

The Myth of Uniformity in Federal Civil Procedure: Federal Civil Rule 83 and District Court Local Rulemaking Powers

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Rule 83 of the Federal Rules of Civil Procedure gives district courts the authority to promulgate local practice rules "not inconsistent" with the federal rules themselves.¹ The stated objective of rule 83 is to preserve federal procedural consistency without proscribing some flexibility. On the one hand, the crafters of the rules saw superfluous rulemaking as contrary to the simplicity and uniformity achieved by the 1938 federal rules. On the other hand, they recognized that local rulemaking may be the best means to achieve some important efficiencies, accommodate local practice conditions and needs, and promote procedural innovation and reform. Although the need for local rules originally was viewed as quite limited,² the district courts have

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1. FED. R. CIV. P. 83 provides:

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

See also 28 U.S.C. § 2071 (1984) (all courts established by acts of Congress may prescribe rules for conduct of their business, so long as the rules are consistent with acts of Congress and Supreme Court rules). Congress has provided for regulation by local rule in specific instances. See statutes and rules cited *infra* note 60.

2. See, e.g., Abridged Report to the Judicial Conference of the Committee on Local District Court Rules 969 n.1 (1940), reprinted in 4 Fed. R. Serv. 969 (Callaghan 1941)

taken up their rulemaking power with an enthusiasm that would astound the framers of rule 83. In the past four-and-one-half decades, the district courts have promulgated nearly 3000 local rules.³ The rules cover a wealth of areas, ranging from the trivial to the profound. In some districts, they are now nearly as important as the federal rules themselves.

At its last annual meeting, the Judicial Conference of the United States, acting on the recommendation of its Committee on Rules of Practice and Procedure,⁴ forwarded a proposed amendment of federal rule 83 to the Supreme Court for adoption.⁵ Noting criticism both of the local rulemaking process and of the validity of many local rules,⁶ the committee proposed

[hereinafter cited as Knox Report]; A.B.A., FEDERAL RULES OF CIVIL PROCEDURE, PROCEEDINGS OF THE INSTITUTE AT WASHINGTON AND OF THE SYMPOSIUM AT NEW YORK CITY 232 (1938) (statement of W. Mitchell) [hereinafter cited as A.B.A. PROCEEDINGS]. See also authorities collected and discussed in Note, *Rule 83 and Local Federal Rules*, 67 COLUM. L. REV. 1251, 1255-59 (1967).

3. The local federal rules are commercially published in Fed. Local Ct. R. (Callaghan), but there is no generally available definitive source. An attorney must contact the court clerk for a copy of rules in force, and in some cases, the clerk of a particular judge. The Administrative Office of the United States Courts has prepared a 223-page Local Rule Index, which is now maintained on computer by the Federal Judicial Center.

4. The Advisory Committee on Civil Rules submitted a final draft revision of rule 83 to the Committee on Rules of Practice and Procedure on July 18, 1984. The Judicial Conference transmitted proposed amendments to the Federal Rules of Civil Procedure to the Supreme Court with the recommendation that they be approved and submitted to Congress pursuant to 28 U.S.C. § 2072 (1984).

5. The proposed rule 83, with new material underscored and deleted material struck through, provides:

RULE 83. RULES BY DISTRICT COURTS

Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the ~~Supreme Court of the United States~~ judicial council and the Administrative Office of the United States Courts and be made available to the public. In all cases not provided for by rule, the ~~district courts~~ judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

6. See Proposed Amendments to the Federal Rules of Civil Procedure, Rule 83 committee note, 98 F.R.D. 337, 370 (1983). See generally 12 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 3152, at 217 (1973); Note, *supra* note 2; Comment, *The Local Rules of Civil Procedure in the Federal District Courts—A Survey*, 1966 DUKE L.J. 1011. But see Flanders, *Local Rules in Federal District Courts: Usurpation, Legislation, or Information?*, 14 LOY. L.A.L. REV. 213 (1981) (most local rules are well reasoned and beneficial; sum total of errors is insignificant).

reform by requiring public notice and an opportunity for comment before district court judges adopt local rules. In addition, the rules could be abrogated by the Circuit Judicial Council.⁷ The Administrative Office of the United States Courts, rather than the Supreme Court, would become the repository of copies of all local rules, which would be made available to the public.

Notice and comment rulemaking and circuit council review are important ameliorative reforms, but further re-thinking is necessary to preserve the benefits of local rulemaking without the costs of undermining the integrity and uniformity of federal civil procedure through a proliferation of local rules. The proposed changes do not address some of the most fundamental difficulties of rule 83. In particular, the proposed amendment does not jettison the rule's sole guideline for testing the validity of a local rule—that it must not be “inconsistent” with the Federal Rules of Civil Procedure. “Inconsistency” has not been a useful standard against which to measure local rules.⁸

7. Circuit judicial councils are composed of the chief judge of the circuit, circuit judges, and district court judges; they meet twice a year. 28 U.S.C. § 332(a)(1) (1984). A council may hold hearings and “make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit.” 28 U.S.C. § 332(d)(1) (1984). The Advisory Committee noted the expectation that councils “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 objectives of the Federal Rules.” Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 98 F.R.D. 337, 373 (1983).

8. See *supra* note 1. One reason for rule 83's ineffectiveness has been the inability of the Supreme Court to perceive its purposes. The Court has twice attempted to measure the validity of local rules against the “inconsistency” standard articulated in rule 83. Both efforts were inadequate.

