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Promulgating Procedural Rules For the United States District Courts and Courts of Appeals

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Summary

By rules enabling acts, Congress has authorized federal courts to promulgate rules of procedure, but it has generally reserved the right to review proposed rules before they become effective. On occasion, the Legislature has amended the changes submitted and it has also, *sua sponte*, made amendments through legislation. This report sketches the manner in which procedural rules for United States district courts and United States courts of appeals are adopted or modified and the participants in the process. This report will be updated if changes take place in the way procedural rules are promulgated for the federal courts.

All courts created by Act of Congress have been given the power to prescribe rules for the conduct of their business, after giving public notice and allowing time for comment, so long as the rules are consistent with Acts of Congress and procedural rules promulgated by the Supreme Court.¹ District court rules so made may be modified or

¹ 28 U.S.C. § 2071. Also, the U. S. Court of Military Appeals has been specifically authorized to promulgate its own rules of procedure, 10 U.S.C. § 944, as has the U. S. Tax Court, 26 U.S.C. § 7453 (with exceptions), the U.S. Court of Federal Claims, 28 U.S.C. § 2503, and the U. S. Court of Veterans Appeals, 38 U.S.C. § 7264. The territorial courts, with a hybrid U.S.-local jurisdiction, use federal rules of procedure where appropriate. *See generally* 48 U.S.C. §§ 1424 through 1424-4 (District Court of Guam), 48 U.S.C. §§ 1611 through 1614 (District Court of Virgin Islands), and 48 U.S.C. §§ 1821 through 1824 (District Court for the Northern Mariana Islands). The District of Columbia Court of Appeals conducts its business according to the Federal Rules of Appellate Procedure, which it may modify, 11 *D.C. Code* § 743, and the District of Columbia Superior Court conducts its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure which it may modify with the approval of the D.C. Court of Appeals. Rules which do not modify the federal rules may be adopted by the Superior Court without the approval of the Court of Appeals. 11 *D.C. Code* § 946.

abrogated by circuit judicial councils,² while the Judicial Conference of the United States³ may modify or abrogate rules prescribed by courts other than the Supreme Court.⁴

For more than 65 years, by virtue of the authority granted in several enabling acts, Congress has authorized the Supreme Court of the United States to promulgate rules of procedure for the federal district courts and courts of appeals.⁵ It has provided that "[s]uch rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."⁶ The long standing practice of having committees of the Judicial Conference review proposed rule changes has been statutorily recognized albeit with a requirement that the meetings generally be open to the public.⁷ The committees are composed of "members of the bench and the professional bar, and trial and appellate judges."⁸

The amendatory process begins with a suggestion for a change, addition or deletion to the rules made, in writing, to the Secretary of the Judicial Conference. The suggestion is then forwarded to the Chair of the Standing Committee on Rules of Practice and Procedure and the Chair of the appropriate advisory committee of which there are five - one each for appellate rules, bankruptcy rules, civil rules, criminal rules, and evidence

² Each judicial circuit has a circuit council consisting of the chief judge, who presides, and an equal number of circuit and district judges of the circuit as determined by vote of all judges in the circuit. The council's principal statutory duties are to: make necessary and appropriate orders for the effective and expeditious administration of justice within the circuit; make or amend general orders relating to practice and procedure within the circuit; periodically review rules promulgated by the circuit's district courts and amend or abrogate the rules as necessary; and to appoint, and assign duties to, a circuit executive who shall be subject to supervision by the chief judge of the circuit.

³ The Conference, established in 1922, is the policy making body of the federal judiciary with the Chief Justice as its chairman and membership composed of the chief judge of each circuit, the chief judge of the Court of International Trade, and a district judge from each circuit. 28 U.S.C. § 331. Its principal statutory duties are to: survey conditions of business in the federal courts so judges may be reassigned according to need; submit suggestions to the federal courts for purposes of uniformity and expedition of business; and to conduct a continuous study of federal judicial practices and procedure for the improvement of the administration of justice. *Id.*

⁴ 28 U.S.C. § 2071.

⁵ Beginning with the Act of February 24, 1933 [procedure after verdict], Congress authorized the Court to promulgate rules of procedure. Other authorizing Acts were those of: June 19, 1934 [rules of civil procedure]; June 29, 1940 [procedure to and including verdict]; October 9, 1940 [procedure for and appeal from trial by U.S. magistrates]; October 3, 1964 [bankruptcy rules]; and January 2, 1975 [rules of evidence]. Except for the authority to promulgate the bankruptcy rules, these various authorities were combined into one statute, 28 U.S.C. § 2072, by Pub. L. 100-702, Act of November 19, 1988, 102 Stat. 4648, eff. December 1988. Authority to promulgate bankruptcy rules remains in a separate statute, 28 U.S.C. § 2075.

