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A SIXTH CIRCUIT STORY

CARL TOBIAS*

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I. INTRODUCTION

At the May 4, 1994 regular meeting of the Judicial Council of the United States Courts for the Sixth Circuit, the Council voted to “suspend further review of local rules until it receives further guidance from Congress, the Judicial Conference of the United States or by case law on the question of whether provisions of the Civil Justice Reform Act take precedence over the Federal Rules of Civil Procedure.”¹ By so doing, the Council was ostensibly discharging responsibilities assigned to it by the Judicial Improvements and Access to Justice Act (JIA) of 1988.² The JIA requires that every circuit council periodically survey local rules adopted by the district courts within the council’s purview for consistency with the Federal Rules of Civil Procedure and Acts of Congress, and it authorizes each council to modify or abrogate conflicting local directives.³

The Sixth Circuit Judicial Council’s decision may seem inconsequential in the 200-year history of the federal courts. However, the vote is a telling comment on the confused state of civil procedure and the need to ameliorate that situation. I wish to employ this apparently innocuous story as a

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1. Judicial Council of Sixth Circuit, U.S. Ct. Appeals, Minutes of Meeting 3-4 (May 4, 1994) (on file with Office of Cir. Exec.) [hereinafter Minutes].

2. See 28 U.S.C. §§ 332(d)(4), 2701(a) (1988 & Supp. V 1993).

3. See *id.* Federal Rule of Civil Procedure 83 assigns similar responsibilities. See *infra* notes 8-9, 14-15 and accompanying text. Rule 83’s 1995 amendment also proscribes the adoption of duplicative local procedures. See Amendment to Federal Rule of Civil Procedure 83, *reprinted in* 160 F.R.D. 149, 161 (1995). I emphasize inconsistent procedures because they are more problematic than duplicative procedures and the JIA because it is broader than Rule 83.

starting point for exploring civil procedure's current condition and for showing how the Council might resume its review with an approach to which its members seemed oblivious when voting.

Several reasons explain the decision of the Sixth Circuit Judicial Council to postpone review. For example, complexity and fragmentation characterize modern civil procedure. More specifically, Congress did not state how councils should harmonize the JIA and the Civil Justice Reform Act of 1990 (CJRA). The Sixth Circuit Council also seemed to want a consensus before resolving a delicate, close question of authority and was justifiably concerned about spending scarce resources on an effort that members believed the CJRA could moot.

The Council prematurely and unnecessarily suspended review, however. It can circumvent the conflict that Council members perceived between the JIA and the CJRA and thereby expeditiously fulfill most of its review obligations. The issue warrants analysis because all twelve regional circuit judicial councils must confront the same question that the Sixth Circuit Judicial Council faced when complying with its duties—responsibilities that few councils have fully satisfied. This Article undertakes that analysis.

The second part of the Article analyzes the national and Sixth Circuit developments in civil procedure that led the Sixth Circuit Judicial Council to discontinue review. The third part offers suggestions for addressing concerns that underlay the Council's postponement determination and for resuming the review mandated and discharging the obligations imposed.

II. DEVELOPMENTS LEADING TO THE LOCAL RULE REVIEW SUSPENSION

Many procedural developments that apparently prompted the Sixth Circuit Judicial Council to delay reviewing local rules have received comparatively thorough evaluation elsewhere.⁴ However, this Article comprehensively examines those events because broader assessment should enhance understanding of the Council's action. The Article emphasizes developments of the last decade because they are most relevant to the suspension decision.

A. National Developments

Congress passed the Rules Enabling Act in 1934 after years of contentious debate.⁵ The legislation, which constituted a political compromise,

4. See, e.g., Stephen N. Subrin, *Federal Rules, Local Rules and State Rules: Uniformity, Divergence and Emerging Patterns*, 137 U. PA. L. REV. 1999, 2020-26 (1989); Carl Tobias, *More Modern Civil Process*, 56 U. PITT. L. REV. 803, 807-09 (1995).

