

THE CIVIL RULES COMMITTEE AND AMENDING RULE 56

by
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These are interesting times for the Advisory Committee on Civil Rules. At one level, the strong showing in the increase in those wanting to testify is consistent with Congressional intent to achieve an open and transparent process. Listening to these new inputs provides valuable information essential to decisions to amend, to revise, or to stay put. The number of groups and individuals seeking to provide the Committee input has risen to an all-time high. The queue to provide the Committee input should be seen as a sign of health. At the same time, the recent leaders of the Committee have been energetic and enthusiastic in reaching out to invite participation by experts and other interested parties. Professor Marcus terms this a “pattern of outreach” to the bench and bar. Leadership has also scored high marks in rulemaking innovation by pioneering new types of informational procedures such as mini-conferences and workshops to expand dialog of rules ripe for discussion. Similarly, the Civil Rules Committee now makes great effort to obtain, solicit, and make available empirical information regarding the rules.

Increased participation in assessing proposed changes in positive law, however, fails to automatically improve the lawmaking process or to reach either closure or consensus on the issues ripe for consideration. Despite the growth of Committee involvement with outside participants, one sometimes hears complaints that the Committee is frozen or just plain unwilling or unable to make major changes. To be sure, the Committee has an option to stand pat and take no action. This is an historic stance that any group of legislators possesses.

The Article will set forth a theory to justify so-called stay put or non-action options. Although informational input to the Committee has spiked, much of it appears repetitive and unproductive. Legislative decision makers each have an optimal point of their ability to assess new input. Continuing to encourage new input after that point of optimality is probably questionable policy.

This Paper will look closely at the Civil Rules Committee’s efforts to revise Rule 56, the summary judgment rule. The very helpful papers of Ed Cooper and Richard Marcus also assess the Civil Rules Committee’s work revising Rule 56. Professors Cooper and Marcus serve as the Reporter and Associate Reporter of the Civil Rules Committee and have inside positions in the rulemaking process.

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My Paper necessarily describes the work of the Civil Rules Committee as that of a legislative or rulemaking model. The making or revising of a Federal Rule of Civil Procedure amounts to an act of legislation. In the Rules Enabling Act, Congress delegated the responsibility of procedural rulemaking to the Supreme Court, which sends this task to the Judicial Conference, which, in turn, appears to have passed the authority to recommend rule revisions to the Civil Rules Committee. Such delegations, including the subdelegations seen here, are common to administrative law and the rulemaking process. My own analysis heavily borrows from the Administrative Law model.

While the use of the rulemaking model governs, the expertise of the Civil Rules Committee members contributes to the invaluable respect and trust that allows new procedures to function effectively. Committee decisions are those of experts in their fields. I include the Reporter and Co-Reporter who are clearly insiders having great influence and apparent control of the all-important drafting process. Expertise must be patent in order to maximize trust and respect.

Separation of powers questions can arise when we have a mixed-model body such as the Civil Rules Committee. The Committee allows Article III judges to craft legislative rules authorized by the Article I Congress. The analogy of an expert administrative agency is clearly appropriate in this context. Congress has delegated the task of rule creation in civil cases to an expert group of federal judges. This allocation of rule creation to an expert group of adversary model decision makers is what it is—the presence of expertise in one model does not necessarily lead all-encompassing expertise in other models of governance.

I take an optimistic view toward the recent summary judgment work of the Committee. It would be incorrect to assert that the 2008 and 2009 revisions to Rule 56 made no changes. The amended Rule 56 (1) mandated a reasoned and written decision, (2) confirmed that all summary judgment evidence must be admissible in evidence, (3) clarified that the court need not search the record to find summary judgment evidence but can rely on record evidence not cited by the parties, (4) stated expressly that the district judge has the power to grant sua sponte summary judgment, (5) clarified that a judge need only consider pinpointed evidence, and (6) enshrined partial summary judgment in the text of Rule 56. These helpful changes were supported by case law but not the prior text of the summary judgment rule. Now part of the Rule, they create a much more organized and transparent Rule 56 procedure.

The Committee's refusal to legislate Trilogy caselaw language into the Rule's text seems savvy. Leaving such subjects as standards to the common law development regarding summary judgment is sensible and demonstrates a measure of confidence in the ability to improve summary judgment in the trenches of civil litigation. Common law development adds a degree of creativity and nuance that could help improve rulemaking. Subjects such as burden shifting are difficult to transform into clear procedural rules. Clarifying evidentiary norms is helpful to the summary judgment process and advances the need to achieve accurate decisions.

