Federal Rules Symposium

INTRODUCTION TO THE FEDERAL RULES SYMPOSIUM

A TRIBUTE TO JUDGE MARK R. KRAVITZ

by
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The *Lewis & Clark Law Review* is honored to present this symposium commemorating Judge Mark R. Kravitz. The participants in this symposium—a distinguished group of judges, professors, and practicing lawyers—originally presented their articles and tributes at a conference at Lewis & Clark Law School on April 10, 2014. The Federal Judicial Center graciously co-sponsored that conference.

PART I

Judge Mark R. Kravitz was a graduate of Wesleyan University and Georgetown Law Center. He clerked for Judge James Hunter, III, on the U.S. Court of Appeals for the Third Circuit, and subsequently clerked for then-Justice William H. Rehnquist of the U.S. Supreme Court. Judge Kravitz practiced law for more than 25 years at Wiggin & Dana, LLP in New Haven, Connecticut, before President George W. Bush appointed him to the U.S. District Court for the District of Connecticut in 2003. Judge Kravitz served on the federal bench with great distinction until September 30, 2012, when he passed away from amyotrophic lateral sclerosis (ALS) at the age of 62.

Judge Kravitz was one of the giants of the federal rulemaking process. His passion for rulemaking began even before his appointment to

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the bench. In 2001, Chief Justice Rehnquist appointed Judge Kravitz to the Standing Committee on the Rules of Practice and Procedure (the "Standing Committee"), which oversees the rules process for the civil, criminal, appellate, evidence, and bankruptcy rules advisory committees. In 2007, after Judge Kravitz had been on the bench for four years, Chief Justice John G. Roberts, Jr., appointed him to be Chair of the Advisory Committee on Civil Rules (the "Advisory Committee"). In 2011, Chief Justice Roberts elevated Judge Kravitz to the position of Chair of the Standing Committee. In all of these positions Judge Kravitz contributed greatly to the rulemaking process. His work guided numerous rule amendments and innovations in judicial case management and procedural structure. Two of Judge Kravitz's major contributions—the amendments to Rules 26 and 56, and the 2010 Civil Litigation Review Conference held at Duke Law School ("Duke Conference")—are addressed in this symposium.

Judge Kravitz's many contributions continue to be felt. For example, in May 2014, the Standing Committee approved various proposed amendments to the Federal Rules of Civil Procedure, including numerous amendments that arose directly as a result of the Duke Conference. The Judicial Conference of the United States will consider the proposed amendments during its September 2014 meeting.

PART II

Judge Kravitz participated in, and guided, monumental projects during his tenure on the Advisory Committee and the Standing Committee. It is no surprise that an esteemed group of jurists, scholars, and practitioners came together to reflect on Judge Kravitz's career and on the rules process generally. Chief Justice Roberts wrote a letter in tribute to Judge Kravitz that was read to the attendees at the April 10, 2014 conference. The Chief Justice's letter is included in this written symposium. In his letter the Chief Justice praises Judge Kravitz for his service on the bench as well as his numerous contributions to judicial procedure, many of which are discussed in the subsequent essays and tributes. Five scholarly essays—all of which were presented at the live symposium—are also included in this written symposium.

The first essay is by Professor Edward H. Cooper, a widely respected scholar. Professor Cooper is Reporter to the Advisory Committee and the Thomas M. Cooley Professor of Law at University of Michigan School of Law. As Reporter to the Advisory Committee—a position he has held since 1992—Professor Cooper's insight into the rulemaking process is a valuable contribution to this discussion.

Professor Cooper begins his essay with praise for Judge Kravitz and a description of the state of the Advisory Committee's projects when Judge Kravitz became Chair in 2007. As Professor Cooper points out, the Committee was in the process of revising Rule 56. Professor Cooper notes that the discussion of Rule 56 revisions was prompted in part by the "trilogy"

of summary judgment cases decided by the Supreme Court in 1986.[1] That discussion was further prompted by the complete overhaul of the civil rules through the Style Project. Professor Cooper discusses the subsequent work of revising Rule 56 in light of the Advisory Committee's methods and tools empowered to it by the Rules Enabling Act[2]—including the use of "miniconferences," subcommittees, public comment, and empirical studies by the Federal Judicial Center.

