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912

count.[564] The court sustained joinder solely on the basis of the section 1962(c) count.[565]

A different approach was implicitly adopted in *United States v. Boffa*,[566] indicating that Rule 8(b) requires that a common purpose support joinder of the substantive offenses and a section 1962(c) count.[567] The court had previously observed, however, that the predicate acts need not be related to each other if each act is related to the conduct of the enterprise's affairs.[568] Conceivably, *Boffa* is assuming that a section 1962(c) offense can consist of unrelated acts but that Rule 8(b) precludes joinder of defendants involved in those acts. The Eighth Circuit decision in *United States v. Dean*[569] may also limit joinder to the extent that it holds that where an enterprise is operated through separate patterns, separate RICO counts can be alleged.[570]

b. Retroactive misjoinder. Where a RICO count is the only element relating the various predicate offenses, reversal of the RICO count may give rise to the argument that the predicates were misjoined. This argument is substantially weakened by the Supreme Court decision in *Shaffer v. United States*,[571] holding that if a conspiracy count supplied the joinder element a dismissal or acquittal

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[564] *Id.* at 1052.

[565] *Id.* at 1052-53.

[566] 513 F. Supp. 444 (D. Del. 1980). *Boffa* involved a RICO indictment for fraud and union corruption. The defendants filed over 28 separate motions, which produced a correspondingly voluminous series of published opinions on virtually every point of criminal law and procedure that could arise in a RICO case. The judge, Judge Latchum, denied every motion, including a recusal motion. *Id.* at 458-512.

The indictment alleged a complex fraudulent scheme involving an enterprise consisting of a group of associated individuals who were in the business of leasing labor to employers through various dummy corporations. The scheme purportedly commenced when an employer leased labor from UCI, a front for an enterprise that had a collective bargaining agreement with the Teamsters. UCI would then terminate its contract with the lessee-employer and recommend that the employer lease from a second corporation that was also controlled by the enterprise. The employer was unaware that the second corporation was also controlled by the enterprise. UCI would then fire its leased employees and the second corporation would employ drivers at a lower pay than was required under the old Teamster-UCI labor agreement. The enterprise infiltrated a defendant, Sheehan, into the Teamster local, and Sheehan eventually became local president and assisted the enterprise. *Id.* at 454-56.

[567] *Id.* at 475 n.30.

[568] *Id.* at 463 n.16.

[569] 647 F.2d 779 (8th Cir. 1981).

[570] *Id.* at 789; *see supra* text accompanying notes 522-23.

[571] 362 U.S. 511 (1960).

of the conspiracy count during or after the trial does not result in misjoinder.[572]

Applying *Shaffer* to a RICO charge, the Fifth Circuit decision in *United States v. Sutherland*[573] rejected a misjoinder claim despite holding that two conspiracies were improperly joined in a single section 1962(d) count.[574] The court noted that the misjoinder claim must be judged by the language of the indictment; the fact that the Government failed to prove a single conspiracy at trial is not material on an appeal of the Rule 8(b) decision.[575]

In considering the problem of retroactive misjoinder, the Ninth Circuit decision in *United States v. DeRosa*[576] acknowledged the prejudicial effect of the "racketeer" label. In *DeRosa*, the RICO count was dismissed as to two defendants by the trial court at the close of the Government's case. The two defendants then moved for severance, a motion that was denied. On appeal of the severance denials the court found that the racketeering taint was alleviated by two factors: (1) the RICO count in the jury's copy of the indictment did not mention the acquitted defendants, and (2) the Government did not "argue their relationship to the racketeering enterprise in any prejudicial way."[577] It is debatable, however, whether the jury can be expected simply to ignore the fact that for much of the trial two defendants were alleged "racketeers."

Nevertheless, in some instances misjoinder has been found where the RICO count is dismissed on appeal. In *United States v. Winter*,[578] the conspiracy count was defectively pleaded as to defendants Charles and James DeMetri, who were mentioned in only one racketeering offense. The court held that the DeMetris were misjoined since their participation in race fixing was limited to the

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[572] *Id.* at 516. There are two exceptions to *Shaffer:* (1) where the prosecution acts in bad faith; and (2) where the Government indictment was based on an improper interpretation of the law. United States v. Levine, 546 F.2d 658, 663 (5th Cir. 1977); *see also* United States v. Kabbaby, 672 F.2d 857, 860-61 (11th Cir. 1982) (rejecting defendant's argument that legal interpretation of the charge and its place in the indictment were improper); Tarlow, *supra* note 426, at 285-90.

[573] 656 F.2d 1181 (5th Cir. 1981).

[574] *Id.* at 1191-95. The full facts of this holding are set out *supra* in the text accompanying notes 403-08.

[575] *Id.* at 1190 n.6.

[576] 670 F.2d 889, 897-900, 897 n.11 (9th Cir. 1982).

[577] *Id.* at 897 n.11.

[578] 663 F.2d 1120, 1138-39 (1st Cir. 1981).

one alleged scheme.[579] The DeMetris were involved in fixing only one race while the other defendants were charged with committing acts of force and violence that did not involve the DeMetris.

In addition to *Winter*, two cases that had rejected RICO counts based on illegal enterprise theories held that misjoinder occurred.[580] In one case, *United States v. Turkette*,[581] a First Circuit panel reversed a section 1962(d) conviction and considered whether the elimination of this count resulted in misjoinder of the predicate offenses, which included drug offenses, arson, and insurance fraud. The court held that misjoinder had occurred because the drug-offense scheme and the arson-mail-fraud scheme were not part of the same series of transactions in the absence of the RICO count.[582] The absence of any evidentiary overlap between the two schemes eliminated any benefit to the Government of a joint trial.[583] The *Shaffer* rule was inapplicable because *Turkette* fell within an exception for cases in which a conspiracy is dismissed for legal insufficiency.[584]

If dismissal or acquittal of a RICO count occurs during or after trial, some courts consider a severance or mistrial motion as an issue of prejudicial joinder governed by Rule 14.[585] In *United States v. Kabbaby*,[586] the court indicated that an invalid RICO count may result in prejudicial joinder because of the prejudicial impact of the "racketeer" label.[587] In *Kabbaby*, the predicate offenses included contract murders, arson, drug trafficking, counterfeiting currency, truck hijacking, loansharking, and prostitution. The defendant was acquitted of all charges except one count alleging a cocaine sale. *Kabbaby* held that no prejudice resulted from the allegation of the RICO count because the jury had carefully consid-

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[579] *Id.* at 1139.

[580] *See* United States v. Turkette, 632 F.2d 896, 906-09 (1st Cir. 1980), *rev'd*, 452 U.S. 576 (1981); United States v. Sutton, 605 F.2d 260, 270-72 (6th Cir. 1979), *rev'd on rehearing en banc*, 642 F.2d 1001 (6th Cir. 1980).

[581] 632 F.2d 896 (1st Cir. 1980), *rev'd*, 452 U.S. 576 (1981).

[582] *Id.* at 907-09.

[583] *Id.* at 909.

[584] *Id.* at 907. The Supreme Court, in its opinion reversing *Turkette*, did not discuss the joinder problem because of its conclusion that the RICO count was valid. *See* 452 U.S. at 593.

[585] FED. R. CRIM. P. 14; *see, e.g.*, United States v. Scott, 511 F.2d 15, 18-19 (8th Cir.), *cert. denied*, 421 U.S. 1002 (1975); United States v. Donaway, 447 F.2d 940, 943 (9th Cir. 1971).

[586] 672 F.2d 857 (11th Cir. 1982).

[587] *Id.* at 862.

ered the evidence and acquitted on all counts except one.[588]

2. Joinder of a RICO Count and an Offense That Is Not Part of the Pattern. Although the inclusion of a RICO count may broaden the scope of joinder as to offenses that are part of the alleged pattern, the inclusion should not affect joinder of offenses that are not part of the pattern. The difficulties in sustaining joinder of nonpredicate offenses with a RICO substantive offense are illustrated by the Eighth Circuit decision in *United States v. Bledsoe*.[589] *Bledsoe* involved a RICO count charging a complex multidefendant scheme of securities fraud employing a series of corporations and agricultural cooperatives. Prior to the events alleged in the RICO count, a defendant, Phillips, had allegedly engaged in similar acts of securities fraud, which were alleged as two counts separate from the RICO charge. These securities fraud counts involved only Phillips and were related to the RICO activities only by a common defendant, Phillips, and a common modus operandi, the sale of certain types of securities.

Bledsoe held that the RICO count was misjoined with the earlier activities of Phillips.[590] The common modus operandi could not suffice to establish joinder because mere similarity of offense is not a basis for joinder under Rule 8(b).[591] The remaining allegations did not satisfy the "same series of acts or transactions" requirement of Rule 8(b), which the Eighth Circuit has interpreted as requiring that all acts "be part of one overall scheme about which all joined defendants knew and in which they all participated."[592]

VIII. Conclusion

Although the growing number of reported RICO decisions has clarified many aspects of the RICO criminal provisions, this should not obscure the need for legislative reform. Under existing case law, RICO can too often be used to expand unfairly the scope of federal criminal trials and to include stale and tenuously related

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[588] *Id.* This prejudicial joinder argument is probably unavailable in the Fifth Circuit, which has refused to hold that an acquittal on some of the underlying predicate offenses may require reversal of the RICO count. *See supra* note 549 and accompanying text.

[589] 674 F.2d 647 (8th Cir. 1982).

[590] *Id.* at 657.

[591] *Id.* at 656.

[592] *Id.* The facts of *Bledsoe* are discussed *supra* in greater detail in the text accompanying notes 171-87.

charges. The grave threat to individual rights and liberties posed by RICO and the consequent need for reform have become evident to informed members of the bar. Responding to these concerns, the American Bar Association has adopted a program suggesting reforms of the RICO statute in areas that include: (1) the use of the term "racketeering";[593] (2) the statute of limitations;[594] (3) single-transaction patterns;[595] (4) a common-scheme requirement;[596] (5) the use of mail fraud, wire fraud, and transportation and receipt of stolen goods as predicate offenses;[597] (6) application of section 1962(a) to principals in the racketeering;[598] (7) mens rea;[599] (8) repeal of section 1962(d);[600] (9) liberal construction of RICO;[601] and (10) RICO forfeiture provisions.

The reforms are not a definitive list of the amendments necessary to improve and clarify the RICO statute. Nevertheless, the recommendations can serve as a valuable starting point for the long-simmering debate as to what RICO should do and how RICO should be drafted to accomplish those aims. This debate did not occur when the statute was enacted since Congress did not have the slightest notion of the expansive manner in which the statute would be applied. Ultimately, Congress must participate in this dialogue in view of the unwillingness of a number of courts to formulate a rational and coherent policy for construing the RICO criminal provisions in a manner consistent with the original congressional intent.

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[593] *See supra* text accompanying note 557.
[594] *See supra* text accompanying notes 469-70.
[595] *See supra* text accompanying notes 275-76.
[596] *See supra* text accompanying notes 256-58.
[597] *See supra* text accompanying notes 324-26.
[598] *See supra* text accompanying note 122.
[599] *See supra* text accompanying notes 385-86.
[600] *See supra* text accompanying note 432.
[601] *See supra* text accompanying notes 80-81.

RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James O. Smith
Signature of Camera Operator

11/7/89
Date

02-519 (REV 8/78)

SMALL CLAIMS

MEMORANDUM ALASKA COURT SYSTEM

TO: Chief Justice Jay A. Rabinowitz
Justice Edmond W. Burke
Justice Allen T. Compton
Justice Warren W. Matthews
Justice Daniel A. Moore
Arthur H. Snowden, II
David Lampen

DATE: May 31, 1985

FROM: Don C. Bauermeister DCB
Court Rules Attorney

SUBJECT: Proposed Administative Rule 42: Rule-making

Attached is a copy of the memorandum discussing the issues surrounding a proposed rule on rules. An index directly follows this cover.

The attachments list is on page 41. Attachment 1 is a Judge Stewart memo with a proposed rule I have called the modified North Dakota proposal. Attachment 2 is an alternative proposal I have drafted that more closely follows the present practice of this court. Both proposals, however, expand the role of committees considerably from the present practice.

