A Critical Review of the Local Rules of the United States District Court for the Southern District of California

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I. INTRODUCTION

The Southern District of California has experienced the same proliferation of local rules that has afflicted many federal district courts throughout the nation.[1] Typical of other district courts, the Southern

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1. The 1989 report of the Local Rules Project documented the tremendous increase in promulgation of local rules by federal district courts nationwide. *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 (1989) [hereinafter REPORT OF THE LOCAL RULES PROJECT]. *See also* Daniel R. Coquillette et al., *The Role of Local Rules*, A.B.A. J., Jan. 1989, at 62 (summarizing Local Rules Project report); *infra* notes 16-21 and accompanying text. Several scholars have analyzed the reasons for, as well as the consequences of, this proliferation of local procedures. *See, e.g.*, Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447 (1994); Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 (1992); Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992) [hereinafter Tobias, *Balkanization*]; Stephen N. Subrin, *Federal Rules, Local Rules, and*

District has promulgated local rules after some opportunity for comment from the local federal bar,[2] but has imposed the rules without external scrutiny or other meaningful review. The Southern District has approximately eighty separate local rules, many with multiple subparts, which fill fifty pages of double-column fine print.[3] In addition, 435 or so "General Orders"—many the functional equivalent of local rules—announce policies and procedures for the district court. This proliferation of procedural rules means that a Southern District practitioner seeking an answer to a procedural question faces a more complicated task than merely consulting the relevant federal rules and federal statutes; counsel must also determine whether any local rules and general orders control.

The task becomes even more challenging when the local and federal rules are inconsistent. Despite the directive of 28 U.S.C. § 2071 and Rule 83 of the Federal Rules of Civil Procedure that local rules be consistent with the federal rules and federal statutes, many of the Southern District's local rules conflict with federal law.[4] Other local rules may not conflict, but duplicate the analogous federal rule by repeating it with slightly different language.

The Committee to Review Local District Rules, a newly constituted task force under the auspices of the Ninth Circuit Judicial Council, is currently undertaking a comprehensive review of all local rules of the district courts within the Ninth Circuit. The charge of this ad hoc committee is to identify local rules in each district that are inconsistent with, or duplicative of, the federal rules or the United States Code. Through this task force review process, the Ninth Circuit Judicial

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State Rules: Uniformity, Divergence, and Emerging Procedural Patterns, 137 U. PA. L. REV. 1999 (1989).

Professor Carl Tobias attributes the recent proliferation of local district court rules—which he decries as the "balkanization" of a once uniform and simple national rule system—to a variety of factors, the most significant of which has been the perceived explosion of litigation and litigation abuses since the mid-1970s. *See* Tobias, *Balkanization*, *supra*, at 1396. The federal trial courts responded to this perceived explosion by actively employing numerous local practices (for example, discovery limitations, pretrial conferences, alternative dispute resolution, and sanctions) designed to expedite dispute resolution and to prevent or remedy abuses. *Id.* at 1396-1406. The primary means by which the district courts sought to achieve this goal of managerial judging was through promulgation of local rules. *Id.* at 1397-99. *See generally infra* notes 14-16, 29-34 and accompanying text.

2. A 1988 amendment to 28 U.S.C. § 2071(b)(1994) requires the district court to give public notice of proposed local rules and an opportunity for comment on them prior to adoption. FED. R. CIV. P. 83, as amended in 1985, contains similar requirements.

3. By comparison, publication of all 83 of the Federal Rules of Civil Procedure in the same format would require approximately 45 pages.

4. 28 U.S.C. § 2071 (1994); FED. R. CIV. P. 83.

Council hopes to implement the oversight responsibilities imposed on it by the Judicial Improvements Acts and by Federal Rule 83.[5] The Committee anticipates submission of a final report in Spring 1997.

This Article contains an overview of some conflicts with and duplication of federal laws apparent in the current local rules of the Southern District and concludes with some curative suggestions for the district court and for the Ninth Circuit. The forthcoming report of the Ninth Circuit Judicial Council's Committee to Review Local District Rules will contain more detailed analyses and recommendations with respect to these and other local rules.

II. A BRIEF HISTORY OF THE LOCAL RULES REVIEW PROCESS

A. The Phenomenon of Local Rules Proliferation

Local federal rules have existed in one form or another since the creation of federal trial courts in 1789.[6] Prior to the adoption of the Federal Rules of Civil Procedure (Federal Rules), federal statutes already authorized the district courts to make local rules not inconsistent with federal law.[7] The Rules Enabling Act of 1934[8] carried forward this authority to make local rules not inconsistent with the Federal Rules, as did the original version of Federal Rule 83. The new scheme of national uniform rules embodied in the 1938 Federal Rules, therefore, appreciated the practical need for local rules to fill in gaps in the Federal Rules and to respond to local conditions.[9] Soon after the Federal Rules became

5. *See* Carl Tobias, *Suggestions for Circuit Court Review of Local Procedures*, 52 WASH. & LEE L. REV. 359, 364-365 (1995) (summarizing the Ninth Circuit's efforts at local rules review) [hereinafter Tobias, *Suggestions*].

6. *See* Jack B. Weinstein, REFORM OF COURT RULE-MAKING PROCEDURES 117 (1977); Note, *Rule 83 and the Local Federal Rules*, 67 COLUM. L. REV. 1251, 1253-1254 (1967) [hereinafter *Local Federal Rules*]; Subrin, *supra* note 1, at 2012.

7. *E.g.*, Act of March 2, 1793, ch. 22, § 7, 1 Stat. 335; 28 U.S.C. § 731 (1873) (originally enacted as Act of Aug. 23, 1842, ch. 188, § 6); Equity Rule 79, 226 U.S. 673 (1912). *See Local Federal Rules*, *supra* note 6, at 1253-1254 (summarizing statutory authority for local rules before 1938); Subrin, *supra* note 1, at 2012 (summarizing district court local rulemaking power from 1789 until the Conformity Act of 1872, and from 1872 until the Rules Enabling Act of 1934).

8. Pub. L. No. 73-415, 48 Stat. 1064 (1934) (current version codified at 28 U.S.C. §§ 2071-2077 (1994)).

9. *See* Subrin, *supra* note 1, at 2013.

effective, the Judicial Conference of the United States,[10] the policy-making arm of the federal courts, recognized the need to review then-existing local rules for compliance with the new national rules. The Judicial Conference appointed a committee, which became known as the Knox committee, to review local rules for the purpose of developing recommendations to achieve a greater degree of simplicity and uniformity.[11] After a comprehensive survey, the 1940 Knox committee report found that several district courts had local rules that repeated or conflicted with the Federal Rules and made appropriate recommendations.[12] For the next several decades, the federal trial courts seemed satisfied with the procedural scheme of uniform national rules and limited local variations.[13]

Beginning in the mid-1970s, however, federal judges became increasingly dissatisfied with the Federal Rules, which they perceived as fostering an explosion of litigation and litigation abuses in the federal courts.[14] This dissatisfaction gave rise to new efforts by federal judges to more actively manage the conduct of civil litigation, which, in turn, led to their increasing reliance on local rules and procedures.[15] The

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10. The Judicial Conference of the United States consists of the Chief Justice of the U.S. Supreme Court, the chief judge of each judicial circuit and of the Court of International Trade, and a district judge from each judicial circuit. 28 U.S.C. § 331 (1988). The Conference possesses a variety of responsibilities with respect to improvement of the administration of justice in the federal courts including the duty to make comprehensive surveys of the condition of business in the federal courts, to submit recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business, and to study and make recommendations to the Supreme Court with respect to the Federal Rules. *Id.* The Judicial Conference also has the power to review local rules of the courts of appeals for consistency with federal law, and to modify or abrogate any such circuit rule found inconsistent. *Id.* The Judicial Conference does not have any similar direct authority to review local rules of the district courts. *Id.*

11. *See* Subrin, *supra* note 1, at 2016.

12. *See* REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON LOCAL DISTRICT COURT RULES (1940). *See generally* Subrin, *supra* note 1, at 2016-19 (discussing the Knox committee report).

13. *See* Subrin, *supra* note 1, at 2017-18. This historical overview of local rules review draws substantially from the various works of several scholars, but particularly those of Professor Carl Tobias whose extensive writings on the proliferation of local rules and on the Judicial Improvements Acts illuminate the problems associated with the attempts at local rules oversight. *See, e.g.*, Carl Tobias, *More Modern Civil Process*, 56 U. PITT. L. REV. 801, 814-831 (1995); Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1592-93 (1994) [hereinafter Tobias, *Improving the Acts*]; Tobias, *Balkanization*, *supra* note 1, at 1393-1413; Tobias, *Suggestions*, *supra* note 5, at 359-367.

14. *See* Tobias, *Improving the Acts*, *supra* note 13, at 1593-99; Tobias, *Balkanization*, *supra* note 1, at 1395-99; Tobias, *More Modern Civil Process*, *supra* note 13, at 810-12.