The Committee’s restoration of the word “shall” demonstrates the Civil Rules Committee’s work at its best and worst, but also demonstrates the flexibility of its members. Somehow the Committee came to accept the 2007 thesis of the Style Project that eliminated the word “shall” from numerous rules and replaced it with the word “should.” This is the single segment of the recent set of attempted revisions that defies rational explanation. “Should” clearly adds a layer of discretion to a summary judgment norm that already has more discretion than required. The presence of the trial judge’s ability to deny summary judgment if only one issue of fact exists guarantees that Rule 56 is discretionary. The Standing Committee, the group that reviews recommendations from the Civil Advisory Committee, showed good judgment when it restored the “shall grant summary judgment” phrase and deleted the words “should grant summary judgment.”

Professor Marcus observes correctly that some of the testimony of interested parties overstated the problems of some proposed amendments. My Essay briefly describes the Committee’s rejection of the point-counterpoint amendment. The point-counterpoint concept had been used successfully in many local rules. There was substantial opposition to the point-counterpoint amendment. My own 2009 testimony took the practical position that good lawyers would essentially follow something approximating point-counterpoint, even without being forced to, by marshaling evidence in the record on the major issues presented in their cases. If true, the point-counterpoint methodology had already been part of the summary judgment process and was hardly revolutionary.

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I. INTRODUCTION

This Essay explores the work of the Advisory Committee on Civil Rules (“Civil Rules Committee”) in considering amendments to the summary judgment rule, Federal Rule of Civil Procedure 56. The Civil Rules Committee evaluates and recommends procedural rules. The varied methodology of the Committee’s use of subcommittees, invited participants, mini-conferences, and willingness to listen to testimony from a wide variety of citizens and public interest groups demonstrates the flexibility and amazing work ethic of the Committee. Decision makers need relevant information to make quality decisions and the Committee is an

institution that appears to have taken great efforts to maximize the quality of information used in its work.

In the words of Professor Marcus, the present Civil Rules Committee operates in an “outreach” manner. The Committee’s generation, use, and willingness to share empirical evidence supplements the “pattern of outreach” by embracing and commissioning new Federal Judicial Center (FJC) proposals.¹ Rulemaking quality is enhanced by interjecting relevant available data, and a spirit of cooperation appears to exist at the FJC.²

The work of the Civil Rules Committee is extremely demanding and undoubtedly of great importance. Professor Cooper’s paper captures the complexity of revising the summary judgment norm when he reminds readers that “the full story” of the Rule 56 amendments is “equal in length to a multi-volume novel.”³

Analysis of the recent efforts to amend Rule 56, however, reveals a Civil Rules Committee process that some might say is unable or unwilling to arrive at major change. Some question the possible avoidance of a broad agenda that relies directly on the Rule’s text to confront major litigation policies. For example, the rise of judicial management theory and practice, and the increasing popularity of alternative dispute resolution, have not been incorporated systematically into the Federal Rules of Civil Procedure.⁴ Major areas of litigation reform and policy have simply not been considered by the Civil Rules Committee. Serious attempts to comprehensively amend Rule 56 have been largely unsuccessful, both in the 1990s and more recently in 2007 to 2010. These attempts at change cannot be criticized either as setting a meek agenda or avoiding tough issues. Judge Lee Rosenthal has chronicled the complicated and fascinating story of these “almost” efforts for major reform.⁵ To be sure, the most recent set of revisions to Rule 56 (2008 to 2010) reorganized the content of the rule and made noteworthy clarifications in the text that achieved a more-modern summary-judgment norm. The post 2010 version of Rule 56 is much more informative and definitive than the original Rule. It is now settled that a district judge may grant summary judgment *sua sponte*, may encourage partial summary judgment, and must state written reasons for granting or denying summary judgment.

Nonetheless, these changes were not designed to alter summary-judgment practice in any major way. In the words of the Committee, the

¹ Richard Marcus, *How to Steer an Ocean Liner*, 18 LEWIS & CLARK L. REV. 615, 623 (2014).

² Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 611–16 (2004) (advocating greater use of empirical research).

³ Edward H. Cooper, *Revising Civil Rule 56: Judge Mark R. Kravitz and the Rules Enabling Act*, 18 LEWIS & CLARK L. REV. 591, 610 (2014).

⁴ See, e.g., Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 889 (1999).

⁵ Lee H. Rosenthal, Speech, *The Summary Judgment Changes That Weren’t*, 43 LOY. U. CHI. L.J. 471, 472 (2012).

modest goal of the Committee was “a better rule 56 procedure that increases the likelihood of good motions and good responses, and deters bad motions and bad responses.”⁶ Critics of the reform efforts might find this modest goal to be far from ambitious.

