law,[205] judges should consider whether the foreign law could be faithfully applied.[206] The greater the number of differences between the foreign and forum systems, the less confidence courts should have about their ability to apply another's law with fidelity to its mandate.

Second, in circumstances where the application of foreign law is appropriate and necessary, we should incorporate as much of that law as reasonably possible, regardless of whether that law is "substantive" or "procedural." We must be mindful that our doctrines have misunderstood the nature of a substantive right. The rights created or responsibilities

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202. Hans Wolfgang Baade, *Foreword* to Symposium, *New Trends in the Conflict of Laws*, 28 LAW & CONTEMP. PROBS. 673, 677 (1963).

203. Robert D. Childres, *Toward the Proper Law of the Tort*, 40 TEX. L. REV. 336, 338 (1962).

204. "Foreign" refers only to law that is not a product of the court's jurisdiction. Thus "foreign" law could be federal law in a state court, state law in a federal court, any law in an ADR proceeding, and so forth.

205. *See generally* Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1844–51 (2006) (describing wide discretion of the court under the "most significant relationship" standard used in the Restatement (Second) of Conflict of Laws).

Of course in many instances of mismatch there is no discretionary choice, whether because there is no forum law (as in ADR) or because the foreign law must be applied (as when state cases are in federal court in diversity, under *Erie*). *See supra* notes 163–65 and accompanying text.

206. The *Restatement (Second) of Conflict of Laws* includes as one of the general factors relevant to the choice of the applicable rule of law the "ease in the determination and application of the law to be applied." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(g) (1971). Fidelity to the full substantive mandate is not a primary concern of the Restatement, however. *See id.* § 6 cmt. j.

> Ease in the determination and application of the law to be applied. Ideally, choice-of-law rules should be simple and easy to apply. This policy should not be overemphasized, since it is obviously of greater importance that choice-of-law rules lead to desirable results. The policy does, however, provide a goal for which to strive.

Id.

assigned by substantive law must be enforced in the context of their affiliated procedures. Procedures that can easily be replicated should enjoy a presumption of applicability if a court is timely informed of their existence. That presumption could be rebutted in situations where the procedure is trivial or could not influence the substantive mandate.

Importantly, this suggestion would change the rhetoric of cases more than the results of cases. After all, much of the clutter in the substance-procedure doctrines is caused by intuition to classify things that matter as substantive, and things that do not as procedural.[207] Even under current doctrine, procedures can be enforced when they are "bound up" with a state-created right.[208] Similarly, when a state "has taken a rule of practice and substantially intertwined that rule with the basic right of recovery," it will be applied.[209] Procedures are recognized in this jurisprudence provided they are considered a *condition* of the substantive right.[210] And creativity is welcome, even encouraged.[211] My point here is simply that, in many U.S. courts the doctrine is—or at least very nearly is—in place to

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207. *See generally* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 59 (5th ed. 2006) ("If . . . the foreign rule in issue is not especially difficult to find and apply and if there is any probability that the rule may affect the outcome, the rule should be considered as 'substantive' . . . ."); 3 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 1600 (1935).

> If the practical convenience to the court in adopting the local rule of law is great, and the effect of so doing upon the rights of the parties is negligible, the law of the forum will be held to be controlling. If the situation is reversed the rule of the foreign law will be adopted.

Id. The RESTATEMENT (SECOND) OF CONFLICT OF LAWS does not even "attempt to classify issues as 'procedural' or 'substantive'. Instead [the rules] face directly the question whether the forum's rule should be applied." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122, cmt. b (1971).

208. *See* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 535 (1958) (citing Cities Servs. Oil Co. v. Dunlap, 308 U.S. 208 (1939)), *overruled on other grounds*, Hanna v. Plumer, 380 U.S. 525 (1958); *see, e.g.*, Hines v. Elkhart Gen. Hosp., 603 F.2d 646, 648 (7th Cir. 1979) (explaining that state's requirement that "submission of a claim to the medical review panel for its opinion prior to the institution of a judicial action is an integral part of the rights and obligations established by the Act").

209. Prashar v. Volkswagen of America, Inc., 480 F.2d 947, 953–54 n.14 (8th Cir. 1973).

210. In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 544–45 (1949), a state statute required any plaintiff filing a derivative suit to post an indemnity bond. The Court held, "[w]e do not think a statute which so *conditions* the stockholder's action can be disregarded by the federal court as a mere procedural device." *Id.* at 556 (emphasis added).

211. *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996) (recognizing a state statute that called on appellate and trial courts to strike damage awards that materially deviated from what would be reasonable compensation); Walker v. Armco Steel Corp., 446 U.S. 740, 750–52 (1980) (disregarding FED. R. CIV. P. 3 because there was no indication that that Rule was intended for the situation presented); *see also* FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE § 2.37 at 172–73 (5th ed. 2001) ("[A]pplying *Erie* remains an exercise of judgment rather than the application of mechanical tests, calling for the comparison and in appropriate cases the accommodation of state and federal policies.").

facilitate the application of procedure that either accompanies or informs a substantive mandate.[212]

The third suggestion charts a different track. With regard to efforts to harmonize or approximate procedural systems, I would contribute an additional value to be considered in those discussions. Typically these efforts are championed with promises of efficiency, simplicity, and uniformity.[213] But the thrust of this Article suggests that such efforts are not only about procedure *qua* procedure, but are also about the integrity of substantive law. From a long-term perspective, harmonization efforts would help courts avoid geographic mismatches because substantive law would be constructed upon a shared procedural platform. From a short-term perspective, however, harmonization efforts would, if applied retroactively, introduce chronologic mismatches because they would displace procedures embedded in vintage substantive law in favor of new procedures. This consideration should be included in the contemporary discourse about the merits and demerits of procedural harmonization and model laws.

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212. To be sure there could be a problem under current doctrine when, in a diversity case, there is a direct and unavoidable conflict between a protocol and a Federal Rule of Civil Procedure. When there is a direct and unavoidable conflict with a Federal Rule of Civil Procedure, the Federal Rule ordinarily trumps. *See* Hanna v. Plumer, 380 U.S. 460, 473–74 (1965); *see generally* John C. McCoid, Hanna v. Plumer: *The* Erie *Doctrine Changes Shape*, 51 VA. L. REV. 884 (1965). However, direct and unavoidable conflicts can often be explained away with creativity. *See supra* note 211. Further, courts have been instructed to balance the policies behind a state statute against the policies that inhere in the Federal Rule. *See Byrd*, 356 U.S. at 536–39; *see also* Steinman, *supra* note 140, at 267–68 (discussing viability of "Byrd-balancing"). And "Gasperini indicates that, even after Hanna, state law with procedural aspects will sometimes prevail in federal court." FLEMING ET AL., *supra* note 211, at 172; *see Gasperini*, 518 U.S. 415. Further still, a protocol would present a much stronger case for enforcement because the protocol would be part of the legislation establishing or acknowledging a particular state substantive right rather than a stand-alone or generally-applicable state statute. In *Gasperini*, for example, the state statute applied by the Court was a stand-alone "tort reform" statute of a rather generalized applicability. 518 U.S. at 418.

Every application of the reverse- or inverse-*Erie* doctrine reflects this basic methodology. The Supreme Court has held, for example, that a strict pleading standard in state court "cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws." Brown v. Western Railway of Ala., 338 U.S. 294, 298 (1949); *see generally* Kevin M. Clermont, *Reverse*-Erie, 82 NOTRE DAME L. REV. 1 (2006); Steinman, *supra* note 140, at 294.

213. *See, e.g.*, ALI/UNIDROIT, *supra* note 191, at 11 (adoption of model rules would "reduce . . . uncertainty"). This argument includes (and actually began with) efforts to harmonize substantive law. *See generally* Bruce H. Kobayashi & Larry E. Ribstein, *Uniformity, Choice of Law and Software Sales*, 8 GEO. MASON L. REV. 261 (1999); Perry E. Wallace, *The Globalization of Corporate Governance: Shareholder Protection, Hostile Takeovers and the Evolving Corporate Environment in France*, 18 CONN. J. INT'L L. 1, 32 (2002).

CONCLUSION

Although we have known that procedure is inherently substantive, we should now also appreciate that substance is inherently procedural. The construction of substantive law entails assumptions about the procedures that will apply when that substantive law is ultimately enforced. Those procedures are embedded in the substantive law and, if not applied, can lead to over- or under-enforcement of the substantive mandate.

Understanding that procedure is substantive, and that substance is procedural debunks two myths: first, that there is a substance-procedure dichotomy, and second, that procedure is the inferior partner. A substance-procedure antinomy that was introduced for teaching purposes was impulsively codified as a rigid substance-procedure dichotomy. Doctrines founded upon this false dichotomy are flawed and vulnerable.

TAB 4

[Proposed] CRIMINAL RULES OF PRACTICE of the DISTRICT COURT OF THE STATE OF NEVADA

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Blue = CRIMINAL RULES OF PRACTICE FOR THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

Green = Part III, "Criminal Practice," of the RULES OF PRACTICE FOR THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

Purple = RULES OF PRACTICE FOR THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

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Notes:

Under the prevailing scheme of court rules, the Rules of the District Courts of the State of Nevada (D.C.R.) "cover the practice and procedure in all actions in the district courts of *all districts where no local rule covering the same subject has been approved* by the supreme court. Local rules which are approved for a particular judicial district shall be applied in each instance whether they are the same as or inconsistent with these rules." D.C.R. 5. The D.C.R. address subjects such as the form of papers to be filed (D.C.R. 12), motions generally (D.C.R. 13, 15), motions for continuance (D.C.R. 14), and stipulations (D.C.R. 16).

The Second Judicial District has adopted the Rules of Practice for the Second Judicial District Court of the State of Nevada (WDFCR) and the Criminal Rules Of Practice For The Second Judicial District Court Of The State Of Nevada (L.C.R.). The WDFCR do not apply to "[c]riminal matters, except as otherwise expressly stated." WDFCR 1(2)(c). These Rules do contain a number of express provisions that apply to criminal matters. The L.C.R. "govern all criminal actions in the Second Judicial District Court of the State of Nevada." L.C.R. 1.

The Eighth Judicial District has adopted the Rules of Practice for the Eighth Judicial District Court of the State of Nevada (EDCR). These Rules "govern the procedure and administration of the Eighth Judicial District Court and all actions or proceedings cognizable therein." In terms of criminal practice, EDCR 1.10. Part I, "Organization of the Court and Administration," includes provisions for a criminal presiding judge (EDCR 1.31, "Presiding judge – family/civil/criminal divisions"), criminal division masters (EDCR 1.48), the assignment of criminal cases (EDCR 1.64), and the calendaring of criminal trial (EDCR 1.74). Part III, which includes Rules 3.01 through 3.80, specifically addresses criminal practice. Part VII, "General Provisions," is "applicable to all actions and proceedings commenced in the Eighth Judicial District Court" "[u]nless otherwise stated," EDCR 7.01, and addresses matters such as the form of papers for filing (EDCR 7.20), the service of order and other papers (EDCR 7.26), the custody of exhibits and records (EDCR 7.28), motions for trial continuances (EDCR 7.30), sanctions (EDCR 7.60), and voir dire examination (EDCR 7.70).

