IRON MAN OF THE RULES

The Honorable Patrick E. Higginbotham*

I was not a member of the Advisory Committee when Chief Justice Rehnquist asked me to serve as Chair. Seeking reassurance, my immediate question was who the Reporter would be. To the response of "your call," my recommendation was quick—Professor Ed Cooper, University of Michigan. It seemed safe to echo Charles Alan Wright's and Arthur Miller's choice of a co-author, and I had long admired the clarity of Professor Cooper's writing. This proved to be a fortunate choice for the Committee, as he became its anchor for the ensuing twenty years—the walking institutional memory for a Committee charged to think long-term but whose membership was ever-changing.

To grasp Professor Cooper's contribution to rulemaking, it is helpful to review issues that the Advisory Committee confronted during his tenure. I will focus on the first four of his twenty years of service. The issues were many and challenging, which did not change for the two decades of his tenure. Three issues are prominent in my mind—class actions, the transparency of the Committee's work, and the size of civil juries.

In selecting these, I walk by discovery—the perennial problem. The Advisory Committee was keenly aware that Congress's wide use of litigation to enforce its statutory commands—its draws upon private attorneys general—drives the demand for discovery. It was equally apparent that the Supreme Court was for many years Congress's handmaiden given the Court's willingness to imply rights of private enforcement when Congress failed to do so. Given that reality, the Committee doubted the effectiveness of rephrasing Rule 26 against what is fairly described as tidal forces behind American commitment to broad discovery. Rather, the Committee's face to discovery was to be attentive to the role of the trial judge in managing discovery under Rule 26, a dialogic enterprise that continues to this day.

So the Advisory Committee turned to class actions. They were controversial, with pressing issues and many perceived abuses, some of them real. Rule 23 had become a lightning rod for issues across the social spectrum, including civil rights, consumer rights, mass torts, securities, and antitrust enforcement. Each of the Rule's words was so politically charged that any discussion of changes in

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language triggered outcries by its constituents. Two concerns loomed large: weakness in the Rule itself and the relatively cloistered culture in which the Advisory Committee had worked from its inception.[1]

The process attending the 1966 creation of the modern structure of Rule 23 with its (b) clauses, including rights of class members to opt out,[2] is illustrative of the earlier era and our felt need for greater transparency in rule making. Those changes in Rule 23 emerged from a quiet and nigh private meeting of the Advisory Committee, a stellar group then chaired by Dean Acheson, in a conference room of Covington & Burling in Washington, D.C. Aiming at perceived procedural weaknesses in the handling of civil rights cases, the Committee made fundamental changes in the structure of the Rule and its reach. The consequences of these changes were not anticipated—at the very least, they were not discussed—and at the time, the changes drew relatively little attention.

Thirty years later, no studied review of Rule 23 could be so insulated from public view. This reality led the Advisory Committee to conduct open meetings at law schools around the country, meetings that reached out to distinguished representatives of the American College of Trial Lawyers, the litigation section of the American Bar Association, and persons who worked closely with class actions, including John Frank of Phoenix, a member of the Committee in 1966, and Herbert Wachtell of the New York bar, both experts in class litigation. This did bring disinfecting sunshine to all ideas, including a few raw political agendas. It also brought large challenges to the Committee, particularly to the work of the Reporter.

With its work, the Advisory Committee became increasingly aware of a structural flaw in the Rule, one impeding development of a sorely needed jurisprudence of class actions: a want of appellate review of class-certification decisions. Federal courts were not developing a coherent federal common law of class actions. In defiance of federal rulemaking's longstanding objective of a transsubstantive procedural regime,[3] the Committee had organized

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1. *See, e.g.*, Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1683 (1995) (attributing opposition to the 1970s Judicial Conference-proposed Federal Rules of Evidence in part to complaints that during closed Rule Committee proceedings, "changes had been made in the proposals without public notice or input").