5. See 28 U.S.C. §§ 2071-74 (1988 & Supp. V 1993). See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); Stephen N. Subrin, *How*

authorized the United States Supreme Court to adopt procedures to govern civil disputes in the federal district courts.⁶ The 1934 statute also empowered the federal districts to "prescribe rules for the conduct of their business [that] shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."⁷

When the Supreme Court promulgated the initial Federal Rules of Civil Procedure in 1938, it included Rule 83, which authorizes the federal districts and individual judges to adopt local civil procedures.⁸ The Court apparently intended Rule 83 as a limited grant of power. The Rule essentially authorizes districts and judges to *prescribe* local requirements that treat unusual local conditions but *proscribes* procedures that conflict with the federal rules or congressional legislation.⁹

Federal districts and specific judges have honored in the breach both the original understanding that the grant was narrow and the prohibition on inconsistency. These districts and judges have prescribed many local requirements, a number of which conflict with the Federal Rules of Civil Procedure or United States Code provisions. In the 1980s, the Judicial Conference of the United States—the federal courts' policymaking arm—and the Congress evinced concern about the growth of increasingly inconsistent local civil procedures.

1. Judicial Conference

In 1986, the Judicial Conference commissioned the Local Rules Project to assemble and organize all districts' local rules, standing orders issued by individual judges, and other local procedural requirements.¹⁰ In 1989,

Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. PA. L. REV. 909, 943-61 (1987).

6. See 28 U.S.C. §§ 2071-74 (1988 & Supp. V 1993); see also Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 272-77 (1989) [hereinafter Tobias, *Public Law Litigation*]. See generally Joseph R. Biden, Jr., *Congress and the Courts: Our Mutual Obligation*, 46 STAN. L. REV. 1285, 1289 (1994); Burbank, *supra* note 5.

7. See 28 U.S.C. § 2071(a) (1988 & Supp. 1993). See generally Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853, 865-67, 870-1 (1989).

8. See FED. R. CIV. P. 83; see also Subrin, *supra* note 4, at 2016-19. See generally Tobias, *Public Law Litigation*, *supra* note 6, at 272-77.

9. See FED. R. CIV. P. 83; FED. R. CIV. P. 83, 1985 advisory comm. note. See generally Keeton, *supra* note 7; Subrin, *supra* note 4, at 2011-16.

10. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES ON CIVIL PRACTICE 1 (1989) [hereinafter REPORT OF LOCAL RULES PROJECT]; see also Daniel R. Coquillette et al., *The Role of Local Rules*, 75 A.B.A. J. 62 (1989) (summarizing Local Rules Project). See generally Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1596-97 (1994) [hereinafter Tobias, *Improving*]; Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L. J. 1393, 1397-99 (1992) [hereinafter Tobias, *Balkanization*].

the Project issued a thorough report, which found that judges had adopted some 5000 local rules and many other procedures governing local practice.¹¹ The rules and procedures were diversely denominated as general, standing, special, scheduling, or minute orders. Many of the directives conflicted with the Federal Rules of Civil Procedure, Acts of Congress, or local requirements that applied in the remaining ninety-three districts. Districts and individual judges promulgated and enforced inconsistent procedures, notwithstanding proscriptions on this activity in the Rules Enabling Act and in Rule 83.¹²

The federal bench and Congress implemented several responses to the problems posed by local procedural proliferation.¹³ The Judicial Conference sponsored the 1985 amendment to Rule 83. This amendment requires districts to prescribe local rules only after affording public notice and comment, and it mandates that standing orders of individual judges be consistent with the federal rules and local rules.¹⁴ The revision's advisory committee note urged the districts to institute procedures for publishing and reviewing these standing orders. The note also encouraged the circuit judicial councils to analyze all local rules for validity and consistency with the federal rules and with local procedures in the other districts.¹⁵

2. Congress

Congress passed the Judicial Improvements Act in 1988. The Act's objectives were to reduce the proliferation of local procedures and to restore the primacy of the Federal Rules of Civil Procedure.¹⁶ Congress meant to treat local proliferation by regularizing, and opening to public

11. See REPORT OF THE LOCAL RULES PROJECT, *supra* note 10, at 1; see also Telephone Interview with Mary P. Squiers, Project Director of Local Rules Project (Feb. 21, 1992) (notes on file with author); Telephone Interview with Stephen N. Subrin, Consultant to the Local Rules Project (Feb. 15, 1992) (notes on file with author). Moreover, a number of individual judges applied numerous unwritten procedures. See Carl Tobias, *Suggestions for Circuit Court Review of Local Procedures*, 52 WASH. & LEE L. REV. 359, 360 n.2 (1995) [hereinafter *Suggestions*].