Taking the Second Judicial District as an example, there are three sets of rules that could potentially apply to a given situation in a criminal case – the D.C.R., the WDCR, and the L.C.R. The D.C.R. could apply if there is "no local rule covering the same subject" in the WDCR or L.C.R. The WDCR, which only applies to criminal matters if "expressly stated," does contain a number of provisions that expressly apply to criminal cases and therefore would preempt any corresponding provision of the D.C.R. The L.C.R. apply exclusively to criminal matters, but there is overlap with the WDCR, albeit incomplete, in the coverage of certain areas – jury instructions and continuances, for example. A careful practitioner in Washoe County would want to work from the L.C.R. to the WDCR to the D.C.R. to find and ensure compliance with any potentially applicable rule. The *Statewide Rules of Criminal Procedure: A 50 State Review* article criticized this type of overlap for the ambiguities and associated problems it creates for practitioners:

> Eight of the Nevada's eleven judicial districts have their own local procedural rules that either directly, or "if applicable" apply to criminal matters. The Second judicial district is the only district with separate criminal procedure rules. The ambiguity within local district rules creates even more problems for practitioners as it is not clear what civil/general local rules apply to criminal proceedings.[1]

It is suggested that it would be most useful to consolidate *all* district court rules that address procedures in criminal matters in a single set of rules, that any provisions touching upon criminal matters be eliminated from other sets of rules such as the D.C.R., the WDCR, and the EDCR, and that the scope of the other sets of rules, such the D.C.R. and EDCR, be expressly limited to civil matters or, in the alternative, that they expressly exclude criminal matters from their scope. Both practitioner and judge alike would then know that, as far as district court procedural rules are concerned, there is only one source to be consulted.

[1] *Statewide Rules* at p.4.

Rule 1. Scope, purpose and construction

8th Rule 3.01. Scope of rules.
The rules in Part III govern the practice and procedure in all criminal proceedings except in juvenile cases expressly provided for in Title 5 of NRS.

2nd CR Rule 1. Scope, purpose and construction.
These rules govern all criminal actions in the Second Judicial District Court of the State of Nevada. They are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. They shall be cited as "L.C.R." For good cause shown and when the interest of justice requires, the district court may modify these rules by court order, either pursuant to the motion of a party or sua sponte, to fit the facts and circumstances of a particular case pending before the court.

Comment: The purpose of these criminal rules is to provide uniformity in practice among the various judicial departments, however, each individual judge (should) retain discretion over how cases ultimately proceed in their courtroom. This rule strikes a balance between uniformity and judicial discretion. These rules do not apply to juvenile proceedings, post-conviction proceedings or habeas corpus actions. The statement of the purpose and construction of the rules parallels Rule 2 of the Federal Rules of Criminal Procedure.

Rule 2. Case assignment.

8th Rule 3.10. Consolidation and reassignment.

(a) When an indictment or information is filed against a defendant who has other criminal cases pending in the court, the new case may be assigned directly to the department wherein a case against that defendant is already pending.

(b) Unless objected to by one of the judges concerned, criminal cases, writs or motions may be consolidated or reassigned to any criminal department for trial, settlement or other resolution.

(c) In the event of negotiations being reached as to multiple cases having the same defendant, defense counsel and the prosecution may stipulate to having all of the involved cases assigned to the department having the oldest case with the lowest case number, and the court clerk shall then so reassign the involved cases. If the negotiations later break down, then the court clerk will again reassign the involved cases back to their respective department(s) of origin. The objection provision of subparagraph (b) hereinabove does not pertain to this present subparagraph (c).

2nd CR Rule 2. Case assignment.

Each criminal action shall be randomly assigned to a department of the court and shall remain in such department until final disposition of the action, unless:

(a) the action is brought against a defendant who is the subject of another pending or prior action in this court, in which case the action shall be assigned to the department of the most recent other action; or

(b) as otherwise ordered by the chief judge consistent with a plan of courtwide case management.

Comment: To the extent possible, cases involving a defendant who is the subject of another case in this district shall be assigned to the department of the other case. Otherwise, cases shall be randomly assigned.

2nd LR Rule 2. Organization of the court; chief judge; court administrator.

1. All civil and criminal cases shall be randomly assigned.
2. The district judges shall elect from among the general jurisdiction division and family court division judges a chief judge for a term of 2 years. The chief judge is the presiding judge as referred to in NRS 3.025 and the chief judge referred to in Supreme Court Rule 8.

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Rule 3 Appearance and Withdrawal of Attorneys

Rule 7.40. Appearances; substitutions; withdrawal or change of attorney.

(a) When a party has appeared by counsel, the party cannot thereafter appear on the party's own behalf in the case without the consent of the court. Counsel who has appeared for any party must represent that party in the case and shall be recognized by the court and by all parties as having control of the case. The court in its discretion may hear a party in open court although the party is represented by counsel.

(b) Counsel in any case may be changed only:

(1) When a new attorney is to be substituted in place of the attorney withdrawing, by the written consent of both attorneys and the client, which must be filed with the court and served upon all parties or their attorneys who have appeared in the action, or

(2) When no attorney has been retained to replace the attorney withdrawing, by order of the court, granted upon written motion, and

(i) If the application is made by the attorney, the attorney must include in an affidavit the address, or last known address, at which the client may be served with notice of further proceedings taken in the case in the event the application for withdrawal is granted, and the telephone number, or last known telephone number, at which the client may be reached and the attorney must serve a copy of the application upon the client and all other parties to the action or their attorneys, or

(ii) If the application is made by the client, the client must state in the application the address at which the client may be served with notice of all further proceedings in the case in the event the application is granted, and the telephone number, or last known telephone number, at which the client may be reached and must serve a copy of the application upon the client's attorney and all other parties to the action or their attorneys.

(c) No application for withdrawal or substitution may be granted if a delay of the trial or of the hearing of any other matter in the case would result.

Rule 7.42. Appearances in proper person; entry of appearance.

(a) Unless appearing by an attorney regularly admitted to practice law in Nevada and in good standing, no entry of appearance or pleading purporting to be signed by any party to an action may be recognized or given any force or effect by any district court unless the same is signed by the party, with the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit.

(b) A corporation may not appear in proper person.

Rule 7.44. Presence of local counsel required.

(a) Unless otherwise allowed by the court, no attorney who is not a resident of Nevada and has not been admitted to the State Bar of Nevada may appear as counsel in

any cause pending in this district without the presence of associated Nevada counsel.

(b) If foreign counsel is associated, all pleadings, motions and other papers must be signed by Nevada counsel, who shall be responsible to the court for their content. Nevada counsel must be present during oral arguments and must be responsible to the court for all matters presented.

2nd LR Rule 3. Criminal trials; appearance and withdrawal of attorneys.

1. Judges shall set all criminal trials in accordance with their own individual calendars. Such cases shall be randomly assigned to each department, and shall stay with that department through final disposition, unless the case is reassigned by that judge with the concurrence of the court to which it is reassigned. All related cases on the same defendant shall be assigned to the same judge. This random assignment system shall also apply to all criminal appeals, material witnesses and all other miscellaneous criminal matters.
2. If more criminal trials are scheduled on any day than an individual judge can handle that judge shall find another department willing to take the overflow. If the calendar overflow problem cannot be resolved by the individual judge the matter shall be referred to the chief judge who shall assign the overflow trials to other judges as necessary.
3. Criminal arraignments shall be set by the individual judges. If a judge is conducting a criminal jury trial, criminal arraignments, motions, and other criminal matters which are also assigned to that department may be referred by that judge to a department which does not have a trial.
4. Criminal arraignments, motions, pleas, sentencing hearings, and other proceedings, shall be heard by each court department in accordance with their own individual calendars at a time and date specified by each department.
5. Except as may be otherwise ordered by the judge in writing all motions for probation revocation shall be set to be heard by the court as soon as possible and no later than 10 days after the incarceration of the defendant.
6. Attorneys representing defendants in criminal cases shall promptly serve written notice of their appearances upon the district attorney, and file the same with the filing office. When desiring to withdraw from a case, attorneys shall serve a motion upon the district attorney and their client, file the same with the filing office, and set the motion for hearing.
7. Effective January 2, 1992, any status conference and/or "Motions to Confirm" shall be held 1 week prior to the trial date. This will provide at least 5 days' notice of the status of a pending trial to all parties and the jury office. Prior to January 2, 1992, any such status conferences shall be held at least 3 days prior to trial.

Rule 23. Appearances; substitutions; withdrawal or change of attorneys.

1. When a party has appeared by counsel, that individual cannot thereafter appear on his/her own behalf in the case without the consent of the court. Counsel who has appeared for any party shall represent that party in the case and shall be

recognized by the court and by all parties as having control of the client's case, until counsel withdraws, another attorney is substituted, or until counsel is discharged by the client in writing, filed with the filing office, in accordance with SCR 46 and this rule. The court in its discretion may hear a party in open court although the party is represented by counsel.

2. Counsel in any case may be changed:

   (a) When a new attorney is to be substituted in place of the attorney withdrawing, by the written consent of both attorneys and the client, all of which shall be filed with the court and served upon all parties or their attorneys who have appeared in the action; or

   (b) By order of the court, upon motion and notice as provided in these rules, when no attorney has been retained to replace the attorney withdrawing;

      (1) If such motion is made by the attorney, counsel shall include in an affidavit the address, or last known address, at which the client may be served with notice of further proceedings taken in the case in the event the application for withdrawal is granted, and counsel shall serve a copy of such motion and supporting papers upon the client and all other parties to the action or their attorneys; or

      (2) If such motion is made by the client, the client shall state therein the address at which the client may be served with notice of all further proceedings in the case in the event the application is granted, and shall serve a copy of the application upon the attorney and all other parties to the action or their attorneys.

3. Any form of order permitting withdrawal of an attorney submitted to the court for signature shall contain the address at which the party is to be served with notice of all further proceedings.

4. Except for good cause shown, no application for withdrawal or substitution shall be granted if a delay of the trial or of the hearing of any other matter in the case would result. Discharge of an attorney may not be grounds to delay a trial or other hearing.

5. A corporation may not appear in proper person.

Rule 4. Initial appearance and arraignment.

2nd CR Rule 3. Initial appearance and arraignment.

(a) At the initial appearance of the defendant before the district court, the court shall:

(1) supply the defendant a copy of the indictment or information unless the charging document has previously been made available to the defendant through e-filing;

(2) if necessary, determine whether the defendant qualifies for appointed counsel and, if so, appoint counsel to represent the defendant. In such event, newly appointed counsel shall be given an extension of time of at least 5 days before entry of plea;

(3) arraign the defendant upon all charges in the indictment or information;

(4) subject to the conditions set forth in NRS 178.4853,[2] determine appropriate conditions for the defendant's release from custody or that detention is warranted;

(5) if the defendant enters a plea of not guilty, set the dates for trial, pretrial motions, evidentiary hearings or status conferences;

(6) specify any discovery obligations of the parties beyond those contained in Chapter 174 of the Nevada Revised Statutes.

