COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Agenda Item 10

Phoenix, Arizona
January 16-17, 2003

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JANUARY 16-17, 2003

1. Opening Remarks of the Chair

   A. Report on the September 2002 Judicial Conference session
   B. Transmission of Judicial Conference-approved proposed rules amendments to Supreme Court

2. **ACTION** — Approving Minutes of June 2002 Committee Meeting

3. Report of the Administrative Office

   A. Legislative Report
   B. Administrative Report

4. Report of the Federal Judicial Center

5. Report of the Advisory Committee on Appellate Rules

6. Report of the Advisory Committee on Bankruptcy Rules

   A. **ACTION** — Approving publication for public comment proposed amendments to Bankruptcy Rules 3004, 3005, and 4008
   B. Minutes and other informational items

7. Report of the Advisory Committee on Civil Rules

   A. **ACTION** — Approving publication for public comment proposed amendments to Admiralty Rules "B" and "C"
   B. Minutes and other informational items

8. Report of the Advisory Committee on Criminal Rules

9. Report of the Advisory Committee on Evidence Rules

10. Report on Local Rules Project

    A. **ACTION** — Receiving and transmitting report to Standing and Advisory Committee reporters and selected committee members for preliminary review
    B. Future courses of action regarding circulation of report

11. Status Report of Subcommittee on Attorney Conduct Rules (oral report)

12. Report of Technology Subcommittee (oral report)

13. Report of September 23, 2002, Judicial Conference Committee Chairs Long-Range Planning meeting

14. Panel Discussion of Mass Claims Litigation

15. Next Meeting: June 9-10, 2003, in Philadelphia, Pennsylvania

1 Memo

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

Memorandum

TO: Honorable Anthony J. Scirica, and
Members of the Committee on Rules of Practice and Procedure

FROM: Mary P. Squiers

RE: Local Rules Project

DATE: December 12, 2002

This Memorandum provides a brief explanation of what is contained in the packet. Please feel free to contact me with any questions or comments you may have (781.444.2876; marysquiers@attbi.com).

Attached to this Memorandum are two documents. The first of these is the *History and Methodology of the Local Rules Project*. The other document consists of the actual Report of the Local Rules Project, which discusses local rules and is arranged by topic. A brief explanation of these two items follows.

History and Methodology of the Local Rules Project

The ninety-four federal district courts currently have an aggregate of approximately 5,575 local rules, not including many "sub-rules," appendices, and other local directives. This number, although large, is unrepresentative of the actual number of rules in some courts. For example, there are only nineteen rules in the District of Montana yet, when sub-rules, which are each discrete directives, are counted, there are eighty-six of them. There are only twenty-two local rules in the Eastern District of Wisconsin but, when the discrete sub-parts are counted, there are ninety-one rules. The Central District of California has only thirty-two local rules, but there are actually 254 discrete sub-rules. There are only thirteen rules in the District of Maryland but those directives comprise thirty-eight pages of text in the commonly used paper compilation of local rules.[1] There are only four rules in the Western

[1] *See* Federal Local Court Rules (Lawyers Cooperative Publishing) (2d ed. 1995).

District of Wisconsin but, as stated in the preliminary statement to its rules in electronic format, there are other directives that control.

> This court prepared a number of guides to assist you while your case is pending in this court. The court will provide printed copies of these guides when they are appropriate. The copies provided here are provided for your convenience.
>
> These guides will not cover all issues relating to cases in this court. If you are looking for information about issues that are not covered in these guides then you might try our local rules or the Federal Rules of Civil Procedure.[2]

There are only seven local rules in the Western District of Virginia but the paper compilation of the local rules also sets forth thirty-four standing orders that regulate conduct.

In approximately 1988, the Local Rules Project estimated that there were 5,000 local rules, not including other local directives. There has clearly been an increase in the actual number of local rules since that time.

Although the precise number of pages of local rules was not counted or even estimated in 1988, the volume of local rules seems to have increased significantly over the past thirteen years. Regardless of whether there has been an increase, the volume of local rules is staggering. Some examples of the volume of these rules may be illustrative.[3] The rules in the District of Kansas comprise sixty-two pages of text. The rules in the Northern District of Mississippi comprise 107 pages. The rules in the District of Massachusetts comprise 122 pages. The Northern District of California has ninety pages of text devoted to civil local rules. All of the local rules of the district courts fill five 3" wide binders almost completely.

These rules are extraordinarily diverse. They cover the entire spectrum of federal practice, from attorney admission and attorney discipline, through the various stages of trial, including pleading and filing requirements, pre-trial discovery procedures, and taxation of costs.

I. History

As you are aware, the issue of local rulemaking has been a subject of concern for many years for practitioners throughout the country, the judiciary, and the Congress. The "History" section of this document briefly explains the following expressions of that interest.

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[2] Western District of Wisconsin, electronic discussion entitled: "Guides and Procedures."

[3] All of these numbers are determined from the Federal Local Court Rules (Lawyers Cooperative Publishing) (2d ed. 1995).

1. The Rules Enabling Act. Congress passed the new Rules Enabling Act November 19, 1988 as Title IV of the Judicial Improvements and Access to Justice Act, effective December 1, 1988.[4] It sought to provide "greater participation by all segments of the bench and bar" in the rulemaking process. [5]

2. 1985 Amendments to Rule 83 of the Federal Rules of Civil Procedure. While Congress was working to pass the Rules Enabling Act, the Judicial Conference, through the federal rulemaking process, was amending Rule 83 of the Federal Rules of Civil Procedure, effective August 1, 1985 to provide more public awareness of local rules and the rulemaking process.[6]

3. The First Local Rules Project. In 1985, the Judicial Conference also authorized the Committee on Rules of Practice and Procedure to undertake a study of federal district court local rules. The Local Rules Project was fully operational beginning in the fall of 1986. One year later, the Project sponsored the Conference on Local Rules in the Federal District Courts, an invitational workshop intended to examine and fully discuss the tentative proposals and findings of the Local Rules Project. Among other issues, the conferees favored a uniform numbering system and structure to help make the local rules available to the public. Much of the conference discussion focused on eventual implementation of the Project's suggestions. The conferees agreed that voluntary implementation would be the most successful way to proceed, at least initially. While the Project was completing its analysis of the civil local rules, the Committee on Rules of Practice and Procedure was promoting a uniform numbering system, which was approved by the Judicial Conference at its September 1988 meeting.[7] The Conference urged the district courts to adopt such a uniform system. The *Report of the Local Rules Project: Local Rules on Civil Practice* was distributed to the chief judges of the district courts in April of 1989. The *Report of the Local Rules Project: Local Rules on Appellate Practice* was distributed in the following year to the chief judges of the courts of appeals. The *Report on the Local Rules of Criminal Practice* was distributed to the chief judges of the district courts in April of 1996. These documents were provided to the courts as suggestions for the courts to use when reviewing and renumbering their local rules.

4. Uniform Numbering of Local Rules. When the Local Rules Project began, there was no uniform numbering system for federal district court local rules. The Local Rules Project proposed a uniform numbering system that was endorsed by the Standing Committee and Judicial Conference in 1988.[8] The system was explained to the district courts in the original *Report*. During this time, the Advisory Committees were working through the rulemaking process to amend the Federal Rules to require uniform numbering of local rules. Amendments to the Federal Rules of Civil Procedure took effect December 1, 1995. The

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4 Pub. L. No. 100-702, §§401-407, 102 Stat. 4642, 4648-4652 (1988).

5 H.R.Rep. 422, 99th Cong. 2d Sess. 4 (1985).

6 Fed.R.Civ.P. 83. Rule 57 of the Federal Rules of Criminal Procedure was amended at the same time to correspond to the changes made in Rule 83. See Fed.R.Crim.P. 57.

7 Report of the Judicial Conference (September, 1988) 103.

8 *Id.*

Judicial Conference set April 15, 1997 as the date of compliance with this numbering system.[9]

5. Activities of the Advisory Committee on Civil Rules. The first report of the Local Rules Project determined that some areas of local rulemaking may be more appropriately areas of federal rulemaking. The Advisory Committee examined these areas and amended the Civil Rules as appropriate.[10]

6. The Civil Justice Reform Act. The Civil Justice Reform Act of 1990[11] was enacted to investigate the causes of expense and delay in litigation in the federal courts. The courts had an opportunity to review and evaluate many pretrial and trial activities, resulting in changes and additions to the local rules and eventual amendments to the Federal Rules.

7. The Long Range Plan for the Federal Courts. The Judicial Conference of the United States presented *The Long Range Plan for the Federal Courts* by cover letter dated December 15, 1995 from L. Ralph Mecham, the Secretary of the Judicial Conference. There is a Recommendation in the *Long Range Plan* that Federal Rules be adopted as needed "to promote simplicity in procedure, fairness in administration, and a just, speedy, and inexpensive determination of litigation."[12] One of the Implementation Strategies for the Recommendation stresses that the "national rules should strive for greater uniformity of practice and procedure, but individual courts should be permitted limited flexibility to account for differing local circumstances and to experiment with innovative procedures."[13]

8. Activities of the Judicial Councils. Rules promulgated pursuant to the Rules Enabling Act "shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit."[14] While the method used by the judicial councils to review local rules for possible modification or abrogation is not determined by this statute, each circuit council has developed its own procedure for reviewing new and amended local rules. There is discussion and accommodation during the review process between the judicial council and the court. Actual abrogation of a problematic local rule is quite rare.

9. The American Bar Association. The American Bar Association has also demonstrated concern about the proliferation of local rules. The Litigation Section of the American Bar Association created a Federal Practice Task Force, which developed the "Report and Recommendation on Local Rules." The House of Delegates of the American Bar Association adopted the Section's Report at its winter 2000 meeting.[15] The

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9 Report of the Judicial Conference (March, 1996) 34-35.

10 *See, e.g.,* Fed.R.Civ.P. 4, 5, 24, 38, 53, and the discovery rules.

11 Pub. L. No. 101-650, Title I, 104 Stat. 5089-98 (codified in part at 28 U.S.C. § 471-482 (1994)).

12 Long Range Plan for the Federal Courts, Recommendation 28, p. 58.

13 *Id.* at Implementation Strategy 28c, p. 58.

14 28 U.S.C. §2071(c)(1).

15 Litigation Docket Online, (Spring 2000) Vol. 5, No. 3.

recommendations in that Report essentially sought more easily accessible local rules, uniformly numbered local rules, and case-specific orders rather than local rules.[16]

II. Methodology

The first step in the Project was to organize the local rules in a format that could be analyzed. That step has been a lengthy one. The rules were then sorted by topic and examined. Specifically, the Project analyzed the local rules using three broad questions: (1) Do the local rules repeat existing law? (2) Do the local rules conflict with existing law? And, (3) Should the local rules remain subject to local variation?

A brief discussion of each of the three questions listed above, with examples of local rules illustrating them, follows.

The Local Rules Project intended to highlight local rules that repeat existing law since Rule 83 of the Federal Rules of Civil Procedure forbids such repetition.[17] In addition, such repetition is superfluous and may be counterproductive. It is unnecessary since the bench and bar already have access to existing federal rules and statutes through the published United States code services, electronic media, and handbooks of selected rules and portions of Title 28. In addition, attorneys have had courses in law school on some of these subjects. The bar is accountable, of course, for knowledge of existing law. Documentation that restates existing law simply results in more paper with its concomitant production costs. Further, if the law is restated only partially or is restated incorrectly, attorneys may be confused about what law actually applies. Lastly, repetition may cause serious problems if the statute or Rule is amended and the local rule is not. Local rules covering many topics have been found to repeat existing law.[18]

The Local Rules Project noted local rules that are inconsistent with existing law since Rule 83 of the Federal Rules of Civil Procedure and Section 2071 of Title 28 mandate that there be no inconsistency in the local rules with existing law. The determination of whether a particular local rule is inconsistent depends, in the first instance, on the definition of "inconsistency" used. One using a narrow definition of "inconsistency" may conclude that only those local rules that flatly contradict actual statements or requirements in other law are inconsistent.[19]

If one uses a broader definition of "inconsistency," there is more opportunity for disagreement over whether a particular local rule is, in fact, inconsistent. For example, one can argue that a local rule may be inconsistent with the intent or spirit of the Federal Rules.[20]

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16 *Id.*

17 Fed.R.Civ.P. 83.

18 *See, e.g.,* local rules relating to Rule 3—Filing Fee; Rule 3—In Forma Pauperis; Rule 36—Requests for Admission; Rule 17—Minors and Incompetent Persons; Rule 15—Amended and Supplemental Pleadings; Rule 9—Social Security and Other Administrative Appeals.

19 *See, e.g.*, Rule 5—Filing of Discovery Documents; Rule 81—Naturalization.

20 *See, e.g.,* Rule 3—In Forma Pauperis.

One can also argue that local rules that take away the court's discretion in an individual case are inconsistent with the intent and spirit of the Federal Rules that case management, generally, be addressed on an individual basis.[21] One can also argue that local rules that add further requirements than those set forth in the Federal Rules conflict with the intent and spirit of the Federal Rules.[22]

One can argue that a local rule that is inconsistent with existing case law should be rescinded even though neither Rule 83 nor Section 2071 of Title 28 prohibit such repetition.[23] Case law will surely impact on counsel's activities and the court's decisions in much the same way as the Federal Rules and statutes.

The Local Rules Project found many local rules that seem useful in delineating certain procedures and practices in the individual district courts, in answering the third question.[24]

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21 *Id.*

22 *See, e.g.*, Rule 81—Jury Demand in Removed Cases.

23 *See, e.g.*, Rule 3—Filing Fees.

24 *See, e.g.*, Rule 17—Minors and Incompetent Persons; Rule 9—Three-Judge Court; Rule 9—Social Security Numbers; Rule 24—Claim of Unconstitutionality; Rule 5—Certificate of Service.

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Some of these local rules materially supplement or expand the existing uniform Federal Rules. For example, there are rules that explain the requirements of the

[3] All of these numbers are determined from the Federal Local Court Rules (Lawyers Cooperative Publishing) (2d ed. 1995).

form for a motion to amend.[4] There are local rules that provide a procedure for the parties to notify the court of the presence of a constitutional question.[5] Other rules may add to the pleading requirements for a jury demand. Some rules appear to expand upon what is mandated by federal statutes in such areas, for example, as the payment of fees[6] and the procedure used to obtain a three-judge court.[7]

I. History

Local rulemaking has been the subject of many judicial, legislative and bar activities. Congress has been involved in legislation relating to the local rulemaking process. The Judicial Conference, along with its rulemaking committees, has been instrumental in studying the proliferation of local rules, their actual content, and their numbering. The Judicial Conference, through its same committees, has sought to incorporate the ideas behind particular local into the national rules. The American Bar Association has also focused attention on local rules. A brief discussion of these various activities follows.

Rules Enabling Act

In 1983, the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary began an examination of the promulgation of local rules during its examination of rulemaking by the judiciary, generally. The Subcommittee proposed amendments in 1983 and 1985 to Sections 2072

[4] Rule 15—Amended and Supplemental Pleadings.

[5] Rule 24—Claim of Unconstitutionality.

[6] Rule 3—Filing Fee.

through 2076 of Title 28, which amendments are referred to as the Rules Enabling Act of 1983 and 1985, respectively.[8] The 1985 Rules Enabling Act sought

> to revise the process by which rules of procedure used in federal judicial proceedings, and the Federal Rules of Evidence, become effective, to the end that the rulemaking process provides for greater participation by all segments of the bench and bar.[9]

The Subcommittee's 1985 bill was recommended favorably by the Committee on the Judiciary,[10] and passed the House unanimously, only to die before vote by the Senate due to the adjournment of the ninety-ninth Congress. On June 22, 1987, the House passed a bill, which contained, as Title II, the Rules Enabling Act of 1987.[11] This Rules Enabling Act, with only minor changes, was identical to the 1985 bill.[12] It was referred to the Judiciary Committee of the Senate June 23, 1987. Just a few weeks later, Representative Kastenmeier introduced the Court Reform and Access to Justice Act of 1987 in the House of Representatives.[13] Title II of this Act was the new Rules Enabling Act.[14] This new Rules Enabling Act was identical to the earlier bills except that its effective date was December 1, 1988.[15] This Rules Enabling Act was passed November 19, 1988 as Title IV of the Judicial Improvements and Access to Justice Act, effective December 1, 1988.[16]

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[7] Rule 9—Three-Judge Courts.

[8] *See* H.R. 4144, 98th Cong., 1st Sess. (1983) and H.R. 3550, 99th Cong., 2d Sess. (1985).

[9] H.R. Rep. 422, 99th Cong., 2d Sess. 4 (1985).

[10] *Id.*; 131 Cong. Rec. E-177 (daily ed. Feb. 3, 1986).

[11] H.R. 2182, 100th Cong., 1st Sess. 133 Cong. Rec. H5331 (1987).

[12] 133 Cong. Rec. H5336 (daily ed. June 22, 1987) (statement of Rep. Glickman).

[13] H.R. 3152, 100th Cong., 1st Sess. (August 6, 1987).

[14] Id. at §§201-206.

[15] *Id.* at §206.

[16] Pub. L. No. 100-702, §§401-407, 102 Stat. 4642, 4648-4652 (1988).

The portions of the Act that are relevant to local rulemaking are found in Section 2071 and read as follows:

> (a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.
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> (b) Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order.
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> (c)(1) A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit.
>
> (2) Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.
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> ....
>
> (f) No rule may be prescribed by a district court other than under this section.[17]

The Subcommittee noted in its 1985 report that local rules may have some obvious benefits: they can accommodate to local conditions; they can offer predictability to the bar by communicating the required procedure or practice; and, they can efficiently rid the court of certain routine tasks which lend themselves to a uniform result.[18] The Subcommittee further noted, however, that local rules had been severely criticized by commentators for several reasons: because they could be promulgated without notice or an opportunity for comment; because there was a tremendous number of such rules, and

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[17] 28 U.S.C. §2071.

[18] H.R. Rep. No. 422, 99th Cong., 2d Sess. 14 (1985).

because these rules frequently conflicted with the letter and spirit of national rules and federal statutes.[19]

Some of these criticisms were addressed in the 1985 changes in Rules 83 and 57 of the Federal Rules of Civil and Criminal Procedure, respectively.[20] The 1985 amendments to these Rules require that, before rules are promulgated or amended, there be "appropriate public notice and an opportunity to comment."[21] The amendments also authorize the circuit councils to amend and abrogate local rules of district courts within the circuits.[22] The Rules Enabling Act was proposed, in part, to regulate aspects of the local rulemaking process, which were not addressed by these 1985 amendments.[23]

1985 Amendments to Rule 83 of the Federal Rules of Civil Procedure

While Congress was working to pass the Rules Enabling Act,[24] the Judicial Conference, through the federal rulemaking process, was also dealing with local rules. Rule 83 of the Federal Rules of Civil Procedure was amended April 29 1985, effective August 1, 1985, in several significant respects that were designed to provide more public awareness of local rules and the rulemaking process.[25] Specifically, the Rule was amended to require that local rules be promulgated only "after giving appropriate public

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[19] *Id.* at 14-17.

[20] *See* Fed.R.Civ.P. 83; Fed.R.Crim.P. 57 and discussion, *infra.*

[21] *Id.*

[22] *Id.*

[23] H.R. Rep. No. 422, 99th Cong., 2d Sess. 15 (1985).

[24] *See* 28 U.S.C. §§2071 *et al.*

[25] Rule 57 of the Federal Rules of Criminal Procedure were amended at the same time to correspond to the changes made in Rule 83. *See* Fed.R.Crim.P. 57 (1985).

notice and an opportunity to comment".[26] The Advisory Committee Note recognized that, while some district courts solicited outside input before promulgating local rules, many did not.[27] The Advisory Committee explained:

> The new language subjects local rulemaking to scrutiny similar to that accompanying the Federal Rules, administrative rulemaking, and legislation. It attempts to assure that the expert advice of practitioners and scholars is made available to the district court before local rules are promulgated.[28]

The Rule was also amended to allow a local rule to take effect on the date specified by the district court and to remain in effect "unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located."[29] The Advisory Committee explained its rationale:

> The effectiveness of a local rule should not be deferred until approved by the judicial council because that might unduly delay promulgation of a local rule that should become effective immediately, especially since some councils do not meet frequently. Similarly, it was thought that to delay a local rule's effectiveness for a fixed period of time would be arbitrary and that to require the judicial council to abrogate a local rule within a specified time would be inconsistent with its power under 28 U.S.C. §332 (1976) to nullify a local rule at any time. The expectation is that the judicial council will examine all local rules, including those currently in effect, with an eye toward determining whether they are valid and consistent with the Federal Rules, promote inter-district uniformity and efficiency, and do not undermine the basic objections of the Federal Rules.[30]

Lastly, the Rule was amended to require that other local regulation, such as standing orders and other local directives, also be consistent with the Federal Rules and

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[26] *See* Fed.R.Civ.P. 83 (1985).

[27] Fed.R.Civ.P. 83 Note to 1985 Amendments.

[28] *Id.*

[29] *Id.*, *see also* Fed.R.Civ.P. 83 (1985).

[30] *Id.*

the local rules of the respective district.[31] The Advisory Committee explained briefly its concern with standing orders and their functional equivalents:

> The practice pursued by some judges of issuing standing orders has been controversial, particularly among members of the practicing bar. The last sentence in Rule 83 has been amended to make certain that standing orders are not inconsistent with the Federal Rules or any local district court rules. Beyond that, it is hoped that each district will adopt procedures, perhaps by local rule for promulgating and reviewing single-judge standing orders.[32]

The First Local Rules Project

The United States Judicial Conference authorized the Committee on Rules of Practice and Procedure to undertake a study of federal district court local rules in 1985. Daniel R. Coquillette, Report to the Committee, submitted a proposal to the Committee for a Study of these local rules in January 1986. No committee since the Knox Committee[33] in 1940 had attempted: (1) A complete review of local rules for legal errors or internal inconsistencies; (2) A study of the rules and rulemaking procedures to see how they work in practice; or, (3) An examination of the relationship of local rules to the overall scheme of uniform federal rules. The Local Rules Project was fully operational at Boston College Law School beginning in the fall of 1986.

The Local Rules Project submitted a Preliminary Project Report to the Committee on Rules of Practice and Procedure at its January 29, 1987, meeting. At that meeting, the Committee suggested that, in the fall of 1987, a small number of leading

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[31] *See* Fed.R.Civ.P. 83 (1985). It should be noted that an additional change was made to Rule 83 in 1985 to require that copies of the local rules "be furnished to the judicial council and the Administrative Office of the United States Courts and be made public." *Id.* Prior to this amendment, copies of local rules were required to be given to the Supreme Court of the United States.

[32] Fed.R.Civ.P. 83 Note to 1985 Amendments.

experts on federal rulemaking be invited to a workshop for the purpose of examining and fully discussing the tentative proposals and findings of the Local Rules Project to date. Accordingly, the Conference on Local Rules in the Federal District Courts was held at Boston College Law School November 12 and 13, 1987, and the results of the Conference were subsequently discussed at a meeting of the Committee held February 4, 1988, in Washington, D.C.

The format of the Conference was dictated by the initial research of the Local Rules Project. The Project broke down the conference discussions into four discrete subject matters covered by the local rules. The discussion of these four topics comprised most of the work of the conferees during their two days at Boston College. These discussions were preceded, however, by some introductory remarks and an important discussion of the practical and theoretical overview of the Project, an explanation of the Project's analysis and choices, and the methodology for examining and testing local rules. Of course, the theoretical and practical aspects of rulemaking and of the Project's decision-making were discussed throughout the Conference.

The results of the Conference were quite enlightening to the Local Rules Project. The discussions helped focus the Local Rules Project on several areas: (1) workable solutions to perceived problems; (2) areas which may be outside the scope of the Project or otherwise inappropriate for Project study; and, (3) methods of implementation.

The conferees favored a uniform numbering system and structure to help make the local rules available to the public. The conferees were also supportive of efforts

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[33] Report to the Judicial Conference of the Committee on Local District Court Rules (Sept. 3, 1940).

to help the district courts draft better, more effective rules and to rid the districts of out-dated and useless rules. The conferees agreed that rules that merely repeat existing federal law should be rescinded. The attendees also favored rescission of local rules that are inconsistent with each other or other supervening federal law. The conferees were concerned that some local rules address major policy concerns that should be outside the Project's mandate, most notably bar admission and bar discipline; it was thought that changes with these local rules should more aptly come from a policy-making body rather than from the Local Rules Project. The conferees agreed that the Local Rules Project should seek to identify those local rules that may more appropriately be promulgated as amendments to the Federal Rules of Civil Procedure. The conferees were in agreement that the Project should not create new handbooks or pamphlets for pro se litigants, such as prisoners. The conferees did not believe that the Project should prepare a handbook for practitioners that states federal law and rules that have been frequently repeated by local rules.

Much of the conference discussion focused on eventual implementation of the Project's suggestions. This included discussion of how diverse the individual federal districts can or should be, consistent with the concept of a national judicial system. For example, some conferees argued that the federal judiciary is decentralized and that such decentralization is desirable. The best implementation method, therefore, would be to encourage jurisdictions to voluntarily "weed out" obviously inconsistent or unnecessary rules and just to provide a national uniform numbering system. On the other hand, others concluded that the federal system should strive to be as uniform as possible. These conferees tended to favor standardization of local rules. For example, some conferees

suggested that the Project complete a set of model uniform administrative rules, based on the existing local rules, and then go through the national rulemaking process to incorporate such rules into the Federal Rules of Civil Procedure as an appendix.

There seemed agreement, however, that voluntary implementation would be the most successful way to proceed, at least initially. For example, each district court could receive from the Judicial Conference, the Committee on Rules of Practice and Procedure, or the Local Rules Project, a list of questionable rules in that district, together with supporting documentation. The district court could then voluntarily rescind obviously repetitive or inappropriate local rules. In addition, circuit councils are empowered by Rule 83 of the Federal Rules of Civil Procedure to abrogate inconsistent local rules regardless of voluntary district court compliance.

Another suggestion that met with wide approval was to provide a manual for federal court administration to district court judges and to the circuit councils. Such a manual could serve several purposes, including: (1) to explain or justify the Judicial Conference's conclusions with respect to those rules that are repetitive or inconsistent; (2) to provide guidance to the districts as to the types of problems commonly encountered in local rulemaking; (3) to offer sample local rules for districts to consider; and, (4) to further assist judges by providing sample orders for use in commonly recurring cases.

With these comments in mind, the Project completed its analysis of the civil local rules. The analysis focused on an examination of the existing local rules covering each particular topic on the outline.[34] The local rules on a topic were studied singly and

[34] The Local Rules Project originally examined the local rules on bar admission and bar discipline. The Project's preliminary findings were presented at the Conference. Some of the conference participants

in the aggregate to determine if they were appropriate subjects for local district court rulemaking. Specifically, the Project analyzed the local rules using five broad questions:

> (1) Do the local rules repeat existing?
>
> (2) Do the local rules conflict with existing law?
>
> (3) Should the local rules form the basis of a Model Local Rule for all of the jurisdictions to consider adopting?
>
> (4) Should the local rules remain subject to local variation? And
>
> (5) Should the subject addressed by the local rules be considered by the Advisory Committee to become part of the Federal Rules of Civil Procedure?

While these activities were proceeding, the Committee on Rules of Practice and Procedure was promoting a uniform number system. The Judicial Conference, at its September 1988 meeting, approved and urged the district courts to adopt such a uniform number system.[35]

The Committee on Rules of Practice and Procedure approved the circulation of the *Report of the Local Rules Project: Local Rules on Civil Practice* to the chief judges of the district courts at its winter 1989 meeting. The material was actually distributed to the judges by Joseph F. Weis, Jr., the Chairman of the Committee on Rules of Practice and Procedure in April of 1989. It consisted, among other materials, of several documents discussing the existing local rules and evaluating them according to the five questions set out above. The materials also contained the suggested uniform numbering system that had been recommended by the Judicial Conference for adoption

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expressed concern that these subjects may be better addressed by a policy-making body rather than the Local Rules Project. In fact, the Project was instructed to refrain from a further analysis of these subjects. Accordingly, they were not discussed by the Project in its Report.

[35] *See* Report of the Judicial Conference (September, 1988) 103.

by all district courts. The cover memorandum from Judge Weis explained the intent of providing this material to the courts: "The Committee hopes that this material will be helpful to you as you renumber and consider amending your local rules."[36] The material was provided as a helpful suggestion to the district courts if they chose to review their local rules.

The *Report of the Local Rules Project: Local Rules on Appellate Practice* was approved for distribution in the summer of 1990 and provided to the chief judges of the courts of appeals by Kenneth F. Ripple, Chairman of the Advisory Committee on Appellate Rules in the fall of that year. It was suggested by Judge Ripple that each court respond in writing to explain whether they agreed with the findings of the Local Rules Project. The Local Rules Project Director was asked to evaluate those responses, also in writing. These memoranda, then, identified areas of dispute between each of the courts of appeals and the Local Rules Project. They were submitted to the Advisory Committee on Appellate Rules so that the Advisory Committee could decide what action to take given its responsibility under the Rules Enabling Act: "Any other rules prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference."[37]

The Committee on Rules of Practice and Procedure approved for distribution the *Report on the Local Rules of Criminal Practice* at its winter 1996 meeting. It was circulated to the chief judges of the district courts shortly thereafter by Alicemarie

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[36] Cover Memorandum of Report of the Local Rules Project: Local Rules on Civil Practice, to Chief Judges of the District Courts from Joseph F. Weis., Jr., Chairman of the Committee on Rules of Practice and Procedure, dated April 1989, p.4.

[37] 28 U.S.C. §2071(c).

Stotler, Chairwoman of the Committee on Rules of Practice and Procedure, by cover memorandum dated April 21, 1996. A proposed uniform numbering system was also attached. These documents were also provided to the courts as suggestions for the courts to use when reviewing and renumbering their respective local rules:

> The Project's report ought to be considered as the empirical research of scholars. Neither the Committee on Rules of Practice and Procedure nor the Advisory Committee on Criminal Rules has evaluated or approved the Report. The committees hope that the report will be helpful to you as you examine and renumber your local criminal rules.[38]

Uniform Numbering of Local Rules

When the Local Rules Project began, there was no uniform numbering system for federal district court local rules. The Committee on Rules of Practice and Procedure recognized that a uniform system would have advantages. Most importantly, it would be helpful to the bar in locating rules applicable to a particular subject. In September of 1988, the United States Judicial Conference, based on a recommendation from the Committee on Rules of Practice and Procedure "urged each district court to adopt a Uniform Numbering System for its local rules, patterned upon the Federal Rules of Civil Procedure."[39]

The system, as proposed by the Local Rules Project and endorsed by the Standing Committee and Judicial Conference, focused on the numbering system already used for the Federal Rules of Civil Procedure. This system is already familiar to the bar.

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[38] Cover memorandum of Alicemarie Stotler to chief judges and clerks of the district and bankruptcy courts, dated April 21, 1996, and entitled: "Uniform Numbering System for Local Rules of Courts and a Report on the Local Rules of Criminal Practice".

Under this system, each local rule number corresponds to the number of the related Federal Rule. For example, the designation "LR15.1" refers to the local rule entitled: "Form of a Motion to Amend and Its Supporting Documentation." The designation "LR" indicates it is a local rule; the number "15" indicates that the local rule is related to Rule 15 of the Federal Rules of Civil Procedure; and the number "1" indicates that it is the first local rule concerning Rule 15 of the Federal Rules of Civil Procedure. The same system applies with respect to those Federal Rules with a "1" or "2" after the initial rule number, such as Rule 65.1 entitled "Security: Proceedings Against Sureties." Thus, for example, the first local rule concerning Federal Rule 65 "Injunctions" is designated "LR65.1," while the first local rule concerning Federal Rule 65.1 is designated "LR65.1.1.

This system was explained to the district courts in the original Report of the Local Rules Project on Local Rules of Civil Practice.[40] The Report indicated that courts with difficulties in renumbering should contact the Local Rules Project for assistance. In the summer of 1992, the Standing Committee offered additional assistance to the district courts in their effort to renumber. Specifically, a memorandum from Robert E. Keeton, Chairman of the Committee on Rules of Practice and Procedure, was sent to the courts that explained in more detail how the numbering system worked.[41] The courts were, again, advised to contact the Local Rules Project for assistance. Members of various courts and local rulemaking committees did contact the Project.

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[39] Report of the Judicial Conference (September, 1988) 103.

[40] A similar explanation was provided in the Report on Local Rules of Criminal Practice.

[41] Memorandum of August 25, 1992 from Robert E. Keeton to the Chief Judges of the United States District Courts with Memorandum from Mary P. Squiers, dated August 19, 1992, and entitled: "An Example of a Proposed Numbering System for Local Rules, Including a Civil Justice Delay and Expense Reduction Plan" attached.

During this time, the Advisory Committees were working, through the rulemaking process, to amend the Federal Rules to require uniform numbering of local rules. Amendments to the Federal Rules of Civil Procedure took effect December 1, 1995, and required the use of a uniform numbering system:

> A local rule shall be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. §§2072 and 2075, and shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States.[42]

At its March 1996 session, the Judicial Conference prescribed a uniform number system for local rules that is based on and tracks the relevant Federal Rules.[43] It also set April 15, 1997 as the date of compliance with this numbering system.[44]

By June of 1997, 41 per cent (37 courts) were numbered in compliance with the Judicial Conference recommendation and the Federal Rules; the other 59 per cent (53 courts) had not yet been renumbered.[45] Six months later, there had been greater compliance: 58 per cent (52 courts) were appropriately numbered while 42 per cent (38 courts) were not.[46] In June of 1998, 70 per cent (63 courts) were numbered in compliance with the Federal Rules; the other 30 per cent (27 courts) had still not renumbered.[47]

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[42] Fed.R.Civ.P. 83(a)(1).

[43] Report of the Judicial Conference (March, 1996) 34-35.

[44] *Id.*

[45] *See* Memorandum from Mary P. Squiers to the Standing Committee, dated June 5, 1998, and entitled: "Status on Uniform Renumbering of Local Rules." At that time, the local rules for the Districts of Guam, the Virgin Islands, Puerto Rico, and the Northern Mariana Islands were unavailable.

[46] *Id.*

[47] *Id.*

By December of 2001, the picture is much better but still lacking. Out of all ninety-four of the federal district courts, 81 courts, or 86 per cent of them, are numbered in compliance with the Judicial Conference recommendation and the Federal Rules. Another eleven courts, or twelve per cent of them, have not been renumbered.[48] The remaining two courts have local rules that are difficult to categorize.[49]

One of these two courts has local rules that, although not renumbered in the text, do contain a cross-referenced list of the local rules arranged according to the Federal Rules.[50] At least arguably, this index does not comply with the uniform numbering system. An example may be illustrative. In this court, the local rules are arranged according to "Articles" so Article 1 of the local rules on civil practice consists of four rules with a "1" as a prefix and with the following subjects: Definitions (1.01), Stipulations (1.02), Extensions of Answer Date (1.03), and Waiver of Service (1.04).[51] The text of these four rules is set forth at the beginning of the civil local rules in this exact order.[52] The index for the local rules explains that these four rules would have the following numbers if renumbered according to the Federal Rules: LR6.1; LR7.1; LR12.1; and LR4.1.[53] Therefore, these local rules are in very different places within the packet of rules than if they were actually moved to their correct locations pursuant to the

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[48] *See* District of Arizona; District of Connecticut; Middle District of Florida; District of Maryland; District of Montana; Eastern District of North Carolina; District of Puerto Rico, District of Rhode Island; Middle District of Tennessee, Northern District of West Virginia; Southern District of West Virginia; and, Western District of Virginia.

[49] Local Rules of the Eastern District of Missouri and Local Rules of the Northern District of West Virginia.

[50] *See* the Local Rules of the Northern District of West Virginia.

[51] *Id.* at Local Rules of Civil Procedure, Article 1.

[52] *Id.*

uniform numbering system. The local rules materials also do not contain an index that lists the Federal Rule numbers in consecutive order with the original local rule numbers attached. This is significant since, for example, a practitioner investigating waiver of service (local rule number at present of 1.04) would be forced to either review all of the local rules to find the relevant rule, or the entire index. It is not possible to review the index and quickly retrieve any and all local rules relating to Federal Rule 4 on service. The preface to the Table of Contents of these rules states:

> On August 19, 1997, the United States District Court for the Northern District of West Virginia adopted a uniform numbering system for local rules of court which corresponds with the relevant Federal Rules of Practice and Procedures as directed by the Judicial Conference of the United States. Attorneys are urged to use this table of contents as a cross index to cite the uniform rule number rather than the former local rule number. [54]

It should be noted, however, that the local rules, both on paper and in electronic format, do not have the renumbered rules set out anywhere but in the table of contents; the renumbering is not apparent by looking at the text of the local rules. It is difficult to imagine, then, that practitioners will become accustomed to using the new numbering system since it is extremely difficult to even find the new numbers.

The local rules in the other district court are also arranged according to the original format and not according to the uniform number system.[55] Each local rule, however, has a prefix that consists of the corresponding Federal Rule.[56] There is no

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[53] *Id.* at Table of Contents.

[54] *Id.*

[55] *See* the Local Rules of the Eastern District of Missouri.

[56] *Id.*

index or cross-referenced list of the local rules. For example, the first five rules are numbered as follows:

> Rule 1—1.01 Title and Citation
> Rule 81—1.02 Application and Numbering of Local Rules
> Rule 86--.03 Effective Date
> Rule 86—1.04 Relationship to Prior Rules
> Rule 6—1.05 Modification of Time Limits
> Rule 1—1.06 "Judge" Defined

Similar to the other court's rules, these local rules are not placed physically where they would be if the uniform numbering system were actually followed. Instead, these rules are placed exactly as they had been previously. A practitioner looking for direction on a particular topic, then, would be forced to examine all of the rules and rule numbers to determine if there was a local rule on the topic. The drafters of the uniform system did not anticipate this type of numbering.

Activities of the Advisory Committee on Civil Rules

The first report of the Local Rules Project determined that some areas of local rulemaking may be more appropriately areas of federal rulemaking.[57] Local rules that covered such topics were brought to the attention of the Advisory Committee on Civil Riles. What follows is a brief description of the suggestions of the Local Rules Project and the activities of the Advisory Committee.

1. **Rule 4 of the Federal Rules of Civil Procedure**. The Local Rules Project suggested that the Advisory Committee consider an amendment to subsection (a) of Rule 4 that provides that the plaintiff, or plaintiff's attorney, complete the summons before giving it to the clerk for the addition of the docket number. The Rule, as written, seemed

to imply that the clerk complete the summons even though the litigant, not the clerk, is the person who knows the information necessary for preparing the summons. Rule 4 was amended in significant respects effective December 1, 1993.[58] At that time, this problem was remedied.

2. **Rule 5 of the Federal Rules of Civil Procedure.** The Local Rules Project suggested that subsection (e) of Rule 5 be amended to require that the clerk accept all documents that are tendered to the court for filing. This amendment was made effective December 1, 1991. As the Advisory Committee noted:

> Several local district rules have directed the office of the clerk to refuse to accept for filing papers not conforming to certain requirements of form imposed by local rules or practice. This is not a suitable role for the office of the clerk, and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this revision.[59]

3. **Rule 24 of the Federal Rules of Civil Procedure**. The Local Rules Project suggested that there be an amendment to Rule 24(c) to conform that Rule to 28 U.S.C. §2403. Section 2403 of Title 28 permits the United States or a state to intervene in any action where the constitutionality of an act of Congress or the constitutionality of a statute of the state affecting the public interest is drawn in question.[60] Rule 24(c) reiterated the court's responsibility to notify the United States Attorney General but omitted any discussion of notice to state attorneys general. The rule was amended,

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[57] All of these suggestions can be found at *Report of the Local Rules Project.*

[58] *See* Fed.R.Civ.P. 4.

[59] Fed.R.Civ.P. 5(e) Note to 1991 Amendments.

[60] 28 U.S.C. §2403(a) (act of Congress); 28 U.S.C. §2403(b) (state statute).

effective December 1, 1991, "to bring Rule 24(c) into conformity with the statute cited, resolving some confusion reflected in district court rules."[61]

4. Federal Rules on Discovery Practice. There were several suggestions made to the Advisory Committee concerning the discovery rules. Many of these suggestions were incorporated or made unnecessary by the recent and extensive changes made to discovery practice generally. For example, the Local Rules Project suggested that Rule 5 be amended to allow nonfiling of discovery documents and to explain how discovery documents, which are not filed, can be used in court. That Rule was amended, effective December 1, 2000, to address both issues.[62] Suggestions were also made to consider limits on the number of interrogatories, depositions, requests for production, and requests for admission. The Federal Rules were amended to add limits in certain circumstances,[63] to allow local rules to set limits,[64] and to allow unlimited discovery in other circumstances, consistent with the overall discovery process.[65] The Local Rules Project suggested that Rule 16(b) be amended to impose time limits for completing discovery in those situations when a particular action is exempted from the Rule 16(b) order by local rule. Recent changes in Rule 26 seem to have made any such changes unnecessary and, perhaps, unproductive.[66]

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[61] Fed.R.Civ.P. 24 Note to 1991 Amendments.

[62] See Fed.R.Civ.P. 5(d).

[63] *See* Fed.R.Civ.P. 30(a) (limit of ten depositions); Fed.R.Civ.P. 33(a) (limit of twenty-five interrogatories).

[64] See Fed.R.Civ.P. 26 Note to 2000 Amendments permitting local rule limits on requests for admission.

[65] *See* Fed.R.Civ.P. 26(b) and 34 (virtually unlimited requests for production).

[66] *See, e.g.,* Fed.R.Civ.P. 26.

5. Rule 38 of the Federal Rules of Civil Procedure. The Local Rules Project recommended that Rule 38(b) be amended to remove "an apparent ambiguity" between subsections (b) and (d).[67] As written, Rule 38 (b) did not, by its terms, require filing in order to make an effective demand; rather, a demand was made by serving it upon the other parties. Yet, an effective waiver pursuant to Rule 38(d) was made only by failing to both serve and file the demand. Under this rule, then, a party could be in the position of having neither demanded a jury trial nor waived the right to one. The rule was amended to require the filing of a jury demand in subsection (b), effective December 1, 1993.

6. Rule 53 of the Federal Rules of Civil Procedure. The Local Rules Project suggested the Advisory Committee consider an amendment to Rule 53 to require the master to serve a copy of the master's report on the parties. The Rule had originally provided that the master give the report to the clerk who must then notify the parties of the existence of the report. The Rule was amended to require the master to not only file the report with the clerk but also "serve on all parties notice of the filing"[68] in order to "expedite proceedings before a master."[69]

While the Advisory Committee reviewed the suggestions of the Local Rules Project, it did not incorporate all of its recommendations. For example, the Project recommended an amendment to Rule 14 requiring that a third-party plaintiff provide copies of pleadings and other documents to a third-party defendant within a pre-

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[67] Fed.R.Civ.P. 38 Note to 1993 Amendments.

[68] Fed.R.Civ.P. 53(e)(1).

[69] Fed.R.Civ.P. 53 Note to 1991 Amendments.

determined time period. The Project also recommended that the habeas corpus rules be amended to require that, when a habeas corpus proceeding is initiated, the original of a petition or motion, one copy, and an additional copy for each defendant be filed. The Project recommended that Rule 51 be amended to permit the court to require that jury instructions be filed before the trial rather than only during the trial. Lastly, the Project recommended the Advisory Committee consider adding a rule to the Federal Rules of Civil Procedure that addresses the issue of photographing and broadcasting court proceedings.

The Civil Justice Reform Act

The Civil Justice Reform Act of 1990[70] was enacted to investigate the causes of expense and delay in litigation in the federal courts. Pursuant to the Act, each district court was required to implement "civil justice expense and delay reduction plans" that would "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes."[71] This resulted in an increase in local rulemaking and a diminished focus on a uniform numbering system and avoiding repetition in local rules.[72] The Judicial Conference was required, "on a continuing basis... [to] study ways to improve litigation management and dispute resolution services in the district courts; and ...[to] make

70 Pub. L. No. 101-650, Title I, 104 Stat 5089-98 (codified in part at 28 U.S.C. § 471-482 (1994)).

71 28 U.S.C. § 471.

72 *See* 12 Wright, Miller & Marcus, Federal Practice and Procedure §3152, at 505-508 (2d ed. 1997).

recommendations to the district courts on ways to improve such services."[73] The review by the Judicial Conference culminated in the *Civil Justice Reform Act of 1990 Final Report,* which was submitted to Congress by the Judicial Conference. That *Report* acknowledged the value of the systematic review:

> The intensive review of litigation procedures required by the Act has provided the courts with both a format and a source of funding to continue their efforts to improve and enhance judicial management of civil dockets. And, the judiciary adopted almost all of the principles, guidelines, and techniques in the Act through the 1993 amendments to the Civil Rules and the policy directions set forth in the December 1995 *Long Range Plan for the Federal Courts.* The additional experience gained through the pilot courts, demonstration programs, and other experimentation under the Act has been useful to the courts, providing information that can aid policy-making in the future.[74]

In addition to the recent amendments to the Federal Rules and the 1995 *Long Range Plan for the Federal Courts*, the local rules reflect an interest in the various techniques endorsed by the Judicial Conference in this study. For example, there are many rules discussing various forms of alternative dispute resolution, including early neutral evaluation, summary jury trial, mediation, and court-sponsored settlement conferences.[75]

The Long Range Plan for the Federal Courts

The Judicial Conference of the United States presented *The Long Range Plan for the Federal Courts* by cover letter dated December 15, 1995 from L. Ralph Mecham, the Secretary of the Judicial Conference. The cover letter explains that this document is

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[73] 28 U.S.C. §479 (b).

[74] *Civil Justice Reform Act of 1990 Final Report* at 1.

[75] *Id.* at 2-7.

based, in large measure, on the *Proposed Long Range Plan* submitted by the Committee on Long Range Planning in March 1995. The Plan consists of ninety-three recommendations and seventy-six implementation strategies to go along with those recommendations. There is also text that seeks to clarify the drafters' reasoning and provide background information. The Judicial Conference approved only the recommendations and implementation strategies; the text does not necessarily reflect the views of the Conference.[76]

There is a Recommendation in the *Long Range Plan* that Federal Rules be adopted as needed "to promote simplicity in procedure, fairness in administration, and a just, speedy, and inexpensive determination of litigation."[77] Three Implementation Strategies are also provided: The first of these suggests that rulemaking continue pursuant to the Rules Enabling Act. [78] The third Strategy suggests that the Conference and courts seek "significant participation by the interested public and representatives of the bar" in the rulemaking process.[79] The second Strategy is particularly relevant to local rulemaking and reads, in full:

> The national rules should strive for greater uniformity of practice and procedure, but individual courts should be permitted limited flexibility to account for differing local circumstances and to experiment with innovative procedures.[80]

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[76] *See* Cover Letter of December 15, 1995 from L. Ralph Mecham and Long Range Plan for the Federal Courts.

[77] *Long Range Plan for the Federal Courts*, Recommendation 28, p. 58.

[78] *Id.* at Implementation Strategy 28a, p. 58.

[79] *Id.* at Implementation Strategy 28c, p. 58.

[80] *Id.* at Implementation Strategy 28c, p. 58.

