SYMPOSIUM INTERVIEW ON AGGREGATE LITIGATION

Professor Arthur R. Miller joined Professor Robert Klonoff for a Q&A session at Lewis & Clark Law School.

Klonoff: We have a lot of fun stuff to talk about today. There are some students from my Civil Procedure class here so they will actually like this first topic. I want to talk about the Federal Rules of Civil Procedure for a few minutes. Don't worry all of you who are not into procedure.

Almost fifty-five years ago significant parts of the Federal Rules were totally revamped. And you had a major hand in the joinder and class action rules that have really survived to this day in largely the same form. So number one, I'd like to hear what your role was, and number two, what you had in mind, and finally, whether the ultimate implementation of the rules and the way they are used today live up to your expectations.

Miller: I think the best way to describe my role is as an indentured servant. It so happened, life is filled with fortuity, that my procedure teacher at Harvard Law School, Benjamin Kaplan, my mentor, a man I truly adored and modeled much of my career after, became the Reporter to the Advisory Committee on Civil Rules, which is the Committee which you have recently been on, Bob, that is in charge of proposing amendments to and keeping the rules brushed up. And in the early '60s that Committee started to revamp the joinder rules. I was then part-time teaching at Columbia coming off practice and he literally co-opted me. And I spent two to three years working on those rules, primarily the class action rules.

Klonoff: Are you happy with how it's turned out 55 years later?

Miller: It's given us full employment. Where would we be without those rules?

Klonoff: When you were in that process it was really an historic period in our country, the Civil Rights Act, and later the Voting Rights Act. And that was initially what the rules were looking at in part, but it's morphed. Hasn't it?

Miller: It has morphed. It's been transformed. It's . . . I like to say, being a New Yorker, that the class action is the amoeba that ate New York. In his years of his retirement I used to visit Ben, and he'd always start our conversation by saying

"How's our rule? How's our rule?" I would describe some of the litigation under the class action rule and he would just shake his head and say we never could have imagined that the rule would develop that way.

Klonoff: Class actions have a bad reputation in some quarters. Do you think that your rule has done good for society?

Miller: I have no doubt it's done good. Those "quarters" are those who have been kicked in the butt and whose conduct has been called to account by the rule. Let's face it, the class action rule has been a vital force in promoting civil rights in this country. It's been used in desegregation cases, voting rights cases, all the way over to prisoner rights cases. It's been a backbone of gender discrimination cases, disability cases, and my personal favorite, age discrimination. And that's just looking at it from the public side. It has done yeoman service in the antitrust, securities, and all the new substantive fields that have developed out of the '60s through the '80s, environment, products, pharmaceuticals, consumerism. It's the procedural vehicle that provides access to people who otherwise would have no access to the court system because of the economic cost of litigating and the power of the government and economic entities whose conduct is being challenged. When people band together in the aggregate, claims become viable.

Klonoff: How would you compare the rules process when you were involved to the rules process today?

Miller: We were better. Just kidding Bob. There's been a sociological shift on the way the Committee functions. Everything must be transparent today. When I was that indentured servant, and later the Reporter to the Committee and then a Member of the Committee, it was a like a secret society. The chair, I should say Ben's chair, was Dean Atchison, who some may recall was Secretary of State in his prime and a distinguished senior partner at a great Washington law firm. We used to meet at the firm, just the Committee, Ben's Committee, my Committee. The meetings were invisible. Occasionally we would meet at the Supreme Court and the Chief Justice would come in and say hello and wish us well. But there was no transparency whatsoever. We met behind closed doors and alone. Later on everybody and his brother and sister showed up at those meetings and every lobbyist you can imagine was in that room and there was competition as to which lobbyist might take the Committee out to lunch or dinner. Although your Committee stopped that, hasn't it? That's probably the only thing your Committee accomplished.

Klonoff [to the audience]**:** Gee, thanks.

