

## THEY WERE MEANT FOR EACH OTHER: PROFESSOR EDWARD COOPER AND THE RULES ENABLING ACT

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### INTRODUCTION

In June 1935, the United States Supreme Court appointed a small committee of distinguished lawyers and academics to write the Federal Rules of Civil Procedure, the first set of rules promulgated under the Rules Enabling Act of 1934. The Committee was charged with assisting the Supreme Court in its responsibility for

the preparation of a unified system of general rules for cases in equity and actions at law in the District Courts of the United States and in the Supreme Court of the District of Columbia, so as to secure one form of civil action and procedure for both classes of cases, while maintaining inviolate the right of trial by jury in accordance with the Seventh Amendment of the Constitution of the United States and without altering substantive rights.<sup>1</sup>

The primary drafting responsibility fell on the Committee's "Reporter," then the Dean of Yale Law School, Charles E. Clark. Although he later became a judge on the Second Circuit Court of

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\*\*\*\* United States Court of Appeals for the Third Circuit; Chair, Standing Committee, 1998–2003. We all thank Andrea Kuperman, whose work has been invaluable to our work for the Rules Committees since 2007 and was invaluable for this introduction as well. We are also very grateful to Judge David Campbell, Judge Jeffrey Sutton, Professor Steven Gensler, and Professor Richard Marcus for their thorough and helpful feedback.

1. Order of the Supreme Court of the United States (June 3, 1935), *reprinted in* ADVISORY COMMITTEE ON CIVIL RULES, REPORT OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE iii (1937), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV04-1937.pdf>.

Appeals, the Committee he served included no judges.<sup>2</sup> That, of course, has changed: today, the Judicial Conference Rules Committees<sup>3</sup> include what some view as a disproportionately large number of judges in relation to their practitioner and academic members. But one thing has remained constant. “Reporter” is an inadequate description for the vital role that person plays in the Rules Committees. “Reporter” may also be too modest a title given the stature and contributions of the civil-procedure scholars who have filled that position. To take one’s place in this lineup has to be daunting. But in the twenty years since he became Reporter to the Civil Rules Advisory Committee, Professor Edward Cooper has met and exceeded the challenge, over and over. This issue of the *University of Michigan Journal of Law Reform* attempts to describe how Ed Cooper and the Rules Enabling Act have been such a productive combination.

This Symposium brings together important participants in the rulemaking process, all of whom share a keen admiration for Ed Cooper the scholar, the person, and the Reporter. Professor Arthur Miller and Professor Paul Carrington provide different perspectives from the two proceduralists who were Ed Cooper’s immediate predecessors.<sup>4</sup> Professor Miller’s essay includes his personal reflections on his own tenure as Reporter, the evolution of the Advisory Committee’s work as the rulemaking process has become more public, and his work with Ed Cooper on the *Federal Practice and Procedure* treatise. Professor Carrington’s essay expresses disquiet about how case law in some areas has moved away from what he celebrates as the “progressive aim of our Rules of Civil Procedure.”

Several of the contributors focus on class actions and on how Ed Cooper helped guide the Civil Rules Committee in deciding what aspects of class-action practice could be improved by amending Rule 23 and what aspects were best addressed in other ways. Professor Mary Kay Kane, who was a member of the Standing Committee during Professor Cooper’s tenure as Reporter to the Civil Rules

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2. The first committee included William D. Mitchell, later Attorney General, as Chair; Scott M. Loftin, then President of the American Bar Association; George W. Wickersham, then president of the American Law Institute; Wilbur H. Cherry, professor at the University of Minnesota Law School; Armistead M. Dobie, Dean of the University of Virginia Law School; Edmund M. Morgan, professor at Harvard Law School; Edson R. Sunderland, professor at the University of Michigan Law School; and distinguished lawyers from Boston, New Orleans, Chicago, Seattle, San Francisco, and Des Moines. See *id.* at iii–iv.

3. These committees include the Standing Committee on Rules of Practice and Procedure and its five advisory rules committees—Appellate, Bankruptcy, Civil, Criminal, and Evidence.

4. See Paul D. Carrington, *Protecting the Right of Citizens to Aggregate Small Claims Against Businesses*, 46 U. MICH. J.L. REFORM 537 (2013); Arthur R. Miller, *Some Very Personal Reflections on the Rules, Rulemaking, and Reporters*, 46 U. MICH. J.L. REFORM 651 (2013).

Committee, writes on the Committees' work on Rule 23 and on "restyling" the Civil Rules in 2007 to clarify and simplify them, but without changing their substantive meaning.<sup>5</sup> Professor Richard Marcus, who has served as Associate Reporter to the Civil Rules Committee since 1996, writes on some proposed amendments, including to Rule 23, which did not go forward despite, or perhaps because of, years of work and study under the Rules Enabling Act process.<sup>6</sup> Professor Linda Mullenix writes about the Rule 23 rulemaking work to examine how the Civil Rules Committee adapted to operating in an expanded level of public openness and the growing "synergy" between the Committee and case-law developments in proposing amended rules.<sup>7</sup> Judge Patrick Higginbotham, the second chair Ed Cooper served under as Reporter, further describes the class-action work, particularly the interlocutory appeal amendment and Professor Cooper's careful "crafting" and "drafting" that were essential to its enactment.<sup>8</sup> These articles remind us that Professor Cooper's arrival as the new Committee Reporter and the Committee's launch into the difficult and contentious issues of class-action practice coincided.

The essays bring home the breadth, variety, and importance of the issues the Civil Rules Committee and Professor Cooper have worked through in the past twenty years. Professor Thomas D. Rowe, Jr., a Committee member in the mid-1990s, writes about the proposed amendment to Rule 48 that would have required the seating of twelve-member juries in federal civil trials, an amendment that both the Civil Rules and Standing Committees approved by wide margins but the Judicial Conference rejected.<sup>9</sup> Judge Paul Niemeyer, who was the second chair Ed Cooper worked with as Reporter, examines the proposal for a "simplified" set of Civil Rules, primarily for small money-damage actions. Judge Niemeyer suggests that examining this proposal fifteen years after Professor Cooper's last draft could be useful in the current efforts to control discovery costs and burdens.<sup>10</sup> Professor Catherine Struve focuses on Professor Cooper's contributions to the law and scholarship of appellate

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5. See Mary Kay Kane, *Professor Edward Cooper: The Quintessential Reporter*, 46 U. MICH. J.L. REFORM 631 (2013).

6. See Richard Marcus, *Shoes That Did Not Drop*, 46 U. MICH. J.L. REFORM 637 (2013).

7. See Linda S. Mullenix, *Professor Ed Cooper—Zen Minimalist*, 46 U. MICH. J.L. REFORM 661 (2013).

8. See Patrick E. Higginbotham, *Iron Man of the Rules*, 46 U. MICH. J.L. REFORM 627 (2013).

9. See Thomas D. Rowe, Jr., *The Twelve-Person Federal Civil Jury in Exile*, 46 U. MICH. J.L. REFORM 691 (2013).

10. See Paul V. Niemeyer, *Is Now the Time for Simplified Rules of Civil Procedure?*, 46 U. MICH. J.L. REFORM 673 (2013).

jurisdiction and procedure by looking at work on rules that affected both the Civil and Appellate Rules and required a coordinated approach, including amending all the provisions in the federal Rules of Appellate, Civil, Criminal, and Bankruptcy Procedure that specify how to compute time.<sup>11</sup> Professor Stephen Burbank, who has actively followed and participated in the Rules Committees' work for many years, writes about the importance to that work of "thinking small" by engaging in "technical reasoning" and paying close attention to even the smallest details.<sup>12</sup> Professor Steven Gensler, who served as a member of the Civil Rules Committee in the early 2000s, focuses on Judge Charles E. Clark, the first Reporter, and his vision of the Rules and rulemaking, and looks at the Committee's recent work on amending Rule 56 to see how that vision has traveled from the first to the present Reporter.<sup>13</sup> Finally, two of the longest-serving participants in federal rulemaking, Professor Daniel Coquillette, Reporter to the Standing Committee since 1986, and Professor Geoffrey Hazard, member and then consultant to that committee since 1994, have contributed very different pieces. Professor Hazard places the overall enterprise in context, celebrating the achievement of the rules while soberly reminding us of the risks presented by the "politicization of civil procedure" and the importance of the Reporters' competence in meeting those risks.<sup>14</sup> And Professor Coquillette finds parallels between a great law reformer and rulemaker in the 1600s, Francis Bacon, and the Rules Committee Reporters.<sup>15</sup>

This introduction to the essays in this Symposium illuminates Professor Ed Cooper's years as Reporter to the Civil Rules Committee by first briefly describing those who preceded him in the position and his own background. We then describe some of Ed Cooper's many contributions to the Civil Rules Committee, the Federal Rules, rulemaking, and civil procedure by examining the present state of the Rules Committees' work under the Rules Enabling Act. We conclude that after almost eighty years of experience under that Act, it is working well in large part because of the sound

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11. See Catherine T. Struve, *What Ed Cooper Has Taught Me About the Realities and Complexities of Appellate Jurisdiction and Procedure*, 46 U. MICH. J.L. REFORM 697 (2013).

12. See Stephen B. Burbank, *Thinking, Big and Small*, 46 U. MICH. J.L. REFORM 527 (2013).

13. See Steven S. Gensler, *Ed Cooper, Rule 56, and Charles E. Clark's Fountain of Youth*, 46 U. MICH. J.L. REFORM 593 (2013).