The explanatory text accompanying this Strategy discusses the drafters' interest in uniformity:

> The federal rules are designed to establish an essentially uniform, national practice in the federal courts. Nevertheless, they authorize individual courts to prescribe legitimate local variations in practice and procedure through local court rules that are "not inconsistent" with the national rules. Members of the bar have complained about the proliferation of local rules imposing procedural requirements. Moreover, the Civil Justice Reform Act of 1990 has encouraged each district court to engage in its own procedural experimentation and impose additional case management requirements. Accordingly, it is difficult for lawyers, particularly those with a national practice, to know all the current procedural requirements district by district.
>
> Some local procedural variations are appropriate to account for differing local conditions and to allow experimentation with new and innovative procedures. Nevertheless, the long-term emphasis of the courts—at the conclusion of the period of experimentation and evaluation prescribed by the Civil Justice Reform Act—should be on promoting nationally uniform rules of practice and procedure. To this end, an effort should be made to reduce the number of local rules and standing orders. Local rules should be limited in scope and "not inconsistent" with national rules. The Judicial Conference and the judicial councils of the circuits should discourage further "balkanization" of federal practice by exercising their statutory authority to review local court rules.[81]

Activities of the Judicial Councils

As discussed earlier, rules promulgated pursuant to the Rules Enabling Act "shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit."[82] The method used by the judicial councils to review local rules for possible modification or abrogation is not determined by this statute; each circuit council can develop their own procedure. In the spring of 2000, Anthony J. Scirica, Chairman of the

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[81] *Id.* at p. 59.

[82] 28 U.S.C. §2071(c)(1).

Committee on Rules of Practice and Procedure, wrote to the chief judges of the circuit courts indicating that Mary P. Squiers would contact the Circuit Executives to obtain information about their respective Circuit Council's review of local rules.

Each circuit executive was contacted in April and May of 2000. The conversations focused on review of district court local rules but also involved discussions on the use of standing orders, the implementation of uniform numbering, and, to a limited extent, the rulemaking process used in the district courts. The results of those conversations were presented to the Committee on Rules of Practice and Procedure at its June 2000 meeting in Washington, D.C. A brief synopsis of those findings follows.

All of the Circuit Councils have a review process to examine new local rules and amendments to existing rules. These procedures are generally the same among the circuits and begin in the Circuit Executive's office where an initial review of the rule is made in writing. That evaluation and the rule itself are then forwarded to another body for review, for example to a committee of the Council, to the Chief Judge of the Circuit, or to the Conference of District Judges. The reviewers' recommendation or the actual documentation concerning the rule or amendment is then transmitted to the Circuit Council for final action, which may be by paper ballot or voice vote at the actual meeting. At any stage in this process, the reviewing person or entity may be communicating with the particular court to reach an accommodation of any rule or rule amendment that appears problematic. Such discussion may avert a negative vote at the Circuit Council. In fact, abrogation was a rare event in all of the circuits.[83]

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[83] *E.g.*, First Circuit (Incredibly rare and, maybe, it has never been done. It has not been done in the eleven years since the Circuit Executive has been there.); Second Circuit (It has not been done in the two

None of the circuit councils has any written standards for determining whether a local rule is inconsistent with, or duplicative of, existing law. Instead, each of the reviewing entities makes a judgment call on a case-by-case basis. When there may be disagreement over a particular rule, deference is given to the district court.

Activities of the American Bar Association

The American Bar Association has also demonstrated concern about the proliferation of local rules. The Litigation Section of the American Bar Association created a Federal Practice Task Force, which in 1998-99 conducted an abbreviated review of the local rules in five predominantly urban districts.[84] The Task Force found that "the quantity of local rules has continued to grow, that the topics they cover continue to be remarkably diverse, and that the local rules in many districts remain difficult to find, especially for lawyers who do not regularly practice there."[85] The House of Delegates of the American Bar Association adopted the Section's *Report and Recommendation on Local Rules* at its winter 2000 meeting.[86] The recommendations in that Report:

> strongly endorsed efforts to make all local rules adopted by federal districts and standing rules or orders adopted by an individual judge conveniently available in written and electronic format in a single national location. The recommendation also urge[d] universal

years since the Circuit Executive has been there.); Third Circuit (Circuit Executive cannot recall that a local rule has been abrogated.); Fifth Circuit (Three times in fifteen years.); Eighth Circuit (Since October 1997, a rule has not been abrogated.); Ninth Circuit (It happened during the first comprehensive review five or six years ago.); Tenth Circuit (No abrogation for at least six years.); Eleventh Circuit (The council has never abrogated or modified a rule ever.); District of Columbia Circuit (Never to the knowledge of the Circuit Executive.).

[84] *See* Report to the House of Delegates from the American Bar Association Section of Litigation (December 1999) discussed in Litigation Docket Online, (Spring 2000) Vol. 5, No. 3.

[85] *Id.* at p.10-11.

[86] Litigation Docket Online, (Spring 2000) Vol. 5, No. 3.

> implementation of the uniform numbering system required by Federal Rule of Civil Procedure 83 and suggest[ed] that when federal trial court judges need to vary procedures prescribed by the Federal Rules or by local rules, they do so by issuing case-specific orders that are readily accessible to the parties rather than by adopting additional local rules or individual court rules.[87]

II. Methodology

The first step in the Project was to organize the local rules in a format that could be analyzed. The rules were, first, read by topic. The actual rule numbers were entered on a database and coded according to the content of the rules themselves. An illustration may be helpful to understanding this process. Copies of two documents relating to jury cost assessment are attached as Appendix A. The first sheet is the code sheet that was developed about jury cost assessment based upon reading the rules themselves. This sheet itemizes the content of the local rules on this topic. The second sheet is an example of the rules relating to jury cost assessment for four jurisdictions. A rule number is placed on this list when the named district court has a rule on the topic. Under the rule number is a checklist with boxes that can be tagged. Those boxes correlate to the code sheet. The boxes are tagged that relate to the content of the rule. When the rules are read and coded from all of the jurisdictions that relate to jury cost assessment, the numbers of rules can be counted. It is also possible to understand the great variety of local rules on the topic. This data along with the code sheet are then used to analyze and evaluate the rules.

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[87] *Id.*

Specifically, the Project analyzed the local rules using three broad questions: (1) Do the local rules repeat existing law? (2) Do the local rules conflict with existing law? (3) And, Should the local rules remain subject to local variation?

A brief discussion of each of the three questions listed above, with examples of local rules illustrating them, follows. It is helpful to be mindful of one issue that presents itself. The Local Rules Project intends, in making determinations on which local rules are repetitive and which are inconsistent, to err on the side of over inclusion rather than under inclusion. In some instances, for example, before a final determination can be made as to whether a rule is inconsistent, it is helpful to know how the rule is interpreted or used in practice. The Project is unable to interview or survey the individual districts in these situations. If a rule appears, on its face, to conflict with existing law, it is included as an inconsistent rule, leaving any further interpretation to the particular district.

The Local Rules Project intended to highlight local rules that repeat existing law since Rule 83 of the Federal Rules of Civil Procedure forbids such repetition.[88] In addition, it is superfluous and may be counterproductive. It is unnecessary since the bench and bar already have access to existing federal rules and statutes through the published United States code services, electronic media, and handbooks of selected rules and portions of Title 28. In addition, attorneys have had courses in law school on some of these subjects. The bar is accountable, of course, for knowledge of existing law. Documentation which restates existing law simply results in more paper with its concomitant production costs. Further, if the law is restated only partially or is restated incorrectly, attorneys may be confused about what law actually applies. Lastly, repetition

may cause serious problems if the statute or Rule is amended and the local rule is not. Local rules covering many topics have been found to repeat existing law.[89]

The Local Rules Project noted local rules that are inconsistent with existing law since Rule 83 of the Federal Rules of Civil Procedure and Section 2071 of Title 28 mandate that there be no inconsistency in the local rules with existing law. The determination of whether a particular local rule is inconsistent depends, in the first instance, on the definition of "inconsistency" used. One using a narrow definition of "inconsistency" may conclude that only those local rules that flatly contradict actual statements or requirements in other law are inconsistent.[90]

If one uses a broader definition of "inconsistency," there is more opportunity for disagreement over whether a particular local rule is, in fact, inconsistent. For example, one can argue that a local rule may be inconsistent with the intent or spirit of the Federal Rules.[91] One can also argue that local rules that take away the court's discretion in an individual case are inconsistent with the intent and spirit of the Federal Rules that case management, generally, be addressed on an individual basis.[92] One can also argue that local rules that add further requirements than those set forth in the Federal Rules conflict with the intent and spirit of the Federal Rules.[93]

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[88] Fed.R.Civ.P. 83.

[89] *See, e g*, local rules relating to Rule 3—Filing Fee; Rule 3—*In Forma Pauperis*; Rule 36—Requests for Admission; Rule 17—Minors and Incompetent Persons; Rule 15—Amended and Supplemental Pleadings; Rule 9—Social Security and Other Administrative Appeals.

[90] *See, e.g.*, Rule 5—Filing of Discovery Documents; Rule 81—Naturalization.

[91] *See, e.g.*, Rule 3—*In Forma Pauperis*.

[92] *See, e.g.*, Rule 3—*In Forma Pauperis*.

[93] *See, e.g.*, Rule 81—Jury Demand in Removed Cases.

One can argue that a local rule that is inconsistent with existing case law should be rescinded even though neither Rule 83 nor Section 2071 of Title 28 prohibit such repetition.[94] Case law will surely impact on counsel's activities and the court's decisions in much the same way as the Federal Rules and statutes.

The Local Rules Project found many local rules that seem useful in delineating certain procedures and practices in the individual district courts, in answering the third question set forth above.[95]

[94] *See, e.g.*, Rule 3—Filing Fees.

[95] *See, e.g.*, Rule 17—Minors and Incompetent Persons; Rule 9—Three-Judge Court; Rule 9—Social Security Numbers; Rule 24—Claim of Unconstitutionality; Rule 5—Certificate of Service.

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I. Scope of Rules—One Form of Action

Rule 1. Scope and Purpose of Rules

Seventy-three jurisdictions have local rules that explain the applicability of the local rules in the respective jurisdictions.[1] These rules generally cover seven broad areas: 1) The title and citation form for the local rules; 2) The effective date of the local rules; 3) The scope of the local rules; 4) The relationship of the local rules to prior rules; 5) The modifications or suspension of the local rules; 6) The rules of construction and definition; and, 7) The numbering of the local rules. Most of these rules should remain subject to local variation. Rules in some jurisdictions, however, repeat existing law, and rules in a few courts are inconsistent with existing law. These problematic rules should be rescinded.

DISCUSSION

Rules addressing each of these seven topics are appropriate as local rules. For example, forty jurisdictions have local rules setting forth the title of the rules.[2] Forty-two

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[1] M.D.Ala. LR1.1; S.D.Ala. LR1.1; C.D.Cal. LR1; E.D.Cal. GR1-100; N.D.Cal. LR01-Jan; S.D.Cal. LR1.1; D.Colo. LR1.1; D.Conn. LR1; D.Del. LR1.1; D.D.C. LR101; M.D.Fla. LR1.01; N.D.Fla. LR1.1; S.D.Fla. LR1.1; N.D.Ga. LR1.1; S.D.Ga. LR1.1; D.Haw. LR1.1; D.Idaho LR1.1; C.D.Ill. LR1.1; S.D.Ill. LR1.1; N.D.Ind. LR1.1; S.D.Ind. LR1.1; N.D.Iowa LR1.1; S.D.Iowa LR1.1; D.Kan. LR1.1; E.D.Ky. LR1.1; W.D.Ky. LR1.1; D.Me. LR1; D.Mass. LR1.1; E.D.Mich. LR1.1; W.D.Mich. LR1.1, 1.2; D.Minn. LR1.1; N.D.Miss. LR1.1; S.D.Miss. LR1.1; E.D.Mo. LR1-1.01; D.Mont. LR100-1; D.Neb. LR1.1; D.Nev. LR1A. 1-1; D.N.H. LR1.1; D.N.J. LR1.1; D.N.Mex. LR1.1, 1.2; E.D.N.Y. LR1.1; N.D.N.Y. LR1.1; S.D.N.Y. LR1.1; W.D.N.Y. LR1.1; E.D.N.Car. LR1; M.D.N.Car. LR1.1; D.N.Mar.I LR1.1; N.D.Ohio LR1.1; S.D.Ohio LR1.1; E.D.Okla. LR1.1; N.D.Okla. LR1.1; W.D.Okla. LR1.1; D.Or. LR1.1; E.D.Pa. LR1.1; M.D.Pa. LR1.1; W.D.Pa. LR1.1; D.P.R. LR101; D.R.I. LR1; D.S.Car. LR1.01; E.D.Tenn. LR1.1; M.D.Tenn. Preface; E.D.Tex. LRCV-1; N.D.Tex. LR1.1; W.D.Tex. LRCV-1; D.Utah LR101; D.Vt. LR1.1; D.V.I. LR1.1; E.D.Va. LR1; E.D.Wash. LR1.1; N.D.W.Va. Civ 1.01; S.D.W.Va. Civ 1.01; E.D.Wis. LR1.01; D.Wyo. LR1.1.

[2] M.D.Ala. LR1.1; S.D.Ala. LR1.1; C.D.Cal. LR1; E.D.Cal. GR1-100; N.D.Cal. LR01-Jan; S.D.Cal. LR1.1; D.Colo. LR1.1; D.Conn. LR1; D.Del. LR1.1; S.D.Fla. LR1.1; N.D.Ga. LR1.1; D.Haw. LR1.1; D.Idaho LR1.1; C.D.Ill. LR1.1; S.D.Ill. LR1.1; N.D.Ind. LR1.1; S.D.Ind. LR1.1; N.D.Iowa LR1.1; S.D.Iowa LR1.1; D.Mass. LR1.1; E.D.Mich. LR1.1; W.D.Mich. LR1.1, 1.2; D.Minn. LR1.1; E.D.Mo. LR1-1.01; D.Nev. LR1A. 1-1; D.N.H. LR1.1; D.N.Mex. LR1.1, 1.2;

courts have local rules explaining the citation form for the local rules.[3] Forty-two courts have local rules setting forth the effective date of the rules themselves and, in some courts, the effective date of amendments as well.[4]

Forty-five courts have local rules that explain which rules apply to which types of cases.[5] Another nine courts have local rules that list which actions the local rules apply to or govern.[6] Rules in nineteen courts provide that a local rule may be waived for the convenience of the parties or in the interest of justice.[7] Another two courts allow the

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N.D.N.Y. LR1.1; W.D.N.Y. LR1.1; D.N.Mar.I LR1.1; E.D.Okla. LR1.1; N.D.Okla. LR1.1; W.D.Pa. LR1.1; D.P.R. LR101; D.R.I. LR1; E.D.Tenn. LR1.1; D.Utah LR101; D.Vt. LR1.1; D.V.I. LR1.1; D.Wyo. LR1.1.

[3] M.D.Ala. LR1.1; S.D.Ala. LR1.1; N.D.Cal. LR01-Jan; S.D.Cal. LR1.1; D.Colo. LR1.1; D.Conn. LR1; D.Del. LR1.1; N.D.Fla. LR1.1; S.D.Fla. LR1.1; N.D.Ga. LR1.1; D.Haw. LR1.1; D.Idaho LR1.1; C.D.Ill. LR1.1; N.D.Ind. LR1.1; S.D.Ind. LR1.1; N.D.Iowa LR1.1; S.D.Iowa LR1.1; D.Mass. LR1.1; E.D.Mich. LR1.1; D.Minn. LR1.1; E.D.Mo. LR1-1.01; D.Nev. LR1A. 1-1; D.N.H. LR1.1; D.N.Mex. LR1.1, 1.2; N.D.N.Y. LR1.1; E.D.N.Car. LR1; D.N.Mar.I LR1.1; N.D.Ohio LR1.1; S.D.Ohio LR1.1; E.D.Okla. LR1.1; N.D.Okla. LR1.1; D.Or. LR1.3; W.D.Pa. LR1.1; D.P.R. LR101; D.S.Car. LR1.01; E.D.Tenn. LR1.1; E.D.Tex. CV-1; W.D.Tex. CV-1; D.Utah LR101; D.Vt. LR1.1; D.V.I. LR1.1; D.Wyo. LR1.1.

[4] M.D.Ala. LR1.1; S.D.Ala. LR1.1; E.D.Cal. GR1-100; N.D.Cal. LR1-3; S.D.Cal. LR1.1; D.Colo. LR1.1; D.Conn. LR1; D.Del. LR1.1; S.D.Fla. LR1.1; D.Haw. LR1.2; D.Idaho LR1.1; C.D.Ill. LR1.1; S.D.Ill. LR1.1; N.D.Ind. LR1.1; S.D.Ind. LR1.1; N.D.Iowa LR1.1; S.D.Iowa LR1.1; D.Mass. LR1.2; E.D.Mich. LR1.1; W.D.Mich. LR1.3; D.Minn. LR1.1; E.D.Mo. LR86-1.03; D.Mont. LR100-1; D.Nev. LR1A.5-1; D.N.H. LR1.1; D.N.Mex. LR1.1, 1.2; N.D.N.Y. LR1.1; D.N.Mar.I LR1.1; N.D.Ohio LR1.1; S.D.Ohio LR1.1; E.D.Okla. LR1.1; N.D.Okla. LR1.1; W.D.Okla. LR1.2; D.Or. LR1.2; E.D.Pa. LR1.1; W.D.Pa. LR1.1; E.D.Tenn. LR1.1; W.D.Tex. LRCV-1; D.Utah LR101; D.Vt. LR1.1; D.V.I. LR1.1; E.D.Va. LR1.

[5] E.D.Cal. GR1-100; D.Colo. LR1.1; M.D.Fla. LR1.01; N.D.Fla. LR1.1; D.Haw. LR1.3; D.Idaho LR1.1; C.D.Ill. LR1.1; S.D.Ill. LR1.1; N.D.Ind. LR1.1; S.D.Ind. LR1.1; N.D.Iowa LR1.1; S.D.Iowa LR1.1; D.Kan. LR1.1; D.Me. LR1; D.Mass. LR1.2; E.D.Mich. LR1.1; W.D.Mich. LR1.4; D.Minn. LR1.1; E.D.Mo. LR81-1.02; D.Neb. LR1.1; D.Nev. LR1A.2-1, 5-1; D.N.H. LR1.1; D.N.Mex. LR1.3, 1.5, 1.6; E.D.N.Y. LR1.1; S.D.N.Y. LR1.1; M.D.N.Car. LR1.1; D.N.Mar.I LR1.1; N.D.Ohio LR1.1; S.D.Ohio LR1.1; E.D.Okla. LR1.1; N.D.Okla. LR1.1; D.Or. LR1.1; M.D.Pa. LR1.1; W.D.Pa. LR1.1; D.P.R. LR102; D.R.I. LR2; D.S.Car. LR1.01; E.D.Tex. LRCV-1; D.Utah LR101; D.V.I. LR1.1; E.D.Va. LR1; E.D.Wis. LR1.01; D.Wyo. LR1.1.

[6] M.D.Ala. LR1.1; S.D.Ala. LR1.1; C.D.Cal. LR1.1; E.D.Cal. GR1-102; N.D.Cal. LR1-2; D.Del. LR1.1; D.D.C. LR101; S.D.Fla. LR1.1; N.D.Ga. LR1.1.

[7] S.D.Cal. LR1.1; M.D.Fla. LR1.01; N.D.Ind. LR1.1; S.D.Ind. LR1.1; D.Kan. LR1.1; D.Me. LR1; E.D.Mich. LR1.2; D.Nev. LR1A. 3-1; D.N.Mex. LR1.7; E.D.N.Car. LR1; S.D.Ohio LR1.1; E.D.Okla. LR1.1; N.D.Okla. LR1.1; W.D.Okla. LR1.2; D.Or. LR1.4; M.D.Pa. LR1.3; D.P.R. LR105; D.R.I. LR2; D.S.Car. LR1.02.

rules to be suspended unless unjust or impracticable.[8] Another court has a rule allowing a judge to "waive any requirement of these rules regarding the administration of that judge's specific docket."[9] These rules reflect that the court has discretion in interpreting its local rules[10] and that even a court's failure to comply with its own rules is not necessarily grounds for dismissal. [11]

Seventeen courts have local rules that explain that the new local rules supercede the prior rules.[12] Twenty-five courts have local rules explaining that the new rules apply to actions filed after the effective date and to those pending at the effective date, if practicable.[13] In one court, cases pending on the effective date of the rules are governed by prior practice[14] while in another court pending cases are governed by new amendments but not if there are fewer than ten days before a party must act in accordance with the new amendments.[15] These rules are appropriate as local directives.

There are other rules covering this topic that are problematic. One local rule repeats existing law by explaining that the local rules govern "except when the conduct of

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[8] D.Colo. LR1.1; D.Me. LR1.

[9] W.D.Tex. CV-1.

[10] *See, e.g., Henry v. Gill Industries, Inc.,* 983 F.2d 943, 950 (9th Cir. 1993); *Somilyo v. J. Lo-Rob Enterprises, Inc.,* 932 F.2d 1043, 1048 (2d Cir. 1991); *Hernandez v. George,* 793 F.2d. 264, 266067 (10th Cir. 1986); *Zaklama v. Mount Sinai Medical Center*, 906 F.2d 645, 647 (11th Cir. 1990).

[11] *See Mardack v. Southwestern Electric Power Co.*, 915 F.2d 172, 175 (5th Cir. 1990).

[12] M.D.Ala. LR1.1; S.D.Fla. LR1.1; E.D.Mich. LR1.1; W.D.Mich. LR1.4; D.Minn. LR1.1; E.D.Mo. LR86-1.04; D.N.H. LR1.1; D.N.Mex. LR1.3; D.N.Mar.I LR1.1; S.D.Ohio LR1.1; E.D.Okla. LR1.1; N.D.Okla. LR1.1; W.D.Pa. LR1.1; E.D.Tenn. LR1.1; D.Utah LR101; D.Vt. LR1.1; D.V.I. LR1.1.

[13] M.D.Ala. LR1.1; D.Del. LR1.1; N.D.Ga. LR1.1; D.Haw. LR1.2; D.Idaho LR1.1; N.D.Ind. LR1.1; S.D.Ind. LR1.1; N.D.Iowa LR1.1; S.D.Iowa LR1.1; D.Mass. LR1.1; E.D.Mich. LR1.1; D.Minn. LR1.1; D.Neb. LR1.1; D.N.J. LR1.1; D.N.Mex. LR1.3; D.N.Mar.I LR1.1; S.D.Ohio LR1.1; E.D.Okla. LR1.1; N.D.Okla. LR1.1; W.D.Pa. LR1.1; E.D.Tenn. LR1.1; W.D.Tex. LRCV-1; D.Utah LR101; D.Vt. LR1.1; D.V.I. LR1.1.

[14] D.Nev. LR1A.5-1.

[15] M.D.Fla. LR1.01.

this court is governed by federal statutes and rules."[16] Two other courts have local rules stating that the local rules apply unless they are inconsistent with the federal statute or rule.[17] Two other courts explain that, in the event of a conflict between rules, the Federal Rules control.[18] Another rule explains that no litigant is bound by a rule that is not passed in accordance with Rule 83 and 28 U.S.C. §§2071 and 2077.[19] One court has a local rule reminding people that *pro se* litigants are bound by the local rules.[20] Lastly, one court has a local rule explaining that the rules are promulgated pursuant to Rule 83 and 28 U.S.C. §2071.[21] All of these rules repeat portions of either Rule 83, section 2071 of Title 28, or both and are, therefore, unnecessary.

The construction of the rules are set forth in the local rules in seven courts.[22] Fourteen courts state that federal law, specifically, Title I, sections one through five, governs the construction of the local rules.[23] Because these sections also govern the construction of other federal statutes, it is appropriate to use them to construe local court rules as well. Forty courts have local rules that also set forth some actual definitions used in their respective rules.[24] All of these local rules should remain.

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[16] E.D.N.Car. LR1.00.

[17] N.D.Iowa LR1.1; S.D.Iowa LR1.1.

[18] S.D.Ga. LR1.1; D.Haw. LR1.3.

[19] N.D.Ind. LR1.1. *See* Fed.R.Civ.P. 83, 28 U.S.C. §2071.

[20] C.D.Cal. LR1.2.

[21] W.D.Mich. LR1.1, 1.2.

[22] M.D.Ala. LR1.1; E.D.Cal. LRGR1-100; W.D.Mich. LR1.6; N.D.Miss. LR1.1; S.D.Miss. LR1.1; N.D.Ohio LR1.1.

[23] M.D.Ala. LR1.1; D.Del. LR1.1; S.D.Fla. LR1.1; D.Idaho LR1.1; D.Minn. LR1.1; D.Neb. LR1.1; D.N.H. LR1.1; D.N.Mar.I LR1.1; S.D.Ohio LR1.1; W.D.Pa. LR1.1; D.P.R. LR103; E.D.Tenn. LR1.1; D.V.I. LR1.1; E.D.Va. LR1. *See* 1 U.S.C. §§1-5.

[24] S.D.Ala. LR1.1; C.D.Cal. LR1.3; E.D.Cal. GR1-101; N.D.Cal. LR05-Jan; S.D.Cal. LR1.1; D.Colo. LR1.1; D.Conn. LR4; N.D.Ga. LR1.1; D.Haw. LR1.4; D.Idaho LR1.1; N.D.Iowa LR1.1; S.D.Iowa LR1.1; D.Kan. LR1.1; E.D.Ky. LR1.2; W.D.Ky. LR1.2; D.Me. LR1; W.D.Mich. LR1.6;

Twenty-four jurisdictions provide that the local rules shall be construed consistently with the Federal Rules of Civil Procedure and applicable federal statutes.[25] These rules repeat Rule 83 of the Federal Rules of Civil Procedure that provides that individual districts can pass local rules that are "consistent with Acts of Congress and the Federal Rules."[26] These local rules also repeat section 2071 of Title 28, which indicates that the court may prescribe rules that "shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.[27]

There are local rules that address the seventh topic, the uniform numbering system, which either repeat or are inconsistent with the Federal Rules and should, therefore, be rescinded. Five rules, for example, explain how the local rules are numbered.[28] Rule 83 of the Federal Rules of Civil Procedure already requires that the local rules "conform to any uniform numbering system prescribed by the Judicial Conference of the United States."[29] Four other courts have local rules that explain that the rules are numbered according to the Federal Rules of Civil Procedure again repeating the existing framework.[30] Lastly, there are local rules in two jurisdictions explaining that the original structure of the local rules follow a local framework rather than the federal

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N.D.Miss. LR1.2; S.D.Miss. LR1.2; E.D.Mo. LR1-1.06; D.Neb. LR1.1; D.N.H. LR1.1; D.N.J. LR1.2; D.N.Mex. LR1.5, 1.6; N.D.N.Y. LR1.1; W.D.N.Y. LR1.2; M.D.N.Car. LR1.1; D.N.Mar.I LR1.1; N.D.Ohio LR1.2; D.Or. LR1.5; M.D.Pa. LR1.4; D.R.I. LR3; E.D.Tenn. LR1.1; M.D.Tenn. Preface; N.D.Tex. LR1.1; D.Vt. LR1.2D.V.I. LR1.1; N.D.W.Va. Civ 1.01; S.D.W.Va. Civ 1.01; D.Wyo. LR1.1.

[25] S.D.Ala. LR1.1; N.D.Cal. LR02-Jan; S.D.Cal. LR1.1; D.D.C. LR101; M.D.Fla. LR1.01; N.D.Ga. LR1.1; S.D.Ga. LR1.1; D.Haw. LR1.3; E.D.Ky. LR1.1; W.D.Ky. LR1.1; D.Mont. LR100-1; D.Nev. LR1A. 2-1; D.N.J. LR1.1; D.N.Mex. LR1.4; N.D.N.Y. LR1.1; W.D.N.Y. LR1.1; M.D.N.Car. LR1.2; N.D.Ohio LR1.1; S.D.Ohio LR1.1; W.D.Okla. LR1.1, 1.2; D.R.I. LR3; E.D.Tenn. LR1.1; E.D.Tex. LRCV-1.

[26] Fed.R.Civ.P. 83(a)(1).

[27] 28 U.S.C. §2071.

[28] M.D.Ala. LR1.1; E.D.Cal. LRGR1-100; N.D.Miss. LR1.1; S.D.Miss. LR1.1; N.D.Ohio LR1.1.

[29] Fed.R.Civ.P. 83(a)(1).

outline.[31] Such a framework is clearly inconsistent with the stated mandate of Rule 83.

II. Commencement of Action: Service of Process, Pleadings, Motions, and Orders

Rule 3. Commencement of Action

Rule 3.—Filing Fee

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[30] D.Me. LR1; E.D.Mo. LR81-1.02; D.N.H. LR1.1; D.N.Mex. LR1.4.

[31] N.D.Ind. LR1.3; E.D.Mo. LR81-1.02.

Thirty-nine courts have local rules addressing the payment of fees.[1] Many of these rules exist in response to a statutory provision allowing such local rulemaking. Some of them also seek to supplement the statute and are also appropriate. Rules in two courts simply repeat the applicability of the statute and, as such, are unnecessary. Several of the courts have rules that are inconsistent with case law from their respective Courts of Appeals. These rules should be rescinded.

DISCUSSION

Section 1914 of Title 28 provides guidelines on filing fees.[2] This provision sets the filing fee in the district court at $150.00 and permits "[e]ach district court by rule or standing order [to] require advance payment of fees."[3] Thirty-five of the thirty-nine courts actually do require advance payment of the filing fees.[4] Seven of the courts allow the marshal to ask for prepayment of his fee.[5] Other courts refer to a list of the services

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[1] D.Alaska LR27; D.Ariz. LR2.2; S.D.Cal. LR4.5; D.Colo. LR4.4; N.D.Ga. LR3.2; N.D.Ill. LRLR5; S.D.Ill. LR3.1; N.D.Iowa LR3.1(d); S.D.Iowa LR3.1(d); E.D.La. LR5.2; M.D.La. LR5.2; W.D.La. LR5.2; D.Me. LR3(a); D.Mass. LR4.5; W.D.Mich. LR3.1; D.Minn. LR4.2; N.D.Miss. LR3.1(C); S.D.Miss. LR3.1(C); D.Neb. LR3.2; D.N.H. LR4.4; D.N.Mex. LR5.3; N.D.N.Y. LR5.2; W.D.N.Y. LR5.6; W.D.N.Car. LR3.1(A); D.N.Dak. LR4.1; N.D.Ohio LR3.12; S.D.Ohio LR3.3; E.D.Okla. LR5.1C; N.D.Okla. LR5.1F; W.D.Okla. LR3.2; D.Or. LR3.6(a); M.D.Pa. LR4.3; D.P.R. LR303; D.R.I. LR26(a); E.D.Tenn. LR4.5; N.D.Tex. LR4.2; S.D.Tex. LR4; D.Utah LR108; D.Wyo. LR5.1(f).

[2] 28 U.S.C. §1914.

[3] *Id.* at (c).

[4] D.Alaska LR27; D.Ariz. LR2.2; D.Colo. LR4.4; N.D.Ga. LR3.2; N.D.Ill. LRLR5; S.D.Ill. LR3.1; E.D.La. LR5.2; M.D.La. LR5.2; W.D.La. LR5.2; D.Me. LR3(a); D.Mass. LR4.5; D.Minn. LR4.2; N.D.Miss. LR3.1(C); S.D.Miss. LR3.1(C); D.Neb. LR3.2; D.N.H. LR4.4; D.N.Mex. LR5.3; N.D.N.Y. LR5.2; W.D.N.Y. LR5.6; W.D.N.Car. LR3.1(A); D.N.Dak. LR4.1; N.D.Ohio LR3.12; S.D.Ohio LR3.3; E.D.Okla. LR5.1C; N.D.Okla. LR5.1F; W.D.Okla. LR3.2; D.Or. LR3.6(a); M.D.Pa. LR4.3; D.P.R. LR303; D.R.I. LR26(a); E.D.Tenn. LR4.5; N.D.Tex. LR4.2; S.D.Tex LR4; D.Utah LR108; D.Wyo. LR5.1(f).

[5] N.D.Ohio LR3.12; S.D.Ohio LR3.3; N.D.Okla. LR5.1F; M.D.Pa. LR4.3; D.R.I. LR26(a); N.D.Tex. LR4.2; S.D.Tex. LR4.

and their respective fees.[6] These rules are all appropriate.

In addition, a number of courts have local rules concerning the method of payment. One court has a rule allowing payment by credit card.[7] Another court allows the clerk to require payment by cash or certified check.[8] These rules are also appropriate exercises of local rulemaking authority.

Two courts have local rules indicating that the filing fee is $150.[9] These rules repeat subsection (a) of section 1914 and should, therefore, be rescinded. [10]

Rules in eleven courts discuss the consequences of a failure to accompany the complaint with a filing fee. There is also case law addressing this issue. There is a split among the federal courts on whether the filing fee requirement is jurisdictional. The greater weight of authority indicates that the filing fee is not jurisdictional so that a complaint filed with the court and otherwise proper is appropriately before the court even if the fee has not yet been paid.[11] The rules in these eleven courts may be problematic,

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[6] D.Ariz. LR2.2; S.D.Cal. LR4.5; W.D.N.Y. LR5.6; D.N.Dak. LR4.1; E.D.Okla. LR5.1C; N.D.Okla. LR5.1F; D.Utah LR117.

[7] D.Colo. LR4.4.

[8] W.D.Mich. LR3.1.

[9] N.D.Iowa LR3.1(d); S.D.Iowa LR3.1(d).

[10] *See* 28 U.S.C. §1914(a).

[11] *Burnett et al. v. Perry Manufacturing, Inc.* 151 F.R.D. 398, 401 n.3 (D.Kan. 1993). *citing Cintron v. Union Pacific R. Co.,* 813 F.2d 917, 921 (9th Cir. 1987); *Rodgers on Behalf of Jones v. Bowen,* 790 F.2d 1550, 1551 (11th Cir. 1986); *Wrenn v. American Cast Iron Pipe Co.,* 575 F.2d 544, 545 (5th Cir. 1978); *Johnson v. Bowen,* 803 F. Supp. 1414, 1418-1419 (N.D. Ind. 1992); *Bolduc v. United States,* 189 F. Supp. 640, 64-642 (D. Maine 1960). *See also Parissi v. Telechron, Inc.,* 349 U.S. 46, 47, 99 L. Ed. 867, 75 S. Ct. 577 (1955) *(per* curiam)(clerk received timely notice of appeal: "untimely payment of §1917 fee did not vitiate the validity of petitioner's notice of appeal. Anything to the contrary, ... we disapprove."); *Gilardi v. Schroeder,* 833 F.2d 1226, 1233 (7th Cir. 1987) (stating that "the district court should regard as 'filed' a complaint which arrives in the custody of the clerk within the statutory period but fails to conform with formal requirements in local rules"); *Lyons v. Goodson,* 787 F.2d 411, 412 (8th cir. 1986) (same); *Loya v. Desert Sands Unified School District,* 721 F.2d 279, 281 (9th Cir. 1983) (same). *Contra Wanamaker v. Columbian Rope Co.,* 713 F. Supp. 533, 537 (N.D.N.Y. 1989); *Keith v. Heckler,* 603 F. Supp. 150, 156-157 (E.D. Va. 1985); *Anno v United States,* 125 Ct. Cl. 535, 113 F. Supp. 673, 675 (Ct. Cl. 1953); *Turkett v. United States,* 76 F. Supp. 769, 770 (N.D.N.Y. 1948).

depending upon which Circuit Court cases control in the district courts.

Six courts have local rules stating that the complaint is not deemed filed until the fee is paid.[12] Five of these courts are in the Tenth Circuit where there is no specific and controlling case law.[13] These rules, then, can stand. The remaining rule is from the Northern District of Georgia which is in the Eleventh Circuit and which reads: "Advance payment of fees is required before the clerk will file any civil action, suit, or proceeding."[14] This rule is inconsistent with the case law in the Eleventh Circuit and should, therefore, be rescinded.[15]

There is a rule in a district court in the First Circuit that forbids the clerk from filing a complaint submitted without the filing fee.[16] A 7-day grace period is provided during which the fee can be paid; if it is not paid within that time, the complaint is dismissed without prejudice.[17] This local rule may also be appropriate since there is no controlling First Circuit opinion on this issue.

Rules in two courts, the District of Minnesota and the Northern District of Illinois, give the clerk the option to accept a complaint without prepayment of the fee or to reject such a complaint until the fees are paid.[18] Each of these rules seems inconsistent

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[12] D.Colo. LR4.4; N.D.Ga. LR3.2; E.D.Okla. LR5.1C; N.D.Okla. LR5.1F; D.Utah LR108; D.Wyo. LR5.1(f).

[13] D.Colo. LR4.4; E.D.Okla. LR5.1C; N.D.Okla. LR5.1F; D.Utah LR108; D.Wyo. LR5.1(f).

[14] .N.D.Ga. LR3.2.

[15] *See Rodgers v. Bowen*, 790 F.2d 1550, 1551 (11th cir. 1986).

[16] D.N.H. LR4.4.

[17] *Id.*

[18] N.D.Ill. GR11; D.Minn. LR4.2.

with existing case law in their respective circuits, the Eighth and Seventh Circuits.[19] As such, they should be rescinded.

There are two courts with local rules requiring that the clerk mark a complaint as received but file it only when the fee is paid.[20] The significance of these rules is unclear. Assuming they intend to indicate that the complaint is filed after the fee is paid *nunc pro tunc*, they are appropriate. It appears, however, that the rule in the District of North Dakota means something different. This local rule seems to say that the complaint is not constructively filed at the earlier time but is only filed when the fee is actually provided.[21] If this interpretation is accurate, the rule seems to run afoul of controlling case law in the Eighth Circuit and should, therefore, be rescinded.[22]

Rule 3—Civil Cover Sheet

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[19] *See Lyons v. Goodson*, 787 F.2d 411, 412 (8th Cir. 1986) (complaint should be deemed filed even if it fails to conform with formal requirements of local rules); *Gilardi v Schroeder*, 833 F.2d 1226, 1233 (7th Cir. 1987) (same).

[20] D.N.Dak. LR4.1; E.D.Tenn. LR4.5.

[21] D.N.Dak. LR4.1.

[22] *See Lyons v. Goodson*, 787 F.2d 411, 412 (8th Cir. 1986) (complaint should be deemed filed even if it fails to conform with formal requirements of local rules).

Forty-four courts have local rules concerning the use of a civil cover sheet when filing an action in the federal district courts.[1] Most of these rules are appropriate as local rules if it is assumed that a failure to comply with one of these local rules does not result in a rejection of the complaint. A rule in one district court is inconsistent with existing law by allowing the clerk to reject the complaint for failing to file a civil cover sheet.

The content of these local rules has changed somewhat since the first Local Rules Project Report. In 1989, there were forty-five courts with local rules on this subject, almost the same number as now.[2] The earlier Report, however, identified eleven jurisdictions with local rules that conflicted with existing law by allowing the clerk to refuse to accept the filing of a complaint if a civil cover sheet is not also submitted.[3] The number of courts with such a local rule has now been reduced to only one.

DISCUSSION

Forty-two of the forty-four courts have rules requiring that the civil cover

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[1] M.D.Ala. LR3.1; N.D.Ala. LR3.1; S.D.Ala. LR3.2; D.Alaska LR6M; C.D.Cal. LR3.3; E.D.Cal. LR3-200; N.D.Cal. LR3-2(a);S.D.Cal. LR3.1;D.Colo. LR3.1;D.Del. LR3.1;S.D.Fla. LR3.3; S.D.Ga. LR4.1; N.D.Ill. LR2.20; N.D.Iowa LR3.1(c);; S.D.Iowa LR3.1(c); D.Kan. LR3.1; D.Me. LR3(a); D.Md. LR103.1; D.Mass. LR3.1; E.D.Mich. LR3.1; D.Minn. LR3.1; N.D.Miss. LR3.1(B); S.D.Miss. LR3.1(B); E.D.Mo. LR3-2.02(A); D.Mont. LR200-1; D.Neb. LR3.1; D.N.H. LR3.1; D.N.Mex. LR3.1; N.D.N.Y. LR3.1; M.D.N.Car. LR3.1(a); D.N.Mar.I LR3.1; N.D.Ohio LR3.13; S.D.Ohio LR3.1; E.D.Okla. LR3.1; N.D.Okla. LR3.1; W.D.Okla. LR3.1; W.D.Pa. LR3.1; E.D.Tenn. LR3.1; N.D.Tex. LR3.1; S.D.Tex. LR3.A; W.D.Tex. CV-3(a); D.Utah LR201; D.V.I. LR3.1; D.Wyo. LR3.1

[2] Report of the Local Rules Project: Local Rules on Civil Practice [hereinafter "Report"] at "Suggested Local Rules," p.15; and "Questionable Local Rules" p.13. The first Report of the Local Rules Project was distributed to the Chief Judges of the District Courts by the Honorable Joseph F. Weis, Jr., Chairman of the Committee on Rules of Practice and Procedure, in April 1989. It consisted of several documents, two of which are cited throughout this document. The first document is entitled: "Suggested Local Rules, Including Model Local Rules and Rules that Should Remain Subject to Local Variation" [hereinafter "Suggested Local Rules"]. This document discusses those local rules that should remain as local directives. It includes Model Local Rules that may appropriately be the subject of rulemaking for all jurisdictions. The second document is entitled: Questionable Local Rules [hereinafter "Questionable Local Rules"]. This second document identifies those local rules that are inconsistent with existing law and those local rules that repeat existing law.

sheet be filed with the initial complaint or notice of removal.[4] Eighteen of those courts have rules clearly stating that the civil cover sheet is used only for administrative purposes and that it has no legal effect.[5]

The Judicial Conference at its September 1974 meeting recommended the use of a civil cover sheet for all district courts.[6] The civil cover sheet was part of a civil docket package from the Administrative Office of the United States Courts that had been used experimentally in eleven jurisdictions:

> [It was] decided to reduce the clerical effort required to initiate the docket sheet and ... statistical reports for each case and, in addition, [to remove] the burden of serving the complaint for the issue involved from the filing clerk to the attorney. [7]

The civil cover sheet was recommended for use by all districts as of January 1, 1975 "in accordance with Rule 79(a) of the F.R.Civ.P."[8]

Some courts expand on what the civil cover sheet requires in certain ways. For example, four courts require that the document be filed in duplicate[9] and another

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[3] *Id.*

[4] M.D.Ala. LR3.1; N.D.Ala. LR3.1; S.D.Ala. LR3.2; D.Alaska LR6M; C.D.Cal. LR3.3; E.D.Cal. LR3-200; N.D.Cal. LR3-2(a); S.D.Cal. LR3.1; D.Colo. LR3.1; D.Del. LR3.1; S.D.Fla. LR3.3; S.D.Ga. LR4.1; N.D.Iowa LR3.1(c); S.D.Iowa LR3.1(c); D.Kan. LR3.1; D.Me. LR3(a); D.Md. LR103.1; D.Mass. LR3.1; E.D.Mich. LR3.1; D.Minn. LR3.1; N.D.Miss. LR3.1(B); S.D.Miss. LR3.1(B); E.D.Mo. LR3-2.02(A); D.Mont. LR200-1; D.Neb. LR3.1; D.N.H. LR3.1; D.N.Mex. LR3.1; N.D.N.Y. LR3.1; M.D.N.Car. LR3.1(a); D.N.Mar.I LR3.1;; N.D.Ohio LR3.13; S.D.Ohio LR3.1; E.D.Okla. LR3.1; N.D.Okla. LR3.1; W.D.Okla. LR3.1; E.D.Tenn. LR3.1; N.D.Tex. LR3.1; S.D.Tex. LR3.A; W.D.Tex. CV-3(a); D.Utah LR201; D.V.I. LR3.1; D.Wyo. LR3.1

[5] M.D.Ala. LR3.1; E.D.Cal. LR3-200; S.D.Cal. LR3.1; D.Del. LR3.1; S.D.Fla. LR3.3; S.D.Ga. LR4.1; D.Minn. LR3.1; D.Neb. LR3.1; D.N.H. LR3.1; D.N.Mex. LR3.1; N.D.N.Y. LR3.1; D.N.Mar.I LR3.1; S.D.Ohio LR3.1; N.D.Okla. LR3.1; E.D.Tenn. LR3.1; D.Utah LR201; D.V.I. LR3.1; D.Wyo. LR3.1

[6] Report of the United States Judicial Conference (September 1974) 18.

[7] *Id.*

[8] *Id.*

[9] C.D.Cal. LR3.3; N.D.Iowa LR3.1(c); S.D.Iowa LR3.1(c); N.D.Tex. LR3.1.

court requires it be filed in triplicate.[10] Several courts also require that additional information be provided on the document such as whether there is a related action.[11] Two of the courts require the submission of a civil cover sheet and another document that seems to supplement the information requested on the official form.[12] Another court requires the use of a completely different form.[13] While these variations may seem small, they may cause difficulties for people who are new to the jurisdiction or who file only infrequently in that court. These local rules may also be problematic to the extent that a failure to comply with them results in a rejection of the complaint.

In nine of the courts, pro se litigants are specifically exempt from filing the civil cover sheet.[14] Two of these courts also exempt prisoners.[15] In another court a court clerk will file the civil cover sheet on behalf of a prisoner.[16]

Some of the rules discuss the significance of a failure to file the civil cover sheet. For example, six courts indicate that a complaint without a civil cover sheet is dated and filed later *nunc pro tunc*.[17] In other courts, the clerk will either help to complete the document[18] or notify the litigant of the failure to file the document.[19] These rules are consistent with existing law.

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[10] M.D.N.Car. LR3.1(a).

[11] D.Del. LR3.1.

[12] D.Mass. LR3.1 (civil cover sheet and local category sheet); N.D.Ohio LR3.13 (civil cover sheet and Case Information Sheet).

[13] N.D.Ill. GR2.20 (must file a designation sheet).

[14] D.Del. LR3.1; D.Mont. LR200-1; D.N.H. LR3.1; D.N.Mex. LR3.1; N.D.Okla. LR3.1; S.D.Tex. LR3.A; W.D.Tex. CV-3(a); D.V.I. LR3.1; D.Wyo. LR3.1

[15] D.Mont. LR200-1; W.D.Tex. CV3(a).

[16] N.D.Ill. LR2.20.

[17] M.D.Ala. LR3.1; D.Del. LR3.1; S.D.Ga. LR4.1; D.Minn. LR3.1; D.N.Mar.I LR3.1; D.V.I. LR3.1.

[18] E.D.Mich. LR3.1.

In one court, however, the clerk can refuse a pleading that does not have a civil cover sheet: "The Clerk is authorized to reject for filing any civil case which is not accompanied by a completed and executed civil cover sheet."[20] This local rule is inconsistent with Rule 5(e) of the Federal Rules of Civil Procedure which forbids the clerk from rejecting such a complaint: "The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in the proper form as required by these rules or any local rules or practices."[21] In 1991 this Rule was amended to forbid such action: "[refusing to accept a document for filing] is not a suitable role for the office of the clerk, and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this revision."[22] There is also case law indicating that a complaint filed without a civil cover sheet is still deemed a filed complaint.[23] Because this local rule is inconsistent with the federal rules and case law, it should be rescinded.[24]

Rule 3—In Forma Pauperis

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[19] D.N.H. LR3.1; D.N.Mex. LR3.1; S.D.Ohio LR3.1; D.Wyo. LR3.1.

[20] D.Mont. LR200-1.

[21] Fed.R.Civ.P. 5(e).

[22] Fed.R.Civ.P. 5(e) Note to 1991 Amendments; *see also* Fed.R.Civ.P. 5(e).

23 *See, e.g., Cintron v Union Pacific Railroad Co*, 813 F.2d 917, 920 (9th Cir. 1987) (complaint presented without civil cover sheet in violation of local rule still deemed filed: "The consensus is that 'papers and pleadings including the original complaint are considered filed when they arse placed in the possession of the clerk of the court.'" (*citations omitted*)); *see also In Re Toler*, 999 F.2d 140 (6th Cir. 1993) (complaint presented without summons in violation of local rule still deemed filed); *McDowell v. Delaware State Police*, 88 F2d 188 (3rd Cir. 1996) (complaint presented without filing fee in violation of local rule deemed filed); *McClellon v. Lone Star Gas. Co.*, 66 F.3d 98 (5th Cir. 1995) (defective complaint presented in violation of local rule deemed filed.)

[24] D.Mont. LR200-1(b).

