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Fall 2010

## Must, Should, Shall

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# MUST, SHOULD, SHALL

*Steven S. Gensler\**

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## I. INTRODUCTION

If all goes as expected this year, the history of Rule 56 will have a curious three-year period in which summary-judgment practice was governed by “should” instead of “shall.” As originally adopted in 1938, Rule 56 stated that summary judgment “*shall* be rendered forthwith [if the materials in the summary judgment record] show that there is no genuine issue of material fact and that the moving party is entitled to a

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\* Welcome D. & W. DeVier Pierson Professor, University of Oklahoma College of Law. This paper was the basis for my remarks at the Association of American Law Schools (AALS) Section on Litigation program on “The Future of Summary Judgment,” held during the AALS Annual Meeting in New Orleans in January 2010. Since 2005, I have served as a member of the Advisory Committee on Civil Rules. During this time, the Advisory Committee completed its work on the Restyling Project and conducted all work on the Rule 56 Project. While I have drawn on my rulemaking experiences in preparing this paper, the views expressed herein are mine and should not be attributed to the Advisory Committee or any of its other members. I want to thank Ed Cooper, Joe Kimble, and Jeff Stempel for their comments on an earlier draft and hereby absolve them of any responsibility for any errors or heresies that might remain. I also thank the University of Oklahoma College of Law and Mr. DeVier Pierson for their continuing research support.

judgment as a matter of law.”<sup>1</sup> That’s how it read for nearly 70 years. In December 2007, however, Rule 56 was restyled to say that summary judgment “*should* be rendered” when the above-stated conditions are met.<sup>2</sup> The most recent proposed amendments to Rule 56, scheduled to take effect on December 1, 2010, will return Rule 56 from “*should*” to “*shall*.”<sup>3</sup>

The 2007 transition from “*shall*” to “*should*” was part of the Style Project, in which the Advisory Committee rewrote the Federal Rules of Civil Procedure using clearer and more modern language.<sup>4</sup> The style conventions governing the project did not allow the use of “*shall*” in the restyled rules.<sup>5</sup> Thus, the Advisory Committee had to find some other word to use. It settled on “*should*.” The choice of “*should*” reflected the Advisory Committee’s view that Rule 56 conferred on trial judges a limited discretion to deny summary judgment even when the moving party had met the requirements set forth in the rule.<sup>6</sup>

Even before the restyled “*should*” version of Rule 56 took effect, however, the Advisory Committee began a study of the content and substance (not just the style) of Rule 56.<sup>7</sup> As a result of that study, the Advisory Committee published proposed amendments to Rule 56 in August 2008.<sup>8</sup> The published version continued to use “*should*.”

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1. See 11 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 56 app. 1 (3d ed. 2009) (appendix providing historical rule text) (emphasis added).

2. See FED. R. CIV. P. 56 & advisory committee’s note (2007).

3. See Order Adopting Proposed Amendments to the Federal Rules of Civil Procedure (Apr. 28, 2010), <http://www.supremecourt.gov/orders/courtorders/frcv10.pdf>.

4. See *infra* notes 17-23 and accompanying text.

5. See *infra* notes 24-46 and accompanying text.

6. See FED. R. CIV. P. 56 advisory committee’s note (2007).

7. See *infra* notes 62-91 and accompanying text.

8. See ADMIN. OFFICE OF THE U.S. COURTS, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE, AND THE FEDERAL RULES OF EVIDENCE (Aug. 2008). In this article, further citations to the August 2008 proposed amendments to the Civil Rules will be to the Civil Rules Advisory Committee’s Report to the Committee on Rules of Practice and Procedure dated May 9, 2008, as supplemented June 30, 2008. See REPORT OF THE CIVIL RULES ADVISORY COMMITTEE TO THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, May 9, 2008, as supplemented June 30, 2008, at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV\\_Report.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV_Report.pdf) [hereinafter CIVIL RULES REPORT AS SUPPLEMENTED JUNE 2008]. I do so for ease of access. The supplemented report dated June 30, 2008 is available on-line, whereas the full published pamphlet is not. With respect to the proposed amendments to the Civil Rules, the content is identical. The Advisory Committee submitted its proposals to the Standing Committee seeking permission to publish in the version of the report dated May 9, 2008. After the Standing Committee gave permission, the Advisory Committee submitted a supplemented report, dated June 30, 2008, revised to reflect changes to the proposal materials made in response to comments or directions from the Standing Committee. Most importantly for purposes of this article, the supplemented report includes the specific invitations for comment as formulated during the process of seeking approval to publish. The full published pamphlet of proposed amendments simply reproduces

However, the Advisory Committee specifically invited comments on whether “should” was the right term.<sup>9</sup> The Advisory Committee took this step because it was aware that some people – including several members of the Standing Committee on Rules of Practice and Procedure – believed that “should” had been a mistranslation of “shall.”<sup>10</sup> Taking the position that Rule 56 creates an *entitlement* to summary judgment when the criteria set forth in the rule are met, the critics of the restyled “should” version of Rule 56 argued that the correct translation of “shall” was “must.”<sup>11</sup>

During the comment period, the proponents of “must” seized the opportunity to urge the Advisory Committee to fix the alleged mistranslation of “shall.”<sup>12</sup> Their efforts to get “must” into the rule text failed. But the Advisory Committee was persuaded that the switch to “should” had been improvident. In order to avoid the risk that “should” might skew the question of discretion to deny, the Advisory Committee decided to restore “shall.”<sup>13</sup>

This Essay has three parts. Parts I and II look backward. Part I tells the story of the switch from “shall” to “should” in 2007. Part II then explains the events that led the Advisory Committee to propose the amendment that, if it takes effect as scheduled on December 1, 2010, will restore “shall” to the text of Rule 56.

I present these events in considerably more detail than one normally gets about rule changes involving the alteration of a single word. I do so for two reasons. First, Rule 56 is not just any rule; it is one of the cornerstones of the pretrial system created in 1938.<sup>14</sup> And “shall” is not just any word in that rule; it is a critical term defining the court’s authority. Thus, the high level of detail is commensurate with the stakes involved. Second, because of the importance of summary

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the supplemented report (packaging it with the parallel reports from the other Advisory Committees). Thus, the most accessible source of the full proposal is the on-line version of the supplemented report dated June 30, 2008.

9. See *infra* notes 92-98 and accompanying text.

10. See STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, MINUTES, MEETING OF JUNE 9-10, 2008, at 24-29, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST06-2008-min.pdf> [hereinafter STANDING COMMITTEE MINUTES OF JUNE 2008].

11. See *infra* note 104 and accompanying text. See generally Bradley Scott Shannon, *Should Summary Judgment Be Granted?*, 58 AM. U. L. REV. 85 (2008).

12. See *infra* notes 102-06 and accompanying text.

13. See *infra* notes 112-23 and accompanying text.

14. See EDWARD J. BRUNET & MARTIN H. REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 1:1 (3d ed. 2006); MOORE ET AL., *supra* note 1, at ¶ 56.02 (“Rule 56, which provides for and regulates summary judgment, is one of the most important of the Federal Rules of Civil Procedure.”).

judgment, and because “shall” and “should” are key words in terms of the meaning of Rule 56, it would be tempting to conclude that the Advisory Committee must have had significant changes in mind. In fact, quite the opposite is true. Both times, the Advisory Committee’s objective was to make *no change whatsoever* to the court’s authority to grant or deny summary judgment.<sup>15</sup> The stories behind the round-trip journey from “shall” to “should” and back explain how and why so much rulemaking activity occurred given that the goal all along has been to leave this aspect of summary-judgment practice undisturbed.

Part III looks forward. It addresses a single, critical question: how much discretion to deny summary judgment will trial judges have once “shall” is restored? The answer is this: with the restoration of “shall,” trial courts will return to whatever measure of discretion they had on November 30, 2007 – no more, no less.<sup>16</sup>

## II. FROM “SHALL” TO “SHOULD”

For almost 70 years, Rule 56 provided that summary judgment “shall be rendered” upon a showing that no genuine dispute of material fact existed and the moving party was entitled to judgment as a matter of law. That familiar phrase was changed on December 1, 2007, when Rule 56 was amended to provide that summary judgment “should be rendered” upon that showing. This Part explains the reasons behind that change.

