

Rick Marcus

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There is only one Rick Marcus. Of course, when one considers the sum of his contributions to American law—as a teacher, scholar, mentor, and public servant—it’s remarkable that there is *only* one Rick Marcus. I have had the privilege of working closely with Rick for several years now as his co-author and fellow Reporter to the Civil Rules Advisory Committee. And, as I try (futilely) to keep up, I regularly wonder whether he has been cloned.

Rick has actually been a part of my life since I was a 1L, when my own Civil Procedure professor, Steve Burbank recommended his work to me.¹ Then, as a 2L, Rick’s name appeared as the co-author of the “Complex Litigation” casebook Arthur Miller assigned in his class.² And then, as a 3L, when I was trying to make sense out of choice of law in the federal courts, there was Rick’s scholarship to light the way.³ And then *again*, as a budding scholar interested in this weird, and seemingly underappreciated statutory device—multidistrict litigation—I found that Rick was one of the few people who appreciated its power early on.⁴ A couple of years later, when I was an academic fellow attending a Advisory Committee meeting, just to get a sense of how the process worked, there was Rick, holding court with Ed Cooper. And finally, when I began teaching at UC Berkeley and knew hardly a soul in California, Rick made me feel like I belonged at the Bay Area Procedure Forum, and then, a decade later, as a formal contributor to the rulemaking process.

In short, there hasn’t been a single moment of my life as a lawyer or law professor that hasn’t been improved in some way by Rick Marcus, even though we didn’t meet in person until I was about a decade into my professional life. He has been such an influence that there is rarely a procedural question that I don’t ask myself, “I wonder what Rick would think?” Of course, given Rick’s immense productivity, I can usually find the answer in an article on his CV. And,

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1. See generally Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L.Q. 901 (2002).

2. RICHARD L. MARCUS & EDWARD SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* (3d ed. 1998).

3. See generally Richard L. Marcus, *Among Between Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677 (1984).

4. See generally Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel’s Transfer Power*, 82 TUL. L. REV. 2245 (2008).

unlike some academics whose identities I will keep to myself, Rick's conclusions are not hard to figure out. His writing is unfailingly clear, precise, and, mercifully, fun to read. Who else but Rick could boast that his article titles allude to figures as disparate as Edward Bellamy,⁵ Barry Goldwater,⁶ Henry V,⁷ Joan Didion,⁸ and the Big Bad Wolf?⁹

Rick's impact on American procedure is unquestionable. Having served as a Reporter to the Advisory Committee since 1996, Rick's stamp is on every rule amendment and committee note that has survived the gauntlet of the rulemaking process. Like his partner-in-reporting, the equally extraordinary Ed Cooper,¹⁰ in my short time working for the Committee, I've seen how Rick's remarkable memory and deep knowledge have preserved the Committee from error and misdirection. I marvel at Rick's (and Ed's) encyclopedic recall of events that occurred thirty years ago. But when a new issue emerges, such as the latest technological developments in e-discovery or third-party litigation funding, Rick jumps in headfirst to learn all he can, never assuming that his priors are unshakeable. And no one doubts Rick's credibility and impartiality—when Rick talks, federal judges listen. Rightfully so.

Drawing on his knowledge, Rick has for the last three decades been the great explainer, not just of the work of the Advisory Committee, but of American civil procedure to the world. Among Rick's talents is a seemingly limitless tolerance for travel (*see* his perpetual top-tier frequent-flyer status on United Airlines). Rick has contributed to conferences and volumes around the world, helping those who might find the American litigation process bizarre and impenetrable to understand why we have made the choices we have. To American and non-American audiences alike, he has become the international avatar of American procedure.

In the short space I have here, I'd like to highlight two particular aspects of Rick's work that might get lost among the avalanche of his output, but that I believe deserve special mention: (1) his classic 1984 Yale Law Journal article on choice of law in the federal courts;¹¹ and (2) his casebook on complex litigation, originally co-authored with Ed Sherman.¹²

First, "Conflicts Between Circuits and Transfers Within the Federal Judicial System," published in the Yale Law Journal in 1984. As a 3L, I was one

5. Richard L. Marcus, "Looking Backward" to 1938, 162 U. PA. L. REV. 1691, 1692–93 (2014).

6. Richard L. Marcus, *Extremism in the Pursuit of Truth is Our 'Virtue': The American Infatuation with Broad Discovery*, in TRUTH AND EFFICIENCY IN CIVIL LITIGATION 165 (C.H. van Rhee & Alan Uzelac eds., 2012).

7. Richard L. Marcus, *Once More Unto the Breach?*, 99 JUDICATURE 57, 57, 64 (2015).

8. Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1561 (2003).

