

Michigan Law Review

Volume 69 | Issue 1

1970

Wright & Miller: Federal Practice and Procedure, Civil Procedure

William H. Becker

United States District Court for the Western District of Missouri

W. Brown Morton Jr.

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Civil Procedure Commons](#), and the [Courts Commons](#)

Recommended Citation

William H. Becker & W. B. Morton Jr., *Wright & Miller: Federal Practice and Procedure, Civil Procedure*, 69 MICH. L. REV. 149 (1970).

Available at: <https://repository.law.umich.edu/mlr/vol69/iss1/6>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

RECENT BOOKS

BOOK REVIEWS

FEDERAL PRACTICE AND PROCEDURE, CIVIL PROCEDURE. VOLS. 4 & 5. By *Charles Alan Wright* and *Arthur R. Miller*. St. Paul, Minn.: West. 1969. Pp. xxiii, 647; xiv, 880. \$22 ea.

Review I

The legal profession is fortunate that two of the nation's best-qualified scholars, lawyers, and teachers of law—Charles Alan Wright and Arthur R. Miller—have been chosen to write a completely new multivolume work on federal civil practice and procedure. The combined experiences and abilities of these two men ensure the success of their uncompleted work, which is designed to replace the venerable Barron & Holtzoff, *Federal Practice and Procedure*, as revised by Professor Wright during the past ten years. The need to rewrite rather than revise the Barron & Holtzoff volumes has been apparent for some time. Wholesale revisions and proposed changes in both the Civil and Criminal Federal Rules of Procedure have made this need a compelling one.

The Federal Rules of Criminal Procedure were overhauled and comprehensively revised by amendments which became effective July 1, 1966. Extensive changes in the Federal Rules of Civil Procedure were made at approximately the same time. The astonishing impact of at least one of those changes, the amendments to rule 23 governing class actions, has not yet been fully realized, but the great importance of the changed practice under that rule is undeniable. Additional important changes in the Federal Rules of Civil Procedure, primarily in the sensitive area of discovery, went into effect on July 1, 1970. Basic Federal Rules of Appellate Procedure were adopted in 1967 and became effective July 1, 1968. In addition to these changes in the federal rules, Congress has enacted important statutory provisions and changes which affect federal civil and criminal procedure. For example, in 1968 Congress created the Federal Judicial Panel on Multidistrict Litigation.¹ The Federal Magistrates Act of 1968² is expected to become effective in 1971.³ Further, the Manual for Complex and Multidistrict Litigation was approved by the Judicial Conference of the United States in 1968.

Since the revision of the Federal Rules of Criminal Procedure

1. 28 U.S.C. § 1407 (Supp. IV, 1965-1968).

2. 28 U.S.C. §§ 631-39 (Supp. V, 1965-1969).

3. The Act becomes effective either when the first magistrate assumes office within each judicial district pursuant to the Act, or on the third anniversary of the Act, whichever event occurs earlier. Act of Oct. 17, 1968, Pub. L. No. 90-578, § 402, 82 Stat. 1108.

seemed to be in a state of temporary repose after 1966, it was possible for Professor Wright to write the first three volumes of this new multivolume work on federal practice and procedure while awaiting the pending revisions of the Federal Rules of Civil Procedure. These first three volumes have been published as *Federal Practice and Procedure, Criminal Procedure*, by Charles Alan Wright.⁴ Now Professors Wright and Miller, as joint authors, have completed the first two volumes of the planned series on civil practice and procedure. These initial volumes are marked by the excellence expected of the authors.

The co-authors open with a concise and comprehensive chapter on the history of procedure in the federal courts. The following chapters deal in order with rules 1 to 12, inclusive. Although, on a reading, rules 1 to 12 appear to deal with fairly simple procedures, the appearances are deceptive. For example, in dealing with the objectives and applications of pleading a claim for relief under rule 8, the authors expose the latent inherent complexities of that rule. They supply comprehensive coverage of difficult questions of pleading jurisdiction and of sufficiency of the statement of the claim for relief in all branches of civil practice.

