REVISING CIVIL RULE 56: JUDGE MARK R. KRAVITZ AND THE RULES ENABLING ACT

by
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This contribution uses the history of amending Federal Rule of Civil Procedure 56, "Summary Judgment," to pay tribute to Mark R. Kravitz and to the Rules Enabling Act process itself. The three central examples involve discretion to deny summary judgment despite the lack of a genuine dispute as to any material fact, the choice whether to prescribe a detailed "point–counterpoint" procedure for presenting and opposing the motion, and the effect of failure to respond to a motion in one of the modes prescribed by the rule. These topics are intrinsically important. The ways in which the Civil Rules Advisory Committee and the Standing Committee on Rules of Practice and Procedure grappled with these topics provide strong reassurances about the capacities of the Enabling Act process to work through difficult problems both by work internal to the committees and by considering, understanding, and adopting the wise advice offered by public comments and testimony at the public hearings.

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INTRODUCTION

This Essay draws from the process of revising the summary-judgment rule, Rule 56 of the Federal Rules of Civil Procedure, to praise Judge Mark R. Kravitz's work as Chair of the United States Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure. This high praise is mingled with admiration for the Rules Enabling Act framework that enables the Committee's work. The purpose to pay tribute is paramount—Rule 56 features prominently, but in a supporting role. The history includes some valuable lessons about Rule 56 as it took effect on December 1, 2010, but this is not a Rule 56 article.

Four main Parts follow an initial offering of direct praise for Judge Kravitz. These Parts cannot be fully separated. The first Part briefly describes the origins of the Rule 56 work. The next Part explores three major elements and one minor element that changed in important ways as the project progressed—the word of command (once again "shall," no longer "should"); the directions for moving and responding ("point–counterpoint" was abandoned); the authority to consider a fact undisputed for failure to respond without examining the proponent's showing; and the opportunity to accept a fact "for purposes of the motion only." Each of these changes was shaped in important ways by comments and testimony from sources outside the Committee. The third Part provides some further illustrations of changes in the early proposals, often generated within the Committee process. The final Part draws from the first Parts to underscore the strengths of the procedures that contribute to the success of the Rules Enabling Act.

JUDGE KRAVITZ

For direct praise, let me quote part of a letter I wrote for a happier purpose in 2010, while Mark Kravitz was Chair of the Civil Rules Committee and before he left the Committee to become Chair of the Standing Committee on Rules of Practice and Procedure:

> I have worked closely with Mark since he took over as Civil Rules Committee Chair. The standard of comparison is high. The chairs I have worked with over the years have been in the forefront of the federal judiciary: Sam Pointer, Patrick Higginbotham, Paul Niemeyer, David Levi, and Lee Rosenthal. Working with each was of course different in many ways, one from another. But there has been a much more important continuity. I have learned enormously from each, and greatly enjoyed the experience.
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> Working with Mark has equaled the joys of working with each of his predecessors. It is presumptuous to attempt even a brief catalogue of his accomplishments, but I presume to make the attempt.
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> Perhaps the most important task of the chair is to set the Committee agenda. There are many more possibilities for adjusting the Civil Rules than the Enabling Act process can accommodate, or than

> the courts and profession could endure. Guiding the Committee in the decisions among competing possibilities requires fine judgment. Some topics are essentially inescapable—the current and continuing perturbation about the fate of "notice pleading" is a fine example. Others may be obviously important, but not obviously manageable. Still others are interesting, and perhaps useful, but not urgent or even not worth the bother. Timing also is important. The common-law process works in interpreting the rules, and often will get to right results if it is just left alone for a while. In my estimate, Mark has displayed flawless judgment in these matters.
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> Actual Committee work on rules proposals shows the same strengths. It takes at least three years, and often more, to make a rule. But Mark has already shepherded to completion the Time Computation Project (he chaired the Standing Committee subcommittee that coordinated the work of all the advisory committees), which has taken effect, as well as amendments that will take effect this December 1 absent a disapproving Act of Congress: a complete rewriting of the summary-judgment rule and important changes in disclosure and discovery with respect to expert trial witnesses. Ongoing work will reflect the fruits of an ambitious two-day conference the Committee sponsored last month at Duke Law School.[1]

The pace of committee work virtually assures that projects begun with the guidance of one chair carry on with the guidance of a successor. So it was with Mark's time as chair. The profusion of ideas generated at the Duke Conference[2] caused Mark to appoint a subcommittee to determine whether the Civil Rules might be amended in response.[3] The work continued under the guidance of Judge John G. Koeltl as Subcommittee Chair and Judge David G. Campbell as Committee Chair. The package of proposals that has emerged from that work was published for comment in August 2013, and generated an outpouring of comments and testimony from bench, bar, and the academy. This public review process is invaluable, even—and perhaps particularly—when, as here, the published proposals provoke many opposing positions, forcefully and cogently expressed. All of this advice was considered at the Committee meeting held in conjunction with this Tribute.

The Rule 56 experience provides another illustration of passing the torch from one committee chair to another. The work began while Judge Lee H. Rosenthal chaired the Civil Rules Committee. When she moved to chair the Standing Committee on Rules of Practice and Procedure, Mark Kravitz became Chair of the Civil Rules Committee and carried the work

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[1] Letter from Edward H. Cooper (on file with author).

[2] The 2010 Conference on Civil Litigation was held at Duke Law School on May 10–11, 2010.

[3] For more information on the Civil Rules Advisory Committee, appointments to the committee, and records of committee action, see Admin. Office of the U.S. Courts, *Records and Archives of the Rules Committee*, http://www.uscourts.gov/RulesAndPolicies/rules/archives.aspx.

to its conclusion. The initial welter of ideas and drafts, founded in large part on existing practices that had grown up around (or despite) the text of Rule 56, was continually refined. Some changes were made before a proposal was published for public comment. Additional changes were made in light of the written comments and testimony at three hearings. Mark Kravitz provided steady guidance, clear thinking, and creative ideas throughout. The ultimate product is the work of the committees, but his contributions as Chair and as member led the committees to a better product than could have been achieved without him.

The work of the Advisory Committee was advanced by the Rule 56 Subcommittee chaired by Judge Michael M. Baylson. This and other subcommittees have done much of the hard initial work in framing the issues and carefully working through draft rule proposals. The Advisory Committee, however, views subcommittee proposals as a starting point for collective work, in which all members, whether or not serving on the subcommittee, participate equally. So it was with Rule 56.

