

FINDING THE LAW

Eleventh Edition

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AMERICAN CASEBOOK SERIES®



ST. PAUL, MINN., 1999

Chapter 9

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A. INTRODUCTION

While much of legal literature focuses on substantive rights, an equally important aspect of the law deals with the processes under which parties come before courts to settle disputes. These processes are the focus of law school classes on civil procedure and of the burgeoning body of material on court rules and practice. Neither substance nor procedure would serve much purpose without the other. As Roscoe Pound succinctly explained: "Procedure is the means; full, equal and exact enforcement of substantive law is the end."

For centuries the rules governing court proceedings were developed piecemeal through case law, eventually creating the arcane and formalistic pleading rituals of the Court of Chancery in Dickens' *Bleak House*. Reforms within the past century have considerably changed court procedures, making them simpler and more flexible.¹ In any area of thought

1. Roscoe Pound, "The Etiquette of Justice," *3 Proc. Neb. St. B.A.* 231, 231 (1909).

2. "The practically universal trend of reform has been in favor of less binding and strict rules of form enforced upon the liti-

shaped by lawyers and judges, however, there are bound to be unforeseen complexities and differences of interpretation. Rules that may appear straightforward must be applied in light of the large body of case law that has developed. An extensive secondary literature also exists to guide litigants through the intricate maze of court proceedings, and formbooks provide the proper format for pleadings and other court documents. This chapter surveys the sources available for finding the texts of court rules and discovering the judicial and secondary reference materials that can aid one's passage through the courts. Much of this chapter is devoted to sets that may play little role in the law school curriculum, though they may shed light on courses like Civil Procedure. But these tools are the bread and butter of anyone who works in the area of litigation.

B. COURT RULES

Court rules regulate the conduct of business before the courts. They range from purely formal details, such as the format to be followed in preparing a brief, to matters of substantial importance, such as grounds for appeal, time limitations, and the types of motions and appeals which will be heard. Court rules may specify or limit available remedies, and may thus affect rights in significant ways.

Each jurisdiction has its own requirements and procedures for the promulgation of court rules. Some involve action by special conferences of judges; others require action or approval by the highest court of the jurisdiction. Some court rules are statutory and are created by legislatures, while some require a combination of judicial action and legislative approval. While courts are traditionally considered to have inherent power to control the conduct of their affairs, court rules are generally promulgated under authority granted by the legislature and are considered a form of delegated legislation.

Federal procedure is discussed here first for two reasons. Not only does it affect more people than the procedure of any individual state, but its forms and methods of publication have been very influential on the states. An increasing number of states have chosen to model their procedural rules on those established for the federal courts in the past half-century.

1. FEDERAL RULES

Since its first session, Congress has expressly given the federal courts power to make rules governing their procedures.¹ It took until

gants and their counsel and with a large measure of discretion accorded to the trial judge in directing the course of a particular lawsuit." Charles E. Clark, "The Handmaid of Justice," 23 *Wash. U. L.Q.* 297, 308 (1938).

3. Section 17 of the Judiciary Act of 1789 gave the new federal courts the power "to make and establish all necessary rules for the orderly conducting [of] business in the said courts, provided such rules are not repugnant to the laws of the United States." Ch. 20, § 17, 1 Stat. 73, 83. The

well into the twentieth century, however, for the Supreme Court to promulgate extensive general rules of procedure for the federal courts. The Federal Rules of Civil Procedure, adopted by the Supreme Court in December 1937 and effective September 16, 1938,⁴ successfully modernized federal civil practice. The Federal Rules of Criminal Procedure followed on March 21, 1946.⁵

The new criminal rules governed proceedings both before and after trial, but appeals in civil cases continued to be handled differently in each circuit. In 1966, Congress empowered the Supreme Court to prescribe rules for the Courts of Appeals in civil actions.⁶ The Federal Rules of Appellate Procedure, governing both civil and criminal proceedings, took effect on July 1, 1968.⁷

The last of the four major sets of rules governing federal court proceedings had a rather different origin. In 1972, the Supreme Court submitted proposed Federal Rules of Evidence to Congress, which passed a law preventing them from taking effect until expressly approved.⁸ One problem was that the proposed rules covering evidentiary privileges were seen as substantive rather than procedural in nature, and thus outside the scope of the Court's rulemaking authority.⁹ Congress adopted its own, amended version of the rules, which became law on July 1, 1975.¹⁰

In 1988, Congress enacted the Judicial Improvements and Access to Justice Act,¹¹ and consolidated the Supreme Court's authority to promul-

Supreme Court's first rules, at its first meeting in February 1790, dealt mostly with qualification of attorneys who wished to practice before it. Appointment of Justices 2 U.S. (2 Dall.) 399 (1790). A rule five years later ordered that "the Gentlemen of the Bar be notified, that the Court will hereafter expect to be furnished with a statement of the material points of the Case, from the Counsel on each side of a Cause." 3 U.S. (3 Dall.) 120 (1795).

Today, the Supreme Court and all courts created by Congress are empowered under 28 U.S.C. § 2071 (1988) to establish rules governing the conduct of their business. The Supreme Court has the power to prescribe general rules of practice and procedure for cases in the federal district courts and courts of appeal. 28 U.S.C. § 2072 (1988), *as amended by* Act of Dec. 1, 1990, 18 U.S.C.A. § 2072 (Law. Co-op).

4. 308 U.S. 645 (1938). The Supreme Court acted under a 1934 Act of Congress that had given it the authority to combine equity and law into one federal civil procedure, and to make and publish rules governing federal actions. Act of June 19, 1934, ch. 651, 48 Stat. 1064. Previously, the Supreme Court had promulgated its first set of procedural rules in equity in 1822, 20 U.S. (7 Wheat.) v (1822), but had not issued general rules for actions at law.

5. 327 U.S. 821 (1946). Congress had given the Supreme Court authority to promulgate rules governing criminal appeals in 1933, Act of Feb. 24, 1933, ch. 119, 47 Stat. 904, as amended by Act of Mar. 8, 1934, ch. 49, 48 Stat. 399; in 1940 it passed a law providing for rules with respect to criminal trial court proceedings, Act of June 29, 1940, ch. 445, 54 Stat. 688.