DCB/jm

Attachment

EDIT 1

MEMORANDUM

PROPOSED ADMINISTRATIVE RULE 42: RULEMAKING

INDEX

MEMORANDUM

TO: Chief Justice Jay A. Rabinowitz
Justice Edmond W. Burke
Justice Allen T. Compton
Justice Warren W. Matthews
Justice Daniel A. Moore
Arthur H. Snowden, II
David Lampen

DATE: May 23, 1985

FROM: Don C. Bauermeister DCB
Court Rules Attorney

SUBJECT: Proposed Rule 42: Rulemaking

I. INTRODUCTION

This memorandum outlines and discusses the major issues concerning rulemaking by this court. The discussion begins with a review of the existing structure and process in the federal system. Criticism of that structure is presented as a way of beginning a general introduction to the parameters of the debate surrounding rulemaking in courts today. Following a summary of the major issues in federal rulemaking is a brief look at the present ABA standards relating to court organization that cover unified court systems and their rulemaking authority. With those standards in mind, the memorandum turns to a review of the present Alaska rulemaking process including its constitutional basis and legal and administrative historical development. Finally, the memorandum focuses on two alternative proposed rulemaking orders. The first was written by retired Judge Stewart and may be reviewed as Attachment 1. It is basically a rewrite of the North Dakota rule on rules amended by Judge Stewart to meet some earlier criticisms by this court. Attachment 2 is my own proposal and it is based primarily on the last 20 months of experience I have had working with this court on rules changes.

to the standing committee for review. If revisions are sufficiently important, the advisory committee will circulate a new draft and may make still further revisions based on new comments. It may also, if appropriate, schedule public hearings. A member of the standing committee will usually have acted as a liaison in order to become more familiar with the draft before the chairman of the advisory committee presents it to the standing committee. All standing committee members may attend advisory committee meetings.

Review by the full standing committee is thorough. However, this review is not directed to any large-scale rewriting. Usually amendments are made only of a technical or clarifying nature before the document is transmitted to the full judicial conference. If the standing committee believes that more substantial changes are required, it will return the draft to the advisory committee for further work. In this case the committee will consider whether the nature of the changes may make another public circulation appropriate.

Semi-annual judicial conference meetings are usually scheduled for March and September. Rules are almost invariably submitted for consideration at the September meeting to leave the Supreme Court sufficient time for review before the rules are transmitted to Congress in accordance with the statutory May 1 deadline. The amount of meeting time the conference can devote to this work is limited and so the rules are normally approved as submitted by the committee and in turn the conference submits them to the Supreme Court.

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II. FEDERAL PROCESS

A. Outline.

All of the following material on the federal rulemaking process is plagiarized and summarized from W. Brown, Federal Rulemaking: Problems and Possibilities (Federal Judicial Center 1981). The full text is 144 pages long and is available in my office if you would like to review it.

The procedure by which rules and rule amendments are now drafted, reviewed, and promulgated was adopted after congress imposed responsibilities for this work on the judicial conference in 1958. The conference decided to carry out its mandate through a standing committee on rules of practice and procedure which would review the work of advisory committees and in turn be reviewed by the full conference. At the base of the pyramid are advisory committees for the civil, criminal, appellate and bankruptcy areas, each served by a reporter who prepares reports, memoranda, and suggested draft rules. Additional committees are appointed as needed. This method of work was initiated by the American Law Institute.

The advisory committee reviews and revises the reporter's draft, circulates the resulting committee draft for comment by bench and bar, and reconsiders the draft in light of the filed comments. It usually makes revisions based on these comments before sending a final draft

to the standing committee for review. If revisions are sufficiently important, the advisory committee will circulate a new draft and may make still further revisions based on new comments. It may also, if appropriate, schedule public hearings. A member of the standing committee will usually have acted as a liaison in order to become more familiar with the draft before the chairman of the advisory committee presents it to the standing committee. All standing committee members may attend advisory committee meetings.

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The Supreme Court is believed to review the rules at a court conference session. Normally this results in a transmittal of the rules to congress. Congress may permit them to go into effect by taking no action for 90 days. It may, on the other hand, reject or amend any or all of the rules; or it may defer their effectiveness for however long it elects. Congress has power to reject or amend the rules, or to enact its own rules.

THE ADVISORY COMMITTEES

Members of these committees are appointed by the Chief Justice in his capacity as chairman of the judicial conference. The current Civil Rules Committee has 12 members including five judges and seven lawyers. The Criminal Rules Committee has 14 members including eight judges, two officials of the Department of Justice, one federal public defender and three attorneys in private practice. The Appellate Rules Committee has 14 members including 9 circuit judges, the chief judge of the customs court and four practicing attorneys.

Members are appointed for either three or four year terms with about half of the terms staggered to provide committee continuity as well as change. There is considerable flexibility in appointments and reappointments with some emphasis on retaining some experienced members on each committee.

Professional ability and experience are the chief criteria for selection of committee members. Committee chairman conscientiously seek information about possible appointees and are frequently the source of recommendations to the chief justice. Experience as litigators or judges is valued. Geographical distribution is also given attention. No persons are compensated, save the reporter.

REPORTER, SOURCES, AND THE EARLY WORK

Reporters are appointed by the chief justice in his capacity as chairman of the judicial conference. In accordance with custom current reporters are law professors. Reporters terms are related to those of the committee members and reappointments are frequent.

It was the original intension that reporters engage in a continuing comprehensive study cf the rules and of their operations in both federal and state courts. Reporters were supposed to submit periodic reports on all matters, as well as analyses of filed comments and tentative drafts of rules. A program of periodic reports based on continuing study has not proved achievable. However, the committees continue to receive all comments on the rules which are circulated to all members. Review and winnowing of comments remain among the reporter's most important functions.

A reporter will have received information from a variety of sources before a first draft is submitted to a committee. The draft includes a memorandum which analyzes proposals, relevant law, history and previous

related proposals, and gives some optional courses of action. The memorandum may provide tentative preliminary drafts for the committee's consideration.

On some occasions advisory committees receive their first drafts from sources other than a reporter such as an American Bar Association Committee or government administrative office memorandum. No matter what the source of the original study material, the committee work that follows is the same.

MEETINGS

Frequency of advisory committee meetings depends on the volume of work, but timing is conditioned by the judicial conference schedule. Committee meetings are generally held for two days at the administrative office. There is no public advance notice and there are no available transcripts. Committee meetings are recorded but they are not transcribed. The committees engage in detailed discussion before voting on the individual rules.

Although meetings are not open to the general public for either participation or observation, the criminal rules committee makes a practice of inviting staff of appropriate congressmen as well as representatives of the justice department.

CIRCULATION OF DRAFTS; COMMENTS; REVISION AND ADOPTION

With extensive analytical materials available, the committees make choices and changes sometimes at their first meetings. They then decide on the circulation of a preliminary draft. The administrative office is responsible for circulating the draft and keeping a circulation lists current for those interested in receiving such drafts. The intended comment period is 90 days although due to logistics problems it sometimes is closer to 30 days.

The reporter reviews all comments and sends each committee member a summary and analysis, together with the views of an editoral committee (subcommittee), if one exists. (A revised draft of the proposals is also made to reflect that committee's views.) If the total advisory committee feels that the circulation has reached all concerned persons, and no additional analytical material needs to be obtained or considered, it will then vote to send the rule to the standing committee. If circulation problems develop, the committee has authority to extend the period during which it will receive comment. Additionally, the committees have authority to determine whether or not they wish to hold hearings. A separate notice is mailed out if hearings are to be held. Hearings are generally disfavored as time-consuming, expensive, and not productive of many comments not already received in writing.

ADVISORY COMMITTEE NOTES AND OTHER DOCUMENTS

Procedures concerning documents are common to all advisory committees. Filed comments are kept at the administrative office where they are available to persons with a legitimate purpose in seeing them. Minutes of meetings are not available, neither are reporter's notes, memoranda nor preliminary drafts.

Drafts published by the advisory committee are accompanied by official "notes" explaining the purposes of the proposed drafts or amendments. Notes may spell out criticisms of the old rule, explain how the proposed rule could be used, point out what it does not do, or outline alternatives that were considered. Notes range from one sentence stating that an amendment is "clarifying" to long scholarly analyses of case law developments requiring or supporting the proposed changes. They contain no indication of any differences of opinion on the committees; all committee decisions appear to be unanimous.

Notes contain no specific information about proposals that are revised or rejected in the course of a draft's development. There are unexplained material differences between the preliminary and revised preliminary drafts. Until recently, changes of this type were explained orally to the standing committee by the chairman and the reporter of an advisory committee. Under new procedures, the civil rule advisory committee introduced the requirement of the preparation of a "gap" report. The report explains changes and is intented to accompany the draft throughout the remainder of

the process, from transmission to the standing committee through submission to Congress.

THE STANDING COMMITTEE

The function of the standing committee is to coordinate the work of advisory committees, to suggest matters for committee study, to consider committee proposals, and to make general recommendations to the conference.

The current standing committee has eight members, including three judges, two law professors, and three practicing attorneys. Members are appointed by the Chief Justice. Current appointments are for three or four year terms.

The committee meets for one or two days at least twice a year approximately six weeks before judicial conference meetings. The committee does not engage in major rewriting of rules, rather it reviews proposed rules individually and examines them closely for policy questions and details. It may consider rules in several areas at a single meeting. The standing committee also maintains important liaison through attendance by its chairman at advisory committee meetings. The chairman and the reporter of an advisory committee normally present proposed drafts to standing committee meetings.

Drafts submitted by the standing committee to the judicial conference have not been generally available to the public. This changed after February 1980 and now such drafts are available to the public.

The standing committee has considered requiring the issuance of "gap" or transmittal reports by all advisory committee. The "gap" report would include not only a discussion of amendments considered and rejected, but also a statement of the extent of public access to proposed amendments, a summary of comments received, information about public hearings, and any other necessary information.

THE JUDICIAL CONFERENCE

The conference is composed of 25 judges including the Chief Justice who is chairman. It meets twice a year. Before the meetings, members normally have had at least 30 days to study the drafts, because the conference requires this period of advance submission by the standing committee.

Transcripts of conference meetings are not available. It seems likely review tends to focus on policy questions. It may also be inferred that the conference determines whether adequate consideration has been given to the proposed rules at lower levels.

Draft rules approved by the conference are transmitted to the court by the administrative office. The transmittal letter contains excerpts from the standing committee's report.

THE SUPREME COURT; CONGRESS

Supreme court deliberations are private and it is unknown whether the Court currently assigns responsibly for rules to a particular Justice or to a committee. Statutes require that the Supreme Court transmit promulgated rules to Congress at the beginning of a regular session, but not later than May 1. When Congress receives rules, it refers them to the appropriate committees for consideration. Congress may permit rules to take effect by inaction. It also has authority to modify the rules or pass rules of its own making.

B. Criticism.

LACK OF OPENNESS

The present process is criticized as "closed" or "private". This complaint holds that the public does not know what the general rulemaking procedures are, and lacks sufficient information at all steps in the process. Resultant lack of participation, it is alleged, means that the process does not receive sufficient public input. Therefore, the process does not recognize problems and deal with interest groups at an early stage, thereby leading to a lack of support by the bar and a lack of acceptance by Congress. Another criticism in this area is that the general rulemaking procedures of the conference and its committees have never been published.

The first public notice that changes are being considered is the publication and circulation of a preliminary draft of proposed rules. Several critics propose that notice be given before the advisory committee adopts a draft. Some critics would move notice back an additional step, to the time when a problem is first identified. This notice would be similar to the advance notice of proposed rulemaking that administrative agencies use to obtain views on whether any action should be taken.

The present system has also been criticized on the grounds that notice--when it is given--does not reach a sufficiently wide segment of the bar and the public. Particularly, the mailing lists have been the subject of some criticism. In 1973 a complaint was raised that the lists were limited to lawyers and this was a matter of particular concern when rules were reviewed that affected other interested groups. Some critics continue to support an active effort to obtain comments from a wider range of persons and organizations, specifically including lay groups that might be affected by rule changes.