Miller: Based on my experience, the Committee I was part of and the Committee I served on with Ben was so damned professional and hardworking and unaffected by outside influences. Of course, perhaps, we were less informed about certain realities than the Committee is today, because it is transparent and more diversified now. But I saw that difference when I testified in the recent Committee hearings. Everyone was there. But there are times when you are trying to do drafting and professional work that you don't want everybody there.

Klonoff: Let me change topics now. You're a well-known Supreme Court advocate. You've argued some of the leading cases, which we all continue to read, and I always pictured you as a man of great confidence. But during the Elk Cove winery tour when you had several glasses of wine, you confessed to me you were actually nervous for your first argument. I want to hear about that. The nervous Arthur Miller?

Miller: For many people in the profession, particularly someone like me, there is no greater challenge or thrill than arguing a case in the United States Supreme Court. Growing up, going to law school, practicing, I never dreamed I'd ever have that honor. So when it came my way the first time, I was petrified, absolutely petrified. And indeed the procedure at the Court requires the lawyers for all the cases to be heard that day to be in the Court, to be prepared to leap up when their case is called. My case was last on the docket and as the day progressed I discovered I had gone numb, physically numb, and I don't think I've experienced terror greater than the first time before the Court.

Klonoff: I know there are thousands of your students who would have loved to have seen that since you inflicted terror on so many of them. What would you say was the most important case you argued?

Miller: Proceduralists would say *Phillips Petroleum Co. v. Shutts*. It's a case which has had a meaningful life since it was decided in 1984. Still heavily referred to, it's had a tremendous impact on class action practice. I then was, by and large, retained on the defense side in cases. I guess I didn't develop a plaintiff's heart until much more recently. So I was arguing for Philips Petroleum and if I had been fully successful in my argument, you never would have gotten all the consulting work you've gotten this century. And then, Bob, the *Shutts* case would have killed multistate class actions.

Klonoff: So I should be thankful you lost at least in part?

Miller: Yes, you should tithe to me or something.

Klonoff: What was you most humorous experience?

Miller: Humorous? Well, I'll give you two. I'm arguing a predecessor to the *Shutts* case—this was my first Supreme Court argument—and it involved whether the State of Illinois could exert personal jurisdiction over 50,000 plus people spread all over the country with no ties to Illinois. So it was about jurisdictional power. Since I was counsel for the defendant, the Gillette company, I wanted the Court's answer to be "No." And I get up on rebuttal, and I say the question is whether you're going to allow the State of Illinois to behave like a giant Pacman going around the nation gobbling up thousands of people and adjudicating their claims. At which point Justice Brennan leaned over to Justice Marshall and in earshot said, "What's Pacman?" The moral of that story is never to assume that senior judges will understand a reference to contemporary pop culture.

Can I tell the other story?

Klonoff: Absolutely.

Miller: I am arguing a securities fraud class action to the Court on behalf of the class that turned on two statutory words "strong inference." You have to plead a strong inference of fraud. And the argument is going along and Justice Stevens says, "Let me try to quantify that." Stevens always had different kinds of questions than many of the other Justices. So he says, "Would you say that you've got to plead more than you would have to plead to get a search warrant?" A question I had never thought about. But it struck me instinctively that the answer had to be yes, that "strong inference" had to mean something more than the modest showing courts accept for a search warrant. And then he said, "Let me try again. Let me see if I can quantify it. Would you say that you had to plead enough so that there was a thirty-three and a third percent likelihood of fraud?" At which point, Scalia bellows out, "No! It has to be sixty-six and two thirds!" And I looked at him, I knew Nino, we were friends. And I looked at him and I said, "That's because you've never met a plaintiff you really liked!" To this day I do not know what possessed me to say that in the middle of a Supreme Court oral argument. I mean the Devil got me. Then there's this audible gasp in the audience and I figure I'm going to purgatory, and then the packed courtroom just explodes in laughter.

Klonoff: Let me just say that very few advocates in the Supreme Court can get away with doing that.

Miller: It's not a funny place!

Klonoff: Although you did have a funny encounter with Justice Rehnquist in Texas.

