

# That's Rick

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Rick Marcus retiring? Not possible. No way. Well, I might be persuaded that he will retire from the job with a paycheck. Retiring will leave him free to go full speed ahead, engaging in the full range of his abiding projects, rebalancing the time devoted to one or another. It will free him from the relentless onslaught of final exam papers, except to the extent he chooses to volunteer for the sheer joy of teaching.

I have known Rick for going on forty years. I have worked with him professionally for thirty years. Others have known and worked with him for still more years. Many encounter him regularly, often daily, in hallways, meeting rooms, offices, and in the ether. Great numbers have learned from him in Illinois, San Francisco, and just about everywhere else—in classrooms, conferences, and meetings of other sorts.

Each of us in these legions of admiring students and colleagues know Rick in different ways. Most of the differences are minor variations on common themes. Some may reflect greater variations in the settings that have brought us together with him. I, for example, have never encountered Rick in a law school classroom. But he has been my teacher and coworker for decades in a common enterprise, as Reporters for the United States Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure. “Advisory” committees come in many shapes. This one advises the Standing Committee on Rules of Practice and Procedure, which in turn sends Rules recommendations to the United States Judicial Conference, thence to the Supreme Court for adoption—if all goes well. It is a long chain of responsible consideration, deliberately undertaken with great care over extended periods for all but the occasional (and rare) correction of a technical error. For all of that, each of the five advisory committees bears primary responsibility for maintaining and revising their respective sets of Federal Rules: Appellate, Bankruptcy, Civil, Criminal, and Evidence.

Reporters play a vital role. Working with Rick in this setting has provided a unique opportunity to know him as the preeminent worker-scholar in civil procedure. That will be my primary focus. But working together, meeting personally several times a year and far more often by one remote means or

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another, has generated a strong sense of Rick's person and a deep and abiding affection that deserve notes as well.

I first came to know of Rick through his writing, which I greatly admired. His articles on pleading struck me with particular force. The chance to meet him in person came soon, as he spent the 1986-1987 year as a visitor at the University of Michigan Law School, teaching an array of courses and even travelling to a meeting of the local rules committee for the Eastern District of Michigan. That acquaintance was wonderfully impressive.

Some years later that early acquaintance led to what was surely my most important contribution to the Federal Rules of Civil Procedure process. Judge Paul Niemeyer was the newly appointed chair. The Committee was working mightily to find improvements to the class action rule, but Judge Niemeyer thought the time had come to study the discovery rules as well. This, he thought, would be too much work for one Reporter. He suggested I take a day or two to reflect and then suggest who might best be recruited for the task. My instant reply was that I needed no time, unless he should fail to persuade Rick Marcus to join in. Rick was persuaded, and remains in place. Only a small world knows much about the rulemaking process, but in that world, Rick has earned legendary status. He would have been found inevitably but sooner was better.

Rick's contributions to the Rules committees are as vitally important now as they have been from the beginning. The committees are each structured in similar ways. All members have achieved greatly in their professions. A majority are federal judges—magistrate judges, bankruptcy judges, district judges, and circuit judges. Four are practicing lawyers. Another is from a state supreme court, sometimes from a state that has rules similar to the federal rules and other times from a state with quite different rules. Another is an ex officio member from the Department of Justice. One is an academic. All members rotate off, usually after serving six years. In this milieu, Rick has earned not just respect but admiration from all sides. Practicing lawyers and judges may be tempted to question the practical, real-world value of academics who deal with the intensely practical, experience-driven issues encountered in an attempt to improve adversary procedure. Rick has a deep understanding of how procedure works in the real world. He also understands the need to synthesize competing views and experiences and knows how to do it. If a lofty theoretical perception must be tailored to fit with the system we have, so be it. If an occasional perspective from one or another of the world's different legal systems creeps into the discussion, that too is accepted for the fresh perspective it offers. The hosts of lawyers and judges who continually reconstitute the Advisory and Standing Committees have come to hold Rick in high esteem for his superb blend of theory with procedure, on the ground and in the trenches.