12. See 28 U.S.C. § 2071(a) (1988 & Supp. V 1993); FED. R. CIV. P. 83; see also Subrin, *supra* note 4, at 2020-26. See generally Coquillette et al., *supra* note 10, at 62-65.

13. The Judicial Conference commissioned the Local Rules Project to analyze the difficulties and, after receiving the Project's Report, it issued an order requesting that districts conform local procedures to the federal rules. See Tobias, *Improving*, *supra* note 10, at 1597; Tobias, *Balkanization*, *supra* note 10, at 1399.

14. See FED. R. CIV. P. 83; see also FED. R. CIV. P. 83, 1985 advisory comm. note. See generally David M. Roberts, *The Myth of Uniformity in Federal Civil Procedure: Federal Civil Rule 83 and District Court Local Rulemaking Powers*, 8 U. PUGET SOUND L. REV. 537 (1985).

15. See FED. R. CIV. P. 83, 1985 advisory comm. note; see also *supra* note 3 (discussing Rule 83's 1995 amendment); see generally Tobias, *Improving*, *supra* note 10, at 1596.

16. Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified at 28 U.S.C. §§ 332(d)(4), 2071-2074 (1988 & Supp. V 1993)). See generally Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991).

involvement, the procedural revision processes.¹⁷ It addressed proliferation by imposing on circuit judicial councils an affirmative duty periodically to monitor local procedures for consistency and by empowering councils to change or abolish conflicting procedures.¹⁸ Congress apparently intended for these requirements to cover individual-judge procedures.¹⁹

3. Circuit Judicial Council Implementation

A tiny number of circuit judicial councils have thoroughly effectuated the local procedural review requirements embodied in revised Rule 83 and the 1988 Judicial Improvements Act. Numerous significant reasons, which can be ascribed to Congress and to federal judges, explain the incomplete implementation of those mandates.

A few circuit councils have been reluctant to effectuate the mandates requiring oversight and abrogation or modification of conflicting local procedures.²⁰ The several councils that attempted to institute rigorous review have apparently found the task daunting. Monitoring may have been especially onerous in circuits that encompass many federal districts or that include districts which have adopted large numbers of local procedures. Congress did not appropriate any money to implement this feature of the 1988 statute, and that omission complicated the efforts of councils, which possess relatively few resources for discharging a plethora of difficult duties.

Another significant reason why several circuit councils incompletely fulfilled the requirements of Rule 83 and the Judicial Improvements Act is

17. See Tobias, *Improving*, *supra* note 10, at 1599-1601. See generally Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, 300-01 (1994).

18. See 28 U.S.C. §§ 332(d)(4), 2071(a) (1988 & Supp. V 1993). See generally Tobias, *Balkanization*, *supra* note 10, at 1401. The JIA, therefore, placed an ongoing responsibility on councils to review local procedures that existed on the statute's December 1, 1988 effective date as well as those subsequently adopted.

19. See 28 U.S.C. § 2071 notes (1988 & Supp. V 1993). See generally Myron J. Bromberg & Jonathan M. Korn, *Individual Judges' Practices: An Inadvertent Subversion of the Federal Rules of Civil Procedure*, 68 ST. JOHN'S L. REV. 1 (1994). The statute made the process exclusive to prevent districts and judges from avoiding it by describing local procedures as something other than local rules. See 28 U.S.C. § 2071(f) (1988 & Supp. V 1993). See generally Tobias, *Improving*, *supra* note 10, at 1600.

