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PROFESSOR ED COOPER: ZEN MINIMALIST

Linda S. Mullenix*

Professor Ed Cooper is a great listener. As a matter of fact, Professor Ed Cooper is a *prodigious* listener. *And* he has buns of steel.

In celebration of his twentieth year as the Reporter for the Advisory Committee on Civil Rules, I write to contribute some modest reflections on Professor Cooper's tenure as Advisory Committee Reporter. My comments are those of an academic who had the opportunity to observe the Advisory Committee for nearly a decade, but they are largely the comments of an outsider. Readers might be disappointed to find that there is no dish or inside baseball here.

Although I knew Professor Cooper as a colleague and friend before his appointment as the Advisory Committee Reporter, my fine *appreciation* for Professor Cooper was forged during his early years as Reporter. Assuming the role of Reporter in 1991, Professor Cooper was immediately thrust into the midst of the great Rule 23 mass-tort and class-action controversy then swirling in the federal courts. But more on this later.

To fully appreciate Professor Cooper's role in the class-action wars—and my entirely minor, obscure, and bit part in that procedural melodrama—requires a somewhat self-absorbed, digressive background narrative. This narrative sets the stage for the intersection of the Advisory Committee, Rule 23 revision, Professor Cooper, and me.

I was first exposed to the Advisory Committee on Civil Rules from 1989–1990, when I worked at the Federal Judicial Center (FJC) Research Division as a Supreme Court Judicial Fellow. During that year, Fifth Circuit Judge John C. Godbold headed the FJC, and he was succeeded by Judge William W. Schwartzer of the Northern District of California. As part of this appointment, I had the opportunity to attend all meetings of the Advisory Committee on Civil Rules and the meeting of the Judicial Conference of the United States. For a procedure junkie, this was a heady experience that only other procedure junkies can possibly understand. Otherwise, it garners no admiration points with one's children (quite the contrary).

* Morris and Rita Atlas Chair in Advocacy, The University of Texas School of Law. Our instruction was to contribute a reflection on Professor Cooper, approximately ten pages, and without footnotes. I have assiduously followed these directions.

My year at the FJC coincided with an auspicious paradigm shift in the operation of the Advisory Committee on Civil Rules. Congressional enactment of judicial-reform legislation in 1988 imposed new sunshine requirements on the Federal Rules Committees. No longer could the Rules Committees function in relative privacy, obscurity, and authoritarian decisiveness. The days of rulemaking in proverbial smoke-filled back rooms—accomplished by wise, old, white-male sages—were over. Participatory democracy, replete with open meetings, had been thrust upon the rulemaking process.

Somewhat vaguely aware of past history, I was present at the very first open meeting of the Advisory Committee on Civil Rules. I immediately sensed the tectonic shift in atmosphere among Advisory Committee members, including Committee Chair Judge John F. Grady of the Northern District of Illinois and Professor Paul Carrington, the Advisory Committee Reporter. So taken was I with the apparent angst among Advisory Committee members that I did the only thing academic law professors know how to do: I wrote a law review article.

In that masterpiece of academic erudition, I commented on the alarming change in the Advisory Committee process, and (now) famously compared the Advisory Committee to the doomed *ancien régime* in France. I think this is the only thing I have ever written that anyone remembers. Professor Carrington—a populist and libertarian to the core—was not amused. He was pained and, to this day, reminds me of this comparison every time I see him.

The late 1980s and early 1990s were exhilarating times to be exposed to the internal workings of the Advisory Committee, because this period dovetailed with the immense problems generated by mass-tort litigation in federal and state courts and the quest to find some means for resolving these massive cases. By the mid-1980s, every institutional law-reform group—including the American Bar Association, the American Law Institute, the Federal Judicial Center, the Rand Institute for Civil Justice, and the Commissioners on Uniform State Laws—was studying the dilemmas posed by mass-tort litigation.

In the early 1990s, a series of actors converged in the judicial arena with an interest in finding the ultimate solution to resolving mass-tort litigation. These included Judge William Schwartzer, who became Director of the FJC in 1990; Judge John Grady, who then headed the Advisory Committee on Civil Rules; Professor Arthur Miller, immediate past Reporter for the Advisory Committee who repeatedly reminded everyone that he was present at the creation of the 1966 Rule 23 amendments; and Professor Paul Carrington,

eminent academic proceduralist. If memory serves me correctly, Advisory Committee members also included Judge Sam Pointer of Alabama and Fifth Circuit Judge Patrick Higginbotham, both of whom took an especial interest in finding a solution to the mass-tort litigation clogging their dockets.