Work as a reporter brings the great professional advantage of working with, and learning from, the committees and, most especially, the chairs. It also brings great personal satisfaction in working with the wonderful people who have served as chair. Mark Kravitz was a most wonderful person.

I. THE BEGINNINGS

The Supreme Court explored summary judgment extensively in three 1986 opinions that are commonly referred to as the "trilogy."[4] The rules committees reacted promptly, recommending adoption of a thoroughly revised Rule 56.[5] The revised rule sought to express the standards and moving burdens announced by the Court, and also provided a complete overhaul of the procedures for invoking and resisting summary judgment. The proposal was rejected by the Judicial Conference in 1992. Judicial Conference proceedings are confidential. Speculation, however, cannot be suppressed. A common speculation was that rejection was supported by conflicting views drawn from the common premise that the proposal accurately reflected what the Court had done. One view was that the rule "was working well in its present form and that judges had

[4] Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

[5] Memorandum from Judge John F. Grady, Chair, Advisory Comm. on Civil Rules to Judge Joseph F. Weis, Jr., Chair, Standing Comm. on Rules of Practice & Procedure, at vi–vii (June 12, 1989), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV06-1989.pdf (describing the proposed changes to Rule 56).

become familiar with the language of the rule and the current case law."[6] Another view was that "some members seemed not to like the case law on Rule 56 and might not have wanted to enshrine it in the rule."[7]

Rule 56 was not forgotten, but the impetus to restore it to an active place on the Committee agenda arose from the Style Project. The Style Project undertook to rewrite all of the Civil Rules to say more clearly what they actually meant.[8] Any attempt to change the meaning of a rule had to be published separately, for separate comment. When Rule 56 took its turn, the Committee was persuaded that actual practice in administering summary judgment had moved far from the rule text in many ways. Any effort to make the rule conform to practice, and perhaps to introduce some new wrinkles, must be undertaken independently.

So in 2005, Judge Rosenthal, then-Chair of the Committee, suggested that the time had come to reconsider the procedures that surround summary judgment.[9] The scope of the project was clear from the beginning. The standard for summary judgment was not to be considered. Lower courts had worked to develop the 1986 decisions for nearly 20 years and were continuing to work at the task. This process should be allowed to continue, working through far more concrete problems in a far greater variety of settings than any committee project could consider. The allocation of the moving burden also was not to be considered because it is so closely related to the summary-judgment standard.

The 1992 proposal provided the foundation for the initial drafts. The passage of time, however, meant that substantial changes were made even in the initial drafts. From this starting point, the project was pursued through countless subcommittee meetings,[10] two "miniconferences,"[11] several Committee meetings,[12] consideration by the Standing

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[6] COMM. ON RULES OF PRACTICE & PROCEDURE, MINUTES DEC. 17–19, 1992, at 2, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST12-1992-min.pdf.

[7] *Id.*

[8] *See* Edward H. Cooper, *Restyling the Civil Rules: Clarity Without Change*, 79 NOTRE DAME L. REV. 1761 (2004).

[9] Memorandum from Judge Lee H. Rosenthal to the Civil Rules Comm. (Oct. 10, 2005), at 3, 155–85, *in* ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, AGENDA BOOK FOR OCT. 27–28, 2005, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2005-10.pdf [hereinafter AGENDA BOOK OCT. 27–28, 2005].

[10] The Rule 56 Subcommittee was chaired throughout by Judge Michael M. Baylson. The Subcommittee met frequently by telephone and occasionally in person in conjunction with a miniconference or a committee meeting.

[11] Notes on the November 7, 2007 Miniconference are included in the Committee agenda materials for April 7–8, 2008. ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, AGENDA BOOK APR. 7–8, 2008, at 60–81, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2008-04.pdf [hereinafter AGENDA BOOK APR. 7–8, 2008]. Notes on the January 28, 2007 Miniconference are included in the Committee agenda materials for April 19–20, 2007. Notes: Rule 56 Miniconference, at 1–19, *in* ADVISORY COMM. ON RULES OF CIVIL

Committee,[13] numerous public comments and extensive testimony,[14] and many drafts.[15] Rigorous empirical information was sought by asking the Federal Judicial Center to study actual uses and outcomes of summary-judgment motions.[16] The proposal published for comment in the summer of 2008 was shaped by three years of continuous work.

The next Section begins with two important changes that were made in light of comments and testimony on the published draft. The word expressing the command to grant summary judgment was changed from

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PROCEDURE, AGENDA BOOK APR. 19–20, 2007, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2007-04.pdf [hereinafter AGENDA BOOK APR. 19–20, 2007]. Miniconferences are held to discuss drafts of complex proposals with fifteen to twenty invited participants who are not directly involved with the Committee. The process provides a small-scale version of the public comment process that follows actual publication of a proposal. The different participants in these two miniconferences provided invaluable help in refining the proposals to become ready for the public-comment process.

[12] Rule 56 materials appear in the agenda books beginning with the October 27–28, 2005 agenda book and continue through the April 20–21, 2009 Committee meeting. *See* AGENDA BOOK OCT. 27–28, 2005, *supra* note 9; ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, MINUTES APR. 20–21, 2009, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV04-2009-min.pdf [hereinafter MINUTES APR. 20–21, 2009].

[13] The Civil Rules Committee, and the other advisory committees, continually inform the Standing Committee of active agenda items. Rule 56 was brought on for an initial—and lively—discussion at the meeting on January 14–15, 2008. *See* COMM. ON RULES OF PRACTICE & PROCEDURE, AGENDA BOOK JAN. 14–15, 2008, at 164, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/ST2008-01.pdf. The proposal to publish proposed Rule 56 for comment was presented at the meeting on June 9–10, 2008. *See* COMM. ON RULES OF PRACTICE & PROCEDURE, AGENDA BOOK JUNE 9–10, 2008, at 227, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/2008-06-Standing-Agenda-Book-Vol-I.pdf. The recommendation to recommend the final rule to the Judicial Conference was presented at the meeting on June 1–2, 2009. *See* COMM. ON RULES OF PRACTICE & PROCEDURE, AGENDA BOOK JUNE 1–2, 2009, at 92, 111, 194–280, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2009-06.pdf [hereinafter AGENDA BOOK JUNE 1–2, 2009].

