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LOCAL RULES IN FEDERAL DISTRICT COURTS: USURPATION, LEGISLATION, OR INFORMATION?

By
*Steven Flanders**

A fundamental policy choice concerning the way federal courts shall run themselves is contained in the seemingly innocuous language of rule 83 of the Federal Rules of Civil Procedure. The rule states:

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.¹

The first and third sentences of the rule provide two powers that are distinct, though related. The first sentence is self-explanatory. Each district court is empowered to promulgate local rules as it deems necessary, with the limitation that its rules be consistent with the Federal Rules of Civil Procedure.² The third and final sentence of the rule in-

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1. FED. R. CIV. P. 83. Rule 83 has not been amended since it became effective in 1938. See note 285 *infra*, for a discussion of the sparse "legislative history." See also notes 170 & 171 *infra*.

2. See Weinstein, *Reform of Federal Court Rule Making Procedures*, 76 COLUM. L. REV. 905 (1976); J. WEINSTEIN, REFORM OF COURT RULEMAKING PROCEDURES chs. I, II & V (1977) [hereinafter cited as WEINSTEIN]. The first sentence of rule 83 restates an inherent power that already had been restated in 28 U.S.C. § 2071, which grants all courts established by act of Congress the powers to prescribe rules for the conduct of their business. See note 39 *infra*. Analogous rules are FED. R. CRIM. P. 57, FED. R. APP. P. 47, and former GEN. ADMIRALTY R. 44 (rescinded July 1, 1966).

roduces what has come to be known as the "decision-making power."³ Where guidance is not forthcoming in federal rules or statutes, the court may act as it deems desirable and appropriate, without regard to state statute or practice. The rulemakers of the 1930's attached great importance to this latter provision. For example, Edgar B. Tolman, Secretary of the Advisory Committee, remarked:

That provision is, in my opinion, one of the most important and salutary in the entire set of rules. It closes all gaps in the rules. It puts an end to the whole of the Conformity Act and it permits judges to decide the unusual or minor procedural problems that arise in any system of jurisprudence in light of the circumstances that surround them.⁴

Most federal district courts have promulgated local rules in considerable numbers, often using them to provide detailed instructions concerning many aspects of their practice and the practice of law before them. Nevertheless, since the Federal Rules of Civil Procedure became effective in 1938, there has been a remarkable difference of opinion between practitioners and legal scholars about the courts' exercise of the choice rule 83 provides. Among practitioners, the flourishing of local rules has apparently occasioned little objection.⁵ When federal judges meet to discuss procedural alternatives, local rules are

3. Note, *Rule 83 and the Local Federal Rules*, 67 COLUM. L. REV. 1251, 1252 (1967) [hereinafter cited as Columbia Note]. Other critical commentary on local rules, referred to throughout this article, draws heavily on this distinction. Although the Columbia Note authors were not the first to distinguish the rulemaking power from the decision-making power in rule 83, the distinction might have been forgotten had they not highlighted it. See text accompanying note 49 *infra*.

4. ABA INSTITUTE ON FEDERAL RULES 129 (Wash., D.C. 1938) [hereinafter cited as ABA INSTITUTE (Wash., D.C.)]. During the summer and fall of 1938, three "Institutes" on the new rules were held under the auspices of the American Bar Association in Cleveland, Washington, and New York. Participants included most members of the original Advisory Committee, who made addresses and responded to questions about the rules. Major Tolman, of the Illinois Bar, was editor-in-chief of the AMERICAN BAR ASSOCIATION JOURNAL.

5. In several recent instances, lawyer committees have been established to propose a complete revision of local rules in one or more districts. None of these committees has proposed a significant reduction in the number or scope of local rules. For example, in 1977, a statewide committee was established in the two districts in Arkansas to propose local rules common to both districts. No judge or other employee of either court was on the committee, and the chief judge emphasized that the committee had an entirely free rein. The proposed rules completely revised their outdated predecessors and are far broader in scope. A similar exercise in the Northern District of California led to adoption on August 1, 1977, of new rules comparable in scope to the older ones. The work of an Iowa statewide committee is described in Blair, *The New Local Rules for Federal Practice in Iowa*, 23 DRAKE L. REV. 517 (1974). A committee for the Ninth Circuit has proposed uniform local rules for possible adoption by all district courts on many of the topics covered by present rules. E. Cleary & R. Misner, Preliminary Report: Uniform Local Rules For United States District Courts of

often the language they use.⁶ Proposals are framed and exchanged in this form and great importance is attached to developing effective rules.⁷ In one commentator's view, "[o]ne of the first steps a concerned court should undertake is to devise up-to-date local rules that address the current problems the court faces and provide procedures for dealing with them."⁸

On the other hand, among scholars the commentary on court rulemaking has been almost uniformly critical.⁹ Professor Charles Alan Wright believes that the "[u]se by lower courts of their rulemaking power . . . is for the most part an unmitigated disaster."¹⁰ Elsewhere, in what he has described as "the more restrained language appropriate for a treatise,"¹¹ Professor Wright has provided detailed views on the subject. Referring to "[t]he flood of local rules on important and controversial subjects," Professors Wright and Miller advocate imposing restrictions upon the courts' rulemaking powers:

Unfortunately many of the products of this well-intentioned effort are either invalid on their face or intrude unwisely into areas that should be dealt with on a national basis by rules made by the Supreme Court. The great goals of a simple, flexible, and uniform procedure in federal courts throughout the nation will be seriously compromised unless an effective check is put on the power to make local rules. This might be done either by amending Civil Rule 83, and its counterparts in the Criminal and Appellate Rules, to specify those few limited areas in which local rules may be made or by requiring

the Ninth Circuit (Mar. 2, 1979) (unpublished draft). Professors Cleary and Misner have served as reporters to the committee. See Appendix B *infra*.

For one practicing lawyer's broadside attack on local rules, see Caballero, *Is There an Over-Exercise of Local Rule-Making Powers by the United States District Courts?* 24 FED. B. NEWS 325 (Dec. 1977) [hereinafter cited as Caballero, *Over-Exercise*] and *Proceedings of a Session of the Conference of Metropolitan District Chief Judges on Rules and Rule Making*, 79 F.R.D. 471, 484-91 (1978) (remarks of Mr. Caballero) [hereinafter cited as *Conference on Rule Making*]. See also, Kahn, *Local Pretrial Rules in Federal Courts*, 6 LITIGATION, Spring 1980 at 34 [hereinafter cited as Kahn]. A committee of the American College of Trial Lawyers is beginning a study of local rules from a generally critical perspective.

6. For references to local rules and related forms, see SEMINARS FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES, 1970-1971 (West) [hereinafter cited as SEMINARS].

7. Grady, *Trial Lawyers, Litigators, and Clients' Costs*, 4 LITIGATION, Spring 1978 at 5.

8. Schwarzer, *Beating the Trial Court Paper Chase*, 5 LITIGATION, Spring 1979 at 5.

9. See, e.g., note 91 *infra*.

10. Wright, Book Review, 9 ST. MARY'S L.J. 652, 657 (1978) (WEINSTEIN, REFORM OF COURT RULEMAKING PROCEDURES).

11. *Id.*

approval of local rules, perhaps by the Standing Committee on Rules of Practice and Procedure or its parent body, the Judicial Conference of the United States, before they may go into effect.¹²

Some years ago Professor Maurice Rosenberg, now Assistant Attorney General for Improvements in the Administration of Justice, characterized federal courts as a "procedural Tower of Babel" because of the differences between local rules. He recommended reform of local rules as a top priority for the new Federal Judicial Center, then under consideration.¹³

How are we to account for this chasm that separates the practitioners from the commentators? Have the courts simply been irresponsible in their exercise of the rulemaking power, as the commentators suggest? The purpose of this article is to analyze the district courts' exercise of their power to make local rules and to demonstrate that the courts' actions have been, more often than not, well-reasoned and beneficial. While there have been occasional abuses, the sum total of errors appears to be slight and their effects insignificant, particularly in relation to the advantages the local rules offer.

I. A FRAMEWORK FOR DISCUSSING LOCAL RULES

The exercise of local rule power and the resulting proliferation of local rules have been characterized in essentially three ways. Some critics consider it a usurpation of powers that properly belong to the Supreme Court and Congress. Other critics believe the exercise of the rulemaking power represents impermissible legislation by the courts. Yet others view it as serving a useful informational purpose that could not effectively be accomplished by any other means. This divergence

12. 12 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3152, at 223 (1973) (footnotes omitted) [hereinafter cited as WRIGHT & MILLER]. *But see Conference on Rule Making*, *supra* note 5, at 491. For critical commentary, see WEINSTEIN, *supra* note 2, at ch. 5; Columbia Note, *supra* note 3; Caballero, *Over-exercise*, *supra* note 5; Comment, *The Local Rules of Civil Procedure in the Federal District Courts—A Survey*, 1966 DUKE L.J. 1011 [hereinafter cited as *Local Rules Survey*]. See also Cohn, *Federal Discovery, A Survey of Local Rules and Practices in View of Proposed Changes to the Federal Rules*, 63 MINN. L. REV. 253 (1979) [hereinafter cited as Cohn]. For a defense of the courts' exercise of the rulemaking power, see Flanders, *In Praise of Local Rules*, 62 JUD. 28 (1978) [hereinafter cited as Flanders, *In Praise*].

13. *Hearings on S. 915 and H.R. 6111 before the Senate Subcommittee on Improvements in Judicial Machinery*, 90th Cong., 1st Sess. 282 (1967). The "Tower of Babel" characterization has been widely and erroneously ascribed to a different hearing where this language does not appear.

in the views of the operation of local rules can be traced to the premises from which one approaches the exercise of local rule power.

Wright and Miller criticize local rules practice because, in their view, the federal trial courts have effectively usurped powers of the Supreme Court and Congress that properly are delegated only to the Judicial Conference of the United States through the conference rules committees.¹⁴ Contrary to the purposes of the rules¹⁵ and contrary to the standard established in *Miner v. Atlass*,¹⁶ which stated that district courts cannot institute "basic procedural innovations" under the guise of local rules,¹⁷ the local courts have arrogated to themselves powers not delegated to them. Pursuant to their rulemaking power, the courts have introduced limitations on the number of interrogatories that may be served,¹⁸ have made anachronistic references to the old conformity principle,¹⁹ and have regulated endless minor matters of procedural detail. In Wright and Miller's view, "[l]ocal rules, which were expected to be few in number and to cover noncontroversial housekeeping matters, now are extremely numerous and cover a great variety of subject matter."²⁰

Wright and Miller further remark that "[m]any local rules have been held invalid Many other local rules that seem in direct conflict with the general rules remain on the books."²¹ An early treatment of local rules, relied upon by Wright and Miller, argues that "[i]t is peculiarly difficult to bring the issue of a local rule's validity before an appellate court."²² These critics argue, in essence, that the district courts have exercised a power assigned to them neither by the Rules

14. See generally 12 WRIGHT & MILLER, *supra* note 12, at § 3152; WEINSTEIN, *supra* note 2.

15. See Columbia Note, *supra* note 3, at 1253-59 for an argument that the local rules were intended to be few and narrow. For a counterargument, see note 285 *infra*.

16. 363 U.S. 641 (1960).

17. *Id.* at 650.

18. 8 WRIGHT & MILLER, *supra* note 12, at § 2168 (Supp. 1980). See text accompanying notes 119-29 *infra*.

19. 12 WRIGHT & MILLER, *supra* note 12, at 244. See text accompanying notes 81-90 *infra*.

20. 12 WRIGHT & MILLER, *supra* note 12, at 228 (footnote omitted). See generally *Local Rules Survey*, *supra* note 12.

21. 12 WRIGHT & MILLER, *supra* note 12, at 219.

22. Columbia Note, *supra* note 3, at 1263. Another commentator observes, "[i]n most instances the finality rule, limiting appeals from non-dispositive orders, prevents intermediate appeals challenging local rules. Moreover, local bar associations as well as attorneys have been reluctant to cross swords with local judges by challenging their rules in litigation." WEINSTEIN, *supra* note 2, at 121 (footnote omitted).

Enabling Act²³ nor any other source, and have exercised this power largely unchecked because the appellate process has proven peculiarly inadequate to deal with this supervisory task.

The criticism that the district courts exercise impermissible legislative power has focused on the procedure by which local rules are adopted. Judge Weinstein argues that the making of court rules is to be understood through reference to theories of legislation and legislative delegation.²⁴ This argument leads Judge Weinstein to conclude that publication and debate are desirable before adoption of local rules.²⁵ At the district level, as at the national level, he advocates requiring notice, hearings, and an opportunity to be heard on proposed rules. His belief, which is widely shared by other critics of the process,²⁶ is that local rules have usually been developed with minimal consultation and often represent the whims and idiosyncrasies of temporary majorities of judges.

By focusing on what they perceive as usurpation or legislation, these critics have largely ignored the practical utility of local rules. For example, the local rule device serves essential informational purposes that are consistent with most critics' conception of its proper limits. At the most mundane level, the local rules serve as a kind of national notice board, informing lawyers of unexceptionable details of a court's operation. From local rules, lawyers learn in which division they should file a suit,²⁷ and what regulations govern access to court files and exhibits.²⁸

More important, local rules have been essential tools in implementing court policy in administrative matters. Courts differ from most organizations in that they must rely heavily on outsiders, especially members of the bar, in their operation.²⁹ Particularly in matters affecting the management of case flow, the policies of the court directly

23. 28 U.S.C. § 2072 (1979).

24. See WEINSTEIN, *supra* note 2, at 89-96.

25. *Id.* at 128-29.

26. See, e.g., 12 WRIGHT & MILLER, *supra* note 12, at 220. See text accompanying notes 223-25 *infra*.

27. See, e.g., S.D. FLA. R. 1. There is no other source for this information. 28 U.S.C. §§ 81-131 define the boundaries of the districts, and of any divisions of each district, but offer no information about the clerk's office service county by county. In addition, some divisions have been created by local rule. See Appendix A, and notes 255-57 *infra* and accompanying text.

28. See, e.g., N.D. ALA. R. 6.

29. See H. JACOB & J. EISENSTEIN, FELONY JUSTICE (1977). Judge Hubert L. Will places counsel immediately after the judge in listing "the available work or production force in court cases." SEMINARS, *supra* note 6, at 15.

involve the lawyers who practice before it.³⁰ When a district court adopts a procedure to implement Federal Rule of Civil Procedure 16 on pretrial practice,³¹ the result can only be effective if lawyers know what is expected of them and why. The same is true for many other areas of the policy and practice involved in running the complex operation of a federal trial court. Matters such as determining the balance between "free press" and "fair trial" concerns,³² dismissing cases for failure to prosecute³³ and interrogating jurors after verdict³⁴ all involve regulation of the conduct of lawyers, and are clearly within a court's discretion.

Local rules provide a third important informational function because they alert rulemakers to the need for changes in national rules and provide an empirical basis for making changes. District court efforts to develop policies for effectuating national rules may fail, suggesting that the national rule is incomplete, inadequate or leads to unanticipated conflicts with other rules, statutes, or the Constitution. Alternatively, district court policies may succeed, and a formulation embodied in a local rule may commend itself to the national rulemakers. This source of information on procedural developments is only gradually gaining recognition, though precursors can be identified.³⁵

Usurpation, legislation, and information have all been a part of the local rules experience. The task now is to determine what balance has been struck among the three. Our notion of the proper procedure to be used in drafting and promulgating local rules turns on a determination of the proper role of local rules in the judicial function.

30. See generally S. FLANDERS, *CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS* (Federal Judicial Center 1977) [hereinafter cited as *CASE MANAGEMENT*]; Flanders, *Case Management in Federal Courts*, 4 *JUST. SYS. J.* 147 (1978) [hereinafter cited as *Flanders*].

31. See text accompanying notes 167-75 *infra*, on local rules to implement rule 16.

32. See text accompanying notes 176-89 *infra*.

33. See note 194 *infra*.

34. See text accompanying notes 68-76 *infra*.

35. Judge Weinstein recently said,

I think it is useful to have local rules supplementing national rules and statutes. The issue parallels that of federalism in the broadest sense The advantage of our federal system and of the practice of permitting local rules is that they encourage initiative and imaginative development of new ideas in a variety of different settings. Local rules can act as "laboratories," much as the states do.

Letter to the author (Mar. 29, 1978). See also, WEINSTEIN, *supra* note 2, at 136. The Advisory Committee on Civil Rules is now making active use of local rules in its own agenda and in occasional proposals for innovation by local rule. See, e.g., *Proposed Amendment to Fed. R. Civ. P.* 33, 77 F.R.D. 613, 645 (1978).

If local rulemaking is indeed the final step in legislative delegation under the Rules Enabling Act, it follows that the courts should adopt corresponding procedures, including not only notice and hearings but also fact-gathering, perhaps by permanent staff. Under this conception we might begin to question the standard adopted by the Supreme Court majority in *Miner*³⁶ that forbids "basic procedural innovations," and consider the more expansive approach of the *Miner* dissent³⁷ and apparently of the Court in *Colgrove v. Battin*.³⁸ Under this approach we might wish to expand use of the local rules as a proving ground for significant procedural change to aid national rulemakers.

If, on the other hand, local rulemaking is understood as a tool for trial courts to use in governing themselves under their inherent powers,³⁹ as well as under the express authorities for local rules, then it may follow that the subject matter of local rules should be relatively limited and the adoption process simple. Consultation and fact-gathering could be undertaken only to the extent the court found useful. Finally, perhaps there is a distinct "notice board" function that can be clearly distinguished from local rulemaking, so that purely informational matters could be reserved to a separate document.

The purpose of this article is to outline a local rules policy consistent with the history of rule 83, and based on an assessment of the use and abuse of the local rules device. In order to achieve this, it is necessary to consider previous experiences with local rules. The first step requires examining the assertion that the device has been abused, by detailing every available instance in which a local rule has been questioned. The next step will be to describe and assess the procedures employed for drafting and promulgating local rules. The third step involves surveying the scope, use, and purposes of local rules.

II. A SEARCH FOR SIGNIFICANT ABUSES

In order to show that the makers of local rules have unwisely

36. 363 U.S. 641, 650 (1960).

37. *Id.* at 660, 663 (Brennan, J., dissenting) (*Miner* dissent would uphold the local rule regulating procedure under General Admiralty Rule 44, because local rules provide an opportunity for input by the district court, the most apt body to deal with specific problems).

38. 413 U.S. 149 (1973). In *Colgrove*, the Court upheld District of Montana Rule 13(d), which provides for six person juries in civil cases. The Court determined that this rule did not violate the seventh amendment, or 28 U.S.C. § 2072, which states that the right to a jury shall be retained as at common law. The Court also found that the rule was not inconsistent with Federal Rule of Civil Procedure 83.

39. See *United States v. Howard*, 440 F. Supp. 1106 (D. Md. 1977); Levin & Amsterdam, *Legislative Control Over Judicial Rule Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 30-32 (1958). See also note 213 *infra*.

usurped powers belonging to the Supreme Court or Congress, it would be necessary to show that local rulemaking power has been commonly abused. Abuses certainly exist, and can be found in many forms. Some of them merely involve areas in which the court already has broad discretion, so a local rule merely imposes a uniform, albeit sometimes arbitrary rule.⁴⁰ Other claimed abuses turn out to be inconsequential, moot, or meaningless upon analysis.⁴¹ Still other abuses pose significant problems that may require resolution at the national level.⁴²

A. Court Discretion

Several local rules have been attacked as substituting rulemaking for adjudication, "to escape from the arduous but essential task of case-by-case analysis."⁴³ Among these are local rules that set the amount of a supersedeas bond, require cost bonds, establish a discovery cutoff date, prohibit interrogation of jurors, and allocate payment of discovery expenses.

1. Supersedeas bond

The common local rule indicating the usual amount for a supersedeas bond is useful for examining the notion that rulemaking avoids case-by-case analysis.⁴⁴ A typical rule, from the District Court of

40. See text accompanying notes 43-90 *infra*.

41. See text accompanying notes 91-111 *infra*.

42. See text accompanying notes 112-229 *infra*.

43. Columbia Note, *supra* note 3, at 1252.

44. FED. R. CIV. P. 62(d) provides:

When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

The provisions of subparagraph (a) do not allow a stay as a matter of right in cases involving injunctions, receiverships, or patent infringements where an accounting has been ordered. Only where there has been a money judgment can a stay be obtained as a matter of right, and only where the court has approved the security posted by appellant.

