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**THE BALKANIZATION OF APPELLATE
JUSTICE: THE PROLIFERATION OF
LOCAL RULES IN THE FEDERAL
CIRCUITS**

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I. INTRODUCTION

In the waning years of the twentieth century, the leading story of federal procedure is one of growing disunity in practice and fragmentation in rules. A little more than half a century

* Associate Professor of Law, Drake University Law School (gs5671r@acad.drake.edu). This article originated with my involvement as reporter for two studies investigating the proliferation of local rules in the federal courts of appeals. In 1989, I prepared a report on local rules in the courts of appeals on behalf of the Civil Division of the U.S. Department of Justice, which was submitted to the Local Rules Project conducted under the auspices of the Judicial Conference of the United States. More recently, in 1994, I served as reporter of a subcommittee exploring the impact of local circuit rules on appellate justice that was appointed by the Appellate Practice Committee of the American Bar Association's (ABA) Section on Litigation. The subcommittee, chaired by Sharon Freytag, included David Hricik and Michael Lukin as members, and benefited from comments by Kenneth Servay. I wish to acknowledge their contributions to that project. The subcommittee's report was adopted by the Section on Litigation in 1994 for submission as public comment to the United States Judicial Conference on proposed amendments to the Federal Rules of Appellate Procedure. As the drafter of the Department of Justice and ABA subcommittee reports, I have borrowed freely from the language and substance of those reports in this article. Although I believe the views expressed here are consistent with and faithful to the spirit of both of those reports, I must take ultimate responsibility and am obliged to state that this article does not necessarily reflect the views of either the Department of Justice or any section of the ABA. For reviewing a draft and providing encouragement or suggestions, I thank Carl Tobias, Laurie Doré, Edward Mansfield, Daniel Coquillette, Lauren Robel, Robert Haig, Steven Shapiro, Thomas Bondy, and Sharon Freytag. I also thank Douglas Letter, Deborah Kant, Scott McIntosh, Bruce Forrest, and Edward Himmelfarb for their contribution of ideas and observations. None of these individuals can be held to guarantee the accuracy of the discussion or to necessarily endorse the opinions expressed in this article.

after federal procedure was unified in 1938 with the adoption of the Federal Rules of Civil Procedure,¹ the federal judicial system is de-evolving into a collection of largely autonomous court units with separate procedural regimes.² Instead of a unitary federal judicial system, joined together in a common procedural enterprise, each district and each circuit has become its own fiefdom with its own independent rules governing the progress and disposition of litigation.³ As Professor Charles Alan Wright laments, “[p]rocedural anarchy is now the order of the day.”⁴

Both the Legislative and Judicial Branches have contributed to this state of division by encouraging, in different ways, the development of local practice rules in the district courts that differ from the federal rules or conflict with procedures in neighboring districts. In 1990, Congress enacted the Civil Justice Reform Act⁵ directing local district courts to experiment with alternative approaches for efficient disposition of civil litigation and authorizing innovative variations on the federal rules.⁶

1. See Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1394 (1992) (stating that the drafters of the Federal Rules of Civil Procedure in 1938 intended “to devise a code of federal civil procedure that was simple and uniform”); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2001 (1989) (“When the proponents of the Enabling Act and the Federal Rules talked and wrote about uniformity they either explicitly or implicitly utilized several interconnected themes: efficiency, professionalization, federalism or nationalism, effective law application, power, and politics.”); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 503-04 (1986) (stating that the original drafters of the Federal Rules of Civil Procedure aimed to “slay[] the dragons’ of their procedural world: the felt needs for uniformity of federal practice across the country, for uniformity of practice between law and equity, for reducing the possibility of technical errors, and for greater court (rather than legislative) control of rulemaking”).

2. See Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 757 (1995) (saying that, almost sixty years after adoption of the Federal Rules of Civil Procedure, “the central accomplishment of uniform federal rules is in serious jeopardy”).

3. Professor Paul D. Carrington has described the devolution of the unified federal courts as the rise of a new Confederacy with individual district courts seceding from the union of the federal judiciary. See Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 929-30 (1996).

4. Charles A. Wright, *Foreword: The Malaise of Federal Rulemaking*, 14 REV. LITIG. 1, 11 (1994).

5. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-82 (1994)).

6. See, e.g., *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 885 F. Supp. 934, 937 (E.D. Tex. 1995) (holding that the Civil Justice Reform Act authorizes district courts to develop local rules “uninhibited by the [Rules Enabling Act] or the Federal

Thereby, as one scholar has observed, Congress effectively created “ninety-four amateur ‘advisory committees on the civil rules.’”⁷ By “creating an environment in which many courts were experimenting simultaneously,” the stage was set for a further erosion of “uniformity and simplicity while increasing judicial discretion, cost, and delay.”⁸

In 1993, the Supreme Court adopted, at the recommendation of the Judicial Conference, amendments to the federal discovery rules that added controversial mandatory disclosure requirements.⁹ Nearly every element of the bar had opposed the proposal, arguing that, rather than decreasing the amount of discovery, it would add another layer, produce satellite litigation over the adequacy of disclosure, and increase litigation expense.¹⁰ Three justices dissented from the Court’s adoption of the rule, expressing concern that these “radical reforms to the discovery process” threatened the adversarial system and might impair professional ethics by requiring lawyers to exercise judgment as to whether information damaging to their clients falls within the disclosure obligation.¹¹ Proponents of mandatory disclosure contended that, by providing the parties with material information at the outset, the scope and amount of discovery may be reduced; by encouraging more specific fact allegations in pleadings to trigger an opponent’s duty of disclosure, the issues may be

Rules of Civil Procedure”). *But see* Carrington, *supra* note 3, at 979 (concluding that the Civil Justice Reform Act “did not authorize local plans in defiance of national rules”); Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1448 (1994) (arguing that the Civil Justice Reform Act “neither compels nor authorizes local deviations from the Federal Rules of Civil Procedure or other statutory law”).

7. Judith Resnik, *Revising the Canon: Feminist Help in Teaching Procedure*, 61 U. CIN. L. REV. 1181, 1194 (1993); *see also* Lauren K. Robel, *Grass Roots Procedure: Local Advisory Groups and the Civil Justice Reform Act of 1990*, 59 BROOK. L. REV. 879, 881 (1993) (describing the “more novel aspect” of the Civil Justice Reform Act of 1990 as “its creation of ninety-four district court advisory groups charged with reinventing procedures at the trial court level”).

8. Carl Tobias, *Improving the 1988 and 1990 Judicial Improvement Acts*, 46 STAN. L. REV. 1589, 1619 (1994).

9. *See* Amendments to Federal Rules of Civil Procedure and Forms, 146 F.R.D. 401 (1993).

10. *See, e.g.*, Tobias, *supra* note 8, at 1612; Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 28-32 (1992); Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is It Again Time for Reform?*, 138 F.R.D. 155, 157-60 (1991).

11. Amendments to Federal Rules of Civil Procedure and Forms, 146 F.R.D. 401, 510-11 (1993) (Scalia, J., dissenting).

narrowed earlier in litigation; and by establishing an obligation to cooperate in disclosing information, the level of professionalism would be enhanced.¹²

On a matter of such profound philosophical and practical disagreement, it is unthinkable that the crucial choice of procedure would be left to each individual district court—and yet that is precisely what has occurred. For the first time in history, a federal rule explicitly authorized each district court to determine by local rule whether to follow the nationally-adopted procedural approach.¹³ Some districts have “opted-out” altogether, others have fully accepted the new disclosure rule, and others have taken a middle ground.¹⁴ As a result, discovery in the federal courts is a patchwork quilt with fundamental procedures varying widely from district to district.¹⁵ This has exacerbated the preexisting problem of the exponential growth of local rules during the last two decades.¹⁶

Although generally unremarked upon by scholars, the federal courts of appeals have not been immune to this centrifugal procedural tendency. While the academic community has widely decried the excessive proliferation of local rules in the district

12. See Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263, 266-71 (1992); William W. Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective Than Discovery?*, 74 JUDICATURE 178, 183 (1991).

13. See FED. R. CIV. P. 26(a)(1), (a)(4), (b)(2), (d), (f). See also Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1444 (1994) (“For the first time in history, the Federal Rules of Civil Procedure include a nonuniversal rule.”); Lauren K. Robel, *Mandatory Disclosure and Local Abrogation: In Search of a Theory for Optional Rules*, 14 REV. LITIG. 49, 50 (1994) (explaining that the rule “is unprecedented in authorizing each federal district court to excuse all attorneys within the court’s jurisdiction from many of the obligations Rule 26 imposes, particularly that of mandatory early disclosure”).

14. See Donna Stienstra, *Implementation of Disclosure in United States District Courts, With Specific Attention to Courts’ Responses to Selected Amendments to Federal Rule of Civil Procedure 26*, published in 164 F.R.D. No. 4 (advance sheet No. 4) LXXXIII (Apr. 1996) reprinted in 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 35 (Supp. 1996) (reporting on behalf of the Federal Judicial Center that half of the districts have implemented the federal initial disclosure rule, and half of the districts have not, although many of these districts require disclosure by local rule or allow individual judges to require disclosure).

15. See Mullenix, *supra* note 13, at 1444 (“[D]iscovery is in hopeless, balkanized disarray.”).

16. See Tobias, *supra* note 1, at 1397 (commenting upon the “remarkable proliferation of local rules that has occurred since the 1938 Federal Rules’ adoption but that has grown almost exponentially over the last two decades”).

courts,¹⁷ it has thus far been largely left to organizations of the practicing bar and the judiciary to point out the similar splintering of federal appellate practice.¹⁸ As with developments at the district court level, the proliferation of local circuit rules has impaired the uniformity of federal appellate procedure and has unnecessarily complicated appellate practice, while destroying the unity of the federal appellate system. Sadly, this is occurring and accelerating less than thirty years after federal appellate procedure was unified under the Federal Rules of Appellate Procedure ("FRAP").¹⁹

Many of the local rules adopted by the individual circuits are in sharp conflict with the FRAP.²⁰ These rules thereby deprive

17. See, e.g., CHARLES A. WRIGHT, *LAW OF FEDERAL COURTS* § 62, at 431-32 (5th ed. 1994); Chemerinsky & Friedman, *supra* note 2; Daniel R. Coquillette et al., *The Role of Local Rules*, A.B.A. J., Jan. 1989, at 62, 64-65; Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 377-81 (1992); David M. Roberts, *The Myth of Uniformity in Federal Civil Procedure: Federal Civil Rule 83 and District Court Local Rulemaking Powers*, 8 U. PUGET SOUND L. REV. 537, 540 (1985); Tobias, *supra* note 1; Wright, *supra* note 4, at 10-11; see also A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567 (1991) (arguing in favor of uniformity in general, while suggesting legislation to authorize limited local experimentation with innovative procedures on a case-by-case basis upon approval of a national authority under the Judicial Conference); Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, 51 LAW & CONTEMP. PROBS. 67 (1988) (proposing a program of restricted "field experiments" in the district courts for empirical testing of procedures).