Specific illustrations could be drawn from many projects. Rick is actively involved in everything the Advisory Committee does and particularly takes the lead in discovery and aggregate litigation projects. This is not surprising, given his role as author of the leading complex litigation casebook and of multiple

treatise volumes on discovery. Brief identification of a few examples can provide a hint of what he does, although informed imagination must carry the load of real appreciation.

Discovery has had a regular role on the committee agenda, and without a significant gap, for the last thirty years. One major project was launched in 2010, culminating in a wide range of discovery rules amendments that took effect in 2015. The work was broad enough to require two subcommittees, working in tandem on related but separate tracks. Rick was especially important in guiding the work through the process of knitting together sound policy, practical problems, and continually evolving technology to produce a new and good rule on preserving—or failing to preserve—electronically stored information. Everyone involved engaged in learning and teaching each other and speculating about the best open-ended ways to accommodate whatever changes might come to the means of storing information. At times, it seemed tempting to yield to the counsels of despair, but Rick held to the task, leading the way to a rule that seems to function well.

A more recent discovery example is ever so much more modest. Civil Rule 30(b)(6) makes it possible to depose an artificial entity, such as a business corporation. The notice or subpoena “must describe with reasonable particularity the matters for examination.”<sup>1</sup> A deposition of an automobile manufacturer in a steering-design case, for example, can require the manufacturer to designate the real persons who will testify about the design and the design process. Complaints about experiences in implementing this practice provoked consideration of an array of ambitious changes that might be made. In the end, after a vigorous round of public comments and testimony at public hearings, the resulting amendment was limited to requiring the parties to “confer in good faith about the matters for examination,” whether “before or promptly after the notice or subpoena is served.”<sup>2</sup> Many good lawyers were already doing that, to real advantage, but the painstaking work that Rick guided through to completion showed the risks of attempting more outweighed the potential gains.

Aggregate litigation rules also have been shaped by Rick’s masterful guidance. The most recent example is new Civil Rule 16.1, which has been transmitted by the Supreme Court to Congress, to take effect on December 1, 2025, unless Congress (en)acts to reject it. The Rule addresses, for the first time, topics related to the conduct of cases consolidated for multidistrict pretrial litigation (MDL). An MDL proceeding may consolidate a rather modest number of individual actions. The most massive MDL proceedings consolidate tens of thousands of individual actions. Practices for managing mass case proceedings have developed through a complex process in which experienced MDL lawyers devise new approaches, experienced MDL judges work with the lawyers and consult with each other, and new lawyers and judges are gradually drawn into

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1. FED R. CIV. P. 30(b)(6).

2. *Id.*

the mix. The more inventive practices have seemed to lack a firm foundation in current rules texts, and despite regularized efforts to share knowledge of new practices and how they have worked, many MDL judges have been heard to lament “I wish I knew then what I know now.” Stepping into this world with the rulemaking process was a daunting task.

Civil Rule 16.1 took many years, beginning with a wide range of conferences with MDL lawyers and judges and meetings with organized lawyer groups. An early draft rule, modeled on Rule 23 class-action provisions, was considered and rejected. The final rule identifies many of the practices that have developed across countless numbers of MDL consolidations, spanning all sizes and all subject matters. Judges are invited to consider these practices in managing the proceeding, without mandating any specific steps to be taken. Once again, Rick’s steady guidance led to a better rule than could have been crafted with anyone else in the wheelhouse.

