HEADNOTES

RULEMAKING

An Instinct for the Capillary

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It used to be that every year, when my new West rules pamphlet arrived, I'd take the old one home for reference. I stopped doing that several years ago, though. Not because of the Internet, but because the civil rules started changing so fast that last year's pamphlet was no longer reliable.

For practicing lawyers (not to mention trial judges), relentless rulemaking is relentlessly inconvenient. Amendments to the Federal Rules of Civil Procedure introduce transaction costs—motions, letters, doubled research when subparts are renumbered—so they ought to be important. Sometimes they are. When the rules were amended in 2010 to re-confer work-product protection on draft expert reports, when the "reasonably accessible" standard was introduced for electronic discovery in 2006, when interlocutory appeals of class certification were inaugurated in 1998, and when mandatory Rule 11 sanctions were switched to permissive in 1993, each was a striking improvement.

That totals about four major amendments in the last 20 years. I'm sure there are a few more I'm not thinking of right now. And tinkering can certainly be for the better. But amendments are now turned out with such distressing regularity that keeping up is like trying to board a moving bus. The Civil Rules Committee is considering accumulating amendments and introducing them only every few years, to create some stability. That addresses the symptom but not the cause, which is that there are too many amendments.

The indispensable quality of a trial lawyer is an instinct for the jugular. The rulemaking process too often displays an instinct for the capillary. I won't get started on the whole notion of "restyling." Rewriting every rule to say the same thing but with better syntax is sort of a Lady Bird Johnson approach to rulemaking—the highway sits in exactly the same place but has been beautified. Is there someone who reads the rules for their syntax? Too much attention is devoted to minute refinements. On major issues, the rulemakers commendably think about the problems but frequently do not act. Spoliation litigation is a prime example. It is the sport of the century. It's an extreme sport with often fatal consequences.

Two years ago, following the Duke Conference in May 2010, the Civil Rules Committee began considering a spoliation rule. For two years, it has been considering approaches to the problem. It hasn't gotten beyond approaches, mired in a thicket of perceived drafting problems. Meanwhile, clients and lawyers daily confront pressing real-world problems with huge consequences: Precisely when is the duty to preserve triggered? Once triggered, just what must be preserved? By whom? For how long? It is a fine thing to eschew the "shoot first, aim later" strategy, but if you do nothing but aim, you get nowhere. It really is time to decide on an approach to spoliation and move forward.

For some reason, Supreme Court decisions are off limits. Why, I don't understand. Rulemakers can never reverse the Supreme Court—they can only give the Court the opportunity to reverse itself. A classic example: *Twombly* and *Iqbal* reversed a 50-year-old interpretation of Rule 12(b)(6). Maybe they're right, maybe they're not—but it's hard to reconcile them with the text of a rule that was consistently read for 50 years to say exactly the opposite. *Twombly* and *Iqbal* have been studied for five years. Is that long enough to study their effects and tentatively conclude they haven't done any harm without addressing the fundamental questions: Do they articulate the right standard? Should that standard apply to all cases? Should the words of the rule reflect its judicial construction?

It is a legitimate concern of rulemakers that, if the Court rejects an

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amendment, the whole process may have been nugatory. Rejection, however, is extraordinarily rare for several reasons: In rules cases that come before it, the Court's role is one of construction, not policy articulation; the Court looks to rulemakers to weigh the real-world consequences of rules in practice; and a rule codifying a decision may make important, nuanced advances. Thus, it was disappointing that, when Rule 56 was amended in 2010, it did not address the *Celotex / Liberty Lobby / Matsushita* trilogy. The existence of a Supreme Court decision shouldn't be the end of the discussion. It may be the beginning.

The process has a tendency to become too insular. Here are a few examples:

- The organized bar—the Section of Litigation's leadership and the American College of Trial Lawyers—notified the Civil Rules Committee that there was a real-world problem with Rule 45: It doesn't obligate parties who receive documents pursuant to subpoena to let their adversaries know. Lawyers had alerted the rulemakers to this problem at least as early as 2008. This spring, the committee finalized amendments to Rule 45 but did not amend the rule to address this problem, focusing on issues it considered more important.
- When the committee circulated what is now Rule 37(e) (a sanctions-related provision) for public comment in 2005, the draft was rightly pummeled because it didn't work. The committee responded by drafting a new and entirely different provision that it never sent out for comment and that raised significant questions.
- When Rule 23(e)(1)(A) was circulated for comment in 2001, it preserved the requirement that a putative (uncertified) class action could be settled or dismissed only with court approval. That was uncontroversial. But the version it sent to the Supreme Court, without further opportunity for public comment, eliminated that requirement. Given *American Pipe* (statute of limitations tolling) and other issues, that was a very substantial change.

You don't encourage public comment by demonstrating disinterest in it.

There is no better lawmaking than the rulemaking process. It is thoughtful, deliberative, open, and careful. Extremely smart people work extremely hard and produce extremely nuanced, first-rate work. But the process has a tendency to fall subject to the paralysis of timidity and the self-indulgence of insularity. Tinkering is safe, but it doesn't solve serious problems. ■