6. Act of Nov. 6, 1966, Pub. L. No. 89-773, 80 Stat. 1323.

7. 389 U.S. 1063 (1968).

8. Act of Mar. 30, 1973, Pub.L. No. 93-12, 87 Stat. 9.

9. The then-governing statutory provision contained the same language as the current provision, 28 U.S.C. § 2072 (1988), specifying that rules promulgated by the Supreme Court "shall not abridge, enlarge or modify any substantive right." See Arthur J. Goldberg, "The Supreme Court, Congress, and Rules of Evidence," 5 *Seton Hall L.Rev.* 667 (1974).

10. Act of Jan. 2, 1975, Pub.L. No. 93-595, § 2(a)(1), 88 Stat. 1926, 1948.

11. Act of Nov. 19, 1988, Pub. L. No. 100-702, 102 Stat. 4642 (codified as amended in scattered sections of 28 U.S.C.). The part of the act dealing with court rules (the Rules Enabling Act) can be found at §§ 401-407, 102 Stat. 4648-4652.

gate "general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeal."¹² As a result of this consolidation, scattered sections of the *U.S. Code* which previously had given the Court power to prescribe rules of procedure and evidence were repealed.¹³ The Court's authority to promulgate rules is now concentrated in sections 2072-2075 of 28 U.S.C.

In addition to the four major sets of federal rules, the Supreme Court also has issued rules for more limited circumstances. For example, rules governing bankruptcy proceedings were first promulgated under the authority of the Bankruptcy Act of 1898,¹⁴ and have undergone several revisions and changes. The current Federal Rules of Bankruptcy Procedure were promulgated by the Supreme Court in 1983.

An important resource in applying federal court rules is the accompanying commentary by the Advisory Committee that drafted the original rules or a later committee that drafted and proposed an amendment." These notes usually consist of a few paragraphs discussing the history of procedure under prior law and the purpose of the new rule or amendment, and provide a sort of "legislative history" analogous to congressional committee reports. Advisory Committee notes are often an invaluable first step in interpreting rule provisions. In most versions of the major sets of rules, these important notes are printed immediately following the text of each rule.

Finally, in addition to the sets of rules applying to the federal courts in general, there are rules governing proceedings in particular courts. The Supreme Court and specialized courts such as the Claims Court have their own sets of rules, and individual Courts of Appeals and District Courts promulgate supplementary rules for local practice. Any federal court can establish local rules for the conduct of its business, as long as they are not inconsistent with Acts of Congress or rules prescribed by the Supreme Court.¹⁷ These local rules are important.

12. 28 U.S.C. § 2072(a) (1988).

13. Before being repealed by the 1988 Act, 28 U.S.C. § 2072 had provided for rules of civil procedure; § 2076 had governed rules of evidence; and 18 U.S.C. §§ 3771-3772 had provided for rules of criminal procedure.

14. Ch. 541, § 30, 30 Stat. 544, 554. This section was repealed in 1964, when Supreme Court rulemaking power in bankruptcy was brought into conformity with its power to make other court rules. Act of Oct. 3, 1964, Pub.L. No. 88-623, § 1, 78 Stat. 1001, 1001 (codified as amended at 28 U.S.C. § 2075 (1988)).

15. 461 U.S. 977 (1983).

16. Under a 1958 Act, a permanent Committee on Rules of Practice and Procedure of the Judicial Conference of the United States studies the federal rules on a

continuous basis and recommends changes as necessary. Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356 (codified as amended at 28 U.S.C. § 331 (1988)).

17. 28 U.S.C. § 2071 (1988). The Judicial Conference reviews for consistency with federal law rules prescribed under this provision by courts other than the Supreme Court and the district courts, and is empowered to modify or abrogate any rule found to be inconsistent. 28 U.S.C. § 331 (1988). The Supreme Court may also exercise its inherent supervisory power to ensure that local rules are consistent with principles of right and justice. *See, e.g., Frazier v. Heebe*, 482 U.S. 641 (1987), *on remand*, 825 F.2d 89 (5th Cir.1987) (prohibiting Eastern District of Louisiana from requiring that a member of its bar live or maintain an office in Louisiana).

These various rules governing federal court proceedings are rarely far from hand in any law library. They can be found in online databases and in numerous publications, both unannotated and annotated. The sheer number of resources about to be described may be bewildering at first, but different versions serve different purposes. The proper source to use depends on the research needs in a particular situation. Sometimes one just needs to consult the text of a set of rules, but often it is necessary to have references to judicial decisions or expert commentary. Table 1 lists the locations of rules in the tools discussed below.

a. Unannotated Texts

(1) Major Rules

A variety of resources contain the texts of federal court rules. The *United States Code* publishes both the rules and Advisory Committee notes for the major sets of rules. An appendix to Title 28, Judiciary and Judicial Procedure, contains the Federal Rules of Civil Procedure, Appellate Procedure, and Evidence, as well as rules governing proceedings in the Supreme Court and several specialized courts.¹⁸ The Federal Rules of Criminal Procedure appear in an appendix to Title 18, Crimes and Criminal Procedure. The official *U.S. Code*, however, is always at least two or three years out of date when it is published, so it cannot be relied upon for more recent developments or changes.

Several commercially published sources also contain the texts of the major rules, updated on a more timely basis. For example, Lawyers Cooperative Publishing published annually the text and Advisory Committee notes for all major rules in the "National Volume" of its *Federal Procedure Rules Service*, with updates provided in a cumulative pocket part issued quarterly.¹⁹ This title is now published by West Group.

Two other references, previously published by Callaghan and Lawyers Co-op, but now published by West Group also include the major federal rules. The "Finding Aids" volume of *Federal Rules Service* contains the Rules of Civil Procedure and Appellate Procedure; the Rules of Evidence can be found in the corresponding volume of *Federal Evidence Rules Service*.²⁰ The *Cyclopedia of Federal Procedure*, Volume 16A, "Rules," (3d ed. 1990) contains the text of the major rules, but does not include Advisory Committee notes.

