

Researching Federal Court Rules

by Amy Levine

There are a number of parties involved in the federal rule-making process. The U.S. Supreme Court, the U.S. Judicial Conference (Conference), and the U.S. Congress each plays a unique role in creating the federal rules. Attorneys often want to research the history of a federal procedural rule because the documents produced in the process of creating or amending a rule can clarify how that rule should be applied to a particular case.

This article explains the process used to create and modify the general federal rules and discusses where to look when researching the intent, rationale, and reasons behind these rules. The article also provides resources that can be used to find case law interpreting the rules and treatises for analysis and background. Finally, it mentions databases that can be used to research issues concerning the federal court rules.

The U.S. Supreme Court

Under the U.S. Code, the U.S. Supreme Court is charged with the creation of the general rules of practice, procedure, and evidence in the federal district courts and the courts of appeals.¹ The rule-making process often begins with a suggestion made to the Conference.

The U.S. Judicial Conference

The Conference is charged with the management of the U.S. courts in the federal judiciary. One of its main functions is to create and modify the federal court rules.² There is a strict statutory requirement that the Conference continually review the rules to ensure that they are fulfilling the mission and purpose of the courts.³ The review process is ongoing; after a rule is enacted, it remains subject to analysis and review by the Conference until it either is repealed or altered. This analysis considers whether the rules

promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay.⁴

The Conference comprises the Committee on Practice, Procedure, and Evidence (The Standing Committee) and five advisory committees, which are essential in the review process.⁵ There are advisory committees on Rules of Appellate Practice, Rules of Bankruptcy Procedure, Rules of Civil Procedure, Rules of Criminal Procedure, and Rules of Evidence.⁶ Each committee is assigned a particular collection of general rules.

The Rule-Making Process

The creation of a new rule or the review of a rule starts with a recommendation to an advisory committee. A recommendation can come from anyone—an advisory committee, an attorney, a member of the U.S. Congress, a judge, or even a member of the public. Whether a recommendation is for a new rule or to revise an existing rule, the rule-making process is the same. The advisory committee reviews the rule or revision, records recommendations, and drafts changes to existing rules or drafts a new rule based on the recommendations it has received. The committee holds meetings that must be open to the public and where minutes are recorded.⁷ The minutes and reports generated by the committees are an important source to a researcher looking for information about the history of a rule modification or its creation.

Each advisory committee is required to prepare a record of documentation supporting its recommendations. The record includes the proposed rule(s), any explanatory notes about the proposed rule(s), and a written report on why the advisory committee believes the rule change is needed.⁸

An advisory committee report also must include any alternative opinions or views regarding the rule being studied.⁹ When its re-



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view and analysis are completed, an advisory committee forwards the report to the Standing Committee. If the Standing Committee approves the new rule, it will be subject to a six-month public comment period. (If the Standing Committee does not give its approval, the Standing Committee will remand the issue for further analysis to the particular advisory committee.) During this comment period, hearings may be held by the Advisory Committee. If revisions are required after the public comment period, the advisory committee may submit a second, updated draft of its report to the Standing Committee that includes recommended revisions, after which another six-month period of review and comment will be imposed. At the conclusion of all public comment periods, the advisory committee sends its final draft version of the new rule, along with a report of comments and analysis, to the Standing Committee.

Once the Standing Committee receives information from an advisory committee, it reviews the report and the rule, and approves, modifies, or rejects the recommendations. If it approves a rule, it sends all information gathered to the Judicial Conference.

The Conference usually reviews rule changes during its September session and sends the rules it approves to the U.S. Supreme Court. The Court has until May 1 of the year the rule is to take effect to send a rule to Congress.¹⁰ Therefore, Congress has a statutory period of at least seven months¹¹ to review and act on the rule. If it does not act, the rule takes effect on December 1.¹²

Researching Amendments

The U.S. Courts website has information about proposed amendments in the current comment period.¹³ The website has links to proposed amendments to the rules, to minutes, to reports, and to comments. Users can submit comments online regarding current proposed amendments to the rules.

