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THE 50TH ANNIVERSARY OF THE
FEDERAL RULES OF CIVIL PROCEDURE,
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I. INTRODUCTION

PREFACE

On October 7 and 8, 1988, the Northeastern University School of Law in Boston sponsored a national conference commemorating the fiftieth anniversary of the Federal Rules of Civil Procedure.¹ Two hundred lawyers, judges, law professors, and students gathered in Cambridge, Massachusetts, at the Hyatt Regency Hotel, to hear twenty of the country's leading proceduralists honor, assess, and question the now venerable Rules.

¹ At least five other conferences and symposia marked the fiftieth anniversary of the Rules. These were sponsored by the Civil Procedure Section of the Association of American Law Schools; the American Society of Legal History; Notre Dame Law School (63 NOTRE DAME L. REV. 597 (1988)); St. Johns University School of Law (62 ST. JOHNS L. REV. 399 (1988)); and the University of Pittsburgh School of Law (50 U. PITT. L. REV. 701 (1989)).

The longer, edited versions of the papers and commentary presented at the Northeastern Conference are printed here. As in the years preceding the Field Code of 1848 and the Federal Rules of Civil Procedure of 1938, we are in a transitional period of intense debate and uncertainty about the future contours of American civil procedure. The presenters and commentators did not pull their punches. Their concern and forthrightness inform and enliven these pages.

There are at least three ways to follow the major strands of the emerging procedural debate. First, the Table of Contents of this volume, which for the most part follows the chronological order of the conference, provides a road map. One starts with the toast to the Rules of Justice Benjamin Kaplan and the overviews of John Frank, Esq. and Judge Jack Weinstein, and moves to three papers probing the underlying assumptions of the Rules, particularly those that relate to simplicity, flexibility, uniformity, and judicial discretion. Those papers center on Rule 11, Rule 16, and local and state procedural rules. Paul Carrington's thought-provoking analysis of rulemaking completes what was the first day of the conference. The volume then explores "The Federal Rules in Practice." Those papers examine the Rules as a facilitator of new institutions and a vindicator of civil rights, and then look to what we know—and what we do not know—empirically about the Rules in operation. The volume ends with two new literary forms: a Keynote Address at the *end* of the conference by Geoffrey Hazard and a procedural parable by Martha Minow. Commentary follows each section.

A second way to read the volume is to consider a series of recurring questions. They include (although the reader will surely pose others):

- 1) What have been the effects of the drafters' underlying drafting techniques, such as flexibility, open-ended texture, simplicity, and broad grants of judicial discretion? Would more defined procedural rules be good or bad?
- 2) What kind of, and how much uniformity, have the Federal Rules provided, and how important is uniformity in judging their success?
- 3) Are we currently in a period in which judicial control and sanctions have replaced (or supplemented) an initial period under the Rules of attorney freedom, legal creativity, and the rapid expansion of rights? If so, has the adjustment reached an appropriate level, gone too far, or not far enough?
- 4) Are the Rules truly trans-substantive (procedural rules that apply across substantive lines), or have they, in operation, become

non-trans-substantive in material ways. Should some specific procedures be fashioned for specific types of cases?

- 5) What do we actually know about the impact of the Rules on judges, lawyers, clients, and the ultimate disposition of lawsuits? How can the information gaps be filled?
- 6) To what extent are the Federal Rules and procedural rulemaking political? Should they be?

One can read the volume in still a third way, looking for clusters of thought that define the writers' procedural outlooks. At least three main viewpoints emerge. Some proceduralists are generally content with the Rules, while acknowledging the need for incremental change. Others find the Rules basically sound (with the exception of Rule 11), but are concerned (even angry) that some judges use them in ways that thwart legitimate attempts to vindicate important rights. Still others argue that many of the problems seen by the other two groups are a result of flawed assumptions underlying the Rules, and that different assumptions and additional techniques should be considered.²

Thanks are due the presenters and commentators who contributed to the conference and to this remarkable collection. Others also played important roles and merit recognition and gratitude:

— The Northeastern University School of Law, and its Dean, Daniel J. Givelber, who chose to celebrate the twentieth anniversary of the School's reopening under the cooperative system of legal education by sponsoring the conference.³

— Seven Boston law firms which co-sponsored the conference: Bingham, Dana & Gould; Cargill, Masterman & Culbert; Goodwin, Procter & Hoar; Hale & Dorr; Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.; Palmer & Dodge; and Ropes & Gray.

— Thomas E. Cargill, Carol S. Ball, numerous other graduates of the Northeastern University School of Law, and the Alumni/ae Association, who encouraged and supported the conference at every stage.

— Joanne Lynch Cooney (Conference Coordinator), Susan Moge,

² These viewpoints, as they were presented at the Northeastern Conference, are summarized in more detail in Subrin, *Fireworks on the 50th Anniversary of the Federal Rules of Civil Procedure*, 73 JUDICATURE 4 (June-July 1989).

³ The cooperative plan, unique to Northeastern among the country's law schools, combines legal apprenticeship with academic studies. After a traditional first-year curriculum, each second and third-year student is required to alternate academic quarters with full-time legal employment (for which academic credit is awarded). As a result, each student graduates with a full year of legal experience in a combination of law firms, government agencies, corporate legal offices, unions, advocacy groups, legal services and public interest organizations, and as clerks to judges. Northeastern does not publish a law review, which led to the cooperative venture with the *University of Pennsylvania Law Review*, resulting in this volume.

Elaine Walsh, and many other members of the Northeastern University School of Law staff, who unselfishly gave hundreds of hours of gracious help.

— The staff of the *University of Pennsylvania Law Review*—and three successive Editors-in-Chief, Marci Hamilton, Bill Petersen, and Peter Flocos—who agreed to undertake, and masterfully completed this challenging project.

— Jane Pasanen, President of *The Chelsea Forum* (New York City), who placed the conference and the issues it raised in the national spotlight.

Perhaps this hard work will permit those who in 2038 celebrate the one-hundredth anniversary of the Federal Rules of Civil Procedure to uncover our footsteps, even if we were unsure where we were or where we were going.

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A TOAST TO THE
FEDERAL RULES (CIRCA 1938)

THE ADVISOR'S LAMENT

*We were plump when our nation was Ten —
But the "Now" is quite different from "Then";
For we'll scarcely survive
On a ration of five
Like our Rules, we'll be Simplified Men!*

— George Wharton Pepper*

A TOAST

*"Two carbons or one, in a court appeal?"
The outcome threatens the Country's weal,
A duplicate carbon — and all is well.
Aliter — all of us go to hell!
Debate proceeds — and our hearts beat fast:
Today may be the Republic's last . . .
The Founding Fathers turn in the grave:
Their seismic motion suffices to save!
The trembling balance tips to two:
The Ship of State glides safely through!
Two carbons it is: the crisis passes —
"Gentlemen all — pray charge your glasses.
"Drink to our Rules — they know of no flaw:
"Equal Justice Under the Law!"*

— George Wharton Pepper*