Many law students first encounter the Federal Rules of Civil Procedure in one of several available soft-cover editions that usually contain the other major rules as well. For example, West's *Federal Rules of Civil Procedure (1993-94 Educational Edition)* includes the texts of the Rules of Civil Procedure, Appellate Procedure, and Evidence, along with the

18. Bankruptcy Rules and Official Forms are in an appendix to Title 11, Bankruptcy.

19. This volume also includes research references to the publisher's encyclopedia,

Federal Procedure, Lawyers Edition (to be discussed below in Section D).

20. These very useful resources for research on judicial decisions relating to the rules will be discussed below in Section C.

text of Title 28 of the U.S. Code.²¹ Foundation Press publishes a similar volume aimed at law students, *The Judicial Code and Rules of Procedure in the Federal Courts*, which includes the Rules of Criminal Procedure.

(2) *Local Court Rules*

While not as widely applicable as the major sets of rules discussed above, rules for specific federal courts can be just as important in the day-to-day practice of law. For example, the Rules of the United States Supreme Court can be found in the U.S. Code and several of the other sources discussed above, as well as in Commerce Clearing House's looseleaf *Supreme Court Bulletin*.

The rules of individual lower federal courts are not quite as widely published as rules promulgated by the Supreme Court. The most comprehensive source for all circuit and district court civil practice rules is *Federal Local Court Rules*, a set of updated looseleaf volumes now published by West Group as an adjunct to its *Federal Rules Service*. Most of the set consists of rules for individual U.S. District Courts, arranged by state; the third volume includes rules and internal operating procedures for the Courts of Appeals.

The rules of individual courts are also available in several other places. For example, eleven separate "Circuit Volumes," corresponding to the eleven numbered U.S. Courts of Appeals, are published as part of *Federal Procedure Rules Service*. Each volume contains the rules of its circuit and of each district within the circuit. Rules for the District of Columbia Circuit appear in the Third and Fourth Circuit volumes, and Federal Circuit rules are in the Second, Third and Fourth Circuit volumes. The "Rules" volume of the *Cyclopedia of Federal Procedure* also includes rules of the federal circuit, but not district, courts.

The handiest source for rules of the district courts in a particular state, and of the circuit within which that state lies, will frequently be a state court rules pamphlet published by West or LEXIS Law Publishing. These pamphlets, published for over thirty states to accompany annotated state codes, contain rules of both state and federal courts, and will be discussed further in the "state rules" section, below.

Table 1

Published and online locations of various sets of federal court rules

Annotated Editions

	<i>United States Code Annotated</i>	<i>United States Code Service</i>	<i>Supreme Court Digest, L.Ed.</i>	<i>Moore's Rules Pamphlets</i>
Federal Rules of Civil Procedure	Title 28 Appendix	Rules volumes	Vol. 18	Vol. 1

21. West also publishes annually the soft-covered *Federal Civil Judicial Procedure and Rules* and *Federal Criminal Code*

and *Rules*. As the titles indicate, these books contain the texts of relevant statutes as well as numerous sets of court rules.

	<i>United States Code Annotated</i>	<i>United States Code Service</i>	<i>Supreme Court Digest, L.Ed.</i>	<i>Moore's Rules Pamphlets</i>
Federal Rules of Criminal Procedure	Title 18 Appendix	Rules volumes	Vol. 19	Vol. 3
Federal Rules of Appellate Procedure	Title 28 Appendix	Rules volumes	Vol. 17	Vol. 1 (unannotated)
Federal Rules of Evidence	Title 28 Appendix	Title 28 Appendix	Vol. 20	Vol. 2
Bankruptcy Rules and Official Forms	Title 11 Appendix	Rules volumes	Vol. 17	
Rules of the Supreme Court of the U.S.	Title 28 Appendix	Rules volumes	Vol. 17	Vol. 1 (unannotated)
Rules of individual U.S. Courts of Appeals	Title 28 Appendix	Rules volumes	Vol. 21	
Rules for the Trial of Misdemeanors before U.S. Magistrates	Title 18 Appendix	Rules volumes	Vol. 19	Vol. 3
Rules Governing Sections 2254 and 2255 (habeas corpus) Proceedings	Title 28 following §§ 2254, 2255	Rules volumes	Vol. 19	Vol. 3
Rules of the Judicial Panel on Multidistrict Litigation	Title 28 following § 1407	Rules volumes	Vol. 22	
Rules of the U.S. Claims Court	Title 28 Appendix	Rules volumes	Vol. 22	
Rules of the U.S. Court of International Trade	Title 28 Appendix	Rules volumes	Vol. 22	
Rules of the U.S. Tax Court	Title 26 following § 7453	Rules volumes	Vol. 22	
Rules of the U.S. Court of Military Appeals	Title 10 following § 867	Rules volumes	Vol. 22	

Table 1 (Continued)

Unannotated Editions

<i>United States Code</i>	<i>Federal Procedure Rules Service</i>	<i>Cyclopedia of Federal Procedure</i>
Title 28 Appendix	National volume	Vol. 16A
Title 18 Appendix	National volume	Vol. 16A
Title 28 Appendix	National volume	Vol. 16A
Title 28 Appendix	National volume	Vol. 16A
Title 11 Appendix		
Title 28 Appendix	National volume	Vol. 16A

<i>United States Code</i>	<i>Federal Procedure Rules Service</i>	<i>Cyclopedia of Federal Procedure</i>
	Individual circuit volumes	Vol. 16A
Title 18 Appendix	National volume	Vol. 16A
Following Title 28 §§ 2254, 2255	National volume	Vol. 16A
Following Title 28 § 1407	National volume	
Title 28 Appendix	3d & 4th Circuit volumes	Vol. 16A
Title 28 Appendix	Second Circuit volume	
Title 26 Appendix		
Title 10 Appendix		

b. Annotated Texts

Annotated editions of the federal rules contain not only Advisory Committee comments but headnotes of relevant cases. Both commercially published annotated versions of the U.S. Code provide comprehensive coverage of rules.

