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FEDERAL CIVIL PROCEDURE

KENNETH E. GRAY*

In reviewing recent decisions of the Seventh Circuit Court of Appeals concerning the Federal Rules of Civil Procedure and related issues, one finds cases dealing with topics such as: "What Law Governs?"; "Directed Verdicts"; "Judgment N.O.V."; "Rule 52(A) and Scope of Review"; "Precedential Value of the Supreme Court's Supremacy Affirmance"; "Attorney's Fees"; "Appealable Orders"; "Res Judicata and Collateral Estoppel"; "Summary Judgment"; "Right to Jury Trial"; "When Exercise of Strategy Option Constitutes Waiver on Appeal"; "Judge's Conduct a Trial"; "Certification to

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1. See Unarco Indus., Inc. v. Kelly Co., 465 F.2d 1303 (7th Cir. 1972); Chicago v. General Motors Corp., 462 F.2d 1262 (7th Cir. 1972).
4. See In Re O.L. Schmidt Barge Lines, Inc., 475 F.2d 428 (7th Cir. 1973); Haythe v. Decker Realty Co., 468 F.2d 336 (7th Cir. 1972); Maxon Premix Burner Co. v. Eclipse Fuel Eng'r Co., 471 F.2d 308 (7th Cir. 1972).
5. See Jordan v. Weaver, 472 F.2d 985 (7th Cir. 1973).
6. See Swanson v. American Consumers Indus., Inc., 475 F.2d 516 (7th Cir. 1973); Tcherepnin v. Campbell, 469 F.2d 531 (7th Cir. 1972).
7. See Thill Sec. Corp. v. The New York Stock Exch., 469 F.2d 14 (7th Cir. 1972).
9. See Abrodun v. Martin Oil Serv., Inc., 475 F.2d 14 (7th Cir. 1973); National Family Ins. Co. v. Exchange Nat'l Bank, 474 F.2d 237 (7th Cir. 1973); United States v. Borchardt, 470 F.2d 257 (7th Cir. 1972); Illinois State Employers Union v. Lewis, 473 F.2d 561 (7th Cir. 1972).
10. See Rogers v. Loether, 467 F.2d 1110 (7th Cir. 1972).
11. See Mach v. Jorgensen, 467 F.2d 1177 (7th Cir. 1972); Pickens-Kane Moving and Storage Co. v. Aero Mayflower Transit Co., 468 F.2d 490 (7th Cir. 1972); Wheeler v. Glass, 473 F.2d 100 (7th Cir. 1972).
12. See Hutter Northern Trust v. Door County Chamber of Commerce, 467 F.2d 1075 (7th Cir. 1972); United States ex rel. Wilson v. Coughlin, 472 F.2d 100 (7th Cir. 1972).
State Supreme Court”¹³; “Class Actions”¹⁴; and “Special Interrogatories-Allocation of Functions Between Judge and Jury”.¹⁵

Some of the most significant and troublesome decisions (from the practitioner's point of view) are those which concern Rule 60 of the Federal Rules of Civil Procedure.

This paper will discuss three recent cases decided by the Seventh Circuit under Rule 60 with the purposes of both providing the practitioner with an indication of some of the problems and pitfalls he may be faced with under the Rule and suggesting that the philosophical approach taken in solving some of the problems needs re-evaluation.

I. Bershad v. McDonough, (469 F.2d 1333 (7th Cir. 1972))

In this case, defendant-appellant McDonough, unsuccessfully appealed the denial of his Rule 60 motion by the Northern District Court of Illinois. On June 23, 1969, the district court had entered a judgment against McDonough for $612,000 which represented “short-swing” profits apparently made on the purchase and sale of 272,000 shares of a company within a six month period when he owned more than 10% of that company's stock. McDonough's appeal was registered by the Seventh Circuit¹⁶ and McDonough paid the $612,000 on January 25, 1971. On May 4, 1971, McDonough petitioned the district court for relief under Rule 60 because of a "clerical error." He alleged that before he had entered into the option agreement to sell the 272,000 shares of stock, he had sold 10,000 shares to one William C. Lea at no profit to himself and had arranged to have Lea's 10,000 shares sold as part of the 272,000. Therefore, he argued, only the profit on 262,000 shares should have been recoverable, and, because he and his attorney had been too involved with the complexities of the litigation to notice the error, the judgment should be reduced by $22,000. Plaintiff's answer to this petition included a suggestion that McDonough had intentionally concealed the sale of the 10,000 during the trial and appeal for purposes of preventing the revelation of other damaging evidence¹⁷, and the district court summarily rejected the petition on May 28, 1971. The Court of Appeals affirmation of the district court's rejection of the petition held

¹³. See Wecker v. Kilmer, 471 F.2d 782 (7th Cir. 1972).
¹⁴. See Johnson v. Illinois Dept. of Pub. Aid, 467 F.2d 1269 (7th Cir. 1972).
¹⁷. 469 F.2d at 1335 n.2.
that McDonough had presented no arguments to convince the appellate court that the denial of his petition was an abuse of discretion.

On appeal, McDonough apparently conceded that Rule 60(a), the "clerical error" section, did not apply, and sought to invoke Rule 60(b),18 to cover his "inadvertent error." The court, by Judge Castle, held that:

1. Rule 60(b)(1) and not Rule 60(b)(6) applied because the two sections were mutually exclusive;19

2. A motion under Rule 60(b)(1) can only be made within one year after entry of judgment [unlike a motion under Rule 60(b)(6)];

3. The taking of an appeal does not extend the one year period;20

4. McDonough’s petition was not filed within the time allowed, that is within one year from June 23, 1969, and therefore its denial was proper.

The court also indicated in what is apparently dicta, that even if his petition were timely, McDonough would not be entitled to relief under Rule 60(b)(1) since "neither ignorance nor carelessness on the part of a litigant or his attorney will provide grounds for rule 60(b) relief."21

18. FED. R. CIV. P. 60(1) provides the following:
(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.


21. 469 F.2d at 1337, citing Hoffman v. Celebrezze, 405 F.2d 833 (8th Cir. 1969), and other earlier cases. Hoffman talks about intentional mistakes not being covered by Rule 60(b)(1).
Judge Kilkenny concurred specially; he felt bound by *Transit Casualty* on the one year point that an appeal does not extend the one year limitation under Rule 60(b)(1), but stated that such a time limit should not apply to the circumstances of this case thereby allowing appellee to take advantage of this type of error.