[14] The written comments and transcripts of the testimony at the three hearings are available on the website of the Administrative Office of the United States Courts. Summaries of the comments and transcripts are included in the agenda materials for the June 1–2, 2009 meeting of the Standing Committee. AGENDA BOOK JUNE 1–2, 2009, *supra* note 13, at 210–80.

[15] The drafts began with "56." After several changes had been made, it seemed prudent to begin anew with "56.1." Several changes later, "56.2" appeared. The proposal transmitted by the Standing Committee to the Judicial Conference, and ultimately adopted by the Supreme Court, was "56.40." (Copies on file with author.)

[16] *See* Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr. to Judge Michael Baylson, Report on Summary Judgment Practice Across Districts with Variations in Local Rules (Aug. 13, 2008), *available at* https://bulk.resource.org/courts.gov/fjc/sujulrs2.pdf; Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr. to Judge Michael Baylson, Estimates of Summary Judgment Activity in Fiscal Year 2006 (June 15, 2007), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/$file/sujufy06.pdf.

"should" to "shall," reflecting a profound division of views on the role of summary judgment in relation to trial. An elaborate "point–counterpoint" procedure designed to channel presentation of a motion and resistance to it was abandoned in face of mixed experience with similar procedures adopted by local rules. Both of these changes relate to a third question that was resolved before publication—whether the court must examine the materials relied upon to support the motion if there is no proper response.

The brief third Section describes a few of the changes that were made before publication as the committee process added, discarded, and substituted many provisions in the search for a good rule. These changes are intrinsically interesting as issues in summary-judgment procedure. They also illustrate the painstaking care that is taken to present a proposal worthy of being refined by the public-comment process without the distractions of many small points that require further improvements.

II. THE INFLUENCE OF PUBLIC COMMENTS

Two deep divisions of opinion emerged during the public-comment period. Each illustrates the vital role public comments play in the full Rules Enabling Act process.[17]

[17] 28 U.S.C. § 2072 recognizes the Supreme Court's "power to prescribe general rules of practice and procedure and rules of evidence for cases in the" district courts and courts of appeals. 28 U.S.C. § 2072(a) (2012). Section 331 directs the Judicial Conference of the United States to "carry on a continuous study of the operation and effect of the general rules of practice and procedure," and to recommend to the Supreme Court "changes in and additions to" these rules. *Id.* § 331. Section 2073 authorizes the Judicial Conference to appoint committees to assist in recommending rules under § 2072 (and also § 2075, which enables the Court to prescribe rules of bankruptcy practice). *Id.* §§ 2073(a), 2075. Section 2073(b) amplifies this authority by directing that the Judicial Conference "shall authorize the appointment of a standing committee on rules of practice, procedure, and evidence . . . . Such standing committee shall review each recommendation of any other committees so appointed" and make recommendations to the Judicial Conference. *Id.* The Civil Rules Advisory Committee is one of five advisory committees that make recommendations to the Standing Committee. Section 2073(c) directs that each meeting of any committee appointed under § 2073 be open to the public, and that any meeting be preceded by sufficient notice to enable interested persons to attend. *Id.* The final step comes when the Supreme Court transmits to Congress a rule prescribed under § 2072. *Id.* A rule transmitted "not later than May 1 of the year in which" it is to become effective takes effect on the following December 1 "unless otherwise provided by law." *Id.* The provisions for public comments and public hearings are established by the Judicial Conference of the United States. 1 STANDING COMM., ADMIN. OFFICE OF THE U.S. COURTS, GUIDE TO JUDICIARY POLICY § 440 (2011), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Procedures_for_Rules_Cmtes.pdf.

A. Shall, Should, Must (or May)?

One debate addressed the question whether a judge should have discretion to deny summary judgment, preferring trial, even if the summary-judgment papers seem to show there is no genuine dispute as to any material fact. This debate goes to the very nature of summary judgment.

It all began innocently. The Style Project undertook to rewrite the entire body of Civil Rules, aiming to achieve clearer expression without changing the meaning.[18] From the beginning in 1938, Rule 56 directed that summary judgment "shall be rendered" if the papers show that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[19] The convention of the Style Project was that "shall" must not be used as a word of authority. It was to be replaced by "must," or "may," or "should."[20] The 2007 Committee Note explained that "shall" was replaced with "should" in Rule 56 because "there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact."[21] This drafting choice emerged unscathed from the public comment period. From 2007

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[18] *See* Cooper, *supra* note 8, at 1761.

[19] Rules of Civil Procedure for the District Courts of the United States, 308 U.S. 645, 735 (1938).

[20] *See* BRYAN A. GARNER, GUIDELINES FOR DRAFTING AND EDITING COURT RULES 29 (1996).

[21] FED. R. CIV. P. 56 advisory committee's note (2007). To support this proposition, the Note cited *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256–57 (1948), and 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2728 (3d ed. 1998). The *Kennedy* case involved questions under the Fair Labor Standards Act and related statutes that the Court described as "an extremely important question . . . ultimately affecting by a vast sum the cost of fighting" World War II. *Kennedy*, 334 U.S. at 256. The cited paragraph said this: "We do not hold that in the form the controversy took in the District Court that tribunal lacked power or justification for applying the summary judgment procedure. But summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice." *Id.* at 256–57 (footnote omitted). This passage, and a casual footnote statement that "Rule 56 provides that the trial court may award summary judgment," *id.* at 252 n.4, can easily suggest discretion to deny summary judgment even when the record satisfies the standard for granting summary judgment. This reading is supported by the Court's later citation of the *Kennedy* decision: "Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (citing *Kennedy*, 334 U.S. 249). On the other hand, the opinion could be read to reflect the Court's reluctance "as a matter of good judicial administration," to decide for itself "issues of far-flung import" on the basis of arguments and materials submitted after the summary-judgment record was closed. *Kennedy*, 334 U.S. at 252, 257.

to 2010, Rule 56 directed that the court "should" grant summary judgment.