20. Circuit judges might have deferred to district judges on councils who know more about civil litigation in trial courts and within each circuit's districts. District judges may have been reluctant to scrutinize or modify procedures that the judges might apply in their own districts or could have lacked sufficient familiarity with the local conditions in the districts whose procedures they were assessing to alter those requirements found to conflict. Some judges, out of courtesy or respect for individuals who occupy the identical position in the judicial hierarchy, might have deferentially evaluated procedures. Local procedural review is also very sensitive because many district judges strongly defend their prerogatives to apply local procedures. See Tobias, *Suggestions*, *supra* note 11, at 363-64; Tobias, *Balkanization*, *supra* note 10 at 1406-07. In the remainder of this subsection, I rely substantially on interviews with many individuals who are familiar with councils' implementation efforts, on numerous council documents, and on Tobias, *Suggestions*, *supra* note 11.

that some aspects of the 1990 CJRA effectively suspended the 1988 JIA's implementation.²¹ For example, the 1990 legislation implicitly suggested that districts could prescribe inconsistent local procedures for decreasing cost and delay in civil cases.²² A number of districts accepted this invitation. The Eastern District of Texas adopted a settlement offer provision that conflicts with Federal Rule 68,²³ while the Montana District prescribed a procedure for co-equal assignment of cases to Article III judges and magistrate judges that is inconsistent with section 636 of Title 28.²⁴ The CJRA correspondingly established circuit review committees, in addition to councils, and imposed on those committees the task of monitoring effectuation of the expense and delay reduction procedures.²⁵

A few circuit councils, accordingly, may have been reluctant to scrutinize or modify local procedures that Congress seemed to authorize and that Congress instructed a similar, but distinct and new, institution to oversee.²⁶ Indeed, the Ninth Circuit District Local Rules Review Committee solicited the perspectives of the Ninth Circuit Judicial Council on whether and how the Civil Justice Reform Act affected its review.²⁷ These factors may explain why the Sixth Circuit Judicial Council decided to discontinue review of local requirements until it received more guidance.²⁸

Despite these problems, several judicial councils have instituted rigorous review or made commendable efforts to satisfy the requirements included in Rule 83 and the 1988 Judicial Improvements Act.²⁹ For instance, the Ninth Circuit has depended on numerous volunteer lawyers and law

21. See Tobias, *Improving*, *supra* note 10, at 1623-7.

22. See 28 U.S.C. § 473 (1988 & Supp. V 1993); see also Tobias, *Improving*, *supra* note 10, at 1623-27; Tobias, *Balkanization*, *supra* note 10, at 1414-22.

23. Compare U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 10 (1991) [hereinafter DELAY REDUCTION PLAN] with FED. R. CIV. P. 68; see also *Friends of the Earth v. Chevron*, 885 F. Supp. 934 (E.D. Tex. 1995). See generally Tobias, *Improving*, *supra* note 10, at 1620.

24. Compare U.S. DISTRICT COURT FOR THE DISTRICT OF MONTANA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 3-4 (1991) with 28 U.S.C. § 636 (1988 & Supp. V 1993). See generally Tobias, *Balkanization*, *supra* note 10, at 1417; Carl Tobias, *The Montana Federal Civil Justice Plan*, 53 MONT. L. REV. 91, 93 & n.9 (1992).

25. See 28 U.S.C. § 474 (Supp. V 1993); see generally Tobias, *Balkanization*, *supra* note 10, at 1406-09.

26. Compare 28 U.S.C. § 332 (1988 & Supp. V 1993) (prescribing circuit judicial councils) with 28 U.S.C. § 474 (Supp. V 1993) (prescribing circuit review committees). See generally Tobias, *Improving*, *supra* note 10, at 1623-27.

27. See Telephone Interview with David Pimentel, Assistant Circuit Executive for Legal Affairs, United States Courts for the Ninth Circuit (July 22, 1994) (notes on file with author) [hereinafter Pimentel Interview]; see also Tobias, *Suggestions*, *supra* note 11, at 365-66 (affording additional analysis of Fourth Circuit efforts).

28. See Minutes, *supra* note 1, at 4-5; see also *infra* notes 32-39 and accompanying text. See generally Tobias, *Improving*, *supra* note 10, at 1605 & n.106.

