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Some Very Personal Reflections on the Rules, Rulemaking, and Reporters

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SOME VERY PERSONAL REFLECTIONS ON THE RULES, RULEMAKING, AND REPORTERS

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My entry into the world of federal rulemaking was one of those unpredictable but welcome fortuities of life. In early 1961, more than a half century ago, I was a happy and progressing associate in a prominent medium-sized, Wall Street, New York City law firm.[1] Columbia Law School approached me to be the Associate Director of its newly formed Project on International Procedure. They dangled several attractive incentives: I could try my hand at teaching some civil procedure;[2] hobnob with the giants of the Columbia faculty, like Herb Wechsler, Walter Gellhorn, Maury Rosenberg, and Jack Weinstein; and take my first trip to Europe to work with proceduralists in several countries on international judicial assistance matters.

It was all very Machiavellian. Even though this was decades before today's privacy-destroying social networking, the people at Columbia had unearthed a few of my weaknesses that made me a good bet to accept the invitation. First, although I enjoyed life at the law firm, I had been thinking about teaching. Second, I loved federal civil procedure. Third, then-Professor Benjamin Kaplan had been my civil procedure teacher at Harvard Law School, had mesmerized me, and had challenged and penetrated my sluglike tendencies. I had abjured the blandishments of the big firms and been his full-time research assistant during the summer following my second year.[3] Ben had become the Reporter for the Federal Rules Advisory Committee since I graduated from law school. The Columbia Project wanted to generate some proposals for amendments to the Federal Rules relating to certain aspects of "international cases"—service of process abroad (now Rule 4(f)), discovery

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1. The firm was Cleary, Gottlieb, Friendly & Hamilton, as it was known before Henry Friendly was appointed to the Second Circuit. It had fifty-five lawyers in New York then and has grown to eight hundred in New York plus two hundred more around the world. It is still considered a medium-sized law firm.

2. Paul Hays, one of Columbia's superb proceduralists, had been appointed to the Second Circuit.

3. I doubt any law student at a top-tier law school would work full time for a law professor today during the summer after his or her second year. When Ben called to offer me the position, I accepted instantly. It was a no-brainer. I said to myself, "I have sixty years to practice law, but only one summer to work for Ben Kaplan."

in transnational litigation (now Rule 28(b)), proof of foreign official records (now Rule 44), and proof of foreign law (now Rule 44.1). They thought I could get Ben to pay some attention to our proposals. On hearing that was part of the job, I was a fish who couldn't resist the bait.

Now it was Ben's turn to be Machiavellian. "Of course" he would work with me on developing the Columbia Project's rule proposals and put them before the Advisory Committee. But then, in a seemingly off-handed manner, he wondered whether I could "assist" him with some of the work on what was then the centerpiece of the Advisory Committee's efforts: the revision of the joinder rules, the class action rule in particular. Naturally, the bait was now even more attractive; not only was I hooked, I was being reeled in. Never did involuntary servitude seem so attractive. We worked diligently on all of this, both while I was with the Columbia Project and after I started full-time teaching at the University of Minnesota Law School in the fall of 1962.[4] Several working meetings with Ben in Cambridge reminded me of what a grand man and mentor he was and reinforced my interest in a future academic life.

At one point, we went off to the Kaplans' summer home on Martha's Vineyard for a weekend of work. I was in the backseat of their car, pounding on a very old manual typewriter. Ben was in the front passenger seat. His indescribably talented wife, Felicia Lamport—an author, poet, and wordsmith in her own right—was driving.[5] While we were in the bowels of the Martha's Vineyard car ferry, the clacking of the typewriter—I think we were trying to draft Rule 23(b)(3) at the time—was so loud that the driver of the adjacent car yelled to us asking whether we thought that the repetitive sound they heard meant the boat was sinking.

Work on "my" rules and Ben's rules continued throughout a long summer weekend largely spent on the oceanfront beach in front of the Kaplans' home, with occasional breaks for blueberry picking and digging for clams for evening chowder. But we did work. And that is but a small part of the backstory of how what became the 1966 Rule amendments came into being.

