THE CIVIL RULES COMMITTEE AND RULE 56

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These are interesting times for the Civil Rules Committee. 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 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 to those not on the Committee. 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 Rules Committee now makes great effort to obtain and solicit 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 to make major changes. To be sure, the Rules Committee has an option to stand pat and take no action. This is an historic stance that any group of legislators possesses.

This paper also seeks a theory to justify so-called 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 short paper will look closely at the Rules Committee's efforts to revise Rule 56, the summary judgment rule. The very helpful papers of Ed Cooper and

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Richard Marcus also assess the Rules Committee's work revising Rule 56. Professors Cooper and Marcus serve as the Reporter and Co-Reporter.

This paper necessarily describes the work of the 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. Congress has delegated the responsibility of procedural rulemaking to the Supreme Court, which has sent 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 are common to administrative law and the rulemaking process.

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

Separation of powers questions can arise when we have a mixed-model body such as the Rules Committee. The Rules 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. The refusal to legislate Trilogy case law language into the Rule's text seems savvy. Leaving such subjects as standards to common law development is sensible and a measure of confidence. 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 Rules Committee work at its best and 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 a segment of the recent set of revisions that defies explanation.

"Should" clearly adds a layer of discretion to a summary judgment norm that already has more than enough 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 Committee showed good judgment when it restored the "shall grant summary judgment" phrase and deleted the words "should grant summary judgment."

Professor Marcus observes that some of the testimony of interested parties overstated the problems of some proposed amendments. There was substantial opposition to the point-counterpoint amendment. My own 2009 testimony took the practical position that good lawyers would marshal evidence in the record on the essentials of their cases. If true, the point-counterpoint methodology had already been part of the summary judgment process and was hardly revolutionary.