18. See, e.g., Section of Litig., ABA, *Local Appellate Rules—Effect on Quality of Justice* (Apr. 11, 1994) (unpublished report submitted as the Section of Litigation's comments to the Judicial Conference on proposed amendments to the Federal Rules of Appellate Procedure) (on file with the *University of Colorado Law Review*); Daniel R. Coquillette & Mary P. Squiers, Report of the Local Rules Project: Local Rules on Appellate Practice (Jan. 14, 1991) [hereinafter Report of the Local Rules Project] (report to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States). However, academic scholars played major roles in the studies relating to the proliferation of local circuit rules that have been conducted under the auspices of professional and judicial organizations. Professors Daniel R. Coquillette and Mary P. Squiers prepared the report of the Local Rules Project conducted by the Committee on Rules of Practice and Procedure of the Judicial Conference. After joining the Drake law faculty, I served as the reporter for the American Bar Association report adopted by the Section of Litigation. See *supra* note *.

19. See Committee on Rules of Practice and Procedure, Judicial Conference of the United States, *Federal Rules of Appellate Procedure with Conforming Amendments to Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure*, 43 F.R.D. 61 (1968) (announcing Federal Rules of Appellate Procedure as prescribed and adopted December 4, 1967, and effective July 1, 1968).

20. See *infra* Part II.

the federal regime of much of its force and deny counsel the right to rely in their appellate practice upon those rules adopted by the Supreme Court through the more visible and regular national judicial rulemaking process. Local circuit variations on and supplementation of the FRAP raise technical obstacles to the efficient prosecution and defense of federal appeals.²¹ As a consequence, significant lawyer time is diverted to discovery of and compliance with technical requirements, thereby adding to the expense of appellate litigation and undermining the ability of federal appellate practitioners to represent parties effectively in appellate cases.²²

Because a single circuit generally covers a larger geographical area than a district, the impact of divergent circuit rules is more diffuse, but no less real, than that of variant district court rules. Particularly for institutional entities engaged in litigation across the nation, the often dramatic differences among the circuits complicate practice and increase the cost of compliance with procedural rules. Even for the local practitioner, and especially the lawyer whose contact with the appellate courts is occasional, the complexity of local practice stands as an obstacle to efficient and cost-effective representation of clients and denies justice in individual cases.²³ Moreover, the growth of local circuit rules conveys an unmistakable symbolic message of disunity among the federal appellate courts.²⁴ As Judge Joseph F. Weis, Jr. recently stated in another context, the "thirteen federal courts of appeals function at times as separate sovereignties."²⁵ Indeed, the radiation of inconsistent circuit rules poses a direct challenge to the fundamental concept of a *federal* procedure.

The time has come to revitalize the FRAP as the uniform national regime governing federal appellate practice and procedure.²⁶ The Supreme Court, Judicial Conference, and individual

21. See *infra* Part III.B.

22. See *infra* Part III.C.

23. See *infra* Part III.B.

24. See *infra* Part III.A.

25. Joseph F. Weis, Jr., *Disconnecting the Overloaded Circuits—A Plug for a Unified Court of Appeals*, 39 ST. LOUIS U. L.J. 455, 458 (1995) (criticizing "the lack of uniformity that results from the practice of one United States Court of Appeals deliberately handing down a decision that diverges from previous opinions of other courts of appeals, thus creating conflict and uncertainty in the law," and proposing a unified court of appeals).

26. See *infra* Part V.

circuits should implement the directive of FRAP 47 that local circuit rules and circuit practice must not be inconsistent with the uniform federal rules.²⁷ Or else Congress should intervene to halt the slip and slide away from national uniformity and toward local autonomy. Full compliance with the provisions of a federal rule on any matter should be sufficient in any circuit. Only when a circuit rule addresses a matter of uniquely local concern and the federal rules expressly authorize such local variation, when the federal rules are silent on a subject, or when a local rule simplifies or streamlines the process, should the various courts of appeals be permitted to formulate their own procedural schemes.²⁸ Otherwise, innovations in procedure should be proposed as amendments to the FRAP, to become effective only after an opportunity for public comment, deliberation by the Judicial Conference of the United States, adoption by the Supreme Court, and submission to Congress, as required by the Rules Enabling Act.²⁹

Through a revitalization of the federal rules, the unitary nature of the federal system can be preserved—or, rather, restored. Those responsible for governance of the federal judicial system must take firm action to ensure the consistency of local circuit rules with the federal rules and to control the increasing diffusion of the federal rules by divergent requirements of local practice. The alternative is the continued balkanization of federal appellate justice.

II. THE PROLIFERATION OF LOCAL CIRCUIT RULES

There is a remarkable disunity in rules of appellate practice among the federal courts of appeals, including notable instances of actual conflict between local practice and the FRAP.³⁰ In the

27. See FED. R. APP. P. 47(a) ("A local rule shall be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. § 2072 . . .").

28. See *infra* Part IV.

29. See 28 U.S.C. §§ 2071-77 (1994).

30. To conduct a brief survey of local circuit rules, I wrote to each of the 13 circuits, all of which provided me copies of their local rules, internal operating procedures, and letters sent to counsel upon the docketing of an appeal—with the exception of the United States Court of Appeals for the District of Columbia Circuit, which did not respond to repeated written requests. See also *infra* note 169 and accompanying text. Because local circuit rules are being constantly revised, this limited survey also reflects amendments to each circuit's rules as reported in the *Federal Reporter* advance sheets as of October 7, 1996. In addition to an examination

discussion below, rather than provide a comprehensive survey of all local circuit rules on all aspects of appellate practice, I examine but a few central elements of the ordinary civil appeal, with illustrative examples of the diversity of local circuit rules. However, if anything, the diversity and complexity of local rules is more pronounced with respect to other special appellate matters, ranging from applications for a stay or a writ of mandamus at the outset of the appellate process to petitions for rehearing and applications for attorney's fees at the conclusion of an appeal.³¹

A. *Notice of Appeal and Docketing of Appeal*

Several circuits provide for preparation and filing of appeal information or docketing statements. Two circuits require that this docketing form, including a description of the matter, be completed and submitted to the district court together with the notice of appeal,³² while other circuits require the form to be filed with the appellate court within a short time period after filing the appeal.³³ Failure to comply with these rules often results in sanctions, ranging from dismissal to monetary penalties. Because circuits demand these documents at a very early stage, especially

of the local rules of each of the 13 circuits, the description of the proliferation of local rules and local procedures and the effects upon appellate justice are based upon interviews with appellate attorneys, in both the public and private sectors, and my prior study as an appellate attorney with the Department of Justice of the problems encountered by the Department's litigating divisions in dealing with the growing disunity of the federal courts of appeals. See Letter from Stuart E. Schiffer, Acting Assistant Attorney General, Civil Division, United States Department of Justice, to Mary P. Squiers, Director, Local Rules Project (June 22, 1989) (report that I compiled and drafted on behalf of the Department's litigating divisions on the local rules of the courts of appeals for submission to the Judicial Conference's Local Rules Project in support of its ongoing study) (on file with the *University of Colorado Law Review*).

31. See generally Report of the Local Rules Project, *supra* note 18 (surveying circuit rules on all aspects of appellate procedure).

32. See 8TH CIR. R. 3B; 9TH CIR. R. 3-4. For consistency, and because individual citation to the latest advance sheet showing the most recent amendment to a particular circuit's rules is awkward, circuit rules are cited in this article simply as "X CIR. R. #". As noted earlier, *supra* note 30, all circuit rules cited in this article are current to October 7, 1996, as reported in the advance sheets to the *Federal Reporter*.

33. See, e.g., 1ST CIR. R. 47.5(1)(a)(1); 4TH CIR. R. 3(b); 7TH CIR. R. 3(c); 10TH CIR. R. 3.4; 11TH CIR. R. 33-1. The Second Circuit requires filing of a docketing statement within ten days by provision in the "Civil Appeals Management Plan," which is Appendix C to the circuit's local rules, rather than by including the requirement in a rule. See 2d Cir. Civil Appeals Management Plan 3(a), 2D CIR. R. app. C at 39 (1993).

when the form must be filed with the notice of appeal, counsel may not yet have had the opportunity to fully determine what issues should be raised on appeal, particularly if the case is being handled by a different attorney on appeal.

FRAP 12 has recently been amended by the addition of a new subdivision (b) requiring the attorney who files the notice of appeal to file a statement naming each party represented on appeal by that attorney.³⁴ The representation statement allows the court of appeals to identify the individual appellants, especially since FRAP 3 was simultaneously amended to allow the notice of appeal to specify the appellants by general description rather than naming them individually.³⁵ The federal rules do not, however, provide for the filing of a docketing statement providing detailed information about the nature of the appeal at such an early stage.³⁶

In addition to the basic jurisdictional requirement of filing a notice of appeal, the Third Circuit requires the appellant to mail a copy of the notice of appeal to the trial judge.³⁷ Although the rule carefully provides that failure to give notice of the appeal to the trial judge does not affect appellate jurisdiction,³⁸ it remains an additional duty imposed upon counsel, presumably enforceable by other sanctions.

B. Motions

Even the basic process of filing motions, however simple or routine, has become complicated by the expansion of local rules. Some courts have adopted detailed rules, not only on the length, but also on the format of motions. The District of Columbia ("D.C.") and Federal Circuits have each adopted specific page

34. See Amendments to Federal Rules of Appellate Procedure, 147 F.R.D. 287, 307-08 (1993) (amending FED. R. APP. P. 12).

35. See *id.* at 291-92 (amending FED. R. APP. P. 3(c) to provide: "An attorney representing more than one party may fulfill [the requirement of specifying the party or parties taking the appeal] by describing those parties with such terms as 'all plaintiffs,' 'the defendants,' 'the plaintiffs A, B, et al.,' or 'all defendants except X.'").

36. The Local Rules Project, under the auspices of the Judicial Conference, recommended amendment of the federal rules to provide a uniform format for docketing statements and a uniform time limit for filing such statements, because "[l]ocal variation on any of these issues may promote confusion, without any corresponding benefit." Report of the Local Rules Project, *supra* note 18, at 22-23.

37. See 3D CIR. R. 3.1.

38. See *id.*

limits for motions, with the D.C. Circuit permitting twenty pages while the Federal Circuit limits motions to ten pages.³⁹ The Second Circuit, as discussed immediately below, has a set of forms that must be used for motions and limits the length of memoranda of law supporting the motion to ten pages.⁴⁰ The D.C. Circuit has adopted a set of detailed rules governing motions, including schedules for the filing of and required attachments to dispositive motions,⁴¹ and special rules on motions to extend filing deadlines and to exceed page limits for other documents.⁴²

The Second Circuit has imposed an especially burdensome procedure, requiring that a motion be attached to a "notice of motion" form.⁴³ This "notice of motion" essentially asks for the very kind of information that would be included in the motion itself. Moreover, the Second Circuit insists upon exact compliance with this rule, returning non-conforming documents, although technical errors are made more likely by the inherent complexity of the procedure.

C. *Content and Format of Briefs*

The preparation of an appellate brief is the heart of appellate practice. One thus would expect a uniform national standard concerning the content and format of briefs in the federal courts of appeals. Because appellate briefs are central to any appeal, wide variation and confusing inconsistencies among the circuits

39. See D.C. CIR. R. 27(a)(2); FED. CIR. R. 27(c). The Judicial Conference's Advisory Committee on Appellate Rules has proposed an amendment to FRAP 27 that would set a page limit on motions of 20 pages. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Revision of the Federal Rules of Appellate Procedure Using Guidelines for Drafting and Editing Court Rules and Preliminary Draft of Proposed Amendments to Appellate Rules 27, 28, and 32, at 83, published in 165 F.R.D. 117, 211 [hereinafter 1996 Proposed Amendments].