Thirty-three jurisdictions have local rules concerning the procedure to obtain permission to proceed *in forma pauperis*.[1] There are rules that explain the content necessary for affidavits seeking to proceed *in forma pauperis* and those that explain the procedure for seeking court approval. These rules are appropriate. There are also rules that require the use of form affidavits and those that allow the clerk to reject a request to proceed *in forma pauperis* without judicial action. These rules are problematic and should be rescinded. There are also rules that permit the assessment of partial payment of fees against non-prisoners. Existing law does not permit these types of assessments, so these local rules are also problematic. Lastly, several courts have local rules that repeat existing law and should, therefore, be rescinded.

DISCUSSION

Most of the procedure for securing *in forma pauperis* status is found in the first instance in Section 1915 of Title 28, which was amended in 1996 by the Prisoner Litigation Reform Act.[2] This provision, generally, allows any person to bring a lawsuit "without prepayment of fees or security therefor" if the person files an affidavit of poverty.[3] Prisoners must also file a trust fund account statement indicating the amount of money in the prisoner's account.[4]

There are eight courts with local rules that discuss the required content of any

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[1] D.Alaska LR27; D.Ariz. LR1.19; C.D.Cal. LR26.3; N.D.Cal. LR3-10; S.D.Cal. LR3.2; M.D.Fla. LR4.07; N.D.Ga. LR3.2; N.D.Ill. LRGR11; S.D.Ill. LR3.1; N.D.Ind. LR4.3; E.D.Ky. LR5.5; W.D.Ky. LR5.5; D.Me. LR3(a); D.Mass. LR4.5; W.D.Mich. LR3.4; D.Minn. LR4.2; E.D.Mo. LR2.05; D.Neb. LR3.5; D.N.H. LR4.2; D.N.Mex. LR5.3; N.D.N.Y. LR5.4; W.D.N.Y. LR5.3; E.D.N.Car. LR22.00; N.D.Ohio LR3.15; W.D.Okla. LR3.3; D.Or. LR3.6(b); M.D.Pa. LR4.6; D.P.R. LR303; E.D.Tenn. LR4.2; D.Utah LR108; W.D.Wash. LRCR3; N.D.W.Va. LRGR6.02; S.D.W.Va. LRGR6.02.

[2] *See* 28 U.S.C. §1915.

[3] *Id.* at (a)(1).

affidavit seeking *in forma pauperis* status.[5] Such directives are appropriate supplements to the existing statutory scheme.[6]

There are, however, rules requiring the use of a form affidavit that may be problematic. Seven courts have local rules requiring that a form application be used in seeking *in forma pauperis* status.[7] These rules do not allow for the use of an equivalent affidavit but rely solely on the form affidavit. Such a requirement is inconsistent with the statute which only requires submission of an affidavit "that includes a statement of all assets such prisoner possesses [and a statement] that the person is unable to pay such fees or give security therefor."[8]

This requirement is also inconsistent with the spirit of the Federal Rules. The Supreme Court Rules and the Federal Rules of Appellate Procedure each have a specific requirement that a party interested in proceeding *in forma pauperis* file an affidavit or declaration "in the form prescribed by the Fed. Rules of App. Pro. Form 4."[9] Even this requirement is not unyielding. For example, the Supreme Court Rules provide for "due allowance" when a document is filed by a pro se litigant if the document, while not precisely following the form, still complies "with the substance of these Rules."[10] The relevant Appellate Rule also does not require absolute compliance with Form 4 by stating

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[4] *Id.* at (a)(2).

[5] D.Ariz. LR1.19; C.D.Cal. LR26.3; N.D.Cal. LR3-10; S.D.Cal. LR3.2; D.Neb. LR3.5; D.N.H. LR4.2; N.D.N.Y. LR5.4.

[6] *See* 28 U.S.C. §1915(a)(1); *see also Zaun v. Dobbin*, 628 F.2d 1990, 992 (7th Cir. 1980); *Adkins v E.I. DuPont DeNemours & Co.*, 335 U.S. 331, 339-340, 69 S.Ct. 85, 89, 93 L.Ed 43, 47 (1948).

[7] N.D.Cal. LR3-10; S.D.Ill. LR3.1; E.D.Ky. LR5.5; W.D.Ky. LR5.5; D.Mass. LR4.5; E.D.Mo. LR2.05; W.D.Okla. LR3.3; D.Utah LR108; W.D.Wash. LRCR3.

[8] 28 U.S.C. §1915(a).

[9] Sup.Ct.R. 39.1; *see also* Fed.R.App.P. Form 4.

[10] Sup.Ct.R. 39.3.

that the necessary affidavit must show "in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay."[11] Lastly, existing case law recognizes that the precise form of the affidavit is not what is important but, rather, the general content.[12] Because these local rules are inconsistent with existing law, they should be rescinded.

There are a variety of local rules that discuss the procedure used to approve a request to proceed *in forma pauperis*. For example, there are local rules explaining that, after filing, the affidavit is provided to the assigned judge,[13] to the chief judge,[14] or to the magistrate judge for approval.[15] Five courts have local rules that explain that, after approval, the clerk files the materials.[16] One court has a local rule indicating that a request to proceed *in forma pauperis* is deemed granted if there is no court action within sixty days.[17] All of these rules are appropriate supplements to the statutory arrangement.

There are, however, rules in two jurisdictions that may be problematic. These rules permit the clerk to return any action that is not accompanied by an affidavit.[18] Such a requirement is inconsistent with both Rule 5 and Rule 83 of the Federal Rules of Civil Procedure, which seek to protect a litigant from being penalized by an action of the clerk

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[11] Fed.R.App.P. 24(a)(1)(A).

[12] *See McGore v. Wrigglesworth*, 114 F.3d 601, 605 (6th Cir. 1997) (must file a completed Form 4 or its equivalent); *Adkins v. E.I DuPont DeNemours & Co.*, 335 U.S. 331, 339, 69 S.Ct. 85, 89, 93 L.Ed 43, 47 (1948) (court can seek particularized information about a party's financial status).

[13] N.D.Cal. LR3-10; M.D.Fla. LR4.07; N.D.Ill. LRGR11.

[14] D.Alaska LR27; M.D.Pa. LR4.6.

[15] D.Minn. LR4.2; W.D.Mich. LR3.4; N.D.N.Y. LR5.4; N.D.Ohio LR3.15; M.D.Pa. LR4.6; D.P.R. LR303.

[16] D.Alaska LR27; N.D.Ill. LRGR11; D.Mass. LR4.5; D.N.Mex. LR5.3; D.Or. LR3.6(b).

[17] N.D.Ill. GR11.

[18] D.Ariz. LR1.19; E.D.Mo. LR2.05.

without benefit of judicial action.[19] These rules should be rescinded.

Another potentially problematic issue concerns the circumstances under which the court is permitted to order partial payment of a fee. Local rules in seven courts allow for a partial fee assessment for non-prisoners.[20] These rules are contrary to existing law reflected in both statutory amendments to the *in forma pauperis* statute and case law. These rules should, therefore, be rescinded.

Prior to the Prisoner Litigation Reform Act of 1996, the *in forma pauperis* statute was silent on whether a partial fee could be assessed. The statute allowed a suit to be commenced "without prepayment of fees and costs or security therefor, by a person who made affidavit that he was unable to pay such costs or give security therefor."[21] District courts ordered partial payment of fees for prisoners seeking to proceed *in forma pauperis* after examining the inmate's trust account.[22] The Ninth Circuit Court of Appeals extended this procedure to non-prisoners:

> Appellants' chief contention is that while 28 U.S.C. §1915 permits district courts to require full fees or to wave all fees, it does not grant district courts the authority to require a partial filing fee. We take this opportunity to make the apparent explicit: Courts have discretion to impose partial filing fees under the in forma pauperis statute.[23]

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[19] Fed.R.Civ.P. 5(e) ("The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices."); Fed.R.Civ.P. 83(a)(2) ("A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.").

[20] S.D.Cal. LR3.2; M.D.Fla. LR4.07; N.D.Ind. LR4.3; D.Neb. LR3.5; D.N.H. LR4.2; W.D.Okla. LR3.3; E.D.Tenn. LR4.2.

[21] 28 U.S.C. §1915(a) (1995).

[22] *See e.g., In Re Williamson*, 786 F.2d 1336 (8th Cir. 1986); *Lambert v. Illinois Department of Corrections*, 827 F.2d 257 (7th Cir. 1987); *Prous v. Kastner*, 842 F.2d 138 (5th Cir. 1988), *rehearing den'd, en banc*, 847 F.2d 840 (5th Cir. 1988), *cert. den'd*, 488 U.S. 941, 109 S.Ct. 364, 102 L.Ed.2d 354 (1988).

[23] Olivares v. Marshall, 59 F.3d 109, 111 (9th Cir. 1995).

That court then cited cases in nine other circuit courts as support for the idea that partial filing fees could be assessed against non-prisoners.[24] All of the cited cases, however, refer only to prisoners proceeding *in forma pauperis*.

The distinction between prisoners and non-prisoners was articulated in the statute in 1996. The Prisoner Litigation Reform Act of 1996 amended section 1915.[25] There is now specific reference to prisoners in the statute, and they are treated differently than non-prisoners. Subsection (a) of the statute allows anyone to proceed "without prepayment of fees or security" if the person can establish an inability to pay.[26] The statute then specifically requires a prisoner to pay the filing fee albeit in installments:

> Notwithstanding subsection (a), if a prisoner brings a civil action ... the prisoner shall be required to pay the full amount of the filing fee. The court shall assess and, when funds exist, collect, as a partial payment [a certain amount based on a formula].... After payment of the initial partial filing fee ... [payments shall be forwarded] until the filing fees are paid.[27]

The prisoner is also required to make payments for costs in a similar manner.[28] The change in this statute means that, now, the issue for an inmate is not whether that inmate will pay the fees and costs but when—will the inmate pay the filing fee at the beginning of the lawsuit or throughout some period of the lawsuit on an installment plan?[29]

The partial fee assessment discussed in the *in forma pauperis* statute in

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[24] *Id.*, *see also Zaun v. Dobbin*, 628 F.2d 1990, 993 (7th Cir. 1980) (with respect to a non-prisoner, "it should be within the court's authority to order payment of a portion of the expense while waiving the remainder.")

[25] 28 U.S.C. §1915 last amended by Pub.L. 104-134, April 26, 1996.

[26] 28 U.S.C. §1915(a).

[27] *Id.* at (b).

[28] *Id.* at (f)(2).

[29] *McGore v. Wrigglesworth*, 114 F.3d 601, 605 (6thCir. 1997).

section (b) refers only to prisoner.[30] The requirement of paying for costs under an installment system is also applicable only to prisoners.[31] At least one court has acknowledged the significance of differentiating between prisoners and non-prisoners in this regard.[32] The statute treats the two categories of people differently and requires prisoners to be assessed the full fee through an installment payment arrangement. This method of payment is not sanctioned in the statute for use with non-prisoners. Accordingly, the local rules seeking to do so in the seven district courts should be rescinded.

Several courts have local rules that repeat existing law and should, therefore, be rescinded. For example, one court has a local rule requiring a person to provide sufficient copies of the complaint for service.[33] This rule simply repeats Rule 4(c)(1) of the Federal Rules of Civil Procedure.[34] Several courts have local rules stating that persons proceeding *in forma pauperis* have agreed to pay the costs and fees from any recovery.[35] These provisions repeat a portion of the *in forma pauperis* statute itself.[36] Two courts have local rules that simply repeat the applicability of this statute.[37]

Rule 5. Service and Filing of Pleadings and Other Papers

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[30] 28 U.S.C. §1915(b).

[31] *Id.* at (f)(2).

[32] *Walker v. People Express Airlines, Inc.*, 886 F.2d 598, 601 (3rd Cir. 1989) (Non-prisoner treated the same as a prisoner with respect to partial fee assessment before Prisoner Litigation Reform Act: "[I]nasmuch as neither §1915(a) nor §753(f) differentiates between prisoner and non-prisoner cases, we find it of no consequence that Walker litigated his suit from outside prison walls.")

[33] S.D.Ill. LR3.1..

[34] Fed.R.Civ.P. 4(c)(1).

[35] M.D.Fla. LR4.07; Mass. LR4.5; E.D.Mo. LR2.05D.Neb. LR3.5; W.D.Wash. LRCR3; N.D.W.Va. LRGR6.02; S.D.W.Va. GR6.02.

[36] *See* 28 U.S.C. §1915(f).

[37] N.D.W.Va. GR6.02; S.D.W.Va. GR6.02.

Rule 5—Proof of Service

Thirty-two courts have rules discussing the use of a proof of service.[1] Many of these local rules address either the form or content of any certificate of service and, as such, are appropriate supplements. There is one local rule that questions whether a certificate of service is actually required; given the existence of Rule 5, this rule is problematic and should be rescinded. There are other rules that discuss when the certificate must be filed that are also problematic because they appear inconsistent with Rule 5.

DISCUSSION

Rule 5 of the Federal Rules of Civil Procedure was amended in 1991 to include a requirement that papers be accompanied by a certificate of service when filed: "All papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court within a reasonable time after service...."[2] The Committee Note to this Rule recognized that this requirement had previously been provided by local rule.[3] Prior to this amendment, in fact, forty-six courts had local rules requiring that some type of proof of service accompany documents filed pursuant to Rule 5.[4]

Most of the current local rules in the thirty-three courts explain the form of the

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[1] C.D.Cal. LR5.8; E.D.Cal. LR5-135(a); N.D.Cal. LR5-4; S.D.Cal. LR5.2;; D.Conn. LR7(e); D.Del. LR5.2(a); D.D.C. GR110; N.D.Fla. LR5.1(C);; S.D.Fla. LR5.2(A); S.D.Ga. LR5.1; D.Idaho LR5.2; N.D.Iowa LR5.1(b); S.D.Iowa LR5.1(b); E.D.La. LR5.3; M.D.La. LR5.3; W.D.La. LR5.3; D.Md. LR102.1; W.D.Mich. LR5.2; N.D.Miss. LR5.2(B); S.D.Miss. LR5.2(B); D.Mont. LR210-3; D.Neb. LR5.2; D.Nev. LR5-1; E.D.Okla. LR5.1(D); N.D.Okla. LR5.1(C); W.D.Okla. LR5.1; W.D.Pa. LR5.2; D.R.I. LR10(b); D.S.Dak. ; W.D.Tex. CV-5(c); W.D.Wash. LR5(f); D.Wyo. LR5.1(g).

[2] Fed.R.Civ.P. 5(d).

[3] *See* Fed.R.Civ.P. 5(e) Note to 1991 Amendments.

proof of service. For example, twenty-three courts have local rules requiring that the proof of service be by certification from counsel pursuant to 28 U.S.C. §1746.[5] Another ten courts require that the certification be from the person making service.[6] Approximately eleven courts have rules requiring, instead, that the proof be by written acknowledgement from the person served.[7] Lastly, three courts simply state that other proof may be permitted if satisfactory to the court.[8] These rules are all appropriate.

Many of the rules also discuss the content of the proof of service. Twenty-one of the courts have rules requiring that the date of service be set forth.[9] Sixteen courts have rules requiring an explanation of the method or manner of service, such as personal service or mail service.[10] Nine courts have directives indicating that the proof of service must contain the name[11] or name and address[12] of the person being served. These rules

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[4] *See* Report at Suggested Local Rules, p.19.

[5] N.D.Cal. LR5-4; S.D.Cal. LR5.2; D.Conn. LR7(e); D.Del. LR5.2(a); D.D.C. GR110; N.D.Fla. LR5.1(C); S.D.Fla. LR5.2(A); S.D.Ga. LR5.1; D.Idaho LR5.2; N.D.Iowa LR5.1(b); S.D.Iowa LR5.1(b); E.D.La. LR5.3; M.D.La. LR5.3; W.D.La. LR5.3; D.Md. LR102.1; W.D.Mich. LR5.2; N.D.Miss. LR5.2(B); S.D.Miss. LR5.2(B); D.Neb. LR5.2; E.D.Okla. LR5.1(D); N.D.Okla. LR5.1(C); D.R.I. LR10(b); D.Wyo. LR5.1(g).

[6] S.D.Cal. LR5.2; D.Conn. LR7(e); D.Del. LR5.2(a); N.D.Iowa LR5.1(b);; S.D.Iowa LR5.1(b); W.D.Mich. LR5.2; D.Mont. LR210-3; D.Neb. LR5.2; D.Nev. LR5-1; W.D.Okla. LR5.1.

[7] S.D.Cal. LR5.2; D.Conn. LR7(e); D.Idaho LR5.2; N.D.Iowa LR5.1(b); S.D.Iowa LR5.1(b); W.D.Mich. LR5.2; D.Mont. LR210-3; D.Neb. LR5.2; D.Nev. LR5-1; W.D.Okla. LR5.1; D.R.I. LR10(b).

[8] S.D.Cal. LR5.2; D.D.C. GR110; D.Mont. LR210-3.

[9] C.D.Cal. LR5.8; E.D.Cal. LR5-135(a); N.D.Cal. LR5-4; S.D.Cal. LR5.2; D.D.C. GR110; N.D.Fla. LR5.1(C); S.D.Fla. LR5.2(A); S.D.Ga. LR5.1; D.Idaho LR5.2; N.D.Iowa LR5.1(b); S.D.Iowa LR5.1(b); W.D.Mich. LR5.2; N.D.Miss. LR5.2(B); S.D.Miss. LR5.2(B); D.Mont. LR210-3; D.Nev. LR5-1; E.D.Okla. LR5.1(D); N.D.Okla. LR5.1(C); D.R.I. LR10(b); W.D.Tex. CV-5(c); D.Wyo. LR5.1(g).

[10] C.D.Cal. LR5.8; E.D.Cal. LR5-135(a); N.D.Cal. LR5-4; S.D.Cal. LR5.2; D.D.C. GR110; D.Idaho LR5.2; N.D.Iowa LR5.1(b); S.D.Iowa LR5.1(b); W.D.Mich. LR5.2; N.D.Miss. LR5.2(B); S.D.Miss. LR5.2(B); D.Mont. LR210-3; D.Nev. LR5-1; D.R.I. LR10(b); W.D.Tex. CV-5(c); D.Wyo. LR5.1(g).

[11] C.D.Cal. LR5.8; S.D.Fla. LR5.2(A); S.D.Ga. LR5.1; D.Idaho LR5.2; N.D.Miss. LR5.2(B); S.D.Miss. LR5.2(B); D.Neb. LR5.2; D.Nev. LR5-1; W.D.Tex. CV-5(c).

are also appropriate.

Some of the courts discuss where the proof of service should be physically located within the pleadings. For example, eight courts have local rules requiring that the proof be a separate attachment or on the document itself.[13] Another four courts require that the proof of service be a separate attachment.[14] Four courts state that, if the proof of service is attached as a document, it must be the last page.[15] These rules may stand.

The courts vary on whether they actually require a certificate of service and, if so, what the effect of a failure to file is. For example, one court has a rule stating that, when a document is filed with the court, it is a representation that it has also been served and that "[n]o further proof of service is required unless an adverse party raises a question of notice."[16] This rule, by its language is inconsistent with Rule 5 (d) of the Federal Rules of Civil Procedure and should, therefore, be rescinded.

Seven courts have local rules stating that the failure to make proof of service does not affect the validity of service.[17] There is, however, some case law to the contrary.[18]

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[12] D.Conn. LR7(e); S.D.Fla. LR5.2(A); S.D.Ga. LR5.1; N.D.Miss. LR5.2(B);; S.D.Miss. LR5.2(B); D.Neb. LR5.2.

[13] E.D.Cal. LR5-135(a); D.Idaho LR5.2; E.D.La. LR5.3; M.D.La. LR5.3; W.D.La. LR5.3; D.Nev. LR5-1; W.D.Tex. CV-5(c); D.Wyo. LR5.1(g).

[14] D.Del. LR5.2(a); D.D.C. GR110; S.D.Fla. LR5.2(A); S.D.Ga. LR5.1.

[15] C.D.Cal. LR5.8; S.D.Cal. LR5.2; D.Mont. LR210-3; D.Nev. LR5-1.

[16] W.D.Pa. LR5.2.

[17] S.D.Cal. LR5.2; D.D.C. GR110; D.Mont. LR210-3; D.Neb. LR5.2; D.Nev. LR5-1; D.R.I. LR10(b); W.D.Wash. LR5(f).

[18] *E.g., Patel v. Contemporary Classics of Beverly Hills & Herbert Schachter*, __F.3d __, 2001 W.L. 872901 (2d Cir. 2001); *Eilander v. Federated Mutual Insurance Co.*, 2001 W.L. 770986 (N.D.Tex. 2001) (although court determined that motion was not timely filed since it was not accompanied by a certificate of service and, therefore, was appropriately dismissed, the court noted that there were no substantive grounds to uphold the motion either); *Board of Trustees of the Laborers' District Council*

Lastly, some of these local rules indicate when the proof of service must be filed. The Federal Rule on the timeliness of filing the certificate of service reads as follows: "All papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court within a reasonable time after service...."[19] Six of the courts have local rules that allow the proof of service to be filed anytime unless material prejudice would result.[20] Five courts have local rules requiring that the proof of service be filed before the court takes action on the filed document.[21] Three other courts mandate that the proof of service be filed "promptly."[22] Because the Federal Rules require that the filing occur "within a reasonable time after service", these local rules are inconsistent and should, therefore, be rescinded.

Rule 5—Filing of Discovery

Health & Welfare Fund v. Pennsbury Excavating and Landscaping, Inc., 2001 W.L. 1201380 (E.D.Pa. 2000) (because there was no certificate of service, the motion was denied but without prejudice).

[19] Fed.R.Civ.P. 5(d).

[20] S.D.Cal. LR5.2; D.D.C. GR110; D.Mont. LR210-3; D.Neb. LR5.2; D.Nev. LR5-1;; W.D.Wash. LR5(f).

[21] S.D.Cal. LR5.2; N.D.Iowa LR5.1(b); S.D.Iowa LR5.1(b); D.Mont. LR210-3; D.Nev. LR5-1.

[22] S.D.Cal. LR5.2; D.Mont. LR210-3; W.D.Tex. CV-5(c).

Eighty-three courts have local rules addressing whether discovery documents are permitted or required to be filed. These rules were promulgated before December 1, 2000, the effective date of the amendments to Rule 5.[1] Most of these rules were rendered ineffective by the new amendments. They should be rescinded. In addition, some rules, specifically those discussing how to obtain access to filed discovery and who maintains non-filed discovery, can remain subject to local variation.

DISCUSSION

Prior to the recent amendments, Rule 5(d) of the Federal Rules of Civil Procedure allowed the court on motion of a party or on its own initiative to order that certain discovery material not be filed.[2] That Rule made the filing requirement subject to a court order that discovery not be filed if so requested by the court or the party.[3] The language in the Committee Note indicates that the Advisory Committee intended in Rule 5(d) that filing be the norm and that non-filing only be permitted in particular cases. The Committee Note to the 1980 amendments states that the requirement of filing is:

> subject to an order of the court that discovery materials not be filed unless filing is requested by the court or is effected by the parties who wish to use the material in the proceeding. [4]

Eighty-three courts have local rules based on this version of Rule 5(d).[5]

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[1] *See* Fed.R.Civ.P. 5(d).

[2] Fed.R.Civ.P. 5(d) prior to the 2000 amendments read, in relevant part: "but the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding."

[3] Fed.R.Civ.P. 5 Note to 1980 Amendments.

[4] *Id.*.

[5] M.D.Ala. LR5.1; N.D.Ala. LR5.1; S.D.Ala. LR5.5; D.Alaska LR8(A); E.D.Ark. LR5.5; W.D.Ark. LR5.5; C.D.Cal. LR26-8.3; E.D.Cal. LR5-134(e); N.D.Cal. LR26-2;; S.D.Cal. LR30.1; D.Colo. LR31; D.Conn. LR7(g); D.Del. LR5.4; D.D.C. LR107;; M.D.Fla. LR3.03; N.D.Fla. LR26.2; S.D.Fla. LR26.1; M.D.Ga. LR5.1; N.D.Ga. LR5.4; S.D.Ga. LR26.6; D.Haw. LR5.1; D.Idaho LR5.5;

Basically, these rules require non-filing of discovery in the ordinary course. Seventy-six of them require that general discovery such as interrogatories, requests for production, requests for admission, and answers and responses, not be filed.[6] There are several exceptions written into these rules. For example, forty-six courts have local rules providing that no discovery be filed except on order of the court.[7] Thirty-two courts provide for non-filing except for use at trial.[8] Thirty-six courts provide for non-filing

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C.D.Ill. LR26.3; N.D.Ill. LR18; N.D.Ind. LR26.2; S.D.Ind. LR26.2; N.D.Iowa LR5.2; S.D.Iowa LR5.2; D.Kan. LR26.3; E.D.Ky. LR5.2; W.D.Ky. LR5.2; E.D.La. LR26.5; M.D.La. LR26.5; W.D.La. LR26.5; D.Me. LR5(b); D.Md. LR104.5; D.Mass. LR26.6; E.D.Mich. LR26.2; W.D.Mich. LR5.3;; D.Minn. LR26.4; E.D.Mo. LR26-3.02; W.D.Mo. LR26.4; D.Mont. LR200-3; D.Neb. LR5.1; D.Nev. LR26-8; D.N.H. LR26.1; D.N.J. LR26.1(c); ; D.N.Mex. LR26.2; E.D.N.Y. LR5.1; N.D.N.Y. LR26.2; S.D.N.Y. LR5.1; W.D.N.Y. LR26(c);; M.D.N.Car. LR5.2; W.D.N.Car. LR26.1; D.N.Mar.I LR26.13; N.D.Ohio LR5.3;; S.D.Ohio LR26.2; E.D.Okla. LR26.1; N.D.Okla. LR26.1B; W.D.Okla. LR26.3; D.Or. LR5.1(c); E.D.Pa. LR26.1(a); M.D.Pa. LR5.4; W.D.Pa. LR5.3; D.P.R. LR315; D.R.I. LR14(b); D.S.Car. LR5.01; D.S.Dak. LR; E.D.Tenn. LR26.2; M.D.Tenn. LR9(c); W.D.Tenn. LR26.1(b); E.D.Tex. LR26(e); N.D.Tex. LR5.2; S.D.Tex. LR5B; W.D.Tex. LR30(b); D.Utah LR204-3(c); D.Vt. LR26.1(f); D.V.I. LR26.1; E.D.Wash. LR26.1; W.D.Wash. LR5(d); N.D.W.Va. LR3.03; S.D.W.Va. LR3.03; E.D.Wis. LR5.04; D.Wyo. LR26.1(d).

[6] M.D.Ala. LR5.1; N.D.Ala. LR5.1; S.D.Ala. LR5.5; D.Alaska LR8(A); E.D.Ark. LR5.5; W.D.Ark. LR5.5; C.D.Cal. LR26-8.3; E.D.Cal. LR32-250; N.D.Cal. LR26-2;S.D.Cal. LR33.1, 36.1; D.Colo. LR31; D.Conn. LR7(g); D.Del. LR5.4; D.D.C. LR107; M.D.Fla. LR3.03; N.D.Fla. LR26.2; S.D.Fla. LR26.1; N.D.Ga. LR5.4; S.D.Ga. LR26.6; D.Haw. LR5.1; D.Idaho LR5.5; C.D.Ill. LR26.3; N.D.Ill. LR18; N.D.Ind. LR26.2; S.D.Ind. LR26.2; N.D.Iowa LR5.2; S.D.Iowa LR5.2; D.Kan. LR26.3; E.D.Ky. LR5.2; W.D.Ky. LR5.2; E.D.La. LR26.5; M.D.La. LR26.5; W.D.La. LR26.5; D.Me. LR5(b); D.Md. LR104.5; D.Mass. LR26.6; E.D.Mich. LR26.2; W.D.Mich. LR5.3; D.Minn. LR26.4; E.D.Mo. LR26-3.02; D.Mont. LR200-3; D.Neb. LR5.1; D.Nev. LR26-8; D.N.H. LR26.1; D.N.J. LR26.1(c); D.N.Mex. LR26.2; E.D.N.Y. LR5.1; N.D.N.Y. LR26.2;; S.D.N.Y. LR5.1; M.D.N.Car. LR5.2; W.D.N.Car. LR26.1; S.D.Ohio LR26.2; E.D.Okla. LR26.1A; N.D.Okla. LR26.1B; W.D.Okla. LR26.3; D.Or. LR5.1(c); E.D.Pa. LR26.1(a); M.D.Pa. LR5.4; W.D.Pa. LR5.3; D.P.R. LR315; D.S.Car. LR5.01; D.S.Dak. LR; E.D.Tenn. LR26.2; M.D.Tenn. LR9(c); W.D.Tenn. LR26.1(b); N.D.Tex. LR5.2; S.D.Tex. LR5A; W.D.Tex. LR5(b); D.Utah LR204-3(c); D.Vt. LR26.1(f); E.D.Wash. LR26.1; W.D.Wash. LR5(d); N.D.W.Va. LR3.03; S.D.W.Va. LR3.03; E.D.Wis. LR55.0; D.Wyo. LR26.1(d).

[7] M.D.Ala. LR5.1, LR26.1; N.D.Ala. LR5.1, LR26.1; N.D.Cal. LR26-2, LR26-4; S.D.Cal. LR30.1, LR33.1, LR36.1; D.Colo. LR31; D.Conn. LR7(g); D.Del. LR5.4; D.D.C. LR107; M.D.Fla. LR3.03; S.D.Fla. LR26.1; S.D.Ga. LR26.6; D.Haw. LR5.1; D.Idaho LR5.5; N.D.Ill. LR18; E.D.La. LR26.5; M.D.La. LR26.5; W.D.La. LR26.5; D.Me. LR5(b); D.Md. LR104.5; D.Mass. LR26.6; E.D.Mich. LR26.2; D.Minn. LR26.4, LR26.1(a)(2); W.D.Mo. LR26.4; D.Nev. LR26-8; D.N.H. LR26.1; D.N.J. LR26.1(c); E.D.N.Y. LR5.1; S.D.N.Y. LR5.1; M.D.N.Car. LR5.2; W.D.N.Car. LR26.1; W.D.Okla. LR26.3; D.Or. LR5.1(c); M.D.Pa. LR5.4; W.D.Pa. LR5.3; D.R.I. LR14(b); E.D.Tenn. LR26.2; M.D.Tenn. LR9(c); D.Utah LR204-3(c); N.D.W.Va. LR3.03; S.D.W.Va. LR3.03; E.D.Wis. LR5.04.

[8] M.D.Ala. LR5.1; N.D.Ala. LR5.1; D.Alaska LR8(A); E.D.Ark. LR5.5; W.D.Ark. LR5.5; N.D.Cal. LR26-4; S.D.Cal. LR30.1; D.Colo. LR31; D.Del. LR5.4; N.D.Fla. LR26.2; S.D.Fla. LR26.1; N.D.Ga. LR5.4; S.D.Ga. LR26.6; D.Haw. LR5.1; D.Idaho LR5.5; E.D.Ky. LR5.2; W.D.Ky. LR5.2; E.D.Mich. LR26.2; W.D.Mich. LR5.3; D.Neb. LR5.1; N.D.N.Y. LR26.2; W.D.N.Car. LR26.1;

except when needed in connection with motions.[9] Thirty-eight courts require that, when discovery is needed with a motion, only the relevant parts of the discovery be filed.[10] Eighteen courts require that any discovery material needed for an appeal be filed at that time.[11]

There are also local rules specifically discussing depositions. Twenty-three courts have local rules mandating that notices of depositions not be filed.[12] Sixty-three courts have local rules requiring that depositions themselves not be filed.[13] Eight courts

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N.D.Okla. LR26.1B; W.D.Okla. LR26.3; M.D.Pa. LR5.4; D.P.R. LR315; D.S.Car. LR5.01; D.S.Dak. LR; W.D.Tenn. LR26.1(b); S.D.Tex. LR5B; D.Vt. LR26.1(f); W.D.Wash. LR5(d).

[9] M.D.Ala. LR5.1; N.D.Ala. LR5.1; D.Alaska LR8(A); E.D.Ark. LR5.5; W.D.Ark. LR5.5; S.D.Cal. LR30.1, LR33.1, LR36.1; D.Colo. LR31; D.Del. LR5.4; M.D.Fla. LR3.03; N.D.Fla. LR26.2; S.D.Fla. LR26.1; N.D.Ga. LR5.4; S.D.Ga. LR26.6; D.Haw. LR5.1; N.D.Ill. LR18; E.D.Ky. LR5.2; W.D.Ky. LR5.2; D.Md. LR104.5; E.D.Mich. LR26.2; D.Minn. LR26.4, LR26.1(a)(2); E.D.Mo. LR26-3.02; D.Mont. LR200-3; D.N.J. LR26.1(c); N.D.N.Y. LR26.2; M.D.N.Car. LR5.2; W.D.N.Car. LR26.1; S.D.Ohio LR26.2; N.D.Okla. LR26.1B; W.D.Okla. LR26.3; D.S.Dak. LR; W.D.Tex. LR5(b); D.Vt. LR26.1(f); W.D.Wash. LR5(d); E.D.Wis. LR5.04.

[10] M.D.Ala. LR5.1; N.D.Ala. LR5.1; S.D.Ala. LR5.5; E.D.Ark. LR5.5; W.D.Ark. LR5.5; C.D.Cal. LR26-8.3; E.D.Cal. LR32-250; N.D.Cal. LR26-4; D.Conn. LR7(g); D.Del. LR5.4; D.D.C. LR107; N.D.Fla. LR26.2; N.D.Ga. LR5.4; S.D.Ga. LR26.6; D.Idaho LR5.5; C.D.Ill. LR26.3; N.D.Ind. LR26.2; S.D.Ind. LR26.2; D.Mass. LR26.6; W.D.Mich. LR5.3; W.D.Mo. LR26.4; E.D.N.Y. LR5.1; S.D.N.Y. LR5.1; M.D.N.Car. LR5.2; W.D.N.Car. LR26.1; W.D.Pa. LR5.3; D.P.R. LR315; D.S.Car. LR5.01; E.D.Tenn. LR26.2; M.D.Tenn. LR9(c); W.D.Tenn. LR26.1(b); N.D.Tex. LR5.2; S.D.Tex. LR5B; W.D.Tex. LR26(a); E.D.Wash. LR26.1; N.D.W.Va. LR3.03; S.D.W.Va. LR3.03; D.Wyo. LR26.1(d).

[11] M.D.Ala. LR5.1; D.Conn. LR7(g); D.Del. LR5.4; D.D.C. LR107; N.D.Fla. LR26.2; S.D.Fla. LR26.1; N.D.Ga. LR5.4; D.Idaho LR5.5; S.D.Ind. LR26.2; E.D.Ky. LR5.2; W.D.Ky. LR5.2; E.D.Mich. LR26.2; E.D.N.Y. LR5.1; S.D.N.Y. LR5.1; M.D.Pa. LR5.4; W.D.Pa. LR5.3; D.P.R. LR315; D.S.Car. LR5.01.

[12] M.D.Ala. LR5.1; N.D.Ala. LR5.1; S.D.Ala. LR5.5; C.D.Cal. LR26-8.3; E.D.Cal. LR30-250(a); N.D.Cal. LR26-2; D.Conn. LR7(g); M.D.Fla. LR3.03; D.Haw. LR5.1; N.D.Ill. LR18; N.D.Ind. LR26.2; N.D.Iowa LR5.2; S.D.Iowa LR5.2; E.D.N.Y. LR5.1; N.D.N.Y. LR26.2; S.D.N.Y. LR5.1; D.Or. LR5.1(c); E.D.Pa. LR26.1(a); N.D.Tex. LR5.2; W.D.Tex. LR5(b); N.D.W.Va. LR3.03; S.D.W.Va. LR3.03; E.D.Wis. LR5.04.

[13] M.D.Ala. LR5.1; N.D.Ala. LR5.1; S.D.Ala. LR5.5; D.Alaska LR8(A); E.D.Ark. LR5.5; W.D.Ark. LR5.5; C.D.Cal. LR26-8.3; E.D.Cal. LR5-134(e), LR30-250(a); S.D.Cal. LR30.1; D.Colo. LR31; D.Conn. LR7(g); D.D.C. LR107; M.D.Fla. LR3.03; N.D.Fla. LR26.2; S.D.Ga. LR26.6; D.Haw. LR5.1; C.D.Ill. LR26.3; N.D.Ill. LR18; N.D.Ind. LR26.2; S.D.Ind. LR26.2; N.D.Iowa LR5.2; S.D.Iowa LR5.2; E.D.La. LR26.5; M.D.La. LR26.5; W.D.La. LR26.5; D.Me. LR5(b); D.Mass. LR26.6; E.D.Mich. LR26.2; W.D.Mich. LR5.3; D.Minn. LR26.4; E.D.Mo. LR26-3.02; W.D.Mo. LR26.4; D.Mont. LR200-3; D.Nev. LR26-8; D.N.H. LR26.1; D.N.Mex. LR30.3; E.D.N.Y. LR5.1; N.D.N.Y. LR26.2; S.D.N.Y. LR5.1; M.D.N.Car. LR5.2; W.D.N.Car. LR26.1; E.D.Okla. LR26.1A; N.D.Okla. LR26.1B; W.D.Okla. LR26.3; D.Or. LR5.1(c); E.D.Pa. LR26.1(a); W.D.Pa. LR5.3; D.P.R. LR315; D.R.I. LR14(b); D.S.Car. LR5.01; E.D.Tenn. LR26.2; W.D.Tenn. LR26.1(b);

have local rules mandating that depositions upon written questions not be filed.[14]

Some courts have local rules that specifically forbid filing of disclosures made pursuant to several portions of Rule 26: Rule 26(a)(1) concerning initial disclosures,[15] Rule 26(a)(2) concerning expert testimony,[16] and Rule 26(a)(3) concerning pre-trial discovery.[17]

Rule 5(d) was amended effective December 1, 2000 to forbid filing of discovery in many cases:

> All papers ... must be filed with the court ... but disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: (i) depositions, (ii) interrogatories, (iii) requests for documents or to permit entry upon land, and (iv) requests for admission.[18]

The existing local rules are rendered ineffective by this new amendment:

> The rule supersedes and invalidates local rules that forbid, permit, or require filing of these materials before they are used in the action.[19]

Most of these local rules, then, should be rescinded.

There are some local rules, however, that may continue to be valid even with the newly amended Rule 5(d). These rules relate to maintenance of the original

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N.D.Tex. LR5.2; S.D.Tex. LR5A; D.Utah LR204-3(c); D.Vt. LR26.1(f); E.D.Wash. LR26.1; W.D.Wash. LR5(d); N.D.W.Va. LR3.03; S.D.W.Va. LR3.03; E.D.Wis. LR5.04.

[14] S.D.Fla. LR26.1; C.D.Ill. LR26.3; N.D.Ill. LR18; E.D.Mo. LR26-3.02; D.Nev. LR26-8; D.N.H. LR26.1; W.D.Tenn. LR26.1(b); S.D.W.Va. LR3.03.

[15] M.D.Ala. LR26.1; N.D.Ala. LR26.1; N.D.Ind. LR26.2; S.D.Ind. LR26.2; D.Kan. LR26.3; W.D.Mo. LR26.4; D.N.Mex. LR26.2; W.D.N.Y. LR26(c); E.D.Wash. LR26.1; D.Wyo. LR26.1(d).

[16] N.D.Ala. LR26.1; D.Conn. LR7(g); D.Idaho LR5.5; S.D.Ind. LR26.2; D.Kan. LR26.3; D.Me. LR5(b); D.N.H. LR26.1; D.N.Mex. LR26.2; D.Minn. LR26.1(a)(2); W.D.N.Y. LR26(c); D.Or. LR5.1(c).

[17] D.Me. LR5(b); S.D.N.Y. LR5.1.

[18] Fed.R.Civ.P. 5(d).

[19] Fed.R.Civ.P. 5(d) Note to 2000 Amendments.

discovery and access to the unfilled discovery. Forty-two courts, for example, have local rules stating that the party responsible for service of the discovery retains the original.[20] In addition, four courts specifically indicate by local rule that the original deposition be maintained by the party seeking it.[21] Five courts have local rules that specifically indicate that the custodian of the discovery must provide reasonable access of the discovery to all parties.[22] Seven courts indicate that others can obtain the material by paying reasonable copying expenses with leave of the court.[23] Another five courts suggest that the public can ask the court that the discovery be filed.[24]

III. Pleadings and Motions

Rule 9. Pleading Special Matters

Rule 9—Three-Judge Courts

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[20] M.D.Ala. LR5.1; N.D.Ala. LR5.1; S.D.Ala. LR5.5; C.D.Cal. LR26-8.3; D.Colo. LR31; D.Del. LR5.4; D.D.C. LR107; N.D.Fla. LR26.2; N.D.Ga. LR5.4; S.D.Ga. LR26.6; D.Idaho LR5.5; C.D.Ill. LR26.3; N.D.Ill. LR18; N.D.Ind. LR26.2; S.D.Ind. LR26.2; E.D.Ky. LR5.2; W.D.Ky. LR5.2; E.D.La. LR26.5; M.D.La. LR26.5; W.D.La. LR26.5; D.Me. LR5(b); D.Md. LR104.5; D.Mass. LR26.6; E.D.Mich. LR26.2; W.D.Mich. LR5.3; D.Nev. LR26-8; D.N.J. LR26.1(c); M.D.N.Car. LR5.2; W.D.N.Car. LR26.1; E.D.Okla. LR26.1A; E.D.Pa. LR26.1(a); M.D.Pa. LR5.4; W.D.Pa. LR5.3; D.P.R. LR315; D.R.I. LR14(b); D.S.Car. LR5.01; W.D.Tenn. LR26.1(b); W.D.Tex. LR30(b); D.Utah LR204-3(c); E.D.Wash. LR26.1; N.D.W.Va. LR3.03; S.D.W.Va. LR3.03.

[21] S.D.Fla. LR26.1; N.D.Ga. LR5.4; D.Idaho LR5.5; M.D.Pa. LR5.4.

[22] M.D.Ala. LR5.1; N.D.Ala. LR5.1; C.D.Cal. LR26-8.3; D.D.C. LR107; D.Md. LR104.5.

[23] M.D.Ala. LR5.1; N.D.Ala. LR5.1; S.D.Ala. LR5.5; C.D.Cal. LR26-8.3; D.Haw. LR5.1; N.D.Ill. LR18; D.Neb. LR5.1.

[24] D.Mass. LR26.6; D.Mont. LR200-3; W.D.Pa. LR5.3; N.D.W.Va. LR3.03; S.D.W.Va. LR3.03.

Twenty-four jurisdictions have local rules concerning the procedures by which a party seeking a three-judge court files a pleading.[1] The original Local Rules Project suggested that the courts adopt a Model Local Rule. Most of the existing local rules consist of language that is either taken from that model Local Rule or varies from it in only small respects. In addition, there are four courts with local rules that are inconsistent with existing law and those rules should, therefore, be rescinded.

DISCUSSION

The circumstances under which a three-judge court is convened and the procedure for convening such a tribunal are governed by 28 U.S.C. §2284. It provides for a three-judge court in cases challenging the constitutionality of state or federal legislative apportionment and in cases in which the convening of a three-judge court is allowed by other federal law.[2] The jurisdiction of three-judge courts has been largely eliminated since the repeal in 1976 of 28 U.S.C. §§2281 and 2282, which required determination by a three-judge court of injunctions restraining the enforcement, on constitutional grounds, of state and federal statutes. At present, there are relatively few situations where a three-judge court is either required or available, if requested:

1) Actions challenging the constitutionality of the apportionment of congressional districts or of any statewide legislative body (three-judge court required);[3]

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[1] M.D.Ala. LR9.2; D.Ariz. LR2.3; S.D.Cal. LR9.2; D.Conn. LR7(c); D.Del. LR9.2; D.D.C. LR202; S.D.Fla. LR9.1; N.D.Ga. LR9.1; N.D.Ill. LR31; N.D.Ind. LR9.2; S.D.Ind. LR9.2; E.D.La. LR9.1; M.D.La. LR9.1; W.D.La. LR9.1; D.Me. LR9(a); E.D.Mich. LR9.1(c); D.Neb. LR9.2; D.N.H. LR9.2; N.D.N.Y. LR9.1; D.N.Mar.I LR9.2; N.D.Okla. LR9.2; W.D.Okla. LR9.1; D.R.I. LR28; W.D.Wash. LR9(i).

[2] 28 U.S.C. §2284.

[3] 28 U.S.C. §2284.

2) Actions brought under the Civil Rights Act of 1964 relating to voting rights protection (Attorney General or defendants may request three-judge court);[4]

3) Actions alleging deprivation of rights in public accommodations (Attorney General may request three-judge court and must file certificate stating case is of "general public importance");[5]

4) Actions seeking to protect equal employment opportunities (Attorney General may request three-judge court and must file certificate stating case is of "general public importance");[6]

5) Actions brought under the Voting Rights Act of 1965 challenging tests which may abridge the right to vote (three-judge court in the District Court of the District of Columbia required if action brought by state or political subdivision seeking declaratory relief);[7]

6) Other actions under the Voting Rights Act (three-judge court required)[8]

7) Actions brought under the Presidential Election Campaign Fund Act of 1971 for declaratory or injunctive relief "concerning any civil matter" (Federal Election Commission may request three-judge

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[4] 42 U.S.C. §1971(g).

[5] 42 U.S.C. §2000a-5.

[6] 42 U.S.C. §2000e.

[7] 42 U.S.C. §1973(b), (c)

[8] 42 U.S.C. §1973aa-2, 1973H, 1973bb.

court);[9] and,

8) Actions brought under the Presidential Election Campaign Fund Act by an entity or individual "appropriate to implement or construe" the Act (three-judge court required).[10]

The first Local Rules Project suggested that a Model Local Rule be provided that encompassed, generally, the issues addressed by the then-existing local rules.[11] For example, there were provisions requiring that particular notice be given to the clerk or that a special designation be made on the pleading requesting a three-judge court. The required designation following the title of the pleading was straightforward and simple and intended to alert the clerk. The requirement of setting forth the basis of the request was equally straightforward. If the basis were clearly provided, the judge would not be forced to determine what the ground might have been. The Model Local Rule also permitted the designation to be a sufficient request pursuant to 28 U.S.C. §2284, although the party requesting the three-judge court was not precluded from making any other request. Those provisions were intended to assist the court in complying with the procedures of 28 U.S.C. §2284 so that, after the clerk was made aware of the designation, the clerk could notify the appropriate judge.

There were also local rules establishing the number of copies of pleadings to be filed. The clerk could file the original and then have copies to distribute to the three judges. The Model Local Rule required that three copies of each document be filed along with the original, unless it was determined that a three-judge court would not be

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[9] 26 U.S.C. §9010(c).

[10] 26 U.S.C. §9011(b).

convened or until the three-judge court was convened and dissolved and the case remanded to a single judge. This procedure put the burden on the litigants, rather than on the court, to provide the copies. In the event, however, that a litigant could not comply with this requirement, the rule provided that the litigant could have the requirement waived by court order. This provision was a convenient mechanism for timely receipt of the pleadings by the judges.

There was also a statement in the Model Local Rule indicating that a failure to comply with the local rule was not a ground for failing to convene or for dissolving a three-judge court. This provision recognized that Section 2284(a) is jurisdictional so that a failure to make an appropriate demand does not preclude the judge from convening a three-judge court or empower the judge to hear the case as a single judge.

It should be noted that many of the twenty-four courts with local rules on this subject have adopted, in large measure, the substance of this Model Local Rule. For example, fifteen courts have local rules that require a designation of "Three-Judge Court Requested" or the equivalent in the caption of the first pleading.[12] Nine of these rules indicate that these words are sufficient pursuant to 28 U.S.C. §2284.[13] Twelve of the courts mandate that the basis for the request be apparent from the pleadings,[14] be set forth

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[11] *See* Report at Suggested Local Rules, p.47.