Prior to July 1, 1968, when the Federal Rules of Appellate Procedure were promulgated, rule 73(d) specifically stated the requirements for an "acceptable" supersedeas bond. Rule 73(d) provided that the "amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on appeal, interest, [and] damages for delay." Rule 73(d), however, also provided that the court could affix a different amount for the bond or order security other than the bond if the circumstances so warranted.

The purpose of requiring a supersedeas bond is to protect the claim of the successful party, in case a judgment debtor moved to make himself "judgment proof" while pursuing an appeal. The desire to protect the interests of the claimant is not absolute, however. It has been held that the judgment debtor should not be made to endure irreparable harm merely

Rhode Island, reads:

A supersedeas bond staying execution of a money judgment shall be in the amount of the judgment plus 10% of the amount to cover interest and any award of damages for delay plus \$250 to cover costs, unless the court directs otherwise.⁴⁵

Eight other districts have comparable provisions. Only one of these, rule 28 of the Northern District of Illinois, differs in the important respect that there is no express provision for court discretion. Otherwise the provisions are essentially similar to the Rhode Island rule except for variation in the amount required to cover interest.⁴⁶ Referring to the Rhode Island rule and to two others, Wright and Miller say, "[t]his is an unfortunate provision. The appellate rules deliberately say nothing on the size of a supersedeas bond because they intended that this should be fixed individually by the court in each case."⁴⁷

This objection has no force unless applied only to the Northern District of Illinois rule. The Rhode Island language informs lawyers of

to satisfy the requirements of a hard and fast rule on the amount of bond. *See* C. Albert Sauter Co. v. Richard S. Sauter Co., 368 F. Supp. 501 (E.D. Pa. 1973). In such cases, the interests of the claimant must be balanced with the desire to prevent irreparable harm to the appellant, who may be successful on appeal.

A balancing of interests was necessary in *Trans World Airlines, Inc. v. Hughes*, 314 F. Supp. 94 (S.D.N.Y. 1970). Hughes, appealing an antitrust judgment in the amount of \$145,448,141.00, was required under local rule 33 of the Southern District of New York to post a bond in the amount of judgment plus 11%. Hughes maintained that compliance was impracticable because the sureties contacted would provide a bond of this size only upon deposit of collateral, in cash or government bonds, for the full amount of the bond. The trial judge felt that it was within his inherent power to reduce and modify the bond requirement. *Id.* at 96. This discretion is now explicit in the current version of local rule 33.

What should be the amount of a supersedeas bond? Professor Moore believes that the provisions of former rule 73(d) requiring the amount of the judgment plus interest and costs should be used as the guide in all but extraordinary cases. 9 J. MOORE, FEDERAL PRACTICE ¶ 208.06[2] (2d ed. 1980). Moore states that rule 73(d) was merely the codification of early Supreme Court opinions on the subject and thus should be instructive, even though the rule has been abrogated. *See* *Catlett v. Brodie*, 22 U.S. 553 (1824) and *Jerome v. McCarter*, 88 U.S. 17 (1874). However, the fact that the explicit language of rule 73(d) was not retained in Federal Rule of Appellate Procedure 8(b) suggests that the Advisory Committee on Appellate Rules felt that the amount of the bond was best left to the discretion of the district court. Local rules on supersedeas bonds generally conform to former rule 73(d). *See* note 46 *infra*.

45. D.R.I. R. 37.

46. Local rules D. MASS. R. 31 and D.N.H. R. 28, specify 10% to cover interest. Local rules N.D. ILL. R. 28, N.D.N.Y. R. 29, S.D.N.Y. R. 33, and W.D.N.Y. R. 29 all specify 11% for interest. Local rules E.D. LA. R. 6.6 and N.D. TEX. R. 12.4 specify 20% for interest. All specify \$250 for costs, a figure that must be unrealistic today in almost all cases. Since there is no current and reliable source for local rules, this enumeration and others in this article may not be complete. *See* note 230 *infra*.

47. 12 WRIGHT & MILLER, *supra* note 12, at 242.

the court's normal requirement and puts them on notice that they should be prepared to show exceptional circumstances if they believe a different amount is appropriate. To the extent that the provision narrows the court's broad discretion to fix the amount individually in each case, it probably achieves a desirable result.

It would be interesting to know precisely how the practice differs in courts that have this provision from the practice in those that do not. There are several possibilities, but for all of them it seems useful to have a local rule. Probably we can assume that Rhode Island and the other districts with such a rule set most of the bonds at the level specified, with most of the exceptions at a lower figure. Possibly the other courts have a similar pattern, following past practice based on former rule 73(d). Suppose, then, that the practice is identical in local rule and non-local rule courts. In that case, it seems clear that a useful purpose is served by informing the bar that exercise of the court's discretion on this point normally leads to a single, predictable result.

Alternatively, suppose the practice is more varied, as Wright and Miller presumably prefer. If the court acts randomly and treats similar cases differently, the result is undesirable. In this situation, a court would do well to adopt and publicize a uniform policy, by rule or otherwise. The harder case would be the hypothetical court that arrives at a subtle and yet precise standard for setting a bond that permitted determination in each instance of the characteristics of the case and led to a result tailored to the case, which would be reached each time a bond was set in a similar case. What sort of information flow would support this achievement? There is relatively little law on bond amounts, and what little there is deals with clearly exceptional cases to which the local rule specification presumably would not apply.⁴⁸ Unless it has unpublished or secret standards, our hypothetical court must draw upon the experience, past practice, and sense of fairness of each judge in consultation with counsel.

Two observations seem clear. First, in a mechanical and repetitive matter such as this, it is undesirable to approach each decision as though the case at hand were unique and could be "adjudicated" only after an appraisal of its special characteristics, in light of past action and experience. Lawyers and judges have far better ways to spend their time and money. Second, such a process would probably not achieve our hypothesized goal of setting bonds that vary in fair and predictable ways. A likely outcome would be bond "disparity" reflect-

48. See note 45 *supra*.

ing the idiosyncrasies of individual judges and the lawyers they have worked with on this point.

In sum, it is difficult to imagine how a court could function with no bond rule and serve litigants better than if it had a rule or other articulation of its policy. On this matter, as on most local rules matters, if articulable standards exist, it is best not to hide them.⁴⁹ If they do not exist, disparate treatment will occur unless the court undertakes the burden of exhaustive investigation and consultation each time a bond is set. Substantial disparity would probably survive even this improbable exercise. Of course, any rule promulgated should contain the allowance for court discretion provided in the Rhode Island rule. Rules that omit this provision are possibly questionable.⁵⁰

2. Cost bonds

Local rules that require security for costs present a somewhat similar issue, but these rules have been attacked on constitutional and other grounds as well. The principal problem that local rules have attempted to address is the foreign plaintiff coming into a jurisdiction with a frivolous claim, bringing suit, and then leaving the jurisdiction before judgment is entered. When this occurs and the plaintiff loses, the court may lack jurisdiction to recover costs. Local rules seek to forestall this result by requiring foreign and sometimes other plaintiffs to post security for costs with the court.

Case law on this subject is sparse. The leading cases are *Farmer v. Arabian American Oil Co.*,⁵¹ *Hawes v. Club Ecuestre El Comandante*,⁵² and *Kreitzer v. Puerto Rico Cars, Inc.*⁵³ In *Farmer*, the plaintiff's case was dismissed when he failed to post a \$6000 bond pursuant to the court's order under rule 2(a) of both the Southern and Eastern Districts of New York. On appeal from the dismissal, the plaintiff challenged

49. The Columbia Note authors grant the merit of this approach in connection with one minor matter, while attacking local rules on supersedeas bonds and similar matters for substituting formula for reasoned decisions. Columbia Note, *supra* note 3, at 126. The Supreme Court made a strong argument for articulated standards by local rule in the area of time limits in *Miner v. Atlass*, 363 U.S. 641, 648-49 (1960). See also *In re Petrol Shipping Corp.*, 360 F.2d 103, 108 (2d Cir.), *cert. denied*, 385 U.S. 931 (1966).

50. On the other hand, a court's inherent powers, plus the admonition in Federal Rule of Civil Procedure 1 that the rules are to be construed to secure the just disposition of every action, are probably adequate to remedy the omission. The difference between the Northern Illinois and Rhode Island rules is primarily one of appearance and attitude only, as the court points out in *Trans World Airlines, Inc. v. Hughes*, 314 F. Supp. 94 (S.D.N.Y. 1970).

51. 285 F.2d 720 (2d Cir. 1960).

52. 535 F.2d 140 (1st Cir. 1976).

53. 417 F. Supp. 498 (D.P.R. 1975).

rule 2(a) as being outside the authority conferred by Federal Rule of Civil Procedure 83. At the time, rule 2(a) read:

a plaintiff, who is not a resident of the State of New York, shall file within twenty days after service upon him of a demand therefor, a bond for costs in the sum of \$250.00, unless the court, on motion and for cause shown, dispenses with the bond or fixes a different amount.

The court of appeals reversed the dismissal, holding that the requirement of a \$6000 bond as security for costs was an abuse of the trial court's discretion that effectively denied the plaintiff his day in court.⁵⁴ While the court in *Farmer* questioned the validity of rule 2(a)'s fixed requirement that a bond of \$250 be posted by all nonresident plaintiffs, it did not invalidate the rule.⁵⁵ Rather, the court reversed what it considered to be an abuse of discretion by the court.

In *Hawes v. Club Ecuestre El Comandante*,⁵⁶ the court considered the validity of rule 5 of the District Court of Puerto Rico. Rule 5 provided in relevant part:

When the plaintiff is domiciled outside of Puerto Rico or is a foreign corporation, a bond shall be required to secure the costs, expenses, and attorneys' fees which may be awarded. All proceedings in the action shall be stayed until bond is given, which shall not be less than five hundred dollars (\$500.00). The court may require an additional bond upon a showing that the original bond is not sufficient security

. . . .

This rule shall be liberally interpreted in favor of the plaintiff so as not to preclude his right to sue through excessive bond requirement. Consistent with this, the Court, for good cause shown, may dispense with this requirement.

The appellant in *Hawes* challenged the order for the bond, alleging that rule 5 contravened the policy of securing an inexpensive determination of every action as expressed in Federal Rule of Civil Procedure 1, placed a limitation on venue in violation of the constitutional principle of equal protection, and obstructed the plaintiff's right to travel interstate in violation of the privileges and immunities clause. The court held that rule 5 did not violate the policy or letter of the federal rules because it is to be "liberally construed" so as not to preclude the plain-

54. 285 F.2d at 721.

55. The case has been wrongly cited as though it did invalidate the rule in 12 WRIGHT & MILLER, *supra* note 12, at 231-32.

56. 535 F.2d 140 (1st Cir. 1976).

tiff's right to sue.⁵⁷ The court also found that the appellant's constitutional claims were without merit, because the distinction rule 5 draws between resident and non-resident plaintiffs is rationally related to the end of enforcing an award for costs against a non-resident who may be out of the court's jurisdiction at the time of judgment.⁵⁸ A district court reached a similar conclusion in *Kreitzer v. Puerto Rico Cars, Inc.*,⁵⁹ in ruling on a similar attack on a revised version of the same rule.

While upholding the validity of rule 5, the court in *Hawes* was careful to point out that "the district court is under an obligation to evaluate each case individually, and to exercise its inherent discretion to apply the requirements of rule 5 so as to facilitate a just and speedy determination on the merits as required by Fed. R. Civ. P. 1."⁶⁰ Further, the court pointed out that "to require *all* foreign plaintiffs, *as such*, to post substantial security as a condition to access to the courts may well be an unconstitutional denial of equal protection."⁶¹

As was true of supersedeas bonds, local rules concerning security for costs only conflict with the Federal Rules of Civil Procedure or the Constitution if they preclude the use of judicial discretion.⁶² The great majority of local rules on this matter do provide for the use of judicial discretion in determining if a bond is necessary. Some rules, however, impose the requirement of a bond as a matter of course and allow for reduction or elimination of the bond only for good cause shown by the plaintiff. A few rules do not explicitly provide for the use of discretion, at least insofar as eliminating the requirement for a bond is concerned.⁶³ If the discretion is not abused, as it was in *Farmer*, enforce-

57. *Id.* at 143.

58. *Id.* at 145.

59. 417 F. Supp. 498 (D.P.R. 1975).

60. 535 F.2d at 145.

61. *Id.* at 145 (emphasis added) (quoting *Coady v. Aguadilla Terminal, Inc.*, 456 F.2d 677, 679 (1st Cir. 1972)).

62. But again, inherent power may be adequate. See notes 39, 44 & 50 *supra*. A constitutional attack was also found wanting in *Brewster v. North Am. Van Lines*, 461 F.2d 649, 651 (1972). In *Hawes*, the court enumerated several factors to be considered by a court in determining whether a bond is necessary. These include ownership by a non-resident plaintiff of attachable property in the district, the likelihood of success on the merits, the presence of a co-plaintiff who is domiciled in the district, the conduct of the litigants, and the purposes of the litigation. 535 F.2d at 144.

63. Local rules on non-resident plaintiff bonds are either discretionary, mandatory upon request of the defendant or purely mandatory.

Local Rules which provide that a bond is discretionary include: N.D. ILL. C.R. 2; S.D. ILL. R. 2; N.D. IND. R. 4 ("Upon good cause shown"); D. NEB. R. 15(F); D.N.D. R. XXIV(C)(1) (upon good cause and defendant's motion); W.D. PA. R. 9(a) (good cause and motion by defendant); M.D. PA. R. 701.4 ("may"); D.P.R. R. 5 (good cause); W.D. WASH.

ment of the rule presents no problem.

Rules providing for posting of bonds by non-resident plaintiffs differ from rules on supersedeas bonds in that they add a requirement not specified in the federal rules. Once again, a useful purpose is served by specifying the instances in which the requirement is likely to be imposed. This puts lawyers and their clients on notice, alerting them to the need to show special circumstances if they require treatment that differs from the court's normal practice.

3. Limitations on discovery

As with cost bonds, local rules that establish a discovery cutoff date also add a requirement not in the national rules. Discovery time limits have been criticized on the grounds that they make routine a decision that should be tailored to a particular case⁶⁴ but they have not been characterized as impermissible in general. The Columbia Note authors say, "[t]he wide differences in the times allotted by the rules themselves suggest that it is not possible to predetermine accurately how much time is reasonable in particular classes of cases The rule-making approach saves judicial time and effort at the expense of the policies behind the federal discovery rules."⁶⁵

This is a large topic that cannot be treated in detail here. Convincing empirical evidence demonstrates that court-imposed discovery cutoff dates are valuable in keeping discovery within reason.⁶⁶ No prohibition of this activity exists.⁶⁷ Abuse of discovery is a matter of wide-

R. G.R. 5(a) ("may"); W.D. Wis. R. 3(a); D. MONT. R. 17(b) (good cause); E.D. PA. R. 38(a).

Local rules which make the posting of a bond mandatory upon defendant request include: D. IDAHO R. 7; D. ME. R. 33; D. MD. R. 31; D.N.J. R. 35(D); W.D.N.Y. R. 25; E.D. WASH. R. 23(a).

Posting of a bond is mandatory under the following rules: E.D. & W.D. ARK. R. 4(b); D. HAWAII R. 7; S.D. IND. R. 4; E.D. ILL. R. 2(a).

64. Columbia Note, *supra* note 3, at 1262; 12 WRIGHT & MILLER, *supra* note 12, at 238. Raising an issue that is now moot, the authors of the Columbia Note question the related practice of granting leave to take depositions within twenty days of filing. Columbia Note, *supra* note 3, at 1262. Before 1970, rule 26 required the plaintiff to obtain leave of court in order to take a deposition noticed within that period. The authors are clearly correct that to grant leave by rule was "an extreme violation of the clear purpose [of the old rule] . . . invalid on its face as 'inconsistent' with rule 26." *Id.*

65. Columbia Note, *supra* note 3, at 1262.

66. See P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY ch. VI. (Federal Judicial Center 1978) [hereinafter cited as JUDICIAL CONTROLS]. See also note 31 *supra*.

67. Indeed, the *Miner* Court noted that "rules fixing the time for doing certain acts are the essence of orderly procedure." 363 U.S. at 648-49. Of course, discretion may not be abused.

spread concern, and there have been several recent proposals to limit discovery rights by rule amendment.⁶⁸ To date, those proposals have been rejected or modified on the ground that judicial management is a more flexible and useful approach.⁶⁹ The National Commission for the Review of Antitrust Laws and Procedures recently endorsed judicial controls as a better approach to restrict discovery than more drastic measures, stating that "when the parties lack incentives to expedite the case, judicial control is the single most important factor in eliminating waste and delay."⁷⁰ Because the power to set an appropriate discovery deadline is not questioned, and doing so has been found generally permissible within the court's discretion, this is another area in which it is useful to promulgate a local rule, so the bar knows what the court will allow in most cases.

Ultimately, this becomes a question of local administrative policy, which the criticisms of local rules do little to illuminate. If a court finds that its caseload is sufficiently uniform and the judges' policies on discovery sufficiently similar that a ninety-day limitation will be found realistic in most cases, then it seems useful, as with other aspects of court discretion, to so inform the bar by local rule. However, if either condition (or both) does not hold, very likely there should not be a rule. Certainly there should not be a rule if one or more judges normally impose no cutoff date or allow a period much longer or shorter than the others. In that case, a rule will be more misleading than informative. However, it may be possible to establish agreement on policy and practice through promulgating a rule, provided the judges of a court agree to be bound by it.

The Columbia Note authors fail to show any clearly objectionable features of the cutoff rules they criticize. They criticize an Arkansas rule, which has since been revoked, that seemed to establish a very high standard for exceptions to the rule-imposed cutoff because it required "manifest injustice."⁷¹ Actually this rule only prohibited discovery af-

68. See, e.g., ABA Litigation Section, Report of the Special Committee for the Study of Discovery Abuse (Oct. 1977) [hereinafter cited as ABA Report].

69. The [Advisory] Committee [on Civil Rules] believes that abuse of discovery, while very serious in certain cases, is not so general as to require such basic changes in the rules that govern discovery in all cases In the judgment of the Committee abuse can best be prevented by intervention by the court as soon as abuse is threatened.

Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure 5 (Feb. 1979) (Committee on Rules of Practice and Procedure, Judicial Conference of the United States).

70. Report to the President and the Attorney General 18 (Jan. 22, 1979).

71. E.D. & W.D. ARK. R. 9(e) (rescinded 1979).

ter the pretrial conference, and no earlier limitation was mentioned. Unlike the other cutoff rules the Columbia Note authors considered, that rule was not primarily a discovery provision at all. Its purpose was to protect the integrity of the pretrial process by assuring that the pretrial order would be meaningful. Because discovery between pretrial and trial can clearly be an instrument of surprise at trial, it is hard to see how such a limitation could conflict with the structure or purpose of the rules.

Another criticized provision, Western District of North Carolina General Rule 10, sets a ninety-day limit on discovery following joinder of issue, permitting exceptions for the "exceptionally difficult case." Data now available suggest that this rule provides reasonable guidance, though perhaps a one hundred twenty-day limit would be better.⁷²

The District of Massachusetts has an odd requirement, regarding the issuance of a notice of delinquency in responding to interrogatories, that is more likely to delay discovery than to expedite it. The rule states:

If a party on whom interrogatories have been served does not serve answers or objections, as appropriate, within the time allowed, the party who served the interrogatories may apply in writing to the clerk for issuance to the delinquent party of a notice of his delinquency. The clerk shall issue such a notice on application, and the party making the application shall not for 20 days thereafter make a motion for an order compelling an answer or an order penalizing the delinquent party for failing to serve answers.⁷³

In effect, the rule prevents a lawyer from filing a motion to compel until he has completed this novel step and waited twenty days. Not only does the rule withdraw for this period a power granted in Federal Rule of Civil Procedure 37(a),⁷⁴ it also delays any motion for sanctions that might turn out to be necessary. This rule has not been attacked,⁷⁵ though it seems more questionable than the cutoff provisions.

72. JUDICIAL CONTROLS, *supra* note 66, at 80-81.

73. D. MASS. R. 15(g).

74. Federal Rule of Civil Procedure 37(a) provides for sanctions for failure to make discovery after giving the appropriate parties notice and making application to the appropriate court.