29. See Pimentel Interview, *supra* note 27; Telephone Interview with Andrew Tietz, Assistant Circuit Executive, United States Courts for the First Circuit (July 22, 1994) (notes on file with author) [hereinafter Tietz Interview]; *supra* note 11.

student interns for assistance in overseeing local district and bankruptcy procedures.³⁰ The District of Columbia Circuit concomitantly appointed an entity that worked closely with the district court's local rules committee in identifying inconsistent procedures, which the court then revised.³¹

B. Sixth Circuit Developments

The Sixth Circuit Judicial Council and the Sixth Circuit Executive Office began considering local procedural review soon after passage of the 1988 JIA and issuance of the Local Rules Project Report.³² The enactment of the 1990 CJRA apparently delayed the Sixth Circuit's efforts, although the Executive Office examined the possibility of local rule review when it attempted to fulfill certain oversight responsibilities imposed by the CJRA. Cooperation between the Staff Attorney's Office and the Sixth Circuit Review Committee while monitoring implementation of CJRA procedures fostered the Council's efforts to comply with the 1988 JIA.³³

In 1993, the Sixth Circuit's Staff Attorney's Office, on behalf of the Judicial Council, spent several months reviewing the consistency of rules of all districts in the Sixth Circuit. It analyzed local rules adopted under the CJRA or pursuant to other authority as well as general and standing orders that were incorporated in the local rules. The office designated potential areas of conflict between local procedures and the federal rules and Acts of Congress, submitted a thorough list of possibly inconsistent local requirements to the Council, and made recommendations regarding conflicts.

At a November 1993 meeting, the Sixth Circuit Judicial Council considered the Staff Attorney's report but deferred further examination until after December 1, 1993.³⁴ The Council apparently wanted to evaluate the effects of the recently promulgated amendments to the Federal Rules of Civil Procedure. The Council's delay also afforded every district an opportunity to implement procedures in its CJRA expense and delay reduction plan.

The Staff Attorney's Office continued reviewing local rules after the November meeting and raised the threshold issue of whether the CJRA's provisions empowering each district to experiment with local cost and delay

30. Pimentel Interview, *supra* note 27; see also Tobias, *Suggestions*, *supra* note 11, at 364-65 (affording additional analysis of Ninth Circuit efforts).

31. Pimentel Interview, *supra* note 27.

32. See Minutes, *supra* note 1.

33. *Id.* See generally Tobias, *Balkanization*, *supra* note 10, at 1406-9.

34. Minutes, *supra* note 1, at 3; Memorandum from James A. Higgins, Circuit Executive, U.S. Courts for the Sixth Circuit, to Circuit Council, U.S. Courts for the Sixth Circuit (Apr. 1994) [hereinafter Higgins Memorandum]. Some federal districts voluntarily changed local rules that the Staff Attorney's Office found to be clearly inconsistent, although the districts modified few rules that involved questions of interpretation.

reduction procedures took precedence over the federal rules and statutory requirements governing practice.³⁵ The office prepared a memorandum on inconsistency which observed that the CJRA might render moot the Council's review of local rules because the statute could enable local requirements prescribed thereunder to supersede conflicting federal rules of practice.³⁶ The views of the Staff Attorney's Office apparently persuaded the Sixth Circuit Judicial Council. On May 4, 1994, the Judicial Council voted to suspend additional review of the local procedures until the issue of whether the CJRA took precedence over the federal rules was addressed by Congress, the Judicial Conference, or decisional law.³⁷

A number of defensible reasons may explain the Council's decision. For instance, the Council could have decided to postpone review because of the confused state of civil procedure and the possibility—albeit remote—that the CJRA might moot the Council's efforts and squander limited resources. Moreover, the Council may have been concerned about unclear legislative intent in the JIA and CJRA. Of special concern could have been the statutory inconsistencies, the difficulty and cost of effectuating the JIA's cryptic mandates, and Congress's failure to allocate resources for implementation.

The Sixth Circuit Judicial Council strives to act by consensus. That consensus would have been difficult to achieve for this sensitive, disputed question of authority because Council members probably differed. After all, numerous districts and many judges throughout the nation have disagreed over the precise issue which the Council confronted.³⁸ The Council may have also found little reason to resolve the issue until Congress or the courts clarified it or the CJRA experimentation concluded.³⁹ In any event, the Council apparently envisioned that it would resume local procedural review in 1997, after Congress determined whether the CJRA should "sunset."