14. See Geoffrey Hazard, *Edward Cooper as Curator of the Civil Rules*, 46 U. MICH. J.L. REFORM 623 (2013).

15. See Daniel R. Coquillette, *Past the Pillars of Hercules: Francis Bacon and the Science of Rulemaking*, 46 U. MICH. J.L. REFORM 549 (2013).

leadership provided by Ed Cooper over his twenty years as Reporter. It was during these years that the Committee developed an approach to rulemaking that was at once transparent and empirical, with multiple opportunities for participation by members of the public, the bench, the academy, and the bar; with many informal opportunities for consultation with members of Congress and the Executive Branch; and with an understanding by the Committee of its role in relation to the courts, Congress, and the Executive.

Two episodes of recent rulemaking and related activity are described as examples of how well the Rules Enabling Act is working, in large part because of the very flexibility and discretion the Act has provided since 1934. One of those episodes occurred when Judge Anthony Scirica chaired the Standing Committee and then Judge David Levi chaired the Civil Rules Committee. The other occurred when Judge Lee Rosenthal and Judge Mark Kravitz were the chairs of the Standing and Civil Rules Committees, respectively. Both episodes provide a basis for optimism about the future. And they make clear Ed Cooper's continued steady role in supporting and cultivating the robust good health of the rulemaking process and the institutional values it protects.

## I. THE REPORTERS WHO CAME BEFORE

Those who preceded Ed Cooper as Reporter to the Civil Rules Committee were, simply, the giants of the procedural world. The first Reporter, Charles E. Clark, set the bar high.<sup>16</sup> As Professor Steven Gensler describes in his contribution to this issue, Dean Clark was principally responsible for drafting the Federal Rules of Civil Procedure enacted in 1938 and wrote important articles explaining and making the case for the Rules.<sup>17</sup> In 1942, then-Judge

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16. The height of this bar is demonstrated by the fact that Clark's assistant as Reporter was eminent Yale Law Professor James W. Moore. See Leland L. Tolman, *Discovery Under the Federal Rules: Production of Documents and the Work Product of the Lawyer*, 58 COLUM. L. REV. 498, 511–12 (1958) (noting that James William Moore was the chief assistant to Charles Clark and contributed greatly to the form of the Rules, and noting that Professor Moore's writings about the Rules are "in a very large degree responsible for their successful application in practice").

17. See Gensler, *supra* note 13, at 593–95; see also Charles E. Clark, *The Federal Rules of Civil Procedure 1938–1958*, 58 COLUM. L. REV. 435 (1958); Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976 (1937); Charles E. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447 (1936); Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456 (1943); Charles E. Clark & James W. Moore, *A New Federal Civil Procedure: The Background*, 44 YALE L. J. 387 (1935); Charles E. Clark & James W. Moore, *A New Federal Civil Procedure: Pleadings and Parties*, 44 YALE L. J. 1291 (1935).

Clark served as Reporter to the redesignated Advisory Committee and worked on amendments proposed in 1946, 1951, and 1955.<sup>18</sup> Clark served in this role until 1956, when the Supreme Court disbanded the Advisory Committee on the Rules for Civil Procedure.<sup>19</sup> The Committee was reconstituted in 1960 as part of the Judicial Conference,<sup>20</sup> and Benjamin Kaplan, then a professor at Harvard Law School and later a justice on the Massachusetts Supreme Court, became its Reporter.<sup>21</sup> Professor Kaplan's work as Reporter from 1960 to 1966 included the revision of Rule 23 that created the class action as we know it today. Albert M. Sacks, then the dean and a professor at the Harvard Law School, served as Reporter from 1966 to 1970, followed by Bernard Ward, a professor at the University of Texas Law School, who served until 1978.<sup>22</sup> Dean Sacks was the Reporter during what Professor Richard Marcus described as the "high-water mark" of liberal discovery, during which the discovery rules were made even more expansive.<sup>23</sup> Professor Ward, by contrast, served as Reporter during the development of the rules that

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18. See ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES (1946), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV06-1946.pdf>; ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS (1955), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV10-1955.pdf>; ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, SUPPLEMENTARY REPORT OF PROPOSED RULE TO GOVERN CONDEMNATION CASES IN THE UNITED STATES DISTRICT COURTS (1951), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV03-1951.pdf>; see also Gensler, *supra* note 13, at 593 n.1, 598–601.

19. Order Discharging the Advisory Committee, 352 U.S. 803 (1956).

20. See ADMIN. OFFICE OF U.S. COURTS, ANNUAL REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 6 (1958), available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/1958-09-ST-JC\\_approves\\_ST\\_Comm\\_Adv\\_Comm.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/1958-09-ST-JC_approves_ST_Comm_Adv_Comm.pdf) (approving of the creation of the Standing Committee and the appointment by the Chief Justice of five advisory committees); SUPREME COURT OF THE U.S., PRESS RELEASE (1960), available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/SC\\_Press\\_Release.1960.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/SC_Press_Release.1960.pdf) (announcing the appointment of committees to engage in a continuous study of the federal rules).

21. See ADVISORY COMMITTEE ON CIVIL RULES, MEETING MINUTES, DECEMBER 5, 1960, at 1 (1960), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV12-1960-min.pdf> (containing minutes of the first meeting of the Advisory Committee on Civil Rules and listing Benjamin Kaplan as Reporter). That same year, Judge Clark was appointed to serve on the new Standing Committee on Rules of Practice and Procedure. See SUPREME COURT OF THE U.S., *supra* note 20, at 1; see also Gensler, *supra* note 13, at 595 n.11.

22. The records are somewhat unclear as to the exact date that Dean Sacks's term ended and Professor Ward's began, but the difference is small in terms of the work done.

23. See Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 749 (1998) ("Party-controlled discovery reached its high-water mark in the 1970 amendments in terms of rules provisions.").

became effective in 1980, narrowing some of the discovery provisions.<sup>24</sup> Professor Arthur Miller, also on the Harvard faculty, served from 1978 to 1985. Professor Miller's work included changes to Rule 16<sup>25</sup> and Rule 26<sup>26</sup> that instituted the case-management tools and the proportionality limits on discovery that are important to the current rulemaking work on electronic discovery.<sup>27</sup> He was succeeded by Paul Carrington, a professor and dean of the Duke Law School, who served as Reporter from 1985 to 1992. Professor Carrington's tenure as Reporter was marked by the passage of the Civil Justice Reform Act,<sup>28</sup> which further complicated the relationship between national rules that are intended to be consistent across federal district courts and local procedures for individual districts that the statute encouraged.<sup>29</sup>

In October 1992, Ed Cooper became the Reporter to the Civil Rules Committee. Like his predecessors, Professor Cooper was supremely qualified by education, experience, and, above all, an abiding passion for the law and procedure, to assume the Reporter responsibilities. Ed Cooper received his undergraduate degree from Dartmouth College and his LLB from Harvard Law School.

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24. See *id.* at 756–60 (describing the 1980 amendments and the controversy that the discovery limitations did not go far enough).

25. See FED. R. CIV. P. 16 advisory committee's notes (1983) (discussing case-management tools implemented by the amendments).

26. See FED. R. CIV. P. 26(b)(2)(C)(iii) ("On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: . . . the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."); FED. R. CIV. P. 26 advisory committee's notes (1983) (discussing addition of the proportionality limitation on discovery).

27. See, e.g., ADVISORY COMMITTEE ON CIVIL RULES, AGENDA BOOK, ANN ARBOR, MICHIGAN, MARCH 22–23, 2012, at 249–304, 375–406 (2012), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-03.pdf> (discussing work of the Discovery Subcommittee to address electronic-discovery issues in connection with concerns about preservation and sanctions and discussing work of the Duke Subcommittee on efforts to improve case management and address proportionality); see also ADVISORY COMMITTEE ON CIVIL RULES, AGENDA BOOK, WASHINGTON, DC, NOVEMBER 7–8, 2011, at 53–469, 567–622 (2012), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-11.pdf> (same); ADVISORY COMMITTEE ON CIVIL RULES, AGENDA BOOK, AUSTIN, TX, APRIL 4–5, 2011, at 194–236, 276–302 (2011), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-04.pdf> (same).

28. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended at 28 U.S.C. §§ 471–482 (2006)).

29. See, e.g., 28 U.S.C. § 471 (2006) (requiring each district court to implement a civil-justice expense and delay-reduction plan); 28 U.S.C. § 472 (2006) (stating that in developing a civil justice expense and delay reduction plan, a district court could consider the recommendations of an advisory group); 28 U.S.C.A. § 478 (West 2008) (describing the process for selecting advisory groups).

He clerked for Judge Clifford O'Sullivan on the United States Court of Appeals for the Sixth Circuit from 1964 to 1965 and spent two years in private practice in Detroit, simultaneously beginning his academic career as an adjunct professor at Wayne State University Law School. He took up full-time teaching at the University of Minnesota Law School in 1967 and in 1972 joined the faculty of the University of Michigan Law School, where his own father had been a professor.<sup>30</sup>

As a scholar, Ed Cooper's contributions have been all the more noteworthy in light of the amount of writing and other work required of him as Reporter to the Civil Rules Committee. His scholarly work includes twenty years of reports for the agenda books for the twice-yearly meetings of the Civil Rules Committee and for the twice-yearly meetings of the Standing Committee on the Rules of Practice and Procedure. It includes twenty years of thorough and thoughtful pieces accompanying the publication of proposed rules and rule amendments for comment. It includes analyses accompanying the proposals when they are transmitted to the Standing Committee, then the Judicial Conference, the Supreme Court, and finally to Congress. This body of work covers a huge range of issues and draws upon Ed's deep learning in the field of civil procedure and federal practice more generally.