75. A related group of provisions, designed to assure that discovery is automatic and does not normally involve the court, was singled out for praise by two commentators. The most common is the requirement that parties must confer on discovery disputes before applying to the court for resolution. See *Local Rules Survey*, *supra* note 12, at 1048 (citing 4A J. MOORE, FEDERAL PRACTICE ¶ 26.02[5] (2d ed. 1980)).

4. Interrogation of jurors

Local rules that limit interrogation of jurors after verdict are the subject of a vigorous attack by Raymond Caballero, a lawyer in El Paso, Texas.⁷⁶ Mr. Caballero believes that these rules are "facially invalid."⁷⁷ The rule he attacks reads as follows:

No attorney or any party to an action or any other person shall himself or through any investigator or other person acting for him interview, examine or question any juror, relative, friend or associate thereof either during the pendency of the trial or with respect to the deliberations or verdict of the jury in any action, except on leave of court granted upon good cause shown.⁷⁸

Many district courts have promulgated comparable local rules.⁷⁹ The rules are designed to safeguard the interests of freedom of deliberation, promote stability and finality of verdicts, and protect jurors from harassment and embarrassment.⁸⁰ While the law is replete with cases stating that contact with jurors after trial is either disfavored or prohibited outright unless leave of court is obtained,⁸¹ the issues of whether and how the post-trial interviewing of jurors should be controlled by court rule have not been resolved.

On the one hand, the lack of an express federal prohibition of post-trial interviews indicates that the matter should be dealt with on a case-by-case basis. Rule 606(b) of the Federal Rules of Evidence,

76. Caballero, *Over-Exercise*, *supra* note 5. See also, *Conference on Rule Making*, *supra* note 5, at 48.

77. Caballero, *Over-Exercise*, *supra* note 5, at 328.

78. W.D. TEX. R. 20.

79. The following rules regulate the post-verdict interrogation of jurors: N.D. ALA. R. 10 (communication permitted after juror's release from service); S.D. ALA. R. 12 (court's permission after formal written petition); D. CONN. R. 12(f) (no interrogation of jurors regarding deliberations except as permitted by the court in open court); D.D.C. R. 1-28 (leave of court, good cause, in open court); E.D. LA. R. 14.5 (no jurors may be interviewed without court order); W.D. LA. R. 16 (leave of court, good cause shown); D. MD. R. 25A (leave of court, good cause shown); S.D. MISS. R. 16 (attorney shows judge relevant evidence; if "probable cause" found, attorney can question juror); E.D. MO. R. 16(D) (leave of court, good cause); W.D. TEX. R. 20 (leave of court, good cause); D. WYO. R. 18(b) (written interrogatories with affidavit giving reasons; interview according to interrogatories; second affidavit giving results of interview).

80. See *McDonald v. Pless*, 238 U.S. 264, 265-69 (1915) (juror impeachment); *United States v. Moten*, 582 F.2d 654, 665 (2d Cir. 1978) (discussion of these interests in relation to FED. R. EVID. 606(b), which regulates juror interrogation).

81. See, e.g., *Miller v. United States*, 403 F.2d 77 (2d Cir. 1968); *United States ex rel. Daverso v. Hohn*, 198 F.2d 934 (3d Cir. 1952); *United States v. Driscoll*, 276 F. Supp. 333 (S.D.N.Y. 1967).

which allows jurors to give affidavits concerning untoward influences on their verdicts, also encourages an adjudicative approach to the question. In suggesting that reasonable grounds be present before juror interviews are conducted,⁸² and that the interviews be conducted with "circumspection and restraint,"⁸³ the American Bar Association implicitly favors this approach. The contrary position is embodied in the view that the post-trial questioning of jurors "must only be conducted under the strict supervision and control of the court, with inquiry restricted to those matters found by the court as both relevant and proper."⁸⁴ In other words, the court is regarded as best able to address the interests at stake in such situations.

The absence of federal statutes prohibiting judicial control of juror interviews seems ample authority, pursuant to Federal Rule of Civil Procedure 83, Federal Rule of Criminal Procedure 57, and 28 U.S.C. section 2071, to justify the existence of local rules such as the Western District of Texas rule. Since none of these local rules have been directly challenged in court, Mr. Caballero's complaint remains a personal expression of one side of a policy issue, and an assertion that discretion has been abused in certain cases. Abuse of discretion in connection with this local rule, however, is a more likely subject for a practical appeal than on many others, because a final judgment exists.

Again we are dealing with a local rule that defines the court's exercise of discretion. With regard to juror interviews, perhaps this one only restates the case law. Still, Mr. Caballero's complaint raises a question of policy, even if the rule in question appears to be lawful. Caballero certainly has identified a dilemma thrust upon the lawyer who suspects that improper influence reached a jury. The lawyer may not interview jurors unless he can show improper influence, yet perhaps he cannot make a showing until he *has* interviewed jurors. A national rule might be considered that would specify more precisely the showing required for a lawyer to have access to jurors. This presents a useful opportunity to take advantage of local experience in determining what should or should not be included in the national rules.

82. ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, The Defense Function § 7.3(c) (1971). *See also* United States v. Moten, 582 F.2d 654, 667 (2d Cir. 1978).

83. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-30.

84. United States v. Brasco, 516 F.2d 816, 819 n.4 (2d Cir.), *cert. denied*, 423 U.S. 860 (1975).

5. Payment of deposition expenses

Two local rules that provide for payment of expenses when a deposition is to be taken at a distant place have been criticized because they reverse the burden, which is on the party being deposed, to show that the contemplated discovery will impose a hardship.⁸⁵ While both rules are certainly questionable, one of them⁸⁶ only informs the bar of what the court "may provide" in what would be a clearly lawful protective order. This provision is little more than notice of the court's likely stance. The other rule does provide that the court "shall . . . prepay or secure the cost of travel"⁸⁷ of opposing counsel within certain limits, a novel provision that surely belongs in the federal rules, if anywhere.

6. Summary

The rules we have examined thus far seem to do little more than restate the discretion available to the court, or attempt to define how available discretion will be exercised. The latter seems clearly useful in informing lawyers of court policy, the former is only slightly less so. The few rules that define a court policy without explicit provision for variation when exceptional circumstances are shown are questionable. This seems to be mostly a drafting error with no great practical significance.⁸⁸

No error uncovered thus far supports a characterization of local rules as "an unmitigated disaster" or a reliance "on prefabricated solutions rather than analysis in dealing with unresolved problems."⁸⁹ However, as with the rules that provide travel costs for depositions, there is always a potential danger when local rules are used to state or restate court discretion. Drafters of local rules must be careful not to create a new presumption or reverse an existing burden as they try to describe a court policy that itself is within the rules.⁹⁰

B. Minor Problems

A sizable group of purported abuses do not withstand analysis.

85. Cohn, *supra* note 12, at 283.

86. N.D. ILL. CIV. R. 4(a).

87. E.D. VA. R. 21(B)-(C).

88. Of course, all federal rules, including local rules, are subject to the proviso that: "They shall be construed to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1. In addition, judges have often found the necessary discretion, whether it was expressly provided or not. *See* note 50 *supra*.

89. Columbia Note, *supra* note 3, at 1271.

90. *See* text accompanying notes 119-27 *infra*.

Several local rules claimed to be abusive are not, or the problems posed are moot or inconsequential.

Perhaps the most notable instance of local rules that pose few problems are those that invoke state practice. The Columbia Note authors say that "some local rules call for state procedure to govern in the absence of any controlling federal rule. . . . Such rules undermine the whole concept of an independent federal system."⁹¹ Only slightly less emphatic, Wright and Miller, relying on some of the same rules, say:

Some districts have a local rule saying that the procedure in the state courts shall govern in the absence of any controlling federal rule. Provisions of that kind destroy the power intended to be granted by the final sentence of Rule 83 and are at least a vestigial return to the era of conformity with state procedure that it was a principal purpose of the Civil Rules to end.⁹²

Rule 83 certainly had the purpose mentioned,⁹³ and a local rule that required conformity in this fashion would indeed be contrary to its purpose. But no such local rule appears to exist now.⁹⁴ Consider the following current rules, establishing a procedure in absence of a rule, which were cited in both commentaries:⁹⁵

Whenever a procedural question arises which is not covered by the provisions of any statute of the United States, or of the Federal Rules of Civil Procedure or of these rules, it shall be determined, if possible, by the parallels or analogies furnished by such statutes and rules. If, however, no such parallels or analogies exist, then the procedure heretofore prevailing in courts of equity of the United States shall be ap-

91. Columbia Note, *supra* note 3, at 1261 n.55 (citing S.D. CAL. R. 27; N.D. GA. R. 2; N.D. ILL. CIV. R. 19).

92. 12 WRIGHT & MILLER, *supra* note 12, at 244 (footnotes omitted).

93. Columbia Note, *supra* note 3, at 1261 n.55. See text accompanying notes 3 & 4 *supra*.

94. There is no adequate collection of outdated local rules. The "rules room" in the library of the Supreme Court contains a file folder for local rules furnished by each court, pursuant to rule 83. A search of those files did not uncover any "conformity rules" stronger than those quoted. However, the files may not be complete.

95. Since the Columbia Note was written, the Southern District of California was split, and the Central District created. Pub. L. No. 89-372, § 3, 80 Stat. 75 (1966) (amending 28 U.S.C. § 84). See Carl Baar, *When Judges Lobby: Congress and Court Administration* (1969) (Unpublished Dissertation, U. of Chicago). The Central District itself may shortly be split. H.R. REP. NO. 2505, 96th Cong., 1st Sess. (1979). Until the new Southern District recodified its rules in 1979, the Central and Southern Districts had similar rules and numbering systems. Thus, present Central District Rule 27 is the Southern District Rule referred to in the Columbia Note passage quoted at note 91 *supra*.

plied or, in the absence thereof, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.⁹⁶

Whenever a procedural question arises which is not covered by the provisions of any statute of the United States, or of the Rules of Civil Procedure, or of the Rules of the United States District Courts for the Eastern and Southern Districts of New York, it shall be determined, if possible, by the parallels and analogies furnished by such statutes and rules. If, however, no such parallels or analogies exist, then the procedure heretofore prevailing in courts of equity of the United States shall be applied, or in default thereof, in the discretion of the court, the procedure which shall then prevail in the Supreme Court or the Surrogates Court as the case may be of the State of New York may be applied.⁹⁷

These rules and their counterparts elsewhere provide nothing more than advice. They do not require conformity with state practice, they only suggest that approach among many others. It may add nothing to tell lawyers that state law "may" be applied if all else fails, but there is no harm in doing so. The framers of rule 83 probably would have permitted a *more* prominent place to the conformity approach, among the many possibilities mentioned. Addressing a question about the meaning of rule 83, committee chairman William D. Mitchell said:

That doesn't say they must follow the state practice under the Conformity Act. They may follow the state practice, if they think that is an adequate one, and probably will in most cases, but the Conformity Act does not fill the gap. The district judges fill it. We hope there are not going to be many gaps, but you never can tell, and we had to provide for that situation.⁹⁸

"Conformity" in this broad sense is probably fairly common in federal courts,⁹⁹ and it is difficult to quarrel with. A recent study by the

96. C.D. CAL. R. 27.

97. S.D.N.Y. G.R. 8.

98. ABA INSTITUTE (Cleveland), *supra* note 4, at 189.

99. For example, the following local rules specify a procedure in absence of rule: D. IDAHO R. 25; N.D. ILL. R. 19; N.D. W. VA. R. 2.31. These rules generally state that if no federal rule is applicable, procedural questions shall be determined "by the parallels or analogies furnished by such statutes and rules." Note, however, the following deviations: N.D. OHIO R. 21.04 ("In any proceeding or in any instance where there is no applicable rule or procedure, a Judge may prescribe the same."); D. ALASKA R. 36 ("The court may in the

Federal Judicial Center found that *voir dire* practice often follows state practice.¹⁰⁰ Because most federal trial lawyers have a substantial state practice, and federal judges are often recruited from their ranks, it would be surprising if this effect did not exist. As a matter of policy it seems appropriate for federal courts to follow state practice in most instances where no other guide exists. It would seem perverse to depart from procedures judges and lawyers are familiar with unless there is a compelling reason.

Actually, there are provisions elsewhere that are stronger in urging conformity than any local rules. For example, Federal Rule of Civil Procedure 4(d)(2) provides that service shall be made as follows:

Upon an infant or incompetent person, by serving the summons and complaint *in the manner prescribed by the law of the state in which the service is made* for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state. (emphasis added).

In *Dredge Corp. v. Penny*¹⁰¹ a local rule was found invalid because it denied a right to oral argument in motions for summary judgment. The offending rule has been withdrawn, and no other rules now in effect contain similar language.¹⁰²

exercise of its discretion excuse compliance with these rules if interests of justice so require.”).

One commentator identified five local rules that expressly incorporate state practice on continuances. All of these have been withdrawn except W.D. Wis. R. 10. *Local Rules Survey*, *supra* note 12, at 1059 n.315.

100. “The percentage of federal judges allowing oral participation by lawyers is greatest in states in which state court rules either emphasize lawyer participation or are discretionary, as in Federal Rules of Civil Procedure 47(a).” G. BERMANT & J. SHAPARD, *THE VOIR DIRE EXAMINATION, JUROR CHALLENGES, AND ADVERSARY ADVOCACY* 23 (1978) (Federal Judicial Center 1968). On the other hand, Mr. Caballero argues cogently that there should be a national policy on such an important matter, defined in the federal rules. Caballero, *Overexercise*, *supra* note 5, at 328.

101. 338 F.2d 456, 462 (9th Cir. 1964).

102. The requirement established in *Dredge*, that local rules not preclude a party from requesting oral argument, nor deny such a request unless the summary judgment motion is to be denied, is followed by every local rule on summary judgments. The following rules mention summary judgment motions. Those in which Federal Rule of Civil Procedure 56 is mentioned are flagged with an asterisk: S.D. ALA. R. 8; D. ALASKA R. 5(C), 5(H); D. ARIZ. R. 11(e), 11(h); C.D. CAL. R. 3(g); E.D. CAL. CIV. R. 116; D. CONN. R. 9(d); D.D.C. R. 1-9(h); S.D. FLA. R. 10(J); *N.D. GA. R. 91.71, 91.72; *S.D. GA. R. 6.6; D. HAWAII R. 2(3); D. IDAHO R. 4(e); S.D. ILL. R. 7; N.D. IND. R. 7(b); S.D. IND. R. 8; E.D. LA. R. 3.9, 3.10; M.D. LA. R. 5(E); *D. NEB. R. 20(H); D.N.M. R. 9(j); *N.D.N.Y. R. 10(e); *S.D.N.Y. R. 9(g); D.R.I. R. 12.1; W.D. TENN. R. 8(d); N.D. TEX. R. 5.2(a); E.D. VA. R. 11(G); D. WYO. R. 6(d).

District Court of Rhode Island Rule 12.1 specifically gives effect to the language used in

Other rules are no longer improper because provisions of the Federal Rules of Civil Procedure with which they once conflicted have themselves been changed.¹⁰³ In a few minor instances, old local rules are now improper because a change in the federal rules introduced a conflict. For example, a 1963 amendment to rule 58 forbids a district court to direct attorneys to prepare forms of judgment as a matter of course. Several local rules still direct attorneys to prepare judgments.¹⁰⁴ While these rules are obsolete and unlawful, it seems likely that they have minimal practical effect because a judge remains free to order an attorney to draft a form of judgment in any appropriate case. In a case that seemed not "appropriate," it seems unlikely that the presence of the rule would lead the court to insist upon this practice over a lawyer's objections.

Rule 30 of the Western District of Pennsylvania contains an unusual provision that adds a specification regarding pleading practice.¹⁰⁵ The rule, entitled "Claim for Damages Unliquidated," reads as follows: "Except for any required jurisdictional allegation of the amount in controversy, a pleading demanding relief for elements of general damages unliquidated in amount shall, without claiming any specific sum, set forth only that money damages are claimed and may specify the categories of damages so claimed."¹⁰⁶ This rule is still enforced before this court. A reference to the rule in a published opinion clearly suggested the judge expected pleadings to meet this novel requirement.¹⁰⁷ Although the rule adds a pleading requirement, it is only a minor addition essentially consistent with the intent to keep pleadings simple.

The Wright and Miller treatise cites, as the "clearest examples" of improper local rules, two local rules of the Court of Appeals for the First Circuit.¹⁰⁸ Local rule 8 provides that a case will be docketed as soon as the record is received, "notwithstanding" rule 12 of the Federal Rules of Appellate Procedure, which requires a court to wait until the fee has been paid. The main problem with this rule is the insertion of

Dredge. See also *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 391-92 (6th Cir. 1975) (court upheld Northern District of Ohio Rule requiring application before oral argument will be permitted).

103. See Columbia Note, *supra* note 3, at 1262 (deposition limitation).

104. C.D. CAL. R. 7a; E.D. CAL. R. 121; D. IDAHO R. 18a; N.D. OHIO R. 5.02 (prevailing party prepares "at the court's direction"); E.D. OKLA. R. 23; W.D. OKLA. R. 22; E.D. WASH. R. 20; D. WYO. R. 23.

105. This rule, and the objection to it, were brought to the author's attention by Professor Wright in a personal communication, May, 1978.

106. W.D. PA. R. 30.

107. *Knouff v. United States*, 74 F.R.D. 555, 557 (W.D. Pa. 1977).

108. 12 WRIGHT & MILLER, *supra* note 12, at 219.

the word "notwithstanding," which makes a valid rule appear invalid. Local rule 8 only reiterates the position of the Supreme Court in *Parissi v. Telechron*.¹⁰⁹ Federal Rules of Appellate Procedure 3 and 12 were recently amended to conform to this decision.¹¹⁰ To greater effect, Wright and Miller also criticize¹¹¹ First Circuit Rule 11(c), which also uses the impermissible "notwithstanding," and states that the court "may decline to refer to portions of the record omitted from the Appendix" Federal Rule of Appellate Procedure 30 says "[t]he fact that parts of the record are not included in the appendix shall not prevent parties or the court from relying on such parts." Here the use of "may" in the First Circuit rule seems to forestall a part of the conflict, though conflict does remain. Upon analysis, these "clear" examples of improper rules appear to be nothing of the kind. Only the gratuitous use of the word "notwithstanding" suggests an apparent conflict with the federal rules, but in operation the word adds nothing to either rule.

C. Consequential Problems

1. Six-member juries

Perhaps the most serious abuse of the power to make local rules is the widespread rule¹¹² providing for a six-member jury in civil cases. The spread of this rule seems to have followed from the interest of Chief Justice Warren E. Burger, who has urged district courts to adopt this rule not only as a direct economy measure, to reduce juror expense and inconvenience, but also to speed the courts' handling of civil jury trials.¹¹³

Whether six-member juries are a good policy or not is a complex

109. 349 U.S. 46 (1955). The *Parissi* Court held that "the Clerk's receipt of the notice of appeal within the 30 day period satisfied the requirements of § 2107, and that untimely payment of the § 1917 fee did not vitiate the validity of the petitioner's notice of appeal." *Id.* at 47.

110. See H.R. Doc. No. 96-112 (transmitting amendments to various federal rules, May 1, 1979), at 33-34, 51-52.

111. 12 WRIGHT & MILLER, *supra* note 12, at 219.

112. Eighty-five of the ninety-five courts had such a rule in September, 1978, as reported to the Judicial Conference of the United States; Proceedings (1978) at 78.

113. In addition to informal settings within the judiciary, the Chief Justice has encouraged use of a smaller civil jury in various addresses and interviews. See *Slow Justice is Inadequate Justice*, FORBES 21, 22 (July 1, 1971); *The State of the Federal Judiciary Address* (1971), reprinted in 57 A.B.A.J. 855, 860 (1971); *Annual Report on the State of the Judiciary 4* (Feb. 16, 1976), reprinted in 62 A.B.A.J. 443 (1976); Year-end Report of the Judiciary 7 (Jan. 1, 1978); State of the Judiciary Address 4 (1978).

At its meeting of March 15-16, 1971, the Judicial Conference of the United States approved "in principal" a reduction in jury size, leaving open the question whether this should be accomplished by rule or statute. Proceedings (1971), at 5-6.

problem. The costs and the benefits are not fungible, and they are hard to calculate on any basis. The savings of six-member juries are all expressible in dollar terms in principle, though a rigorous accounting would be complex and has never been undertaken. One would need to assign a value to jurors' opportunity costs, and add in the juror fees and apply these to an adequate estimate of the number of juror days to be saved, assuming that the number of days of jury trial would not change as a result of the rule. More difficult, but surely possible, would be estimating the number of trial days a six-member jury rule would save, and assigning a dollar value to the result, calculating costs to parties and to the court. These calculations could produce an estimate of the total savings from the rule, which in the final analysis are probably substantial.