I react positively to the new package of revisions to Rule 56. It would be incorrect to assert that the 2008 and 2009 revisions to Rule 56 made no changes. The amended Rule 56: (1) mandated a reasoned and written decision, (2) confirmed that all summary judgment evidence must be admissible in evidence, (3) clarified that the court need not search the record to find summary judgment evidence but can rely on record evidence not cited by the parties, (4) stated expressly that the district judge has the power to grant sua sponte summary judgment, and (5) enshrined partial summary judgment in the text of Rule 56.⁷ These helpful changes were supported by case law but not the prior text of the summary judgment rule. Now part of the Rule, they create a much more organized and transparent Rule 56 procedure. The changes also illustrate a process of common-law improvement of legislative rules.

While other areas of civil procedure could be viable candidates for analysis, there are several reasons to focus more closely on the Civil Rules Committee’s actions used to evaluate summary-judgment revision.

This Essay’s focus on summary judgment appears reasonable. As ably articulated by Gensler and Rosenthal, summary judgment “would make any lawyer’s—and any judge’s—list of most influential pretrial rules.”⁸ Summary judgment is one of the most used pre-trial motions and possesses the raw power to dispose of claims and cases. Not surprisingly, summary judgment is attractive to members of the defense bar because of its dispositive powers. Conversely, counsel who specializes in plaintiff’s claims often seem antagonistic toward the motion.

Criticism and controversy surround the history of summary judgment. In the legendary *Arnstein v. Porter*⁹ copyright infringement litigation, Judge Jerome Frank, no great fan of the civil jury,¹⁰ went out of his way to severely limit summary judgment. The standard used to assess the motion was narrowed to make the motion almost impossible to grant; summary judgment was said to be unavailable if “the slightest doubt” existed.¹¹ Pro se plaintiff Arnstein’s totally unimpressive and unsupported

⁶ Committee Memorandum from Judge Mark R. Kravitz, Chair, Advisory Comm. on Fed. Rules of Civil Procedure to Judge Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure, Report of the Civil Rules Advisory Comm. 63 (May 9, 2008), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV06-2008.pdf>.

⁷ FED. R. CIV. P. 56.

⁸ Steven S. Gensler & Lee H. Rosenthal, *Managing Summary Judgment*, 43 LOY. U. CHI. L.J. 517, 524 (2012).

⁹ 154 F.2d 464 (2nd Cir. 1946).

¹⁰ See JEROME FRANK, *LAW AND THE MODERN MIND* 170–85 (1930) (attacking the use of the civil jury).

¹¹ *Arnstein*, 154 F.2d at 468 (citations omitted).

deposition testimony failed to explain or support his pleading allegation that the defendant Porter had sent “stooges” to his apartment to steal his musical compositions and to “follow me, watch me, and live in the same apartment with me”¹² Judge Clark’s dissent asserted that the majority had treated this type of case differently than other cases by asserting that “[p]lagiarism suits are not excepted from F.R. 56.”¹³ The trial judge rightly characterized the testimony of the plaintiff Arnstein as “fantastic.”¹⁴ The slightest-doubt standard dominated the legal discourse for decades and lasted until the Supreme Court dealt it a clear death in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*¹⁵

The prevailing mood calling for summary-judgment reform also supports singling it out for a microscopic analysis. Summary judgment is increasingly unpopular with an important constituency, the federal bench, and several themes of criticism are emerging. Numerous federal judges have gone public with their very negative criticisms of the summary-judgment process. Judge Brock Hornby’s tirade regarding Rule 56 motions accused summary judgment as being anything but summary. In a highly accessible essay, Judge Hornby asserts that summary-judgment motions now consume an expanding amount of proof and laments decisions to file Rule 56 motions as unnecessarily costly.¹⁶ Patricia Wald criticizes the characteristic description of the motion as a docket-clearing mechanism and expresses the opinion that the lack of jury trials has been caused by wide use of summary judgment, far beyond the original intent of Rule 56.¹⁷ Judge Mark Bennett directly attacks summary-judgment motions as typically unnecessary and overly lengthy.¹⁸ Judge Bennett considers summary judgment a “huge part of the problem with our civil justice system” and criticizes “its expanded and aggressive use.”¹⁹ Judge Diane

¹² *Id.* at 467.

¹³ *Id.* at 480 (Clark, J., dissenting).

