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The Role of Local Rules

BY DANIEL R. COQUILLETTE,
MARY P. SQUIERS, AND
STEPHEN N. SUBRIN

You are an experienced trial attorney with an important federal case. Like so many cases today, it spills into other federal districts. You are familiar with the Federal Rules of Civil Procedure and of Evidence, and with the relevant sections of Title 28. You can easily be admitted on motion to handle the cases in the other districts. Indeed, because of the complexity of the facts, you would not wish to involve other lawyers unless absolutely necessary. Are you on safe ground to proceed alone?

The answer today is probably "no," unless you are absolutely familiar with the local rules of the federal district courts outside your own district. Local rules in the 94 federal districts have grown so far apart that you will have difficulty even finding relevant information unless you know each district.

Even worse, some rules now modify or contradict the Federal Rules. There are nearly 5,000 local rules in the 94 federal districts, and the number is growing. There are thousands of additional standing orders. To give one example, the Central District of California, based in Los Angeles, has 31 local rules with 434 subrules, supplemented by an additional 275 standing orders. These are published in three volumes that are hard even to lift, let alone read.

At the other extreme, the Middle District of Georgia, based in Macon, has only one local rule and just 11 standing orders.

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The rapid proliferation of local rules can create serious problems. Let us return to our hypothetical case. Your only safe course may be to retain additional counsel in each federal district for the case. This is frequently done today in complex litigation, but those with frequent multistate cases—from large corporations to national civil-rights organizations—could justifiably ask who is paying the bill and why it is necessary.

**To what extent
should
procedure
be uniform
throughout
all federal
trial
courts?**

There is a second part to this problem. Few people have access to all these local rules. There is not even a uniform numbering system. Getting information is difficult, even for locals. Some local rules even attempt to restate sections of Title 28 or the Federal Rules of Civil Procedure or Evidence. In so doing, the wording is frequently changed, and the local rule becomes inconsistent with the uniform federal rule system, or even federal statutes.

The problem is made worse by the extraordinarily diverse subject areas governed by local rules. They cover the entire spectrum of federal practice, from attorney admission and discipline through the various stages

of trial, including filing requirements, pretrial discovery procedures, and taxation of costs.