But how do we make a corresponding calculation of the cost of the change? Richard Lempert has made a convincing showing that different verdicts are highly probable in a small proportion of cases: the close ones.¹¹⁴ It seems likely that Chief Justice Burger did not anticipate this, and expected little or no impact of the rule on outcomes. Indeed, he has said as much in voting with the majority in *Colgrove v. Battin*,¹¹⁵ which upheld local rules providing for six-member juries. Treating the matter for the moment as one of policy rather than law, it is quite possible to imagine an acceptable justification for this rule as an economy measure, though the difficulty of measuring the costs and benefits assures that the matter will remain controversial.

As a matter of law interpreting rule 83, the *Colgrove* decision now seems impossible to sustain. Surely the six-member jury is a "basic procedural innovation" at least of equal consequence as depositions in admiralty cases, discussed in *Miner v. Atlass*.¹¹⁶ In *Ballew v. Georgia*,¹¹⁷ the Court found five-member juries to be unconstitutional in a criminal case, so one may presume that a six-member jury must amount to a basic change. *Colgrove* could only be valid if it is read as a shift away from the *Miner* standard that would permit innovation and experimentation within the local rulemaking power on a larger scale than the Court previously thought permissible. Whatever the problems

114. Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 643 (1975).

115. 413 U.S. 149 (1973). *Colgrove* has been widely criticized. See, e.g., Hazard, *Undemocratic Legislation*, 87 YALE L.J. 1284, 1285 (1978); Grofman, *Jury Decision Making Models and the Supreme Court*, 2 LAW & POL'Y Q. 285 (1980); 12 WRIGHT & MILLER, *supra* note 12, at 221-22.

116. 363 U.S. 641 (1960).

117. 435 U.S. 223 (1978).

with six-member juries, however, the rule does not make the case for critics of local rules because the Supreme Court declared it acceptable.¹¹⁸

2. Limits on the number of interrogatories

More compelling as a problem with local rules is the rule adopted in nine districts that limits the number of interrogatories that may be filed unless leave is obtained. Maryland Rule 6(B) is typical, though other courts permit different numbers of interrogatories:¹¹⁹ "Unless otherwise permitted by the court for good cause shown, no party shall serve upon any other party, at one time or cumulatively, more than 30 written interrogatories, including all parts and subparts, pursuant to Rule 33, F.R. Civ. P."

Rule 33 of the Federal Rules of Civil Procedure provides that any party may serve written interrogatories upon any other party. Rule 26(a) provides that "[u]nless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited." Thus, the number of interrogatories that may be propounded by a party is limited only by the court's discretion in protecting a party from "annoyance, embarrassment, oppression, or undue burden or expense," as Federal Rule of Civil Procedure 26(c) provides. Such a protective order will be provided only upon motion of the party seeking protection and only for good cause shown. The burden of proving that certain interrogatories, or other discovery devices, are burdensome or oppressive rests with the party seeking the court's protection.

Case law on this subject is in accord with the liberal interpretation to be given discovery under the federal rules. In *Kainz v. Anheuser-*

118. With one unusual circumstance: *Colgrove* placed Chief Justice Burger in the anomalous position of passing on his own work, given his previous role in encouraging use of reduced civil juries. Judge Weinstein has shown that courts of appeals are sometimes in a similar position when they are asked to review work they have initiated or approved as a Judicial Council under 28 U.S.C. § 332. WEINSTEIN, *supra* note 2, at 126. Since, under 28 U.S.C. § 331, a Chief Justice presides over the Judicial Conference of the United States, this anomaly is inevitable on occasion, as cases that question Conference policies or actions find their way to the Court. The author is not aware of any other case in which any Chief Justice has recused himself on these grounds, so probably Chief Justice Burger was on firm precedential ground in hearing *Colgrove*. If the Chief Justice's responsibilities to the Judicial Conference were removed and assigned elsewhere, as Chief Justice Burger has suggested, this problem would not exist.

119. See, e.g., M.D. FLA. R. 303 (50 maximum); N.D. MISS. R. C-12 (2 sets: 1st set 30 maximum; 2d set 20 maximum); D. WYO. R. 7(f) (50 maximum); S.D. FLA. R. 10(I) (40 maximum); D. MD. R. 6(B) (30 maximum); S.D. MISS. R. 17 (30 maximum); W.D. TENN. R. 9(g) (30 maximum); S.D. CAL. R. 230-1 (25 maximum); N.D. ILL. R. 9(g) (20 maximum).

Busch, Inc.,¹²⁰ the plaintiff objected to the number of interrogatories propounded by the defendant on the ground that their excessive number made the interrogatories vexatious and oppressive. In support of this claim, the plaintiff alleged that it would take one week to prepare answers to the interrogatories. In overruling the objection of the plaintiff, the court recognized that answering the interrogatories might indeed be burdensome.¹²¹ The court noted, however, that

the fact that interrogatories may be burdensome is alone not enough to excuse a party from answering. Use of the liberal discovery techniques provided by the Federal Rules may often prove time consuming and expensive

The fact that the interrogatories number forty-one is no basis for objection

The limits imposed by the requirements of justice [to protect the party from annoyance, expense, embarrassment, or oppression] are not to be found in the application of some fixed formula, but must be determined by the circumstances of the case.¹²²

In support of this position, the court cited the Advisory Committee note to the 1948 amendment of rule 33, which states:

it is provided that the number of or the number of sets of interrogatories to be served may not be limited arbitrarily as a general policy to any particular number, but that a limit may be fixed only as justice requires . . . in individual cases. The party interrogated, therefore, must show the necessity for limitation on that basis.¹²³

Numerous decisions hold that a specified number of interrogatories will not be considered burdensome¹²⁴ and that the burden of proving that interrogatories are burdensome rests with the party objecting to them.¹²⁵

Local rules dealing with interrogatories also shift the burden of proof concerning whether or not the interrogatories are oppressive from the party being interrogated to the interrogator. Finally, they depart from a steady evolution that has loosened restrictions on interroga-

120. 15 F.R.D. 242 (N.D. Ill. 1954).

121. *Id.* at 247.

122. *Id.* at 247-48.

123. *Id.* See also *United States v. Kordel*, 397 U.S. 1, 9 (1969) (respondent has the burden of proving that government interrogatories are improper).

124. See, e.g., *Stoneybrook Tenants Ass'n v. Alpert*, 29 F.R.D. 165, 168 (D. Conn. 1961).

125. See, e.g., *Luey v. Sterling Drug, Inc.*, 240 F. Supp. 632, 634 (W.D. Mich. 1965).

tories. Rule 33 was more restrictive before a 1970 amendment, so local rules that modify it depart from a specific, recently articulated national policy.¹²⁶

So far, no case has invalidated or upheld a local rule limiting interrogatories to a specific number.¹²⁷ This lack of judicial review leaves these local rules on the books even though they conflict with the Federal Rules of Civil Procedure. The local rules may have served a useful purpose, however, because they have provided an opportunity to gain experience on a limited scale with a provision that interests several national bodies.¹²⁸ So far, where the provision has been tried, the experience seems to have been generally favorable.¹²⁹

3. Restrictions on communications in class action suits

Local rules have been found invalid that restrict communications by class action lawyers with members of the class.¹³⁰ These rules have their source in the work of a series of national bodies, and the unsatisfactory experience with them strongly suggests that Federal Rule of Civil Procedure 23, which governs class actions, should be modified. The *Manual for Complex Litigation (Manual)* identifies several potential abuses to which the class action suit is subject. These are:

- 1) solicitation of direct legal representation of potential and actual class members who are not formal parties to the class action;
- 2) solicitation of funds or agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action;
- 3) solicitation by

126. See 8 WRIGHT & MILLER, *supra* note 12, at § 1261; JUDICIAL CONTROLS, *supra* note 66, at ch. I.

127. See Bauer, *General Local Rule 9(g) of the United States District Court for the Northern District of Illinois and the Federal Rules of Civil Procedure: Are They Consistent?* 9 J. MAR. J. PRAC. & PROC. 923 (1976), for a highly critical analysis.

128. See, e.g., ABA Report, *supra* note 68, at 20. Since the Committee on Rules of Practice and Procedure in its February 1979 revision dropped the proposal to limit interrogatories by local rule, we do not know the Committee's rationale, or whether it has taken advantage of local experience, because no comments were printed on proposals that were dropped. However, the earlier Preliminary Draft of March 1978 had converted the ABA proposal for a uniform national rule into a new proposal that authorized local rules to limit interrogatories. The Committee made specific reference to local conditions that might govern the choice among courses of action and requested the views of bench and bar on the point. Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Mar. 1978) (Committee on Rules of Practice and Procedure, Judicial Conference of the United States).

129. Oral reports to the author by judges in the Northern District of Illinois, the District of Maryland, and the Southern District of California.

130. *E.g.*, W.D. PA. R. 34(d).

defendants of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23; and 4) unauthorized direct or indirect communications from counsel or a party, which may misrepresent the status, purposes and effects of the action and of court orders therein and which may confuse actual and potential class members and create impressions which may reflect adversely on the court or the administration of justice.¹³¹

To prevent these abuses, the *Manual* recommends that courts limit communications between parties and their attorneys in a class action and actual or potential members of the class who are not formal parties to the suit.¹³² The *Manual* also provides a "model" rule and order prohibiting the types of communications listed above and allowing some others.¹³³

Pursuant to the *Manual's* recommendation, eleven districts have

131. MANUAL FOR COMPLEX LITIGATION 27 (West 1977) [hereinafter cited as MANUAL].

132. *Id.*

133. Suggested Local Rule No. 7 states:

In every potential and actual class action under Rule 23, F.R. Civ. P., all parties thereto and their counsel are hereby forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent of and approval of the communication by order of the Court. Any such proposed communication shall be presented to the Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by the Court of the proposed communication and proposed addressees. The communications forbidden by this rule include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses, from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, Fed. R. Civ. P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the action, and of actual or potential Court orders therein, which may create impressions tending, without cause, to reflect adversely on any party, any counsel, the Court, or the administration of justice. The obligations and prohibitions of this rule are not exclusive. All other ethical, legal and equitable obligations are unaffected by this rule.

This rule does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel or misrepresenting the status, purposes or effect of the action and orders therein. Nor does the rule forbid communications protected by a constitutional right. However, in the latter instance the person making the communication shall within five days after such communication file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

Id. at 187-88.

promulgated rules that limit communication between actual and potential parties to a class suit.¹³⁴ These rules have varied in scope from those that adopt the Suggested Local Rule No. 7 in the *Manual* verbatim, to those that are broader, and in effect prohibit all communication between parties and non-parties without obtaining leave of court. Local rule 34(d) of the Western District of Pennsylvania was of this type prior to its invalidation.

Rules and orders prohibiting communication in class suits have been attacked as being contrary to the policy underlying rule 23, and as being unconstitutional prior restraints upon freedoms of speech and association. In *Rodgers v. United States Steel Corp.*,¹³⁵ the Third Circuit Court of Appeals struck down rule 34(d) of the Western District of Pennsylvania, which prohibited any communication between parties, or their attorneys, and potential class members not party to the suit without prior court approval.¹³⁶ The court in *Rodgers* distinguished between the rule's effect upon litigants before and after class determination had been made. The court held only that the restraint imposed by rule 34(d) was outside the rulemaking power of the district court in that it required prior judicial approval of communications that seek to encourage common participation in a lawsuit.¹³⁷ Local rule 34(d) was thus found to be outside the scope of the rulemaking power granted by rule 83 because of its inconsistency with the purpose of rule 23.¹³⁸ The court declined to address the issue of whether rule 34(d) was an unconstitutional prior restraint on the plaintiff's rights of freedom of speech and association.¹³⁹ The court also did not address the validity of rule 34(d) when applied to a class that had already been determined.¹⁴⁰

Two years later, in *Coles v. Marsh*,¹⁴¹ the Third Circuit considered a court-imposed restraint upon communications between formal and potential parties to a class suit. In *Coles*, the trial court, upon defendant's motion, had entered an order prohibiting certain communications between the plaintiff, her attorney, and third parties, including potential members of the class.¹⁴² The order of the court was taken in sub-

134. S.D. FLA. R. 19(b); N.D. FLA. R. 17(b); M.D. FLA. R. 4.04(e); N.D. GA. R. 221.2; N.D. ILL. R. 22; E.D. LA. R. 2.12(e); D. MD. R. 20; S.D. OHIO R. 3.9.4; S.D. TEX. R. 6; N.D. TEX. R. MISC. 688; W.D. WASH. R. 23(g).

135. 508 F.2d 152 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975).

136. *Id.* at 166.

137. *Id.* at 164.

138. *Id.*

139. *Id.*

140. *Id.*

141. 560 F.2d 186 (3d Cir. 1977).

142. *Id.* at 187.

stantial part from Sample Pretrial Order No. 15 as set out in the *Manual*.¹⁴³

Defendant's motion for the order was based upon plaintiff's deposition testimony that she had contacted present and former employees of defendant with the hope of interesting them in her employment discrimination suit. She also testified that she intended to continue this activity.¹⁴⁴ In vacating the order, the Third Circuit Court of Appeals stated, "[w]e do not accept the idea expressed by the defendant that plaintiff's activities represent abuses of the class action device. Rather, plaintiff's activities were directed toward effectuating the purposes of Rule 23 by encouraging common participation in the litigation of her sex/race discrimination claim."¹⁴⁵ Basing its decision on *Rodgers*, the

143. *Id.* at 188. The MANUAL also provides Sample Pretrial Order No. 15, which states:

In this action, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of this Court. Any such proposed communication shall be presented to this Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this Court of the proposed communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F.R. Civ. P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.

This order does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or a prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

A hearing at which applications may be presented for relaxation of this order and proposed communications with actual or potential members of the class is hereby set for — at —m.

Dated this — day of —, 19—.

Sample Pretrial Order No. 15, MANUAL, *supra* note 131, at 188-89.

144. 560 F.2d 186, 189 (3d Cir. 1977).

145. *Id.*

court held that the district court lacked the power to impose any restraint on communication for the purpose of preventing the recruitment of additional parties or the solicitation of financial or other support.¹⁴⁶ Such an order would be upheld only where the moving party articulated the particular abuses by which it was threatened and the court found a satisfactory basis for relief consistent with the policies of rule 23.¹⁴⁷

Rule 2.12(e) of the Eastern District of Louisiana, which incorporates the exact language of Suggested Local Rule No. 7, was upheld as consistent with the policy of rule 23 in *Waldo v. Lakeshore Estates, Inc.*¹⁴⁸ In *Waldo*, the defendant moved to have plaintiff's class action dismissed on the ground that plaintiff violated rule 2.12(e).¹⁴⁹ Whether rule 2.12(e) had in fact been violated was referred to a special master, whereupon the plaintiff moved to have the rule declared invalid on the grounds that it violated the first and fifth amendments and exceeded the court's rulemaking authority.¹⁵⁰

While recognizing that rule 2.12(e) did limit the exercise of certain rights otherwise guaranteed by the first amendment, the court found that these rights were "properly limited pursuant to sufficiently important governmental interests."¹⁵¹ However, this determination was made on the basis that rule 2.12(e) *was not* a "prior restraint," and thus the court did not examine the rule with a "heavy presumption" against its validity.¹⁵² The court also considered whether the rule as drafted "needlessly restrained" the freedoms protected by the first amendment. Plaintiffs alleged that specific abuses should be matched with specific prohibitory rules, as opposed to adopting an across-the-board restriction. In rejecting this line of attack, the court noted that the likelihood of drafting a rule which would specifically address all potential abuses was extremely dubious as a practical matter.¹⁵³

After disposing of the plaintiff's contention that rule 2.12(e) violated the fifth amendment, the court addressed the claim that rule 2.12(e) exceeded the rulemaking power of the district court. Recognizing that *Rodgers* had determined that a similar rule was inconsistent with rule 83, the court stated:

146. *Id.*

147. *Id.*

148. 433 F. Supp. 782 (E.D. La. 1977).

149. *Id.* at 786.

150. *Id.* at 787.

151. *Id.* at 788.

152. *Id.* at 789.

153. *Id.* at 791.

[w]e categorically oppose the notion that a policy allowing unfettered communication to encourage participation in a class suit is consistent with the purpose of Federal Rule 23. The potential abuses attendant upon such unregulated communication clearly undermine the efficacy of the class action device. By proscribing such communications as tend to solicit legal services and/or fund contributions, the rule protects the right of the class membership to judicial redress that is not unnecessarily burdened. By foreclosing unapproved notices of the right to opt out and preventing misrepresentations of the lawsuit's status, purpose or effect, the membership's entitlement to a fair trial is safeguarded We therefore regard Local Rule 2.12(e) as entirely consistent with and in furtherance of the purpose of fully and fairly disposing of class-wide claims and remedying class-wide grievances in a single proceeding.¹⁵⁴

A similar approach was recently adopted by a divided panel of the Fifth Circuit, but then was rejected by the full court en banc; the en banc court was upheld by the Supreme Court. In *Bernard v. Gulf Oil Co.*,¹⁵⁵ the panel majority said,

[a]ny communication between parties and class members may mislead the class members by appearing to reflect the opinion of the court rather than that of the party making the communication Thus, there are many substantial reasons a trial judge may believe that an order such as that suggested in the Manual on Complex Litigation is justified.¹⁵⁶

Judge Godbold dissented because he believed the restraints imposed by the court "contravene Rule 23 . . . and violate freedom of speech and freedom of association as guaranteed by our Constitution."¹⁵⁷ He sustained this view in writing for the majority of the en banc court.

Those who have commented on local rules that limit communication in class action suits generally favor the approach taken by the Third Circuit and the Supreme Court and the Fifth Circuit en banc in *Bernard*. A Note on the *Rodgers* case states,

154. *Id.* at 794. It should be noted that this court was passing on the validity of its own rule, an anomalous situation that is common in the local rule context. See WEINSTEIN, *supra* note 2, at 126.

155. 596 F.2d 1249 (5th Cir. 1979), *rev'd in part*, 619 F.2d 459 (1980) (en banc), *aff'd*, 101 S. Ct. 2193 (1981).

156. *Id.* at 1260.

157. *Id.* at 1263 (Godbold, J., dissenting).

the court is correct that local rule 34(d) is inconsistent with federal rule 23. The minimum purpose of rule 23 is to allow adjudication in a single action of claims which meet the rule's requirements. A broad ban on communication with absent class members creates obstacles to class litigation in two ways. First, it prevents representative plaintiffs and their attorneys from obtaining from absentees information necessary to demonstrate the appropriateness of class certification and to prove the merits of their claims. Second, the rule prevents class representatives from gathering "front money" necessary to pay for attorney's fees, notice expenses, and other litigation costs.¹⁵⁸

Further, the Note points out that traditional concepts of unprofessional solicitation, which such rules are meant to prevent, may not be appropriate in class suits.¹⁵⁹

Other commentators suggest that limited categories of forbidden communications be established, and the class attorney or class opponent be required to file a copy of any communication with the court before disseminating it to the class.¹⁶⁰ Courts screening these communications would limit their inspection to a search for "blatantly abusive" communications that are likely to cause irreparable injury unless restrained in advance of dissemination. The court could rely on opposing counsel to bring to light any other suspect communications and then hold a hearing to establish whether there was a violation of the restrictions. If a violation were established, the court could order the offending party to distribute corrective notices to the class, in addition to taking any other appropriate disciplinary action. This position seems to be substantially in accord with the Third Circuit's mandate in *Coles* that the party requesting a restraint on communication show the potential abuses that he seeks to curb before an order restraining communication can be issued by the court.¹⁶¹

The Southern District of Texas amended its broad restriction on

158. Note, *Rules of Civil Procedure—Local Rule Barring Communications with Absent Class Members Held Beyond Rulemaking Authority of District Courts*, 88 HARV. L. REV. 1911, 1917-18 (1975) [hereinafter cited as Harvard Note]. Another valuable note on this case is Note, *Federal Procedure—Class Actions*, 43 FORDHAM L. REV. 1086 (1975).

159. Harvard Note, *supra* note 158, at 1918. Cf. *Halverson v. Convenient Food Mart, Inc.*, 458 F.2d 927 (7th Cir. 1972) (court said, in an atypical fact situation, that it is not necessarily improper to seek out potential class members before filing a complaint).