9. Richard L. Marcus, *The Big Bad Wolf: American Class Actions*, in MULTI-PARTY REDRESS MECHANISMS IN EUROPE: SQUEAKING MICE? 35 (Viktoria Harsági & C.H. van Rhee eds., 2014).

10. *See* Richard L. Marcus, *Shoes That Did Not Drop*, 46 U. MICH. J. L. REF. 637, 637 (2013) (describing Professor Cooper's profoundly impactful service to the Advisory Committee).

11. Marcus, *supra* note 3.

12. MARCUS & SHERMAN, *supra* note 2.

of the unfortunate few infected with the choice-of-law prion and fell in love with Conflict of Laws.¹³ Having already been fascinated by Civil Procedure, I was entranced (and flummoxed) by the morass created by the transfer statute, the *Erie* Doctrine, and common-law choice-of-law rules. Rick's article on the subject remains the best analysis of this knotty problem more than four decades after it was published. Like all of Rick's work, it untangles the knot like an encounter with Holmes's famous dragon: getting him "out of his cave and onto the plain and in the daylight," where "you can count his teeth and claws, and see just what is his strength."¹⁴ Like Holmes though, Rick doesn't stop there and leave the dragon alone. He decides whether "to kill him, or to tame him, or to make him a useful animal."¹⁵ In so doing, Rick concludes that the rule of *Van Dusen v. Barrack*¹⁶ does not justify applying the law of the transferor circuit to a federal claim transferred under 28 U.S.C. § 1404(a).¹⁷

Candidly, as a third-year law student, I found Rick's conclusion counter-intuitive—if a plaintiff who has filed a state-law claim in a proper federal court should retain the choice-of-law advantages of his venue privilege after transfer, why shouldn't a plaintiff who has filed a federal-question claim enjoy the same advantage? But Rick's deft treatment of the issues convinced me by extracting the issue from the *Erie* question and explaining why federal law is different. Unlike state law, all federal courts are equally competent to decide issues of federal law and the interests those laws seek to vindicate derive from the national government, not the states. And, unlike a state-law claim, a federal claim is detached from any federalism or sovereignty-based reasons to defer to the federal law of the circuit in which the case was filed. With the state interests out of the picture, the plaintiff's prerogatives provide an insufficient basis for requiring a federal court to apply another circuit's interpretation of the same law.¹⁸ Years later, when attempting my own treatment of these problems as they arise in multidistrict litigation, Rick's article was my lodestar, though I doubt I presented the issues as clearly as he did. When budding scholars ask me to identify a perfect doctrinal law-review article, this one remains at the top of my list.

Second, I'd like to highlight Rick and Ed Sherman's path-marking Complex Litigation casebook, which, in my view, remains the best available learning tool and reference when digging into that field. Authors of competing casebooks might bristle at that conclusion, but I stand by that opinion, recognizing well my bias from both using the casebook as a student and

13. Neither my family nor my students would be surprised to learn that Dean Prosser referred to such people as "eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon." William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

14. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

15. *Id.*

16. 376 U.S. 612 (1964).

17. Marcus, *supra* note 3, at 679.

18. *Id.* at 719-21.

becoming a co-author for the seventh edition in 2020.¹⁹ It is indeed a lasting testament to Rick and Ed’s achievement that they essentially invented the field of complex litigation when they published the first edition in 1985.²⁰ And thankfully they did so in a much more readable way than Hart and Wechsler. “Complex Litigation” has since become a staple of modern law-school curricula. Perhaps even more importantly, the book has been rigorously updated to keep pace with the dynamism of the field it covers. When I came on board as the junior partner, I had the occasion to compare the then-most recent version of the casebook to the one I still had on my shelf from law school. I was amazed to see that most of it had changed, aside from the most obligatory cases. And since joining the project, I have been awed by Rick’s summer supplements (for which I can take no credit), which serve as the most comprehensive update on developments in federal complex litigation available.

Finally, it would be a shame if, amid all of these tributes, I didn’t acknowledge what good guy Rick is. His remarkable capacity for patience and good humor in the face of challenging assignments (and people) is aspirational. It would also be a shame if anyone interpreted this much-deserved celebration as a sign that Rick is slowing down. Having tried to keep up with him through airports throughout the country the last five years, I can confirm he is not. I have thirty years on him, but his bottomless reserve of energy puts me to shame. As Rick’s friends know, he has an array of devotions: to public transportation, to WordPerfect and Courier New, and, of course, to his family. But we all reap the benefits of his devotion to our field and the rule of law. May we continue to long into the future.

19. See generally RICHARD L. MARCUS, EDWARD F. SHERMAN, HOWARD M. ERICHSON & ANDREW D. BRADT, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* (7th ed. 2021).

20. See Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1487 (1987) (reviewing RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* (1985) (describing the book as “a major contribution to knowledge”).