The *United States Code Annotated* and *United States Code Service* treat the rules in similar fashion to statutes and provide extensive annotations of relevant decisions. In *USCA*, the eighty-six Federal Rules of Civil Procedure fill ten volumes, and in *USCS* they occupy almost eight volumes. The rules are located in the sets in different places: *USCA* includes the rules at the same place they appear in the *U.S. Code*, following the code titles to which they are most closely related (for example, the Federal Rules of Civil Procedure, Appellate Procedure, and Evidence follow Title 28, Judiciary and Judicial Procedure, while the Federal Rules of Criminal Procedure appear in a volume after Title 18, Crimes and Criminal Procedure). *USCS* publishes several unnumbered "Court Rules" volumes, which are generally shelved at the end of the set. The one exception is the Federal Rules of Evidence; because they were enacted by Congress, *USCS* prints them as an appendix volume to Title 28. Both *USCA* and *USCS* also include annotated editions of the rules of the Supreme Court, of the thirteen individual circuits, and of specialized federal courts. Like the rest of the sets, the volumes of court rules are updated by annual pocket parts and by interim pamphlets.

As it does with statutes, *USCA* includes extensive cross-references to related material such as other federal rules, the publisher's treatise *Federal Practice and Procedure*, and *West's Federal Forms* (discussed below in Sections D.1 and E, respectively). The notes to each section also provide relevant digest key numbers and *C.J.S.* section numbers. The bulk of each volume consists of case headnotes, arranged by subject after each rule. Illustration A shows the *USCA* version of Federal Rules of Evidence, Rule 802, concerning the admissibility of hearsay.

Illustrations A-1 and A-2

Federal Rules of Evidence, Rule 802, in USCA

Rule 801

Nate 565

565. Affirmance

Even if, in antitrust suit brought by beer wholesaler against brewer and an authorized distributor, the testimony of several wholesalers was wrongfully excluded by the district court, such statements, either singularly or cumulatively, would not have altered the out-

come reached by the court of appeals and, therefore, the district court's judgment would be affirmed without deciding the correctness of its **application** of the James test for the introduction of testimony by a **coconspirator**. **Mendelovitz v. Adolph Coors Co., C.A.Tex. 1982, 693 F.2d 570.**

RULES OF EVIDENCE

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1939.)

Notes of Advisory Committee on Proposed Rules

The provision excepting from the operation of the rule hearsay which is made admissible by other rules **adopted** by the Supreme Court or by Act of Congress continues the admissibility thereunder of hearsay which would not qualify under these Evidence Rules. The following examples illustrate the working of the exception:

Federal Rules of Civil Procedure

Rule 4(g): proof of service by affidavit.
 Rule 32: admissibility of depositions.
 Rule 43(e): affidavits when motion based on facts not **appearing** of record.
 Rule 56: **affidavits** in summary judgment proceedings.
 Rule **65(b)**: showing by affidavit for temporary restraining order.

Federal Rules of Criminal Procedure

Rule 4(a): affidavits to show grounds for issuing warrants.
 Rule 12(b)(4): affidavits to determine issues of fact in connection with motions.

Acts of Congress

10 U.S.C. § 7730: affidavits of **unavailable** witnesses in actions for **damages caused by** vessel in **naval** service, or **towage** or **salvage** of same, when taking of testimony or **bringing of action delayed or stayed** on security grounds.
 29 U.S.C. § 161(4): affidavit as proof of service in NLRB **proceedings**.
 38 U.S.C. § 5206: **affidavit as proof** of posting notice of sale of unclaimed property by Veterans Administration.

Cross References

Affidavits

Proof of posting notice of sale of unclaimed property by Veterans' Administration, see section 5206 of Title 38, Veterans' Benefits.
 Proof of service in National Labor Relations Board proceedings, see section 161 of Title 29, Labor.
 Unavailable witnesses in actions for **damages caused by** vessel in **naval** service, or **towage** or **salvage** of same, when **taking** of testimony or **bringing of action delayed or stayed** on security grounds, see section 7730 of Title 10, Armed Forces.

Federal Rules of Civil Procedure

Affidavits

Motion on facts not **appearing** of record, see rule 43, this title.
 Process, proof of service, see rule 4.
 Summary judgment proceedings, see rule 56.
 Temporary restraining order, see rule 65.
 Depositions, admissibility of in court proceedings, see rule 32.

Federal Rules of Criminal Procedure

Affidavits

Motions, determination of issues of fact on, see rule 12, Title 18, Crimes and Criminal Procedure. [020,0241]
Warrants, issuance upon showing grounds, see rule 4.

HEARSAY

Rule 803

Federal Practice and Procedure

Admissible or inadmissible evidence, see Wright & Graham: Evidence § 5191 et seq.
 Character evidence **not admissible**, see Wright & Graham: Evidence § 5231 et seq.
 Recognition of usual exceptions to hearsay rule, see Wright & Miller: Civil § 2407.
 Scope of these rules, see Wright & Graham: Evidence § 5011 et seq.

West's Federal Practice Manual

Hearing procedure and hearsay, see § 10956.

Library References

Criminal Law 41=419(1).
 Evidence 18=314(1).
 United States Magistrates **e**:a5.

C.J.S. Criminal Law § 718 et seq.
 C.J.S. Evidence § 192 et seq.
 C.J.S. United States Commissioners § 3.

Notes of Decisions

Constitutional rights

Generally 1
 Fourteenth Amendment 2
 Summary judgment 3

1. Constitutional rights—Generally

Legislation, or rules with the force and effect of legislation, may change common law standards for the admission of hearsay evidence so long as the confrontation clause of U.S.C.A. Const.Amend. 6, or any other relevant constitutional provision is not offended. U.S. v. Lynch, 1974, 499 F.2d 1011, 165 U.S. App.D.C. 6.

2. Fourteenth Amendment

The hearsay evidence rule, with all its subtleties, anomalies and ramifications, will not be read into U.S.C.A. Const.Amend. 14. Stein v. People of State of N.Y., N.Y.1953, 73 S.Ct. 1077, 346 U.S. 156, 97 L.Ed. 1522, rehearing denied 74 S.Ct. 13, 346 U.S. 842, 98 L.Ed. 362.

