

WHAT ED COOPER HAS TAUGHT ME ABOUT THE REALITIES AND COMPLEXITIES OF APPELLATE JURISDICTION AND PROCEDURE

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In this brief essay, I will describe some of what I have learned from Ed Cooper as a fellow participant in the rulemaking process and as a coauthor of two volumes of his *Federal Practice and Procedure* treatise. To describe everything that Ed has taught me would require much more than the length of this essay. So instead, I will try to offer some representative examples—or, as Ed might say, some “sketches.” Because others will discuss Ed’s expert guidance of the Rules Committees’ consideration of key issues concerning the Civil Rules, my discussion of Ed’s scholarship and reporting work will focus mostly on the large subset of his work that relates to appellate practice. I will touch upon his unique contributions to the law and scholarship of appellate jurisdiction and procedure, and also upon his generosity and wisdom as a mentor.

In Ed’s articles from the 1970s and 1980s, one can already see clearly his sensitivity to the multiple ways in which institutional realities affect the nature, scope, and timing of appellate review.¹ For instance, Ed’s 1984 article on the timing of civil appeals² sets out a rich analysis of the factors that affect our view of the desirability of permitting appeals before final judgment—including the quality of district-court and appellate decision making, the standard of appellate review, the docket pressures in the courts of appeals, the capabilities of appellate lawyers, the particularities of a given area of substantive law, and the evolution of procedural devices.³

Ed’s 1988 article on appellate review of district court findings of fact praises the flexibility of Civil Rule 52(a)’s clear-error standard

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1. In addition to the examples discussed in the text, see, e.g., Edward H. Cooper, *Extraordinary Writ Practice in Criminal Cases: Analogies for the Military Courts*, 98 F.R.D. 593 (1983); Edward H. Cooper, *Government Appeals in Criminal Cases: The 1978 Decisions*, 81 F.R.D. 539 (1979).

2. See Edward H. Cooper, *Timing as Jurisdiction: Federal Civil Appeals in Context*, 47 LAW & CONTEMP. PROBS. 157 (1984).

3. See *id.* at 158–62. As to the last of these points, Ed presciently suggested the usefulness of interlocutory appeals from rulings on class certification. See *id.* at 163. Some fourteen years later, Civil Rule 23(f) took effect—one of the products of Ed’s work as Reporter to the Civil Rules Committee. See FED. R. CIV. P. 23(f) committee note (1998).

and suggests considerations that should guide the application of that standard in different circumstances.⁴ Like his treatment of the final-judgment rule, Ed's analysis of Civil Rule 52(a) focuses on institutional considerations, such as the effect of appellate caseloads on the appellate functions of law development and error correction, the differences between factual findings by juries and those by judges, the individual aptitudes of appellate judges and the collective aptitudes of appellate panels, the specifics of the evidence and of the relevant legal rules, the complexity of the trial, the burden of proof, and the meticulousness of the judge's findings.⁵ Ed illuminates the subtleties in this area by discussing circumstances that might influence an appellate court's "[c]haracterization of an issue of law application as fact or law for purposes of identifying a formalized standard of review"⁶ and closes by suggesting an approach to the standard of review in cases where the claim is governed by state law.⁷

Ed's work on the appellate-practice volumes in the Federal Practice and Procedure treatise (like his work on other topics in that treatise) shows his exhaustive knowledge of doctrinal complexities and his clear-eyed analysis of sometimes-muddled case law. I first encountered the treatise as a new law teacher, when I frequently consulted it to deepen my understanding of issues that had come up in class discussion. In 2006, I became the junior coauthor of the volume (more recently, two volumes) on the Appellate Rules.⁸ I knew that I owed a debt to—collectively—Eugene Gressman (the author of the portion of the First Edition that treated the Appellate Rules), Ed (who wrote the Supplement to the First Edition), Charles Alan Wright (who wrote the Second and Third Editions), and Patrick J. Schiltz (who wrote the subsequent pocket parts).

This symposium gave me an occasion to look at Ed's Supplement. Readers who have not written pocket parts to treatise volumes might not be accustomed to thinking of such supplements as scholarly works in their own right. But by 1996, the portion of

4. See Edward H. Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645, 645–46 (1988).

5. See *id.* at 649–50, 653–56.

6. See *id.* at 660.

7. See *id.* at 669–70 (suggesting that in a case where the substance of the claim is governed by state law, Civil Rule 52(a)'s clear-error standard is flexible enough to take into account the level of deference that a particular finding would receive from the appellate courts of the relevant state).