The court's decision is illustrative of the dilemma underlying Rule 60(b) and the failure of the Rule to satisfactorily deal with that dilemma. The two conflicting policies that underlie Rule 60(b) are: First, the policy of the law to favor a hearing of a litigant's claim on the merits and, second, the policy of seeking to achieve finality in litigation.22

The court's first holding, *i.e.*, that Rule 60(b)(1) rather than 60(b)(6) applies because the two sections are mutually exclusive, involves more than one analytical step (although this is not made clear by the court). The two sections are held to be mutually exclusive based upon the *Transit Casualty* case which in turn is based on a 1967 Second Circuit opinion23 and a discussion in *Moore's Federal Practice*.24 Moore refers to the two leading United States Supreme Court cases on the subject *Klapprott v. United States*,25 and *Ackermann v. United States*26 to which we now turn.

*Klapprott* was a case in which a federal district court had entered a default judgment which set aside an earlier order granting Klapprott citizenship. Klapprott was in jail when the default judgment was entered and moved to set aside the default judgment more than four years later, while still a federal prisoner. The Supreme Court, reversing the lower courts, remanded the case with instructions to vacate the original default judgment and to grant Klapprott a hearing on the merits of the issues raised by the denaturalization proceeding. Five opinions were written in the case, three in favor of the Court's judgment, and two in dissent. Justice Black's opinion (in which Justice Douglas concurred) discussed the applicability of Rule 60(b)(6). Black said,

> It is contended that the one-year limitation bars petitioner on the premise that the petition to set aside the judgment showed, at most, nothing but 'excusable neglect.' And, of course, the one-year limitation would control if no more than 'neglect' was dis-

24. 7 J. Moore, Federal Practice ¶ 60.27(1) (2d ed. 1970).
closed by the petition. In that event the petitioner could not avail himself of the broad 'any other reason' clause of 60(b) [Rule 60(b) (6)]. But petitioner's allegations set up an extraordinary situation which cannot fairly or logically be classified as mere 'neglect' on his part. . . . The basis of his petition was not that he had neglected to act in his own defense, but that in jail as he was, weakened from illness, without a lawyer in the denaturalization proceedings or funds to hire one, disturbed and fully occupied in efforts to protect himself against the gravest criminal charges, he was no more able to defend himself in the . . . court than he would have been had he never received notice of the charges.27

In the Ackermann case, the petitioner along with his wife and a relative had a judgment entered against them in 1943 cancelling their certificates of naturalization on ground of fraud. The relative appealed and won a reversal but petitioner and his wife did not. Over four years after entry of judgment against them, petitioner and his wife filed a motion to set aside the denaturalization judgment under Rule 60(b). They alleged that the denaturalization judgment was erroneous; that they did not appeal because their attorney advised them that they would have to sell their house to pay the costs; and that a federal officer, in whose custody they were, advised them to hold onto their home and they would be released after the war. The district court denied the motion and this denial was affirmed by Justice Minton writing the majority opinion of the Supreme Court. Justice Black wrote a dissenting opinion with Justices Frankfurter and Douglas concurring in the dissent.

Justice Minton first notes that Ackermann alleged in his motion that his failure to appeal was excusable. [Court's italics.] A motion for relief because of excusable neglect as provided in Rule 60(b)(1) must, by the rule's terms, be made not more than one year after the judgment was entered.28

Justice Minton then notes that Ackermann seeks to bring himself within Rule 60(b)(6).

We cannot agree that petitioner has alleged circumstances showing that his failure to appeal was justifiable.29

First, says Minton, nothing said by the federal officer (the Alien Control Officer in whose custody the Ackermanns were held) could relieve the Ackermanns of their duty to take legal steps to protect their interests in litigation in which the United States was their adversary. Secondly, the

27. 335 U.S. 601, 613-614.
29. Id.
Ackermanns had no right to rely on a stranger. They had their own attorney and confidential adviser.

Instead of relying upon that confidential adviser, [Ackermann] freely accepted the advice of a stranger, a source upon which he had no right to rely. Petitioner made a considered choice not to appeal, apparently because he did not feel that an appeal would prove to be worth what he thought was a required sacrifice of his home. His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong. . . . There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from. 30

Minton compares the Ackermann's situation with Kalpprott as follows:

From a comparison of the situations . . . it is readily apparent that the situations of the parties bore only the slightest resemblance to each other. The comparison strikingly points up the difference between no choice and choice; imprisonment and freedom of action; no trial and trial; no counsel and counsel; no chance for negligence and inexcusable negligence. 31

Justice Black's dissent clarifies his position with respect to Kalpprott:

The court's interpretation of amended Rule 60(b) of the Federal Rules of Civil Procedure neutralizes the humane spirit of the Rule and thereby frustrates its purpose. The Rule empowers courts to set aside judgments under five traditional, specified types of circumstances in which it would be inequitable to permit a judgment to stand. But the draftsmen of the Rule did not intend that these specific grounds should prevent the granting of similar relief in other situations where fairness might require it. Accordingly, there was added a broad sixth ground. . . . 32

On the basis of these two decisions then, it has been almost uniformly held that the first five sections of Rule 60(b) are mutually exclusive from section (6). 33 In United States v. Karahalias 34 Judge Learned Hand wrote an opinion reversing the denial of a motion to reopen a default judgment of denaturalization that had been entered 17 years prior to the time relief was sought. Karahalias had gone back to Greece in 1929 and, because of his wife's continued illness and

30. Id. at 198.
31. Id. at 202.
32. Id. at 202-203.
34. 205 F.2d 331 (2d Cir. 1953).
World War II, found it impossible to return until 1947. Judge Hand first found that the ground for relief was "excusable neglect" (specifically mentioned in clause (1)), but said,

Subsection (6) . . . if confined to situations not covered by the first three subsections, would be extremely meagre, even assuming that we could find any scope for it at all. Moreover, if we could, it would be a strange purpose to ascribe to the Rule to say that, although subsection (6) was no more than a kind of receptacle for vestigial equities, it should be without any limit in time, while the other and the usual equitable grounds for relief were narrowly limited. We do not believe that this was its purpose; we think that it was meant to provide for situations of extreme hardship, not only those, if there be any, that subsections (1), (2), and (3) do not cover, but those that they do. In short—to put it quite baldly—we read the subsection as giving the court a discretionary dispensing power over the limitation imposed by the Rule itself on subsections (1), (2), and (3); . . . 35

On a petition for rehearing, Judge Hand decided his first opinion was contrary to Klapprott. No neglect, however excusable, says Hand, will survive the (time) limitation of Rule 60(b)(1). However Hand reaffirmed the result in Karahalias by finding that Karahalias' inaction was not "neglect" and that his inaction would be covered by subsection (6) when it resulted from forcible obstacles imposed upon him.36