160. Note, *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1602 (1976) [hereinafter cited as *Developments—Class Actions*].

161. See text accompanying notes 141-46 *supra*.

communications in class actions in October, 1976.¹⁶² The amended rule prohibits only communications that deal with the four potential abuses enumerated in the *Manual*. All other communications are allowed, but notice of any communication must be filed with the court five days prior to its dissemination so that the court can prohibit any communication found to be improper.

Thus, local rules restricting communications in class action suits are of questionable validity. Rules that are broader in scope than the *Manual's* Suggested Local Rule No. 7 are contrary to the policy underlying rule 23, but none of the rules in force among the district courts is of this type. The rules that follow the *Manual's* suggestion are also potentially troublesome. This situation exposes a policy dispute to the national rulemakers, including Congress.¹⁶³ Rule 23 has been found, through experience in the courts implementing it, to permit or encourage behavior apparently indistinguishable from common law solicitation. Court efforts to control this and related "abuses" undermine the rule's operation¹⁶⁴ and may even be unconstitutional. The local rules have exposed the problems and have provided experience in attempting to solve it so that future action on class communications will be better focused and more informed.¹⁶⁵

4. Pretrial procedure

The local rule experience offers guidance in another area in which a common local rule has been found invalid, that of pretrial procedure under rule 16.¹⁶⁶ This is an area peculiarly suited to administration by local rule, as the original rulemakers indicated both in the rules them-

162. S.D. TEX. R. 6.

163. There have been numerous proposals involving rule 23. See *Developments—Class Actions*, *supra* note 160, at 1623-44.

164. A noted authority, responding to this dilemma, asks, "why should 'solicitation' by an attorney—absent any coercion or deception—be condemned . . . ?" Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 666 n.16 (1979) [hereinafter cited as Miller].

165. It should be noted that local rules based on suggestions in the MANUAL draw upon a lengthy process of notice and comment not unlike the activity surrounding the birth of a new national rule. The latter has been compared to the gestation of an elephant: "First there is a great deal of movement by large bodies. Several years later, a birth occurs." A more precise description can be found at 4 WRIGHT & MILLER, *supra* note 12, at §§ 1005, 1007. See note 215 *infra*.

166. *McCargo v. Hedrick*, 545 F.2d 393, 400-02 (4th Cir. 1976) (Northern District of West Virginia Rule 2.09, which provided for dismissal of action not brought to trial within 12 months, held invalid). For a detailed discussion of this case, see McDermott, *The Pretrial Order and McCargo v. Hedrick: Effective Management or Unproductive Formalism?* 4 JUST. Sys. J. 245 (1978).

selves and in their contemporary comments about them.¹⁶⁷ Rule 16¹⁶⁸ is one of the few that specifically suggests a local rule,¹⁶⁹ a fact duly noted by Judge Charles Clark in responding to a question on the subject:

The question is on Rule 16: Is that to be provided for by local rules or by the court in individual cases? The answer is that it is to be done by the court either in individual cases or by establishing a pre-trial calendar by rule. You will notice that whenever, in the rules, we provide for general local rules, it is referred to explicitly.¹⁷⁰

In a somewhat broader context, Mr. Mitchell said, "[t]he [federal] rules do not apply to calendar administration The conditions differ widely in the country and that is left to local district court rules."¹⁷¹

Rule 16 has not been amended since it was promulgated in 1938, although practice under the rule is more complex than was contemplated when it was drafted. Most current practice appears to be consistent with the rule and to serve its broad purposes, although lawyers often complain that courts' requirements are counterproductive and judges sometimes make excessive and unnecessary demands. However, in some respects, present practice has extended the rule so far that it no

167. See Report to the Judicial Conference of the Committee on Local District Court Rules 8 (1940) [hereinafter cited as Knox Report]. The committee notes, for example, that techniques for calendar management suitable for large courts will not be suitable for smaller courts.

168. Rule 16 of the Federal Rules of Civil Procedure provides:

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

- (1) The simplification of the issues;
- (2) The necessity or desirability of amendments to the pleadings;
- (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
- (4) The limitation of the number of expert witnesses;
- (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
- (6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

169. The last sentence states: "The court in its discretion may establish by rule a pre-trial calendar" See note 168 *supra*.

170. ABA INSTITUTE (Wash. D.C.), *supra* note 4, at 71.

171. ABA INSTITUTE (N.Y.), *supra* note 4, at 231.

longer serves the essential purpose of advising attorneys. Local rules, however, provide the only source of information about a bewildering variety of preliminary conferences, scheduling conferences, and final pretrial conferences, each of which is the subject of different and sometimes conflicting requirements by different judges and courts.¹⁷²

Despite the problems with local rules, convincing evidence indicates that judicial case management under rule 16 is the best hope available for controlling the duration and possibly the expense of civil litigation.¹⁷³ Perhaps rule 16, therefore, should be amended to better describe contemporary practice and to relieve the present burden on local rules. Changes that would alleviate many of the problems associated with pretrial local rules include: (1) explicitly providing for an early conference at which a schedule would be agreed upon and any problems ironed out;¹⁷⁴ (2) assigning a responsibility to the court to assure an expeditious schedule to complete the case; (3) listing requirements to be imposed in most cases, for preparation of the proposed pretrial order; and (4) outlining specific sanctions for failure to comply with the pretrial order. If rule 16 is amended, the ninety-five district courts have gathered vast experience with alternative pretrial techniques that can guide the national rulemakers.¹⁷⁵

5. Press conduct

The common local rule regulating press conduct has also been attacked as invalid. Local district court rules that address the fair trial/free press issue proliferated in the years following the Supreme Court's decision in *Sheppard v. Maxwell*,¹⁷⁶ in which the Court stated that local courts must take "strong measures"¹⁷⁷ to ensure that pretrial publicity does not prevent a fair trial. Justice Clark, in dictum, stated that "the courts must take such steps by rule or regulation that will protect their processes from prejudicial outside interference."¹⁷⁸ This statement prompted eighty of the ninety-five district courts to adopt

172. Some flavor of this diverse practice can be gathered in Cohn, *supra* note 12; Flinders, *supra* note 30. The proliferation of pretrial rules has been attacked in Kahn, *supra* note 5, at 34.

173. See note 66 *supra*.

174. See Rubin, *The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy and Inexpensive Determination of Civil Cases in Federal Courts*, 4 JUST. SYS. J. 135, 140-41 (1978).

175. This experience was used by the Wisconsin Supreme Court when it promulgated a pretrial rule in 1974. Wis. R. Civ. Proc. 802.10, 67 Wis. 2d 585, 637 (1975).

176. 384 U.S. 333 (1966).

177. *Id.* at 362-63.

178. *Id.* at 363.

local rules restricting the reporting of proceedings by the press.¹⁷⁹

After *Sheppard*, the district courts were armed by the bench and the bar with a variety of proposals to implement Justice Clark's suggestion.¹⁸⁰ Many of the present fair trial/free press local rules reflect the guidelines and specific recommendations contained in the Kaufman Report, prepared by the Judicial Conference of the United States in 1969. Not surprisingly, the cases in which fair trial/free press rules have been challenged concern Kaufman Report progeny.

In *United States v. CBS*,¹⁸¹ district court orders that forbade the sketching for publication of court proceedings, either inside the courtroom or from memory outside the courtroom, were held to be constitutionally impermissible. Though made pursuant to Northern District of Florida Rule 16, the orders in question conflicted with an express caveat of the Kaufman Report which stated that "[t]he committee does not presently recommend any direct curb or restraint on publication by the press of potentially prejudicial material. Such a curb, it feels, is both unwise as a matter of policy and poses serious constitutional problems."¹⁸² The court noted in passing that only three of the eighty district courts which have fair trial/free press rules have adopted the suggestion in the Kaufman Report that in certain widely-publicized cases the court may direct that "no photograph be taken or sketch made of any juror within the environs of the court."¹⁸³

In *Chicago Council of Lawyers v. Bauer*,¹⁸⁴ Northern District of Illinois Local Criminal Rule 1.07, which was substantially similar both

179. See Landau, *Fair Trial and Free Press: A Due Process Proposal*, 62 A.B.A.J. 55 (1976).

180. See, e.g., NEW YORK CITY BAR ASS'N, SPECIAL COMM. ON RADIO, TELEVISION, AND THE ADMINISTRATION OF JUSTICE, FREEDOM OF THE PRESS AND FAIR TRIAL (1967) (Medina Report); ADVISORY COMMITTEE ON FREE TRIAL AND FREE PRESS, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (approved draft, 1968) (Reardon Report); ABA LEGAL ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, RECOMMENDED PROCEDURE TO ACCOMMODATE RIGHTS OF FAIR TRIAL AND FREE PRESS (rev. draft, Nov. 1975); Judicial Conference of the United States, *Report of the Committee on the Operation of the Jury System on the "Fair Trial-Free Press" Issue* (Kaufman Report), 45 F.R.D. 391 (1969) (amended, 51 F.R.D. 135 (1970)) [hereinafter cited as Kaufman Report].

181. 497 F.2d 102 (5th Cir. 1974).

182. 45 F.R.D. at 401-02.

183. 497 F.2d at 106 n.5.

184. 522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom. Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976). For a lengthy discussion of *Bauer* and of fair trial/free press issues generally, see Note, *ABA and Local Court Disciplinary Rule's Standards for Prohibiting Attorney Comments on Pending Investigations or Litigation Violate First Amendment Protections*, 51 NOTRE DAME L. REV. 1234 (1976); Note, *Trial Publicity Rules*, 54 TEX. L. REV. 1158 (1976).

to the Kaufman recommendations and to Disciplinary Rule 7-107(A)-(E), was held to be an unconstitutionally overbroad restriction of lawyers' first amendment right to comment publicly and receive comment on pending litigation. The court stated that local rules restricting public access to information on pending litigation will be scrutinized less closely than quintessential "prior restraints," but more closely than legislative restrictions.¹⁸⁵ In restricting the flow of information to the public, local rules are to exhibit "clearness, precision, and narrowness."¹⁸⁶ The court ruled that only those comments that pose a "serious and imminent threat" of interference with the fair administration of justice can constitutionally be proscribed pursuant to local rule.¹⁸⁷ Rule 1.07 had proscribed public comments which merely exhibited a "reasonable likelihood" of interfering with a fair trial or of otherwise prejudicing the due administration of justice.¹⁸⁸

It seems that present fair trial/free press rules, based on the carefully considered recommendations of the Judicial Conference and the Bar, do much to ameliorate the inherent tension between first and sixth amendment rights. Court orders that embellish or go beyond the sweep of the fair trial/free press rules carry the risk of impinging on these constitutional rights.¹⁸⁹

6. Attorney behavior

A final serious conflict posed by local rules appears in the efforts of some courts to regulate attorney behavior.¹⁹⁰ The authority of the district courts to promulgate rules governing admission to the bar is derived from legislative grants of power¹⁹¹ and inherent judicial power.

185. 522 F.2d at 248-49.

186. *Id.* at 249. *See* Dorfman v. Meiszner, 430 F.2d 558 (7th Cir. 1970) (citing Craig v. Harvey, 331 U.S. 367 (1947)), in which the court invalidated a provision of Northern District of Illinois Rule 34 that extended the court's rule concerning television coverage and photographs to floors of the federal building above and below the courtroom area.

187. 522 F.2d at 249 (citing Chase v. Robson, 435 F.2d 1059, 1061-62 (7th Cir. 1970), which formulated a restrictive constitutional standard for examining local rules that proscribe first amendment rights).

188. 522 F.2d at 249.

189. The Supreme Court's recent decision in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), which held that a reporter does not have a right of access to pretrial procedures in criminal cases, changes the complexion of case law on the fair trial/free press issue. Its impact on rulemaking in this area, however, is as yet unclear.

190. *See generally* 12 WRIGHT & MILLER, *supra* note 12, at 228-29.

191. "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct cases therein." 28 U.S.C. § 1654 (1976).

The Supreme Court in *Ex parte Secombe*¹⁹² held that it rests “exclusively with the court to determine who is qualified to become one of its officers.”¹⁹³ Subsequent cases have affirmed a state’s right to prescribe conditions for membership in the bar.¹⁹⁴ In *Brown v. Supreme Court of Virginia*,¹⁹⁵ the general principle was outlined:

[T]he highest court of a state may prescribe rules relating to admission to the bar even in absence of a statute. The admission or exclusion of an attorney is not the exercise of a mere ministerial power. It is the exercise of judicial power and the admission of an attorney may, with propriety, be entrusted to the courts.¹⁹⁶

The Knox Committee Report¹⁹⁷ on local district court rules determined that rules governing attorney admission fall specifically within the intended scope of rule 83. The authors of the report expressed the view that completely uniform rules were “neither feasible nor desirable” though they advised that “supplementary local rules be kept at a minimum.”¹⁹⁸ Even critics of local rules have acknowledged that procedures for admission to the bar are satisfactorily within the confines of rule 83.¹⁹⁹

Because the courts clearly have authority over admission to practice, the issue is what standards the courts may impose. The Knox Report proposed a model rule for the eligibility of attorneys: “Any person who is a member in good standing of the bar of (1) the highest court of this state or of (2) the highest court of any other state, is eligible for admission to the bar of this court”²⁰⁰ The Northern District of Oklahoma Rule 5(c) typifies local rules that follow the Knox proposal in that it requires that a person be a member of the bar of the Supreme Court, a United States Court of Appeals or District Court, or of the highest court of any state. Other district courts, however, stipulate that an attorney must be a resident of the state.²⁰¹ At least one circuit has held that the requirement that applicants for admission to the bar be

192. 60 U.S. (19 How.) 9 (1856). *Accord, Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866).

193. 60 U.S. at 13.

194. *See, e.g., In Re Summers*, 325 U.S. 561 (1945); *Emmons v. Smitt*, 58 F. Supp. 869 (E.D. Mich. 1944), *aff'd*, 149 F.2d 869 (6th Cir. 1945).

195. 359 F. Supp. 549 (E.D. Va. 1973), *aff'd sub nom. Titus v. Supreme Court of Virginia*, 414 U.S. 1034 (1973).

196. 359 F. Supp. at 554 (citing *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866)).

197. *See* note 167 *supra*.

198. Knox Report, *supra* note 167, at 7.

199. 12 WRIGHT & MILLER, *supra* note 12, at 220.

200. Knox Report, *supra* note 167, at 29.

201. *E.g.*, S.D. OHIO R. 2.4.2.

state residents is a "reasonable classification designed to serve the compelling state interest of preventing misconduct by itinerant or nonresident practitioners."²⁰²

Many districts also provide that in *pro hac vice* appearances, an out-of-state attorney must associate himself with a resident attorney. There are two justifications for this requirement: local counsel are needed because they are better acquainted with local court procedures, and joinder of local counsel permits the court to have a member of its bar professionally responsible for litigation. Despite criticisms of these justifications, it has been held that permission to appear *pro hac vice* is not a right, but a privilege.²⁰³

Local rules requiring joinder of local counsel, however, cannot be applied when they deny a party access to the federal courts. Accordingly, a local rule should be waived or admission *pro hac vice* granted when an out-of-state attorney cannot find a local attorney who will sign the pleadings with him.²⁰⁴ Nor can it be applied when the result will be to preclude the appearance of out-of-state attorneys in civil rights actions.²⁰⁵

In an attempt to exclude out-of-state counsel, a district court in Alabama advanced the following rationale for a local rule dealing with representation by counsel in civil rights cases:

[B]eing aware not only of the legal but of the social problems involved in the cases filed and prosecuted in this Court that have as their basis the alleged violations of civil and constitutional rights, [the Court] is of the opinion that it is not in the public interest nor in the Court's interest for the Court to continue to permit litigants to employ or utilize counsel in this field of litigation when all parties are not actively represented by counsel that reside in this district, as has been the practice heretofore followed in some instances. This Court is of the further opinion that such a practice does not make for the proper and efficient administration of justice and tends to make this Court's burden in this type of litigation more difficult in that assistance to the Court is not immediately and

202. *Tang v. Appellate Div.*, N.Y. Sup. Ct., 373 F. Supp. 800, 801 (S.D.N.Y. 1972), *aff'd*, 487 F.2d 138 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974).

203. *Thomas v. Cassidy*, 249 F.2d 91, 92 (4th Cir. 1957), *cert. denied sub nom. Fitzgerald v. Cassidy*, 355 U.S. 958 (1958).

204. *Lefton v. City of Hattiesburg*, 333 F.2d 280, 285 (5th Cir. 1964).

205. *Sanders v. Russell*, 401 F.2d 241, 247 (5th Cir. 1968). The court's holding concerned "non-fee generating cases" but the court made it clear that attorneys may still seek a fee and have the rule apply in appropriate cases. *Id.* at 244 n.5.

readily available from counsel actively participating in and fully cognizant of all aspects of said cases.²⁰⁶

This poorly-drafted local rule requires that whenever an allegation involving a violation of civil rights is to be heard,

each litigant must have at least one legal representative of record who permanently resides in this district and is regularly admitted to practice before the Court, and who during all phases of the litigation should be personally aware of the various social and/or legal problems involved and will be fully informed as to all aspects of the litigation, and who has authority to speak for his client and will be readily available to the Court for assistance, counsel and advice. Said local counsel in all such cases including the United States Attorney for the Middle District of Alabama when said litigation concerns actions by or against the United States, shall appear and actively participate during all stages and phases of said litigation, including any proceedings deemed necessary by the Court to enforce its orders, decrees and judgments.²⁰⁷

Under the standards enunciated above for controlling appearances by out-of-state counsel, Alabama Rule 1 would fail.

A difficult question that is still unresolved concerns whether rules requiring that local counsel "actively associate"²⁰⁸ or "meaningfully participate"²⁰⁹ in the lawsuit deny a party access to the federal courts. It is uncertain what these phrases mean, but the following local rules offer some indications. The District of Idaho Rule 2(d) states that a resident "designee shall personally appear with non-resident attorney on all matters heard and tried before the court." The District of Montana Rule 1(c) requires that "local counsel must be furnished with all factual, evidentiary, and legal information necessary for him to intelligently act on behalf of the party he represents; and he must also be vested with full and complete authority to act on behalf of and bind the party he represents" Finally, Eastern District of Virginia Rule 7(D) provides that "no pleading or notice required to be signed by counsel shall be accepted by clerk unless signed by [resident] counsel." This rule was recently upheld in *Willis v. Semmes, Bowen & Semmes*.²¹⁰

206. M.D. ALA. R. 1.

207. *Id.*

208. D. ME. R. 3(d)(1); D. MINN. R. 1(d).

209. D. HAWAII R. 1(e); D. ORE. R. 3(c); D. COLO. R. 1(b).

210. 441 F. Supp. 1235, 1246 (E.D. Va. 1977).

D. Miscellaneous problems

Other local rules and procedures that have been criticized include those that provide for alternate jurors to be selected from regular juries only when a trial is complete,²¹¹ those that modify the requirement of rule 5(d) that all discovery papers be filed,²¹² those that provide for dismissals for want of prosecution if the suit has been inactive for a specified period,²¹³ and those that define the time when judgment is entered.²¹⁴ None of the attacks are persuasive, though local rules certainly can be found that suffer from poor drafting and other errors of detail.

III. ADOPTION OF LOCAL RULES

The courts' exercise of the local rulemaking power has been criticized for the method by which rules are drafted. District court performance in this regard is criticized especially for failing to meet the high standard set by the national process. Though subject to some criticism and reappraisal, the national rulemaking process is widely admired.²¹⁵ Proposed revisions of national rules have been widely

211. *United States v. Viserto*, 596 F.2d 531, 539-40 (2d Cir.), *cert. denied*, 444 U.S. 841 (1979).