This body of work is preceded and surrounded by an even larger number of analytical documents that Reporter Cooper generates with seemingly impossible speed and fluency. These documents serve many purposes, including conference calls, small and large conferences, subcommittee meetings and drafting sessions, and innumerable other exchanges that are part and parcel of the Advisory Committee's work.

Ed Cooper has also authored treatises, including the volumes of *Federal Practice and Procedure* and its annual supplements that are among the most important resources for lawyers and judges on difficult and important areas of procedure in practice, especially preclusion, justiciability, and appeals (including appeals timing).<sup>31</sup> He

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30. Ed Cooper's father was the faculty editor when the *University of Michigan Journal of Law Reform*, then called *Prospectus: A Journal of Law Reform*, was created. See 1 U. MICH. J.L. REFORM i (1968).

31. See CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, vols. 16A–16AA (4th ed. 2008) (co-authored with Charles A. Wright, Arthur R. Miller, and Catherine T. Struve) (addressing the Appellate Rules); CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, vols. 13, 13A, 13B, 13C (3d. ed. 2008) (co-authored with Charles A. Wright and Arthur R. Miller) (addressing the federal judicial system and related matters); CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, vols. 14, 14A, 14B, 14C, 16A (3d ed. 1998) (co-authored with Charles A. Wright and Arthur R. Miller) (addressing jurisdiction, removal, and the Appellate Rules); CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, vols.



has written significant articles on topics including extraordinary writs, mass torts, discovery, and pleading.<sup>32</sup> He has been a critical voice in the American Law Institute, serving as a member of the Council and as an adviser on restatements and principles projects on torts, judgments, transnational procedure, aggregate litigation, and international intellectual property. He served as Reporter for the Uniform Transfer of Litigation Act. In addition to serving the Rules Committees, the American Law Institute, and the world of procedure, Ed Cooper has provided years of service to the University of Michigan Law School. That service includes working as Associate Dean for Academic Affairs for over a decade, beginning in 1981. In short, when Professor Cooper became the Reporter to the Civil Rules Committee in 1992, he brought decades of dedicated teaching and proven scholarship, a deep knowledge of the legal academy, and wide experience with judges and lawyers. He brought a record as distinguished as any preceding him and extraordinarily thorough preparation to the role and tasks of Reporter.

## II. THE RULES ENABLING ACT PROCESS AND THE REPORTER'S ROLE

Much has been written about the history of civil rulemaking and the changes that have occurred under the Rules Enabling Act.<sup>33</sup> Some of those changes are briefly reviewed here, with a look at how the Committees' and the Reporters' roles have evolved in carrying out the work under the Act.

The task of the first Reporter to the Committee was, of course, different than it has been since. The task then was to draft an entire body of civil rules, from pleading through discovery, pretrial motions, and trial, that would not only merge law and equity but would also replace dynamic conformity between state and federal procedural rules with consistent rules across the nation's federal district

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13–19 (2d ed. 1984) (co-authored with Charles A. Wright and Arthur R. Miller) (addressing jurisdiction and related matters); CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE*, vols. 13–19 (1975–1982) (co-authored with Charles A. Wright and Arthur R. Miller).

32. See, e.g., Edward H. Cooper, *Aggregation and Choice of Law*, 14 *ROGER WILLIAMS U. L. REV.* 12 (2009); Edward H. Cooper, *Aggregation and Settlement of Mass Torts*, 148 *U. PA. L. REV.* 1943 (2000); Edward H. Cooper, *Class Action Advice in the Form of Questions*, 11 *DUKE J. COMP. & INT'L L.* 215 (2001); Edward H. Cooper, *Extraordinary Writ Practice in Criminal Cases: Analogies for the Military Courts*, 98 *F.R.D.* 593 (1983); Edward H. Cooper, *King Arthur Confronts Twlqy Pleading*, 90 *OR. L. REV.* 955 (2012); Edward H. Cooper, *Rewriting Shutts for Fun, Not to Profit*, 74 *UMKC L. REV.* 569 (2006).

33. See, e.g., Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 *U. PA. L. REV.* 1015 (1982); Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 *AM. U. L. REV.* 1655 (1995).

courts. Professor Steven Gensler's contribution to this issue describes Charles Clark's vision of the new Federal Rules of Civil Procedure and of the central role the Reporter played in their creation and after.<sup>34</sup>

In 1942, the Supreme Court charged the Committee with the ongoing responsibility "to advise the Court with respect to proposed amendments or additions to the Rules of Civil Procedure."<sup>35</sup> The Supreme Court needed better institutional support for its rulemaking work. In the 1950s, the Rules Enabling process was changed by legislation designed and endorsed by the Supreme Court to provide a secure source of advice and assistance in rulemaking. The 1958 amendments made the Judicial Conference responsible for the "continuous study of the operation and effect" of the Federal Rules, including the Criminal Rules, which had been enacted in 1946.<sup>36</sup> Advisory committees were created to "carry on a continuous study of the operation and effect of rules of practice and procedure" and propose changes "to the Judicial Conference through a standing Committee on Rules of Practice and Procedure."<sup>37</sup> The Advisory Committees' overarching task was to "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."<sup>38</sup> The Reporters' role moved from creating an integrated, complete set of new—indeed, revolutionary—rules toward, today, analyzing problems in the practice of law and whether they are amenable to improvement by changing existing rules or adding new rules, writing drafts of proposed rules and accompanying notes, writing documents raising or answering questions and explaining what might be or has been done, and transmitting the results to those tasked with the next stage of review.<sup>39</sup> The Reporters continued to be law professors and the appointments continued

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34. See Gensler, *supra* note 13, at 593–610.

35. Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 465 (1993) (citing Order Continuing Advisory Committee, 314 U.S. 720 (1942)).

36. Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356 (codified as amended at 28 U.S.C. § 331 (2006)). The Federal Rules of Appellate Procedure took effect in 1968, and the initial Bankruptcy Rules became law in 1973. In 1972, the proposed Evidence Rules were transmitted to Congress and, as discussed later, proved controversial. They were enacted by affirmative legislation, after revision by Congress, in 1975. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (codified as amended at 28 U.S.C. App. at 314 (2006)).

37. ADMIN. OFFICE OF U.S. COURTS, *supra* note 20, at 7.

38. *Id.*

39. See WINIFRED R. BROWN, FED. JUDICIAL CTR., FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES 12 (1981), available at [http://www.fjc.gov/public/pdf.nsf/lookup/fdrlmkng.pdf/\\$file/fdrlmkng.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/fdrlmkng.pdf/$file/fdrlmkng.pdf) (outlining Reporters' role in ongoing study of federal rules and their operation).

to be made by the Chief Justice of the United States.<sup>40</sup> The tradition of long service in the Reporters' terms was established.<sup>41</sup> That tradition began when Committee members also served extended terms, but even after members were presumptively limited to two three-year terms, the Reporters continued to serve for extended periods, reflecting the greater need for institutional memory and experience in that role.

A study of rulemaking by the Federal Judicial Center (FJC), the education and research agency for the federal courts, summarized how the Reporters' work was intended to proceed under the 1958 Act:

[T]he original intention and early practice [was] that [the] reporters [would] engage in continuing comprehensive study of the rules and of their operation in both federal and state courts, particularly those states that made adaptations to local needs. Such constant study was expected to uncover any restrictive glosses placed on the rules, and any need for additional rules. The reporters were to submit periodic reports on all matters, as well as analyses of filed comments and tentative drafts of [R]ules.<sup>42</sup>

It is an understatement to observe that "such a program of periodic reports based on continuing study" by the hard-working Reporter did not prove "achievable."<sup>43</sup> Instead, the Reporter was fully occupied by tasks that are still at the heart of today's work: receiving information from a variety of sources on ideas for proposals and drafting memoranda analyzing those proposals, the relevant law, the history of previous related proposals, and optional courses of action; circulating proposed drafts for the Advisory Committee to consider; reviewing and summarizing comments on the Civil Rules and proposed amendments and drafting revisions in light of those comments and the Committee's reaction; drafting the Committee Notes; and drafting the reports, memoranda, and other materials needed to explain and transmit the Committee's work. These tasks continue to lie at the heart of the Reporters' work. It is no wonder that the responsibility for preparing periodic reports based on continuing study did not prove "achievable." Since the 1960s, both the

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40. *See id.* at 11–12.

41. *See id.* at 12 n.23.

42. *Id.* at 12 (citing Albert Maris, *Federal Procedural Rule-Making: The Program of the Judicial Conference*, 47 A.B.A. J. 772 (1961)).

43. *Id.* at 12–13.

number and variety of the Reporters' tasks, and their complexity, have grown even more.