Considerable criticism is directed to the fact that all meetings in the rulemaking process are closed to public observation. It is said that open meetings would generate confidence in the process and result in better acceptance of the rules because the public would be informed of the reasoning behind them.

Other students of the process oppose open meetings, at least in the initial stages of rule drafting. They believe that the presence of any

observers would inhibit free, spontaneous discussion, exploration of positions, and the development of good working relationships within the committee. They are concerned about observation by representatives of the specialized media with all the risks of inaccurate or out-of-context reporting.

ADVISORY COMMITTEE NOTES

Advisory committee notes have been praised for their scholarship and helpfulness, even by critics of the process. Advocates of openness nonetheless criticize the notes for failing to disclose minority views, to explain the reasons for rejection of modification of earlier committee proposals, and--on some occasions--to give what critics regard as sufficient weight to views and authorities the committees reject. One critic has referred to committee notes as "biased and relatively one-sided."

Unavailability of documents, from reporter's notes through the draft submitted by the judicial conference to the Supreme Court, has been a particular source of complaint. Presumably, the theory is that if all interested persons had ready access to comments, they would use them in preparing their own comments, or would respond to them, as in proceedings before administrative agencies. There is now no special comment file for public examination.

Unavailability of drafts following final circulation for comments has also been criticized, particularly on the grounds that material changes

might be made without the knowledge of interested participants. This problem is somewhat obviated by the practice of the standing committee to recirculate a draft if any substantial changes are made. Nevertheless, there is strong support for the proposition that all documents in the process be made public on request, if not by publication.

MONITORING

Additional criticisms of present procedures relate to monitoring of the rules and to the time required to effect amendment. Some critics see a relationship between these criticisms: more constant monitoring could shorten the process, because committees would be in a position to make changes more expeditiously. (Monitoring means observation of the functioning of rules and includes following legislative developments to determine whether new rules may be required.)

Other observers respond that more active monitoring would inevitably lead to too much revision and tinkering, depriving the bar of any period in which to adjust to amendments. Ten years has been suggested as an appropriate length of time between rule changes. Justices Black and Douglas have in the past questioned whether certain rule changes were too small to be worth promulgating, or whether too many changes were being made. See Statement of Justice Black dissenting from 1966 amendments, 383 U.S. 1029, 1032; Statement of Justice Douglas in 1961 dissenting from promulgation of civil amendments 368 U.S. 1009, 1012. Justices Powell, Stewart and Rehnquist dissented from the 1980 promulgation of civil rule amendments on

grounds that the "tinkering changes" the amendments make will delay genuinely effective reforms.

TIME REQUIREMENTS

There has been particular concern with the length of time required to put new rules and amendments into effect. The evidence rules required ten years from the date the advisory committee started work on the draft to their effective date. Criminal rules required five years and seven months. Criminal revisions, however, were accomplished on one occasion in approximately 14 months.

Current comment periods are relatively short, and the standing committee has spoken of the need to study them and achieve flexibility. On occasion, there have been complaints that the time allowed for comments has been insufficient, but the committees can't always grant extensions and lack of time does not seem to be a general problem. There is, surprisingly, no criticism that particular stages in the court phase of the rulemaking process takes too long. The problem is more often seen as arising from the number of stages and from the fixed dates of some of the meetings.

ADVISORY COMMITTEE STRUCTURE

Complaints have arisen that committee membership is too narrowly based and fails to represent some segments of the profession and the public. Opportunity for wider participation was one of the major objectives when

the present judicial conference rulemaking system was introduced in 1958. Concern was with increased representation of various types of legal practice and with wider geographical range. More recent criticism has focused on the under-representation of various social-economic groups. There is, however, not much support for lay committee members. Proposals are, rather, directed at including more lawyers who are woman or members of minority groups or other groups normally outside the "establishment" lawyers.

A strong suggestion has been made that membership for or liaison with the clerks of court be considered. This is because clerks of court are engaged in interpretation and application of the rules on a daily basis. It is believed that they could provide insight into a special range of practical experience and help to ensure that rules are drafted to advance desired policies.

THE SUPREME COURT

The structural question most frequently addressed by current critics is whether the Supreme Court should continue to exercise the promulgating role given it by the enabling statutes, or whether the statutes should be amended to place the rulemaking power elsewhere.

The following arguments have been made against promulgation by the Court: 1) that review of the rules is a burden for which the Court lacks time and staff and with which it is uncomfortable; 2) that the Court should

not take responsibility for the rules when the conference is responsible for their drafting and the Court is acting as a "conduit"; 3) that Supreme Court Justices are removed from day-to-day experience with lower court practice and therefore have no special insight to contribute to review of the rules; 4) that in some instances Court promulgation of rules amount to issuance of an advisory opinion; 5) that public criticism of promulgated rules at congressional hearings results in loss of prestige for the Court; and 6) that placing its imprimatur on the rules through promulgation makes it impossible for the Court, or for lower federal courts, to rule objectively in cases where the validity of the rules is later attacked.

C. Summary.

The federal rulemaking process is generally viewed as a legislative one, but with essential judicial components. Questions about procedures are to a considerable extent questions about how both judicial and legislative values can be accommodated.

Basic questions remain about how successfully the process responds to various points of view, and about its openness and efficiency. Policy on appointments to committee membership is critical to representation of diverse segments of the profession and of society.

Openness issues turn upon availability of information and public participation in rulemaking. Availability of information involves both documents and meetings. Should documents in the rulemaking process

(particularly advisory committee notes) include more information about differing views, or about the reasons for rejection of suggested alternatives? Should all essential documents used in the process be published or be available on request? Should an exception be made for reporters' memoranda or summaries?

As for meetings, should they be open to public observation? If so, should an exception be made for early advisory committee meetings where actual drafting is done? And how far in advance, where, and to whom should public notice of meetings be given?

Questions also remain about the importance of faster promulgation, either generally or in the case of the particular rules, and about the relative values according to speed and openness. Obviously, if many proposals to increase openness are adopted, the process will probably be a longer one.

III. ABA STANDARDS

The American Bar Association Commission on Standards of Judicial Administration has published standards relating to court organization with commentary. Standard 1.10 lists a unified court system as the general principle of the standards. It states in pertinent part that "the aims of court organization can be most fully realized in a court system that is unified. . . and. . . has uniform rules. . ." To this end, the courts should have authority to prescribe rules of procedure according to

arrangements that include opportunities for the public and bar to participate. Standard 1.11 (c) provides for uniform standards of justice. It states that "the procedures by which the court system administers justice should be based on principles applicable throughout the system, and so far as practicable, should be uniform in their particulars. The court system should have: (i) uniform rules of procedure, promulgated by a [illegible] authority; (ii) rules of court administration that are uniform so far as possible and have local variations only as approved by an appropriate central authority in the court system;. . ."

Attachment 3 is a copy of the standards relating to rulemaking. Standard 1.30 is the general principle for rulemaking. It provides that authority to formulate rules of procedure for all types of matters and procedings in the courts should be vested in the court system, under arrangements in which the legal profession and the public have an opportunity to participate. The authority to promulgate rules of procedure may be vested in the members of the state's highest court or in a rulemaking committee composed of judges, lawyers, legal scholars and representatives of the legislature. Standard 1.31 describes the rulemaking authority itself. It provides this authority should be exercised through a procedure that involves use of advisory committees from the bar, notice to and opportunity on the part of members of appropriate legislative committees, and the bar to suggest, review, and make recommendations concerning proposed rules. The rulemaking body should have staff assistance for research and drafting.

Commentary to the previous sections provides that the power to prescribe administrative policy is essentially a matter of internal concern to the court system. Presumably, administrative rules are therefore also more of a matter of internal concern. Procedural rules, however, are said by the commentary to have broader effects and should be the product of a more widely reaching process of deliberation and decision. The commentary described the essential features of a balanced and effective rulemaking procedure as the participation of judges, lawyers, legal scholars, and legislators in deliberations concerning the rules, the provision of staff assistance for research and drafting, and the public circulation of proposals for review and comment before their adoption.

The commentary does note that the scope of the rulemaking authority should extend to all types of rules that may appropriately be called "procedural" as distinct from "substantive." The commentary notes there is no distinct boundary between "procedural" rules and rules of "substantive" law, just as there is none between "procedural" rules and court administrative regulations. The commentary suggests that the judicial exercise of the rulemaking power should not encroach on the legislature's supremacy in matters of substantive law, but the difficult question is how to identify and preserve this division of responsibilities. All procedural rules have some effects, often very significant ones, on the enjoyment of substantive rights. Hence, all procedural rules have substantive legal implications.

These interconnections make it impossible to define the scope of the rulemaking power in precise and enduring terms. The commentary suggests

that due recognition of historical categorizations permits an accommodation of the legislative and judicial spheres of authority without a general definition of the boundary between them. Another process for determining the boundary between substance and procedure involves one form or another of consultation and joint deliberation. The commentary suggests this can be achieved through such mechanisms as law-revision commissions and ad hoc study committees in which representatives of the legislature, the bar, and the judiciary are participants.

Another view of a model open rulemaking procedure is found in Parness and Manthey, Public process in State Court Rulemaking, 63 Judicature 338, 341 (February, 1980). This article lists the six characteristics of open rulemaking: 1) A system known to the public; 2) Standing committees on rules; 3) Adequate notice of rulemaking activity; 4) An opportunity to be heard; 5) A reasoned basis for new rules; and 6) An opportunity to initiate changes.

IV. ALASKA PROCESS

RULEMAKING AUTHORITY

Article 4, Section 15 of the Alaska Constitution provides that the rule-making authority governing practice and procedure in civil and criminal cases in all courts rests with the supreme court subject to change by a two-thirds vote of each house of the legislature. The supreme court also has authority to make and promulgate rules for the administration of all courts. The procedural/substantive issue is discussed in

the context of judicial rulemaking in Channel Flying Co. v. Bernhardt, 451 P. 2d 570 (Alaska 1969), which case determined that substantive law creates, defines and regulates rights, while procedural law prescribes the method of enforcing the rights. If it is substantive in nature it is a matter within the legislative prerogative; if it is procedural, it falls within the ambit of the supreme court's rulemaking power. See also: City of Valdez v. Valdez Development Co. 506 P. 2d 1279 (Alaska 1973). It should also be recognized that while the legislature has authority to change court rules, a legislative enactment will not be effective to change the rules unless the bill specifically states that its purpose is to effect such a change. Leege v. Martin, 379 P. 2d 447 (Alaska 1963). This proposition is restated in both Civil Rule 93 and Criminal Rule 52.

RULEMAKING PROCESS

Attachment 4 is an insightful excerpt from C. Korbakes, J. Alfini, and C. Grau, Judicial Rulemaking in the States Courts (1978). It correctly suggests that procedures for developing and adopting court rules are not specified in either the constitution or the statutes of the state. However, it also says the court rules do not address this question. That ignores Administrative Rule 39.5. In addition, the excerpt discusses the wide ranging role of the standing advisory committees to the rules adoption process in Alaska. It is interesting to find out what other people think we're doing. It is also interesting to speculate on the reliability of the printed word when the truth is actually known.

Administrative Rule 39.5 provides for standing advisory committees on rules. It is Attachment 5. Subsection (a) provides that the court shall appoint standing advisory committees and that they shall carry on a continuous study of the general rules of practice. The committee is charged with making recommendations to the court from time to time when it is desirable to change the rules to promote simplicity, fairness, justice, and the elimination of expense and delay. The supreme court has absolute discretion in making appointments to these committees. Committee members serve without compensation although per diem is available.

Subsection (b) allows that any person may propose changes to the rules by submitting their ideas to the administrative director of courts at Anchorage. The proposals must be in writing and include the statement of the reasons for the requested change.

In practice, this rule has only sometimes been followed. The involvement of committees has varied from time to time, often depending upon the interest of the chief justice as to the role of committees in rulemaking. The idea of having a continuous on-going operation of committee study for the purpose of improving the rules has never been effectuated in Alaska, just as it was never possible to effectuate on the federal level with all the additional resources that go into rulemaking there.