212. Cohn, *supra* note 12, at 290-91.

213. Columbia Note, *supra* note 3, at 1272-75. Local rules regarding dismissal for want of prosecution, which were questioned in *McCargo*, are well within the scope of the district courts' inherent powers. As stated in *Shotkin v. Westinghouse Elec. & Mfg. Co.*, 169 F.2d 825, 826 (10th Cir. 1948) (referring to District of Colorado Rule 8): "[a] district court of the United States is vested with power to dismiss an action for failure of plaintiff to prosecute it with reasonable diligence. The power is inherent and independent of any statute or rule." See also *United States v. Furey*, 514 F.2d 1098, 1103 (2d Cir. 1975). It is argued, however, that local rules on the subject are superfluous, especially in light of Federal Rule of Civil Procedure 41(b). See *McCargo v. Hedrick*, 545 F.2d 393, 396 n.3 (4th Cir. 1976) (citing *Link v. Wabash R.R.*, 370 U.S. 626, 630 (1962)). There is also the danger that such local rules, if not superfluous, might be inconsistent with rule 41(b) or other federal rules. In *Radack v. Norwegian Am. Line Agency, Inc.*, 318 F.2d 538 (2d Cir. 1963), for example, provisions of Eastern District of New York General Rule 23 were found to violate the mandate of now-abrogated Federal Rule of Civil Procedure 77(d). *Id.* at 542.

214. See Columbia Note, *supra* note 3, at 1269-71.

215. See Hazard, *Undemocratic Legislation*, 87 YALE L.J. 1284 (1978) [hereinafter cited as Hazard]; 4 WRIGHT & MILLER, *supra* note 12, at §§ 1005, 1007. Critics have focused on the dual role of the Supreme Court in promulgating and also reviewing rules. WEINSTEIN, *supra* note 2, at ch. IV. The limited opportunities in the past for public comment and discussion, and the occasional intrusion of rulemaking into areas that have the character of advisory opinions, have also been criticized. Justices Black and Douglas dissented from the orders promulgating rules on the grounds that revised rules are not really the Court's work. Amendments to Rules of Civil Procedure for the United States District Courts, 374 U.S. 865, 869-70 (1963). See Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975).

circulated and commented upon, hearings have occasionally been held, and expert advice of scholars, practitioners and judges is available through the relatively diverse character of the advisory committees. The national rules are subject to searching scrutiny as they pass from an Advisory Committee to the Standing Committee on Practice and Procedure, to the Judicial Conference of the United States, to the Supreme Court, and finally to Congress. The role of Congress is especially significant because elected officials may intervene in this otherwise undemocratic process²¹⁶ if they believe the rulemakers have stepped beyond the technical, procedural tasks assigned them²¹⁷ and have begun to intrude into substantive areas.

We are told that the district courts have undertaken an essentially similar task without the searching examination, expertise, or scrutiny appropriate to it.

[T]he process by which local rules are made is simply not suited for the complex and controversial subjects to which many local rules are addressed. When the Civil Rules are amended, the process is extremely careful. . . . The process is calculated to ensure that any changes reflect the best thinking of the entire profession.

That process on the national scene is in striking contrast to the way in which local rules are made. In a few districts a committee of local practitioners is consulted but this is the exception rather than the rule.²¹⁸

Judge Weinstein adds:

[T]he subject matter of local rulemaking continues to expand as local judges exercise their fertile imaginations to deal with perceived problems. . . . Mere publication is probably not enough. Members of the bar will generally not respond unless committees of the bar associations have studied the matter or the court itself appoints a committee or reaches out to invite persons who should be interested to attend a public hearing. The meetings of the circuit conferences have sometimes been used to good effect in this connection. Our experience in the Eastern District of New York, where most rules are published before adoption, is that almost no communica-

216. The process has been aptly characterized by Professor Hazard, *supra* note 215.

217. While it has been argued that rulemaking is an inherent power, Judge Weinstein is persuasive in arguing that federal rulemaking can no longer be understood otherwise than as legislative delegation. WEINSTEIN, *supra* note 2, at 47-48.

218. 12 WRIGHT & MILLER, *supra* note 12, at 220.

tions are received unless pointed questions are put to individuals and associations. In the Northern District of Illinois the experience has been similar.²¹⁹

But is the character of the local rulemaking task similar to that of the national bodies? Judge Weinstein distinguishes rulemaking from the normal tasks of a court in this way:

Rule-making by federal courts represents a reversal of usual adjudicative patterns. In most instances a court acts in controversies based upon particular facts on a case-by-case basis, leaving subsequent decisions to synthesize general substantive and procedural rules. At the level of national federal rule-making, the Supreme Court lays down general standards applicable to all future cases without the aid of individual fact situations and argument. The Court does not have before it interested parties with a motive for presenting the case fully, as it does in litigation meeting constitutional justiciability requirements. In rule-making the Court makes legislative pronouncements reviewed by Congress—a departure from the usual instance where congressional legislation is measured and interpreted by the courts in the light of constitutional and other requirements. In normal adjudications the Court's power is based upon the Constitution, although that power is limited and proscribed by jurisdiction, venue, and other provisions enacted by Congress. In rule-making the Court's power is granted by Congress under specific limitations; having accepted that grant for many years it is doubtful whether the Court could claim inherent power were general rule-making power circumscribed. Usually a court is concerned with due process and the opportunity for those concerned to be heard publicly, whereas in rule-making a court generally acts *in camera* without providing an opportunity for argument.

Where the courts utilize a litigation to pronounce broad general principles and detailed regulations, such as the *Miranda* rules designed to control police interrogations in a quasi-legislative manner, the courts are subject to the restrictions imposed by judicial tradition. Such cases involved the concreteness of a litigated matter with specific facts presenting the issue and with opposing counsel strenuously arguing different points of view. Public argument is normally afforded

219. WEINSTEIN, *supra* note 2, at 129-30.

and briefs by the parties and by amici may be submitted. The court is obligated to justify its decisions by a reasoned opinion. Moreover, the possibility exists of relatively easy modification through future interpretations and legislation, though change becomes awkward when the decision is justified by constitutional imperatives.²²⁰

If we follow Judge Weinstein and approach local rules as an exercise in legislation using delegated authority, the procedures employed surely must meet a very high standard. But consider what courts do in this area. When a court codifies its practice into a rule on supersedeas bonds like that of Rhode Island,²²¹ the notion of "legislation" is exaggerated if it must accommodate this sort of activity. Much local rulemaking differs from legislation in its source, its scope, and its relevant constituency. Its source is the experience with internal operation of the court itself, supplemented as appropriate by ideas from lawyers and other courts. Legislation may draw upon almost any aspect of human experience, while national rulemaking is less global because of its exclusive focus on legal procedure. The rulemakers may consider basic policy choices informed by relevant experience. The scope of local rulemaking is further limited to matters or procedures not preempted by national rules, and to lawyers and litigants before a single court. Local rules also differ from legislation in that the practical constituency cannot be broader than the active bar of one court. While clients, foreign lawyers and non-litigants may be affected, it is impractical to attempt to canvass their views, because these people will largely be represented through the influence of lawyers in the district. No one else has a sustained interest.

Sometimes courts do more than codify practice when they write rules. They consider alternative policies, choose one, and then codify it in a rule. Much of this might be characterized as a rather mundane sort of managerial policy making, not legislation. When judges discuss rules involving pretrial procedures, for example, it is in the context of considering alternative policies for running their courts. Wise consideration of these alternatives often requires consultation because so many policies involve the activity of lawyers.²²² A wise manager in any organization will solicit views of all participants before embarking on a major policy change, so also a court must understand the consequences

220. *Id.* at 4-6 (footnotes omitted).

221. *See* text accompanying notes 44-50 *supra*.

222. In matters like pretrial procedure, lawyers' work is an integral part of the court's work. *See* note 29 *supra*.

of present and proposed policies. Such action has a narrower scope of applicability than almost any legislation, however. If we take literally the principle that lawyers are officers of the court, these local rules appear to be matters of internal operations only. In the degree that a proper rule goes beyond these "officers" to their clients, it normally has the effect only of codifying what would have occurred without the rule.

What are the usual procedures for adopting a local rule? A very limited survey indicates that Weinstein, Wright and Miller and other critics may be wrong in their characterization of the process. Nearly all clerks contacted in a telephone survey conducted in the spring of 1979 reported that regular bar consultation is usual.²²³ In at least three recent instances, bar committees have undertaken drafting of a complete revision of local rules.²²⁴ Many courts work closely with bar association groups.²²⁵ On the other hand, bar participation was very limited in an extensive revision of the local rules in the Southern District of New York.²²⁶

It appears that the critics have overdrawn the attack on local rulemaking procedures, just as the attack on the rules' substance has

223. Thirteen districts were contacted by Barry Groce through telephone calls to the clerks of the respective courts. Districts surveyed were N.D. Cal., D. Conn., D.D.C., S.D. Fla., N.D. Ga., N.D. Ill., E.D. La., E.D. Mich., M.D.N.C., D. Ore., W.D. Tex., W.D. Wash., and N.D. W. Va. The author summarized his conclusions as follows:

All districts surveyed maintained some form of bench/bar interaction with respect to the drafting of local rules. Several districts consulted with a special bar committee, while others maintained informal communication with bar members. . . . Still other districts sought bar input only for major rule changes, keeping "house keeping" matters to themselves.

About one-half of the districts surveyed utilized bar participation in drafting their local rules. In one district, (N.D. Cal.) a local bar committee was presented with old local rules and asked to submit a revised version. Other districts use members of the bar on the court's rule drafting committee.

Few districts held formal hearings or published their proposed rules prior to adoption. In some instances meetings between the court and members of the bar were used. Only one district (N.D. Cal.) published all of its proposed rules prior to adoption. Another (N.D. Ill.) published only "major revisions." Others did not publish rules but made an effort to circulate a draft of the rules to select members of the bar.

In all districts having more than a handful of judges there was a special committee set up to consider local rules. Some committees are made up exclusively of judges, while others are composed of both judges and bar members.

B. Groce, *Reforming Local Rules of the United States District Courts* (May 24, 1979) (unpublished paper at University of California, Berkeley).

224. See note 5 *supra*.

225. See, e.g., the outstanding work of the Committee on Federal Courts, New York City Bar Ass'n, on use of magistrates, implementation of the Speedy Trial Act, and other matters of management of the federal courts in New York City. See 33 REC. N.Y. BAR ASS'N 212, 510 (1978).

226. The revision was conducted in October, 1980.

been overdrawn. No one is yet in a position to say precisely how much public or expert involvement is typical. Presumably, many courts employ more elaborate procedures for a general revision of their rules, or for a change they regard as important, than for a single, technical modification. If we consider together all revisions of any rule, no matter how minor, Judge Weinstein may be overly broad in his observation that "[l]ack of public debate and publication of local rules before adoption is typical,"²²⁷ although this no doubt is true of a slight majority of all revisions. Nothing in the Knox Report or elsewhere in the early history of rule 83 requires that more than "a majority of judges" participate in local rulemaking. Evidently, however, we live in an age of increased demand for broad participation in decisions of public and private bodies.²²⁸ Clearly, participation by experienced practitioners and by scholars can be valuable in major revisions.²²⁹ When a court is codifying what it is already doing, however, perhaps there is little need for any participants other than judges.

IV. THE SCOPE AND USE OF LOCAL RULES

One of the barriers to understanding the place of local rules in the structure of governance of the judiciary is the difficulty in obtaining a grasp on the present scope of the enterprise. The local civil rules total about one and one-half million words in two large loose-leaf volumes.²³⁰ There are at least six rules or statutes that require courts to promulgate local rules²³¹ and four more contain suggestions.²³² In ad-

227. WEINSTEIN, *supra* note 2, at 129. In notes 460, 461, and 462, Judge Weinstein indicates that he relies heavily on some speculations I advanced in 1976 at his request, in drawing a dark picture of the process. I had no special knowledge of local rule procedures at the time of the correspondence quoted.

228. This is true for some excellent reasons in the specific context of rulemaking. See Wheeler, *Broadening Participation in the Courts Through Rule-Making and Administration*, 62 JUDICATURE 280 (1979).

229. See 12 WRIGHT & MILLER, *supra* note 12, at 220.

230. The Callaghan service does not include specialized rules dealing solely with criminal, bankruptcy, or admiralty matters.

231. 28 U.S.C. § 137 (1976) ("The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court."); 28 U.S.C. § 139 (1976) ("times [and places for court sessions] shall be determined by the rules or orders of the court."); 28 U.S.C. § 636 (b)(4) (1976) ("Each district court shall establish rules pursuant to which the magistrates shall discharge their duties."); 28 U.S.C. § 1654 (1976) ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."); FED. R. CIV. P. 40 ("The district courts shall provide by rule for the placing of actions upon the trial calendar . . ."); FED. R. CIV. P. 78 ("Unless local conditions make it impracticable, each district court shall establish regular times and places . . . at which motions requiring notice and hearing may be heard and disposed of . . .").

232. 28 U.S.C. § 1914(c) (1976) ("Each district court by rule or standing order may re-

dition, there have been many proposals and recommendations for local rules from national bodies, usually the Judicial Conference of the United States and its staff agency, the Administrative Office of the United States Courts, as well as the Federal Judicial Center, the American Bar Association and other bodies.²³³ Responding to these initiatives and to their own predilections, some courts have many rules, some have few. In a recent speech on local rules, Professor Arthur R. Miller said, “[i]sn’t it startling that in 1978—forty years after the federal rules took effect . . . forty years into the game, nobody knows what the shape of the ball is?”²³⁴

This section will summarize the general scope of local rules,²³⁵ and may provide a sense of “the shape of the ball” not previously available.

1. Information

One group of local rules simply provides mundane information for lawyers about how, where, and when the court operates. Numerous rules describe the case assignment system.²³⁶ Other local rules inform

quire advance payment of fees.”); FED. R. CIV. P. 16 (“The court in its discretion may establish by rule a pre-trial calendar”); FED. R. CIV. P. 66 (“The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts.”); FED. R. CIV. P. 77(c) (court may provide by local rule for extended hours for the clerk’s office).

233. See WEINSTEIN, *supra* note 2, at 490, for a “curious example of ‘national’ local rules”: a model local rule on black lung cases proposed to all United States District Judges by the Director of the Administrative Office of the United States Courts, March 1, 1976. See text accompanying notes 274-79 *infra*, for additional examples.

234. *Conference on Rule Making*, *supra* note 5, at 494.

235. A “census” of all the local rules is beyond the scope of this article. Rather, certain key rules on particular topics will be the focus of discussion in combination with the lists of rules on particular topics that appear throughout this article. Local rules encompass such topics as: attorneys, divisions within a district, calendars, motions, pleadings, notification of a claim of unconstitutionality, orders grantable by the clerk, bonds, depositions, discovery, pretrial procedure, stipulations, continuances, dismissal for want of prosecutions, trial procedure, impartial medical examinations and testimony, exhibits, records and files, juries, costs, fees, motions for new trials, appeals, bankruptcy and receivership, and habeas corpus. These topics are discussed in *Local Rules Survey*, *supra* note 12. See also Appendix B, *infra*, which contains the system of numbering proposed for uniform adoption in the Ninth Circuit.

236. Several new rules have been promulgated in this once-dormant area since the controversy following assignment of the Chicago Seven trial to Judge Julius Hoffman. As a result of the court’s random assignment procedure, the case was assigned to a judge who was obviously unsympathetic to the defendants’ political beliefs and who was widely attacked as being biased against the defendants. Northern District of Illinois Rule 2.22 contains a complete description of the “Procedures for Filing and Assigning Cases.” Rules 2.30 and 2.31 are similarly comprehensive regarding reassignments and related cases. Cf. E.D. Wis. R.

lawyers about where to file suits and papers,²³⁷ detail the hours and operation of the various clerk's offices in the district, provide regulations that govern access to files and exhibits, or establish a "Motions Day,"²³⁸ as required by Federal Rule of Civil Procedure 78. Other local rules assure a flow of substantive and procedural information in the other direction. Substantively, they require lawyers to notify the court when they intend to claim that a statute is unconstitutional.²³⁹ Procedurally, they require lawyers to submit the name of a resident attorney upon whom papers may be served.²⁴⁰

2. Management

Local rules also play a vital role in the courts' efforts to manage themselves and their dockets.²⁴¹ The rules reflect a diverse policy and practice, which is, in substantial degree, both inevitable and desirable.²⁴² Some diversity is inevitable because state, district, and county boundaries are more important in the practice of law than in any other modern profession. The bar is organized by jurisdictions, and a lawyer's work is specific to a jurisdiction in a degree unheard of in professions such as medicine or engineering. Federal judges, for the most part, are products of the locations they serve.²⁴³ Diversity is a necessity

4.01, which describes a less desirable system that randomly assigns cases to judges in a fixed sequence. This type of system is open to manipulation.

237. In a geographically large district this information may not be available otherwise. See note 27 *supra*.

238. See JUDICIAL CONTROLS, *supra* note 66, at ch. I.

239. This type of rule is praised in *Local Rules Survey*, *supra* note 12, at 1034-37. These rules enable the court to notify the Attorney General when an act of Congress is challenged and the United States is not a party, as required in FED. R. CIV. P. 24(a) and 28 U.S.C. § 2403 (1976). Examples of such rules may be found in: D. ARIZ. R. 35; E.D. & W.D. ARK. R. 18; E.D. CAL. R. 16; N.D. CAL. R. 8; D. COLO. R. 13; D. DEL. R. 21; S.D. FLA. R. 9; N.D. FLA. R. 6; E.D. ILL. R. 8; N.D. ILL. R. 22; S.D. ILL. R. 6; N.D. IND. R. 20; S.D. IND. R. 16; S.D. & N.D. IOWA R. 21; D. KAN. R. 12; M.D. LA. R. 11; W.D. R. 21; D. MASS. R. 23; D. NEB. R. 36; D.N.H. R. 22; D.N.J. R. 32; N.D.N.Y. R. 34; S.D.N.Y. R. 24; W.D.N.Y. R. 9; M.D.N.C. CIV. R. 20; D. ORE. CIV. R. 14; E.D. PA. R. 20; W.D. PA. R. 11; D.R.I. R. 27; E.D. WASH. R. 4; N.D. W. VA. CIV. R. 2.14; S.D. W. VA. CIV. PRO. R. 2.10; W.D. WIS. R. 11.

240. Rules requiring designation of local counsel upon whom papers may be served include: W.D. KY. R. 4c; W.D. LA. R. 4; D.N.J. R. 5; W.D. OHIO CIV. R. 2.03; W.D. TEX. R. 4.

The above provisions specifically deal with designation of resident counsel; these requirements may also be found in rules relating to admission to the bar: D. DEL. R. 4d; S.D. FLA. R. 16d; M.D. FLA. R. 2.02; N.D. GA. R. 71.41; N.D. & S.D. IOWA R. 5f; D. KAN. R. 4f; M.D. LA. R. 1e; D. ME. R. 3dl; D. Minn. R. 1d; D. NEB. R. 5q; D.N.H. R. 5b; E.D.N.C. R. 1e; M.D.N.C. R. 2d; D.N.D. R. IID(2); N.D. OKLA. R. 5h; W.D. OKLA. R. 4h.

241. See, e.g., CASE MANAGEMENT, *supra* note 30.

242. See Flanders, *In Praise*, *supra* note 12, at 32-33.

243. See H. CHASE, FEDERAL JUDGES: THE APPOINTMENT PROCESS (1972).

in federal courts so that they can respond not only to local expectations and practice but also to specific institutional demands. As one commentator stated:

Because courts must respond to the environment in which they operate, they must remain flexible. Courts must be able to adjust to changes in case flow, particularly at the trial court level. The trial court is at the hub of a wheel which intersects with prosecutors' offices, private attorneys, litigants, juries, witnesses, lay groups, city and county governments²⁴⁴

Local rules are one of the main tools employed, though perhaps some alternatives might serve. When federal judges discuss procedural problems, the solutions suggested are very often formulated as suggestions to try specific local rules.²⁴⁵

Most controversial are the local rules that touch upon important provisions in the national rules. One prominent scholar has said that national rule 23 "really must be thought of as a procedural skeleton requiring fleshing out by judges and lawyers" ²⁴⁶ One way this has been achieved is through rulemaking in narrow areas, filling in the gaps in the national rules or providing a consistent interpretation to provisions found there. For instance, several districts have declared that five days will be considered "reasonable notice" for oral depositions under Federal Rule of Civil Procedure 30(a).²⁴⁷ Oddly, the authors of the Columbia Note find this a reasonable bit of guidance, while criticizing this sort of interpretative rulemaking in other areas.²⁴⁸ Also, the Knox Report and the authors of the Columbia Note find no objection to local rules setting requirements for the posting of security for costs:²⁴⁹ "the natural response of the district courts to repeated mo-

244. Saari, *Modern Court Management: Trends in Court Organization Concepts—1976*, 2 JUST. SYS. J. 19, 23 (1976).

245. As an illustration, fourteen specific suggestions for local rules appear in the original reprint of seminars for newly appointed United States District Judges, 1970-71. SEMINARS, *supra* note 6. Criticizing the legalistic approach judges sometimes take to administrative problems, one distinguished court administrator has said in a private conversation with the author that judges believe all that is necessary to solve a problem is to pass a rule; the problem, they think, will go away without any further effort. An alternative to local rules for disseminating administrative policy might be a published pamphlet of "internal operating procedures" separate from local rules.