¹⁴ *Id.* at 469 (internal quotations marks omitted).

¹⁵ 475 U.S. 574, 585–88 (1986).

¹⁶ D. Brock Hornby, *Summary Judgment Without Illusions*, 13 GREEN BAG 2D 273, 274–80 (2010).

¹⁷ Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1897–98 (1998) (warning that summary judgment can be “a stealth weapon for clearing calendars”).

¹⁸ See generally Mark W. Bennett, *Essay: From the “No Spittin’, No Cussin’ and No Summary Judgment” Days of Employment Discrimination Litigation to the “Defendant’s Summary Judgment Affirmed Without Comment” Days: One Judge’s Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685 (2012/13).

¹⁹ *Id.* at 697. Judge Bennett even attacks me for advocating the possible existence of a “summary judgment premium,” a sum of money available in negotiation to non-movants following a denial of a motion for summary judgment. *Id.* at 695. Bennett states that he is “tempted to box up eighteen years’ worth of frivolous summary judgment motions that I have ruled on, rent two large semi-trucks, and send them off to this professor.” *Id.* at 696. Bennett goes on to say, “[w]ith all due respect, some of these professional claims about summary judgment are evidence that ‘[t]he difference between theory and practice in theory is much less than the difference

Wood reasons that filings of summary judgment motions have increased the costs of litigation, necessitating costly discovery that might not have been required if Rule 56 motions were unavailable.²⁰ Professor Steven Gensler and former Civil Rules Committee Chair Judge Lee Rosenthal also seem to fear the cost of summary-judgment motions and have recommended that the court set meetings between counsel and the trial judge prior to the filing of a Rule 56 motion. They argue that summary judgment “should be a central part of the Rule 16 discussion of the case in general and of discovery management in particular.”²¹ Even Arthur Miller, a former Reporter of the Civil Rules Committee and a professor with a mythic reputation who merits judge-like status, has joined the growing fraternity of summary-judgment skeptics.²² He criticizes judges for overusing the motion and delivers a decidedly negative view of the summary-judgment mechanism.²³

Singling out summary judgment for special attention also permits consideration of another major subject of procedural controversy, namely, the degree of uniformity used in the application of the civil rules. The initial drafts of the Civil Rules Committee’s work of the 1930s were full of support for achieving one set of procedures for all types of cases. Supporters of Rule 56 sought a truly national norm. This was the vision set out by Charles Clark, Reporter to the Civil Rules Committee.²⁴ At present, however, this one-size-fits-all position has been broadly attacked. The Committee received a significant amount of anti-transsubstantive input regarding potential 2008 amendments to Rule 56.²⁵ The summary-judgment-motion filing rate and grant rate are at their highest in the area of Civil Rights litigation.²⁶ The attitude of the trial lawyers’ bar clearly calls for a fresh and different set of summary judgment rules that mean differing treatment of potentially unique civil rights theories.²⁷ These

between theory and practice in practice.” *Id.* (alteration in original) (citation omitted). To date, the semi-trucks have not arrived at my office.

²⁰ Diane P. Wood, *Summary Judgment and the Law of Unintended Consequences*, 36 OKLA. CITY U. L. REV. 231, 243–45 (2011).

²¹ Gensler & Rosenthal, *supra* note 8, at 528.

²² Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1090 (2003) (worrying that the court lacks all the evidence when ruling on summary judgment requests).

²³ *Id.* at 1133–34.

²⁴ See, e.g., Charles E. Clark, *Special Pleading in the “Big Case,”* 21 F.R.D. 45 (1957).

²⁵ CIVIL RULES ADVISORY COMMITTEE MINUTES 5 (April 14, 2008); see also Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “Once Size Fits All” Assumption*, 87 DENV. U. L. REV. 377 (2010).

²⁶ See Edward Brunet, *Antitrust Summary Judgment and the Quick Look Approach*, 62 SMU L. REV. 493, 513–14 (2009) (stating that Federal Judicial Center data show a grant rate of 70% of summary judgment motions filed in civil rights cases, and, in contrast, a 53% grant rate in antitrust litigation).