"Should" was retained in the version of Rule 56 published for comment in August 2008.[22] This time it did not escape unnoticed. Quite to the contrary, it provoked an outpouring of comments. Many comments, primarily offered by those who ordinarily represent defendants, urged that "shall" means "must." Added support was found in the words "entitled to judgment as a matter of law." Summary judgment was lauded as an essential instrument to protect against the costs of going to trial, or being coerced to settle. "Should," on the other hand, was championed—primarily by those who ordinarily represent plaintiffs—as a necessary safety valve to protect against the risk that summary judgment may cut off a claim that would win a deserved vindication at trial.[23]

The Committee ultimately chose to restore "shall," in deliberate defiance of the style convention. The 2010 Committee Note explained that neither "must" nor "should" "is suitable in light of the case law."[24] An exhaustive memorandum prepared for the Committee showed that although many courts had recognized discretion to deny summary judgment despite an apparent showing that there is no genuine dispute as to any material fact, other courts had seemed to deny any such discretion.[25] The Note explained further that "[e]liminating 'shall' created an unacceptable risk of changing the summary-judgment standard. Restoring 'shall' avoids the unintended consequences of any other word."[26] This explanation fit "shall" within two other conventions of the Style Project, and within the limited scope of the Rule 56 revision. One convention was that an ambiguity in rule text that had not been clarified by decisional law must be carried forward, lest resolution of the ambiguity into a clear direction change the rule's meaning. A second convention forbade interference with "sacred phrases" that had taken on independent lives. Faced with ambiguity in a sacred phrase, there was a clear prospect that substituting a clear rule would indeed affect the standard for summary judgment.

Which side had the better of it, as a matter of Rule 56 principle? The Rule 56 work was not bound by the strictures that fenced substantive decisions out of the Style Project. It could have opted for an unambiguous command, adopting "must" to entrench the advantages of summary

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[22] The proposed amendments to Rule 56 can be found in the agenda book for the June 1–2, 2009 Standing Committee meeting. AGENDA BOOK JUNE 1–2, 2009, *supra* note 13, at 194–200.

[23] Summaries of the written comments and testimony are provided in the agenda book for the June 1–2, 2009 Standing Committee meeting. AGENDA BOOK JUNE 1–2, 2009, *supra* note 13, at 210–80.

[24] FED. R. CIV. P. 56 Advisory Committee Note (2010).

[25] AGENDA BOOK APR. 7–8, 2008, *supra* note 11, at 86–106.

[26] FED. R. CIV. P. 56 Advisory Committee Note (2010).

judgment in avoiding costly trials. Why should there have been any reluctance?

One range of arguments for "should" is pragmatic, particularly from the court's perspective. A summary-judgment motion may require a very difficult, on-the-edge decision whether the summary-judgment record shows just barely enough to escape a directed verdict at trial. It may be far easier for the judge—if not the parties—to hold a trial that may consume less time, perhaps much less time, than deliberating the motion. The time spent on deliberation is wasted if the motion is denied, and much of it is wasted if the motion is granted only in part. The time also is wasted if summary judgment is granted, only to be reversed on appeal. Despite the costs to the parties, a careful allocation of scarce judicial resources may justify discretion to deny. And the parties also benefit if an actual decision would deny the motion after delaying proceedings to make the ruling, or would grant the motion only to be reversed on appeal.

Another argument draws from the well-established rule that once trial is had, the sufficiency of the evidence is measured by the trial record, not the summary-judgment record.[27] A judgment on a jury verdict or a judge's findings based on a sufficient trial record stands. It will not be reversed after trial on the ground that judgment as a matter of law would have been required on the summary-judgment record.[28] There is no "entitlement" to summary judgment. If anything, the courts should join with the winning party in celebrating the advantage of waiting for trial. In turn, this practice suggests a deeper insight. A paper summary-judgment record may strike a judge as too incomplete, too uncertain, to justify forgoing the opportunity to learn whether a real and full trial record makes out a sufficient case. This concern may be particularly important when a case involves issues of some public importance beyond the parties' interests, and even more important if the law is unclear and would benefit from considering facts as they are presented at trial.

The value of opting for trial may be put more directly. The only way to know whether trial will produce a record that rises above the directed-verdict threshold is to have a trial. Any summary judgment based on treating a paper record as if a trial record rests on a vulnerable assumption. Summary judgment is a valuable tool despite this vulnerability, but it may not always rise to the level of deserved entitlement.

Yet another argument draws from the integration of summary-judgment standards with the standards for judgment as a matter of law after trial. It is clear that a court does not have discretion to enter judgment on a verdict based on evidence that fails to cross the threshold for

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[27] *See, e.g.*, Ortiz v. Jordan, 131 S. Ct. 884, 889 (2011) ("Once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary judgment motion.").

[28] *See* 15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction 2d, § 3914.28 (2d ed. 1992).

escaping judgment as a matter of law. But Rule 50(b) and (c) recognize discretion to grant a new trial even though judgment cannot be entered on the verdict.[29] Elaborate procedures have been developed to preserve this discretion.[30] If there is discretion to allow a second full trial after a first full trial has failed to produce sufficient evidence to escape judgment as a matter of law, why should there not be discretion to deny summary judgment so as to provide an opportunity for a first full trial to escape judgment as a matter of law?

These reflections on some of the established practices that surround summary judgment pave the way for the central question. Just how much should we make of summary judgment? Denial may lead to trial, the central—if seldom—feature of civil procedure. Although that may seem a good thing, it imposes costs. The costs may seem particularly inappropriate in the face of a motion that urges an immunity defense designed to protect against the burdens of trial.[31] Denial instead may lead to settlement, commonly a compromise that seems to overvalue or undervalue the claims. Plausible arguments might be made that denying summary judgment in order to pave the way for settlement can promote a just outcome. Some of the public comments suggested that some judges do this deliberately. Fervent arguments are made to decry any such practice.

Caught in the middle of these competing forces, the Committee chose to adhere to the original purpose to avoid any changes that might affect the standard for granting summary judgment. The Committee Note, in expressing an intent to avoid "the unintended consequences" of any word other than "shall," reflects two common themes in Committee work. One is exactly what the words express—a concern that a rule that seems attractive in the abstract may in practice develop in undesirable ways. The other, closely allied to it, is a belief that truly complex choices are often better made in a common-law process that stretches out over countless cases, crossing the full range of subjects brought before the courts. So it may be with discretion to deny summary judgment. Some courts continue to recognize this discretion.[32] "Shall," in its unrestrained ambiguity, leaves the way open for continuing development, one way or

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[29] FED. R. CIV. P. 50.

[30] The need to observe Rule 50 procedures punctiliously is illustrated by *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 399–402 (2006).