15. *See* sources cited *supra* note 14.

growth in district court local rules continued during the 1980s and 1990s with a resultant decline in the uniformity, simplicity, and trans-substantivity of federal procedure envisioned by the Federal Rules.[16]

During the 1980s, the Judicial Conference became increasingly concerned with the proliferation of local rules by the various district courts.[17] The Conference was particularly troubled by those local procedural requirements that appeared to conflict with the Federal Rules or with sections of the United States Code. In 1986, the Conference commissioned the Local Rules Project to systematically review all local rules and procedures, to identify problems associated with local rules proliferation, and to make recommendations to resolve these problems.[18] The Local Rules Project published its findings and recommendations in a 1989 report entitled *Report of the Local Rules Project: Local Rules on Civil Practice.*[19] This report not only verified the suspected proliferation of local rules,[20] but also identified widespread instances of their possible inconsistencies with, and repetition of, federal rules or statutes.[21] Based on this report, the Judicial Conference requested all district courts to conform their local procedures to the Federal Rules.[22] For a variety of reasons, few courts have complied.[23]

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16. *See* Tobias, *Improving the Acts*, *supra* note 13, at 1598-1622; Tobias, *Balkanization*, *supra* note 1, at 1397-1403.

17. *See* Coquillette et. al., *supra* note 1, at 65; Tobias, *Improving the Acts*, *supra* note 13, at 1596-97; Tobias, *Balkanization*, *supra* note 1, at 1398-99.

18. *See* Subrin, *supra* note 1, at 2019-20.

19. REPORT OF THE LOCAL RULES PROJECT, *supra* note 1.

20. The *Report of the Local Rules Project* observed:

> The ninety-four district courts currently have an aggregate of approximately 5,000 local rules, not including many "sub-rules," standing orders and standard operating procedures. These rules are extraordinarily diverse and their numbers continue to grow rapidly. To give one stark example, the Central District of California, based in Los Angeles, has about thirty-one local rules with 434 "sub-rules," supplemented by approximately 275 standing orders. At the other extreme, the Middle District of Georgia has only one local rule and just one standing order. These local rules literally cover the entire spectrum of federal practice, from attorney admission and attorney discipline, through the various stages of trial, including pleading and filing requirements, pre-trial discovery procedures, and taxation of costs.

REPORT OF THE LOCAL RULES PROJECT, *supra* note 1, at 1.

21. *See* Subrin, *supra* note 1, at 2021-26.

22. *See* Tobias, *Improving the Acts*, *supra* note 13, at 1597.

23. *Id.* Some of the reasons for the district courts' failure to comply are discussed *infra* note 99.

Congress also focused its attention on the problems associated with local rules proliferation specifically, and with civil litigation generally, and passed two pieces of remedial legislation at the end of the 1980s: The Judicial Improvements and Access to Justice Act of 1988 (Judicial Improvements Act)[24] and the Civil Justice Reform Act of 1990 (CJRA).[25] Unfortunately, these two Acts represent largely incompatible views with respect to local rules and have greatly complicated current efforts toward local rules review.

By enacting the 1988 Judicial Improvements Act, Congress sought to reverse the proliferation of local rules and restore the primacy of the uniform Federal Rules.[26] The 1988 Act requires each district court to appoint a local rules committee to advise the court with respect to formulation of local rules, and to provide public notice and opportunity for comment prior to adoption of local rules.[27] More significantly, the Act requires each circuit judicial council to periodically review all local rules for consistency with the Federal Rules and empowers each council to "modify or abrogate any such [local] rule found inconsistent in the course of such a review."[28]

Two years later, Congress turned its attention to very different concerns with the civil justice system: the perceived problems of litigation abuses, increased costs, and lengthening delays in federal civil litigation. After considering recommendations for improvement—mostly reforms relating to litigation management, judicial monitoring of discovery, and alternative dispute resolution—Congress passed the CJRA in 1990.[29] The CJRA required each of the ninety-four federal district courts to adopt an individualized civil justice and delay reduction plan by December 1993.[30] The CJRA directed each district to appoint an advisory group consisting of local attorneys, client representatives, and the U.S Attorney to help formulate a plan based on the particular needs and circumstances of the district.[31] The advisory group was instructed to review the court's docket, evaluate the reasons for the district's civil

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24. Title IV of the Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4648 (1988) (codified as amended at 28 U.S.C. §§ 332(d)(4), 2071-2074 (1994)).

25. Title I of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5090 (1990) (codified as amended at 28 U.S.C. §§ 471-482 (1994)).

26. *See* Tobias, *Improving the Acts*, *supra* note 13, at 1623-27.

27. 28 U.S.C. §§ 2071, 2077(b)(1994).

28. 28 U.S.C. § 332(d)(4)(1988).

29. The legislative background of the CJRA is discussed in detail in Mullenix, *supra* note 1, and in Tobias, *Improving the Acts*, *supra* note 13, at 1601-04.

30. 28 U.S.C. § 471 (1994).

31. 28 U.S.C. §§ 472, 478 (1994).

litigation delays, and recommend cost and delay reduction measures.[32] The district court must develop an expense and delay reduction plan after considering the advisory group's recommendations, litigation management principles, and the cost and delay reduction techniques set forth in the CJRA.[33] The CJRA also created committees to monitor and assess the plans.[34]

These two Acts are at cross-purposes. The Judicial Improvements Act's purpose is to rein in local rules, remove conflicts, and restore uniformity; the CJRA's goal is to reduce costs and delays by improved judicial case management.[35] To accomplish the latter goal, the CJRA encouraged federal district courts to experiment with local procedures and rules.[36] Not only did the CJRA invite each district to expand its local rules, but, by implication, authorized each district to promulgate local rules that may conflict with the Federal Rules.[37] The CJRA of 1990 altered the 1988 Judicial Improvements Act's directive to each circuit judicial council as to local rule oversight and, more significantly, effectively suspended efforts to implement the earlier Act's mandate to limit local rules.[38]

More recently, an unexpected source has further complicated the local rules review process. The 1993 amendments to the Federal Rules of Civil Procedure sanction local variations from the Federal Rules themselves, although on a more limited basis than the CJRA. Most notably, new Federal Rule 26 permits each district court to opt out of the automatic disclosures, quantity limitations, and certain other discovery requirements imposed by the 1993 amendments.[39]

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32. 28 U.S.C. §§ 472-473, 478 (1994).
33. 28 U.S.C. §§ 472(a), 473(a),(b)(1994).
34. 28 U.S.C. § 474(a),(b)(1994).
35. *See* Tobias, *Improving the Acts*, *supra* note 13, at 1623-27.
36. 28 U.S.C. § 473(b)(6)(1994)(authorizing the district court to include various specified litigation management and delay reduction techniques, including "such other features as the district court considers appropriate after considering the recommendations of the advisory group").
37. *See* Tobias, *Improving the Acts*, *supra* note 13, at 1620; Robel, *supra* note 1, at 1467-70.
38. *See* Tobias, *Improving the Acts*, *supra* note 13, at 1623-27; Tobias, *More Modern Civil Process*, *supra* note 13, at 819, 824-26.
39. *See* FED. R. CIV. P. 26(a)(1) (authorizing local rules that exempt litigants from compliance with various automatic initial disclosures); *id.* 26(b)(2) (authorizing district courts to alter the numerical limits imposed on depositions and interrogatories, and the length limits imposed on depositions and requests for admission); *id.* 26(d) (authorizing

The Ninth Circuit Judicial Council directed its Local Rules Review Committee to exclude from review those local rules adopted by the district courts under the authority of the CJRA or the 1993 Federal Rule amendments.[40] Likewise, this Article does not discuss several local rules adopted pursuant to the Southern District's Delay and Cost Reduction Plan under the CJRA,[41] nor those local discovery rules adopted pursuant to the Southern District's standing order opting out of some of the 1993 amendments to Federal Rules on discovery.[42] The CJRA is scheduled to sunset in December 1997.[43] If Congress does permit the CJRA to expire at that time, the Southern District may then need to modify the local rules implementing its CJRA plan to conform once again to the Federal Rules.[44]

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local rules that except parties from certain limitations on the timing and sequence of discovery); *id.* 26(f) (authorizing local rules that exempt parties from a required meeting to discuss case and develop proposed discovery plan).

40. *See* Memorandum from Margaret Z. Johns, Chair, Local Rules Review Committee, to Local Rules Reviewers, at 2 (Apr. 17, 1995) (on file with author).

41. The Southern District's Delay and Cost Reduction Plan was adopted by General Order No. 394 on June 3, 1992, with occasional amendments thereafter. *E.g.*, General Order No. 394, In the Matter of the Delay and Cost Reduction Plan Under the Civil Justice Reform Act of 1990 (S.D. Cal. June 3, 1992); General Order No. 394-E, General Order Regarding Proposed Modification to the Federal Rules of Civil Procedure (S.D. Cal. Nov. 8, 1993); General Order No. 394-I, General Order Regarding Proposed Modification to the Federal Rules of Civil Procedure (S.D. Cal. Jan. 17, 1995). The Plan authorizes an Early Neutral Evaluation Conference and a Case Management Conference to supervise discovery, encourage settlement, explore arbitration and other alternative dispute resolutions, and otherwise manage pretrial proceedings. *See* S.D. CAL. R. 16.1(c)-(e), 16.2, 16.3, 37.1. The Plan also contains specific time restrictions—which often conflict with the Federal Rules—for service of process, extensions, default judgments, and summary judgment motions. *See* S.D. CAL. R. 4.1(a),(b), 12.1, 16.3(n)(1)-(6), 55.1.

