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PROFESSOR EDWARD COOPER: THE QUINTESSENTIAL REPORTER

Mary Kay Kane*

Ed Cooper's twenty-year service as the Chief Reporter for the Civil Rules Advisory Committee deserves special recognition and tribute not only because of its longevity—which is remarkable in and of itself—but more particularly, because of the scope and depth of the rule changes he has helped to shepherd into law. Just a listing of all the amendments to the Federal Civil Rules during his tenure as Reporter illustrates how his work has helped to shape modern civil litigation procedure.¹ It also underscores his breadth and depth of knowledge about federal procedure that few, if any, can match. So this special occasion marking his twentieth anniversary with the Civil Rules Committee is one well worth taking some time to savor and celebrate with him.

As part of that celebration, I would like to share some observations about two of the Civil Rules projects that I had the pleasure of being involved with when I was a member of the United States Judicial Conference Committee on Practice and Procedure (Standing Committee)² and Ed was the Civil Rules Committee Reporter. Ed's contributions to those projects, though each was very different, seem to me to demonstrate why Edward Cooper will and should always be remembered as “The Quintessential Reporter”³—the Toscanini of the Civil Rules! Those projects, as well as many others that

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1. From 1993–2011, the Civil Rules were amended sixteen times, in 1993, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2005, 2006, 2007, 2008, 2009, and 2010. The topics covered by the amendments run the gamut. In addition to amendments made as part of the general restyling of all the Civil Rules in 2007 and to the timing-computation provisions of all the rules in 2009, there have been amendments to the class-action rule and to the discovery rules; the complete rewriting of Rule 58 on judgments, of Rule 56 on summary judgments, and of the rules on civil forfeiture; and the introduction of new rules setting out procedures for a constitutional challenge to a statute (Rule 5.1), privacy protections for court filings (Rule 5.2), judicial disclosure statements (Rule 7.1), and indicative rulings (Rule 62.1), to name but a few. These changes are detailed in the relevant committee note to each amendment, found in 12A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & RICHARD L. MARCUS, *FEDERAL PRACTICE AND PROCEDURE* (2012).

2. I served on the Standing Committee from 2000–2006.

3. The term “quintessential” is used here as referring to “the essence of a thing in its purest and most concentrated form.” WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 967 (9th ed. 1986).

contributors to this issue describe, all reveal the same amazing qualities. These include his intellectual curiosity and devotion to exploring any and all relevant questions, leaving no stone unturned; his ability to translate concepts and complex ideas into precise, understandable language; his patience and ability to listen to any and all comments or criticisms; and his sheer intellectual brilliance coupled with a touching modesty about his accomplishments and contributions. All these traits manifest themselves each time Ed Cooper takes on a new rulemaking assignment. But I hope the two examples I am about to describe capture why his role has been so important and critical in ensuring that the rule amendments made are well positioned to improve the civil litigation process to the betterment of the courts and the parties who litigate in them.

The first project I want to discuss is the total restyling of the Civil Rules, completed in 2007. At the request of the Chief Justice,⁴ the Standing Committee began working with the different rules committees on a stylistic review of all the rules. The decision to embark on this endeavor rested on recognition that over the years the rules had been amended numerous times by different Reporters and Advisory Committees. Thus, the objectives of this project were to ensure consistent language when identical objectives or meanings were intended, to modernize any uses of archaic language no longer in common usage, and to clarify or sharpen ambiguous language to make the rules more accessible to judges and lawyers alike. But the changes were to be stylistic only; no substantive change could be made unless it was separately identified as a change in existing practice or procedure.⁵ The Committee restyled the Appellate Rules first, in 1998, and restyled Criminal Procedure Rules followed in 2002. The Committee began to restyle the Civil Rules in 2002 and adopted the revisions in 2007.