No cases have been found subsequent to Karahalias that have directly challenged the assumption that the first five subsections of of Rule 60(b) are mutually exclusive from subsection (6). Rather the courts in later cases, when inclined to favor granting relief, find that "something more" than one of the grounds stated in the first five clauses is present,37 even though the something more does not quite reach the category of "forcible obstacles imposed upon the movement" or an "extraordinary situation." Many cases arising under Rule 60(b)(6) involve alleged blundering by the movant's counsel. If the attorney misconduct is characterizable as "grossly negligent"

35. Id. at 333.
36. Id. at 334-335.
37. See Menier v. United States, 405 F.2d 245, 248 (5th Cir. 1968), where the court relied on "far more than mere allegations of excusable neglect" and "a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses" to vacate a default judgment where U.S. (as plaintiff) failed to promptly obtain default against defendant (which judgment, if promptly filed would have been discharged in bankruptcy) and where defendant had not been promptly notified of default judgment and was without counsel and hopelessly insolvent. The dissenting judge thought the claim of "excusable neglect" had not been supported by allegations, 405 F.2d at 249-250 (5th Cir. 1968). See also Bros. Inc. v. W.E. Grace Mfg. Co., 351 F.2d 208 (5th Cir. 1965), cert. denied, 383 U.S. 936 (1966).
or "inexcusable neglect", Rule 60(b)(6) has been held to apply. An attorney's serious illness and death have been held to be not sufficient to allow relief under 60(b)(6) rather than 60(b)(1) after more than a year elapsed. But an attorney's serious personal problems have been held to be an "other reason" justifying 60(b)(6) relief. Obviously it is better at times to have an attorney who is really bad rather than one who may have been excusably negligent!

In Bershad v. McDonough the court assumes that the appellant's conduct could only be encompassed under clause (1) of Rule 60(b) if at all, and then applies the "mutually exclusive" doctrine to exclude coverage of a 60(b)(1) reason for relief under clause 60(b)(6) after the one year time period of 60(b)(1) has expired. McDonough's conduct would and should (according to the allegations he made with his motion) logically fall under the Rule 60(b)(1) category of excusable neglect, mistake, or inadvertence. Is it "something more" than excusable neglect, mistake, or inadvertence? Hardly! But such an unfair result, giving the appellee a windfall should not be allowed to stand. It is the contention of this paper that the "mutually exclusive" doctrine is not mandated by the Klapprott and Ackermann decisions, and is in any event unjust and unworkable. Its most pronounced effect has been to arbitrarily apply a one year time limit upon some grounds for relief from judgment but not upon others.

The categories that the courts have used in the cases cited above, to classify the grounds for relief from a final judgment that a petitioner is using, actually fall into one of three broad areas. The first area


40. L.P. Steuart Inc. v. Matthews, 329 F.2d 234 (D.C. Cir. 1964), cert. denied, 379 U.S. 824 (1964); Judge Miller dissented strongly.

41. The court does suggest, as indicated above, that as an alternative holding or as dicta, it finds that McDonough would not even be entitled to 60(b)(1) relief for excusable neglect, mistake or inadvertence had his motion been timely. This seems erroneous in view of the fact that McDonough was not given a hearing by the district court on his motion, and therefore the allegations by the appellees that McDonough intentionally concealed the sale of the 10,000 shares to Lea must be disregarded on appeal and only considered if the case is sent back to the district court for further hearings. See nn. 16 and 17 supra.

42. In Comment, Rule 60(b): Surveys and Proposal for General Reform, 60 Cal. L. Rev. 531, 559 (1972), the student author describes these broad areas somewhat differently.
is where the grounds for relief are based upon prior conduct of the party seeking relief that was deliberate or freely engaged in. When so based, the courts seldom, if ever, grant relief. This appears to be so whether or not the one year time period governing relief under clauses (1) to (3) of Rule 60(b) have been met. Apparently inadmissible in this first area of reasons for which the courts will not grant relief are "mere neglect" and "inexcusable neglect." The policy behind refusing to relieve a party of his deliberate acts is probably a sound one. If a deliberate choice not to appeal, or not to introduce certain evidence, or to take some other calculated risk during the litigation process could later be rescinded giving the litigant another chance to try a different strategy, it is obvious that the burdens such an approach would place upon the adversary system would be enormous. This first area is where we would logically place Justice Minton's decision in Ackermann.

The second major area is where the grounds for relief from a final judgment are based upon prior conduct of the party seeking relief that can be characterized by one or more of the descriptive words or phrases found in clauses (1) through (5) of Rule 60(b). Clause (1), which we have been primarily concerned with in this paper, lists four reasons: mistake, inadvertence, surprise or excusable neglect. Motions based upon these reasons must be brought within a reasonable time, but no more than a year after the final judgment (or order) was entered.

43. See n.6 supra.
44. See Cuewrrillo v. Schulte, 324 F.2d 234 (2nd Cir. 1963). Here the petitioner's conduct amounted to neglect for failure to explain why he had delayed bringing his motion for eight months. It appears that a failure to explain leaves the court with no choice but to presume that the conduct of the petitioner was deliberate.
45. See Greenspan v. Seagram, 186 F.2d 616, 619 (2nd Cir. 1951), disallowing relief where there had been "gross carelessness". Note that an attorney's gross neglect may not necessarily be ascribed to a client so that an attorney's gross neglect may amount to a forcible obstacle placed in the path of his client entitling him to relief. See L.P. Steuart, Inc. v. Matthews, 329 F.2d 234 (D.C. Cir. 1964) and a further discussion of the problems in ascribing an attorney's negligence to his client, infra.
46. See two 1972 Seventh Circuit opinions that elaborate the reasoning behind the concept that a party through his attorney can consciously waive certain issues by failing to raise them at the proper time: Maxon Premix Burner Co. v. Eclipse Fuel Eng'r Co., 471 F.2d 308 (7th Cir. 1972); and Mack v. Earle M. Jorgensen Co., 467 F.2d 1177 (7th Cir. 1972).