(b) If the defendant enters a plea of guilty or nolo contendere, the court may transfer the action to the Second Judicial District Court (Washoe County) Specialty Courts, if appropriate, or order a presentence report and set a sentencing date consistent with the jail population management policies of the court and L.C.R. 9.[3]

(c) Subject to the provisions of NRS 176.135,[4] a presentence report may be waived and sentence imposed at the entry of a plea of guilty or nolo contendere.

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[2] **NRS 178.4853 Factors considered before release without bail.** In deciding whether there is good cause to release a person without bail, the court at a minimum shall consider the following factors concerning the person:

1. The length of residence in the community;
2. The status and history of employment;
3. Relationships with the person's spouse and children, parents or other family members and with close friends;
4. Reputation, character and mental condition;
5. Prior criminal record, including, without limitation, any record of appearing or failing to appear after release on bail or without bail;
6. The identity of responsible members of the community who would vouch for the reliability of the person;
7. The nature of the offense with which the person is charged, the apparent probability of conviction and the likely sentence, insofar as these factors relate to the risk of not appearing;
8. The nature and seriousness of the danger to the alleged victim, any other person or the community that would be posed by the person's release;
9. The likelihood of more criminal activity by the person after release; and
10. Any other factors concerning the person's ties to the community or bearing on the risk that the person may willfully fail to appear.

[3] L.C.R. 9 addresses sentencing.

[4] **NRS 176.135 Presentence investigation and report: When required; time for completing.**

1. Except as otherwise provided in this section and NRS 176.151, the Division shall make a presentence investigation and report to the court on each defendant who pleads guilty, guilty but mentally ill or nolo contendere to, or is found guilty or guilty but mentally ill of, a felony.
2. If a defendant is convicted of a felony that is a sexual offense, the presentence investigation and report:

(a) Must be made before the imposition of sentence or the granting of probation; and

Comment: The initial appearance is the occasion for the court and counsel to establish a meaningful schedule for the trial and all pretrial activity appropriate to each case. Except in unforeseen, extraordinary circumstances, the schedule will not be subsequently modified. Status conferences are conducted to monitor the progress of a case. Persons who enter a plea of guilty or nolo contendere and qualify for treatment in the Second Judicial District Drug Court may, if the department deems the defendant to be an appropriate referral, be immediately referred to such court without further proceedings in the department in which the criminal action is commenced.

(b) If the sexual offense is an offense for which the suspension of sentence or the granting of probation is permitted, must include a psychosexual evaluation of the defendant.

3. If a defendant is convicted of a felony other than a sexual offense, the presentence investigation and report must be made before the imposition of sentence or the granting of probation unless:

(a) A sentence is fixed by a jury; or

(b) Such an investigation and report on the defendant has been made by the Division within the 5 years immediately preceding the date initially set for sentencing on the most recent offense.

4. Upon request of the court, the Division shall make presentence investigations and reports on defendants who plead guilty, guilty but mentally ill or nolo contendere to, or are found guilty or guilty but mentally ill of, gross misdemeanors.

Rule 4.1 Setting of cases.

2nd LR Rule 4. Setting of cases.

1. All matters shall be set in the Office of the Administrative Assistants in the department where the case is filed. The office shall be open for that purpose from 9:00 a.m. to 12:00 noon, Tuesday through Thursday. All other calendaring shall be done by appointment. If any department wishes to deviate from this procedure it shall be responsible for setting its own calendar in a manner and at a time specified. The times and procedures for such calendaring shall be advertised by each department.
2. If any case may not be heard because of another case or the unavailability of the judge, it shall be the primary responsibility of that judge or the administrative assistant to arrange a transfer to another department with the agreement of the new department. In the event that the department cannot successfully transfer the case the matter shall be referred to the chief judge for resolution.
3. In every civil case, within 30 days after the last answer is filed, the parties must obtain a date for trial unless the judge waives this requirement for good cause shown. If the parties fail to obtain a trial date, the court may set the case for trial at its discretion.
4. All cases shall be set for trial within 12 months of the date that the setting occurs, unless ordered otherwise by the trial court.
5. Contested matters shall be set by each court department on dates agreeable to counsel. A 10-day notice to appear and set a time for trial may be given by any party upon certification that the case is at issue. At the time fixed in the notice, with showing of service upon all parties, a court department shall set the case for trial at a time certain. If fewer than all parties appear before a court department on an application for setting, and file with the court department a conformed copy of written notice to appear for setting at that hour and day, a court department shall set the matter to be heard on a date satisfactory to the counsel present. Time shall be computed as provided in N.R.C.P. 6. An individual court department may dispense with these procedures if necessary. Cases can be set via telephone conference or any other convenient method.
6. If the parties cannot agree on a trial date, a court department shall set the case for trial on the first available date in accordance with the judge's individual calendar.
7. All disputes concerning calendar settings shall be resolved by each court department in accordance with procedures established by that department.
8. Matters set in each department shall be heard in the order set unless otherwise ordered by the trial judge. Matters which cannot be heard in the department in which set because of a conflict with a prior matter, shall be assigned to another department, if one is available, by the affected department, to be heard at the same time as originally set. If a matter cannot be heard at the time originally set because of conflicts in all other departments, the matter shall be continued by order of the affected department. Thereafter, such matters shall be entitled to priority for resetting in accordance with the judge's individual calendar. Each court department shall determine the maximum allowed time that a matter can be set out on the calendar, subject to the 12-month setting rule.

9. All applications for setting shall be made on a printed form designated "Application for Setting," copies of which shall be available at each court department, unless this requirement is waived by the department. It shall be the responsibility of the applicant to produce for the court department one original and the necessary copies of the "Application for Setting" form on which the court department shall endorse the date and time of such setting. The applicant shall file the original and serve a copy upon counsel for each other party.
10. If there are multiple settings, each court department shall endorse on the application the priority of the case in numerical order.
11. Once set, a case may be removed from the calendar only with the consent of the trial judge or the chief judge, if the trial judge is unavailable.
12. When a trial judge or the chief judge signs an order in chambers setting forth a calendar date, a copy of said order shall be delivered by counsel to the individual responsible for calendaring cases in each court department, together with any "Application for Setting" form.
13. Effective January 2, 1992, the judge who determines that a certain criminal defendant is incompetent shall be responsible for impanelling the Sanity Commission.
14. Effective January 2, 1992, the District Attorney's Office shall be responsible for contacting each court department in succession to find someone willing to schedule the Grand Jury hearings.
15. Any questions arising under this Rule 4 which cannot be resolved by the individual court department shall be referred to the chief judge for decision.
16. Each district judge shall be willing and prepared to take overflow work from another department as each judge's calendar permits.

Rule 5. Pleas of guilty or nolo contendere.

2nd CR Rule 4. Pleas of guilty or nolo contendere.

(a) All pleas of guilty or nolo contendere entered pursuant to a plea bargain agreement shall be supported by a written plea memorandum, filed in open court at the entry of the plea, stating:

(1) the terms of the plea bargain agreement;

(2) the factual basis for the plea and an acknowledgment by counsel that the defendant has been advised of the discovery produced and the evidence the State intends to present at trial;

(3) the constitutional rights waived by the defendant;

(4) the maximum possible punishment for any charge which is the subject of the plea bargain agreement;

(5) whether probation is available and whether multiple or enhanced sentences can be concurrent or consecutive;

(6) the defendant's acknowledgment that the court is not bound by the plea bargain agreement; and

(7) the defendant's knowledge of and voluntary consent to the terms of the plea bargain agreement and the contents of the memorandum.

(b) The guilty or nolo contendere plea memorandum shall be signed by the defendant and counsel for all parties to the agreement.

Comment: The plea bargain memorandum is integral to the entry of a guilty or nolo contendere plea and must be completed, signed and filed when the plea is entered.

Rule 6. Release and detention pending judicial proceedings.

8th Rule 3.80. Release from custody; bail reduction.

(a) When an individual is arrested on probable cause or on an arrest warrant, any district judge may, on an emergency basis only, unilaterally, without contact with a prosecutor, grant a release upon the individual's own recognizance pursuant to NRS 178.4851[5] and 178.4853[6] or reduce the amount of bail below the standard bail, provided that the arrest is for a misdemeanor, gross misdemeanor, non-violent felony, or some combination thereof. Before the court may grant an own recognizance release or bail reduction, the court must be satisfied that the individual arrested will likely appear in court at the next scheduled appearance date and does not present a threat in the interim if released. Once the individual arrested makes an initial court appearance, all issues regarding custodial status shall be addressed by the judge assigned the case or any other judge specifically designated or authorized by the assigned judge. A judge designated or authorized by the assigned judge, or by court rule, may release an individual from a bench warrant for a misdemeanor, gross misdemeanor or non-violent felony, or some combination thereof.

(b) When an individual is arrested on probable cause for a violent felony offense or on a bench warrant for a violent felony offense issued by the district court, Justice Court, or municipal court, a district judge shall not grant an own recognizance

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[5] **NRS 178.4853 Factors considered before release without bail.** In deciding whether there is good cause to release a person without bail, the court at a minimum shall consider the following factors concerning the person:

1. The length of residence in the community;
2. The status and history of employment;
3. Relationships with the person's spouse and children, parents or other family members and with close friends;
4. Reputation, character and mental condition;
5. Prior criminal record, including, without limitation, any record of appearing or failing to appear after release on bail or without bail;
6. The identity of responsible members of the community who would vouch for the reliability of the person;
7. The nature of the offense with which the person is charged, the apparent probability of conviction and the likely sentence, insofar as these factors relate to the risk of not appearing;
8. The nature and seriousness of the danger to the alleged victim, any other person or the community that would be posed by the person's release;
9. The likelihood of more criminal activity by the person after release; and
10. Any other factors concerning the person's ties to the community or bearing on the risk that the person may willfully fail to appear.

[6] **NRS 178.4853 Factors considered before release without bail.** In deciding whether there is good cause to release a person without bail, the court at a minimum shall consider the following factors concerning the person:

1. The length of residence in the community;
2. The status and history of employment;
3. Relationships with the person's spouse and children, parents or other family members and with close friends;
4. Reputation, character and mental condition;
5. Prior criminal record, including, without limitation, any record of appearing or failing to appear after release on bail or without bail;
6. The identity of responsible members of the community who would vouch for the reliability of the person;
7. The nature of the offense with which the person is charged, the apparent probability of conviction and the likely sentence, insofar as these factors relate to the risk of not appearing;
8. The nature and seriousness of the danger to the alleged victim, any other person or the community that would be posed by the person's release;
9. The likelihood of more criminal activity by the person after release; and
10. Any other factors concerning the person's ties to the community or bearing on the risk that the person may willfully fail to appear.

release or reduce the amount of bail established unless the judge provides an opportunity pursuant to NRS 178.486[7] for the prosecution to take a position thereon by telephone or in person, either in chambers or in open court. A district court judge may unilaterally increase bail for an individual arrested for a violent felony if the court is satisfied that the individual arrested will not likely appear in court at the next scheduled appearance date or presents a threat to the community in the interim if released.

(c) Between the time of an individual's arrest on probable cause, a bench warrant, or an arrest warrant and his or her subsequent court appearance, ex parte contact between the court and any person interested in the litigation regarding the individual's custodial status shall be allowed.

2nd CR Rule 5. Release and detention pending judicial proceedings.

