

RONALD M. GOULD*

A Student's Tribute to Professor Arthur Miller

I offer this tribute to my former teacher, Professor Arthur Miller, commending his teaching, scholarship, and contributions to the American legal system. My deep admiration for Professor Miller is based on my experiences as a student, a practicing lawyer, and a judge.¹

I started at the University of Michigan Law School in the summer of 1970. Professor Miller was the teacher for my opening and basic Civil Procedure class. On the opening day of class I went to a large classroom that must have had more than 100 students in it. I walked Professor Miller in a three-piece suit with a total command of the atmosphere in the class. I wasn't sure then what a lawyer or law professor looked like, but surely this was it. From the start he asked students tough and demanding questions. This was a few years before *The Paper Chase* portrayal of a fictional Professor Charles Kingsfield's demanding inquiries of students made the Socratic method more familiar in public consciousness, but we had the real thing.

Under Professor Miller's guidance, we started to learn to think like lawyers. Before long we were enjoying the tasks of spotting issues, identifying potentially governing legal rules, debating their application, and coming to a sensible conclusion. I recall, for example, our class talking about the personal jurisdiction requirements of *International Shoe*: What were the "minimum contacts" necessary to sustain jurisdiction? What did it mean for such exercise of jurisdiction to be consistent with "fair play" and

* Circuit Judge, U.S. Court of Appeals for the Ninth Circuit.

¹ I write in a personal capacity, and not on behalf of the court on which I serve.

“substantial justice?” Soon, too, we were exploring the contours of the *Federal Rules of Civil Procedure*. Under Rule 8, the niceties and potential pitfalls of detailed pleading were a thing of the past; instead, only a “short and plain statement of the claim showing that the pleader is entitled to relief” was required. If a party made a motion to dismiss under Rule 12(b)(6) for failure to state a claim, we learned we were to look to the nature of the facts pleaded in the complaint, and to consider if a claim was stated assuming that the plaintiff could prove these facts were true. When were any counterclaims mandatory and when permissive? Rule 13 covered that. When could third persons be brought into a lawsuit, for example to indemnify the defendant? Rule 14 gave guidance on that. If a pleading was deficient, we absorbed the governing standard for amendment under Rule 15, that the “court should freely give leave when justice so requires.” Discovery in those days was governed by the standard of Rule 26, which before today’s preoccupation with “required disclosures,” had an extremely broad relevance standard. Next, assuming that the case had proceeded past initial pleadings, perhaps with the benefit of some discovery, we pondered the critical summary judgment standard: when was there, in the language of then-applicable Rule 56, a “genuine issue of material fact?” What if a judgment had been reached but there was an apparent mistake, when could there be relief from the judgment? Rule 60 established standards for relief and when something could be done about it.

As we explored such questions, Professor Miller’s long experience and searching inquiries made us realize that the law was not a prize to be easily won. We would have to work hard and think critically to understand these lessons and to help clients find their way in litigation.

Many professors used Socratic dialogue, but Professor Miller was one of the best. When we were called upon in class, we knew that our thought process and reasoning would be carefully tested. We learned early in the year that the first and foremost need was to be well prepared each day for class. Professor Miller seemed to call on students randomly, asking them to state the case under review and help us with its lessons. In one of the first days of class, Professor Miller called on a particular student and asked him to comment about the case being studied that day. This unfortunate student tried to “pass” as unprepared. Arthur Miller would have none of that. He folded up his papers, thundered that he was not going to waste his time or the class’s time talking to a student who was not prepared, and

strode briskly out of the classroom, telling us that it was important for each student to do their part in preparation. After that, few of us would risk coming to class without having studied the assigned cases for the day. A possibly apocryphal anecdote made the rounds in our classroom: The story was that during a class a year or two earlier, after Professor Miller had taken some procedural issue to its limit, he tore open his suit and shirt and revealed a Superman costume. Whether or not that had occurred, we knew that it was just as unwise to step on Superman's cape as to come to Professor Miller's class unprepared or to try to bluff your way through a case discussion. I don't believe that Professor Miller had a Superman costume under his shirt every day, but he certainly seemed to have the mental superpowers that went with command of the civil procedure territory.

But let's say you had studied the cases, had thought about them hard, had some ideas about the law, and were ready to state them. Voicing your opinions in class to Professor Miller was just the beginning. He had a nice way of asking question after question, fairly criticizing your arguments and piercing to the core of what you knew and what you did not know. I suppose that's what got Socrates in trouble in ancient Athens, but in twentieth-century Ann Arbor this was part of the process by which we improved and deepened our legal analysis. After such a session with Professor Miller, you understood that this type of study required harder thought and deeper thinking than the typical undergraduate fare. If you were going to think like a lawyer and advocate for a client, you had to recognize that there would be another person on the other side of the case, likely as smart as you, and certainly as highly motivated. You couldn't just dance through the issues casually; you had to be able to defend your arguments. Through classes like these our minds were stretched, we started to think like lawyers, we understood the difficulties inherent in even apparently straightforward cases, and we knew that doing our preparation with diligence, coming to conclusions, and testing them against hard questions would advance our skills. In all of this, Professor Miller was a master teacher.

After law school it was my very good fortune to serve as a law clerk to the Honorable Wade H. McCree, Jr. on the U.S. Court of Appeals for the Sixth Circuit, and thereafter to be a law clerk for Justice Potter Stewart on the Supreme Court of the United States. I wasn't surprised that each of these jurists, when discussing any civil

procedure question, might ask to see what Professor Miller's treatise, *Wright & Miller*,² had to say on the subject.

