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*** CURRENT THROUGH CHANGES RECEIVED DECEMBER, 2004 ***

RULES GOVERNING SECTION 2254 CASES

USCS Sec 2254 Cases R 11 (2005)

Review Court Orders which may amend this Rule.

Rule 11. Applicability of the Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

HISTORY:

(As amended Dec. 1, 2004.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee on Rules. Habeas corpus proceedings are characterized as civil in nature. See, e.g., *Fisher v Baker*, 203 US 174, 181 (1906). However, under *Fed R Civ P 81 (a)(2)*, the applicability of the civil rules to habeas corpus actions has been limited, although the various courts which have considered this problem have had difficulty in setting out the boundaries of this limitation. See *Harris v Nelson*, 394 US 286 (1969) at 289, footnote 1. Rule 11 is intended to conform with the Supreme Court's approach in the Harris case. There the court was dealing with the petitioner's contention that Civil Rule 33 granting the right to discovery via written interrogatories is wholly applicable to habeas corpus proceedings. The court held:

We agree with the Ninth Circuit that *Rule 33 of the Federal Rules of Civil Procedure* is not applicable to habeas corpus proceedings and that 28 USC § 2246 does not authorize interrogatories except in limited circumstances not applicable to this case; but we conclude that, in appropriate circumstances, a district court, confronted by a petition for habeas corpus which establishes a prima facie case for relief, may use or authorize the use of suitable discovery procedures, including interrogatories, reasonably fashioned to elicit facts necessary to help the court to "dispose of the matter as law and justice require" 28 USC § 2243. 394 US at 290.

The court then went on to consider the contention that the "conformity" provision of rule 81(a)(2) should be rigidly applied so that the civil rules would be applicable only to the extent that habeas corpus practice had conformed to the practice in civil actions at the time of the adoption of the Federal Rules of Civil Procedure on September 16, 1938. The court said:

Although there is little direct evidence, relevant to the present problem, of the purpose of the "conformity" provision of Rule 81 (a)(2), the concern of the draftsmen, as a general matter, seems to have been to provide for the continuing applicability of the "civil" rules in their new form to those areas of practice in habeas corpus and other enumerated proceedings in which the "specified" proceedings had theretofore utilized the modes of civil practice. Otherwise, those proceedings were to be considered outside of the scope of the rules without prejudice, of course, to the use of particular rules by analogy or otherwise, where appropriate. 394 US 294.

The court then reiterated its commitment to judicial discretion in formulating rules and procedures for habeas corpus proceedings by stating:

[T]he habeas corpus jurisdiction and the duty to exercise it being present, the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage. Where their duties require it, this is the inescapable obligation of the courts. Their authority is expressly confirmed in the All Writs Act, 28 USC § 1651.

394 US 299.

Rule 6 of these proposed rules deals specifically with the issue of discovery in habeas actions in a manner consistent with Harris. Rule 11 extends this approach to allow the court considering the petition to use any of the rules of civil procedure (unless inconsistent with these rules of habeas corpus) when in its discretion the court decides they are appropriate under the circumstances of the particular case. The court does not have to rigidly apply rules which would be inconsistent or inequitable in the overall framework of habeas corpus. Rule 11 merely recognizes and affirms their discretionary power to use their judgment in promoting the ends of justice.

Rule 11 permits application of the civil rules only when it would be appropriate to do so. Illustrative of an inappropriate application is that rejected by the Supreme Court in *Pitchev v Davis*, 95 S Ct 1748 (1975), holding that *Fed R Civ P 60(b)* should not be applied in a habeas case when it would have the effect of altering the statutory exhaustion requirement of 28 USC § 2254.

Notes of Advisory Committee on 2004 amendments. The language of Rule 11 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.