(a) The court shall determine appropriate conditions for release or that detention is warranted using the factors set forth in NRS 178.4853[8] and NRS 178.486.[9]

(b) All persons released from custody, on bail or otherwise, shall comply with any terms or conditions of release imposed by the court.

(c) The court shall order the pretrial release of a defendant on personal recognizance (subject to supervision by the court services department, or upon such additional conditions as the court deems appropriate) unless the court determines that such release will not reasonably assure the appearance of the defendant as required or will endanger the safety of any other person or the community.

(d) If the court determines that the release of the defendant pursuant to subsection (c) of this rule will not reasonably assure the appearance of the defendant as required or will endanger the safety of any other person or the community, the court shall

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[7] **NRS 178.486 When bail is matter of discretion, notice of application must be given to district attorney.** When the admission to bail is a matter of discretion, the court, or officer by whom it may be ordered, shall require such notice of the application therefor as the court or officer may deem reasonable to be given to the district attorney of the county where the examination is had.

[8] **NRS 178.4853 Factors considered before release without bail.** In deciding whether there is good cause to release a person without bail, the court at a minimum shall consider the following factors concerning the person:

1. The length of residence in the community;
2. The status and history of employment;
3. Relationships with the person's spouse and children, parents or other family members and with close friends;
4. Reputation, character and mental condition;
5. Prior criminal record, including, without limitation, any record of appearing or failing to appear after release on bail or without bail;
6. The identity of responsible members of the community who would vouch for the reliability of the person;
7. The nature of the offense with which the person is charged, the apparent probability of conviction and the likely sentence, insofar as these factors relate to the risk of not appearing;
8. The nature and seriousness of the danger to the alleged victim, any other person or the community that would be posed by the person's release;
9. The likelihood of more criminal activity by the person after release; and
10. Any other factors concerning the person's ties to the community or bearing on the risk that the person may willfully fail to appear.

[9] **NRS 178.486 When bail is matter of discretion, notice of application must be given to district attorney.** When the admission to bail is a matter of discretion, the court, or officer by whom it may be ordered, shall require such notice of the application therefor as the court or officer may deem reasonable to be given to the district attorney of the county where the examination is had.

consider the release of the defendant upon the least restrictive condition, or combination of conditions, that will reasonably assure the presence of the defendant as required and the safety of any other person or the community, which may include the condition that the defendant:

(1) remain in the custody of a designated person, who agrees to assume supervision and agrees to report any violation of a release condition to the court services department, if the designated person submits to the jurisdiction of the court and is able reasonably to assure the court that the defendant will appear as required and will not pose a danger to the safety of any other person or the community;

(2) maintain employment or, if unemployed, actively seek employment;

(3) maintain or commence an educational program;

(4) abide by specified restrictions on personal associations, place of abode or travel;

(5) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(6) report by telephone or in person on a regular basis to the court services department or a designated law enforcement agency or other agency;

(7) comply with a specified curfew;

(8) refrain from possessing a firearm, destructive device or other dangerous weapon;

(9) refrain from the use of alcohol or controlled substances;

(10) undergo a specified program of available medical, psychological, psychiatric or other counseling or treatment, and remain in a specified institution if required for that purpose;

(11) execute an agreement to forfeit upon failing to appear as required, such designated property, including money, as is reasonably necessary to assure the appearance of the defendant as required, and post with the court such indicia of ownership of the property or such percentage of the money as the court may specify;

(12) execute a bail bond with solvent sureties in such amount as is reasonably necessary to assure the appearance of the defendant as required;

(13) return to custody for specified hours following release for employment, schooling or other limited purposes; and

(14) satisfy any other condition that is reasonably necessary to assure the appearance of the defendant as required and to assure the safety of any other person and the community

(e) The court may at any time amend the order or conditions of release.

Comment: This rule adopts a release evaluation process primarily derived from 18 U.S.C. § 3142.[10]

[10] 18 U.S. Code § 3142 is lengthy and is therefore reproduced at the end of this document.

- Note that 2nd L.C.R. 7(i), "Pretrial Motions," provides that: "Motions made under L.C.R. 5 may be made orally in open court or in an on-the-record telephone conference with the court and opposing counsel."

Rule 7. Discovery/Discovery Motions

8th Rule 3.24. Discovery motions.

(a) Any defendant seeking a court order for discovery pursuant to the provisions of NRS 174.235[11] or NRS 174.245[12] may make an oral motion for discovery at the time of initial arraignment. The relief granted for all oral motions for discovery will be as follows:

(1) That the State of Nevada furnish copies of all written or recorded statements or confessions made by the defendant which are within the possession, custody or control of the State, the existence of which is known or by the exercise of due diligence may become known to the district attorney.

(2) That the State of Nevada furnish copies of all results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with this case which are within the possession, custody or control

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[11] **NRS 174.235 Disclosure by prosecuting attorney of evidence relating to prosecution; limitations.**

1. Except as otherwise provided in NRS 174.233 to 174.295, inclusive, at the request of a defendant, the prosecuting attorney shall permit the defendant to inspect and to copy or photograph any:

(a) Written or recorded statements or confessions made by the defendant, or any written or recorded statements made by a witness the prosecuting attorney intends to call during the case in chief of the State, or copies thereof, within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney;

(b) Results or reports of physical or mental examinations, scientific tests or scientific experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney; and

(c) Books, papers, documents, tangible objects, or copies thereof, which the prosecuting attorney intends to introduce during the case in chief of the State and which are within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney.

2. The defendant is not entitled, pursuant to the provisions of this section, to the discovery or inspection of:

(a) An internal report, document or memorandum that is prepared by or on behalf of the prosecuting attorney in connection with the investigation or prosecution of the case.

(b) A statement, report, book, paper, document, tangible object or any other type of item or information that is privileged or protected from disclosure or inspection pursuant to the Constitution or laws of this state or the Constitution of the United States.

3. The provisions of this section are not intended to affect any obligation placed upon the prosecuting attorney by the Constitution of this state or the Constitution of the United States to disclose exculpatory evidence to the defendant.

[12] **NRS 174.245 Disclosure by defendant of evidence relating to defense; limitations.**

1. Except as otherwise provided in NRS 174.233 to 174.295, inclusive, at the request of the prosecuting attorney, the defendant shall permit the prosecuting attorney to inspect and to copy or photograph any:

(a) Written or recorded statements made by a witness the defendant intends to call during the case in chief of the defendant, or copies thereof, within the possession, custody or control of the defendant, the existence of which is known, or by the exercise of due diligence may become known, to the defendant;

(b) Results or reports of physical or mental examinations, scientific tests or scientific experiments that the defendant intends to introduce in evidence during the case in chief of the defendant, or copies thereof, within the possession, custody or control of the defendant, the existence of which is known, or by the exercise of due diligence may become known, to the defendant; and

(c) Books, papers, documents or tangible objects that the defendant intends to introduce in evidence during the case in chief of the defendant, or copies thereof, within the possession, custody or control of the defendant, the existence of which is known, or by the exercise of due diligence may become known, to the defendant.

2. The prosecuting attorney is not entitled, pursuant to the provisions of this section, to the discovery or inspection of:

(a) An internal report, document or memorandum that is prepared by or on behalf of the defendant or the defendant's attorney in connection with the investigation or defense of the case.

(b) A statement, report, book, paper, document, tangible object or any other type of item or information that is privileged or protected from disclosure or inspection pursuant to the Constitution or laws of this state or the Constitution of the United States.

of the State, the existence of which is known or by the exercise of due diligence may become known to the district attorney.

(3) That the State of Nevada permit the defense to inspect and copy or photograph books, papers, documents, tangible objects, buildings, places, or copies or portions thereof, which are within the possession, custody or control of the State, provided that the said items are material to the preparation of the defendant's case at trial and constitute a reasonable request.

(b) Pursuant to NRS 174.255,[13] the court may condition a discovery order upon a requirement that the defendant permit the State to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within the defendant's possession, custody or control provided the said items are material to the preparation of the State's case at trial and constitute a reasonable request.

2nd CR Rule 6. Discovery.

(a) The parties, through their counsel, without order of the court, shall timely provide discovery of all information and materials permitted by any applicable provision of the Nevada Revised Statutes.

(b) The content, timing, manner and sequence of any additional discovery shall be directed by the court at the initial appearance or as soon thereafter as reasonably practicable.

(c) Any discovery dispute shall be brought to the attention of the court expeditiously by telephone conference, on the record, with the court and all counsel, on oral application in open court or a written motion.

(d) The court may impose appropriate sanctions for the failure of a party or counsel to comply with any discovery obligation imposed by law or ordered by the court.

Comment: Subsection (a) of this rule eliminates the need for a discovery order unless the court orders discovery beyond that required by the statutes of Nevada. The other subsections of the rule promote prompt resolution of discovery disputes and require sanctions for non-compliance with any discovery obligation.

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[13] NRS 174.255 has been repealed.

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and [prior to] *before* or during trial, a party discovers additional material previously requested [or ordered] which is subject to discovery or inspection under [such] *those* sections, he shall promptly notify the other party or his attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with [such sections or with an order issued pursuant to such] *those* sections, the court may order [such] *the* party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.

Sec. 8. NRS 174.255 and 174.265 are hereby repealed.

Rule 8. Pretrial motions.[14]

8th Rule 3.20. Motions.

(a) Unless otherwise provided by law or by these rules, all motions must be served and filed not less than 15 days before the date set for trial. The court will only consider late motions based upon an affidavit demonstrating good cause and it may decline to consider any motion filed in violation of this rule.

(b) Except as provided in Rules 3.24[15] and 3.28,[16] each motion must contain a notice of hearing setting the matter for hearing not less than 10 days from the date the motion is served and filed. A party filing a motion must also serve and file with it a memorandum of points and authorities in support of each ground thereof. The absence of such memorandum may be construed as an admission that the motion is not meritorious, as cause for its denial or as a waiver of all grounds not so supported.

(c) Within 7 days after the service of the motion, the opposing party must serve and file written opposition thereto. Failure of the opposing party to serve and file written opposition may be construed as an admission that the motion is meritorious and a consent to granting of the same.

(d) Unless otherwise allowed by the court, all motions to increase or decrease bail must be in writing, supported by an affidavit of the movant or the movant's attorney, and contain a notice of hearing setting the matter for hearing not less than 2 full judicial days from the date the motion is served and filed. The opponent to the motion may respond orally in open court.

(e) Either the prosecutor or the defendant may place a matter on calendar by oral request to the clerk of the court made not later than 11:00 a.m. on the day preceding the date of the hearing. Such requests are to be used only to bring to the attention of the court a matter of an emergency nature or to place a case on calendar when the matter is to be resolved, such as by entry of a guilty plea or for dismissal. An oral request to the clerk to place a case on the calendar for the hearing of any other matter is improper.

8th Rule 3.28. Motions in limine.

All motions in limine to exclude or admit evidence must be in writing and noticed for hearing not later than calendar call, or if no calendar call was set by the court, no later than 7 days before trial. The court may refuse to consider any oral motion in limine and any motion in limine which was not timely filed.

2nd CR Rule 7. Pretrial motions.