### A. *Rule 56 and the Style Project*

The switch from “shall” to “should” took place as part of the Style Project. Most readers likely are familiar with the Style Project, so I will not engage in a detailed history of it here.<sup>17</sup> Nor do I think it necessary to rehearse the debate about whether the Style Project was a wise

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15. See *infra* notes 114-23 and accompanying text.

16. By answering the question this way I do not mean to be coy. An upcoming companion article will address both the historical question of whether Rule 56 conferred discretion to deny from 1938 to 2007 and the policy arguments that might support such discretion. See Steven S. Gensler, *Discretion to Deny Summary Judgment* (forthcoming 2011) (draft on file with author).

17. The most comprehensive discussion of the Style Project was written by Professor Ed Cooper, the Reporter to the Civil Rules Advisory Committee. See Edward H. Cooper, *Restyling the Civil Rules: Clarity Without Change*, 79 NOTRE DAME L. REV. 1761 (2004). For additional treatment, see Jeremy Counsellor, *Rooting for the Restyled Rules (Even Though I Opposed Them)*, 78 MISS. L.J. 519, 524-41 (2009) (discussing the history leading up to the Style Project and the restyling process as it played out), and Lisa Eichhorn, *Clarity and the Federal Rules of Civil Procedure: A Lesson from the Style Project*, 5 J. ASS’N. OF LEGAL WRITING DIRECTORS 1, 3-5 (Fall 2008).

undertaking.<sup>18</sup> For purposes of this essay, it is sufficient to note two things.

First, the Style Project entailed a stem-to-stern rewriting of the Civil Rules that took the existing meaning of each Rule and attempted to express that meaning more clearly and in modern language.<sup>19</sup> Second, the most fundamental guiding principle of the Style Project was that it truly be limited to style; the restyling could not alter the meaning of the Rules.<sup>20</sup> The Advisory Committee took extraordinary steps to honor that limitation. In the pre-publication phase alone, the restyling process included five separate steps in which different sets of eyes reviewed the proposed changes for possible substantive effects.<sup>21</sup> Whenever the Advisory Committee concluded that a proposed style change posed a serious risk of changing meaning, the Advisory Committee either rejected the change or, in a small number of situations, proceeded with the change as part of a separate Style-Substance track.<sup>22</sup>

Rule 56 proved to be one of the most difficult rules to restyle. Although lawyers generally are well-versed in the day-in-and-day-out workings of summary-judgment practice, the text of Rule 56 is silent on many of those matters. Worse yet, some provisions are routinely ignored or neglected by judges and lawyers alike because they are

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18. See, e.g., Edward A. Hartnett, *Against (Mere) Restyling*, 82 NOTRE DAME L. REV. 155 (2006); Jeremy Counsellor & Rory Ryan, *The Restyling of the Federal Rules of Civil Procedure: A Solution in Search of a Problem*, WASH. U. L. REV. SLIP OPINIONS (Nov. 7, 2007), <http://lawreview.wustl.edu/slip-opinions/the-restyling-of-the-federal-rules-of-civil-procedure-a-solution-in-search-of-a-problem/>; Jeffrey S. Parker, *Postponing the 2007 "Restyling" Amendments to the Federal Rules of Civil Procedure: A Letter to Members of the Judiciary Committees of the House and Senate*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1016221](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1016221). One critic characterized the restyling project as "an example of the kind of minor rules alteration that does not seek to improve adjudication." Glenn S. Koppel, *Reflections on the "Chimera" of a Uniform Code of State Civil Procedure: The Virtue of Vision in Procedural Reform*, 58 DEPAUL L. REV. 971, 980 n.63 (2009).

19. See Cooper, *supra* note 17; Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 THE SCRIBES J. OF LEGAL WRITING 25 (2008-09) (providing examples of the types of changes that were made during the restyling of the Civil Rules).

20. See Cooper, *supra* note 17, at 1780; Introduction to Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure, at vii-ix (Feb. 2005), [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Prelim\\_draft\\_proposed\\_pt1.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Prelim_draft_proposed_pt1.pdf) [hereinafter Introduction to Preliminary Draft of Restyled Civil Rules].

21. See Memorandum from Joseph Kimble Accompanying Preliminary Draft of Proposed Style Amendments, at x-xi (Feb. 2005), [http://www.uscourts.gov/rules/Prelim\\_draft\\_proposed\\_pt1.pdf](http://www.uscourts.gov/rules/Prelim_draft_proposed_pt1.pdf) [hereinafter Kimble Memorandum]. Professor Kimble's memorandum, titled "Guiding Principles for Restyling the Civil Rules," has been reprinted in 84 MICH. B.J. 56 (Sept. 2005); 84 MICH. B.J. 52 (Oct. 2005).

22. See REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, June 2, 2006 (Revised July 2006), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV06-2006.pdf>, at 19, 430-36.

simply outdated and out-of-step with modern summary-judgment practice. As discussed in detail below, the disconnect between the text of Rule 56 and accepted summary-judgment practice that the Style Project exposed is what inspired the Advisory Committee to later consider and develop substantive amendments to Rule 56.<sup>23</sup>

Perhaps the thorniest issue presented during the restyling of Rule 56 was how to translate the word “shall” as it appeared in the phrase “shall be granted.” Under the governing style conventions, the Advisory Committee was not allowed to use “shall”; it was a disfavored word to be excised from the rules wherever found. Thus, some other word or phrase would have to be used. And because of the Style Project imperative to not alter substantive meaning, the replacement word or phrase would have to convey the same meaning as had “shall.” That would prove to be a very difficult task. Before looking at how the Advisory Committee resolved the problem, however, it is worth exploring the history behind the directive to rid the rules of “shall.”

### *B. The Banishment of “Shall”*

In 1991, the Standing Committee on Rules of Practice and Procedure created a Style Subcommittee to review the drafting style of all amendments to all of the Federal Rules.<sup>24</sup> Soon thereafter, the Style Committee enlisted the assistance of Bryan Garner, a noted expert on legal writing, to be its style consultant.<sup>25</sup> During the course of its work, the Style Committee developed numerous style conventions. The Style Committee eventually asked Garner to compile those conventions into a manual.<sup>26</sup> The Standing Committee published the manual, titled *Guidelines for Drafting and Editing Court Rules*, so that the public would better understand and appreciate the drafting and editing choices that were being made in the rulemaking process. The Style Committee continues to adhere to those guidelines.<sup>27</sup>

The banishment of “shall” from the Civil Rules reflects Garner’s view that rule-drafters needed to establish and follow a consistent

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23. See *infra* notes 62-73.

24. Robert E. Keeton, *Preface* to BRYAN A. GARNER, *GUIDELINES FOR DRAFTING AND EDITING COURT RULES*, at iii, (1996). For a more complete history of the effort to standardize the style of the various Federal Rules and how that effort evolved, see Counsellor, *supra* note 17, at 524-30.

25. Keeton, *supra* note 24, at iii.

26. George C. Pratt, *Introduction* to BRYAN A. GARNER, *GUIDELINES FOR DRAFTING AND EDITING COURT RULES*, at vi (1996).

27. See Kimble, *supra* note 19, at 79.



scheme for expressing what he termed “words of authority.” As Garner would write in the Second Edition of his *Dictionary of Modern Legal Usage*, “Few reforms would improve legal drafting more than if drafters were to begin paying closer attention to the verbs by which they set forth duties, rights, prohibitions, and entitlements. In the current state of common-law drafting, these verbs are a horrific muddle . . . .”<sup>28</sup>

According to Garner, the chief culprit was the word “shall.” Garner characterized “shall” as both promiscuous and slippery. He called “shall” promiscuous because it was being used in so many different ways.<sup>29</sup> He called “shall” slippery because its usage often would slip from one meaning to another, sometimes in the same rule, without any apparent recognition on the part of the drafter that the meaning had changed.<sup>30</sup>

One way of solving both the “slipperiness” and the “promiscuity” problems would have been to give “shall” a single meaning and then strictly confine the usage of “shall” to that single meaning. But Garner did not think that would be an effective solution. He believed that “shall” had been so corrupted—and that the old usage habits would be so hard to break—that the only effective solution was to stop using “shall” altogether. In other words, when it came to “shall,” he preached abstinence.<sup>31</sup>

It should come as no surprise then that the Drafting Guidelines that Garner developed for the rulemaking process generally adopted and urged the abstinence method. The Drafting Guidelines first supply a glossary setting forth the proper word to use for a particular expression of authority.<sup>32</sup> When the drafters’ intent is to say that something is required, the Drafting Guidelines say to use “must.”<sup>33</sup> When the drafters’ intent is to say that something is allowed, or that a court has discretion to do something, the Drafting Guidelines say to use “may.”<sup>34</sup> The glossary itself does not list “shall.” Rather, the Drafting Guidelines say to replace “shall” with “must,” “may,” or some other, more

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28. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 939 (2d. ed. 1995).