In *Miner v. Atlass*, 363 U.S. 641 (1960), the Court examined a local rule allowing discovery depositions in admiralty proceedings. The Northern District of Illinois had promulgated the rule pursuant to General Admiralty Rule 44. *Id.* at 643. At that time, admiralty was exempted from the federal rules and was governed by the General Admiralty Rules. *Id.* at 646. General Rule 44 permitted promulgation of local rules “provided the same are not inconsistent with these [admiralty] rules.” *Id.* at 647.

The Court struck down the local rule as inconsistent with the General Admiralty Rules. *Id.* The Court characterized the change in practice caused by the local rule as weighty and complex. *Id.* at 649. It also noted the interest in maintaining nationwide uniformity in admiralty proceedings. *Id.* at 650. The Court concluded that enacting “basic procedural innovations” requires the rulemaking powers of the Supreme Court. *Id.* Only this process would ensure “mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords.” *Id.*

Thirteen years later, the Court upheld a local rule of the District of Montana that provided for six-person juries in civil cases. *Colgrove v. Battin*, 413 U.S. 149, 163 (1973). The Court distinguished *Miner* by concluding that the rule was not a “basic procedural

This Article begins by demonstrating that the proliferation of local rules indeed poses a threat to the integrity and uniformity of federal procedure. The Article next examines the general policies relating to local rulemaking. Based on that analysis, the final section presents specific proposals for rethinking rule 83 to permit informed local control over truly local matters, while placing beyond the reach of district courts those matters that are national in scope.

Reviewing existing local rules in 1940, a committee of judges—the Knox Committee—concluded that most local rules were dispensable because they conflicted with the letter or the spirit of the federal rules, unnecessarily repeated or restated federal rules, covered pre-empted ground, or provided rigid procedural detail in areas deliberately unregulated.⁹ A survey of local rules today supports the same conclusions and criticisms. Rather than uniformity, a high degree of local diversity has been introduced into almost every phase of federal pretrial procedure, including laying of venue, pleading, the use of motions directed to the pleadings, discovery, and even the substitution of alternative methods of dispute resolution for the litigation process itself. Many local rules arguably are consistent with the explicit language of the Federal Rules of Civil Procedure, but conflict with their underlying purpose or fundamental policies. Other local rules are unwise, confusing, or poorly drafted.

Rule 83 has not precluded district court adoption of local rules that, on their face and by their inescapable plain meaning, erect procedural standards contrary to the letter of the federal rules. The Northern District of Texas, for example, prohibits motions for a more definite statement “when the information

innovation.” *Id.* at 163-64 n.23. That conclusion rested on the determination that the reduction in jury members “plainly does not bear on the ultimate outcome of the litigation.” *Id.*

In dissent, Justice Marshall opined that “surely it cannot be doubted that this shift in practice of seven hundred years’ standing . . . constitutes a ‘basic procedural innovation.’ ” *Id.* at 168 n.3 (Marshall, J., dissenting). The “outcome-determinative” standard presented in the majority opinion is neither a measure of how “basic” a procedural innovation is, nor of whether it is inconsistent with the federal rules.

Miner and *Colgrove* give little assistance in explicating the inconsistency standard of rule 83. Beyond their facial agreement that basic procedural innovations are beyond the scope of local rulemaking power, they provide no useful standards for distinguishing the changes that are basic from those that are not. Further, they are irrelevant to the vast majority of local rules whose innovations could hardly be said to be more basic than that upheld in *Colgrove*.

9. See *id.* at 969-70.

sought can be obtained by discovery.”¹⁰ Federal rule 12(e), however, has no such limitation; it permits the motion whenever “a pleading . . . is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading.” The local rule requires a would-be movant to plead responsively *before* obtaining, through discovery, the very information necessary to frame his pleading.

At the other extreme from the Northern District of Texas’ distaste for rule 12(e) motions is the apparent affection of its neighboring district in New Mexico for motions under rule 12(b). A local rule in that district requires a party who files an answer or other pleading that raises one of the seven defenses specified in rule 12(b) to request in writing that it be treated as a motion.¹¹ Except for jurisdictional motions, any defenses articulated in the pleadings, but not reduced to a motion, are to be treated as waived.¹² This “mandatory motion” and waiver provision conveniently ignores the language of federal rule 12(b) itself, which explicitly gives to the pleader an option whether to raise the defenses by motion or by pleading.

Other clear inconsistencies between local rules and federal rules and statutes are pervasive.¹³ Many districts, for example, require that certain civil rights complaints be verified,¹⁴ although federal rule 11 provides otherwise.¹⁵ Some of these dis-

10. N.D. TEX. R. 5.2(d).

11. D.N.M. R. 5(c) provides:

If an answer or other pleading raises or contains any of the seven enumerated defenses provided in Rule 12(b) of the Federal Rules of Civil Procedure, the party filing such a pleading shall request in writing that such portion of the answer or other pleading be treated as a motion and, thereafter, it shall be considered as a motion filed under Rule 9 of these rules. Should a party fail to make such written request, such a defense may be treated as having been waived, except for jurisdictional motions.