246. Miller, *supra* note 164, at 677.

247. Notice periods vary under the local rules: D. KAN. R. 17b (5 days); M.D. FLA. R. 3.02 (10 days); D. COLO. R. 5a (5 days); D.N.M. R. 8a (10 days); W.D. & E.D. OKLA. R. 14 (3 days); N.D. OKLA. R. 15 (3 days); E.D. VA. R. 21g (7 days).

248. Columbia Note, *supra* note 3, at 1262.

249. Columbia Note, *supra* note 3, at 1267; Knox Report, *supra* note 167, at 49-50. Some

tions for security for costs was to pass local rules on the subject."²⁵⁰

Several courts have rules that provide for an assessment of juror and other costs, when a settlement occurs shortly before trial. In *Martinez v. Thrifty*,²⁵¹ a rule was upheld that assessed jury costs equally between parties unless the court was notified of the pretrial settlement before noon on the last working day before trial. Several courts have comparable provisions.²⁵² Last minute settlements inconvenience jurors who are called unnecessarily, and they waste valuable trial time because it is often impossible to schedule another trial soon enough to fill the time suddenly made available.²⁵³ No strategic advantage will be gained from waiting for serious settlement negotiations until the last minute before trial that cannot be gained by waiting for a deadline imposed by local rules.

Less commendable are the local rules that create new "divisions" within a district. Congress has partitioned thirty-four of the ninety-five judicial districts into divisions. In all, 208 divisions are created by statute, and an additional forty-six have been created by local rule.²⁵⁴ There is no discernible logic to either group of provisions, nor to the additional statutory provisions establishing places where court shall be held. Some large states, such as California and New York, have no statutory divisions and few statutory places where court is to be held, while some much smaller states have many of both.²⁵⁵ District court local rules have not improved matters; they have disappointed the earnest hope of one commentator who recommended local rules rather than legislation because "the local courts are in a better position than Congress to determine the most equitable division of jurisdictional units for venue purposes."²⁵⁶

districts require security bonds for non-residents, while others require bonds from poor persons.

250. Columbia Note, *supra* note 3, at 1267; Knox Report, *supra* note 167, at 49-50.

251. 593 F.2d 992 (10th Cir. 1979).

252. *E.g.*, D.N.M. R. 13e; D. COLO. R. 11; N.D. ILL. Civ. R. 11; W.D. LA. R. 5g; W.D. TENN. R. 6b; E.D. VA. R. 20c.

253. See CASE MANAGEMENT, *supra* note 30, at 52-53; SEMINARS, *supra* note 6, at 139-40 (remarks of Judge Alvin B. Rubin); Judge Rubin, *The Managed Calendar*, 4 JUST. SYS. J. 135, 144-45 (1978).

254. See Appendix A *infra*.

255. California, with its large population and area, has no statutory divisions and a total of only six places where court is regularly held in its four districts. Two additional divisions have been added by local rule. See Appendix A *infra*. The four districts of New York have no divisions of either variety and nine places where court is regularly held. By contrast, the three Alabama districts are divided into twelve statutory divisions, each with at least one active court location. The two Iowa districts have ten statutory divisions.

256. *Local Rules Survey*, *supra* note 12, at 1023.

Actually these local rules have clouded the application of venue statutes,²⁵⁷ with little corresponding rationalization for the judiciary's

257. Venue in civil cases is governed by 28 U.S.C. §§ 1391, 1393, and 1404. The effect of sections 1393 and 1404 becomes lost if local rule divisions are equivalent in effect to statutory divisions. 28 U.S.C. § 1393 provides:

(a) Except as otherwise provided, any civil action, not of a local nature, against a single defendant in a district containing more than one *division* must be brought in the *division* where he resides.

(b) Any such action against defendants residing in different *divisions* of the same district or different districts of the same State may be brought in any of such *divisions*.

(emphasis added). 28 U.S.C. § 1404 provides in relevant part:

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or *division* where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action . . . of a civil nature . . . may be transferred, in the discretion of the court, from the *division* in which pending to any other *division* in the same district.

(c) A district court may order any civil action to be tried at any place within the *division* in which it is pending.

(emphasis added).

Local rules that subdivide statutory divisions, *e.g.*, E.D. MICH. R. II and W.D. MICH. R. 2, alter the meaning of the venue statutes in four ways. First, under section 1393(a), the creation of more and therefore smaller divisions restricts the area in which non-local actions against a single defendant must be brought. Second, under section 1404(a), the creation of additional divisions limits the places where actions "might have been brought," thus narrowing the court's choice of locations for transfer. Third, under section 1404(b), the subdivision of statutory divisions adds a requirement that all parties agree to a transfer which, under the larger statutory divisions alone, would otherwise have been an unconditional right. Fourth, under section 1404(c), the creation of smaller divisions limits a court's choice of places at which a pending action may be tried.

Local rules that create divisions in districts undivided by statute, *e.g.*, E.D.N.C. R. 2B, M.D.N.C. R. 3(b), E.D. VA. R. 3(B), N.D. FLA. R. 2; M.D. FLA. R. 1.02(b), D. ARIZ. R. 1, N.D. CAL. R. 105, E.D. CAL. R. 6, D. MONT. R. 2, D. NEV. R. 1, and E.D. WASH. R. 16(c), alter the meaning of the civil venue statutes in three ways. First, legislatively undivided districts are brought within the ambit of section 1393(a). Second, under section 1404(a), district courts must find that three criteria are met before making a transfer that would otherwise have been left solely to their discretion. Third, undivided districts are unnecessarily brought within the coverage of section 1404(b).

The only line of cases in which local rule divisions are discussed as they relate to civil venue statutes deal with District of Montana Rules 2 and 4. In *Standish v. Gold Creek Mining Co.*, 92 F.2d 662 (9th Cir. 1937), *cert. denied*, 302 U.S. 765 (1938), the district court held that it did not have in personam jurisdiction over a defendant who resided in another locally-created division. On appeal, this ruling was reversed. The court of appeals, divining a congressional intent that the District of Montana have no divisions, disregarded the local rule division because it improperly restricted the court's in personam jurisdiction. In a later case, *McNeil Constr. Co. v. Livingston State Bank*, 155 F. Supp. 658 (D. Mont. 1957), the same local rule divisions were held to be "divisions" within the meaning of 28 U.S.C. § 1404(a), and a transfer of the case from one local division to another was allowed. *Livingston* has been read as limiting the *Standish* view of local rule divisions to cases where the court's jurisdiction, not venue, is restricted. See *Tassie v. Continental Oil Co.*, 228 F. Supp. 807 (D. Mont. 1964); *Local Rules Survey*, *supra* note 12, at 1023.

Venue in criminal cases is determined by Federal Rule of Criminal Procedure 18,

geographical coverage. There are extreme differences in the level of service the federal courts provide in various parts of the country,²⁵⁸ and creating new divisions has done little to mitigate these effects. If a court, or the organized bar in a district, wishes to make the judiciary more accessible in portions of that district, the more promising course is to lobby in Congress for new statutorily designated places where court may be held if necessary, and such resources as a building and—

which reflects the sixth amendment's requirement that criminal defendants be tried by an impartial jury of the district in which the offense was committed. Rule 18 provides that "[e]xcept as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses." After rule 18 was amended in 1966 to delete a provision that restricted venue to the division in which the offense was committed, statutory and local rule divisions no longer constituted units of venue in criminal cases. *Bostick v. United States*, 400 F.2d 449, 452 (5th Cir. 1968), *cert. denied*, 393 U.S. 1068 (1969). Thus, the transfer of a case from one division to another does not constitute a change of venue. *See United States v. Clark*, 416 F.2d 63, 64 (9th Cir. 1969). Since the constitutional protections that accompany venue rights no longer apply to interdivision transfers, the courts possess wide discretion in making such transfers. *United States v. Partin*, 320 F. Supp. 275, 278 (E.D. La. 1970); *Houston v. United States*, 419 F.2d 30, 33 (5th Cir. 1969). *See United States v. James*, 528 F.2d 999, 1021 (5th Cir. 1976) (*sua sponte* interdivision transfer upheld); *United States v. Lewis*, 504 F.2d 92, 98-99 (6th Cir. 1974) (transfer of federal prosecution for retrial after hung jury did not violate statute prohibiting new creation of divisions).

Despite the ostensibly small role that district divisions are to play in the area of criminal venue, local rule divisions indirectly impinge upon the meaning of rule 18. Some local rules, *e.g.*, N.D. FLA. R. 2(C), M.D. FLA. R. 1.02(e), D. ARIZ. R. 1, N.D. CAL. R. 105-2(b), E.D. VA. R. 3 & 4, and E.D. WASH. R. 16(c), contain provisions that allow interdivision transfer for good cause, at the court's discretion. Another, D. MONT. R. 2, explicitly incorporates the dictates of rule 18. While these rules arguably complement rule 18, others, *e.g.*, E.D. CAL. R. 6; E.D. MICH. R. II, W.D. MICH. R. 2, D. NEV. R. 1, E.D.N.C. R. 2B, and M.D.N.C. R. 3, which rigidly specify the divisions where civil and criminal cases *are to be* tried, defy the policy of flexibility evidenced by the 1966 amendment of rule 18. Similarly, Middle District of Tennessee Rule 5, that incorporates the divisions for that district set forth in 28 U.S.C. § 123(b), requires that *all* criminal cases be tried in the Nashville division, an egregious departure from rule 18.

It is likely also that local rule divisions complicate the interpretation of 18 U.S.C. § 3240, which provides in relevant part:

Whenever any new district or division is established . . . prosecutions for offenses committed within such district [or] division . . . shall be commenced and proceeded with the same as if such new district or division had not been created . . . unless the court, upon the application of the defendant, shall order the case to be removed to the new district or division for trial.

(emphasis added). The obvious question is whether the establishment of new divisions by local rule activates 18 U.S.C. § 3240. If local rule divisions are "divisions" within the meaning of section 3240, then defendants have a right, conditioned on the court's discretion, to have their cases removed to newly-created local rule divisions, a result that Congress surely did not contemplate.

258. *See* CASE MANAGEMENT, *supra* note 30, at 10-13, 96-98.

most significant—one or more resident judges and support staff.²⁵⁹

Another questionable body of local rules is that which creates new burdens. There are many specifications establishing the format of various documents or requiring that a form be used that is not otherwise required either by rule or by any national body.²⁶⁰ The existence of these requirements is irritating to commentators and probably to foreign lawyers. Yet provisions of this kind serve obvious purposes of the court. If papers for a given purpose are always similar in size and format, the work of the court and staff can be expedited. Court rules that specify the format of documents to be filed are a routine part of the landscape for any litigating lawyer.²⁶¹ Most lawyers seem to strongly dislike conflicting requirements and would prefer a single set of requirements, but do not object to requirements per se.²⁶² Presumably, however, a chief purpose of the federal rules was to do away with detailed and precise pleadings and other requirements.²⁶³

As an aspect of the management function, local rules can be a powerful tool for rationalizing diverse court practices and imposing uniformity. A local rule that defines a single method and approach, and is implemented as written, performs a great service to lawyers. The greatest difficulty for the practitioner arises when no effective rule exists. In 1977 the Federal Court Committee of the Bar Association of

259. Without a resident judge, facilities, and support staff, local "boosters" may well find that no court sessions are held in the city desired. Under 28 U.S.C. § 140, a court may adjourn any session "for insufficient business or other good cause." Many statutorily established places have not held regular sessions for years.

Changes are frequent in the geographical coverage defined in 28 U.S.C. §§ 81-131. For example, statutory divisions were recently eliminated in the district courts of the Western District of Louisiana, (Federal District Court Organization Act of 1978, Pub. L. No. 95-408, § 3, 92 Stat. 883 (amending 28 U.S.C. § 98(c) (1976))), and Maine (Judicial Districts, Pub. L. No. 95-573, § 2, 92 Stat. 2458 (1978) (amending 28 U.S.C. § 99 (1978))). The districts in Illinois were reorganized and renamed (Federal District Court Organization Act of 1978, Pub. L. No. 95-408, § 4(b), 92 Stat. 884 (amending 28 U.S.C. § 93 (1976))), and the divisions in North Dakota were reorganized (Federal District Court Organization Act of 1978, Pub. L. No. 95-408, § 3(b), 92 Stat. 883 (amending 28 U.S.C. § 114 (1976))). Numerous minor adjustments were made in district boundaries and places for holding court in New York. *See, e.g.*, Pub. L. No. 95-271, 92 Stat. 221 (1978) (amending 28 U.S.C. § 112(c) (1976)); Pub. L. No. 95-408, § 4(c), 92 Stat. 885 (1978) (amending 28 U.S.C. § 112 (1976)); Pub. L. No. 95-573, § 3, 92 Stat. 2458 (1978) (amending 28 U.S.C. § 112(b) (1976)).

260. For example, see Northern District of California Rule 200-3 to -9; 230-1 to -3. The fact that these rules resulted from a revision in which new rules were proposed by a bar committee suggests no great objection to them by lawyers.

261. *See, e.g.*, SUP. CT. R. 15 & 39.

262. Conferences of the author with lawyers in ten districts surveyed, *see* note 30, *supra*, produced fairly uniform reactions on this point, as did the Ninth Circuit survey. *See* note 5, *supra*.

263. 4 WRIGHT & MILLER, *supra* note 12, at § 1041; 5 *id.* at §§ 1181-1182, 1202.

Greater Cleveland assembled materials on the pretrial procedures of the judges in the Northern District of Ohio, with the intention of publishing a compilation that would guide lawyers through the various procedures of each judge at each stage. Unfortunately, the report never got beyond the stage of a rather confusing draft. The committee felt that procedures were too fluid and individual for any compilation to be both useful and current.²⁶⁴ Situations such as the above dramatically demonstrate the need for the court to agree upon a single approach and sequence of forms, and to publish them.²⁶⁵

3. Improving national rules

Local rules have a great potential for informing the national rulemaking process. This potential has remained largely untapped.²⁶⁶ The failures of local rules can sometimes be useful indicators that modification is needed in a national rule. The experience gained with attempts to control class action communications and rules on pretrial procedures are prime examples. Without local rules there would be even less documentation of experience than is now available. In the cases in which a local rule has been attacked, the rule has provided a visible and definite target for the appeals court to examine in light of the facts at hand.²⁶⁷ Particularly in pretrial matters, but in other matters of procedure as well, the absence of a record of policies effectuated by the trial court can entirely forestall supervision by the appellate court.²⁶⁸

The work of Professor Cohn on discovery exemplifies an approach that could be widely used. He surveyed rules and procedures outlining

264. Personal conversation with Thomas Brady, Executive Director of the Bar Association of Greater Cleveland (June 14, 1979).

265. See *Conference on Rule Making*, *supra* note 5, at 501 (observations of Judge Walter E. Hoffman); *id.* at 481 (observations of Judge Charles W. Joiner). See also Cohn, *supra* note 12.

266. Professor Arthur R. Miller, the Reporter to the Advisory Committee on Civil Rules, has repeatedly expressed interest in using the local rules experience for this purpose in personal conversations with the author, 1979-80. The Supreme Court's decision in *Miner v. Atlass*, 363 U.S. 641, 651, 663 (1960), was criticized for restricting this fund of experience. See Comment, *Admiralty-Depositions—District Court not Authorized to Make Local Rules Permitting Depositions for Discovery*, 36 N.Y.U. L. REV. 228, 233 (1961). See also note 35 *supra*.

267. Compare *United States v. Viserto*, 596 F.2d 531 (2d Cir. 1979) (because there was no local rule, court relied on speculation and hearsay regarding the practice questioned) with *McCargo v. Hedrick*, 545 F.2d 393 (4th Cir. 1976) (language of local rule established practice in question).

268. As previously noted, appellate review of local rules is difficult and sporadic at best. See note 22 *supra*.

the judiciary's efforts regarding discovery rules and draws lessons for the national rules.²⁶⁹ Along similar lines, the authors of the Columbia Note on local rules, although highly critical of these rules, used local rule experience to identify several problems in the federal rules.²⁷⁰

4. National policy

Local rules have been used to implement national policy. There are numerous local rules that define the powers of magistrates in a district's implementation of the several Magistrate Acts.²⁷¹ Most of the rules developed from a series of communications from the Committee on Administration of the Federal Magistrate System, Judicial Conference of the United States. For example, after the 1976 revisions to the Act²⁷² the committee directed its staff, the Magistrate Division of the Administrative Office of the United States Courts, to prepare alternative materials for the courts' use. In March, 1977, the Division sent out two sets of proposed rules to each district, a "long form" and an alternative "short form," and a "jurisdictional checklist" interpreting the relevant law. Several courts have since incorporated these proposals into their rules.

We have already seen that other local rules are based on national models, especially those dealing with the fair trial/free press issue.²⁷³ Some other national models that have been or may be used in local rules are Federal Judicial Center guidelines on prisoner civil rights cases,²⁷⁴ the current discussion of proposals for a national system setting qualifications for admission to federal court bars,²⁷⁵ Model Federal Rules of Disciplinary Enforcement,²⁷⁶ a model rule for Petition for Disclosure of Presentence or Probation Records,²⁷⁷ and the several statutory requirements for district court "plans."²⁷⁸

269. See Cohn, *supra* note 12. Surveying procedures outside the rules was difficult and unavoidably incomplete. Professor Cohn relied on a limited survey of individual judges conducted by the Federal Judicial Center.

270. Columbia Note, *supra* note 3, at 1271.

271. 28 U.S.C. §§ 631-639 (1976).

272. Act of Oct. 21, 1976, Pub. L. 94-577, 90 Stat. 2729 (1976) (amending 28 U.S.C. § 636(b)).

273. See text accompanying notes 176-89 *supra*.

274. RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS (Federal Judicial Center 1977).

275. See Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts to the Judicial Conference of the United States (Sept. 19-20, 1979).

276. ABA Standing Committee on Professional Discipline (Feb. 14, 1978).

277. May 15, 1979.

278. Requirements for district court plans appear in Jury Selection and Service Act, 28

Statutory plan requirements represent a form of double delegation. In each statute involved, Congress required the district to establish a plan subject to approval by the circuit judicial council. Several judicial councils have developed model plans that have served as the basis for district court plans. Neil Kerwin has shown that the statutory plan device can be a highly effective way to implement new national policies.²⁷⁹ Most of the widely-used local rules discussed throughout this article do not represent any national policy. They go through an entirely informal and voluntary process of diffusion through the judiciary, from judge to judge and from court to court. In a decentralized system involving much judicial discretion, there is obvious appeal for an intermediate device, such as a national proposal of a local rule that will respond to a widespread problem. But the danger of this approach is obvious, because it could be used to circumvent the national rulemaking process, especially the congressional role. Beyond the clear impropriety of bypassing the one democratic element of a largely undemocratic system, it seems nearly as clear that multiplication of local rules is undesirable when a uniform national policy is available.

A national proposal for a local rule should be made only when the national body can show specific aspects of local practice that are so diverse that a national policy is impractical or undesirable. Alternatively, sometimes a national proposal of alternative local rules might be sensible for matters on which a national body is divided. However, it seems clearly undesirable to perpetuate disagreements within or among national bodies in the form of conflicting local rules, so the device should be limited to closely related alternatives that are well within the existing bounds of judicial discretion.

5. An approach

Is the present broad scope of local rules consistent with the power to make local rules? Local rules are now used not only as specifically required by statute or rule but also as a "notice board" for routine information, a tool of court and docket management, a channel of information about court views on matters where it must exercise broad discretion, an occasional device for filling gaps in the national rules, and an occasional vehicle for implementing national policies. The rules have also provided opportunities for courts to hammer out inter-

U.S.C. § 1863 (1976); Criminal Justice Act, 18 U.S.C. § 3006A (1976); Speedy Trial Act, 18 U.S.C. §§ 3165-3166 (1976).

279. Kerwin, *Judicial Implementation of Public Policy: The Courts and Legislation for the Judiciary*, 16 HARV. J. LEG. 415 (1979).

nal agreement on common policies, and they are a valuable potential resource for national rulemakers.