The requirement that rules change proposals be in writing has historically been only intermittently followed. I have attempted to follow this requirement both because it makes my job easier, and because it avoids the

confusion that can surround interpretation of what someone orally communicated me as a desirable change in the rules.

Attachment 6 is a chart that shows the present steps to rule adoption by the supreme court. This chart represents to the best of my ability a diagramatic of the acutal process that rulemaking has followed over the last several years. As the chart shows, dotted steps are listed as optional and the references to either standing or advisory committees are placed in dotted boxes. Over the last 20 months, very little rulemaking review has been done by committees. Whether it is advisable to increase committee review or not is a separate question from whether or not such requirement ought to be made in the new rule on rulemaking.

Attachment 7 is a copy of a letter by Professor Steven Saltzburg which gives his position on the use of committees in the rulemaking process. In general, Saltzburg argued against the use of either a full time rules advisor or standing advisory committees in the rulemaking process. He thought a permanent "rule-drafter" could not have the wide range of expertise necessary for drafting rules in all areas. He criticized advisory committees since he felt that they only worked when the leading judges and lawyers in the state were on them and they would probably be too busy to serve. Additionally, he criticizes committee consideration as "tieing up" rules changes.

Saltzburg promotes the idea of the court hiring special advisors to provide rule opinions for a fee when rules changes are needed. This would

allow the court to avoid a constant retainer and merely pay for work that is actually done. His bottom line was that the court should have done one of three things: hire that unusual person who is expert in everything (the path eventually chosen); hire advisors as he suggests or go back to using committees. It now seems, based on the federal model or other state practices, that a reinvigoration of the committee process is in order. This is the thrust of the alternative rule proposals presented in the next section.

V. PROPOSALS.

MODIFIED NORTH DAKOTA RULE

At the December, 1982 administrative conference retired Judge Stewart presented a proposed rule on rulemaking to the supreme court. That proposal was based directly on the North Dakota rule on rules adopted in 1978 by that state. The proposal noted that the rulemaking process is a quasi-legislative function. Consequently, the elements of open rulemaking (listed in Section III of this memorandum) were argued as the basic reasons in support of the somewhat complicated or cumbersome North Dakota rule. Attachment 8 is a memorandum from Judge Stewart to the court including his analysis of the reasons for his first proposal and a copy of that proposal itself.

That first proposal was criticized as being too formal and adversarial. It was suggested that the petition procedure for rulemaking should

be dropped in favor of a request system. The portions of the rule that provided notice and an opportunity to be heard were to be preserved, as well as the requirement that proposals should be submitted in written form with documentation to the extent possible. It was also requested that the selection of committees be addressed in the rule.

Attachment 1 is Judge Stewart's response to the above criticisms. It is a substantial rewrite of his original proposal in attachment 8. For this reason I have labelled it the modified North Dakota proposal.

The rewrite shortens the rule from six and a half pages to four and a half pages. This was accomplished principally by deleting the entire section (c) on petitioning for rule change. Under the modified proposal any suggestion for rule change would be by request instead of petition.

The second major area of change was a rewrite of the standing committee section. The original proposal for standing committees was revised to six. This was not by mere addition, but rather by a re-evaluation of the role of each committee. The original proposal had committees for Joint Procedure, Attorney Standards, Judiciary Standards, and Court Services Administration. The modified proposal changed these committees entirely. New rules committees were listed in the area of Criminal, Civil, Children's, Appellate, Bar, and Administrative Law.

The modified proposal did retain the original definition section, emergency rule action section, notice provisions section, detailed

standards for committee appointments (although somewhat different from the first proposals), and a lengthy and detailed section guiding the action of the Supreme Court itself on rulemaking adoption, effective dates, and codification.

I do not find the modified version to be a totally objectionable rule on rules. The procedure would definitely work somewhat within the bounds of the present rulemaking process, albeit with a largely expanded role for committees. The major thrust to my objections to the rule can probably be seen by comparing it with my own alternative proposal. Basically, I have attempted a more particularized description of the rulemaking process itself. I favor a simpler form of the rule which operates to inform about the steps involved in rulemaking, without developing constrictive specific procedures which would make the process much less flexible.

PROPOSED RULE ON RULES (DCB)

Attachment 1 is a copy of my proposed rule on rules. It is substantially different than the modified North Dakota rule because its major purpose is to inform about, rather than make rigid the rulemaking process. What follows is a section-by-section discussion of this proposed rule including some explanatory statements about its intended operation as well as the rationale for the operational steps.

Subsection (a) is entitled "Uniform Policy". It provides (as the constitution requires) that the supreme court makes and promulgates rules

of administration and practice and procedure in all courts. The subsection states the policy that the rule should be uniform throughout ACS. This section implements ABA standard 1.11 on unified court structures. Subsection C of that standard states that the procedures by which the Court System administers justice should be based on principles applicable throughout the system, and, so far as practicable, should be uniform in their particulars. The court system should have both uniform rules of procedure, which are promulgated by a common authority, and rules of court administration that are uniform so far as possible and have local variations only as approved by an appropriate central authority in the court system. Local variations are something that my proposed rule does not address other than by its reference requiring uniformity. One change the court may wish to consider is adding language requiring local variations to be approved by the supreme court before they become effective. I hesitated to add that language for fear that it would suggest local variations were to be expected.

Subsection (b) is entitled "Request for Rule Making." It informs the reader that any person may make a proposal for a new rule so long as it is in writing, includes the language proposed for change, includes the reason for suggesting the change, and is submitted to the court rules attorney at the Anchorage office of administrative director of courts. The subsection language also requires the rules attorney to make certain each proposal is clear.

Subsection (c) is entitled "Preliminary Analysis." It requires the rules attorney to prepare a preliminary legal analysis for each proposed rules change. The analysis is to include an examination of the present Alaska rule, including adoption and amendment history, as well as a comparison with the Federal rule. In my view, this information is required to evaluate adequately almost any proposal concerning a rules change. Once the historical filing system is complete, it should be a reasonably quick procedure since all of this information should be available in a single easily retrievable file in the rules attorney office. Of course, many amendments are suggested for the same rule and once this information has been placed in memorandum form it will only require a quick review of recent amendments to insure that the information is up to date.

Subsection (d) is entitled "Meritless Proposal." The language of this section notes that it is an "unusual case" where a proposal should be handled as meritless. The requirement of this section is that the rules attorney refer an opinion on meritlessness to the chief justice for concurrence. Once concurrence is obtained, then the proponent of the rules change would be notified that no further action would occur and the reasons for that decision. This section was written to provide an efficient administrative outlet for unworkable suggestions. I would note that of the more than 100 rules change proposals I have reviewed there have been very few of them that were totally without merit. However, I felt it sensible to provide a simple procedure for eliminating meritless proposals from a more lengthly (and therefore more expensive) review. At the same time, I felt it was appropriate to involve the chief justice in

reviewing those few cases where the system would not make a more comprehensive analysis of the proposal. The point of this concurrence check is to insure that written public inquires are not deemed without merit on the basis of a single opinion.

Subsection (e) is entitled "Notice." It requires that once a rule is being considered for change, that fact, including the nature of the proposed change, must be published in the Monthly Activity Report of the appellate courts. This subsection is intended to meet much of the criticism directed to the Federal procedure wherein rulemaking is ongoing to the point of circulating proposed rules for adoption before many people find out that anything is going on. It's not a very difficult procedure to comply with and shouldn't take too much of the rules attorney work time to do. I expect little public response from the availability of this information. Rather, it is provided as a demonstration of good faith that the rules of procedure are not being manipulated in a smoke-filled room. On some few occasions, I suppose it will elicit inquiries and information from a small number of people who are highly interested in a particular rule of procedure. I now get similar kinds of information from attorneys who say they had heard from a judge that a letter was being written to suggest changes in a particular rule and that made them want to call me and argue for or against the change in a very specific way.

Subsection (f) is entitled "Major or Minor Change." It requires the rules attorney to designate a proposal as a major or minor rule change. It provides a standard for such designation that at a minimum requires all new

rules proposals to be seen as major. Additionally all proposals effecting "substantial rights" of litigants are major. At the other end of the spectrum, minor rules changes are defined as those which are technical in nature. The purpose of this subsection is to develop the first step of a two track system for rules change proposals. Policymaking rules are intended to be seen as major changes and as such should require a longer system of consideration. Minor rules changes are to be adopted without the less efficient and more costly longer review process. Defining which changes are major and minor necessarily entails some overlap. One check is provided in subsection (g) for the case when the rules attorney erroneously designates a rules change as minor: the supreme court may simply refer the change back to a standing or advisory committee to be treated as a major rules change.

Subsection (g) is entitled "Minor Change." It requires that minor rules change proposals be submitted to the supreme court along with the preliminary legal analysis and appropriate orders in both signature and legislative form. The chief justice then calendars a review of the proposal at an appropriate law conference. Following review, the supreme court decides whether to adopt or reject the proposal, or, as mentioned above, to refer it to a standing or advisory committee to be treated as a major rules change.

Subsection (h) is entitled "Major Change." It provides that major rules change proposals be referred by the rules attorney to an appropriate standing or advisory committee. The committee is directed to review the

proposal and determine if should be circulated to the bar for comment and also to prepare a written recommendation supporting or opposing the change. If no circulation is made, the committee must state the reason for that decision in the written recommendation. This requirement is added to alert the supreme court to any rules matter received from a committee that was not circulated. The presumption is that circulation will usually occur, but I have avoided requiring circulation in all cases because there are many relatively minor changes that a unanimous committee could recommend be adopted without a genuine necessity for circulation. In particular, I was hoping to give committees some ability to receive a second reference from the supreme court and feel that a relatively small change could be made without necessarily requiring the additional time it takes to recirculate that material to the bar. Then, when the supreme court again receives the committee's response, it would be aware that it was considering at least in part a proposal that the full bar would not have seen.

Subsection (h) also requires that the written recommendation, where appropriate, include proposed orders in signature and legislative form as well as advisory notes suitable for publication stating the rationale for the rule change. The requirement of the advisory notes is similar to the process in the federal system. It is an attempt to do two things: 1) help the committee explain the language it used in the rule; and 2) require the committee to give the rationale for the rule change it recommends. This is the heart of the "quasi-legislative" aspect of rulemaking from a researcher's point of view. If advisory notes are later published, which is not required by this rule, they would be instructive only. They are not a true

legislative history because the final ratifying authority is not the committee but rather the supreme court. That body may have adopted the language with some slight difference in mind. The question is then raised, why have advisory notes at all? The answer is that in most cases courts do indeed adopt rules with the same intentions that the committees recommending those rules proposed them. In that case, litigation may actually be avoided because some questions not settled facially on the rule may be settled by a reference to the advisory committee notes. Additionally, the notes--over the course of time--should provide a clear evolutionary lineage of the rule. That information will prove invaluable in the consideration of rules changes in the future.

Subsection (h) also requires that all committee written recommendations be forwarded to the supreme court. There, the chief justice calendars a review of the recommendation at an appropriate administrative conference. Following review, the court may adopt or reject the proposal in whole or in part, or refer the proposal to the same or different committee for further study or additional information. The intent of the bulk of this language is merely to provide the supreme court with as much latitude as possible in pursuing its rulemaking goals.

Subsection (i) is entitled "Public Information." It states that the original proposal, preliminary legal analysis, circulation material and proposed order and advisory notes shall be made available to the public upon request. It states that committee minutes, reporter's notes, and other preparatory drafts or memoranda shall not be made public. The spl

of this information into public and non-public groups reflects an attempt to follow recommended federal procedures while allowing committees to do their work in a reasonably uninhibited atmosphere. This section puts people who submit proposals on notice that their suggestions are going to be made public. It informs the public that they may also obtain the preliminary legal analysis, any circulation material, and a proposed order and advisory notes should those be prepared for the supreme court. The public availability of this material is again an attempt to demonstrate the willingness of the court to have the public involved in the rulemaking process. On the other hand, there is also notice given that committee members, reporters, and legal analysts for the supreme court may prepare memoranda or other documents that help the process along knowing that they will not be subject to public scrutiny. In the main, I was most concerned with preserving the work product confidentiality of the rules attorney as it now stands under Administrative Rule 37.5(b)(3). Also of concern was an interest in protecting the right of committee members to initially consider potentially controversial answers to presented problems without fearing that public scrutiny would generate criticism of such daring. This worry may sound a bit out of place given the rather prosaic substance of most rules changes. Perhaps it is. On the other hand, the public will have access to every document that must be transmitted in order for a rule change to take place through a committee reference. With that protection, it seems that little harm exists in providing committee members some privacy in which to develop a spirited interrelationship for rules change discussions.