The process used for restyling the Civil Rules was somewhat different from that used in making other rule amendments. Normally, the Civil Rules Committee decides what amendments to pursue, often after studying areas where problems or gaps appear in connection with certain procedures. That Committee then proposes amendments to the Standing Committee—first, for permission to issue proposals for public comment, and second, after making any

4. Chief Justice Rehnquist directed the style projects for the Appellate Rules in 1998, the Criminal Rules in 2002, and the Civil Rules in 2002–2003. Chief Justice Roberts continued the style project by ordering the restyling of the Evidence Rules, which was just completed in 2011.

5. A description of what was entailed in the restyling of the Rules appears in the Committee Note to the 2007 amendment of Rule 1. FED. R. CIV. P. 1 advisory committee's note (2007).

changes as a result of those comments, for a recommendation for approval to the United States Judicial Conference.

The restyling project involved additional layers of review, with Ed Cooper as the Civil Rules Reporter at the center of it all. Judge Sirica, then-Chair of the Standing Committee, appointed a three-person Style Subcommittee, of which I was a member.⁶ He also hired a legal writing consultant⁷ (who was not a civil procedure specialist). Work began with the writing consultant editing the rules in clusters to make them consistent with modern English language conventions and usage and to improve clarity and consistency. His initial draft was sent to Ed Cooper, who annotated each rule (and almost every change) with footnote queries or hypotheticals. He asked, for example, whether a proposed word change might change the meaning and explained how it might be interpreted differently from the original language. In some instances, he inquired whether the consultant had misunderstood the meaning of an existing word and asked whether or how the courts had interpreted it. He also questioned whether particular language had become a term of art such that any change might cause confusion. In effect, he was the ultimate Socratic teacher, allowing us to reach conclusions about whether a proposed change was purely stylistic only by answering a series of directed questions.

Two special procedure consultants⁸ had been hired by the Civil Rules Committee to assist Ed, and they split responsibility for researching the answers to his questions. He then reviewed their answers and, in some instances, added further comments, questions, or suggestions. This entire work product was forwarded to the Style Subcommittee to revise the original draft in light of the footnote information or to make other stylistic changes it deemed appropriate, and a clean, restyled, and footnote-free draft then was presented to the Civil Rules Committee. That Committee met, with the Style Subcommittee present, to determine whether its members concurred that the proposed changes did not substantively alter the Rules.

Those Civil Rules Advisory Committee meetings again saw Ed Cooper playing a pivotal role. Civil Rules Committee members often would raise some of the earlier questions he had raised, or

6. Judge Garvan Murtha of the District of Vermont was the Subcommittee's Chair, and Judge Thomas Thrash of the Northern District of Georgia and I were the two other members.

7. The writing consultant was Professor Joseph Kimble of the Thomas M. Cooley Law School.

8. The procedure consultants were Professor Richard Marcus of UC Hastings College of the Law and Professor Thomas Rowe, then of Duke University Law School.

new ones, and Ed's encyclopedic memory and understanding of all the Rules (not only the ones before the Advisory Committee at a particular meeting) immeasurably facilitated consensus among Committee members on whether a particular change was substantive or had implications beyond the word choices made. After the Advisory Committee and Style Subcommittee reached agreement about which changes were to go forward, Ed composed the final proposed draft to present to the Standing Committee.

I include this somewhat elaborate description about the process used for the restyling project because only by understanding the careful, nuanced, and detailed attention Ed Cooper gave to the restyling of each and every one of the Civil Rules, and knowing the kinds of insights he was able to provide throughout the multiyear process at each layer of review, can one fully appreciate how pivotal he was to the success of that project. He understood and never lost sight of the big picture, but he also saw every little speck of dust in the room and thereby ensured the integrity of the rulemaking process and the issuance of a product—the restyled rules—that all who participated can be proud of.