12. *Id.*

13. Another example comes from adjoining districts across the continent, which have displayed greater agreement than Texas and New Mexico. FED. R. CIV. P. 8(a)(3) requires that every pleading that contains a claim for relief shall contain a demand for the judgment to which the pleader deems himself entitled. In the District of New Jersey and the Eastern District of Pennsylvania, local rules prohibit persons with claims for unliquidated damages from alleging the dollar amounts claimed. D.N.J. R. 8(g); E.D. PA. R. 30. This regional reform of federal pleading standards not only contravenes rule 8(a)(3) but also renders it difficult for plaintiffs with unliquidated damages to obtain judgment by default, despite provision for such judgments in rule 54(c), which provides: “A judgment by default shall not . . . exceed in amount that prayed for in the demand for judgment.” FED. R. CIV. P. 54(c).

14. *E.g.*, N.D. ILL. GEN. R. 47; W.D. KY. R. 29(a).

15. FED. R. CIV. P. 11 provides: “Except when otherwise specifically provided by rule

tricts also provide that venue in prisoner condition-of-confinement cases may be laid only in the district in which the plaintiff resides,¹⁶ while the federal venue statute affords a significantly broader choice.¹⁷ Summary judgment has proven to be a particularly fertile ground for local variations. By stipulating that the failure of a party to file a brief in connection with a summary judgment motion "shall be deemed an admission" that the opponent's position on the motion is well taken,¹⁸ at least one district has effectively displaced the uniform standard adopted by Congress and the Supreme Court in rule 56.¹⁹ Other districts have shown a similar penchant for unnecessary paperwork in their requirement that all motions for summary judgment be accompanied by suggested findings of fact and conclusions of law.²⁰ Inoperative in these districts is federal rule 52(a), which states that findings of fact and conclusions of law "are unnecessary on decisions of motions under rules 12 or 56."

Distressing though such blatant inconsistencies are, other inconsistencies pose greater difficulties because they are more subtle and more difficult to expose. These arise when a local rule conflicts, not with the express language of a federal rule, but rather with the general policies or purposes underlying the federal rule—what the 1940 Knox Committee termed "conflict with the spirit of the federal rules."²¹ At least three classes of these local rules can be identified.

One such class of local rules are those that mandate wholesale and unthinking application of ad hoc discretionary powers granted by the federal rules to deviate from general procedural norms. An instance of this process is found in districts that have provided by local rule for the routine bifurcation of liability and damages issues in, for example, personal injury cases.²² Although

or statute, pleadings need not be verified or accompanied by affidavit."

16. *E.g.*, S.D. ILL. R. 10; D. MD. R. 37A; E.D. OKLA. R. 5.

17. 28 U.S.C. § 1391(b) (1984) (emphasis added) provides: "Except as otherwise provided by law, nondiversity civil actions may be brought in the judicial district in which all defendants reside or in which the claim arose."

18. D.N.D. R. 5(c).

19. FED. R. CIV. P. 56(c) provides:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

20. *E.g.*, S.D. ALA. R. 8; C.D. CAL. R. 7.14.1.

21. See Knox Report, *supra* note 2, at 970-71.

22. *E.g.*, N.D.N.Y. R. 40; E.D. Tenn. Standing Order of Oct. 6, 1978.

federal rule 42(b) authorizes entry of such orders "to avoid prejudice" or when "conducive to expedition and economy," it does not envision bifurcation as a matter of course. A perceptive article by Judge Weinstein exposes the policy foundations supporting this presumption: the results of bifurcated and unitary trials are likely to differ.²³ Although undoubtedly motivated by a desire to advance local dockets, a procedural change with such substantive overtones is inappropriate for the local rulemaking process.²⁴

A second class of local rules inconsistent with the policies underlying the federal rules are those prescribing areas intended to be regulated on a case-by-case basis as an exercise of judicial discretion. Many districts limit pretrial discovery, for example, by imposing a flat ceiling on the number of interrogatories that may be submitted by any party without obtaining leave of the court for good cause shown. The limit varies, depending on the district, from twenty to fifty.²⁵ Several of these districts have

23. Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power*, 14 VAND. L. REV. 831, 834 (1961).

24. Few appellate challenges have been mounted to this sort of local rule. In at least one area, however, rules have been struck on the ground of their inconsistency with federal procedural policy, even though not explicitly in conflict with an express provision of a federal rule. Following a recommendation in the MANUAL FOR COMPLEX LITIGATION ¶ 1.41 (1982) (1-Pt. 2 J. MOORE, MOORE'S FEDERAL PRACTICE 31-34 (2d ed. 1984)), several districts adopted rules that routinely required the parties in class actions to obtain leave of court before communicating with absent class members. *See, e.g.*, the discussion of such rules in *Williams v. United States Dist. Court*, 658 F.2d 430, 434-36 (6th Cir.), *cert. denied*, 454 U.S. 1128 (1981); *Rodgers v. United States Steel Corp.*, 508 F.2d 152, 163-65 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975). Other districts accomplished this end through their routine entry of gag orders in pending cases. *See, e.g.*, the order discussed in *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99-102 (1981). Because of the obstacles such rules and orders posed to the gathering of litigation funds and evidence, plaintiffs' attorneys found ample incentive to seek quick appellate review. The silence of rule 23 on the matter did not give appellate courts much pause; the policies underlying rule 23 are easily ascertainable and dispositive. As the Third Circuit observed in *Rodgers*, "[t]he rules adopted must be consistent with the policy underlying Rule 23; that is a policy in favor of having litigation in which common interests, or common questions of law or fact prevail, disposed of where feasible in a single law suit." *Rodgers*, 508 F.2d at 163. Because the local rule discouraged nonparty class members from participating in the lawsuit, the court of appeals found the local rule "outside the power granted to the district court" by rule 83. *Id.* at 164.

