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PUBLIC COMMENT ON THE WORK OF FEDERAL RULES COMMITTEES
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BOTH CONGRESS AND THE COURTS want the bar and the public to help draft federal court rules. In particular, the advisory committees charged with drafting rules routinely seek public comment on proposed rules. Some public comments make a difference. Others, however, do not, except insofar as they provide the committees with a gentle reassurance that if the committee had not gotten a hit, someone was there who potentially might have called a strike.

The problem is a familiar one: not knowing your audience. Some attorneys and bar associations who write the committees seem to have little familiarity with the committees and the way they work. As a result, a comment letter, even one reflecting great effort, may accomplish little more than filling the spectator seats in the rulemaking ballpark.

To provide a clearer picture for those who are inspired to participate in rulemaking, this article will briefly describe the workings of the federal rules committees and will suggest eight ways to craft an effective comment.

HOW RULES COMMITTEES WORK

The Supreme Court first established a rules advisory committee to help it draft the Federal Rules of Civil Procedure, which took effect in 1938. The committee met privately, but circulated drafts to the bench and bar for comment. It continued in existence for almost two decades. The longer it lasted, the more controversial it became. Because its members were appointed for indefinite terms, questions arose concerning the tenure and influence of the committee's members. In apparent response to those questions, the Court abolished the committee in 1956.

The Modern Advisory Committees Emerge

From the ashes of the Supreme Court's experiment sprang the current system of advisory committees to federal courts other than the Supreme Court. Created by Congress in 1958, the federal rules advisory committees report to the Judicial Conference of the United States, a group of 27 federal judges chaired by the Chief Justice who meet twice a year to set policy for the federal courts. The Conference takes its immediate cue on rule revisions from its Standing Committee on Rules of Practice, Procedure and Evidence, composed of eight judges, five lawyers, and one law professor. In turn, reporting to that committee are separate advisory committees for each set of federal rules: appellate, civil, criminal, bankruptcy and evidence. The Chief Justice appoints the committee members whose terms are limited to no more than six years. They receive no payment for their service.

Work of the Committees

Typically, the committees meet twice a year. Their meetings are public meetings. Public attendance varies widely. Committee minutes available on Westlaw are public. The gestation process for a rule begins with a suggestion to an advisory committee. Suggestions come from many sources, including individual members of the bar. The committee assigns an agenda number to suggestions that merit discussion. If it decides to pursue the idea, the committee drafts an amendment and sends its draft to the Standing Committee. The Standing Committee reviews the draft and then, if it thinks it worthy of publication, requests public comment and schedules hearings.

How the Committees Elicit Comments

To elicit comment, the proposed rules are mailed to more than 10,000 persons and organizations, including federal judges, state attorneys general, law schools, designated state bar "points of contact" and others who ask to be on the mailing list. Notice is published in the Federal Register, and West prints the proposals in the advance sheets of its reporters. They are also posted on the Website, <http://www.uscourts.gov/rules>.

Time for Submitting Comment

Persons wishing to comment must do so within the time allowed, normally six months, by sending the comment, which is usually in letter form, to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Washington, D.C. 20544. After the comment period closes, the rule goes back to the advisory committee. That committee reconsiders the rule in light of the comments and then returns it to the Standing Committee. If the rule receives a favorable vote in the Standing Committee, it goes to the full Judicial Conference.

Endorsed Changes

The Judicial Conference submits changes it endorses to the Supreme Court. The Court sends changes it approves to Congress by May 1 of each year and, by statute, the changes become effective on December 1 unless Congress takes action to the contrary. The minimum time for a suggestion to work its way through this process and become law thus is about three years.

Influencing the Process

Members of the public have several opportunities to influence this process:

First, a member of the public can submit a suggestion that becomes an agenda item for a committee;

Second, a member of the public can comment on a published draft by sending in written comments or, in the event the committee holds a public hearing, attending that hearing; and

Finally, public comment can influence whether or not Congress takes action on a rule.

Although the committee members are sophisticated readers in a hurry, they nevertheless value public input. Rulemaking remains more of an anecdotal than an empirical process. Comments and suggestions that bear on the practical operation of the rules in unforeseen circumstances get particular attention. Sometimes a committee is acutely aware of its lack of technical expertise.