40. See 2D CIR. R. 27(a)(1), (a)(2)(b). The Advisory Committee on Appellate Rules has proposed an amendment to FRAP 27 that would prohibit the filing of a separate brief supporting the motion. See 1996 Proposed Amendments, *supra* note 39, at 80, 165 F.R.D. at 208. The Committee Note explains that "all legal arguments should be presented in the body of the motion," thereby adopting the "single document approach" used by the Supreme Court. *Id.* at 83-84, 165 F.R.D. at 211-12.

41. See D.C. CIR. R. 27(g).

42. See *id.* 27(h).

43. See 2D CIR. R. 27(a)(1). The Advisory Committee on Appellate Rules has proposed an amendment to FRAP 27 that expressly states that a "notice of motion is not required." 1996 Proposed Amendments, *supra* note 39, at 80, 165 F.R.D. at 208.

are least acceptable in this area.⁴⁴ In fact, however, the local rules of the various circuits probably deviate more on this point than on any other. The circuits have developed a wide range of regulations on content and format of the brief and frequently demand strict compliance with such rules.

1. Content of Brief

In addition to the detailed requirements set forth in FRAP 28 respecting the content of the appellate brief,⁴⁵ many circuits require a preliminary statement identifying the decision-maker below,⁴⁶ a statement of related cases,⁴⁷ or a statement regarding oral argument.⁴⁸ The Eighth Circuit requires that the statement of issues also include a list of up to four of the most apposite cases and the most apposite constitutional and statutory provisions relied upon by counsel.⁴⁹ The Ninth Circuit directs that any party who intends to seek attorney's fees for the appeal include in the brief "a short statement to that effect and must identify the authority under which the attorneys fees will be sought."⁵⁰ FRAP 28(a)(4) specifically provides for a statement of the case, including a "statement of the facts relevant to the issues presented for review, with appropriate references to the record."⁵¹ Nevertheless, the Fourth Circuit recently adopted a new local rule elaborating on this provision by requiring inclusion in the brief of a "separate section" to be entitled "STATEMENT OF FACTS" (in all capitalized letters) consisting of a "narrative statement" of the necessary facts and "references showing the source of the facts stated."⁵²

44. As a model of the possible, the United States Court of Appeals for the First Circuit notably has found little need to supplement the federal rules with respect to briefing. However, even the First Circuit has departed to a limited degree by including a specific rule on citation of authorities, *see* 1ST CIR. R. 28.1, and a requirement that an addendum of the district court's judgment and certain other district court documents be attached to the brief. *See* 1ST CIR. R. 28.2.

45. *See* FED. R. APP. P. 28.

46. *See* 2D CIR. R. 28(2); 8TH CIR. R. 28A(i)(3)(i).

47. *See* D.C. CIR. R. 28(a)(1)(C); 3D CIR. R. 28.1(a)(ii); 9TH CIR. R. 28-2.6; 10TH CIR. R. 28.2(a); FED. CIR. R. 28(a)(4), 47.5.

48. *See* 5TH CIR. R. 28.2.4; 8TH CIR. R. 28A(h)(1), (i)(1); 10TH CIR. R. 28.2(e); 11TH CIR. R. 28-2(c).

49. *See* 8TH CIR. R. 28A(i)(4).

50. 9TH CIR. R. 28-2.3.

51. FED. R. APP. P. 28(a)(4).

52. *See* United States Court of Appeals, Fourth Circuit, Notice of Proposed

Circuits requiring the same additional element may nonetheless contradict one another in how it is to be presented. For example, the Fifth Circuit directs that a request for oral argument be included as a preamble to the brief,⁵³ the Eighth Circuit requires that a one-page summary of the case and request for oral argument be placed at the beginning of the brief,⁵⁴ the United States Court of Appeals for the Eleventh Circuit locates the request for oral argument following the certificate of interested persons and corporate disclosure statement at the beginning of the brief,⁵⁵ and the United States Court of Appeals for the Tenth Circuit mandates that a statement as to whether oral argument is desired be placed on the front cover of the brief and that a statement of the reasons for oral argument follow the conclusion of the brief.⁵⁶

Other circuits multiply the complications in the already painstaking task of preparing the table of authorities that prefaces the main text of the brief. The D.C. and Eleventh Circuits direct that asterisks be placed in the table of authorities next to those authorities that are primarily relied upon.⁵⁷ The D.C. Circuit also mandates inclusion of a glossary of abbreviations used in the brief.⁵⁸

Individual circuits have entered the business of prescribing citation form. Several circuits enunciate rules, concerning the citation of cases and statutes,⁵⁹ which conflict with one another. For example, the D.C. Circuit's rule directs that "[c]itations of state court decisions included in the National Reporter System shall be to that system in both the text and the table of authori-

Amendment to and Adoption of Local Rules 22(a), 22(b), 22(d), 28(g), and 34(b), published in 86 F.3d No. 2 (advance sheet No. 30) CLXXVIII, CLXXXI (July 22, 1996) (on file with the *University of Colorado Law Review*) (including text of new 4TH CIR. R. 28(g)). Although this new rule appears to add nothing to FRAP 28(a)(4) beyond verbiage and the demand that the statement of facts be set out separately with a heading in all capitalized letters, the Fourth Circuit determined that there was "an immediate need for these changes" and therefore implemented them immediately and before seeking comment. *Id.* at CLXXIX.

53. See 5TH CIR. R. 28.2.4.

54. See 8TH CIR. R. 28A(h)(1), (i)(1).

55. See 11TH CIR. R. 28-2(c).

56. See 10TH CIR. R. 28.2(e).

57. See D.C. CIR. R. 28(a)(2); 11TH CIR. R. 28-2(e).

58. See D.C. CIR. R. 28(a)(3).

59. See, e.g., D.C. CIR. R. 28(b); 1ST CIR. R. 28.1; 3D CIR. R. 28.3(a); 11TH CIR. R. 28-2(k); see also FED. CIR. R. 28(e) (specifying preferred form of citation to the Federal Circuit and its predecessors).

ties.”⁶⁰ By contrast, the First Circuit departs from the modern citation trend and mandates that references to state court decisions be to “both the official state court citation and the National Reporter System citation when such decisions have been published in both reports.”⁶¹ The Eleventh Circuit falls in the muddled middle. On the one hand, that court provides that citations “shall comply with rules of citation in the latest edition of *A Uniform System of Citation*,”⁶² thereby adopting *The Bluebook*.⁶³ *The Bluebook* citation manual now provides, like the D.C. Circuit’s rule, that in documents submitted to federal courts, citations to state court decisions should note only the relevant regional reporter.⁶⁴ However, the Eleventh Circuit’s rule further provides that “[f]or state reported cases the national reporter series should be cross referenced,”⁶⁵ which suggests that parallel citations to the state reporter are anticipated. In all likelihood, changes in *The Bluebook*’s citation rules simply moved ahead of the First and Eleventh Circuits. The lesson here is that the circuits more profitably could entrust citation rules to other authorities.⁶⁶

On another matter of citation—the permissibility of citing unpublished opinions issued by that circuit—the courts of appeals are also notably inconsistent. Diversity among the circuits prevails even on so fundamental a matter as the definition of legal authority. The majority of the circuits forbid the citation of their unpublished decisions as precedent, but allow citation in related cases or when the preclusive effect of the disposition on those particular parties is relevant.⁶⁷ The Third Circuit hedges

60. D.C. CIR. R. 28(b). The Third Circuit requires that citations to state decisions “should include the West Reporter system whenever possible, with an identification of the state court,” 3D CIR. R. 28.3(a), thus apparently leaving citation of the parallel state court reporter to the option of the practitioner.

61. 1ST CIR. R. 28.1.

62. 11TH CIR. R. 28-2(k).

63. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (16th ed. 1996).

64. See *id.* rule 10.3.1.

65. 11TH CIR. R. 28-2(k).

66. *But see* Report of the Local Rules Project, *supra* note 18, at 49 (recommending that local rules “that discuss how cases are to be cited in the briefs” should “remain subject to local variation”).

67. See, e.g., D.C. CIR. R. 28(c); 1ST CIR. R. 36.2(b)(6); 2D CIR. R. 0.23; 7TH CIR. R. 53(b)(2)(iv); 9TH CIR. R. 36-3. On circuit rules regarding publication of opinions and citation of unpublished opinions, see generally Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757,

somewhat, stating that it "historically has not regarded unpublished opinions as precedents that bind the court," and therefore "the court by tradition does not cite to its unpublished opinions as authority."⁶⁸ Thus, while the court discourages counsel from citing an unpublished opinion lacking precedential value, counsel is not prohibited from doing so. The Eighth, Tenth, and Eleventh Circuits similarly declare that their unpublished opinions are not binding precedents, but then authorize citation of such decisions for their "persuasive" value.⁶⁹

Still other circuits are dangerously ambiguous about the precedential effect of their unpublished dispositions and consequently uncertain in their direction to counsel regarding reference to these dispositions.⁷⁰ In the Fourth Circuit, for example, citation of the court's unpublished decisions is "disfavored,"⁷¹ but, along with the Sixth Circuit, that court permits citation when counsel believes that the unpublished opinion "has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well."⁷² Perhaps the greatest confusion follows the Fifth Circuit's new rule, under which unpublished opinions issued by that court before January 1, 1996, are precedential, while those issued after that date are denied precedential effect, but may still be cited as "persuasive" authority.⁷³

By declaring that "an increment of precedent is . . . unusable," a nonpublication/noncitation rule directly diminishes the principle of *stare decisis*.⁷⁴ The authorities that may be cited in an appellate brief define the parameters of legal authority, that is, what constitutes the "law" in that court.⁷⁵ On this question of the cognizable content of the law, there should be no daylight between one circuit and another. Accordingly, as Professor

761-62 & nn.12-17 (1995).

68. 3D CIR. INTERNAL OPERATING PROC. 5.8.

69. See 8TH CIR. R. 28A(k); 10TH CIR. R. 36.3; 11TH CIR. R. 36-2.

70. See Dragich, *supra* note 67, at 791 (stating that when a circuit disfavors citation of an unpublished disposition, but allows it, the result is "an unacceptably ambiguous statement of precedential effect").

71. See 4TH CIR. R. 36(c).

72. *Id.*; see 6TH CIR. R. 10(f).

73. See 5TH CIR. R. 47.5.3-47.5.4.

74. See THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 130 (1994).

75. See Dragich, *supra* note 67, at 758 ("To the extent our 'law' is embodied in precedents, published opinions are the authoritative source of law.").

Thomas E. Baker concludes, the “time has come for rigorous evaluation and adoption of a single uniform national standard”⁷⁶ governing when a federal appellate decision may be left unpublished, when it lacks precedential effect, and when it may be rendered uncitable.⁷⁷

2. Printing and Length of Briefs

Although FRAP 32 provides directions on the form of the brief,⁷⁸ the circuits are all over the page in providing further detailed rules about printing of briefs. For example, the Second Circuit, although aware of the office computer, views it negatively and specifically prohibits the use of proportional computer fonts, unless the result is visually identical to standard typographic

76. BAKER, *supra* note 74, at 134.

77. However, as Professor Robel observes, forbidding citation of an unpublished decision does not make it entirely disposable. See Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989). As she discovered, institutional entities, such as the Department of Justice, with unique access to unpublished opinions, may still make other uses of them, including incorporation of analysis in briefs and arguments, and evaluation in making litigation and settlement decisions. See *id.* at 955-59.