After clerking I joined the law firm Perkins Coie in Seattle and became a litigation department associate in late 1975. This work constantly brought me back in touch with Professor Miller's leading treatise on civil procedure. In early 1976, I was called in and asked to argue a motion. I was the new guy on the block, but in those days litigation associates at the firm got responsibility quickly. One of the firm's clients had been sued in a county in central Washington, and the litigation partner and the senior associate on the case had developed a procedural argument that they hoped would get our client dismissed from the case. I'm sure other law firm associates at times have encountered this setting: The battle lines were drawn and I was asked to fly to the remote town, go to the county courthouse, and try to get our client out of the lawsuit. This case concerned a state court procedure, but the state court's rules of civil procedure were much the same as the federal rules. Although I had no practical experience, and knew that the other lawyers had handled many cases, I did have the sense that I understood, however imperfectly, the big picture of what these civil rules were trying to accomplish. I told the partner and senior associate involved that I was honored to have the chance to advocate for our client, but I thought I should say that the theory of the case on the applicable procedural rule seemed wrong to me, and I thought that the court would adopt an analysis along lines I described, which were probably parroted from what I remembered of Professor Miller's class. The partner acknowledged my position, asked me to "do my best," and the next morning off I went.

Law practice was cordial in those days in Washington, and when I landed my opposing counsel was there in his pickup truck to meet me at the airport. I am sure I was wearing a three-piece suit, trying to model myself after Professor Miller's New York law practice style. But my opponent was a country lawyer, complete with cowboy boots, a string tie, and a wide-brimmed hat. He drove us to the county courthouse where instead of arguing in the courtroom we were invited to come into the judge's chambers for discussion. The judge said he would let us argue this formally in the courtroom if we preferred, but he would be just as happy to chat in chambers. This was an offer not

² The current version of Professor Miller's treatise, a collaborative effort with Professor Wright and other distinguished scholars, is known as CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* (4th ed. 2008). It has long been a staple of almost every law office, law library, and judicial chambers.

to be refused. I was the moving party and went through my advocacy statement as well as I could, the other lawyer responded, and the judge paused for a few minutes, took a book or two off the shelf, and thought about the case for some time. Then he spoke, and there was something familiar about the substance: He stated the law much as I would have expected Professor Miller to state it. His analysis was right down the middle of the fairway in terms of how Arthur Miller's treatise analyzed this rule. I went back to my law firm in Seattle with a loss. I didn't think anyone really had expected that I would win that motion. I suppose that we were just giving it a good advocate's try for the client. But I also think that more than one person noticed that the language of the judge's order was similar to the analysis I had thought would be adopted, which in turn was simply what I thought Professor Miller would have said. For years after that, and my litigation practice extended from 1975 until the end of 1999, when the rules of civil procedure came into issue, I just tried to analyze them in the way I learned in Arthur Miller's classroom and things worked out well.

Whenever a procedural issue arose in my law practice, *Wright & Miller* was a starting point. Not surprisingly to those familiar with Professor Miller's class, on a great many cases I also started off with a good command of the true issues, a feeling for how the rules work together, and an understanding of the verbal issues presented in each of the key rules. Professor Miller had indeed taught me to think like a lawyer. My experience in law practice improved on, but did not alter, the basic pattern that he and his colleagues at the law school had instilled in my approach to law.

I maintained my admiration for the work of Professor Miller once, courtesy of President Clinton and the U.S. Senate, I got to be a judge. Most appeals that come before us involve substantive issues of law, not rules of civil procedure. But whenever there was an issue about the *Federal Rules of Civil Procedure*, my first question was, what does *Wright & Miller* say? The evenhanded way in which Professor Miller's treatise assesses tough issues gives a good model for aspiring judges: Identify the rules of law that have been clearly established, discuss the leading precedents, analyze the language of the rules and the issues they present, assess the underlying policy impacts of differing interpretations, identify the weight of authority, and know why it goes that way.

My admiration for Professor Arthur Miller builds upon my experience as a student at law school, as a litigator in a commercial

litigation practice applying the *Federal Rules of Civil Procedure*, and as a judge happy to have the benefit of his scholarship. I know that Professor Miller has made many other contributions to our country and its legal system, not the least of which are the important books that he has written on difficult legal subjects, exposing cutting-edge legal issues to his deep and insightful analysis,³ and his moderating of a popular television show which took methods of legal thinking to the general public on important issues.⁴ But if I ask myself what can be said that is true and simple about Professor Miller's contributions to our country's legal system, it takes me back to the classroom setting in which I first met him. I can hear him explaining and asking questions about the principles in the *Federal Rules of Civil Procedure*: How do these rules operate individually and in combination? What are the key phrases within them subject to interpretation? What are the arguments pro and con one could expect for any interpretation? How should the law governing these rules be best stated? Professor Miller on subjects such as these is always clear in analysis, fair in evaluation, and precise in statement.

Scholars like Professor Miller work in combination with lawyer advocates and judges in a cumulative process that can improve the legal system. The practice of civil procedure in the courts of the United States has been elevated by Professor Miller's work, his trenchant analysis has made its mark on our perceptions, and our ability to understand the law and apply it has been enhanced by his efforts.

³ See, e.g., ARTHUR R. MILLER, *THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS* (1971), which presciently warned of coming dangers.

⁴ I recall watching Professor Miller hold forth in his popular television show known as *Miller's Court*. I always thought of it as "King Arthur's Court." Professor Miller could deploy his Socratic methods of questioning not only with first-year law students, but also with political figures, other scholars, and those who studied the keenest public policy issues.