By the end of the 1980s, the American Law Institute (ALI) embarked on its effort to grapple with the burgeoning mass-tort litigation crisis. This enterprise, called the “Complex Litigation Project,” was shepherded by its Reporter, Professor Arthur Miller, and Associate Reporter, Professor Mary Kay Kane. The ALI believed, however, that any proposed amendments to the Federal Rules were not properly within its ambit and instead focused on proposals to amend the multidistrict-litigation statute and choice-of-law considerations.

Several other events in the late 1980s and early 1990s converged to provide hydraulic heft to the rule-reform movement. For example, in spring 1990, Judge Schwartzner convened a major FJC conference to find a comprehensive solution to the national asbestos crisis, which brought together all the actors in the litigation, including federal judges managing substantial asbestos dockets. Rather than achieving consensus and agreement, these meetings instead, ironically, moved the parties further apart and entrenched their relative positions.

In response to the failure of the FJC asbestos conference, several federal judges, alarmed at the intransigence of the negotiating parties, took the unprecedented and dramatic step in summer 1990 of *sua sponte* certifying a nationwide asbestos class action. Within ten days, the United States Court of Appeals for the Sixth Circuit struck down the class certification, dramatically characterizing the rogue judges’ conduct as an unconstitutional usurpation of judicial authority.

Against this backdrop of crisis and seeming judicial embarrassment, Chief Justice Rehnquist appointed a panel in autumn 1990 chaired by Fifth Circuit Judge Thomas Reavley. The Reavley Commission was asked to study the mass-tort-litigation problem and issue recommendations. In early spring 1991, the Reavley Commission issued its report, suggesting that Congress legislatively resolve the mass-tort crisis. Virtually everyone involved immediately understood that this would not occur.

Thus, by late spring 1991—with the Rule 23 amendment off the ALI’s reform table, the failure of the FJC to craft a mass-tort solution to the asbestos crisis, and the ineffectual recommendations of the Reavley Commission—the Advisory Committee on Civil Rules

placed reconsideration of the class-action rule on *its* agenda. The Advisory Committee on Civil Rules, with its vast institutional memory and collective class-action expertise, would now handle crafting a solution to the mass-tort-litigation crisis.

Thus, at this crucial juncture, *finally entered* Professor Ed Cooper.

In the early 1990s, the stewardship of the Advisory Committee experienced two significant changes: the appointment of Fifth Circuit Judge Patrick Higginbotham as Committee Chair and the appointment of Professor Cooper as Reporter to succeed Professor Paul Carrington. Both changes heralded subtle shifts in interest and temperament.

Judge Higginbotham hailed from the judicial circuit perhaps most entrenched in the asbestos litigation crisis. By the time of his appointment, Judge Higginbotham was more knowledgeable about and familiar with the problems of mass-tort litigation than almost any other jurist in the United States. Moreover, he was aggressively committed to finding a workable solution through amending the class action rule. Counterbalancing Judge Higginbotham's determined persona and agenda, Professor Ed Cooper embodied a studied, quiet addition to the Committee.

* * *

I can now weave together several narrative threads. With Rule 23 on the Advisory Committee's agenda, various groups had heightened interest as litigation stakeholders in the revision of the class-action rule. And, consistent with the new sunshine era, everyone invested in Rule 23 wanted to be heard during the Advisory Committee's deliberations and amendment process. At approximately the same time that Professor Cooper arrived as the new Committee Reporter, the American Bar Association appointed me as Reporter for a task force on the class-action rule. In this capacity, I spent the next five years attending Advisory Committee meetings as various proposed Rule 23 amendments made their way through the rulemaking process.

From 1991 through 1996, I was a backbench observer—along with a very sizeable contingent of other backbench observers—of assorted Rule 23 proposals and their ultimate fate. During this period, I not only learned a good deal about the rulemaking process but also gained great insight into the immense patience and craftsmanship of the Committee's new Reporter, Professor Ed Cooper.

* * *

The development of the Rule 23 amendments occurred during three separate intervals. The first began in 1991 and extended through 1996, culminating in the promulgation of Rule 23(f) in 1997. By then, Fourth Circuit Judge Paul Niemeyer had succeeded Judge Higginbotham as Chair of the Advisory Committee. Perhaps because of, or in addition to, the considerable heat that had been generated in round one of Rule 23 revisions, Judge Niemeyer's enthusiasm and passion for further amending Rule 23 had waned considerably by 1996.