42. Pursuant to General Order No. 394-I, the Southern District has ordered that compliance with the following 1993 Federal Rules of Civil Procedure is not required: Federal Rules 26(a)(1)-(4) (pretrial disclosures), 26(f) (meeting of parties regarding discovery), 30(a)(2)(A)&(C)(limits on oral depositions), and 33(a), 34(b), and 46(a)(insofar as these rules require leave of court or stipulation for serving interrogatories, document production requests, and requests for admissions). General Order No. 394-I, *supra* note 41. This General Order is codified in several local rules. *See* S.D. CAL. R. 26.1(f), 30.1(d), 33.1(d), 36.1(d), 34.1(a).

43. *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 103(b)(2), 104 Stat. 5089 (1990).

44. *See* Tobias, *Suggestions*, *supra* note 5, at 368 ("Should Congress permit the CJRA to sunset as scheduled in 1997, the conflicting [local] procedures adopted under the CJRA ought to sunset as well.") (footnote omitted).

B. Statutory Prescriptions Regarding Local Rules and Local Rules Review

Title 28 U.S.C. § 2071 authorizes individual federal district courts to adopt local rules, but mandates that such rules "be consistent with" the Federal Rules and federal statutes and be "prescribed only after giving appropriate public notice and an opportunity for comment."[45] Likewise, Federal Rule 83 authorizes each district court to make and amend rules "not inconsistent with these [Federal Rules]." In addition, Federal Rule 83 provides: "A local rule must be consistent with—*but not duplicative of*—Acts of Congress and [the Federal Rules]."[46]

The Judicial Improvements Act of 1988 requires each circuit judicial council to periodically review local rules adopted by district courts for consistency with national rules.[47] In the Ninth Circuit, the Judicial Council delegated this responsibility to the Conference of Chief District Judges, a creation of the Judicial Council.[48] The Chair of this Conference, Chief Judge Robert Coyle of the Eastern District of California, appointed a Committee to Review Local District Rules to carry out this charge.[49] The membership of this Committee includes three district court chief judges, a clerk of the court, two law professors, and representatives of the federal bar. In addition, several law professors serve as volunteer local reviewers. In anticipation of the amendment to Federal Rule 83, the Ninth Circuit Judicial Council expanded the scope of the Committee to include review of local rules that are duplicative of national rules.[50] However, as discussed above, the Judicial Council excluded as outside the scope of the Committee's review (1) local rules promulgated by a district court pursuant to the Civil Justice Reform Act

45. 28 U.S.C. § 2071(a),(b) (1994).
46. FED. R. CIV. P. 83 (emphasis added). Unfortunately, the 1995 amendment to Federal Rule 83 does not define what it means by "duplicative" or "consistent" rule, leaving considerable room for legitimate debate.
47. 28 U.S.C. § 332(d)(4)(1994).
48. *See* Tobias, *Suggestions*, *supra* note 5, at 365.
49. *Id.*
50. *See* Memorandum from Margaret Z. Johns, Chair, Local Rules Review Committee, to Local Rules Reviewers, at 2 (May 26, 1995) (on file with author).

of 1990 (CJRA) and (2) local rules promulgated to implement, suspend, or modify the 1993 amendments of the Federal Rules.[51]

The Committee to Review Local District Rules anticipates submission of a final report to the Conference of Chief District Judges in Spring 1997. The Judical Improvements Act of 1988 empowers each circuit judicial council, in the course of its review process, to modify or abrogate any district court local rules within the circuit found to be inconsistent with federal rules or statutes.[52] Whether and to what extent the Ninth Circuit Judicial Council will exercise this power with respect to inconsistent local rules, including those of the Southern District, remain to be seen.

The remainder of this Article discusses some preliminary findings with respect to the local rules of the Southern District of California as well as some suggestions for the district court and the Ninth Circuit Judicial Council with respect to local rules review.

III. LOCAL RULES THAT CONFLICT WITH FEDERAL LAW

A. "Unintentional" Conflicts

Many of the Southern District of California Rules (Local Rules) conflict with provisions of the Federal Rules of Civil Procedure (Federal Rules).[53] Some of these conflicts may simply reflect an inadvertent failure to conform the local rule to an amendment to the Federal Rules. In these cases, the conflict may be unintentional. Local Rule 48.1, for example, provides: "In all civil actions in which a party is entitled to a jury trial, the jury shall consist of six members and such alternates as the judge may determine."[54] The 1991 amendments to Federal Rules 47 and 48, however, abolished the institution of the alternate juror.[55]

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51. *See* Memorandum from Margaret Z. Johns, Chair, Local Rules Review Committee, to Local Rules Reviewers, at 2 (Apr. 17, 1995) (on file with author).

52. 28 U.S.C. § 332(d)(4)(1994).

53. The Committee's review of local rules is not limited to conflicts with the Federal Rules of Civil Procedure, but also includes inconsistencies with federal statutes and with other federal rules such as the Federal Rules of Criminal Procedure, the Supplemental Rules for Certain Admiralty and Maritime Claims, the Rules Governing Section 2254 Proceedings in the United States
District Courts, and the Rules Governing Section 2255 Cases in the United States District Courts. This part of the Article surveys conflicts between the Federal Rules of Civil Procedure and the Southern District's civil rules because these conflicts are the most significant and numerous.

54. S.D. CAL. R. 48.1 (effective Dec. 2, 1991).

55. The provision for alternate jurors in former Federal Rule 47 was stricken, and the institution of the alternate juror was abolished, by the 1991 amendments. *See* FED. R. CIV. P. 47 advisory committee's notes (1991 amendment). The reason for this

Although the Southern District's actual practice undoubtedly complies with current Federal Rules 47 and 48, the district court neglected to revise Local Rule 48.1 to conform to the 1991 amendments.

Likewise, at numerous points the Southern District's local rules instruct the clerk not to accept for filing any document which does not comply with the various form requirements imposed by the Local Rules.[56] Such a delegation of authority may have been appropriate when these local rule provisions were first adopted, but no longer. Federal Rule 5(e), as amended in 1991, provides: "The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in the proper form as required by these rules

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abolition, according to the Advisory Committee, was: "The use of alternate jurors has been a source of dissatisfaction with the jury system because of the burden it places on alternates who are required to listen to the evidence but denied the satisfaction of participating in its evaluation." *Id.* Because the institution of the alternate juror has been abolished, the Advisory Committee also advised that it will ordinarily be prudent and necessary in civil actions, in order to provide for sickness or disability among jurors, to seat more than the constitutionally permissible minimum of six jurors. *See* FED. R. CIV. P. 48 advisory committee's notes (1991 amendment). This advice also calls into question the continued propriety of Local Rule 48.1's directive that juries in civil actions consist of only six members. *See* S.D. CAL. R. 48.1.

56. Local Rule 5.1(f) provides: "Unless a waiver is first obtained from the court, the clerk shall not file any document which does not comply with the requirements of these rules. Said document will be endorsed 'lodged' until approved by the court." S.D. CAL. R. 5.1(f). Several other rules contain similar instructions to the clerk with respect to specified nonconforming documents. *See, e.g.*, S.D. CAL. R. 1.1(d)(13) (defining "file" to mean acceptance by the clerk of a document), 5.1(g) (authorizing clerk to refuse to accept for filing any pleading unless entitled an adversary proceeding naming the defendant), 9.3(a) (authorizing clerk to return nonconforming habeas corpus petition), 15.1 (declaring that no pleading shall be deemed amended until amendment complies with local rules).

The Southern District has recently amended two other rules, Local Rules 4.2 and 9.4(a), that had contained such instructions to the clerk. Effective July 15, 1996, Local Rule 9.4(a) no longer provides that the clerk "shall" return complaints by prisoners under 42 U.S.C. § 1983 (1994) which do not comply with the form requirements specified in the rule, but now provides that the clerk "may" return such noncomplying complaints when tendered to the clerk for filing. S.D. CAL. R. 9.4(a). The amendment to Local Rule 4.2 deleted the instruction to the clerk to return any action, sought to be filed in forma pauperis, which was not accompanied by a supporting declaration that complied with the numerous content requirements of that rule. S.D. CAL. R. 4.2. Local Rule 4.2 as amended still requires that the declaration in support of a request to proceed in forma pauperis shall contain numerous specified statements; and, presumably, the clerk still has the authority under Local Rule 5.1(g) to not file any declaration that fails to comply with the requirements of Local Rule 4.2.

or any local rules or practices."[57] The Advisory Committee's Note to Federal Rule 5(e) explains that the refusal to accept for filing nonconforming papers is not a suitable role for the office of the clerk, and that local rules allowing such refusals are proscribed.[58] These various local provisions instructing the clerk not to accept nonconforming papers obviously conflict with Federal Rule 5(e) and should be rescinded by the district court.