Professor Cooper then addresses the substantive changes implemented through the Advisory Committee's processes, including the decision to restore the use of "shall" and reject "point–counterpoint" procedure for framing motions and responses. He concludes with a discussion of additional issues the Committee considered prior to publication of the revised Rule 56, such as the shifting burdens throughout the summary-judgment process, and the ability of the courts to consider materials not cited by the parties.

The second essay is by Professor Richard Marcus. Professor Marcus is the Associate Reporter to the Advisory Committee, a distinguished Professor of Law, and the Horace O. Coil Chair in Litigation at the University of California Hastings College of the Law. Professor Marcus has served as the Associate Reporter since 1996 and is a respected scholar in the areas of civil procedure and complex litigation.

Professor Marcus begins his essay with a description of recent congressional concerns regarding the rulemaking process and the role of the Advisory Committee. He then posits a chronological framework of rulemaking in the American legal system.

Professor Marcus summarizes the first, pre-federal rules period, and the second period of controversy from 1934 to 1938, which involved the implementation of a uniform system of federal procedure. He describes the third period, from 1938 to approximately 1970, as the golden age of federal procedural rulemaking. The creation of a uniform system of rules within three years, followed by years of revisions and expansions of the federal rules, was praised by many scholars.

In the fourth period, both legislators and members of the bar expressed concern about the dramatic increase in litigation and an abundance of groundless claims. Rule changes focused on such subjects as proportionality and sanctions. The fifth period centers on the introduction of initial disclosures in 1991. Professor Marcus posits that rulemaking has entered a sixth period, which he calls the Kravitz Era. That period began in 1993, and centered on the amendments to Rule 23, including discovery and e-discovery. In this environment of rapid change in the practice of law, Congress prompted more transparency in the rulemaking process. Professor Marcus argues that Judge Kravitz guided the Advisory

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[1] Anderson v. Liberty Lobby, 477 U.S. 242 (1986); Celotex v. Catrett, 477 U.S. 317 (1986); Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

[2] 28 U.S.C. § 2072 (2012).

Committee to exceed the transparency requirements mandated by Congress, as exemplified by the Duke Conference's broad evaluation of litigation-related issues.

The third essay is by Professor Edward Brunet. Professor Brunet is the Henry J. Casey Professor of Law at Lewis & Clark Law School. He is a respected scholar in the area of pre-trial procedure and has authored numerous books and articles on topics such as summary judgment, complex litigation, and arbitration.

Professor Brunet argues that the health and vitality of public participation in the rulemaking process, described in Professor Cooper's and Professor Marcus's essays, does not automatically improve the rulemaking process. He evaluates the work of the Advisory Committee through a legislative model. Professor Brunet then poses the question of whether the Committee is unwilling or unable to effect major changes to procedural rules, and whether the Committee has reached a point of diminishing returns given the enormous number of public comments that it receives on proposed rule amendments. He then discusses these questions by evaluating the recent work of the committee in revising Rule 56 and its restoration of "shall" and rejection of "point–counterpoint" methodology.

The fourth essay is co-authored by Judge Lee H. Rosenthal and Professor Steven S. Gensler. Judge Rosenthal is a U.S. District Court Judge for the Southern District of Texas, as well as former Chair of the Standing Committee, and former Chair and member of the Advisory Committee. Professor Gensler is the Associate Dean of Research and Scholarship and Welcome D. and W. DeVier Pierson Professor of Law at the University of Oklahoma College of Law. Professor Gensler served as a member of the Advisory Committee from 2005 to 2011. Judge Rosenthal and Professor Gensler have co-authored several articles on pre-trial procedure and judicial case management, and their combined expertise here is a tremendous contribution to the symposium.