Subsection (j) is entitled "Standing and Advisory Committees." It requires the establishment of standing committees to review Civil Rules, Criminal Rules, and Appellate Rules. It requires the administrative senior staff to act as the standing committee for the review of Administrative Rules. This section was meant to implement ABA Court Organization Standard 1.11(d) relating to clearly vested policy making authority. The commentary to that section notes that the rulemaking power concerned with rules of procedure should be exercised by a body that is responsible not only to the courts but also to the bar and the legislature. On the other hand, it recognizes that authority to prescribe administrative regulations for the courts is properly a function of the courts themselves and should be exercised by a body responsible for the court system.

Subsection (j) further provides that advisory committees shall be appointed as needed, and that all committees shall receive major rules change proposals from the rules attorney or the supreme court. It adds that the standing committees shall carry on a continuous study of the operation and effect of the rules of procedure and administration. This is a carry-over from the present language of Administrative Rule 39.5. It is recognized that the lack of success in the federal system with all of its resources for having an effective continuous study system means that the state committees will probably not be better able to perform that function. Still, I thought it advisable to suggest to the committees that they have a basic authority to suggest or initiate proposals for rules changes as the need for the same becomes apparent to them in the course of their work. Subsection (j) does require that when such a proposal initiates in a

committee that it must still be published in the monthly activity report under subsection (e), which provides for notice to the bar generally. Subsection (j) ends with the statement of the four principles from present Administrative Rule 39.5 that guide committees in recommending rule changes: simplicity, fairness, justice, and the elimination of delay and expense.

The court may wish to add additional standing committees to the ones proposed by this subsection. Attachment 9 is a list of all the present outstanding committees of the supreme court. The modified North Dakota proposal contains two additional standing committees: one on Children's Rules and one on Bar Rules. In my view, the Bar Association is doing just fine with Bar Rules and the procedure that they have been following should be maintained without an additional supreme court committee review. Children's Rules could be an additional committee, but since a total rewrite (I am told) has just been completed I would feel safe in allocating amendments to those rules to either the criminal or civil rules committees, depending upon whether the portion of the rules affected was related to delinquency or merely custody.

Subsection (k) is entitled "Appointment". This section provides the court with full authority to make all decisions relative to appointment to supreme court committees. It allows nominees to be considered from <u>any</u> source, but requires solicitation for nominee recommendations to both the board of governors of the state bar association and the statewide court clerks' conference. The thought of this requirement was that there should

be a broadening of the pool of nominees considered by the court, and that these two groups might provide some interesting recommended nominees that otherwise would go unconsidered by the supreme court. One widely considered proposal for improving the federal process was to expand representation of previously unrepresented groups on the federal committees, including specifically representation by court clerks. This section recognizes that suggestion. This section also requires that where possible, terms of the committee members be staggered to preserve committee continuity. The attempt here was to avoid the highly specific appointment process of the modified North Dakota rule. Committee membership will change for a variety of reasons at a variety of times and I did not think it appropriate to handcuff the supreme court in any way concerning the makeup of the committees simply on the basis of terms of appointment. Finally, subsection (k) incorporates the provisions of the present Administrative Rule 39.5 which recognize that committees serve without compensation but that per diem and travel expenses can be approved. There is a slight change from the present rule in that the word "may" is added as well as the requirement of prior approval before there is any possibility of the payment of travel expenses or per diem. These qualifiers are an improvement over the existing language which could create some expectation of expenses or per diem stemming simply from committee involvement as opposed to requiring prior approval.

Attachment 10 is a December 4, 1981 memorandum from Justice Rabinowitz to the rest of the court. It outlines a plan for soliciting applications for committee membership by notice in the Bar Rag. It also suggests a

selection committee be formed which should include members from the court of appeals and trial courts in order to broaden the expertise in the committee compositions in the future. These two suggestions could easily be incorporated in subsection (k). I left them out thinking that the court may wish to experiment with these procedures, and if the suggestions are not required by the rule more flexibility is maintained.

Subsection (l) is entitled "Emergency Rule Action." This section states in straight-forward terms that the supreme court retains authority to handle any emergency circumstances that require rulemaking as the court sees fit. The intent of this section is not to provide any specific procedure to follow in such circumstances, rather it exists to recognize the retainment by the supreme court of the authority in emergency circumstances to adopt rules under procedures that meet the needs of those circumstances.

Subsection (m) is entitled "Effective Date." It provides that the effective date for each rule change is to be stated in the order adopting the rule. It also notes that normally the effective date shall be the same as the publisher's distribution date in order to provide adequate notice to those affected by the rule change. This incorporates the present practice as noted in Attachment 11, which is a February 15, 1985 memorandum from the rules attorney listing in outline form the correct distribution of supreme court orders with effective dates. Subsection (m) further provides that where this is not possible, the effective date should be the one set by the supreme court. When this occurs, the court is also to determine what

additional notice, if any, should be provided to those affected by the rule change. The concern here is that if we are using the publisher's distribution date to inform bar members who are going to be affected by rules changes, then we should provide a different form of notice if we implement a rule more rapidly then the publisher's notice will cover. The last part of subsection (m) states that the adoption or rejection of a rules change proposal must be published in the monthly activity report. This is an overlapping notice to the publisher's distribution notice. It will usually be somewhat faster than the publisher's distribution notice. (However, relying on it as the sole form of notice for an actual rules change could provide some syncronization problems since the activity report has been somewhat erratic in its publication cycles. This was something of a concern to me in the use of the activity report for subsection (e) general notice that a rule is being considered for change. However, I believe subsection (e) notice to be far less important in the great majority of cases then the notice that a rule has been changed and that attorneys are thereafter going to be affected by it. Thus, I am willing to use activity report notice under subsection (e), but think that it should be supplanted or supplemented under subsection (m).)

Subsection (n) is entitled "Rule Application." It provides merely that all rules and orders in effect on the date of the adoption of the rule on rules remain in effect. This is mainly a clarifying section, which probably will be of more use 10 or 20 years in the future when a rulemaking procedure that has become commonplace is not traceable for certain rules which have remained unchanged from now until then.

Attachment 12 is the final document I have for your perusal. It does not relate particularly to any subsection of my proposed rule. Instead, it relates to circulation generally. It is a copy of the form used to circulate proposed amendments to the bar association by the federal bankruptcy committee. I offer it for your consideration on the question of just how formalized you would like the committee review, circulation, and advisory notes process to be. In substance, it is perhaps not too different from the memorandums I have circulated to the bar on proposed rule changes that include rationales for the proposals. I believe it may be time to standardize the format of circulation in order to make a better legislative history for rules changes. The level of that standardization is something the court may wish to address.

VI. ATTACHMENTS

1. 3/3/83 Stewart memo including modified North Dakota Proposed Rule.

2. Alternative proposed rule by Don Bauermeister.

3. ABA court organization standards 1.30 on rulemaking.

4. Excerpt-Judicial Rule Making in the State Courts.

5. Administrative Rule 39.5-Standing Advisory Committee on Rules.

6. Chart listing steps to rule adoption by Alaska supreme court.

7. 4/6/78 letter from Professor Saltzburg to Justice Rabinowitz regarding rulemaking procedures.

8. 11/29/82 Stewart memo including original proposal based on North Dakota rule.

9. List of present Supreme Court Committees.

10. 12/4/81 - Rabinowitz memo to other court members suggesting committee appointment procedures.

11. 2/15/85 Bauermeister memo outlining present procedure controlling distribution of supreme court orders.

12. Federal bankruptcy rules committee circular.

March 3, 1983

M E M O R A N D U M

TO: Chief Justice Burke
Justice Rabinowitz
Justice Matthews
Justice Compton

INFO: Arthur H. Snowden, II
Stephanie J. Cole
Karla Forsythe
Robert D. Bacon

FROM: Thomas B. Stewart

SUBJECT: Procedure for Rule Change

A revised proposal for improved rulemaking procedures is attached for review as desired in advance of the administrative conference on May 15-16, 1983. This memorandum is intended to supplement the one of November 29, 1983, that was in explanation of a possible "rule on rules" discussed at the conference on December 14, 1982.

In the attached revised plan, effort has been made to reduce substantially the formalities of the earlier proposal. The standing committee structure has been entirely revised as suggested by Chief Justice Burke. It seems important to retain the six elements discussed in the original memorandum which leading commentators agree should be included in rulemaking procedures. These elements are stated and briefly discussed on page 2 of the 11/29/82 memorandum (copy attached).

T.B.S.

TBS/seb

Enclosures

PROPOSED RULE ON RULES

Rule 42. Rulemaking.

(a) Statement of Policy. It is the policy of the supreme court to promulgate procedural rules, administrative rules, and administrative orders for the unified judicial system of Alaska, to provide an effective procedure for the continuing study and review of rules and orders of the supreme court, to provide notice and opportunity to express views regarding proposed and adopted rules and orders, and to provide a mechanism for the amendment and repeal of existing rules and orders.

(b) Definitions. In this rule, unless the context or subject matter otherwise requires:

(1) "Procedural rules" includes supreme court rules and regulations and amendments thereto of general application relating to pleading, practice, and procedure, and to the admission to practice, conduct, discipline and disbarment of attorneys at law.

(2) "Administrative rules" includes supreme court rules and regulations and amendments thereto, of general application, relating to the operation of the judicial system.

(3) "Administrative orders" includes supreme court orders and amendments thereto, of limited effect and of particular application to a court or to the operation of a specific portion of the judicial system.

(c) Request for Rulemaking. Any person interested in the adoption, amendment, or repeal of a procedural rule, administrative rule, or administrative order, may file with the clerk of the appellate courts a request for such rulemaking action.

(1) The request shall state the particular action sought, the reasons in support of it, and where possible the proposed new or amended rule or order; it may be accompanied by supporting documentation.

(2) Upon the filing of a request for rulemaking, the supreme court may refer it to its revisor of rules, to the appropriate standing committee on rules or a special committee, or may take direct action on the request as it may determine appropriate.

(3) Upon request or on its own motion, the supreme court may provide for written comment or oral hearing on proposed rulemaking action, or its standing or special committees may do so. Notice of such hearings must be given as provided in paragraph (f).

(d) Court Statement of Intention for Rule Change. The supreme court, on its own motion, may file with the clerk of the appellate courts, a statement of intention to adopt, amend, or repeal a rule or order.

(1) A court statement of intention shall be treated in the same manner as a request pursuant to paragraph (c).

(e) Emergency Rule Action.

(1) Whenever the supreme court determines that an emergency exists requiring the immediate promulgation of a procedural rule or administrative rule or order, the court will take any action the circumstances require. Any rule or order promulgated pursuant to this section becomes immediately effective, unless otherwise ordered by the court.

(2) Notwithstanding that a rule or order is made immediately effective, the notice provisions of paragraph (f) must be, and if applicable, the procedures provided in paragraph (c) may be followed with a view to determine whether the rule or order should be continued in effect.

*(f) Notice of Rules or Orders.

(1) Within 30 days after the filing of a request for rulemaking, or a statement of intention by the court for a rule change, and within 30 days after the adoption of a procedural rule or an administrative rule, the clerk of the appellate courts shall send notice of the matter to the executive director of the state bar association, to all judges, the attorney general, the chairperson of each standing committee on rules, the executive director of the legislative affairs agency and additional notice may be ordered by the supreme court as circumstances warrant.

(2) Within 30 days after the adoption of an administrative order, the clerk of the appellate courts shall send notice of the order to all judges, the executive director of the state bar association, and additional notice as circumstances warrant.