Legislative reports to the Standing Committee also are accessible online. These abstracts are issued by the Administrative Office of the U.S. Courts and include a summary of bills introduced into Congress that concern the general federal rules. Presently, summaries for the 108th through the 111th Congresses are available online.¹⁴

Committee Minutes

As mentioned above, the Standing Committee and the advisory committees of the Conference are required to keep minutes of their meetings and make them available to the public.¹⁵ Unless there is a compelling reason to close a specific meeting, the meetings are required to be open to the public.¹⁶ Depending on the particular committee, the minutes from the early 1960s to the present are available on the U.S. Courts website. The exception to this is the minutes for the Advisory Committee on Rules of Civil Procedure, which are accessible online beginning from the 1930s.¹⁷ There may be a gap in years, however, because the advisory committees were discharged for a number of years. For example, the Advisory Committee on Rules of Bankruptcy was discharged between 1976 and 1979.¹⁸

The minutes from the Standing Committee from September 1958 to the present are available online.¹⁹ The most current minutes available online are from the meeting in January 2010. The minutes from the Standing Committee include lists of attendees and discussions of the legislative reports, which summarize legislative activities and views since the last meeting of the Standing Committee. The minutes also include a discussion of the reports that each Advisory Committee made to the Standing Committee. These minutes are very detailed and include a large amount of information about the intent behind the proposal or recommendation, often demonstrating the rationale behind the new or amended rule.

Standing Committee Reports

Reports of the Standing Committee to the Judicial Conference also contain important information about rule changes. The reports include a letter to the Judicial Conference and the Chief Justice of the Supreme Court listing who was in attendance from the Standing Committee and from the advisory committees. The reports also include the new rules or revisions each advisory committee submitted for publication and comment. "Informational Items" that explain why the rule or revision was suggested are included. For example, the Standing Committee may explain that a certain revision grew out of a recent decision made by the U.S. Supreme

Court.²⁰ These reports are accessible online at the U.S. Courts website and date back to 1960. Attorneys who are interested in the federal rules would do well to bookmark and browse the website. In addition to the reports, other publications on the U.S. Courts website contain information about rule changes, including publications from the Federal Judicial Center.²¹ This is helpful when a researcher needs to find cases to learn how the courts apply the federal rules in practice. Additionally, treatises can help with background and analysis in federal rules research.

Researching Cases Interpreting the Rules

There are various resources to find case law that interprets the rules. One of the best sources is an annotated code. The *United States Code Annotated* and the *United States Code Service* are available in print and through Westlaw® and Lexis®, respectively. Researchers can simply look up the code section in question and read the case summary annotations following the rule.

The *Federal Rules Service*, the *Federal Rules Digest*, and the *Federal Rules Decisions* also are valuable resources for finding case law. The *Federal Rules Service* covers cases involving the Federal Rules of Civil Procedure. It contains decisions from all federal courts interpreting the federal rules. It also includes cases concerning the Appellate Rules of Procedure since 1968. The *Federal Rules Digest* is organized by rule number and contains summaries of cases from the federal courts. The *Federal Rules Decisions* is a case reporter that provides full text of decisions by the U.S. District Courts that concern the federal rules of civil procedure and criminal procedure.

Researchers looking for case law also can use Shepard's® on Lexis and KeyCite on Westlaw. Both services provide citations to cases that have adjudicated a court rule. For example, by using KeyCite® on Westlaw, a researcher can locate cases interpreting Rule 2017 of the Federal Rules of Bankruptcy Procedure. After entering the rule citation, KeyCite will provide case law under the rule, as well as other useful information. Much of this information is provided by links on the left side of the KeyCite results page. KeyCite "Notes of Decisions" are organized into types of cases under a particular rule. Shepard's on Lexis works in much the same way.

Online Sources for Federal Cases

There also are free, low-cost, and subscription databases that can be used to research cases that have adjudicated questions about the federal rules. A brief discussion of some of these databases follows.

lexisONE®

lexisOne® provides free access to federal cases in all eleven circuit courts of appeals for the last ten years, as well as the Federal Circuit Court of Appeals, the District of Columbia Circuit, and the bankruptcy appellate panels.²² It also provides free access to the U.S. Supreme Court cases from 1781 to the present. Users can search by keyword or citation and should use Boolean connectors (for example, AND or OR) between keywords to tailor their search. Date ranges can be further limited to narrow the number of cases searched, thereby increasing the relevancy of their results.

FindLaw

Another free database is FindLaw.²³ FindLaw makes available federal cases from each circuit in individual files by circuit. It has cases from the Tenth Circuit Court of Appeals from 1995 to the present. There are a number of ways to use Findlaw. It is possible to limit a search to a particular jurisdiction. For example, after choosing the link to search the opinions and resources for the Tenth Circuit, the resulting page will allow users to search by party, judge, or counsel name or by text. The option to limit the dates searched also is available and may improve search results. Users also can browse by year and month beginning from January 1987 to the present.