⁶ 28 U.S.C. § 2072.

⁷ Pub. L. 100-702, Act of November 19, 1988, codified at 28 U.S.C. § 2073. There had been instances where rules had been promulgated with little or no notice to the bar or public. *See* David D. Siegel, Commentary: The Method for Prescribing the General Rules, *following* 28 U.S.C.A. § 2073 (1994).

⁸ 28 U.S.C. § 2073.

rules. If the advisory committee finds that the proposal is important enough to merit changing the rules, a draft of the change is made and, with permission of the Standing Committee, is published for comment and mailed to, *inter alia*, the bench and bar, legal publishers, and government agencies. During a six month comment period, the advisory committee schedules one or more public hearings on the proposed amendment. After the hearings, the advisory committee again considers the proposal in light of the public comments. If approved, the amendment, along with a report summarizing the public comments and any minority views of the committee, is forwarded to the Standing Committee on Rules of Practice and Procedure. If accepted by that body, the proposal is forwarded to the Judicial Conference for approval. The Conference normally considers changes to the rules in September and if ratified, the proposed rule amendment is forwarded to the Supreme Court for transmittal to Congress.⁹

When a new or amended rule is proposed, the Supreme Court must transmit it to Congress not later than May 1 of the year in which it is to become effective. The rule shall take effect no earlier than December 1 of the year in which it is transmitted unless otherwise provided by law. Generally, the Supreme Court may fix the extent to which the rule shall apply to pending proceedings.¹⁰ Rules creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.¹¹

The Supreme Court may prescribe general bankruptcy rules of procedure but such rules may not abridge, enlarge, or modify any substantive right.¹² "Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May and until the expiration of ninety days after they have been thus reported."¹³

Congress acquiesced in the rules proposed by the Supreme Court until 1973 when the long-awaited, controversial, Federal Rules of Evidence (FRE) were submitted by the Chief Justice along with proposed amendments to the Federal Rules of Criminal Procedure (FRCrP) and to the Federal Rules of Civil Procedure (FRCP).¹⁴ Those rules

⁹ See generally Administrative Office of the U.S. Courts, *The Federal Rules of Practice and Procedure: A Summary for the Bench and Bar* (Brochure, October 1993).

¹⁰ 28 U.S.C. § 2074(a).

¹¹ 28 U.S.C. § 2074(b). This provision was added as a floor amendment to the then-proposed Federal Rules of Evidence. It was argued that: "[e]videntiary privileges are not simple legal technicalities, they involve extraordinarily important social objectives. They are truly legislative in nature. ... I think that the importance of privileges requires Congress to act affirmatively and not to delegate power to the Supreme Court to legislate in this area. To give you one example, I think it would be incredible if that after months and months of controversy and argument, we in the Congress enacted a newspaperman's privilege and then the Supreme Court passed a rule modifying that law" 120 *Cong. Rec.* 2391 (1974) (Statement of Rep. Holtzman).

¹² 28 U.S.C. § 2075.

¹³ *Id.*

¹⁴ 119 *Cong. Rec.* 3247 (1973).

changes, delayed to allow additional time for review,¹⁵ were later amended and approved by Congress.¹⁶ Since that time, on several occasions, Congress has delayed or amended rules changes submitted by the Supreme Court and has, *sua sponte*, amended the FRE, the FRCrP, and the FRCP, as well as the Federal Rules of Appellate Procedure (FRAP), legislatively.¹⁷

¹⁵ Pub. L. 93-12, Act of March 30, 1973.

¹⁶ Pub. L. 93-595, Act of January 2, 1975.

¹⁷ *E.g.*, Pub. L. 94-64, Act of July 31, 1975, added FRCrP Rules 12.1, 12.2, and 29.1; Pub. L. 95-540, Act of October 28, 1978 added FRE Rule 412; Pub. L. 96-481, Act of October 21, 1980, repealed FRCP Rule 37(f); Pub. L. 98-473, Act of October 12, 1984, amended FRAP Rule 9(c), FRE Rule 704, and several FRCrP Rules; Pub. L. 100-690 amended FRCP Rule 35, FRAP Rule 4(b), FRE Rules 412, 615, 804(a)(5), and 1101(a), FRCrP Rules 11(c)(1) and 54(c), and added FRCrP Rule 12.3; Pub. L. 103-322, Act of September 13, 1994, added FRE Rules 413 to 415; Pub. L. 104-132, Act of April 24, 1996, amended FRCrP Rule 32(b).