A problem not discussed in this paper is whether Rule 60(b) relief should include relief for judicial error of law, at least during the time in which an appeal could be taken. For an analysis of this subject see Comment, Federal Rule 60(b): Finality of Civil Judgment v. Self-Correction by District Court of Judicial Error of Law, 43 Notre Dame L. Rev. 98 (1967). The comment points out that hypothetically, allowing relief in such circumstances might extend the time for appeal under Rule 73(a).
47. Clauses (2) to (5) will not be discussed in this paper but the arguments
The third major area is where the grounds for relief are based upon "something more than" the reasons mentioned in clause (1); an "extraordinary situation" where "forcible obstacles" have been placed in the petitioner's path; "inexcusable neglect" on the part of movant's counsel; in other words, "any other reason justifying relief" under clause (6), which motion need only be brought within a reasonable time. As we have seen, the courts have sometimes strained the categories in order to grant relief on grounds that more logically fit within clause (1), doing this in order to avoid the one year restriction on clause (1). Clause (1) relief cannot be explicitly included under clause (6) relief because of the "mutually exclusive" doctrine. So the courts either fudge the matter or routinely deny relief because more than a year has gone by since the final judgment was entered.

Notice, however, into which area Klapprott and Ackermann fit. Ackermann, according to Justice Minton, is a case of deliberate choice and would, therefore, seem to fit into area one. Klapprott, according to Justice Black, was indeed a case where the petitioner was almost literally and unwilling prevented by outside forces from acting sooner. His case, therefore, does really involve something other than neglect or inexcusable neglect, as those terms are ordinarily used and, therefore, fits into area three. We need stretch no categories here to reach this conclusion. The Supreme Court has never dealt with a case that it thinks falls squarely into area two, that is a case covered by the grounds set forth in clauses (1), (2) or (3) but where relief is sought within reasonable time beyond the one year period. If faced with such a case (such as Bershad v. McDonough) the Supreme Court would then have to pass upon the validity of the "mutually exclusive doctrine," but until such time that doctrine lives solely on the basis of dicta by Justice Black (in which he was joined by one Justice Douglas) in Klapprott. Justices Black may fairly be said to have brought the validity of that dicta into question by his dissent in Ackermann.

herein have some bearing on questions that might arise at least under clauses (2) and (3). The one-year time limit does not apply to clauses (4) and (5), but does apply to clause (2) (newly discovered evidence) and clause (3) (fraud). For a good discussion of some of the problems raised by applying the one-year provision to clause (3), see Comment, Rule 60(b): Survey and Proposal for General Reform, 60 Cal. L. Rev. 531 (1972). For the text of Rule 60(b) see n.3, supra. Note that the reasonable time requirement applies to all clauses of the Rule.

48. 335 U.S. at 613-614. The somewhat offhanded remark of Black's opinion establishing this doctrine would appear to be, "And, of course, the one-year limitation would control if no more than "neglect" was disclosed by the petition...." In that event the petitioner could not avail himself of the broad "by any other reason" clause of 60(b).

49. After all, he essentially suggests that conduct the majority thinks deliberate, or
If there is no clearly "definitive decision" from the United States Supreme Court establishing the "mutually exclusive" doctrine as binding precedent, is the doctrine soundly based upon reason and public policy which dictate its continuance?

It has been suggested that not to apply the exclusivity doctrines would render the word "other" in the Rule meaningless. Surely however, "one would have to be singularly unmindful of the treachery and versatility of our language to deny that as a matter of mere English the words . . . may carry more than one meaning." "Any other reason justifying relief" certainly could, in linguistic terms, be read to include "reasons enumerated in clauses (1), (2), or (3) where the relief is sought beyond the one year period," without doing irreparable violence to the English language.

As noted above, the policies underlying Rule 60(b) are essentially contradictory. They are, again, the public interest in having a case decided on its merits contrasted with the notion of finality, that is; the policy that litigation must end sometime. Now in discussing the "mutually exclusive" doctrine, the overriding reason that the doctrine has any practical importance is, of course, the presence of the one-year limitation on clauses (1), (2) and (3). The one-year limitation aspect of the rule promotes the policy of finality (it could hardly be argued that it promotes resolution on the merits except by use of very sophisticated logic). So presumably does the "reasonable time" limitation of the Rule. A recent student comment has suggested that Rule 60(b) be amended to reflect and define the more equitable approach that is usually taken where the less rigid "reasonable time" provision of the Rule is applicable. The suggested revision of Rule 60(b) proposes that five factors be mentioned specifically in the Rule in order to guide the Courts in deciding when relief should be granted under the Rule either before or after the one year period has elapsed. The five proposed factors are:

1. The extent to which the party has received a full and a fair trial on the issues;

the equivalent, should be subject to be included under 60(b)(6) relief, as long as the harm suffered or the injustice perpetrated dictates relief. What, in his opinion, would then remain of the one-year provision?


53. It has been stated that where the courts are faced with a party seeking relief from a default judgment or dismissal they generally stretch to find reasons to justify
(2) the degree of the party's own negligence or fault, his diligence in seeking relief, the nature and quality of his claim or defense, and the detriment to the party if relief is denied;
(3) the degree of the other party's fault or wrongdoing, and the nature and quality of his claim or defense;
(4) a preference that decision be on the merits, but with due regard to the rights of the other party and third persons and the requirement that judgments be final;
(5) the degree to which detriment to the other party or to third persons may be reduced by imposition of just terms on the party seeking relief, including posting of bond to cover the other party's costs should the moving party fail to show reasons justifying relief.  

More than likely, if these or similar standards had been applied to Bershad v. McDonough, the movant would at least have been entitled to a hearing on his motion. Would there by any justification for applying the above set of standards or similar standards under the present Rule? Certainly it would be equitable and sensible to do so as long as the "mutually exclusive" doctrine does not prevent it. If the courts were to forge ahead and apply such standards under Rule 60(b) (6), dispensing with the "mutually exclusive" doctrine and thereby the rigidities of the one-year provision, wouldn't they render the one-year provision nugatory and meaningless thereby contravening the very language of the Rule itself? Or would the one-year provision still have a viable meaning and function within the context of the Rule? This paper will now suggest what meaning and role the one-year provision would still play.

The five factors that the above mentioned law review comment thinks should be balanced when deciding whether to grant relief from a final judgment and which it suggests be specifically incorporated into the Rule, may perhaps be reduced to three fundamental elements that should be taken into account:

(1) the extent of the harm or injustice to the movant in not granting relief;
(2) the degree of diligence or speed of the movant in discovering his mistake;
(3) the degree of reliance of non-movants on the finality of the judgment.

The one-year limitation cannot fairly be interpreted to mean that once a year has gone by after the entry of a final judgment, no movant relief, whereas when there has been a full trial they are less willing to be broad minded. See Wright & Miller, Federal Practice and Procedure: Civil § 2857, n.78.