35. See Memorandum Regarding Conflicts Between Local Rules and the Federal Rules of Civil Procedure from Dave Wallace, Staff Attorney, U.S. Courts for the Sixth Circuit, to Ken Howe, Senior Staff Attorney, U.S. Courts for the Sixth Circuit (Mar. 2, 1994) [hereinafter Wallace Memorandum]; Higgins Memorandum, *supra* note 34.

36. Minutes, *supra* note 1, at 3-4; see also Higgins Memorandum, *supra* note 34.

37. Minutes, *supra* note 1, at 3-4.

38. See *supra* notes 24-31 and accompanying text. For valuable analysis, concluding that the CJRA affords comparatively limited authority to adopt inconsistent local procedures, see Lauren K. Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447 (1994); see also Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 (1992). But see *Friends of the Earth v. Chevron*, 885 F. Supp. 934 (E.D. Tex. 1995). But cf. Edwin J. Wesley, *The Civil Justice Reform Act; The Rules Enabling Act; The Amended Federal Rules of Civil Procedure; CJRA Plans; Rule 83—What Trumps What?*, 154 F.R.D. 563, 574 (1994) (suggesting that the "CJRA trumps the FRCP to the extent the CJRA specifically deals with a particular matter"). See generally Higgins Memorandum, *supra* note 34.

39. CJRA experimentation is scheduled to end in 1997, if Congress allows the statute to expire. See 28 U.S.C. § 471 notes (Supp. V 1993) (reproducing Pub. L. No. 101-650, §103(b)(2) (1990)). See generally Biden, *supra* note 6, at 1294.

These phenomena make the Council's decision to suspend local review seem reasonable; however, that determination was premature and unwarranted. The Council could proceed in a manner that would avoid the dilemma which the Council thought the CJRA created and that would efficaciously and promptly discharge its review duties. I next examine this prospect and suggest ways in which Congress might help councils fulfill their responsibilities.

III. SUGGESTIONS FOR THE FUTURE

Separation of the CJRA and its potential effect on local procedural review would facilitate the satisfaction of the Council's review obligations and, perhaps, save resources.⁴⁰ The Council should continue its examination of local district court procedures adopted under authority not provided in the CJRA. Districts and specific judges have issued these local procedures under inherent judicial authority or under power apart from the statute—namely, additional substantive and procedural legislation such as the JIA and Rule 83.

The Council should seriously consider expanding its review to encompass local requirements other than local rules, such as general orders and individual-judge procedures, which a few councils are already monitoring. For instance, the Ninth Circuit District Local Rules Review Committee is scrutinizing general orders that have the effect of local rules.⁴¹ The Sixth Circuit Judicial Council could review such orders and similar directives. The Council originally excluded these procedures from consideration because of concern that some district judges would not be receptive to such an evaluation.⁴²

The Council, or the Staff Attorney's Office acting on its behalf, has several effective means of identifying local procedures not prescribed under the CJRA. The Staff Attorney's Office could rely on the procedures' dates of adoption. Most local requirements not authorized under the 1990 enactment were promulgated before CJRA expense and delay reduction procedures were issued. The Staff Attorney's Office might also ascertain

40. I employ the Sixth Circuit Judicial Council's experience as an example from which other councils can extrapolate. For instance, the coincidence that the Sixth Circuit had already undertaken some review means that some suggestions for identifying local procedures not based on the CJRA have more applicability to other councils. My recommendations are premised primarily on the work of the Ninth Circuit District Local Rules Review Committee. Congress should address some concerns; most importantly, it should appropriate sufficient resources to allow councils to fulfill their review duties under the JIA and Rule 83. See Tobias, *Suggestions*, *supra* note 11, at 364-65.

41. Telephone Interview with Professor Margaret Johns, U.C. Davis School of Law, and Chair, Ninth Circuit District Local Rules Review Committee (Sept. 22, 1995) (notes on file with author) [hereinafter Johns Interview]; see also *supra* note 19 and accompanying text.