Ben invited me to several of the Advisory Committee's meetings to present and shepherd "my" proposals through the debates and to assist when his were being discussed. I remember the first one I attended. It was like entering Valhalla and finding myself in the

4. My successor as Associate Director of the Project when I went off to Minnesota was my friend from law school (now Justice) Ruth Bader Ginsburg.

5. Ben, like the legendary Second Circuit Judge Learned Hand—one of his idols—never drove a car or felt comfortable with any mechanical device.

midst of the gods. Former Secretary of State Dean Acheson was the Committee's Chairman, and a decisive one he was, especially in closing debate on a point.[6] Among the people around the table were Judge Albert Maris of the Third Circuit, a true and principled gentleman and a distinguished jurist, and Judge Charles Wyzanski of the District of Massachusetts, viewed by Harvard Law School graduates like myself (and many, many other people around the country, of course) as the paragon of district judges. Professor James William Moore of the Yale Law Faculty was also present. He had been a key participant in the development of the original Rules and was the author of the then-standard multivolume treatise on federal practice (I note simply in passing that this was more than a decade before the emergence of Wright & Miller). A young Professor Charles Alan Wright of the University of Texas faculty, whose skills already were legendary and whose total—and I mean total—recall "frightened" Ben at the outset of their association, also served on the Committee. The two became very respectful and supportive of each other.[7] Professor Archibald Cox, then JFK's Solicitor General,[8] represented the Justice Department, and Professor Abram Chayes represented the State Department. Both were to become my colleagues when I joined the Harvard Law School faculty years later. And, of course, several luminaries of the bar were members—John Frank of Phoenix and Burt Jenner of Chicago among them.

The several Committee meetings I participated in exposed me to the most sophisticated debate on numerous subjects relating to federal civil litigation and saw the successful completion of the Committee's work on both the joinder and transnational rules. Both sets of proposed amendments were promulgated without change. The cumulative experience had the most profound effect on me and undoubtedly contributed to my becoming a procedure wonk for life and a devotee of the rulemaking process.

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6. One summer, Ben was in a bit of a "panic" about preparing the materials for an upcoming Committee meeting and wanted me to work on the drafts with him for several days. But I was then a reservist in the United States Army and had to be on active duty during the time Ben needed me. Ben sought help from Secretary Acheson, who communicated with Chief Justice Warren, who sent a note to the Commanding General of the 77th Infantry Division asking him to release me for the few critical days as—according to the Chief's request—I was "needed on the Nation's business." So, off I went back to Martha's Vineyard. There is a delicious footnote to this footnote, but I will refrain from an almost irresistible desire to recount it.

7. Charlie's command of the federal procedural case law was so great that the Committee had an animate Lexis and Westlaw capability at its disposal a decade or two before either of those electronic retrieval systems came into being.

8. A Committee meeting at the Supreme Court took a break one morning so that Archie could move for my admission to the bar, which was granted by Chief Justice Warren, who immediately urged us to return to our labors.

Nothing could have pleased and surprised me more a dozen years later than becoming the Reporter to the Civil Committee in 1978 by appointment of Chief Justice Warren Burger.[9] Following in Ben Kaplan's footsteps was especially rewarding. Professor Albert Sacks, later to be my colleague and Dean at Harvard, and Professor Bernard J. Ward, Charlie Wright's great friend on the University of Texas law faculty, had served as Reporters in the years following Ben's tour of duty. Bernie remained in place to complete the work that was then in process. His counsel and hand holding were extremely helpful to me. The Committee's chairman was Judge Walter R. Mansfield of the Second Circuit, a wonderfully gracious and dedicated individual who guided the Committee with a velvet glove, commanded universal respect, and allowed the Reporter to be in the "tent" at all times. Working with him and the rest of the Committee was a joy.