78. See FED. R. APP. P. 32. The Judicial Conference’s Advisory Committee on Appellate Rules has proposed several amendments to FRAP 32 allowing for proportionately spaced typeface and altering the length of briefs. See 1996 Proposed Amendments, *supra* note 39, at 104-08, 165 F.R.D. at 232-36. Moreover, if amended as proposed, FRAP 32(d) would provide that the courts of appeals “must accept documents that comply with the form requirements of this rule.” *Id.* at 109, 165 F.R.D. at 237. As the Committee Note explains, “[l]ocal rules may move in one direction only”; they may “authorize noncompliance with certain of the national norms” but may not “impose requirements that are not in the national rule.” *Id.* at 113, 165 F.R.D. at 241. This is the second time that these proposals have been offered by the Advisory Committee. In 1995, the Judicial Conference’s Committee on Rules of Practice and Procedure recommitted a similar set of proposed amendments to FRAP 28 and 32 to the Advisory Committee for further study as to whether a national rule concerning the details of brief form and length was appropriate or whether these matters instead should be left to local rules. See Report of the Judicial Conference Committee on Rules of Practice and Procedure at 6 (Sept. 1995) (on file with *University of Colorado Law Review*). Although some Committee members believed “the proposal was too technical and overly specific for a national rule,” other members recognized that a comprehensive approach was necessary because “otherwise the local rules of the courts of appeals would (as most already have) fix specific and technical requirements that are equally as detailed, but which vary from court to court.” *Id.* The discussion in the text demonstrates the disarray and inconsistency that follows when the national rule fails to fix the standard clearly. Through the 1996 proposals, the Advisory Committee has confirmed its commitment to establishing national unity on the form of briefs.

printing, which is permitted.⁷⁹ The Tenth Circuit, while not prohibiting proportional computer fonts, "prefers typewritten briefs."⁸⁰

Other circuits have recognized the advent of the computer age and provide separate options for non-proportional typewriting and for proportional computer fonts. The D.C., Fourth, Fifth, Seventh, and Ninth Circuits authorize use of proportional fonts, but then proceed to limit the length of the briefs in a manner different from the federal rules.⁸¹ FRAP 28(g) provides that the length of principal briefs shall not exceed fifty pages and that reply briefs shall not exceed twenty-five pages, although the rule allows variation on page length by local rule.⁸² The Fourth and Fifth Circuits allow fewer briefing pages when proportional fonts are used.⁸³ The D.C. Circuit measures the permissible length of briefs prepared by word processing and typographical printing by number of words (12,500 for principal briefs and 6250 for reply briefs).⁸⁴ The Seventh and Ninth Circuits recently adopted new rules that also measure the length of briefs printed with proportionately spaced type in terms of number of words, but with a different count (14,000 words for principal briefs and 7000 words for reply briefs).⁸⁵

79. See 2D CIR. R. 32(b).

80. 10TH CIR. R. 32.1. By measuring type size (other than for standard typographical printing) only in terms of characters per inch, the Sixth Circuit also is decidedly unfriendly to word-processing proportional fonts which are not easily measured by that standard. See 6TH CIR. R. 10(h).

81. See, e.g., D.C. CIR. R. 28(d); 4TH CIR. R. 28(d), 32(a); 5TH CIR. R. 28.1, 32.1; 7TH CIR. R. 32(d); 9TH CIR. R. 32. The Third and Federal Circuits expressly permit use of proportional fonts without altering the page length requirements, although these circuits differ in the font size permitted—12 point in the Third Circuit, see 3D CIR. R. 32.1(c)(ii), and 11 point in the Federal Circuit, see FED. CIR. R. 32(a).

82. See FED. R. APP. P. 28(g). The Judicial Conference's Advisory Committee has proposed deletion of FRAP 28(g), and substitution of detailed rules on length of briefs in a rewritten FRAP 32, with express prohibition of local rules imposing requirements in addition to those in the national rule. See 1996 Proposed Amendments, *supra* note 39, at 104-09, 165 F.R.D. at 232-37. See also *infra* notes 205-08 and accompanying text (explaining that FRAP 28(g) was intended to allow circuits to *expand*, not *retract*, the permissible length of briefs).

83. See 4TH CIR. R. 28(d), 32(a); 5TH CIR. R. 28.1, 32.1.

84. See D.C. CIR. R. 28(d)(1).

85. See 7TH CIR. R. 32(d); 9TH CIR. R. 32(e)(1); Richard C. Reuben, *Courts Playing Against Type*, A.B.A. J., Aug. 1996, at 42, 42 (stating that the new Seventh and Ninth Circuit rules on brief lengths went into effect on January 1, 1996). In the Seventh Circuit, the brief-writer has a choice between a page, word, or character measure of length—either 30 pages, 14,000 words, or 90,000 characters for a principal brief. See 7TH CIR. R. 32(d)(1)-32(d)(2)(A). The Seventh Circuit rule applies to briefs

Even with ordinary typewritten briefs, the Ninth Circuit has staked out its independence from FRAP 28(g) by limiting the page length for principal briefs to forty pages and for reply briefs to twenty.⁸⁶ The Eleventh Circuit has moved in the opposite direction, expanding the permissible length of the appellant's brief to fifty-five pages.⁸⁷ By contrast, the D.C. Circuit recently brought itself back in line with the national standard by changing its prior rule limiting reply briefs to twenty pages and readopting FRAP 28(g)'s limitation of twenty-five pages (but only when the brief is produced on a typewriter or printed with non-proportional fonts).⁸⁸

When briefs are typewritten, the D.C. and Eleventh Circuits limit type size to ten characters per inch,⁸⁹ while the Sixth and Seventh Circuits allow up to eleven characters per inch.⁹⁰ Under the new Seventh and Ninth Circuit rules, those circuits split the difference at 10.5 characters per inch for monospaced type.⁹¹ The Eighth Circuit recently weighed in with yet another choice, announcing by letter to counsel (rather than by local rule)⁹² that

with either a proportional or a mono-spaced type, although a brief "using mono-spaced type also is acceptable if it does not contain more than 1,300 lines of text." *Id.* The Seventh Circuit's rule is identical to the proposed amendment to FRAP 32 that was recently circulated for comment by the Judicial Conference's Advisory Committee on Appellate Rules. See 1996 Proposed Amendments, *supra* note 39, at 107, 165 F.R.D. at 235.

86. See 9TH CIR. R. 32(e)(2). The Seventh Circuit also establishes page limitations different from present FRAP 28 (30 pages for principal briefs and 15 pages for reply briefs), which apply whether the brief is printed with a proportional or monospaced type, but the circuit rule allows an alternative (and more generous) measurement of the length by words, characters, or, for monospaced type, by lines. See 7TH CIR. R. 32(d).

87. See 11TH CIR. R. 28-1(a).

88. See D.C. CIR. R. 28(d)(2); see also Proposed Rules, United States Court of Appeals for the District of Columbia Circuit, Explanation of New Proposed D.C. Circuit Rules, published in 979 F.2d No. 1 (advance sheet No. 3) CXXXVIII, CXL (Jan. 18, 1993) (on file with the *University of Colorado Law Review*) (explaining that the amendment to D.C. Circuit Rule 28 "changes the Court's present rule limiting reply briefs to 20 pages, and instead adopts the FRAP provision for 25 pages").

89. See D.C. CIR. R. 28(d)(2); 11TH CIR. R. 32-4(b).

90. See 6TH CIR. R. 10(h); 7TH CIR. R. 32.

91. See 7TH CIR. R. 32(b)(2); 9TH CIR. R. 32(b). The Judicial Conference's Advisory Committee on Appellate Rules has proposed an amendment to FRAP 32 to provide for monospaced typeface producing no more than 10.5 characters per inch, the same figure arrived at by the Seventh and Ninth Circuits. See 1996 Proposed Amendments, *supra* note 39, at 106, 165 F.R.D. at 234.

92. But see FED. R. APP. P. 47(a)(1) ("A generally applicable direction to a party or a lawyer regarding practice before a court shall be in a local rule rather than an internal operating procedure or standing order.").

it will reject appellate briefs that contain more than twelve characters per inch.⁹³

The type size and spacing of footnotes has not escaped the attention of the local rule codifiers. Some circuits require that footnotes be printed in the same size type as the text of the brief,⁹⁴ and at least two circuits require that footnotes not limited to citations or direct quotations be double-spaced like the text.⁹⁵ An experienced appellate practitioner reported to me that the Fifth Circuit recently rejected a brief based on the substance of the footnotes.⁹⁶ The brief was stricken, not because it would have been overlength had the footnote material been double-spaced and placed in the text, but rather because the clerk's office simply declared there was too much material in the footnotes beyond basic citations.

3. Cover and Binding of Brief

The extraordinary detail of the local appellate rules extends beyond the contents of the brief to the cover and the binding. The Second Circuit requires that the appeal numbers on the cover be in large print.⁹⁷ The Federal Circuit, in contrast with the practice everywhere else, requires that the title of the document (that is, "Brief for Appellant") be displayed at the very top of the cover.⁹⁸ The Tenth Circuit directs that a statement as to whether oral argument is requested be placed on the cover.⁹⁹ None of these

93. See Letter from Michael E. Gans, Clerk of United States Court of Appeals for the Eighth Circuit, to Counsel (Mar. 3, 1995) (entitled "Notice to Counsel Concerning the Use of Proportional Spacing in the Preparation of Briefs") (on file with the *University of Colorado Law Review*).

94. See 3D CIR. R. 32.2(a); 5TH CIR. R. 32.2; 8TH CIR. R. 28A(a).

95. See 11TH CIR. R. 32-4; FED. CIR. R. 32(a). The Judicial Conference's Advisory Committee on Appellate Rules has proposed an amendment to FRAP 32 that specifically permits single-spaced quotations, headings, and footnotes. See 1996 Proposed Amendments, *supra* note 39, at 106, 165 F.R.D. at 234.

96. Here and elsewhere in this Article I draw upon reports regularly made to me by experienced federal appellate practitioners, both in the public and private sector, concerning practice in the various circuits, as well as my own substantial experience litigating in ten of the thirteen federal circuits.

97. See 2D CIR. R. 32(c).

98. See FED. CIR. R. 32(e)(1). The Judicial Conference's Advisory Committee on Appellate Rules has proposed an amendment to FRAP 32 that specifically directs that the number of the case is to be centered at the top of the cover of the brief and appendix. See 1996 Proposed Amendments, *supra* note 39, at 105, 165 F.R.D. at 233.