Miller: That happened after the first case I argued in the Supreme Court that I mentioned before, which preceded the *Shutts* case. It was an Illinois class action involving a national class of consumers. The issue was whether Illinois could take jurisdiction over 98% of the class who were not from Illinois. Since it was my first case, I felt enormous tension. It was sort of an out-of-body experience. You don't really have the sense of what's going on when you are doing it. In any event, I survived the argument. Three weeks later an order comes down from the Court, and it says, "Certiorari improvidently granted, case dismissed." Now, anyone who's ever argued a serious appeal to a federal circuit or the Supreme Court, that's a real downer, you know.

Klonoff: Especially for a civil procedure professor.

Miller: You win. You lose. But to say you shouldn't have been here in the first place? You have sweated bullets preparing for eight or nine months. All that work for nothing. And I remember this crazy thought went through my head, my name will never be in the Reporter volume because the publisher doesn't include that when certiorari is improperly granted. So I had this feeling that life had ended. Six months later, I'm at the Texas Bar Association's annual convention. A thousand people are having lunch and they seat me at the table with Justice Rehnquist. I had actually done a little television with him before. He says, in the middle of the meal, in a very strong voice, he had an enormously strong voice when he was healthy, and he bellows out, "Arthur, have your colleagues stopped laughing at you yet?" You have never seen a room go from noise to silence. The whole room had heard it. And I didn't know what he was talking about. I said, "Justice what do you mean?" And he says, "Oh, that class action case that you brought up to the Court, didn't you know that you didn't have a final order? That's why certiorari was improperly granted." So I looked at him and stupidly said, "Of course we knew that we didn't have a final order, but Justice you knew that when you granted certiorari. So we just assumed the case was too difficult for you to decide, so you dumped it out." Again there was an audible gasp from the crowd. I was banking on, to the extent I had any cognition of what the hell I was doing or saying, that he had a great sense of humor, he really did. And I was banking on it. A few seconds of silence were followed by a tremendous guffaw by the Justice. And I said to myself thank goodness!

Klonoff: You're one of the few people I know that has argued in all thirteen circuits.

Miller: I have.

Klonoff: So with all those arguments, with all the years of Supreme Court arguments, given your stature, have you ever had a judge just really be abusive from the bench?

Miller: Yes! I will never forget it.

Klonoff: Tell me about it. [To the audience] I'm enjoying hearing some of this.

Miller: Yes. It was a Ninth Circuit judge. Huge case. One of those cases in which the argument is presented by multiple lawyers and goes on and on. And the number of lawyers arguing meant you're up and then you're down and then you are up again. From the second I got up the first time, one of the best court of appeals judges in the United States starts going after me. Almost, in effect, on a personal level. "Can't you help me?" "You're not helping." "Isn't that stupid?" I sit down. The other lawyers get up, they're treated gently. I get back up, and whack! It goes on and on. So it can happen.

Klonoff: Was that a former student?

Miller: No, no, no. I happened to bump into the late Judge Rymer, also of the Ninth Circuit, for lunch afterward. And when I arrived she said, "I hear you had an interesting day at the courthouse." Apparently word of the episode had spread throughout! He was a superb judge with a superb mind. There were two theories. One was that he had a brand new clerk, and he was in impression mode. And the other theory was it just happened to be the day that Justice Ruth Ginsburg was nominated to the Supreme Court of the United States. And it might have been a bit of "that nominee should have been me." He certainly had the skills to be a fine Justice.

Klonoff: Can you explain why he was just focusing on you?

Miller: On me? I guess I'm a soft touch. Maybe he just wanted to humiliate a Harvard professor. But no one could explain it. Since he has passed away I'll never know.

Klonoff: So when we were at Elk Cove one of the gentlemen serving wine recognized your face and knew you from *Miller's Court*. I suspect that happens

regularly where people recognize you as a TV personality. How did you get into TV?