(a) Except as otherwise ordered by the court, all pretrial motions, including motions in limine, shall be served and filed no later than 20 days prior to trial. Computation of time as set forth in this rule shall be in calendar days. If a pretrial motion is filed

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[14] The *Statewide Rules of Criminal Procedure: A 50 State Review* article specifically referenced the apparent conflict among the timeframes for filing motions in NRS 174.125, EDCR 3.28, and LCR 7. *See Statewide Rules* at p.22.
[15] Addresses discovery motions.
[16] Addresses motions in limine.

within 30 days prior to trial, it shall either be personally served upon the opposition on the date of filing or be e-filed.

(b) Every motion or opposition thereto shall be accompanied by a memorandum of legal authorities and any exhibits in support of or in opposition to the motion.

(c) All motions shall be decided without oral argument unless requested by the court or party.

(d) If an evidentiary hearing is required by law or requested by a party or ordered by the court and a hearing has not already been set, counsel for the movant shall, upon filing the motion, notify the opposing counsel and the department's administrative assistant of the need for the hearing. No later than 5 days after movant's filing of the motion, all counsel must meet with the department's administrative assistant and set the hearing.

(e) A legal memorandum in opposition to a motion shall be served and filed no later than 10 days after service of the motion, but in no case later than 10 days prior to trial. Failure of the opposing party to serve and file a written opposition may be construed as an admission that the motion is meritorious and consent to the granting of the same.

(f) A reply memorandum in support of a motion shall be served and filed, and the motion submitted for decision, no later than 3 days after service of the opposition, but in no case later than 7 days prior to trial. On the date that the reply is filed, the moving party shall notify the filing office to submit the motion for decision by filing and serving all parties a written request for submission of the motion on a form supplied by the filing office. Should the moving party elect not to reply, the moving party shall notify the filing office to submit the motion in accordance with this rule within 3 days after service of the opposition.

(g) Nothing in subsections (a), (d), (e), or (f) precludes a request for an extension of time upon good cause shown.

(h) Except as permitted by the presiding judge, legal memoranda in support of a motion, opposition, or reply shall not exceed 10 pages, exclusive of exhibits.

(i) Motions made under L.C.R. 5[17] may be made orally in open court or in an on-the-record telephone conference with the court and opposing counsel.

(j) If counsel for a party fails to comply with the time frames specified in this rule, the court, in its discretion, may order that said counsel be sanctioned in any manner the court deems appropriate, including, but not limited to, monetary sanctions.

Comment: The process and timing of motions and evidentiary hearings should enable disposition of pretrial issues substantially in advance of trial. Good cause for an extension may include the filing of two or more motions on the same date.

Rule 12. Motions; points and authorities and decisions.

1. Except as provided in Rule 1, all motions shall be accompanied by points and authorities and any affidavits relied upon. Motions for support or allowances and opposition thereto in divorce and separate maintenance actions shall include

[17] Addresses pretrial release.

disclosure of the financial condition of the respective parties upon a form approved by the court pursuant to Rule 40 of these rules.

2. The responding party shall file and serve upon all parties, within 10 days after service of a motion, answering points and authorities and counter-affidavits.
3. The District Attorney's Office shall have 21 days to respond to any motions to seal criminal records pursuant to NRS 179.245.
4. The moving party may serve and file reply points and authorities within 5 days after service of the answering points and authorities. Upon the expiration of the 5-day period, either party may notify the filing office to submit the matter for decision by filing and serving all parties with a written request for submission of the motion on a form supplied by the filing office. The original of the submit form shall be delivered to the filing office. Proof of service shall be attached to the motion and response.
5. Decision shall be rendered without oral argument unless oral argument is ordered by the court, in which event the individual court department shall set a date and time for hearing.
6. All discovery motions shall include the certificate of moving counsel certifying that after consultation with opposing counsel, they have been unable to resolve the matter.
7. Except by leave of the court, all motions for summary judgment must be submitted to the court pursuant to subsection 4 of this rule at least 30 days prior to the date the case is set for trial.
8. The rehearing of motions must be done in conformity with D.C.R. 13, Section 7. A party seeking reconsideration of a ruling of the court, other than an order which may be addressed by motion pursuant to N.R.C.P. 50(b), 52(b), 59 or 60, must file a motion for such relief within 10 days after service of written notice of entry of the order or judgment, unless the time is shortened or enlarged by order. A motion for rehearing or reconsideration must be served, noticed, filed, and heard as is any other motion. A motion for rehearing does not toll the 30-day period for filing a notice of appeal from a final order or judgment.
9. If a motion for rehearing is granted, the court may make a final disposition of the cause without reargument, or may restore it to the calendar for reargument or resubmission, or may make such other orders as are deemed appropriate under the circumstances of the particular case.
10. Drop box filing.
    (a) Papers eligible for filing. All papers and pleadings, including motions, oppositions and replies may be filed in the drop box located outside the Court Clerk's Office, with the exception of filings which require the payment of filing fees. Filings which require the payment of filing fees must be made directly with the Court Clerk's Office.
    (b) Procedure. Papers may be filed in the drop box during all hours the courthouse is open. Papers must be date and time stamped prior to being placed in the drop box. Drop box filings shall be deemed filed as of the date and time noted on the paper or pleading. If a drop box filing has not been date and time stamped, the paper or pleading shall be deemed filed at the time it is date and time stamped by the Court Clerk. of probable cause or otherwise challenging the court's right or jurisdiction to proceed to the trial of a criminal charge shall

be accompanied by a notice for the prosecutor to appear before the appropriate court department, at a specific date and time not less than 5 nor more than 10 days after filing such petition, to set the matter for hearing. The hearing on the writ shall be set within 21 days from the date the petition is filed.

Relevant statutes

NRS 174.095 Defenses and objections which may be raised by motion. Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

NRS 174.098 Motion to declare that defendant is intellectually disabled: When authorized; procedure.

1. A defendant who is charged with murder of the first degree in a case in which the death penalty is sought may, not less than 10 days before the date set for trial, file a motion to declare that the defendant is intellectually disabled.

2. If a defendant files a motion pursuant to this section, the court must:

(a) Stay the proceedings pending a decision on the issue of intellectual disability; and

(b) Hold a hearing within a reasonable time before the trial to determine whether the defendant is intellectually disabled.

3. The court shall order the defendant to:

(a) Provide evidence which demonstrates that the defendant is intellectually disabled not less than 30 days before the date set for a hearing conducted pursuant to subsection 2; and

(b) Undergo an examination by an expert selected by the prosecution on the issue of whether the defendant is intellectually disabled at least 15 days before the date set for a hearing pursuant to subsection 2.

4. For the purpose of the hearing conducted pursuant to subsection 2, there is no privilege for any information or evidence provided to the prosecution or obtained by the prosecution pursuant to subsection 3.

5. At a hearing conducted pursuant to subsection 2:

(a) The court must allow the defendant and the prosecution to present evidence and conduct a cross-examination of any witness concerning whether the defendant is intellectually disabled; and

(b) The defendant has the burden of proving by a preponderance of the evidence that the defendant is intellectually disabled.

6. If the court determines based on the evidence presented at a hearing conducted pursuant to subsection 2 that the defendant is intellectually disabled, the court must make such a finding in the record and strike the notice of intent to seek the death penalty. Such a finding may be appealed pursuant to NRS 177.015.

7. For the purposes of this section, "intellectually disabled" means significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period.

NRS 174.105 Defenses and objections which must be raised by motion.

1. Defenses and objections based on defects in the institution of the prosecution, other than insufficiency of the evidence to warrant an indictment, or in the indictment, information or complaint, other than that it fails to show jurisdiction in the court or to charge an offense, may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant.

2. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver.

3. Lack of jurisdiction or the failure of the indictment, information or complaint to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

NRS 174.115 Time of making motion. The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

NRS 174.125 Certain motions required to be made before trial.

1. All motions in a criminal prosecution to suppress evidence, for a transcript of former proceedings, for a preliminary hearing, for severance of joint defendants, for withdrawal of counsel, and all other motions which by their nature, if granted, delay or postpone the time of trial must be made before trial, unless an opportunity to make such a motion before trial did not exist or the moving party was not aware of the grounds for the motion before trial.

2. In any judicial district in which a single judge is provided:

(a) All motions subject to the provisions of subsection 1 must be made in writing, with not less than 10 days' notice to the opposite party unless good cause is shown to the court at the time of trial why the motion could not have been made in writing upon the required notice.

(b) The court may, by written order, shorten the notice required to be given to the opposite party.

3. In any judicial district in which two or more judges are provided:

(a) All motions subject to the provisions of subsection 1 must be made in writing not less than 15 days before the date set for trial, except that if less than 15 days intervene between entry of a plea and the date set for trial, such a motion may be made within 5 days after entry of the plea.

(b) The court may, if a defendant waives hearing on the motion or for other good cause shown, permit the motion to be made at a later date.

4. Grounds for making such a motion after the time provided or at the trial must be shown by affidavit.

NRS 174.135 Hearing on motion.

1. A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue.

2. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution of the United States or of the State of Nevada or by statute.

3. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct.

NRS 174.145 Effect of determination.

1. If a motion is determined adversely to the defendant, the defendant shall be permitted to plead if the defendant had not previously pleaded. A plea previously entered shall stand.

2. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment, information or complaint, it may also order that the defendant be held in custody or that the defendant's bail be continued for a specified time pending the filing of a new indictment, information or complaint.

3. Nothing in this section shall affect the provisions of any statute relating to periods of limitations.

Rule 8.1 Papers which may not be filed

8th Rule 3.70. Papers which may not be filed.
Except as may be required by the provisions of NRS 34.730 to 34.830,[18] inclusive, all motions, petitions, pleadings or other papers delivered to the clerk of the court by a defendant who has counsel of record will not be filed but must be marked with the date received and a copy forwarded to that attorney for such consideration as counsel deems appropriate. This rule does not apply to applications made pursuant to Rule 7.40(b)(2)(ii).

[18] NRS 34.730 to 34.830 address petitions for postconviction relief.

Rule 9. Pretrial Writs of Habeas Corpus

8th Rule 3.40. Writs of habeas corpus.

(a) Each petition for a writ of habeas corpus based on alleged want of probable cause or otherwise challenging the court's jurisdiction to proceed to the trial of a criminal charge must contain a notice of hearing setting the matter for hearing 14 days from the date the petition is filed and served. In the event the judge to whom the case is assigned is not scheduled to hear motions on the 14th day following the service and filing of the petition, the notice must designate the next day when the judge has scheduled the hearing of motions.

(b) Any other petition for writ of habeas corpus, including those alleging a delay in any of the proceedings before the magistrate or a denial of the petitioner's right to a speedy trial, must contain a notice of hearing setting the matter for hearing not less than 1 full judicial day from the date the writ is filed and served.

(c) All points and authorities in support of the petition for writ of habeas corpus must be served and filed at the time of the filing of the petition. The prosecutor must serve and file a return and a response to the petitioner's points and authorities within 10 days from the receipt of a petition for a writ of habeas corpus based on alleged want of probable cause or otherwise challenging the court's jurisdiction to proceed to the trial of a criminal charge. The prosecutor may serve and file a return and a response to the petitioner's points and authorities in open court at the time noticed for the hearing on any other writ of habeas corpus.