For example, the appellate rules committee sought a second round of public comment on a proposal to express the brief length limit as a number of words rather than as a number of pages. The committee felt it needed outside help. The first comment period did not elicit much response. Fortunately, the second period attracted the attention of printing industry experts and bar groups who flagged several potential problems.

HOW TO DRAFT AN EFFECTIVE COMMENT

With these committee characteristics in mind, a member of the public who wants to persuade a committee to adopt or amend a rule would do well to consider the following eight tips.

Get to the Point

The comment process is a form of advocacy and, as with most forms of advocacy, it is best to get to the point. Comments should focus on particular insights that the person or organization commenting has to offer to the committee. Brevity is the soul of persuasion as well as of wit. Rule proposals generally go out for comment in a package. In one unfortunate scenario, a local bar association gives the package to a

committee. The committee prepares a lengthy but uncritical analysis of each change and, after a vote, lightly edits the analysis and sends it to Washington as a comment. The resulting parade of the obvious accomplishes little. If a useful point is made, it is buried in a mass of irrelevant discussion.

Say How To Say It

Often, the devil is in the details. It is one thing to identify a problem with a proposed rule and quite another thing to solve the problem. For that reason, it is not helpful to say, "draft Rule X adopts a new and incoherent standard" without proposing any alternative. On the other hand, specific language that clarifies a rule always attracts attention.

Cite Model Rules from Other Courts

Rule makers justifiably live in the fear of the unknown. For this reason, a comment carries substantially more force if it is backed by citations to rules of other courts that provide a model. Justice Holmes' aphorism, "The life of the law has not been logic; it has been experience," comes to mind.

The most striking example of this is a local rules project commissioned by the Standing Committee. That study began in the late 80's and not only produced useful new ideas for amendments to the federal rules, but also demonstrated what a Tower of Babel the rules for practice in the various appellate circuits had become. Since the conclusion of the appellate rules portion of that study in 1991, the committee has incorporated numerous local rules provisions into the federal rules. It was from that source that the committee developed proposals for using word counts to regulate the length of briefs, for revising mandamus procedure to minimize the involvement of the district judge, and for requiring that certificates of service state the addresses to which papers are sent.

Consider Statutes and Case Law

Occasionally Congress and the Supreme Court get in the way of a good idea. One commentator recently criticized the detail required by the new appellate Form 4 without realizing that most of the detail was required by Congress, see 28 U.S.C. @ 1915.

Similarly, the committee itself recently proposed to restyle Fed. R. App. P. 22 without taking into account pending congressional changes to habeas corpus procedures in the Anti Terrorism and Effective Death Penalty Act of 1996. Members of the public who discern such discrepancies merit a special place in the hearts of the committee.

In the same vein, relevant case law can have a chastening effect. One letter recently urged that a statement in a committee note be placed in the text because the Supreme Court has been known to discount the weight given to notes, see *Curtis Wright Corp. v. General Electric Co.*, 446 U.S. 1, 910 (1980).

Find an Inconsistency or Unintentional Ambiguity in the Rules

One of the most useful things that careful readers can do for a rules committee is to locate inconsistencies or ambiguities in proposed rules. Ambiguity frequently depends on context. Members of the bar frequently can envision situations not within the ken of the advisory committee.

For example, one recent commentator noted that a rule amended to require a motion for extension of time "within 30 days after" the expiration of the allowed time inadvertently precluded a motion being made before the allowed time expired. The comment suggested that the language be changed to require a motion filed "not less than 30 days after" the expiration, and the committee adopted that language.

By the same token, it is incumbent on those who comment on the rules to read them first. No one is helped by an extensive comment on Fed. R. App. P. 35 criticizing the "trap" created by the failure of a suggestion for en banc consideration to toll the time for seeking certiorari when a pending amendment to Fed. R. App. P. 41 eliminates that very trap.