25. *E.g.*, D. ALASKA R. 8 (20, including all subparagraphs and sub-subparagraphs); D. DEL. R. 4.1 (50); S.D. FLA. GEN. R. 10I.1 (40); M.D. FLA. R. 3.03(a) (50); S.D. GA. R. 7.4 (25); N.D. ILL. GEN. R. 9(g) (20); S.D. ILL. R. 15 (20); S.D. IND. R. 14(c) (30); N.D., S.D. IOWA CIV. R. 2.3.32 (30); D. KAN. R. 17(d) (30); W.D. KY. R. 11(c) (30); W.D. LA. R. 10(a)(1) (25); D. MD. R. 6(B) (30); D. MINN. R. 3(B) (50); N.D. MISS. R. C-12 (50 in two stages); S.D. MISS. R. 17 (30); W.D. MO. R. 15(K) (20, with maximum of 2 subparagraphs each); E.D. MO. R. 8 (20); D.N.M. R. 10(e) (50); D.S.C. Standing Order of Jan. 29, 1979 (50);

added restrictions on the number of requests for admission that may be filed without leave.²⁶ At least one district similarly limits the number of depositions that may be taken as a matter of course; moreover, the limit is not waivable by the parties.²⁷ The federal rules, however, curb abusive or unproductive overdiscovery by articulating substantive, not numerical, standards and by calling for judicial oversight, intervention, and sanctioning only on a case-by-case basis as actual circumstances warrant.²⁸

Another type of local rule exists that is so violently at odds with some of the most fundamental policies embodied in the federal rules that it is almost inconceivable that a district court would adopt it. Yet at least four have done so.²⁹ For certain classes of cases, these districts have short-circuited virtually the entire procedural scheme created by the federal rules, substituting for it some variety of arbitration or mediation. In the Northern District of California, for example, arbitration is required for many types of diversity actions in which the damages sought are less than \$100,000.³⁰ In the Eastern District of Michigan, any civil diversity case may be submitted to mediation by agreement of the parties, motion of a party, or the court's own motion when the relief sought is exclusively money damages.³¹

The mediation procedures established in the Eastern District of Michigan are typical. Apparently, evidence is to be submitted in documentary form, and the local rule expressly prohibits the mediation panel from taking personal testimony from any party.³² The rules of evidence do not apply.³³ If the panel's award is not rejected by any party, the court enters judgment.³⁴ A party may reject the award and bring the matter to trial,³⁵ but the party must receive a trial verdict significantly more favorable than the mediation award or pay actual costs, includ-

M.D. TENN. R. 9(a)(2) (30); W.D. TENN. R. 9(g) (30); S.D. TEX. R. 10(E)(4) (30); W.D. TEX. R. 26 (d)(1) (20); E.D. VA. R. 11.1(A) (30, nonwaivable); N.D.W. VA. R. 2.06(b) (30); D. WYO. R. 7(f) (50).

26. *E.g.*, D. DEL. R. 4.1(b)(4) (25); W.D. KY. R. 11(c) (30); D.S.C. Standing Order of Jan. 29, 1979 (20); W.D. TEX. R. 26(d)(1) (10).

27. E.D. VA. R. 11.1(B) (maximum of five depositions).

28. *See infra* text following note 50.

29. N.D. CAL. R. 500; E.D. MICH. R. 32; E.D. PA. R. 8.3; W.D. WASH. CIV. R. 39.1.

30. N.D. CAL. R. 500-2.

31. E.D. MICH. R. 32(a)-(b).

32. *Id.* at 32(i).

33. *Id.*

34. *Id.* at 32(j).

35. *Id.* at 32(j)(2).

ing "an attorney fee for each day of trial."³⁶

A bedrock premise of the federal rules is that cases filed in a federal district court are to be resolved through adversarial litigation before the court, not by summary proceedings before a mediator. A mediation scheme such as that just described is utterly alien to civil litigation in a federal court. The local rule, in fact, creates an entirely novel process of resolving factual and legal issues by persons who are neither judge nor jury, and authorizes the court to enter judgment on the mediator's decision merely because the parties have remained silent. It is doubtful whether the procedure is saved by its "reservation" to the parties of their right to trial, hedged as that reservation is by penalty provisions of considerable severity.

In addition to the failure of rule 83 to proscribe local rules that are "inconsistent" with the letter and the spirit of the federal rules, another problem has arisen over the years. Perhaps this is because the drafters did not anticipate the zeal with which the rulemaking power would be wielded. They therefore made no effort to ban local rules that, although arguably "consistent" with the federal rules, are nevertheless poorly conceived, carelessly executed, unwise, unnecessary, or downright silly.

Some local rules are unnecessary, now as in 1940, and do no more than repeat key provisions of the federal rules.³⁷ Still other rules apparently regard the federal procedural mechanisms merely as themes upon which they are free to create their own variations. Discovery is a particularly fruitful area for such innovations.³⁸ An occasional rule stands out as especially poorly con-

36. *Id.* at 32(j)(3)-(5).

37. Thus, D. MASS. R. 10(a) cautions that papers filed with it shall be served in accordance with FED. R. CIV. P. 5 and that the form and signing of such papers shall be in accordance with the federal rules. Similarly, N.D. ILL. GEN. R. 9(a) goes to considerable pains to set forth general pleading requirements that closely parallel FED. R. CIV. P. 10(b). E.D. MICH. R. 20 proclaims that the court may dismiss a complaint on its own motion for lack of subject matter jurisdiction, thus replicating FED. R. CIV. P. 12(h)(3). Most informative is W.D.N.Y. R. 21, which provides that petitions filed under 28 U.S.C. §§ 2254-2255 (governing habeas corpus petitions) must comply with the Rules Governing §§ 2254 and 2255 Cases in the District Courts (Congress has created sets of rules for federal habeas corpus petitions filed under 28 U.S.C. §§ 2254 and 2255. The rules follow the statute in the United States Code.).