By mid-1979, the Committee had decided to focus on several aspects of the pretrial process in the hope of making some headway regarding cost and delay. Those twin scourges of civil litigation were the focal point of debate within the profession at the time, as they continue to be today.[10] Elements of the practicing bar, primarily the defense bar, had begun to bang the drum for "reform" to eliminate these deleterious by-products of contemporary litigation and to respond to assertions of abuse and frivolous litigation behavior. So that is what we tried to confront. The "big" case had emerged and was showing its fangs, resulting in the enactment of the multidistrict litigation statute[11] and the publication of the first edition of the Manual on Complex Litigation,[12] in which I participated as an informal reporter to the judge who drafted it. It was time for the Federal Rules to take note of these phenomena.

The Committee's agenda had three major prongs: First, an attempt to upgrade lawyer behavior by breathing some life into Rule

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9. Part of the surprise was that I was then on the Harvard faculty and it was well known that the Chief Justice had no love of that institution and its denizens. Sometime later it was reported to me—although it may well have been apocryphal—that, in a sense, I had been foisted on the Chief by a very strong letter of "recommendation" from the Committee asking for my appointment.

10. Chief Justice Berger often referred to the two in his annual State of the Judiciary messages and in 1976 had sponsored a major conference, entitled "Causes of Popular Dissatisfaction with the Administration of Justice," which focused in significant part on cost and delay. President Reagan and Vice President Dan Quayle frequently made less-than-complimentary comments about our civil justice system during this period. *See* Michael S. Greve, *Why "Defunding the Left" Failed*, 89 NAT'L AFF. 91 (1987) (describing how President Reagan was quoted as referring to public-interest lawyers as a "bunch of ideological ambulance chasers").

11. Act of Apr. 29, 1968, Pub. L. No. 90-296, 82 Stat. 109 (codified as amended at 28 U.S.C. § 1407 (2006)).

12. FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION (1st ed. 1969).

11, which had never gained any traction with the district courts because its standard for sanctionable conduct was amorphous (as well as subjective), and the possible punishments authorized by the rule were totally unworkable. Second, to deal with the growth of class actions and other types of complex cases, we revised the permissive eve-of-trial conference, which was all that the original Rule 16 described, and transformed it into a much more elaborated program for pretrial judicial control, scheduling, and conferencing. Conceptually, the new rule was drawn in part from the Manual for Complex Litigation and the practices that were springing up in various districts. The objective was that the Federal Rules should formally validate judicial management (including conferring on the possibility of settlement) as a legitimate and expected activity for district judges. Third, the Committee attempted to achieve some containment of excessive discovery by giving birth to the notion of proportionality (now found in Rule 26(b)(2)(C)) by empowering and encouraging district judges to prevent discovery that was unreasonably cumulative or duplicative, more easily obtainable from another source, or disproportionate to its benefits.

That three-headed package was the core of what became the 1983 amendments to the Federal Rules. Projects on other provisions, such as proposed amendments to Rules 42.1, 52, 68, and 71A, occupied my remaining time as Reporter.[13] In due course, I transitioned to Committee membership, with the Reporter's role passing to my friend of many decades and occasional collaborator on various matters, Professor (later Dean) Paul D. Carrington of Duke Law School.

Thinking about Paul and, of course, Ed Cooper and the reason for this celebratory occasion has made me realize that, in some respects I had it comparatively easy as a Reporter. The Committee met by itself, usually in a comfortable law-firm conference room somewhere in Washington or in the Supreme Court building, with an occasional drop-in by the Chief. So, to a significant degree, other than when a guest who had been invited or requested to speak and be questioned on some particular subject or other was present, we worked in a hermetically sealed environment. Of course, we did solicit reactions to our drafts from the bench and

13. The Committee had imposed a moratorium on work on the class-action rule several years earlier because it had become a political football and a source of enormous contention within the bar, and there was reason to believe Congress would take up the subject. I, however, was asked for and produced a study paper to enable the Committee to consider whether to lift the moratorium. It chose not to go into those dangerous waters at that time.

bar and did hold "public" hearings. But there were few external pressures or intrusions when we were in work mode.