[31] See Jones v. Johnson, 26 F.3d 727, 728 (7th Cir.1994), *aff'd*, 515 U.S. 304 (1995), an official-immunity case that states a general proposition that there is no discretion—that summary judgment must be granted if the nonmovant lacks sufficient evidence.

[32] *E.g.*, Fencorp, Co. v. Ohio Ky. Oil Corp., 675 F.3d 933, 939–41 (6th Cir. 2012); Revolution Eyewear, Inc. v. Aspex Eyewear, Inc., 563 F.3d 1358, 1365 (Fed. Cir. 2009). A different approach is to confer with the parties before any motion is filed. Judge Zouhary, for example, notes that he "may encourage the parties to go straight to trial—bringing the case to conclusion quicker and at less cost than briefing motions." Jack Zouhary, *Ten Commandments for Effective Case Management*, 60 FED. LAW., Jan./Feb. 2013, at 38, 39.

the other. Whatever the eventual outcome, the public comment process effectively redirected Rule 56 on a point that lies close to the heart of summary judgment.

Leaving in limbo the question of discretion in disposing of an entire motion did not, however, carry over to the option available when "the court does not grant all the relief requested by the motion."[33] Rule 56(g) says gently that the court "may" enter an order stating any material fact that is not genuinely in dispute. Before the Style Project, its predecessor, Rule 56(d), said the court "shall if practicable" ascertain and specify "the facts that appear without substantial controversy." From 2007, Style Rule 56(d) directed that the court "should, to the extent practicable, determine what material facts are not genuinely in dispute." The choice of "may" was actively discussed, both in Committee deliberations and public comment. "May" was seen to recognize more discretion than "should." The advantages of broad discretion began with a negative—the gains from partial summary judgment may be less than the gains from summary judgment on the whole action. The gains, further, might be offset not only by the time required to make the rulings and the risk of reversal after further proceedings, but also by the prospect that trial of the remaining issues would—at perhaps negligible cost—provide a better basis for determining whether there is a genuine dispute.[34] Here, at least, discretion is well entrenched.

B. Point–counterpoint

Public comments and testimony also redirected a proposal that aimed at the procedure for framing a summary-judgment decision. The published proposal included an elaborate procedure that came to be known as the "point–counterpoint" procedure:

> (c) Procedures.
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> . . .
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> (2) Motion, Statement, and Brief; Response and Brief; Reply and Brief.
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> (A) *Motion, Statement, and Brief.* The movant must simultaneously file:
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> (i) a motion that identifies each claim or defense—or the part of each claim or defense—on which summary judgment is sought;
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> (ii) a separate statement that concisely identifies in separately numbered paragraphs only those material

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[33] FED. R. CIV. P. 56(g).

[34] This summary paraphrases the question framed for the Committee in the materials for the April 7–8, 2008 meeting. AGENDA BOOK APR. 7–8, 2008, *supra* note 11, at 47 n.25.

> facts that cannot be genuinely disputed and entitle the movant to summary judgment; and
>
> (iii) a brief of its contentions on the law or facts.
>
> (B) Response and Brief by the Opposing Party. A party opposing summary judgment:
>
> (i) must file a response that, in correspondingly numbered paragraphs, accepts or disputes—or accepts in part and disputes in part—each fact in the movant's statement;
>
> (ii) may in response concisely identify in separately numbered paragraphs additional material facts that preclude summary judgment; and
>
> (iii) must file a brief of its contentions on the law or facts.
>
> (C) *Reply and Brief*. The movant:
>
> (i) must file, in the form required by Rule 56(c)(2)(B)(i), a reply to any additional facts stated by the nonmovant; and
>
> (ii) may file a reply brief.[35]

This detailed road map was drawn both from the proposal that failed in the Judicial Conference in 1992 and from experience with similar procedures specified by the local rules in many districts. It is difficult to imagine an orderly procedure that does not require identification of the material facts claimed to be established beyond genuine dispute, and also require citations to the record materials that establish whether there is a genuine dispute as to each of those facts. So too for the "additional material facts" that may preclude summary judgment even though there is a genuine dispute as to those facts. Many comments supported the proposal in essentially these terms, complaining that without such directions, motions and responses often were like ships passing in the night. The advantages of a uniform national procedure were also urged in support. This proposal might have survived as an example of adopting into national procedure a procedure that had been tested through local rules in many districts.

Disagreement, however, drew from actual experience with the local rules to offer three main lines of argument for rejecting point–counterpoint. One was that some lawyers had responded by generating fantastically lengthy motions, listing hundreds of facts said to be without genuine dispute. The cost of responding fact-by-fact was great. The alternative of simply failing to contest facts that seemed not material was used only with reluctance, in part for fear that the court might think the fact material and in part for fear that failure to contest on summary judgment would somehow limit the opportunity to contest at trial.

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[35] AGENDA BOOK JUNE 1–2, 2009, *supra* note 13, at 133–35.

A second concern was that point–counterpoint procedures are inimical to the nonmovant's ability to present its case cogently. These comments focused on motions made by a party who does not have the burden at trial, usually the defendant. The movant gets to shape the case by its choice and ordering of facts. The obligation to respond in the same sequence to a fractured statement of facts, moreover, makes it difficult to reassemble the facts in a pattern that supports the inferences that are necessary to support many claims. Employment discrimination claims were a particularly common illustration. An employee with an exemplary work record complains of discrimination against another worker. Two days later, she is discharged for clocking in 10 minutes late. An inference of pretext, of intent to discriminate, may depend on a concerted presentation of the treatment of other employees who have clocked in late. To these lawyers, the nonmovant, who has the burden at trial, should be allowed to tell a coherent story that weaves the facts into a pattern far different from the order chosen by the movant.

A third concern was that a summary-judgment motion by a party who does not have the trial burden reverses the ordinary sequence that, at trial, allows the party who has the burden to open and close. The three-step procedure embodied in the proposal would mean that the movant gets to open, and, in its reply, to have the last word. One suggested remedy was to provide for a surreply. The need to provide for a surreply was further supported by several witnesses who said that some motions deliberately presented a fuzzy and incomplete initial statement of facts, to be followed by a clearly focused reply that left the nonmovant without any clear opportunity to challenge the facts asserted in the reply.