²⁷ See, e.g., Summary of Comment on 2008 Rule 56 Proposal by Elizabeth M. Schneider, in Memorandum from Judge Mark R Kravitz, Chair, Advisory Comm. on

views came from lawyers who usually oppose summary judgment. Their testimony against the “point-counterpoint” reform appeared strongly opposed to a transsubstantive vision for summary judgment.²⁸

II. THE GHOST OF ADMINISTRATIVE LAW: THE CIVIL RULES COMMITTEE AS AN ARTICLE III RULEMAKING AGENCY

The Advisory Committee on Civil Rules is a legislative body that recommends changes in the legislative-style of rules used in the United States courts. The Rules Enabling Act contains an express delegation to the United States Supreme Court to make rules.²⁹ The delegation appears to set forth a yardstick or standard, probably a practical necessity to avoid major separation-of-powers problems.³⁰ The Rules Enabling Act awards the Supreme Court the authority to make “general rules of practice and procedure and rules of evidence for cases.”³¹ It also sets forth a clear zone of off-limits rulemaking, namely that rules promulgated “shall not abridge, enlarge or modify any substantive right.”³² This language, while admittedly broad, seems more than adequate to satisfy the need for some sort of “intelligible principle.”³³

The delegating of procedural-rulemaking power to a cohort largely composed of Article III judges is not without substantial constitutional questions. The reality is that Rules Committee work is legislative in nature but is set in motion by carefully selected members of the judicial branch. The judicial branch shares co-equal powers with the other branches of government. Much can be said in favor of a theory that provides a “structure” to constitutional analysis. A “structural” view of the Civil Rules Committee is one that stresses equivalent and similar powers. For example, if Congress has a “necessary and proper” conceptual power, then the courts should possess a similar authority. Some variety of proce-

Fed. Rules of Civil Procedure to Judge Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice & Procedure, Report of Civil Rules Advisory Comm. 68 (May 8, 2009), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2009.pdf>.

²⁸ *See, e.g., id.* (asserting that point-counterpoint passage “may aggravate an already unsatisfactory situation” in the employment and civil rights litigation areas, already the subject matter with the highest grant rate in motions for summary judgment).

²⁹ 28 U.S.C. § 2071(a) (2012) (stating that the “Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business”).

³⁰ *See, e.g., Yakus v. United States*, 321 U.S. 414, 427 (1944) (upholding vague delegation containing sufficiently precise standards to set maximum prices that are “fair and equitable” and that advance the purposes of the legislation).

³¹ 28 U.S.C. § 2072(a).

³² *Id.* § 2072(b).

³³ *See, e.g., Mistretta v. United States*, 488 U.S. 361, 373 (1989) (upholding delegation to Sentencing Guidelines Commission because delegation contained an intelligible principle).

dural power must be in effect in our Article III courts. Rules of procedure are surely essential to adjudication. Indeed, it seems obvious that the making of court rules is within the inherent powers of the courts. In this light, the Rules Enabling Act is unnecessary to our legal system. The Supreme Court has the inherent and structural power to create its own rules.

Prudence dictates that the federal judiciary cooperate with this delegation. Reality shows a serious effort by the judiciary to open the law-making process via accurate notice and a visible opportunity to submit live or written testimony. To quote Professor Marcus, the Committee's leadership appears to clearly seek a "pattern of outreach."³⁴ Outreach is both efficient and prudential. It encourages input and demonstrates intent to comply with the intent of Congress open up the work of the Civil Rules Advisory Committee to enhanced public scrutiny.

Congress' delegation of rulemaking power to the Supreme Court contains a specific "sunshine" requirement. The 1988 amendments to the Rules Enabling Act provide that new rules require "appropriate public notice" and "an opportunity for comment."³⁵ This style of legislation—surely a form of notice-and-comment rulemaking—is designed to obtain new ideas and input from those who provide comment. The intake of informational input through notice and comment rulemaking is hardly innovative and unlikely to revolutionize the Civil Rules Committee's policymaking. Notice-and-comment rulemaking sets out an easily satisfied goal, putting a light burden upon the regulatory body.

Notice-and-comment rulemaking is a venerable safeguard with severe limitations. Most federal agencies are subject to the process. It takes little effort to gather and publish proposed rules for public comment. The conclusions of the commentators can be ignored completely. Few agencies take the political risk of criticizing the process. It takes such a small amount of effort to comply that the regulators readily accept the costs of mandatory notice and comment. One potential cost is the well-known, practical "sunshine" impact. Agencies work differently when hidden from public view.

When the Committee acts, the judicial members are not acting as judges but instead appear to be exercising their considerable judicial expertise in a legislative mode. They do not preside over an adversarial contest but are analyzing whether to legislate or, if change is needed, how to draft amendments to existing rules. A Civil Rules Committee recommendation to reject a proposed change and stand pat remains a decision of experts and often can be the best solution.

I stress that the work of the Civil Rules Committee is to make recommendations and is purely advisory. No hard-and-fast completed deci-

³⁴ Marcus, *supra* note 1, at 623.