All of these are useful and important purposes, yet the resulting body of rules is certainly prolix and disorganized, aptly characterized as "the soft underbelly of federal procedure."²⁸⁰ Much can be done to rationalize the body of rules within their present scope. On the prior question, there is little authority for the proposition that the present scope of local rules is too broad.²⁸¹ It is not clear whether the framers of rule 83 intended for the local rules to exclude the purposes just outlined above. Certainly they hoped to abolish conformity. Certainly they also intended to abolish existing local rules that were in conflict with the new rules they had developed. As one would expect, many districts carried forward massive bodies of local rules from the conformity era that made frequent reference to obsolete forms of action.²⁸² When the Knox Committee looked at the rules of each district, its "examination developed the expected conclusion that numerous local rules in effect when the Federal Rules of Civil Procedure became operative, were in conflict with the provisions of those rules. . . . The continued existence of those obsolete [local] rules without recession or revision has caused some uncertainty"²⁸³ It is in this context that we should understand the Knox Committee's view that Federal Rules of Civil Procedure were "so comprehensive as to leave very few subjects that need now be dealt with at all by local rules."²⁸⁴ The Committee had a specific purpose that it successfully discharged. Given the occasional statements of the authors of the Federal Rules of Civil Procedure suggesting remaining significant purposes for local rules,²⁸⁵ we need

280. Letter from Charles A. Wright to the Duke Law Journal (Nov. 16, 1965), *quoted in Local Rules Survey*, *supra* note 12, at 1012 n.6 and 12 WRIGHT & MILLER, *supra* note 12, at 218.

281. Except, of course, the many commentaries of the last fifteen years cited throughout this article that have looked at local rules with a jaundiced eye.

282. On September 15, 1938, the District Court of Oregon simply reissued its former rules, with a notation that any that might be inconsistent with the Federal Rules of Civil Procedure were of no effect. The old rules had been adopted March 1, 1913, with amendments in 1936 and 1937. The Southern District Court of New York, on the other hand, appointed a bar committee that rewrote the local rules. Pre-1938 local rules were often voluminous and full of references to state procedure and to demurrers and other pleadings that the Federal Rules of Civil Procedure have eliminated.

283. Knox Report, *supra* note 167, at 10.

284. *Id.* at 9.

285. Dean Charles Clark said, for example: "But one of the problems to be faced is the wide diversity of conditions existing in different parts of the country and rules must be adjusted to accommodate themselves to that diversity." Clark, *A Striking Feature of the Proposed New Rules, Change in Basic Attitude Towards Improved Procedure*, 22 A.B.A.J. 787,

not attach a larger significance to the work of this successor committee. We can, rather, respond in two ways: by recognizing that local rules could be expected to proliferate in the increasingly complex litigative environment since 1940, and by searching for ways to simplify and order local rules without restricting their present use in support of the important purposes just outlined.

V. AN AGENDA

The agenda of the local rules critics is fairly straightforward, and follows clearly from their finding that the courts have usurped a quasi-legislative power never assigned to them. The corresponding remedy must be to restrict that power, control its exercise through external supervision, and reform rulemaking procedures. The agenda to draw here must be more complex and less focused, because my main conclusion thus far is that the criticisms are wrong. What follows is incomplete. Some policy conclusions seem clear, but many questions remain unresolved.

The Knox Committee suggested removing "unimportant minutiae" from local rules.²⁸⁶ Clearly enough, purely internal matters that no practitioner needs to know should be excised entirely. A more difficult question concerns what should be done with provisions that are "notice board" matters. Surely not everything that is worth publicly establishing as a matter of policy is worth enforcing as a rule.²⁸⁷ A threshold problem for reform efforts is the desirability of placing purely informational matters in a separate forum. The common model in district courts is to use "General Orders" for this purpose, a practice fairly widespread in the Ninth Circuit and recommended by the Knox Re-

789 (1936). Clark went on to oppose suggestions that local practice be incorporated into the rules, so he left open considerable scope for local variation.

Major Tolman expected that the first sentence of rule 83 (the local rule provision) would be sparingly used: "There should be very few instances where rules of this character are needed, since the general rules cover the ground pretty thoroughly." However, his corresponding reference to the final sentence ("one of the most important and salutary in the entire set of rules") is extremely limiting: "It [the last sentence] permits judges to decide the unusual or minor procedural problems . . ." ABA INSTITUTE (Wash. D.C.), *supra* note 4. It appears we must surprise Major Tolman by expanding the scope of either the first sentence or the final one. To have important matters involving judicial discretion undefined and left to be adjudicated under the final sentence, is at least as inconsistent with his analysis of the rule as is the expansion of local rules the Columbia Note authors criticized. *See also* notes 170 & 171 *supra*.

286. Knox Report, *supra* note 167, at 12.

287. Local rules have the force of law. *See* 12 WRIGHT & MILLER, *supra* note 12, at 223-24.

port.²⁸⁸ Arguably, a distinction that isolates informational matters might improve local rules practice. Local rules could be shortened and their purposes made clearer. The quasi-legislative cast now given to purely descriptive provisions could be abandoned and reserved to matters such as class action communications that deserve a more full and considered treatment before a local rule is adopted. Perhaps most important, it would be easier for a court to insist that the remaining local rules be uniformly enforced and followed.

But who is to define the distinction between local rule material and "General Order" material? Both deal exclusively with procedure, so no guide can be found in distinctions between substance and procedure in other contexts. Perhaps it is necessary to distinguish "substantive procedure" suitable for local rules from "procedural procedure" appropriate for the notice board. Even if such a distinction could be made in principle, its implementation in ninety-five districts probably would not be consistent and lawyers would confront the problematic task of searching two sets of materials for a court's policy on any point not clearly assignable to one or the other.

Finally, how would the "notice board" materials be collected and distributed? The "General Orders" of the Central District of California are collected in two large loose-leaf volumes in the Clerk's Office and, one must assume, in the offices of law firms in Los Angeles and a few other places. There is no national collection. A better solution would be to follow the lead of the Third and Ninth Circuit Courts of Appeals and publish "Internal Operating Procedures" covering all informational matters, but even this might lead to confusion. In the final analysis, the bar will be best served if all courtwide procedures announced in a form intended for circulation among lawyers are called local rules and are printed together. While this procedure creates confusion by treating different provisions similarly, there may be no less effective alternative.

Assuming that a single and heterogeneous body of local rules is to be compiled, how and how much should they be reformed? Consider the following suggestions:

1. *A court's review of its local rules should be continuous and aggressive.* Apart from new policy initiatives a court may consider, a court should assure that someone, *i.e.* the clerk, a bar committee, or a bench committee, has a continuing responsibility to keep the local rules current, assure that the rules are lawful, and that they reflect an ade-

288. Knox Report, *supra* note 167, at 20.

quate technical level of draftsmanship. Obsolete provisions and confusing, unlawful, or misleading provisions must be eliminated.

2. *Courts should make maximum use of local rules for management and informational purposes.* There should be a local rule on every procedural matter lawyers need to know about on which a common policy exists.²⁸⁹ Where judges' policies conflict, a court should try to develop a common policy that can be embodied in a rule. Where a rule is or becomes ineffective, it should be made effective or withdrawn.

3. *Courts should involve the bar and sometimes the public in rulemaking.* Bar committees can clearly be useful in identifying flaws in existing rules and unanticipated burdens or difficulties in proposed rules. These committees can aid in criticizing and helping to modify underlying court policies that affect lawyers and clients. While consultation should be maximized, a formal notice and comment procedure may not be necessary for every rule change. Procedures providing notice and opportunity for comment should be published and invoked whenever a major rule is considered or a wholesale revision is undertaken.²⁹⁰ Individual lawyers should be specifically asked to contribute detailed analysis and criticism.

4. *Courts should be especially meticulous in avoiding local rules that reverse an existing burden or presumption.* Several questionable local rules, that otherwise only define a court's usual practice, are suspect on this ground. Specifically, these rules deal with subjects such as numerical limits on interrogatories and requirements for payment for distant depositions. A court that expands its local rules could easily create new rules with this fault and, therefore, should be aware of the danger.

5. *The judiciary, at every level, should try to achieve maximum uniformity consistent with the informational function of national and local rules.* Circuit-wide local rules, as proposed, for example, in the Ninth Circuit, are certainly desirable if adequate agreement can be obtained by all adopting courts *and* it is clear that the matters in question cannot or will not be adopted nationally. A nationwide uniform numbering system would simplify the task of finding relevant provisions.

6. *The national rules advisory committees should review local rules*

289. Carrying this notion a step further, assuming a presumption against expanding the national rules exists, then perhaps local rules should be as exempt from any corresponding presumption. In that case, local rules are the natural vehicle for informational matters in general, assuming that they meet the other standards defined below.

290. An authoritative recommendation to this effect was recently made to the courts of appeals. See COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 44-46 (June, 1975).

in a continuous effort to memorialize as national policy, the policies of individual courts that enjoy general acceptance. It seems clear that a vigorous national effort to define and remove from local rules each significant new consensus on procedure will greatly aid the effort to rationalize rules and policies at every level.

7. *Rule 83 should be considered for amendment to encourage or require courts to enforce court-wide application of local rules, and to encourage broad consultation before a rule is promulgated or amended.* Rule 83 sets up the rulemaking process that makes a district court very much like a legislature. A current majority can pass a rule that is binding both on the minority who oppose it and on all future appointees. This provision imposes a management burden on a district court that is more apparent than its counterpart in a legislature, whose members are not directly affected by most of their own laws. The district courts have not been effective in assuring that all judges comply with their local rules.²⁹¹ On the question of consultation, it seems clear that present procedures are not widely recognized and may not always be adequate. An amendment might help to clear the air.²⁹²

8. *Uses of local rules for national policy should be systematized and their purposes distinguished from national rulemaking.* Local rules should never be used to avoid scrutiny of rules by Congress. When a national body wishes to use limited experience with a procedure to inform its deliberations, it should determine in advance the information sought.²⁹³

291. Perhaps it would help to amend Federal Rule of Civil Procedure 83 by adding a comma at the end of the first sentence, and continuing "provided the court is satisfied that all judges will enforce and abide by the rules as made or amended by a majority." Alternatively, an amendment might require more than a majority for making or amending local rules. A final possibility would be to include language in rule 83 to make explicit a present and future responsibility of each district court to monitor compliance and take action if compliance is not obtained.

292. A new second sentence might be inserted into Federal Rule of Civil Procedure 83 as follows: "Promulgation shall follow appropriate notice and consultation with the bar and other interested groups."

293. Possible new language to add at the end of Federal Rule of Civil Procedure 83:

From time to time the Judicial Conference of the United States may propose local rules for possible adoption by district courts. If it wishes to consider the possibility of future amendments to the Federal Rules of Civil Procedure through a version of the proposed local rule, it shall specify the information desired to be obtained and the fashion in which that information will bear on adoption or non-adoption of the amendment to the federal rules.

The Judicial Conference shall not propose local rules in the expectation of universal adoption.

VI. SOME UNRESOLVED QUESTIONS

While this agenda may propose a good deal of new activity, it forecloses little and leaves some questions open. Where is the best boundary between national and local rules? One answer might be that the national rules should incorporate *all* procedural matters on which national agreement can be obtained. This extreme measure might greatly expand the national rules, violating the principles of "simplicity, scarcity and economy" that have served well.²⁹⁴ The rules might eventually include precise specification of paper size, format, and sequence of topics in various pleadings, for example. Or should the rules be rigorously limited to their original topics?²⁹⁵ This would likely be a prescription for steadily expanding differences among districts. A suitable middle ground is elusive.

Another open question is the possibility of a review body for local rules. This body might include the existing advisory committees on rules, the circuit Judicial Councils, or the Federal Judicial Center.²⁹⁶ The drawbacks are clear in each case; yet pressure for review could necessitate some new formal mechanisms. If the courts do not reform their own rules, as suggested above, some form of review will become increasingly desirable.

Finally, there are interesting unresolved questions on the present and prospective use of local rules to illuminate proposals for national rules. Do experiments along these lines raise equal protection problems?²⁹⁷ How can the local rules experience be brought to bear on national proposals in something better than an *ad hoc* fashion? These and other questions will hopefully be determined through expanded experimentation with the local rules process.

294. Columbia Note, *supra* note 3, at 1252, *quoted in* 12 WRIGHT & MILLER, *supra* note 12, at 217.

295. This approach would be inconsistent with the expectation of the Federal Rule of Civil Procedure authors. See Knox Report, *supra* note 167, at 13 & n.5.

296. We have the views of the original advisory committee on the possibility of review by the courts of appeals only.

There was a discussion in the Committee as to whether the local rules in each district should be made as a finality by the district judges or whether they should be subject to approval by the circuit court of appeals of the respective circuits. The Committee entertained the view that as the district judges are the ones to operate under the local rules they should have the final determination subject to modification by the Supreme Court of the United States if that court desires to change any local rule so prescribed.

ABA INSTITUTE (Cleveland), *supra* note 4, at 357 (statement of Hon. George Donworth).

297. These issues are the subject of current work by the Federal Judicial Center's Advisory Committee on Experimentation in the Law.

APPENDIX A

Divisions Created by Statute and Local Rule

STATUTORY DIVISIONS		LOCAL RULE DIVISIONS		STATUTORY DIVISIONS		LOCAL RULE DIVISIONS	
28 U.S.C. §	#	LOCAL RULE	#	28 U.S.C. §	#	LOCAL RULE	#
FIRST CIRCUIT							
Me.	99	2					
Mass.	101	1					
N.H.	109	1		W.D. Tenn.	123(c)	2	
R.I.	120	1		SEVENTH CIRCUIT			
P.R.	119	1		N.D. Ill.	93(a)	2	
SECOND CIRCUIT				S.D. Ill.	93(b)	2	
Conn.	86	1		E.D. Ill.	93(c)	1	
N.D.N.Y.	112(a)	1		N.D. Ind.	94(a)	3	
E.D.N.Y.	112(c)	1		S.D. Ind.	94(b)	4	
S.D.N.Y.	112(b)	1		E.D. Wis.	130(a)	1	
W.D.N.Y.	112(d)	1		W.D. Wis.	130(b)	1	
Vt.	126	1		EIGHTH CIRCUIT			
THIRD CIRCUIT				E.D. Ark.	83(a)	5	
Del.	87	1		W.D. Ark.	83(b)	6	
N.J.	110	1		N.D. Iowa	95(a)	4	
E.D. Pa.	118(a)	1		S.D. Iowa	95(b)	6	
M.D. Pa.	118(b)	1		Minn.	103	6	
W.D. Pa.	118(c)	1		E.D. Mo.	105(a)	3	
V.I.	48 U.S.C. § 1615	2		W.D. Mo.	105(b)	5	
				Neb.	107	1	
				N.D.	114	4	
				N.D.	122	4	
FOURTH CIRCUIT				NINTH CIRCUIT			
Md.	100			Alaska	81A	1	
E.D.N.C.	113(a)	1	Rule 2B	7	Ariz.	82	1
M.D.N.C.	113(b)	1	Rule 3(b)	6			Rule 1
W.D.N.C.	113(c)	1					4
S.C.	121	10					("[T]he district is divided into four <i>unofficial</i> divisions.") (emphasis added).
E.D. Va.	127(a)	1		N.D. Cal.	84(a)	1	Rule 105
W.D. Va.	127(b)	1		E.D. Cal.	84(b)	1	Rule 6
N.D.W. Va.	129(a)	1		C.D. Cal.	84(c)	1	2
S.D.W. Va.	129(b)	1		S.D. Cal.	84(d)	1	
FIFTH CIRCUIT				Hawaii	91	1	
N.D. Ala.	81(a)	7		Idaho	92	1	
M.D. Ala.	81(b)	3		Mont.	106	1	Rules 2 & 4
S.D. Ala.	81(c)	2		Nev.	108	1	Rule 1
N.D. Fla.	89(a)	1	Rule 2				5
M.D. Fla.	89(b)	1	Rule 1.02b				2
S.D. Fla.	89(c)	1					("For convenience, the district is divided into two <i>unofficial</i> districts.") (emphasis added).
N.D. Ga.	90(a)	4		Or.	117	1	
M.D. Ga.	90(b)	7		E.D. Wash.	123(a)	1	Rule 16c
S.D. Ga.	90(c)	6		W.D. Wash.	128(b)	1	3
E.D. La.	98(a)	1		Guam	48 U.S.C. § 1424	1	
M.D. La.	98(b)	1		N. Mariana Is.	48 U.S.C. § 1694(a)	1	
W.D. La.	98(c)	6		TENTH CIRCUIT			
N.D. Miss.	104(a)	4		Colo.	85	1	
S.D. Miss.	104(b)	5		Kan.	96	1	
N.D. Tex.	124(a)	7		N.M.	111	1	
E.D. Tex.	124(c)	6		N.D. Okla.	116(a)	1	
S.D. Tex.	124(b)	6		E.D. Okla.	116(b)	1	
W.D. Tex.	124(d)	7		W.D. Okla.	116(c)	1	
C.Z.	48 S.A.L. § 1122	1		Utah	125	2	
				Wyo.	131	1	
SIXTH CIRCUIT				DISTRICT OF COLUMBIA CIRCUIT			
E.D. Ky.	97(a)	1		D.C.	88	1	
W.D. Ky.	97(b)	1		TOTALS			
E.D. Mich.	102(a)	2	Rule II	TOTAL			
W.D. Mich.	102(b)	2	Rule 2	DIVISIONS			
N.D. Ohio	115(a)	2		224			
S.D. Ohio	115(b)	2		285			
E.D. Tenn.	123(a)	4					
M.D. Tenn.	123(b)	3	Rule 5				

APPENDIX B**Ninth Circuit Proposed Uniform Local Rules***

- I. Organization and Operation of the Court
 - 1-105 Sessions
 - 1-110 Office of the Clerk
 - 1-120 Assignment and Transfer of Cases
 - 1-125 Court Fees
 - 1-130 Files and Records: Exhibits
 - 1-135 Orders Grantable by Clerk
 - 1-140 Official Newspapers
 - 1-145 Conduct in Courtroom: Photography and Recording Devices
 - 1-150 Court Library
 - 1-155 Sanctions
 - 1-160 Procedure for Adopting, Rescinding, and Amending Rules
 - 1-165 Transitional Provision; Effective Date
 - 1-170 Short Title
- II. Attorneys
 - 2-105 Attorneys—Appearance and Withdrawal
 - 2-110 Attorneys—Admission to Practice
 - 2-115 Standards of Professional Responsibility
 - 2-120 Model Federal Rules of Disciplinary Enforcement (Alternative 1)
 - 2-120 Alternative 2
 - 2-125 “Free Press—Fair Trial”
- III. Civil Rules
 - A. Form of Papers Filed; Related Cases; Stipulations
 - 3-105 Format of Papers
 - 3-110 Notice of Related Cases
 - 3-115 Stipulations
 - B. Proceedings Before Trial
 - 3-205 Service of Process
 - 3-210 Scheduling Conference
 - 3-215 Motions
 - 3-220 Motions Dealing with Depositions and Discovery
 - 3-225 Interrogatories to Parties
 - 3-230 Requests for Productions
 - 3-235 Requests for Admission

* This table is drawn from a preliminary report submitted by Profs. Edward W. Cleary and Robert L. Misner (Arizona State University, Mar. 2, 1979) to the circuit-wide committee of the circuit judicial conference.

- 3-240 Notice of Settlement or Other Disposition
- 3-245 Dismissal for Failure to Prosecute
- 3-250 Minors and Incompetents
- 3-255 Security for Costs
- 3-260 Surety Bonds
- 3-265 Removal Bond

C. Trial

- 3-305 Size of Civil Juries
- 3-310 Jurors—Examination
- 3-315 Jurors—Exercise of Peremptory Challenges
- 3-320 Instructions to Juries—Requests and Objections
- 3-325 Verdicts: Special Verdicts and Interrogatories to Juries
- 3-330 Proposed Findings of Fact and Conclusions of Law

D. Judgments and Proceedings After Trial

- 3-405 Judgments: Preparation and Objections
- 3-410 Motions for New Trial and Motion Judgment Notwithstanding the Verdict
- 3-415 Taxation of Costs

E. Special Proceedings and Ancillary Remedies

- 3-505 Habeas Corpus and § 2255 Motions
- 3-510 Receivers Other Than in Bankruptcy
- 3-515 Naturalization
- 3-520 Social Security and Black Lung Actions