

# Celebrating the Neutral and Gradual: An Ode to Professor Richard Marcus

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I love proceduralists. I wasn't sure why I found them such interesting and admirable people until I asked Professor Richard Marcus why he had chosen civil procedure as his life's work. His answer was quick and short. "I somehow became enamored of civil procedure because it aspired to neutrality." On closer questioning, Rick acknowledged that neutrality in an adversary system in which the stakes are often high is . . . well, aspirational. But he ardently defends the Federal Rules of Civil Procedure and the rulemaking process because they are so determined to be neutral.

I share his belief and his faith, and I thank him for explaining the singular virtue of the procedural rules and the process of making and changing them. The rulemaking process is set up to create and improve procedural rules that do not put a thumb on either side of the scale, that do not advantage one side of the "v" over another, and that assiduously avoid anything political or politically influenced. A major reason for my belief that the rulemaking process and its recent products have achieved these goals is Rick Marcus. He's been a major force in federal rulemaking since 1996, and a steady source of accurate, insightful civil procedure scholarship since he published his first articles in 1983.<sup>1</sup> We are all beneficiaries. The theme of this piece is to thank Rick Marcus for two things: making the procedures used in civil cases, and consequently, their outcomes, better; and for helping us understand and apply those procedures.

Proceduralists love to talk about the "Giants of Procedure" and the "Golden Age of Federal Procedural Rulemaking." The familiar pantheon of the Giants includes Roscoe Pound, Judge Charles Clark, Judge Benjamin Kaplan, Professor Arthur Miller, and Professor Edward H. Cooper of the University of Michigan Law School. It's a daunting group.

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1. See generally Richard L. Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure*, 66 JUDICATURE 363 (1983); Richard L. Marcus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?*, 71 GEO. L.J. 829 (1983); Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORN. L. REV. 1 (1983).

The Golden Age is usually defined as beginning in 1938, when the Federal Rules were first promulgated. Running to until roughly 1970, when, after years of expansion, the rules reached their “high-water mark” and a period of trying to define some boundaries began. Since the 1970s, Rick has been an important participant in these efforts, as a scholar with a prodigious output of articles and treatises; as a teacher of generations of students, now lawyers and professors themselves; and, perhaps above all, as one with a key role in the rulemaking process.

When I began to think about what to say about Rick, I knew I could draw on our many years working together on the Federal Rules of Civil Procedure through the Judicial Conference Rules Committees. Rick became the Associate Reporter to the Civil Rules Committee in 2011, serving with Professor Edward H. Cooper until 2023, when Rick became the Reporter. Rick (and every member of the Committee) was blessed by an extraordinary teacher, Professor H. Edward Cooper, who served as the indomitable Committee Reporter for over twenty years.<sup>2</sup> Rick has now assumed Ed Cooper’s role. He is a superb successor.

Ed, Rick, and I attended every meeting of the Civil Rules Committee and the Standing Committee from 1998 until my term as chair of the Standing Committee ended in 2011. Rick continued to serve the Civil Rules Committees long after my term ended—in fact, he continues to serve as the Reporter today.<sup>3</sup> As Assistant Reporter and now Reporter, he was tasked with preparing voluminous summaries and analyses of the proposed changes for each meeting of the Civil Rules and Standing Committees, along with summaries of the public comments (which were themselves often voluminous). But these writings were far from his only efforts. I asked our wonderful Fifth Circuit librarian to gather all of his articles. Because I still like paper, I am now the proud owner of three stuffed binders of his seventy-five-plus articles. And yes, dear reader, I read them. I have learned a great deal.

Rick has been involved in all the important tasks of the Civil Rules Committee since 1996. Here are just a few of the areas he has worked on, all of which he has improved.