(d) The court reporter who takes down all the testimony and proceedings of the preliminary hearing must, within 15 days after the defendant has been held to answer in the district court, complete the certification and filing of the preliminary hearing transcript.

(e) Ex parte applications for extensions of the 21-day period of limitation for filing writs of habeas corpus will only be entertained in the event that the transcript of the preliminary hearing or of the proceedings before the grand jury is not available within 14 days after the defendant's initial appearance. Such ex parte applications must be accompanied by an affidavit of the defendant's attorney that counsel has examined the file in the Office of the Clerk of the Court and that the transcript of the preliminary hearing or of the proceedings before the grand jury has not been filed within the 14-day period of limitation. Applications for extensions of time to file writs of habeas corpus must be for not more than 14 days. Further extensions of time will be granted only in extraordinary cases.

2nd LR Rule 22. Writs of habeas corpus.

1. Each petition for a writ of habeas corpus based on alleged want of probable cause or otherwise challenging the court's right or jurisdiction to proceed to the trial of a criminal charge shall be accompanied by a notice for the prosecutor to appear before the appropriate court department, at a specific date and time not less than 5 nor more than 10 days after filing such petition, to set the matter for hearing. The hearing on the writ shall be set within 21 days from the date the petition is filed.

2. Any other pretrial petition for writ of habeas corpus, including those alleging a delay in any of the proceedings before a magistrate or a denial of the petitioner's right to a speedy trial in justice court or municipal court, shall contain a notice of the hearing thereof setting the matter for hearing not less than 1 full judicial day from the date the petition is filed and served.
3. All points and authorities urged in support of the petition for writ of habeas corpus shall be served and filed at the time of the filing of the petition. The prosecutor shall serve and file a return and a response to the petitioner's points and authorities within 10 days from the receipt of a petition for a writ of habeas corpus based on alleged want of probable cause or otherwise challenging the court's rights or jurisdiction to proceed to the trial of a criminal charge (section 1 hereof). The prosecutor may serve and file a return and a response to the petitioner's points and authorities in open court at the time noticed for the hearing on a writ of habeas corpus covered under section 2 hereof.
4. Ex parte applications for extension of the 21-day period of limitation for filing writs of habeas corpus will only be entertained in the event that the transcript of the preliminary hearing or of the proceedings before the grand jury, as the case may be, is not available within 14 days after the defendant's initial appearance. Such ex parte applications shall be accompanied by a certificate of the defendant's attorney that the attorney has examined the file in the filing office and that the transcript of the preliminary hearing or the proceedings before the Washoe County Grand Jury has not been filed within the 14-day period (NRS 34.700(3)).[19] Applications for extension of time to file writs of habeas corpus shall be for not more than 14 days, except where the ground for such application is the unavailability of the transcript, in which case the extension may be for not more than 14 days after the transcript is available. Further extensions of time will be granted only in extraordinary cases.
5. Any writ filed on a criminal case at the district court level shall be assigned to the same department where the underlying criminal case is filed. If no such previous criminal case exists the writ shall be randomly assigned to a department.

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[19] **NRS 34.700 Time for filing; waiver and consent of accused respecting date of trial** 1. Except as provided in subsection 3, a pretrial petition for a writ of habeas corpus based on alleged lack of probable cause or otherwise challenging the court's right or jurisdiction to proceed to the trial of a criminal charge may not be considered unless:

(a) The petition and all supporting documents are filed within 21 days after the first appearance of the accused in the district court; and

(b) The petition contains a statement that the accused:

(1) Waives the 60-day limitation for bringing an accused to trial; or

(2) If the petition is not decided within 15 days before the date set for trial, consents that the court may, without notice or hearing, continue the trial indefinitely or to a date designated by the court.

2. The arraignment and entry of a plea by the accused must not be continued to avoid the requirement that a pretrial petition be filed within the period specified in subsection 1.

3. The court may extend, for good cause, the time to file a petition. Good cause shall be deemed to exist if the transcript of the preliminary hearing or of the proceedings before the grand jury is not available within 14 days after the accused's initial appearance and the court shall grant an ex parte application to extend the time for filing a petition. All other applications may be made only after appropriate notice has been given to the prosecuting attorney.

Rule 10. Stay Orders.

8th Rule 3.44. Stay orders.

An ex parte application for a stay of proceedings before a magistrate may only be made with the written consent of the State of Nevada. Any other application for a stay of proceedings before a magistrate may only be made after reasonable oral notice to the State.

Rule 11. Extending Time.

8th Rule 3.50. Extending time.

(a) When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion, with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order; but it may not extend the time for taking any action under Rule 3.40,[20] except to the extent and under the conditions stated therein.

(b) Ex parte motions to extend time may not be granted except upon an affidavit or certificate of counsel demonstrating circumstances claimed to constitute good cause and justify enlargement of time.

8th Rule 7.25. Orders extending time; notice to opposing party.

No order, made on ex parte application, granting or extending the time to file any paper or do any act is valid for any purpose in case of objection, unless a copy thereof is served upon the opposing party not later than the end of the next judicial day.

2nd LR Rule 11. Extension or shortening of time.

1. All motions for extensions of time shall be made upon 5 days' notice to all counsel. Such motion shall be made to the judge who is to try the case, or, if the judge is not in the courthouse during regular judicial hours, to a judge on the same floor who shall set or cause the motion to be set for early hearing. (For the sake of this rule Department 10 is deemed to be on the second floor.)
2. Except as provided in this subsection, no ex parte application for extension of time will be granted. Upon presentation of a motion for extension, if a satisfactory showing is made to the judge that a good faith effort has been made to notify opposing counsel of the motion, and the judge finds good cause therefor, the judge may order ex parte a temporary extension pending a determination of the motion.
3. For good cause shown, the judge who is to try the case, or if the judge is not in the courthouse during regular judicial hours, the chief judge, may make an ex parte order shortening time upon a satisfactory showing to the judge that a good faith effort has been made to notify the opposing counsel of the motion.
4. Extensions to answer or otherwise respond to a complaint shall not exceed 40 days without court approval. The trial judge shall determine the appropriate sanction if this rule is violated.

[20] Addresses pretrial writs of habeas corpus.

Rule 12. Shortening Time.

8th Rule 3.60. Shortening time.

Ex parte motions to shorten time may not be granted except upon an affidavit or certificate of counsel describing the circumstances claimed to constitute good cause and justify shortening of time. If a motion to shorten time is granted, it must be served upon all parties promptly. In no event may the notice of the hearing of a motion be shortened to less than 1 full judicial day.

2nd LR Rule 11. Extension or shortening of time.

1. All motions for extensions of time shall be made upon 5 days' notice to all counsel. Such motion shall be made to the judge who is to try the case, or, if the judge is not in the courthouse during regular judicial hours, to a judge on the same floor who shall set or cause the motion to be set for early hearing. (For the sake of this rule Department 10 is deemed to be on the second floor.)
2. Except as provided in this subsection, no ex parte application for extension of time will be granted. Upon presentation of a motion for extension, if a satisfactory showing is made to the judge that a good faith effort has been made to notify opposing counsel of the motion, and the judge finds good cause therefor, the judge may order ex parte a temporary extension pending a determination of the motion.
3. For good cause shown, the judge who is to try the case, or if the judge is not in the courthouse during regular judicial hours, the chief judge, may make an ex parte order shortening time upon a satisfactory showing to the judge that a good faith effort has been made to notify the opposing counsel of the motion.
4. Extensions to answer or otherwise respond to a complaint shall not exceed 40 days without court approval. The trial judge shall determine the appropriate sanction if this rule is violated.

Rule 13. Jury instructions and exhibits.

2nd CR Rule 8. Jury instructions and exhibits.

(a) Prior to the submission of jury instructions, counsel for the parties shall meet and confer to avoid the submission of duplicate instructions. Jury instructions offered by the State shall be served on any opposing party and submitted to the court no later than 5:00 p.m. on the Wednesday before trial. Jury instructions offered by the defense shall be submitted in camera by Friday before trial.

(b) All proposed jury instructions shall be in clear, legible type on clean, white, heavy paper 8 1/2 × 11 inches in size and not lighter than 16 lb. weight with a black border line and no less than 24 numbered lines. The signature line with the words "District Judge" typed thereunder shall be placed on the right half of the page, a few lines below the last line of type on the last instruction. The designation, "Instruction No. ___" shall be near the lower left hand corner of the page.

(c) All original instructions, except pattern instructions, shall be accompanied by a separate copy of the instruction containing a citation to the form instruction, statutory or case authority supporting that instruction.

(d) The district court shall conduct a conference with all counsel to settle jury instructions as provided by NRS 175.161.[21] During that conference, the parties may submit additional jury instructions as needed. New instructions offered at that time must comply with subsections (b) and (c) of this rule.

(e) Any rejected instruction shall be made a part of the record as proposed and filed with the clerk marked as "Refused."

(f) Trial exhibits shall be marked in one numerical sequence, without regard to the offering party, at a conference scheduled by counsel with the court clerk. The conference shall be conducted during the week before trial. Once the clerk marks the trial exhibits, they shall remain in the custody of the clerk.

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[21] **NRS 175.161 Instructions.**

1. Upon the close of the argument, the judge shall charge the jury. The judge may state the testimony and declare the law, but may not charge the jury in respect to matters of fact. The charge must be reduced to writing before it is given, and no charge or instructions may be given to the jury otherwise than in writing, unless by the mutual consent of the parties. If either party requests it, the court must settle and give the instructions to the jury before the argument begins, but this does not prevent the giving of further instructions which may become necessary by reason of the argument.

2. In charging the jury, the judge shall state to them all such matters of law the judge thinks necessary for their information in giving their verdict.

3. Either party may present to the court any written charge, and request that it be given. If the court believes that the charge is pertinent and an accurate statement of the law, whether or not the charge has been adopted as a model jury instruction, it must be given. If the court believes that the charge is not pertinent or not an accurate statement of law, then it must be refused.

4. An original and one copy of each instruction requested by any party must be tendered to the court. The copies must be numbered and indicate who tendered them. Copies of instructions given on the court's own motion or modified by the court must be so identified. When requested instructions are refused, the judge shall write on the margin of the original the word "refused" and initial or sign the notation. The instructions given to the jury must be firmly bound together and the judge shall write the word "given" at the conclusion thereof and sign the last of the instructions to signify that all have been given. After the instructions are given, the judge may not clarify, modify or in any manner explain them to the jury except in writing unless the parties agree to oral instructions.

5. After the jury has reached a verdict and been discharged, the originals of all instructions, whether given, modified or refused, must be preserved by the clerk as part of the proceedings.

6. Conferences with counsel to settle instructions must be held out of the presence of the jury and may be held in chambers at the option of the court.

7. When the offense charged carries a possible penalty of life without possibility of parole a charge to the jury that such penalty does not exclude executive clemency is a correct and pertinent charge, and must be given upon the request of either party.

(g) When marking exhibits with the clerk, counsel shall advise the clerk of all exhibits that may be admitted without objection. Any stipulated exhibits or exhibits as to which there is no objection are deemed admitted and may be referenced by counsel in opening statement.

2nd LR Rule 7. Jury instructions.