The Advisory Committees and Standing Committee generated rules and amendments that became law with no significant modification by Congress until the controversy over the Evidence Rules submitted in 1972. That controversy is well documented and studied.<sup>44</sup> It sparked a critical reexamination of the Rules Enabling Act's allocation of rulemaking power between the judiciary and Congress and raised questions about whether the judiciary had exceeded the authority delegated to it under the Act. Critics of the proposed Evidence Rules argued that they were not rules of "practice and procedure" but instead made substantive law, particularly in proposed rules that would supersede state-law evidentiary privileges.<sup>45</sup> Congress intervened, indefinitely deferred the effective date of the proposed Evidence Rules, and after extensive hearings, enacted a modified version that eliminated the federal privileges.<sup>46</sup> Amendments to the Rules Enabling Act gave the judiciary explicit authority to amend the Federal Rules of Evidence,<sup>47</sup> but Congress also required affirmative legislation for any rule that created, abolished, or modified an evidentiary privilege.<sup>48</sup> This formed a second limit on the judiciary's delegated rulemaking authority, in addition to the provision in place since 1958 prohibiting any procedural rule from abridging, enlarging, or modifying any substantive right.<sup>49</sup> But when the dust settled, the basic delegation of authority and the process for making, amending, and enacting rules had not changed.<sup>50</sup>

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44. See, e.g., 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5421 (1980) (discussing the controversy surrounding the proposed Federal Rules of Evidence); Kenneth S. Broun, *Giving Codification a Second Chance—Testimonial Privileges and the Federal Rules of Evidence*, 53 HASTINGS L. J. 769, 777 (2002) ("The controversy over the Proposed Federal Rules of Evidence was not only a controversy over the merits of the proposals, but also about process."); Eileen A. Scallen, *Interpreting the Federal Rules of Evidence: The Use and Abuse of the Advisory Committee Notes*, 28 LOY. L.A. L. REV. 1283, 1290 (1995) (discussing the controversy over the initially proposed Federal Rules of Evidence).

45. See, e.g., 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5421 (1980).

46. See McCabe, *supra* note 33, at 1660.

47. See 28 U.S.C. § 2072(a) (2006).

48. See *id.* § 2074(b).

49. See *id.* § 2072(b).

50. The legislation also attempted to promote the national uniformity that had been one of the signature goals of the 1938 Civil Rules by limiting inconsistent local-court rules on subjects addressed by the national rules. See 28 U.S.C. § 331 (2006) ("The Judicial Conference shall review rules prescribed under section 2071 of this title by the courts, other than the Supreme Court and the district courts, for consistency with Federal law. The Judicial Conference may modify or abrogate any such rule so reviewed found inconsistent in the course of such a review."). The legislation gave circuit judicial councils authority to modify or abrogate any district court local rules and gave the Judicial Conference authority to modify

Professor Stephen Burbank has authoritatively identified the predominant purpose of the Rules Enabling Act in 1934 as allocating authority for judicial legislation between Congress and the Court.<sup>51</sup> Under the Act, Congress reserved to itself the right to review proposed rules before they became effective. Unless Congress affirmatively acts to defeat, change, or delay proposed rules, they become effective after a specified period.<sup>52</sup> And of course, Congress also limited the judiciary's delegated rulemaking authority to rules of procedure, prohibiting any rules that enlarged, abridged, or modified substantive rights. This allocation of authority between the judiciary and legislative branches is marked by the absence of details about implementation or process. It gives the judiciary considerable discretion about how to engage in rulemaking. The rulemaking controversy of the 1970s was very much a controversy about the allocation of authority over the Federal Rules. That controversy, followed by a well-publicized dispute between the judiciary and Congress over certain criminal rules (and in the 1980s by a very different set of arguments ignited by the short-lived amendment to Rule 11 of the Federal Rules of Civil Procedure on sanctions for frivolous pleadings), generated proposals to revise the Rules Enabling Act in different ways, including ways to limit the discretion the Act provided.<sup>53</sup>

Some of the proposals for amending the Act were focused on making the rulemaking process more open and participatory, and

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or abrogate any other rule prescribed by a court other than the Supreme Court. *See id.* § 2071(c)(1)–(2).

51. *See generally* Burbank, *supra* note 33 (describing the decades of effort culminating in the Act).

52. The time that Congress has to review proposed rules and amendments—and when, absent congressional action, they become effective—has been modified since 1938. The statute originally stated that proposed rules “shall not take effect until they have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session.” Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064. In 1950, this was changed to provide that rule proposals transmitted to Congress by May 1 could become effective ninety days later regardless of the status of the congressional session. Act of May 10, 1950, Pub. L. No. 81-510, § 2, 64 Stat. 158. The 1988 legislation required the Supreme Court to transmit proposed rule changes to Congress by May 1 and provided that the changes would take effect no earlier than December 1 of the year of transmittal. Act of Nov. 19, 1988, Pub. L. No. 100-702, § 401(a), 102 Stat. 4649 (codified at 28 U.S.C. § 2074 (2006)).

53. *See, e.g.*, H.R. 481, 96th Cong. (1979); H.R. 480, 96th Cong. (1979); BROWN, *supra* note 39, at 35–102 (describing various proposals for change); JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 89–115, 147–50 (1977); Robert N. Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 IOWA L. REV. 15, 61–83 (1977); Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 685 (1975); William L. Hungate, *Changes in the Federal Rules of Criminal Procedure*, 61 A.B.A. J. 1203, 1207 (1975); Howard Lesnick, *The Federal Rule-Making Process: A Time for Re-Examination*, 61 A.B.A. J. 579, 580–82 (1975).

resulted in legislative change. In 1988, after years of comprehensive review by the Judicial Conference and its Standing Committee and hearings by the House Judiciary Committee, legislation was proposed to alter the Rules Committee structure and process to make the work more transparent and the Committees less insular. When it was enacted, the legislation codified what had already become the Conference requirement that all Rules Committee meetings be open to the public—while allowing executive sessions for cause—and that minutes be prepared.<sup>54</sup> The legislation provided for the Rules Committees to consist of trial judges, appellate judges, and members of the bar, consistent with existing practice.<sup>55</sup> The legislation approved the Judicial Conference’s ability to authorize the appointment of standing and advisory rules committees, again codifying practice.<sup>56</sup> The legislation also required the Conference to publish a statement of the Rules Committees’ procedures, which had been done since 1983.<sup>57</sup>

The 1988 amendments did not, however, adopt many of the proposals that resulted from the rigorous scrutiny applied to the rulemaking process in the early 1980s. Some of these proposals would have significantly curtailed the discretion and flexibility of the judiciary under the Rules Enabling Act. One proposal, for example, would have required each rules committee to consist of “a balanced cross section of bench and bar, and trial and appellate judges.”<sup>58</sup> This directive was not included in the amendments to the Act. Instead, the legislation simply stated that the Rules Committees were to consist of trial and appellate judges and members of the bar, leaving the specific implementation to the judiciary’s discretion. Other proposals would have imposed more requirements for earlier and different notice of proposed rulemaking, such as requiring formal public notice that a proposed rule change was being considered in advance of any publication and circulation of a preliminary draft, or requiring even earlier formal notice, at the stage when a problem is first identified.<sup>59</sup> Still other proposals responded to criticism that the documents generated in rulemaking did not disclose minority views, did not explain the reasons for rejecting or changing earlier proposals, and did not “alert interested persons to

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54. See 28 U.S.C. § 2073(c) (2006). The authority to close sessions is rarely used. See McCabe, *supra* note 33, at 1671 & n.86.

55. See 28 U.S.C. § 2073(a)(2) (2006).

56. See *id.* § 2073(a)(2), (b).

57. McCabe, *supra* note 33, at 1667; see 28 U.S.C. § 2073(a)(1) (2006).

58. McCabe, *supra* note 33, at 1662 (quoting H.R. REP. NO. 100-889, at 3 (1988)).

59. See BROWN, *supra* note 39, at 43.

controversial matters” or “provide a record to assist review and interpretation.”<sup>60</sup> Some of the bills introduced would have specifically required the Conference to record timely “dissenting views” with an explanation of why the rule was nonetheless recommended.<sup>61</sup> Again, this detailed prescription for how the Committees should operate did not make it into the amended Act.

Recounting every one of the proposals to make the rulemaking process more transparent and open to participation is neither necessary nor interesting. By the time the legislation to achieve these goals was enacted, it largely codified what had become the Rules Committees’ practice and had Judicial Conference support. This end result reflected the benefits of interaction between Congress and the Rules Committees and the Judicial Conference to produce a confluence of views. The legislation avoided detailed directives to the Judicial Conference about how to implement the Rules Enabling Act and retained the structure provided under the Act essentially without change. That structure—review by the Advisory Committees and then the Standing Committee (with membership chosen by the Chief Justice), public comment, then additional input by the Advisory Committees and Standing Committee, and then review by the Judicial Conference, the Court, and Congress—remained in place. It still does, despite numerous proposals for changing the rulemaking structure, particularly the allocation of rulemaking power between Congress and the courts.<sup>62</sup>

If the structure has remained intact, however, the informal processes of rulemaking have altered over the years in response to some of the criticisms and concerns expressed by thoughtful observers and under the gentle encouragement of Reporter Cooper. For example, although proposals to require that the Rules Committee have dedicated membership slots for representatives from certain groups or constituencies have never formally been adopted as part of the Rules Enabling Act, it is now the Committee’s consistent practice to invite participation from the relevant bar and other groups to address and assist the Committee in areas where specialized expertise and experience and differing perspectives could be helpful. Examples of this abound. The Committees actively

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60. *Id.* at 54.

61. *Id.* (citing H.R. 480, 96th Cong. § 2074(e) (1979); H.R. 481, 96th Cong. § 2074(e) (1979)).

62. For a discussion of various criticisms and proposals to change the rulemaking process, see BROWN, *supra* note 39, at 35–86.

encourage attendance at meetings by interested parties. Representatives of some of the larger bar organizations regularly attend, including sections of the American Bar Association, the American College of Trial Lawyers, the American Medical Association, the U.S. Equal Employment Opportunity Commission, the National Employment Lawyers Association, the Lawyers for Civil Justice, and the American Association for Justice. Their presence and the observations they make are matters of record.