29. *Id.* at 939–40.

30. *Id.*

31. *Id.* at 940–41. For an extended discussion on the history of the usage of “shall,” see Joseph Kimble, *The Many Misuses of Shall*, 3 SCRIBES J. LEGAL WRITING 61 (1992).

32. See BRYAN A. GARNER, GUIDELINES FOR DRAFTING AND EDITING COURT RULES § 4.2.A (1996).

33. *Id.*

34. *Id.*

appropriate term.<sup>35</sup> Notably, one of those other words of authority that appears in the glossary of terms is “should,” which is listed for use to denote a “directory provision.”<sup>36</sup>

So, when the Advisory Committee embarked upon the restyling of the Civil Rules, it was not working from scratch.<sup>37</sup> The Drafting Guidelines were already in place and had been used successfully in the projects to restyle the Appellate Rules and the Criminal Rules. The Garner-inspired campaign to rid the rules of “shall” was, by then, well-established. The following passage from the minutes of the October 2002 Advisory Committee meeting, which marked the start of the Style Project for the Civil Rules, sums up the situation well: “The Civil Rules project will benefit from the experience of the other rules committees. Some of the battles have been fought; the winners and losers are identified. ‘Must’ has replaced ‘shall’ as a term of mandatory duty.”<sup>38</sup>

If a final nail was needed to seal “must’s” coffin, it came in the form of Professor Joseph Kimble, a legal writing expert who had taken over as the Style Consultant.<sup>39</sup> Professor Kimble was an equally staunch believer in the inherent ambiguity of “must” and of the resulting need to excise it from the rules.<sup>40</sup>

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35. *Id.* § 4.2.B. The Drafting Guidelines do not completely foreclose the usage of “shall.” Rather, they provide an alternative that allows the use of “shall” so long as the drafters are diligent in only using it to mean “has a duty to.” *Id.* § 4.2.C. This is consistent with Garner’s view that, while abstinence is the *best* method, other solutions to the problem of inconsistent usage did exist.

36. *Id.* § 4.2.A.

37. This is true in a second respect as well. The Advisory Committee began work on the Style Project as we know it in 2002. See ADVISORY COMMITTEE ON CIVIL RULES, MINUTES, Oct. 3-4, 2002, at 6, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CRAC1002.pdf> [hereinafter CIVIL ADVISORY MINUTES OF OCT. 2002]. That work, however, built on prior efforts. The first effort to restyle the Civil Rules was undertaken by Bryan Garner when he was serving as the Style Consultant to the Standing Committee. See Introduction to Preliminary Draft of Restyled Civil Rules, *supra* note 20, at vii. The Garner draft then was revised by Judge Sam Pointer when he was the Chair of the Civil Rules Advisory Committee. See CIVIL ADVISORY MINUTES OF OCT. 2002, *supra*, at 6, 11. An initial effort to restyle all of the Civil Rules in one marathon session – now referred to as the “fabled” or “notorious” “Sea Island Meeting” – quickly bogged down, demonstrating just how difficult and time-consuming a project to restyle the Civil Rules would be. See *id.* at 6. The Garner-Pointer draft of the Civil Rules was then set aside while the Appellate Rules and the Criminal Rules were restyled. See Introduction to Preliminary Draft of Restyled Civil Rules, *supra* note 20, at viii. When the Advisory Committee picked the project back up, it used the Garner-Pointer draft as a starting point. See ADVISORY COMMITTEE ON CIVIL RULES, MINUTES, Oct. 2-3, 2003, at p. 3, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CRAC1003.pdf> [hereinafter CIVIL ADVISORY MINUTES OF OCT. 2003].

38. See CIVIL ADVISORY MINUTES OF OCT. 2002, *supra* note 37, at 7.

39. See Introduction to Preliminary Draft of Restyled Civil Rules, *supra* note 20, at viii.

40. See Kimble, *supra* note 31, at 75-76 (“So forget the archaic *shall*, use *must* instead . . .”).

Once the Advisory Committee started the process of restyling the Civil Rules, it quickly began to confront the problem of translating all of the different usages of “shall” in the rules. One particularly telling vignette is when the Advisory Committee had occasion to consider how to translate the various uses of “shall” in Rule 16.<sup>41</sup> The discussion was equally illuminating and daunting. It convincingly demonstrated to the committee members both how difficult the translation of “shall” was going to be at times—and how tempting it might be to duck those hard choices by sticking with “shall” when the translation was difficult.<sup>42</sup>

In the end, though, the Advisory Committee followed the lead set by the earlier restyling of the Appellate Rules and the Criminal Rules and decided that it would, to use Garner’s term, practice abstinence and find a way to either replace or eliminate all of the “shalls.”<sup>43</sup> In total, the Civil Rules had contained almost 500 “shalls.”<sup>44</sup> Of the 500, 375 were translated to “must.”<sup>45</sup> The remaining “shalls” were eliminated through tightening of the rule language, converted to present-tense verbs, or translated to different modal verbs like “will,” “may,” or “should.”<sup>46</sup>

### C. *Eliminating “Shall” from Rule 56*

With that background, we can return to the restyling of Rule 56. Knowing that it needed to somehow eliminate “shall,” the Advisory Committee considered its options.

The Advisory Committee rejected replacing “shall” with “must.” “Must” seemed too rigid and inconsistent with Supreme Court language indicating that courts had discretion to decline to grant summary judgment in appropriate circumstances even when the motion was properly made and supported.<sup>47</sup> Moreover, leading treatises and

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41. See CIVIL ADVISORY MINUTES OF OCT. 2003, *supra* note 37, at 4-8.

42. See Cooper, *supra* note 17, at 1777.

43. See Kimble Memorandum, *supra* note 21, at xviii. See also CIVIL ADVISORY MINUTES OF OCT. 2003, *supra* note 37, at 8; FED. R. CIV. P. 1 advisory committee’s note (2007) (“[T]he word ‘shall’ can mean ‘must,’ ‘may,’ or something else, depending on context. The potential for confusion is exacerbated by the fact that ‘shall’ is no longer generally used in spoken or clearly written English. The restyled rules replace ‘shall’ with ‘must,’ ‘may,’ or ‘should,’ depending on which one the context and established interpretation make correct in each rule.”).

44. See Kimble, *supra* note 31, at 79.

45. *Id.*

46. *Id.* at 79-84.

47. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-57 (1948).

considerable lower court case law also recognized that trial courts had discretion to deny summary-judgment motions for various reasons.<sup>48</sup>

The Advisory Committee also rejected replacing “shall” with “may.” “May” seemed too weak. As the Supreme Court famously expressed in *Celotex Corp. v. Catrett*, summary judgment is not merely a discretionary power of the court or a disfavored remedy, but an integral part of the federal pretrial scheme.<sup>49</sup> Indeed, language from *Celotex* can be read to say that summary judgment is mandatory when the required showing is made.<sup>50</sup>

Ultimately, the Advisory Committee opted to translate “shall” into “should.” As noted above, the Drafting Guidelines specifically allow for the use of “should” when the intent is to denote a “directory provision.”<sup>51</sup> The Advisory Committee concluded that using “should” instead of “must” or “may” would signal that, while courts retain discretion to deny summary judgment when the required showing is made, the usual and expected course had been and would continue to be to grant such motions.<sup>52</sup> To reinforce that point, the Advisory Committee included the following language in the accompanying Committee Note: “‘Should’ in amended Rule 56(c) recognizes that courts will seldom exercise the discretion to deny summary judgment when there is no genuine issue as to any material fact.”<sup>53</sup>

The proposed Style Amendments were published for comment in February 2005.<sup>54</sup> Taking up an invitation made by Reporter Ed Cooper,<sup>55</sup> a blue-ribbon group of eleven law professors and ten practicing attorneys led by Professor Stephen Burbank and Greg Joseph undertook to review the entire restyling project.<sup>56</sup> Written comments

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48. See 10A WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2728 (3d ed. 1998) (discussing lower court case law); 6 (Part 2) JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 56.16[6] (2d ed. 1988) (same); 4 HAROLD A. KOOMAN, FEDERAL CIVIL PRACTICE § 56.03 (1975).

49. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

50. *Id.* at 322.

51. See GARNER, *supra* note 32, § 4.2.A.

52. See ADVISORY COMMITTEE ON THE CIVIL RULES, MINUTES, Apr. 15-16, 2004, at 39, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CRAC0404.pdf> [hereinafter CIVIL ADVISORY MINUTES OF APR. 2004].

53. See FED. R. CIV. P. 56 advisory committee’s note (2007).

54. See Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure (Feb. 2005), [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Prelim\\_draft\\_proposed\\_pt1.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Prelim_draft_proposed_pt1.pdf).

55. See Cooper, *supra* note 17 at 1785-86.

56. See Counsellor, *supra* note 17, at 538-40.

were submitted by fifteen other groups or individuals.<sup>57</sup> Only one of those comments directly addressed the change from “shall” to “should” in Rule 56.<sup>58</sup>

The Advisory Committee made various changes to the style package of amendments in light of the comments and suggestions received and then submitted the Style Amendments for approval. As submitted, restyled Rule 56 still translated “shall” into “should.” After completing their journey through the full rulemaking process,<sup>59</sup> the restyled Civil Rules took effect on December 1, 2007. On that day, “shall” became “should.”

### III. THE RESTORATION OF “SHALL”

Though the Advisory Committee did not know it at the time, the seeds of “shall’s” return were sowed two years before the restyled version of Rule 56 even took effect. That is because the Advisory Committee began work on a substantive review of Rule 56 during a lull in the Style Project—the period when the Preliminary Proposed Draft of the Restyled Civil Rules was published and open for comment.<sup>60</sup> By the time the restyled rules took effect in December, 2007, the work on revising the substance of Rule 56 had been in progress for nearly two years.

In August 2008, less than a year after the restyled “should” version of Rule 56 took effect, the Advisory Committee published proposed amendments to Rule 56.<sup>61</sup> Although the published Rule 56 proposal retained the use of “should,” it flagged the choice of “should” for comment. That set in motion a chain of events that ultimately led to the decision to restore “shall.”

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57. See 2005 Civil Rules Comments Chart <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Comments/Proposed0805Comments/2005CVCommentsChart.aspx>.

58. See Comment Submitted by Professor Bradley Scott Shannon, 05-CV-009, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CV%20Comments%202005/05-CV-009.pdf>. See also Shannon, *supra* note 11, at 88 n.15 (2008). It should be noted, though, that the Burbank-Joseph group did raise other issues associated with the translation of words of authority. See <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CV%20Comments%202005/05-CV-022.pdf>.

59. See James C. Duff, *The Rulemaking Process: A Summary for the Bench and Bar* (October 2010), <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/SummaryBenchBar.aspx>.

60. See *infra* note 74 and accompanying text.

61. See *infra* notes 88-91 and accompanying text.

### A. *The Rule 56 Project*

Rulemaking projects occasionally beget other projects. This happens when work in one area brings to light issues that merit attention but that lie outside the scope of the existing project. In this case, the restyling of Rule 56 led to a freestanding project to overhaul the content of Rule 56.

The restyling of Rule 56 exposed a significant gulf between the text of the rule and everyday summary-judgment practice. Some parts of the rule are no longer in sync with modern practice. For example, the pre-style version of Rule 56(c) provided that the motion “shall be served at least 10 days before the time fixed for the hearing.”<sup>62</sup> But in reality, most summary-judgment motions are decided without a hearing,<sup>63</sup> and the deadline for serving summary-judgment motions is typically set by the scheduling order rather than by reference to a hearing date.<sup>64</sup> Given the limits of the Style Project, though, the Advisory Committee could do no more than restyle those outdated concepts.<sup>65</sup> As another example, the pre-style version of Rule 56(c) provided that “[t]he adverse party prior to the day of hearing may serve opposing affidavits.”<sup>66</sup> Under Rule 5, however, service after the summons and complaint generally can be accomplished by mail, and service is complete upon mailing.<sup>67</sup> That meant that someone technically could comply with Rule 56(c) by mailing opposing affidavits the day before a hearing even though the affidavits might not be received by opposing counsel until after the hearing had taken place. Here too, the Advisory Committee flagged the problem but carried it forward in restyled text.<sup>68</sup>

Another problem was that some well-established summary-judgment practices find only indirect support in the text of Rule 56. For example, the practice of parties seeking partial summary judgment—i.e., seeking summary judgment on fewer than all claims in the case—is

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62. See STEVEN S. GENSLER, 2007 STYLE PROJECT COMPARISON CHARTS 187 (2008).

63. See 1 STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY 899 (2010); MOORE ET AL., *supra* note 1, at § 56.15[1]; see also FED. R. CIV. P. 43(c) (“When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.”).

64. See GENSLER, *supra* note 63, at 888; see also FED. R. CIV. P. 16(b)(3)(A) (scheduling order must set a deadline for filing motions).

65. See FED. R. CIV. P. 56(c) (“The motion must be served at least 10 days before the day set for the hearing.”).

66. See GENSLER, *supra* note 62, at 187.

67. See FED. R. CIV. P. 5(b)(2)(C).

68. See FED. R. CIV. P. 56(c) (“An opposing party may serve opposing affidavits before the hearing day.”).

well-established in both the case law and in the secondary sources.<sup>69</sup> But Rule 56 does not contain the phrase “partial summary judgment.”<sup>70</sup> Nonetheless, judges and lawyers alike recognized the propriety of the practice, and with good reason. Both Rule 56(a) and Rule 56(b) allow a party to move for summary judgment “on all or part of a claim.” And Rule 54(b) implicitly recognizes the concept of partial summary judgments by creating a mechanism for a judge to enter a final judgment on a ruling that disposes of fewer than all claims.<sup>71</sup> To many, though, it seemed odd that such an important and well-established aspect of summary-judgment practice was not addressed in the rule text more directly.

Finally, many of the crucial practical aspects of summary judgment—particularly motion and briefing practices—were not covered in the national rule, leading to a dizzying array of local practices sometimes codified in local rules and sometimes left to the individual judge’s preferences.<sup>72</sup> Here too, the gap in the rule simply was not a subject that could be addressed in the Style Project. The Advisory Committee flagged the apparent need for content reform but left it for another project and another day.<sup>73</sup>

That day came quickly. The Advisory Committee took up the matter of a possible Rule 56 project at its October 2005 meeting.<sup>74</sup> There was strong support for undertaking a project that would address the many ways in which the rule text failed to connect with everyday summary-judgment practice. In the words of one of the attorney members of the Advisory Committee, “the rule [was] a wreck.”<sup>75</sup> Others feared that the variation in local summary-judgment practices created traps for the unwary.<sup>76</sup> A consensus emerged that the Advisory

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69. See GENSLER, *supra* note 63, at 909-11; MOORE ET AL. *supra* note 1, at § 56.40.

70. The phrase “partial summary judgment” does appear in the 1946 Advisory Committee note discussing the addition of the text specifically allowing for “interlocutory summary judgment” on the matter of liability. See FED. R. CIV. P. 56(d) & advisory committee’s note (1946).

71. See FED. R. CIV. P. 54(b).

72. See GENSLER, *supra* note 63, at 897; MOORE ET AL. *supra* note 1, at § 56.10[5].

73. See CIVIL ADVISORY MINUTES OF APR. 2004, *supra* note 52, at 38-39.

74. See ADVISORY COMMITTEE ON THE CIVIL RULES, MINUTES, Oct. 27-28, 2005, at 24-29, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2005-min.pdf> [hereinafter CIVIL ADVISORY MINUTES OF OCT. 2005]. To put the timing in perspective, the proposed style amendments were still in the comment period when the Advisory Committee returned to Rule 56 to follow up on the issues flagged during the restyling of Rule 56. The Advisory Committee published the restyled Civil Rules for comment in February 2005, but due to the magnitude of the project allowed a ten-month period for comment through December 15, 2005. See Introduction to Preliminary Draft of Restyled Civil Rules, *supra* note 20, at viii.

75. See CIVIL ADVISORY MINUTES OF OCT. 2005, *supra* note 74, at 27.

76. See *id.* at 28.

Committee should explore ways to reconnect the text of Rule 56 with summary-judgment practice and to make summary-judgment practice more predictable and more uniform.