B. "Intentional" Conflicts

1. Fact Pleading and the RICO Case Statement

Other inconsistencies cannot be characterized as mere inadvertent failures to keep current with Federal Rule amendments. For example, three Southern District local rules require "fact pleading" in circumstances where the Federal Rules do not require such a heightened pleading standard.[59] The most significant is Local Rule 11.1, which requires any plaintiff bringing a civil action under the federal Racketeer Influenced and Corrupt Organizations Act (RICO)[60] to file, within thirty days of filing the complaint, a "RICO Case Statement," which the court

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57. FED. R. CIV. P. 5(e).

58. The Advisory Committee offered the following additional explanation for this 1991 amendment: "The enforcement of these rules and of local rules is a role for a judicial officer. A clerk may of course advise a party or counsel that a particular instrument is not in proper form, and may be directed to so inform the court." FED. R. CIV. P. 5(e) advisory committee's note (1991 amendment).

59. Local Rule 3.2(a) requires each complaint to state the "facts supporting . . . jurisdiction." S.D. CAL. R. 3.2(a). Local Rule 23.1(b)(2) requires a pleading alleging a class action to contain a "statement of facts showing that the party is entitled to maintain the action under paragraphs (a) and (b) of Rule 23 F. R. Civ. P." S.D. CAL. R. 23.1(b)(2). Local Rule 11.1 requires plaintiffs in civil RICO actions to file a "RICO Case Statement" which states in detail the specific factual information requested in that form. S.D. CAL. R. 11.1.

60. 18 U.S.C. §§ 1961-1968 (1994). The RICO statutes authorize a private cause of action for treble damages, plus attorneys fees, for any person injured in his business or property by reason of a "pattern of racketeering activity" or collection of an unlawful debt. *Id.* §§ 1962, 1964(c). A "pattern of racketeering activity" requires the commission of two or more predicate acts of "racketeering activity" within ten years. *Id.* § 1961(5). "Racketeering activity," as defined by RICO, includes "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance" chargeable under state law; or any act indictable under several provisions of Title 18 of the United States Code, including bribery, counterfeiting, theft from interstate shipping, embezzlement from pension funds, mail and wire fraud, obstruction of justice, witness tampering, illegal gambling business, money laundering, interstate transportation of stolen property, obscene matter, and sexual exploitation of children. *Id.* § 1961(1).

shall construe as an amendment to the pleadings.[61] This mandatory case statement contains twenty separate requests, some with numerous subparts, for detailed information about the factual bases for the civil RICO claims.[62] These detailed requests must be answered with specificity; failure to file a detailed case statement which responds to these requests with the required specificity will subject the RICO claims to dismissal.[63]

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61. When the Southern District adopted the RICO Case Statement requirement by a general order in January, 1992, it explained that civil RICO claims "tend to expand the scope of a given case, increase discovery, lead to numerous time-consuming and costly motions to dismiss, and prevent possible settlement of litigation. This order is not intended to minimize valid claims of to render their prosecution more difficult." General Order No. 386 Revised, Civil RICO Actions Filed in the United States District Court for the Southern District of California Pursuant to 18 U.S.C. § 1961 (S.D. Cal. Jan. 9, 1992). The RICO Case Statement requirement was not, however, adopted as part of the Southern District's CJRA Delay and Cost Reduction Plan. *See* General Order No. 394, *supra* note 41.

62. The RICO Case Statement requires the civil RICO claimant to provide detailed information about such matters as the defendants and their alleged misconduct and the basis of liability of each defendant, the alleged victims and their injuries, the pattern of racketeering activities, the enterprise, the relationship between the enterprise and the volunteering activity, the effect on interstate commerce, the causal relationship between the alleged injuries and the violation of the RICO statute, and "any additional information that you feel would be helpful to the court in processing your RICO claims." General Order No. 394, *supra* note 41. The detailed factual information requested in paragraph 5 of the RICO Case Statement, reproduced *infra* note 67, exemplifies the kinds of information sought in the remainder of the Case Statement.

63. S.D. CAL. R. 11.1(b). The Southern District is not alone in requiring detailed fact pleading as a means of judicially managing civil RICO actions. *See* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 460-462 (1986). The civil RICO litigation boom that began in the 1980s caused many courts to impose specificity in pleading in order to facilitate dismissal or some other early disposition of RICO claims. *Id.*

Other attempts to restrict civil RICO litigation have been more substantive in nature. For example, some circuits had construed the RICO Act to require a prior criminal conviction for a predicate act as a prerequisite to a civil RICO claim based on that activity, and others had required a distinct "racketeering injury" separate from the harm caused by the predicate act. *See* Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 488-93 (1985) (collecting cases). The Supreme Court rejected these substantive limitations in *Sedima* because they were not supported by the language, the legislative history, nor the policy considerations of the RICO statutes. *Id.* The Supreme Court found such restrictions on civil RICO actions inconsistent with the express congressional admonition that RICO "be liberally construed to effectuate its remedial purposes." *Id.* at 498. The Supreme Court acknowledged the problems caused by the increased filings and novel uses of civil RICO actions, but concluded that such practical consequences did not justify a narrow construction of the statute. *Id.* at 499-500.

Because the RICO Case Statement mandates extensive and detailed "fact pleading," and not the liberal "notice pleading" envisioned by Federal Rule 8(a)(2), this local requirement conflicts with the Federal Rules.[64] Presumably, the Southern District reasoned it had legal authority for the mandatory RICO Case Statement under Federal Rule 9(b), which requires in all averments of fraud that the "circumstances constituting fraud . . . be stated with particularity."[65] This heightened pleading standard for fraud claims does not, however, justify the Southern District's elaborate RICO Case Statement. The Ninth Circuit has repeatedly held that where the predicate act upon which the RICO claim is based is fraud, Federal Rule 9(b) applies and the pleader must allege with particularity the time, place, and specific content of the false representations as well as the identities and roles of the parties to the alleged fraudulent scheme.[66] However, the Southern District's RICO Case Statement goes far beyond the particularity required by Federal Rule 9(b) and the Ninth Circuit precedent. Subparagraph 5(c) of the RICO Case Statement requests the specific factual information required by Federal Rule 9(b) and the Ninth Circuit cases.[67] The remaining

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64. In Conley v. Gibson, 355 U.S. 41 (1957), the Supreme Court reversed a district court decision requiring fact pleading as inconsistent with the notice pleading policy of Federal Rule 8(a). The Supreme Court rejected the defendant's argument that plaintiffs' complaint was deficient because it failed to set forth specific facts to support its general allegations of race discrimination:

> The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail facts upon which he bases his claim. To the contrary, all the Rules require is a 'short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

Id. at 47 (footnote omitted).

65. FED. R. CIV. P. 9(b).

66. *See, e.g.*, Lancaster Community Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397, 404-05 (9th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992) (collecting cases that require specification of such facts relating to predicate act of mail fraud); Moore v. Kayport Package Express, Inc., 885 F.2d 531, 541-42 (9th Cir. 1989) (upholding dismissal of complaint alleging predicate acts of mail and securities fraud); Alan Neuman Prods., Inc. v. Albright, 862 F.2d 1388, 1392-93 (9th Cir. 1988) (requiring complaint to specifically plead such facts when predicate acts alleged are mail and wire fraud).

67. Paragraph 5(c) of the Southern District's RICO Case Statement is but one of seven subparts comprising paragraph 5. Paragraph 5, in its entirety, provides as follows:

> 5. Describe in detail the pattern of racketeering activities or collection of unlawful debts alleged for each RICO claim. The description of the pattern of racketeering shall include the following information:
>
> a. List the alleged predicate acts and the specific statutes that were allegedly violated;
>
> b. Provide the date of each predicate act, the participants in each predicate act, and a description of the facts constituting each predicate act;

nineteen paragraphs require additional detailed factual allegations, far beyond the type of specific factual averments of fraud required by Federal Rule 9(b) and the Ninth Circuit decisions.[68]

Moreover, the "predicate act" upon which a RICO claim is based need not be one of fraud. "Racketeering activity" is defined by RICO as any act or threat involving a variety of crimes chargeable under state law or indictable under several provisions of Title 18 of the United States Code.[69] Where the predicate act is not one of fraud, a civil RICO claim would not trigger the heightened pleading standards of Federal Rule 9(b).[70]

The Supreme Court recently held in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*[71] that a federal court cannot impose a more demanding pleading standard on one category of claims as opposed to others unless expressly authorized to do so by Federal Rule 9(b). Consequently, because the RICO Case Statement requires particularity in pleading in instances not governed by Federal Rule 9(b), Local Rule 11.1 violates the notice pleading requirements of

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c. If the RICO claim is based on the predicate offenses of wire fraud, mail fraud, or fraud in the sale of securities, the "circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). Identify the time, place and substance of the alleged misrepresentations, and the identity of the persons to whom and by whom the alleged misrepresentations were made;

d. State whether there has been a criminal conviction for violation of any predicate act;

e. State whether civil litigation has resulted in a judgment with regard to any predicate act;

f. Describe how the predicate act forms a "pattern of racketeering activity;" and

g. State whether the alleged predicate acts relate to each other as part of a common plan. If so, describe the alleged relationship and common plan in detail.