The Committee has used a variety of other means to get information from the bench, bar, and academy, including “miniconferences,” surveys, and large conferences. For a miniconference, the Committee identifies a balanced group of thoughtful experts with diverse views on a specific topic and sends out questions and materials—often extensive—in advance. These miniconferences help provide the Committee with a more accurate picture of what is actually going on in the practice of law and what different segments of the bar view as problematic and helpful. They also provide perspectives on the practicability of initial—often exploratory—rules drafts. A miniconference can be held well in advance of a formal rule proposal, as part of the work to determine if there is a problem a rule change is needed to address, or further along in the process to provide guidance on alternative approaches. The Civil Rules Committee used such miniconferences to help educate itself about electronic discovery during the early stages of what became the 2006 e-discovery rule amendments<sup>63</sup> and, more recently, in studying whether those amendments should be revised to address preservation and spoliation issues more directly.<sup>64</sup>

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63. See Memorandum from Myles Lynk and Rick Marcus to Advisory Committee on Civil Rules, Proposal for Effort to Draft Possible Rules Changes to Address the Problems of Electronic Discovery 2 (Apr. 14, 2003), reprinted in ADVISORY COMMITTEE ON CIVIL RULES, AGENDA BOOK, WASHINGTON, DC, MAY 1–2, 2003, VOLUME II, at 263 (2003), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2003-05%282%29.pdf> (noting that the Discovery Subcommittee hosted miniconferences in March 2000 and October 2000 on initial work on electronic-discovery amendments).

64. See Subcommittee on Discovery, Judicial Conference Civil Rules Committee, *Materials Produced for Mini-Conference on Preservation and Sanctions*, U.S. COURTS (Sept. 9, 2011), <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DallasMiniConfSept2011.aspx> (providing agenda and other materials used for the miniconference on preservation and spoliation). The Committee also used miniconferences to learn about problems in litigating summary-judgment motions, in the early stages of considering what became the 2010 amendments to Rule 56; about state-court experience with the type of expert-disclosure requirements that were enacted as part of Rule 26 in 2010; and about experience with subpoenas under Rule 45 in connection with changes to that Rule that, as of this writing, were pending before the Supreme Court. See ADVISORY COMMITTEE ON CIVIL RULES, MEETING MINUTES, NOVEMBER 15–16, 2010, at 3 (2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2010-min.pdf> (noting an October 2010 miniconference on Rule 45); ADVISORY COMMITTEE ON CIVIL RULES, MEETING MINUTES, NOVEMBER 8–9,



Less frequently, the Civil Rules Committee has held large conferences to more comprehensively assess what is going on in the practice and to explore whether rules should be changed, whether better ways of making existing rules more effective should be devised, or both. The Civil Rules Committee held large conferences in 1998 and in 2010. The first, at Boston College Law School, focused on discovery. The second, at Duke University School of Law, took a pleadings-through-trial look at civil litigation, including discovery practices and problems. The conferences brought together judges, lawyers, in-house counsel, state-court judges, governmental lawyers, and nonprofit organizations. These meetings examined how to address problems of undue cost, delay, and burdens that can frustrate the goals set forth in Rule 1 since 1938: “to secure the just, speedy, and inexpensive determination of every action and proceeding.”<sup>65</sup> The resulting presentations, discussions, papers, and studies have been immensely important in illuminating what is taking place in the practice and providing opportunities to work toward improvement.<sup>66</sup>

Another change in the practices of the Rules Committees is reflected in the way the Committees publicize proposals and invite responses. There have been persistent criticisms that even after the 1988 amendments, the Rules Committees remained too insular and isolated.<sup>67</sup> More recently, the combination of technological developments and changes in how the Committees operate has led to increased openness. The Internet has made it easier to disseminate

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2007, at 19 (2007), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2007-min.pdf> (describing the miniconference held in November 2007 on possible amendments to Rule 56); ADVISORY COMMITTEE ON CIVIL RULES, MEETING MINUTES, APRIL 19–20, 2007, at 2 (2007), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV04-2007-min.pdf> (noting that two miniconferences were held on disclosure and discovery of expert trial witnesses and that a miniconference on Rule 56 revisions was held in January 2007).

65. FED. R. CIV. P. 1.

66. See, e.g., Symposium, *2010 Civil Litigation Review Conference*, 60 DUKE L.J. 537 (2010); Symposium, 39 B.C. L. REV. 517 (1998) (symposium issue on Boston conference on discovery rules).

67. See, e.g., Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 294–96 (2009) (suggesting reducing the number of judges on the Committee and striving toward greater balance in the backgrounds of lawyer members); Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 614–18, 637 (2001) (asserting that the Civil Rules Committee’s composition is not ideologically balanced and arguing that “policymakers should consider fine-tuning the generally wise Rules Enabling Act process to ensure that the various committees are more evenly balanced in socio-political makeup”); Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229, 238–39 (1998) (arguing that judges should be removed from the initial drafting process and put in an advisory role).

proposals broadly and has made the comment period more effective. When the proposals concern such central topics as discovery or class actions, the Committees get many written comments during the public-comment period. The comments are posted on the Rules Committee website. The Committee then gets comments on the comments. A robust national debate can result.

Each Committee conducts as many as three public hearings around the country on published proposals, at which anyone can testify. This is not new. But additional exposure from the Internet increases the number of those who want to, and do, testify on central or controversial issues. Technology makes it easier for people to testify from remote places. This allows those facing budgetary constraints—such as judges—to testify more often. The public hearings held on the proposals later enacted as the 2010 changes to Rule 56 exemplify the use of such innovations to expand participation and make robust exchange even more so.<sup>68</sup>

As with the proposals to allocate membership spots for particular viewpoints,<sup>69</sup> proposals to increase congressional participation in rulemaking have not found favor.<sup>70</sup> Yet informal consultation with Congress has never been more pronounced and the cooperation of Congress, where statutory amendments were needed in conjunction with rulemaking, never higher. The Committees have welcomed opportunities to work with Congress on improving the Rules. The Committee Chairs, the Reporters, and the staff of the Administrative Office of U.S. Courts have led these efforts to keep

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68. The extensive comments and testimony submitted about the Rule 56 proposals are available at <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Comments/Proposed0808Comments.aspx>.

69. See, e.g., WEINSTEIN, *supra* note 53, at 106 (supporting Professor Lesnick's view that the "composition of the advisory committees should be more representative") (footnote omitted); Coleman, *supra* note 67, at 294–96; Lesnick, *supra* note 53, at 581 ("Greater care needs to be taken that the lawyers appointed to the advisory committees reflect a true cross-section of those segments of the public and of the bar likely to be affected by the rules in the relevant areas."); Stempel, *supra* note 67, at 614–18, 637.

70. For examples of proposals to increase congressional involvement in rulemaking, see, for example, Clinton, *supra* note 53, at 62 (arguing that there is a continuum between substance and procedure, and that Congress must either "delineate with more particularity the areas which the Supreme Court cannot unilaterally invade, as it has begun to do in enacting section 2076, or it must again assume for itself the burden of affirmative approval (although not necessarily the initiative and drafting) of the general rules of practice and procedure for the federal judiciary"); Coleman, *supra* note 67, at 293 (suggesting that increasing congressional involvement in the rulemaking process would be beneficial, because under current procedures, "if the Committee strays from [the goal of court] access, Congress is too busy to notice"); Lesnick, *supra* note 53, at 583 ("Rule drafting, it seems clear, is legislative work, but the habits of judges and of those dealing with them are not easily altered when they turn to their nonjudicial tasks. A legislative commission, even if staffed partly by judges, would inevitably be more open, less prone to give over-riding weight to confidentiality, insularity, and the muting of controversy than is the Judicial Conference.").

Congress well informed and involved. The Standing Committee Chair and one or more Advisory Committee Chairs routinely meet with the staff of the House and Senate Judiciary Committees—and, on occasion, with members—to let them know what the Supreme Court has approved that they will be reviewing, to preview work that is still in the pipeline, and to discuss proposals for legislation that would affect the Rules. Ed Cooper and other Reporters have aided the Committee Chairs in these communications with Congress.

Proposals for repeal of the supersession clause in the 1934 Act have also not found favor.<sup>71</sup> An effort in an earlier version of the 1988 bill to delete the supersession clause of the 1934 Rules Enabling Act did not succeed.<sup>72</sup> Those who supported it asserted that the reasons the supersession clause was important in 1935—to achieve the merger of law and equity and displace inconsistent legislation—were no longer present, and that the way in which the clause operated to repeal a statute raised constitutional questions.<sup>73</sup> With sound guidance from the Reporter, the Rules Committees have been careful to avoid using supersession authority, instead working with Congress to avoid conflicts with existing statutes.<sup>74</sup>

Other proposals have focused on requiring that rulemaking be more informed by empirical information that demonstrates a need for a rule change and provides a basis to predict its likely impact.<sup>75</sup>

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71. The supersession clause states that “[a]ll laws in conflict with . . . rules [promulgated under the Act] shall be of no further force or effect after such rules have taken effect.” 28 U.S.C. § 2072(b) (2006).