Rules work in progress involves a wide range of topics, some familiar and some not yet directly addressed by a formal rule. Third party litigation funding is a fine example. Nonrecourse litigation funding has grown by leaps and bounds in recent years. It seems likely that many of the most important questions blend matters of judicial procedure with enough matters of substantive right to stymie comprehensive regulation by court rules. Concerns about professional responsibility also enter the picture. Still, it is worthwhile to pay close attention to these rapidly evolving practices to determine whether there is some useful role for court rules. Any rule proposal, however, would have to be framed with a clear and reasonably deep understanding of the many substantive aspects that lie outside the realm of judicial rulemaking. Rick devotes considerable energy to keeping abreast of developing financing practices and academic work, including international developments. No one could be better suited to the task.

Working with Rick on these and countless other tasks has been inestimably valuable and pleasurable. We regularly begin at different points, and work to lead each other to common ground. He persuades me, and at times I persuade him. I have never been his student in Rick’s law school classroom, but he has taught me continually and well. I suppose that Rick is not infallible, but he comes close.

If we have an identifiable difference, it lies in our different approaches to matters of rule drafting style. The Standing Committee long ago mandated that each of the five sets of federal rules must be drafted in a common style. Lawyers and judges seeking guidance or advantage often look to parallel provisions in different sets of rules. Different ways of expressing the same thought in different sets of rules lead to, and at times seem to support, different interpretations of what is intended to be a uniform meaning. The task cannot be executed perfectly but has been greatly helped by a team of expert style consultants. Rick at times seems impatient with their suggestions, particularly when made at the last minute without much time to guard against unintended changes of meaning, or when earlier style conventions seem to evolve in new directions. “Is there no

sense of *res judicata*”? I am always grateful for whatever help I can get. But then, perhaps I need it more.

Rick is daunting as a professional model. However, he is much less daunting as a person and friend. We have some characteristics in common, perhaps verging on eccentricities. We both insist on maintaining WordPerfect 5.1 for word processing—it seems antique and quaint to many but remains the best word piano available for our needs. We share an abiding sense of value that may be politely described as thrifty, or even frugal. At times I may approach “cheap.” But I cannot approach his parsimonious tenacity in continuing to drive a 1986 compact automobile that he persuaded his insurer to abandon to him after paying full compensation as a total loss. In other ways, we are different. Rick’s physical energy and prowess are overwhelming. More than once, we have moved together through airports that have parallel escalators and stairs. To my credit, I walk up the escalator, lugging shoulder bags for personal effects and work impedimenta. Rick, similarly encumbered, bounds up the stairs and arrives at the top well ahead of me.

On a more personal level, Rick is fascinating. He forever quotes song lyrics that I, ignorantly, attribute to the 1960s or perhaps 1970s. He refers to motion pictures from bygone days with affectionate knowledge. He occasionally spices up a working conversation with direct or esoteric trivia questions: What is the fourth most populous country in the world? He is widely read in nonprofessional news and literature—once, when I confessed to not having read one of his favorite books, he sent me his personal copy with instructions to keep it. He is the perfect example of the doting grandfather, continually sharing news and videos of “kiddo’s” exploits and astonishingly rapid developments—the combination of child and grandfather are irresistibly charming and rewarding.

No picture of Rick can be complete, but one vital piece remains to be supplied. I met Rick’s late wife, Andrea Saltzman, occasionally over a wide span of years, and found her completely engaging. Then, more recently, she took to coming along with Rick to Advisory Committee meetings. My wife and I got to know her much better then. She taught me and my wife that one can be brilliant and a lawyer, and at the same time be a delightful and warm friend. It became apparent that she and Rick were closely entwined, entirely at ease in agreeing or disagreeing with each other on an immense array of topics, vitally important or curiously frivolous. They supported each other in all ways. She carries on in Rick, and he is the better for it.

Rick is not without quirks. He can be impatient with things that impede orderly progress, particularly things electronic. A good summary was provided on several occasions by our treasured joint venturer in the worlds of procedure, Professor, Dean, Chancellor Mary Kay Kane. Reporting one or another episode of Rick’s irascible frustrations, she would shrug—visibly or audibly—and say, “That’s Rick.”

And that’s good.

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