In contrast, there was little support for undertaking any effort to change—or even restate—the *standard* for summary judgment.<sup>77</sup> I think this reflected, at least in part, a prevailing sense among the committee members that the existing summary-judgment standard gets it more or less right. It also reflected the Advisory Committee's awareness of what happened the last time it undertook a comprehensive Rule 56 project. After the Supreme Court's 1986 trilogy of summary judgment cases,<sup>78</sup> the Advisory Committee undertook a project to comprehensively revise Rule 56. Among other things, the revisions would have restated the summary-judgment standard as it "ha[d] been developed through case law."<sup>79</sup> The Judicial Conference ended up rejecting the proposed changes in 1992.<sup>80</sup> Legend has it that the proposal came under attack both from those who liked the trilogy and those who did not.<sup>81</sup> Those who liked the trilogy saw no need to make any changes. Those who disliked the trilogy resisted any effort to enshrine its meaning. That failed effort illustrated how difficult it would be to re-articulate the summary-judgment standard in a way that would achieve anything like a consensus of approval.

The lessons learned from 1992 played no small part in the Advisory Committee's decision not to touch the articulation of the underlying summary-judgment standards in the Rule 56 Project. It seemed likely that any changes to the standard would draw fire from somewhere. Given that there did not appear to be any pressing need to change the existing phrasing of the standard, it seemed prudent to limit the scope of the project to the more mechanical proposals and not risk needlessly creating additional grounds for potential opposition.

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77. See CIVIL RULES REPORT AS SUPPLEMENTED JUNE 2008, *supra* note 8, at 23 (emphasizing "the firm purpose to revise Rule 56 only with respect to the procedures for presenting and deciding a summary-judgment motion").

78. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

79. See REPORT OF THE CIVIL RULES ADVISORY COMMITTEE TO THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, May 1, 1992, at 124, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-1992.pdf>.

80. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, MINUTES, Dec. 17-19, 1992, at 2, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST12-1992-min.pdf>.

81. See CIVIL ADVISORY MINUTES OF OCT. 2005, *supra* note 74, at 26.



A subcommittee was formed and District Judge Michael Baylson (E.D. Pa.) was tabbed to serve as Chair. After a year of study,<sup>82</sup> the subcommittee reported back to the full Advisory Committee in September 2006.<sup>83</sup> Consistent with the tentative views expressed in October 2005, the subcommittee submitted a preliminary draft of a proposed amended Rule 56, along with an accompanying memorandum that made three principal recommendations. First, the subcommittee proposed that Rule 56 should set forth nationally-uniform procedures for making and briefing summary-judgment motions.<sup>84</sup> These procedures would include a requirement that the moving party file a detailed statement of facts and that the responding party meet that statement head on. Second, the subcommittee proposed that Rule 56 should explicitly address various common practices like motions for partial summary judgment.<sup>85</sup> Third, the subcommittee's proposal left the operative summary-judgment standard untouched, instead leaving that topic to the ongoing evolution of summary-judgment practice under *Celotex* and related cases.<sup>86</sup> The Advisory Committee agreed with those recommendations and, after discussing the various details of the proposal, remitted it back to the subcommittee for further work.<sup>87</sup>

After two years of further study and deliberation at both the subcommittee level and before the full committee,<sup>88</sup> including two mini-conferences held in 2007 to elicit the views of practicing lawyers and

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82. The Advisory Committee received an interim report at its May 2006 meeting. The focus of the interim report was on how local rules were addressing the various practice issues under consideration. See ADVISORY COMMITTEE ON CIVIL RULES, AGENDA BOOK, May 22-23, 2006, at 396, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2006-05.pdf>. In that regard, the Advisory Committee benefited greatly from the research assistance of Administrative Office staff attorneys James Ishida and Jeffrey Barr. See *id.* at 397-408. See also ADVISORY COMMITTEE ON CIVIL RULES, MINUTES, Apr. 19-20, 2007, at 3, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV04-2007-min.pdf>.

83. See ADVISORY COMMITTEE ON THE CIVIL RULES, MINUTES, Sept. 7-8, 2006, at 24-30, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV09-2006-min.pdf> [hereinafter CIVIL ADVISORY MINUTES OF SEPT. 2006].

84. See Memorandum from the Rule 56 Subcommittee to the Hon. Lee H. Rosenthal, Chair, Advisory Committee on Civil Rules, Aug. 21, 2006, at 1, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2006-09.pdf> (Sept. 2006 Agenda Book at 303).

85. *Id.* at 2.

86. *Id.* at 1.

87. CIVIL ADVISORY MINUTES OF SEPT. 2006, *supra* note 83, at 24-30.

88. The Advisory Committee discussed the ongoing work on the Rule 56 project at its April 2007 meeting, at its November 2007 meeting, and again at its April 2008 meeting. Detailed information on those discussions can be found in the official Minutes of those meetings, which are available on-line at the Federal Rulemaking website hosted by the Administrative Office of the U.S. Courts. See <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Minutes.aspx>.

academics,<sup>89</sup> the Advisory Committee presented a Rule 56 proposal to the Standing Committee seeking permission to publish it for public comment.<sup>90</sup> Permission was granted and the Rule 56 proposal was published in August 2008.<sup>91</sup>

### B. *The Push for “Must”*

In the published materials, the Advisory Committee specifically invited comments on several aspects of the proposal.<sup>92</sup> One of those topics was whether Rule 56 should continue to use the term “should.”<sup>93</sup> There were several reasons for doing so. First, whereas the initial switch from “shall” to “should” elicited very little comment just two years earlier,<sup>94</sup> things were different this time around. People were definitely taking notice of the issue and were arguing that the style translation had been a mistake.<sup>95</sup> Second, those same questions were being raised inside the rulemaking process.<sup>96</sup> Finally, when the proposal was presented to the Standing Committee to receive permission to publish, several members of the Standing Committee presented their own beliefs that summary judgment was and should remain a mandatory procedure.<sup>97</sup> After a lengthy discussion, permission to publish was granted on the

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89. See RULE 56 MINICONFERENCE NOTES, Nov. 7, 2007, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2006-09.pdf> (Apr. 2008 Agenda Book at 60); NOTES: RULE 56 MINICONFERENCE, Jan. 28, 2007, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2006-09.pdf> (Apr. 2007 Agenda Book at 413).

90. See CIVIL RULES REPORT AS SUPPLEMENTED JUNE 2008, *supra* note 8.

91. See *supra* note 8; Memorandum to Bench, Bar, and Public, Aug. 8, 2008, [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2008-08-Memo\\_to\\_Bench\\_Bar\\_8\\_8\\_08.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2008-08-Memo_to_Bench_Bar_8_8_08.pdf).

92. For example, the Advisory Committee specifically invited comment on the so-called point-counterpoint briefing procedure included in the published proposal. See CIVIL RULES REPORT AS SUPPLEMENTED, *supra* note 8, at 25.

93. See *id.* at 23-25. The summary brochure version contained a similar specific invitation for comment on the use of “should” in Rule 56. See ADMIN. OFFICE OF THE U.S. COURTS, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF PRACTICE AND PROCEDURE, A SUMMARY FOR BENCH AND BAR (Aug. 2008), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/Brochure.pdf>.

94. See *supra* notes 54-58 and accompanying text.

95. See Mark R. Kravitz, *To Revise, or Not to Revise: That Is the Question*, 87 DENV. U. L. REV. 213, 221 (2010) (“When ‘should’ was carried forward in the proposed Rule 56 revisions, defense counsel awoke and protested vigorously, arguing that the Committee should change ‘should’ to ‘must.’”).

96. As the invitation for comment explained, “[s]ome who have participated in developing the present proposal have argued that ‘should’ is the wrong word, and should be replaced by ‘must.’” See CIVIL RULES REPORT AS SUPPLEMENTED, *supra* note 8, at 23.

97. See STANDING COMMITTEE MINUTES OF JUNE 2008, *supra* note 10, at 24-29.

condition that the proposed amendment be published in a form that highlighted “should” and “must” as alternatives.<sup>98</sup> The invitation to comment fulfilled that condition.