99. See 10TH CIR. R. 28.2(e).

requirements are imposed by FRAP 32(a),¹⁰⁰ and thus they are inconsistent with the federal rules "since Rule 32(a) clearly intends to regulate the content of brief covers."¹⁰¹

For brief binding, the Fifth and Federal Circuits by rule require special binding that permits a brief to lie flat when open.¹⁰² The Ninth Circuit is only slightly more lenient; it allows binding that "permits the document to lie reasonably flat when open."¹⁰³ Some courts prohibit certain types of binding,¹⁰⁴ while other courts require that any metal fastener, including staples, be covered.¹⁰⁵

4. Addendum to Brief

Under FRAP 28(f), a party is directed to reproduce documents such as pertinent statutes, rules, and regulations in the brief, an addendum to the brief, or a pamphlet.¹⁰⁶ The federal rules require nothing further by way of attachment to the back of the brief. The D.C. Circuit has adopted a rule paralleling the FRAP 28(f) requirement, but then complicates the simple federal provision by directing that any statutory addendum be "introduced by a table of contents" and "be separated from the body of the brief (and from any other addendum) by a distinctly colored separation page."¹⁰⁷

Other circuits have not restrained themselves in expanding the number and nature of required addenda to the brief. The Third Circuit requires that a certificate of membership in that circuit's bar be attached to the brief.¹⁰⁸ The Sixth and Seventh Circuits require that an addendum to the brief include further information or certification about the preparation of the record appendix.¹⁰⁹ Several circuits require that the decision of the court

100. See FED. R. APP. P. 32(a).

101. Report of the Local Rules Project, *supra* note 18, at 58-59.

102. See 5TH CIR. R. 32.3; FED. CIR. R. 32(b). The Judicial Conference's Advisory Committee on Appellate Rules has proposed an amendment to FRAP 32 that would adopt such a standard at the national level. See 1996 Proposed Amendments, *supra* note 39, at 106, 165 F.R.D. at 234.

103. 9TH CIR. R. 32(f).

104. See 11TH CIR. R. 32-3.

105. See 3D CIR. R. 32.1(a); FED. CIR. R. 32(b).

106. See FED. R. APP. P. 28(f).

107. D.C. CIR. R. 28(a)(5).

108. See 3D CIR. R. 28.3(d).

109. See 6TH CIR. R. 10(d), 10(m), 11(b); 7TH CIR. R. 30(c).

or administrative agency from which the appeal is taken or other record material be attached to the brief.¹¹⁰

The location and numbering of an addenda directive within a particular circuit's set of local rules may be quite different from that in another circuit, hindering the very discovery of such requirements. Some circuits provide for record addenda to the brief through local rules that supplement the requirements for appellate briefs under FRAP 28.¹¹¹ At least one circuit imposes its addendum requirement through a local rule numbered to correspond with FRAP 30, which governs the record appendix.¹¹² The Sixth Circuit has created its own rule-numbering system that is entirely divorced from the organization of the federal rules.¹¹³

D. Timing for Filing Briefs

The courts of appeals vary widely both in their receptivity to motions for extensions of time for filing briefs and in the manner by which the court reveals its attitude toward such extensions. Indeed, in many circuits it is more difficult to obtain even a short extension of the time within which to file a brief than it is in the Supreme Court. Several circuits by rule have indicated reluctance to allow extensions, vying with one another for superlatives to describe the rare situation that would justify an extension. For example, the D.C. Circuit states that motions to extend the time limits are "disfavor[ed]" and "will be granted only for extraordinarily compelling reasons."¹¹⁴ The Sixth Circuit provides that such motions are "not favor[ed]" and "will be granted only in the

110. See 1ST CIR. R. 28.2; 3D CIR. R. 28.1(a)(1)(iii); 7TH CIR. R. 30(a); 8TH CIR. R. 28A(I)(7), 30A(d); 10TH CIR. R. 28.2(d); FED. CIR. R. 28(a)(11). The Third Circuit both requires attachment of record material as a brief addendum and then modifies the preparation of the separate record appendix by commanding that materials included in the addendum not be reproduced in the appendix. See 3D CIR. R. 28.1(a)(1)(iii); see also 1ST CIR. R. 28.2 (providing that material included in the addendum to the brief "need not be reproduced in the appendix also"). By contrast, the Federal Circuit adopts what the court candidly calls a "duplicative requirement," mandating that the decision below both be attached to the brief and included in the appendix. See FED. CIR. R. 30(c)(1) (explaining that inclusion of the decision appealed from is a duplicative requirement of the addendum to the initial brief of the appellant).

111. See, e.g., 1ST CIR. R. 28.2; 3D CIR. R. 28.1(a)(1)(iii); 10TH CIR. R. 28.2(d); FED. CIR. R. 28(a)(11).

112. See 7TH CIR. R. 30(a).

113. See, e.g., 6TH CIR. R. 10(d), (m) (addendum to brief).

114. D.C. CIR. R. 28(f).

most extraordinary circumstances."¹¹⁵ The Tenth Circuit "discourages" the filing of extension motions and will grant them only for "extraordinary and compelling circumstances."¹¹⁶ The First Circuit through an "Information Sheet" distributed to counsel, rather than by rule, states that "[m]otions for an extension of time for filing of briefs are disfavored by the court and will be granted only upon a showing of extenuating circumstances."¹¹⁷

The Fifth Circuit recently adopted a rule that addresses this question in exquisite detail. The rule sets a time period for filing an extension motion; outlines "levels" of extensions with correspondingly higher standards for longer extension requests; and states that "generalities" (such as the statement that "counsel is too busy") are insufficient justifications for extensions.¹¹⁸ The Seventh Circuit has a similarly detailed rule, stating that extension motions are not favored and describing the exceptional circumstances that may merit consideration.¹¹⁹ Moreover, the Seventh and Federal Circuits require that every motion for an extension of time be supported by an affidavit,¹²⁰ notwithstanding that the motion itself is signed by the attorney with personal knowledge of the reasons why he or she cannot complete a brief by the due date and who is bound to speak truthfully as an officer of the court.¹²¹

In terms of conflict with the federal rules, the Eighth Circuit's approach is particularly interesting. FRAP 26(b) says that the court "for good cause shown may upon motion enlarge the

115. 6TH CIR. R. 10(k).

116. 10TH CIR. R. 28.3.

117. Information Sheet from Office of the Clerk, United States Court of Appeals for the First Circuit (on file with the *University of Colorado Law Review*).

118. See 5TH CIR. R. 31.4.1-31.4.4. This new local rule on request for extensions in the Fifth Circuit was adopted effective January 9, 1996. See Amendments to 5th Circuit Local Rules, United States Court of Appeals for the Fifth Circuit, published in 71 F.3d No. 3 (advance sheet No. 5) CLXXV (Jan. 26, 1996) (on file with the *University of Colorado Law Review*) (including text of new 5th Cir. R. 31.4.1-31.4.4).

119. See 7TH CIR. R. 26.

120. See *id.*; FED. CIR. R. 26(c) (requiring that the "extraordinary circumstances" justifying an extension be "described in an accompanying affidavit or unsworn declaration under penalty of perjury pursuant to 28 U.S.C. § 1746").

121. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(1) (1995) ("A lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal . . ."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(5) (1983) ("In his representation of a client, a lawyer shall not . . . [k]nowingly make a false statement of law or fact.").

time" for taking an action.¹²² The Eighth Circuit requires that "[a]ll papers must be filed within the time period allowed by the rules" and that extensions of time for briefs "will not be granted except for good cause."¹²³ In sum, the Eighth Circuit rule simply restates FRAP 26(b) in a negative manner. The committee comment to the local rule suggests that the purpose of this restatement is to indicate that motions for extensions of time are disfavored.¹²⁴ Thus, the Eighth Circuit has taken an express provision in the federal rule and reordered the language to change the emphasis and thereby alter the underlying policy.

In effect, the various circuits have replaced the simple "good cause" standard of the federal rule with heightened standards of their own creation. "Good cause" means a "substantial reason"¹²⁵—not "extraordinarily compelling reasons," "extraordinary and compelling circumstances," or "extenuating circumstances." In sum, by substituting a heightened standard, these circuit rules cannot be characterized as mere elaboration upon the federal rule.¹²⁶

By contrast, the Ninth Circuit is reasonable and accommodating, authorizing its clerk to grant an extension of no more than 14 days upon an oral request by telephone.¹²⁷ Although prior notice of the request must be given to opposing counsel, the clerk's power to grant a telephonic request for good cause is not conditioned on the consent of the opposing party.¹²⁸ A diligent attorney seeking a briefing extension due to unanticipated difficulties in completing the brief or problems in the reproduction generally needs no more than a few days extension. The Ninth Circuit's approach facilitates this reality with no significant delay in the ultimate disposition of the appeal.

122. FED. R. APP. P. 26(b).

123. 8TH CIR. R. 26A.

124. *See id.*

125. *See* BLACK'S LAW DICTIONARY 692 (6th ed. 1990).

126. *See* Report of the Local Rules Project, *supra* note 18, at 41-42 (stating that, to the extent that local rules "apply a different, and perhaps more stringent standard [to permit an enlargement of time], they are inconsistent with Rule 26(b)").

127. *See* 9TH CIR. R. 31-2.2(a); *see also* 5TH CIR. R. 31.4.3 (allowing unopposed requests for extensions for up to 30 days to be granted by telephone).

128. *See* 9TH CIR. R. 31-2.2(a).

E. Record Appendix

Even for experienced appellate practitioners, one of the most time-consuming and technically detailed areas of appellate practice in any court involves the preparation and filing of a record appendix as governed by FRAP 30.¹²⁹ Accordingly, it seems vital that the federal judiciary determine uniformly the most appropriate manner for presenting the record to the appellate courts. Unfortunately, the wide variation among the circuits concerning the record appendix engenders considerable confusion. Some circuits generally do follow the FRAP approach of a joint appendix for reproducing important portions of the record for the appellate court.¹³⁰ Other courts follow a simple variation on that approach by allowing each party to file excerpts of record.¹³¹ However, some of these circuits then complicate this streamlined process with detailed requirements for the contents, length, and format of the excerpts of record.¹³²

Unfortunately, a few circuits make an already burdensome process more difficult by the nature of the specific local rules they have adopted. The First, Seventh, and Eighth Circuits provide for a joint appendix, but then also require an addendum to the brief that includes the key portions of the record that ordinarily would be included in the appendix.¹³³ The Federal Circuit has extraordinarily detailed instructions concerning how the appendix is to be arranged, when it is to be created, and what documents are or are not to be included within it.¹³⁴ In addition, by limiting certain contents of the appendix to those items actually referenced in the brief,¹³⁵ the Federal Circuit effectively mandates a deferred appendix in nearly every case. Because the parties cannot know for certain which record documents in fact will be cited until the briefs have actually been written, counsel in the

129. See FED. R. APP. P. 30.

130. See, e.g., D.C. CIR. R. 30; 2D CIR. R. 30; 3D CIR. R. 30.3; 4TH CIR. R. 30(c).

131. See, e.g., 5TH CIR. R. 30; 9TH CIR. R. 30-1; 11TH CIR. R. 30-1.

132. See, e.g., 5TH CIR. R. 30.1.4 (specifying mandatory contents of excerpts of record), 30.1.5 (outlining optional contents of excerpts of record), 30.1.6 (placing a page limit on optional contents of excerpts of record), 30.1.7 (detailing form for excerpts of record, including table of contents, tabs, and bindings); 10TH CIR. R. 10.3, 30.1 (specifying required contents of appendix, items that should be excluded, and the order and form of the appendix).

