

Richard Marcus, Master of Rules

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Many lawyers are forever indebted to Rick Marcus as a consummate professor of civil procedure, who merges the theoretical with the practical. Professor Marcus enables the students he teaches to not only think like lawyers, but to act like litigators. I did not have the good fortune to be one of Professor Marcus' law school students, but I did learn more than I could ever have imagined about the Federal Rules of Civil Procedure (FRCP) by working with him on the Advisory Committee on Civil Rules. It was a master class in advanced—and practical—civil procedure.

When I was appointed to the Advisory Committee in 2010, I was not entirely unacquainted with the federal rulemaking process. I had been an interested and avid observer of numerous committee meetings, a regular suspect at complex litigation conferences, and a participant in the comment and hearing process that precedes the finalization of proposed new rules and rule amendments. Being predisposed to an interest in the process, and somewhat “rulish” by nature, I was fairly confident going in that I knew the job. In truth, I quickly realized that I did not know what I did not know. But I also realized that Rick Marcus, a seasoned Reporter, knew everything.

Rick's knowledge was and is not a matter of mere expertise. It is not pedantic. It is invariably knowledge to put to practical use, aimed not only at conforming new provisions to the style of pre-existing rules, but at enhancing the Federal Rules' collective function. It is knowledge in service of Rule 1, which admonishes the court and the parties to secure the “just, speedy, and inexpensive determination of every action and proceeding.”¹ Listening to Rick during committee meetings caused me to reflect constantly on that Rule 1 goal of securing fairness, speed, and economy for EVERY action and proceeding, large or small, complex or straightforward.

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

This is no small ambition, given the tendency of civil litigation to grow inexorably in cost, complexity, and delay, but it is the mission I believe Richard Marcus has internalized, and it imbues his approach to the often tedious, technical, and detail-oriented rulemaking process with a quiet and steadfast nobility. Rick recognizes that a few words can make a big difference, and effect, or reflect, a major evolution in procedure. The 2015 amendment to FRCP, Rule 1, itself is a prime example of the Marcus method. This amendment added three little words, “and the parties,” to the text of the Rule. As the Advisory Committee note to the amendment explains:

Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way. Most lawyers and parties cooperate to achieve these ends. But discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with—and indeed depends on—cooperative and proportional use of procedure.²

The addition of the “and the parties” clause articulates what is often referred to as a “duty of cooperation”—a novel concept to adversary procedure traditionalists, but one on which the efficacy of the Rules depends.³ The Committee’s recognition and expression of both the need for, and the complementary nature of, both advocacy and cooperation owes much to the Marcus approach. This additional language has yet to be fully appreciated, much less implemented, by users of the Rules—it is a mere ten years old. But it will, if and as it is read and heeded, catalyze a quiet and constructive revolution in civil litigation. As such, it may stand as one of the most profound and enduring legacies of Richard Marcus’ tenure as the Advisory Committee Reporter.

The law is a profession, a vocation, an art, and a craft. It can be practiced with an emphasis on any of these perspectives. Some lawyers are inspiring advocates, others meticulous drafters. Some pursue the law as devotees, to the exclusion of all else. Lawyers, judges, and legal scholars can be architects, visionaries, creators, illuminators, archivists, and makers. If this sounds like a description of the guilds of a medieval town, in a sense it is. And Professor Marcus’ prominence in multiple guilds of procedure, theory, and practice derives from accomplishment and skill across and inclusive of these categories.

2. FED. R. CIV. P. 1 advisory committee’s note to 2015 amendment.

3. See CHIEF JUSTICE JOHN ROBERTS, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5. The Chief Justice noted that “the amendments may not look like a big deal at first glance, but they are.” *Id.* They “(1) encourage greater cooperation among counsel; (2) focus discovery . . . on what is truly necessary to resolve the case; (3) engage judges in early and active case management, and (4) address serious new problems associated with vast amounts of electronically stored information.” *Id.* In approving the 2015 amendments, the Supreme Court recognized, as the Advisory Committee had, the crucial role that an express articulation of a duty of cooperation would play in fairly implementing the other amendments. *Id.*

When it comes to the FRCP, the title of “Reporter” does not even begin to describe the skill set Rick brings to the role, or his accomplishments in the rulemaking sphere.