General Order No. 386-B Revised, *supra* note 61.

68. *See supra* notes 62 and 67.

69. *See supra* note 60 (discussing federal statutory provisions that define civil RICO claims).

70. Because the lengthy and detailed RICO Case Statement is deemed an amended pleading by Local Rule 11.1(a), mandating its use may also conflict with the Federal Rules: "No technical forms of pleadings are required." FED. R. CIV. P. 8(e)(1).

71. 507 U.S. 163 (1993).

Federal Rule 8(a).[72] Except for Paragraph 5(c), the Southern District should eliminate its RICO Case Statement pleading requirement.

2. *Sanctions for Noncompliance with Local Rules*

Another area of potential conflict between the Southern District's local rules and federal authority concerns the imposition of sanctions for noncompliance with the local rules. Local Rule 1.3(a) states:

> Failure of counsel or of any party to comply with these rules . . . may be ground for imposition by the court of any and all sanctions authorized by statute or rule or within the inherent power or the court, including, without limitation, dismissal of any actions, entry of default, finding of contempt, imposition of monetary sanctions or attorneys' fees and costs, and lesser sanctions.[73]

The Local Rules Project concluded that a local rule such as Rule 1.3(a) conflicts with the Federal Rules because it allows "the court to impose sanctions altering the outcome of a case for a technical violation."[74] As those commentators recognized, while the district court may impose such sanctions for a local rule violation that prejudices the outcome of a case, the court may not impose claim-dispositive sanctions because of a technical error.[75] In explaining that harsh sanctions should not be available for technical violations, the Local

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72. In *Leatherman*, the Supreme Court reviewed a Fifth Circuit rule that required a plaintiff's complaint to state with factual particularity the basis for any 42 U.S.C. § 1983 civil rights claims against municipalities or other local government entities. The Supreme Court struck down the Fifth Circuit's heightened pleading standard as incompatible with the liberal system of notice pleading set up by Federal Rule 8(a)(2). *Id.* at 168-69. In the absence of an amendment to Federal Rules 8 and 9, the Supreme Court observed, federal trial courts "must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Id. Leatherman* instructs that, despite the laudable reasons that may have induced the Southern District to adopt Local Rule 11.1, the RICO Case Statement requirement is inconsistent with Federal Rules 8 and 9(b).

The Ninth Circuit has recently utilized the *Leatherman* reasoning to strike down heightened pleading standards previously imposed by district courts on complaints alleging constitutional torts by government officials, where the subjective intent of the defendants was not an element of the plaintiffs' claims. *See, e.g.*, Housley v. United States, 35 F.3d 400 (9th Cir. 1994); Mendocino Envtl. Ctr. v. Mendocino County, 14 F.3d 457, 462 (9th Cir. 1994); *but see* Branch v. Tunnell, 14 F.3d 449, 451 (9th Cir.), *cert. denied*, 114 S. Ct. 2704 (1994) (upholding heightened pleading standard for qualified immunity cases and noting "the Court in *Leatherman* expressly stated it was not deciding whether federal courts may employ a heightened pleading standard in qualified immunity cases").

73. Local Rule 41.1(b), which states "[f]ailure to comply with the provisions of the local rules of this court may . . . be grounds for dismissal," provides additional specific authority for claim-terminating sanctions. S.D. CAL. R. 41.1(b).

74. REPORT OF THE LOCAL RULES PROJECT, *supra* note 1, at 7-9.

75. *Id.*

Rules Project relied in part on *Cintron v. Union Pacific R.R. Co.*,[76] a Ninth Circuit decision holding that the district court could not refuse to consider a proffered complaint merely because the complaint did not comply with technical local rules. Local Rule 1.3(a), in some applications, may therefore conflict with federal law and should be amended to authorize outcome-altering sanctions only for appropriate rule violations.[77] The district court should modify this local rule to eliminate this potential conflict.

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76. 813 F.2d 917 (9th Cir. 1987). The plaintiff in *Cintron* mailed his complaint to the district court for filing shortly before the relevant statute of limitations was to run. Because the plaintiff failed to include a copy of the civil cover sheet, to punch two holes in the top of the complaint, and to submit the correct filing fee (plaintiff submitted $99.00 instead of the required fee of $60.00) as required by local rules, the clerk refused to accept the complaint for filing and returned it to the plaintiff. *Id.* at 919. By the time plaintiff refiled the corrected complaint, the statute of limitations had expired. *Id.* The district court subsequently dismissed the action as untimely. The Court of Appeals reversed, and observed that local rules designed for administrative purposes should not be applied in a manner that defeats a litigant's access to the courts. *Id.* at 920.

The Ninth Circuit has often relied on *Cintron* for the proposition that local rules merely regulate the practice of the court and should not be construed as affecting jurisdiction. For example, in Smith v. Frank, 923 F.2d 139 (9th Cir. 1991), the Ninth Circuit held that the district court erred in refusing to accept plaintiff's timely filed objections to a magistrate judge's findings of fact and conclusions of law, where the ground for the refusal was that plaintiff's objections were too long, in violation of local rules. *Id.* at 142. *See also* Lacuna v. G-K Trucking, 877 F.2d 741 (9th Cir. 1989)(reversing dismissal where clerk refused timely filed complaint because it violated the local rule prohibiting use of fictional Doe defendants in pleading captions); Loya v. Desert Sands Unified Sch. Dist., 721 F.2d 279 (9th Cir. 1983) (reversing dismissal based on clerk's refusal to file timely complaint typed on wrong size paper, in violation of the local rule); United States v. Dae Rim Fishery Co., 794 F.2d 1392 (9th Cir. 1986)(reversing summary judgment where complaint, although timely filed, was rejected pursuant to local rule because form of summons was improper).

77. Some applications of Local Rules 1.3(a) and 41.1(b) would also appear to conflict with new Federal Rule 83(a)(2), which took effect on December 1, 1995, and now provides: "A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement." FED. R. CIV. P. 83(a)(2), 161 F.R.D. 161 (1995). The purpose of Federal Rule 83(a)(2) is to protect against loss of rights in the enforcement of local rules relating to matters of form where the violation is nonwillful, but does not limit a court's power to impose substantive penalties upon a party for contumacious or willful violations of a local rule, even one involving merely a matter of form. *See* FED. R. CIV. P. 83(a)(2) advisory committee's note.

3. *Other Conflicts and Lapses in Clarity*

The local rules of the Southern District contain many other provisions that appear to conflict with the Federal Rules or federal statutes, albeit with varying degrees of significance.[78] One such local rule arguably inconsistent with federal law is Local Rule 74.0(i)(6), which authorizes a magistrate judge to "[c]onduct voir dire and select petit juries for the court in civil cases."[79] Because this delegation of authority operates regardless of the consent of the parties, it raises an issue of compliance with the Federal Magistrates Act,[80] the federal statute defining the limits of a magistrate judge's power. Courts of appeals in at least two other circuits have concluded that jury selection in a civil trial is not one of the duties that can be delegated under the Federal Magistrates Act to a magistrate judge without the consent of the parties.[81] Although the

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78. There are numerous other notable problems with the Southern District's local civil rules. For example, Local Rule 1.1(c) permits a district judge to waive the applicability of the local rules in a particular case and therefore may conflict with Ninth Circuit cases construing Federal Rule 83. *See, e.g.*, Standing Comm. v. Yagman, 55 F.3d 1430, 1435 n.8 (9th Cir. 1995) (ruling that because the district court may not disregard the local rules it has promulgated with respect to the right to discovery in disciplinary proceedings generally, it lacked the authority to dispense with discovery altogether in a specific case); Martel v. County of Los Angeles, 34 F.3d 731, 737 (9th Cir. 1994)(holding that the district court's failure to comply with pretrial conference and trial setting time limits in local rules required reversal, that local rules have the force of law and are binding upon the parties and upon the court, and that a departure from local rules that affects substantial rights requires reversal).

Two local CJRA rules authorize dismissal on the court's own initiative and without notice to the plaintiff—Local Rule 4.1(b) for failure to file timely proof of service of the complaint and Local Rule 55.1 for failure to move for a default judgment within 30 days—and therefore raise due process concerns. S.D. CAL. R. 4.1(b), 55.1. Local Rule 45.1 requires any party not represented by counsel to submit a proposed subpoena accompanied by a statement of reasons and to obtain approval from the court prior to the issuance of a subpoena, and therefore is contrary to Federal Rule 45(a)(3) which requires the clerk to issue a signed but otherwise blank subpoena to any party requesting it. *Compare* FED. R. CIV. P. 45(a)(3) *with* S.D. CAL. R. 45.1. Another example is Local Rule 7.1 which, among other things, expressly declines to follow Federal Rule 6(e) for motion practice and instead adopts increases in various notice periods for certain mail service that are inconsistent with Federal Rule 6(e). *Compare* FED. R. CIV. P. 6(e) *with* S.D. CAL. R. 7.1.