133. See 1ST CIR. R. 28.2; 7TH CIR. R. 30(a); 8TH CIR. R. 28A(i)(7), 30A(d).

134. See FED. CIR. R. 30.

135. See *id.* 30(a)(2).

Federal Circuit must defer finalization of the appendix until completion of briefing. The Federal Circuit allows an exception when the designated appendix materials are fewer than 100 pages, in which case the appendix must include all designated materials *and* must be attached to the initial brief, making for a single voluminous document that, with tables, argument, and appendix, can be as much as 170 pages in length.¹³⁶

On this same subject, the Third Circuit declares that use of a deferred appendix is not favored,¹³⁷ while the Sixth Circuit has proposed a rule expressly mandating a deferred appendix.¹³⁸ Under the proposed Sixth Circuit procedure, each party would initially file a "proof" brief with references directly to the pages of the actual record; the contents of the appendix would then be finalized based upon references to the record in the briefs, and lastly the parties would file a "final" brief adding references to the appropriate pages of the appendix.¹³⁹ Although FRAP 30(c),¹⁴⁰ which authorizes the deferred appendix procedure, allows the circuits to adopt this approach "by rule for classes of cases,"¹⁴¹ the rule does not contemplate universal application to all cases.¹⁴²

136. *See id.* 30(d).

137. *See* 3D CIR. R. 30.4.

138. *See* Notice of Proposed Amendments to the Rules of the Sixth Circuit, United States Court of Appeals for the Sixth Circuit, *published in* 61 F.3d No. 1 (advance sheet No. 36), CLXIII (Sept. 4, 1995) (on file with the *University of Colorado Law Review*).

139. *See id.* (proposed amendments to 6TH CIR. R. 10 and 11).

140. FED. R. APP. P. 30(c).

141. *Id.*

142. The specific provision in FRAP 31(a) permitting variation of the time for serving and filing briefs by local rule "for all cases" indicates that the limited permission of FRAP 30(c) for variation by local rule only in "classes of cases" should be read narrowly. *Compare* FED. R. APP. P. 30(c) (allowing court to adopt deferred appendix procedure "by rule for classes of cases") *with* FED. R. APP. P. 30(f) (allowing court to dispense with the requirement of an appendix "by rule applicable to all cases, or to classes of cases"). In sum, the federal rulemakers apparently contemplated adoption of the deferred appendix only when justified for a particular class of cases, absent case-by-case application by court order.

III. THE BALKANIZATION OF FEDERAL APPELLATE PRACTICE

A. *The Dissolution of the Federal Appellate Judicial System*

The Rules Enabling Act¹⁴³ “was designed to foster a uniform system of procedure throughout the federal system, supplemented but not altered, by local rules to take care of local problems.”¹⁴⁴ Instead of adhering to the simple and uniform standards of the FRAP, the circuit courts of appeals have adopted an ever-expanding and diverse catalogue of local rules. As a consequence, appellate practice is becoming “ever more disuniform and complex.”¹⁴⁵ At the same time, the “unitary nature of the federal judicial system,” which was “the *raison d’être* for the establishment of the federal courts,”¹⁴⁶ is being incrementally, but ever surely, destroyed.

The acceleration of local appellate practice, and the absence of any forceful effort to slow the growth of divergent rules, has fostered a culture of variation among the federal circuits. In effect, every circuit has constituted itself as an autonomous Advisory Committee on the Appellate Rules, openly considering innovative procedures and creative variations upon the federal rules. Rather than taking suggestions for procedural reform directly to the Judicial Conference’s Advisory Committee on the Appellate Rules for possible incorporation into the FRAP, each circuit freely plays its own procedural tune, largely heedless of the singularly unmusical cacophony emanating from the appellate courts as a whole.

143. 28 U.S.C. §§ 2071-2077 (1994).

144. *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 665 (7th Cir. 1989) (en banc) (Ripple, J., dissenting).

145. *Cf. Tobias*, *supra* note 1, at 1393 (discussing the effect of the proliferation of local rules in the federal district courts).

146. *Cf. Dolores K. Sloviter*, *The Judiciary Needs Judicious Growth*, NAT’L L.J., June 28, 1993, at 17, 17 (Chief Judge, U.S. Court of Appeals, Third Circuit) (describing Second Circuit Judge Jon O. Newman’s argument that expansion of the size of the federal judiciary may “destroy the unitary nature of the federal judicial system,” and further observing that this was the historical “*raison d’être* for the establishment of the federal courts”). *See also Carrington*, *supra* note 3, at 934 (stating that the federal courts of appeals were created to be “a functioning part of a unified judicial system designed to enforce national law evenhandedly across the continent”).

What little coordination does exist occurs after the fact, when an innovation adopted by an individual circuit is subsequently embraced by the Judicial Conference as an amendment to a federal rule. The courts of appeals rarely defer local experimentation in favor of efforts to achieve national rule reform. As a consequence, the federal rules and the national rulemakers do not lead, but follow. Rulemaking energy is being harnessed and applied primarily at the circuit conference level, with the result that each circuit moves in its own wandering orbit, only loosely tethered by minimal gravity to the federal rules.

B. Deleterious Effects on Appellate Justice

The adding of layer upon layer of local rules impairs the quality and increases the cost of appellate justice. Indeed, in terms of litigation costs, the burden of complying with local appellate rules may be disproportionately greater than the burden of complying with local district court rules. In the context of a district court proceeding, the additional time and expense of complying with local variations of the rules may be relatively minimal in comparison to the total amount of time necessarily devoted to trial litigation. By contrast, precisely because an appeal proceeds on a faster schedule and generally demands less attorney time within that compressed period, each hour of attorney time added by the need to discover, understand, and comply with idiosyncratic local rules meaningfully inflates the expense of an appeal. When an appellate attorney "bids on" an appeal by predicting the cost to the client, but then an additional five or ten hours of attorney time is required to find, interpret, and follow local circuit rules, the enhanced expense attributable to local circuit rules compliance is not at all negligible in the context of the overall expense statement for legal services.¹⁴⁷

Moreover, when the rules to be followed for such basic tasks as preparing a brief or filing a motion are excessively varied, complex, and detailed, the inevitable result is that more mistakes are made by counsel. If an attorney is practicing in a circuit other than his home circuit, the idiosyncratic variations of a circuit's

147. I am indebted to Edward Mansfield, presently of Belin, Harris, Lamson & McCormick in Des Moines, based on his extensive inter-circuit appellate experience, for this observation.

local rules become an obstacle course, or more accurately, a minefield, through which the practitioner is unlikely to traverse without some misstep along the way. In turn, more time is demanded of the court's staff in identifying errors and of counsel in correcting errors. As the Chicago Council of Lawyers commented in their evaluation of the Seventh Circuit, "[h]arsh application of a multitude of rules governing minor areas of practice involves the court and litigants in expensive detours away from the ultimate resolution of the merits. This increases delay and expense as litigants seek to correct mistakes."¹⁴⁸

Technical rules, such as those governing the cover and binding of an appellate brief or the tables of contents and authorities, are those which counsel are most likely to overlook when putting the substantive document into final form as the filing deadline approaches. Even a diligent practitioner may run afoul of such eccentric requirements as the Eleventh Circuit's demand that the tables of contents and authorities, headings, and signature block of the brief be double-spaced;¹⁴⁹ the Federal Circuit's rule that the title of the brief be displayed at the very top of the cover;¹⁵⁰ the Sixth Circuit's requirement that the designation of contents for the appendix be included as an addendum to the brief;¹⁵¹ or the D.C. and Eleventh Circuits' direction that asterisks be added to the table of authorities to denominate cases primarily relied upon.¹⁵² Although such mistakes may not affect the timeliness of the document, and thus not cause a party to lose rights,¹⁵³ the document still must be

148. See Chicago Council of Lawyers, *Evaluation of the United States Court of Appeals for the Seventh Circuit*, 43 DEPAUL L. REV. 673, 695 (1994) [hereinafter *Evaluation of the Seventh Circuit*].

149. By local rule, the Eleventh Circuit provides:

Only the cover page, the certificate of service, and direct quotes in the text of a brief and in footnotes may be single-spaced. All other typed matter must be double-spaced, including the Table of Contents, the Table of Citations, and headings within the numbered pages of the brief. The court may reject or require recomposition of brief for failure to comply.

11TH CIR. R. 32-4. Read literally, the rule appears to preclude single-spacing even footnotes that contain only citations. By all reports from practitioners, the Eleventh Circuit does indeed reject briefs that vary from this requirement in the slightest, such as by single-spacing the table of contents and signature block.

150. See FED. CIR. R. 32(e)(1).

151. See 6TH CIR. R. 10(d), (m), 11(b).

152. See D.C. CIR. R. 28(a)(2); 11TH CIR. R. 28-2(e).

153. Under FRAP 47 as recently amended, a local "requirement of form" may 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. APP. P. 47(a)(2). However, while the

corrected and re-submitted. The efficient, inexpensive, and equitable disposition of appeals is not thereby promoted.

Because there are fewer appellate circuits than trial districts in the federal system—thirteen circuits as opposed to 94 districts¹⁵⁴—the harm caused by fragmentation of federal appellate practice is more diffuse than that occasioned by the proliferation of district court local rules. Many litigators practice in more than one federal district, while fewer practice in more than one circuit. But the deleterious effects of circuit level variation are nonetheless substantial. Several major cities and metropolitan areas border upon or overlap more than one circuit: Washington, D.C. comprises the geographical venue of the District of Columbia Circuit and is surrounded by states within the Fourth Circuit; New York City falls within the Second Circuit and neighbors the Third Circuit; and Kansas City lies at the dividing line between the Eighth and Tenth Circuits. Even outside of those “border towns,” “[l]awyers increasingly practice in a nationwide market for legal services.”¹⁵⁵

The effect of the proliferation of local rules upon the unity of the federal appellate system is perhaps most acutely illustrated by the advent of the United States Court of Appeals for the Federal Circuit. Because the Federal Circuit has nationwide appellate jurisdiction over certain types of cases, including patent cases and claims for monetary relief against the federal government,¹⁵⁶ it draws practice by lawyers who may otherwise practice primarily in one of the regional circuits. These lawyers are thus required to expend significant attorney time in learning how to prosecute or defend an appeal differently in the Federal Circuit after becoming accustomed to the details of the local rules in a regional circuit.¹⁵⁷

court clerk must initially accept a non-conforming document for filing to preserve timeliness, the party may still be required to correct the document before the appeal proceeds. See *infra* Part V.A.1 (discussing effect of amendments to FRAP 47).

154. See DANIEL J. MEADOR, *AMERICAN COURTS* 23, 24-25 (1991).

155. Chemerinsky & Friedman, *supra* note 2, at 783.

156. See 28 U.S.C. § 1295 (1994).

157. David Hricik, of Baker & Botts, in Houston, and a member of the American Bar Association subcommittee study, see *supra* note *, emphasized to the subcommittee that the advent of the Federal Circuit furthers the need for a unified set of appellate rules: “Too much lawyer time is lost determining how to do an appeal ‘differently’ for the Federal Circuit.” Letter from David Hricik to Sharon Freytag, Chair, Subcommittee on Local Rules, Appellate Practice Committee, ABA Section of Litigation (Aug. 10, 1993) (on file with the *University of Colorado Law Review*).

Similarly, the United States Court of Appeals for the District of Columbia Circuit is, in many respects, a national court.¹⁵⁸ Much of its docket has a uniquely national importance because of its location in the nation's capital.¹⁵⁹ Moreover, Congress has authorized, and in some cases required, that certain claims involving the federal government be brought in Washington, D.C., or be appealed to the D.C. Circuit.¹⁶⁰ Thus, as with the Federal Circuit, attorneys from around the nation may be called upon to advocate a matter within the D.C. Circuit, and thus be obliged to develop familiarity with its peculiar rules of practice. Adherence to the FRAP would affirm the truth that the Federal and D.C. Circuits are part of a single intermediate appellate court system.