72. See McCabe, *supra* note 33, at 1662–63.

73. See *id.*

74. See, e.g., FED. R. CIV. P. 86(b) advisory committee’s notes (2007) (explaining that Rule 86(b)—which provides that if rule provisions conflict with another law, priority in time for purposes of 28 U.S.C. § 2072(b) is not affected by the 2007 amendments that restyled the Civil Rules—was added to clarify that the restyled rules were not intended to supersede other laws through the Enabling Act’s supersession clause); Memorandum from Leonidas Ralph Mecham, Dir., Admin. Office of the U.S. Courts, to the Chief Justice of the United States and the Associate Justices of the Supreme Court (Nov. 19, 2001), *reprinted in* 207 F.R.D. 336 (2002) (transmitting to the Supreme Court proposed stylistic amendments to the Federal Rules of Criminal Procedure; noting that after the Judicial Conference had approved of the proposals, the USA PATRIOT Act added new provisions to two Criminal Rules; and noting that the Advisory Committee was preparing conforming amendments to avoid confusion and possible supersession problems); see also Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 41–42 (2010) (“[A]s part of the successful campaign to persuade the House not to insist on repeal of the supersession clause in the 1988 amendments to the Enabling Act, Chief Justice Rehnquist wrote a letter asserting that the Judicial Conference and its committees ‘have always been keenly aware of the special responsibility they have in the rules process and the duty incumbent upon them not to overreach their charter.’”).

75. See, e.g., Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 841–42 (1993) (arguing for a moratorium on rulemaking until the likely impact of the proposed amendments is understood and supported with empirical evidence); Walker, *supra* note 35, at 464 (proposing that discretion in exercising the

In 1983, the amendment of the sanctions provisions of Rule 11 to, among other things, make attorney's fee awards mandatory on a finding of frivolous filing, led to an explosion of academic criticism over the lack of empirical support for the revisions.<sup>76</sup> Professor Burbank called for an end to any rulemaking unless, and until, there could be a thorough and empirically based study of proposed changes in light of the experience with prior amendments.<sup>77</sup> The 1993 discovery rule amendments led to another outpouring of criticism over the absence of empirical study.<sup>78</sup> Some called for legislation to create a national body to oversee experiments with local rules and create a controlled empirical basis for proposing national changes.<sup>79</sup> Such proposals foundered over uncertainty about who should make up such a national body, how it should function, and whether such rigid requirements would add intolerable amounts of time to a process that is already designed to take at least three years and often takes more.<sup>80</sup> But the criticisms were heard. The result is a modern approach to rulemaking that heavily relies on empirical

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rulemakers' delegated power be curbed by requiring the Advisory Committee to "make rules based on adequate information" and requiring analyses of all proposed major rule changes to be submitted in advance of any publication for comment to the FJC, which would have the authority to reject the proposal); Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121, 1204 (2002) (arguing that "what is needed is a statute that would vest the power to create experimental rules in the Standing Committee").

76. See, e.g., Burbank, *supra* note 75, at 844 ("[A]mended Rule 11 was promulgated in a virtual empirical vacuum, but with numerous warnings from the bar about its potential costs.") (footnote omitted); Carl Tobias, *Discovery Reform Redux*, 31 CONN. L. REV. 1433, 1434 (1999) (noting that the 1983 version of Rule 11 proved "troubling" because the rule revisors had not collected empirical data on Rule 11's operation before revising it in 1983); Matthew G. Vansuch, *Icing the Judicial Hellholes: Congress' Attempt to Put Out "Frivolous" Lawsuits Burns a Hole Through the Constitution*, 30 SETON HALL LEGIS. J. 249, 304 (2006) ("Rule 11 was changed in 1983 without an empirical justification and then was altered again because the 1983 amendments were perceived to have created all of the problems that the bar had predicted but that the rulemakers had ignored."); Willging, *supra* note 75, at 1122 ("The tone set by the original rulemakers and their successors came under attack in the late 1980s and early 1990s when commentators decried the lack of empirical support for major rule revisions relating to Rule 11 sanctions in 1983 and Rule 26(a) initial disclosures in 1993."); see also Georgene M. Vairo, *Foreword*, 37 LOY. L.A. L. REV. 515, 517 n.4 (2004) ("It is fair to say that the debate about the 1983 version of Rule 11 prompted the need for empirical study in the rulemaking process.").

77. See Burbank, *supra* note 75, at 842.

78. See, e.g., *id.* at 845 (noting that the 1993 amendments to Rule 26 were based on "little relevant empirical evidence"); Willging, *supra* note 75, at 1122–23 (explaining criticism of the 1993 amendments that imposed a requirement of initial disclosures in Rule 26(a)).

79. See, e.g., A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1585–86 (1991). See generally Willging, *supra* note 75 (reviewing proposals for, and evolution in the use of, empirical research in rulemaking).

80. Cf. Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 829 (1991) (noting that while empirical study has its benefits, it can also delay solving a problem).

study by the Federal Judicial Center and the collection of information through national and regional conferences and calls for comment. Ed Cooper has been a leader of this trend to a more empirical rulemaking process.

Over the past two decades, the Committees, led by the Civil Rules Committee, have obtained and studied empirical data as an integral part of the rulemaking process. The Committees recognize that the need for such data is acute when the issue affects a large number or an important aspect of cases. Issues like this often come before the Committees with broad agreement that there is a serious problem under the existing rules but little agreement on a potential solution. Empirical data gathering and analysis help the Committees understand the extent and frequency of the problem, how the existing rules are in fact operating, whether the problem identified is one that can be addressed by changing a rule, and what the effect of a particular proposed rule change is likely to be. This evolution in practice is a good example of how the Committees have listened to criticisms and used the flexibility and discretion the Rules Enabling Act provides to adopt suggestions for change without legislation amending the Act and without the problems that specific legislative directives would inevitably create.

The Civil Rules Committee has been at the forefront of using empirical data, and Ed Cooper has been critical to that work. The Committee has gathered empirical information from a variety of sources throughout the rulemaking process. The Committee has frequently asked the FJC to collect and study empirical information in advance of formal rulemaking and as specific questions arose during rulemaking. Some of the studies rely on sources that have become practically available only recently. Using the tools computers and computerized docketing now provide, the FJC researches case filings to detect trends and causal relationships. This kind of research was extraordinarily difficult and time-consuming before electronic filing, but the Public Access to Court Electronic Records (PACER) system has made docket and case information remotely and efficiently available. A recent example of such work for the Civil Rules Committee is the detailed study of Rule 56 motions in the federal district courts, to help the Committee understand the likely impact of a proposed national “point-counterpoint” rule requiring a detailed statement of undisputed

facts by a party moving for summary judgment and the nonmovant's detailed fact-by-fact response.<sup>81</sup>

The Civil Rules Committee has asked the FJC to conduct surveys of the bench and bar in connection with a number of proposed rule changes. These surveys have included a 1997 closed-case survey done in connection with the changes to Rule 26(b)(1) in 2000 on the scope of discovery, changes to the rules on initial disclosures, and the imposition of presumptive limits on the number of interrogatories and the length of depositions.<sup>82</sup> In 2010, the FJC did a more thorough closed-case survey on costs and discovery than it had been able to do in 1997, giving the Committee information on the number and types of cases with large discovery costs—information critical to the Committee's work on ways to control discovery effectively and fairly.<sup>83</sup> The Committee has also asked the FJC to help analyze and explain surveys of lawyers and litigants and other empirical studies done by other organizations or scholars.<sup>84</sup>

Through this institutionalized use of empirical information, the Civil Rules Committee has worked to draw out, consider, and address the concerns of competing interests, actively engaging those with diverse views in the discussion. The process has allowed proposals—developed through countless drafts by Ed Cooper and the Committee's Associate Reporter, Richard Marcus—to emerge with language addressing many of the concerns raised that were closely examined and found to have validity. The result is a rule proposal with broad support. That is the type of secure basis for rulemaking that proposals to mandate the use of empirical data were designed to provide. The Rules Enabling Act permitted and facilitated this

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81. See Memorandum from Joe Cecil & George Cort to Hon. Michael Baylson, Report on Summary Judgment Practice Across Districts with Variations in Local Rules (Aug. 13, 2008), available at [http://www.fjc.gov/public/pdf.nsf/lookup/sujults2.pdf/\\$file/sujults2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sujults2.pdf/$file/sujults2.pdf).

82. See THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE: A CASE-BASED NATIONAL SURVEY OF COUNSEL IN CLOSED FEDERAL CIVIL CASES (1997), available at [http://www.fjc.gov/public/pdf.nsf/lookup/discovty.pdf/\\$file/discovty.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/discovty.pdf/$file/discovty.pdf).

83. See EMERY G. LEE, III & THOMAS E. WILLGING, FED. JUDICIAL CTR., LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS (2010), available at [http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/\\$file/costciv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/$file/costciv1.pdf); see also EMERY G. LEE, III & THOMAS E. WILLGING, FED. JUDICIAL CTR., CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf).

84. See, e.g., EMERY G. LEE, III & THOMAS E. WILLGING, FED. JUDICIAL CTR., ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2010), available at [http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/\\$file/costciv2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/$file/costciv2.pdf) (collecting and comparing results of surveys given to attorneys in the American College of Trial Lawyers, the American Bar Association Section of Litigation, and the National Employment Lawyers Association (NELA), where the FJC administered the ABA Section and NELA surveys).

change in the Rules Committees' work, and the change has made that work better.<sup>85</sup>

In response to criticisms and suggestions, the Rules Committees implemented these and similar informal changes to the ways that the Committees gather a variety of viewpoints on proposed rules, interact with Congress, avoid supersession, and collect empirical data. The flexibility and discretion provided by the Rules Enabling Act made it possible for the Rules Committees to improve the way in which they operate and adapt to changes affecting their work, without the need for externally imposed requirements. That flexibility and discretion, built into the 1934 Act, has helped produce the continued and current success of the process. This success could not have happened without calls for improvement and suggestions for change. The Rules Committees welcome continued critical examination of the process and proposals to make it work better. The changes to the Committees' procedures, using suggestions from varied voices and sources, have improved the process, within the structure of the Enabling Act.