42. See *supra* note 20 (suggesting that district judges strongly defend their prerogatives to adopt local procedures).

which local directives were not prescribed pursuant to the 1990 CJRA by comparing them with, and excluding from review, requirements adopted under the legislation, nearly all of which procedures are readily available in CJRA cost and delay reduction plans.

Reliance on rule adoption dates and the existence of CJRA requirements in civil justice plans should assist in identifying non-CJRA procedures. The two techniques suggested may seem to overstate the ease with which the relevant local directives can be distinguished. For example, it is possible to view the CJRA as a comparatively broad grant of power that arguably authorizes almost any local procedure.⁴³ However, the most persuasive statutory reading, which more accurately reflects congressional intent, suggests that this power is considerably narrower.⁴⁴

Certain federal districts have also capitalized on the opportunity offered by the CJRA to reexamine and amend, as warranted, all of their local rules. This activity may appear to complicate designation of the applicable local requirements.⁴⁵ Insofar as courts in the Sixth Circuit have reevaluated and revised local rules, the Staff Attorney's Office can identify the procedures to be reviewed by excluding the amended local rules that appear in civil justice plans.⁴⁶ In short, these potential problems seem relatively minor or are easily remediable.

Once the attorney's office has isolated those local procedures that were not prescribed under the CJRA, it can review them for consistency with the federal rules and with congressional legislation. A valuable starting point would be the list of conflicting local procedures which the Staff Attorney's Office compiled before the Council suspended review. The Staff Attorney's Office should supplement its 1993 effort by designating any subsequently promulgated local procedures. However, districts and judges probably adopted many of those requirements pursuant to the CJRA.⁴⁷

43. See DELAY REDUCTION PLAN, *supra* note 23, at 9 (asserting that "to the extent that the Federal Rules of Civil Procedure are inconsistent with this Plan, the Plan has precedence and is controlling"); see also *Friends of the Earth v. Chevron*, 885 F. Supp. 934 (E.D. Tex. 1995); see generally *supra* note 38.

44. See *Robel*, *supra* note 38; see also *Mullenix*, *supra* note 38; see generally *supra* note 38.

45. A number of districts have apparently reconsidered and amended, as indicated, their local rules. See *Tobias, Suggestions*, *supra* note 11, at 366 (identifying Eastern District of Virginia, Northern District of West Virginia, Southern District of West Virginia); Carl Tobias, *Refining Federal Civil Justice Reform in Montana*, 56 MONT. L. REV. 539, 542-43 (1995) (identifying District of Montana).

46. No districts in the Sixth Circuit appear to have reexamined and amended local rules; however, my research is not definitive because it is difficult to secure reliable information. If the concern that I have expressed is irrelevant to the Sixth Circuit, it remains applicable to councils in other circuits whose districts have reconsidered and revised local rules.

47. I believe that the Sixth Circuit's districts are typical. The three Early Implementation Districts (EID) adopted civil justice plans and prescribed nearly all CJRA procedures before 1992. These and many EIDs elsewhere have subsequently modified some rules, namely, those

The Staff Attorney's Office then could assemble a complete compendium of conflicting procedures and offer thorough explanations for the inconsistencies of the requirements.⁴⁸ The Council next should transmit this material to districts and individual judges. Districts and judges could explain why their provisions were adopted and why they believe the requirements do not conflict with federal rules or statutes. Districts and judges also would be able to abolish or change rules that they agree are inconsistent. Finally, after consulting the districts' and judges' reasons for conflicts, the Council should abrogate or modify particular local requirements that remain inconsistent.

The Council has several options for treating local procedures that districts and courts have promulgated pursuant to the CJRA. First, it could simply ignore them for purposes of the review recommended above. Second, the Council could compile a list of the requirements and defer their analysis until 1997, when Congress determines whether the CJRA should sunset.

If Congress decides that the statute must expire, local procedures adopted under it should expire also.⁴⁹ Were districts or judges to continue applying local requirements predicated on the CJRA, judicial councils would need to review those procedures under the suggested process. If Congress extends the enactment, it must clarify the relationship between the JIA and the CJRA, particularly by stating whether procedures based on the CJRA supersede the federal rules and United States Code provisions.