[12] M.D.Ala. LR9.2; S.D.Cal. LR9.2; D.Del. LR9.2; S.D.Fla. LR9.1; N.D.Ind. LR9.2; S.D.Ind. LR9.2; D.Me. LR9(a); E.D.Mich. LR9.1(c); D.Neb. LR9.2; D.N.H. LR9.2; N.D.N.Y. LR9.1; D.N.Mar.I LR9.2; N.D.Okla. LR9.2; D.R.I. LR28; W.D.Wash. LR9(i).

[13] M.D.Ala. LR9.2; S.D.Cal. LR9.2; D.Del. LR9.2; S.D.Fla. LR9.1; N.D.Ind. LR9.2; S.D.Ind. LR9.2; E.D.Mich. LR9.1(c); D.N.Mar.I LR9.2; N.D.Okla. LR9.2.

[14] M.D.Ala. LR9.2; S.D.Cal. LR9.2; D.Del. LR9.2; S.D.Fla. LR9.1; N.D.Ind. LR9.2; S.D.Ind. LR9.2; D.Neb. LR9.2; D.N.H. LR9.2; N.D.N.Y. LR9.1; D.N.Mar.I LR9.2; N.D.Okla. LR9.2; D.R.I. LR28.

in the pleading,[15] or be in a brief, attached statement.[16] Eighteen courts have local rules requiring the submission of the original and three copies of all documents.[17] The court has discretion to order fewer than three copies in ten jurisdictions.[18] Seven jurisdictions indicate that failure to comply with the local rule is not grounds for either denying or dissolving the three-judge court.[19]

There are also some local rules that vary from the original Model Local Rule. For example, two courts have local rules that require a memorandum when seeking a three-judge court that contains cited authority to support the application.[20] One court requires only three copies of documents[21] while another requires an original and four copies.[22] Six courts have local rules requiring simply that the party notify the clerk that a three-judge court is requested and state the relevant statutory provision.[23] These rules are also appropriate exercises of local rulemaking.

Three jurisdictions have local rules that simply state that, in the absence of the required notice, the clerk may treat the case as one not requiring a three-judge court.[24]

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[15] M.D.Ala. LR9.2; S.D.Cal. LR9.2; D.Del. LR9.2; S.D.Fla. LR9.1; N.D.Ind. LR9.2; S.D.Ind. LR9.2; D.Neb. LR9.2; D.N.H. LR9.2; N.D.N.Y. LR9.1; D.N.Mar.I LR9.2; N.D.Okla. LR9.2; D.R.I. LR28.

[16] M.D.Ala. LR9.2; S.D.Cal. LR9.2; D.Del. LR9.2; S.D.Fla. LR9.1; N.D.Ind. LR9.2; S.D.Ind. LR9.2; D.Neb. LR9.2; D.N.H. LR9.2; N.D.N.Y. LR9.1; D.N.Mar.I LR9.2; N.D.Okla. LR9.2; D.R.I. LR28.

[17] M.D.Ala. LR9.2;; D.Ariz. LR2.3; S.D.Cal. LR9.2; D.Conn. LR7(c); D.Del. LR9.2; D.D.C. LR202; S.D.Fla. LR9.1; N.D.Ill. LR31; N.D.Ind. LR9.2; S.D.Ind. LR9.2; E.D.La. LR9.1; M.D.La. LR9.1; W.D.La. LR9.1; D.Neb. LR9.2; D.N.H. LR9.2; N.D.N.Y. LR9.1; N.D.Okla. LR9.2; W.D.Wash. LR9(i).

[18] M.D.Ala. LR9.2; S.D.Cal. LR9.2; D.Del. LR9.2; S.D.Fla. LR9.1; N.D.Ind. LR9.2; S.D.Ind. LR9.2; D.Neb. LR9.2; D.N.H. LR9.2; D.N.Mar.I LR9.2; N.D.Okla. LR9.2.

[19] M.D.Ala. LR9.2; S.D.Cal. LR9.2; D.Del. LR9.2; S.D.Fla. LR9.1; D.Neb. LR9.2; D.N.H. LR9.2; D.N.Mar.I LR9.2.

[20] D.D.C. LR202; E.D.Mich. LR9.1(c).

[21] D.Me. LR9(a). .

[22] D.N.Mar.I. LR9.2.

[23] N.D.Ga. LR9.1; N.D.Ill. LR31; E.D.La. LR9.1; M.D.La. LR9.1; W.D.La. LR9.1; W.D.Okla. LR9.1.

[24] E.D.La. LR9.1; M.D.La. LR9.1; W.D.La. LR9.1.

The requirement of Section 2284 is jurisdictional so that a failure to comply with any notice requirement will not affect the applicability of that provision. These rules should, therefore, be rescinded.

One court has a local rule that seems to refer to a three-judge court but the precise language used in describing this court is "A District Court Composed of Three District Judges."[25] This definition is inconsistent with the clear language of Section 2284 that requires three judges "at least one of whom shall be a circuit judge."[26] This rule should also be rescinded.

Rule 9—RICO, Patent, and Other Cases

[25] D.Ariz. LR2.3.

[26] 28 U.S.C. §2284(b)(1).

Seven courts have local rules concerning pleading requirements in certain types of cases.[1] All of these local rules should be rescinded since they either repeat portions of relevant federal statutes and rules or they are inconsistent with such law.

DISCUSSION

Five of the seven courts have local rules relating to the Racketeering Influence and Corrupt Organization Act (RICO).[2] For example, three of these courts have local rules explaining that a RICO case statement is needed within thirty days of filing the complaint.[3] Another court requires that the statement be filed with the complaint.[4] Five courts explain that the statement must include facts relied upon to initiate the claim.[5] One court actually provides a large list of the fact that should be set forth.[6] Two courts recognize that a failure to submit a statement may mean dismissal.[7] The statutory scheme for RICO actions, both criminal and civil, is quite extensive.[8] To the extent the local rules intend to restate the controlling federal statute relating to civil actions, the rules are unnecessary. To the extent, on the other hand, that these rules intend to supplement the pleading requirements of not only the Federal Rules but also the relevant federal statute, they are inconsistent with the extensive and detailed statutory scheme that already exists.

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[1] S.D.Cal. LR11.1; S.D.Fla. LR12.1; S.D.Ga. LR9.1; D.Haw. LR 9.1, 9.2, 9.3; N.D.Ill. LR13; N.D.N.Y. LR9.2; D.Or. LR10.6.

[2] S.D.Cal. LR11.1; S.D.Fla. LR12.1; S.D.Ga. LR9.1; D.Haw. LR 9.1, 9.2, 9.3; N.D.N.Y. LR9.2.

[3] S.D.Cal. LR11.1; S.D.Fla. LR12.1; N.D.N.Y. LR9.2.

[4] D.Haw. LR9.1.

[5] S.D.Cal. LR11.1; S.D.Fla. LR12.1; S.D.Ga. LR9.1; D.Haw. LR 9.1; N.D.N.Y. LR9.2.

[6] S.D.Fla. LR12.1.

[7] S.D.Cal. LR11.1; D.Haw. LR9.2.

[8] *See* 18 U.S.C. §§1961 *et seq.*

Two courts have local rules relating to a remedy for patent infringement.[9] Similar to the local rules imposing greater pleading requirements in RICO cases, these local rules either repeat or are inconsistent with federal law. For example, these rules require, in essence, what is already required by the statute so they are unnecessary.[10]

One court has a local rule intending to mandate additional pleading requirements in Truth in Lending Act cases.[11] This rule repeats the requirement in the provision explaining how civil actions can be brought.[12] This rule is unnecessary.

Rule 9— Social Security and Other Administrative Appeal Cases

[9] N.D.Ill. LR13; D.Or. LR10.6; *see* 35 U.S.C. §§281-297.

[10] *See* 35 U.S.C. §290.

[11] S.D.Ga. LR9.1; *see* 15 U.S.C. §§1601 *et seq.*

[12] *See* 15 U.S.C. §1640.

Twenty-five courts have local rules that relate to the use of a social security number in appeals from either social security cases or black lung cases.[1] Rules in fourteen courts require the use of the social security number in the complaint and are, therefore, inconsistent with existing law. The original Local Rules Project proposed a Model Local Rule to avoid the problem with using the social security number.[2] There are rules in about seven courts that already rely on this Model Local Rule, in basic substance. These rules are appropriate.

There are also rules that address various other aspects of administrative appeals. For example, there are local rules covering the procedure used to obtain attorneys fees and the briefing schedules for these types of cases that are appropriately the subject of local rulemaking. There are rules concerning the use of form complaints in administrative cases that may be problematic. Another two courts have rules that are inconsistent with the Federal Rules of Civil Procedure in applying different time limits from those set forth in the Federal Rules. Lastly, there are rules in two courts that simply repeat existing law.

DISCUSSION

Most of the twenty-five courts have local rules concerning the use of a social security number when seeking judicial review.[3] It is understandable that providing a

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[1] *See generally* 42 U.S.C. §405(g). *See generally* 33 U.S.C. §921(d). *See also* E.D.Ark. LR9.1; W.D.Ark. LR9.1; E.D.Cal. LR8-206; M.D.Ga. LR9.1; D.Idaho LR9.1;; S.D.Ill. LR9.1; E.D.Ky. LR9.1; W.D.Ky. LR9.1; E.D.La. LR9.2; M.D.La. LR9.2; W.D.La. LR9.2; E.D.Mich. LR9.1(f); D.Minn. LR9.1; W.D.Mo. LR9.1; D.Neb. LR9.1(a); D.N.H. LR9.1; D.N.J. LR9.1; N.D.N.Y. LR9.3; D.N.Mar.I LR9.1; N.D.Ohio LR9.1; E.D.Okla. LR9.1; N.D.Okla. LR9.1; E.D.Tenn. LR9.1; N.D.Tex. LR9.1' D.V.I. LR9.1.

[2] Report at Suggested Local Rules, p.43.

[3] E.D.Cal. LR8-206; D.Idaho LR9.1; S.D.Ill. LR9.1; E.D.Ky. LR9.1; W.D.Ky. LR9.1;; M.D.La. LR9.2; W.D.La. LR9.2; D.Minn. LR9.1; W.D.Mo. LR9.1; D.Neb. LR9.1(a); N.D.N.Y. LR9.3;

social security number would be helpful in cases appealing social security and black lung awards since these cases are initially adjudicated at the agency level and are filed according to social security number.[4] The relevant statute, however, does not mandate the provision of the social security number when seeking judicial review.[5] To the contrary, the Social Security Administration specifically discusses the confidential nature of the social security number:

> Social security account numbers and related records that are obtained or maintained by authorized persons pursuant to any provision of law, enacted on or after October 1, 1990, shall be confidential, and no authorized person shall disclose any such social security account number or related record.[6]

This Act goes on to allow the federal, state, and local governments, and, rarely, private organizations, to use social security numbers as a means of identifying people in specifically enumerated circumstances such as for tax collection,[7] child support,[8] blood donation,[9] and jury selection.[10] It should be noted that the Privacy Act[11] regulates the use of social security numbers generally although it appears to be inapplicable to the courts since the definition of "agency" as used in the Act does not include the courts of the United States.[12]

D.N.Mar.I LR9.1; N.D.Ohio LR9.1; E.D.Okla. LR9.1; N.D.Okla. LR9.1; N.D.Tex. LR9.1; E.D.Tenn. LR9.1; D.V.I. LR9.1.

[4] *See e.g.*, 42 U.S.C. §405(g); 33 U.S.C. §921, 932, 945.

[5] *Id.*

[6] 42 U.S.C. §405(c)(2)(C)(viii).

[7] *Id.* at §405(c)(2)(C)(i).

[8] *Id.* at §405(c)(2)(C)(ii).

[9] *Id.* at §405(c)(2)(D)(i).

[10] Id. at §405(c)(2)(D)(ii).

[11] 5 U.S.C. §552a note.

[12] 5 U.S.C. §551(1) (applicable to the Privacy Act through 5 U.S.C. §552a(a)(1), 552(e), and 551(1)).

The Local Rules Project originally suggested that the courts adopt a Model Local Rule that is based on the provisions of the policy under the Social Security Act and the Privacy Act. It recognized the problem of the Commissioner of Social Security or other agency head in identifying and locating a particular record without the benefit of the social security number. The requirement was not a burden to the claimant since these claimants have already used social security numbers to apply for benefits in the first instance. Therefore, no one would be obliged to have a number assigned solely for the purpose of judicial review. The Model Local Rule also considered the policy behind the Social Security Act and the Privacy Act by requiring that only the Commissioner of Social Security or other agency head receive the social security number. The number was not required to be filed with the court. It further stated that, in the event a claimant did not provide the number, the claimant did not waive any rights to judicial review.

At present, seven courts have adopted, in almost identical form, the original Model Local Rule on this topic, which requires that the social security number be provided on a separate piece of paper and that the person state in the complaint that a separate paper is attached.[13] Eight courts have adopted the provision in the Model Local Rule that the failure to provide this information is not grounds for dismissal of the complaint.[14]

Fourteen courts have local rules requiring that the social security number be

[13] D.Idaho LR9.1; S.D.Ill. LR9.1; D.Minn. LR9.1; D.Neb. LR9.1(a); D.N.Mar.I LR9.1; E.D.Tenn. LR9.1; D.V.I. LR9.1.

[14] D.Idaho LR9.1; S.D.Ill. LR9.1; E.D.Mich. LR9.1(f); D.Minn. LR9.1; D.Neb. LR9.1(a); D.N.Mar.I LR9.1; E.D.Tenn. LR9.1; D.V.I. LR9.1.

set forth in the complaint.[15] These rules are problematic since they provide for the public display of the social security number. Actually, in two of the courts the local rules require the placement of the social security number in the caption of the complaint or directly below the caption.[16] It is not necessary that these numbers be available for anyone to see in the public court documents. It is necessary only that the person or agency charged with responsibility for certifying the record on appeal be able to accurately and quickly find the relevant record. This duty can be accomplished by providing the social security number on a separate sheet of paper that is not made part of the public court papers. In addition, these local rules are inconsistent with the wording and spirit of two relevant federal statutes, the Social Security Act and the Privacy Act.[17] Accordingly, the Local Rules Project suggests that these courts rescind their existing local rules.

Two jurisdictions have local rules outlining the procedures to be used by attorneys seeking an award of fees.[18] These procedures should remain subject to local variation since they do not impact on any rights of the litigants, they assist the court in processing the material expeditiously, and they appear to impose only a negligible burden on the attorneys, a burden that the court could impose on the attorneys regardless of the existence of any rule.

Eight district courts have local rules setting forth the briefing schedule for

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[15] E.D.Ark. LR9.1; W.D.Ark. LR9.1; E.D.Cal. LR8-206; E.D.Ky. LR9.1; W.D.Ky. LR9.1; M.D.La. LR9.2; W.D.La. LR9.2; E.D.Mich. LR9.1(e); W.D.Mo. LR9.1; N.D.N.Y. LR9.3; N.D.Ohio LR9.1; E.D.Okla. LR9.1; N.D.Okla. LR9.1; N.D.Tex. LR9.1.

[16] E.D.Ark. LR9.1; W.D.Ark. LR9.1..

[17] 42 U.S.C. §405; 5 U.S.C. §552a note.

[18] E.D.Ky. LR9.1; W.D.Ky. LR9.1; *see also* 42 U.S.C. §406; 28 U.S.C. §2412.

social security claims and review of other administrative claims.[19] These rules are also appropriate as local directives.

Three courts have local rules that require that the complaint be on a form supplied by the court or be in substantial conformity with the form.[20] To the extent these rules simply provide guidance to a litigant, they are appropriate. To the extent, however, that a failure to be in substantial compliance with the form may result in negative repercussions such as dismissal, the rules are problematic and should be rescinded. The Federal Rules allow for a "short and plain statement of the claim" and require that "all pleadings ... be so construed as to do substantial justice."[21] To punish a litigant solely because the person did not use a form complaint is contrary to Rule 8 of the Federal Rules of Civil Procedure.

Local rules in two jurisdictions extend the time within which the Secretary of Health and Human Services may answer the complaint from sixty days to within thirty days after the record is filed[22] or within ninety days after service.[23] Both of these rules are inconsistent with Rule 4 of the Federal Rules of Civil Procedure, which requires the agency head to file an answer within sixty days after service.[24]

Four other courts have local rules allowing a one-time automatic extension of time within which the Commissioner of Social Security or the Secretary of Health and

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[19] M.D.Ga. LR9.2; S.D.Ill. LR9.1; E.D.Ky. LR9.1; W.D.Ky. LR9.1; W.D.Mo. LR9.1; D.N.H. LR9.1; D.N.J. LR9.1; E.D.Okla. LR9.1.

[20] E.D.La. LR9.2; W.D.Mo. LR9.1; N.D.Ohio LR9.1.

[21] Fed.R.Civ.P. 8(a), and (f).

[22] W.D.Mo. LR9.1 (defendant files answer within thirty days after filing record).

[23] D.N.H. LR9.1 (defendant files answer and record within ninety days after service of complaint).

[24] Fed.R.Civ.P. 4(a).

Human Services must answer.25 These rules are problematic in allowing extensions of time on a routine basis. They are similar to the local rules just discussed that allow a specific amount of extra time within which to answer. In all of these jurisdictions, the plaintiff is disadvantaged by a delay in answering which Rule 4 of the Federal Rules of Civil Procedure does not permit. These rules should be rescinded.

Two courts have local rules that repeat existing law and should, therefore, be rescinded. One rule repeats the applicability of the Social Security Act to court review of social security awards.[26] The other rule simply repeats the portion of Federal Rule 4, that an answer must be filed within sixty days of service.[27]

Rule 15. Amended and Supplemental Pleadings

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[25] M.D.Ga. LR9.3; E.D.Ky. LR9.1; W.D.Ky. LR9.1; E.D.Tenn. LR9.1.

[26] M.D.Ga. LR9.1; *see also* 42 U.S.C. §405(g).

[27] E.D.Tenn. LR9.1; *see also* Fed.R.Civ.P. 4(a).

Thirty-seven jurisdictions have local rules outlining the procedure and the form of the motion to be used in amending or supplementing a pleading pursuant to Rule 15 of the Federal Rules of Civil Procedure.[1] All of these courts have local rules that are appropriate supplements to this Federal Rule. In addition, one of these jurisdictions has a local rule that is inconsistent with Rule 15 and should be rescinded. Four courts have local rules that repeat portions of the Federal Rule that should also be rescinded.

DISCUSSION

Rule 15 allows a party to amend a pleading under certain circumstances: (1) either "before a response is served" or within twenty days after service of a pleading to which no response is allowed; (2)"by leave of court or by written consent of the adverse parties"; or (3) upon motion to conform to the evidence.[2] The Rule sets forth the circumstances under which a pleading may relate back to the date of the original pleading.[3] Lastly, the Rule allows a party to move to file a supplemental pleading "setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented."[4]

The original Local Rules Project recommended a Model Local Rule for the

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[1] Fed.R.Civ.P. LR15; *see* M.D.Ala. LR15.1; D.Alaska LR6J; D.Ariz. LR1.9(e); C.D.Cal. LR3.8; E.D.Cal. LR15-220; S.D.Cal. LR15.1; D.Del. LR15.1; D.D.C. LR108(Ii); M.D.Fla. LR4.01; N.D.Fla. LR15.1; S.D.Fla. LR15.1; N.D.Ga. LR15.1; D.Idaho LR15.1; S.D.Ill. LR15.1; N.D.Ind. LR15.1; S.D.Ind. LR15.1; N.D.Iowa LR15.1; S.D.Iowa LR15.1; ; .Kan. LR15.1; D.Md. LR103.6; D.Mass. LR15.1; E.D.Mich. LR15.1; D.Minn. LR15.1; D.Mont. LR200-2; D.Neb. LR15.1; D.Nev. LR15-1; D.N.H. LR15.1; D.N.Mex. LR15.1; ; .D.N.Y. LR7.1; D.N.Mar.I LR15.1; E.D.Okla. LR15.1; D.Or. LR15.1; D.S.Dak. LR15.1; E.D.Tenn. LR15.1; N.D.Tex. LR15.1; D.Vt. LR15.1; D.V.I. LR15.1; D.Wyo. LR15.1.

[2] Fed.R.Civ.P. 15(a) and (b).

[3] *Id* at (c).

[4] *Id* at (d).

jurisdictions to consider adopting.[5] The Model Local Rule required submission of the original amended pleading along with the motion to amend. It is already common practice to include the amendment with the Rule 15(a) motion; at present, twenty-nine courts have this requirement[6]

The Model Local Rule also required submission of a copy of the amended pleading. In the event the motion to amend is allowed, the copy could remain attached to the motion as a supporting document, and the original could be filed as the pleading. Eight courts have this requirement at present.[7]

The Model Local Rule required that the pleading be complete and not incorporate earlier pleadings by reference. This can ease the process of review for the court and opposing parties. By requiring a party filing a Rule 15(a) motion to include a copy of the proposed amendment without any references to other pleadings, the rule can further aid the disposition of cases on the merits, by allowing a judge to read the amendment in full before ruling on it. Twenty-six courts have local rules that contain this provision.[8]

The last sentence of the Model Local Rule provided that the motion will not

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[5] Report at Suggested Local Rules, p.51.

[6] M.D.Ala. LR15.1; D.Alaska LR6J; C.D.Cal. LR3.8; D.Del. LR15.1; D.D.C. LR108(Ii); N.D.Fla. LR15.1; S.D.Fla. LR15.1; S.D.Ill. LR15.1; N.D.Ind. LR15.1; S.D.Ind. LR15.1; N.D.Iowa LR15.1; S.D.Iowa LR15.1; D.Kan. LR15.1; D.Md. LR103.6; E.D.Mich. LR15.1; D.Minn. LR15.1; ; D.Mont. LR200-2; D.Neb. LR115.; D.Nev. LR15-1; D.N.H. LR15.1; ; D.N.Mex. LR15.1; N.D.N.Y. LR7.1; D.N.Mar.I LR15.1; E.D.Okla. LR15.1; D.Or. LR15.1; D.S.Dak. LR15.1; E.D.Tenn. LR15.1; N.D.Tex. LR15.1; D.V.I. LR15.1.

[7] M.D.Ala. LR15.1; C.D.Cal. LR3.8; D.Del. LR15.1; S.D.Ind. LR15.1; D.Mont. LR200-2; E.D.Okla. LR15.1; E.D.Tenn. LR15.1; D.V.I. LR15.1.

[8] M.D.Ala. LR15.1; D.Alaska LR6J; D.Ariz. LR1.9(e); C.D.Cal. LR3.8; E.D.Cal. LR15-220; S.D.Cal. LR15.1; D.Del. LR15.1; M.D.Fla. LR4.01; N.D.Fla. LR15.1; S.D.Fla. LR15.1; N.D.Ind. LR15.1; S.D.Ind. LR15.1; N.D.Iowa LR15.1; S.D.Iowa LR15.1; E.D.Mich. LR15.1; D.Minn. LR15.1; D.Neb. LR15.1; D.Nev. LR15-1; D.N.H. LR15.1; N.D.N.Y. LR7.1; D.N.Mar.I LR15.1; E.D.Okla. LR15.1; D.Or. LR15.1; E.D.Tenn. LR15.1; D.Vt. LR15.1; D.V.I. LR15.1.

be denied for failure to comply with the local rule, thus avoiding any denial of the motion to amend for technical matters only. This provision is important in promoting the language of the rule, that leave to amend shall be "freely given when justice so requires."[9] Nine courts have such a local rule now.[10]

Many of the remaining local rules are appropriate exercises of local rulemaking. For example, many of the courts have local rules explaining the form of the pleadings that must accompany the motion to amend. Six courts require that amended pleadings contain all exhibits[11] while one court requires that only newly added exhibits be attached.[12] Another four courts require court permission to remove exhibits from prior pleadings and attach them to the amended pleading.[13] Three courts define the title of such pleadings such as "First Amended Complaint", and "Second Amended Complaint."[14] Some courts require that the motion to amend contain the amended pleading with an explanation of what is different by bracketing and underlining what is newly added in the complaint,[15] or by including a concise statement of the amendment sought.[16] Two courts require that the motion have a copy of the original complaint

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[9] Fed.R.Civ.P. 15(a); *see also Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); *Ordonez v Johnson*, 254 F3d 814 (9th Cir. 2001) (disallowing motion to amend because of violation of local rule is abuse of discretion).

[10] M.D.Ala. LR15.1; D.Del. LR15.1; S.D.Fla. LR15.1; D.Idaho LR15.1; N.D.Ind. LR15.1; E.D.Mich. LR15.1; D.N.Mar.I LR15.1; E.D.Tenn. LR15.1; D.V.I. LR15.1.

[11] D.Alaska LR6J; D.Ariz. LR1.9(e); C.D.Cal. LR3.8; E.D.Cal. LR15-220; S.D.Cal. LR15.1; D.Nev. LR15-1.

[12] D.Md. LR103.6.

[13] D.Alaska LR6J; E.D.Cal. LR15-220; S.D.Cal. LR15.1; D.Nev. LR15-1.

[14] S.D.Cal. LR15.1; D.Or. LR15.1; D.V.I. LR15.1.

[15] D.Del. LR15.1; S.D.Ill. LR15.1; N.D.Iowa LR15.1; S.D.Iowa LR15.1; D.Md. LR103.6; D.Vt. LR15.1.

[16] D.Kan. LR15.1; D.Neb. LR15.1; D.N.H. LR15.1; N.D.N.Y. LR7.1; D.Or. LR15.1; D.V.I. LR15.1.

attached to it.[17] Two courts require that the original amended complaint and two extra copies be provided.[18]

Four courts have local rules that repeat portions of the Federal Rules of Civil Procedure and should, therefore, be rescinded. These four jurisdictions provide that, if the motion to amend a complaint is granted, the party must then file and serve the amended complaint.[19] This requirement simply repeats the service and filing provision of Rule 15(a) and Rule 5.[20] One of these courts also states in its local rule that a motion to supplement a pleading is limited to acts occurring after the filing of the original complaint.[21] This rule repeats the requirements in Rule 15(d) that a supplemental pleading must relate to "transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented."[22]

One court has a local rule that is inconsistent with Rule 15 and should, therefore, be rescinded. This local rule provides that the date for a party to answer shall run from the date of filing the order allowing the pleading or, where there was no order, from the date of service of the amended pleading.[23] This rule is inconsistent with Rule 15(a) that states that the party must plead "within the time remaining for response to the original pleading or within 10 days after service of the amended pleadings, whichever

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[17] N.D.Iowa LR15.1; S.D.Iowa LR15.1.

[18] D.Minn. LR15.1; D.N.Mar.I LR15.1.

[19] D.Minn. LR15.1; D.Neb. LR15.1; N.D.N.Y. LR7.1; D.Or. LR15.1.

[20] Fed.R.Civ.P. 15(a), 5(a), 5(b).

[21] N.D.N.Y. LR7.1.

[22] Fed.R.Civ.P. 15(d).

[23] D.Nev. LR15-1.

period may be longer...."[24]

Rule 16. Pretrial Conferences; Scheduling; Management

Rule 16—Alternative Dispute Resolution

[24] Fed.R.Civ.P. 15(a).

The Alternative Dispute Resolution Act of 1998 (hereinafter Act) was passed after some experimentation with other alternative dispute mechanisms in the previous ten years.[1] The Civil Justice Reform Act of 1990[2] and the Judicial Improvements and Access to Justice Act of 1988[3] had both provided an opportunity for experimenting with alternative dispute resolution in the federal courts. Both of these acts were intended to expire after a set time period.[4]

This Act requires each district court by local rule to authorize alternative dispute resolution processes in civil actions.[5] An alternative dispute resolution process, under the Act, includes

> any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, mini-trials, and arbitration as provided in sections 654 and 658.[6]

Under this Act, courts are permitted to use existing alternative dispute resolution programs and to devise other processes not enumerated above.[7]

The act gives broad authority to the district courts to set forth, by local rule, the type of available alternative dispute resolution process and the categories of actions

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[1] Pub.L. No. 105-315, 112 Stat. 2298 (codified at 28 U.S.C. §§651-658).

[2] Pub.L. No. 101-650, 104 Stat. 5089 (1990) (codified as amended at 28 U.S.C. §§471-482).

[3] Pub.L. No. 100-702, 102 Stat. 4642 (1988).

[4] The Civil Justice Reform Act expired December 1, 1997. 28 U.S.C. §471 note (1994). The Judicial Improvements and Access to Justice Act was originally intended to expire in 1994 but that provision was repealed in 1994 so that the arbitration programs in the twenty experimental district courts could continue. Judicial Improvements Act of 1994, Pub.L. No. 103-420, 3(b), 108 Stat. 4343, 4345.

[5] 28 U.S.C. §651(b).

[6] *Id.* at (a).

[7] *Id.* at (a)-(c), *see* 28 U.S.C. §652(a).

exempted from the particular alternative dispute resolution mechanism.[8] The Act also requires that the district court adopt procedures to make appropriate neutrals available for each of the processes offered by the court.[9] With respect to all alternative dispute resolution processes, except arbitration, the statute provides no other requirements. The Act's arbitration provisions, on the other hand, do provide some concrete guidance.[10] These specifics are discussed in the section on arbitration, *infra*.

Thirty courts discuss the use of alternative dispute resolution techniques generally.[11] Because different courts may have different alternative dispute resolution options available to litigants and because some courts have specific local rules discussing certain forms of alternative dispute resolution, the rules on this topic are quite diverse. Generally, they seek to alert litigants to the court's interest in using one or more forms of alternative dispute resolution. These rules should all remain subject to local variation.

DISCUSSION

The first issue addressed by these rules is how the litigants get to the actual alternative in the first instance. Twenty-six of the courts have local rules permitting the court to order litigants to participate in alternative dispute resolution.[12] In five courts, the

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[8] *Id* at 652(a).

[9] 28 U.S.C. §653.

[10] *See* 28 U.S.C. §§654-658.

[11] M.D.Ala. LR16.1(c); N.D.Ala. App. C; S.D.Ala. LR16.6; D.Ariz. LR2.11; C.D.Cal. LR23; N.D.Cal. LRADR 2; D.Conn. LR36; N.D.Ga. LR16.7; S.D.Ill. LR16.4; E.D.Ky. LR16.2; W.D.Ky. LR16.2; D.Mass. LR16.4; W.D.Mich. LR16.2; D.Minn. LR16.5; D.Nev. LR16-5; W.D.N.Car. LR16.3; N.D.Ohio LR16.1; N.D.Okla. LRCJRA Sec. VI; W.D.Okla. LRL.Civ.R.16.3 Supp.; D.Or. LRCJRA Sec.6; M.D.Pa. LR16.7; E.D.Tenn. LR16.3; M.D.Tenn. LR21; W.D.Tenn. LR16.1; E.D.Tex. LRCV-16(c); S.D.Tex. LR20; W.D.Tex. CV-88; D.Utah LR212; N.D.W.Va. LR5.02; D.Wyo. LR16.3.

[12] M.D.Ala. LR16.1(c); N.D.Ala. LR16.1; S.D.Ala. LR16.6; N.D.Cal. ADR 2, ADR 3, LR16-12; N.D.Ga. LR16.7; S.D.Ill. LR16.4; E.D.Ky. LR16.2; W.D.Ky. LR16.2; D.Mass. LR16.4; W.D.Mich. LR16.2; D.Minn. LR16.5; D.Nev. LR16-5; W.D.N.Car. LR16.3; N.D.Okla. LR16.3;

counsel must meet to discuss alternative dispute resolution options within a prescribed time.[13] In seven courts, the parties must decide on the actual alternative procedure used.[14] Three courts allow relief from an alternative method on motion for good cause shown.[15] The actual methods available for use are set out in the Civil Justice Reform Act plans of three courts[16] and in the Alternative Dispute Resolution Plans of three other courts.[17]

Some courts address whether the result of a particular form of alternative dispute resolution is binding or not on the parties. In two courts, the parties, themselves, must decide whether the method used will be binding or not.[18] Two other courts specifically say that they are non-binding.[19]

Other rules address the issue of neutrals. There are panels of neutrals available to conduct various alternative dispute resolution processes in five courts.[20] Two other courts have administrative bodies that run district-wide alternative dispute resolution programs.[21]

Another issue concerns the cost of the procedure. Three courts explain that

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W.D.Okla. LR16.3; D.Or. CJRA Sec.6; M.D.Pa. LR16.7; E.D.Tenn. LR16.3; M.D.Tenn. LR20; W.D.Tenn. LR16.1; E.D.Tex. LRCV-16(c); S.D.Tex. LR20; W.D.Tex. LRCV-88; D.Wyo. LR16.3.

[13] N.D.Cal. LR16-12W.D.Mich. LR16.2; W.D.Okla. LR16.3; S.D.Tex. LR20; W.D.Tex. LRCV-88.

[14] N.D.Ala. App. C; D.Ariz. LR2.11; N.D.Cal. ADR 3; D.Conn. LR36; N.D.Ohio LR16.1, 16.4; W.D.Tex. CV-88; D.Wyo. LR16.3.

[15] W.D.Okla. LR16.3; S.D.Tex. LR20; W.D.Tex. LRCV-88.

[16] M.D.Ala. LR16.1(c); N.D.Okla. CJRA Sec. VI; D.Utah LR212.

[17] N.D.Ala. LR16.1; M.D.Tenn. LR20; D.Utah, LR212.

[18] D.Conn. LR36; S.D.Tex. LR20.

[19] D.Minn. LR16.5; W.D.Tex. CV-88.

[20] N.D.Cal. LRADR 2; W.D.Okla. LR 16.3 Supp.; M.D.Tenn. LR21; S.D.Tex. LR20; W.D.Tex. LRCV-88.

[21] N.D.Cal. ADR2; N.D.Ohio LR16.4.

any alternate method is conducted at the expense of the parties.[22] One court admonishes that any fee be "reasonable"[23]; another court allows the parties and the alternative dispute resolution neutral to agree on a fee or else it will be determined by the judge.[24]

Some courts address confidentiality of the procedure. Seven courts specifically state that any of the available choices are confidential.[25] Three courts explain that the information is privileged and cannot be used in court.[26]

There are other topics addressed as well that vary significantly among the courts. Five courts provide sanctions for violation of any of the alternative dispute resolution rules.[27] In three courts, the rules provide that a representative, with authority to settle, be present unless that person is excused by motion for good cause shown.[28] The remaining rules on this subject cover narrow topics particular to just one court.[29]

Rule 16—Early Neutral Evaluation

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[22] N.D.Ala. App. C; D.Minn. LR16.5; W.D.Tex. LRCV-88.

[23] W.D.Okla. LR16.3 Supp.

[24] M.D.Tenn. LR21.

[25] C.D.Cal. LR23; D.Conn. LR36; W.D.Mich. LR16.2; W.D.Okla. LR16.3 Supp.; M.D.Tenn. LR21; S.D.Tex. LR20; W.D.Tex. LRCV-88.

[26] M.D.Tenn. LR27; S.D.Tex. LR20; W.D.Tex. CV-88.

[27] N.D.Cal. LRADR 2; N.D.Okla. LR16.3; M.D.Tenn. LR20; S.D.Tex. LR20; W.D.Tex. LRCV-88.

[28] M.D.Tenn. LR20; S.D.Tex. LR20; W.D.Tex. LRCV-88.

[29] *E.g.*, #31 (discovery stayed during alternative dispute resolution); #30 (all parties must attend alternative dispute resolution orientation session); #8 (settlement must be reported immediately).

Thirteen courts have local rules that discuss early neutral evaluation.[1] These rules should remain subject to local variation.

DISCUSSION

Early neutral evaluation is a "hybrid process" designed, at an early point in the pretrial process, to bring in some of the benefits of arbitration, mediation, and the use of a special master.[2] As originally designed, the significant feature of early neutral evaluation was an evaluator who had experience with the subject matter of the case, who had experience as a civil litigator, and who had special training for early neutral evaluation.[3] The idea behind early neutral evaluation is to force the parties to delve into a large in a comprehensive way earlier than would normally occur.[4] This examination may help the parties develop an efficient plan for the case disposition either through a follow up settlement negotiation, motion, or trial.[5]

Most of the courts have local rules explaining how a case may become part of the early neutral evaluation process. For example, nine courts allow the judge to refer a case for early neutral evaluation.[6] One court allows all cases, except certain enumerated types of cases, to be referred for early neutral evaluation.[7] In addition, in two courts the

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[1]. M.D.Ala. LRCJRA; E.D.Cal. LR16-271; N.D.Cal. LRADR 5; N.D.Ga. LR16.7; W.D.Mich. LR16.4; E.D.Mo. LR6.01 *et seq.*; N.D.Ohio LR16.5; N.D.Okla. CJRA VI; W.D.Okla. LRL.Civ.R.61.3 Supp.; W.D.Pa. LR16.3; M.D.Tenn. LRApp.3; D.Vt. LR16.3; S.D.W.Va. LR5.01(g).

[2] 3 *Moore's Federal Practice 3d.* §1653[5][a] pp16-126-27.

[3] *Id.* at 127.

[4] *Id.*

[5] *Id.*

[6] M.D.Ala. CJRA; E.D.Cal. LR16-271; N.D.Cal. LRADR 5; N.D.Ga. LR16.7; E.D.Mo. LR6.01 *et seq.*; N.D.Ohio LR16.5; W.D.Okla. LRL.Civ.R.61.3 Supp.; W.D.Pa. LR16.3; S.D.W.Va. LR5.01(g).

[7] E.D.Cal. LR16-271.

parties themselves may elect this procedure.[8] Two courts explain the mechanics of a referral to early neutral evaluation.[9] In two courts, the clerk may automatically make the referral.[10] In one court, the judge cannot refer a case over the objection of a party[11]; in two other courts the parties may seek relieve from referral for good cause shown.[12]

There are also rules that deal with who evaluators can be. In seven courts, there is a list of potential evaluators.[13] In four courts the parties pick the evaluator and, if they are unable to do so, the judge selects the person.[14] In two courts the judge selects the evaluator.[15] In one court a senior district judge or a magistrate judge conducts the evaluation.[16]

There are some rules concerning the fee for the evaluation. The fee is agreed upon or set by the judge in one court.[17] In another court the evaluator sets the fee.[18] One court explains that each side pays one-half of the fee.[19]

Two courts specifically state that the result of an early neutral evaluation is non-binding.[20]

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[8] E.D.Cal. LR16-271; W.D.Okla. LR16.3 Supp.

[9] E.D.Mo. LR6.01 *et seq.*; N.D.Ohio LR16.10.

[10] N.D.Cal. ADR 5: D.Vt. LR16.3.

[11] E.D.Cal. LR16-271.

[12] N.D.Cal. ADR 5; D.Vt. LR16.3.

[13] E.D.Cal. LR16-271; N.D.Cal. ADR 5; E.D.Mo. LR6.01 *et seq.*; N.D.Ohio LR16.5; W.D.Okla. LR61.3 Supp.; W.D.Pa. LR16.3; D.Vt. LR16.3.

[14] W.D.Mich. LR16.4; E.D.Mo. LR6.01 *et seq.*; N.D.Ohio LR16.5; D.Vt. LR16.3.

[15] N.D.Ga. LR16.7; W.D.Pa. LR16.3.

[16] M.D.Ala. CJRA.

[17] N.D.Ga. LR16.7.

[18] W.D.Mich. LR16.4.

[19] E.D.Mo. LR6.01 *et seq.*

[20] N.D.Ga. LR16.7; W.D.Okla. LR16.3 Supp.

There are procedures set forth in some courts that explain the actual mechanics of the process. For example, six courts specifically require the submission of certain paperwork before the actual session with the evaluator.[21] All statements made are kept confidential by local rule in eight jurisdictions.[22] Local rules in eight courts require the parties themselves to attend.[23] In five courts the attorneys who will try the case must attend as well.[24] Four courts explain that, after the process, the evaluator reports the results to the judge within a specified time period.[25]

Rule 16—Summary Jury Trial

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[21] N.D.Ohio LR16.5; W.D.Okla. LR16.3 Supp.; W.D.Pa. LR16.3; M.D.Tenn. LR24, App.3; D.Vt. LR16.3.

[22] E.D.Cal. LR16-271; N.D.Cal. ADR 5; N.D.Ga. LR16.7; E.D.Mo. LR6.01 *et seq.*; N.D.Ohio LR16.5; W.D.Okla. LRL.Civ.R.16.3 Supp.; W.D.Pa. LR16.3; D.Vt. LR16.3.

[23] N.D.Cal. LRADR 5; N.D.Ga. LR16.7; W.D.Mich. LR16.4; N.D.Ohio LR16.5; W.D.Okla. LR16.3 Supp.; W.D.Pa. LR16.3; M.D.Tenn. LR24; D.Vt. LR16.3.

[24] N.D.Ohio LR16.5; W.D.Okla. LR16.3 Supp.; W.D.Pa. LR16.3; M.D.Tenn. LR24; D.Vt. LR16.3.

[25] N.D.Ga. LR16.7; W.D.Mich. LR16.4; E.D.Mo. LR6.01 *et seq.*; D.Vt. LR16.3.

Twelve courts have local rules explaining the summary jury trial procedure.[1] All of the rules in these courts are appropriate supplements to Rule 16 and should remain subject to local variation.

DISCUSSION

A summary jury trial results in an advisory jury verdict that can be used as a tool in settlement negotiations.[2] A jury is usually drawn from the court's jury pool. The parties then make their presentations, consisting of opening and closing remarks and a narrative summary of the evidence from the attorneys. Witnesses are not usually called. At the conclusion of each side's presentation, the judge instructs the jury. The jury then deliberates. The jury announces its verdict and the jury may be asked questions by the parties about particular aspects of the case. The verdict and the jurors' evaluation of the case can then be used to facilitate settlement.[3]

The first issue the district courts address in the local rules concerns what category of a case is eligible for summary jury trial. In four jurisdictions, the court may order this procedure even if a party objects[4] while in three other jurisdictions the court is authorized to order summary jury trial only if everyone agrees.[5] In four jurisdictions, the court is authorized to order summary jury trial for any case.[6] It should be noted that the *Manual for Complex Litigation* does not favor requiring parties to participate in this

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[1] N.D.Cal. LRADR 8; S.D.Cal. LR16.3; E.D.Ky. LR16.2; W.D.Ky. LR16.2; D.Mass. LR16.4; W.D.Mich. LR16.7; E.D.N.Car. LR31; D.N.Mar.I LR16.11; N.D.Ohio LR16.9; E.D.Okla. LRCJRA IV; W.D.Okla. LR16.3 Supp.; W.D.Tex. LRCV-88(h).

[2] *Manual for Complex Litigation, Third*, ¶23.152 (2000).

[3] *Id.* For a general discussion on this method of alternative dispute resolution, *see also* 3 *Moore's Federal Practice 3rd* §16.53[6][b].

[4] S.D.Cal. LR16.3; E.D.Okla. LRCJRA IV; W.D.Okla. LR16.3 Supp.; W.D.Tex. LRCV-88(h).

[5] S.D.Cal. LR16.3; D.Mass. LR16.4; E.D.N.Car. LR31.

procedure:

> Because of the time and expense involved and because the process is less likely to be productive with unwilling parties, it is not advisable to hold a summary jury trial without the parties' consent.[7]

Because of the expense and judicial resources used in this procedure, one court requires that it be used only in those cases with trials scheduled to last longer than seven days.[8]

There are also rules that explain the effect of a summary jury trial and how it fits with other aspects of trial management. For example, six courts explain that a summary jury trial is non-binding[9] while three other courts offer the parties the opportunity to agree to a binding summary jury trial.[10] Two courts specifically explain that, after summary jury trial, settlement negotiations are held, and the verdict and jury reactions may be used for settlement purposes.[11]

Three courts stipulate that the jury shall consist of six members and, in certain situations, more members.[12] These came courts also contemplate the use of non-jury summary trials.[13]

The remaining rules set forth some procedural aspects to the process. For example, three courts state that summary jury trial is confidential.[14] Four courts set forth

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[6] E.D.Ky. LR16.2; W.D.Ky. LR16.2; D.N.Mar.I LR16.11; N.D.Ohio LR16.8, 16.9.

[7] *Manual for Complex Litigation, Third* ¶ 23.152.

[8] E.D.N.Car. LR31.00.

[9] N.D.Cal. LRADR 8; S.D.Cal. LR16.3; D.Mass. LR16.4; W.D.Mich. LR16.7; E.D.N.Car. LR31; W.D.Okla. LR16.3 Supp.

[10] E.D.N.Car. LR31.00; W.D.Okla. LR16.3 Supp.

[11] N.D.Cal. ADR 8; W.D.Okla. LR16.3 Supp.

[12] E.D.N.Car. LR31.00; N.D.Ohio LR 16.8; W.D.Okla. LR16.3 Supp.

[13] *Id.*

[14] D.Mass. LR16.4; E.D.Okla. CJRA IV; W.D.Okla. LR16.3 Supp.

some specific procedural considerations that must be examined.[15] One court clearly requires the lead attorneys to attend and requires that the parties attend with full authority to settle.[16] This court provides that attendance may be waived on motion for good cause shown in one court.[17] This court also explains that the attorneys make the case presentation and that certain paper work is required before the summary jury.[18] One court specifically says that judge and the parties will decide the particular procedure for the actual summary jury trial.[19]

Rule 16—Mediation

[15] E.D.N.Car. LR31; D.N.Mar.I LR16.11; N.D.Ohio LR16.8, 16.9.

[16] W.D.Okla. LR16.3 Supp.

[17] *Id.*

[18] *Id.*

[19] W.D.Tex. CV-88(h).

Thirty-three courts have local rules concerning how cases get to mediation and, once there, what the procedure is for actually conducting the mediation.[1] All of these rules should remain subject to local variation.

DISCUSSION

Mediation is an informal non-binding settlement opportunity using a facilitator or neutral to assist the parties. It can be particularly useful in helping the parties articulate fully not only their legal positions but also their underlying concerns and interests. It can also be useful in helping the parties develop a non-traditional settlement arrangement. Some judges favor referral to mediation in simpler cases while others feel that more complex cases can benefit from the process as well. There is also variation among judges about when in the trial process mediation should be initiated with some judges referring a case only after substantially all discovery is completed and others referring much earlier in the process. Generally, mediation has been shown to be fairly inexpensive and successful.[2]

In nine courts, local rules exist that encourage mediation and discuss its purpose.[3]

Many courts have local rules explaining the circumstances under which cases are referred to mediation. For example, seventeen courts have local rules allowing the

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[1] M.D.Ala. LR16.1(c); N.D.Ala. App. C; S.D.Ala. LRS.O.; N.D.Cal. LRADR 6; M.D.Fla. LR9.01 *et seq.*; N.D.Fla. LR16.3; S.D.Fla. LR16.2; N.D.Ga. LR16.7; N.D.Ill. LRCR5.10; D.Mass. LR16.4; E.D.Mich. LR16.3; W.D.Mich. LR16.3; E.D.Mo. LR6.01 *et seq.*; D.N.J. LR301.1; N.D.N.Y. LR83.11; E.D.N.Car. LR32; M.D.N.Car. LR16.4; W.D.N.Car. LR16.3; N.D.Ohio LR16.6; W.D.Okla. LRL.Civ.R.16.3 Supp.; D.Or. LR16.4; E.D.Pa. LRCJRA 6; M.D.Pa. LR16.8; D.S.Car. LR16.3 *et seq.*; E.D.Tenn. LR16.4; M.D.Tenn. App. 2; W.D.Tenn. Med. Plan; E.D.Tex. App. H; D.Utah LR212; E.D.Wash. LR16.2; N.D.W.Va. LR5.01; S.D.W.Va. LR5.01; W.D.Wis. Add. I, Sec.IV.

