

A Reporter for All Seasons

JUDGE ROBERT M. DOW, JR.[†]

My introduction to Professor Richard Marcus took place on my first day of law school. It was, as we now would say, a virtual encounter. Rick was present in the form of a not inexpensive textbook: *Marcus, Redish, and Sherman, Civil Procedure: A Modern Approach*.¹ This was September 1990, and the first edition of *Marcus, Redish, and Sherman* was just one year old. The hefty tome remains on my bookshelf at the Dirksen Federal Courthouse. Fast forward to today: In its eighth edition, the textbook now known as *Marcus, Redish, Pfander, and Zambrano*,² continues to introduce civil procedure to thousands of new law students every year.

For almost as many decades, Professor Marcus has been at the center of the universe for the Federal Rules of Civil Procedure (FRCP). In 1996, Rick accepted an appointment to serve as Associate Reporter to the Judicial Conference Advisory Committee on Civil Rules, working alongside Professor Edward Cooper of the University of Michigan, who became Reporter in 1992. Over the next quarter of a century, the legendary duo of Rick and Ed teamed up to make monumental contributions to the evolution of the FRCP. When Ed assumed Reporter Emeritus status in 2022, Chief Justice Roberts promoted Rick to Reporter, a position he still holds.

Reporters are the workhorses of the federal rules committees. They provide both the intellectual heft and the institutional memory. Try as we do, neither the judges nor the lawyers serving on the committees possess the grasp of the subject matter that comes with teaching it for decades and writing the casebooks and treatises that capture and convey its wrinkles and nuances. Nor can we, serving for shorter periods of time, possess the recall of prior battles lost and won that often inform the wisdom of moving forward or taking a pass on the dozens of proposed rules changes that come before the committee in a given year. To be sure, Reporters are not voting members. And, in my experience, they deftly

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1. RICHARD L. MARCUS, MARTIN H. REDISH & EDWARD F. SHERMAN, *CIVIL PROCEDURE: A MODERN APPROACH* (West Publ'g Co. 1989).

2. RICHARD L. MARCUS, MARTIN H. REDISH, JAMES E. PFANDER & DIEGO A. ZAMBRANO, *CIVIL PROCEDURE: A MODERN APPROACH* (West Acad., 8th ed. 2024).

manage the challenge of guiding the discussion while deferring to the voting members as to final outcomes. Still, their work is invaluable and indispensable.

The Reporters play a critical role in preserving the twin hallmarks of the rulemaking process: transparency and consensus. Much of the Committee's work takes place in subcommittees, which convene by Zoom or telephone between the semi-annual meetings mandated by the Judicial Conference of the United States. The work of those subcommittees is organized by a Chair and a Reporter. The assigned Reporter takes meticulous minutes of the subcommittee's discussions, which are published for the world to see in the Agenda Books uploaded to the U.S. Courts website in advance of each public meeting. The Reporter also gathers outside reading materials for subcommittee members to consider as they deliberate on the pros and cons of proposed amendments. With rare exceptions, rule amendments require buy-in from the bar (on both sides of the "v"), the bench, and the academy. Opposition from any of those constituencies almost always derails any attempt to change the status quo. The process—guided by the Reporters—can be painstakingly slow at times, but the evolutionary change it yields enables the Rules to meet the needs of modern civil litigation.

My first in-person meeting with the good Professor Marcus took place in the Fall of 2013. As a new member of the Advisory Committee on Civil Rules and the newly-designated Chair of a subcommittee created to evaluate possible amendments to Rule 23, I set out to introduce myself at a dinner the night before my first committee meeting. As a litigator and a district judge, I had some experience with class actions. But discussing the subject with a legend in the field still was an intimidating experience—and one that left me feeling rather unprepared for the task assigned to me by Judge David Campbell, the full Advisory Committee Chair. Rick was to be the lead scribe for the subcommittee, always working closely with Ed Cooper and the judges and lawyers who comprised the subcommittee's members. After our first conversation on what the subcommittee might consider, I left with the impression that perhaps I had scored a B-, or maybe a C+, on the oral exam from Professor Marcus. A glimmer of hope came from my homework assignment: A 2013 law review article written by the Committee's academic member, Professor Robert Klonoff, on the demise of class actions.³ Perhaps I had some potential after a bit of remedial work.

Rick proved to be a most able guide for the subcommittee's work. Through his time as a law student, judicial clerk, litigator, professor, author, and reporter, Rick has watched the class action device ebb and flow from its infancy to today. What started primarily as a device for injunctive relief in civil rights actions became a powerful mechanism for distributing money damages (and attorney's fees) in a wide range of civil cases. Later, the Supreme Court trimmed back the

3. See generally Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013) (discussing the impacts of federal caselaw on class actions).

availability of class-wide relief in certain types of cases—most notably, mass torts—which led to the explosion of multi-district litigation (MDL). Through it all, the class device has evolved, yet it survives, and some would even say flourishes. Indeed, the Supreme Court’s decision last term in *Trump v. CASA*⁴ may have brought class actions full circle, perhaps reinvigorating Rule 23(b)(2) injunctive relief classes as the drafters of the 1966 amendments anticipated.

Rick has provided a guiding hand in all of the major amendments to Rule 23 since 1996, most prominently, the adoption of an interlocutory appeal device for class certification rulings in 1998 (Rule 23(f)) and the overhaul of the Rule more generally in 2018. He also shepherded the drafting of the text and committee note for the new FRCP 16.1 through three full committee chairs and three subcommittee chairs, and finally to the finish line on December 1, 2025. Class actions and MDL provide the anchors for modern complex litigation in the United States. Along with the MDL statute, 28 U.S.C. § 1407, Rule 16.1, and Rule 23 will provide the roadmaps for practitioners and judges as we enter the second quarter of the century. These are Rick Marcus’s rules, as much as they are anyone’s.

As Rick’s current sidekick, Associate Reporter Andrew Bradt, has noted, the Federal Rules of Civil Procedure “are one of the great success stories of American litigation.”⁵ Now almost a century old, they have served us well—in large part due to the steady, usually behind-the-scenes efforts of dedicated Reporters like Rick Marcus and the top-flight academics who preceded him and with whom he has served for the past three decades. Take a bow, Professor, on work well done, though yet unfinished.

4. 606 U.S. 831, 849 (2025)

5. Gwyneth K. Shaw, *Professor Andrew Bradt Appointed to Prestigious Role Shaping Federal Rules of Civil Procedure*, U.C. BERKELEY L. (Jan. 6, 2023), <https://www.law.berkeley.edu/article/andrew-bradt-associate-reporter-judicial-conference-advisory-committee-on-civil-rules>.