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*Comment: It is intended that the state bar association maintain appropriate mechanisms for providing notice to its member attorneys.

(g) Standing Committees on Rules and Orders. The following standing committees on rules are established with composition, method of selection, and terms of office as provided in this paragraph, to study and review all rules within the indicated rulemaking topic.

(1) (A) Criminal rules committee.

(B) Civil rules committee (including probate rules).

(C) Children's rules committee.

(D) Appellate rules committee.

(E) Bar rules committee.

(F) Administrative rules committee.

(2) Each standing committee shall be composed of two practicing attorneys who are members of the state bar and one judicial officer from any trial or appellate court of the judiciary, except the supreme court.

(3) The judicial member of each standing committee will be selected by the supreme court; the attorney members will be selected from nominees recommended by the board of governors of the state bar association, but appointed by the supreme court. The supreme court will designate a chairperson for each committee from among its members.

(4) Each member of a committee will serve for a term not to exceed 3 years and is eligible for reappointment. Initially, as determined by lot, one member of each committee will serve for 3 years, one member will serve for 2 years, and one member will serve for one year. At the end of a member's term, a successor will be designated by the court for a full three year term. Upon a vacancy occurring during a member's term, a successor will be designated by the court for the remainder of that term.

(5) Each committee may be given appropriate staff assistance by the revisor of rules, or as otherwise assigned by the administrative director of courts, and shall make reports as requested by the court.

(6) Any proposed rulemaking action initiated by a standing or special committee must be filed as provided in paragraph (c), and is subject to the notice and other applicable provisions of this rule.

(7) The supreme court may establish other committees and jurisdictional responsibilities as circumstances warrant.

(h) Action of Supreme Court on Rules and Orders. Whenever the supreme court intends to make a substantial change in a proposed rule or order of which adequate notice has not been given, it will submit the matter to an appropriate committee for further study, or provide notice and opportunity for comment or hearing consistent with paragraph (f).

(1) The action on any rule adopted or amended may be accompanied by an official comment, including a concise statement of its basis and purpose.

(2) Whenever necessary for clarity, an amendment to a procedural rule or administrative rule or order will be promulgated as a readoption of the rule or order as amended.

(i) Effective Terms of Rules and Orders.

(1) Each procedural rule and administrative rule has an indefinite effective term unless otherwise ordered by the supreme court.

(2) Each administrative order has an effective term of 5 years after the effective date unless otherwise ordered by the supreme court and is subject to re-adoption at any time.

(3) Upon the expiration of the effective term of any rule or order, the rule or order lapses and is void. The lapse of any rule or order does not revive any superseded rule or order.

(j) Effective Date of Rules and Orders.

(1) Each final action taken by the supreme court on a procedural rule or administrative rule or order becomes effective on the 30th day after the date of adoption or repeal unless otherwise ordered by the supreme court.

(k) Codification of Rules and Orders.

(1) The procedural rules and administrative rules of the supreme court shall be codified and published periodically and made available to the judiciary, bar, and public.

(2) Whenever possible, all rules directed to a common subject will be grouped and numbered together. Desirable references to related rules will be provided.

(3) References to decisions of the appellate courts and comments of the supreme court and committees may be included as annotations in the codification and publication of each rule.

(l) Effective Date and Application of Rule.

(1) The rule takes effect on _____, and will apply to all rules and orders adopted after that date.

(2) All rules and orders in effect on the date of the adoption of this rule remain in effect.

PROPOSED RULE ON RULES (DCB)

Rule 42. Rulemaking.

(a) Uniform Policy. The supreme court shall make and promulgate rules governing administration of all courts, and practice and procedure in civil and criminal cases in all courts. The rules shall be uniform throughout the Alaska Court System.

(b) Request for Rulemaking. Any person may propose new rules or changes in present rules to the supreme court. Each proposal must:

1) Be in writing;
2) Include the language proposed for change;
3) Include the reason for the suggested rule or change;
4) Be submitted to the court rules attorney at the Anchorage Office of the Administrative Director of Courts.

The court rules attorney shall review each proposal. If the proposal is unclear or in need of further documentation, the rules attorney shall contact the person submitting the proposal and seek clarification.

(c) Preliminary Analysis. The rules attorney shall then prepare a preliminary legal analysis of each proposal. This shall include an examination of the present Alaska rule including adoption and amendment history, as well as a comparison with the federal rule where appropriate.

(d) Meritless Proposal. In the unusual case where no further consideration seems merited, the rules attorney shall forward such opinion and the reason for it along with all pertinent supporting information to the chief justice. If the chief justice concurs, a letter shall be sent by the rules attorney to the person submitting the proposal stating the reason it was not accepted.

(e) Notice. In all other cases notice that a rule is being considered for change, including the nature of the proposed change, shall be published in the Monthly Activity Report of the appellate courts.

(f) Major or Minor Change. The rules attorney shall determine whether a proposal is a major or minor rule change. All proposals for new rules and all proposals affecting substantial rights of litigants are major. Minor rules changes are those which are technical in nature.

(g) Minor Change. Minor rules change proposals shall be submitted to the supreme court along with the preliminary legal analysis and appropriate orders in both signature and legislative form. The chief justice shall calendar a review of the proposal at an appropriate law conference. Following review, the supreme court may adopt or reject the

proposal, or refer it to a standing or advisory committee to be treated as a major rules change.

(h) Major Change. Major rules change proposals shall be referred by the rules attorney to the appropriate standing or advisory committee. The committee shall review the proposal, determine if a draft should be circulated to the bar or other interested persons for comment, and prepare a written recommendation supporting or opposing the change. If no circulation was made, the reason for this decision shall be stated in the recommendation. Where appropriate, the recommendation shall also include proposed orders in signature and legislative form, as well as advisory notes suitable for publication stating the rationale for the rule change. All committee written recommendations shall be forwarded to the supreme court. The chief justice shall calendar a review of the recommendation at an appropriate administrative conference. Following review, the supreme court may adopt or reject the proposal in whole or in part, or refer the proposal to the same or a different committee for further study or additional circulation.

(i) Public Information. The original proposal, preliminary legal analysis, circulation material, proposed order and advisory notes shall be made available to the public upon request. Committee minutes, reporter's notes, and other preparatory drafts or memoranda shall not be made public.

(j) Standing and Advisory Committees. Standing committees shall be established to review Civil Rules, Criminal Rules and Appellate Rules. The administrative senior staff shall act as the standing committee to review Administrative Rules. Advisory committees shall be appointed as needed to review all other rules. All committees shall receive major rules change proposals from the rules attorney or the supreme court. In addition, the standing committees shall carry on a continuous study of the operation and effect of the rules of procedure and administration. When specific proposals for change initiate in a committee, notice that the proposal is being considered must be published in the Monthly Activity Report under subsection (e) of this rule. Changes to those rules found by the committees to promote: 1) Simplicity in procedure; 2) Fairness in administration; 3) The just determination of litigation; and 4) The elimination of unjustifiable expense and delay, shall be periodically recommended to the supreme court for its consideration.

(k) Appointment. The supreme court shall appoint such members of the judiciary, Alaska Bar Association, and other qualified persons to the committees as it deems advisable. Nominees shall be considered from any source, but solicitation for nominee recommendations shall also be made to the board of governors of the state bar association and the statewide court clerks conference. Where possible, terms of the committee members will be staggered to preserve committee continuity. The members of the committees shall serve without compensation. However, with prior approval the members may be reimbursed for per

diem and travel expenses incident to their duties as members of the committees.

(l) Emergency Rule Action. Whenever the supreme court determines that an emergency exists requiring the immediate promulgation of a procedural or administrative rule, the court may take any action required by the circumstances. The court shall follow all of the requirements of this rule consistent with meeting the nature of the emergency circumstances.

(m) Effective Date. The effective date for each rule change order shall be stated in the order. Normally, the effective date shall be the same as the publisher's distribution date, in order to provide adequate notice to those affected by the rule change. Where this is not possible, the effective date shall be set as determined by the supreme court. When this occurs, the supreme court shall determine what additional notice, if any, shall be provided to those affected by the rule change. Adoption or rejection of a rules change proposal shall be published in the Monthly Activity Report.

(n) Rule Application. All rules and orders in effect on the date of the adoption of this rule remain in effect.

Judicial officers should have a sense of independence in office comparable to judges. Accordingly, they should be granted tenure in office after a probationary period and evaluation. Upon receiving tenure, they should not be subject to discharge or discipline except for good cause. When disciplinary action or discharge is proposed, the judicial officer should have the opportunity to contest it in an impartial hearing. The hearing should be conducted by a panel of judges, preferably three in number, none of whom is personally involved in the issues that gave rise to the proposed action. Where appropriate, jurisdiction of such hearings could be vested in the board of judicial inquiry provided in Section 1.22. The hearing procedure should conform substantially to that prescribed for the discipline of judges, as set forth in Section 1.22.

References:

CALIFORNIA SELECT COMMITTEE ON TRIAL COURT DELAY, REPORT 4, 20–21 (1972).

SUPERIOR COURT OF CALIFORNIA, PERSONNEL MANUAL (Dec. 22, 1971).

Hearings on Federal Magistrates Act Before Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, 90th Cong., 2nd Sess., March 7 and 13, 1968.

AMERICAN JUDICATURE SOCIETY, THE EXPANDING ROLE OF THE PARA-JUDGE IN THE UNITED STATES (1973).

1.30 Rule-Making, Policy-Making, and Administration: General Principle. Authority to formulate rules of procedure for all types of matters and proceedings in the courts should be vested in the court system, under arrangements in which the legal profession and the public have an opportunity to participate. The court system should control its own administrative policies and should have procedures through which all

its judges can participate in developing such policies. Authority to implement the courts' administrative policies should be established in a clear and simple set of management relationships under the supervisory authority of the chief justice.

The authority to promulgate rules of procedure may be vested in the members of the state's highest court or in a rule-making committee composed of judges, lawyers, legal scholars and representatives of the legislature. Authority to promulgate administrative policy should be vested in a judicial council composed of judges from various courts within the system or of the members of the supreme court sitting as a judicial council. The judicial council should act as an advisory committee to the chief justice concerning matters of administration. All judges in the court system should convene regularly as a body to deliberate upon and discuss the work of the court system and their problems and responsibilities in its administration.

1.31 Rule-Making Authority. A court system should have authority to prescribe rules of procedure, civil and criminal. The authority should extend to all proceedings in all courts in the system and should include all aspects of procedure. The authority should be exercised through a procedure that involves use of advisory committees from the bar, notice to and opportunity on the part of members of appropriate legislative committees, and the bar to suggest, review, and make recommendations concerning proposed rules. The rule-making body should have staff assistance for research and drafting.

Commentary

It is generally recognized that the courts should have authority to prescribe rules of procedure governing judicial

proceedings. Comprehensive rule-making authority exists in most state court systems and in the federal courts, and more limited authority has been conferred on the courts in most other jurisdictions. The rule-making authority goes beyond and involves somewhat different considerations than the authority to prescribe administrative policy for the courts, which is provided for in Section 1.32. The power to prescribe administrative policy is essentially a matter of internal concern to the court system, and is therefore unqualifiedly an inherent judicial power. Procedural rules, however, have broader effects and should be the product of a more widely reaching process of deliberation and decision. The legislature and the bar have a legitimate concern with procedural policy, and the legislature, as the popularly elected representative of the community as a whole, should have the opportunity to participate in determining what the policy should be. It is especially important that the rule-making power be exercised with prudent and diplomatic regard for legislative concern about matters of general public interest, even as to matters that might technically be deemed "procedural."

There are various procedures by which the views of the legislature and of the bar may be brought to bear in procedural rule-making. The procedure used in many states is as follows: The supreme court establishes drafting committees composed of judges, lawyers, and legal scholars, assisted by a staff; the committees prepare, publicly circulate, revise, and finally propose rules and rule changes; the court considers and if necessary revises the proposals and then promulgates them as rules of court. Another successful procedure, used in such states as California, involves a rule-making body that is composed of judges of various courts, lawyers, legal scholars, and representatives of the legislature. The rule-making body, assisted by staff, drafts and circulates rule proposals, makes revisions if necessary in light of responses to the circulation, and then promulgates the

rules or rule changes. The procedure in the federal system has also proved very successful. A rules committee consisting of judges, lawyers, and legal scholars is established by the supreme court; the committee drafts and circulates rule proposals and submits them for approval by the court; if the court approves them, they are submitted to the legislature for review; if the legislature does not reject them, they become effective.