3. Summary judgment

Plaintiff's statement that his employees denied knowledge of alleged violations of section 2021 of Title 7 governing disqualification from food stamp program would not be admissible at trial, and therefore was not considered on summary judgment motion. Yaghnam v. U.S., D.C.Colo.1981, 526 F.Supp. 554.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it

USCS provides the same rules text and Advisory Committee notes, along with cross-references to other rules and statutes and to its publisher's other works. These references include *Federal Procedure, Lawyers' Edition*, as well as *Am.Jur.2d* and annotations in *ALR* and *U.S. Supreme*

Court Reports, Lawyers' Edition. The notes following some rules also include references to other texts and to law review articles. Illustrations B—1 and B—2 show Rule 802 of the Federal Rules of Evidence as it appears in *USCS*.

Illustrations B—1 and B—2

Rule 802 in USCS

Rule 802

FEDERAL RULES OF EVIDENCE

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

(Jan. 2, 1975, P. L. 93-595, § 1, 88 Stat. 1939.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of **Advisory Committee on Rules.** The provision excepting from the operation of the rule hearsay which is made admissible by other rules adopted by the Supreme Court or by Act of Congress continues the admissibility thereunder of hearsay which would not qualify under these Evidence Rules. The following examples illustrate the working of the exception:

FEDERAL RULES OF CIVIL PROCEDURE

Rule 4(g): proof of service by affidavit.

Rule 32: admissibility of depositions.

Rule 43(e): affidavits when motion based on facts not appearing of record.

Rule 56: affidavits in summary judgment proceedings.

Rule 65(b): showing by affidavit for temporary restraining order.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 4(a): affidavits to show grounds for issuing warrants.

Rule 12(b)(4): affidavits to determine issues of fact in connection with motions.

CROSS REFERENCES

Accused's right to confront witnesses, *USCS Constitution*, Amendment 6.
 Agricultural certificates, 7 *USCS* §§ 54, 79(d), 94, 511f, 1622(h).
 Immigration records, 8 *USCS* §§ 1284(b), 1360(d), **1439(b)**, **1440(c)**, **1441(a)**.
 Maritime matters, 10 *USCS* § 7730.
 Banking documents, 12 *USCS* § 1464(j).
 State prosecution for destruction of property, 15 *USCS* § 1281(c).
 Copyright records, 17 *USCS* § 410(c).
 Extradition proceedings, 18 *USCS* § 3190.
 Competency and incompetency, 18 *USCS* §§ 4244, 4245.
 Foreign trade and commerce, 19 *USCS* §§ 1402(b), 1509(b).
 Forfeiture proceedings, 19 *USCS* § 1615.
 Lading vessels, 19 *USCS* § 1708.
 FDA proceedings, 21 *USCS* § 371.
 District Courts, 28 *USCS* § 753(b).
 Court of International Trade, 28 *USCS* § 2635(b)(1).
 Workers' compensation proceedings, 33 *USCS* § 923(a).
 Veterans, 38 *USCS* § 5206.
 Bills of health for foreign vessels, 42 *USCS* § 269(b).
 Social Security and Medicare, 42 *USCS* § 405(c)(3).
 Destitute seamen, 46 *USCS* § 11104.
 Maritime forfeiture judgments, 46 *USCS Appx* § 837.

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FEDERAL RULES OF EVIDENCE

Rule 802

Carriage of goods by sea, 46 USCS Appx § 1303.
 FCC, 47 USCS § 412.
 Railroads, 49 USCS § 10303.
 Service of process, USCS Rules of Civil Procedure, Rule 4(g).
 Depositions, USCS Rules of Civil Procedure, Rule 32.
 Motions and affidavits, USCS Rules of Civil Procedure, Rule 43.
 Summary judgment motion, USCS Rules of Civil Procedure, Rule 56
 New trial motion, USCS Rules of Civil Procedure, Rule 59.
 Relief from judgment motion, USCS Rules of Civil Procedure, Rule 60.
 Temporary restraining orders, USCS Rules of Civil Procedure, Rule 65(b).
 Arrest warrants and probable cause, USCS Rules of Criminal Procedure,
 Rule 4(a).
 Pretrial motions, USCS Rules of Criminal Procedure, Rule 12.
 Depositions, USCS Rules of Criminal Procedure, Rule 15.
 Posttrial motions, USCS Rules of Criminal Procedure, Rule 33.

RESEARCH GUIDE

Federal Procedure L Ed:

Evidence, Fed Proc, L Ed §§ 33:87, 217, 218, 223-225, 227, 228.
 Witnesses, Fed Proc, L Ed § 80:43.

Am Jur:

5 Am Jur 2d, Appeal and Error § 737.
 29 Am Jur 2d, Evidence §§ 493-497, 1094.
 32B Am Jur 2d, Federal Rules of Evidence §§ 77, 195, 196, 200-202,
 204, 356.

Am Jur Proof of Facts:

Dead Man's Statutes, 39 Am Jur Proof of Facts 2d, p. 91.

Forms:

¹ Federal Procedural Forms L Ed, Actions in District Court § 1:1967.

Annotations:

Admissibility of sound recordings as evidence in federal criminal trial.
 10 L Ed 2d 1169.
 Exception to hearsay rule, under Rule 803(3) of Federal Rules of
 Evidence, with respect to statement of declarant's mental, emotional, or
 physical condition. 75 ALR Fed 170.
 Treatises, periodicals, or pamphlets as exception to hearsay rule under
 Rule 803 (18) of the Federal Rules of Evidence. 64 ALR Fed 971.
 What information is of type "reasonably relied upon by experts" within
 Rule 703, Federal Rules of Evidence, permitting expert opinion based
 on information not admissible in evidence. 49 ALR Fed 363.
 Admissibility of statement under Rule 801(d)(2)(B) of Federal Rules of
 Evidence, providing that statement is not hearsay if party-opponent has
 manifested his adoption or belief in its truth. 48 ALR Fed 721.
 Who qualifies as "widow" or "widower" under § 216 of the Social
 Security Act (42 USCS § 416), pertaining to survivor's benefits, where
 two or more alleged spouses survive decedent. 31 ALR Fed 300.
 Admissibility in evidence of sound recording as affected by hearsay and
 best evidence rules. 58 ALR3d 598.