These concerns seemed real. They were supported by the particularly powerful testimony and comments of several federal district judges. Some were judges who had extensive experience both in their own district, without a point–counterpoint practice, and in another district where, as visiting judges, they confronted a point–counterpoint practice. They testified that the point–counterpoint practice took longer, cost more, and produced less satisfactory results. Many more were judges from districts that had once adopted local rules directing a point–counterpoint procedure, and then abandoned the procedure for the reasons given by the lawyers who opposed the proposal.[36]

The opposition stood in marked contrast with the enthusiasm of other judges for the point–counterpoint procedures established by their local rules. The conclusion seemed plain enough. Point–counterpoint was not ready for adoption as a uniform national rule. At the same time, nothing should be done to preempt local rules adopting this procedure.

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[36] *See* AGENDA BOOK JUNE 1–2, 2009, *supra* note 13, at 237–38, 243, 245. Judge Vaughn R. Walker, a Committee member, provided a foretaste of the judges' comments in a memorandum to Judge Michael M. Baylson. AGENDA BOOK APR. 19–20, 2007, *supra* note 11, Memorandum from Judge Vaughn R. Walker to Judge Michael M. Baylson, *Comments on Summary Judgment Proposal* (Mar. 7, 2007), at 1–4.

This may well be an example of a procedure that works in some courts but not others. Apart from possible differences in case mix and docket pressures, the culture of the local bar may be important. Ingrained traditions and reflexes may lead too many lawyers in some districts to the kinds of practices that led to abandonment of what proved to be experiments in point–counterpoint. Sturdy common sense and an understanding of the need for proportion may be more widely shared in other districts, enabling a procedure that, wisely employed, could substantially promote efficient presentation and proper disposition.

C. Summary Judgment by Default?

Recognizing a role for local rules led to a question that was resolved in Committee deliberations before publication. Point–counterpoint local rules commonly include a provision that a fact is "deemed admitted" if there is no response or if an attempted response does not conform to the detailed point–counterpoint procedure. This approach touches on a deeper question—can summary judgment be granted by "default?" A pure default approach would grant the motion if there is no response, and perhaps also if there is a defective response, without any further consideration.[37] A pure rejection of default would require the court to examine the materials submitted with the motion to determine whether, standing alone, they suffice to carry the burden of showing no genuine dispute as to any material fact.[38] More than one intermediate position is possible. Some were considered. One would require examination of the supporting materials, not to determine whether they carry the summary-judgment burden, but only to determine whether they support the movant's position. For example, a plaintiff's affidavit that the defendant went through a red light need not be believed, and does not carry the

[37] Summary judgment by default might be supported by analogy to Federal Rules of Civil Procedure Rule 55, which authorizes default and then judgment by default for failing to plead or otherwise defend. Some analogy also might be found in Rule 37(b)(2)(A)(vi), which authorizes a default judgment as a sanction for failing to obey a discovery order. A party who fails to play by the rules may properly be subject to severe sanctions. FED. R. CIV. P. 37(b)(2)(A)(vi), 55(a).

[38] This approach is reflected in interim drafts. An example is a draft Rule 56(d): "If a party does not respond to the motion or if a response fails to comply with Rule 56(c) [point–counterpoint provisions], the court may . . . . (2) grant summary judgment if the motion and supporting materials show that the movant is entitled to it . . . ." Memorandum from Judge Lee H. Rosenthal, Chair, Advisory Comm. on Fed. Rules of Civil Procedure to Judge David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure, Report of the Civil Rules Advisory Comm. 57, 61 (May 25, 2007), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2007.pdf. Several decisions seemed to require this examination of the summary-judgment record. *See* De la Vega v. San Juan Star, Inc., 377 F.3d 111, 115–16 (1st Cir. 2004); Vt. Teddy Bear Co. v. 1-800 Beargram Co., 373 F.3d 241, 242 (2d Cir. 2004); United States v. 5800 SW 74th Ave., 363 F.3d 1099, 1101–02 (11th Cir. 2004). *See also* Cusano v. Klein, 264 F.3d 936, 950 (9th Cir. 2001).

plaintiff's summary-judgment burden on this issue, but does support the position.[39]

These questions require careful evaluation of the value that should be placed on summary judgment as a means of final disposition without trial. They were resolved in Rule 56(e), which permits—but does not require—a court to "consider the fact undisputed for purposes of the motion" if a party fails to properly address another party's assertion of fact. Considering the fact undisputed does not of itself lead to summary judgment. The court may grant summary judgment only "if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it." "Deemed admitted" practice under local rules is preserved. But the court still must determine whether the movant has carried the burden as to any material facts challenged by a proper response, and must determine the legal effects of the package of facts considered undisputed and those, if any, shown to be without genuine dispute despite a properly framed response.

Rule 56(e) lives in the space between discretion to deny summary judgment and point–counterpoint procedure. A court has discretion whether to consider a fact undisputed when it is not properly addressed by a response. The Committee Note suggests that in many circumstances, the preferred first step may be to invoke Rule 56(e)(1), giving a further opportunity to address the fact properly.

D. Accept Fact for Motion Only

A less fundamental procedure also was linked to the point–counterpoint proposal. The concern that a motion might pile on a large number of facts not material to the decision led to subdivision (c)(3) in the published proposal: "A party may accept or dispute a fact either generally or for purposes of the motion only."[40] A nonmovant could avoid the risk of admitting, or the work of refuting, by provisionally accepting an asserted fact. But fears were expressed that the acceptance might be misused as a stipulation.[41] A more general concern was that accepting a fact for purposes of the motion might lead the court to treat the fact as established in the case even on denying summary judgment. In the end, the Committee decided to delete this provision as part of the decision to discard the point–counterpoint provision.[42] But the Committee Note to Rule 56(g) directs that the court must take care not to treat a fact as es-

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[39] This possibility is described in the Rule 56 Subcommittee notes of February 13, 2008 conference call, *see* AGENDA BOOK APR. 7–8, 2008, *supra* note 11, at 59, and again in the March 3, 2008 Draft Rule 56 with Discussion Notes. *Id.* at 45 n.20.

[40] AGENDA BOOK JUNE 1–2, 2009, *supra* note 13, at 135.

[41] *Hearing on Evidence Before the Advisory Comm. on Civil Rules* 104–05 (Feb. 2, 2009), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CV02-2009-tr.pdf [hereinafter *Hearing on Evidence*] (statement of Sharon J. Arkin, The Arkin Law Firm).

[42] MINUTES APR. 20–21, 2009, *supra* note 12, at 7.

tablished because a party has accepted it for purposes of the motion only. And Rule 56(c)(1)(A) recognizes that the parties may enter a stipulation made for purposes of the motion only, a bilateral act that ensures better protection than a unilateral "acceptance."

