

FEDERAL RULES OF CIVIL PROCEDURE

Rules and Commentary

Steven S. Gensler

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Federal Rules of Civil Procedure: Rules and Commentary

Steven S. Gensler

**Welcome D. & W. DeVier Pierson Professor of Law
President's Associates Presidential Professor
University of Oklahoma**

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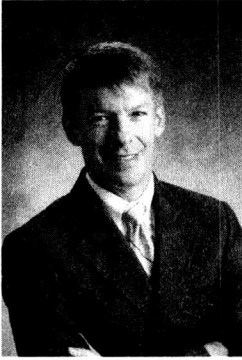
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About the Author



Steven S. Gensler is the Welcome D. & W. DeVier Pierson Professor at the University of Oklahoma College of Law. In 2006, he was named a President's Associates Presidential Professor at the University of Oklahoma. He teaches Civil Procedure, Complex Litigation, Federal Courts, and Conflict of Laws.

From 2005–2011, Professor Gensler served as a member of the Civil Rules Advisory Committee. During 2003–2004, he served as the Supreme

Court Fellow at the Administrative Office of the U.S. Courts. Professor Gensler is a member of the American Law Institute, the Local Civil Rules Committee for the Western District of Oklahoma, and the Oklahoma Bar Association Civil Procedure Committee.

A member of the Wisconsin Bar, Professor Gensler practiced in Milwaukee, Wisconsin before beginning his career in legal education. He previously clerked for the Honorable Deanell Reece Tacha of the United States Court of Appeals for the Tenth Circuit and for the Honorable Kathryn H. Vratil of the United States District Court for the District of Kansas.

Professor Gensler graduated summa cum laude from the University of Illinois College of Law, where he served as Editor-in-Chief of the University of Illinois Law Review.

Professor Gensler lives in Norman, Oklahoma with his wife, Sonia.

Acknowledgment

I thank the University of Oklahoma and Mr. DeVier Pierson for their generous support of this book and related research projects. My greatest gratitude goes to my wife Sonia who makes all of the good things in life possible.

Author Introduction

I wrote this book to provide actual answers to the day-to-day procedural questions that arise in federal-court litigation. Procedural questions pop up constantly. Sometimes they are difficult questions without clear or easy answers. But most of the time there is a simple answer, either because practice under the rule is clear or because a quick and focused analysis shows that the facts of the case do not implicate the potentially complicated aspects of the rule. What busy litigators need more than anything is a way to determine—quickly and cheaply—whether their question is one that, for purposes of that case, can be answered easily or is one that requires a greater investment of time and resources.

Users of this book—from both the bar and the bench—repeatedly tell me that this is the first book they turn to when they have questions under the Federal Rules of Civil Procedure. They tell me that, most of the time, it gives them all of the answer they need for that task. And when they have a problem that requires further research and analysis, they are able to do it more efficiently because they have guidance about what to look for and where to look for it.

I update and revise this book every year. Practice under the Federal Rules of Civil Procedure is constantly changing. Sometimes the changes are large and obvious, like major amendments to rule text and major Supreme Court cases dealing with the most oft-used rules. More often the changes are smaller and less visible. Every year I read thousands of lower court cases to identify trends and hot spots, track new developments, and locate key decisions in important areas. That work is central to the mission of this book—to provide a useful guide to the day-to-day procedural problems that litigators encounter.

As always, I welcome any comments and suggestions you might have regarding the content or format of this book. We think we put out a pretty good product, but we're always looking for ways to make it even better. Should you have any questions or suggestions regarding this product, please do not hesitate to contact Customer Service at 1-800-328-4880 or by fax at 1-800-340-9378 (WEST).

Steven S. Gensler
Norman, Oklahoma
March 2013

Preface

(2007 Edition)

A U.S. congressman once said—and I must paraphrase here—that if one side to a dispute got to write the substance of the law and the other side got to control the procedure, the side controlling the procedure would prevail every time. That surely puts the case too strongly. While rules of procedure no doubt could be crafted to have that kind of effect, the rules of procedure are, in reality, carefully crafted to be the “handmaid” of justice and not its source. But I suspect that few experienced federal litigators would disagree with the implicit premise—that procedure matters, a lot. Procedural expertise alone is not likely to win your case. But it will maximize your chances for success. And procedural errors or shortsightedness can easily turn what began as a good case into a bad loss.

The goal of this book is to provide a quick reference point for the content and application of the Federal Rules of Civil Procedure. There are obvious limits to a single-volume work on a subject this broad. Not every application and scenario can be addressed. Generalizations must be made. Local practice may differ from national practice. Aberrations are inevitable. Change is constant. Accordingly, no practice book can substitute for thoughtful and case-specific research and analysis. Lawyers using this book must recognize these limits and take responsibility to conduct an analysis based on the facts of each case in consultation with the applicable original source materials. But a reference of this type can help organize thoughts, identify issues, focus research, suggest ranges of resolution, and even confirm prior understandings. In short, the goal and purpose of this book is to serve as a guide to the original sources, making the path to the “answer” supplied by the original sources shorter, faster, and easier to travel.

My Dean is fond of saying that if you find a frog sitting on a fence post, he probably didn’t get there by himself. That statement aptly describes this project. The book that you read today reflects the efforts and extraordinary talents of many people.