[2] *See Manual for Complex Litigation, Third*, §23.151 (2000).

judge to refer eligible cases.[4] In another six courts, the judge may refer any case to mediation.[5] One court provides that the clerk will refer all "odd-numbered civil cases" for mediation.[6] In two courts, certain cases are automatically selected for mediation.[7] In seven courts, there is a procedure in place for the parties to object to the referral.[8] In ten courts, the mechanics of actually referring a case are set out.[9]

The effect of mediation is discussed in some courts. For example, seven courts explain that mediation is non-binding.[10] Two courts, however, explain that, if settlement is reached based on a mediation report, judgment is entered on that report.[11] Three courts specifically state that mediation will not delay other activities in the case.[12] One court has a local rule explaining that, if the mediation is unsuccessful, the court will decide whether a special master mediation or arbitration is a good next step.[13]

The question of who can be a mediator is addressed by the local rules in many courts. For example, in twenty-one courts, there is a list of interested and qualified

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[3] M.D.Ala. LR16.1(c), 16.2; M.D.Fla. LR9.01 *et seq.*; E.D.N.Car. LR32; M.D.N.Car. LR83.10; N.D.Ohio LR16.6; E.D.Tex. App. H; E.D.Wash. LR16.2; N.D.W.Va. LR5.01.

[4] M.D.Ala. LR16.1(c); N.D.Cal. LRADR 6; M.D.Fla. LR9.01 *et seq.*; N.D.Fla. LR16.3; E.D.Mich. LR16.3; E.D.Mo. LR6.01 *et seq.*; E.D.N.Car. LR32; W.D.N.Car. LR16.2; N.D.Ohio LR16.6; E.D.Pa. LRCJRA 6; W.D.Tenn. LR16.1; E.D.Tex. App. H; E.D.Wash. LR16.2; N.D.W.Va. LR5.01.

[5] N.D.Ga. LR16.7; N.D.N.Y. LR83.11; M.D.N.Car. LR83.10; N.D.Ohio LR16.6; M.D.Pa. LR16.8; E.D.Tex. App. H.

[6] E.D.Pa. LR53.2.1.

[7] M.D.N.Car. LR16.4, 83.10.

[8] N.D.Ala. App. C ; E.D.N.Car. LR32; M.D.N.Car. LR16.4, 83.10; N.D.Ohio LR16.6; D.S.Car. LR16.3 *et seq.*; E.D.Tex. App. H; S.D.W.Va. LR5.01.

[9] M.D.Fla. LR9.01 *et seq.*; S.D.Fla. LR16.2; W.D.Mich. LR16.3; E.D.Mo. LR6.01 *et seq.*; E.D.Pa. LRLR53.2.1E.D.Tex. App. H; D.Utah LR212; N.D.W.Va. LR5.01; S.D.W.Va. LR5.01.

[10] N.D.Cal. LRADR 6; N.D.Ga. LR16.7; W.D.Okla. LRL.Civ.R.16.3 Supp.; D.S.Car. LR16.3 *et seq.*; E.D.Tenn. LR16.4; E.D.Tex. App. H; E.D.Wash. LR16.2.

[11] M.D.Fla. LR9.01 *et seq.*; W.D.Mich. LR16.5.

[12] N.D.N.Y. LR83.11; D.Or. LR16.4; D.S.Car. LR16.3 *et seq.*

[13] E.D.Wash. LR16.2.

neutrals from which the mediator is selected.[14] One court suggests that its magistrate judges be mediators.[15] In four other courts, anyone can be a mediator if agreed upon by the parties.[16] In thirteen courts, the parties select the mediator[17] and in six other jurisdictions, the judge picks the person.[18]

Another important issue addressed by the local rules in some courts has to do with whether there is a fee for mediation and, if so, who pays it and when. In five courts, mediation is provided to the parties at no cost.[19] In other courts, there is a fee at a rate either set by the court[20], or set by the mediator.[21] In two courts, the money for mediation is deposited with the court before the mediation begins[22]; in two other courts, the fees can be recovered as costs to the prevailing party at trial.[23]

Most of the courts have local rules explaining in detail how the actual mediation will operate. For example, fourteen courts have local rules indicating that the

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[14] N.D.Ala. App. C;; S.D.Ala. LRS.O.; N.D.Cal. ADR 6; M.D.Fla. LR9.01 *et seq.*; N.D.Fla. LR16.3; S.D.Fla. LR16.2; E.D.Mich. LR16.3; W.D.Mich. LR16.3; E.D.Mo. LR6.01 *et seq.*; D.N.J. LR301.1; N.D.N.Y. LR83.11; E.D.N.Car. LR32; M.D.N.Car. LR83.10; E.D.Pa. LR52.2.1; M.D.Pa. LR16.8; D.S.Car. LR16.3 *et seq.*; E.D.Tenn. LR16.4; W.D.Tenn. Med. Plan; D.Utah LR212; E.D.Wash. LR16.2; S.D.W.Va. LR5.01.

[15] W.D.Wis. Add.I Sec.IV.

[16] N.D.Fla. LR16.3; E.D.Mich. LR16.3; D.S.Car. LR16.3 *et seq.*; W.D.Tenn. Med. Plan.

[17] N.D.Ala. App. C; W.D.Mich. LR16.5; E.D.Mo. LR6.01 *et seq.*; N.D.N.Y. LR83.11; E.D.N.Car. LR32; M.D.N.Car. LR83.10; N.D.Ohio LR16.6; D.Or. LR16.4; D.S.Car. LR16.3 *et seq.*; W.D.Tenn. Med. Plan; D.Utah LR212; E.D.Wash. LR16.2; S.D.W.Va. LR5.01.

[18] N.D.Ga. LR16.7; E.D.N.Car. LR32; E.D.Pa. LR53.2.1; M.D.Pa. LR16.8; E.D.Tex. App. H; N.D.W.Va. LR5.01.

[19] E.D.Pa. LR53.2.1; M.D.Pa. LR16.8; E.D.Wash. LR16.2; N.D.W.Va. LR5.01; S.D.W.Va. LR5.01.

[20] M.D.Fla. LR9.01 *et seq.*; N.D.Fla. LR16.3; S.D.Fla. LR16.2; N.D.Ga. LR16.7; W.D.Mich. LR16.5; D.N.J. LR301.1; E.D.N.Car. LR32; M.D.N.Car. LR83.10.

[21] W.D.Mich. LR16.3; E.D.Mo. LR6.01 *et seq.*; E.D.N.Car. LR32; D.S.Car. LR16.3 *et seq.*; E.D.Tenn. LR16.4; E.D.Tex. App. H.

[22] N.D.Ala. App. C; N.D.Cal. ADR 6.

[23] W.D.Okla. LR16.3 Supp.; W.D.Tenn. MedPlan.

process is confidential.[24] Nine courts allow the mediator discretion in determining how the mediation will be conducted.[25] In approximately seven courts, the local rules explain, in a general sense, that mediation involves a joint meeting of all parties and counsel, followed up by individual meetings with the mediator.[26] Certain paperwork is required to be submitted in fifteen courts.[27] After the actual mediation, nineteen courts require that the report be filed.[28] The parties themselves are required to attend in twenty-two courts unless excused by the judge.[29] The court's power to sanction anyone who fails to participate in good faith is articulated in the local rules in nine jurisdictions.[30]

Rule 16—Arbitration

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[24] M.D.Fla. LR9.01 *et seq.*; S.D.Fla. LR16.2; D.Mass. LR16.4; N.D.N.Y. LR83.11; E.D.N.Car. LR32; D.Or. LR16.4; E.D.Pa. LR53.2.1; M.D.Pa. LR16.8; E.D.Tenn. LR16.4; E.D.Tex. App. H; D.Utah LR212; E.D.Wash. LR16.2; N.D.W.Va. LR5.01.

[25] M.D.Fla. LR9.01 *et seq.*; S.D.Fla. LR16.2; D.Mass. LR16.4; N.D.N.Y. LR83.11; E.D.N.Car. LR32; M.D.N.Car. LR83.10; D.Or. LR16.4; M.D.Pa. LR16.8; E.D.Tenn. LR16.4; E.D.Tex. App. H; D.Utah LR212; E.D.Wash. LR16.2; N.D.W.Va. LR5.01.

[26] M.D.Ala.LR16.2; N.D.Ala. App. C; N.D.N.Y. LR83.11; W.D.Okla. LRL.Civ.R.16.3 Supp.; E.D.Tenn. LR16.4; D.Utah LR212; N.D.W.Va. LR5.01.

[27] N.D.Ala. App. C; N.D.Ga. LR16.7; W.D.Mich. LR16.3, 16.5; D.N.J. LR301.1; N.D.N.Y. LR83.11; M.D.N.Car. LR83.10; W.D.Okla. LRL.Civ.R.16.3 Supp.; D.Or. LR16.4; D.S.Car. LR16.3 *et seq.*; M.D.Tenn. LRLR23, App. 2; D.Utah LR212; E.D.Wash. LR16.2; S.D.W.Va. LR5.01.

[28] M.D.Fla. LR9.01 *et seq.*; S.D.Fla. LR16.2; N.D.Ga. LR16.7; W.D.Mich. LR16.3; E.D.Mo. LR6.01 *et seq.*; N.D.N.Y. LR83.11; E.D.N.Car. LR32; M.D.N.Car. LR83.10; W.D.N.Car. LR16.3; N.D.Ohio LR16.6; W.D.Okla. LRL.Civ.R.16.3 Supp.; M.D.Pa. LR16.8; E.D.Tenn. LR16.4; M.D.Tenn. LR23; W.D.Tenn. Med. Plan; E.D.Tex. App. H; E.D.Wash. LR16.2; N.D.W.Va. LR5.01; S.D.W.Va. LR5.01.

[29] N.D.Cal. ADR 6; M.D.Fla. LR9.01 *et seq.*; S.D.Fla. LR16.2; N.D.Ga. LR16.7; W.D.Mich. LR16.3; D.N.J. LR301.1; N.D.N.Y. LR83.11; E.D.N.Car. LR32; M.D.N.Car. LR83.10; N.D.Ohio LR16.6; W.D.Okla. LRL.Civ.R.16.3 Supp.; D.Or. LR16.4; E.D.Pa. LR53.2.1; D.S.Car. LR16.3 *et seq.*; E.D.Tenn. LR16.4; M.D.Tenn. LR23; E.D.Tex. App. H; D.Utah LR212; E.D.Wash. LR16.2; N.D.W.Va. LR5.01; S.D.W.Va. LR5.01; W.D.Wis. Add. I, Sec.IV.

[30] E.D.N.Car. LR32; E.D.Pa. LR53.2.1; D.S.Car. LR16.3 *et seq.*; E.D.Tenn. LR16.4; M.D.Tenn. LR23; D.Utah LR212; E.D.Wash. LR16.2; N.D.W.Va. LR5.01; S.D.W.Va. LR5.01.

The Alternative Dispute Resolution Act of 1998 (hereinafter Act) requires each court to authorize the use of alternative dispute resolution processes by local rule.[1] The Act provides some specific guidance for those courts interested in providing arbitration as one of its alternative dispute resolution processes.[2] It should be noted that this Act indicated that arbitration procedures already established pursuant to the Judicial Improvements and Access to Justice Act of 1988 could continue to remain in effect.[3]

Seventeen courts have local rules relating to arbitration.[4] Most of these local rules are appropriate supplements to the Act and should continue to exist. Some of these rules are inconsistent with the Act and some of them repeat portions of the Act. These problematic rules should be rescinded.

DISCUSSION

The Act allows a district court to refer cases for arbitration when the parties consent.[5] Local rules in some courts supplement this referral process and explain the general procedure for initiating the arbitration. These rules should remain subject to local variation. For example, three courts have local rules explaining that the court will refer certain cases[6], and two of those courts acknowledge that a party may opt out.[7] Another

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[1] 28 U.S.C. §651. For a brief discussion of this Act, *see* local rule discussion at "Rule 16.—Alternative Dispute Resolution", *supra*..

[2] *See* 28 U.S.C. §§654-658.

[3] *See* 28 U.S.C. §654(d).

[4] N.D.Ala. App. C; D.Ariz. LR2.11; N.D.Cal. LRADR 4; M.D.Fla. LR8.01 *et seq.*; M.D.Ga. LR16.2; N.D.Ga. LR16.7; W.D.Mich. LR16.6; D.N.J. LR201.1; W.D.N.Y. LR16.2; N.D.Ohio LR16.7; N.D.Okla. LRCJRA VI; W.D.Okla. LRL.Civ.R16.3 Supp.; E.D.Pa. LR53.2; W.D.Pa. LR16.2; M.D.Tenn. LRApp.4; D.Utah LR212; E.D.Wash. LR16.2.

[5] 28 U.S.C. §654(a).

[6] M.D.Ga. LR16.2; N.D.Ohio LR16.7; E.D.Pa. CJRA.

[7] M.D.Ga. LR16.2; W.D.Pa. LR16.2.

three courts explain the actual procedure used to opt out of arbitration.[8] One court indicates that the clerk notifies the parties of the opportunity for arbitration.[9] That same court has a local rule explaining that, in the event there is no consent to arbitrate, the judge and magistrate judge are not notified as to which party refused the process.[10] Three courts explain either that mediation may be substituted for arbitration[11], or that arbitration can begin after the mediation phase.[12] Three courts explain how arbitration is scheduled[13] and another eight courts require the submission of certain paperwork before the actual process begins.[14] Three courts have local rules that specifically state that the normal operation of the case will continue in spite of on-going arbitration efforts "unless good cause [is] shown."[15] Seven courts explain that the Act is applicable to the arbitration program.[16] Another two courts have local rules that acknowledge that the parties may agree to arbitration as set forth in the Act.[17]

There are some local rules relating to the referral process that are problematic because they either repeat this Act or are inconsistent with it. Five courts repeat a portion

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[8] M.D.Ga. LR16.2; N.D.Ohio LR16.7; W.D.Pa. LR16.2.

[9] W.D.N.Y. LR16.2.

[10] *Id.*

[11] M.D.Fla. LR8.01 *et seq.*

[12] N.D.Ala. App. C; E.D.Wash. LR16.2.

[13] W.D.N.Y. LR16.2; W.D.Okla. LR16.3 Supp.; W.D.Pa. LR16.2.

[14] N.D.Ala. App. C; M.D.Fla. LR8.01 *et seq.*; M.D.Ga. LR16.2; W.D.Okla. LRL.Civ.R16.3 Supp.; W.D.Pa. LR16.2; M.D.Tenn. LR25; D.Utah LR212; E.D.Wash. LR16.2.

[15] M.D.Ga. 16.2; W.D.N.Y. LR16.2; W.D.Pa. LR16.2.

[16] D.Ariz. LR2.11; W.D.Mich. LR16.6; W.D.N.Y. LR16.2; N.D.Ohio LR16.7; W.D.Okla. LR16.3 Supp.; W.D.Pa. LR16.2; M.D.Tenn. LR25.

[17] W.D.Mich. LR16.6; D.N.J. LR201.1.

of section 654 indicating that the arbitration program is voluntary.[18] Four courts allow the clerk to automatically refer some cases[19] while two of the jurisdictions provide relief from the automatic referral for good cause.[20] To the extent these rules dispense with the consent requirement altogether or require a party to prove in some way why the failure to consent is justified, these rules are inconsistent with the act which simply explains that the parties must consent to arbitration and that there is no arbitration without consent.[21] Presumably, these rules were based on the old statutory provisions.[22]

Section 653 of the Act explains that the district courts must develop a procedure for making neutrals available to assist with all methods of alternative dispute resolution, including arbitration.[23] Twelve courts have local rules explaining that the jurisdictions each maintain s panel of arbitrators for use by the parties.[24] In seven courts, the parties pick the neutral and, if unable to do so, the court will make the selection.[25] In two other courts, the clerk picks the arbitrator[26] and, in a third court, if the parties cannot agree, the clerk makes the choice.[27] All of these rules are appropriate supplements to the statutory scheme.

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[18] D.Ariz. LR2.11; M.D.Ga. LR16.2; W.D.N.Y. LR16.2; W.D.Pa. LR16.2; E.D.Wash. LR16.2. *See* 28 U.S.C. §654(a).

[19] N.D.Cal. ADR 4; M.D.Fla. LR8.01 *et seq.*; W.D.Mich. LR16.6; D.N.J. LR201.1.

[20] N.D.Cal. ADR 4;W.D.Okla. LR16.3 Supp.

[21] *See* 28 U.S.C. §652(a); 654.

[22] *See* 28 U.S.C. §652(a) (1988) ("A district court ... may ... require ... arbitration [under a specific set of circumstances]".)

[23] *See* 28 U.S.C. §653.

[24] D.Ariz. LR2.11; N.D.Cal. LRADR 4; M.D.Fla. LR8.01 *et seq.*; M.D.Ga. LR16.2; W.D.Mich. LR16.6; D.N.J. LR201.1; W.D.N.Y. LR16.2; N.D.Ohio LR16.7; E.D.Pa. LR53.2; W.D.Pa. LR16.2; D.Utah LR212; E.D.Wash. LR16.2.

[25] N.D.Ala. App. C; D.Ariz. LR2.11; M.D.Fla. LR8.01 *et seq.*; N.D.Ohio LR16.7; W.D.Okla. LRL.Civ.R16.3 Supp.; D.Utah LR212; E.D.Wash. LR16.2.

[26] D.N.J. LR201.1; W.D.Pa. LR16.2.

The Act sets forth the effect of the arbitration award and allows any party to seek a trial de novo within thirty days after the arbitration award is filed.[28] The existing local rules in this area are either inconsistent with this Act or repeat it; they should be rescinded. For example, nine courts have local rules explaining that the arbitration decision is non-binding[29]; another eight courts permit the parties to agree to binding arbitration.[30] These rules are inconsistent with the language of Section 657 that the award "shall be entered as the judgment of the court after the time has expired for requesting trial de novo."[31] Of course, the Act, itself, provides the parties with the practical equivalent of a non-binding process since either party may seek a trial de novo and, during such a trial, the existence of the award remains sealed.[32]

Fourteen courts have local rules repeating that the award is entered as the judgment if a trial de novo is not requested.[33] Two courts have local rules repeating that the judgment is entered right away when the arbitration is binding.[34] These rules repeat the language in Section t657 that the arbitration award be filed "promptly after the arbitration hearing is concluded."[35] One court has a local rule explaining that the award

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[27] W.D.N.Y. LR16.2.

[28] 28 U.S.C. §657.

[29] N.D.Ala. App. C; D.Ariz. LR2.11; N.D.Cal. LRADR 4; W.D.N.Y. LR16.2; W.D.Okla. LR16.3 Supp.; W.D.Pa. LR16.2; M.D.Tenn. LR25; D.Utah LR212; E.D.Wash. LR16.2.

[30] N.D.Ala. App. C; D.Ariz. LR2.11; N.D.Cal. LRADR 4; N.D.Ga. LR16.7; W.D.Mich. LR16.6; W.D.N.Y. LR16.2; W.D.Okla. LR16.3 Supp.; E.D.Wash. LR16.2.

[31] 28 U.S.C. §657(a).

[32] *See* 28 U.S.C. §657(a), (b).

[33] D.Ariz. LR2.11; N.D.Cal. LRADR 4; M.D.Fla. LR8.01 *et seq.*; M.D.Ga. LR16.2; W.D.Mich. LR16.6; D.N.J. LR201.1; W.D.N.Y. LR16.2; N.D.Ohio LR16.7; W.D.Okla. LRL.Civ.R16.3 Supp.; E.D.Pa. LR53.2; W.D.Pa. LR16.2; D.Utah LR212; E.D.Wash. LR16.2.

[34] M.D.Fla. LR8.01; M.D.Ga. LR16.2.

[35] 28 U.S.C. §657(a).

is kept confidential from the judge or magistrate judge if not accepted.[36] To the extent this rule repeats that the arbitration award is sealed until the action is terminated, it repeats the Act.[37] To the extent it assumes that the arbitration award may be non-binding, it is inconsistent with the Act.[38]

Lastly, there are rules in some courts that concern the parties' ability to secure a trial de novo after the filing of the arbitration award which are inconsistent with the Act and should be rescinded. For example, five courts require a party to deposit an amount equal to the arbitrator's fee when seeking a trial de novo.[39] Another three courts provide that, if the trial de novo amount is not "substantially more favorable" than the award, the opposing party may be awarded costs and fees pursuant to 28 U.S.C. §655(e).[40] Six other courts explain that the arbitrator's fee is assessed to the party demanding a trial de novo if the trial award is not more favorable than the arbitration award.[41] One court defines "substantially more favorable" as 10 per cent above the award.[42] Another court requires a $50 deposit when seeking a trial de novo.[43] These local rules were undoubtedly passed to supplement the old statute that allowed the arbitrator's fee to be taxed as costs against

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[36] W.D.Pa. LR16.2.

[37] *See* 28 U.S.C. §657(b).

[38] *Id.*

[39] D.Ariz. LR2.11; N.D.Cal. LRADR 4; M.D.Fla. LR8.01 *et seq.*; M.D.Ga. LR16.2; W.D.Mich. LR16.6; D.N.J. LR201.1; W.D.N.Y. LR16.2; N.D.Ohio LR16.7; W.D.Okla. LRL.Civ.R16.3 Supp.; E.D.Pa. LR53.2; W.D.Pa. LR16.2; D.Utah LR212; E.D.Wash. LR16.2.

[40] D.Ariz. LR2.11; W.D.N.Y. LR16.2; N.D.Ohio LR16.7.

[41] D.Ariz. LR2.11; M.D.Fla. LR8.01 *et seq.*; W.D.N.Y. LR16.2; N.D.Ohio LR16.7; W.D.Okla. LR16.3 Supp.; E.D.Pa. LR53.2.

[42] D.Ariz. LR2.11, *see also* W.D.Mich. LR16.6 (formula for preventing assessment of costs if award is rejected and trial de novo sought.)

[43] D.N.J. LR201.1, *see also* E.D.Wash. LR16.2 (standard is "more favorable to that party").

the party demanding a trial de novo under certain enumerated circumstances.[44]

There are local rules that explain some aspects of the actual arbitration process. Most of these rules are appropriate as local directives. The power of the arbitrator is set forth in the Act.[45] Five courts have local rules that supplement the discussion on the authority of the arbitrator.[46] There are also rules explaining the procedure that will be used during the actual arbitration. For example, seven courts have local rules requiring a pre-hearing exchange of information[47] and another three courts have rules explaining the need for written statements, telephone conferences, and attendance.[48] With respect to attendance, three courts specifically require the parties to attend unless excused for good cause.[49]

The Act requires that each court, by local rule, "provide for the confidentiality of the alternative dispute resolution process and ... prohibit disclosure of confidential dispute resolution communications." [50] Three courts have local rules stating that the arbitration process is confidential[51] while six courts have local rules stating that the arbitration itself is privileged.[52] These rules are also appropriate.

Eighteen courts have local rules requiring either that the arbitrator files the

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[44] *See* 28 U.S.C. §655(d) (1988).

[45] *See* 28 U.S.C. §655 and 656.

[46] D.Ariz. LR2.11; N.D.Cal. LRADR 4; D.N.J. LR201.1; W.D.N.Y. LR16.2; E.D.Wash. LR16.2.

[47] D.Ariz. LR2.11; M.D.Fla. LR8.01 *et seq.*; W.D.N.Y. LR16.2; N.D.Ohio LR16.7; E.D.Pa. LR53.2; W.D.Pa. LR16.2; E.D.Wash. LR16.2.

[48] N.D.Cal. ADR 4; W.D.N.Y. LR16.2; M.D.Tenn. LRApp.4.

[49] M.D.Fla. LR8.01 *et seq.*; N.D.Ohio LR16.7; W.D.Okla. LR16.3 Supp.

[50] 28 U.S.C. §652(d).

[51] M.D.Ga. LR16.2; W.D.Mich. LR16.6; W.D.Pa. LR16.2.

[52] D.Ariz. LR2.11; M.D.Ga. LR16.2; W.D.Okla. LR16.3 Supp.; E.D.Pa. LR53.2; W.D.Pa. LR16.2; D.Utah LR212.

decision[53] or that the arbitrator reports to the court at the end.[54] These rules are unnecessary since they repeat the Act's requirement that the award be filed with the clerk "promptly after the arbitration hearing is concluded."[55] They should be rescinded.

Pursuant to the Act, compensation for arbitration can be established by the district court.[56] Five courts set forth the pay for arbitrators[57], and another court explains that the fee is agreed upon or, in the absence of agreement, set by the judge.[58] These local rules are appropriate supplements to the Act.

Rule 16—Court Settlement Conferences

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[53] N.D.Ala. App. C; D.Ariz. LR2.11; N.D.Cal. LRADR 4; M.D.Fla. LR8.01 *et seq.*; M.D.Ga. LR16.2; W.D.Mich. LR16.6; D.N.J. LR201.1; W.D.N.Y. LR16.2; N.D.Ohio LR16.7; W.D.Okla. LR16.3 Supp.; E.D.Pa. LR53.2; W.D.Pa. LR16.; D.Utah LR21; E.D.Wash. LR16.2.

[54] N.D.Ala. App. C; M.D.Fla. LR8.01 *et seq.*; N.D.Ga. LR16.7; W.D.Okla. LR16.3 Supp.

[55] 28 U.S.C. §657(a).

[56] 28 U.S.C. §658(a).

[57] D.Ariz. LR2.11; W.D.Mich. LR16.6; D.N.J. LR201.1; E.D.Pa. LR53.2; W.D.Pa. LR16.2.

[58] N.D.Ga. LR16.7.

Although a court settlement conference may not technically be designated an alternative dispute resolution process, it can help the parties achieve settlement and, even if the case continues, it can be helpful in fostering communication, narrowing issues for trial, and forcing the parties to examine settlement early in the judicial process.[1] Twenty-seven courts have local rules explaining the procedure for judicially hosted settlement conferences.[2] All of these rules are appropriate as local directives.

DISCUSSION

The first issue addressed by these rules is how the conference is offered in the first instance. Fourteen courts have local rules permitting the court to refer a case for such a settlement conference.[3] Another three courts require such a conference automatically after the close of discovery.[4] Either of these mechanisms is appropriate under Rule 16, which contemplates early judicial involvement in case management.[5]

There are various local rules explaining exactly who the facilitator should be in these conferences. Ten courts suggest that the trial judge serve as facilitator;[6] another eight courts suggest that a randomly selected judge or magistrate judge not already

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[1] *See, generally*, Fed.R.Civ.P. 16; Fed.R.Civ.P. 16 Advisory Committee Note to 1983 Amendments; Manual for Complex Litigation (3rd ed.) §20.13 (1995).

[2] C.D.Cal. LR23; E.D.Cal. LR16-270; N.D.Cal. LRADR 7; S.D.Cal. LR16.3; D.Conn. LR11(c); D.Haw. LR16.5; D.Idaho LR16.2; C.D.Ill. LR16.1(B); S.D.Ill. LR16.4; D.Md. LR111.2; D.Mass. LR16.4; W.D.Mich. LR16-8; E.D.N.Car. LR30; W.D.N.Car. LR16.3(D); E.D.Okla. LRCJRA Sec. IV; N.D.Okla. CJRA Sec. VI; W.D.Okla. LR16.2; D.Or. LR16.5; M.D.Pa. LR16.9; M.D.Tenn. LR22; W.D.Tenn. LR16.1; N.D.Tex. LR16.3(b); D.Utah LR204-2; N.D.W.Va. LR2.04(e); S.D.W.Va. LR2.04(e); E.D.Wis. LR13.06(p); D.Wyo. LR16.3.

[3] N.D.Cal. LRADR 7; D.Idaho LR16.2; C.D.Ill. LR16.1(B); S.D.Ill. LR16.4; D.Mass. LR16.4; E.D.N.Car. LR30; W.D.N.Car. LR16.3(D); E.D.Okla. LR16.3, CJRA Sec. IV; N.D.Okla. LR16.3; W.D.Okla. LR16.2; D.Or. LR16.5; M.D.Pa. LR16.9; M.D.Tenn. LR22; D.Utah LR204-2.

[4] D.Conn. LR11(c); D.Haw. LR16.5; D.Idaho LR16.2.

[5] *See, e.g.,* Fed.R.Civ.P. 16(a) ("The court may in its discretion ...[hold] a conference or conferences before trial for such purposes as ... facilitating the settlement of the case.")

connected with the case serve.[7] Two courts allow an attorney to facilitate.[8] Three courts require that the parties specifically request the trial judge to act as facilitator or else that person cannot participate.[9] Three courts explain that the magistrate judge usually runs these conferences.[10] Six courts explain that the judge conducting the conference is usually not the judge assigned to the case.[11] In one court, the local rule explains that the parties usually agree on the settlement officer with the court's approval[12] and that the selected person does not need to be a judicial officer.[13]

There are rules in seven jurisdictions that require that the content of the conferences be kept confidential.[14] Six courts have local rules indicating that the content of the conference is privileged and cannot be used at trial.[15] These rules are appropriate as local directives.

Six courts have specific procedures for these conferences.[16] One jurisdiction

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[6] C.D.Cal. LR23; S.D.Cal. LR16.3; D.Conn. LR11(c); D.Haw. LR16.5; D.Idaho LR16.2; C.D.Ill. LR16.1(B); W.D.Mich. LR16-8; W.D.Tenn. LR16.1; N.D.W.Va. LR2.04(e); S.D.W.Va. LR2.04(e).

[7] D.Conn. LR11(c); D.Haw. LR16.5; D.Idaho LR16.2; C.D.Ill. LR16.1(B); W.D.Mich. LR16-8; M.D.Tenn. LR22; N.D.Tex. LR16.3(b); D.Utah LR204-2.

[8] C.D.Cal. LR23; D.Utah LR204-2.

[9] E.D.Cal. LR16-270; N.D.Cal. LRADR 7; S.D.Cal. LR16.3.

[10] N.D.Cal. ADR 7; E.D.Wis. LR13.06(p); D.Wyo. LR16.3.

[11] E.D.N.Car. LR30; W.D.N.Car. LR16.3(D); E.D.Okla. LR16.3; N.D.Okla. LR16.3; W.D.Okla. LR16.2; M.D.Tenn. LR22.

[12] M.D.Pa. LR16.9.

[13] D.Wyo. LR16.3.

[14] D.Idaho LR16.2; S.D.Ill. LR16.4; W.D.Okla. LR16.2; M.D.Pa. LR16.9; M.D.Tenn. LR22; D.Utah LR204-2; D.Wyo. LR16.3.

[15] E.D.N.Car. LR30; E.D.Okla. LR16.3; W.D.Okla. LR16.2; M.D.Pa. LR16.9; M.D.Tenn. LR22; D.Utah LR204-2.

[16] C.D.Cal. LR23; E.D.Cal. LR16-270; D.Haw. LR16.5; D.Idaho LR16.2; S.D.Ill. LR16.4; W.D.Okla. LR16.2; M.D.Tenn. LR22.

has a local rule explaining that the settlement judge may require certain procedures.[17] Again, these rules are appropriate supplements to Rule 16.

There are rules that explain who may or must participate and what their roles ought to be. For example, eight courts require that the actual parties participate in the settlement efforts unless they have been exempted.[18] Twelve courts have rules that require that principals usually participate.[19] In six courts where the parties are not required to attend, they must be telephone accessible.[20] Seven courts require the attendance of the attorneys[21], and two of those courts specifically require the attendance of attorneys familiar with the case.[22] Eight courts require that attorneys come to the conference with authority to settle.[23] Three courts require that everyone in attendance be candid.[24] Again, these rules are appropriate as local directives.

IV. Parties

Rule 17. Parties Plaintiff and Defendant; Capacity

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[17] E.D.Okla. LR16.3.

[18] C.D.Cal. LR23; S.D.Cal. LR16.3; C.D.Ill. LR16.1(B); S.D.Ill. LR16.4; N.D.Okla. LRCJRA Sec. VI; N.D.W.Va. LR2.04(e); S.D.W.Va. LR2.04(e); E.D.Wis. LR7.12.

[19] E.D.Cal. LR16-270; W.D.Mich. LR16-8; E.D.N.Car. LR30; E.D.Okla. CJRA Sec. IV; N.D.Okla. LRCJRA Sec. VI ; W.D.Okla. LR16.2; M.D.Tenn. LR22; D.Utah LR204-2; N.D.W.Va. LR2.04(e); S.D.W.Va. LR2.04(e); E.D.Wis. LR13.06(p); D.Wyo. LR16.3.

[20] D.Haw. LR16.5; D.Idaho LR16.2; D.Mass. LR16.4; N.D.Okla. LR16.3; M.D.Tenn. LR22; E.D.Wis. LR7.12.

[21] D.Md. LR111.2; W.D.N.Car. LR16.3(D); E.D.Okla. LR16.3; M.D.Pa. LR16.9; N.D.W.Va. LR2.04(e); S.D.W.Va. LR2.04(e); D.Wyo. LR16.3.

[22] M.D.Pa. LR16.9; D.Utah, LR204-2.

[23] D.Conn. LR11(c); D.Haw. LR16.5; D.Idaho LR16.2; C.D.Ill. LR16.1(B); W.D.N.Car. LR16.3(D); M.D.Tenn. LR22; D.Utah LR204-2; D.Wyo. LR16.3.

[24] E.D.N.Car. LR30.00; E.D.Okla. LR16.3; N.D.Okla. LR16.3.

Seventeen courts have local rules dealing with infants and incompetent persons.[1] These rules address one or both of these topics: (1) who is permitted to represent a minor or incompetent person; and (2) how a settlement is approved and distributed.

Eight courts have local rules discussing who can represent the minor or incompetent person. Rules in three of these courts are appropriate supplements to Rule 17. Rules in seven of these courts should be rescinded because they are either inconsistent with existing law or repeat it.

Sixteen courts have local rules that discuss the settlement of cases involving minors or incompetent persons and the disbursement of any settlement funds for the benefit of such person. These rules should remain subject to local variation.

DISCUSSION

Rule 17 of the Federal Rules of Civil Procedure provides that infants and incompetent persons may sue and be sued under certain circumstance.[2] Subsection (a) requires that an action "be prosecuted in the name of the real parties in interest."[3] Subsection (b) states the capacity of a person "other than one acting in a representative capacity" to sue or be sued is determined by the law of the person's domicile.[4] Subsection (c) relates specifically to infants and incompetent persons and indicates that the representative of such minor or infant "may sue or defend on behalf of the infant or

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[1] E.D.Cal. LR17-202; S.D.Cal. LR17.1; S.D.Ga. LR17.1; D.Haw. LR17.1; D.Idaho LR17.1; D.Minn. LR17.1; D.Mont. LR226; D.N.H. LR17.1; N.D.N.Y. LR17.1; E.D.N.Car. LR20.01; M.D.N.Car. LR17.1; D.N.Mar.I LR17.1; W.D.Okla. LR17.1; W.D.Pa. LR17.1; D.S.Car. LR17.01; E.D.Wash. LR17.1; W.D.Wash. LR17(c).

[2] Fed.R.Civ.P. 17.

[3] *Id* at (a).

[4] *Id.* at (b).

incompetent person."[5]

If the infant or incompetent person is not otherwise represented, either by a nominal party or by another representative, then, under subsection (c), the infant or incompetent person may sue by a next friend or guardian *ad litem*.[6] Even if a representative exists, the court still has discretion to appoint a next friend or guardian *ad litem*:

> [T]he courts have consistently recognized that they have inherent power to appoint a guardian ad litem when it appears that the minor's general representative has interests which may conflict with those of the person he is supposed to represent.[7]

Such appointment is a matter of procedure and, therefore, not a matter of state law.[8]

Eight courts have local rules concerning who the representative of any infant or incompetent person can be.[9]

Three of these courts have local rules that should remain subject to local variation.[10] Two of these local rules simply mandate that the guardian *ad litem* be an attorney.[11] Another local rule explains that any motion for appointment of a guardian *ad*

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[5] *Id.* at (c).

[6] *Id.*

[7] *Hoffert v. General Motors Corporation*, 656 F.2d 161, 164 (5th Cir. 1981) *reh'g and reh'g en banc denied* October 13, 1981, *and cases cited therein. See also Developmental Disabilities Advocacy Center, Inc. v. Melton*, 689 F.2d 281 (1st Cir. 1982); *Wolfe v. Bias*, 601 F.Supp. 426 (S.D.W.Va. 1984); *Slade v. Louisiana power and Light Company*, 418 F.2d 125 (5th Cir. 1969) *cert. denied* 397 U.S. 1007, 90 S.Ct. 1233, 25 L.Ed.2d 419 (1970).

[8] *Bengtson v. Travelers Indemnity Company*, 132 F.Supp. 512, 516-17 (W.D.La. 1955).

[9] E.D.Cal. LR17-202; D.Mont. LR226; E.D.N.Car. LR20.01; M.D.N.Car. LR17.1; D.N.Mar.I LR17.1; D.S.Car. LR17.01; E.D.Wash. LR17.1; W.D.Wash. LR17(c).

[10] M.D.N.Car. LR17.1; E.D.Wash. LR17.1; W.D.Wash. LR17(c).

[11] E.D.Wash. LR17.1; W.D.Wash. LR17(c).

litem be made early in the proceedings.[12] Both of these requirements are appropriate supplements to Rule 17.

Three courts have local rules concerning the appointment of guardians *ad litem* that are problematic and should be rescinded.[13] The local rules in two of the courts require that, in representing a minor or incompetent person, the attorney provide either proof of the appointment of a representative under state law or a motion for an appointment of a guardian *ad litem.*[14] The local rule in the other court states that minors or incompetent persons may sue or defend only by a general or testamentary guardian or by a guardian *ad litem.*[15] To the extent these requirements may eliminate the possibility that the minor or incompetent person is represented by a next friend they are inconsistent with Rule 17(c), which, by its terms, contemplates that a minor or incompetent person may be represented by a next friend as well as by a guardian *ad litem.*[16]

Further, the requirement that an attorney, at the commencement of the action, provide proof of the appointment of a representative made pursuant to state law, conflicts with Rules 8 and 9 of the Federal Rules of Civil Procedure.[17] Rule 9(a) indicates, with respect to the capacity to be sued, that "[i]t is not necessary to aver ... the authority of a party to sue or be sued in a representative capacity";[18] rather, any party wishing to challenge the capacity must raise the issue by "specific negative averment, which shall

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[12] M.D.N.Car. LR17.1.

[13] E.D.Cal. LR17-202; M.D.N.Car. LR17.1; E.D.Wash. LR17.1.

[14] E.D.Cal. LR17-202; E.D.Wash. LR17.1.

[15] M.D.N.Car. LR17.1.

[16] Fed.R.Civ.P. 17(c).

[17] Fed.R.Civ.P. 8, 9.

[18] Fed.R.Civ.P. 9(a).

include such supporting particulars as are peculiarly within the pleader's knowledge."[19]

Another four district courts have local rules concerning, generally, the appointment of a representative that repeat existing law and should be rescinded.[20] Two jurisdictions have local rules that simply repeat the applicability of Rule 17.[21] Another two courts have rules that allow the appointment of a guardian *ad litem* anytime upon a proper showing.[22] Rule 17 clearly articulates the court's authority to make any order at any time "as it deems proper for the protection of the infant or incompetent person."[23]

Sixteen jurisdictions have local rules concerning the resolution of cases involving minors and incompetent person.[24] These local rules may assist in delineating the procedures used in approving any settlement of actions involving minors or incompetents.

Fourteen of these local rules provide that any settlement or compromise of a suit involving a minor or incompetent be approved by the court.[25] Many of these rules also set forth various procedures which the individual district courts use such as: (1) the procedure for the disbursement of any award for the benefit of the minor or incompetent

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[19] *Id.*

[20] D.Mont. LR226; E.D.N.Car. LR20.01; D.N.Mar.I LR17.1; D.S.Car. LR17.01.

[21] E.D.N.Car. LR20.01; D.S.Car. LR17.01.

[22] D.Mont. LR226; D.N.Mar.I LR17.1.

[23] Fed.R.Civ.P. 17(c).

[24] E.D.Cal. LR17-202; S.D.Cal. LR17.1; S.D.Ga. LR17.1; D.Haw. LR17.1; D.Idaho LR17.1; D.Minn. LR17.1; D.Mont. LR226; D.N.H. LR17.1; N.D.N.Y. LR17.1; E.D.N.Car. LR 20.02; M.D.N.Car. LR17.1; D.N.Mar.I LR17.1; W.D.Pa. LR17.1; D.S.Car. LR17.02; E.D.Wash. LR17.1; W.D.Wash. LR17(c).

[25] E.D.Cal. LR17-202; S.D.Cal. LR17.1; S.D.Ga. LR17.1; D.Haw. LR17.1; D.Idaho LR17.1; D.Minn. LR17.1; D.N.H. LR17.1; N.D.N.Y. LR17.1; E.D.N.Car. LR 20.02; M.D.N.Car. LR17.1; D.N.Mar.I LR17.1; W.D.Pa. LR17.1; D.S.Car. LR17.02; E.D.Wash. LR17.1.

person;[26] (2) the procedure for claiming attorneys' fees and expenses;[27] (3) the procedure for securing court approval of any settlement;[28] and, (4) the requirement of state court approval of a settlement, where necessary in addition to federal court approval.[29]

Such court involvement in cases involving minors or incompetent persons is clearly within the powers set forth in Rule 17(c) and the existing case law. Rule 17(c) specifically provides that the court has the authority to "appoint a guardian ad litem ... or ... [to] make such other order as it deems proper for the protection of the infant or incompetent person."[30] Further, it has been recognized that the courts have inherent power to protect the interests of the minor or incompetent person by appointing an appropriate representative and that, after such an appointment, the court has broad authority to inquire into issues bearing on the settlement agreement.[31] The right of the court to approve or fix the amount of the fees for counsel and the expenses for the appointed representative is also well recognized.[32]

These local rules are appropriate as supplements to the existing case law and Rule 17. Local variation is desirable since the law of the state in which the jurisdiction is

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[26] E.D.Cal. LR17-202; S.D.Cal. LR17.1; S.D.Ga. LR17.1; D.Idaho LR17.1; D.Minn. LR17.; D.Mont. LR226; D.N.H. LR17.1; N.D.N.Y. LR17.1; E.D.N.Car. LR20.03: M.D.N.Car. LR17.1; D.N.Mar.I LR17.1; W.D.Pa. LR17.1; D.S.Car. LR17.03; E.D.Wash. LR17.1; W.D.Wash. LR17(c).

[27] E.D.Cal. LR17-202; S.D.Ga. LR17.1; D.N.H. LR17.1; M.D.N.Car. LR17.1; W.D.Pa. LR17.1.

[28] E.D.Cal. LR17-202; S.D.Ga. LR17.1; D.N.H. LR17.1; E.D.N.Car. LR 20.02; M.D.N.Car. LR17.1; W.D.Pa. LR17.1; D.S.Car. LR17.02.

[29] E.D.Cal. LR17-202; D.Haw. LR17.1.

[30] Fed.R.Civ.P. 17(c).

[31] *Hoffert v. General Motors Corporation*, 656 F.2d 161, 164 (5th Cir. 1981) *reh'g and reh'g en banc denied* October 13, 1981, *citing M.S. v. Wermers*, 557 F.2d 170, 175 (8th Cir. 1977); *Dacanay v Mendoza,* 573 F.2d 1075, 1079 (9th Cir. 1978); *Horacek v. Exxon*, 357 F.Supp. 71, 74 (D.Neb. 1973).

[32] *See Friends for All Children, Inc. v. Lockheed Aircraft Corporation*, 533 F.Supp. 895 (D.C. 1982) (reasonable cost for the guardian ad litem); *United States v. Equitable Trust Company of New York*, 283 U.S. 738, 51 S.Ct. 639, 75 L.Ed. 1379 (1931) (reasonable cost for the next friend); *Hoffert v. General*

located may influence many of the procedures. Such rules do not alter the rights of the litigants since, when a representative is suing or defending on behalf of a minor or incompetent, the court already has discretionary authority to be involved in the formulation of the result.

Rule 24. Intervention

Rule 24—Claim of Unconstitutionality

Motors Corporation, 656 F.2d 161, 164 (5th Cir. 1981) *reh'g and reh'g en banc denied* October 13, 1981 (attorneys' fees).

The United States or a state is permitted to intervene in certain cases that present a constitutional question.[1] Thirty-three jurisdictions have local rules that, generally, provide a procedure for the parties to notify the court of the presence of a constitutional question so that the court can notify the United States or a state of its opportunity to intervene. In addition, there are rules in approximately eighteen district courts that are inconsistent with existing law and should, therefore, be rescinded.

DISCUSSION

Section 2403 of Title 28 permits the United States or a state to intervene in any action where the constitutionality of an Act of Congress or the constitutionality of a state statute affecting the public interest is drawn into question.[2] The procedure which the court must follow in notifying the United States or a state is set forth in this statute.[3] Specifically, with respect to an Act of Congress, "the court shall certify such fact to the Attorney General";[4] with respect to a state statute, "the court shall certify such fact to the attorney general of the State."[5] This procedure is again set forth in the Federal Rules of Civil Procedure:

> When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. §2403. When the constitutionality of any statute of a state affecting the public interest is drawn in question in any action in which that State or an agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. §2403. A party challenging the constitutionality of

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[1] 28 U.S.C. §2403; Fed.R.Civ.P. 24.

[2] 28 U.S.C. §2403(a) (Act of Congress), 2403(b) (state statute).

[3] *Id.*

[4] *Id.* at (a).

[5] *Id.* at (b).

> legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.[6]

The obligation of the court to notify the proper governmental agency is absolute and certification is not discretionary.[7] This is true even if the court thinks the claim "is obviously frivolous or may be disposed of on other grounds."[8] In fact, judicial discretion was expressly removed by amendment in 1937 when section 2403 was originally adopted.[9] It has been recognized that certification and intervention "are permissible at any stage of the proceeding."[10]

The Local Rules Project originally recommended that a Model Local Rule be provided to jurisdictions that chose to have any rule concerning notification of claims of unconstitutionality.[11]

The Model Local Rule sought to assist the court in complying with 28 U.S.C. §2403. At the same time, it removed from the party the responsibility for providing notice to the appropriate governmental entity. Since notification to the state or federal government is the court's responsibility and not the litigant's, this rule required that the initial notice be directed to the court. No litigant, then, was obliged to give any notice to any governmental entity.

The initial notification to the court was quite simple. If the claim of

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[6] Fed.R.Civ.P. 24(c).

[7] *Jones v. City of Lubbock*, 727 F.2d 364, 372 (5th Cir. 1984), *reh'g and reh'g en banc denied* April 10, 1984, 730 F.2d 233; *Merrill v. Town of Addison*, 763 F.2d 80, 82 (2d Cir. 1985).

[8] *Merrill, supra*, at 82.

[9] *See* 81 Cong. Rec. 8507 (1937).

[10] *Wallach v. Lieberman*, 366 F.2d 254, 258 n.9 (2d Cir. 1966); *see also Thatcher v. Tennessee Gas Transmission Co*, 180 F.2d 644 (5th Cir. 1950) *cert. denied* 340 U.S. 829, 71 S.Ct. 66, 95 L.Ed 609 (1950); *Tonya K. v. Board of Education*, 849 F.2d 1243, 1247 (7th Cir. 1988); *Merrill, supra*; *Jones, supra.*

unconstitutionality is made when the first pleading is filed, the accompanying civil cover sheet may serve as the notice to the court. At present, eight courts have this provision.[12] If the claim is made in a pleading, a designation may be made immediately following the title of the pleading stating: "Claim of Unconstitutionality" or the equivalent. At present, approximately twelve courts provide for this method of notification.[13] Either of these methods will provide sufficient notice to the clerk of the existence of the constitutional question.

The potential for unfair punitive measures was avoided in the original Model Local Rule by stating that a litigant will not waive any rights by failing to give notice under the rule. Twelve courts now have local rules containing this provision.[14] It is appropriate that no significant sanctions be available since this rule exists only to assist the court and not to pursue or protect any rights of the parties.