The invitation for comment on the must-should issue was heard and accepted. Published proposals often elicit few comments. The Advisory Committee frequently cancels scheduled hearings due to a lack of requests to testify. But other published proposals elicit comments in droves and result in well-attended hearings. The Rule 56 proposal fell squarely in the latter camp.<sup>99</sup> By my count, the Advisory Committee received 48 written comments that specifically addressed the must-should issue.<sup>100</sup> At hearings held in Washington, San Antonio, and San Francisco, 25 witnesses (by my count) dedicated all or part of their testimony to addressing the must-should issue.<sup>101</sup>

There appears to have been an organized effort by the defense bar to press for replacing “should” with “must.”<sup>102</sup> I suspect that the proponents of “must” were marshaling the troops in an effort to capitalize on what must have seemed like a once-in-a-generation opportunity to enshrine their preference for a mandatory approach to summary judgment into the rule text.

The comments and testimony offered in support of “must” covered a wide range of grounds. Many simply argued that the style translation of “shall” to “should” was an error that needed to be corrected.<sup>103</sup> One

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98. *Id.* at 29.

99. Had the Rule 56 proposal been by itself, I am certain it still would have provoked a similar level of interest. It should be noted, though, that the Advisory Committee was simultaneously seeking comment on a proposal to amend the expert discovery provisions of Rule 26. See CIVIL RULES REPORT AS SUPPLEMENTED JUNE 2008, *supra* note 8. The Rule 26 proposed amendments no doubt contributed to the public’s interest in examining and commenting on the full package of proposed amendments.

100. The full set of comments is available at the following link: <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Comments/Proposed0808Comments/2008CVCommentsChart.aspx>.

101. Transcripts of the hearings are available at the following link: <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Comments/Proposed0808Comments.aspx>.

102. See Cary E. Hiltgen, *DRI’s Voice Is Being Heard*, FOR THE DEFENSE, June 2010, at 1 (describing organized participation at hearings to argue against “should”).

103. See, e.g., *Hearing Before the Advisory Committee on Civil Rules*, Nov. 17, 2008, at 139 (statement of Bruce R. Parker); *Hearing Before the Advisory Committee on Civil Rules*, Jan. 14, 2009, at 107-09 (statement of G. Edward Pickle); *Hearing Before the Advisory Committee on Civil Rules*, Feb. 2, 2009, at 204 (statement of Mr. Lucey); *id.* at 235-37 (statement of Jeffrey Greenbaum); Comment Submitted by Claudia D. McCarron, 08-CV-44; Comment Submitted by Latha Raghavan, 08-CV-051; Comment Submitted by Lawyers for Civil Justice and the U.S. Chamber Institute for Legal Reform, 08-CV-61; Comment Submitted by G. Edward Pickle, 08-CV-110; Comment Submitted by Keith B. O’Connell, 08-CV-116. Transcripts of the hearings and the

of the more persistent themes was that summary judgment was inherently nondiscretionary because the text of Rule 56 requires a successful moving party to show that it is “entitled to judgment as a matter of law.”<sup>104</sup> Other arguments were less technical. Some argued that unequivocally mandatory language was needed to combat what those persons characterized as a persistent reluctance of federal judges to grant the relief afforded under Rule 56.<sup>105</sup> A few appealed to the Advisory Committee’s commitment to promoting the rule of law, worrying about the loss of respect for the judicial system if federal courts were to signal that they do not feel obligated to respect legal entitlements.<sup>106</sup>

The “pro-must” comments were then met by voices from (generally) the plaintiff’s bar who urged the retention of discretion. In the aggregate, they read, ironically enough, like a point-counterpoint-style response to the arguments being urged for “must.” These comments often supported the style translation to “should” as accurately capturing the sense of the pre-2007 case law.<sup>107</sup> Some urged that

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submitted comments may be found at <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Comments/Proposed0808Comments.aspx>.

104. See, e.g., *Hearing Before the Advisory Committee on Civil Rules*, Nov. 17, 2008, at 52-53 (statement of Ed Brunet); *id.* at 93 (statement of Tom Gottschalk); *id.* at 155 (statement of Alfred Cortese); *Hearing Before the Advisory Committee on Civil Rules*, Feb. 2, 2009, at 69 (statement of Michael Nelson); *id.* at 94 (statement of Mr. Glaesner); Comment Submitted by American College of Trial Lawyers, Federal Civil Rules Committee, 08-CV-60; Comment Submitted by Michael R. Nelson, 08-CV-127; Comment Submitted by Marc E. Williams, 08-CV-135; Comment Submitted by the U.S. Dept. of Justice, 08-CV-180; Comment Submitted by Lawyers for Civil Justice and U.S. Chamber Institute for Legal Reform, 08-CV-181. Transcripts of the hearings and the submitted comments may be found at <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Comments/Proposed0808Comments.aspx>.

105. See, e.g., *Hearing Before the Advisory Committee on Civil Rules*, Nov. 17, 2008, at 109 (statement of Theodore Van Itallie); *Hearing Before the Advisory Committee on Civil Rules*, Jan. 14, 2009, at 35 (statement of Michele Smith); *id.* at 141 (statement of Stephen Pate); *Hearing Before the Advisory Committee on Civil Rules*, Feb. 2, 2009, at 81-82 (statement of Kevin J. Dunne); Comment Submitted by Robert B. Anderson, 08-CV-011; Comment Submitted by Lawyers for Civil Justice, 08-CV-061; Comment Submitted by Wayne B. Mason, 08-CV-124. Transcripts of the hearings and the submitted comments may be found at <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Comments/Proposed0808Comments.aspx>.

106. See, e.g., *Hearing Before the Advisory Committee on Civil Rules*, Nov. 17, 2008, at 10 (statement of Claudia McCarron); *id.* at 92-93 (statement of Thomas Gottschalk); *Hearing Before the Advisory Committee on Civil Rules*, Jan. 14, 2009, at 132-33 (statement of Keith B. O’Connell); *Hearing Before the Advisory Committee on Civil Rules*, Feb. 2, 2009 (statement of Mr. Downs); Comment Submitted by Lawyers for Civil Justice and U.S. Chamber Institute for Legal Reform, 08-CV-181. Transcripts of the hearings and the submitted comments may be found at <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Comments/Proposed0808Comments.aspx>.

107. See, e.g., Comment Submitted by Gregory K. Arenson, 08-CV-131; Comment Submitted by the Federal Magistrate Judges Association, 08-CV-161. Both Comments may be found at

discretion was essential as a means of dealing with cases where there was reason to think that the trial evidence might differ materially from the pretrial record, or where some other reason existed to believe that the sufficiency of the evidence would be better tested with live evidence at trial than on a paper record.<sup>108</sup> Some noted the possibility that, in certain cases, it might be easier to proceed to trial if only as a means of facilitating appeal.<sup>109</sup> Some argued that “should” was appropriate as a means of tempering the behavior of judges who, according to this view, were too quick and too eager to grant summary judgment.<sup>110</sup> Finally, some argued that the overuse and abuse of summary judgment was itself threatening respect for the courts and the rule of law.<sup>111</sup>

### C. “*Shall Be Granted*” Returns as a “*Sacred Phrase*”

The Advisory Committee met immediately after the final hearing on the proposed changes to Rule 56 in San Francisco. Concluding that there was no consensus on either the need for or the merit of a nationally-uniform point-counterpoint process, the Advisory Committee dropped that part of the proposal.<sup>112</sup> That left the issue of must-should,

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<http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Comments/Proposed0808Comments/2008CVCommentsChart.aspx>.

108. See, e.g., Comment Submitted by Joseph D. Garrison, 08-CV-016; Comment Submitted by the Honorable David F. Hamilton, 08-CV-142; Comment Submitted by Professor Suja A. Thomas, 08-CV-158; Comment Submitted by Professor Eric Schnapper, 08-CV-183. All Comments may be found at <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Comments/Proposed0808Comments/2008CVCommentsChart.aspx>. See generally REPORT OF THE CIVIL RULES ADVISORY COMMITTEE TO THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, May 8, 2009, at 21, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2009.pdf> [hereinafter CIVIL RULES REPORT OF MAY 2009].

109. See, e.g., Comment Submitted by Alan B. Morrison, 08-CV-39, <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Comments/Proposed0808Comments/2008CVCommentsChart.aspx>.

110. See, e.g., *Hearing Before the Advisory Committee on Civil Rules*, Jan. 14, 2009 (statement of Tom Crane). A related comment made by many plaintiff-oriented writers and witnesses was that judges were abusing summary judgment by overreaching in their determinations that the plaintiff lacked proof sufficient to sustain a favorable jury finding on an essential element of the claim. See, e.g., *Hearing Before the Advisory Committee on Civil Rules*, Nov. 17, 2008, at 23 (statement of Richard Seymour); *id.* at 67 (statement of Professor Elizabeth Schneider). These comments, however, typically came in the context of objecting to the point-counterpoint mechanism rather than the choice between “must” and “should.” Transcripts of the hearings and the submitted comments may be found at <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Comments/Proposed0808Comments.aspx>.