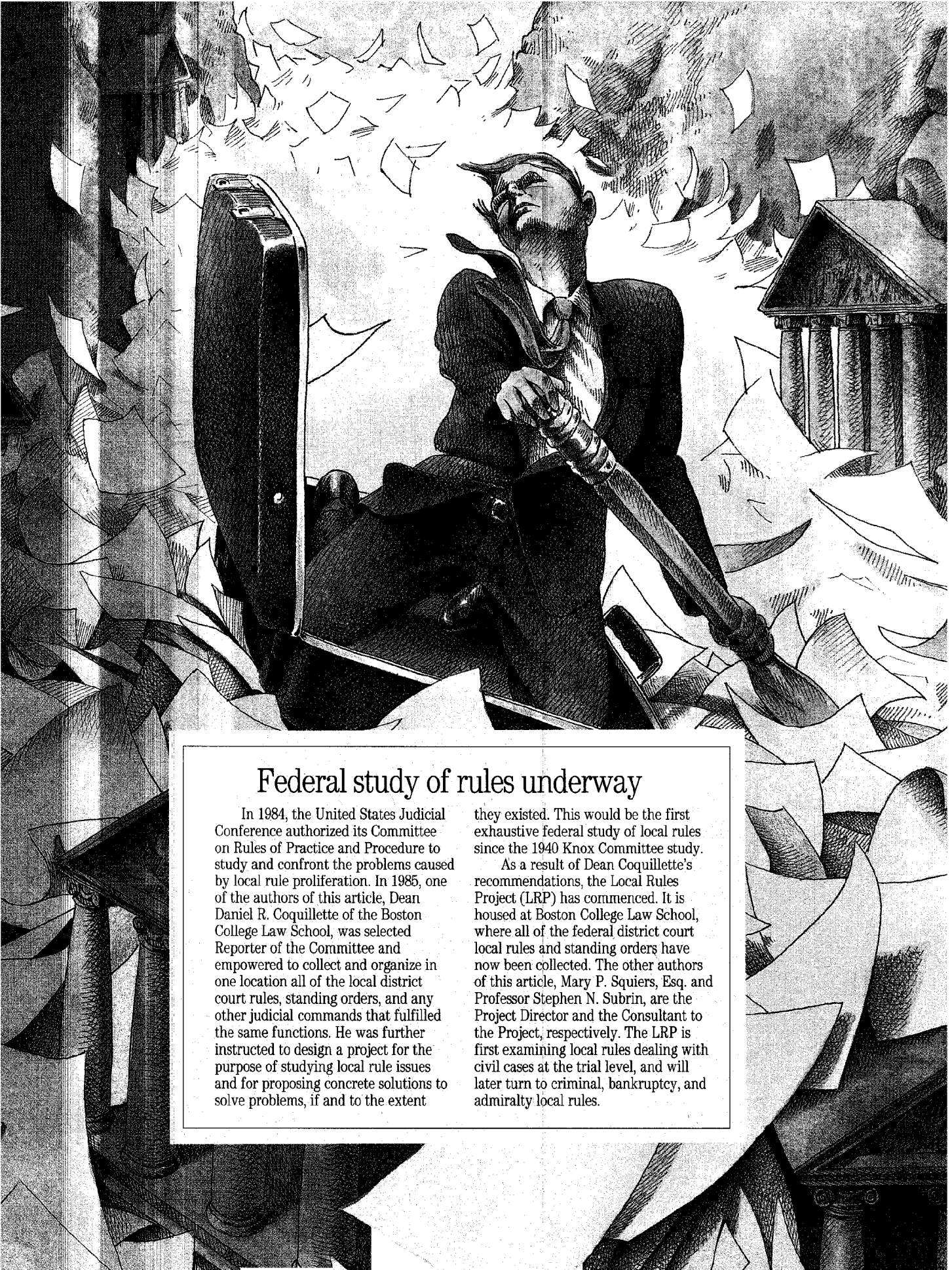
Some local rules supplement or expand the Federal Rules of Civil Procedure—for example, defining the content and scope of the pretrial conferences and scheduling requirements outlined in Fed.R.Civ.P. 16. Other rules provide greater detail on motion practice than that provided in Fed.R.Civ.P. 7(b).

The rules add to the class-action requirements of Fed.R.Civ.P. 23. Some of the rules appear to expand on what is mandated by federal statutes, in such areas as habeas corpus proceedings and the power and scope of authority of magistrates. Other local rules address administrative issues not adequately covered by any other federal directive. Examples are rules about security in the courtroom and custody of exhibits.

The local rules problem has recently attracted the attention of two organizations capable of making major steps toward a solution: the House Committee on the Judiciary and the Judicial Conference of the United States. These two organizations are now cooperating closely through the staff of the House's Subcommittee on Courts, Civil Liberties and the Administration of Justice and the Judicial Conference's Committee on Rules of Practice and Procedure, respectively.

In 1984 the subcommittee began an examination of the promulgation of local rules during its review of rulemaking by the judiciary generally. The subcommittee has proposed amendments to Sections 2072 through 2076 of Title 28. These amendments are known as the Rules Enabling Act of 1985. The Act seeks "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."