Lastly, the Model Local Rule indicated that any notice under this rule is not a substitute for any other pleading requirements that may exist in the Federal Rules or statutes. Twelve courts currently provide this directive as well.[15]

Some of the other rules are problematic in several respects. For example, twelve courts have local rules explaining the particular requirements for the content of

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[11] *See* Report at Suggested Local Rules p.40.

[12] M.D.Ala. LR24.1; S.D.Ill. LR24.1; D.Minn. LR24.1; D.N.Mar.I LR24.1; W.D.Pa. LR24.1; E.D.Tenn. LR24.1; D.V.I. LR24; D.Wyo. LR24.1.

[13] M.D.Ala. LR24.1; S.D.Fla. LR24.1; S.D.Ill. LR24.1; D.Minn. LR24.1; D.N.H. LR24.1; D.N.Mar.I LR24.1; N.D.Ohio LR24.1; E.D.Okla. LR24.1; W.D.Pa. LR24.1; E.D.Tenn. LR24.1; D.V.I. LR24; D.Wyo. LR24.1.

[14] M.D.Ala. LR24.1; S.D.Fla. LR24.1; S.D.Ill. LR24.1; N.D.Ind. LR24.1; S.D.Ind. LR24.1; D.Minn. LR24.1; D.N.H. LR24.1; D.N.Mar.I LR24.1; N.D.Ohio LR24.1; W.D.Pa. LR24.1; E.D.Tenn. LR24.1; D.V.I. LR24.

the notice.[16] The relevant statute and Federal Rule do not require such specificity.[17] It should not be permitted in local rulemaking either. To require such detail puts an unnecessary burden on the parties, which is not supported by the existing law. The responsibility for notifying the Attorney General belongs to the court, not the parties. The parties, of course, have the responsibility to provide "a short and plain statement" to demonstrate the court's jurisdiction and "a short and plain statement of the claim showing that the pleader is entitled to relief" along with a demand for judgment.[18] Local rules requiring further specificity are inconsistent with the language and spirit of Rule 8 and should be rescinded.

Three courts have local rules that require the litigant to carry out the court's responsibility in providing notice, requiring that notice be served on the judge, the parties, and the attorney general.[19] Local Rules in three courts have other requirements that may unduly burden litigants. One court mandates that a separate pleading be filed as notice.[20] Another two district courts require duplicate copies.[21] All of these rules should be rescinded.

V. Depositions and Discovery

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[15] M.D.Ala. LR24.1; S.D.Fla. LR24.1; S.D.Ill. LR24.1; N.D.Ind. LR24.1; S.D.Ind. LR24.1; D.Minn. LR24.1; D.N.H. LR24.1; D.N.Mar.I LR24.1; N.D.Ohio LR24.1; W.D.Pa. LR24.1; E.D.Tenn. LR24.1; D.V.I. LR24.

[16] D.Ariz. LR2.4; E.D.Cal. LR24-133; S.D.Cal. LR24.1; D.Colo. LR24.1; N.D.Fla. LR24.1; S.D.Fla. LR24.1; D.Kan. LR24.1; D.N.J. LR24.1; W.D.N.Y. LR24; M.D.Pa. LR4.5; D.Utah LR208; E.D.Wash. LR24.1.

[17] *See* 28 U.S.C. §2403; Fed.R.Civ.P. 24(c).

[18] Fed.R.Civ.P. 8(a).

[19] E.D.Cal. LR24-133; D.Colo. LR24.1; D.Kan. LR24.1.

[20] N.D.Okla. LR24.1.

[21] M.D.Pa. LR4.5; E.D.Wash. LR9.1.

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

Fifty-three courts have local rules that relate to requests for production of documents and things.[22] Approximately thirty-two courts have local rules defining the form of requests for production. The Local Rules Project originally recommended the jurisdictions adopt a Model Local Rule describing the form of many discovery documents, including requests for production. Most of these thirty-two courts have adopted at least some part of this Model Local Rule. Four courts have local rules that concern the form of such requests and that repeat existing law. Three courts have local rules that require certain items be included in requests for production; these rules also repeat existing law.

Seven courts have local rules concerning when requests for production can be served; these rules either repeat existing law or are inconsistent with it.

Seventeen courts have local rules that explain how objections can be made to requests for production. Rules in all of these courts repeat existing law. In addition, rules in several of these jurisdictions that address this topic are appropriate.

Two courts have limits on the number of requests for production that can be served. These rules are inconsistent with the discovery process set forth in the Federal

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[22] M.D.Ala. LR26.3; N.D.Ala. LR26.1(a); S.D.Ala. LR26.1; C.D.Cal. LR6.2; E.D.Cal. LR34-250; N.D.Cal. LR34-1; S.D.Cal. LR34.1; D.Del. LR26.1; D.D.C. LR207(d); N.D.Fla. LR26.2; S.D.Fla. LR26.1G; M.D.Ga. LR34; S.D.Ga. LR26.7; D.Haw. LR26.2; N.D.Ind. LR26.1; S.D.Ind. LR26.1; E.D.Ky. LR34.1; W.D.Ky. LR34.1; M.D.La. LR26.2; W.D.La. LR26.2; D.Md. LR104.6; D.Mass. LR34.1; E.D.Mich. LR26.1; D.Minn. LR26.2; W.D.Mo. LR26.2; D.Mont. LR200-5; D.Neb. LR34.1; D.Nev. LR34-1; D.N.H. LR26.1(h); D.N.J. LR34.1; D.N.Mex. LR26.1; E.D.N.Y. LR26.6; N.D.N.Y. LR26.1; S.D.N.Y. LR34.1; E.D.N.Car. LR23.02; N.D.Ohio LR26.1; S.D.Ohio LR26.1; N.D.Okla. LR26.1A; D.Or. LR34.2; D.R.I. LR13(b); D.S.Car. LR26.02; E.D.Tenn. LR34.1; M.D.Tenn. LR9(b); W.D.Tenn. LR26.1; S.D.Tex. LR5(c); D.Utah LR204-3; E.D.Va. LR26(c); E.D.Wash. LR34.1; W.D.Wash. LR34.1; N.D.W.Va. LR3.05; S.D.W.Va. LR3.05; E.D.Wis. LR7.02; D.Wyo. LR34.1.

Rules.

Lastly, two courts impose time limits within which responses to requests for production must be provided. These limits are inconsistent with Rule 34.

DISCUSSION

Rule 34 allows a party to serve on any other party a request for documents and things or for permission to enter land.[23] The Rule defines with some specificity these "documents and things," explains how the requesting party can use or manipulate these documents and things, and explains the purposes for permitting the requesting party to enter property.[24]

The Rule explains the general procedure for making such requests and responding to them. It states that any request for production describe "with reasonable particularity" the items to be produced and set forth the "time, place, and manner of making the inspection."[25] The Rule 26 timing provisions come into play here so that, in the absence of a written stipulation or court order, any request for production cannot be served until the parties have met and conferred pursuant to Rule 26(f).[26]

The party responding to the request must serve a written response "within 30 days after the service of the request."[27] For each item, the response must either state that the party gives permission to inspect or enter or that the party objects to the request.[28] The reason for any objection must be provided, and any portion of a request to which

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[23] Fed.R.Civ.P. 34(a).

[24] *Id.*

[25] *Id.* at (b).

[26] Fed.R.Civ.P. 26(d).

[27] Fed.R.Civ.P. 34(b).

[28] *Id.*

there is no objection must be permitted.[29] The actual documents may be provided for inspection if they are kept in the ordinary course or organized and labeled according to the request for production.[30]

At least thirty-two courts have local rules concerning the form of the requests for production.[31] The original Local Rules Project suggested that there be a Model Local Rule setting forth the form of discovery documents including requests for production of documents and things.[32] Most of these courts have adopted, in some form, this Model Local Rule.

The Model Local Rule was consistent with the Federal Rules of Civil Procedure, which contain general requirements as to form for interrogatories, requests for admission, and requests for the production of documents and things.[33] It governed only the form of discovery documents and sought to provide a more efficient system without affecting the substantive rights of the litigants. If interrogatories or requests and their respective answers, responses, or objections, are on the same document, the parties and the court can examine them more easily. Requiring that the interrogatories and responses be numbered sequentially prevents attorneys from assigning the same numbers to interrogatories or requests in different sets, which can lead to confusion, particularly at

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[29] *Id.*

[30] *Id.*

[31] M.D.Ala. LR26.3; E.D.Cal. LR34-250; N.D.Cal. LR34-1; D.Del. LR26.1; D.D.C. LR207(d); S.D.Ga. LR26.7; D.Haw. LR26.2; N.D.Ind. LR26.1; S.D.Ind. LR26.1; E.D.Ky. LR34.1; W.D.Ky. LR34.1; D.Md. LR104.6; D.Mass. LR34.1; E.D.Mich. LR26.1; D.Minn. LR26.2; W.D.Mo. LR26.2; D.Mont. LR200-5; D.Neb. LR34.1; D.N.H. LR26.1(h); D.N.Mex. LR26.1; N.D.N.Y. LR26.1; S.D.Ohio LR26.1; N.D.Okla. LR26.1A; D.Or. LR34.2; D.R.I. LR13(b); M.D.Tenn. LR9(b); W.D.Tenn. LR26.1; S.D.Tex. LR5(c); D.Utah LR204-3; N.D.W.Va. LR3.05; S.D.W.Va. LR3.05; E.D.Wis. LR7.02.

[32] *See* Report at Suggested Local Rules, p.68.

[33] *See generally* Fed.R.Civ.P. 33(a); 34(b); 36(a).

trial. A sequential numbering system also deters the use of "stock" requests that may be inappropriate in a particular case.

The first sentence of the suggested Rule required that the party propounding the requests leave a space before each request so that the responding party could insert an answer or objection. Seven courts have local rules that provide for this form.[34] The second sentence of the Model Local Rule required that the response or objection to a request for production quote the actual request directly before such response or objection. Thirty-two of the district courts have local rules requiring this form.[35] The last sentence of the Model Local Rule provided that the request for production be numbered sequentially. Eleven courts have this same requirement at present.[36]

Several courts have local rules that concern the form of the request for production and repeat existing law. One court has a local rule requiring that a certificate of service accompany any request for production.[37] This rule repeats Rule 5(d) of the Federal Rules of Civil Procedure, that papers be filed "together with a certificate of service."[38] Three courts have local rules reminding litigants that form requests not be

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[34] D.Haw. LR26.2; M.D.La. LR26.2; W.D.La. LR26.2; E.D.Mich. LR26.1; D.N.H. LR26.1(h); D.N.Mex. LR26.1; S.D.Ohio LR26.1.

[35] M.D.Ala. LR26.3; E.D.Cal. LR34-250; N.D.Cal. LR34-1; D.Del. LR26.1; D.D.C. LR207(d); S.D.Ga. LR26.7; D.Haw. LR26.2; N.D.Ind. LR26.1; S.D.Ind. LR26.1; E.D.Ky. LR34.1; W.D.Ky. LR34.1; D.Md. LR104.6; D.Mass. LR34.1; E.D.Mich. LR26.1; D.Minn. LR26.2; W.D.Mo. LR26.2; D.Mont. LR200-5; D.Neb. LR34.1; D.N.H. LR26.1(h); D.N.Mex. LR26.1; N.D.N.Y. LR26.1; S.D.Ohio LR26.1; N.D.Okla. LR26.1A; D.Or. LR34.2; D.R.I. LR13(b); M.D.Tenn. LR9(b); W.D.Tenn. LR26.1; S.D.Tex. LR5(c); D.Utah LR204-3; N.D.W.Va. LR3.05; S.D.W.Va. LR3.05; E.D.Wis. LR7.02..

[36] M.D.Ala. LR26.3; D.Del. LR26.1; D.Mass. LR34.1; E.D.Mich. LR26.1; D.N.H. LR26.1(h); D.N.Mex. LR26.1; E.D.N.Car. LR23.02; S.D.Ohio LR26.1; N.D.Okla. LR26.1A; D.R.I. LR13(b); D.Utah LR204-3.

[37] D.Neb. LR34.1.

[38] Fed.R.Civ.P. 5(d).

used since they may be irrelevant.[39] Rule 26 already provides for discovery of any matter which is not privileged and which is relevant to the subject matter of the action.[40] These local rules should be rescinded.

Three courts have local rules that set forth what should be included in a request for production. These rules repeat existing law. For example, one court has a local rule requiring that insurance information be provided at the outset.[41] This rule repeats the requirement in Rule 26(a)(1)(D).[42] That local rule also requires that the party provide "a computation of any category of damages claimed by it" and provide the documents "not privileged or protected from disclosure, on which such computation is based.[43] This directive appears to simply repeat the portion of Rule 26(a) that requires disclosure of the computation of damages, including the documents needed for such computation.[44] Two other courts have local rules that simply repeat the applicability of Rule 26(a)(1) and are, therefore, unnecessary.[45]

There are rules in some districts that discuss when requests for production can be served. These rules either repeat existing law or are inconsistent with it and, as such, should be rescinded. For example, three courts have local rules that state that the timing constraints set forth in Rule 26(d),[46] that discovery cannot occur until the parties have

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[39] E.D.N.Y. LR26.6; N.D.Ohio LR26.1; D.Wyo. LR34.1.

[40] Fed.R.Civ.P. 26(b).

[41] N.D.Ala. LR26.1.

[42] Fed.R.Civ.P. 26(a)(1)(D).

[43] N.D.Ala. LR26.1.

[44] Fed.R.Civ.P. 26(a)(1)(C).

[45] S.D.Ala. LR26.1; C.D.Cal. LR6.2.

[46] Fed.R.Civ.P. 26(d) ("Except in categories of proceedings exempted from initial disclosure, ... a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f).")

conferred pursuant to Rule 26(f), are simply not followed.[47] Rule 26(d) not longer permits a court to exempt cases from the discovery moratorium by local rule.[48] Another court has a local rule that forbids discovery until both parties have made an appearance.[49] This time constraint is also not sanctioned by the Federal Rules.[50] There are also rules in three district courts that repeat the time requirements of Rule 26 with respect to requests for production.[51]

There are seventeen district courts with local rules concerning objections that are made to requests for production. [52] All of these rules repeat existing law and should, therefore, be rescinded. Eight courts have local rules requiring that objections contain the reasons.[53] Rule 34 already has such a requirement.[54] Eight courts have local rules that require that the objections be specific.[55] Rule 34 also mandates that the objectionable item or category be specified.[56] Five courts have local rules that require that any claim of

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[47] S.D.Cal. LR34.1; D.Nev. LR34-1; S.D.N.Y. LR34.1.

[48] Fed.R.Civ.P. 26(d). *See also* Fed.R.Civ.P. 26(d) Note to 2000 Amendments: "The amendments remove the prior authority to exempt cases by local rule from the moratorium on discovery before the subdivision (f) conference, but the categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are excluded from subdivision (d). The parties may agree to disregard the moratorium where it applies, and the court may so order in a case, but "standing" orders altering the moratorium are not authorized."

[49] N.D.Ala. LR26.1(a).

[50] *See e.g.*, Fed.R.Civ.P. 26(a)(1)(C) and (d).

[51] S.D.Ala. LR26.1; E.D.Wash. LR34.1; D.Wyo. LR34.1.

[52] E.D.Cal. LR34-250; N.D.Cal. LR34-1; D.Del. LR26.1; N.D.Fla. LR26.2; S.D.Fla. LR26.1G; S.D.Ga. LR26.7; D.Haw. LR26.2; D.Md. LR104.6; D.Mass. LR34.1; D.Mont. LR200-5; N.D.Okla. LR26.1A; D.Or. LR34.2, LR34.3; D.R.I. LR13(b); E.D.Va. LR26(c); N.D.W.Va. LR3.05; S.D.W.Va. LR3.05; D.Wyo. LR34.1.

[53] E.D.Cal. LR34-250; N.D.Cal. LR34-1; D.Del. LR26.1; S.D.Ga. LR26.7; D.Haw. LR26.2; D.Md. LR104.6; D.Mont. LR200-5; D.Or. LR34.2.

[54] Fed.R.Civ.P. 34(b) (If objection is made, "the reasons for the objection shall be stated").

[55] N.D.Fla. LR26.2; S.D.Fla. LR26.1G; S.D.Ga. LR26.7; D.Mass. LR34.1; D.R.I. LR13(b); E.D.Va. LR26(c); N.D.W.Va. LR3.05; S.D.W.Va. LR3.05.

[56] Fed.R.Civ.P. 34(b).

privilege be clear.[57] This provision is already set forth in Rule 26.[58]

In addition, four courts have local rules that explain that a failure to object to a request for production is a waiver of any such objection.[59] Two of these courts[60] are in the Ninth Circuit where case law already supports this view: "It is well established that a failure to object to discovery requests within the time required constitutes a waiver of any objection." [61] This position has been voiced in other courts as well.[62] The rules in these two courts, then, repeat this view and seem unnecessary. The other two courts are both in the Fourth Circuit where the case law is not as well established.[63] These rules, then, may provide guidance in those particular districts.[64]

Two courts have local rules that impose a limit on the number of requests for production that can be served of either 10,[65] or 30.[66] There is no local rule option available to courts to limit the requests for production in Rule 34 or in Rule 26 of the Federal Rules of Civil Procedure.[67] In fact, Rule 34(a) intimates that unlimited documents and things can be requested. Subsection (a) indicates that the request for

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[57] D.Haw. LR26.2; D.Mass. LR34.1; D.N.J. LR34.1; N.D.Okla. LR26.1A; D.Wyo. LR34.1.

[58] *See* Fed.R.Civ.P. (b)(5).

[59] D.Mont. LR200-5; D.Or. LR34.3; N.D.W.Va. LR3.05; S.D.W.Va. LR3.05.

[60] D.Mont. LR200-5; D.Or. LR34.3.

[61] *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473, (9th Cir. 1992), *cert. dismissed sub nom. China Everbright Trading Co v. Timber Falling Consultants, Inc.*, 506 U.S. 948, (1992).

[62] *Marx v. Kelly, Hart & Hallman*, 929 F.2d 8, 12 (1st Cir. 1991); *Smith v. Conway Org., Inc.*, 154 F.R.D. 73, 76 (S.D.N.Y. 1994); *Dunlap v. Midcoast-Little Rock, Inc.*, 66 F.R.D. 29, 30 (E.D.Ark. 1995); *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540, 541-41 (10th Cir. 1984) *cert. dismissed*, 469 U.S. 1199 (1985); *Perry v. Golub*, 74 F.R.D. 360, 363 (N.D.Ala. 1976).

[63] *See Mason C. Day Excavating v. Lumbermans Mutual Casualty Co.*, 143 F.R.D. 601 (M.D.N.Car. 1992).

[64] N.D.W.Va. LR3.05; S.D.W.Va. LR3.05..

[65] M.D.Ga. LR34.

[66] D.Md. LR104.1.

production may be made:

> to produce and permit the party making the request ... to inspect and copy, *any* designated documents ... or ... *any* tangible things which constitute or contain materials within the scope of Rule 26(b)....[68]

Moreover, the Advisory Committee amended Rule 34 on several occasions, most recently in 1993, and did not add a numerical limit on the number of requests that could be made. It should be noted that the Advisory Committee has considered limiting the use of discovery devices in the past and has recently changed the Federal Rules to incorporate national limits on the number of depositions and interrogatories and on the length of depositions.[69] As the Committee Note to the Rule 26 2000 Amendments explain:

> These amendments restore national uniformity to disclosure practice. Uniformity is also restored to other aspects of discovery by deleting most of the provisions authorizing local rules that vary the number of permitted discovery events or the length of depositions. Local rule options are also deleted from Rules 26(d) and (f).[70]

These disclosure rules require a party to provide, in the absence of any discovery request, "a copy of ... all documents ... that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses...."[71] Given that the current Federal Rules favor national uniformity and that the Federal Rules anticipate a free exchange of discoverable documents without relying on discovery requests, a strong argument can be made that any local rule intending to limit the number of requests is inconsistent with these Federal Rules. These local rules, then, should be rescinded.

There are two courts that impose time limits within which responses to

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[67] *See* Fed.R.Civ.P. 34, 26.

[68] Fed.R.Civ.P. 34(a) [emphasis added].

[69] *See* Fed.R.Civ.P. 30, 31, 33.

[70] Fed.R.Civ.P. 26 Note to 2000 Amendments.

requests for production must be provided.[72] Both of these rules are inconsistent with the clear wording of Rule 34, permitting a party to respond "within 30 days after the service of the request."[73] To the extent these local rules refer to initial disclosures made pursuant to Rule 26, these are also inconsistent with the required time limits in that Rule: "These disclosures must be made at or within 14 days after the Rule 26(f) conference...."[74] These local rules should be rescinded.

Rule 35. Physical and Mental Examinations of Persons

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[71] Fed.R.Civ.P. 26(a)(1)(B).

[72] D.Nev. LR34-1 (defendant need not respond sooner than forty-five days after service); D.S.Car. LR26.02, 26.03, 26.04 (plaintiff must file response to "standard directives to produce" at time of filing the first pleading).

[73] Fed.R.Civ.P. 34(b).

[74] Fed.R.Civ.P. 26(a)(1).

Only five jurisdictions have local rules concerning the physical and mental examination of a person.[1] Two of the courts have local rules that are appropriate in discussing the obligation of the parties to agree on the details of such examinations.[2] Another court's rule provides for an impartial medical examination; this directive is appropriate as a local rule.[3] One of the jurisdictions has a local rule that sets forth procedures to be used in ordering the physical and mental examination of person.[4] Because this local rule is inconsistent with Rule 35 of the Federal Rules of Civil Procedure, it should be rescinded. The other court has a local rule that repeats Rule 35 and should, therefore, be rescinded.[5]

DISCUSSION

Rule 35 provides that, when the mental or physical condition of a party or someone under the party's legal control is "in controversy", the court may order an examination of that person.[6] That order is made "only on motion for good cause shown" with appropriate notice provided to the person being examined.[7] The notice must specify "the time, place, manner, conditions, and scope of the examination and the person" making the examination.[8]

Two courts have rules that place the burden on the parties to attempt to agree

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[1] D.Kan. LR35.1; N.D.Miss. LR35.1; S.D.Miss. LR35.1; W.D.Pa. LR35.1; W.D.Wash. LR35.

[2] N.D.Miss. LR35.1; S.D.Miss. LR35.1.

[3] W.D.Pa. LR35.1.

[4] D.Kan. LR35.1.

[5] W.D.Wash. LR35.

[6] Fed.R.Civ.P. 35(a).

[7] *Id.*

[8] *Id.*

to the time, place, manner, and scope of the examination.[9] If the parties cannot agree on these details, the motion must explain their efforts to do so.[10] These rules are appropriate supplements to Rule 35 in imposing an obligation on the parties to try to reach an accommodation. This obligation is similar to those imposed at other times in the discovery process.[11]

Another court has a local rule that sets forth the procedure used to appoint an impartial expert witness and the circumstances under which that expert may testify.[12] This particular rule recognizes the court's inherent authority to appoint such an expert and seems to be an appropriate supplement to Rule 706 of the Federal Rules of Evidence.[13]

One court has a local rule entitled: "Trial Preparation After Close of Discovery" that simply acknowledges that "[p]ursuant to Fed.R.Civ.P. 35 the physical and mental examination of a party may be ordered at any time prior to trial."[14] This rule seems poorly drafted. It is true that the Federal Rule does not forbid an order for an examination after the close of discovery so the rule, read only in conjunction with its title, seems accurate. The rule standing alone, however, is inconsistent with the Federal Rules since Rule 26 indicates that, in at least most cases, there can be no discovery until after

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[9] N.D.Miss. LR35.1; S.D.Miss. LR35.1.

[10] *Id.*

[11] *See e.g.*, Fed.R.Civ.P. 26(f) (discovery conference); 29 (stipulations regarding discovery); 30(b) (stipulations regarding means of taking depositions); 33(a) (stipulations regarding number of interrogatories); 34(b) (agreement concerning inspection of documents and things and entry upon land); 36(a) (stipulations regarding timing of service of requests for admission).

[12] W.D.Pa. LR35.1.

[13] *See* Fed.R.Evid. 706; *Gallagher v. Latrobe Brewing v Dill Construction Co.*, 31 F.R.D. 36 (W.D.Pa. 1962).

[14] D.Kan. LR35.1.

the Rule 26(f) discovery conference is held.[15] The rule is inaccurate, then, in stating that an examination can be ordered at any time.

Another court has a local rule that simply repeats Federal Rule 35.[16] This rule is unnecessary and should be rescinded.

Rule 36. Requests for Admission

[15] Fed.R.Civ.P. 26(d).

[16] W.D.Wash. LR35.

Sixty-two courts have local rules dealing with requests for admission.[1] Seventeen courts have local rules concerning when, in the litigation process, requests for admission may be served;[2] all of these rules are either inconsistent with or repeat the Federal Rules on discovery.

Forty-three courts have local rules that delineate the form of requests for admission.[3] The Local Rules Project originally suggested the courts consider a Model Local Rule concerning the form of discovery documents, including requests for admission.[4] Most of the existing local rules adopt at least some of the Model Local Rule. In addition, five courts have local rules concerning the form of requests for admission that either repeat existing law or are inconsistent with it.

Fourteen jurisdictions have local rules that define the content of the responses

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[1] M.D.Ala. LR26.2; N.D.Ala. LR26.1(c); S.D.Ala. LR26.1(c); D.Alaska LR8(D); D.Ariz. LR2.5(a); E.D.Ark. LR33.1; W.D.Ark. LR33.1; C.D.Cal. LR8.2; E.D.Cal. LR36-250; N.D.Cal. LR36-1; S.D.Cal. LR36.1; D.Del. LR26.1; D.D.C. LR207(d); N.D.Fla. LR26.2; M.D.Ga. LR36; S.D.Ga. LR26.7; D.Haw. LR26.1(c); S.D.Ind. LR26.1; E.D.Ky. LR36.1; W.D.Ky. LR36.1; E.D.La. LR36.1; M.D.La. LR36.1; W.D.La. LR36.1; D.Md. LR104; D.Mass. LR36.1; E.D.Mich. LR26.1; D.Minn. LR26.2; N.D.Miss. LR26.1; S.D.Miss. LR26.1; W.D.Mo. LR26.2; D.Neb. LR36.1; D.Nev. LR36-1; D.N.H. LR26.1; D.N.J. LR36.1; D.N.Mex. LR26.1; E.D.N.Y. LR26.6; N.D.N.Y. LR26.1; S.D.N.Y. LR36.1; W.D.N.Y. LR26; E.D.N.Car. LR23.02; M.D.N.Car. LR26.1; D.N.Mar.I LR26.9; N.D.Ohio LR36.1; S.D.Ohio LR36.1; N.D.Okla. LR26.1; W.D.Okla. LR36.1; D.Or. LR36.2; M.D.Pa. LR36.1; D.R.I. LR13(b); E.D.Tenn. LR26.1; M.D.Tenn. LR9(b); W.D.Tenn. LR26.1; S.D.Tex. LR5.C; W.D.Tex. LR36; D.Utah LR204-3; E.D.Va. LR26(c); E.D.Wash. LR36.1; W.D.Wash. LR36; N.D.W.Va. LR3.01; S.D.W.Va. LR3.01; E.D.Wis. LR7.02; D.Wyo. LR36.1.

[2] N.D.Ala. LR26.1(c); M.D.Ala. LR26.2; S.D.Ala. LR26.1(c); E.D.Ark. LR33.1; W.D.Ark. LR33.1; C.D.Cal. LR6.7; S.D.Cal. LR36.1; D.Haw. LR26.1(c); D.Minn. LR26.1; W.D.Mo. LR26.1; D.Nev. LR36-1; D.N.H. LR26.1; D.N.Mex. LR26.1; S.D.N.Y. LR36.1; W.D.N.Y. LR26; E.D.Tenn. LR26.1; D.Wyo. LR36.1.

3 D.Alaska LR8(D); D.Ariz. LR2.5(a); E.D.Ark. LR33.1; W.D.Ark. LR33.1; C.D.Cal. LR8.2; E.D.Cal. LR36-250; N.D.Cal. LR36-1; S.D.Cal. LR36.1; D.Del. LR26.1; D.D.C. LR207(d); S.D.Ga. LR26.7; S.D.Ind. LR26.1; E.D.Ky. LR36.1; W.D.Ky. LR36.1; E.D.La. LR36.1; M.D.La. LR36.1; W.D.La. LR36.1; D.Md. LR104; D.Mass. LR36.1; E.D.Mich. LR26.1; D.Minn. LR26.2; W.D.Mo. LR26.2; D.Neb. LR36.1; D.N.H. LR26.1; D.N.J. LR36.1; D.N.Mex. LR26.1; E.D.N.Y. LR26.6; N.D.N.Y. LR26.1; E.D.N.Car. LR23.02; M.D.N.Car. LR26.1; D.N.Mar.I LR26.9; N.D.Ohio LR36.1; N.D.Okla. LR26.1; M.D.Pa. LR36.1; D.R.I. LR13(b); M.D.Tenn. LR9(b); W.D.Tenn. LR26.1; S.D.Tex. LR5.C; W.D.Tex. LR36; D.Utah LR204-3; N.D.W.Va. LR3.01; S.D.W.Va. LR3.01E.D.Wis. LR7.02.

to requests for admission; all of these rules are either inconsistent with existing law or repeat it.[5]

Lastly, there are local rules in twelve courts that limit the number of requests for admission that can be served.[6] Although such local rulemaking may be consistent with existing law, the Local Rules Project recommends that the Advisory Committee on Civil Rules consider forbidding such limits since they thwart the intent of the discovery process, generally, and they prevent national uniformity in this aspect of discovery.

DISCUSSION

Rule 36 permits a party to serve on another party "a written request for the admission ... of the truth of any matters within the scope of Rule 26(b)(1).[7] The responding party has thirty days within which to answer or object to each matter in the request for admission.[8] Upon receiving the response, the party requesting the admissions may move "to determine the sufficiency of the answers or objections."[9] Any admission is applicable only for the pending action and is considered "conclusively established unless the court on motion permits withdrawal or amendment of the admission."[10] There is no limit in the rule on the number of requests that can be served.

Seventeen courts have local rules concerning when, in the litigation process,

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4 Report at Suggested Local Rules p.68.

5 E.D.Ark. LR33.1; W.D.Ark. LR33.1; E.D.Cal. LR36-250; N.D.Cal. LR36-1; S.D.Ga. LR26.7; D.Mass. LR36.1; D.N.J. LR36.1; D.Or. LR36.2; M.D.Pa. LR36.2; D.R.I. LR13(b); E.D.Va. LR26(c); E.D.Wash. LR36.1.

6 S.D.Cal. LR36.1; N.D.Fla. LR26.2; M.D.Ga. LR36; D.Md. LR104; N.D.Ohio LR36.1; S.D.Ohio LR36.1; W.D.Okla. LR36.1; M.D.Pa. LR36.1; W.D.Tex. LR36; E.D.Wash. LR36.1; N.D.W.Va. LR3.01; S.D.W.Va. LR3.01.

7 Fed.R.Civ.P. 36(a).

8 *Id.*

9 *Id.*

requests for admission may be served.[11] All of these rules are either inconsistent with or repeat the Federal Rules on discovery. Seven courts have local rules that are inconsistent with existing law. Four courts have local rules state that a party is not required to wait until the Rule 26(f) conference to serve requests for admission.[12] These local rules are inconsistent with Rule 26(d) which states that, unless "exempted from initial disclosure ... or when authorized under these rules or by order or agreement of the parties, a party may not seek discovery from any source before the parties have conferred as required by Rules 26(f)."[13] Waiting until this conference before serving discovery is sensible given that one of the purposes of this conference is to develop a proposed discovery plan.[14] Allowing the parties to begin the discovery process in advance of the conference defeats at least in part the usefulness of the conference. The Committee Note to the 2000 Amendments to Rule 26 recognize that local rulemaking authority in this area is being removed: "The amendments remove the prior authority to exempt cases by local rule from the moratorium on discovery before the subdivision (f) conference...."[15]

Another court has a rule stating that discovery cannot occur until the self-executing discovery is complete.[16] This rule is also inconsistent with the current time sequences set forth in Rule 26: "These disclosures [initial, self-executing disclosures]

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[10] *Id.* at (b).

[11] N.D.Ala. LR26.1(c); M.D.Ala. LR26.2; S.D.Ala. LR26.1(c); E.D.Ark. LR33.1; W.D.Ark. LR33.1; C.D.Cal. LR6.7; S.D.Cal. LR36.1; D.Haw. LR26.1(c); D.Minn. LR26.1; W.D.Mo. LR26.1; D.Nev. LR36-1; D.N.H. LR26.1; D.N.Mex. LR26.1; S.D.N.Y. LR36.1; W.D.N.Y. LR26; E.D.Tenn. LR26.1; D.Wyo. LR36.1.

[12] S.D.Cal. LR36.1; D.Nev. LR36-1; S.D.N.Y. LR36.1; W.D.N.Y. LR26.

[13] Fed.R.Civ.P. 26(d).

[14] *See* Fed.R.Civ.P. 26(f).

[15] Fed.R.Civ.P. 26 Note to 2000 Amendments.

[16] D.Wyo. LR36.1.

must be made at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order...."[17] Another rule requires that no request for admission be served until after a scheduling order is entered pursuant to Rule 16(b).[18] This rule is also contrary to the timing sequence of discovery explained in the Federal Rules. Rule 16(b) anticipates that the court will enter a scheduling order "after receiving the report from the parties under Rule 26(f)...."[19] That scheduling order will, among other things, set out time limits for completing discovery, not starting discovery, and define the extent of discovery that will be permitted.[20] The Rule 26(f) conference is the crucial event in determining the start of discovery, not the subsequent Rule 16(b) scheduling order.

Two other courts have local rules that limit discovery based on times that run from the service of pleadings rather than from the Rule 26(f) conference.[21] One of the rules indicates that there can be no discovery of the defendant until twenty days after service of the complaint on that defendant.[22] Again, this rule is inconsistent with the Rule 26 timing of discovery.[23] The other rule states that the defendant need not answer a request for admission sooner than forty-five days after service of the summons.[24] In 1970, Rule 36 provided this identical time constraint.[25] In 1993, however, the language

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[17] Fed.R.Civ.P. 26(a)(1).

[18] M.D.Ala. LR26.2.

[19] Fed.R.Civ.P. 16(b).

[20] *Id.*

[21] C.D.Cal. LR6.7; D.Nev. LR36-1.

[22] C.D.Cal. LR6.7.

[23] *See* Fed.R.Civ.P. 26.

[24] D.Nev. LR36-1.

[25] *See* Fed.R.Civ.P. 36(a) (1970).

was deleted "to reflect the change made by Rule 26(d), preventing a party from seeking formal discovery until after the meeting of the parties required by Rule 26(f)."[26] This local rule is also inconsistent with the new Rule 26(f).

Ten courts have local rules that address the timing issue and that repeat portions of various Federal Rules.[27] Eight courts have local rules that repeat Rule 26(d) by stating that requests for admission must not be served until after the Rule 26(f) discovery conference,[28] unless either ordered by the court[29] or unless agreed upon by the parties in writing.[30] Two other courts have local rules that merely highlight that a party must pay attention to the time limits in Rule 36.[31] All of these rules are unnecessary and should be rescinded.

Forty-three courts have local rules that discuss the required form of requests for admission.[32] Rules in all of these jurisdictions but one are appropriate as local rules. The first Local Rules Project Report suggested that those courts considering regulation in

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[26] Fed.R.Civ.P. 26 Note to 1993 Amendments.

[27] N.D.Ala. LR26.1(c); S.D.Ala. LR26.1(c); E.D.Ark. LR33.1; W.D.Ark. LR33.1; D.Haw. LR26.1(c); D.Minn. LR26.1; W.D.Mo. LR26.1; D.N.H. LR26.1; D.N.Mex. LR26.1; E.D.Tenn. LR26.1

[28] N.D.Ala. LR26.1(c); S.D.Ala. LR26.1(c); D.Haw. LR26.1(c); D.Minn. LR26.1; W.D.Mo. LR26.1; D.N.H. LR26.1; D.N.Mex. LR26.1; E.D.Tenn. LR26.1.

[29] N.D.Ala. LR26.1(c); S.D.Ala. LR26.1(c); D.Haw. LR26.1(c); D.Minn. LR26.1.

[30] N.D.Ala. LR26.1(c); S.D.Ala. LR26.1(c).

[31] E.D.Ark. LR33.1; W.D.Ark. LR33.1.

[32] D.Alaska LR8(D); D.Ariz. LR2.5(a); E.D.Ark. LR33.1; W.D.Ark. LR33.1; C.D.Cal. LR8.2; E.D.Cal. LR36-250; N.D.Cal. LR36-1; S.D.Cal. LR36.1; D.Del. LR26.1; D.D.C. LR207(d); S.D.Ga. LR26.7; S.D.Ind. LR26.1; E.D.Ky. LR36.1; W.D.Ky. LR36.1; E.D.La. LR36.1; M.D.La. LR36.1; W.D.La. LR36.1; D.Md. LR104; D.Mass. LR36.1; E.D.Mich. LR26.1; D.Minn. LR26.2; W.D.Mo. LR26.2; D.Neb. LR36.1; D.N.H. LR26.1; D.N.J. LR36.1; D.N.Mex. LR26.1; E.D.N.Y. LR26.6; N.D.N.Y. LR26.1; E.D.N.Car. LR23.02; M.D.N.Car. LR26.1; D.N.Mar.I LR26.9; N.D.Ohio LR36.1; N.D.Okla. LR26.1; M.D.Pa. LR36.1; D.R.I. LR13(b); M.D.Tenn. LR9(b); W.D.Tenn. LR26.1; S.D.Tex. LR5.C; W.D.Tex. LR36; D.Utah LR204-3; N.D.W.Va. LR3.01; S.D.W.Va. LR3.01E.D.Wis. LR7.02.

this area adopt the same local rule so that there would be uniformity among the courts.[33] The Model Local Rule regulated the form of many discovery documents, not just requests for admission. Many of the courts have already adopted, at least in part, this Model Local Rule. For example, the Model Local Rule required that the party serving requests for admission leave a space below each request where the party could answer or object and required the answering party to either respond in that space or repeat the request in full just before responding. Thirty-seven courts require that an answer to a request for admission quote the entire admission just above the answer.[34] Another six courts have local rules requiring that, when serving requests for admission, the party leave a space where the responding party can answer.[35] The last sentence of the Model Local Rule requires that the requests be numbered sequentially. Thirteen courts already have this requirement.[36]

These rules are consistent with the Federal Rules of Civil Procedure, which contain general requirements as to form for interrogatories, requests for admission, and requests for the production of documents and things.[37] They govern the form of discovery documents and seek to provide a more efficient system without affecting the

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[33] *See* Report at Suggested Local Rules p.68.

[34] D.Alaska LR8(D); D.Ariz. LR2.5(a); E.D.Ark. LR33.1; W.D.Ark. LR33.1; E.D.Cal. LR36-250; N.D.Cal. LR36-1; S.D.Cal. LR36.1; D.Del. LR26.1; D.D.C. LR207(d); S.D.Ga. LR26.7; S.D.Ind. LR26.1; E.D.Ky. LR36.1; W.D.Ky. LR36.1; E.D.La. LR36.1; M.D.La. LR36.1; W.D.La. LR36.1; D.Mass. LR36.1; E.D.Mich. LR26.1; D.Minn. LR26.2; W.D.Mo. LR26.2; D.Neb. LR36.1; D.N.H. LR26.1; D.N.J. LR36.1; D.N.Mex. LR26.1; N.D.N.Y. LR26.1; D.N.Mar.I LR26.9; N.D.Ohio LR36.1; N.D.Okla. LR26.1; M.D.Pa. LR36.1; D.R.I. LR13(b); M.D.Tenn. LR9(b); W.D.Tenn. LR26.1; S.D.Tex. LR5.C; D.Utah LR204-3; N.D.W.Va. LR3.01; S.D.W.Va. LR3.01E.D.Wis. LR7.02.

[35] D.Ariz. LR2.5(a); E.D.Mich. LR26.1; D.N.H. LR26.1; D.N.J. LR36.1; D.N.Mex. LR26.1; N.D.Ohio LR36.1.

[36] E.D.Ark. LR33.1; W.D.Ark. LR33.1; C.D.Cal. LR8.2; N.D.Cal. LR36-1; S.D.Ind. LR26.1; E.D.Mich. LR26.1; D.N.H. LR26.1; D.N.Mex. LR26.1; N.D.N.Y. LR26.1; E.D.N.Car. LR23.02; M.D.N.Car. LR26.1; N.D.Okla. LR26.1; D.Utah LR204-3.

substantive rights of the litigants. If interrogatories or requests and their respective answers, responses, or objections, are on the same document, the parties and the court can examine them more easily. Requiring that the interrogatories and responses be numbered sequentially prevents attorneys from assigning the same numbers to interrogatories or requests in different sets, which can lead to confusion, particularly at trial. A sequential numbering system also deters the use of "stock" requests that may be inappropriate in a particular case.

There are also rules that discuss the form of the requests that either repeat existing law or are inconsistent with it. Two courts have local rules that repeat portions of two Federal Rules by requiring that requests for admission be accompanied by a certificate of service,[38] or by requiring that form requests be relevant.[39] Another three courts have local rules that indicate that requests for admission cannot be combined with any other discovery.[40] These directives are inconsistent with Rule 26(d) that permits discovery in any order and while other discovery is taking place.[41] All of these directives should be rescinded.

Fourteen courts have local rules concerning the content of any responses to requests for admission.[42] Rules in eleven courts require that any objections be specific

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[37] *See generally* Fed.R.Civ.P. 33(a); 34(b); 36(a).

[38] D.Neb. LR36.1; *see* Fed.R.Civ.P. 5(d).

[39] E.D.N.Y. LR26.2; see Fed.R.Civ.P. 26(b)(1).

[40] E.D.Ark. LR33.1; W.D.Ark. LR33.1; E.D.Wash. LR36.1.

[41] Fed.R.Civ.P. 26(d).

[42] E.D.Ark. LR33.1; W.D.Ark. LR33.1; E.D.Cal. LR36-250; N.D.Cal. LR36-1; S.D.Ga. LR26.7; D.Mass. LR36.1; D.N.J. LR36.1; D.Or. LR36.2; M.D.Pa. LR36.2; D.R.I. LR13(b); E.D.Va. LR26(c); E.D.Wash. LR36.1.

and contain the reasons.[43] These rules repeat Rule 36(a) that reads, in relevant part:

> If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.[44]

Another court requires in its local rule that, when a privilege is claimed, the nature of that privilege be identified.[45] This rule repeats, generally, both Rules 26(b) and 36 of the Federal Rules of Civil Procedure.[46] These rules are unnecessary.

Rules in three courts require that objections to requests for admission be made earlier than responses to the requests.[47] These rules are inconsistent with Rule 36 that sets the same time limit for the parties to respond either by admitting, denying, or objecting.[48] These rules should be rescinded.

Twelve jurisdictions have local rules that limit the number of requests for admission a party can serve.[49] These limits vary from a low of ten[50] to a high of fifty[51] with the largest number of jurisdictions, five, imposing a limit of thirty.[52] Three of these

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[43] E.D.Ark. LR33.1; W.D.Ark. LR33.1; E.D.Cal. LR36-250; N.D.Cal. LR36-1; S.D.Ga. LR26.7; D.Mass. LR36.1; D.Or. LR36.2; M.D.Pa. LR36.2; D.R.I. LR13(b); E.D.Va. LR26(c).

[44] Fed.R.Civ.P. 36(a).

[45] D.N.J. LR36.1.

[46] Fed.R.Civ.P. 26(b), 36.

[47] E.D.Va. LR26(c).

[48] Fed.R.Civ.P. 36(a).

[49] S.D.Cal. LR36.1; N.D.Fla. LR26.2; M.D.Ga. LR36; D.Md. LR104; N.D.Ohio LR36.1; S.D.Ohio LR36.1; W.D.Okla. LR36.1; M.D.Pa. LR36.1; W.D.Tex. LR36; E.D.Wash. LR36.1; N.D.W.Va. LR3.01; S.D.W.Va. LR3.01.

[50] M.D.Ga. LR36.

[51] N.D.Fla. LR26.2.

[52] S.D.Cal. LR36.1; W.D.Okla. LR36.1; M.D.Pa. LR36.1; N.D.W.Va. LR3.01; S.D.W.Va. LR3.01; *see also* D.Md. LR104 (limit of thirty); W.D.Tex. LR36 (limit of thirty); S.D.Ohio LR36.1 (limit of thirty); E.D.Wash. LR36.1 (limit of 15).

courts also allow a different number of requests for good cause.[53] One court limits the number of requests based on the kind of case.[54] Because these local rules at least arguably conflict with the spirit and intent of the Federal Rules of Civil Procedure, the Local Rules Project recommends they be rescinded. The Local Rules Project suggests that the Advisory Committee on Civil Rules consider an amendment to Rule 36 of the Federal Rules of Civil Procedure forbidding a limitation on the number of requests for admission that may be made.

The purpose of Rule 36, as expressed by the Advisory Committee, is to simplify litigation by narrowing the issues, when possible, and facilitating proof with respect to issues that cannot be eliminated.[55] The 1970 Amendments furthered these objectives by resolving disputes about the scope of the requests in favor of a broader purpose. The amended rule specifically allows requests to encompass opinions of fact and the application of law to fact, in addition to merely "matters of fact."[56] These amendments also provide that any admissions have a conclusively binding effect for the purposes of the particular action.[57]

In the recent amendments to the Federal Rules on discovery, national limits on the numbers of depositions and interrogatories were established as well as a new national limit on the length of depositions.[58] The earlier version of Rule 26(b)(2) allowed the courts to establish different presumptive limits on the number of depositions and

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[53] S.D.Cal. LR36.1; N.D.Fla. LR26.2; M.D.Ga. LR36.

[54] N.D.Ohio LR36.1.

[55] Fed.R.Civ.P. 36 Note to 1970 Amendments.

[56] *Id.*

[57] *Id.*

[58] *See* Fed.R.Civ.P. 26 Note to 2000 Amendments.

interrogatories by local rule.[59] This rulemaking authority was taken away by the 2000 amendments:

> There is no reason to believe that unique circumstances justify varying these nationally applicable presumptive limits in certain districts. The limits can be modified by court order or agreement in an individual action, but "standing" orders imposing different presumptive limits are not authorized.[60]

With respect, specifically, to requests for admission, the Note continues:

> Because there is no national rule limiting the number of Rule 36 requests for admissions, the rule continues to authorize local rules that impose numerical limits on them.[61]

Although this statement reflects a clear willingness to allow local rules limiting the number of requests for admission, the Local Rules Project recommends that the Advisory Committee on Civil Rules specifically forbid limits on the number of requests for admission by local rule since such regulation is contrary to the intent of the Federal Rules on discovery.

Interrogatories and depositions are quite different from requests for admission and the reasons for limiting requests for admission are not as compelling as they may be for these other forms of discovery. In the first instance, requests for admission are not really discovery devices at all. They are different from discovery in that they presuppose known facts and seek only a concession from the responding party as to the truth of those facts.[62] As one commentator explains:

> Requests are not useful tools for discovering the unknown. They are best used to establish the undisputed, relieving the parties of the need

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[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] Wright & Miller, *Federal Practice and Procedure*, Civil §2253.