Miller: I was just minding my own business, truly minding my own business. There is a local station in Boston, Massachusetts, WCVB-TV, that got its license with one of the very few successful license fights in television history and did it by pledging local programing. Nobody believed they ever would make good on it, but it was an honorable group of people, and they developed a wonderful medical package with Dr. Timothy Johnson who then went full-time on ABC. They said, "What do we do now?" And somebody said, "How about law?" I get this by report, because I wasn't there. And somebody else apparently said, "You can't put law on television; it has no pictures!" Somebody else said, "Well there's this professor over at Harvard who supposedly is dynamic." So one day two people in suits are in the back of the classroom. I didn't know who were they were. I thought they were parents or they were alums. It turned out they were the two top executives at the station and I was teaching some really tedious, technical subject that day. They came up at the end of class. They introduced themselves and said, "You know, we don't have any idea what you and the class were talking about, but what we noticed was there was an energy in the classroom. Can we translate you and that energy to television about law?" And that eventuated into *Miller's Court*.

Klonoff: What was *Miller's Court*?

Miller: The format we developed was we conducted a miniature trial on some basic legal issue of general interest spontaneously done by great lawyers that lasted nine to twelve minutes, two witnesses, examination, cross examination, closing statements, and a studio audience which I then interacted with. There was very little interactive television in those days, very little. And then the jury, the audience, would go out, discuss the case, and vote and I would do a narrative of the basic concepts. In many respects life is fortuitous. About two weeks after the show starts airing, *Time Magazine* wrote it up: "Law Finally Comes to Television." And there I am in a very bad suit questioning the audience.

And a week after that *The Wall Street Journal* does one of those left-hand front page columns and there I am in sketched profile. *Good Morning America* sees those pieces and they invite me down to do one segment, "You and the Law." After doing it one Monday they said, "What are you doing the rest of the week? Why don't you stay?" So I stayed and did segments for five days, and by Friday they're introducing me as their legal expert. And that started 20 years of being the law commentator on *Good Morning America*. I never sought television. It just happened. I never gave up my day job.

Klonoff: How did you get into academia? You seem to love being in the courtroom so much and being on TV. Yet you're such a scholar. How did you end up going in that direction?

Miller: Oh, I was with a big New York firm. I had been so impressed by my procedure professor at Harvard, as I described earlier, that academia was in the back of my head. When I was his research assistant I noticed he led a free life. He did what he wanted to do and had enormous respect from his colleagues and the appreciation of his students. So there came a moment in time when Columbia Law School asked me to head up a project on international procedure and put two carrots in front of me. One was they'd let me teach. I thought, "This is an opportunity to see if I've got any capacity to teach." And the second was that Ben Kaplan had become the Reporter to the Advisory Committee on Civil Rules, and the project was developing procedural rules dealing with international judicial assistance and trans-national litigation. How do you serve process in another country? How do take testimony abroad? How do you prove foreign law? Those kinds of things. They knew my relationship with Ben, so they said, "You can take care of formulating Federal Rules and work with Professor Kaplan." He agreed to present my proposed transnational Rules to the Committee, and I agreed to help him with the revision of the federal joinder rules. When I tried teaching, I fell in love with it. I stumbled in. I believe in stumbling.

Klonoff: So was it a good choice? A fulfilling career?

Miller: I don't know. I've only been at it for 56 years. Ben would always say to me up to his passing, he would say, "What are you going to do when you grow up?" I would answer, "I don't know, but I owe everything to you." And he'd say, "I take absolutely no responsibility for you."

Klonoff: Now, I'd love to hear your take on the current Supreme Court, and how you think this Court compares to the Rehnquist Court, and to the Burger Court, pros and cons.

Miller: You know it's apples and oranges and peaches and pears, because what is the Court? The Court is the sum total of the nine personalities. So the Court changes as the Justices change. Maybe you can say, "Oh, this Court is smarter than that Court." I have reverence, absolute reverence for the Warren Court. That was a transformative Court and it's where my professional life began. I was presented to the Court for admission to its Bar by my Harvard colleague Archie Cox when he was Solicitor General and sworn in by Chief Justice Warren. That's special. That Court transformed and humanized American law. The Burger Court was, in my

judgment, less distinguished, but solid and preserved much of the Warren Court's good work. I think the Rehnquist Court was quite distinguished as well.