The second project I want to relate is very different. It shows another role assumed by the Civil Rules Reporter that demands additional talents and tolerance—a role that is critical in helping the Advisory Committee decide which rule changes need to be made and recognize the challenges that will come with moving ahead. As noted earlier, the Committee generally decides which amendments to pursue. Sometimes that choice begins with complaints or concerns from the bench and bar about certain rules or procedures that are not appropriately addressing modern litigation demands, followed by arguments that rule amendments may be necessary. In the last ten to fifteen years it has become common for the Advisory Committee to sponsor one or more conferences on a particularly contentious topic, inviting key lawyers, judges, and academics in the area to exchange ideas in order for the Civil Rules and Standing Committees to gain greater insight into the problem, the possibilities for improvement through rule changes, and the challenges in drafting appropriate rules to address the problems identified. One such area, in which I was involved, was class actions—an area rife with contentiousness and challenges whenever any rule amendment is suggested.

Among major criticisms of current class-action practice has been the problem of overlapping class actions and multiple class filings for the purpose of finding a court that will grant certification. These overlapping actions are commonly viewed as extremely

wasteful of both judicial and litigant resources. Thus, several suggestions were made that Rule 23 should be amended to, for example, clarify the binding effect of class certification denials or perhaps to allow the injunction of parallel class actions. Despite Ed's early recognition that either of those two solutions would likely pose major Rules Enabling Act⁹ and Anti-Suit Injunction Act¹⁰ problems, the Committee wanted him to try to develop a draft rule proposal and defend it at a Committee-sponsored class-action conference of experts held at the University of Chicago in 2001.

Ed had no difficulty developing Rule 23 language to address the problem presented. After all, he is a master draftsman, and he certainly understood the issue. His paper exploring how those amendments might be defended against attack was an exemplar of a creative and brilliant lawyer developing theories and new legal approaches to try to support a desired objective. And, of course, it was vociferously attacked on the basis that it far exceeded any legitimate rulemaking power. I am sure that the Chair of the Advisory Committee knew when he asked Ed to take on this task that if anyone could ever make it work, Edward Cooper could. Of course, as everyone who follows federal rulemaking knows, the Civil Rules Committee ultimately determined that although the problem of overlapping class litigation was very real and very serious, amending Rule 23 could not resolve it.¹¹ Instead, it focused on other objectives of improving the handling of class actions by incorporating into Rule 23 enhanced notice, settlement, and attorney appointment and fee provisions that in most instances codified what were deemed "best practices" in the field.¹² But Ed's efforts on the overlapping class-action problem should not be viewed as wasteful or in vain, even though the problem was left unaddressed. Because of his work, the Advisory Committee ultimately could decide in good conscience not to attempt a rule amendment in this area since it had explored the solution to this burdensome problem in the most thorough and careful way—the hallmark of all of Ed Cooper's work

9. 28 U.S.C. § 2072 (2006).

10. 28 U.S.C. § 2283 (2006).

11. Nor can it be resolved through preclusion. The attempt to address the problem posed by multiple class-certification decisions through the application of issue-preclusion principles, rather than through rulemaking, was struck down by the Supreme Court in 2011 when it held that due process prevented the application of preclusion to unnamed class members who had filed a duplicate class action in state court. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2381 (2011). The Court noted that by definition, once class certification was denied, the unnamed class members were not parties to the action and could not be bound by the decision not to certify it as a class action. *Id.*

12. These changes ultimately became the 2003 amendments to Rule 23.

through his twenty-year tenure with the Civil Rules Advisory Committee.

These two examples are but the tip of the iceberg of Ed Cooper's contributions to the smooth functioning of the federal courts.¹³ Even standing alone, however, they reveal the many qualities that he has continually exhibited and the roles that he has played as the Civil Rules Reporter. They also underscore why, as I noted at the outset, I believe he deserves the title "Professor Edward Cooper: The Quintessential Reporter."

13. Of course, his authorship of multiple treatise volumes in CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS*, also establish him as a major thinker and contributor to the understanding of federal court jurisdiction and preclusion issues that lie at the heart of the federal court system.