> to prove such matters and shortening the trial.[63]

Interrogatories and depositions, on the other hand, can seek information about material that is not yet known by inquiring of a party or, sometimes, of other persons. The purpose of discovery, as stated by the Advisory Committee in 1946 is:

> to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case....[64]

Although there is potential for misuse of requests for admission, abuses cannot be determined by the number of requests submitted, but from the content of those requests.[65] Whether limitations on the number of requests for admission exist or not, the court retains its ability to sanction litigants if necessary.[66] The Committee Note recognizes the power of the district court to curb such abuses:

> Requests for admission involving the application of law to fact may create disputes between the parties which are best resolved in the presence of the judge after much or all of the other discovery has been completed. Power is therefore expressly conferred upon the court to defer decision until a pretrial conference is held or until a designated time prior to trial. On the other hand, the court should not automatically defer decision; in many instances, the importance of the admission lies in enabling the requesting party to avoid the burdensome accumulation of proof prior to the pretrial conference....
>
> On the other hand, requests to admit may be so voluminous and so framed that the answering party finds the task of identifying what is in dispute and what is not unduly burdensome. If so, the responding party may obtain a protective order under Rule 26(c).[67]

Because there are significant advantages to narrowing the issues for trial

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[63] Epstein, *Rule 36: In Praise of Requests to Admit*, 7 Litigation 30 (Spring, 1981).

[64] Fed.R.Civ.P. 26 Note to 1946 Amendments.

[65] *Baldwin v. Hartford Accident and Indemnity Co.*, 15 F.R.D. 84 (D.Neb. 1953).

[66] *Misco Inc. v. U.S. Steel Corp.*, 784 F.2d 198 (6th Cir. 1986), *Baldwin, supra.*

[67] Fed.R.Civ.P. 36 Note to 1970 Amendments.

through the use of requests for admission and because there are mechanisms to curb potential abuses, short of limiting the actual number of requests in all cases, the Local Rules Project suggests that the Advisory Committee consider forbidding local rule limits on the number of requests.

VI. Trials

Rule 38. Jury Trial of Right

Thirty-two jurisdictions have local rules governing civil jury demand.[1] The Local Rules Project originally recommended that there be a Model Local Rule requiring that any party who makes a jury demand on a pleading, as allowed by Rule 38(b), place that demand immediately below the title of the pleading in addition to, or instead of, any other indorsement on the pleading. Most of the courts have adopted some variation of this rule already. In addition five district courts have local rules concerning jury demand that are duplicative of Rule 38 of the Federal Rules of Civil Procedure and should be rescinded.

DISCUSSION

Rule 38(b) sets forth the procedure for making a demand for a jury trial:

> Any party ma demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d). Such demand may be

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[1] M.D.Ala. LR38.1; C.D.Cal. LR3.4.10; E.D.Cal. LR38-201; S.D.Cal. LR38.1; D.Del. LR38.1; D.Idaho LR38.1; C.D.Ill. LR38.1; S.D.Ill. LR38.1; S.D.Ind. LR38.1; E.D.La. LR38.1; M.D.La. LR38.1; W.D.La. LR38.1; D.Me. LR38; D.Minn. LR38.1; N.D.Miss. LR38.1; S.D.Miss. LR38.1; E.D.Mo. LR38-2.04; W.D.Mo. LR38.1; D.Neb. LR38.1; D.Nev. LR38-1; D.N.H. LR38.1; D.N.J. LR38.1; N.D.N.Y. LR38.1; W.D.N.Y. LR38; N.D.Ohio LR38.1; S.D.Ohio LR38.1; E.D.Okla. LR38.1A; N.D.Okla. LR38.1A; D.Or. LR38.1; E.D.Tex. LRCV-38(a); D.V.I. LR38.1; E.D.Va. LR38; E.D.Wash. LR38.1; W.D.Wash. LR38(b).

indorsed upon a pleading of the party.[2]

Rule 38 is silent about the physical placement of a jury demand on a pleading. Courts have, however, determined what is a sufficient demand under this subsection. For example, the Court of Appeals for the Second Circuit has held that an indorsement on the front of the last page of the defendants' answer is sufficient under Rule 38(b).[3] The court explained that, although the better practice may be to place the demand on the front of the pleading, the placement on the last page was consistent with Rule 38:

> The Rule does not state that the demand, if made on the pleading, must be made on the back thereof as the District Court found. While the etymology of the word "indorse" suggests a writing on the back, the modern meaning of the word is broad enough to encompass a writing on the face of the document as well. [Citation omitted.] Indeed, the recommended practice is to write the demand on the first page of the pleading. [Citations omitted.] While defendants' demand, made on the last page of their answer, was not in the preferred style, and its obscure placement perhaps caused the clerk of the court to overlook it, we nonetheless conclude that it complied with Rule 38(b).[4]

In fact, it has been recognized that, even though "endorsement of a demand for jury trial on the pleading would seem to be better practice," a demand in the body of the answer constitutes a proper demand.[5]

In determining the exercise of a waiver of the right to a jury trial, "[t]he service of a jury demand on the other parties in a case is central to the operation of Rule

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[2] Fed.R.Civ.P. 38(b).

[3] *Gargiulo v. Delsole*, 769 F.2d 7 (2d Cir. 1985).

[4] *Id.* at 78-79. *See also Rosen v. Dick*, 639 F.2d 82 (2d Cir. 1980), *reh'g denied* Feb. 10, 1981; *Rutledge v. Electric Hose and Rubber Company*, 511 F.2d 668, 674 (9th Cir. 1975) *corrected* March 3, 1975.

[5] *Allstate Insurance Company v. Cross*, 2 F.R.D. 120 (E.D.Pa. 1941). *Cf. Whitman Electric Inc. v. Local 363, International Brotherhood of Electrical Workers, AFL-CIO*, 398 F.Supp. 1218 (S.D.N.Y. 1974) (*dictum*).

38.[6] A notation, therefore, on the United States District Court civil cover sheet that a jury trial was demanded was insufficient in spite of the fact that the clerk's office was aware of the purported demand, because no demand was served on the defendants:

> The mere notation on the Cover Sheet and in the docket cannot substitute for service of notice upon the Defendants as required by the rule.[7]

Rule 38 is silent concerning the placement of the demand. There is case law, however, discussing whether a party who fails to comply with a technical requirement as to placement of a demand in a local rule waives the right to a jury trial, even though that party made a demand in a different form.[8] The Court of Appeals for the Eighth Circuit, for example, overturned a district court decision that the plaintiff had waived his right to a jury trial by failing to comply with a local rule of the Eastern District of Arkansas, since the plaintiff had complied with Rule 38(b) and since the local rule at issue was only suggestive:

> The quoted language recites no legal requirement applicable to jury trial demands and is suggestive only. The failure to comply with such a "suggestion" does not constitute waiver of a right to jury trial when one has been demanded in accordance with Federal Rule of Civil Procedure 38(b).[9]

In another case involving a local rule, *Pradier v. Elespuru*, the Court of Appeals for the Ninth Circuit conceded that the local rule of the District of Oregon was more than just

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[6] *Rosen v. Dick*, *supra*, at 89.

[7] *Biesencamp v. Atlantic Richfield Company*, 70 F.R.D. 365, 366 (E.D.Pa. 1976). *See also Cochran v. Birkel,* 651 F2d 1219 (6th Cir. 1981) *cert denied* 454 U.S. 1152, 102 S.Ct. 1020, 71 L.Ed.2 307 (1982); *Omawale v. WBZ*, 610 F.2d 20 (1st Cir. 1979); *Houston North Hospital Properties v. Telco Leasing, Inc.* 688 F.2d 408 (5th Cir. 1982) (words "Jury Requested" on docket cover sheet insufficient); *Early v. Bankers Life & Casualty Co* , 853 F. Supp. 268 (N.D.Ill. 1994).

[8] *See, e.g., Drone v. Hutto*, 565 F.2d 543 (8th Cir. 1977); *Pradier v. Elespuru*, 641 F.2d 808 (9th Cir. 1981).

[9] *Drone*, *supra*, at 544.

suggestive since it said that, when the demand is made on a pleading pursuant to Rule 38(b), the words "Demand for Jury Trial" or their equivalent were to be placed in the title of the pleading.[10] The court, however, held that such a notation did "not effect the substance of the demand itself" so that the failure to make such a notation was only a "minor deviation from the form required by the local rules."[11] The court explained:

> [T]he failure to fulfill an additional requirement of a local rule to place a notation to that effect in the title cannot constitute a waiver of a trial by jury. Because the right to a jury trial is a fundamental right guaranteed to our citizenry by the Constitution, courts should indulge every presumption against waiver.[12]

In 1975, however, the Court of Appeals for the Ninth Circuit allowed a waiver to stand upon a showing that the demanding party failed to comply with a local rule in *Rutledge v. Electric Hose and Rubber Company*.[13] In *Rutledge*, the court noted that Rule 38(b) used the phrase "indorsed upon a pleading" but was silent "as to the form and substance of the indorsement" so that the local rule which "merely refine[d] or prescribe[d] the form and substance of the indorsement" was reasonable and the district court was correct in insisting on compliance with the local rule.[14] The court held that the local rule did not conflict with Rule 38 and did not "impose additional basic procedural requirements beyond the local rule making power."[15] The Rutledge opinion seems grounded on a belief that the district court can alter the intent of the jury demand requirement:

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[10] *Pradier, supra*, at 810-811.

[11] *Id.* at 811.

[12] *Id. and cases cited therein.*

[13] 511 F.2d 668 (9th Cir. 1975).

[14] *Id.* at 674.

[15] *Id. citing Colgrove v. Battin*, 413 U.S. 149, 93 S.Ct. 2448, 37 L.Ed.2d 522 (1973).

> [T]he demand for jury trial on the face of the pleading is to alert the clerk in the docket process, and the signed statement at the end is to constitute the affirmative action required by Rule 38.[16]

Yet, it must be stressed that the Supreme Court, as well as other inferior courts, have maintained that, because of the constitutional implications inherent in Rule 38, a court must "indulge every reasonable presumption against waiver"[17] and should "not presume acquiescence in the loss of fundamental rights."[18] Further, the decision in *Rutledge* has been criticized but not overruled by the Court of Appeals for the Ninth Circuit which noted:

> serious concern with the alternate holding in the *Rutledge* majority opinion wherein it was stated that a failure to comply with Local Rule 13 constituted a waiver of a jury trial.[19]

The Court of Appeals for the Seventh Circuit has also recently rejected the Rutledge reasoning:

> [W]e chose to adopt the reasoning in [*Pradier*] ... because there was a proper jury demand under Rule 38(b) which Local Rule 5(f) could not invalidate, and ... because the right to a jury trial is 'fundamental'."[20]

Of the thirty-two jurisdictions that now have local rules governing civil jury demands, twenty-nine courts have local rules that stipulate the form of the demand when

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[16] *Rutledge*, *supra*, at 674.

[17] *Aetna Insurance Company v. Kennedy*, 301 U.S. 389, 393, 57 S.Ct. 809, 811, 81 L.Ed. 1177, 1180 (1937). *See also In Re Zweibon*, 565 F.2d 742, 746 (D.C. Cir. 1977) ("These procedural rules are not intended to diminish this right ... and should be interpreted, where possible to avoid giving effect to dubious waivers of rights," (citations omitted).)

[18] *Ohio Bell Telephone Co., v. Public Utilities Commission*, 301 U.S. 292, 307, 57 S.Ct. 724, 81 L.Ed. 1093 (1937).

[19] *Pradier*, supra, at 811 n.3.

[20] *Partee v. Buch*, 28 F.3d 636 (7th Cir. 1994) (citations omitted).

it is placed on the pleading.[21] Twenty-two of these courts have rules that allow an indorsement on the front page of the pleading immediately following the title by using the words "Demand for Jury Trial" or the equivalent.[22] This language tracks the Model Local Rule that was originally proposed in the first Local Rules Project Report.[23] The other seven courts have local rules that vary from this requirement. For example, one court requires that the demand be made at the conclusion of the appropriate pleading,[24] while two other courts require that an indorsement be made in the document title and also "asserted in the last paragraph of the document."[25] Two courts mandate that the demand be in capital letters.[26] The remaining two courts have local rules that require the demand be in the upper right hand corner[27] and consist of the word "jury".[28]

Nine of the courts that have adopted the Model Local Rule previously proposed explicitly note in their local rules that failure to use the suggested language is not a waiver of the right to a jury trial.[29] The remaining twenty courts do not have local rules addressing this issue. These omissions may be problematic. On the basis of the

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[21] M.D.Ala. LR38.1; C.D.Cal. LR3.4.10; E.D.Cal. LR38-201; S.D.Cal. LR38.1; D.Del. LR38.1; D.Idaho LR38.1; C.D.Ill. LR38.1; S.D.Ill. LR38.1; S.D.Ind. LR38.1; E.D.La. LR38.1; M.D.La. LR38.1; W.D.La. LR38.1; D.Me. LR38; D.Minn. LR38.1; E.D.Mo. LR38-2.04; W.D.Mo. LR38.1; D.Neb. LR38.1; D.Nev. LR38-1; D.N.H. LR38.1; D.N.J. LR38.1; N.D.N.Y. LR38.1; N.D.Ohio LR38.1; S.D.Ohio LR38.1; E.D.Okla. LR38.1A; N.D.Okla. LR38.1A; D.Or. LR38.1; E.D.Tex. LRCV-38(a); D.V.I. LR38.1; W.D.Wash. LR38(b).

[22] M.D.Ala. LR38.1; C.D.Cal. LR3.4.10; D.Del. LR38.1; D.Idaho LR38.1; S.D.Ill. LR38.1; S.D.Ind. LR38.1; D.Minn. LR38.1; E.D.Mo. LR38-2.04; W.D.Mo. LR38.1; D.Neb. LR38.1; D.Nev. LR38-1; D.N.H. LR38.1; D.N.J. LR38.1; N.D.N.Y. LR38.1; N.D.Ohio LR38.1; D.Or. LR38.1; E.D.Tex. LRCV-38(a); D.V.I. LR38.1; W.D.Wash. LR38(b)..

[23] See Report, Suggested Local Rules at p.35.

[24] W.D.Mo. LR 38.1.

[25] D.Or. LR38.1; *see also* C.D.Cal. LR3.4.10.

[26] D.Nev. LR38-1; W.D.Wash. LR38(b).

[27] E.D.Mo. LR2.04.

[28] E.D.Tex. LR38.

case law, an argument can be made that a local rule, which dictates the form for a demand and which, if not followed, may result in an inadvertent waiver of the right to a jury trial, is inconsistent with the intent and wording of Rule 38. Rule 38 acknowledges a constitutional right and sets forth the procedure to exercise that right. Moreover, such a local rule maybe inconsistent with Rule 8 of the Federal Rules of Civil Procedure which provides that technical forms of pleading are not required and that all pleadings shall be interpreted "so as to do substantial justice."[30]

The content of these local rules satisfy both the Rule 38(b) requirement of an affirmative demand and the local courts' need for clear notification. They are also helpful in providing notice to the clerk.

Twenty-two of the courts have already adopted the language concerning the placement of the demand.[31] Only nine of the courts, however, have acknowledged that a failure to comply with this rule does not operate as a waiver of the right to a jury trial. This sentence is a key addition to any local rule on this subject because of the constitutional dimension recognized by Rule 38:

> The right to trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statue of the United States shall be preserved to the parties inviolate.[32]

Three courts have local rules that simply repeat a portion of Rule 38(b)

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[29] M.D.Ala. LR38.1; D.Idaho LR38.1; S.D.Ill. LR38.1; S.D.Ind. LR38.1; D.Minn. LR38.1; D.Neb. LR38.1; D.N.H. LR38.1; N.D.Ohio LR38.1; D.V.I. LR38.1.

[30] Fed.R.Civ.P. 8(f).

[31] M.D.Ala. LR38.1; C.D.Cal. LR3.4.10; E.D.Cal. LR38-201; S.D.Cal. LR38.1; D.Del. LR38.1; D.Idaho LR38.1; C.D.Ill. LR38.1; S.D.Ill. LR38.1; S.D.Ind. LR38.1; E.D.La. LR38.1; M.D.La. LR38.1; W.D.La. LR38.1; D.Me. LR38; D.Minn. LR38.1; E.D.Mo. LR38-2.04; W.D.Mo. LR38.1; D.Neb. LR38.1; D.Nev. LR38-1; D.N.H. LR38.1; D.N.J. LR38.1; N.D.N.Y. LR38.1; N.D.Ohio LR38.1; S.D.Ohio LR38.1; E.D.Okla. LR38.1A; N.D.Okla. LR38.1A; D.Or. LR38.1; E.D.Tex. LRCV-38(a); D.V.I. LR38.1; W.D.Wash. LR38(b)..

[32] Fed.R.Civ.P. 38(a).

acknowledging that any party may make a demand.[33] These rules should be rescinded.

Five courts have local rules stating that checking off a box on the civil cover sheet indicating that a jury trial is requested is insufficient as a demand for a jury trial.[34] There is extensive case law, as mentioned above, indicating that, although the civil cover sheet does alert the clerk of the interest in a jury trial, the civil cover sheet is not served on the opposing parties and does not provide notice to them of the demand as required by Rule 38.[35] Because these rules repeat existing law, they should be rescinded.

Rule 39—Trial by Jury or by the Court

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[33] C.D.Cal. LR3.4.10l; N.D.Miss. LR38.1; S.D.Miss. LR38.1; *see also* Fed.R.Civ.P. 38(b).

[34] C.D.Cal. LR3.4.10; E.D.Cal. LR38-201; S.D.Cal. LR38.1; N.D.Miss. LR38.1; S.D.Miss. LR38.1d.

[35] *See, e.g.*, *Omawale v. WBZ*, 610 F.2d 20 (1st Cir. 1979); *Houston North Hospital Properties v. Telco Leasing, Inc.* 688 F.2d 408 (5th Cir. 1982); *Biesencamp v. Atlantic Richfield Company*, 70 F.R.D. 365, 366 (E.D.Pa. 1976); *Cochran v. Birkel,* 651 F2d 1219 (6th Cir. 1981) *cert denied* 454 U.S. 1152, 102 S.Ct. 1020, 71 L.Ed.2 307 (1982); *Early v. Bankers Life & Casualty Co.,* 853 F. Supp. 268 (N.D.Ill. 1994).

Four courts have local rules concerning the parties' right to a trial by jury or by the court.[1] Two of these rules are appropriate as local rules. The other two rules repeat existing law and should, therefore, be rescinded.

DISCUSSION

Three of these courts have local rules that refer to the applicability of a bankruptcy judge to conduct a jury trial.[2] Section 157 of Title 28 indicates, in relevant part:

> If the right to a jury trial applies in a proceeding that may be held under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdictions by the district court and with the express consent of all the parties.[3]

Two of the courts have appropriate rules that provide this specific authorization to bankruptcy judges.[4] The other court's local rule seems to simply repeat this statutory provision and, as such, is unnecessary.[5]

One court has a local rule that simply repeats almost the entire Federal Rule 39.[6] This rule is unnecessary.

Rule 41—Dismissal of Actions

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[1] D. Conn. LR 12(f); D.Guam LR39; S.D.Ind. LR39.1; W.D.Va. SO.

[2] D. Conn. LR 12(f); S.D.Ind. LR39.1; W.D.Va. SO.

[3] 28 U.S.C. §157(e).

[4] D.Conn. LR12(f); W.D.Va. SO.

[5] S.D.Ind. LR39.1.

[6] D.Guam LR39.

Fifty-six courts have local rules concerning voluntary and involuntary dismissal of actions.[1] Approximately twenty of these courts have rules that address voluntary dismissals. Approximately thirteen courts have rules on this subject that should remain subject to local variation. The remaining rules are either inconsistent with or duplicative of existing law. Most of the fifty-six courts have rules that address involuntary dismissals. Many of those rules are appropriate local directives. Rules in twenty-one courts, however, are problematic.

DISCUSSION

Rule 41 of the Federal Rules of Civil Procedure addresses both voluntary and involuntary dismissals.[2] In essence, subsection (a) provides that the plaintiff, or all the parties by filing a stipulation, may seek a voluntary dismissal.[3] Unless otherwise stated, this dismissal is without prejudice except in one situation.[4] If a plaintiff has already once dismissed the action in a state or federal court, then a dismissal pursuant to Rule 41(a) "operates as a adjudication upon the merits."[5] This rule also provides that the voluntary dismissal occurs only "upon order of the court and upon such terms and conditions as the

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[1] D.Alaska LRGR 24; D.Ariz. LRLR2.6; C.D.Cal. LRLR12; S.D.Cal. LRLR41.1; D.Colo. LRLR41.1; D.Conn. LRCiv.R16(a); D.Del. LRLR41.1; D.D.C. LRLR211; M.D.Fla. LRLR3.10; N.D.Fla. LRLR41.1; S.D.Fla. LRLR41.1; N.D.Ga. LRLR41.1; S.D.Ga. LRLR41.1; D.Guam LRLR41; D.Idaho LRLR41.1; N.D.Ill. LRGR21; N.D.Ind. LRLR41.1; S.D.Ind. LRLR41.1; N.D.Iowa LRLR41.1; S.D.Iowa LRLR41.1; D.Kan. LRLR41.1; E.D.Ky. LRLR41.1; W.D.Ky. LRLR41.1; E.D.La. LRLR41.1; M.D.La. LRLR41.1; W.D.La. LRLR41.1; D.Me. LRLR41.1; D.Mass. LRLR41.1; E.D.Mich. LRLR41.2; W.D.Mich. LRLR41.1; E.D.Mo. LRLR8.01; D.Neb. LRLR41.1; D.Nev. LRLR41-1; D.N.H. LRLR41.1; D.N.J. LRLR41.1; D.N.Mex. LRLR41.1; N.D.N.Y. LRLR41.2; W.D.N.Y. LRLR41.2; D.N.Mar.I LRLR41.1; E.D.Okla. LRLR41.1; N.D.Okla. LRLR41.0; W.D.Okla. LRLR41.1; D.Or. LRLR41.1; E.D.Pa. LRLR41.1; M.D.Pa. LRLR41.1; D.P.R. LR313; D.R.I. LRLR21(b); E.D.Tex. LRCV-41; N.D.Tex. LRLR41.1; D.Utah LRLR115; E.D.Wash. LRLR41.1; W.D.Wash. LRLR41; N.D.W.Va. LRLR7.01; S.D.W.Va. LRLR8-01; E.D.Wis. LRLR10; D.Wyo. LRLR41.1.

[2] Fed.R.Civ.P. 41.

[3] *Id.* at (a)(1).

[4] *Id.*

court deems proper."[6]

Subsection (b) provides that the defendant may seek an involuntary dismissal if the plaintiff fails "to prosecute or to comply with these rules or any order of court."[7] Unless otherwise states, this type of dismissal is with prejudice except "a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under rule 19."[8]

This Rule is also applicable to counter claims, cross-claims, and third-party claims.[9] If an action is previously dismissed under this rule and the plaintiff brings the same claim again against the same defendant, that defendant may seek payment of costs pursuant to this Rule.[10]

Many courts have local rules concerning the voluntary dismissal of cases. Rules in some of these jurisdictions are appropriate supplements to Rule 41 and should remain. For example, eleven courts have local rules explaining how cases are dismissed after settlement.[11] Two courts allow the clerk to grant orders of voluntary dismissal.[12]

Some of the courts have rules that are inconsistent with Rule 41 and should be abrogated. For example, two courts have local rules that provide that a voluntary dismissed action is dismissed with prejudice.[13] These rules are inconsistent with the clear

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[5] *Id.*

[6] *Id.* at (a)(2).

[7] *Id* at (b).

[8] *Id.*

[9] *Id.* at (c).

[10] *Id.* at (d).

[11] N.D.Iowa LRLR41.1; S.D.Iowa LRLR41.1; E.D.La. LR41.2; M.D.La. LR41.2; D.Me. LRLR41.1; D.N.H. LRLR41.1; D.N.J. LRLR41.1; D.Or. LRLR41.1; E.D.Pa. LRLR41.1; N.D.W.Va. LRLR7.01; S.D.W.Va. LRLR8-01.

[12] N.D.Ga. LR41.1; S.D.Ga. LR41.1.

[13] N.D.Iowa LR41.1; S.D.Iowa LR41.1.

language of Rule 41(a) that, in the absence of certain circumstances, a voluntary dismissal is without prejudice.[14] Three courts have local rules that require a party, wanting to refile after a voluntary dismissal, to seek permission to do so.[15] This requirement is also inconsistent with Rule 41.[16] Rule 41 does discuss how a dismissal operates on an action when there was a previously dismissed similar case, and it provides no constraint on the party's ability to file the second action in the first instance.[17]

Several other courts have local rules on voluntary dismissal that repeat the existing Federal Rule. Three courts have local rules that simply acknowledge the option to seek a voluntary dismissal.[18] These rules should be rescinded.

Most of the fifty-six courts with rules on dismissal have local rules concerning involuntary dismissals. The Rule does not specifically permit the court to dismiss on its own motion. The "inherent power" of a court *sua sponte* to order an involuntary dismissal is not, however, abrogated by the existence of this Rule.[19] Local Rules providing guidance to the litigants concerning when the court may exercise this power to dismiss has been upheld on various occasions.[20]

Local rules in twenty-seven of the jurisdictions indicate that the court may dismiss a case for failure to prosecute if there has been no action on the case within a set

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[14] Fed.R.Civ.P. 41(a)(1).

[15] E.D.La. LRLR41.1; M.D.La. LRLR41.1; W.D.La. LRLR41.1.

[16] Fed.R.Civ.P. 41(a).

[17] *Id.*

[18] D.Guam LRLR41; N.D.Iowa LRLR41.1; S.D.Iowa LRLR41.1.

[19] *Link v. Wabash Railway Company*, 370 U.S.626, 630, 82 S.Ct. 1386, 1389, I L.Ed.2d 734, 738 (1962).

[20] *See, e.g., Sperling v Texas Butadiene and Chemical Corporation*, 434 F.2d 677, 14 Fed.R.Serv.2d 769 (3rd Cir. 1970), *cert. den'd* 404 U.S. 854, 92S.Ct. 97, 30 L.Ed.2d 95 (1971); *Allied Air Freight, Inc. v. Pan American World Airways, Inc.*, 393 RF.2d 441 (2d Cir. 1960), *cert. den'd* 393 U.S. 846, 89 S.Ct. 131, 21 L.Ed.2d 117 (1968).

period of time: three months[21]; four months[22]; six months[23]; nine months[24]; and one year.[25] Another twelve courts have local rules that permit involuntary dismissals for "unreasonable delay" without specifying a precise time frame.[26] Another two jurisdictions allow motions for involuntary dismissal to be filed at any time.[27] These rules should remain subject to local variation.

Sixteen jurisdictions have local rules that list criteria other than time, which the court may use in determining whether the plaintiff has failed to prosecute the claim so that dismissal is warranted.[28] For example, seven courts have local rules permitting involuntary dismissal for failure to effect service[29]; seven courts permit involuntary dismissal for failure of the party or party's attorney to update an address[30]; and, five courts allow involuntary dismissal for a willful failure to prepare the case.[31] Other courts have specified particular reasons for allowing involuntary dismissal such as for filing a

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[21] D.Del. LRLR41.1; N.D.Fla. LRLR41.1; S.D.Fla. LRLR41.1; D.N.Mex. LRLR41.1; D.Wyo. LRLR41.1.

[22] D.N.J. LR41.1.

[23] D.Ariz. LRLR2.6; S.D.Cal. LRLR41.1; D.Conn. LRCiv.R16(a); D.Idaho LRLR41.1; N.D.Ill. LRGR21; N.D.Ind. LRLR41.1; S.D.Ind. LRLR41.1; D.Kan. LRLR41.1; E.D.Mo. LRLR8.01; W.D.N.Y. LRLR41.2; D.N.Mar.I LRLR41.1.

[24] D.Nev. LR41-1.

[25] D.Alaska LRGR 24; E.D.Ky. LRLR41.1; W.D.Ky. LRLR41.1; D.Mass. LRLR41.1; D.Neb. LRLR41.1; E.D.Pa. LRLR41.1; M.D.Pa. LRLR41.1; E.D.Wash. LRLR41.1; W.D.Wash. LRLR41.

[26] C.D.Cal. LRLR12; S.D.Ga. LRLR41.1; D.Kan. LRLR41.1; E.D.La. LR41.3; D.Me. LRLR41.1; E.D.Mich. LRLR41.2; N.D.N.Y. LRLR41.2; D.Or. LR41.2; D.R.I. LRLR21(b); D.Utah LRLR115; N.D.W.Va. LRLR7.01; S.D.W.Va. LRLR8-01.

[27] D.Alaska LRGR 24; S.D.Fla. LRLR41.1.

[28] C.D.Cal. LR12; S.D.Cal. LR41.1; N.D.Ga. LR41.2; S.D.Ga. LRLR41.1; N.D.Ill. GR21; N.D.Iowa LRLR41.1; S.D.Iowa LRLR41.1; M.D.La. LR41.3; W.D.La. LR41.3; W.D.Mich. LRLR41.1; D.Neb. LRLR41.1; D.N.Mex. LR41.2; N.D.N.Y. LRLR41.2; D.P.R. LR313; W.D.Wash. LRLR41; E.D.Wis. LRLR10.

[29] N.D.Ga. LR41.2; N.D.Iowa LRLR41.1; S.D.Iowa LRLR41.1; M.D.La. LR41.3; W.D.La. LR41.3; D.P.R. LR313; E.D.Wis. LRLR10.

[30] C.D.Cal. LR12; N.D.Ga. LR41.2; M.D.La. LR41.3; W.D.La. LR41.3; W.D.Mich. LRLR41.1; N.D.N.Y. LRLR41.2; W.D.Wash. LRLR41.

frivolous case[32], a failure to furnish security[33], a failure to remedy non-conforming papers[34], a failure to meet a deadline[35], a failure to comply with the local rules[36], a failure to appeal[37], and a failure to engage in discovery.[38] These rules are also appropriate exercises of local district court rulemaking.

Thirty-eight jurisdictions have local rules that explicitly provide some type of procedure that the court will follow in deciding to order a dismissal.[39] These rules should also remain subject to local variation.

There are rules in twenty-one courts that either conflict with, or duplicate, a portion of rule 41(b) and should, therefore, be rescinded.[40] For example, rules in thirteen jurisdictions indicate that an involuntary dismissal is made without prejudice unless the

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[31] S.D.Ga. LRLR41.1; D.Neb. LRLR41.1; D.P.R. LR313; E.D.Wis. LRLR10.

[32] E.D.Wis. LR10.

[33] D.P.R. LR313.

[34] D.N.Mex. LR41.2.

[35] N.D.Iowa LR41.1; S.D.Iowa LR41.1.

[36] S.D.Cal. LR41.1.

[37] C.D.Cal. LR12; N.D.Ga. LR41.3; N.D.Ill. GR21.

[38] S.D.Ga. LR41.1.

[39] C.D.Cal. LRLR12; S.D.Cal. LRLR41.1; D.Colo. LRLR41.1; D.Conn. LRCiv.R16(a); D.Del. LRLR41.1; M.D.Fla. LRLR3.10; N.D.Fla. LRLR41.1; S.D.Ga. LRLR41.1; N.D.Ind. LRLR41.1; S.D.Ind. LRLR41.1; N.D.Iowa LRLR41.1; S.D.Iowa LRLR41.1; D.Kan. LRLR41.1; E.D.Ky. LRLR41.1; W.D.Ky. LRLR41.1; W.D.La. LR41.3; D.Me. LRLR41.1; D.Mass. LRLR41.1; E.D.Mich. LRLR41.2; W.D.Mich. LRLR41.1; E.D.Mo. LRLR8.01; D.Neb. LRLR41.1; D.Nev. LR41-1; D.N.J. LRLR41.1; D.N.Mex. LRLR41.1; N.D.N.Y. LRLR41.2; W.D.N.Y. LRLR41.2; D.N.Mar.I LRLR41.1; D.Or. LR41.2; E.D.Pa. LRLR41.1; M.D.Pa. LRLR41.1; D.R.I. LRLR21(b); D.Utah LRLR115; E.D.Wash. LRLR41.1; W.D.Wash. LRLR41; N.D.W.Va. LRLR7.01; S.D.W.Va. LRLR8-01; D.Wyo. LRLR41.1.

[40] D.Ariz. LRLR2.6; C.D.Cal. LRLR12; S.D.Cal. LRLR41.1; D.Colo. LRLR41.1; D.D.C. LRLR211; N.D.Ga. LR41.2, 41.3; D.Idaho LRLR41.1; N.D.Iowa LR41.1; S.D.Iowa LR41.1; D.Kan. LRLR41.1; M.D.La. Lr41.3; W.D.La. LR41.3; D.Me. LRLR41.1; D.Mass. LRLR41.1; E.D.Mo. LRLR8.01; D.N.Mar.I LRLR41.1; E.D.Pa. LRLR41.1; D.P.R. LR313; D.R.I. LRLR21(b); D.Utah LRLR115; E.D.Wash. LRLR41.1; W.D.Wash. LRLR41; E.D.Wis. LRLR10.

court states otherwise.[41] These rules are inconsistent with Rule 41 that explains that an involuntary dismissal "operates as a adjudication upon the merits."[42] In addition, three courts have local rules that simply repeat this requirement and are unnecessary.[43] Local rules in six courts provide that the involuntary dismissal may be determined with or without prejudice.[44] To the extent these rules repeat that the dismissal is with prejudice, they are repetitious and unnecessary. To the extent, however, that they allow involuntary dismissal to be without prejudice, they are inconsistent. In either event, the rules should be rescinded.

Rule 42. Consolidation; Separate Trials

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[41] D.Ariz. LRLR2.6; C.D.Cal. LRLR12; S.D.Cal. LRLR41.1; D.D.C. LRLR211; N.D.Ga. LR41.2; D.Idaho LRLR41.1; M.D.La. Lr41.3; W.D.La. LR41.3; D.Mass. LRLR41.1; D.N.Mar.I LRLR41.1; E.D.Pa. LRLR41.1; D.P.R. LR313; E.D.Wash. LRLR41.1.

[42] Fed.R.Civ.P. 41(b).

[43] N.D.Ga. LR41.3; N.D.Iowa LR41.1; S.D.Iowa LR41.1; D.Kan. LRLR41.1; W.D.Wash. LRLR41.

[44] D.Colo. LRLR41.1; D.Me. LRLR41.1; E.D.Mo. LRLR8.01; D.R.I. LRLR21(b); D.Utah LRLR115; E.D.Wis. LRLR10.

Eleven courts have local rules concerning consolidation and separate trials.[1] All of the rules concerning the procedure to consolidate should remain subject to local variation. In addition, there are two local rules relating to consolidation that repeat existing and should be abrogated. The rule concerning bifurcation simply repeats existing law and should also be rescinded.

DISCUSSION

Rule 42 gives the court authority to order that there be a joint hearing or trial "[w]hen actions involving a common question of law or fact are pending before the court."[2] Subsection (b) gives the court permission to order that there be separate trials "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy."[3]

Most of the rules that relate to Rule 42 explain the procedure used to seek consolidation of two or more issues or claims for purposes of a trial or hearing. The first issues concerns who can seek consolidation. Three courts have local rules permitting any party to move for consolidation.[4] Two other courts recognize that the court may consolidate *sua sponte* absent objection.[5]

There are also local rules explaining how to actually make the motion to consolidate. For example, the content of the motion to consolidate is set forth in one

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[1] N.D.Miss. LRLR42.1; E.D.Mo. LRLR42-4.03; D.N.H. LRLR42.1; D.N.J. LRLR42.1; D.Or. LRLR42.1-42.5; M.D.Pa. LRLR42.1; D.R.I. LRLR7(f); E.D.Tex. LRCV-42; N.D.Tex. LRLR42.1; D.Vt. LRLR42.1; D.Wyo. LRLR42.1.

[2] Fed.R.Civ.P 42(a).

[3] *Id.* at (b).

[4] D.N.H. LRLR42.1; D.Or. LRLR42.1-42.5; D.Vt. LRLR42.1.

[5] D.N.H. LRLR42.1; D.Vt. LRLR42.1.

court's local rule.[6] The related[7] and complex[8] cases must be identified to the court, and the motion made to the lowest numbered case in another ___ courts.[9] The lowest case number is the one that controls[10] and even cases from other divisions are controlled by the earliest filing date.[11] Three courts also set forth three different ways of referring to cases after consolidation: in one court the caption is only of the first case[12]; in another court, the caption must also say "consolidated with ..."[13]; in another court the caption must list all cases, beginning with the oldest.[14]

There are local rules in two courts that require that copies of these papers be served on all parties.[15] These directives simply repeat the service requirement of Rule 5 of the Federal Rules of Civil Procedure[16] and should, therefore, be rescinded.

One court has a rule repeating Rule 42(b) that the court has authority to bifurcate.[17] This rule is unnecessary.

Rule 47. Selection of Jurors

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[6] D.Or. LRLR42.1-42.5.

[7] D.N.H. LRLR42.1; D.Or. LRLR42.1-42.5; E.D.Tex. LRCV-42; D.Vt. LRLR42.1.

[8] D.Or. LRLR42.1-42.5.

[9] E.D.Mo. LRLR42-4.03; D.N.J. LRLR42.1; D.R.I. LRLR7(f); D.Wyo. LRLR42.1.

[10] N.D.Miss. LRLR42.1; D.N.J. LRLR42.1; D.N.H. LRLR42.1; D.Or. LRLR42.1-42.5; E.D.Tex. LRCV-42; D.Vt. LRLR42.1.

[11] N.D.Miss. LRLR42.1.

[12] N.D.Tex. LRLR42.1.

[13] N.D.Tex. LRLR42.1.

[14] D.Vt. LRLR42.1.

[15] D.N.J. LRLR42.1; N.D.Tex. LRLR42.1.

[16] Fed.R.Civ.P. 5(a).

[17] M.D.Pa. LRLR42.1.

Rules in seventy-five jurisdictions relate to Rule 46 of the Federal Rules of Civil Procedure concerning the selection of jurors.[1] These rules explain the voir dire procedure used by the court and the general issue of outside communication with jurors before, during, and after the trial. All of these rules are appropriate as local rule directives. In addition, two courts have local rules that are inconsistent with existing law and should be rescinded.

DISCUSSION

Rule 47 explains that the court may conduct the questioning of potential jurors or permit the parties and/or their attorneys to do so.[2] If the court performs the voir dire, the Rule also allows the parties or attorneys to supplement the court's inquiry with additional questions; these questions are used if the court determines they are "proper".[3] The Rule also refers to the applicable statue on the number of preemptory challenges allowed[4] and allows the court, "for good cause" to excuse a juror during the trial or

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[1] M.D.Ala. LR47.1; N.D.Ala.LR47.1; S.D.Ala. LR47.2; D.Alaska LR14; D.Ariz. LR1.11; E.D.Ark. LR47.1; W.D.Ark. LR47.1; E.D.Cal. LR47-162; S.D.Cal. LR47.1; D.Colo. LR47.2; D.Conn. LR12; D.Del. LR47.1; D.D.C. LR115; M.D.Fla. LR5.01(b); N.D.Ga. LR47.2; S.D.Ga. LR47.1; D.Idaho LR47.1; C.D.Ill. LR47.3; N.D.Ill. LR1.3; S.D.Ill. LR48.2; N.D.Ind. LR47.1; S.D.Ind. LR47.1; N.D.Iowa LR47.1; S.D.Iowa LR47.1; D.Kan. LR47.1; E.D.Ky. LR47.1; W.D.Ky. LR47.1; E.D.La. LR47.1; M.D.La. LR47.2; W.D.La. LR47.1; D.Me. LR47; D.Md. LR107.16; W.D.Mich. LR34; D.Minn. LR47.2; E.D.Mo. LR7.01; W.D.Mo. LR47.1; D.Mont. LR245-1; D.Neb. LR47.1; D.Nev. LR48-1; D.N.H. LR47.3; D.N.J. LR47.1; N.D.N.Y. LR47.1; W.D.N.Y. LR47.1; E.D.N.Car. LR6; M.D.N.Car. LR47.1; W.D.N.Car. LR47.1; D.N.Dak. LR47.1; N.D.Ohio LR47.1; S.D.Ohio LR47.1; E.D.Okla. LR47.1; N.D.Okla. LR47.1; W.D.Okla. LR47.1; D.Or. LR47.2; E.D.Pa. LR48.1; W.D.Pa. LR47.1; D.P.R. LR322;

D.R.I. LR15; D.S.Car. LR47.01-47.05; E.D.Tenn. LR48.1; M.D.Tenn. LR12(h); W.D.Tenn. LR47.1; E.D.Tex. LRCV-38(b); N.D.Tex. LR47.1; S.D.Tex. LR12; W.D.Tex. LRCV-47; D.Utah LR113; D.V.I. LR47.1; E.D.Va. LR47; E.D.Wash. LR47.1; W.D.Wash. LR47; N.D.W.Va. LR6.01; S.D.W.Va. LR6.04; E.D.Wis. LR8.03; W.D.Wis. LR4; D.Wyo. LR47.1.

[2] Fed.R.Civ.P. 47(a).

[3] *Id.*

[4] *Id* at (b).

deliberation.[5]

Most of the local rules concern the procedure for conducting the voir dire. For example, thirty-six courts have local rules stating that the court will conduct the voir dire.[6] Twenty-five courts have local rules that explain the voir dire procedure generally.[7] Eighteen courts have local rules explaining the procedure for making challenges to the venire.[8] Forty-two courts have local rules that speak, in a general way, to the entire jury selection process.[9] All of these rules are appropriate.

Two courts have local rules that state, in relevant party, "[n]o attorney ... may request a judge to excuse any person lawfully summoned for jury service."[10] To the extent these rules forbid a party from exercising a preemptory challenge already

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[5] *Id* at (c).

[6] D.Alaska LR14; E.D.Cal. LR47-162; S.D.Cal. LR47.1; D.Conn. LR12; D.Del. LR47.1; N.D.Ga. LR47.2; D.Idaho LR47.1; N.D.Ind. LR47.1; S.D.Ind. LR47.1; N.D.Iowa LR47.1; S.D.Iowa LR47.1; E.D.La. LR47.2; M.D.La. LR47.2; W.D.La. LR47.2; D.Me. LR47; D.Mont. LR245-1; D.Neb. LR47.1; D.N.H. LR47.2; N.D.N.Y. LR47.2; W.D.N.Y. LR47.1; E.D.N.Car. LR6; M.D.N.Car. LR47.1; W.D.N.Car. LR47.1; N.D.Ohio LR47.2, 47.3; E.D.Okla. LR47.1; D.Or. LR47.2; W.D.Pa. LR47.1; D.R.I. LR15; D.S.Car. LR47.01-47.05; D.Utah LR113; E.D.Wash. LR47.1; W.D.Wash. LR47; N.D.W.Va. LR6.01; S.D.W.Va. LR6.04; E.D.Wis. LR8.03; D.Wyo. LR47.1.

[7] D.Alaska LR14; E.D.Cal. LR47-162; S.D.Cal. LR47.1; D.Conn. LR12; D.Del. LR47.1; M.D.Fla. LR5.01(b); D.Idaho LR47.1; N.D.Ind. LR47.1; S.D.Ind. LR47.1; N.D.Iowa LR47.1; S.D.Iowa LR47.1; D.Me. LR47; E.D.Mo. LR7.01; W.D.N.Y. LR47.1; E.D.N.Car. LR6; M.D.N.Car. LR47.1; W.D.N.Car. LR47.1; D.N.Dak. LR47.1; N.D.Ohio LR47.2, 47.3; W.D.Pa. LR47.1; D.R.I. LR15; D.S.Car. LR47.01-47.05; D.Utah LR113; E.D.Wash. LR47.1; D.Wyo. LR47.1.

[8] D.Conn. LR12; D.Del. LR47.1; E.D.Ky. LR47.2; W.D.Ky. LR47.2; D.Me. LR47; W.D.Mo. LR47.1; D.Neb. LR47.1; D.N.H. LR47.2; D.N.J. LR47.1; N.D.N.Y. LR47.2; W.D.N.Y. LR47.2; D.N.Dak. LR47.1; N.D.Ohio LR47.4; D.Or. LR47.3, 47.4; D.R.I. LR15; M.D.Tenn. LR12(j); E.D.Va. LR47.

[9] D.Alaska LR14; E.D.Cal. LR47-161, 48-162; D.D.C. LR114(a); N.D.Ga. LR47.1, 47.2; S.D.Ga. LR47.1; D.Idaho LR47.1; N.D.Ill. LR1.3; S.D.Ill. LR48.2; N.D.Iowa LR47.1; S.D.Iowa LR47.1; E.D.La. LR47.1; W.D.La. LR47.1; W.D.Mich. LR34; D.Neb. LR47.1; D.N.H. LR47.1; D.N.J. LR47.1; N.D.N.Y. LR47.1, 47.2; W.D.N.Y. LR47.1, 47.2; D.N.Dak. LR47.1; N.D.Ohio LR47.1, 47.2, 47.3; N.D.Okla. LR47.1; E.D.Pa. LR48.1; D.R.I. LR15; D.S.Car. LR47.01-47.05; E.D.Tex. LRCV-38(b); W.D.Tex. LRCV-47; D.V.I. LR47.1l D.Utah LR113; E.D.Va. LR47l N.D.W.Va. LR6.011 S.D.W.Va. LR6.04; W.D.Wash. LR47; E.D.Wis. LR8.02; D.Wyo. LR48.1.

[10] E.D.Ky. LR47.3; W.D.Ky. LR47.3.

permitted by federal statute, they are inconsistent with that statute.[11] To the extent they forbid a party from asking the court to excuse a juror during the trial or deliberation, as permitted by Rule 47(c), they are inconsistent with that Federal Rule.[12]

Many of the local rules concern communication with jurors outside of the courtroom, before, during, or after the trial. Forty-eight courts have local rules forbidding post-verdict interviews with jurors without the court's permission.[13] Thirty-six courts forbid such communication with a juror both before and during the trial.[14] Eight courts articulate the fact that the juror has a right not to communicate with anyone outside of the courtroom setting.[15] All of these rules are appropriate as local directives.

Rule 48. Number of Jurors

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[11] 28 U.S.C. §1870; *see* Fed.R.Civ.P. 47(b).

[12] Fed.R.Civ.P. 47(b); trial court's action in deciding whether juror should be excused was prompted by a party's request to excuse the juror (*Murray v. Laborers Union Local 324*, 55 F.3d 1445, 1451 (9th Cir. 1995); *United States v. Hernandez*, 862 F.2d 17, 23 (2d Cir. 1988) *cert. den'd* 489 U.S. 1032 (1989); *Port Terminal & Warehousing Co. v. John S. James Co.*, 695 F.2d 1320 (11th Cir. 1983)).

[13] M.D.Ala. LR47.1; N.D.Ala. LR47.1; S.D.Ala. LR47.2; D.Ariz. LR1.11 E.D.Ark. LR47.1; W.D.Ark. LR47.1; D.Colo. LR47.2; D.Conn. LR12; D.D.C. LR115; M.D.Fla. LR5.1(d); C.D.Ill. LR47.2; N.D.Ind. LR47.2; S.D.Ind. LR47.2; N.D.Iowa LR47.2; S.D.Iowa LR47.2; D.Kan. LR47.1; E.D.Ky. LR47.1; W.D.Ky. LR47.1; E.D.La. LR47.4, 47.5; M.D.La. LR47.5; W.D.La. LR47.4, 47.5; D.Md. LR107.16; D.Minn. LR47.2; E.D.Mo. LR7.01; D.Mont. LR245-5; D.N.H. LR47.3; D.N.J. LR47.1; N.D.N.Y. LR47.5; E.D.N.Car. LR6; M.D.N.Car. LR47.1; S.D.Ohio LR47.1; E.D.Okla. LR47.2; N.D.Okla. LR47.2; W.D.Okla. LR47.1; D.P.R. LR322; D.R.I. LR15; D.S.Car. LR47.01-47.05; E.D.Tenn. LR48.1; M.D.Tenn. LR12(h); W.D.Tenn. LR47.1; E.D.Tex. LRCV-47; N.D.Tex. LR47.1 S.D.Tex. LR12; E.D.Wash. LR47.1; W.D.Wash. LR47; E.D.Wis. LR8.07; W.D.Wis. LR4; D.Wyo. LR47.2.