Developments in the Rules Committees' operations reflect the guidance of the Reporters and, in turn, change the way the Reporters work. Their work, like that of the Committees they serve, has also become more varied, more exposed, and more complex. The fact that work begins on many issues and proposals so far in advance of formal rulemaking extends and expands the Reporters' work. Adding events such as miniconferences, work such as surveys and PACER studies, and duties like periodic meetings with Congress amounts to more work for the Reporter, on top of the long-standing tasks of drafting proposed rule amendments, note language, agenda materials, meeting minutes, analytical and explanatory memos, and transmittal documents. The Reporter's work

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85. Of course, other rules committees also rely on empirical data gathering. For example, the Criminal Rules Committee's examination of whether to amend Rule 16 to include a statement of the prosecutors' obligation to disclose exculpatory or impeaching information used a variety of empirical-data-gathering methods. The Committee held a miniconference at which prosecutors, defense attorneys, individuals knowledgeable about victims' rights, and individuals knowledgeable about national security and witness protection issues all appeared. See Criminal Rule 16 Subcommittee, Advisory Committee on Criminal Rules, Agenda Book, Feb. 1, 2010 Miniconference (2010) (on file with Administrative Office of the United States Courts); see also ADVISORY COMMITTEE ON CRIMINAL RULES, AGENDA BOOK, APRIL 15–16, 2010, at 168 (2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Criminal/CR2010-04.pdf> (discussing the consultative session on Rule 16 held on Feb. 1, 2010). The FJC also did a survey regarding Criminal Rule 16. See LAURAL HOOPER ET AL., FED. JUDICIAL CTR., A SUMMARY OF RESPONSES TO A NATIONAL SURVEY OF RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND DISCLOSURE PRACTICES IN CRIMINAL CASES: FINAL REPORT TO THE ADVISORY COMMITTEE ON CRIMINAL RULES (2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/Rule16Rep.pdf/\\$file/Rule16Rep.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Rule16Rep.pdf/$file/Rule16Rep.pdf).

is public and may prompt blog posts or listserv dissemination and comments from many quarters. The Reporter for the Civil Rules Committee, which often deals with controversial issues, must work and write extraordinarily quickly, thoroughly, accurately, and clearly; must know and understand the law; must have exquisite judgment; and must be able to engage in diplomacy. The Reporter must help the Committee know when a particular proposal should be changed, adopted, or rejected, even when it represents years of work and effort. We have just described Professor Ed Cooper. His facility with words, phrases, and writing manages to both effectively communicate and entertain.

A brief description of two recent rulemaking episodes provides examples of changes in how the Committee operates and some of Professor Cooper's contributions as Reporter.

### III. FROM CLASS ACTIONS TO SUMMARY JUDGMENT

In the 1990s, the Civil Rules Committee was looking closely at Rule 23 in response to concerns about both nationwide and multistate mass torts class actions and consumer class actions. Large-scale litigation in state and federal courts had grown significantly.<sup>86</sup> There was significant controversy and disagreement about whether damages class actions were appropriate for personal-injury mass claims and what a feasible alternative would be to resolve such claims efficiently and fairly.<sup>87</sup> There was significant controversy and disagreement over whether so-called negative-value consumer cases, in which individual recoveries were too small to justify individual litigation, were benefitting only the lawyers who filed them, usually on behalf of an uninterested class.<sup>88</sup> Overlapping and duplicative classes simultaneously pending in different federal courts or in federal and state court, and efforts to "shop" settlements that were rejected in one court to other courts perceived to have more relaxed standards, were major and growing concerns.<sup>89</sup> During the same period, what became the Class Action Fairness Act (CAFA)<sup>90</sup> was working its way through Congress, raising in a different way the

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86. See John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 *MISS. C.L. REV.* 323, 345 (2005) (noting the growth of class actions).

87. See *id.* at 347–48.

88. See *id.* at 356.

89. See *id.* at 387 (noting the problems with overlapping and duplicative class actions).

90. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. §§ 1332(d), 1453, 1711–1715 (2006)).



question of the proper role of the Rules Committees vis-à-vis Congress. In their essays, Professor Struve, Professor Mullenix, and Professor Kane describe well how the Committees and, in particular, Ed Cooper, recognized the complexities of a rules-based response to these problems.<sup>91</sup> We will only briefly add to those discussions.

The process the Civil Rules Committee used in addressing the class-action issues exemplifies many of the ways the Committees now operate. The work began in the early 1990s, when Judge Sam Pointer was Chair, and continued under the chairmanships of Judge Patrick Higginbotham, Judge Paul Niemeyer, and then-Judge David Levi. The Standing and Civil Rules Committees convened a conference to bring together experienced practitioners, academic experts, and judges to educate the Committees about modern class-action practice.<sup>92</sup> At the Civil Rules Committee's request, the FJC undertook a study of federal class actions.<sup>93</sup> The Committee informally circulated proposals for change to obtain guidance from members of the bar on both sides of the "v." Different proposals were eventually published, including the change to Rule 23 permitting interlocutory appeals from an order of the district court granting or denying class-action certification. This proposal became effective; others did not, in part because the public comments on proposals that added certification factors or called for different certification standards for a settlement class revealed deep divisions and uncertainties about the proposed changes. The empirical studies and extensive public comments gave the Committee a wealth of new information about class-action practice.<sup>94</sup> In 2003, amendments providing better judicial supervision of settlements, class counsel, and attorneys' fees were enacted based largely on the insights that the long rulemaking process provided.<sup>95</sup>

The 2003 amendments did not address two critical questions. One was whether Rule 23 could address overlapping and duplicative class actions pending simultaneously in state and federal courts.

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91. See Kane, *supra* note 5, at 631–36; Mullenix, *supra* note 7, at 664–71; Struve, *supra* note 11, at 697 n.3.

92. See ADVISORY COMMITTEE ON CIVIL RULES, MEETING MINUTES, OCTOBER 22–23, 2001 (2001), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CRAC1001.pdf> (minutes of the October 2001 conference on Rule 23 at the University of Chicago Law School).

93. See THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO ADVISORY COMMITTEE ON CIVIL RULES 1–2 (1996), available at [http://www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/\\$file/rule23.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/$file/rule23.pdf).

94. See Rabiej, *supra* note 86, at 367–68 (noting the wealth of materials that came from the study of class actions, which led to the 1998 amendments to Rule 23).

95. See *id.* at 368–69 (describing the proposals to amend Rule 23 that took effect in 2003 and how they were influenced by the Committee's earlier work on Rule 23).

The second was what position the Rules Committees and the Judicial Conference should take on the pending CAFA legislation. The Committee gave careful consideration to both questions. Although that consideration did not result in formal proposals, it was the Rules Enabling Act process that provided the framework for a thoughtful, workable resolution.

Professor Cooper issued a Reporter's call for comment on the issues of overlapping and duplicative class actions.<sup>96</sup> The response to that call for comment was thoughtful and copious. It allowed the Civil Rules Committee to explore and persuade itself—and others—of the rulemaking and federalism constraints that counseled against a formal rule change.<sup>97</sup> And the Standing and Civil Rules Committees collaborated with another Judicial Conference Committee—the Committee on Federal-State Jurisdiction—to craft a statement, which the Judicial Conference endorsed, on the pending legislation enacted as CAFA.<sup>98</sup> That statement reflected the Advisory Committee's recommendation to recognize and support “the concept of minimal diversity for large, multi-state class actions, in

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96. See DAVID F. LEVI, CHAIR, ADVISORY COMMITTEE ON FEDERAL RULES OF CIVIL PROCEDURE, REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 293 (2002), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2002.pdf>.

97. See *id.* (“[T]he Committee expressed a unanimous consensus that the problems created by overlapping class actions are worthy of congressional attention and that some form of minimal diversity legislation might provide an appropriate answer to some of the problems.”); *id.* at 13 (“In light of . . . constraints on rulemaking, and because of the sensitive issues of jurisdiction and federalism implicated by overlapping class actions, Congress would seem the appropriate body to deal with the question.”).

98. The Judicial Conference's Committee on Federal-State Jurisdiction, after extensive discussions with the Standing Committee, recommended, with the Standing Committee's concurrence, adopting the following resolution, which the Judicial Conference unanimously adopted:

The Judicial Conference recognizes that the use of minimal diversity of citizenship may be appropriate to the maintenance of significant multi-state class action litigation in the federal courts, while continuing to oppose class action legislation that contains jurisdictional provisions that are similar to those in the bills introduced in the 106th and 107th Congresses. If Congress determines that certain class actions should be brought within the original and removal jurisdiction of the federal courts on the basis of minimal diversity of citizenship and an aggregation of claims, Congress should be encouraged to include sufficient limitations and threshold requirements so that federal courts are not unduly burdened and states' jurisdiction over in-state class actions is left undisturbed, such as by employing provisions to raise the jurisdictional threshold and to fashion exceptions to such jurisdiction that would preserve a role for the state courts in the handling of in-state class actions. Such exceptions for in-state class actions may appropriately include such factors as whether substantially all members of the class are citizens of a single state, the relationship of the defendants to the forum state, or whether the claims arise from death, personal injury, or physical property damage within the state. Further, the Conference should continue to explore additional approaches to the consolidation and coordination of overlapping or duplicative class actions that do not unduly intrude on state courts or burden federal courts.

which the interests of no one state are paramount, with appropriate limitations or threshold requirements so that the federal courts are not unduly burdened and the states' jurisdiction over in-state class actions is left undisturbed."<sup>99</sup> That process left to Congress what was for Congress, allowed the courts to weigh in, and resulted in the Rules Committees changing Rule 23 in ways that did not implicate jurisdiction or diversity. This reflected and preserved the Rules Enabling Act's allocation of rulemaking and legislative authority between the courts and Congress. It was all done under the structure put into place by that Act in 1934, and Professor Cooper was essential to the work.