79. S.D. CAL. R. 74.0(1)(6).

80. 28 U.S.C. § 636 (1994).

81. *See, e.g.*, Stockler v. Garratt, 974 F.2d 730 (6th Cir. 1992); Olympia Hotels Corp. v. Johnson Wax Dev. Corp., 908 F.2d 1363 (7th Cir. 1990). 28 U.S.C. § 636(b)(3)(1994) authorizes a district court to assign to a magistrate judge "such additional duties" as are not inconsistent with the U.S. Constitution and laws. In Gomez v. United States, 490 U.S. 858 (1989), the Supreme Court held that Congress did not intend this additional duties clause to include the vital function of jury voir dire in a criminal case. The Sixth and Seventh Circuit Courts of Appeals have extended the *Gomez* rationale to civil cases and have concluded that under the Federal Magistrates

Ninth Circuit has not yet weighed in on this issue, the Southern District may find it prudent to limit Local Rule 74.0(i)(6) to those cases in which the parties consent to jury selection by a magistrate judge.[82]

One of the more curious conflicts is in Local Rule 65.2(b), which governs the procedure for obtaining a temporary restraining order (TRO). Local Rule 65.2(b) states that "[e]xcept in those emergencies controlled by Federal Rule 65(b), no judge of this court shall consider an application for a temporary restraining order unless the party against whom the order is sought or counsel for that party is present at the time the application is submitted to the court."[83] Federal Rule 65(b), referred to as an exception to the local rule's requirements, delineates the prerequisites and procedures for issuance of an ex parte TRO without notice.[84] Therefore, by its exclusionary reference to Federal Rule 65(b), Local Rule 65.2(b) does not apply to ex parte TRO applications, but only to TRO applications with notice. Although Federal Rule 65 requires notice to the adverse party as a prerequisite to the issuance of a TRO in circumstances not governed by Federal Rule 65(b), it does not require that the adverse party or attorney also be actually present.[85] The additional requirement of *presence* at the time of a TRO application with notice—a requirement which invites a defendant with notice to defeat a TRO application by the simple expedient of not showing up—is therefore inconsistent with Federal Rule 65. Most likely the district court did not intend Local Rule 65.2(b) to mean what it says! At any rate, the Southern District should delete this enigmatic provision from the local rule.

An illustration of a related problem is in Local Rule 7.1, a lengthy rule with thirty-two subsections specifying the procedural requirements of civil motion practice.[86] Many of these specific requirements raise questions as to their consistency with the applicable Federal Rules.[87]

Act, jury selection in a civil trial is not one of the additional supervisory duties which can be delegated to a magistrate judge pursuant to 28 U.S.C. § 636(b)(3) without the consent of the parties. *E.g.*, *Stockler*, 974 F.2d at 732; *Olympia Hotels*, 908 F.2d at 1368-69.

82. *See supra* note 81.
83. S.D. CAL. R. 65.2(b).
84. FED. R. CIV. P. 65(b).
85. *Id.*
86. S.D. CAL. R. 7.1.
87. The Local Rules Project observed that local rules governing motion practice generally, such as Local Rule 7.1, are appropriate exercises of district court supplemental

Perhaps aware of these possible conflicts, the Southern District, in the first subsection of Local Rule 7.1, advises that the provisions of this local rule shall apply to motions and other requests for rulings by the district court "unless contrary to statute or in conflict with a provision of the F.R.Civ.P."[88] In other words, a practitioner must follow the motion procedure detailed in Local Rule 7.1 unless that procedure violates a Federal Rule, in which case the practitioner must ignore the local rule and follow the Federal Rule. Local Rule 7.1's disclaimer may respond to inconsistency concerns, but obviously places a practitioner in a precarious position. An attorney cannot rely on the detailed and comprehensive local rule for proper motion practice procedures, but must diligently consult the Federal Rules for contrary directions. This approach is confusing and inefficient.[89] The Southern District should

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rulemaking under Federal Rules 7 and 78 and should remain subject to local variation. *See* REPORT OF THE LOCAL RULES PROJECT, *supra* note 1, at 53-54. However, Local Rule 7.1 does not merely supplement the Federal Rules, it also conflicts with them in a few respects. For example, Local Rule 7.4(e)(4) directs the clerk not to accept a motion for filing unless accompanied by proof of service, a technical requirement that may conflict with Federal Rule 5(e) when enforced as to certain motions, such as a renewed motion for judgment as a matter of law under Federal Rule 50 or a new trial motion under proposed Federal Rule 59, which are required to be filed within a specified time limitation (10 days after entry of judgment). *See supra* notes 56-58 and accompanying text (discussing FED. R. CIV. P. 5(e)). *Compare* FED. R. CIV. P. 5(e) *with* S.D. CAL. R. 7.4(e)(4). Local Rule 7.1(e)(8) directs the clerk's office not to file untimely motions, and thereby raises concerns of unauthorized delegation of judicial authority to the clerk's office. *See* FED. R. CIV. P. 77(c); S.D. CAL. R. 7.1(e)(8). Also, Local Rule 7.1(e)(4) increases the various motion practice time periods for up to ten days for certain mail service and only two days for overnight mail service, contrary to Federal Rule 6(e) which mandates that three days be added to a prescribed period when service of a motion paper is by mail. *See infra* note 89. *Compare* FED. R. CIV. P. 6(e) *with* S.D. CAL. R. 7.1(e)(4).

88. S.D. CAL. R. 7.1(a).

89. Local Rule 7.1(e)(4), for example, increases the various local time limitations for filing motions and oppositions by mail by three days if the place of address is within California, by five days if outside California, and by ten days if outside the United States; but only by two days if service is by overnight mail. S.D. CAL. R. 7.1(e)(4). Local Rule 7.1(e)(4) also expressly provides that the time extension of Federal Rule 6(e) does not apply. *Id.* Federal Rule 6(e) requires the addition of three days to any prescribed period after service by mail, and applies to service of any notice or court paper. FED. R. CIV. P. 6(e). Consequently, a practitioner must decide whether to incorporate the increased notice periods of Local Rule 7.1(e)(4) or the conflicting period of Federal Rule 6(e). And to what effect is the disclaimer in Local Rule 7.1(a)? *See* S.D. CAL. R. 7.1(a)("[U]nless contrary to statute or in conflict with a provision of the Fed. R. Civ. P.," the local rules shall apply to motions and other requests for rulings by the district court). Because Local Rule 7.1(e)(4) is contrary to Federal Rule 6(e), does Local Rule 7.1(a) make Local Rule 7.1(e)(4) inapplicable? Or does the pronouncement in Local Rule 7.1(e)(4) that Federal Rule 6(e) is inapplicable mean that the federal rule's time period really is inapplicable? This local rule is, to say the least, confusing.

revise Local Rule 7.1 to remove both the disclaimer and any apparent conflicts with federal law.

IV. LOCAL RULES THAT DUPLICATE FEDERAL LAW

Duplicative local rules, which one commentator charitably characterized as nuisances,[90] present a host of related problems. Local rules that merely repeat provisions of the federal rules or federal statutes increase the volume of local rules without adding any new procedural information. As such, they are unnecessary and in some instances misleading. A practitioner may (incorrectly) believe that a duplicative local rule repeats *all* the procedural guidelines of the analogous federal rule when in fact the local rule may repeat only selected portions. In such circumstances, the practitioner may rely on the local rule and neglect the federal rule in the mistaken belief that the seemingly comprehensive local rule provides all the necessary procedural requirements. Obviously, such reliance may produce unfortunate consequences for the attorney and for the client.