³⁵ Pub. L. 100-702 § 403, 102 Stat. 4642, 4650 (codified as amended at 28 U.S.C. § 2071(b)).

sions are made by this body. In some ways the Civil Rules Committee resembles the “advisory committees” that form to lobby for or against proposals of U.S. administrative agencies. These committees are regulated by the Federal Advisory Committee Act.³⁶ Before this legislation, advisory committees comprised of representatives from competing firms would gather in secret without public knowledge and voice concerns about relevant changes in rules. The possibility of cartel-like behavior made agency advisory committees both powerful and potentially dangerous.³⁷ The 20th century growth in numbers of committees can be explained by the New Deal lack of faith in government’s ability to effectively monitor American businesses and a belief that self-regulation might advance competition and job creation.³⁸

The important characteristic of expertise is not a major factor in the Federal Advisory Committee’s background or text. While advisory committees, like the Civil Rules Committee, render advice, it seems a stretch to think that the two entities perform similarly.

The presence of lawyer members of the Civil Rules Committee reaps similar expertise. Lawyers are veterans who work with the rules of litigation procedure daily. They make up the foundation of the demand curve for litigation, and their views are of great value when a rule is subject to review. The presence of law professor members expands the collective knowledge of the Committee and helps to assure that proposals are practical and efficient.

III. A CLOSER LOOK AT THE CIVIL RULES COMMITTEE’S RECENT TREATMENT OF SUMMARY JUDGMENT

A. *The No-Action or Stay Put Technique Served With a Common-Law Twist: The Rise and Fall of Point-Counterpoint*

The theory set forth here has real value when we examine the efforts to revise Rule 56 in the 1990s and in 2007 to 2010. Despite reform efforts by the organized bar and the Committee, the net result of these proposed amendments amounted to a reorganized Rule 56 that, although modified to clarify best attorney practices, continued much as it had in

³⁶ See Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (codified as amended at 5 U.S.C. §§1–15 (2012)).

³⁷ The advisory committee might lead to illegal conduct under the Sherman Antitrust Act, 15 U.S.C. §§1–7 (2012). The conduct should be partially or even fully defended under the *Noerr* Doctrine, the case law exemption to allow productive lobbying activity to fall outside antitrust laws. See E. R.R. President’s Conference v. *Noerr Motor Freight Co.*, 365 U.S. 127 (1961) (holding that legitimate private attempts to influence Executive Branch decisions falls outside the Sherman Act).

³⁸ See WILLIAM F. FUNK, SIDNEY A. SHAPIRO & RUSSELL L. WEAVER, *ADMINISTRATIVE PROCEDURE AND PRACTICE* 784–85 (5th ed. 2014) (noting that there was a great growth in advisory committees before and after World War II); Philip G. Phillips, *Commercial Arbitration Under the N.R.A.*, 1 U. CHI. L. REV. 424 (1934) (describing use of arbitration as a form of self-regulation).

the past. As various commentators have said, not much in the way of major changes had been accomplished. Judge Lee Rosenthal put it best by asserting that what was “most notable about the changes that were made are the ones that weren’t.”³⁹

Nevertheless, it would be erroneous to conclude that the twists and turns of suggested summary judgment reforms of recent years were of no value. The Civil Rules Committee’s use of a legislative model has great utility in the situation presented by the point-counterpoint controversy. The Committee is free to adopt neither position advanced by two opposing factions. The clear expertise of the Civil Rules Committee helps to legitimize its actions and makes attractive a no-action response. In an adversary model of adjudication there must be winners or losers. In the rulemaking model, there are often no winners or losers.

There is no one dominant model describing the process of rulemaking. Rulemaking resembles sausage making; there are many recipes and no single recipe will dominate. There are multiple ways to draft new laws. In theory, laws can be passed quickly, but a change to a Federal Rule of Civil Procedure takes time. This point is nicely developed by Professor Cooper who suggests that “[i]t takes at least three years . . . to make a rule.”⁴⁰

There will be numerous occasions when the preferable course of Civil Rules Committee action is no action. Professor Cooper stresses the rulemaking practice of relying on common-law development by the courts. Reliance on the developing step-by-step caselaw to later provide answers to difficult rulemaking problems is a respected no-action technique.