*Class Actions and Mass Actions.* The Committee spent much time on class actions, but in 1998 limited itself to one amendment: the interlocutory appeal from orders granting or denying class certification.<sup>4</sup> When the Committee returned to class actions, it was to focus on the procedures for selecting class counsel, settlement, and awarding attorneys’ fees. Rick’s careful writing and belief in the value of rules that are based on broad experience with good practices are evident in Rule 23(e), (g), and (h).<sup>5</sup> They have worked extraordinarily well

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2. For a full list of prior committee members, see *Past Members of the Rules Committees*, U.S. COURTS, <https://www.uscourts.gov/forms-rules/records-rules-committees/past-members-rules-committees> (last visited Oct. 14, 2025).

3. *Id.*

4. FED. R. CIV. P. 23(f).

5. FED. R. CIV. P. 23(e), (g), (h).

in providing lawyers and judges a common and workable framework for selecting class counsel, scrutinizing settlements to see if they should be approved, and paying counsel appropriate amounts, across a wide variety and size of class actions. Thank you, Rick.

*E-Discovery.* In 2006, the Civil Rules Committee responded to urging from the bar that the chasm between the rules and the suddenly ubiquitous electronic discovery had to be bridged. For a guy who practiced only a short time, and years ago, and who only recently acquired a smart phone, Rick had a deep understanding of the problems that can arise when discovery becomes e-discovery. He started with a comprehensive understanding of the need for clear rules governing discovery mechanics, rights, and obligations, that will work across the wide range of subject matters and sizes of litigations in federal courts. Rick then added to this an accurate understanding of how discovery works—or not—across this range of cases. This understanding is seen in Rule 37, which was amended in 2015 to address the specific problems of sanctions for failure to preserve electronically stored information.<sup>6</sup> Again, thank you, Rick.

*Proportionality.* In 2015, Rule 26 was changed to move the “proportionality calculation” from the basement of Rule 26(b)(2)(C)(iii) to the storefront window of Rule 26(b)(1), as a limit, along with relevance, on the scope of discovery.<sup>7</sup> Proportionality is, to be sure, fuzzy. But the Committee Notes are a terrific source for judges and lawyers trying to figure out what it means and how to apply it to particular cases. The Reporter has the primary responsibility to draft, refine, and rework not only Rule text, but also the Committee Notes. Rick’s careful work is again evident. Thank you, Rick.

*Case Management.* In 2010, the Civil Rules Committee held a conference at Duke University Law School to examine civil litigation in federal courts and propose ways to improve it. The message that emerged was simple—judges needed to be more involved in the cases that need it. The Committee responded by drafting the 2015 amendments, which expanded the topics to be addressed in the meet and confer and in the initial conference with the judge. The amendments also permitted an approach to discovery disputes that many judges have found successful—requiring a pre-motion conference shortly after a dispute arises, without the need for the prolonged and expensive motion-and-briefing minuet.<sup>8</sup> Rick’s ability to listen to judges’ and lawyers’ descriptions of what worked in practice helped shape the rule amendments to allow those good practices to continue.

*Multi-District Litigation.* In 2025, the Committee and Rick developed a new Rule 16.1 to codify and institutionalize the best practices that had developed for managing Multi-District Litigation.<sup>9</sup> The Rule, which became effective on

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6. FED. R. CIV. P. 37(e).

7. FED. R. CIV. P. 26(b)(2)(C)(iii).

8. FED. R. CIV. P. 16(b)(3)(v).

9. FED. R. CIV. P. 16.1.

December 1, 2025, bears the signature mark of Rick’s careful drafting and his insight into the practicalities of litigation amplified by having many cases coordinated by a single judge. Again, the bench, bar, and academy owe Rick a thank you.

In shepherding these and other amendments, Rick was keenly aware—more than many judges—of the risks of the growth of “ad hoc” judicial activity, as judges expanded and front-loaded their role in case development and made decisions without the thorough presentation afforded by the “minuet.” He also understood that “managerial” judging might lend itself to encouraging mediation by giving the judge early information about cases and more occasions to suggest—or exhort—lawyers to opt for mediation. Rick has done us the service of reminding us of the risks—as well as the benefits—of procedural changes. Thank you, Rick.