Judge Rosenthal and Professor Gensler focus on the work of the Duke Conference. They argue that the empirical studies presented at the conference show general satisfaction with the civil rules themselves; however, there was agreement at the conference that the rules were not being used to their full potential, particularly in complex and document-intensive cases. This consensus prompted a reevaluation of the role of the trial judge as a case manager. In examining how to support the trial judge in this role, the Duke Conference Subcommittee considered special schemes tailored to certain categories of cases. The subject of many of these schemes—designed to augment, not replace, the general civil rules—is discovery. Judge Rosenthal and Professor Gensler argue that the focus of judicial management of discovery should be where discovery begins, rather than determining the outer bounds of the discovery universe for each case. To this end Judge Rosenthal and Professor Gensler present several suggested practices for trial judges to employ in case management, such as "live" Rule 16(b) conferences, and they reflect on how

Judge Kravitz—the inspiration behind much of the Duke Conference inquiry—embodied these practices during his time on the bench.

The fifth essay is by Judge Diane Wood. Judge Wood is the Chief Judge of the U.S. Court of Appeals for the Seventh Circuit and a former member of the Standing Committee. Given her background and experience, Judge Wood offers valuable perspective.

Judge Wood's article explores the intersection of procedural and substantive law through a reevaluation of the *Erie*[3] doctrine. Tracing the history of the common law prior to the emergence of the Legal Realist movement, Judge Wood criticizes the characterization of *Swift v. Tyson*[4] in later opinions of the Court. The resulting definitive rule from *Erie*—requiring federal courts to apply state law, except in matters governed by the U.S. Constitution or Acts of Congress—left the federal judiciary with the difficult task of reconciling this requirement with its independent authority as part of the federal government. Judge Wood outlines the various cases in which the Court took on the task of sorting out state and federal rules of decision and the layers of analysis the Court must now work through. Judge Wood then analyzes how the Court creates federal rules of decision in cases that do not implicate a directly applicable federal statute, yet implicate federal law because of what the Court recognizes as a "uniquely federal interest." These uniquely federal interests include cases in which the United States is a party, cases in admiralty, and interstate and international cases. Judge Wood argues that, excluding cases of international relations, in the absence of positive federal law, state law must govern. She further argues that by returning to the rule contemplated by *Erie* itself, the judicial system would gain much-needed clarity.

PART III

Several friends and colleagues of Judge Kravitz gave personal tributes to the Judge at the April 10, 2014 conference, and they have submitted written tributes to this symposium. The authors of these tributes are as follows:

1. Charles J. Cooper is a founding member and chairman of Cooper & Kirk, PLCC and a prominent appellate lawyer. Chuck Cooper and Judge Kravitz served as co-clerks to then-Justice William H. Rehnquist, and they remained close friends until Judge Kravitz's death.
2. Elizabeth J. Cabraser and Peter D. Keisler co-authored a tribute. Ms. Cabraser is a partner at Lief Cabraser Heimann & Bernstein, and is one of the country's premier class action litigators. She served on the Advisory Committee with Judge Kravitz. Peter Keisler, a partner at Sidley Austin LLP and leading lawyer, also served on the Advisory Committee with Judge Kravitz.

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[3] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[4] 41 U.S. 1 (1842).

3. Judge Jeremy Fogel is a U.S. District Judge for the Northern District of California and the current Director of the Federal Judicial Center. As Director of the Federal Judicial Center, Judge Fogel worked closely with Judge Kravitz during the final years of Judge Kravitz's career.
4. Judge Anthony J. Scirica is a Senior Circuit Judge for the U.S. Court of Appeals for the Third Circuit. Judge Scirica also served as a member and Chair of the Executive Committee of the United States Judicial Conference, Chair of the Standing Committee, and member of the Advisory Committee. He is the current Chair of the Committee on Judicial Conduct and Disability. Judge Scirica worked closely with Judge Kravitz in the rules process. Although he was unable to attend the April 10, 2014 conference, we are pleased that he provided a written tribute, which was read to the attendees.