38. Mimicking FED. R. CIV. P. 33, but departing substantially from its provisions, E.D.N.Y. R. 2 establishes a quasi-interrogatory discovery device, under which a party must provide certain personal information, under oath, within five days after being so requested. If interrogatories have not been answered, the District of Massachusetts has modified the enforcement mechanisms of FED. R. CIV. P. 37 with its own procedure, under which the interrogator must apply to the clerk for a "notice of delinquency" and

ceived. For example, a local rule of the District Court of the District of Columbia that prohibits the clerk from accepting or filing any "complaint, amended complaint, counterclaim, cross claim, or third party complaint [that has] appended thereto any document that is not essential to the determination of the cause of action."³⁹ Disregarding the questionable wisdom of vesting enforcement in the clerk, the problem remains of how one determines whether a document is truly "essential" or whether it is merely material, and of why the latter should be banished into the outer darkness. One also may legitimately wonder why other pleadings, such as answers and replies, are exempted from the rigors of this rule since federal rule 10(c) permits documents and other exhibits to be appended to those pleadings.⁴⁰

Of the 3000 or so local rules now in force, only a handful, such as the mandatory arbitration and mediation schemes, effect radical procedural changes. Others present direct textual conflicts with federal rules. It is often difficult to assess the propriety of the large residue, for the only standards against which they may be measured are the policies embedded in the federal rules. Those policies may be clear and widely appreciated; more often they are not. Of course, in theory, any local rule may be tested against federal procedural policies, for all the federal rules are supported by policies that can be isolated and articulated. These policies are rarely obvious, however, and to a busy judge or attorney the task of exhuming them may not appear to be worth the effort.

Thus, another failure of rule 83 flows from the fact that occasions for judicially testing local rules have been and will continue to be infrequent. Given practical realities and economic constraints, few litigants will venture into battle over issues that seem so arcane. To demonstrate how involved this process of measuring local rules against federal procedural policies may become, consider a hypothetical local rule that limits to twenty-

may not for 20 days thereafter move to compel answers or obtain sanctions. D. MASS. R. 15(g).

39. D.D.C. R. 1-5(d).

40. FED. R. CIV. P. 10(c) provides: "Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." Also curious is the local rule's reference to the "cause of action," a concept that, because of its long train of unnecessary semantic difficulties, was intentionally omitted from the federal rules. Clark, *The Handmaid of Justice*, 23 WASH. U.L.Q. 297, 313-14 (1938).

five the number of interrogatories a party may serve without securing leave of the court.⁴¹ Since a litigant normally could expect to obtain leave fairly readily upon showing good cause for additional discovery, there will seldom be any incentive to litigate whether or not the restrictive local rule is valid under rule 83. Yet, if one is prepared to make the following uneconomical investment of effort, the resulting analysis shows that such a rule is indeed inimical to federal procedural policies.

The essence of the hypothetical rule is that judicial discretion must be exercised before a party may submit more than the allowed number of interrogatories. This reverses a fundamental presumption that underlies almost all federal discovery: the exercise of judicial discretion is necessary to limit discovery, not to allow it.⁴² Indeed, until recent years, the parties' discovery rights were virtually boundless, constrained only by relevance, privilege, and work product.⁴³ Advisory committees over the years have reiterated the framers' judgment that a court's limited resources will best be allocated when routine discovery is removed from judicial supervision, and that trial by ambush can best be avoided when every litigant has access to all the relevant facts.⁴⁴ The federal rules radically restructured pretrial processes that isolate the legal and factual issues actually in controversy. Under the codes, this task was largely fulfilled by rigorous pleading rules. The federal rules substituted a much more relaxed "notice pleading" standard and shifted to the discovery phase much of the burden of issue production. Whether this shift was wise is not now the question; it was made, and its objectives unquestionably are undercut by a local rule that, without considering the actual needs of a particular case, routinely limits the parties' ability to add flesh to skeletal

41. Of course, it is not really necessary to hypothesize such a rule, since at least two local rules actually so provide. S.D. GA. R. 7.4; W.D. LA. R. 1(a)(1). See *supra* note 25 for the numerical limits imposed by other districts.

42. Because of the potential for unnecessary invasions of personal privacy, FED. R. Civ. P. 35 creates an exception for requests for physical and mental examinations, for which leave of court is still required.

43. Fed. R. Civ. P. 26(a)-(b) (1976). *Cf.* FED. R. Civ. P. 26(a)-(b), 28 U.S.C.A. (Supp. 1984). When the discovery rules were rearranged in 1970, the Advisory Committee on Rules noted that a provision that the frequency of use of discovery methods was not limited confirmed existing law. See Advisory Committee Notes on the 1970 Amendments, Rule 26, Subdivision (a), 48 F.R.D. 487, 498 (1970).

44. *E.g.*, Advisory Committee Notes on the 1970 Amendments, Rule 34, 48 F.R.D. 487, 526 (1970). See Advisory Committee Notes on the 1983 Amendments, Rule 26, 97 F.R.D. 165, 216 (1983). See also *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

pleadings.