[020,027]

Federal rules are also available online in both LEXIS and WESTLAW. LEXIS has individual files in its GENFED library containing the four major sets of rules (Civil Procedure, Criminal Procedure, Appellate Procedure, and Evidence), as published in *USCS*. Historical notes and Advisory Committee comments are included as well as texts. Also available are the rules for several federal courts, including the U.S. Supreme Court, the U.S. Tax Court, the U.S. Claims Court, and the eleven circuit courts. A group file, RULES, combines these individual files with other specialized federal rules. WESTLAW's USCA (and USC) database includes the texts of rules printed in *USCA*, along with annotations. A separate database of federal rules (US—RULES) contains the four major sets of rules and the Bankruptcy Rules as they appear in the *U.S. Code* or an appendix to the *Code*. WESTLAW also provides numerous specialized sets of rules in their related topical areas.

Finally, multivolume treatises on the federal rules, such as *Federal Practice and Procedure* and *Moore's Federal Practice* (to be discussed below in Section D), can also be considered annotated editions of the rules. They are frequently arranged by rule number, and include the rule texts and Advisory Committee notes as well as extensive analyses of interpretive cases.

2. STATE RULES

The publication of state court rules vary from state to state. In states where legislative acts determine court procedures, these "rules" appear as part of the state's statutory code. In states where rules are promulgated by the judiciary alone, until recently they often appeared only in elusive pamphlets or in the state reports.²³ Increasingly, however, publishers of annotated codes recognize the importance of court rules and include them within their scope of coverage. Even when court rules are not legislative in nature, they receive the same treatment as statutes and are published in a fully annotated, regularly supplemented format. For many state codes, the rules volumes are published in a softcover format and reissued annually.

In many states, court rules are also issued in annual, unannotated pamphlets designed for ready desktop reference. The West Group publishes such pamphlets for virtually every state in which it publishes an

22. Three of the major sets of rules are published by Clark Boardman in shorter, one-volume, looseleaf format editions that are updated annually. For each rule, the text and Advisory Committee notes are accompanied by "practice comments" discussing the rule and its application. The volumes are: Thomas A. Coyne, *Federal Rules of Civil Procedure* (2d ed. 1994-date); Michelle G. Hermann, *Federal Rules of Criminal Procedure* (2d ed. 1980-date); and Paul F. Rothstein, *Federal Rules of Evidence* (2d ed. 1978-date).

23. A few states provide for official publication of their court rules on a regularly updated basis, either as part of codes of administrative regulations or separately. For example, volumes 22(A)-22(C) of the *Official Compilation of Codes, Rules and Regulations of the State of New York* consist of court rules, and the Administrative Code Editor for Iowa publishes the looseleaf *Iowa Court Rules*.

annotated code, and for several other states as well. Each state has competing publishers performing the same task. As noted earlier, these rules pamphlets are valuable sources not only for state court rules but for the rules of federal courts sitting in that state. In some states, annotated editions of court rules are also published separately as part of practice treatises.

Many state court rules are available online through WESTLAW or LEXIS, usually in a state's code or statute database. WESTLAW also often provides a separate rules database (for example, IL—RULES).

To learn about available sources for state court rules other than statutory compilations, it may help to consult Betsy Reidinger & Virginia T. Lemmon, "Sources of Rules of State Courts," 82 *Law Libr. J.* 76²⁴ (1990), or one of the state legal research guides listed in Appendix B. Once the set of rules is in hand, pinpointing applicable provisions depends on the quality of organization and indexing. A steadily increasing number of states, however, have rules modeled on the various federal rules, particularly the Federal Rules of Civil Procedure and the Federal Rules of Evidence. A researcher who knows the relevant rules provision in federal court can easily check the comparable provision in another state.

For civil matters, one can use the Federal Rules of Civil Procedure numbers to find relevant state provisions even if the state rules bear no relation to the Federal Rules. Each Circuit Volume of *Federal Procedure Rules Service* includes a "Comparator," which correlates the provisions of the Federal Rules of Civil Procedure to²⁵ the court rules or statutory provisions for each state within the circuit.

Several works provide rule-by-rule comparisons of federal and state evidence provisions. Two useful references are: Gregory P. Joseph & Stephen A. Saltzburg, *Evidence in America: The Federal Rules in the States* (4 vols.) (LEXIS Law Publishing 1987-date); and the "State Correlation Tables" in *Federal Rules of Evidence Service* (West Group), "Finding Aids" volume.

C. UPDATING AND INTERPRETING RULES

1. FINDING AMENDMENTS TO FEDERAL RULES

It is important that practitioners be aware of and be able to find proposed and recent amendments to rules. For the major rules sets, the Supreme Court submits newly adopted amendments to Congress. The texts of the amendments, accompanied by Judicial Conference Advisory

24. For court rules (both Federal and State) via the Internet, see, e.g., Genie Tyburski, *Litigator's Internet Resource Guide: Rules of Court* (visited January 31, 1999) <<http://www.lrx.com/columns/litigat.htm>>

25. The civil procedural systems of all fifty states and the District of Columbia

were surveyed in John B. Oakley & Arthur F. Coon, "The Federal Rules in the State Courts: A Survey of State Court Systems of Civil Procedure," 61 *Wash. L. Rev.* 1367 (1986).

ress). The volum *cove ;etc-* u] es sets are organized by rule. The entire set is commonly as "*Wright & Miller*," after two of its principal authors, Professors Charles Alan Wright²⁷ of the University of Texas and Arthur R. Miller of Harvard Law school.

For each rule, *Federal I ;acs ice and Procedure* provides extensive discussion of its history, purpose, and application generally and in specific situations. The text includes copious footnotes to cases and other materials. The set is upcl to a by annual. pocket parts. There is one index covering the civil and , *d. : ;* oval components, but the other parts are separately indexed.