First in line for acknowledgement and thanks is my contributing author, Christine Cave. Christine is an attorney in Oklahoma City and a member of the Local Rules Committee for the United States District Court for the Western District of Oklahoma. She participated heavily in the researching, drafting, and revising of the commentaries to the rules governing discovery and trial. Her efforts were essential to the writing of this book, and it greatly benefited from her insights,

experience, and practical good sense.

I also would like to acknowledge and thank both Judge Robin J. Cauthron of the United States District Court for the Western District of Oklahoma and her law clerk, Elizabeth Barnett. Judge Cauthron provided very helpful comments on earlier drafts of many of the rules commentaries, while Elizabeth also contributed to the researching, drafting, and revising of several rules commentaries. I also thank and acknowledge Carol Posegate, a former attorney member of the Civil Rules Advisory Committee who brought me into this project. Lastly, work on this book proceeded over three academic years, during which time I drew on the talents of a large team of law student research assistants: in alphabetical order, they are Scott Backus, Elizabeth Carroll, Marcy Fassio, Brett Gray, Christina Gray, Whitney Kerr, Mark Stoneman, and Patrick Wyrick. My sincere thanks go to each of them.

Finally, I dedicate this book to my wife, Sonia.

Steve Gensler
Norman, Oklahoma
May 2007

Using This Book

This book is intended as a guide to practice under the Federal Rules. For each rule, two items are included in the following order:

- (1) the text of the rule; and
- (2) a detailed Practice Commentary.

The Practice Commentary discusses what the rule does, how it has been applied, and how it relates to other rules or other procedural matters. The discussion in each Practice Commentary is organized to present the content and the application of the rule by topic and theme. In most cases, this corresponds to the internal structure of the rule. Where the rule scatters related provisions throughout the rule text, however, we have attempted to collect those scattered provisions for a unified discussion, or at least to note where related matters are addressed.

While this book is intended to provide lawyers with current and accurate information about the Federal Rules, it is a guide only. It is not a substitute for case-specific research and analysis of the original sources of authority. Lawyers using this book must recognize these limits and take responsibility to conduct an analysis based on the facts of each case in consultation with the applicable original source materials. But a reference of this type can help organize thoughts, identify issues, focus research, suggest ranges of resolution, and even confirm prior understandings. In short, the goal and purpose of this book is to serve as a guide to the original sources, making the path to the “answer” supplied by the original sources shorter, faster, and easier to travel.

This book will be updated every year. As part of that process, I will be continually seeking new ways to make the book easier to use and new ways to make the Practice Commentaries more effective. Should you have any questions or suggestions regarding this product, please do not hesitate to contact Customer Service at 1-800-328-4880 or by fax at 1-800-340-9378 (WEST).

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I. SCOPE OF RULES—ONE FORM OF ACTION

Rule 1. Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

CREDIT(S)

(Amended December 29, 1948, eff. October 20, 1949; February 28, 1966, eff. July 1, 1966; April 22, 1993, eff. December 1, 1993; April 30, 2007, eff. December 1, 2007.)

PRACTICE COMMENTARY

Overview

Rule 1 combines with Rule 81 to define the cases and proceedings to which the Federal Rules of Civil Procedure apply. When construing and applying the Rules, courts should recall the overarching goal of the Rules—to “secure the just, speedy, and inexpensive determination of every action.”

Actions and Proceedings to Which the Rules Apply

All civil actions and proceedings. Rule 1 provides that the Rules govern procedure in “all civil actions and proceedings in the United States district courts, except as stated in Rule 81.”¹ Before its restyling in 2007, Rule 1 provided that the Federal Rules applied to “suits of a civil nature” in federal court. That language had been construed to include both civil actions and other civil proceedings generally.² But longstanding precedent has placed certain civil proceedings outside the control of the Federal Rules. For example, though rare, summary proceedings are allowed in some circumstances and are not subject to the Federal Rules.³ Disbarment proceedings also are not governed by the Federal Rules.⁴ The Advisory Committee Notes to the 2007

[Rule 1]

¹Fed. R. Civ. P. 1. *See* *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953, 173 L. Ed. 2d 868, 73 Fed. R. Serv. 3d 837 (2009) (pleading standards set forth in Rule 8 “appl[y] to antitrust and discrimination suits alike”).

²*Cf.* *Willy v. Coastal Corp.*, 503 U.S. 131, 134, 112 S. Ct. 1076, 117 L. Ed. 2d 280, 21 Fed. R. Serv. 3d 1121 (1992) (“This expansive language contains no express exceptions and indicates a clear intent to have the Rules, including Rule 11, apply to all district court civil proceedings.”).

³*See* *New Hampshire Fire Ins. Co. v. Scanlon*, 362 U.S. 404, 406, 80 S. Ct. 843, 4 L. Ed. 2d 826, 3 Fed. R. Serv. 2d 16 (1960); *S.E.C. v. McCarthy*, 322 F.3d 650, 655, 54 Fed. R. Serv. 3d 1209 (9th Cir. 2003); *S.E.C. v. Securities Investor Protection Corp.*, 842 F. Supp. 2d 321, 327-28, 81 Fed. R. Serv. 3d 1016 (D.D.C. 2012) (noting that the court has discretion to apply the Civil Rules “as circumstances and justice require” but deferring that question until later).

⁴*See* *Coughlan v. U.S.*, 16 Alaska 407, 236 F.2d 927 (9th Cir. 1956) (“suits of a civil nature” contemplates adversarial proceedings, and disbarment proceedings are not adversarial).