Thus in his early days as new Committee Chair, Judge Niemeyer deftly deflected any further Rule 23 adventures, pending some possible guidance from the Supreme Court in the then-pending appeals in *Amchem v. Windsor* and *Ortiz v. Fibreboard*. With the prospect of Supreme Court direction as a compelling rationale, Judge Niemeyer memorably indicated that any further Rule 23 amendments would be relegated "to the back burner" of the Committee's agenda. From 1997 through the early 2000s, Rule 23 revision thus went into quasi hibernation, asleep but never quite forgotten. The prospect of further amending Rule 23 was then resuscitated, resulting in the promulgation of Rule 23(g) and (h), which became effective in 2003.

* * *

Almost all of my observations concerning Professor Cooper's role as Reporter on the Rule 23 revisions derive from the first round of proposed amendments, from 1991 through 1997. What I do not and cannot know is the origin of the first proposed Rule 23 draft amendments, which I well remember. Whatever the source, the Advisory Committee's original approach from 1991–1992 was to scrap the existing Rule 23 and create an almost entirely new class-action rule. There was precedent for this radical root-and-branch approach in the 1996 amendments to Rule 23.

This was one of Professor Cooper's first endeavors as Committee Reporter. He submitted his radical revision of Rule 23 to the Committee, which proposal was then disclosed to the substantial array of sunshine overseers. No sooner had Professor Cooper's radical new Rule 23 draft appeared that it immediately was subjected to excoriating, negative, and in some quarters, horrifying reaction and criticism. This could not have been fun for Professor Cooper, but it did provide a teachable moment.

I began my comments by saying that Professor Cooper is a great listener, and this was amply illustrated during the ensuing six years of Rule 23 amendments. Over these years—and here I radically truncate the narrative arc—Professor Cooper patiently generated draft after draft of proposed Rule 23 revisions in response to the barrage of comments and criticisms that the Advisory Committee received. With every draft, he was confronted with vociferous competing objections to additions, deletions, phraseology, linguistics, and grammar. And at every twist and turn, Professor Cooper had to assess inevitable arguments concerning Rules Enabling Act violations.

The history of the Rule 23 draft amendments between 1991 and 1997 provides a riveting chronicle of the rulemaking process, the positive and negative effects of open rulemaking, and the good and bad ideas left on the cutting-room floor. Through successive drafts, the Committee jettisoned any revision of Rule 23(a), substantial portions of Rule 23(b), and ultimately most of the rest of the rule. Class-action litigators, interest groups, judges, academics, and other observers understood very well the substantive impact of various proposals, and so the Advisory Committee was subjected to considerable flak on all sides.

The most memorable fights in the later stages of the Rule 23 amendment process focused on three proposed additions to Rule 23(b). One proposal would have added a “maturity” factor for judges to consider in certifying a Rule 23(b)(3) class, to supplement the existing four factors in Rule 23(b)(3)(A)–(D). This proposal derived from an understanding of how mass torts evolve over time from immature to truly mature mass-tort litigation.

Experience had suggested that hasty certification of immature mass torts provided plaintiffs with an unfair settlement advantage and that some immature mass-tort cases were not suitable for class certification at all. Consequently, some advocated that judges ought to be able to defer class certification until individual case outcomes indicated that a mass tort was ripe for certification. The “maturity factor” would have permitted federal judges, in their discretion, to assess the relative development of class litigation and whether the litigation was evolved enough for certification.

The other proposed Rule 23(b)(3) amendment would have added a famous “it just ain’t worth it” factor. This proposal derived not from the mass-tort-litigation experience but rather from the consumer small-claims-class-action arena. The rationale undergirding this proposal stemmed from the belief that judges—again at their discretion—ought to be able to balance the costs and

benefits of proposed class litigation and determine whether class certification with the attendant costs was worth it.

Not surprisingly, both proposed new Rule 23(b)(3) factors generated a massive response. Attorneys involved in mass-tort litigation aligned in predictable camps regarding the proposed maturity factor, with the plaintiffs' bar strongly opposed and the defense bar just as strongly supportive. The colorfully labeled "it just ain't worth it" factor, which drew considerable support from judges, evoked the particular ire of plaintiffs' attorneys and public-interest groups involved in small-claims-consumer-class litigation. Rules Enabling Act arguments raised their disagreeable heads regarding both proposals. Given the squishiness, subjectivity, and controversy entailed in judicial evaluation of these factors, both proposals died aborning.