A particularly annoying example of a duplicative local rule is one that does not repeat verbatim a federal rule but instead paraphrases it. A practitioner must carefully read such a local rule and compare it to the federal analogue to determine whether the local rule adds any new procedural information or merely repeats the requirements of the federal rule in slightly different language. Many of the Southern District's local rules applicable to criminal litigation suffer from this malady. For example, Local Rule 9.3, a lengthy rule consisting of approximately sixty paragraphs that specify the procedures applicable to writs of habeas corpus and post-conviction motions, mostly repeats procedural information contained in the federal Rules Governing Section 2254 Cases in the United States District Courts and the federal Rules Governing Section 2255 Proceedings in the United States District Courts. Local Rule 9.3 must be closely examined to ascertain the new prescriptions that actually

90. Mary Josephine Newborn Wiggins, *Globalism, Parochialism and Procedure: A Critical Assessment of Local Rulemaking in Bankruptcy Court*, 46 S.C. L. REV. 1245, 1255 (1995). Professor Wiggins served as the Reporter for the Ninth Circuit Judicial Council's Committee for the Review of Local Bankruptcy Rules. Her survey found widespread local bankruptcy rule proliferation within the Ninth Circuit and several instances where local bankruptcy rules were inconsistent with or duplicative of the Federal Rules of Bankruptcy Procedure and the Bankruptcy Code. *Id.* at 1251-57.

supplement, or in some instances conflict with, these comprehensive federal rules.[91]

The same criticism is appropriate for the Southern District's other criminal procedure rules.[92] The fourteen lengthy and detailed local rules governing criminal proceedings mostly repeat the requirements of the Federal Rules of Criminal Procedure. These local rules do provide some specific supplemental guidelines for practitioners, but disperse them throughout eight pages of double-column fine print. A similar problem is apparent in some of the six local rules that delineate the duties and practices of the Southern District's magistrate judges.[93] Much of the information in these rules is set forth in the Federal Magistrates Act.[94] Likewise, the two local rules applicable to admiralty claims and in rem actions duplicate provisions of the Federal Rules and the federal Supplemental Rules for Certain Admiralty and Maritime

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91. Local Rule 9.3 does contain some useful supplementary information such as the procedures for appointment of counsel, the imposition of certain notice requirements on the California Attorney General in death penalty cases, the assignment of petitions to judges, and the guidelines for various stays of execution. *See* S.D. CAL. R. 9.3(c)(2),(4),(6),(8).

The apparent conflicts between Local Rule 9.3 and the federal rules are sporadic and subtle. For example, Local Rules 9.3(a)(4)(d) and 9.3(c)(9)(f) impose on the habeas petitioner the duty to timely request an evidentiary hearing, whereas Rule 8(a) of the Rules Governing Section 2254 Proceedings imposes on the court the duty to determine whether an evidentiary hearing is required without the procedural prerequisite of a request by the petitioner. *Compare* R. GOVERNING SEC. 2254 PROC. IN THE U.S. DIST. CTS. 8(a) *with* S.D. CAL. R. 9.3(a)(4)(d),(c)(9)(f). 28 U.S.C. § 2241(d) authorizes venue either in the district where the petitioner is in custody or in which the petitioner was convicted, and permits the district court "in the exercise of its discretion and in the furtherance of justice" to transfer to the other district. 28 U.S.C. § 2241(d)(1994). On the other hand, Local Rule 9.3 declares the policy of the Southern District is that "a petition should be heard in the district in which petitioner was convicted, rather than in the district of petitioner's present confinement." S.D. CAL. R. 9.3(c)(7). Other examples are Local Rules 9.3(b)(1) and 9.3(c)(5) which require the filing of more copies of the habeas corpus petitioner than does Federal Rule 3(a). *Compare* R. GOVERNING SEC. 2254 PROC. IN THE U.S. DIST. CTS. 3(a) *with* S.D. CAL. R. 9.3(b)(1), (c)(5).

92. S.D. CAL. R. 73-73.13.

93. S.D. CAL. R. 74-74.5.

94. 28 U.S.C. §§ 631-639 (1994). The scheme of the Federal Magistrates Act, however, necessitates some local rules. The Act defines the powers of magistrate judges, but does not require their use unless authorized by the individual district court through local rules or designated by a judge in a particular case. *See id.* § 636(b)(1)(A),(b)(4). Although the Act identifies some of the specific activities magistrate judges are authorized to undertake, *id.* § 636(a),(b)(1)(2),(c), it also generally provides "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." *Id.* § 636(b)(3). This scheme requires the Southern District to adopt local rules implementing the statutory authority and defining the additional duties of magistrate judges. *See, e.g.*, S.D. CAL. R. 74(a),(i), 74.1. Other local rules, however, unnecessarily repeat provisions of the Act when a simple statutory reference would suffice. *See, e.g.*, S.D. CAL. R. 74(d).

Claims (Federal Admiralty Rules), although to a lesser extent than do the local criminal rules.[95]

The duplication problems discussed above are also evident in the Southern District's civil rules. Several local civil rules reproduce verbatim provisions of the Federal Rules of Civil Procedure.[96] More prevalent are local rules that functionally repeat, paraphrase, or expressly incorporate analogous Federal Rules in the course of announcing supplementary details and local variations.[97] Although what constitutes a

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95. Local Rule 72.1, whose numerous subparts apply to admiralty and maritime claims, often duplicates provisions of the Federal Admiralty Rules. For example, Local Rule 72.1(e) defines the right to a hearing to contest an attachment by essentially repeating the content of Federal Admiralty Rule E(4)(f). *Compare* FED. ADM. R. E(4)(f) *with* S.D. CAL. R. 72.1(e). Local Rule 72.1(g) is repetitive of Federal Admiralty Rules C(3) and C(6) in describing publication of notice. *Compare* FED. ADM. R. C(3) *and* C(6) *with* S.D. CAL. R. 72.1(g). Local Rule 72.1(h) duplicates much of Federal Admiralty Rules C(3) and C(6) regarding attachment of intangible property. *Compare* FED. ADM. R. C(3) *and* C(6) *with* S.D. CAL. R. 72.1(h). Although Local Rule 72.2 duplicates parts of Federal Admiralty Rules E(2)(b) and E(4)(a)-(d) with respect to security and the attachment process applicable to vessels, this local rule does contain considerable supplemental information on the sale of arrested or attached property in an in rem action. *Compare* FED. ADM. R. E(2)(b) *and* E(4)(a)-(d) *with* S.D. CAL. R. 72.2.

Conflicts with the Federal Admiralty Rules also occasionally occur in these local admiralty rules. For example, Local Rule 72.1(i)(4) requires, as a prerequisite to a default judgment, that notice of suit be given by mail to the owner of an attached vessel, but only if personal service can not be done; whereas Federal Admiralty Rule B(2) does not require efforts to personally serve the notice as a precondition to mail service. *Compare* FED. ADM. R. B(2) *with* S.D. CAL. R. 72.1(i)(4). Also, Local Rule 72.2 requires the posting of security for costs in the amount of $500 unless otherwise ordered in in rem actions, whereas Federal Admiralty Rule E(2)(b) appears to make the imposition of any such security a matter of discretion. *Compare* FED. ADM. R. E(2)(b) *with* S.D. CAL. R. 72.2.

96. *See, e.g.*, S.D. CAL. R. 5.1(k) (reproducing much of the language of FED. R. CIV. P. 10(b) in requiring pleadings with numbered paragraphs and separate statements, without adding any new guidelines); *id.* 33.1 (reproducing the numerical limitation of 25 interrogatories contained in FED. R. CIV. P. 33(a)).

97. *See, e.g.*, S.D. CAL. R. 1.1(c), 1.2(a) (repeating much of FED. R. CIV. P. 83 when describing the scope and availability of local rules); *id.* 3.2(a) (repeating the requirement of FED. R. CIV. P. 8(a) as to pleading jurisdiction); *id.* 4.1(a) (expressly incorporating FED. R. CIV. P. 4 and repeating the service time limitation of FED. R. CIV. P. 4(m)); *id.* 4.1(d) (incorporating FED. R. CIV. P. 5 and repeating portions of FED. R. CIV. P. 5(a)-(c) with respect to service of pleading, other than the original complaint); *id.* 5.2 (repeating parts of FED. R. CIV. P. 5(d) with respect to proof of service); *id.* 7.1 (expressly incorporating FED. R. CIV. P. 6 as to computation of time); *id.* 23.1 (repeating portions of FED. R. CIV. P. 23 as to class action allegations); *id.* 51.1 (expressly incorporating FED. R. CIV. P. 51 as to filing of jury instructions); *id.* 54.1(a) (expressly incorporating numerous federal rules and statutes applicable to costs and repeating portions of FED. R. CIV. P. 54); *id.* 65.2 (repeating some of FED. R. CIV. P. 65 when

"duplicative" local rule prohibited by amended Federal Rule 83 is subject to legitimate debate, under a reasonably broad construction substantial portions of the Southern District's civil rules on service of process, form of papers, proof of service, motion practice, habeas corpus and post-conviction motions, class actions, discovery, jury instructions, findings of fact, temporary restraining orders, and clerk's orders are suspect.[98] Likewise, much of the Southern District's criminal rules could be eliminated, the local rules applicable to magistrate judges could be shortened, and the two lengthy admiralty rules could be streamlined. Employing such a standard of abrogation would result in local rules greatly reduced in quantity, perhaps by as much as one-third the volume of the current Southern District rules, with a corresponding increase in quality.

V. CONCLUSIONS AND SUGGESTIONS

A. The Ninth Circuit and the Southern District Should Eliminate Inconsistent and Duplicative Local Rules

Local rules are a fact of federal court life. Despite the disunity they create, local rules are not likely to go away. As supplements to the gaps in the federal rules, some local district court rules are obviously desirable. But the Southern District, and most other district courts as well, must do a better job of policing its rules to remove conflicts and duplications. Where the conflict is due to the Southern District's unintentional failure to conform to amendments in the federal rules, the solution is fairly simple: The district court must pay closer attention to federal rule amendments. The Southern District surely has the resources to track periodic amendments to the federal rules and revise its local rules accordingly. There is little excuse for a district court not to have incorporated the 1991 amendments to the Federal Rules of Civil Procedure into the 1996 version of its local rules.