54. The full text of the proposed revised Rule 60(b) is as follows:
could be said to be suffering an injustice or harm (even though it was a result of his own mistake, etc.). Nor could the one-year limitation be fairly interpreted to mean that once a year has gone by, the non-movant has conclusively and of necessity relied on the judgment such that it would be to his serious detriment if relief were granted to the movant. This point is best illustrated by looking at Klapprott, Ackermann, and Bershad v. McDonough. How could the government ever be said to have relied to its detriment on a final judgment in a denaturalization

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud [(whether heretofore denominated intrinsic or extrinsic)], misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. [The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.] A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. The distinction between extrinsic and intrinsic fraud for all purposes is abolished. Relief by motion or independent action may be allowed within a reasonable time, and not more than one year after the judgment, order, or proceeding was entered or taken. However, the court may in its discretion determine that relief is justified at any time, upon consideration of the following factors: (1) the extent to which the party has received a full and a fair trial of the issues; (2) the degree of the party's own negligence or fault, his diligence in seeking relief, the nature and quality of his claim or defense, and the detriment to the party if relief is denied; (3) the degree of the other party's fault or wrongdoing, and the nature and quality of his claim or defense; (4) a preference that decision be on the merits, but with due regard to the rights of the other party and third persons and the requirement that judgments be final; (5) the degree to which detriment to the other party or to third persons may be reduced by imposition of just terms on the party seeking relief, including posting of bond to cover the other party's costs should the moving party fail to show reasons justifying relief. Relief for fraud upon the court may be allowed at any time, but the court shall consider the extent to which the fraud impaired judicial impartiality, the extent to which the fraud affects the public interest, and the extent to which rights of third persons may be adversely affected if relief is granted. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Would an independent action to set the first judgment aside have been available to McDonough under the present Rule 60(b)? The requirements that he would have to meet in order to succeed in an independent action are very similar to the five considerations set out in the Law Review Comment's proposed new Rule 60(b). See WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2868, at 238. If McDonough were entitled to bring and succeed in an independent action he, of course, merely put the wrong label on his papers submitted to the Court. The result in Bershad v. McDonough is not rendered more sound by this possibility.
case? In Bershad, the non-movant apparently had not yet committed or spent the essentially punitive damages he had recovered. Perhaps the one-year provision could be read to express the sense of the drafters that once a year has gone by after a final judgment, it must be conclusively presumed that a movant guilty of a mistake, inadvertence, or excusable neglect has not been diligent in discovering his (or his attorney's) mistake. The Advisory Committee on the Rules recommended in 1954 that Rule 60(b) be revised to read that motions be made "within a reasonable time, and for reasons (1), (2), (3), and (6) not more than one year after the grounds thereof have accrued and are known to the moving party." The recommendation is an interesting one, but since it was not adopted, one might conclude that the purpose and intent of the one-year provision was in fact to punish one who has not been "diligent" with an arbitrary year period regardless of other meritorious arguments the movant has for seeking relief. Such an interpretation would be a reproach to the draftsmen, the Rules, and the federal judiciary since it automatically imposes a severe penalty upon a party for what may otherwise be a minor fault or mistake (that is, not discovering an error in time). A better interpretation of the one-year provision, and one which leaves the provision with some real content, would be to conclude that the provision creates only a rebuttable presumption that after a year has elapsed, the movant has not been diligent in discovering his error or the non-movant has relied to his detriment. In other words, the one-year provision shifts the burden of persuasion onto the movant, or suggests the drafters' intent that the burden weigh more heavily on the movant. This interpretation would probably have saved McDonough or at least gotten him a hearing, and more importantly it would allow the courts to get away from the "mutually exclusive" doctrine and the arbitrary unfairness that the doctrine can cause while at the same time not abolishing by judicial fiat any of the language of the Rule itself.56

To the argument that this liberalized interpretation of Rule 60(b) would "open the floodgates" to numerous suits or motions based on the Rule and destroy the principle of finality, the following observations are appropriate. First, the purpose of ending congestion in the courts should be no basis for arbitrary dismissals. Courts have been created

56. Perhaps the most cogent analysis of Rule 60(b)(6) was expressed by Judge Learned Hand in United States v. Karahalias, 205 F.2d 331, 333 (2d Cir. 1953) before the rehearing in that case. See nn. 34 and 35, and accompanying text, supra.
for the very purpose of trying cases on their merits and dismissals and default judgments should not be utilized as a handy instrument for lessening the caseload burden.\textsuperscript{57} Second, while much concern has been expressed in recent years over the congestion in our courts, there has been little truly scientific study or experimentation to find out just what effect changes in various procedural rules or substantive laws would have on court congestion.\textsuperscript{58} Much is left to speculation and guesswork. It is hardly impressive to say one will apply a rule or doctrine in a way that produces an unjust result simply because one fears the opposite result might overcrowd the courts. Finally, it has been observed that in states such as Wisconsin where courts have wide discretion in these types of cases; the courts have been "sufficiently concerned with the aims of finality."\textsuperscript{59}

In brief then, while changes in the Rule itself might be desirable, it is proposed that until this happens, the "mutually exclusive" doctrine is neither sound in reasoning, nor required by United States Supreme Court decisions, and ought to be abolished.

In \textit{Bershad v. McDonough} the Court of Appeals for the Seventh Circuit also held that the taking of an appeal does not extend the one-year time period.\textsuperscript{60} This harsh result is based upon the following reasoning: the Rule 60(b) motion can be made even though an appeal has been taken and is pending.\textsuperscript{61} The very question of whether a district court could hear a Rule 60(b) motion while a case is on appeal has been considered doubtful and there has been a split among the circuits on the matter.\textsuperscript{62} According to the authors, Wright and Miller, the better procedure is to allow the district court to "indicate" whether it is inclined to grant the motion or not.\textsuperscript{63} If not, the district court has power to deny the motion, but if it is inclined to grant the motion, application can be made to the appellate court to remand the case and upon remand, the district court then has power to grant the motion.\textsuperscript{64} In

\textsuperscript{60} See n.20, and accompanying text, supra.
\textsuperscript{61} See Gulf Coast Bldg. & Supply Co. v. Local 480, IBEW, 460 F.2d 105 (5th Cir. 1972).
\textsuperscript{62} See \textit{WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL} § 2873.
\textsuperscript{63} \textit{Id.}, § 2873 at 265.
\textsuperscript{64} This is the view of the Seventh Circuit, Binks Mfg. Co. v. Ransburg Electro-Coating Corp., 281 F.2d 252 (7th Cir. 1960), \textit{cert. denied}, 366 U.S. 211 (1961).
any event, it would seem likely that the ordinary litigant (and perhaps the ordinary attorney) would naturally conclude that while an appeal is pending the Rule 60 clock is not running. Again this narrow and harsh interpretation of the Rule is fundamentally unfair in that it may in effect impose a major penalty upon a party for a minor fault and there is no discernable benefit to be gained in terms of "finality" or anything else by shortening the time period.