The Committee’s outright rejection of placing the directed verdict formula in the Rule 56 text is illustrative. The Trilogy of 1986 summary judgment decisions⁴¹ each relied on the judgment-as-a-matter-of-law standard. No major player outside the Committee lobbied for inserting this test into Rule 56. Judge William Schwarzer, a former head of the FJC., led a bid to amend Rule 56 in the early 1990’s by incorporating the Trilogy standard into the text of the rule, but the proposed revision was rejected in 1992 by the Judicial Conference. Professor Cooper’s “speculation” suggests that the pro-summary judgment camp felt the rule was working well without revision.⁴²

Professor Cooper’s summary of the debate regarding the point-counterpoint question is invaluable and succinctly captures the intense

³⁹ Rosenthal, *supra* note 5, at 472.

⁴⁰ Cooper, *supra* note 3, at 593 (quoting Letter from Edward H. Cooper, Reporter, Advisory Comm. Fed. Rules of Civil Procedure, to Judge Mark Kravitz, Chair, Advisory Comm. Fed. Rules of Civil Procedure (2010) (on file with Professor Edward H. Cooper)) (internal quotation marks omitted).

⁴¹ *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.*, 477 U.S. 574 (1986).

⁴² Cooper, *supra* note 3, at 594–95.

nature of the various interested parties—ranging from judges in districts that had abandoned the practice because of costs and length of time, to judges who felt that their local rule version of “point-counterpoint” was working well, to others who disliked the directed verdict approach and who did not want it enshrined in the text.⁴³ My own testimony characterized point-counterpoint as good law practice. The party who holds quality evidence will want to call it to the court’s attention. Viewed in this light, the point-counterpoint requirement seems much less revolutionary and likely to happen without a revision to Rule 56.

The no-action position relies on the common law to resolve the meaning of a process. We often think of a common-law solution as one brimming with raw, unbridled discretion. Although this might be true generally, the summary judgment arena presents ideal conditions for developing caselaw answers. Judge Rosenthal correctly describes common law development as “add[ing] nuance and context” to the summary judgment process.⁴⁴ District and court of appeals judges decide and write opinions in a large number of summary judgment decisions.

B. The Mugging of “Shall” by the Style Project and the Civil Rules Committee and the Restoration of the “Sacred” Shall by the Flexible Civil Rules Committee

The 2007 Style Project illustrates the inherent dangers of minimal reform. The slogan frequently associated with the Style Project was that the proposed revision would have no real impact and was not intended to change the law.⁴⁵ Professor Bryan Garner attacked the word “shall” as “promiscuous” because it is used in various ways and “slippery” because it had different meanings within the same writing.⁴⁶ Professor Kimble described the banishment of shall.⁴⁷

This is the one Civil Rules Committee change that I fail to understand. The typical theory is that “shall” means “must.” “Should,” the new word, indicates what the judge usually does, but leaves a degree of discretion to act in an unusual manner. In the early thinking on this issue, the Committee was simply too willing to listen to inaccurate advice regarding the verb shall. The Civil Rules Committee used the “no intent to change the law” generalization often in this period. This was the theme song

⁴³ *Id.* at 603–10.

⁴⁴ Rosenthal, *supra* note 5, at 496.

⁴⁵ See Steven S. Gensler, *Must, Should, Shall*, 43 AKRON L. REV. 1139, 1142 (2010).

⁴⁶ BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 939–40 (2d ed. 1995); BRYAN A. GARNER, GUIDELINES FOR DRAFTING AND EDITING COURT RULES 4.2(A) (5th ed. 2007).

⁴⁷ Memorandum from Joseph Kimble, Style Consultant, Thomas Cooley Law School, to All Readers (Feb. 21, 2005), at xviii, in PRELIMINARY DRAFT OF PROPOSED STYLE REVISION OF THE FEDERAL RULES OF CIVIL PROCEDURE (Feb. 2005), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Prelim_draft_proposed_pt1.pdf.

used in 2007 to justify the change from “shall grant summary judgment” to “should grant summary judgment.”

Following the 2007 change to “should grant summary judgment,” the Committee continued to consider major and minor changes to Rule 56. In its post-2007 review, the Committee heard “vigorous” and “numerous” public comments regarding the change to “should.”⁴⁸ One Committee member labeled the 2007 change a “wreck.”⁴⁹

Why did the initial 2007 change to “should” occur? While one can criticize the Civil Rules Committee for allowing the word “should” to sneak into approved status, there is no doubt that the momentum of the Style Project had much to do with the temporary demise of “shall.” By the time that the Style Project collided with Rule 56, the rulemakers had already approved the restyling of the Appellate Rules, the Criminal Rules, and the Evidence Rules.⁵⁰ These earlier victories for Style, which spanned the large number of years from 1977 to 2008, permitted the Style defenders to gain further momentum.