The widening variation in circuit local rules is felt most regularly by nationwide institutional entities, most notably federal government agencies and departments, but also some public interest organizations.¹⁶¹ Presumably the federal government and its Department of Justice, which has responsibility for a national litigation practice, are most capable of adapting to divergence among the circuits. However, even the Department of Justice is significantly inhibited in the efficient representation of the public by the proliferation of local circuit rules.¹⁶² Although

158. See generally Carl Tobias, *The D.C. Circuit as a National Court*, 48 U. MIAMI L. REV. 159 (1993) (evaluating the merits of relying on national pools of potential judges for the D.C. Circuit judicial selection).

159. See *id.* at 174.

160. See, e.g., 15 U.S.C. § 2060(a) (1994) (providing for review of consumer product safety rules in the D.C. Circuit or circuit where the plaintiff resides); 42 U.S.C. § 7607(b) (1994) (restricting review of certain administrative orders under the Clean Air Act to the D.C. Circuit); 47 U.S.C. § 402(b) (1994) (restricting review of Federal Communications Commission's licensing decision to the D.C. Circuit).

161. See Tobias, *supra* note 1, at 1423 (observing that district court disuniformity "complicates the efforts of lawyers with national practices, such as federal government attorneys, to participate in lawsuits in districts that follow procedures with which they are not completely familiar," and that these problems are also "acute for public interest litigants, such as the Sierra Club and the NAACP, and public interest lawyers"). For certain public interest organizations, such as the American Civil Liberties Union, the conduct of most litigation by state chapters or affiliates whose lawyers primarily practice in a single circuit significantly alleviates the problem of unfamiliarity with strange local procedures. However, even the association by national public interest organizations of local counsel is no guarantee against error, both because the proliferation of arcane local rules trips up even attorneys practicing in their home circuit, see *infra* notes 234-35 and accompanying text, and because the pressures of time deadlines may limit the opportunity for full consultation with local counsel in every instance.

162. The following description of the Justice Department's experience with local circuit rules is based upon my experience as an appellate attorney in the

in theory the United States Attorney in each district might advise Department of Justice lawyers on local circuit procedure, a large volume of civil appeals are handled out of Washington, D.C., with little or no involvement by a local United States Attorney's office. It is not practical or efficient for an appellate attorney operating out of Main Justice in Washington, D.C., to have each brief reviewed by an Assistant United States Attorney, located in another region of the country, for compliance with local circuit rules before timely filing of the document. Despite diligent efforts to remain abreast of the constantly changing rules in each of the thirteen circuits, even the most conscientious of appellate attorneys in the Department of Justice eventually sees a brief or motion "bounced" by a clerk's office because it inadvertently deviates from a technical local rule.

Although nationwide institutions most frequently experience the divergence between circuits in procedure, the impact of the proliferation of local rules falls most heavily upon the neophyte practitioner who rarely, or perhaps never before, has handled a federal appeal. An unsophisticated lawyer may naively, but understandably, believe that the FRAP govern federal appellate practice and therefore fail to uncover conflicting or further complicating local procedural twists. Something is plainly awry when a lawyer may not justifiably stand confidently upon the most obvious and natural authority for federal practice, that is, the *federal* rules, adopted by the Supreme Court after public comment and full deliberation by the Judicial Conference.

C. *Difficulty and Confusion in Finding and Applying Local Rules*

The proliferation of local rules among the circuits has meant a dramatic expansion in the number of rules to be discovered and followed.¹⁶³ Even when circuit practice directives are combined in a set of local rules that are numbered to correspond with the federal rule,¹⁶⁴ the myriad of circuit rules and their increasing

Department's Civil Division for three years, my work in preparing a report for the Division on the Department's problems with the proliferation of local appellate rules, and interviews with numerous Department appellate attorneys in the past two years.

163. See Tobias, *supra* note 8, at 1589 ("Federal court judges, lawyers, and litigants confront a bewildering array of civil procedures, many of which conflict or are difficult to discover, comprehend, and satisfy.").

164. The Judicial Conference's Local Rules Project, in its report on local

complexity hinder full comprehension and multiply the opportunities for innocent error. Attempts first to discover and then to follow local rules require inordinate expenditures of attorney time on relatively minor matters. The risks of error and the consequent harm to litigants rise exponentially with the number of rules to be applied. As Professor Carl Tobias has stated: "Increased complexity is evidenced by the growing number of procedures, many of which have become more complicated, impose onerous obligations, or are obscure or otherwise difficult to find. This complexity has deleterious ramifications for all judges, lawyers, and litigants, but especially for counsel and parties with limited resources."¹⁶⁵

Perhaps no greater evidence of the discord among the courts of appeals exists than the growing market for practitioner handbooks tailored to the individual practice of each of the

appellate rules, recommended the adoption of a uniform numbering system for circuit rules based upon the FRAP. See Report of the Local Rules Project, *supra* note 18, at 2 of accompanying letter. As recently amended, FRAP 47 requires that local rules "conform to any uniform numbering system prescribed by the Judicial Conference of the United States." FED. R. APP. P. 47(a)(1). Moreover, the amended Rule 47 mandates that any "generally applicable direction to a party or a lawyer regarding practice before a court shall be in a local rule rather than an internal operating procedure or standing order." *Id.* Some circuits renumbered their rules in response to the Local Rules Project's suggestion. See, e.g., Proposed Rules, United States Court of Appeals for the District of Columbia Circuit, Explanation of New Proposed D.C. Circuit Rules, *published in* 979 F.2d No. 1 (advance sheet No. 3) CXXXVI, CXXXVIII (Jan. 18, 1993) (on file with the *University of Colorado Law Review*) (stating that, in response to the local rules study, "the primary change proposed is the renumbering and revision of the [c]ourt's local rules so that they correlate to FRAP"). In compliance with FRAP 47, the remainder of the circuits are renumbering their local rules or moving procedural directions from internal operating procedures to local rules. See, e.g., Notice of Proposed Amendments to Local Rules and Internal Operating Procedures, United States Court of Appeals for the Fourth Circuit, *published in* 67 F.3d No. 2 (advance sheet No. 47) CLVII, CLVII (Nov. 20, 1995) (stating that the court was amending its local rules and internal operating procedures "to comply with the anticipated change to Rule 47"); Notice of Proposed Revisions to Local Rules, United States Court of Appeals for the Fifth Circuit, *published in* 66 F.3d No. 2 (advance sheet No. 45) CLXXIX, CLXXIX (Nov. 6, 1995) (explaining changes to local rules as "result[ing] from the amendment to Fed. R. App. P. 47"). As of the date this article was completed, the Sixth Circuit alone persisted in maintaining local rules that are not numbered in correspondence to the federal rules. See Notice of Proposed Amendments to the Rules of the Sixth Circuit, United States Court of Appeals for the Sixth Circuit, *published in* 61 F.3d No. 1 (advance sheet No. 36) CLXIII (Sept. 4, 1995) (describing proposed amendments approved by the court on June 28, 1995, which continue the prior local rule numbering system).

165. See Tobias, *supra* note 1, at 1422 (footnote omitted) (discussing complexity created by diversity of local district court rules).

circuits. Practice manuals—some with multiple volumes—have been or shortly will be published to guide lawyers representing clients in eleven of the thirteen circuits.¹⁶⁶ What a sad commentary upon the disunity of federal appellate practice that a handbook upon the federal rules is no longer adequate and that a particularized treatise upon the peculiar requirements of each circuit has become an essential resource for effective practice.¹⁶⁷

In the meantime, the expansion of local rules seems unabated. The frequency of alterations in local rules further adds to confusion and makes it troublesome just to keep abreast of modifications and revisions.¹⁶⁸ Even a cursory review of the advance sheets of the *Federal Reporter* shows that, at nearly any point in time, some circuit is considering yet another wave of changes in local rules. The constant and unsettled state of change makes it ever more difficult for appellate practitioners to remain current on local rules. In terms of procedural requirements, many of the individual circuits are constantly moving targets.

As a further illustration of the difficulties that may be encountered when an attorney outside of a circuit seeks to ascertain the nature of a court's local rules, I had a trying time in obtaining current copies of the local rules of each circuit. Although nine of the thirteen circuits promptly responded to my written request to the clerk's office for a copy of the local rules and other information, four circuits had failed to answer after four months. Three circuits then responded to a second letter, generally with an apology for the delay. The District of Columbia Circuit, despite repeated written requests to the clerk's office,

166. See Appellate Practice Committee, A.B.A. Section Litig., *A Bibliography of Appellate Practice Books—A Working Draft*, APPELLATE PRAC. J. & UPDATE, Summer 1995, at 5, 8 (listing federal practice handbooks for every circuit except the First and Federal Circuits).

167. Cf. Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1042 (1982) ("To the average lawyer it is Sanskrit; to the experienced federal practitioner it is monopoly; to the author of text books on federal practice it is a golden harvest.") (emphasis added) (quoting *Report of the Committee on Uniform Judicial Procedure*, 46 A.B.A. REP. 461, 466 (1921), which described the disuniformity of federal procedures that prevailed prior to the adoption of the Federal Rules of Civil Procedure).

168. See Wright, *supra* note 4, at 9-10 (observing that even a scholar devoting a lifetime to study in the field of procedure finds it difficult to know which rule is in effect at a particular time because of the frequency of amendments to the federal rules).

never responded to any letter and never provided a copy of the court's rules,¹⁶⁹ even though I noted in my letters that I was a member of the court's bar.

D. Increased Problems in Interpretation and Application of Procedural Rules

The proliferation in number and variety of circuit rules further adds to disunity and confusion by generating additional occasions for interpretation and application of procedural rules—and for error by the court and its staff. As Professor John B. Oakley has written, “Unduly complex rules of procedure not only increase the cost of training, compliance, and enforcement, but also increase the likelihood of mistaken and, hence, unfair application.”¹⁷⁰

For example, the Seventh Circuit by local rule requires the appellant to file a jurisdictional docketing statement within seven days of filing the notice of appeal,¹⁷¹ a requirement not imposed by the federal rules. As reported to me by an experienced federal appellate practitioner, the Seventh Circuit recently granted permission for an interlocutory appeal in a case pursuant to 28 U.S.C. § 1292(b). Since the court of appeals by order had expressly invoked appellate jurisdiction, the attorney for the appellant naturally did not file a jurisdictional statement. The Seventh Circuit clerk's office then issued an order to show cause why the appeal should not be dismissed for failure to file a jurisdictional statement. Although counsel explained the

169. For purposes of this article, the rules of the D.C. Circuit are taken from West's United States Code Annotated Supplement to Title 28 for 1996, as updated by announcements in the advance sheets of the *Federal Reporter*. Local circuit rules are also available on Westlaw.

170. John B. Oakley, *An Open Letter on Reforming the Process of Revising the Federal Rules*, 55 MONT. L. REV. 435, 445 (1994).