What lies ahead? As usual, there are preliminary drafts of amendments out for public comment—Rules 7.1, 26, 45, and 81 among them.<sup>10</sup> None seem likely to attract strong pushback, and they are likely to become effective in December 2026. And after that? The Committee is looking at amendments to the rules governing filing under seal, making it clear that the standard for filing under seal is more rigorous than the one for a protective order, but not supplanting the common law and First Amendment criteria for filing under seal.

The Committee is also looking at issues related to remote testimony, an increasingly important part of the practice. Rule 43(a) imposes a “compelling circumstances” requirement for remote trial testimony, but pandemic experience generated interest in taking out the “compelling circumstances” requirement.<sup>11</sup> And, of course, the Committee must look at whether the issues surrounding artificial intelligence will lend themselves to, or benefit from, new rules or rule amendments.

The issue of whether, and how, to require disclosures of third-party litigation funding continues to engage the Committee. The issue has attracted political attention, which is at odds with the Committee’s determination to avoid politics and any appearance of political influence.<sup>12</sup> Again, Rick is leading the effort to study the experience of jurisdictions that have required the disclosure of third-party litigation financing to identify the benefits and drawbacks of implementing such disclosure as a national rule.

In short, says Rick, his work on the Committee continues the tried and true approach—move slowly, move carefully, embrace the incremental

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10. See *Preliminary Draft of Proposed Amendments to Federal Rules*, U.S. CTS. (Aug. 2025), [https://www.uscourts.gov/sites/default/files/document/preliminary-draft-of-proposed-amendments-to-federal-rules\\_august2025.pdf](https://www.uscourts.gov/sites/default/files/document/preliminary-draft-of-proposed-amendments-to-federal-rules_august2025.pdf).

11. FED. R. CIV. P. 43(a).

12. See, e.g., *Setting the Record Straight on Third-Party Litigation Funding*, U.S. CHAMBER OF COM. (Oct. 15, 2024), <https://www.uschamber.com-lawsuits-setting-the-record-straight>; Jarrett Lewis, *Third-Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice*, 33 GEO J. LEGAL ETHICS 687, 687–89 (2020).

improvements, and avoid the risks of the long jumps. This approach has worked for over seventy-five years. Thanks to Rick, among others, it continues to do so and will for years to come.

Before I end this piece, I want to say some words about Rick himself. His family is fascinating. His father, Irvine “Brick” Marcus, was a University of California football star and a broad jumper; a fine athlete. His mother, Bertha, was a state beauty queen and a star in aquatic sports (as well as Miss California in an Atlantic City beauty contest). His brother is a professional musician who plays guitar, violin, other stringed instruments, and sings. And Rick himself? He too was a track star. An ardent traveler, fluent in Spanish as English. He and his wife, Andrea Saltzman, traveled the world before she succumbed to cancer. Andrea was a successful lawyer, specializing in municipal and appellate law, and a forceful community advocate. She is deservedly remembered for her work to defend California’s End of Life Option Act. Rick’s daughter and granddaughter absorb the time he is not teaching, writing, or rulemaking. Fortunately, Rick has figured out how to wring every minute from every day.

Professor Richard Marcus has spent his life improving the rules of civil procedure. He deserves his place in the pantheon of those who have made our civil justice system better, by understanding that maintaining neutrality is key and that incremental changes are both feasible and safe. His predecessor in rulemaking, Benjamin Kaplan, summed it up best:

No one, I suppose, expects of a Rule that it shall solve its problems fully and forever. Indeed, if the problems are real ones, they can never be solved. We are merely under the duty of trying continually to solve them.<sup>13</sup>

Rick has more than done his part. I thank him for the work he has done, and will do, in continually trying to solve the problems we all face and improve the civil justice system we all cherish.

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13. Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 500 (1969).

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