8. See 16A & 16AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & CATHERINE T. STRUVE, FEDERAL PRACTICE & PROCEDURE (4th ed. 2008).

Ed's pocket part that was attributable to his discussion of the Appellate Rules⁹ was more than three times as long as the relevant portion of the First Edition.¹⁰ Some of this was a natural product of the need to discuss intervening amendments to the Rules. But the length of the pocket part also stemmed from Ed's decision to tackle in the pocket part difficult issues that were not treated—or not treated in any depth—in the First Edition: What happens when the appellant's lawyer fails to sign the notice of appeal?¹¹ Do earlier orders merge in the final judgment for purposes of interpreting the scope of the notice of appeal?¹² If cases are consolidated in the district court, will a notice of appeal from the judgment in one case suffice to appeal the judgment in the other?¹³ What are the effects, in detail, of postjudgment motions on appeal timing?¹⁴ When does an alteration in the judgment re-start the appeal time?¹⁵

I could go on. But what I have sketched above suffices to indicate some of the key features of Ed's scholarly work: tolerance—indeed, appreciation—of flexibility; sensitivity to institutional factors; and encyclopedic recall of case law. In our joint projects concerning the intersection of the Civil and Appellate Rules, he has shown all of these virtues. The recent adoption of Civil Rule 62.1 and Appellate Rule 12.1 provides a good example. Civil Rule 62.1(a) provides that

[i]f a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may: (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.¹⁶

9. See CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, 1996 SUPPLEMENT TO 16 FEDERAL PRACTICE & PROCEDURE (467 pages spanning Sections 3945 through 3994) [hereinafter *Cooper Supplement*].

10. See 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & EUGENE GRESSMAN, FEDERAL PRACTICE & PROCEDURE §§ 3945–3994 (1977) (145 pages).

11. See *Cooper Supplement*, *supra* note 10, at 434 (“[F]ailure to sign the notice should not defeat the appeal.”). For the Supreme Court's later disposition of this issue, see *Becker v. Montgomery*, 532 U.S. 757, 760 (2001) (“[I]f the notice is timely filed and adequate in other respects, jurisdiction will vest in the court of appeals, where the case may proceed so long as the appellant promptly supplies the signature once the omission is called to his attention.”).

12. See *Cooper Supplement*, *supra* note 10, at 435 (stating that notice of appeal from final judgment “support[s] review of all earlier orders that merge in the final judgment”).

13. See *id.* at 513 (warning of the “surprisingly harsh results” that may follow from the fact that actions consolidated for trial “may continue to be treated as separate actions for purposes of appeal time”).

14. See *id.* at 513–14 (addressing, *inter alia*, issues raised by “mistakenly captioned” motions).

15. See *id.* at 514.

16. FED. R. CIV. P. 62.1(a).

This rule and its companion provision in the Appellate Rules formalize the practice of “indicative rulings”—a useful means for facilitating coordination between the trial and appellate courts.¹⁷

In the minutes of the Rules Committees, one can follow the project as it bounced from the Appellate Rules Committee to the Civil Rules Committee and back again.¹⁸ But the public record does not fully memorialize how Ed’s keen eye and alert analysis improved the Rule’s text and Note. When the Committee Note to Civil Rule 62.1 specifies that the Rule “does not attempt to define the circumstances in which an appeal limits or defeats the district court’s authority to act in the face of a pending appeal” and observes that “[t]he rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction,”¹⁹ those who know Ed will recognize his characteristically cautious approach. When the Committee Note to Appellate Rule 12.1 warns of the dangers of an unlimited remand,²⁰ those of us who worked on the project will recall that this warning grew out of Ed’s concern about the risk that appeal rights might be lost because of absent-mindedness on the part of the appellate court.

If I were to describe all the instances in which the rulemaking process has benefited from Ed’s work—both amendments that have been successfully adopted and amendments that have been wisely avoided²¹—this essay would be longer than the pocket part that I

17. *See id.*

18. *See* Minutes of Appellate Rules Committee, April 26–27, 2007, at 20 (noting that the Solicitor General had proposed in 2000 the adoption of a rule formalizing the practice of indicative rulings; that the Appellate Rules Committee had referred the question to the Civil Rules Committee in 2001; and that in light of the Civil Rules Committee’s decision to publish for comment proposed Civil Rule 62.1, the Appellate Rules Committee was considering whether to publish for comment proposed Appellate Rule 12.1).