With respect to those rule conflicts that may be "intentional"—those where the district court knowingly departs from the federal rules without CJRA or Federal Rules authorization—the solution is more complicated. The forthcoming report of the Committee to Review Local District Rules should provide valuable specific recommendations to the Ninth Circuit Judicial Council and to the district court. But the willingness of the

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describing TRO procedures); *id.* 74.3 (expressly incorporating FED. R. CIV. P. 53(e)); *id.* 77.2 (essentially repeating the provisions of FED. R. CIV. P. 77(c), 55(b), in describing orders grantable by the clerk).

98. *See* sources cited *supra* note 97.

Judicial Council to impose local rule changes, and the degree to which the district court will voluntarily incorporate the Committee's recommendations, remains to be seen.[99] The substantial amount of effort and resources needed for the current Committee's review project—the first comprehensive review of local rules undertaken by the Ninth Circuit and one of the few such circuit reviews nationally[100]—makes it unlikely that such an effort can be sustained on an ongoing or periodic basis. The Committee report therefore will provide the Southern District with a rare opportunity to scrutinize its existing local rules based on an independent review. If the Southern District balks at implementing the report's recommendations, the Ninth Circuit Judicial Council must be prepared to impose these recommendations through the exercise of its local rules oversight power. Absent a strong effort by the Judicial Council to directly abrogate or modify local rules that conflict with

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99. To date, district courts have shown little inclination to review and eliminate conflicts in their own local rules, and most circuit judicial councils have not made serious efforts to implement their oversight responsibilities under Federal Rule 83 and the Judicial Improvements Act. *See* Memorandum from David Pimental, Assistant Circuit Executive, United States Courts for the Ninth Circuit to Local Rules Review Committee (Feb. 8, 1995)(on file with author). Professor Tobias offers various explanations for these failures. *See* Tobias, *Suggestions*, *supra* note 5, at 363. First, the circuit judges serving on the circuit council may have deferred to the district courts because they believed the district judges knew more about civil litigation at the trial court level. *Id.* Second, the district court judges may have been less concerned about reducing inconsistencies than with furthering what they believed to be the best interests of their own districts. *Id.* Third, individual district courts may have been unwilling to review their own rules because they were protective of their own prerogatives to adopt and apply local procedures and were unwilling to admit that the very rules they promulgated may be unnecessary or inconsistent with federal laws. *Id.* District judges serving on circuit councils may have been reluctant, out of lack of familiarity with local conditions elsewhere or out of professional courtesy, to critically examine the local rules of other districts. *Id.* at 363-64. Fourth, few circuit councils had the resources and personnel to undertake the onerous task of comprehensive local rules review. *Id.* at 364. Finally, the adoption of the CJRA in 1990 made circuit councils reluctant to scrutinize local rules when Congress had apparently authorized the district courts to adopt experimental cost and delay reduction procedures which may depart from the Federal Rules. *Id.* Likewise, individual federal district courts were too busy formulating experimental procedures pursuant to the CJRA's mandates to worry whether their new or existing local rules conformed to federal laws other than the CJRA.

100. According to a survey of eleven other circuit judicial councils by David Pimentel, Assistant Circuit Executive for Legal Affairs, United States Courts for the Ninth Circuit, apparently only the Seventh Circuit has made serious efforts to undertake comprehensive and periodic review of local rules of each district within the circuit. *See* Memorandum from David Pimental, *supra* note 99.

federal laws, the recommendations of the Committee may have little practical effect.

Even more daunting is the task of identifying and eliminating local rules that duplicate federal rules. Whatever may be the merits of the view that local rules should repeat or paraphrase their federal analogues, that approach is precluded by the 1995 amendment to Federal Rule 83. The weeding out of duplicative rules is essential to the Judicial Improvements Act's goal of reversing the proliferation of local rules, but may prove difficult to accomplish. One reason is that amended Rule 83 does not define the term "duplicative," leaving room for legitimate debate as to its meaning.[101] Another is the district court's obvious predilection for detailed local rules which, to be comprehensive, necessarily must repeat federal rules. The resources required to identify and analyze duplicative local rules, combined with the likely resistance to rule pruning from the district court itself, make meaningful review of this aspect of local rules problematic. Nevertheless, the Southern District and the Judicial Council must devote the same kind of effort to the elimination of duplicative rules as they would to inconsistent rules. As with inconsistent rules, the Judicial Council must be willing to impose modification of duplicative local rules if the district court fails to do so.

The Southern District should purge its local rules of all duplicative provisions, leaving in place only those rules which actually supplement the various federal rules, implement the CJRA, or opt out of the 1993 amendments to the Federal Rules of Civil Procedure. Employing this standard, the Southern District could eliminate substantial portions of its civil, criminal, and admiralty rules. Such abrogation would result in local rules, greatly reduced in volume, that deal with such topics properly the subject of local variation.[102]

B. The Ninth Circuit Should Institutionalize the Local Rules Review Process

After the Local Rules Committee has completed its work, the Ninth Circuit Judicial Council should institutionalize the local rules review

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101. *See supra* note 46 and accompanying text.

102. The Local Rules Project has identified a number of areas where local variation is not only permissible but desirable. These include such topics as the general format of papers, in forma pauperis, social security cases, motion practice, pretrial conferences and orders, appointment of guardians, assignment of cases to trial, the mechanics of trial, jury selection, use of masters, taxation of costs, receiverships, the duties of magistrate judges, court hours and sessions, duties of court personnel, use of court libraries, courtroom decorum and security, and admission to practice. REPORT OF THE LOCAL RULES COMMITTEE, *supra* note 1. The Local Rules Project also included several model local rules as part of its recommendations. *Id.*

process. In light of the amount of effort necessary to mount the current Committee review process, that volunteer task force approach to local rules review is simply too burdensome to be practical on an ongoing or periodic basis. In the past, the Ninth Circuit Judicial Council, the entity directed by the Judicial Improvements Act to undertake local rules review, has apparently lacked the resources necessary to perform this task.[103] But the current Committee now provides the Ninth Circuit with a window of opportunity to effectively institutionalize local rules review in the future. When the Committee submits its report and recommendations, the Judicial Council will be in the position to assure that all then-existing local rules within the Ninth Circuit are consistent with and not duplicative of the Federal Rules and federal statutes. Thereafter, as each district court within the circuit proposes new local rules, those proposed rules should be forwarded to the Judicial Council for a preadoption compliance review. The Judicial Council could assign this review responsibility to existing Ninth Circuit staff, or, as is the practice of the Seventh Circuit, may hire appropriate independent persons to conduct the compliance review on an as needed basis.[104] This type of ongoing, institutionalized maintenance program would be far less burdensome than the periodic, comprehensive approach exemplified by the current volunteer task force review. The Ninth Circuit Judicial Council must act now to put in place the staff and resources necessary to implement local rule oversight on an ongoing, systematic, and meaningful basis.[105]

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103. Chief Judge J. Clifford Wallace, U.S. Court of Appeals for the Ninth Circuit, apparently had difficulty obtaining sufficient funding for comprehensive local rules review as part of the Ninth Circuit's budget. *See* Tobias, *Suggestions*, *supra* note 5, at 365. This lack of financial resources undoubtedly contributed to the Ninth Circuit Judicial Council's decision to delegate its local rule oversight responsibilities to the volunteer Committee to Review Local District Rules.

104. *See* Memorandum from David Pimentel, *supra* note 99, at 2. The Seventh Circuit pays one of the law professors involved in the Local Rules Project to review all bankruptcy and district local rules for consistency with the national rules; her analysis goes to the subject court for response before consideration by the Seventh Circuit Judicial Council. *Id.*

105. Professor Tobias recommends that the district court advisory groups and circuit committees created under the CJRA merge with the local rules committees and circuit judicial councils required by the Judicial Improvements Act and earlier legislation. Tobias, *Improving the Acts*, *supra* note 13, at 1628. The newer entities have already achieved their principal purpose—the formulation of delay and cost reduction plans—and the older institutions can now competently assume both the CJRA monitoring and the

local rules oversight responsibilities. *Id.* Local rules committees reconstituted in this manner could provide valuable assistance to district courts in reviewing existing and proposed local rules. *Id.* at 1629.

Implementation of this recommendation would reverse the proliferation of local rules institutions, but may not be sufficient to curtail the proliferation of local rules themselves. Certainly a single, unified local advisory committee would result in a more efficient and better coordinated local rules revision process. Less certain is whether such a committee at the district court level could effectively accomplish the goals of eliminating inconsistent and duplicative local rules. For a variety of reasons, the district courts have been unwilling to critically scrutinize their own rules. *See* discussion *supra* note 99. With respect to inconsistent and duplicative local rules, the district courts traditionally have been part of the problem and not the solution. *See supra* notes 14-23 and accompanying text. The abrogation of such local rules may therefore only occur if imposed on the district courts by the relevant circuit judicial council.