II. Beshear v. Weingapfel, 474 F.2d 127 (7th Cir. 1973)

In this case, Plaintiff-Appellant (Beshear) unsuccessfully appealed the denial of his Rule 60 motion by the Southern District Court of Indiana. On May 20, 1970, Beshear filed a diversity suit for damages allegedly sustained when he fell while exiting from defendant's tavern. After an answer had been filed and discovery commenced, defendant's motion was granted removing the case from the pre-trial and trial calendars. At the pre-trial conference on January 13, 1971, Beshear's attorney announced that he had written Beshear asking permission to dismiss the suit and that his letter further stated that if permission were not granted, the attorney would ask the court to be allowed to withdraw from the case. On March 8, 1971, the case was assigned for another pre-trial conference for April 30, 1971. On March 12, 1971, plaintiff's attorney petitioned to withdraw. Attached to the petition was a copy of a letter dated January 12, 1971, and sent to Beshear by certified mail. This letter stated that the attorney was going to withdraw from the case within ten days of the date of the letter, and cited as reasons that he could not find witnesses that Beshear had indicated had previously fallen at the accident site, that some were non-existent, and that in any event the attorney had suggested dismissing the claim which Beshear did not want to do. The attorney's petition to withdraw was granted April 6, 1971, and a copy of the court entry was sent to Beshear by certified mail. On April 30 neither Beshear nor an attorney representing him showed up at the pre-trial conference and on the same day defendant's motion to dismiss for failure to prosecute the action was granted with prejudice. A copy of the court's entry was sent to Beshear by certified mail, and a copy of the defendant's motion including an attorney's affidavit detailing Beshear's derelictions in respect to prosecuting the suit was also mailed to Beshear. On May 24, 1971, the day the case was listed on the court calendar for trial, Beshear by a new attorney (#2) moved for relief from the order of dismissal. Attached to the motion was Beshear's affidavit (dated May 22) stating that he had not been notified that a pre-
trial conference was to be held on April 30, 1971; and that on April 12, 1971, when he found out about the May 24 trial, he "took steps" to obtain another attorney to appear on May 24 and ask for a continuance, or if necessary to appear at trial on that date. The court treated the motion as a Rule 60 motion. On June 18, 1971 (11 days after defendant had filed a memorandum opposing the motion), other attorneys had filed an appearance for Beshear (set #3), but had presented no additional explanations for Beshear's conduct. The district court denied the motion and Beshear (now with a fourth set of attorneys) appealed.

The court of appeals, in the decision by Judge Pell, stressed what it considered to be the fact that Beshear had not set forth the date on which he first took steps to procure new counsel; that he had not set forth whether any trial preparations had been made in the event trial had been found "necessary" on May 24, 1971; that he had not explained why there was a delay of three weeks from the latest time that he could have learned of the dismissal (May 5) until May 24 in which time he did nothing, or why his attorney (#2) had the right to do nothing in that period and to assume that there would be a trial on May 24 notwithstanding the dismissal, lack of a pre-trial conference, and lack of completion of discovery; and that he had made no contention that he had a "meritorious claim." The court of appeals held that the district court had not abused its discretion since the district court action could not be said to be arbitrary.

Citing Link v. Wabash Railroad Co. the court points out that while in that case the Supreme Court expressly refrained from deciding whether an unexplained absence from a pre-trial conference would alone justify a dismissal, they held that that fact in the context of other evidence of similar purport could justify a dismissal. The Court then holds:

1. There was a context of facts in this case reflecting a lack of

65. Fed. R. Civ. P. 55(c) would not apply since it only refers to relief from entries of default and default judgments.

66. The court pointed out Beshear had followed the better practice in presenting his motion for relief to the district court rather than launching a direct appeal, as he might have done, but that in any event, the key question was still whether the district court had abused its discretion. 474 F.2d at 130. The concept of leaving the matters discussed in this paper to the trial courts discretion may be viewed as another facet of the Federal Court System that prevents correction of certain unfair results. That is not to say that the concept is not functional in other areas. See, Comment, Equitable Power of a Federal Court to Vacate a Final Judgment For "Any other Reason Justifying Relief"—Rule 60(b)(6), 33 Missouri L. Rev. 427, 432 (1968) [hereinafter cited as Comment, Equitable Power].

prosecutive intent which went beyond the mere failure to attend the pre-trial conference;

2. The record reflected a complete absence of any regard for the "salutary" rule\(^{68}\) that a Rule 60(b) motion be buttressed by a showing of the existence of a meritorious claim or defense.

3. The district court, therefore had not abused its discretion, and the decision of the district court was affirmed.

Circuit Judge Fairchild concurred in the result stating that while he felt that a dismissal based solely on the failure to appear at the pre-trial (on April 30, 1971) without notice of his duty to do so (it could not be presumed that attorney #1 had notified Beshear of the date) would be an abuse of discretion; lack of diligence and other deficiencies in the motion to dismiss rendered the denial of relief not an abuse of discretion.

The Court's first holding, while appearing to rely to some extent on the opinions of Beshear's first attorney about the merits of the case, seems to focus more upon the fact that for at least three weeks Beshear and/or his attorney did nothing but wait for the May 24 trial date, apparently not preparing for trial and, therefore, probably assuming that they could get a reinstatement and a continuance on that date. The Court appears to be saying that this was so presumptuous of them and shows such a lack of diligence that it is evidence that the lawsuit or at least the intent to prosecute it was frivolous. Of course, if attorney #2 had been on the job for three weeks and was the one primarily responsible for such an error in judgment (as it turns out), Beshear is being penalized for his attorney's conduct\(^{69}\) (although it is true that Beshear had not indicated the date that he actually hired attorney #2). In any event, this appears to be another example of the penalty by dismissal, far outweighing the offense (missing a pre-trial because of lack of notice, and then waiting three weeks to move for relief where the Rule provides that relief may be sought under 60(b)(1) within a reasonable time, but no more than one year after the final judgment is entered). The Court mentions in passing the preference that cases be heard on the merits but gives no justification for disregarding that

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\(^{68}\) The court cited Gomes v. Williams, 420 F.2d 1364 (10th Cir. 1970) for the most recent statement of this "salutary" rule which cannot be found in the language of Rule 60(b) or any other Federal Rule of Civil Procedure. The Gomes court held that the lack of anything more than the mere allegations of a meritorious defense was by itself a sufficient ground for denying relief under Rule 60(b).