2. FED. R. CIV. P. 26(c)(2) (1966).

3. For a discussion (and criticism) of transsubstantive procedure, see Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377, 378 (2010) ("By transsubstantive, I mean two things: the notion that the same procedural rules should be available for all civil law suits: (1) regardless

a taxonomy of class cases along the lines of the distinct and substantive arenas of civil rights, antitrust, and securities. The securities bar had its own approach and its own culture, as did practitioners engaged in the trials of antitrust and civil rights cases. This phenomenon of a distinct ethos defined by substantive law was the direct consequence of this lack of appellate review.

In response, the Advisory Committee proposed Rule 23(f), a path for appellate review of rulings on class certification.[4] Its history offers insight into Professor Cooper's craft. Carefully fashioned, it lay quietly among several possible changes the Advisory Committee put forward for comment, all controversial. Professor Cooper's skilled drafting of the many changes urged upon us—his translation of myriad ideas pressed upon the Committee into the language of rules—made openness both possible and workable. His crafting exposed strengths and weaknesses in each of the many proposals, leaving this simple but single most important change to be adopted with little difficulty as a housekeeping measure, in the shadow of the "hot button" proposals that were ventilated but not accepted.[5] Thus was born Rule 23(f).

The third major effort of the Advisory Committee, perhaps its most important, did not succeed: a return to a twelve-person jury in civil cases. The Committee examined empirical studies of jury dynamics and the history of shifting constitutional values and rule changes that enabled the federal trial courts to empanel as few as six jurors to decide major cases. I will not pause to recount that history.[6] The Advisory Committee and the Standing Committee unanimously recommended a return to the twelve-person jury, supported by virtually every study of jury dynamics.[7] Those studies supported the Committee's view that the six-person jury presented a less stable and less reliable process than the twelve-person jury.[8] Unfortunately, some district court judges successfully opposed the change as a reduction of their power to seat as many jurors from six

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of the substantive law underlying the claims, or 'case-type' transsubstantivity; and (2) regardless of the size of the litigation or the stakes involved, or 'case-size' transsubstantivity.").

4. *See* ADVISORY COMMITTEE ON CIVIL RULES, REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES 44–45 (1996), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-1996.pdf.

5. *See* ADVISORY COMMITTEE ON CIVIL RULES, MEETING MINUTES (1996), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/cv4-1896.htm.

6. *See generally* Richard O. Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and Jury-Size Cases*, 73 MICH. L. REV. 643 (1975); *see also* Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1 (1993) (collecting and discussing such studies).

7. Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, Criminal Procedure and Evidence, 163 F.R.D. 91, 135–36 (1995).

8. *See id.*

to twelve as they might choose. Although corporate America has continued to avoid jury trials, not returning to the more stable process has only fed its discomfort. Professor Cooper's powerful supporting materials remain a platform for revisiting the issue.[9]

I have briefly reviewed the work of the Advisory Committee during Professor Cooper's first four-year stint as its Reporter. This writing offers only a sense of the range and difficulty of the Advisory Committee's, and thus Professor Cooper's, work. That those four years have continued for an additional sixteen years with similar challenges makes plain that his passage continues to be stellar. It could be traveled so well only by an extraordinary talent. I say without hesitation or qualification that to these eyes, no other single individual has had more influence on the rule processes of the federal courts. All those years, he gave me only one concern: his gift for producing a well-crafted rule from a sack of loosely stated contentions sometimes gave legs to some silliness. That was with purpose. Always, his effort was to tee up proposals for scrutiny, and even proponents whose measures failed in no small part because they were unable to survive their clear statement left proud of Professor Cooper's restatement. I am honored to salute Professor Cooper. He deserves it. He became my friend, but more importantly here, a treasure to the courts. Thank you, Ed.

9. *See* Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 757–58 (2010); Patrick E. Higginbotham, Ainsworth Lecture, *So Why Do We Call Them Trial Courts?*, 55 S.M.U. L. REV. 1405 (2002).