Another example of the excellence of the first two civil procedure volumes is found in the sections on service of process and personal jurisdiction. In these sections the authors recognize the difficult questions and review the authorities in an expert manner. As they do throughout the work, Professors Wright and Miller support their conclusions concerning the requirements of the federal rules with lucid discussions of the history, purposes, and philosophy of the rules. They also review the state of the critical comments in legal literature, offer some wholesome criticism of their own, and predict future trends in the law, in a manner likely to contribute to the realization of those predictions.

In addition to the quality of the completed volumes themselves, the most impressive recommendations for this uncompleted multivolume work are the credentials of the authors. These credentials are emphasized by Justice Tom C. Clark in his thoughtful Foreword in volume 4.

Charles Alan Wright is presently the Charles T. McCormick Professor of Law of the University of Texas Law School. He has served on the faculties of the law schools of Minnesota, Pennsylvania, Harvard, and Yale. He has taught in the summer sessions of the law schools of the Universities of Michigan, Colorado, North Carolina, Utah, and California. Professor Wright has worked in the field of procedural improvement, serving as a member of the Ad-

4. See Lumbard, Book Review, 67 MICH. L. REV. 1640 (1969); Shadoan, Book Review, 67 MICH. L. REV. 1646 (1969).

visory Committee on Civil Rules and of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. He also served as Reporter for the Study of Division of Jurisdiction between State and Federal Courts for the American Law Institute. In addition, Professor Wright is the author of the widely used hornbook on the law of federal courts.⁵

Arthur R. Miller possesses a wide assortment of talents and has had exceptional experiences which qualify him to participate as co-author of this work. Professor Miller practiced law in New York following his graduation from Harvard Law School. Thereafter, he served as Associate Director of the Columbia Law Project on International Procedure and as Lecturer at the Columbia University School of Law. He was a member of the faculty of the School of Law of the University of Minnesota until 1965, when he accepted his present position as Professor of Law at the University of Michigan Law School. He was co-author of a manual and a multivolume work on New York Civil Practice.⁶ He is a draftsman of the Uniform Interstate and International Procedure Act. In addition, Professor Miller serves as an active member of the American Bar Association Special Committee on Economic and Scientific Proof and of its Special Committee on Complex and Multidistrict Litigation. As a member of this Special Committee, Professor Miller contributed materially to the drafting of the Manual for Complex and Multidistrict Litigation. In recent years, he has engaged in special study, teaching, and writing in the new field of computers and the law, an experience which gives him special competence in this important field and a unique understanding of its profound effects on procedural law.

Federal Practice and Procedure is in bound volume form with pockets in each volume for supplementary material. The entire work will not be finished for some time. Although the greatest part of *Federal Practice and Procedure* work remains to be published, the sample available in Civil Procedure volumes 4 and 5 indicates that the work will be a necessary part of the libraries of all federal practitioners and judges and of all teachers of federal procedure and practice.

William H. Becker,
Chief Judge,
United States District Court for the
Western District of Missouri

5. C. WRIGHT, *FEDERAL COURTS* (2d ed. 1970).

6. J. WEINSTEIN, H. KORN & A. MILLER, *MANUAL CPLR* (1967); J. WEINSTEIN, H. KORN & A. MILLER, *NEW YORK CIVIL PRACTICE* (1963).

Review II

This Review is concerned only with two volumes—volumes 4 and 5—of what is to be a completely new, eighteen-volume edition of the encyclopedic *Federal Practice and Procedure (Wright and Miller)*.¹ These volumes begin the topic of civil procedure. Chapter 1 of volume 4 serves as an introduction to the subject, dealing briefly but informatively with the history of procedure in the federal courts. Volume 4 then proceeds, in chapters 2 and 3, to deal with rules 1 through 6 of the Federal Rules of Civil Procedure. Volume 5 continues with a treatment of rules 7 through 12. This Review, dealing as it does with a work designed as a practitioner's tool rather than as a scholar's delight, will consider how *Federal Practice and Procedure* measures up as a choice for the practitioner's library.