The 2010 amendments to Rule 56 also demonstrate the Rules Committee process. As Professor Gensler points out in his essay, the Civil Rules Committee studied Rule 56 as part of the 2007 "Style" project and recognized that it badly needed revisions beyond what could be done in that project.<sup>100</sup> The rule had become so far removed from modern summary-judgment practice as to spawn numerous varying local and individual judge-made rules. About half of the ninety-two districts had local rules requiring movants to set out, in separately numbered paragraphs, the facts that they believed to be undisputed and that entitled them to summary judgment. Of the fifty-six districts with such rules, twenty required the nonmovant to respond in kind. The rest of the districts did not have such a requirement.<sup>101</sup> To improve national consistency, the 2008 proposal included a so-called point-counterpoint provision. The proposed change would have required the party seeking summary judgment to file three items: a motion, a statement of the facts that are asserted to be beyond genuine dispute, and a brief. The response would have included a submission addressing each stated fact and could include a statement of additional facts asserted to preclude summary judgment, along with a brief. The movant could file a reply to any additional facts stated in the response, again with a brief.<sup>102</sup> The proposal to make the point-counterpoint motion and

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JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE U.S. 13–14 (2003), available at <http://www.uscourts.gov/uscourts/FederalCourts/judconf/proceedings/2003-03.pdf>.

99. LEVI, *supra* note 96, at 17.

100. See Gensler, *supra* note 13, at 611–12.

101. See Memorandum from Jeffrey Barr & James Ishida to Hon. Michael Baylson, Survey of District Court Local Summary Judgment Rules, at 1–3 (Mar. 21, 2007), reprinted in HON. LEE H. ROSENTHAL, CHAIR, ADVISORY COMMITTEE ON FEDERAL RULES OF CIVIL PROCEDURE, REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 110–12 (2007), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2007.pdf>.

102. In relevant part, the proposed amendments to Rule 56(c) that were published in 2008 provided:

response the default national standard, subject to the judge's ability to deviate from it by case-specific order but beyond the ability of a district or division to deviate from it by local rule or standing or general order, provoked a robust and deeply divided debate.

During the public comment period on the proposed amendments to Rule 56 published in 2008, it became clear that imposing the point-counterpoint procedure as the default national standard would be viewed as favoring defendants at the expense of plaintiffs.<sup>103</sup> Lawyers representing plaintiffs, who are often opposing summary-judgment motions, argued that having to respond to individual paragraphs identifying facts asserted to be undisputed and entitling the movant to relief, in correspondingly numbered individual paragraphs, imposed yet another burden on the unrepresented and the underrepresented who were already at a disadvantage in summary-judgment practice.<sup>104</sup> These lawyers also argued that the point-counterpoint procedure often prevented them from telling their client's story in a way that allowed the inferences as well as the facts to become clear, and instead disaggregated—sliced and diced—the evidence in a way that helped defendants and made

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(2) Motion. The motion must:

- (A) describe each claim, defense, or issue as to which summary judgment is sought; and
- (B) state in separately numbered paragraphs only those material facts that the movant asserts are not genuinely in dispute and entitle the movant to judgment as a matter of law.

(3) Response. A response:

- (A) must, by correspondingly numbered paragraphs, accept, qualify, or deny—either generally or for purposes of the motion only—each fact in the Rule 56(c)(2)(B) statement;
- (B) may state that those facts do not support judgment as a matter of law; and
- (C) may state additional facts that preclude summary judgment.

(4) Reply. The movant may reply to any additional fact stated in the response in the form required for a response.

ROSENTHAL, *supra* note 101, at 66–67.

103. See, e.g., Summary of General Comments: 2008 Rule 56 Proposal (Jan. 26, 2009), reprinted in ADVISORY COMMITTEE ON CIVIL RULES, AGENDA BOOK, APRIL 20–21, 2009, at 120 (2009), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2009-04.pdf> (summarizing comments received on proposed amendments to Rule 56 from a professor concerned that “[t]he detailed statement and response procedure may aggravate an already unsatisfactory situation” in civil rights and employment cases in which summary judgment is more frequently sought and granted than in other categories of cases).

104. See, e.g., *id.* at 145 (summarizing comments by a lawyer that the point-counterpoint system in his district “doesn’t work and unfairly favors the defendants” and that “[t]he point-counterpoint system is, for many reasons, ‘biased against plaintiffs and their lawyers in civil rights cases’”).

summary judgment easier to grant. In other words, the lawyers argued, the point-counterpoint procedure could itself affect the substantive standard for granting summary judgment in a way that adversely affected plaintiffs.<sup>105</sup> Other lawyers praised the procedure and emphasized how well it had worked in their cases.<sup>106</sup>

And though it is not common to have judges speak out against rule proposals, it happened here. Judges in districts that had tried point-counterpoint and abandoned it came to ask the Civil Rules Committee not to recommend a change to Rule 56 that would impose the procedure on a national basis. Judges with experience both in districts with it and without it made similar pleas. A judge who had extensive experience with summary-judgment motions in districts with a point-counterpoint local rule and in districts with no such rule, having regularly served in different courts, reported on the results of what turned out to be a nice controlled experiment.<sup>107</sup> The comparison did not yield favorable reviews for the point-counterpoint system.<sup>108</sup> Yet other judges in districts with a local rule requiring point-counterpoint presentation in summary-judgment motions and responses praised its benefits and emphasized that it made deciding summary-judgment motions faster and better.<sup>109</sup> The Civil Rules Advisory Committee added to this information the FJC study on differences in the rulings and time to disposition between districts that required point-counterpoint and those that did not.<sup>110</sup> At the end of the day, the Advisory Committee decided not to pursue the published proposal for a national system of point-counterpoint. There were a number of proposed changes to the summary-judgment rule that were enacted in 2010,<sup>111</sup> but they did not include a national system of a point-counterpoint procedure.

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105. *See, e.g., id.* at 148 (summarizing comments by a lawyer stating that “[p]oint-counterpoint ‘is . . . very disturbing . . . because it encourages defendants to set forth excessive, unnecessary facts that must be addressed by the plaintiff in a painstaking piecemeal way’”).

106. *See, e.g., id.* at 140–60 (summarizing the comments of several lawyers who felt that the procedure was beneficial).

107. *See id.* at 140–41 (summarizing the comments of a judge who had experience in both the District of Alaska, which did not use point-counterpoint, and the District of Arizona, which did use it).

108. *See id.*

109. *See, e.g., id.* at 147 (summarizing the comments of a judge who supported the proposed revisions). *Cf. id.* at 155 (summarizing the testimony of a judge describing how his district successfully uses point-counterpoint, but only by placing limits on the briefing that contains the undisputed facts and responses).

110. *See Cecil & Cort, supra* note 81.

111. The amendments that took effect in 2010 require a party asserting a fact that cannot be genuinely disputed to provide a “pinpoint citation” to the record, restore “shall” to express the direction to grant summary judgment when the standard is met, provide courts with “options when an assertion of fact has not been properly supported by the moving party or

The local-rule variations could continue to operate in this area, at the expense of national consistency.

Both rulemaking episodes exemplified, and resulted from, the robust, transparent, and highly effective process under the Rules Enabling Act. They provide reason for optimism about its continued success.

## CONCLUSION

Important changes in how the Civil Rules Committee operates have occurred during Ed Cooper's tenure as Reporter, including increased public access and participation, increased reliance on empirical research, and greater congressional interaction. These changes made his work as Reporter more challenging and the depth of his knowledge and the soundness of his judgment more apparent. As Judge Higginbotham states in recounting some of the controversial proposed amendments to Rule 23, "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."<sup>112</sup> The essays in this Symposium reflect Ed Cooper's quiet and steady guidance, helping to keep the Civil and Standing Rules Committees from taking steps that would not work and, through his writing ensuring that the promise of greater transparency is fully kept. Those who are thinking about the forthcoming seventy-fifth birthday of the Civil Rules and the eightieth birthday of the Rules Enabling Act should be of good cheer.

In a recent article, Ed Cooper offered words of praise about Arthur Miller, another Reporter to the Civil Rules Committee and a contributor to this issue. Those words capture what we wanted to say about Ed Cooper himself, merely by substituting the word "we" for "I": "[We] have learned much from him, and gained much more by association with him, than [we] could hope to repay. At most [we] can hope to pay tribute where tribute is richly deserved,

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responded to by the opposing party," and explicitly recognize authority to grant partial summary judgments. See JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 14–15, 17 (2009), available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/Combined\\_ST\\_Report\\_Sept\\_2009.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/Combined_ST_Report_Sept_2009.pdf); see also FED. R. CIV. P. 56 advisory committee's notes (2010).

112. Higginbotham, *supra* note 8, at 629.

however far short [we] may fall in the execution.”<sup>113</sup> We look forward to his “good work ongoing.”<sup>114</sup>

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113. Edward H. Cooper, *King Arthur Confronts Twlqy Pleading*, 90 OR. L. REV. 955, 955 n.\* (2012).

114. The words “good work ongoing” come from a poem: “What are we sure of? Happiness isn’t a town on a map, or an early arrival, or a job well done, but good work ongoing.” Mary Oliver, *Work, Sometimes, in NEW AND SELECTED POEMS* 6 (2005).