To its credit, the Civil Rules Committee specifically rethought the “shall-should” amendment of 2007 and theorized that the phrase “shall grant summary judgment” was so special to the bar and trial bench that it had become “sacred.”⁵¹

It is also possible that some opponents of the Style Project were concerned by a summary judgment text that made discretion to deny explicit. Even with a “shall grant” rule, the court can always deny summary judgment by finding just one disputed issue of fact. Several decisions deny summary judgment on this basis.⁵² Also, the *Anderson v. Liberty Lobby, Inc.* opinion seems to make any summary judgment motion discretionary. This case emphasizes the district judge’s vast powers by stating that the court may “deny summary judgment in a case in which there is reason to believe that the better course would be to proceed to a full trial.”⁵³ In the final analysis, Rule 56 already has a large dose of discretion and probably needs even less.

The restoration of “shall” amounts to the Civil Rules Committee admitting making a mistake by earlier authorizing the “should” change effective in 2007.⁵⁴ Yet, the Committee’s later support of “shall” displayed flexibility, and should be commended for its ability to adjust to change.

⁴⁸ Rosenthal, *supra* note 5, at 484.

⁴⁹ CIVIL RULES ADVISORY COMMITTEE MINUTES 27 (Oct. 27–28, 2005).

⁵⁰ See, e.g., Rosenthal, *supra* note 5, at 480.

⁵¹ Gensler, *supra* note 45, at 1157–60.

⁵² See, e.g., *Bond v. Giebel*, 787 N.Y.S.2d 512, 513 (App. Div. 2005) (affirming the denial of summary judgment and observing that the motion must be denied if any issue of fact can be found).

⁵³ *Anderson*, 477 U.S. at 255 (citation omitted).

⁵⁴ Gensler, *supra* note 45, at 1157–60 (noting that “shall” grant summary judgment was such a sacred phrase that it had been a mistake to change it as part of the Style Project in 2007).

IV. CONCLUDING THOUGHTS

The summary judgment rule is in improved condition. The set of amendments to Rule 56 provide needed textual guidance to the user. The rule is now much more organized and decidedly clearer. Each of these changes is a very helpful improvement.

1. The Rule's text now mandates a reasoned and written opinion.
2. Summary judgment evidence must now be admissible.
3. The Rule now clarifies that the court has no obligation to search the record to find summary judgment evidence but is also free to rely on any evidence in the record.
4. The text of Rule 56 firmly grants the court power to enter summary judgment *sua sponte* and to enter summary judgment for the non-movant.
5. The rule now embraces partial summary judgment and makes it an integral part of the summary-judgment mechanism.
6. A pinpoint citation to the record is mandated; the court need only consider the pinpointed evidence.

These revisions, while hardly earthshaking, improve the summary-judgment process and make it more transparent and efficient. Caselaw refined these changes and provides a useful corpus juris of summary-judgment doctrine.

At the same time, these recent revisions do not seem to be major changes. The Committee looked at major changes in considering the point-counterpoint amendment and also when changing the Style Project "should grant" to the 2010 "shall grant." However, for practical reasons the Civil Rules Committee decided to stay put on point-counterpoint and, instead, followed similar instincts in restoring the "shall grant" to its historic and sacred position. In Judge Lee Rosenthal's description, the recent Committee efforts regarding summary judgment featured the "changes that weren't."⁵⁵

The debate between the forces supporting and opposing summary judgment featured sharply different constituencies. The pro forces were mostly the bench and moving-party defense attorneys. Opposition came from the plaintiff's bar. These parties each advanced their respective arguments but failed to convince the Civil Rules Committee to adopt their position. The net result today is a continued use of this technique via local rules in existence in many district courts.

The Committee's work to carefully process revision of Rule 56 triggers no "legitimacy" concerns. The Committee used multiple techniques to invite input into the rulemaking decisions. It received oral and written testimony, created "workshops," held conferences relevant to proposed

⁵⁵ Rosenthal, *supra* note 5, at 471.

rule changes,⁵⁶ and invited academics to expound new theories. In addition, the Committee's meetings and exchanges of view were largely transparent for all to see, accept, or object. The set of possible summary judgment revisions and attempted changes had many hiccups and twists and turns, but the gravitas of the Civil Rules Committee surely survived the two-decade efforts to consider Rule 56 revisions.

⁵⁶ The Rules Committee even co-sponsored an academic conference on the policies relevant to pending revisions at Duke Law School, which, by all accounts, was a huge hit in providing opportunity for study and reflection.