The essential features of a balanced and effective rule-making procedure are the participation of judges, lawyers, legal scholars, and legislators in deliberations concerning the rules the provision of staff assistance for research and drafting and public circulation of proposals for review and comment before their adoption. By means of such a procedure, primary responsibility for procedural rules rests with the court system. The judiciary has special familiarity with the problems of applying and enforcing rules of procedure; it can give attention more promptly and intensively than the legislature to problems of procedure as they arise, and it may be less susceptible to the influence of special interests that would oppose or promote procedural change. The judiciary is also able more freely and easily to enlist the help of specialists in litigation among the bar in formulating procedural rules.

The scope of the rule-making authority should extend to all types of rules that may appropriately be called "procedural" as distinct from "substantive." This includes both civil and criminal rules, and can include rules of evidence, in all courts in the system. There is no distinct boundary between "procedural" rules and rules of "substantive" law, just as there is none between "procedural" rules and court administrative regulations. See the Commentary to Section 1.11(d). Judicial exercise of the rule-making power should not encroach on the legislature's supremacy in matters of substantive law, but the difficult question is how to

identify and preserve this division of responsibilities. All procedural rules have some effects, often very significant ones, on the enjoyment of substantive rights. Hence, all procedural rules have substantive legal implications. At the same time, because substantive legal rules ordinarily imply the possibility of enforcement by judicial procedures, almost all substantive law has procedural implications.

These interconnections make it impossible to define the scope of the rule-making power in precise and enduring terms. Furthermore, some clearly procedural rules are of such great general significance that they should not be modified except by a procedure, such as legislation or constitutional revision, that involves general political assent. The right to jury trial, for example, is in this category.

The proper boundaries of the rule-making power must therefore be worked out by processes that go beyond strict legal definition. One of these processes is reference to legal tradition and precedent. In any particular jurisdiction, many types of rules that could be categorized as either substantive or procedural have long been regarded as in the province either of the legislature or of the courts. Thus, statutes of limitations and rules regarding survival of causes of action have been treated as substantive and therefore subject to legislative mandate, while rules of discovery have been treated as procedural even though they may involve very sensitive questions of public policy. Due recognition of historical categorizations such as these permits accommodation of the legislative and judicial spheres of authority without a general definition of the boundary between them. Another process for determining the boundary between substance and procedure involves one form or another of consultation and joint deliberation. This can be achieved through such mechanisms as law-revision commissions and *ad hoc* study committees and commissions, in which representatives of the legislature, the bar, and the judiciary are participants.

References:

AMERICAN JUDICATURE SOCIETY, THE JUDICIAL RULE-MAKING POWER IN STATE COURT SYSTEMS (1967).

Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1 (1958).

Wright, *Procedural Reform: Its Limitations and Its Future*, 1 GA. L. REV. 563 (1967).

Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule-Making*, 55 MICH. L. REV. 623 (1957).

NEW YORK STATE ADVISORY COMMITTEE ON PRACTICE & PROCEDURE, PRELIM. REPORT NO. 3, RULE-MAKING POWER (1959).

Curd, *Substance and Procedure in Rule-Making*, 51 W. VA. L.Q. 34 (1948).

Note, *Courts—Rule-Making Power*, 43 N.Y.U.L. REV. 776 (1968).

1.32 Administrative Policy.

(a) Authority. The authority to make policy for administration of the courts, provided in Section 1.11(d), should be vested in a judicial council representative of all the courts of the system or in the members of the supreme court sitting as a judicial council. The chief justice should be the council's presiding officer. The council should prescribe policy in the form of rules and regulations and should obtain staff and research assistance as needed in developing policy and evaluating its effects. A judicial council representing judges of all the courts in the system should be constituted in accordance with the following principles:

(i) The council should have a membership of approximately 12 to 15.

(ii) The members should include judges and judicial

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Judicial Rulemaking in the State Courts

A Compendium

Chris A. Korbakes
James J. Alfini
Charles W. Grau

I. Rulemaking Authority

Rulemaking authority in Alaska rests within the supreme court, subject to change by a two-thirds vote of each house of the legislature. Alaska Const. art. IV, § 15.

The judicial article defines the extent of rulemaking authority. First, it places the judicial power of the state in a supreme court, among others, and establishes a unified judicial system for operation and administration. Alaska Const. art. IV, § 1. It then grants the supreme court authority to make and promulgate rules for court administration and civil and criminal procedure. Id. § 15. The procedural/substantive issue is discussed in the context of judicial rulemaking in Channel Flying Co. v. Bernhardt, 451 P. 2d 570 (Alaska 1969), (statute defining a right held to be "substantive"); and in City of Valdez v. Valdez Development Co., 506 P. 2d 1279 (Alaska 1973), (statute providing for postponement of civil proceeding found to be "procedural").

In general, court rules invalidate conflicting procedural statutes. Valdez, supra; Winegardner v. Greater Anchorage Area Borough, 534 P. 2d 541 (Alaska 1975). Although court rules may be changed by a two-thirds vote of the legislature, legislative changes of procedural rules must be explicit in their intent to effect such change, or they will be ineffectual. Legee v. Martin, 379 P. 2d 447 (Alaska 1963); Ware v. City of Anchorage, 439 P. 2d 793 (Alaska 1968).

II. Rulemaking Process

Procedures for developing and adopting court rules are not specified in the constitution, the statutes or the court rules. However, the judicial council conducts studies and makes recommendations to the supreme court and legislature. Alaska Const. art. IV, §§ 8, 9 (1973).

In addition, the supreme court has established standing advisory committees on both civil and criminal rules. Suggestions regarding rule changes are initially directed to the Administrative Director of the Courts. In the event that the recommended change is deemed to be warranted it is then referred to the standing committee which may make recommendations to the court.

A number of groups have participated in the development of court rules with varying degrees of significance attached to their contributions. The court's standing advisory committees and the court's staff were found to have made very significant contributions. Other supreme court committees and the suggestions of individuals, attorneys and judges were found to have been moderately significant in terms of input. The contributions of the judicial council and bar committees were found to have only been slightly significant. Of the mechanisms utilized in the development and adoption of court rules one, comment periods, was found to have been very significant. Prior publication of proposed rules was found to be moderately significant. Although open hearings were

found to be only slightly significant in this process, this mechanism had only been used once--proposed revisions of the Rules of Children's Procedure.

Of the various advisory groups involved in the rulemaking process, three groups (the standing committees, the judicial council and the bar) have permanent committees dealing with this subject area. Ad hoc committees are established by the judges' association to deal with matters of concern to these groups. These associations and the court's administrative staff are the only two groups which deal with both procedural and administrative rules. The court's standing committees, legal staff and the judicial council are the three groups which deal with procedural matters. Although bar committees were listed as dealing with administrative rules, these rules are primarily bar rules.

Of the groups participating in the process of developing, drafting and formulating court rules only one (the judicial council) is provided for by the state constitution. Appointments to the judicial council are made by the governor and the state bar association. Traditionally, the ad hoc bar committees, which are created at the request of the court, are appointed by the Board of Governors of the state bar. The court's own standing committees as well as the ad hoc committees of judges appointed from the judge's associations are all appointed by the chief justice. Generally, the court has found that committees appointed to review proposals dealing with court rules, both ad hoc and standing, offer considerable assistance to the court. Since these individuals are experienced practitioners who will be affected by the proposed rules they provide critical and thoughtful commentary.

III. Notice and Distribution of Rules

A regular mailing list is maintained for distribution of all adopted court rules. Although proposed rules have no established mailing list they are circulated to individuals and/or agencies which are directly affected by such rules. Among those to whom adopted rules are normally distributed are justices, judges, magistrates, court clerks, law librarians, court administrators, members of the Alaska Bar Association and representatives of both the executive and legislative branches of government. One may be added to this list by request directed to the clerk of the supreme court. The court promulgating the rules bears the financial cost of printing and distributing such rules. Individual orders, either adopting new rules or amending existing rules, are mailed out to the persons included in the above distribution lists as well as to the official publishing company. The publisher, the Book Publishing Company, is a private concern which sells volumes of rules to individuals.

IV. Rulemaking Challenges

The legislature has attempted to supersede existing court rules on many occasions. However, there is rarely a "dispute" involved. In the event the legislature follows the procedures established in article 4, section 15, of the Alaska Constitution, the rule is changed. If not, the rule prevails over any conflicting statutes (See Civil Rule 93, and Criminal Rule 52, for a statement of this proposition). Similarly, the court has also superseded existing statutes through the adoption of court rules.

When proposed rules, or amendments to the existing rules are circulated for comment, or in the event that hearings are held, differing opinions are frequently expressed. For example, in 1964 a dispute arose between the supreme court and the Alaska State Bar Association regarding the court's inherent supervisory authority over bar association matters. The dispute was resolved amicably when the court included the state bar's Board of Governors in the process of considering such rules. The court has promulgated rules concerning the practice of law, admission to the bar, discipline and other matters of this nature. However, for the most part, the court has relied heavily upon the recommendations of the Board of Governors.

V. Uses of the Rulemaking Power

Rulemaking Areas	Rule*	Sources of Authority**
Appellate Procedure	x[1]	C
Civil Procedure	x[2]	C
Criminal Procedure	x[3]	C
Admission to Bar	x[4]	I
Attorney Discipline	x[5]	I
Judicial Discipline		
Judicial Code of Ethics	x[6]	I
Professional Corporations		
Client Security Fund		
Attorney Fees	x[7]	C
Rules of Evidence		
Pattern Jury Instructions		
Statutes of Limitations		
Superintendence of General Trial Courts	x[8]	C
Superintendence of Limited Courts	x[9]	C
Assignment of Judges	x[10]	C
Creation of Judgeships	x[11]	S
Court Boundaries		
Court Financing		
Court Costs	x[12]	C
Courtroom Facilities		
Courtroom Security		
Superintendence of Support Personnel		
Other Rules of Procedure	x[13]	C
Licensing and Special Practice Problems		
Juvenile Procedure		
Traffic		
Supreme Court Practice		

. Uses of the Rulemaking Power (cont.)

* An x in this column indicates that rules have been promulgated in this area. The specific rules are cited in the footnotes below.

** Source Key: C = Constitutional
S = Statutory
I = Inherent

FOOTNOTES

'. Rules of the Supreme Court (1962).

.. Rules of Civil Procedure (1962).

:. Rules of Criminal Procedure (1962).

4. Alaska Bar Rules, Rule 11 (1962).

5. Id. Rule 1 (1962).

6. Canons of Judicial Ethics (1962).

7. Rules of the Supreme Court, Rules 37(d), 39, 43(e); Rules of Civil Procedure, Rules 30(g), 37(c), 37(1), 56(g), 72(k), 82.

8. Rules of Administration (1962).

9. Id.

10. Id. Rules 24, 33, 39.

11. Id. Rule 31.

12. Id. Rules 7, 11-14, 16; Rules of Civil Procedure, Rules 54(d), 79.

13. Rules of Probate Procedure (1962); Rules of Juvenile Procedure (1962).

Rule 39. Vital Statistics.