The subcommittee noted that lo-

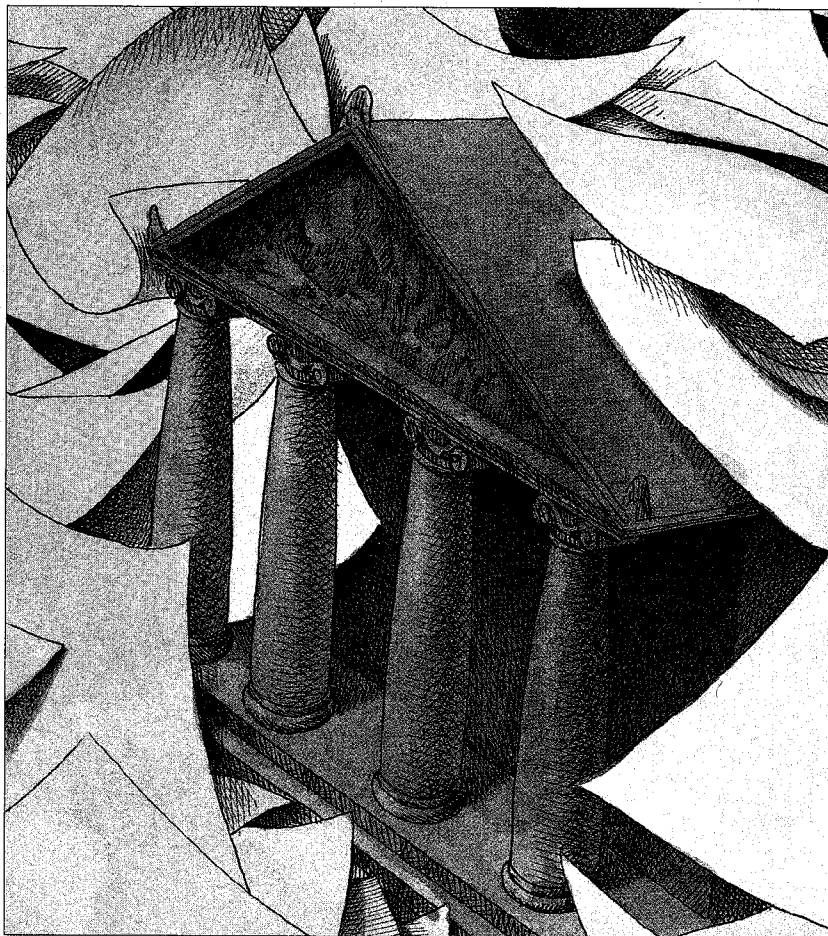


Federal study of rules underway

In 1984, the United States Judicial Conference authorized its Committee on Rules of Practice and Procedure to study and confront the problems caused by local rule proliferation. In 1985, one of the authors of this article, Dean Daniel R. Coquillette of the Boston College Law School, was selected Reporter of the Committee and empowered to collect and organize in one location all of the local district court rules, standing orders, and any other judicial commands that fulfilled the same functions. He was further instructed to design a project for the purpose of studying local rule issues and for proposing concrete solutions to solve problems, if and to the extent

they existed. This would be the first exhaustive federal study of local rules since the 1940 Knox Committee study.

As a result of Dean Coquillette's recommendations, the Local Rules Project (LRP) has commenced. It is housed at Boston College Law School, where all of the federal district court local rules and standing orders have now been collected. The other authors of this article, Mary P. Squiers, Esq. and Professor Stephen N. Subrin, are the Project Director and the Consultant to the Project, respectively. The LRP is first examining local rules dealing with civil cases at the trial level, and will later turn to criminal, bankruptcy, and admiralty local rules.



cal rules may have some obvious benefits: They accommodate local conditions, offer predictability to the bar by communicating the required procedure or practice, and rid the court of certain routine tasks. The subcommittee noted, however, that local rules have been severely criticized by commentators because they could be promulgated without notice or an opportunity for comment; because there is a tremendous number of such rules; and because they frequently conflict with the letter and spirit of national rules and federal statutes. It is often difficult to determine whether this is so because the answer depends on the definitions of "conflict" and "inconsistency."

For example, some people argue that a limit on the number of interrogatories conflicts with the specific wording of Fed.R.Civ.P. 33(a), that "[a]ny party may serve upon any other party written interrogatories." Others urge that, at a minimum, these

limits conflict with the generous spirit of the Federal Rules.

Many jurisdictions that limit the number of interrogatories allow a party to ask for more. On the one hand, the potential for additional interrogatories makes the local rule consistent with the Federal Rules. On the other, the requirement for a motion conflicts with the federal discovery rules, because it shifts the burden to the party seeking the discovery to prove that the discovery is necessary, rather than forcing the party opposing the discovery to move for a protective order.

It is unclear whether local rules regulating motion practice conflict with existing law. Rule 7(b) of the Federal Rules already addresses the requirements for filing a motion. Some jurisdictions have additional rules requiring that a motion be accompanied by a written brief. Failure to do so means that the movant loses and, in some jurisdictions, that costs

may be assessed against the movant for a frivolous motion. These jurisdictions usually provide that a failure of the responding party to file a brief in opposition meant that the responding party consents to the motion.

These local rules raise at least two questions about conflict with existing Federal Rules. First, does Rule 7(b) pre-empt local rules that set additional requirements? Second, if there is no pre-emption, do these local rules conflict with the Federal Rules because they state more stringent requirements?