\(^{69}\) While Link v. United States, 370 U.S. 626 (1962) holds that an attorney's conduct is attributable to his client, we have seen that this doctrine is not always carried to its logical conclusion. Its rigid application would lead to many malpractice suits, or perhaps just as often, leave a client without any remedy at all.
principle here except the vaguest generalities. No countervailing policy seems to be served by the decision except perhaps the interest the courts have in preserving the speed and integrity of their trial calendar. The notion, however, that drastic penalties really cut down on court congestion is, as indicated in discussing Bershad v. McDonough speculative reasoning at best. Would not a system of fines for these types of mistakes serve just as well and promote the ends of justice too in the process?70 Actually the ordinary litigant, and even the ordinary attorney, would probably reason that to wait until May 24 in these circumstances would be a sensible thing to do and would avoid some paper work, especially where they anticipate that no judge would insist that the trial proceed on May 24 anyway.71

The Court's second holding is only slightly more acceptable than the first in that it is at least based on well defined precedent. The requirement that a party make a showing that he has a meritorious claim or defense before being relieved of a dismissal or default judgment had its origin in equity. The theory was that equity would not do or require a useless act so, therefore, the movant had to demonstrate that the second suit might produce a result different from the initial dismissal or default.72 The requirement of such a showing has, of course, no foundation in the language of Rule 60, or any other Federal Rule. It is therefore a potential trap for the unknowing as well as the uncareful. The courts have differed greatly on the nature and extent of the showing that will be necessary.73 It is another matter lying within the court's discretion. That the application of this principle in the instant case appears to thwart the liberal pleading provisions of Rule 8 of the Federal Rules of Civil Procedure is virtually conceded in

70. Rule 60(b) expressly provides that relief from a default judgment may be granted "upon such terms as are just."
71. How much time is it safe for an attorney to delay bringing this type of motion? Very, very little it seems. Two and a half months has been held to be too long. See Consolidated Masonry & Fireproofing, Inc. v. Wegman Constr. Corp., 383 F.2d 249 (4th Cir. 1967). But see Bridoux v. Eastern Airlines, Inc., 214 F.2d 207 (D.C. Cir. 1954), cert. denied, 348 U.S. 821 (1954).
72. See Wright & Miller, Federal Practice and Procedure: Civil § 2697.
73. Compare Trueblood v. Grayson Shops of Tenn., Inc., 32 F.R.D. 190 (E.D. Va. 1963), a case essentially saying that mere statements by a defendant's attorney and insurance agent that he had a good defense were sufficient, with Gomes v. Williams, 420 F.2d 1364 (10th Cir. 1970). The Trueblood decision contains a good evaluation of the wide variety of standards applied in these situations. 32 F.R.D. at 196-197. The cases appear to fall into 3 categories. Many require a specific recitation of facts in the motion which, if proven, would constitute a meritorious claim or defense. Some allow bare allegations, conclusions, or even denials. A few treat oral statements or the court's own assumptions as a sufficient indication of a meritorious claim or defense. See Comment, Equitable Power, supra note 66, at 433-34.
Nevertheless, the appellate court applies this principle in a situation where the plaintiff has had trouble retaining and keeping an attorney and has not been able to complete discovery. Again this holding obviously does not promote the policy that lawsuits be heard on the merits, and it is difficult to imagine what legitimate policy it does promote. The holding is supportable only by the unproven notion that such provisions are necessary to keep the courts free of congestion. But the plaintiff, because of a minor error, has triggered a procedure whereby he is denied a substantive right to have his case heard, or at least to proceed with pre-trial discovery, a right that could not be denied him under Rule 8, but can be if he or his attorney make one small slip-up.

The following case, it will be seen, reaches a result that is essentially the exact opposite of that reached in Beshear.

III. VAC-AIR, INC. V. JOHN MOHR & SONS, INC., 471 F. 2d 231 (7th Cir. 1973).

In this case, Defendant-Appellant (Mohr) successfully appealed the denial of a motion to vacate a default judgment in favor of the Plaintiff by the Eastern District Court of Wisconsin. On September 4, 1970, plaintiff, Vac-Air, filed a complaint against Mohr charging patent infringement and common law unfair competition. Vac-Air sought a preliminary and permanent injunction, an accounting for damages and attorney's fees. Mohr failed to answer as required by October 20, 1970, and Vac-Air moved for a default judgment which was heard on November 19, 1970. Mohr's attorney admitted he had been simply negligent and stated that the significance of the answer might be affected by a case pending in the Wisconsin State courts in which Mohr had sued Vac-Air and another defendant over title to the invention involved in the instant case and Vac-Air counterclaimed. The district court judge expressed the opinion that the plaintiff should have his default, but vacated the default anyway while assessing a $200 penalty on Mohr. Mohr then paid the fine and filed an answer and a counterclaim, the counterclaim raising issues that were also at stake in the state litigation. On March 4, 1971, Vac-Air served interrogatories upon Mohr with answers due in 30 days. On April 14, Vac-Air moved for a default judgment for failure to answer the interrogatories. On June 14 the district judge entered a default judgment without hearing permanently enjoining Mohr from violating the patent in question and

74. 474 F.2d at 132.
ordering an *ex parte* hearing to determine plaintiff's damages.\(^75\)

Meanwhile in the state court, a jury returned a verdict for Vac-Air on all counts, and the state supreme court upheld a jury verdict for Vac-Air against Mohr for $125,000. The *ex parte* hearing was held, hearing the evidence of alleged damages, and on July 6, 1971, the district court entered a permanent injunction against Mohr prohibiting infringement and assessed damages and costs against Mohr in an amount of over $46,000. Mohr moved to vacate the default judgment on July 16, attaching a letter from a doctor who stated that his attorney had been under the doctor's care for a year for severe anxiety neurosis, hypertension and other ailments requiring sedation and other treatment and necessitating a reduction of the attorney's attention to practice. Also attached was Mohr's attorney's affidavit to the same effect, further pointing out that he had been trying the state case from June 10 to 16 at the very time the default order was entered (June 14). On August 31, 1971, the district court denied Mohr's motion and Mohr appealed.\(^76\)

Both the June 14 and August 31 orders of the district court based the default judgment on the failure to answer the complaint timely, failure to answer the interrogatories timely, and failure to file a brief in answer to Vac-Air's motion for default of April 14.