I have enormous regard for the current Court. It has some awfully good people on it, and it's difficult for me say much because I went to law school with Ruth Ginsburg. Ruth has been part of my life for 60 years. Her daughter was my student. Ruth has now been deified. She's a celebrity. There is a superb documentary movie about Ruth. (But I am biased because I have a bit part in it.) Steve Breyer was my colleague at Harvard for 25 years. Breyer is one of the world's nicest, most civilized and thoughtful of people. I knew Scalia. Scalia, one on one, was a wonderful person. A caring person, in spite of the fact that in many of his opinions, particularly his dissents, he was very harsh, some would say almost cruel. But he was very human one on one. I went through a period of bad health and any time we came upon each other the first thing he would do was ask me how I was feeling. He was a nice man. Kagan was my colleague at Harvard and then my dean. She's very, very talented and a unique person, a very unique person. If you are looking for a Justice with a heart, it is Sotomayor. She is the most human person you can possibly imagine. She's also a kick. The last time I was with her I had been invited into the president's box at Yankee Stadium. He is someone I've gotten to know in connection with a little sports institute I run. I was in the stadium with my grandson. I go to the stadium as often as I can. We go up to the box and it's packed! It's a Red Sox game and it's naturally packed. So we slither in behind the front row. I'm in back of a woman who's yammering away, obviously a rabid Yankee fan. This goes on for some time. We are teasing back and forth and then she turns around, and it's Sotomayor. Sotomayor is there with Yankee stuff all over her. Just a fan at the ball park. That is who she is. And you know she bonded with my grandson. Just a terrific human being. And in my humble judgment, the only true liberal on the Court. You can think of Ruth Ginsburg. You can think of Steve Breyer. You can think of Elena Kagan. But when you compare them to the liberals on the Warren Court that scale has moved tremendously over the decades. But Sotomayor does remind me of some of the Justices on the Warren Court.

Klonoff: I want to discuss a topic that I know distresses you. It distresses me. And that's the assault on the civil justice system. *Twombly* and *Iqbal*, mandatory arbitration, the discovery rules, I know that you've written about these. What's your take on where we are as a country in terms of enforcing the rule of law?

Miller: Well, it should be obvious that I am of a liberal bent in my thinking about the justice system. That I believe in access. I believe in adjudication on the merits not by technicality. That's what the Federal Rules were intended to promote. But the last 30 years in my judgment has seen a never-ending stream of closure of the courts by early termination. The best case for some judges is a dead case. How can I kill it early? I call them stop signs. So that the openness and welcoming

character of the Federal Rules as they were written in 1938 and the rules as I saw them as a student and the Rules as I saw them in practice, and in my early years in academia seem gone. Courts were trying to get to the merits. The judicial mindset was, "if need be we'll have a trial and if need be we'll impanel a jury."

For at least ten years now, trials are going the way of the dodo bird. Jury trials are below one percent. Today it's we want you to plead more even though you have no basis for pleading more because you have no access to critical information. You're hurt, you're injured, you took a pill, and now they tell you your heart valves are shot. Or you ingested asbestos, or you smoke, or some appliance burst into flames, but you don't know why you have the physical injuries you do. Now how can the system demand that you plead with a level of particularly that you can't muster? And then judges say we're not allowing you to engage in discovery to get at the facts until you surmount a pleading burden that you can't meet.

Pleading used to be a short and plain statement. Let's get into discovery and find out what really happened. In the last 30 years every amendment to the Federal Rules relating to discovery has cut back on discovery. Now, judges grant summary judgment. All too often, they act like juries, which is exactly what they are not supposed to do. You're not supposed to grant summary judgment if there is any genuine issue of fact. That's what trials are for. You read some of the summary judgment opinions and the judges appear to be fact finders.