111. See, e.g., Comment Submitted by Richard L. Seymour, 08-CV-66, <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Comments/Proposed0808Comments/2008CVCommentsChart.aspx>.

112. See ADVISORY COMMITTEE ON THE CIVIL RULES, MINUTES, Feb. 2-3, 2009, at 2-3, [hereinafter CIVIL ADVISORY MINUTES OF FEB. 2009]. The decision to abandon the point-

and neither option had yet gained any consensus among the committee members.<sup>113</sup> A third option broke the logjam.

Recall that “shall” had been restyled to “should” because the overarching style conventions held that shall was an ambiguous word to be excised from the rules.<sup>114</sup> As a function of translation, “should” appeared then to be a proper substitute. The problem, as future events made clear, was that “shall” turned out to be more than just a word in Rule 56. As embedded in the larger phrase “shall be rendered,” it had acquired a history of usage and meaning over the course of 71 years of practice and case law.

That conclusion triggered a countervailing style convention—the principle that the restyled rules should retain words and phrases that had, through usage and case law, taken on a special meaning that could not safely be translated into properly-styled new text.<sup>115</sup> In other words, when the restyling project encountered so-called “sacred phrases,” it carried them forward undisturbed even if they did not perfectly conform to the general style conventions.<sup>116</sup>

The sacred phrase principle had been applied to Rule 56 before. When Rule 56 was restyled, the Advisory Committee did not attempt to restate the summary-judgment standard. Most notably, restyled Rule 56(c) preserved the phrase “there is no genuine issue as to any material fact” on the basis that it was a sacred phrase.<sup>117</sup>

At the February meeting in San Francisco, the Advisory Committee invoked the “sacred phrase” principle as grounds for reinstating “shall” instead of choosing between “must” or “should” or adopting some other phrasing (e.g., “must unless . . .”).<sup>118</sup> In effect, the Advisory Committee recognized, in retrospect, that the phrase “*shall* be rendered”

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counterpoint mechanism was reaffirmed at the Advisory Committee’s April 2009 meeting. See ADVISORY COMMITTEE ON THE CIVIL RULES, MINUTES, Apr. 20-21, 2009, at 7, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV04-2009-min.pdf> [hereinafter CIVIL ADVISORY MINUTES OF APR. 2009].

113. The Advisory Committee also invited comment on suggestions that would have avoided the must-should issue by rephrasing the operative standard in a way that did not require the choice of a modal verb. See CIVIL RULES REPORT AS SUPPLEMENTED JUNE 2009, *supra* note 8, at 24-25. The Advisory Committee ultimately opted not to take that approach. It was not clear that any substitute phrasing would perfectly convey the existing summary judgment standard, and even if one were found it risked skewing the standard when construed and applied by later generations of practitioners and judges. See *id.*; CIVIL ADVISORY MINUTES OF FEB. 2009, *supra* note 112, at 4.

114. See *supra* notes 24-46 and accompanying text.

115. See Kimble Memorandum, *supra* note 21, at xix-xx.

116. See *id.*; Cooper, *supra* note 17, at 1771-72.

117. See Kimble Memorandum, *supra* note 21, at xx.

118. See CIVIL ADVISORY MINUTES OF FEB. 2009, *supra* note 112, at 3-6.

was a sacred phrase that never should have been altered. When the Advisory Committee met again in April 2009 in Chicago, it reconfirmed by unanimous vote the recommendation to restore “shall.”<sup>119</sup>

Now it was time to convince the Standing Committee to make an exception to the ban on “shall.” In its Report to the Standing Committee, the Advisory Committee couched the decision to revert to “shall” as correcting an error committed during the Style Project.

Restoring ‘shall’ is consistent with two strategies often followed during the Style Project. The objection to ‘shall’ is that it is inherently ambiguous. But time and again ambiguous expressions were deliberately carried forward in the Style Project precisely because substitution of a clear statement threatened to work a change in substantive meaning. And time and again the Style Project accepted ‘sacred phrases,’ no matter how antique they might seem. The flood of comments, and the case law they invoke, demonstrates that ‘shall’ had become too sacred to be sacrificed.<sup>120</sup>

Of course, the substantive Rule 56 project was not inherently limited to style and therefore could have included any sort of content change, even one that would alter a so-called sacred phrase. But, as discussed above, the Advisory Committee had decided early on not to make any changes in the Rule 56 project that would alter the standard for summary judgment.<sup>121</sup> The Advisory Committee determined that, even if the question of discretion was not itself a part of the standard, it was so closely bound up with it as to require preservation of the status quo.<sup>122</sup> Viewed that way, the foundational principles of both the Style Project and the Rule 56 project converged and compelled the selection of language that would ensure that the level of discretion available to judges had not been altered by either. Restoring “shall” presented the clearest path to accomplish that goal.<sup>123</sup>

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119. See CIVIL ADVISORY MINUTES OF APR. 2009, *supra* note 112, at 3.

120. CIVIL RULES REPORT OF MAY 2009, *supra* note 108, at 21.

121. See *supra* notes 77-87 and accompanying text.

122. See CIVIL RULES REPORT OF MAY 2009, *supra* note 108, at 20.

123. Professor Kimble has called the reintroduction of “shall” into Rule 56 “an incredible postscript.” Kimble, *supra* note 31, at 84. Kimble criticizes the choice to reintroduce a term that is now generally accepted as being inherently ambiguous. *Id.* at 85. Implicit in Kimble’s criticism is his belief that the Advisory Committee should have worked harder to find an alternate for “shall.” The problem, though, was that the case law could be read to give conflicting accounts of what “shall be rendered” meant in Rule 56. Here is where the Advisory Committee’s choice to not touch the substantive Rule 56 standard intersects. If one views the issue of discretion as being a part of the standard, and the case law under “shall” gives conflicting accounts of whether the judge has discretion, then the only way to preserve the standard is to carry forward the existing text, including “shall.” Any attempt to translate “shall” would have risked altering the standard.

The die is now cast for the return of “shall.” The Standing Committee approved the Rule 56 proposal with the reversion to “shall,” as did the Judicial Conference.<sup>124</sup> On April 28, the Supreme Court transmitted the proposed Rule 56 amendments to Congress.<sup>125</sup> By Supreme Court order, the proposed amendments have been adopted and will take effect on December 1, 2010 absent contrary action by Congress.<sup>126</sup> Thus, unless Congress derails the proposed amendments, Rule 56 will, on that date, once again provide that summary judgment “*shall* be rendered” if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.

#### IV. DISCRETION IN THE SECOND “SHALL” AGE

So if all goes as expected, “shall” will be restored to Rule 56 on December 1, 2010. What, exactly, will that mean? The answer is both simple and complex.

The simple answer is that things will stand exactly as they did on November 30, 2007, the day before the restyled version of Rule 56 took effect. The clear and clearly-stated purpose of restoring “shall” was to be sure that things were put back to where they were on the day before the style amendments took effect. When the Advisory Committee restyled Rule 56, it believed that the word “should”—in conjunction with the Committee Note explaining that the discretion to deny should be seldom exercised—accurately captured the way that “shall” had been interpreted and applied by the Supreme Court and the lower courts.<sup>127</sup> The change was intended to be stylistic only. It was meant only to communicate what the Advisory Committee believed to be the status quo.

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That conclusion, of course, is contingent on the premise that the choice between “must,” “shall,” “should,” or some other modal verb is intertwined with the standard for summary judgment. I challenge that premise in the forthcoming article addressing the larger picture of discretion to deny summary judgment. See *supra* note 16.

124. See Transmittal Letter of Proposed Amendments to the Supreme Court, <http://www.uscourts.gov/rules/Supreme%20Court%202009/Duff-Main-Transmittal-Memo.pdf>; Summary of the Report of the Judicial Conference on Rules of Practice and Procedure, [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/Combined\\_ST\\_Report\\_Sept\\_2009.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/Combined_ST_Report_Sept_2009.pdf).

125. See Letters Submitting Proposed Amendments to the Speaker of the House of Representatives and to the President of the Senate, <http://www.supremecourt.gov/orders/courtorders/frcv10.pdf>.