We Committee members, who have arrived and departed as Rick’s long tenure has continued, have watched with awe his search for and selection of the right word, the right phrase, and, most importantly, the right balance. Through this careful craft, Rick transformed a static provision into one that made sense and communicated itself clearly to the Rules’ customers—judges, lawyers, and clients—clearly and succinctly. In the Marcus methodology, form serves function, and precision produces an elegant utility. Plainly put, Rick’s rules work.

If the glimpse above of the master at work seems a pursuit of perfection that is self-absorbed, insular, or cloistered, it is anything but. To the contrary, Rick Marcus has been a moving force in bringing the rulemaking process to its users, literally taking the Advisory Committee on the road to law schools, judicial conferences, and bar associations to seek input and ideas for new rules and amendments. Committee meetings are of course public meetings, with an open door policy. But that door was primarily in Washington, D. C., and meetings, while public, were not actively publicized.

As the twenty-first century dawned, first the internet, and, more recently, remote conferencing, made attendance and participation in Committee meetings theoretically more accessible to interested non-committee members. However, it is fair to say that, with sporadic exceptions, the rulemaking process was hiding in plain sight. Law students were taught the FRCP, but not how they were made. Practitioners experienced new rules or amendments as sudden, unanticipated, unilaterally imposed, and sometimes unwelcome, events. It sometimes seemed that new provisions snuck into being.

Rick Marcus’ insistence on taking the process to its users at the very beginning of a project, rather than its final stages, was a needed, welcome, and functional innovation. And its success in the development of major amendments to the discovery and class action rules, to give but two examples, means that the rulemaking road trip has now become established practice.

My experience with this innovation became most immersive as a member of the sub-committee tasked with considering amendments to Rule 23. The class action rule had gone a decade without amendment, and class action practice had evolved. The Rule 23 notice provisions still expressed a preference for, and perhaps a requirement of, first class mail notice, in the era of the internet and social media. Courts were struggling, in many class actions, to gain enough information to responsibly determine the fairness and adequacy of proposed class settlements. Perspectives on class actions were becoming increasingly polarized, while the practical need for aggregating mechanisms to secure court access, “just, speedy, and inexpensive” adjudication, and resolution of mass claims was increasing.

Reliance on an internalized drafting process, followed up by a public comment process dominated by a few industry or advocacy groups, seemed inadequate for the task. So, before a single proposed amendment was published, the Rule 23 subcommittee went on the road to dozens of conferences, large and small, bipartisan and quite partisan, ranging across the political and litigation spectrum, from the Defense Research Institute to the American Association for Justice. There were more stops on this road trip than would fit on an XXL rock band world tour T-shirt.

Scholars, judges, lawyers—all were not only invited but sought out. This was rulemaking market research, with rule provisions inspired by the end-users, prioritized according to what judges and lawyers said they needed and wanted, then sculpted into tentative shape through Professor Marcus' skill, and sent out again for additional comment and resulting refinement. This was a truly iterative—and lengthy—process, consuming nearly seven years, until what we know as the 2018 amendments to Rule 23 became effective. But the result of this affirmatively participatory process was the distillation of “popular demand” into rule amendments that were not an unwelcome surprise, and were not encumbered by provisions no one asked for, needed, or wanted. That the surviving Rule 23 amendments dealt entirely with three issues—(1) updating the standard for class notice, ensuring the ability to adopt new notice media as technology advances; (2) bringing transparency and judicial scrutiny to the treatment of serial objectors;⁴ and (3) providing judges and lawyers with specific guidance on the process and findings necessary for class settlement approval—is no surprise. These were the priorities and desires that emerged on tour.

It was the insight, unstinting curiosity, dedication of time and effort, and faith—exemplified by Rick Marcus—that a participatory process would improve the end product which powered this process. Its success has ensured its adoption as a standard operating procedure of the Advisory Committee today. And by all accounts, Rick has not quit driving this practice. Today, far more lawyers are engaged in the rulemaking process than ever before; the procedure for public comment, and the schedule of public comment and committee meetings, is no longer hiding in plain sight; lawyers of all stripes and in all practice areas have a meaningful opportunity to participate in, and contribute to, the ongoing project of improving and updating the FRCP. For this alone, Rick Marcus deserves the thanks and abiding gratitude of all of us who practice in the federal courts.

4. See generally Elizabeth J. Cabraser & Adam N. Steinman, *What Is a Fair Price for Objector Blackmail? Class Action Objectors and the 2018 Amendments to Rule 23*, 24 LEWIS & CLARK L. REV. 549 (2020).