I may be romanticizing, of course, but I honestly believe that the practitioner members of the Committee did leave their clients outside the room (I must confess to a certain naiveté back then). Discussions were cordial and professional. Work was intense and highly focused. When the proposals that became the 1983 amendments were circulated to the Bench and Bar, they were somewhat controversial but did not raise an enormous amount of partisan debate within the profession. Disagreements, yes. There were some negative views expressed about the judicial management proposal that reflected the resistance of some practitioners and a few academics, who felt the concept represented too much of an intrusion on the adversary system of American litigation and gave too much effectively unreviewable power to the district judge. And some district judges expressed reservations about assuming management duties, fearing that it was not a "judicial" function, that it might become burdensome, that it would take too much time away from their adjudicatory activities, or some combination of those three concerns. For most members of the bench (and the bar) this shift to management was relatively unknown territory at the time. In retrospect, maybe the critics were right, at least in part. Today's "vanishing trial" phenomenon, to some degree, may be an unintended by-product of the diversion of judicial (and lawyer) energy into management and may have contributed to today's settlement-and-work-out culture.

There also were some significant reservations that bubbled up during the congressional phase of the rulemaking process about the stiffened lawyer certification and mandatory sanction provisions that the Committee had inserted in Rule 11.[14] Indeed, my very dear friend and the other person I claim as a professional mentor (although he might dissent from that characterization and disclaim any responsibility), District Judge Jack B. Weinstein of the Eastern District of New York, jousted with me on several occasions and asserted that enhancing the sanction practice was not "civilized" and would not be good for either district judges or practicing lawyers. No one foresaw that sanction motions would become a significant cottage industry that would cause the rule to be amended again ten

14. The 1983 Revision for Rule 11 made sanctions mandatory upon a finding of a violation and authorized the payment of expenses, including attorney's fees, incurred because of an improper paper. Congressional efforts to stop the proposal came to naught, as the statutory time for Congress to act expired. But it was a bit scary at one point and, I must confess, promulgation seemed a damn near thing.

years later to restrain its invocation. But by and large, the public-comment and rule-promulgation process was conducted at a relatively low decibel level.

It was not until Brother Carrington's Reportership that Committee meetings became open. I witnessed that shift in process from the vantage point of Committee membership and soon concluded that the difference in the working culture was palpable. As the legal community came to understand that the meetings were open, visitors were no longer simply attracted by a single issue or were just curious. A few were there at the behest of one or more groups or organizations to monitor the meetings. Sometimes, they merely observed and "reported back" on the proceedings. Others joined Committee members during breaks and lunches or hosted a dinner for one or more of them. Certain individuals came (and apparently continue to come) to every meeting, and, as reported to me, they even begin to take on the demeanor of Committee members. In many other respects, the rulemaking process became increasingly politicized, polarized, and ideologically oriented. The outside world had become aware of us! Professor Carrington has thoroughly described this transition and its impact during his years as Reporter.[15]

Of course, there are certain benefits to the openness that has descended upon the Committee's work, in terms of transparency and, to a certain decree, democratization. But make no mistake about it, there have been costs—costs that have been exacerbated by the increased antipathy and loss of civility within the bar, the intense interest concerning procedural matters that has developed, the increased monetary stakes of so many cases in the federal courts, the rise of the public interest and social action bars with their own litigation agendas, and what many believe have been notable unilateral rule revisions by the Supreme Court in the last two decades that bypass the statutory rulemaking process.

By the time I left the Committee, neither the clients nor the special interests of various persuasions were outside the meeting room anymore, and the credibility of rulemaking and the balance of the Committee's composition were being called into question. Indeed, they continue to be questioned today. To my mind the very real values of a group of committed and gifted professionals deliberating intensely and openly in the civil justice system's interests in a closed environment were gone. This had become a matter of some distress to me. It continues to be today.

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15. Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597 (2010).