[14] D.Ariz. LR1.11; E.D.Ark. LR47.1; W.D.Ark. LR47.1; D.Colo. LR47.2; D.Conn. LR12; D.D.C. LR115; C.D.Ill. LR47.2, 47.3; N.D.Ind. LR47.2; S.D.Ind. LR47.2; N.D.Iowa LR47.2; S.D.Iowa LR47.2; E.D.Ky. LR47.1; W.D.Ky. LR47.1; E.D.La. LR47.4, 47.5; M.D.La. LR47.4; W.D.La. LR47.4, 47.5; D.Minn. LR47.2; E.D.Mo. LR7.01; D.Mont. LR245-5; D.Nev. LR48-1; D.N.H. LR47.3; D.N.J. LR47.1; N.D.N.Y. LR47.5; M.D.N.Car. LR47.1; W.D.N.Car. LR47.2; E.D.Okla. LR47.2; N.D.Okla. LR47.2; W.D.Okla. LR47.1; D.R.I. LR15; D.S.Car. LR47.01-47.05; M.D.Tenn. LR12(g); N.D.Tex. LR47.1; E.D.Wis. LR8.07; W.D.Wis. LR4; D.Wyo. LR47.2.

[15] D.Ariz. LR1.11; E.D.Ark. LR47.1; W.D.Ark. LR47.1; D.Colo. LR47.2; D.Conn. LR12; D.D.C. LR115; C.D.Ill. LR47.2, 47.3; N.D.Ind. LR47.2; S.D.Ind. LR47.2; N.D.Iowa LR47.2; S.D.Iowa LR47.2; E.D.Ky. LR47.1; W.D.Ky. LR47.1; E.D.La. LR47.4, 47.5; M.D.La. LR47.4; W.D.La. LR47.4, 47.5; D.Minn. LR47.2; E.D.Mo. LR7.01; D.Mont. LR245-5; D.Nev. LR48-1; D.N.H. LR47.3; D.N.J. LR47.1; N.D.N.Y. LR47.5; M.D.N.Car. LR47.1; W.D.N.Car. LR47.2; E.D.Okla. LR47.2; N.D.Okla. LR47.2; W.D.Okla. LR47.1; D.R.I. LR15; D.S.Car. LR47.01-47.05; M.D.Tenn. LR12(g); N.D.Tex. LR47.1; E.D.Wis. LR8.07; W.D.Wis. LR4; D.Wyo. LR47.2.

Forty-eight courts have local rules explaining the number of jurors seated in a civil trial.[1] At least twenty-four of those courts have rules that are appropriate supplements to Rule 48 and should remain subject to local variation. Some of the courts have rules that repeat portions of Rule 48 and should, therefore, be rescinded. Seven courts have local rules that are either inconsistent with or duplicative of Rule 48.[2] These rules should also be rescinded. Lastly, two courts have local rules that are inconsistent with Rule 47 and should not remain.[3]

DISCUSSION

Rule 48 of the Federal Rules of Civil Procedure was amended effective December 1, 1991 to require that the court set a jury of "not fewer than six and not more than twelve members" and that all jurors participate in the verdict unless excused pursuant to Rule 47.[4] The prior rule had allowed the parties to stipulate to a jury of "any number less than twelve" and to stipulate to a finding from a state majority of the jurors rather than a unanimous verdict.[5] Rule 47 was also amended effective December 1, 1991 to dispense with alternate jurors.[6] This change is consistent with the requirement in Rule 48 that all jurors participate in the verdict.[7] The Advisory Committee noted that, with the

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[1] N.D.Ala. LR48.1; D.Alaska LRGR14; C.D.Cal. LRLR13.1; E.D.Cal. LR48-162; D.Conn. LR12(a); D.Del. LR48.1; M.D.Fla. LR5.01(a); S.D.Fla. LR47.1; M.D.Ga. LR48; S.D.Ga. LR48.1; D.Haw. LR48; D.Idaho LR47.1; C.D.Ill. LR48.1; S.D.Ill. LR48.1; N.D.Ind. LR48.1; S.D.Ind. LR47.4; N.D.Iowa LR48.1; S.D.Iowa LR48.1; E.D.La. LR48.1; M.D.La. LR48.1; W.D.La. LR48.1; D.Me. LR47; N.D.Miss. LR48.1.

[2] C.D.Ill. LR48.1; M.D.N.Car. LR47.1; E.D.Pa. LR48.1; D.S.Car. LR48.01; W.D.Tex. LRCV-47; E.D.Wis. LR8.01; D.Wyo. LR48.1.

[3] D.P.R. LR321; M.D.Tenn. LR12(j).

[4] Fed.R.Civ.P. 48.

[5] Fed.R.Civ.P. 48 as originally drafted in 1937.

[6] Fed.R.Civ.P. 47.

[7] *See* Fed.R.Civ.P. 48.

abolition of the idea of an alternate jurors, "it will ordinarily be prudent and necessary, in order to provide for sickness or disability among jurors, to seat more than six jurors."[8]

Approximately fifteen courts have local rules setting the number of jurors at six people[9], ten people[10], or twelve people.[11] Five courts require that eight members be seated at the beginning of a trial.[12] Another court explains that the number of jurors will be determined at the final pretrial conference.[13] Two more courts provide that the court fix the number.[14] Assuming, of course, that the number selected pursuant to these rules is not fewer than six or more than twelve, they are appropriate as local directives.

Many of the courts have local rules that repeat Rule 48 and are, therefore, unnecessary. Fifteen courts have local rules that require the jury to consist of no fewer than six members and no more than twelve.[15] Eight courts provide that a jury may, by stipulation, be less than six.[16] Six jurisdictions indicate that a verdict must be unanimous unless otherwise stipulated.[17] Eight courts require that the jury consist of a minimum of

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[8] Fed.R.Civ.P. 48 Advisory Committee Note to 1991 Amendment.

[9] N.D.Ala. LR48.1; D.Alaska LRGR14; S.D.Fla. LR47.1; S.D.Ga. LR48.1; N.D.Ind. LR48.1; S.D.Ind. LR47.4; D.Mont. LR245-1; D.P.R. LR321; D.R.I. LR15; D.S.Car. LR48.01; M.D.Tenn. LR12(j).

[10] S.D.Ind. LR47.4; D.Utah LR113.

[11] M.D.Ga. LR48; D.S.Car. LR48.01; D.Utah LR113; *see also* S.D.Ga. LR48.1 (may stipulate to twelve members).

[12] E.D.Pa. LR48.1; M.D.Pa. LR48.1; D.S.Car. LR48.01; W.D.Tenn. LR47.1; D.V.I. LR48.1.

[13] D.N.H. LR48.1.

[14] D.Or. LR48.1; E.D.Pa. LR48.1.

[15] E.D.Cal. LR48-162; D.Conn. LR12(a); D.Del. LR48.1; M.D.Fla. LR5.01(a); D.Idaho LR47.1; S.D.Ill. LR48.1; N.D.Miss. LR48.1; S.D.Miss. LR48.1; D.Neb. LR48.1; D.N.J. LR48.1; N.D.N.Y. LR48.1; W.D.N.Y. LR47.1; N.D.Ohio LR48.1; N.D.Okla. LR48.1; E.D.Va. LR48.

[16] D.Del. LR48.1; M.D.Ga. LR48; N.D.Okla. LR48.1; E.D.Pa. LR48.1; M.D.Pa. LR48.1; D.S.Car. LR48.01; W.D.Tex. LRCV-47; D.V.I. LR48.1.

[17] M.D.Ga. LR48; N.D.Ind. LR48; S.D.Ind. LR47.4; D.N.J. LR48.1; W.D.N.Y. LR47.1; D.V.I. LR48.1.

six members.[18] Four courts simply refer to the applicability of Rule 48 in determining the number of jurors.[19] Lastly, three courts have local rules requiring that all jury members participate in the verdict.[20] All of these rules should be rescinded.

Seven courts have local rules that require a jury to consist of no less than six members.[21] To the extent these rules simply repeat the requirement of Rule 48 that the court should set a jury of not less than six members, they are unnecessary. To the extent, however, that they forbid the parties from stipulating to a jury of fewer than six members, they are inconsistent with Rule 48. In either case, these rules should be rescinded.

Two courts have local rules that assume alternate jurors may be seated in determining how many jurors to seat.[22] Rule 46, as amended in 1991, no longer allows the practice of seating alternative jurors so these rules are inconsistent with the current law and should be rescinded.

Rule 51. Instructions to Jury; Objections

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[18] S.D.Ind. LR47.4; N.D.Iowa LR48.1; S.D.Iowa LR48.1; E.D.La. LR48.1; M.D.La. LR48.1; W.D.La. LR48.1; D.Me. LR47; M.D.Pa. LR48.1.

[19] C.D.Cal. LRLR13.1; D.Haw. LR48; N.D.Ind. LR48.1; D.N.Dak. LR47.1.

[20] D.Conn. LR12(a); M.D.Ga. LR48; D.V.I. LR48.1.

[21] C.D.Ill. LR48.1; M.D.N.Car. LR47.1; E.D.Pa. LR48.1; D.S.Car. LR48.01; W.D.Tex. LRCV-47; E.D.Wis. LR8.01; D.Wyo. LR48.1.

[22] D.P.R. LR321 (jury consists of "six persons, excluding alternates"); M.D.Tenn. LR12(j) (jury has "alternates as the court may determine").

Forty-two jurisdictions have local rules concerning counsel's ability to submit jury instructions to the court.[1] Local Rules in approximately thirty of these courts are appropriate supplements to Rule 51 of the Federal Rules of Civil Procedure and should, therefore, remain subject to local variation. The local rules in about twelve courts either conflict with existing law or repeat it and are, therefore, unnecessary.

DISCUSSION

> Rule 51 permits any party to file written requests for jury instructions "
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> At the close of the evidence or at such earlier time during the trial as the court reasonably directs.... No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict....[2]

Many of the local rules discuss the form of the jury instructions. For example, twenty-three courts require that the instructions be numbered consecutively.[3] Seventeen courts require that each instruction be accompanied with adequate citation.[4] Twelve

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[1] D.Alaska LRGR15; D.Ariz. LR2.16; C.D.Cal. LR13.2; E.D.Cal. LR51-163; S.D.Cal. LR51.1; D.Del. LR51.1; M.D.Fla. LR5.01(c); N.D.Ga. LR51.1; S.D.Ga. LR51.1; D.Guam LR51; D.Haw. LR51.1; D.Idaho LR51.1; C.D.Ill. LR51.1; S.D.Ill. LR51.1; N.D.Ind. LR51.1; N.D.Iowa LR51.1; S.D.Iowa LR51.1; D.Kan. LR51.1; W.D.La. LR51.1; D.Md. LR106.8; E.D.Mich. LR51.1; N.D.Miss. LR51.1;S.D.Miss. LR51.1; W.D.Mo. LR51.1; D.Mont. LR245-2; D.Neb. LR51.1; N.D.N.Y. LR51.1; E.D.N.Car. LR25.02; M.D.N.Car. LR51.1(b); D.Or. LR51.1; M.D.Pa. LR51.1; D.R.I. LR18(a); D.S.Dak. LR51.1; E.D.Tenn. LR51.1; M.D.Tenn. LR12(f); D.Utah LR114; D.Vt. LR51.1(a); E.D.Va. LR51; E.D.Wash. LR51.1; W.D.Wash. LR51; E.D.Wis. LR8.05; D.Wyo. LR51.1.

[2] Fed.R.Civ.P. 51.

[3] D.Alaska LRGR15; D.Ariz. LR2.16; M.D.Fla. LR5.01(c); N.D.Ga. LR51.1; S.D.Ga. LR51.1; D.Idaho LR51.1; S.D.Ill. LR51.1; N.D.Iowa LR51.1; S.D.Iowa LR51.1; D.Kan. LR51.1; D.Md. LR106.8; E.D.Mich. LR51.1; N.D.Miss. LR51.1; S.D.Miss. LR51.1; W.D.Mo. LR51.1; D.Neb. LR51.1; E.D.N.Car. LR25.02; D.Or. LR51.1; M.D.Pa. LR51.1; D.R.I. LR18(a); D.Utah LR114; E.D.Va. LR51; W.D.Wash. LR51.

[4] D.Alaska LRGR15; C.D.Cal. LR13.2; E.D.Cal. LR51-163; S.D.Cal. LR51.1; D.Del. LR51.1; M.D.Fla. LR5.01(c); N.D.Ga. LR51.1; S.D.Ga. LR51.1; D.Idaho LR51.1; N.D.Iowa LR51.1; S.D.Iowa LR51.1; D.Kan. LR51.1; W.D.La. LR51.1; D.Md. LR106.8; E.D.Mich. LR51.1; N.D.Miss. LR51.1; S.D.Miss. LR51.1; D.Mont. LR245-2; D.Neb. LR51.1; D.Or. LR51.1; M.D.Pa. LR51.1; D.R.I. LR18(a); D.S.Dak. LR51.1; E.D.Tenn. LR51.1; M.D.Tenn. LR12(f); D.Utah LR114; E.D.Va. LR51; W.D.Wash. LR51; D.Wyo. LR51.1.

courts require that each instruction be placed on a single page.[5] Twelve courts require that each instruction be brief and clear and cover only one subject.[6] Six courts require that the name of the party submitting the instructions be on the cover page and not elsewhere.[7] Eight courts indicate that form instructions are appropriate and even preferred[8], but three of those courts state that, if a party deviates in some way from the form instructions, the court must be notified.[9] Two courts impose a duty on the parties to meet and confer on the jury instructions[10] with a view toward providing joint instructions.[11] Three courts require that the instructions be on letter-size paper.[12] These rules are appropriate as supplements to Rule 51.

Twenty-one courts require that copies of the instructions be served on the other parties.[13] Eight other courts require that two copies of the instructions be submitted to the court[14] while one court requires four copies.[15] These directives are also appropriate

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[5] C.D.Cal. LR13.2; E.D.Cal. LR51-163; S.D.Cal. LR51.1; D.Kan. LR51.1; E.D.Mich. LR51.1; N.D.Miss. LR51.1; S.D.Miss. LR51.1; D.Or. LR51.1; M.D.Pa. LR51.1; E.D.Tenn. LR51.1; E.D.Va. LR51; E.D.Wash. LR51.1.

[6] D.Alaska LRGR15; D.Ariz. LR2.16; C.D.Cal. LR13.2; E.D.Cal. LR51-163; S.D.Cal. LR51.1; D.Haw. LR51.1; S.D.Ill. LR51.1; D.Kan. LR51.1; E.D.Mich. LR51.1; D.Or. LR51.1; D.R.I. LR18(a); D.Utah LR114.

[7] C.D.Cal. LR13.2; E.D.Cal. LR51-163; N.D.Iowa LR51.1; S.D.Iowa LR51.1; W.D.Mo. LR51.1; E.D.Wash. LR51.1.

[8] E.D.Cal. LR51-163; S.D.Cal. LR51.1; N.D.Ga. LR51.1; D.Haw. LR51.1; S.D.Ill. LR51.1; N.D.Ind. LR51.1; E.D.N.Car. LR25.02; D.Or. LR51.1.

[9] E.D.Cal. LR51-163; S.D.Cal. LR51.1; D.Haw. LR51.1.

[10] D.Haw. LR51.1; W.D.La. LR51.1.

[11] D.Haw. LR51.1.

[12] S.D.Ga. LR51.1; S.D.Ill. LR51.1; E.D.Wash. LR51.1.

[13] D.Ariz. LR2.16; C.D.Cal. LR13.2; E.D.Cal. LR51-163; D.Idaho LR51.1; C.D.Ill. LR51.1; S.D.Ill. LR51.1; N.D.Iowa LR51.1; S.D.Iowa LR51.1; D.Md. LR106.8; E.D.Mich. LR51.1; N.D.Miss. LR51.1; S.D.Miss. LR51.1; W.D.Mo. LR51.1; D.Mont. LR245-2; M.D.Pa. LR51.1; D.R.I. LR18(b); D.S.Dak. LR51.1; E.D.Tenn. LR51.1; M.D.Tenn. LR12(f); E.D.Va. LR51; D.Wyo. LR51.1.

[14] S.D.Ga. LR51.1; D.Haw. LR51.1; S.D.Ill. LR51.1; D.Kan. LR51.1; W.D.La. LR51.1; E.D.Mich. LR51.1; D.Mont. LR245-2; E.D.Va. LR51.

as local rules.

Eleven courts have local rules that seek to limit the number of instructions either by limiting the actual number of instructions to twelve[16] or by limiting the number of pages of instructions to three pages[17] or one page.[18] These rules appear to serve no useful purpose. In a complicated case, for example, it may be impossible to reduce the number or volume of instructions as required. In that situation, the party will have to seek permission to file more instructions, which activity will further burden the court and the parties. In the event the court is not of the opinion that more than the required number of instructions or pages is needed, the party will be denied the permission to file more requests and should be able to argue effectively a denial of the right set out in Rule 51 to file requests. If, in fact, a particular instruction is unnecessary or cumulative, the court always has the power, regardless of the existence of these local rules, to refuse to give the instruction. In addition, these local rules seem inconsistent with the intent of Rule 51, in permitting counsel to submit the proposed instructions in the first instance, that the Rule "expedite the administration of justice."[19] These rules should be rescinded.

Rule 51 requires that the party object to any instruction before the jury retires to provide an opportunity for the court to correct the instruction and to preserve that issue for later appeal.[20] There are local rules in some courts that require a specific form for these objections. For example, five courts have local rules that require the objection be

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[15] W.D.Wash. LR51.

[16] M.D.Pa. LR51.1.

[17] E.D.Cal. LR51-163; D.Del. LR51.1; N.D.Ga. LR51.1; D.Idaho LR51.1; D.Md. LR106.8; W.D.Mo. LR51.1; M.D.Pa. LR51.1; D.Utah LR114; E.D.Wash. LR51.1.

[18] D.Ariz. LR2.16.

[19] *Curko v. William Spencer & Son, Corporation*, 294 F.2d 410, 414 (2d Cir. 1961).

accompanied by appropriate case citations.[21] Two courts require that written objections be numbered consecutively.[22] Two courts require that any objection set forth alternative language.[23]

Objections, of course, do not need to be made only in writing, and there are rules in some courts outlining the procedure for making oral objections. For example, seventeen courts provide that objections need be made only once, at the initial conference, and not again at trial.[24] Two courts have local rules that explain that the clerk or reporter will note the objections.[25] All of these rules are appropriate supplements to Rule 51.

Four courts have local rules that discuss oral objections and that are problematic.[26] These rules explain that objections are made out of the hearing of the jury. These rules repeat the last sentence of Rule 51, which provides an opportunity for objections to be made out of the hearing of the jury.[27] They are, therefore, unnecessary.

Approximately seven courts have local rules that set forth the time by which the jury instructions must be filed. Many of these rules conflict with Rule 51 by requiring that the proposed instructions be filed by a designated time before trial. For example, five jurisdictions require that proposed instructions be submitted at least five

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[20] Fed.R.Civ.P. 51.

[21] C.D.Cal. LR13.3; E.D.Cal. LR51-163; S.D.Cal. LR51.1; D.Haw. LR51.1; D.Idaho LR51.1.

[22] C.D.Cal. LR13.3; D.Idaho LR51.1.

[23] C.D.Cal. LR13.3; D.Haw. LR51.1.

[24] E.D.Cal. LR51-163; S.D.Cal. LR51.1; D.Guam LR51; N.D.Ind. LR51.1; D.Kan. LR51.1; W.D.La. LR51.1; E.D.Mich. LR51.1; N.D.Miss. LR51.1; S.D.Miss. LR51.1; D.Mont. LR245-2; D.Neb. LR51.1; M.D.Pa. LR51.1; M.D.Tenn. LR12(f);; D.Utah LR114; E.D.Wash. LR51.1; W.D.Wash. LR51; E.D.Wis. LR8.05.

[25] D.Ariz. LR2.16; D.Idaho, LR51.1.

[26] D.Ariz. LR2.16; E.D.Cal. LR51-163; D.Guam LR51; D.Idaho LR51.1.

days before trial.[28] Three jurisdictions require they be submitted seven days before trial.[29] One court requires they be submitted three days before the pretrial conference.[30] Two courts require they be submitted ten days before trial.[31] Another court requires they be submitted fourteen days before trial. [32] All of these rules are inconsistent with the clear wording of Rule 51 indicating the instructions should be submitted "[a]t the close of the evidence or at such earlier time *during the trial* as the court reasonably directs."[33] All of these rules require submission before the trial.

Another ten courts have local rules requiring that the instructions be submitted at the opening of the trial.[34] These rules are also inconsistent since the Federal Rule contemplates that instructions will either be submitted at the close of the evidence or as determined by the court in an individual case. A local rule providing a different procedure in all cases is inconsistent with Rule 51.

Six courts have local rules providing that the judge decides when the instructions are due.[35] These directives are appropriate assuming that the time stated by the judge is always "during the trial" as required by Rule 51.[36]

Two courts have local rules that simply repeat that the judge will instruct the

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[27] *See* Fed.R.Civ.P. 51.

[28] D.Alaska LRGR15; C.D.Cal. LR13.2; E.D.Va. LR51; E.D.Wash. LR51.1; D.Wyo. LR51.1.

[29] D.Haw. LR51.1; W.D.La. LR51.1; D.Vt. LR51.1(a).

[30] D.Del. LR51.1.

[31] N.D.Miss. LR51.1; S.D.Miss. LR51.1.

[32] D.Idaho LR51.1.

[33] Fed.R.Civ.P. 51 (emphasis added).

[34] D.Ariz. LR2.16; E.D.Cal. LR51-163; N.D.Ga. LR51.1; S.D.Ga. LR51.1; D.Kan. LR51.1; E.D.Mich. LR51.1; D.Neb. LR51.1; M.D.Pa. LR51.1; M.D.Tenn. LR12(f); E.D.Wis. LR8.05.

[35] M.D.Fla. LR5.01(c); S.D.Ga. LR51.1; D.Guam LR51; D.Mont. LR245-2; N.D.N.Y. LR51.1; D.R.I. LR18(a).

jury.[37] Another three courts have local rules that repeat various portions of Rule 51.[38] These rules are unnecessary.

VII. Judgment

Rule 54. Judgment; Costs

Rule 54—Jury Cost Assessment

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[36] Fed.R.Civ.P. 51.

[37] D.Idaho LR51.1; E.D.Wash. LR51.1.

[38] M.D.N.Car. LR51.1(b); D.S.Dak. LR51.1; D.Utah LR114.

Fifty-six courts have local rules explaining the procedures used to assess costs in calling a jury when one is not actually needed because the case has already settled.[1] All of these rules are appropriate as local directives.

DISCUSSION

There is no particular federal rule or statute covering this issue although there are several provisions relating to taxation of costs and fees, generally. Rule 54 of the Federal Rules of Civil Procedure provides that the prevailing party may seek costs and attorneys fees by following certain general procedures.[2] A list of what costs may be taxed is set forth in Section 1920 of Title 28.[3] Another provision in Title 28 allows the court to assess costs and fees against an attorney, personally, if that attorney "multiplies the proceedings in any case unreasonably and vexatiously."[4]

Specific local directive is unnecessary since the courts have inherent authority to impose this type of sanction.[5] At least one court has suggested that, although a court need not rely on a local rule to provide authority for imposing jury costs: "a local rule on

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[1] N.D.Ala. LR54.2; C.D.Cal. LR11.3; E.D.Cal. LR16-272; N.D.Cal. LR404; S.D.Cal. LR16.4; D.Colo. LR54.2; D.Del. LR54.2; S.D.Fla. LR47.1(B); N.D.Ga. LR39.2; D.Haw. LR54.1; D.Idaho LR54.2; C.D.Ill. LR83.14; S.D.Ill. LR54.1; N.D.Ind. LR47.3; S.D.Ind. LR42.1; N.D.Iowa LR83.8; S.D.Iowa LR83.8; E.D.Ky. LR54.1; W.D.Ky. LR54.1; E.D.La. LR54.1; M.D.La. LR54.1; W.D.La. LR54.1; D.Mass. LR40.3; E.D.Mich. LR38.2; W.D.Mich. LR40.3; N.D.Miss. LR54.1; S.D.Miss. LR54.1; E.D.Mo. LR41-8.04; D.Neb. LR54.2; D.N.H. LR54.2; D.N.Mex. LR54.4; E.D.N.Y. LR47.1; N.D.N.Y. LR47.3; S.D.N.Y. LR47.1; W.D.N.Y. LR11(c); E.D.N.Car. LR16.00; M.D.N.Car. LR83.3; D.N.Mar.I LR54.2; N.D.Ohio LR54.1; E.D.Okla. LR38.1; N.D.Okla. LR38.1; D.Or. LR47.1; M.D.Pa. LR83.3.2; W.D.Pa. LR54.1; D.P.R. LR323; D.S.Car. LR54.01; E.D.Tenn. LR68.2; E.D.Tex. LRCV-38(c); S.D.Tex. LR10; D.Vt. LR47.1; E.D.Va. LR54(G); E.D.Wash. LR1.1; W.D.Wash. LR39; N.D.W.Va. LRCiv2.04(f); S.D.W.Va. LRCiv2.04(f); D.Wyo. LR54.4.

[2] Fed.R.Civ.P. 54.

[3] 28 U.S.C. §1920.

[4] 28 U.S.C. §1927.

[5] *See e.g., U.S. v. Claros*, 17 F.3d 1041 (7th Cir. 1994); *Eash v. Riggin Trucking, Inc.*, 757 F.2d 557 (3rd Cir. 1985); *White v. Raymark Industries, Inc.* 783 F.2d 1175 (4th Cir. 1986).

the imposition of such a sanction might well be salutary."[6]

All of the fifty-six courts have local rules explaining how the parties can dispose of the case before trial without incurring any costs for the jury. Twenty-one of these courts require that notice of settlement be provided one full day before the day the jury is set to be selected or the day the trial is scheduled to commence.[7] Six courts require that notice be provided by 3:00 pm of the day immediately prior to the trial,[8] and another six courts require notice by noon on the last business day before trial.[9] Four courts require that notice be given several days in advance of the scheduled trial date.[10] Five courts require notice of settlement before the jurors have reported to try the case.[11] Twelve of the courts simply require that notice be timely[12] or made promptly.[13]

Most of the jurisdictions acknowledge the court's power to assess these costs and identify the specific costs that may be assessed. Fifty-two of the courts have local rules that allow the court to assess all jury costs.[14] Many of these courts articulate

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[6] *Eash, supra*, at 569.

[7] N.D.Ala. LR54.2; S.D.Fla. LR47.1(B); N.D.Ga. LR39.2; D.Haw. LR54.1; N.D.Ind. LR47.3; S.D.Ind. LR42.1; N.D.Iowa LR83.8; S.D.Iowa LR83.8; E.D.La. LR54.1; M.D.La. LR54.1; W.D.La. LR54.1; N.D.Miss. LR54.1; S.D.Miss. LR54.1; D.Neb. LR54.2; N.D.N.Y. LR47.3; E.D.N.Car. LR16.00; M.D.N.Car. LR83.3; D.S.Car. LR54.01; E.D.Tex. LRCV-38(c); E.D.Va. LR54(G); E.D.Wash. LR1.1.

[8] D.Idaho LR54.2; S.D.Ill. LR54.1; D.N.H. LR54.2; D.Or. LR47.1; N.D.W.Va. LRCiv2.04(f); S.D.W.Va. LRCiv2.04(f).

[9] D.Colo. LR54.2; D.N.Mex. LR54.4; E.D.N.Y. LR47.1; S.D.N.Y. LR47.1; N.D.Ohio LR54.1; D.P.R. LR323.

[10] D.Del. LR54.2 (three business days); W.D.Wash. LR39 (three business days); D.Wyo. LR54.4 (five business days); D.N.Mar.I. LR54.2 (ten business days).

[11] E.D.Cal. LR16-272; S.D.Cal. LR16.4; C.D.Ill. LR83.14; E.D.Mich. LR38.2; D.Vt. LR47.1.

[12] N.D.Cal. LR404; E.D.Mich. LR38.2; W.D.Mich. LR40.3; E.D.Okla. LR38.1; N.D.Okla. LR38.1; E.D.Tenn. LR68.2.

[13] C.D.Cal LR11.2; E.D.Ky. LR54.1; W.D.Ky. LR54.1; E.D.Mo. LR41-8.04; D.Or. LR47.1; S.D.Tex. LR10.

[14] N.D.Ala. LR54.2; C.D.Cal. LR11.3; E.D.Cal. LR16-272; N.D.Cal. LR404; S.D.Cal. LR16.4; D.Colo. LR54.2; D.Del. LR54.2; S.D.Fla. LR47.1(B); N.D.Ga. LR39.2; D.Haw. LR54.1;

precisely what those costs are such as, for example, the per diem,[15] mileage,[16] marshal's fees,[17] and parking.[18]

These rules also explain who may be made financially responsible for these costs. For example, forty-eight of the courts allow an assessment to be made against the parties, counsel, or both.[19] Two courts have local rules that require the assessment be

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D.Idaho LR54.2; C.D.Ill. LR83.14; S.D.Ill. LR54.1; N.D.Ind. LR47.3; S.D.Ind. LR42.1; N.D.Iowa LR83.8; S.D.Iowa LR83.8; E.D.Ky. LR54.1; W.D.Ky. LR54.1; E.D.La. LR54.1; M.D.La. LR54.1; W.D.La. LR54.1; E.D.Mich. LR38.2; W.D.Mich. LR40.3; N.D.Miss. LR54.1; S.D.Miss. LR54.1; D.Neb. LR54.2; D.N.H. LR54.2; D.N.Mex. LR54.4; E.D.N.Y. LR47.1; N.D.N.Y. LR47.3; S.D.N.Y. LR47.1; W.D.N.Y. LR11(c); E.D.N.Car. LR16.00; M.D.N.Car. LR83.3; D.N.Mar.I LR54.2; N.D.Ohio LR54.1; E.D.Okla. LR38.1; N.D.Okla. LR38.1; M.D.Pa. LR83.3.2; W.D.Pa. LR54.1; D.P.R. LR323; D.S.Car. LR54.01; E.D.Tenn. LR68.2; E.D.Tex. LRCV-38(c); D.Vt. LR47.1; E.D.Va. LR54(G); E.D.Wash. LR1.1; W.D.Wash. LR39; N.D.W.Va. LRCiv2.04(f); S.D.W.Va. LRCiv2.04(f); D.Wyo. LR54.4.

[15] N.D.Ala. LR54.2; C.D.Cal. LR11.3; D.Del. LR54.2; S.D.Fla. LR47.1(B); N.D.Ga. LR39.2; D.Haw. LR54.1; D.Idaho LR54.2; C.D.Ill. LR83.14; N.D.Ind. LR47.3; S.D.Ind. LR42.1; N.D.Iowa LR83.8; S.D.Iowa LR83.8; E.D.La. LR54.1; M.D.La. LR54.1; W.D.La. LR54.1; N.D.Miss. LR54.1; S.D.Miss. LR54.1; E.D.Mo. LR41-8.04; D.N.Mex. LR54.4; N.D.N.Y. LR47.3; E.D.N.Car. LR16.00; M.D.N.Car. LR83.3; D.N.Mar.I LR54.2; D.Or. LR47.1; M.D.Pa. LR83.3.2; W.D.Pa. LR54.1; D.P.R. LR323; D.S.Car. LR54.01; E.D.Tenn. LR68.2; E.D.Tex. LRCV-38(c); E.D.Va. LR54(G); E.D.Wash. LR1.1; D.Wyo. LR54.4.

[16] N.D.Ala. LR54.2; D.Del. LR54.2; S.D.Fla. LR47.1(B); N.D.Ga. LR39.2; D.Haw. LR54.1; C.D.Ill. LR83.14; N.D.Ind. LR47.3; S.D.Ind. LR42.1; N.D.Iowa LR83.8; S.D.Iowa LR83.8; E.D.La. LR54.1; M.D.La. LR54.1; W.D.La. LR54.1; W.D.Mich. LR40.3; N.D.Miss. LR54.1; S.D.Miss. LR54.1; E.D.Mo. LR41-8.04; D.N.H. LR54.2; D.N.Mex. LR54.4; N.D.N.Y. LR47.3; E.D.N.Car. LR16.00; M.D.N.Car. LR83.3; D.N.Mar.I LR54.2; M.D.Pa. LR83.3.2; W.D.Pa. LR54.1; D.P.R. LR323; D.S.Car. LR54.01; E.D.Tenn. LR68.2; E.D.Tex. LRCV-38(c); E.D.Va. LR54(G); E.D.Wash. LR1.1; D.Wyo. LR54.4.

[17] D.Del. LR54.2; D.Haw. LR54.1; N.D.Ind. LR47.3; S.D.Ind. LR42.1; N.D.Iowa LR83.8; S.D.Iowa LR83.8; E.D.La. LR54.1; M.D.La. LR54.1; W.D.La. LR54.1; D.Neb. LR54.2; D.N.H. LR54.2; N.D.N.Y. LR47.3; M.D.N.Car. LR83.3; D.N.Mar.I LR54.2; D.Or. LR47.1; D.P.R. LR323; D.S.Car. LR54.01; E.D.Va. LR54(G)E.D.Wash. LR1.1; D.Wyo. LR54.4rt.

[18] N.D.Ga. LR39.2; E.D.Mo. LR41-8.04; E.D.N.Car. LR16.00; E.D.Tenn. LR68.2.

[19] N.D.Ala. LR54.2; E.D.Cal. LR16-272; N.D.Cal. LR404; S.D.Cal. LR16.4; D.Colo. LR54.2; D.Del. LR54.2; S.D.Fla. LR47.1(B); N.D.Ga. LR39.2; D.Haw. LR54.1; C.D.Ill. LR83.14; N.D.Ind. LR47.3; S.D.Ind. LR42.1; N.D.Iowa LR83.8; S.D.Iowa LR83.8; E.D.Ky. LR54.1; W.D.Ky. LR54.1; E.D.La. LR54.1; M.D.La. LR54.1; W.D.La. LR54.1; E.D.Mich. LR38; W.D.Mich. LR40.3; N.D.Miss. LR54.1; S.D.Miss. LR54.1; E.D.Mo. LR41-8.04; D.Neb. LR54.2; D.N.Mex. LR54.4; E.D.N.Y. LR47.1; N.D.N.Y. LR47.3; S.D.N.Y. LR47.1; W.D.N.Y. LR11(c); E.D.N.Car. LR16.00; M.D.N.Car. LR83.3; N.D.Ohio LR54.1; E.D.Okla. LR38.1; N.D.Okla. LR38.1; M.D.Pa. LR83.3.2; W.D.Pa. LR54.1; D.P.R. LR323; D.S.Car. LR54.01; E.D.Tenn. LR68.2; E.D.Tex. LRCV-38(c); E.D.Va. LR54(G); E.D.Wash. LR1.1; .W.D.Wash. LR39; N.D.W.Va. LRCiv2.04(f); S.D.W.Va. LRCiv2.04(f); D.Wyo. LR54.4.

made against counsel alone.[20] Another two courts allow the parties to agree to divide the responsibility.[21]

Some of the courts explain the standard used to avoid a sanction even if a case is settled at the last minute. Twenty-four courts specifically state that an assessment will not be made upon a showing of good faith for the delay.[22]

Some courts also explain that an assessment of juror costs may be made during the trial itself. Eleven courts extend the operation of this rule to any settlement that occurs after the start of the trial and up to the verdict.[23]

XI. General Provisions

Rule 81. Applicability in General

Rule 81—Naturalization

[20] C.D.Cal. LR11.3; D.Idaho LR54.2..

[21] N.D.Ind. LR47.3; S.D.Ind. LR42.1. .

[22] N.D.Ala. LR54.2; D.Del. LR54.2; S.D.Fla. LR47.1(B); N.D.Ga. LR39.2; D.Haw. LR54.1; N.D.Ind. LR47.3; S.D.Ind. LR42.1; N.D.Iowa LR83.8; S.D.Iowa LR83.8; E.D.La. LR54.1; M.D.La. LR54.1; W.D.La. LR54.1; N.D.N.Y. LR47.3; E.D.N.Car. LR16.00; M.D.N.Car. LR83.3; D.N.Mar.I LR54.2; M.D.Pa. LR883.3.; W.D.Pa. LR54.1; D.P.R. LR323; E.D.Tex. LRCV-38(c); S.D.Tex. LR10; E.D.Va. LR54(G); E.D.Wash. LR1.1; D.Wyo. LR54.4.

[23] D.Colo. LR54.2; N.D.Ga. LR39.2; N.D.Miss. LR54.1; S.D.Miss. LR54.1; D.Neb. LR54.2; D.N.Mex. LR54.4; E.D.N.Car. LR16.00; N.D.Ohio LR54.1; E.D.Tex. LRCV-38(c); E.D.Va. LR54(G); D.Wyo. LR54.4.

Eleven courts have local rules outlining various procedures used to hear naturalization petitions.[1] All of these rules should be rescinded since the district courts no longer have authority to hear naturalization petitions.

DISCUSSION

Prior to 1990 the federal district courts had jurisdiction to hear petitions for naturalization.[2] The procedure for filing those petitions was regulated by section 1445 of the Immigration and Nationality Act which, among other things, set forth the form of the petition, who may file the petition, where petitions were to be filed, and the use and purpose of any declaration of intention.[3] The local rules which explain how and when petitions are filed and heard may have been appropriate as supplements to this law.

The Immigration and Nationality Act was amended, however, in significant respects effective November 29, 1990 so that these rules are now inappropriate. The district courts no longer have nationalization authority: "The full authority to naturalize persons as citizens of the United States is conferred upon the Attorney General."[4] The application for naturalization is now filed with the Attorney General and investigated and determined by the Attorney General.[5]The district court's role now is to administer the oath of allegiance if requested by the applicant.[6] These local rules explain where the petitions are filed and when they are heard. They are inconsistent with the clear wording of the relevant statutes and, as such, should be rescinded.

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[1] D.Alaska LR28; N.D.Ga. LR83.10; E.D.La. LR83.1; M.D.La. LR83.1; W.D.La. LR83.1; D.N.J. LR81.1; W.D.N.Y. LR78; E.D.N.Car. LR14.00; M.D.N.Car. LR77.1(c); D.Utah LR120; D.Wyo. LR83.8.

[2] *See* 8 U.S.C. §1421 (1989).

[3] 8 U.S.C. §1445 (1989).

[4] 8 U.S.C. §1421 (2001).

[5] *See* 8 U.S.C. §§1445, 1446, and 1447 (2001).

[6] 8 U.S.C. §§1421(b) (2001).

Rule 81—Jury Demand in Removed Cases

Local rules in ten courts address the procedure used to secure a jury trial in a removed case. Rules in five of these courts repeat existing law. Rules in six jurisdictions may be inconsistent with existing law. Rules in two courts are flatly contradictory with existing law and should be rescinded.

DISCUSSION

Rule 81(c) regulates the procedure used to obtain a jury trial when a case has been removed from state court.[1] Three specific circumstances are set forth in that Rule. The first concerns the procedure for making an actual demand:

> If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition.[2]

The second situation arises when the party already made an express demand for a jury trial in state court. In this instance, Rule 81 provides that the party need not make a demand at all after removal.[3] The last situation arises when state law did not require that a specific jury demand be made. Rule 81 provides, in these cases, that the parties

> need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party.[4]

Local rules in five courts either repeat the language of Rule 81(c) and Rule

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[1] Fed.R.Civ.P. 81(c).

[2] *Id.*

[3] *Id.*

[4] *Id.*

38(b) or repeat that these Federal Rules are applicable to removed cases generally.[5] Rule 83 of the Federal Rules of Civil Procedure does not permit such repetition.[6]

Local rules in four district courts appear to discuss a party's obligation to reassert its demand for a jury trial after removal.[7] For example, one court specifically requires a new jury demand even if one was already made pursuant to state law: "Notwithstanding state law, trial by jury is waived ... [in a removed case] unless a demand for a jury trial is filed...."[8] One local rule also requires an additional jury demand after removal by stating that a failure to make a demand as directed in the local rule is a waiver of the right to a jury trial.[9] Another local rule acknowledges that the party may have already filed a demand pursuant to state law but still requires that a party reassert its request for a jury unless that demand "is in the removed case file."[10] Another local rule requires that a written jury demand be filed within thirty days of the clerk's notice of removal or the right to a jury trial will be deemed waived.[11] A party is under no obligation to reassert its demand for a jury trial if one was properly made pursuant to state law. To the extent these local rules require exactly that, they are inconsistent with Rule 81 and should, therefore, be rescinded. To the extent, however, these rules are in states where there is no need to make specific demand in state court, then these rules fall under the third circumstance where district court regulation is appropriate.

Two courts have local rules that set forth times within which the parties must

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[5] C.D.Cal. LR3.4.10; N.D.N.Y. LR81.3; D.Me. LR38; E.D.Va. LR38; E.D.Wash. LR38.1.

[6] Fed.R.Civ.P. 83(a)(1).

[7] D.Neb. LR81.2; W.D.N.Y. LR38; N.D.Okla. LR38.1A; W.D.Okla. LR81.1.

[8] W.D.Okla. LR81.1.

[9] D.Neb. LR81.2.

[10] N.D.Okla. LR81.2.

file jury demands after removal.[12] For example, one local rule provides thirty days from the date of removal to make a demand or it is deemed waived unless Rule 38 gives a longer time.[13] These time limits are different from those set forth in Rule 81(c).[14] Because they flatly contradict the stated time limits in the Federal Rule, these local rules should be rescinded.

Two courts have local rules that seem suggestive only.[15] The significance of these rules is not apparent. One of the rules simply states that a "party may file a 'Demand for Jury Trial.'"[16] The other rule states that, if a demand for a jury trial was made already in state court, the removing party "shall include the word 'jury' with the caption of the notice of removal."[17] If these rules are only trying to suggest what a party could do, perhaps to assist the clerk in determining what cases should be given jury trials, the rules are not problematic. If, on the other hand, they are actually requirements and a failure to comply with them will act as a waiver, then they are inconsistent with existing law and should be rescinded.

Rule 83. Rules by District Courts; Judges' Directives

Rule 83—Availability of Local Rules

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[11] W.D.N.Y. LR38.

[12] N.D.Okla. LR81.2; D.Neb. LR81.2.

[13] N.D.Okla. LR81.2.

[14] *See* Fed.R.Civ.P. 81(c) (demand must be served "within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition").

[15] N.D.N.Y. LR38.1; E.D.Tex. LR81(b).

[16] N.D.N.Y. LR38.1.

[17] E.D.Tex. LR81(b).

Seventeen district courts have local rules concerning the availability of local rules.[1] Some of these rules are appropriate supplements to the Federal Rules. Rules in three courts, however, repeat existing law and are, therefore, unnecessary.

DISCUSSION

Rule 83 of the Federal Rules of Civil Procedure requires that copies of local rules be made available to the public.[2] Five courts have local rules indicating that the rules are provided at no charge to people.[3] Seven courts provide free copies of the local rules to new attorneys.[4] Six of these courts explain that there is a charge for local rules when sought by attorneys who are not new to the jurisdiction.[5] These rules supplement Rule 83 and should remain local directives.

Rules in three courts simply restate the Rule 83 provision that copies of local rules are available.[6] These rules are unnecessary and should be rescinded.

Rule 83—Sanctions

[1] S.D.Ala. LR1.2; E.D.Cal. GR1-102; S.D.Cal. LR1.2; D.Del. LR1.2; D.Idaho LR1.2; N.D.Ind. LR1.2; S.D.Ind. LR1.2; E.D.Mich. LR1.3; D.Neb. LR1.2; D.N.H. LR1.2; N.D.N.Y. LR1.2; D.N.Mar.I LR1.2; E.D.Okla. LR1.2; N.D.Okla. LR1.2; W.D.Pa. LR1.2; D.Utah LR102; D.V.I. LR1.2.

[2] Fed.R.Civ.P. 83(a)(1).

[3] D.Del. LR1.2; D.Idaho LR1.2; N.D.Ind. LR1.2; S.D.Ind. LR1.2; D.Neb. LR1.2; D.N.H. LR1.2; D.N.Mar.I LR1.2; W.D.Pa. LR1.2.

[4] S.D.Ala. LR1.2; E.D.Cal. GR1-102; S.D.Cal. LR1.2; E.D.Okla. LR1.2; N.D.Okla. LR1.2; D.Utah LR102; D.V.I. LR1.2.

[5] S.D.Ala. LR1.2; S.D.Cal. LR1.2; N.D.Okla. LR1.2; D.Utah LR102; D.V.I. LR1.2.

[6] E.D.Mich. LR1.3; N.D.N.Y. LR1.2; E.D.Okla. LR1.2.

Sixteen courts have local rules concerning sanctions for some local rule violations.[1] Seven of these courts have rules that are appropriate supplements to Rule 83 of the Federal Rules of Civil Procedure. Rules in some of the jurisdictions may be appropriate but, depending upon how the rules are applied in a specific case, they may be problematic.

DISCUSSION

Rule 83 was amended in 1995 based, at least in part, on suggestions in the original Local Rules Project Report[2] by the addition of the following requirement:

> A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.[3]

Rule 5 of the Federal Rules of Civil Procedure was also amended around that time to forbid rejection of a paper presented for filing "solely because it is not presented in proper form as required by these rules or any local rules or practices."[4]

Six courts have local rules that specifically provide sanctions for incorrect forms of pleadings and other papers consisting only of the imposition of a fine against the attorney or a person proceeding *pro se*.[5] Another court requires that a sanction for any form violation be contested only prior to the payment of any fine.[6] These rules supplement Rule 83 and should remain subject to local variation.

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[1] M.D.Ala. LR1.2; N.D.Cal. LR04-Jan ; D.Del. LR1.3; D.Idaho LR1.3; N.D.Ind. LR1.3; S.D.Ind. LR1.3; N.D.Iowa LR1.1; S.D.Iowa LR1.1; D.Mass. LR1.3; D.Minn. LR1.3; D.Nev. LR1A. 4-1; D.N.H. LR1.3; N.D.N.Y. LR1.1; D.N.Mar.I LR1.3; D.V.I. LR1.3; E.D.Wash. LR1.1.

[2] *See* Report at Suggested Local Rules p.9.

[3] Fed.R.Civ.P. 83(a)(2).

[4] Fed.R.Civ.P. 5(e).

[5] D.Idaho LR1.3; N.D.Ind. LR1.3; S.D.Ind. LR1.3; D.N.H. LR1.3; D.N.Mar.I LR1.3; D.V.I. LR1.3.

Rules in eleven jurisdictions may also supplement this Federal Rule but, depending on their application in specific cases, they may be inconsistent with this Rule.[7] Rules in nine courts set forth the sanctions available for violations of any local rules.[8] Rules in four courts acknowledge that the issue of sanctions is within the sound discretion of the judge whose case is affected.[9] Of course, the court does have discretion to determine appropriate sanctions, but this discretion is tempered by Rule 83 and the requirement of Rule 5.[10] To the extent, then, that these local rules allow sanctions otherwise forbidden by these Federal Rules, they should be rescinded.

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[6] D.N.H. LR1.3.

[7] M.D.Ala. LR1.2; N.D.Cal. LR04-Jan ; D.Del. LR1.3; N.D.Iowa LR1.1; S.D.Iowa LR1.1; D.Mass. LR1.3; D.Minn. LR1.3; D.Nev. LR1A. 4-1; D.N.H. LR1.3; N.D.N.Y. LR1.1; E.D.Wash. LR1.1.

[8] M.D.Ala. LR1.2; N.D.Cal. LR04-Jan ; D.Del. LR1.3; N.D.Iowa LR1.1; S.D.Iowa LR1.1; D.Mass. LR1.3; D.Minn. LR1.3; D.Nev. LR1A. 4-1; D.N.H. LR1.3; N.D.N.Y. LR1.1; E.D.Wash. LR1.1.

[9] M.D.Ala. LR1.2; D.Del. LR1.3; Nev. LR1A 4-1; D.N.H. LR1.3.

[10] Fed.R.Civ.P. 83(a)(2); 5(e).