Before beginning this task, however, your reviewer must initially acknowledge several difficulties. The temporary index to *Wright and Miller* is not yet available at the time of this writing.² In addition, volumes 4 and 5 are self-confessedly incomplete, in that each volume contains cross references to sections that will be contained in future volumes. Finally, it is extremely difficult to present a full and fair analysis of an eighteen-volume work on the basis of its first two volumes. Persisting, however, in the face of these difficulties and in the face of his personal admiration and friendship for the authors, Professors Wright and Miller, your reviewer will proceed to "tell it like it is."

Although comparisons may be odious, and, indeed, are often irrelevant, there is no escaping their value when appraising the tools of a trade. Thus, your reviewer must grace—or disgrace—this Review by a comparison with Moore's *Federal Practice (Moore's)*.³

On the physical side, each of the two treatises has its merits. Granted an efficient page replacement service, the looseleaf structure of *Moore's* would offer a distinct technical advantage over the otherwise handier hardback form of *Wright and Miller*, which can only be updated with periodic "pocket part" supplements. *Wright and Miller* is already somewhat dated because of the recent amendments to the Federal Rules of Civil Procedure, effective July 1, 1970. In partial compensation for this defect, however, Professor Wright's intimate participation for many years in the rule-amending process has enabled him to provide footnote caveats galore. Moreover, the sloppy replacement-sheet service of *Moore's* publishers almost matches

1. The first three volumes are devoted to criminal procedure, insofar as an un-seduced reader of the seductive brochure of the publisher can tell.

2. The temporary index is now available.—Ed.

3. J. MOORE, *FEDERAL PRACTICE* (2d ed. 1961). *Moore's* is published by Matthew Bender & Co., Inc., of New York City.

the built-in obsolescence preferred by the publishers of *Wright and Miller*. Finally, West Publishing Company cannot be surpassed for clear, easily read typography or for sheer excellence as book manufacturers. On balance, therefore, *Wright and Miller* is physically the better book, and your reviewer always looks to that treatise first.

This reviewer finds the citation policy followed by West (*Wright and Miller*) to be rather grating. Although both treatises follow the self-laudatory practice of using boldface type to note that the author of a cited opinion has seen fit to cite a work from the same publishing house, rival publishing enterprises and reporting services are simply ignored by West. This omission of references to rival publications is often a genuine handicap, as, for example, in the patent field, where one such publication is of primary reliance. A policy of ignoring one's competitor might be excused as commercial zeal (after all, the *homunculi* of the law-publishing world can pay their obeisance to the colossus by publishing their own comparative tables), but it is regrettable that the price of such commercialism must be paid by the practitioner in search of professional assistance.

A further problem with the citation policy of *Wright and Miller* is the failure to distinguish the federal districts within a state. The difference in case law between, for example, the Northern and Southern Districts of New York may control the result in any particular case, yet this treatise refers to both districts as "D.C.N.Y."

All this comparative carping leads simply to the conclusion that *Wright and Miller* has virtues on the format side that *Moore's* lacks, and vice versa.

On the merits—which is an incongruous note, stylistically, in discussing procedural treatises—again the honors are divided. *Wright and Miller* is much more readable, and your reviewer's ego was certainly swelled by footnotes 94 and 95 to section 1029 in volume 4 to the effect that "statements on the interpretation of the rules of individual members of the [Civil Rules Advisory] Committee are entitled to considerable respect" (p. 132).

This reviewer was disappointed to discover that the *Wright and Miller* treatment (sections 1023 and 1251) of the interrelation between the Federal Rules of Civil Procedure and the patent laws of the United States⁴ is even sketchier than the minimal treatment found in *Moore's* (paragraphs 1.03[4] and 8.19[3] and [4]). Neither *Moore's* nor *Wright and Miller* fully exposes the anomaly that, regardless of pretrial, no "discovery" of prior art in a patent case can be "binding" until "thirty days before trial."⁵ It is difficult to argue that any of the amendments made to the Civil Rules since the Patent Act of 1952 affect this anomaly. Indeed, the choice made

4. 35 U.S.C. §§ 1-293 (1964), as amended, (Supp. V, 1965-1969).

5. 35 U.S.C. § 282 (1964).

in the 1970 amendments (rule 26(e)) against imposing a continuing duty to update discovery answers given seems to clinch the triumph of 35 U.S.C. § 282 over the Civil Rules. Perhaps the forthcoming volume of *Wright and Miller* dealing with rule 16, Pre-Trial Procedure; Formulating Issues, will suggest just how a patent case can be finally "pretried" earlier than thirty days before actual trial begins.