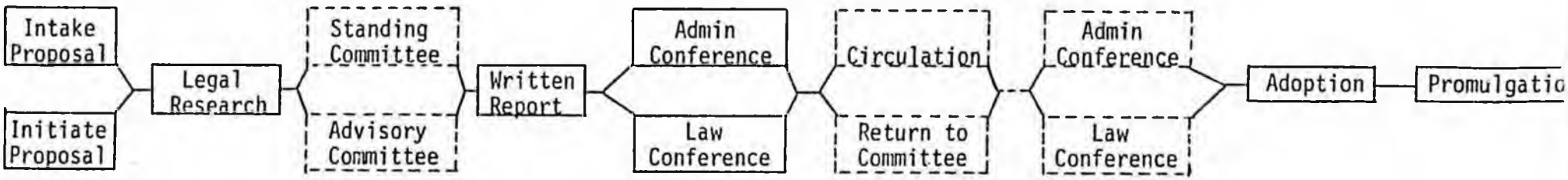
The presiding judge shall designate district judges, magistrates, or judicial employees to perform all of the functions and duties with respect to the preparation, filing and recording of vital statistics, and the maintaining of records incident thereto, as provided by law and in accordance with the regulations and instructions of the Bureau of Vital Statistics.

Rule 39.5. Standing Advisory Committee on Rules.

(a) The supreme court shall appoint standing advisory committees on rules to assist the supreme court in executing its rule making power under Article IV, Section 15 of the Alaska Constitution. The committees shall carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the supreme court for the courts of the state. Such changes in and additions to those rules as the committees may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the committees from time to time to the supreme court for its consideration. The supreme court shall appoint such members of the judiciary, Alaska Bar Association and other qualified persons to the committees as it deems advisable. The members of the committees shall serve without compensation. However, the members will be reimbursed for per diem and travel expenses incident to their duties as members of the committees.

(b) Any person may propose to the supreme court rules or changes in the rules governing practice and procedure in civil and criminal cases and governing administration of all courts. Such proposals must be in writing and include a statement of the reasons for the proposed rules or changes. All proposals shall be submitted to the administrative director of courts at Anchorage. (Supreme Court Order 443 effective November 13, 1980)

STEPS TO RULE ADOPTION BY SUPREME COURT*



Interested Persons/ Rules Attorney	Rules Attorney	Committees	Rules Attorney	Supreme Court	Bar/ Interested Persons	Supreme Court	Supreme Court	Rules Attorney/ Appellate Court Staff

*Dotted steps are optional

UNIVERSITY OF VIRGINIA
CHARLOTTESVILLE-VIRGINIA-22901
SCHOOL OF LAW

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April 6, 1978

The Honorable Jay A. Rabinowitz
Supreme Court Justice
State of Alaska
P.O.Box 850
Fairbanks, Alaska 99707

Dear Justice Rabinowitz:

It was nice of you to find the time in Atlanta to have lunch with Harvey Perlman and me and to talk about the proposed project to develop jury instructions for Alaska. During lunch, we turned from the subject of jury instructions to rule drafting. I offered some ideas which you suggested that I put in writing. This letter represents my effort to do so.

During the course of my preparation of Rules of Evidence for Alaska, I have had occasion to examine many of the procedural rules that your Court has adopted. Although I have studied the criminal and civil rules more carefully than others, from time to time I have been forced to look at the Children's Rules, the Administrative Rules, and others. One thing leaps out from even a cursory examination of these various sets of rules: Alaska follows the federal model as much as it can, but in many important respects Alaska goes its own way.

Because your Court has demonstrated that it prizes conformity to federal drafts only up to a point, and because your Court has been innovative where few other courts have dared tread (e.g.,your attorney's fees rule), it seems to me that [redacted]. It is doubtful that any one person will have the kind of expertise in so many different areas--civil law, criminal law, administrative law, juvenile and family proceedings, etc.--that you surely will demand of a rule-drafter. For a court that apparently wants the best of rules, the best of drafters is needed. And there may be someone who is the best in all these areas. But that person is unknown to me.

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If no person is hired to draft rules, the problem of how to make necessary changes and to improve the rules on a continuing basis remains. [redacted] are an answer, but [redacted] a [redacted] one, [redacted] the only Advisory Committees that work well are those composed of the [redacted]. And these [redacted], or who who will have served so often in the past that it is unfair to ask them to serve again.

I would [redacted] that you consider doing all of the following:

1. [redacted] (or hire a law clerk who will do primarily administrative work, which could include but need not be confined to work on the rules) [redacted] in the rules. By technical changes I mean slight changes that do not involve difficult policy questions. [redacted] This [redacted] the [redacted] that are [redacted]. Assuming that a technical change should be made, the staff person could suggest appropriate language. This same person should be responsible for collecting all Supreme Court decisions interpreting or discussing at length any rules and collating them so that they are retrievable upon the request of any Justice.*

2. [redacted] For example, you might arrange with me to be a Continuing Advisor on Rules of Evidence (if they are ever adopted). The arrangement that I foresee is one where the Advisor is not paid any retainer, but is only paid for work actually done at the request of the Court. As I see it, you get the benefit of the constant work that specialists do to keep themselves current without paying for it (except in the sense that a specialty is reflected in an hourly rate). [redacted] when new rules or needed, or when you want to know whether change or new rules should be considered, [redacted], which opinion might include supplying

*You would have the option of seeking an opinion from the Advisor described in para. 2.

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you with necessary rules. To get the best possible expertise, you would not want to get the same perso to be an Advisor on too many things, although there is no reason why a person could not advise on two different sets of rules. [redacted] (this should be rare if rules are not to be tied up in committee on a regular basis). The Court could ask specific judges, organizations, or lawyers for comments if it wished, a procedure that would resemble an informal committee. You could run a cost-benefit study on this idea, but I would bet that the experts will work more efficiently and provide better rules than a permanent rule-drafter.

3. [redacted] "Committee of Advisors" [redacted]. In other words, if you get people interested in Alaska law, you can probably interest them in helping solve problems that may involve issues that go well beyond the rules on which they are advising. Actually you can just consider any advisors to be part of what you envision as a committee. The point is that you would have people with a close rel tion to the State who might be useful in solving the macro problems as will as the micro problems of individual rules.

4. Arrange with your publisher of rules (The Book Co., I believe) for a decent arrangement of annotations. If you provide the annotations, perhaps the staff person mentioned in 1., above, should suggest the order. If you do not do the annotations, perhaps you should; you could assign them to the staff person.*

The [redacted] would seem to be [redacted]. If the first or last options can be made to work, it will be another "first" for Alaska.

Sincerely,

Stephen A. Saltzburg
Professor of Law

*It is less expensive, of course, to have the publisher do the annotations. If The Book Co. cannot do a better job of organizing, you might think about another publisher. Even if the publisher does do the annotations, it is a good idea to have someone collect the cases so that you have them available at the moment any member of the Court wants to see them. Moreover, it is a good idea to have one person collect the suggestions and criticisms of bench and bar.

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November 29, 1982

M E M O R A N D U M

TO: Chief Justice Burke
Justice Rabinowitz
Justice Connor
Justice Matthews
Justice Compton

INFO: Arthur H. Snowden, II
Karla Forsythe
Robert D. Bacon

FROM: Thomas B. Stewart

SUBJECT: Procedure for Rule Changes

This memorandum is in explanation of a proposal for procedures for effecting changes in court rules. The proposal, made pursuant to direction of the supreme court at its August, 1982, administrative conference, includes recommendations not only for procedures to effect rule changes but also for a new committee structure to aid the court in its rule making functions. Attached to the memoradum are a proposed "Rule on Rules", a description of the committee structure suggested, and copies of some particular background materials used in preparation of the recommendations.

In framing the proposals offered, liberal use has been made of two articles published in Judicature, the journal of the American Judicature Society, in 1979 and 1980 on the subject of court rulemaking. In addition the "rule on rules" adopted in 1978 by North Dakota, the only state with a complete, detailed rule on the subject, has been followed substantially as a pattern. The Nevada rule on its administrative rulemaking has also been used as well as other references, including a letter from Professor Stephen A. Saltzburg, of the University of Virginia Law School, to Justice Rabinowitz dated August 17, 1978, commenting on rulemaking in Alaska (a copy is included in the attached materials).

The process of rulemaking, though constitutionally committed to the courts in many jurisdictions, is obviously not adjudicative in nature. It is more aptly described as a quasi-legislative function, and commentators have argued that quasi-legislative procedures should consequently be used in rulemaking.

Such procedures, in their fuller panoply, would include six elements:

1) A system of rulemaking known to the public (rule on rules);

2) Standing committees on rules (involvement of users);

3) Adequate notice of rulemaking activity (prior publication);

4) An opportunity to be heard (comment periods, hearings);

5) A reasoned basis for new rules (supporting commentary); and

6) An opportunity to initiate changes (open access for changes).

Expressed reasons for this approach include allowing public access to the process; enhancing the accountability of the court in its rulemaking capacity; making rules on a better informed basis by involving those most familiar with daily operation of them in their development; and decreasing conflict over rules. While differing types of rules may suggest different forms or degrees of public process, a maximum recognition of its importance, consistent with reasonably efficient mechanisms to accomplish changes, appears desirable.

Apparently North Dakota, which has an unified court system with rulemaking authority in its supreme court, is one of the only states that has adopted a detailed and comprehensive rule on rulemaking. This satisfies the first element of a system in which details of the full rulemaking process are widely published. Nevada has a similar approach, but limited in its reach to administrative matters. It has been said a reason for the North Dakota action was to show the state legislature that court rulemaking, in both procedural and administrative areas, was done in a responsible manner, thus avoiding legislative intrusions. Rule 39.5, Alaska Administrative Rules, has provided a skeletal approach with some of the elements noted, but it lacks the meaningful details necessary to an adequate system. It is recommended that the attached proposed rule on rules be adopted, in lieu of Administrative Rule 39.5(b).

The recommended committee structure is an effort to establish a manageable system that recognizes the limited number of qualified, available, and interested personnel willing to commit the time and energies necessary to rule-making functions. The structure is self-explanatory and does not need elaboration in this memorandum.

Because of the recognized capabilities of Professor Stephen A. Salzburg, and his direct experience with rule-making in Alaska, his comments on the system are noteworthy. There has been opportunity to discuss with him by telephone, somewhat briefly and in general terms, the plan proposed by this memorandum. He indicated his general concurrence with the idea of a staff person, such as a revisor of rules as now provided for in the Alaska system, being responsible for rule drafting across the spectrum of procedural rules, but serving with a committee system that brings to bear the combined experience and insight of a number of experienced professionals. This approach would contemplate calling upor uniquely qualified persons, such as he is in the field of rules of evidence, to undertake special drafting projects where needs may indicate this as desirable.

This proposed rule on rules is submitted in the nature of a "concept paper" and is not intended as a final draft of plans for such an approach or for fixed ideas on a new advisory committee structure. It is hoped that it may provide a useful basis for discussion and consideration by the supreme court of materially improved plans for rulemaking.

T.B.S.

TBS/saw

Enclosures

PROPOSED RULE ON RULES

Rule 42. Rulemaking.

(a) Statement of Policy. It is the policy of the Supreme Court of Alaska to promulgate procedural rules, administrative rules, and administrative orders for the unified judicial system of Alaska, to provide an effective procedure for the continuing study and review of rules and orders of the Supreme Court, to provide notice and opportunity to express views regarding proposed and adopted rules and orders, and to provide a mechanism for the amendment and repeal of existing rules and orders.

The Supreme Court will exercise its authority to adopt, amend or repeal procedural rules, administrative rules and administrative orders and to prescribe methods and procedures required in connection therewith.

(b) Definition. In this rule, unless the context or subject matter otherwise requires:

(1) "Procedural Rules" includes Supreme Court rules and regulations and amendments thereto of general application relating to pleading, practice, and procedure, and to the admission to practice, conduct, discipline and disbarment of attorneys at law.

(2) "Administrative Rules" includes Supreme Court rules and regulations and amendments thereto, of general application, relating to the operation of the judicial system.

(3) "Administrative Orders" includes Supreme Court orders and amendments thereto, of limited effect and of particular application to a court or to the operation of a specific portion of the judicial system.

(c) Petition for Rule Change.

(1) Any person interested in the adoption, amendment, or repeal of a procedural rule, administrative rule, or administrative order, may file with the Clerk of the Appellate Courts a petition to adopt, amend, or repeal a procedural rule, administrative rule, or administrative order.

(2) The petition shall state petitioner's grounds for the adoption, amendment, or repeal of the rule or order, include a draft of the proposed new or amended rule or order, and may be accompanied by supporting documentation.