III. ISSUES RESOLVED BEFORE PUBLICATION

Changes made in response to public comments and testimony are the most visible signs of progress through deliberation. Publication is recommended, however, only after thorough, and often repeated, testing by internal deliberations. When there is a subcommittee, Committee deliberations begin with recommendations or choices developed by the subcommittee but carry on independently and in depth. A few examples from the Rule 56 work illustrate these events.

A. Materials Not Cited

The court's opportunity to examine materials not cited by the parties lies at the intersection of point–counterpoint procedure and the court's authority to act on its own. Rule 56(f) reflects several practices that had emerged in practice without any foundation in prior rule text. The court may grant summary judgment for a nonmovant, grant a motion on grounds not raised by a party, and consider summary judgment on its own after identifying for the parties material facts that may not be in genuine dispute. But it must first give notice and a reasonable opportunity to respond. Are there other things that it may, or even must, do? The Committee began with the premise expressed in an oft-quoted phrase that "[j]udges are not like pigs, hunting for truffles buried in" the case file.[43] That premise is reflected in the first part of Rule 56(c)(3): "The court need consider only the cited materials . . . ." But if not obliged to take up the hunt, may a judge still examine the file for materials that may illuminate those cited by the parties? A distinction might be drawn between searching out materials that defeat a motion by showing a genuine dispute and searching out materials that support the motion by showing a lack of genuine dispute not shown by the parties. There is a risk that the court may misinterpret materials the parties had good reason to pass over, and the risk seems more severe if summary judgment is granted. This distinction was observed in the published proposal by requiring notice under Rule 56(f) before granting summary judgment on record materials not cited by the parties. But in the end, the Committee concluded that the court should not be required to give notice. An example was that the court should be free to read the entire transcript of a deposition on

[43] This phrase appears to have originated in *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991), where it denied an obligation to hunt for facts buried in briefs. It soon came to be adopted for summary judgment. *See, e.g.*, Crossley v. Ga.-Pac. Corp., 355 F.3d 1112, 1114 (8th Cir. 2004) (citing *Dunkel*, 927 F.2d at 956).

file, "and to evaluate the parts cited in light of the whole."[44] So Rule 56(c)(3) provides simply that the court "may consider other materials in the record."

B. Burdens

Early drafts included attempts to identify the burdens in making and opposing a motion for summary judgment. The first draft is set out in the Appendix. One of the most interesting decisions was to omit any direct attempt to express the burdens on movant and nonmovant. This decision flowed from the determination to avoid any attempt to reconsider the standard for granting summary judgment. The burdens may affect application of the standard in ways that might effectively change the standard.

The appendix includes the provision on burdens that was part of the proposed rule that failed in the Judicial Conference in 1992. The more recent draft addressed only the moving burden, distinguishing between a movant who has the trial burden and a movant who seeks to show that a nonmovant who has the trial burden cannot carry the burden. The distinction was intended to track the distinctions drawn most clearly in Justice Brennan's dissenting opinion in the *Celotex* case.[45] But even that seemed too risky.

What emerged in place of a direct identification of the moving burden is the tightly drafted subdivision (c)(1):

> (1) *Supporting Factual Positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> > (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
> >
> > (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.[46]

It is easy enough to track the provisions that apply to a movant who has the trial burden. The motion must support the assertion by citing to record materials, but may reply to materials cited in response by saying simply that they do not establish the presence of a genuine dispute. It is not much more difficult to track the provisions that apply to a non-

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[44] MINUTES APR. 20–21, 2009, *supra* note 12, at 7–8. Although a change was made from the published proposal, it fairly counts as the result of internal Committee deliberations. The only comment summarized for the Committee was that notice should be given whether the court grants or denies the motion on the basis of materials not cited by the parties. *See Hearing on Evidence*, *supra* note 41, at 238 (statement of Jeffrey J. Greenbaum, ABA Section of Litigation).

[45] Celotex Corp. v. Catrett, 477 U.S. 317, 329–34 (1986) (Brennan, J., dissenting).

[46] FED. R. CIV. P. 56.

movant who does not have the trial burden. The response can cite to record materials that establish a genuine dispute, or can simply show that the materials cited by the movant do not establish the absence of a genuine dispute. A nonmovant who does have the trial burden also can cite to materials in the record that establish a genuine dispute. Somewhat greater care may be required to tease out the rule that a movant who does not have the trial burden can carry the burden by "showing . . . that an adverse party cannot produce admissible evidence to support the fact."[47] "Showing" was deliberately adopted as one of the words used by the Court in the *Celotex* opinion.[48] There is no attempt to solve the mystery of how a movant who does not have the trial burden goes about showing that the nonmovant does not have enough evidence to carry the trial burden. The Committee Note explains blandly that "[t]he amendments will not affect continuing development of the decisional law construing" the standard that there be no genuine dispute as to any material fact and that the movant be entitled to judgment as a matter of law.[49] It is safe to assume that continuing development will not reduce the movant's burden so as to allow a motion that says only that the movant is entitled to summary judgment unless the nonmovant comes forward with materials showing that it can carry the trial burden of production. Rule 56(c)(1)(B) does require the movant to show that the nonmovant cannot produce admissible evidence to support the fact.

C. Standard

The initial decision to avoid any consideration of the summary-judgment standard was observed without question throughout the project. This decision rested in large part on deference to the Supreme Court's opinions and to faith in the capacity of many courts, working in parallel, to continue to develop a working standard sturdier, and better nuanced, than a Committee might articulate in a few words. But it also reflected the inescapable constraints that limit the opportunity to revise the standard, which are anchored in directed-verdict practice.[50] Rule 50 was amended in 1991 to substitute "judgment as a matter of law" for the older (and better descriptive) phrases, directed verdict and judgment notwithstanding the verdict. The Committee Note explains that "judgment as a matter of law" was familiar from Rule 56, and "its use in Rule 50 calls attention to the relationship between the two rules."[51] At least in a

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[47] *Id.*

[48] When the nonmoving party bears the burden of proof, "the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325.

[49] FED. R. CIV. P. 56(c)(1)(B), and Advisory Committee Note (2010).

[50] *Celotex*, 477 U.S. at 323 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)).