The other major treatise, *Moore's Federal Practice* (29 vols.) (3d ed. Matthew Bender 1996-date), is published in a looseleaf format, revised annually by replacement *part*es and supplements. The set is named after its primary author, Professor James. William Moore of Yale Law School, who has had numerous ether e *at*. different times and on various volumes. Like *Federal :Practice - xed Procedure*, *Moore's* devotes several volumes to a rule-by-rule a *tu-.1.7i2;j.::* the Federal Rules of Civil Procedure, with other volumes focusing ea other matters such as jurisdiction, the Federal Rules of Cr^y *l*. *o*. the Federal Rules of Evidence, and Supreme Court practice. The set includes a detailed three-volume index and one volume listing statutes and rules cited.²⁸

Two other multivolume treatments of federal practice are organized not by specific rule but more generally, by subject. An encyclopedia similar in format to its *Am. Jur. 2d* but designed specifically for federal practice is: *Federal Procedure, Lawyers' Edition* (58 vols.) (West Group 1982-date). It consists of eighty alphabetically arranged chapters, some of which focus on procedural issues (Access to District Courts, New Trial) and some on topical areas of federal law (Atomic Energy, Job Discrimination). The chapters deal with civil, criminal and administrative practice, and include checklists, synopses of law review articles, and texts of relevant statutes The text a ¹so includes references to *Federal Procedural Forms, Law >yc; :...i~.* an: of liei relevant materials. The set is updated by annual pocket parts, and includes a three-volume index and a table of statutes, rules and regulations cited.

West Group recently assumed publication of another comprehensive work, *Cyclopedia of Federal Procedure*. The *Cyclopedia* is arranged topically rather than alphabetically; it is divided into five parts (courts and jurisdiction; civil trial practice; criminal procedure; appeal and review; and particular actions and proceedings) and organized topically

27. In actuality, each component is the work of a different set of all'-hors. The criminal volumes are written ty Wr gn' alone; the civil volumes by Wright, Miller, Mary K. Kane, and Richard L. Marcus; the jurisdiction volumes by Wright, Miller, Edward H. Cooper, and Eugene Gressman; and the evidence volumes by Wright, Kenneth W. Graham, Jr., Victor J. Gold, and Michael H. Graham.

28. A similar but less voluminous work is also a^vailable from the same publisher. ales l- . Moore, Allan D. Vestal & Phillip B. Kurland, *Moore's Manual: Federal Practice and Procedure* (3 vols.) (1962—date) is arranged by subject rather than by rule, but contains much of the same text as the larger work. Each section in the *Manual* provides cross-references to more comprehensive treatment in *Moore's Federal Practice*.

within each part. Like most of the other works described in this section, its text summarizes the ruling law and its footnotes provide extensive references to cases. Both text and footnotes are updated in annual pocket parts. In addition to an index, the set includes volumes containing the texts of relevant statutes and court rules, as mentioned earlier.

A number of works focus on the Federal Rules of Evidence. One of the principal drafters of the rules, Judge Jack B. Weinstein, has written with Margaret A. Berger a multi-volume treatise explaining the intent and application of each provision, *Weinstein's Evidence: Commentary on Rules of Evidence for the United States Courts and Magistrates* (7 vols.) (Matthew Bender 1975-date). It includes both a subject index and an author/title index (of works cited in the text), as well as tables of cases and of statutes and rules. A similar multivolume rule-by-rule analysis is Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* (5 vols.) (2d ed. West Group 1994-date), which is the revised edition of the treatise of the same name, authored by David W. Louisell and Mueller. Each of these works is updated annually or more frequently.

Procedural guides for particular courts are also published. One work designed specifically for attorneys practicing before the United States Supreme Court is Robert L. Stern, et. al., *Supreme Court Practice*, (7th ed., Bureau of National Affairs 1993). The book includes extensive discussions of the Court's policies and procedures, and also contains forms, checklists and Supreme Court Building floor plans.

b. State-Specific Materials

State practice manuals and procedural aids, containing such material as the text of court rules, commentaries on the rules, annotations of court decisions, and model forms keyed to the rules, are published for virtually every state. Some of the larger states have two or more competing publications of this kind. The best of these are updated regularly, either with looseleaf filings, pocket part supplements, or complete annual revisions. They provide useful, current information regarding the local rules of practice, and are essential tools for the lawyer's daily work.

West and several other publishers offer multi-volume sets on practice in particular states. Some of these are commentaries on procedural rules, while others are series of individual subject treatises in a uniform format, with legal forms and practice checklists. Usually, these works are regularly updated by either pocket parts or looseleaf supplements.

Another source for practical information on state practice is through continuing legal education materials. Many states publish materials from their C.L.E. programs, often in a looseleaf format. These books often provide clear, step-by-step assistance for practitioners in a particular

29. Less comprehensive but handier treatments include Michael H. Graham, *Handbook of Federal Evidence* (2 vols.) (4th ed., West Group 1996), and Stephen A.

Saltzburg & Michael M. Martin, *Federal Rules of Evidence Manual* (3 vols.) (7th ed. LEXIS Law Publishing 1998).

jurisdiction. They are usually updated or replaced periodically, although not always as frequently as works from major commercial publishers.

One of the easiest ways to learn about available treatises, practice manuals, and C.L.E. materials in a particular state is to consult a reference librarian. He can provide leads to what sets and C.L.E. providers are currently most acceptable in the jurisdiction.

c. General Works

Procedural manuals and treatises published for a general national audience can also be of immense practical value, although they are related to no specific procedural rules. Among these are the practice adjuncts to *American Jurisprudence*, such as *Am. Jur. Trials* and *Am. Jur. Proof of Facts*. Both of these multi-volume sets contain articles on specific issues in litigation, and contain numerous cross-references to other products.

The first six volumes of *Am. Jur. Trials* constitute an extensive treatise on general aspects of trial preparation and procedure. Ensuing volumes, which are issued periodically, consist of "Model Trials." Individual articles in each volume describe unique aspects of specific types of litigation, on issues from compensation for multiple sclerosis to defective automobile door latches. There are more than forty volumes of "Model Trials," and the set has a two-volume index.

Am. Jur. Proof of Facts, now in its third series, contains articles on specific evidentiary issues, and provides sample interrogatories and examinations. Individual articles describe the elements of proof required for establishing particular facts in judicial proceedings, and outline useful procedures. A three-volume index covers all three series.