The history of rules 26 and 33 fully supports this policy analysis. As a result of discontent with federal discovery practice, there have been several recent efforts to impose numerical quotas on the various discovery devices, especially interrogatories.⁴⁵ These efforts came to a head in 1978 and 1979. In a preliminary draft of proposed amendments to the federal rules, the Advisory Committee noted that except when a protective order has been entered, rule 26(a) expressly provides that the frequency of use of the discovery methods is not limited.⁴⁶ Believing that the district courts might be "deterred" by this language from adopting local rules restricting discovery, the committee initially recommended amending rule 33 to authorize local rules limiting the number of interrogatories.⁴⁷ The committee subsequently changed its mind and abandoned this proposal; the district courts never were authorized to impose such limitations by local rule.⁴⁸ Instead, subsection (f) was added to federal rule 26 in 1980 to grant district courts the power to hold discovery conferences at which a court could enter discovery plans tailored to the needs of each case.

Even more to the point, rule 26(b) was amended in 1983 to permit the erection of discovery limits under certain circumstances—for example, when discovery was cumulative, repetitive, or imposed undue burden.⁴⁹ The new rule makes clear that these factors must be weighed on a case-by-case basis and limitations imposed only when actually warranted.⁵⁰ The rule leaves untouched the antecedent presumption that primary responsibility for conducting discovery rests with the litigants, a pre-

45. See discussion in C. WRIGHT, *FEDERAL COURTS* § 81, at 540 n.8 (4th ed. 1983).

46. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure* (1978). See Advisory Committee Note to Proposed Rule 33, Subdivision (a), 77 F.R.D. 613, 648-49 (1978).

47. Advisory Committee Note to Proposed Rule 33, Subdivision (a), 77 F.R.D. 613, 648-49 (1978).

48. See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 80 F.R.D. 323 (1979).

49. FED. R. CIV. P. 26(b), 28 U.S.C.A. (Supp. 1984).

50. *Id.* See Advisory Committee Notes on the 1983 Amendments, Rule 26, Subdivision (b), 97 F.R.D. 216, 218 (1983) ("In an appropriate case the court could restrict the number of depositions, interrogatories, or the scope of a production request. But the court must be careful not to deprive a party of discovery that is reasonably necessary to afford a fair opportunity to develop and prepare the case.").

sumption turned on its head by the hypothetical local rule under consideration.

If, as here, a local rule reverses a fundamental presumption in the federal rules, it should be open to a successful challenge. The failure of the challenge indicates the inability of rule 83 to limit the local rulemaking power. The task is to ascertain the appropriate limits on local rulemaking power and to so articulate them that the courts will be given meaningful and effective guidance. A straightforward cost/benefit analysis is the simplest means of discovering these limits.

The one extreme—that rule 83 impose no limit on local rulemaking—is completely untenable, for the federal rules then would have only such effect as each district chose to give them. Chaos even worse than that prevailing under the old Conformity Act⁵¹ soon would prevail. At the other extreme, amending the rule to withdraw all rulemaking power from the district courts is measurably more attractive than unlimited rulemaking authority, but also has unacceptable costs. Although the federal rules establish a coherent, workable, and reasonably complete procedural system to resolve civil litigation, some aspects of case management almost certainly are governed better by local regulations than by national ones.

What are the benefits of vesting rulemaking power in the district courts? First, one qualified advantage of local rulemaking is the flexibility it may give in accommodating local conditions and needs. Rules of nationwide application can address only those problems that are common to all districts. Trial dockets, for example, are largely a product of local conditions and pressures, and their setting and maintenance are most effectively accomplished by local judges. By formalizing practices customarily followed by district judges and by communicating those practices to attorneys,⁵² local rules add predictability to procedural decision-making, and help speed the orderly and efficient resolution of litigation. Unfortunately, it is easy to give too much weight to “local conditions” as a rationale for local rules. Many national problems have local manifestations, but such local symptoms do not always warrant local cures.

51. The Conformity Act required that in civil actions the federal district conform “as near as may be” to the procedure of the state in which it sat. Act of June 1, 1872, ch. 255, 17 Stat. 197.

52. See, e.g., M.D. FLA. R. 5.03(b) (customs of the court regarding courtroom decorum).

Second, local rulemaking also may achieve efficiencies by rendering routine certain judicial tasks that otherwise would be decided on a case-by-case basis. The federal rules commit many procedural questions to the discretion of the trial judge. At least insofar as those questions that arise frequently in a given court are concerned, it may make sense to resolve them by a uniform rule capable of relatively mechanical application rather than requiring the judge to "re-invent the wheel" each time. Some districts, for example, have fixed by rule a particular dollar amount for the removal bond required by statute,⁵³ thus obviating the need to re-examine the matter in every case removed from state courts. There is a risk, however, that translating discretionary powers into formal rules may generate more inefficiencies than it avoids. This is particularly true in discovery, during which legitimate needs are likely to vary dramatically from case to case. Handling such matters by relatively inflexible rules may therefore impede rather than promote the efficient administration of justice.

