Interpreting the Federal Rules of Civil Procedure

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David Marcus, *When Rules are Rules: The Federal Rules of Civil Procedure and Institutions in Legal Interpretation*, __ **Utah L. Rev.** __ (forthcoming), available on SSRN.

The debate over how best to interpret legal text is not limited to the Constitution and controversial statutes, although the expansive literature about interpretation in those contexts might lead one to think that is the case. There are plenty of other legal texts to argue about, and David Marcus's article, *When Rules are Rules: The Federal Rules of Civil Procedure and Institutions in Legal Interpretation*, focuses on none other than the Federal Rules of Civil Procedure. Shocking as it may seem (maybe because we are all kicking ourselves that we did not notice this first), there is not much written about how judges should interpret the Rules.[1] Moreover, recent Supreme Court decisions, namely *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*, demonstrate that reasonable people can disagree about how best to interpret even the most basic and simply-stated Rules. What's missing is a unified theory of how judges should interpret the Federal Rules, and Marcus's article is here to save the day.

Marcus puts forward a theory of rule interpretation that respects the unique nature of how the Federal Rules of Civil Procedure came to be and how they continue to evolve. The old adage of a parent loving each of her children equally—and appreciating their differences—applies here. The rules are one of many "textual" children, and they cannot be interpreted as an agency regulation or a constitutional provision might be.

Marcus begins by canvassing existing modes of statutory interpretation. He rejects a textualist approach because he argues that the rules themselves and their interpretive notes are succinct by design. Moreover, he notes that there are sources outside of the text that provide a significant window into their meaning. Marcus argues instead for what he calls an "institutional" approach—one that pays heed to the institutions that create and implement the Federal Rules and how the rulemaking process works. This approach must recognize the various aspects of these institutions, how the interaction of those institutions might pose interpretive challenges, and what values emerge from that interaction. The best method of interpretation must come out of an understanding of these institutions and their unique features and must ultimately serve their distinctive institutional values.

Applying these questions to the Civil Rules, Marcus argues first that judges must have discretion to interpret the rules, but that such discretion must be deferential to the rulemakers' intent and purpose. This might sound counterintuitive, he notes, but any student of the federal civil rulemaking process will recognize that this makes complete sense. The rulemaking process was designed to be responsive and flexible. That, in fact, was a foundational goal of its institutional design. Thus, judges should resist implementing changes to the rules in light of new circumstances and should instead wait for the rulemaking process to respond. The committee is made up of experts and the process itself is deliberative and open; as a result, the rules produced by virtue of that process have an air of legitimacy about them. To let judges interpret them ad hoc would create confusion, delegitimize the rules, and defeat the goal of uniformity that underpinned their adoption in the first place. For these reasons, Marcus explicitly rejects the dynamic method of statutory interpretation as ill-fitted.

Turning to what courts should do, Marcus argues that judges should feel free to consult a wide variety of sources, but that the weight given to those sources must account for the unique aspects of the rulemaking process. He groups the outside sources that could aid in interpreting the rules into three tiers: (1) the Advisory Committee Notes to the rules themselves; (2) Advisory Committee Reports; and (3) all other rulemaking documentation. With the final tier of materials, Marcus emphasizes the differences between this documentation and analogous ones in the congressional

setting. For example, while statements made by members of Congress after the fact are given little weight in interpreting legislation, similar comments by rulemakers deserve more attention. For example, the Reporter of the rulemaking committee is often an academic who has an interest in clarifying rule intent because of his or her own professional pedigree.

Finally, Marcus addresses the canons of construction that should be used in interpreting the rules. As for "substantive" canons, Marcus notes two that work particularly well in this context. First, the "rulemaker primacy" canon requires that judges interpret the rules so that significant changes come from the rulemaking process and not from the bench. Second, a "functional relationship" canon requires the court to respect the differences between each of the rules and the attendant differences in judicial function as to each. Marcus then discusses "semantic" canons and determines that some are a good fit for the rules, while others might not be.

Applying this ecumenical approach to the Civil Rules, Marcus argues that the Court's interpretation of Rule 8 in *Twombly* and *Iqbal* was indefensible. First, as to intent, the text of Rule 8—"short and plain statement of the claim"—is undeniably imprecise. But, Marcus points to the language rejected by the rulemaking committee that adopted Rule 8—"statements of facts constituting the cause of action." That language communicated a pleading standard that required "nonconclusory" facts for each element of a legal claim–precisely what *Twombly* and *Iqbal* now appear to require. But Marcus argues that because the committee specifically rejected this language and meaning, the Court should have considered that rejection in interpreting the actual language of Rule 8.

Marcus looks to evidence outside of Rule 8 itself to further support his argument that the purpose and intent was contrary to the Court's most recent interpretation. *Iqbal*'s requirement that courts reject conclusory allegations not supported by well-pled facts directly conflicts with the rulemakers' intent. According to "third tier" committee materials, committee members deliberately rejected language requiring distinctions between ultimate facts and conclusions of law. Marcus points to post-promulgation statements by Charles Clark, the committee reporter and the driving force behind Rule 8, that conflict with the decisions in *Twombly* and *Iqbal*. Namely, when Clark was a Second Circuit judge, he accepted pleading language similar to that used in *Twombly* for an almost identical antitrust claim, stating that he thought *Conley* was a well-decided case. Relying on his argument that dependable post-promulgation statements by certain influential rulemakers should be taken into consideration, Marcus argues that the Supreme Court in *Iqbal* should have consulted these statements, which Clark made after the pleading regime had been in place and scrutinized for two decades. It would have been easy for him to distance himself from what might have been the original intent, but he did not.

Further, Marcus argues that the committee materials do not contain any evidence of a desire for Rule 8 to serve as a means to "screen" out frivolous cases. In fact, the committee emphasized other rules that would serve that function. This again conflicts with the Court's interpretation *Twombly* and *Iqbal*, which both raises the specter of frivolous claims and the abuse of the discovery process. Finally, Marcus argues that the rulemaker-primacy and functional-relationship canons of construction should have required the Court in *Twombly* and *Iqbal* to defer to the committee process and refrain from interpreting the bounds of Rule 8 itself.

By staking out a defensible and pragmatic approach to rule interpretation in this article, Marcus creates a mechanism with which to measure the work of judges in interpreting the Federal Rules of Civil Procedure. As he states, we may not always agree about the best ultimate interpretation of particular rules, but we should be able to agree on a standardized approach to that interpretation. We are proceduralists after all, and thus know that process often, if not always, matters more than substance.

1. Marcus discusses and differentiates the two main articles in this area: Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. Pa. L. Rev. 1099 (2002) and Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 Hastings L. J. 103 (1993).

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