Findlaw provides an Open Summaries Archive search, which will conduct a search across the U.S. Supreme Court, all the circuit courts of appeals, and select state appellate and Supreme Courts.²⁴

Justia

Justia²⁵ is a free resource that has all U.S. Supreme cases starting with 1 U.S. 1. Coverage for federal appellate cases begins from 1951. Federal district court cases also are accessible and searchable by type of law, circuit, or state. A search on Justia can be limited by federal appellate court, federal district court, or state courts. For example, after selecting the link for the Tenth Circuit, the resulting page has links for all years from 1951 to the present. Selecting a year will bring up a list of cases with links to the full text of the case opinions.

Casemaker and Fastcase[®]

For more robust research that is free or low-cost, researchers can consider using Casemaker and Fastcase, which provide access to cases on the court rules. Casemaker includes a federal library containing case law from the U.S. Supreme Court, the circuit courts of appeals, the U.S. district courts, and the U.S. bankruptcy courts. It also includes the court rules. The Colorado Bar Association offers its members free subscriptions to Casemaker as part of its membership benefits package.²⁶

Fastcase can be used for researching case law and covers the circuit courts of appeals, the U.S. district courts, and the U.S. Supreme Court. Coverage of federal case law on Fastcase is extensive and includes electronic versions of *United States Reports* (volume 1); *The Federal Reporter* (second edition); *The Federal Supplement*; and West's[®] *Bankruptcy Reporter*.²⁷ One special feature of Fastcase is that its search results include how many times a case has been cited, which may signal the importance of a case. Searches in Fastcase can be done by using natural language or Boolean searching, or by entering the citation of the case or statute to be searched.

Researching Background and Analysis

There are a number of preeminent treatises to use when researching issues concerning the federal court rules. *Federal Practice and Procedure*, by Charles Alan Wright and Arthur R. Miller, and *Moore's Federal Practice* are two widely known treatises that often are used for background and analysis of the federal rules. There also are treatises that specialize in specific federal rules, such as *Orfield's Criminal Procedure*. Treatises also will provide citations to case law, which is useful to determine the practical implementation of a rule. Additionally, treatises are available electronically on Westlaw and Lexis. Often it is easier to use these resources online after becoming familiar with them in their original print versions.

Conclusion

Finding any kind of law-making intent or rationale can be a daunting task; however, searching federal rules has become relatively easy with the digitization of the minutes and records from

the Judicial Conference committees. These days, there are many resources to use to locate cases and analysis of the rules. Using these resources should make a research project in this area more efficient and yield relevant results.

Notes

1. 28 U.S.C. § 2072(a).
2. See the Rules Enabling Act, 28 U.S.C. §§ 2071 to 2077.
3. 28 U.S.C. § 331.
4. 28 U.S.C. § 2072(a) states:
The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law.
5. 28 U.S.C.A. § 2073(a)(2).
6. 28 U.S.C. § 2073(b).
7. 28 U.S.C. § 2073(b)(1).
8. 28 U.S.C. § 2073(d).
9. *Id.*
10. 28 U.S.C. §§ 2074 and 2075.
11. 28 U.S.C.A. § 2074(a). The Supreme Court must get its version to Congress by May 1 of the year the rule is to go into effect, and Congress must act or not act by December 1 of the same year; thus, the statute provides at least seven months to act.
12. See the U.S. Courts website at www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess.aspx for more information.
13. See www.uscourts.gov/RulesAndPolicies/FederalRulemaking/PublishedRules.aspx.
14. See www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Legislation.aspx.
15. 28 U.S.C. § 2073(c)(1).
16. *Id.*
17. See *id.* (for the exact minutes available by each advisory committee).
18. In the Standing Committee's September 1976 report to the Judicial Conference and the Chief Justice of the U.S. Supreme Court, it was explained that after the Supreme Court had approved its work and new rules went into effect, the Advisory Committee on Bankruptcy Rules function was complete and therefore the committee was discharged. See excerpts from the report at www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK.pdf.
19. See www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Minutes.aspx#four.
20. See, e.g., the Summary of the Report to the Judicial Conference Committee on Rules of Practice and Procedure of March 2011, available at www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Reports.aspx.
21. See www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Publications.aspx.
22. See www.lexisone.com/freecaselaw/coverage.html.
23. See lp.findlaw.com.
24. See caselaw.findlaw.com/summary.
25. See law.justia.com.
26. Casemaker is available through the CBA home page at www.cobar.org. CBA members who have questions may call (303) 860-1115 or toll-free in-state, (800) 332-6736. See McDavid, "Casemaker Upgrades and New Products Improve Functionality," 40 *The Colorado Lawyer* 53 (Feb. 2011), available at www.aallnet.org/chapter/coal/Irc/Irc0211.pdf.
27. See www.fastcase.com/whatisfastcase. ■