Every Comment Counts

Persons tempted to comment should rest assured that their views will be considered and that every comment counts for something. Usually, the number of comments on any proposed amendment is quite small. Also, the process of amending rules is generally an intellectual, not a political, exercise. A single well reasoned comment will get the committee's attention, even if it comes unaccompanied from Last Chance Gulch, Montana.

Conversely, poorly reasoned or badly written comments do not weigh very heavily even if they come from prestigious bar associations or are accompanied by a lengthy recitation of the credentials of the letter writer.

A "hue and cry" rule, however, is occasionally invoked and, when invoked, gives every comment some value. Absent a hue and cry, the committee may assume that its work meets public approval. On the other hand, in the face of a hue and cry, the committee may assume the opposite, especially if the comments do not appear to have been organized by an interest group. Typically, a reporter's summary of the comments received tallies the number of comments on either side of a controversial proposal.

Test Your Proposal

Although rulemaking is generally not an empirical process, there are some circumstances where experimental work by the public has been helpful. Again, perhaps the clearest example of this in the appellate rules committee arose in connection with the rule governing brief length. A principal question is whether that rule will be understandable and workable to lawyers in an ordinary law office. Letters to the committee that said in essence, "I tried your rule out on my word processor and here's what happened," were read with great interest.

Keep up with the Committee's Docket

Persons who want to suggest a new rule to a committee would be well advised to check with the rules committee support office to determine whether or not the proposal is already on the committee's docket. The address is John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the U.S. Courts, Thurgood Marshall Federal Judiciary Building, 1 Columbus Circle, N.E., Washington, D.C. 20544, (202) 502-1820.

For example, a few years ago a national bar committee invested a considerable amount of time and effort in analyzing the local rules of the federal courts of appeals and making recommendations for changes to the federal rules based on that analysis. Unfortunately, the federal advisory committee had completed such a study itself just a few years before. The bar members engaged in much work which was, from the committee's point of view, redundant by the time it reached the committee.

CONCLUSION

The committees need all the public input they can get. Congress and the committees have designed their process to include numerous opportunities for public comment. For those comments to be effective, however, persons who wish to influence the rulemaking process need to take into account the audience they are addressing. By following the admonitions listed above, members of the public can steer a committee away from the shoals of error and toward rules that guide both courts and litigants along the course to justice.

PRACTICE CHECKLIST

Use this checklist to cover all the important points in the article, and save it for future reference.

Most attorneys know what the advisory committees on the federal rules do. Few realize, however, the opportunities that exist to shape the rules that ultimately emerge.

To elicit comment, the proposed rules are mailed to more than 10,000 persons and organizations, including federal judges, state attorneys general, law schools, designated state bar "points of contact" and others who ask to be on the mailing list. Notice is published in the Federal Register, and West prints the proposals in the advance sheets of its reporters. They are also posted on the Website, <http://www.uscourts.gov/rules>. Persons wishing to comment must do so by the time allowed, normally six months, by sending the comment, which is usually in letter form, to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Washington, D.C. 20544.

If you want to send a comment, keep the following pointers in mind:

- Get to the point. The comment process is a form of advocacy and, as with most forms of advocacy, it is best to get to the point. Sometimes a bar committee will prepare a lengthy but uncritical analysis of each proposed change and, after a vote, lightly edit the analysis and send it to Washington as a comment. The resulting parade of the obvious accomplishes little;
- Say how to say it. Specific language that clarifies a rule always attracts attention;
- Cite model rules from other courts. A comment carries substantially more force if it is backed by citations to rules of other courts that provide a model;
- Consider statutes and case law. Occasionally Congress and the Supreme Court get in the way of a good idea. Members of the public who discern discrepancies and conflicts with existing rules merit a special place in the hearts of the committee;
- Point out any inconsistency or unintentional ambiguity in the rules;
- Test your proposal. A principal question is whether that rule will be understandable and workable to lawyers in an ordinary law office; and
- Keep up with the committee's docket. Check with the rules committee support office to determine whether or not the proposal is already on the committee's docket. The address is John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the U.S. Courts, Thurgood Marshall Federal Judiciary Building, 1 Columbus Circle, N.E., Washington, D.C. 20544, (202) 502-1820.