2017

Federal Rules of Civil Procedure

WITH SELECTED STATUTES, CASES, AND OTHER MATERIALS

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Wolters Kluwer

FEDERAL RULES OF CIVIL PROCEDURE

With Selected Statutes, Cases, and Other Materials—2017

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Published by Wolters Kluwer in New York.

Wolters Kluwer Legal & Regulatory U.S. serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.WKLegaledu.com)

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Wolters Kluwer
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-4548-8263-3

ISSN 1074-4150

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EDITORIAL ADVISORS

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PREFACE

The federal procedural system flows from four major sources of law: (1) the Constitution of the United States, (2) the Federal Rules (of Civil Procedure and Appellate Procedure), (3) the Judiciary Code (collected in Title 28 of the United States Code), and (4) cases applying and interpreting these three bodies of law. This supplement contains examples of all four sources: the first three in Part I and case law in Part II. This volume is intended to serve as a rules supplement for any civil procedure course. The statutes and rules reflect amendments through December 1, 2016.

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December 2016

NOTE ON THE FEDERAL RULES OF CIVIL PROCEDURE

The Federal Rules of Civil Procedure govern the conduct of civil trials in federal courts. Their authority comes from Congress, but, unlike the Judiciary Code (Title 28 of the United States Code, found at page 197 of this supplement), the Rules are not a product of direct congressional legislation. Instead Congress has enacted 28 U.S.C. §2072 (the Rules Enabling Act), which authorizes the Supreme Court to promulgate rules of procedure.

Although the Rules Enabling Act gives the Supreme Court power to promulgate the Rules, the Justices do not in practice do the actual drafting. That process instead occurs in committees of the Judicial Conference, a supervisory and administrative arm of the federal courts. In 1988 a set of amendments to 28 U.S.C. §§2072-2074 formalized this committee process. Under these provisions the Judicial Conference appoints a standing committee on rules of practice, procedure, and evidence. This standing committee screens all recommendations for consistency. The Judicial Conference may also appoint committees with a more defined jurisdiction—for example, civil rules, rules of evidence, bankruptcy rules. Judges, practitioners, and scholars are appointed to these advisory committees. Each advisory committee considers proposals for amendments to the Rules, circulates drafts of proposed amendments to members of the bench and bar, holds public hearings and revises in light of the comments received, and then transmits the revised proposals to the Committee on Practice and Procedure, which reports to the Judicial Conference, which in turn recommends changes to the Supreme Court. In recent years the process surrounding Rules amendments has become more "transparent"—open to public and professional comment—and simultaneously slower and more contested.

The Court, if it concurs with the proposals, officially promulgates the revised Rules by May 1, to take effect on December 1 of the same year if Congress does not act in the meantime. The Court has rarely rejected outright a Rules amendment recommended by the Judicial Conference (although several Justices have on occasion dissented from the promulgation of various sets of amendments).

Like the Supreme Court, Congress has usually acceded to the recommendations of the Judicial Conference. As with the Court, however, there have been exceptions. In the instance of the 1993 amendments, Congress came very close to exercising its power of disapproval in connection with the discovery rules; a bill that would have blocked the implementation of those proposals passed the House of Representatives and died in the Senate only when that body adjourned without having acted on it.

The original Rules were promulgated in 1938. Since then there have been significant revisions in 1948, 1961, 1963, 1966, 1970, 1983, 1985, 1987, 1991, 1993, 1995, 2000, 2003, 2006, 2007, and 2015 (with technical amendments in 1971, 1975, 1996, 1997, 1999, 2001, 2002, 2005, 2009, and 2010). The most important changes in the past 50 years have been:

- the 1966 amendments, which revised the rules for joinder of claims and parties;
- the 1970 amendments, which revamped discovery procedures;
- the 1983 amendments, which strengthened judicial control over the pretrial process and stiffened sanctions provisions;
- the 1993 amendments, which changed the conception of service of process and discovery and revised the sanctions provisions of Rule 11;
- the 2000 amendments, which further altered the rules for discovery and rewrote the Supplemental Admiralty Rules;
- the 2003 amendments, which revised Rule 23, governing class actions, and rewrote the rules governing jury instructions and special masters;
- the 2006 amendments, which rewrote the discovery rules to deal with the special challenges of discovery in a digital environment; and
- the 2015 amendments, which rewrote both the basic discovery rules and further addressed discovery sanctions in a digital environment.

During the past decades, as the amendment process changed different rules at different times, the Committee on Practice and Procedure became concerned that the rules were not as clear stylistically as they might be. From this concern came a thoroughgoing stylistic revision that became effective in December 2007. This stylistic revision changed both the language and the appearance of scores of rules, but, pursuant to the committee's charge, is *not supposed to work any substantive change except where one is specifically noted.* In its report to the Chief Justice (recall that the Court officially promulgates amended rules), the Committee on Rules of Practice and Procedure summarized the principles underlying the restyling project:

> The style project is intended to clarify, simplify, and modernize expression, without changing the substantive meaning of the Civil Rules. To accomplish these objectives, the advisory committee used formatting changes to achieve clearer presentation; reduced the use of inconsistent and ambiguous words; minimized the use of redundant words and terms; and removed words and terms that were outdated.
>
> Formatting changes made the dense, block paragraphs and lengthy sentences of the current rules much easier to read. The advisory committee broke the rules down into constituent parts, using progressively indented paragraphs with headings and substituting vertical for horizontal lists. . . .
>
> The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. The seventy years of adding new rules and amend-

ing rules led to inconsistent words and terms. For example, the present rules use "for cause shown," "upon cause shown," "for good cause," and "for good cause shown." . . . The restyled rules reduce inconsistency by using the same words to express the same meaning. . . .

The restyled rules also minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or "should," depending on context. . . . The restyled rules replace "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each rule.

The rules have numerous "intensifiers," expressions that might seem to add emphasis but instead state the obvious and create negative implications for other rules. For example, some of the current rules use the words "the court may, in its discretion." "May" means "has the discretion to"; "in its discretion" is a redundant intensifier. . . .

Outdated and archaic terms and concepts were removed. . . .

The advisory committee declined to make more sweeping changes to the rules that might have resulted in improvements but would have burdened the bar and bench. The advisory committee did not change any rule numbers, even though some of the rules might benefit from repositioning. Although some subdivisions have been rearranged within some rules to achieve greater clarity and simplicity, the advisory committee took care that commonly used and cited subdivisions retain their current designations. . . . Words and terms that have acquired special status from years of interpretation were retained. For example, there is no revision of the term "failure to state a claim upon which relief can be granted."

When the Rules Advisory Committee promulgates a new or revised Rule, it typically includes a set of Notes, which act as a kind of legislative history for the Rule, and are occasionally so cited by courts interpreting the Rules. This supplement reproduces heavily edited portions of some of these Notes. Because the Restyling project culminating in the 2007 revision of the Rules renumbered many Rules, the original Notes sometimes refer to portions of Rules that now have different numbers. Because the Advisory Committee has made it clear that, except where explicitly noted, the restyling is intended to clarify, not to alter the content of the Rules, the Notes for previous revisions should still provide guidance. They are therefore included in this supplement, and, where the current numbering differs from that at the time of the revision, the current number is noted in [brackets].

The Rules have been influential beyond the federal courts. States previously adopted the Federal Rules outright—at one count about 35 of the 50 states had done so. A more recent study found no states that still adopted the Federal Rules outright, but the federal rules remain influential at the state level. Accordingly, many lawyers who practice primarily in state courts will find their procedural systems similar or nearly identical to the Federal Rules.

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