Even though not unqualified, such benefits as these are valuable. By their nature, however, the benefits extend only to those districts that affirmatively seek them. But local rules have a third characteristic with the potential to benefit the entire federal judicial system. This comes from their capability of serving as models for reform, in which innovative procedural approaches may be tested on a limited scale in order to evaluate their suitability for system-wide adoption. The preliminary draft of the amendment to rule 83 would have permitted experimental rulemaking, but that provision unfortunately was dropped.⁵⁴ If local rules are to be used as models for reform,⁵⁵ it will be at the cost either of producing only the most trivial modifications or

53. *E.g.*, D. Mass. R. 25(1) (\$250); S.D. Miss. R. 4 (\$500). The party seeking to remove a case from state to federal court must post a bond under 28 U.S.C. § 1446(d) (1982).

54. *See* Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Aug. 1983, 98 F.R.D. 337, 370-73 (1983).

55. Federal rules committees have looked to the experience of state courts in assessing proposed reforms, although in some respects the business of state courts is sufficiently different from that of their federal counterparts so that drawing meaningful federal lessons from state practices may be difficult. This is not to say that very useful information cannot be drawn from state experience. Based in part on Wisconsin's favorable experience with a state rule authorizing scheduling and planning conferences, Fed. R. Civ. P. 16(b) was added in 1983 to encourage such conferences in the federal courts. *See* Advisory Committee Notes on the 1983 Amendments, Rule 16(b), 97 F.R.D. 165, 207-09 (1983).

else of simply pretending that rule 83, with its demand that local rules be "consistent" with the federal rules, does not exist. Otherwise, federal procedural progress will continue to be accomplished by quantum jumps from proposal to system-wide adoption.

Despite the advantages associated with local rulemaking, there are undoubted costs as well. Clients pay more when attorneys from outside a district find it necessary to retain local counsel familiar with a court's procedural idiosyncrasies. If an additional layer of local lawyers is not added to the case, local rules still generate additional costs through attorneys' efforts to familiarize themselves with the requirements. There is an attendant increased risk of error in understanding and applying the local rules, possibly leading to substantive injustice.

Even when no foreign counsel are involved, unnecessary, ambiguous, or counter-productive unsound local rules inevitably will produce considerable inefficiencies. Far too many local rules appear to be ad hoc efforts to cure specific narrow problems, rather than concrete applications of more general principles. Thus, if a court perceives interrogatories to be frequently over-employed or abused, it is likely to draft a rule restricting their routine use. If its dockets are clogged, it may institute some alternative form of dispute resolution such as mandatory arbitration. Even when rules are borne of understandable frustration at finding no curative measures taken at the national level, their perspective is usually too narrow. The most extreme examples discussed in this essay are not representative of local rules as a whole, but problem rules do occur with sufficient frequency to warrant re-examination of the process that spawns them.

Of course, as a product of human minds, the federal rules may safely be assumed to be flawed in ways that generate procedural inefficiencies that in turn contribute to the current crowded state of federal trial dockets. Nevertheless, although the web woven may not be quite seamless, its parts are strongly interdependent,⁵⁶ and poorly drawn local rules merely aggravate

56. As Judge Clark put it, "a greater degree of legal sophistication is usually needed than in the substantive field to appreciate the subtle nuances of procedural causes and effects and their interrelation, yet the subject is often approached with a blitheness, indeed a naiveté, on the whole appalling." Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 496 (1950). Put more bluntly, most judges have their hands full in keeping up with their dockets. They cannot be expected to have the time, the inclination, or the expertise necessary for improving

this problem. Conversely, even the best-formulated local rules cannot solve the problem since by nature their effect is purely local. Worse, they can mask the gravity of the problems and divert attention from the need to address them nationally. Judging from the large number of districts that have issued rules regulating prisoner condition-of-confinement suits,⁵⁷ for example, there appears to be a consensus that such suits pose a threat to the integrity of federal dockets. These palliative measures will not make the problem disappear; they merely confuse it and shift the field of battle from the national level, where it should be, to the hinterlands.

CONCLUSION

District courts have promulgated approximately 3000 local rules, and more will surely follow, threatening both the integrity and the uniformity of the Federal Rules of Civil Procedure. To be sure, ameliorative reforms have been undertaken, but the reformers have not been asking the appropriate questions. Any reformulation of rule 83 should strive to create procedural consistency, while maintaining flexibility. The following specific issues should be addressed:

First. The necessity for local rules must be confirmed, but their scope tightly circumscribed.

Second. The limits on local rulemaking should be bright, clear, and explicit. A fluid standard of ambiguous meaning, such as the current "consistency" test, will not stay local efforts to improve upon the federal rules. Rule 83, moreover, must discourage local rules that are arguably consistent with the federal rules but regulate matters inappropriate for local control.

upon the federal rules. Indeed, it is a testament to their abilities and energies that local rules have not produced more problems than they have.

57. *E.g.*, S.D. ALA. R. 21; S.D. FLA. GEN. R. 18(A); N.D. ILL. GEN. R. 47; S.D. ILL. R. 10; N.D. IND. R. 6A; D. KAN. R. 33; W.D. KY. R. 29; D. MD. R. 37A; E.D. MICH. R. 16(d); W.D. MICH. R. 40; N.D. MISS. R. M-4.2; D.N.M. R. 26; W.D.N.Y. R. 7(A); M.D.N.C. R. 18; E.D.N.C. GEN. R. 11.00; S.D. Ohio Standing Order of Sept. 1, 1981; E.D. OKLA. R. 5; W.D. PA. R. 38; D.P.R. R. 28; N.D. TEX. R. 3.2(b); D. UTAH R. 19(b); W.D. WASH. CIV. R. 103. The research arm of the federal courts has promoted the adoption of highly questionable local rules to cope with the perceived flood. PRISONER CIVIL RIGHTS COMMITTEE, FEDERAL JUDICIAL CENTER, RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS (1980). The Center's recommendations are surveyed, and many criticized, in Note, *State Prisoners, Federal Rules, and Playing by the Rules: An Analysis of the Aldisert Committee's Recommended Procedures for Handling Prisoner Civil Rights Cases*, 5 U. PUGET SOUND L. REV. 131 (1981).