Now we have the Supreme Court validating arbitration clauses. I suspect everybody in this room has a cell phone, or has rented a car, or has checked in to a hotel. And the great fiction of course is that each and every time you have engaged in basic consumer transactions you've read and understood the contract you are handed from top to bottom and you know there are arbitration clauses in them that waive access to the courts. A federal statute enacted in 1920 to promote arbitration between sophisticated businesses has now been transmogrified by the Court to cover millions of consumer transactions and employment relationships. And to me it's totally inequitable. What's happening is that individual rights, the right to go to court, is being taken away from people through these adhesive arbitration clauses. And the Supreme Court has upheld them. So what we're seeing is, in effect, flight from the courts. People are being forced into arbitration. They don't know a thing about arbitration. They are in effect being deprived of the ability to get resolution of a grievance. And they can't do it as an arbitration class action. They can't do it on an aggregate basis. The Supreme Court said, Justice Scalia said, "If the clause says you have to arbitrate and you have to arbitrate one on one, that means you have to arbitrate one on one, not two on one." The arbitration clause is enforced even though one-on-one arbitration is economically out of the consumer's or employee's reach.

I honestly think that there are judges on the bench who think they're managers, not adjudicators. They think their primary objective is to get the case resolved by settlement or preclusive motion as early as possible. And one very fine federal judge

has studied bench presence. How many hours do federal judges, our best, spend on the bench? How many trials do they actually conduct a year? And numbers are pitiful, absolutely pitiful.

Klonoff: What is your view of the future of aggregate litigation over the next 50 years?

Miller: Bob, before speculating about the next 50 years of aggregate litigation, let me remind you that the concept basically did not exist much more than 50 years ago. It was not taught in law school back then and I never saw it in practice and when I became an academic. I first saw it in the early 1960's while working with Ben Kaplan on revising the class action rule as I described earlier. Litigation back then was one on one. But with the civil rights revolution and the development of a mass economy, we have recognized the value of aggregating related or similar claims. It is efficient, promotes uniformity of result, and gives access to those who cannot afford individual representation or whose claims are too small to attract qualified lawyers. But, of course, there are strong forces in society who oppose it for obvious reasons and have been successful in limiting the availability of the class action and the utility of multidistrict litigation. To me it is also the insanity of enforcing adhesive contract clauses that prohibit class actions and class arbitrations. I sense that the next 50 years or so will be a struggle between those trying to restrict access to the courts by limiting aggregation and those who understand in a world filled with mass phenomena and risks it no longer is possible to restrict adjudication to one-by-one claiming. That is the great challenge for the future. I suspect we will have to develop new procedures for handling complex cases that maximize efficiency without compromising procedural fairness to all concerned. That is for the next generation. So I think it's time for me to go into the pasture, lie down, and munch grass. I'm obsolete! Ironically, we led the world on this subject, were criticized sharply for it by people in other countries, but now many other nations have recognized the virtues of aggregation while we are limiting it.

Klonoff: I look at the audience and a lot of my students are here, incredibly bright and ambitious. I'd like to know, what is your message of hope to law students and to the newly admitted lawyers? What do you tell our younger generation? They're pursuing a noble profession in a very difficult time. What do you tell them?

Miller: Well, you have to be positive. If they pay attention to the people in the front of the classroom, like you, Bob, and develop the skills of a lawyer they can do anything with those skills that life's opportunities bring their way. They can practice law with a big firm or a small one or an agency. They can be a plaintiff's lawyer. They can be a defense lawyer. Down the line they can do public interest work, or be a judge, or run for public office. The discipline of law gives people the skill set to

be anything they want to be. My advice to law students: be your own person. Don't get trapped and become a sheep thinking that there's only one pathway with a professional degree. There are countless pathways. And stay alive to the possibilities. Now, my hope, my wish, is that each of you take that degree, that skill set, anywhere you want to take it, but at some point that you use those skills for the benefit of the society in which you live and the people less fortunate than you. And there's nothing inconsistent with that and making a good living as a practicing or company or government lawyer. There are a lot of people that need legal help. And there are numerous policy issues that distress our society that really could use the input of the best and brightest. You come out of this school with that skill set and you are a part of the best and the brightest and society needs you to contribute.

Klonoff: Thank you so much.