19. *See* FED. R. CIV. P. 62.1 committee note (2009).

20. The 2009 Committee Note to Appellate Rule 12.1 states in part:

The court of appeals may remand all proceedings, terminating the initial appeal. In the context of postjudgment motions, however, that procedure should be followed only when the appellant has stated clearly its intention to abandon the appeal. The danger is that if the initial appeal is terminated and the district court then denies the requested relief, the time for appealing the initial judgment will have run out and a court might rule that the appellant is limited to appealing the denial of the postjudgment motion. The latter appeal may well not provide the appellant with the opportunity to raise all the challenges that could have been raised on appeal from the underlying judgment.

21. The latter category includes, for example, the Appellate and Civil Rules Committees’ joint decision not to amend Appellate Rule 4(a)(4) or Civil Rule 58(a) to address the possibility that there might be a time lag between the entry of an order disposing of a tolling motion and the entry of an amended judgment. *See* Minutes of Fall 2011 Meeting of Advisory Committee on Appellate Rules, Oct. 13–14, 2011, at 6–7.

mentioned above. Instead, I would like to mention briefly a few of the many ways in which Ed has shown kindness to me as his junior colleague. In 2006, when I had just been appointed Reporter to the Appellate Rules Committee, Ed invited me to dinner before the next Standing Committee meeting and explained the Civil Rules Committee projects that had implications for the Appellate Rules. He extended a similarly warm welcome to me when I joined the treatise as a coauthor of the volumes mentioned above, and he has always been generous with his time in consulting on the analysis (for the treatise) of an ambiguous or dubious case. Likewise, his comments have improved my articles on topics that grew out of our rulemaking activities. And he encouraged me to seek membership in the American Law Institute—advice that I am very glad to have taken.

In rulemaking endeavors, I turn regularly to Ed for guidance. For example, when considering questions of drafting style I frequently recall Ed's advice that one should consider how lawyers and judges would read the relevant text. And our joint projects would have foundered without Ed's endless patience, meticulousness, and sense of humor. As my last example, I will take the 2009 amendments to the provisions in the national rules that specify the method for computing time.²² These amendments replaced the old method (which skipped intermediate weekends and holidays when computing short time periods) with a simpler method that counts all days (even when computing short time periods).²³ The project was tremendously labor intensive, requiring not only offsetting amendments to many short time periods set by the national rules but also a review of the United States Code for short statutory time periods that might require adjustment in the light of the change in time-computation method.²⁴

With respect to all these matters, Ed displayed his customary command not only of the big picture but also of the smallest details. Did the Civil Rules include a time period measured in months? It was Ed who pointed out that the answer was yes.²⁵ How should one handle the calculation of a period stated in hours when the period in question spans a shift to daylight savings time? It was Ed who brought this question to our attention. The results of the

22. See FED. R. APP. P. 26(a); FED. R. BANKR. P. 9006(a); FED. R. CIV. P. 6(a); FED. R. CRIM. P. 45(a).

23. See, e.g., FED. R. CIV. P. 6 committee note (2009) (explaining the shift in time-computation approach).

24. For the resulting legislation, see the Statutory Time-Periods Technical Amendments Act of 2009, Pub. L. No. 111-16, 123 Stat. 1607 (2009).

25. See SUPP. R. ADMIRALTY MAR. CLAIMS & ASSET FORFEITURE ACTIONS F(1).

ensuing discussion are set forth in the relevant Committee Notes.²⁶ Working out these intricacies was important to the proper functioning of the amended rules but was not perhaps the most intrinsically rewarding aspect of a Reporter's work. Yet Ed's energy and good humor never faltered. His email on the daylight-savings-time question—after setting out in thoughtful detail the nature of the issue—closed as follows: "Yes, we are still having fun." I hope that Ed continues to feel that way about the rulemaking process for many years to come.

26. FED. R. APP. P. 26(a)(2) committee note (2009); FED. R. BANKR. P. 9006(a)(2) committee note (2009); FED. R. CIV. P. 6(a)(2) committee note (2009); FED. R. CRIM. P. 45(a)(2) committee note (2009).