* * *

The history of the Rule 23 amendments also provides noteworthy insight into the Advisory Committee's sensitivity to the concerns raised by fellow jurists on the bench. Two examples from this period illustrate how the Committee and its Reporter responded to judicial quandaries encountered by those tasked with applying Rule 23.

The first illustration entails the controversy over settlement classes, which first surfaced in the *Georgine* global asbestos settlement class in the Eastern District of Pennsylvania in 1993–1994. In 1995, Third Circuit Judge Edward R. Becker expressed (in an exhaustive opinion) his considerable doubts about the legality of settlement classes in an opinion reversing approval of a settlement class in *GMC Pickup Truck Fuel Tank Products Liability Litigation*. Moreover, he pointedly noted that he could not find authorization for settlement classes in the *text* of Rule 23. Exacerbating this situation, Judge Becker similarly reversed approval of the *Georgine* settlement class the following year, in an opinion expressing considerable hand wringing over the absence of a settlement-class provision in Rule 23.

In immediate response to Judge Becker's *GMC Pickup Truck* and *Georgine* opinions, the rather surprised Advisory Committee judges collectively decided that if Judge Becker's problem was that he could not find a settlement-class provision in Rule 23, then the Advisory Committee would write one into the Rule. With this drafting marching order, Professor Cooper crafted the famous Rule 23(b)(4) settlement-class provision. Needless to say, hardly any of

the proposed Rule 23 amendments generated as great a firestorm as the proposed Rule 23(b)(4) settlement class.

The proposed Rule 23(b)(4) amendment would have permitted judges to certify and approve settlement classes, taking into account the fact of the settlement. In essence, the proposed Rule 23(b)(4) settlement class would have codified and indirectly sanctioned the *Georgine* settlement class, which was then on its way to the Supreme Court for final adjudication. Consequently, a wide array of attorneys, academics, interest groups, judges, and others aligned in vociferous support or opposition to the proposed Rule 23(b)(4) provision, mimicking the positions arrayed in the *Georgine* litigation. The proposed Rule 23(b)(4) settlement class also inspired the most heated debate over whether the settlement-class provision transgressed the Rules Enabling Act and embodied unconstitutional rulemaking.

It also is noteworthy that during these early years of Professor Cooper's tenure, consistent with the new era of Advisory Committee sunshine, the Committee for the first time began conducting its very own traveling road shows throughout the United States to test-drive the proposed Rule 23 amendments. Over the six-year span of Rule 23 revision, the Committee and its Reporter were bombarded with hundreds of written comments as well as verbal critiques delivered at town-hall meetings. Throughout this process, the patient Professor Cooper prodigiously read hundreds of pages of comments and listened to hours of rulemaking oratory.

The second illustration of Advisory Committee responsiveness to judicial concerns occurred in late 1995, when Seventh Circuit Judge Richard Posner issued his famous opinion in the HIV tainted-blood products case, *In re Rhone Poulenc*. That decision reversed the certification of a nationwide class of hemophiliacs who had unknowingly used blood products infected with the HIV virus. Although that decision had significant impact on the jurisprudence of mass-tort class-certification issues, the much-less-noted first half of Judge Posner's opinion garnered the Advisory Committee's special attention.

The opening sections of Judge Posner's *Rhone Poulenc* decision set forth a reasoned essay on the use of mandamus as a means for conferring appellate jurisdiction to review class certification orders. At the time of the *Rhone Poulenc* appeal, practically the only means for judicial review of a class-certification order was pursuant to 28 U.S.C. § 1292(b). If a judge did not certify its order, however, a losing party had no other appellate recourse than to seek mandamus review. In the heyday of mass-tort litigation, attorneys repeatedly used mandamus appeals to seek review of class-certification

orders. In *Rhone Poulenc*, Judge Posner clearly indicated his disapproval of this practice while simultaneously looking askance and allowing the mandamus appeal.

Following publication of Judge Posner's *Rhone Poulenc* opinion, the Advisory Committee immediately discussed it and agreed to amend Rule 23 to provide for a means for appellate review of class certification orders. While proposals for such a provision previously had been suggested, Judge Posner's *Rhone Poulenc* opinion clearly provided the impetus for Committee action. Professor Cooper composed the new Rule 23(f) provision. The *Rhone Poulenc* affair provides an instructive example of the very real synergy between the Advisory Committee and current developments in the judicial arena.

