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## Edward Cooper as Curator of the Civil Rules

Goeffrey C. Hazard Jr.

*University of California, Hastings College of Law*

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## EDWARD COOPER AS CURATOR OF THE CIVIL RULES

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Geoffrey C. Hazard, Jr.\*

Ed Cooper has had a salient role in maintaining the Rules Committee process as a highly competent and stable element of lawmaking in this country. He is a consummate master of civil procedure and acutely understands the constitutional and political milieu in which the Rules process functions. Along with other similarly competent and observant Reporters, including the senior serving Reporter, Dan Coquillette, he has helped keep the Rules process and product as evenhanded as can be expected in our complicated legal system.

The formal history of the Civil Rules process has been well recounted by Peter McCabe in *Renewal of the Federal Rulemaking Process*.<sup>1</sup> An informal history may also be of interest. The Federal Rules as promulgated in 1938 were only vaguely understood by most lawyers, as is the case with any group's response to something new. Only lawyers frequently appearing in federal court would have read the new Rules, and even they could not have fully appreciated what was involved. What was involved, first, was a radical reduction in the significance of pleading: "short and plain statement"<sup>2</sup> replaced the Code formula "facts constituting a cause of action."<sup>3</sup> At the same time, there was a great increase in the weaponry of discovery. The scope of discovery was broadly defined in the Federal Rules as "reasonably calculated to lead to discovery of admissible evidence,"<sup>4</sup> in place of relevant evidence<sup>5</sup> or, in many states, "relevant and necessary" evidence at common law.<sup>6</sup> The devices of discovery were radically expanded to include all those available in any of the existing

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\* Professor Emeritus, University of Hastings College of Law; Professor Emeritus, University of Pennsylvania School of Law; Sterling Professor Emeritus, Yale University.

1. Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1658-64 (1995).

2. FED. R. CIV. P. 8.

3. See Charles E. Clark, *The Code Cause of Action*, 33 YALE L.J. 817, 824 (1924) (explaining the pleading standards under the Code).

4. FED. R. CIV. P. 26.

5. See Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 698-700 (1998) (explaining how discovery operated in the federal courts before the Federal Rules of Civil Procedure).

6. See, e.g., N.Y. CIV. PRAC. art. 29, § 288 (Cahill 1928) (permitting a party to depose any other party whose testimony "is material and necessary in the prosecution or defense of the action").

state systems: depositions of parties and witnesses,<sup>7</sup> demands for documents,<sup>8</sup> requests for admission,<sup>9</sup> and physical examination of personal injury claimants.<sup>10</sup> The new joinder rules virtually eliminated joinder problems in most federal cases<sup>11</sup> except for those imposed by the constraints of federal subject-matter jurisdiction.<sup>12</sup>

Almost any major law reform becomes absorbed and appreciated only by degrees, understood not by reading but by use. Use of the new Federal Rules was primarily in the hands of lawyers experienced in federal courts and the judges then on the federal bench. They all were long experienced in the previously existing systems, and it took a while to overcome old habits of thought. The normal slow learning curve was interrupted by the coming of World War II. During the war, most people, including many lawyers, had more important concerns.

I entered law practice in 1954 in the remote province of Oregon. The trial bar in the Oregon federal court had by then become used to the new regime. The Federal Rules were applied to the very ordinary kinds of civil cases in that court. These were diversity cases, including personal injury and commercial cases, and federal claims cases, such as Federal Employers Liability Act claims, occasional securities cases, and litigation with the federal government. The style in litigation was small-city courtesy. The range of federal court litigation in larger urban centers was much broader, the volume much greater, and the style generally more aggressive.

Whatever the venue, however, civil litigation, particularly on behalf of grievant plaintiffs, had not yet developed into what it has now become. *Brown v. Board of Education*<sup>13</sup> was decided only in 1954, and the civil rights litigation elaborating that precedent was only beginning. A decade later, in 1966, Rule 23 was amended to solidify the procedural basis of civil rights class actions.<sup>14</sup> Mass tort class actions were only experimental at the time,<sup>15</sup> and the amendment to Rule 23 only somewhat solidified the procedural basis of such

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7. FED. R. CIV. P. 26 (1938) (providing for oral and written depositions "pending action"); *id.* 27 (allowing depositions to perpetuate testimony); *id.* 30 (establishing procedures for oral depositions); *id.* 31 (stating the same with respect to depositions of witnesses upon written interrogatories).

8. *Id.* 34.

9. *Id.* 36(a).

10. See Armistead M. Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 275-81 (1939).

11. *Id.* at 271.

12. *Id.*

13. 347 U.S. 483 (1954).

14. See, e.g., CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 7A FEDERAL PRACTICE AND PROCEDURE § 1753 (3d ed. 2005).

15. See, e.g., *Darr v. Yellow Cab Co.*, 433 P.2d 732 (Cal. 1967).

claims. Class action litigation in federal courts has now survived *Eisen v. Carlisle & Jacquelin*.<sup>16</sup>

The later 1960s and 1970s brought legislative creation of important new federal rights enforceable through civil litigation, notably voting rights,<sup>17</sup> anti-discrimination in employment,<sup>18</sup> and the environmental legislation<sup>19</sup> inspired by the book *Silent Spring*.<sup>20</sup> The election of Ronald Reagan as President slowed the expansion of these measures but did not reverse their development. A characteristic of most of the new regulation was the authorization of private-party litigation claims as an enforcement device. Reform-minded civic and political organizations favored such civil litigation remedies because they were unsure of administrative posture, particularly under Republican administrations; more conservative legislators favored that method of recourse because they trusted the courts more than administrative agencies. The plaintiffs' bar favored recourse through litigation not only for obvious reasons of professional interest but also on the basis of basic political outlook and principles.

The total effect has been an explosion in litigation, not so much in volume as in character. Old-fashioned civil litigation had been relatively neutral in political significance, conducted in quiet courts by usually quiet counsel and only a nuisance as far as business interests were concerned. Civil litigation from the 1970s onward has been a major political force and hence unavoidably "politicized." This transformation has been felt in many places in the legal system, including federal and state legislatures, federal and state judicial selection procedures, judicial decisions as such, and media involvement in the "tort wars."

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16. 417 U.S. 156 (1974) (imposing tight restrictions on procedure in class certification). Class-action litigation has also been blessed by *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), which commended the function of class suits to permit mass assertion of claims that individually are too small to prosecute. *Id.* at 809.

17. See, e.g., Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

18. See, e.g., Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (2006)); Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2006)).

19. See, e.g., Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (codified as amended at 42 U.S.C. §§ 7401-7431 (2006)); National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321-4347 (2006)); Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1542 (2006)).

20. RACHEL CARSON, *SILENT SPRING* (1962).

The politicization of civil procedure has also been felt in the process of the Standing Committee on Practice and Procedure. Ambient political controversy has constrained the possibilities of major change or reform through that process—for example, in the shifting and uncertain approach to Rule 11 sanctions against frivolous claims.<sup>21</sup> Nevertheless, the Rules process has maintained a sober, nonpartisan approach in its work. Its Reporters provide the Committee not only excellent professional assistance but also important institutional memory. The membership of the Standing Committee has been constituted of sober and nonpartisan judges, lawyers, and academics. The thoughtful and evenhanded competence of Reporters such as Edward Cooper has greatly helped the Committee.

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21. For a general discussion of some of the criticisms of the Rule 11 amendments, see CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, 5A FEDERAL PRACTICE AND PROCEDURE § 1332 (3d ed. 2004 & Supp. 2012).