126. See 28 U.S.C. § 2074(a) (2006).

127. See *supra* notes 47-53 and accompanying text.



The restoration of “shall” is, in effect, the Advisory Committee’s second attempt at achieving the status quo. During the Rule 56 project, the Advisory Committee started to hear concerns that “should” was a mistranslation of “shall.” As discussed earlier, many contended that “should” was a blatant mistranslation on the basis that “shall” had never conferred any discretion at all.<sup>128</sup> A more moderate criticism of “should” was that, even if courts had some measure of discretion under “shall,” the term “should” overstated whatever discretion did exist. In that vein, the Advisory Committee was told that some lawyers and academic commentators already were taking the position that the introduction of “should” to Rule 56 increased the level of discretion available, that some lawyers were changing their bargaining positions on that basis, and that it would be just a matter of time before courts started to accept the argument.<sup>129</sup> A longer-term concern was that, even if judges today properly gauged the amount of discretion available, over time “should” would become corrupted as future generations of lawyers and courts read into it more discretion than ever existed under “shall.”<sup>130</sup>

In the end, the question boiled down to this: given that the Advisory Committee had all along been trying to find the best way to express the state of the law as it existed under the pre-style version of Rule 56, what words would best capture the meaning of “*shall* be rendered”? The Advisory Committee determined that the only sure-fire way to capture that meaning was with those exact words. Hence, “*shall* be rendered” was restored. As the Committee Note to the 2010 version of the rule explains, “[e]liminating ‘shall’ created an unacceptable risk of changing the summary-judgment standard. Restoring ‘shall’ avoids the unintended consequences of any other word.”<sup>131</sup>

At risk of appearing to state the obvious, I think it is important to emphasize that the restoration of “shall” *does no more* than return us to whatever level of discretion existed prior to the restyling of Rule 56. By

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128. See *supra* notes 103-04 and accompanying text.

129. See, e.g., *Hearing Before the Advisory Committee on Civil Rules*, Nov. 17, 2008, at 54 (statement of Ed Brunet); *Hearing Before the Advisory Committee on Civil Rules*, Nov. 17, 2008, at 12 (statement of Ms. McCarron) (stating that a popular reference book on the Civil Rules had taken the position that “should” gave trial judges additional discretion); Comment Submitted by Lawyers for Civil Justice and the U.S. Chamber Institute for Legal Reform, 08-CV-61. Transcripts of the hearings and the submitted comments may be found at <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Comments/Proposed0808Comments.aspx>.

130. See, e.g., Comment Submitted by Lawyers for Civil Justice and the U.S. Chamber Institute for Legal Reform, 08-CV-61, <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Comments/Proposed0808Comments.aspx>.

131. FED. R. CIV. P. 56 advisory committee’s notes to the proposed 2010 rules.

that I mean to stress that the upcoming switch from “should” back to “shall” is not meant to *decrease* the level of discretion available under Rule 56.

Recall that there was an intense effort to get the Advisory Committee to replace “should” with “must.”<sup>132</sup> While that effort failed, it did lead to a partial victory of sorts with the restoration of “shall.” I expect that the proponents of “must” will now seek to convert it to a full victory by asking the courts to interpret “shall” as “must” in the case law. That argument can take two forms, one legitimate and the other not.

It will be legitimate for the proponents of a mandatory view of summary judgment to argue that Rule 56 never conferred discretion. As I develop in the follow-up to this article, I disagree with that view.<sup>133</sup> But the question is not wholly without debate,<sup>134</sup> and the argument is at least consistent with the purpose of restoring the status quo by restoring “shall.” That is to say, if courts conclude that “shall” always meant “must”—and that “shall” never included any measure of discretion—then a return to the pre-style status quo would properly yield a mandatory, nondiscretionary approach.

What will be illegitimate is if the proponents of a mandatory view of summary judgment argue that the switch from “should” to “shall” itself stripped courts of discretion. The history of the style project and the Committee Notes to the 2007 and 2010 amendments make it abundantly clear that the reason for restoring “shall” was to ensure that the level of discretion available under Rule 56 is restored to whatever it was before December 1, 2007.<sup>135</sup> Just as the switch from “shall” to “should” did not increase that level of discretion, the switch back to “shall” does not decrease it.

This point is an important one, and by making it now I hope to preempt lawyers from arguing that the upcoming 2010 switch from “should” to “shall” has any effect on whether courts have discretion under Rule 56. While I cannot stop lawyers from making that argument, I can say this. Given the history and the explanations provided in the 2007 and 2010 Committee Notes setting forth the reasons for restoring “shall,” any lawyer who argues that the upcoming 2010 switch from

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132. See *supra* notes 102-06 and accompanying text.

133. See *supra* note 16.

134. See generally Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA L. REV. 91 (2002).

135. See *supra* notes 112-23 and accompanying text.

“should” to “shall” took away discretion does so at his or her peril of Rule 11 sanctions.

Now we come to the complex part of the answer. Re-linking the question of discretion to deny to pre-style standards would provide a clear answer if the pre-style standards themselves were clear and unequivocal. They are not. That fact, of course, was the reason why the Advisory Committee ultimately decided that it could not safely translate “shall” without incurring an unacceptable risk of changing the substantive standards.<sup>136</sup> Thus, the complex answer is that we will not know whether the “shall” version of Rule 56 confers any discretion to deny, or how much, or in what circumstances, until the courts provide some more definitive answers. In particular, we must await a clear ruling from the Supreme Court in which it explains or reconciles what appear to be conflicting dicta about whether Rule 56 creates a procedural entitlement to judgment without trial.<sup>137</sup>

## V. CONCLUSION

When the Advisory Committee restyled Rule 56 in 2007, its goal was “clarity without change.”<sup>138</sup> The Advisory Committee thought that translating “*shall* be granted” to “*should* be granted” accomplished that goal. Later events and further analysis persuaded the Advisory Committee that the switch from “shall” to “should” presented a real risk of substantive change, even taking into account language in the Committee Note to the 2007 amendment emphasizing that no substantive change was intended.<sup>139</sup> Receiving a special dispensation to use the otherwise off-limits term “shall,” the Advisory Committee determined that the best course—the only safe course—was to restore “shall” to eliminate the risk that courts now or in the future would conclude that the switch from “shall” to “should” signaled substantive change.

Was the risk of change as real or substantial as some said? I think the jury was still out—so to speak—on that point. What may have been more relevant is the special role that summary judgment plays in the federal civil pretrial scheme. Rule 56 is one of the cornerstones of federal civil pretrial practice.<sup>140</sup> As originally designed, summary

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136. See *supra* notes 112-31 and accompanying text.

137. See *supra* notes 47-50 and accompanying text.

138. See Cooper, *supra* note 17.

139. See FED. R. CIV. P. 56 advisory committee’s note (2007).

140. BRUNET & REDISH, *supra* note 14, § 1:1; GENSLER, *supra* note 63, at 884.

judgment was intended to serve as a check on liberal pleading.<sup>141</sup> And as the Supreme Court famously stated, “[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’”<sup>142</sup> In other words, even the smallest risk of unintended change may have been too much for a rule that is so central to the civil pretrial process.

And so we return to “shall.” In doing so, all of the arguments about whether the 2007 style change to “should” altered the question of whether trial courts have discretion to deny properly-supported summary-judgment motions will become moot. The pre-style meaning of Rule 56 is preserved, and, going forward, the question of whether courts have any discretion to deny summary judgment becomes unquestionably linked with pre-style meaning and practice.

If the three-year “should” era has any lasting legacy, it will be that it put the question of discretion to deny under the brightest of spotlights, placing center-stage a question that largely had stood unnoticed off to the side. Will the question remain in the spotlight? Will the proponents of “must” continue the battle in the courts, arguing that “shall” always meant “must”? Will the Supreme Court weigh in? Or will the restoration of “shall” shuffle the question of discretion to deny into the background once again? We *shall* see.

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141. See 10A WRIGHT ET AL., *supra* note 48, § 2712; Charles E. Clark, *The Summary Judgment*, 36 MINN. L. REV. 567, 578 (1952) (“The very freedom permitted by the simplified pleadings of the modern practice is subject to abuse unless it is checked by the devices looking to the summary disclosure of the merits if the case is to continue to trial. Those are discovery, summary judgment, and pre-trial – all necessary correlatives of each other and of a system which may permit the concealment of the weakness of a case in the generalized pleadings of the present day.”). See also *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 512 (2002) (“This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.”).

142. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).