So what does any of this have to do with Ed Cooper? Before I get into that, let me note that my relationship with Ed spans more than forty-five years. Curiously, however, with intermittent exceptions, it has been a "long-distance relationship." During my years on the Minnesota Law School faculty (1962–1965), I was deeply involved in faculty recruitment and heard about Ed from various sources. The reports were so positive that I strongly recommended Ed's recruitment and appointment as my replacement when I left Minnesota for the University of Michigan Law School, which is what happened. That same process repeated itself when I left Michigan for Harvard in 1972, and Ed has graced Ann Arbor and that wonderful law school with his presence ever since.[16] Then in the mid-1970s, when Charlie Wright and I decided to expand the *Federal Practice and Procedure* treatise beyond the Federal Rules to embrace the vast and often metaphysical world of federal jurisdiction and related matters, we both agreed that a third coauthor was needed to share in that work and seized upon Cooper to be that person. How smart Charlie and I were! It is hard to believe that his name now appears as author in part or in whole on twenty-seven volumes of that incredibly large and seemingly interminable project. He, as is true of me, has been aided by an additional coauthor or two for several of the more recent editions of a number of those volumes. (Indefatigability and perseverance have their limits!) But even as coauthors, miles and miles have separated us over the years. Thus, to a considerable degree, Ed and I have been ships passing in the night. I wish it had been otherwise and that we had been faculty colleagues for some if not all of those years.

So, despite forty-five years of association, in some respects Ed is a bit of a mystery to me. For example, I have never seen him teach, although reports about his classroom effectiveness are superb.[17] But there is absolutely no mystery about his dedication, his productivity, or the quality of whatever he undertakes. To choose but one example, I consider his discussion of preclusion doctrines in Volumes 18, 18A, and 18B of our *Federal Practice and Procedure* treatise to be the very best in the literature on that very difficult subject. In short, no one doubts his extraordinary talents. My admiration for Ed is unbounded.

16. Ed has been sufficiently entrenched in Michigan so that he could not be moved further east, although I tried.

17. I met an accomplished practitioner recently who told me—without leading or coaching—that Ed was the best teacher she had during her student years at the University of Michigan Law School.

If anything about his work is a bit of a mystery, it is how Ed has continued his Advisory Committee rulemaking activities, along with being a very productive academic, for twenty years.[18] The responsibilities of a Reporter can weigh heavily. It is not a job to be undertaken lightly or for the short winded. The process is an arduous one, and there is always the risk of being blindsided by something you didn't think of or by some interest group with its own agenda. I know Ben Kaplan was a bit fatigued at the end of his years of service. The same was true of me. I cannot speak for Paul Carrington, but I suspect he would agree. Yet Ed goes on and on like the Energizer Bunny; indeed, he gets better and better at what he does—this despite the fact that he does his work in a glass house with a variety of discordant voices emanating from the profession around him. His even-temperedness is extraordinary.[19] It is either an act of will on his part far beyond anything I could muster, or perhaps it is genetic. (Maybe "indefatigability and perseverance" have no limits in Ed's case.)

Whatever the source of that capability may be, it enables Ed to be an absolute model of rationality and balance who obviously has maintained the confidence of the Committee and many outside the Committee. He has a fine sense of the rulemaking process and its limits and is acutely aware of the various forces that bear on any proposal to alter a Rule. That is manifest, for example, in a recent surgically clean, level-headed law review article he wrote—ironically, in a symposium in my honor—in which he traverses the currently highly controversial topic of "plausibility" pleading, a subject that deeply concerns me, and dispassionately explores what the Committee might or might not do with it.[20] All of these attributes makes it absolutely impossible not to like Ed or to get upset with him when he or the Committee seems to have gone astray—that is, "gone astray" in the judgment of someone with a different view.

What more can I say? He has been the perfect person for the tasks and responsibilities he has assumed for the past two decades, both in terms of his integrity and his mastery of the world of federal civil procedure. Recognizing his service is both appropriate and

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18. Many prior Reporters served one or two terms, each of three or four years' duration.

19. On occasion, when Ed gets a bit exercised about something, his voice rises about a half octave.

20. *See* Edward H. Cooper, *King Arthur Confronts* TwIqy *Pleading*, 90 OR. L. REV. 955 (2012). My own negative views on those cases are set out in length in Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal: *A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010).

timely. Those of us who in one way or another live with the Federal Rules of Civil Procedure all profit from his labors and are in his debt. May Ed continue with his labors for many years to come.