The court of Appeals, by Judge Sprecher stated that the failure to file a brief in answer to the April 14 motion could not be taken into consideration since no order was on the record that a brief was required and similarly the record failed to indicate that Vac-Air had filed a brief that Mohr was required to answer. The appeals court then indicates that the failure to answer the complaint had been followed by the $200 fine. The appeals court finally points out that the answers to the interrogatories were ultimately submitted one month after they were due and that no order had been entered by the district court compelling answers as is permitted by Rules 37(a) and (b), but not required by Rule 37(d). The appeals court makes no mention whether Mohr was asked or required to show that he had a meritorious claim or defense.

The court holds that the default judgment was too harsh and that it must be vacated, with cost of the appeal assessed, however, against Mohr. Mohr's attorney, says the court, was suffering from health problems and while trying another case between the parties at the same time, he was required to act in the district court as well. The court

75. 52 F.R.D. 508 (E.D. Wis. 1970).
76. 53 F.R.D. 319 (E.D. Wis. 1971).
does not condone this attorney's conduct, especially where the appearance of local counsel for Mohr was also on file in the case, but concludes quoting from *Sapiro v. Hartford Fire Insurance Co.*: 77

While not approving the apparent lack of diligent attention, we are of the opinion that the imposition of the particular sanction was too harsh under the circumstances here presented and judicial discretion should have indicated other less extreme initial steps to accomplish the result of compliance with the order to answer interrogatories. 78

Also quoting from *Sapiro*, the court states, "where an alternative, less drastic, sanction would be just as effective it should be utilized." 79

The result reached by the court of appeals is praiseworthy, especially when compared with *Beshear*, above, where a 3-week delay was fatal. But the state of Rule 37 with respect to sanctions that gave rise to the district court's decision must again give us pause. 80  Rule 37 is extremely flexible with respect to sanctions. They are initially left up to the discretion of the trial court. It has been said that justice

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77. 452 F.2d 215 (7th Cir. 1971), quoted at 471 F.2d at 234.
78. 452 F.2d at 217.
79. Id. at 216.
80. The text of Rule 37(d), Sanctions for Failure to Make Discovery, is as follows:

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

Paragraphs (A), (B), and (C) of subdivision (b)(2) of Rule 37 provides:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.
requires that the most drastic sanctions be reserved for flagrant cases, but Rule 37(d) does provide that a dismissal or a default is allowable where a party fails to answer interrogatories or appear for a deposition within the time allotted, even though no order has been obtained compelling compliance. Until 1970, Rule 37(d) only applied if the failure by a party was willful. The 1970 Amendments eliminated this provision, and according to the Advisory Committee notes, the presence or absence of willfulness should now only govern the choice of sanctions. According to the authors, Wright & Miller, however, willfulness did, and still may include "intentional" conduct, or a deliberate, conscious and intentional choice to disregard the duty to answer, appear, etc. Mohr's attorney here was certainly guilty of "intentional" misconduct, at least in some sense, in the view of the district judge.

What is particularly disturbing is that the Rule leaves open on its face (particularly after the 1970 amendments) the possibility of an entry of default or dismissal where a party has failed to comply with a time limit, but no court order is outstanding and the party received no notice of his failure to observe the time requirements. Again there is the possibility of an overwhelming penalty for a very small dereliction. Would not the automatic levy of a fine in the circumstances present in the Vac-Air case, with the accompanying notice that a daily or periodic fine would require, better serve the ends of justice and protect a client from the possible negligence of his attorney? Should not an outstanding court order at least be required before a dismissal or default is considered a proper penalty? While court dockets may be congested, it must be kept in mind that attorneys too may inevitably face similar "congestion" problems like those faced by the attorney in Vac-Air.

82. For a complete discussion of this subject, see WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2291.
83. Id. See a compilation of cases at nn. 36 and 37 of § 2291 which compare situations where the courts have found dismissals or default judgments proper, with where they have been found to be erroneous.
84. For a comparison of the fierce possibilities of the Federal Rules 37(d) with the practice in the Illinois Courts in the Chicago area, see Hon. Nicholas J. Bua, Motion Practice in the Circuit Court of Cook County—A Cursory Outline, 54 CHICAGO BAR RECORD 231 (1972). In Societe Internationale pour Participation Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958), the Supreme Court did indicate that there were due process limits on the penalties that could be imposed under Rule 37, but Rogers was the extreme case and the Court held that dismissal was not proper where a party was unable (because of a forcible obstacle) in good faith to produce documents because prohibited from doing so by foreign law. Nevertheless the Rule leaves open the possibility of dismissal or default for a minor error, as witnessed by
CONCLUSION

In all three district court decisions discussed above, and in two out of the three appeals court decisions, a party is made to suffer a default judgment or dismissal of his case because of a comparatively minor procedural error. If an attorney was responsible for the error, presumably the client could bring a malpractice suit. His chances of recovery would not be certain, however, and the courts would be faced with the burden of hearing and deciding yet another case. The "mutually exclusive" doctrine, "showing of a meritorious claim or defense" doctrine, the requirement of "diligence," and the idea that the appeals court will not upset the district court's exercise of sound discretion are all judicially created doctrines. The "one-year provision" of 60(b) and the open-ended penalty provisions of 37(d) of course find their source in the Rules themselves. As indicated above, the application of these Rules and doctrines are sometimes contradictory and often harsh. Cases involving almost identical problems reach opposite results for no apparent reason. Truly the law of procedure, even under the "liberal" Federal Rules, has not yet shed its Draconian past. The danger that a minor error can still trigger an overwhelming penalty is a situation that practitioners should be aware of and that the courts and the Bar must seek to change. Our courts should explicitly adopt the principal that such results jurisprudentially must not be allowed to occur. A more careful examination of the goals or purposes of the doctrine of finality and some empirical study of the relationship between drastic penalties and reducing court congestion would be helpful. But uniformity of approach is essential. Uniformly fair results are even more essential.

the district court decision in Vac-Air. Commentators seem to not have raised this problem. They seem to assume that no court would ever exercise its discretion in such a way. See Note, Brown, Proposed Changes to Rule 33 Interrogations and Rule 37 Sanctions, 11 ARIZONA L. REV. 443, 451-455 (1969); and Proposed 1967 amendment to the Federal Discovery Rules, 68 COLUMBIA L. REV. 271, 291-296 (1968).

85. For a suggestion that the existence of severe penalties hampers the conduct of civil litigation because greater hostility develops between the parties see, Schwartz and Orleans, On Legal Sanctions, 34 U. CHI. L. REV. 274, 279 (1967). For a suggestion that is completely contrary to the thrust of this paper, indicating that the one year requirement should be more strongly enforced and that Klapprott was wrong, see Comment, Equitable Power, supra note 66, at 434-441.