Third. The normal appellate process has proved inadequate to keep local rules within proper bounds. The impact of the rules on individual litigants is usually too glancing to warrant appeal, and so they remain unchallenged. The alternative proposed in amended rule 83 is circuit judicial council abrogation of local rules. This approach is not satisfactory.⁵⁸ The current reliance upon normal appellate processes to test questionable local rules at least has the virtue of only rarely giving explicit appellate approval to local rules. Under the proposed veto approach, a judicial council's failure to act on a local rule may give it quick respectability, thus encouraging other districts within the circuit to adopt the rule. Replacing district-to-district inconsistencies with circuit-to-circuit inconsistencies may be an improvement, but not much of one. A preferable alternative is to require approval by the Judicial Conference of the United States, perhaps by delegating that function to its Standing Committee on Rules of Practice and Procedure or to its Advisory Committee on Civil Rules. Those organs, charged as they are with maintaining and improving the federal rules,⁵⁹ have the expertise and perspective essential to an informed evaluation of proposed local rules.

Fourth. Local rules should be permitted when they are expressly required or permitted to be made by statute or federal rule,⁶⁰ and when regulation is accomplished better at the local than at the national level. The former need not now detain us, since the principal difficulty with local rules lies in line-drawing when Congress has not spoken. Precise placement of those lines is difficult. It is not helpful to look for distinctions between "local problems" and "national problems," for in a broad sense all procedural problems are local. That is the *only* place they

58. Interestingly, circuit court approval prior to adoption of local rules was considered by the framers of rule 83, but rejected. A.B.A. PROCEEDINGS, *supra* note 2, at 357 (statement of G. Donworth).

59. 28 U.S.C. § 620 (1984). A thorough study of the process and proposals for change is W. BROWN, FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES (1981).

60. See, e.g., 28 U.S.C. § 137 (1984) (division of business in multi-judge districts); 28 U.S.C. § 139 (1984) (times and places for regular sessions of court); 28 U.S.C. § 636(b)(4) (1984) (magistrates' discharge of duties); 28 U.S.C. § 1654 (1984) (appearances); 28 U.S.C. § 1863 (1984) (plans for random selection of jurors); 28 U.S.C. § 1914(c) (1984) (advance payment of fees); FED. R. CIV. P. 16(b) (cases exempted from mandatory scheduling conferences); FED. R. CIV. P. 40 (trial calendars); FED. R. CIV. P. 66 (receiverships); FED. R. CIV. P. 73(a)-(b), 74(d), 75(c), (e) (proceedings before magistrates); FED. R. CIV. P. 77(c) (extended hours for clerk's office); FED. R. CIV. P. 78 (motion days; submission and determination of motions without oral hearing).

can manifest themselves. Subject matter jurisdiction is just as much a local problem as is docket control, yet the former should be regulated nationally and the latter locally. The key lies instead in the *causes* of a procedural problem. If they are necessarily or largely idiosyncratic to each district, then the cure will be also. A uniform rule will only hinder, since it can consider only those causes that are common to all districts. Where commonality of causation does exist, however, uniform rules are the optimum solution. Not only are economies of scale achieved by having the problem addressed by one body instead of by ninety-five, but that one body likely will generate better rules since it can acquire a level of expertise and sophistication unattainable elsewhere.⁶¹

Fifth. Consistent with the need for bright-line guidance, a revised rule 83 should explicitly delineate those areas in which local rulemaking is appropriate, applying the general criteria discussed above.⁶²

Sixth. Rule 83 should exploit the potential use of local rules as demonstration models to test proposed modifications of the federal rules. Prior approval of the Judicial Conference ought to be required and temporarily limited so that the districts involved do not become permanent pockets of procedural nonuniformity. Most important, the experiments must be scientifically designed to yield objective evidence by which their success or failure can be measured, not results that are merely impressionistic. This almost certainly would require the infusion of funds and personnel from outside the district.

Without further modification, rule 83 will almost certainly fail to stem the proliferation of local rules that are inconsistent with the policies of the federal rules. When local rulemaking rests on a more solid foundation, district courts will have flexi-

61. Discovery can illustrate the distinction between local causes and local symptoms. Abuse of discovery is probably a greater problem in some districts than in others. So also are the consequent demands upon a judge's limited time. Yet those demands, indeed even the antecedent local overdiscovery, are merely symptoms of a national problem. That more attorneys in district A submit excessive interrogatories than do counsel in district B does not mean that the causes of interrogatory abuse are idiosyncratic to district A. It means only that the federal rules governing interrogatory practice are too loosely drawn to prevent abuse wherever it may arise.

62. For example: (a) administrative matters concerning the court's own operation; (b) admission and discipline of attorneys; (c) hearings and arguments on motions; (d) bonds, undertakings, and fees; (e) pre-trial conferences; (f) trial calendars; (g) proceedings before magistrates; (h) receiverships; (i) size of juries; and (k) taxation of costs and awards of fees and expenses.

bility to regulate matters that are truly local, but local rules that impede the efficient federal administration of justice by straying into areas more appropriately left to nationwide rulemaking will be precluded.