1. This rule on jury instructions applies to both civil and criminal cases.
2. All proposed jury instructions shall be in clear, legible type on clean, white, heavy paper, 8 1/2 by 11 inches in size, and not lighter than 16-lb. weight with a black border line and no less than 24 numbered lines.
3. The signature line with the words "district judge" typed thereunder, shall be placed on the right half of the page, a few lines below the last line of type on the last instruction. (See NRS 16.110[22] and NRS 175.161.[23])
4. The designation "Instruction No. ....." shall be near the lower left hand corner of the page.
5. The original instructions shall not bear any markings identifying the attorney submitting the same, and shall not contain any citations of authority, except that such instructions may bear the numerical reference to Nevada Pattern Civil Jury

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[22] **NRS 16.110 Instructions to jury.**

1. The court shall reduce to writing the instructions to be given to the jury, unless the parties agree otherwise, and shall read such instructions to the jury. The court shall give instructions only as to the law of the case. An original and one copy of each instruction requested by any party shall be tendered to the court. The copies shall be numbered and indicate who tendered them. Copies of instructions given on the court's own motion or modified by the court shall be so identified. When requested instructions are refused, the judge shall write on the margin of the original the word "refused" and initial or sign the notation. The instructions given to the jury shall be firmly bound together and the judge shall write the word "given" at the conclusion thereof and sign the last of the instructions to signify that all have been given. After the instructions are given, the judge shall not clarify, modify or in any manner explain them to the jury except in writing unless the parties agree to oral instructions.

2. After the jury has reached a verdict and been discharged, the originals of all instructions, whether given, modified or refused, shall be preserved by the clerk as part of the proceedings.

3. Conferences with counsel to settle instructions may be held in chambers at the option of the court. In any event, conferences on instructions must be out of the presence of the jury.

[23] **NRS 175.161 Instructions.**

1. Upon the close of the argument, the judge shall charge the jury. The judge may state the testimony and declare the law, but may not charge the jury in respect to matters of fact. The charge must be reduced to writing before it is given, and no charge or instructions may be given to the jury otherwise than in writing, unless by the mutual consent of the parties. If either party requests it, the court must settle and give the instructions to the jury before the argument begins, but this does not prevent the giving of further instructions which may become necessary by reason of the argument.

2. In charging the jury, the judge shall state to them all such matters of law the judge thinks necessary for their information in giving their verdict.

3. Either party may present to the court any written charge, and request that it be given. If the court believes that the charge is pertinent and an accurate statement of the law, whether or not the charge has been adopted as a model jury instruction, it must be given. If the court believes that the charge is not pertinent or not an accurate statement of law, then it must be refused.

4. An original and one copy of each instruction requested by any party must be tendered to the court. The copies must be numbered and indicate who tendered them. Copies of instructions given on the court's own motion or modified by the court must be so identified. When requested instructions are refused, the judge shall write on the margin of the original the word "refused" and initial or sign the notation. The instructions given to the jury must be firmly bound together and the judge shall write the word "given" at the conclusion thereof and sign the last of the instructions to signify that all have been given. After the instructions are given, the judge may not clarify, modify or in any manner explain them to the jury except in writing unless the parties agree to oral instructions.

5. After the jury has reached a verdict and been discharged, the originals of all instructions, whether given, modified or refused, must be preserved by the clerk as part of the proceedings.

6. Conferences with counsel to settle instructions must be held out of the presence of the jury and may be held in chambers at the option of the court.

7. When the offense charged carries a possible penalty of life without possibility of parole a charge to the jury that such penalty does not exclude executive clemency is a correct and pertinent charge, and must be given upon the request of either party.

Instructions. No portion thereof shall be in capital letters, underlined or otherwise emphasized.

6. Authorities for any instruction must be attached to the original instructions by removable adhesive paper.
7. Any rejected instructions (i.e., submitted to the judge, but not delivered to the jury) shall be made a part of the case file as having been proposed.
8. Proposed jury instructions shall be submitted to the court by delivering the original to the judge's chambers no later than 5:00 p.m. on the Friday before trial. Proposed jury instructions shall be personally served upon opposing counsel, if counsel maintains an office in Washoe County, on the same day that they are submitted to the court. Otherwise, opposing counsel shall be served at the first day of trial. A judge may order jury instructions to be submitted to the court at a pretrial conference.
9. Plaintiff's attorney shall prepare the stock instructions.

Rule 14. Sentencing

2nd CR Rule 9. Sentencing.

(a) Counsel are required to assist the court in projecting the time required to conduct the sentencing hearing. Counsel anticipating any unusual matters affecting the length or other conditions of any sentencing proceeding shall advise the court prior to or at the setting of the sentencing date, or as soon thereafter as practicable. The court may set lengthy sentencing hearings on dates and times different from the department's customary criminal calendar.

(b) If the court deems the defendant to be an appropriate referral, the court shall,

(1) at arraignment, where legally permissible, transfer the case to Drug Court for all further proceedings. A defendant seeking entry into the Drug Court program must obtain conditional approval prior to assignment;

(2) pursuant to the provisions of NRS Chapters 453 and 458, at sentencing, transfer the case to the Second Judicial District Specialty Court; or

(3) at sentencing, order a defendant to complete Second Judicial District Specialty Court as a condition of probation and transfer the case for that purpose;

(4) the Specialty Court has jurisdiction of the matter until the defendant is terminated from Specialty Court at which time Specialty Court shall transfer the matter to the sentencing court for further action.

(c) The court shall not consider any ex parte communication, letter, report or other document but shall forthwith notify counsel for all parties, on the record, of any attempted ex parte communication or document submission.

Comment: If possible, the court should be aware of any unusual aspects of sentencing when the sentencing time and date are set. These may include anticipated delays in the provision of legal documents, the need for a restitution hearing, or lengthy testimony of witnesses. Except as otherwise required by law, counsel for all parties should be privy to any communications or materials submitted in mitigation or aggravation of sentence. The rule also clarifies the jurisdiction of the departments for cases assigned to Drug Court, Diversion Court and probation where Drug Court is a condition.

Rule 15. Continuances.

Rule 7.30. Motions to continue trial settings.

(a) Any party may, for good cause, move the court for an order continuing the day set for trial of any cause. A motion for continuance of a trial must be supported by affidavit except where it appears to the court that the moving party did not have the time to prepare an affidavit, in which case counsel for the moving party need only be sworn and orally testify to the same factual matters as required for an affidavit. Counter-affidavits may be used in opposition to the motion.

(b) If a motion for continuance is made on the ground that a witness is or will be absent at the time of trial, the affidavit must state:

(1) The name of the witness, the witness' usual home address, present location, if known, and the length of time that the witness has been absent.

(2) What diligence has been used to procure attendance of the witness or secure the witness' deposition, and the causes of the failure to procure the same.

(3) What the affiant has been informed and believes will be the testimony of the absent witness, and whether the same facts can be proven by witnesses, other than parties to the suit, whose attendance or depositions might have been obtained.

(4) The date the affiant first learned that the attendance or deposition of the absent witness could not be obtained.

(5) That the application is made in good faith and not merely for delay.

(c) Except in criminal matters, if a motion for continuance is filed within 30 days before the date of the trial, the motion must contain a certificate of counsel for the movant that counsel has provided counsel's client with a copy of the motion and supporting documents. The court will not consider any motion filed in violation of this paragraph and any false certification will result in appropriate sanctions imposed pursuant to Rule 7.60.[24]

(d) No continuance may be granted unless the contents of the affidavit conform to this rule, except where the continuance is applied for in a mining case upon the special ground provided by NRS 16.020.

(e) No amendments or additions to affidavits for continuance will be allowed at the hearing on the motion and the court may grant or deny the motion without further argument.

(f) Trial settings may not be vacated by stipulation, but only by order of the court. The party moving for the continuance of a trial may obtain an order shortening the time for the hearing of the motion for continuance. Except in an emergency, the party requesting a continuance shall give all opposing parties at least 3 days' notice of the time set for hearing the motion. The hearing of the motion shall be set not less than 1 day before the trial.

(g) When application is made to a judge, master or commissioner to postpone a motion, trial or other proceeding, the payment of costs (including but not limited to the

[24] EDCR 7.60 specifically addresses sanctions.

expenses incurred by the party) and attorney fees may be imposed as a condition of granting the postponement.

(h) Motions or stipulations to continue a civil trial that also seek extension of discovery dates must comply with Rule 2.35.

2nd CR Rule 10. Continuances.

(a) The timing of proceedings as directed by the court at the initial appearance shall not be enlarged except upon a showing of good cause.

(b) Stipulations or requests for the continuance of any proceeding shall be in writing, signed by counsel and the defendant, and submitted to the court as soon as practicable but in no event later than 4:00 p.m. on the judicial day immediately preceding the event. The court may waive the signature of the defendant provided counsel certifies he or she has obtained the consent of the defendant to the continuance.

Comment: Continuances of any criminal proceeding are not favored, but, if requested, shall be presented to the court under the terms of this rule.

2nd LR Rule 13. Continuances.

1. No continuance of a trial in a civil or criminal case shall be granted except for good cause. A motion or stipulation for continuance shall state the reason therefor and whether or not any previous request for continuance had been either sought or granted. The motion or stipulation must certify that the party or parties have been advised that a motion or stipulation for continuance is to be submitted in their behalf and must state any objection the parties may have thereto.
2. If a continuance of any trial is granted, the parties must appear in the individual court department within 5 days and reset the case, unless the court waives this requirement. Failure to follow this rule may result in the court setting the trial date.

Rule 16. Sanctions.

Rule 7.60. Sanctions.

(a) If without just excuse or because of failure to give reasonable attention to the matter, no appearance is made on behalf of a party on the call of a calendar, at the time set for the hearing of any matter, at a pre-trial conference, or on the date of trial, the court may order any one or more of the following:

(1) Payment by the delinquent attorney or party of costs, in such amount as the court may fix, to the clerk or to the adverse party.

(2) Payment by the delinquent attorney or party of the reasonable expenses, including attorney's fees, to any aggrieved party.

(3) Dismissal of the complaint, cross-claim, counter-claim or motion or the striking of the answer and entry of judgment by default, or the granting of the motion.

(4) Any other action it deems appropriate, including, without limitation, imposition of fines.

(b) The court may, after notice and an opportunity to be heard, impose upon an attorney or a party any and all sanctions which may, under the facts of the case, be reasonable, including the imposition of fines, costs or attorney's fees when an attorney or a party without just cause:

(1) Presents to the court a motion or an opposition to a motion which is obviously frivolous, unnecessary or unwarranted.

(2) Fails to prepare for a presentation.

(3) So multiplies the proceedings in a case as to increase costs unreasonably and vexatiously.

(4) Fails or refuses to comply with these rules.

(5) Fails or refuses to comply with any order of a judge of the court.

2nd LR Rule 21. Sanctions for noncompliance.

If a party or an attorney fails or refuses to comply with these rules, the court may make such orders and impose such sanctions as are just, including, but not limited to the following:

1. Hold the disobedient party or attorney in contempt of court.
2. Continue any hearing until the disobedient party or attorney has complied with the requirements imposed.
3. Require the disobedient party to pay the other party's expenses, including a reasonable attorney's fee, incurred in preparing for and attending such hearing.
4. Enter an order authorized by N.R.C.P. 37.