A similar collection of articles on trial practice in very specific areas is *Causes of Action* (2d series West Group 1983-date), which includes extensive references to law review articles, legal encyclopedias, digests, and annotations. Works such as these may be little used in academic research, but they are important time-saving resources for practicing lawyers.

D. PRACTICE FORMS

Many writings must follow certain conventions to have legal significance or to have a desired effect. This is true not only of documents such as contracts and wills, but also of forms used in court practice such as briefs or pleadings. The publication of model forms has evolved and is today a major component of legal literature. Forms are included as part of many procedural treatises, and are published separately in comprehensive collections. Some jurisdictions even have prescribed official forms that must be used for certain pleadings or motions.

For federal practice, several multi-volume collections of forms are published in conjunction with the practice treatises described in the

preceding sections. Some are arranged by rule, some by subject, all provide useful cross-references to other sources. Table 2 lists practice sets and their companion form books.

Table 2
Federal Practice treatises and form books

Practice Treatise	Form Book	Arrangement
<i>Federal Practice & Procedure</i> (Wright & Miller)	<i>West's Federal Forms</i>	by rule
<i>Moore's Federal Practice</i>	<i>Bender's Federal Practice Forms</i>	by rule
<i>Moore's Manual</i>	<i>Federal Practice Forms</i>	by rule
<i>Federal Procedure, Lawyers' Edition</i>	<i>Federal Procedural Forms, Lawyers' Edition</i>	by subject
<i>Federal Local Court Rules</i>	<i>Federal Local Court Forms</i>	by court

Legal forms are an essential part of most state practice manuals discussed above. In addition, many states have separate, commercially published collections of forms. Some states have officially promulgated forms, such as *California Judicial Council Forms*, published annually as an adjunct to *West's Annotated California Codes*.

Although not keyed to the practice of any particular jurisdiction, general formbooks can still be very useful in preparing for litigation. *American Jurisprudence Pleading and Practice Forms*, rev. ed. (West Group 1967-date) is an extensive collection of forms for such matters as complaints, motions, and orders. Its forms are accompanied by explanatory text, case annotations, and cross-references to other publications, as well as tables providing statutory and rules references for each jurisdiction. It is arranged alphabetically by subject, and has a two-volume index. Other series are designed for specific stages of litigation, such as *Bender's Forms of Discovery* (34 vols.) (M. Bender 1963-date), which includes ten volumes of sample interrogatories by subject. Practice forms appear as well in many specialized treatises and manuals.

E. MODEL JURY INSTRUCTIONS

Publications of jury instructions are an important aid to both practicing trial lawyers and judges. Before a jury is sent out to weigh the evidence, the judge instructs its members on the applicable law. Proposed instructions are frequently drafted and submitted to the judge by opposing counsel, and the outcome of a case may turn on which instructions are chosen. Collected examples of jury instructions have been published since the late nineteenth century.

30. Frederick Sackett, *Instructions and Requests for Instructions from the Court to the Jury in Jury Trials* (Jameson & Morse 1881). A book published the previous year

concluded with an example of an instruction not to be followed. It began: "Gentlemen of the Jury: The investigation of guilt and the punishment of crime are a painful,

Cases have frequently been reversed on appeal due to inadequate or erroneous instructions. To reduce the chances of error, many states have prepared standardized, approved instructions to be used in common situations. These instructions are known by various designations, including *model*, *pattern*, or *approved* jury instructions. The first published set of these instructions was in California, *Book of Approved Jury Instructions*, in 1938. By now there are model instructions for practically every state.³¹ In some states model jury instructions are used by judges only as guides, but in others the instructions must be read verbatim if applicable. Some sets of model instructions are promulgated by the state supreme courts, while others are unofficial products of bar or judicial associations.

For the federal courts there is no general set of approved instructions, although some sets of pattern instructions have been published for individual circuits. There are, however, two sets of commercially published, unofficial instructions covering both criminal and civil cases: Edward J. Devitt, Charles B. Blackmar, Michael A. Wolff, & Kevin F. O'Malley, *Federal Jury Practice and Instructions (3 vols.)* (4th ed. West 1987-date) is an authoritative work with explanatory comments and notes of relevant cases; Leonard B. Sand et al., *Modern Federal Jury Instructions (5 vols.)* (Matthew Bender 1985-date) is a looseleaf work, consisting of sample instructions, comments, and case notes.

F. SUMMARY

Access to court rules, both federal and state, is available in a variety of sources. The most useful forms of publication are those which provide commentary and citations to court decisions interpreting and applying the rules. The extensive literature of practice manuals and formbooks is closely related to court rules. These materials describe the procedures to be followed in litigation and usually include the texts of rules as well as forms, commentary, and annotations to court decisions. They are an essential component of the working library of every practitioner.

The literature of court rules and practice is sometimes seen as dry and overly concerned with technical minutiae. This is a valid criticism, particularly when rules prescribe rigid and formalistic processes to be followed in all cases. Even so, a lawyer must be familiar with governing rules and procedures in order to avoid compromising clients' interests. As Justice Hugo Black complained thirty-five years ago: "Judicial statistics would show, I fear, an unfortunately large number of meritorious

but a highly important duty. God has ordered it, and we worms of the dust must recognize what He has ordered." Seymour D. Thompson, *Charging the Jury: A Monograph* 176 (W.H. Stevenson 1880).

31. Recent, comprehensive listings of published jury instructions, arranged by state, are: Cheryl R. Nyberg & Carol Boast, "Jury Instructions: A Bibliography Part I:

Civil Jury Instructions," *Legal Reference Services Q.*, Spring/Summer 1986, at 5; and Cheryl R. Nyberg, Jane Williams & Carol Boast, "Jury Instructions: A Bibliography Part II: Criminal Jury Instructions," *Legal Reference Services Q.*, Fall/Winter 1986, at 3.

cases lost due to inadvertent failure of lawyers to conform to procedural prescriptions having little if any relevancy to substantial justice.' Simplification and flexible application of rules, however, can allow them to achieve the salutary purpose Justice Black enunciated: "The principal function of procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts."³³

32. Order Adopting Revised Rules of the Supreme Court of the United States, 346 U.S. 945, 946 (1954) (Black, J., dissenting).

33. *Id.*

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