Another option, should the Sixth Circuit Judicial Council resume its review before 1997, would be a more ambitious scrutiny of directives premised on the CJRA. For instance, while the Staff Attorney's Office is designating and monitoring procedures that were not adopted under the statute, it could identify local requirements prescribed pursuant to the CJRA and which it thinks may be inconsistent, state the reasons for its beliefs, and circulate that information to districts and judges for their responses.⁵⁰

governing automatic disclosure, a controversial discovery technique. See DONNA STIENSTRA, IMPLEMENTATION OF DISCLOSURE IN U.S. DISTRICT COURTS, WITH SPECIFIC ATTENTION TO COURTS' RESPONSES TO SELECTED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 26 (1996); see also Carl Tobias, *Judicial Oversight of Civil Justice Reform*, 140 F.R.D. 49, 56 (1992) (providing list of EIDs); Carl Tobias, *Collision Course in Federal Civil Discovery*, 145 F.R.D. 139 (1993) (analyzing disclosure). Non-EIDs only had to issue civil justice plans by December 1993. See 28 U.S.C. § 471 notes (Supp. V 1993) (reproducing Pub. L. No. 101-650, § 102 (1990)); see also *supra* notes 45-46 and accompanying text.

48. The approach in this paragraph is the one that the Ninth Circuit Committee is following. Johns Interview, *supra* note 41.

49. Local procedures adopted under the CJRA, but which find support in other authority, such as other federal statutes, the JIA, the Federal Rules of Civil Procedure, or inherent judicial authority, need not expire. I direct some suggestions in this paragraph to Congress. Regardless of how Congress resolves the CJRA's fate, it must allocate adequate funding for councils to discharge their review obligations under the JIA and Rule 83.

50. This approach is similar to the one which I suggested above for local procedures that are not based on the CJRA.

This approach would enable the Council to abrogate or modify inconsistent procedures in 1997, should Congress 1) permit the CJRA to expire and courts or judges fail to abolish local CJRA-based rules or 2) extend the CJRA but clearly state that requirements prescribed under it do not take precedence. The Council should recognize that were it to undertake more ambitious review, its efforts might be wasted. This could happen if Congress allows the legislation to expire and districts and judges abrogate local procedures predicated on the enactment, or if Senators and Representatives extend the statute but do not indicate whether local requirements adopted thereunder take precedence.

There are numerous reasons why the Sixth Circuit Judicial Council should follow the approach suggested above. As a practical matter, districts in the Sixth Circuit have promulgated relatively few local procedures pursuant to the CJRA's grant of authority, a factor that will facilitate the Council's review.⁵¹ Resuming review of local requirements that were not premised upon the CJRA will save much time otherwise lost waiting for Congress to decide whether the legislation should expire in 1997.

The Council can now review all local rules not prescribed under the CJRA. It must perform that task anyway once Congress resolves the CJRA's fate. The Council would also be prepared in 1997 to treat conflicting CJRA procedures should Congress allow the legislation to expire and districts and judges fail to abolish local requirements promulgated under it, or should Congress extend the statute but state that it does not take precedence. This approach would enable the Council to make considerable progress toward complying with its duties under the JIA and Rule 83, obligations that have remained essentially unfulfilled. Finally, satisfying those responsibilities should reduce the proliferation of inconsistent local procedures and restore the primacy of the federal rules, thereby effectuating important purposes of Congress and the Supreme Court in passing the JIA and amending Federal Rule 83.

IV. CONCLUSION

Several plausible reasons explain why the Sixth Circuit Judicial Council postponed its review of local procedures for consistency with the federal rules and United States Code provisions. Nonetheless, the Council's suspension decision was premature and unnecessary. By ignoring local requirements adopted under authority of the CJRA, the Council could avoid the problem that it perceived the CJRA created. The Council should resume review of local rules adopted under other authority. The Council could then fulfill its review obligations under the JIA and Rule 83 and facilitate the realization of significant congressional and Supreme Court objectives relating to local procedural proliferation.

51. Wallace Memorandum, *supra* note 35.