Rule 17. Voir Dire.

Rule 7.70. Voir dire examination.

The judge must conduct the voir dire examination of the jurors. Except as required by Rule 2.68, proposed voir dire questions by the parties or their attorneys must be submitted to the court in chambers not later than 4:00 p.m. on the judicial day before the day the trial begins. Upon request of counsel, the trial judge may permit counsel to supplement the judge's examination by oral and direct questioning of any of the prospective jurors. The scope of such additional questions or supplemental examination must be within reasonable limits prescribed by the trial judge in the judge's sound discretion.

The following areas of inquiry are not properly within the scope of voir dire examination by counsel:

(a) Questions already asked and answered.

(b) Questions touching on anticipated instructions on the law.

(c) Questions touching on the verdict a juror would return when based upon hypothetical facts.

(d) Questions that are in substance arguments of the case.

Rule 18. Court interpreters.

Rule 7.80. Court interpreters.

(a) Counsel must notify the court interpreter's office of a request for interpreter not less than 48 hours before the hearing or trial is scheduled. In criminal cases when the defendant has been declared an indigent, and in civil cases when a determination of indigency has been made pursuant to NRS 12.015, there may be no charge for available court interpreters. In all other cases, the party requesting the interpreter must pay any reasonable fees as may be set by the chief judge to the clerk in advance for the services of a court interpreter.

In exceptional cases, the fee schedule may be waived, increased or decreased, at the discretion of the court. When it is necessary to employ interpreters from outside Clark County, actual and necessary expenses shall also be paid by the party requesting the interpreter.

(b) An interpreter qualified for and appointed to a case must appear at all subsequent court proceedings unless relieved as interpreter of record by the court.

Rule 19. Appeals from municipal and justice courts.

2nd LR Rule 19. Appeals from municipal and justice courts.

1. All appeals from the municipal or justice courts in criminal cases shall be set for trial or hearing within 60 days of the date of application for setting. A setting beyond 60 days may be made only if approved in writing by the trial judge or the chief judge. If a trial setting is continued by order of the court, the case shall be reset within 60 days of the date of the order for continuance.
2. If multiple settings for appeal trials in any one court department exceed the capacity of that department, settings shall be made in the designated department scheduled to handle the overflow. If that court's calendar becomes full, assignment shall be made to any other available department.
3. Appeals in criminal cases shall be set for trial on Thursdays and Fridays, unless the trial judge or the chief judge grants permission to make such settings on other judicial days.
4. In civil appeals from the justice court, appellant shall file within 30 days after the filing of a notice of appeal a written brief containing a statement of the errors committed in the justice court with accompanying authorities which shall not exceed 5 pages. Within 20 days after the filing and service of appellant's brief, respondent shall file a written answering brief which shall not exceed 5 pages.

Rule 20. Miscellaneous provisions.

2nd CR Rule 11. Miscellaneous provisions.

(a) A pretrial status conference may be conducted if deemed appropriate by the court.

(b) Any withdrawal of counsel shall be in writing, approved by the court and served on opposing counsel and notice to the party affected.

(c) Substitutions of counsel shall be in writing and served on opposing counsel. Substituted counsel shall transfer all files and discovery to the defendant's new counsel within 5 days of the date of substitution.

(d) Transfer of primary responsibility for cases between attorneys within the same office requires the filing of a Notice of Appearance. This applies but is not limited to government agencies of the Washoe County District Attorney's Office, the Washoe County Public Defender's Office, and the Washoe County Alternate Public Defender's Office.

(e) Counsel shall not communicate with or attempt to influence a law clerk upon the merits of any contested matter pending before the judge to whom the law clerk is assigned.

Comment: Status conferences are conducted to monitor the progress of a case. The court shall not conduct settlement conferences in criminal cases.

18 U.S. Code § 3142. Release or detention of a defendant pending trial

(a) In General.—Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be—

(1) released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section;

(2) released on a condition or combination of conditions under subsection (c) of this section;

(3) temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or

(4) detained under subsection (e) of this section.

(b) Release on Personal Recognizance or Unsecured Appearance Bond.—

The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a), unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

(c) Release on Conditions.—

(1) If the judicial officer determines that the release described in subsection (b) of this section will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person—

(A) subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a); 1 and

(B) subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person—

(i) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(ii) maintain employment, or, if unemployed, actively seek employment;

(iii) maintain or commence an educational program;

(iv) abide by specified restrictions on personal associations, place of abode, or travel;

(v) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(vi) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(vii) comply with a specified curfew;

(viii) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(ix) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

(x) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(xi) execute an agreement to forfeit upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to assure the appearance of the person as required, and shall provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances as the judicial office may require;

(xii) execute a bail bond with solvent sureties; who will execute an agreement to forfeit in such amount as is reasonably necessary to assure appearance of the person as required and shall provide the court with information regarding the value of the assets and liabilities of the surety if other than an approved surety and the nature and extent of encumbrances against the surety's property; such surety shall have a net worth which shall have sufficient unencumbered value to pay the amount of the bail bond;

(xiii) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(xiv) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

In any case that involves a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title, or a failure to register offense under section 2250 of this title, any release order shall contain, at a minimum, a condition of electronic monitoring and each of the conditions specified at subparagraphs (iv), (v), (vi), (vii), and (viii).

(2) The judicial officer may not impose a financial condition that results in the pretrial detention of the person.

(3) The judicial officer may at any time amend the order to impose additional or different conditions of release.

(d) Temporary Detention To Permit Revocation of Conditional Release, Deportation, or Exclusion.— If the judicial officer determines that—

(1) such person—

(A) is, and was at the time the offense was committed, on—

(i) release pending trial for a felony under Federal, State, or local law;

(ii) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or

(iii) probation or parole for any offense under Federal, State, or local law; or

(B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)); and

(2) such person may flee or pose a danger to any other person or the community;such judicial officer shall order the detention of such person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to

notify the appropriate court, probation or parole official, or State or local law enforcement official, or the appropriate official of the Immigration and Naturalization Service. If the official fails or declines to take such person into custody during that period, such person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings. If temporary detention is sought under paragraph (1)(B) of this subsection, such person has the burden of proving to the court such person's United States citizenship or lawful admission for permanent residence.

(e)Detention.—

(1) If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.

(2) In a case described in subsection (f)(1) of this section, a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if such judicial officer finds that—
(A) the person has been convicted of a Federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed;
(B) the offense described in subparagraph (A) was committed while the person was on release pending trial for a Federal, State, or local offense; and
(C) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in subparagraph (A), whichever is later.

(3) Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed—
(A) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;
(B) an offense under section 924(c), 956(a), or 2332b of this title;
(C) an offense listed in section 2332b(g)(5)(B) of title 18, United States Code, for which a maximum term of imprisonment of 10 years or more is prescribed;
(D) an offense under chapter 77 of this title for which a maximum term of imprisonment of 20 years or more is prescribed; or
(E) an offense involving a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title.

(f)Detention Hearing.—The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community—

(1) upon motion of the attorney for the Government, in a case that involves—
(A) a crime of violence, a violation of section 1591, or an offense listed in section 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed;

(B) an offense for which the maximum sentence is life imprisonment or death;
(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;
(D) any felony if such person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or
(E) any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device (as those terms are defined in section 921), or any other dangerous weapon, or involves a failure to register under section 2250 of title 18, United States Code; or

(2) upon motion of the attorney for the Government or upon the judicial officer's own motion in a case, that involves—
(A) a serious risk that such person will flee; or
(B) a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of such person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for the Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday). During a continuance, such person shall be detained, and the judicial officer, on motion of the attorney for the Government or sua sponte, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether such person is an addict. At the hearing, such person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence. The person may be detained pending completion of the hearing. The hearing may be reopened, before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of such person as required and the safety of any other person and the community.

(g) Factors To Be Considered.—The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;
(2) the weight of the evidence against the person;
(3) the history and characteristics of the person, including—
(A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and
(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. In considering the conditions of release described in subsection (c)(1)(B)(xi) or (c)(1)(B)(xii) of this section, the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

(h) Contents of Release Order.—In a release order issued under subsection (b) or (c) of this section, the judicial officer shall—

(1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and
(2) advise the person of—
(A) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;
(B) the consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and
(C) sections 1503 of this title (relating to intimidation of witnesses, jurors, and officers of the court), 1510 (relating to obstruction of criminal investigations), 1512 (tampering with a witness, victim, or an informant), and 1513 (retaliating against a witness, victim, or an informant).

(i) Contents of Detention Order.—In a detention order issued under subsection (e) of this section, the judicial officer shall—
(1) include written findings of fact and a written statement of the reasons for the detention;
(2) direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;
(3) direct that the person be afforded reasonable opportunity for private consultation with counsel; and
(4) direct that, on order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility in which the person is confined deliver the person to a United States marshal for the purpose of an appearance in connection with a court proceeding.

The judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason.

(j) Presumption of Innocence.—

Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

Here are additional Eighth Judicial District Court Rules that we have identified that were not included. We are not advocating for them to be adopted, just identifying all of the rules relevant to criminal practice so that we can discuss them:

- 1.14 Time Computation and Mail Rules
- 1.44 Competency Court
- 1.45 Juvenile Court
- 1.46 Juvenile Court
- 1.48 Criminal Division Hearing Masters
- 1.60 Assignment of Criminal Cases
- 1.64 Assignment of Criminal Cases
- 1.70 Preservation of track/team assignments
- 1.74 Calendaring trials, stacks
- 1.80 Overflow assignments
- 3.20 Criminal Motions
- 3.70 Papers that can't be filed

Jury Commissioner Rules

- 6.01
- 6.10
- 6.30
- 6.32
- 6.40
- 6.42
- 6.44
- 6.50
- 6.70
- 7.20 Form of papers for filing

Efiling Rules:

- 8.02
- 8.03
- 8.04
- 8.05
- 8.06
- 8.07
- 8.08
- 8.09
- 8.10
- 8.11
- 8.12
- 8.13
- 8.14

*Rules of Practice for the Eighth Judicial District Court can be found here and via the link on the meeting agenda.

TAB 5

2nd CR Rule 6. Discovery

(a) The parties, through their counsel, without order of the court, shall timely provide discovery of all information and materials permitted by any applicable provision of the Nevada Revised Statutes.
(b) (b) The content, timing, manner and sequence of any additional discovery shall be directed by the court at the initial appearance or as soon thereafter as reasonably practicable. At the request of either party, an earlier hearing before the district court on the status of discovery, or other matters in the case, will be required where requested in advance of the statutory time period for production of discovery.
(c) (c) Any discovery dispute shall be brought to the attention of the court expeditiously by telephone conference, on the record, with the court and all counsel, on oral application in open court or a written motion.
(d) (d) The court may impose appropriate sanctions for the failure of a party or counsel to comply with any discovery obligation imposed by law or ordered by the court.

Comment: Subsection (a) of this rule eliminates the need for a discovery order unless the court orders discovery beyond that required by the statutes of Nevada. The other subsections of the rule promote prompt resolution of discovery disputes and require sanctions for non-compliance with any discovery obligation.