* * *

Perhaps the most memorable moment in the history of the Rule 23 amendments came very late in 1995 or 1996, when the Committee Chair, convening an Advisory Committee meeting, turned to Professor Cooper and asked him to discuss his newest, *umpteenth* draft of proposed Rule 23 amendments. Thinking for a few minutes, Professor Cooper—with Zen-like composure—quietly began by saying, “I call this my *minimalist* draft.”

Reviewing the history of his considerable labors from 1991 forward, Professor Cooper went on to elucidate what the draft then before the Committee *did not* contain. This new Rule 23 draft, he explained, did not revise or amend anything in Rule 23(a). Rule 23(a) would remain intact as written. His Rule 23 draft did not revise or amend anything in Rule 23(b), and the draft was shorn of any new factors for Rule 23(b)(3). Gone were the maturity factor and the “it just ain't worth it” concept. And Rule 23 would not be adding any new class-action categories: the controversial (b)(4) settlement-class provision had been purged and consigned to the dustbin of rulemaking history.

What, then, did the minimalist Rule 23 draft proposal contain? What remained after nearly five years of the Rule 23 class actions battles? Well, the minimalist draft modified Rule 23(c) to change the language regarding timing of class certification from “as soon as practical” to “at any early practicable time.” Appreciation for this amendment required the nuanced, linguistic parsing worthy of Jacques Derrida or some other French deconstructionist. And there

was the new Rule 23(f) provision for appellate review of class certification orders. Nonetheless, by 1996, after five years of work on revising Rule 23, the 1996 class-action rule looked very much like the 1966 class-action rule.

* * *

The denouement of the Rule 23 amendment saga suggests collective exhaustion more than anything else. After years of heated controversy, the fight had gone out of the partisan advocates. They successfully had beat back almost all innovative revision of Rule 23, and the language “at any early practicable time” hardly seemed worth disputing. The same was true for the proposed Rule 23(f) amendment. Although Rule 23(f) inspired some relatively muted debate, almost everyone agreed that this was a timely and inspired idea.

By the time of the 1996 presentation of Professor Cooper’s minimalist draft, enthusiasm for further Rule 23 amendment was fairly moribund. Judge Niemeyer had succeeded Judge Higginbotham as Committee Chair, and Judge Niemeyer was more than happy to deflect further consideration of Rule 23 until the Supreme Court issued its decisions on settlement classes in the *Amchem* and *Ortiz* appeals. Under Judge Niemeyer’s direction, Rule 23 revision was removed to the Committee’s back burner, to be superseded by the electronic discovery wars.

The Rule 23(c) and (f) minimalist amendments were forwarded to the Standing Committee and the Judicial Conference; the Supreme Court ultimately approved these amendments, which became effective in 1997. The Advisory Committee resuscitated Rule 23 revision in the early 2000s—deliberations that ultimately resulted in the unexciting and relatively noncontroversial addition of Rule 23(g) and (h) (relating to appointment of counsel and attorneys’ fees).

* * *

The narrative of the Advisory Committee’s Rule 23 revision and Professor Cooper’s efforts during the 1990s is instructive for several reasons. First, this history illustrates the effects on Committee deliberations in the new era of public openness. For better or worse, the narrative demonstrates how the Advisory Committee—in heeding commentary from multiple, diverse sources—more often abandons radical innovation in favor of consensus and non-controversial change.

The Advisory Committee's *ancien régime* has most certainly *not* been replaced by revolutionary forces. Instead, the Committee often now spends years on rule revision that inevitably defaults to a minimalist approach made famous by Professor Cooper. And the Rule 23 narrative also illustrates the glacial pace at which rule revision is accomplished.

Second, the Rule 23 narrative allows us to appreciate the truly inspiring temperament and craft of the Committee's Reporter over the last twenty years, who has had to mediate the competing demands and concerns of thousands of strong personalities. It is a tribute to Professor Cooper's character that in the face of a barrage of criticism (both constructive and destructive), he has maintained his equanimity and good fellowship.

The American Law Institute counsels its newly appointed reporters to learn to "leave their ego outside the door." In observing Professor Cooper over the past twenty years, one cannot help but observe that he somehow has managed to leave his ego not outside the door but off in some far-distant galaxy. Only a Zen reporter could humbly characterize his draft proposal as an unadorned, minimalist approach.

We are all much the better for his quiet presence and his modest example.