

HOW RULES OF PROCEDURE ARE DEVELOPED AND REVISED IN THE U.S. COURTS

Authority

Under the Constitution, Congress has the power to establish the rules of procedure used by the federal courts. By statute, Congress empowered the Supreme Court to develop these rules and authorized the Judicial Conference to study their impact. The Judicial Conference submits recommended changes to the Supreme Court for approval. Congress reviews the approved amendments, and although it has the authority to reject, modify, or defer the judiciary's proposed rules, it rarely does so.

The Rules Committees

The Judicial Conference's Committee on Rules of Practice and Procedure (the "Standing Committee") studies the rules and oversees the reform process. It has an advisory committee for each of five sets of rules: appellate, bankruptcy, civil, criminal, and evidence. Advisory committee members include federal judges, practicing lawyers, law professors, state chief justices, and representatives from the Department of Justice. The Chief Justice of the United States appoints committee members and assigns a reporter—a prominent law professor—to each committee to coordinate the committee's agenda and draft amendments to the rules as well as explanatory notes.

Open Meetings and Records

The Standing Committee and each of its advisory committees typically meet twice per year. These meetings are open to the public, with very limited exceptions. Committee records are available to the public on the judiciary's internet site.

Process

The rule-making process involves several stages of formal review and comment. From beginning to end, it usually takes two to three years for a suggestion to be enacted as a rule. The process may be expedited when there is an urgent need to amend the rules.

Initial consideration by an advisory committee. Suggestions for changes in the federal rules come from many sources, including judges, attorneys, government agencies, academics, and bar associations.

Proposed changes are evaluated by the appropriate advisory committee. The advisory committee may ask the Federal Judicial Center to study the operation of existing rules or the impact of amendments. The Center may conduct an empirical analysis and submit a report with its findings to the committee.

Publication and public comment. When an advisory committee decides that a proposed amendment has merit, it forwards the draft, with a committee note, to the Standing Committee. The Standing Committee may publish the draft amendment for public comment. Proposed amendments are distributed to the bench and bar and posted online.

The public is usually given six months to submit written comments. All comments are publically available and part of the official record. Proposed amendments are also reviewed during public hearings. Anyone who wishes to appear and testify at the hearings may request to do so.

Consideration of public comments and final approval by the advisory committee. At the conclusion of the public comment period, the advisory committee's reporter prepares a summary of the written comments and hearing testimony. The advisory committee reviews the proposed rule changes in light of the written comments and testimony. It may withdraw or revise the proposal. If the advisory committee decides to make a substantial revision, it may provide a period for additional public notice and comment.

Upon settling on a proposed amendment, the advisory committee submits it to the Standing Committee for approval, with a report summarizing the comments received from the public and explaining any changes made by the advisory committee. The advisory committee's report must also include minority views of members who wish to have their separate views recorded.

Approval by the Standing Committee. The Standing Committee considers the final recommendations of the advisory committee and may accept, reject, or modify them. If a modification constitutes a substantial change, the Standing Committee normally will return the proposal to the advisory committee with explanation and guidance.

If the Standing Committee approves a proposed rule change, the proposal is sent to the Judicial Conference with a recommendation for approval, accompanied by the advisory committee's reports and the Standing Committee's report explaining any modifications it made.

Judicial Conference approval. The Judicial Conference normally considers proposed changes to the rules at its annual September session. Changes approved by the Conference are transmitted promptly to the Supreme Court.

Supreme Court approval. The Supreme Court has the authority to prescribe the federal rules, subject to a statutory waiting period. The Court must transmit proposed rules changes that it approves to Congress by May 1 of the year in which the amendment is to take effect.

Congressional review. Congress has a statutory period of at least seven months to act on any rules prescribed by the Supreme Court. If Congress does not enact legislation to reject, modify, or defer the rules, they take effect on December 1.

Local Rules

Although all federal courts follow the Federal Rules of Practice and Procedure, each district court, bankruptcy court, and court of appeals, as well as the Supreme Court, develops its own local rules. The local rules cannot contradict the federal rules, but they may fill in details that are left open in the federal rules. In addition, some judges have their own rules of practice, which may fill in any details left open in the local rules.

Further Resources

More information about the federal rule-making process can be found on the judiciary's internet site at www.uscourts.gov/rules-policies/about-rulemaking-process. Materials related to the Federal Rules of Practice and Procedure produced or made available by the Federal Judicial Center can be found on the Center's website at www.fjc.gov/content/309725/overview.