[51] FED. R. CIV. P. 56 Advisory Committee Note (1991).

case subject to the Seventh Amendment right to jury trial, it is nearly impossible to suggest that summary judgment could cut off the right to jury trial even though the jury would have the right to decide if the same evidence were presented at trial. The efficiency advantages of avoiding jury trial cannot be counted as justification. Nor is there much reason to allow freer use of summary judgment in cases that are not to be tried to a jury, either because there is no right to a jury trial or because no party has demanded a jury trial. It is better to retain the familiar term[52] than to attempt to express the standard in new words, inviting at least confusion and perhaps distorting ongoing evolution of the standard. Of course, it would be possible to set the threshold for summary judgment higher, denying summary judgment unless the evidence falls to some interval below the standard for judgment as a matter of law. That would go further than simple discretion to deny summary judgment when the evidence fails to satisfy the standard, a discretion that even now remains so far controversial as to cause restoration of "shall" in Rule 56(a).

POSTSCRIPT

This Essay is a selective short story of the process that developed the Rule 56 amendments that were adopted by the Supreme Court and took effect in 2010. The full story is told in public Committee papers equal in length to a multi-volume novel, and—to procedure addicts—equally fascinating. The amendments are, above all, a Committee product. The role of the Committee Chair, here Judge Rosenthal at the inception and then Judge Kravitz in the execution, is to inspire the Committee to rise to the highest level of excellence it can attain. Judge Kravitz filled that role in superlative fashion. The success owes much to his intellect, experience, skills as lawyer and judge, and qualities as leader. In addition, the success was fostered by his ability to make friends of all those who worked with him. Universal good feelings made for good work. The same must be said

[52] The familiar term was so well entrenched that it seemed impervious to the perplexing variations that appeared in Rule 56(d) before the Style Project. Rather than ask whether there is a "genuine issue," Rule 56(d) directed that if decision of a summary-judgment motion did not cover the whole case or all the relief requested, the court "shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy." Rules of Civil Procedure for the District Courts, 308 U.S. 645, 735 (1938). Either these phrases suggested a different standard for "partial summary judgment," or they expressed possible tests for finding a genuine issue. "[S]ubstantial controversy" might suggest that it is not enough to barely meet the directed-verdict standard. "[I]n good faith controverted" might suggest that there is a genuine issue if a party in good faith believes there is enough evidence to meet the directed-verdict standard, even when there is not. These irregularities were deleted in the Style Project. The Committee Note says that Style Rule 56 "adopts terms directly parallel to" the "genuine issue" test, replacing this "variety of different phrases." FED. R. CIV. P. 56 advisory committee's note (2007).

for all the other projects completed or begun during his term as Chair, carried on while he chaired the Standing Committee, and carrying on still. He completely embodied the full range of attributes that mark the successive committee chairs I have worked with, going back to 1991. He lives on in many ways, including in the Civil Rules that he helped to shape.

APPENDIX: DRAFT BURDEN PROVISION[53]

Alternatives

An Attempt to Identify the Moving Burden[54]

(d) Moving Burden. A motion for summary judgment must show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

(1) *Movant Has Trial Burden.* A movant who has the trial burden [of persuasion][55] must show affirmatively that it is entitled to judgment as a matter of law.

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[53] This sketch was provided as an "alternative" at the end of draft 56.1 (on file with the author).

[54] (This note is part of the draft 56.1 sketch cited in the preceding note.) The Committee has considered the question whether Rule 56 should attempt to capture the summary-judgment standards identified in *Celotex* and the other 1986 Supreme Court decisions. The determination so far has been to avoid the effort. The concerns have been that the standard is elusive and may still be evolving in practice. It would be difficult to find words that clearly express the intended meaning of the 1986 decisions. Even a successful effort might ignore acquired real meaning, and might stifle desirable developments yet to come. An added concern has been that the Rule 56 amendments that were rejected by the Judicial Conference in 1992 apparently failed because of disagreements about the attempt to restate the standard.

The "1992" proposal was this:

> (b) *Facts Not Genuinely in Dispute.* A fact is not genuinely in dispute if it is stipulated or admitted by the parties who may be adversely affected thereby or if, on the basis of the evidence shown to be available for use at a trial, or the demonstrated lack thereof, and the burden of production or persuasion and standards applicable thereto, a party would be entitled at trial to a favorable judgment or determination with respect thereto as a matter of law under Rule 50.

Read carefully, the draft reflects the difference between the Rule 56 burden imposed on a movant who does not have the trial burden on an issue and the Rule 56 burden imposed on a movant who does have the trial burden. It also reflects the differences in the Rule 56 burden that flow from different trial standards of persuasion—a clear-and-convincing-evidence trial standard plays out differently than a preponderance-of-the-evidence standard. But it may be wondered whether this tight drafting would be as helpful as could be. It might cause more frequent recourse to case law for explanation than we experience now.

Despite these concerns, there may be reasons to consider this question further. Many lawyers appear to believe that the actual standards for summary judgment vary among different courts, no matter that all recite similar formulas. If indeed standards vary in fact, it would be good to establish national uniformity. Whether that can be accomplished by rule language, no matter how carefully drawn, would be the central question.

Another reason for attempting to capture the standard in rule text is that although courts understand the standard, many lawyers do not. If a clear statement is possible, real benefits could follow.

[55] There are several choices here: has "the trial burden," "the [initial] trial burden of production," "the trial burden of persuasion," or "the trial burdens of production and persuasion." The difficulty with any of these formulas is that the burden of production may shift, and may not always couple with the burden of

(2) *Movant Does Not Have Trial Burden*. A movant who does not have the trial burden [of persuasion] must:

(A) show affirmatively that it is entitled to judgment as a matter of law, or

(B) show that the nonmovant does not have sufficient evidence to carry its burden at trial.

persuasion. Particular confusion may be encountered with "prima facie case" concepts that call for articulated explanation. Conceptually, the best answer may be to refer to the burden of persuasion. The burden of persuasion is relevant when all the evidence is in. At that point the burden of "production" is simply a short-hand description of the directed-verdict standard—it expresses one of three conclusions: the party with the burden of persuasion has not produced sufficient evidence to permit a jury to be persuaded; has produced sufficient evidence to permit persuasion; or has produced so much evidence that the jury must be persuaded because the opposing party has not carried the burden of producing evidence that makes a case for jury decision. Ultimately, that is what the summary-judgment standard attempts to predict.