Your reviewer tried to put *Wright and Miller* to the proof of practical application, a difficult task with only rules 1 to 12 yet dealt with. A rule 12 motion was the proving ground. This brought in rules 6 and 7. The particular motion involved rule 12(b)(2), (3), (4), and (5) defenses served at the last minute permitted under rule 12(a). The motion was clearly deficient in its statement of grounds under rule 7(b)(1), but, when the requirement for later presentation of "points and authorities" under local rules was timely complied with, the deficiencies were remedied before the opposing party had to take a position. The local rules set up a timetable clearly at variance with rule 6(d), that is to say, always exceeding the five-day delay therein provided *unless* a special order of court is obtained. Both *Wright and Miller* and *Moore's* point out the existence of local court rules shortening the rule 6(d) requirement, and both set forth a caveat to consult the local rules and a suggestion that the validity of such local rules is questionable. However, neither treatise offers real guidance concerning the effect of a later presentation of "points and authorities" in curing a deficient statement of grounds in the motion itself. Hopefully, *Wright and Miller* will deal more explicitly with this subject in the sections dealing with rule 83, Rules by District Courts, and your reviewer can get Professors Wright and Miller's unequivocal view of whether the moving party in the cited situation was in default, had waived his defenses cited in his motion, or had been saved by the local rule.

On the other hand, comparing *Moore's* treatment of motions under rule 12(b)(6) with that provided by *Wright and Miller*, the balance here seemed to weigh in favor of the latter. Professor Moore devotes twenty-one pages, with very little commentary, to motions to dismiss for failure to state a claim; Wright and Miller devote thirty pages, including substantial commentary, to this subject plus an additional nine pages of "illustrative cases" which are thoughtfully catalogued. Beyond the mere bulk of pages, moreover, Professors Wright and Miller appear to go into far greater detail in describing the actual mechanics of a rule 12(b)(6) motion. Post-answer methods of asserting a rule 12(b)(6) motion when a novel theory of liability is being explored, and a comprehensive treatment of the effect of rules 12(g) and (h) are all found in *Wright and Miller*, but not in *Moore's*. While *Moore's* discussion of rule 12(b)(6) is,

to be sure, quite adequate, it fails to treat many of the issues considered in some detail by Wright and Miller. Therefore, *Wright and Miller* must be judged a substantial improvement in this area.

Finally, there are areas that neither *Moore's* nor *Wright and Miller* covered thoroughly enough to suit your reviewer. One of these areas was the treatment of the notion of "hearing" as used in rules 6, 7, and 12. Neither treatise attempts to explain that notion; on the contrary, the existence of a consensus about the meaning of "hearing" seems to be presumed. There are numerous local rules (see rule 78) which provide for routine submission of contested motions on "the papers" but none of them known to your reviewer attempts to define what constitutes the "hearing" under it. Your reviewer cannot rid himself of the conviction that the basic structure of the Civil Rules contemplates an appearance in person for oral argument at the bar of the court and that rule 78 has encouraged tampering with the symmetry of that structure. Omissions such as this emphasize that no treatise so far appears to have reached every aspect of the broad subject of federal civil procedure.

It is extremely difficult, if not impossible, to review thoroughly and fairly a treatise such as *Wright and Miller* or *Moore's*. Too many criticisms have the unfortunate effect of drawing attention away from what is written and toward what is not. Therefore, your reviewer deems it wise to cut this review short at this point. For the practitioner preparing to purchase either *Wright and Miller* or *Moore's*, your reviewer offers this personal judgment. *Wright and Miller* is handier, better-organized, easier on the eyes, and the better place to look first for an authoritative answer to the routine questions of federal civil practice and procedure. If an office is not to have both *Moore's* and *Wright and Miller*, and *Moore's* is reasonably available in someone else's library, it should prefer *Wright and Miller*; if the office has to rely entirely on its own library resources, perhaps it should prefer *Moore's*.

*W. Brown Morton, Jr.,
Member of the New York, Virginia,
and District of Columbia Bars*