Many jurisdictions impose sanctions on attorneys and parties who violate local rules; these sanctions may conflict with the rights of the parties. For example, some local rules provide that a failure to follow a particular procedure will result in dismissal of the case with prejudice or in another sanction directed at a party, not an attorney. Such a result could violate a litigant's constitutional right to a fair trial or access to the federal courts.

Perhaps most important, the proliferation of local rules conflicts with the spirit of the Federal Rules. When the Federal Rules became law in 1938, they were heralded for their uniformity, simplicity and liberality. They provided wide latitude for attorney choice and creativity in pleading, joinder and discovery. A lawyer admitted in one federal district court was supposed to be able to practice with ease in any other.

In reality, however, a lawyer admitted in one federal district may be unable to be admitted at all to another federal district court due to the local variations in bar admission requirements. And a lawyer may have very circumscribed latitude in formulating trial strategy because the applicable local rules and standing orders may result in only limited options. Last, an attorney may be overwhelmed by the sheer number of directives and rules. To prepare for a civil case, an attorney must read hundreds of pages of direction, including Title 28, the Federal Rules, the relevant local rules, and whatever orders the presiding judge has issued.

Like the 1980 and 1983 amendments to the Federal Rules relating to discovery and pretrial conferences

and to attorney certification of pleadings, motions, and discovery, the local rules often constrict the alternatives available to attorneys. But unlike those amendments, the changes are accomplished in a non-uniform way and without being submitted to Congress. For example, more than 80 percent of the districts now restrict the number of interrogatories (although some of these districts permit the use of more interrogatories upon motion). In effect, the Federal Rules have been amended without going through the normal amendment process.

The number, specificity and impact of local rules in any one district can effect substantive results in at least two ways. The first is their impact on the particular litigants. For example, a local rule requiring verification of a prisoner's civil-rights complaint could prevent the prisoner from getting into court at all. A local rule requiring arbitration, by delaying a jury trial and by imposing ad-

ditional costs, may force a litigant to settle for an arbitration award rather than going to trial.

Second, the very number and complexity of local rules can make it impossible for a poor client or a small law firm, without the backup of large numbers of lawyers and paralegals as well as sophisticated office equipment, to enter federal court. The requirement for associating local counsel or other admission requirements or conditions may make it impossible for a client to have his or her own lawyer bring suit in federal court. These rules may also add to the litigation costs for everyone.

These problems, however, are by no means caused solely or primarily by the individual district courts. It is now clear that the Federal Rules do not cover many of the topics for which courts should have a rule, such as the specifics of briefing, attorney conduct in the courtroom, or carrying out and documenting settlement. The Federal Rules are general and

permissive. Busy trial judges need more specificity to meet daily problems and provide uniformity and predictability within their districts.

It is also clear that the various districts have differing caseloads, cultures and available physical space. Therefore, for some topics, different local rules make sense. For instance, it would be difficult, and probably unwise, to have a uniform case assignment rule or a uniform rule for the custody and disposal of exhibits.

Moreover, dozens of federal statutes and judicial conference resolutions instruct the district courts to promulgate local rules. For example, Congress has required each district court to establish rules pursuant to which the magistrates shall discharge their duties. 28 U.S.C. §636(b)(4). Congress has also permitted each district court, by rule or standing order, to require advance payment of fees. 38 U.S.C. 1914(c). The Judicial Conference approved the Model Rules of Disciplinary Enforcement promulgated by the American Bar Association and recommended their adoption by all federal district and appellate courts. The Judicial Conference asked the district courts to adopt local rules to create alternative mechanisms for service of process where authorized by state law and to encourage their use by the bar.

There is now so much procedural law in Title 28 and the Federal Rules that some courts may need to summarize or highlight portions of that law in the local rules.

The thousands of local rules and standing orders, taken as a whole, represent central procedural questions that have puzzled the legal community since the country's birth. We are left, then, with several questions that the profession needs to consider:

To what extent should procedure be uniform throughout all federal trial courts, and throughout all trial courts—state and federal—of a given state?

To what extent is procedural diversity desirable?

Should procedural rules be general and flexible, leaving wide discretion to judges and lawyers, or should they be more technical and prescriptive?

Should procedure be the prerogative of the courts, or should it be regulated by the legislature? ■