171. See 7TH CIR. R. 3(c)(1). Until recently, and at the time this event occurred, the Seventh Circuit's rule required the filing of a “jurisdictional statement.” See 7TH CIR. R. 3(c) (1994) (on file with the *University of Colorado Law Review*). Under the current rule, the required document is variously referred to as a “docketing statement” and a “jurisdictional docketing statement.” See 7TH CIR. R. 3(c)(1). Although the mandated content of the document has been expanded to include some additional information, the focus remains an explanation of appellate jurisdiction. See *id.* (“The jurisdictional docketing statement must comply with the requirements of Circuit Rule 28(b).”); 28(b) (setting out the required content of a jurisdictional statement in an appellant's brief).

situation and pointed out the inapplicability of the local rule,¹⁷² the clerk's office insisted upon the filing of the document. Thus, a patently inapplicable rule was rigidly applied to an inapposite situation, while counsel was threatened with sanctions for violation and made to incur additional expense in compliance.

Similarly, as reported to me by another experienced federal appellate practitioner, an attorney filed a petition for rehearing and suggestion for rehearing en banc, with relevant record documents attached to the petition. The attorney was directed by the Third Circuit clerk's office to file a motion for leave to attach those documents. When counsel asked the clerk's office which rule required such permission, he was cited to the Third Circuit's local rule governing petitions for rehearing, which states that the panel's opinion is a required attachment.¹⁷³ According to the clerk, the rule implies that no other attachments are permitted absent leave granted upon motion. However, the plain language of the rule precludes this interpretation. The Third Circuit's rule states that the petition "shall *include*" the panel's decision,¹⁷⁴ "include" is a non-exclusive term that communicates that the possibility of other attachments is anticipated. In the end, however, the attorney was obliged either to go through the motions of filing a motion, which likely would be granted, or file a new petition for rehearing without the attachment. Both counsel and the court were forced to expend resources in a meaningless formality occasioned by the erroneous interpretation of a technical rule.

IV. THE PROPER ROLE OF LOCAL CIRCUIT RULES

In view of the disarray and confusion which accompany the expansion of diverse local rules, a restoration of the primacy of the federal rules and discouragement of the upsurge in circuit

172. The Seventh Circuit's rule did not apply by its own terms, as a permissive appeal under Section 1292(b) does not involve the filing of a notice of appeal, which is the event that triggers the docketing statement requirement under the local rule. See 7TH CIR. R. 3(c)(1) (providing that a jurisdictional statement must be filed either "with the clerk of the district court at the time of the filing of the notice of appeal or with the clerk of this court within seven days of filing the notice of appeal").

173. See 3D CIR. R. 35.2 ("A petition seeking either panel rehearing or rehearing in banc shall include as an exhibit a copy of the panel's Judgment, Order, and Opinion, if any, as to which rehearing is sought.").

174. *Id.* (emphasis added).

procedural divergence should be the order of the day. However, it is appropriate to consider when local rules may be warranted. As developed below, the routine apologies for local rules—such as the need to respond to uniquely local concerns¹⁷⁵ or to supplement the general provisions of the federal rules¹⁷⁶—are slender reeds upon which to rest the substantial weight of widespread circuit experimentation. In any event, these rationales justify procedural variation under only the most narrow of circumstances and only when the federal rules either expressly contemplate local variation or are entirely silent on a subject. Rather than unilaterally implementing new ideas through circuit governance, circuit judges should urge their colleagues and attorneys nationwide to support incorporation of positive innovations into the FRAP. In the end, ensuring a high level of national uniformity and avoiding burdensome inter-circuit procedural conflicts may require development of a preclearance process whereby the Judicial Conference must affirmatively approve circuit rules.¹⁷⁷

A. *Responding to Uniquely Local Concerns*

There are matters of genuinely local concern that properly may be subject to regulation by local circuit rules. However, “local concern” should be understood narrowly to mean unique circumstances that arise because of the physical size, geographical location, or caseload of the court—not a different philosophical attitude held by the judges in a circuit about adjudication or litigation. To the extent that a procedural issue implicates a value judgment about the rights and responsibilities of litigants and their counsel, the matter should be governed by a uniform federal rule.¹⁷⁸ Nor should individual circuits be permitted to add to the burdens upon counsel, as when they dictate additional elements that must be included in a brief. Such directives do not legitimately reflect genuinely local exigencies and instead clutter appellate practice with additional technicalities while generating conflicts between the circuits.

Purported differences in the nature or type of litigation among the circuits may not legitimately be invoked to justify local

175. See *infra* Part IV.A.

176. See *infra* Part IV.B.

177. See *infra* Part V.A.3.

178. See *infra* Part IV.B.

disparity in appellate procedures. Although circuits may have the discretion under the rules to vary procedures on a case-by-case basis when dealing with particularly complex appellate litigation, the federal rules are designed to be "trans-substantive," meaning that procedural rights do not vary by the subject matter of the litigation. Rulemaking tailored to the specific type of substantive claim raised or defense made would offend the objective of procedural neutrality. As Professor Paul D. Carrington says, "[J]udicially-made rules directing courts to proceed differently according to the substantive nature of the rights enforced is an idea that has been wisely rejected in the past and must be rejected for the present and for the future."¹⁷⁹

In any event, the nature of appellate litigation among the circuits is unlikely to vary substantially or in a manner conducive to specially designed procedures. And very few local rules can plausibly be defended as responsive to local concerns about the prevailing subject matter of appeals heard within that circuit.¹⁸⁰ The few exceptions may actually prove the opposite point that local variation is not justified based upon a category of litigation. For example, the D.C. Circuit has adopted a special rule requiring the appellate brief to include a glossary of abbreviations used in the document.¹⁸¹ The local rule was adopted in view of the substantial number of administrative appeals, heard by the D.C. Circuit, that feature an "alphabet soup" of abbreviations for agencies, departments, statutes, and regulations. However, potentially confusing abbreviations or short references are not unique to administrative appeals. They also arise frequently in complex commercial litigation, in cases involving medical terminology, and in lawsuits raising science and technology issues. Moreover, regional circuits also hear administrative appeals with regularity. If the requirement of a glossary of

179. Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2068 (1989).

180. See Carrington, *supra* note 3, at 945-46 (stating that "the primary task of each federal court is essentially the same in all districts, and the differences among them seldom suggest reasons for material differences in the procedure employed in different districts," and further observing that a review of sets of local district rules shows that the differences among them "seldom, if ever, reflect variations in local conditions" but rather reflect "differences in the styles and values of particular groups of judges").

181. See D.C. CIR. R. 28(a)(3).

abbreviation is justified as a procedural innovation, the merit of the rule is not limited to a single circuit or a single area of litigation.

1. Local Rules Relating to Size or Location of Court

As an example of a response to truly local concerns, circuit-by-circuit variances on the number of copies of motions, briefs, or petitions to be filed are unavoidable, given the different number of judges in and the varying geographic area of each circuit.¹⁸² Nonetheless, when a national rule on a particular point might not be adequately universal in application and local variation is desirable, the individual federal rule should be drafted to indicate the propriety of adjustment by local rule on that particular point. For example, FRAP 31(b) expressly recognizes the need for local variation, providing that “[t]wenty-five copies of each brief must be filed with the clerk . . . unless the court requires the filing or service of a different number by local rule or by order in a particular case.”¹⁸³

2. Local Rules Relating to Case Management Based upon Particular Court Caseload

Because each court must manage its own caseload, and this burden varies from circuit to circuit, circuits may need some latitude in establishing procedures designed to control that

182. FRAP 25(e) provides generally that “[w]hen these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.” FED. R. APP. P. 25(e). The Advisory Committee comments to the rule explain:

The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that, if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

Notes of Advisory Committee on Rules, 1994 Amendment to Federal Rule of Appellate Procedure 25(e), 28 U.S.C. app. 612 (1994).

183. FED. R. APP. P. 31(b).

caseload.¹⁸⁴ Again, however, as with other local procedures, circuit rules governing case management must be grounded in truly unique local concerns, not contrasting philosophies about the litigation and disposition of disputes. Moreover, as with rules relating to size or location of the circuit, the governing federal rule should expressly indicate whether local supplementation is contemplated.

As an example of legitimate local case management, each circuit must be able to devise and implement an individualized settlement conference program. Settlement programs are not as easily susceptible to detailed national regulation by federal rules. In some circuits, the time and cost of routinely referring civil cases to settlement conferences may not be justified, while other circuits may wish to investigate the possibility of settlement in most categories of civil appeals. Nevertheless, general national guidelines should be developed because experience with various approaches in the circuits reveals that the settlement process may be applied in a manner that unduly burdens appellate practice. FRAP 33,¹⁸⁵ which governs appeal or settlement conferences, should be revised to provide further direction on the purposes and appropriate methods of a settlement conference. Such an amendment could largely leave settlement programs to development by local rule but should mandate that cases be screened to exclude appeals not suitable for settlement discussion¹⁸⁶ and that telephonic conferences ordinarily be

184. See Robel, *supra* note 6, at 1483-84 ("The spectrum of local conditions, ranging from congested and overworked urban courts to the relative quiet of rural courts, offers the most defensible reason for local variation."); Roberts, *supra* note 17, at 549 ("Although the federal rules establish a coherent, workable, and reasonably complete procedural system to resolve civil litigation, some aspects of case management almost certainly are governed better by local regulations than by national ones."). But see Chemerinsky & Friedman, *supra* note 2, at 785 (arguing that differences in caseloads do not justify different treatment by varying local procedural rules but instead demand congressional action through more judges or curtailed jurisdiction to lift the caseload burden).

185. FED. R. APP. P. 33. At present, FRAP 33 requires no evaluation of which cases are suitable for settlement conference and contains no explicit protections for counsel from abusive conduct by settlement commissioners or undue burdens.

186. See BAKER, *supra* note 74, at 138 (concluding that obtaining the full potential of circuit settlement conferences requires "developing a profile of the appeal with a high probability of settlement," so that "[s]carce resources and extra efforts could then be spent more judiciously than in an approach that treated all appeals as fungible").

permitted when out-of-town counsel are involved.¹⁸⁷ In addition, government attorneys participating in a settlement conference should not be required to possess settlement authority when statutes or regulations reserve that authority to higher officials.¹⁸⁸

As an example of a commendable case management approach, but one that nonetheless should be formally approved through the federal rules, the D.C. Circuit is uniquely prompt and efficient in the scheduling of cases for briefing, argument, and submission for decision. Shortly after an appeal is docketed, the court establishes a briefing schedule and simultaneously announces both the date and panel of judges for the oral argument. The D.C. Circuit is understandably reluctant to grant even a short extension of time for filing a brief,¹⁸⁹ because any extension reduces the time allowed to the pre-assigned judges to prepare for the pre-scheduled oral argument.¹⁹⁰ Nevertheless, the court's strict and unfavorable attitude toward extensions cannot be

187. The Ninth Circuit, for example, uses the docketing statement filed by counsel to determine whether a case is suitable for a prebriefing conference. Moreover, the court's plan provides that initial conferences will generally be held by telephone with counsel only. See Memorandum from the United States Court of Appeals for the Ninth Circuit to counsel in civil appeals and petitions for review regarding procedures governing the Prebriefing Conference Program (on file with the *University of Colorado Law Review*).

188. Under published regulations, any settlement of a federal government case has to be approved by specified Department of Justice officials, up to and including the Deputy Attorney General, depending upon the nature of the case or amount of money involved. See 28 C.F.R. §§ 0.160-.172 (1995). See generally URBAN A. LESTER & MICHAEL F. NOONE, *LITIGATION WITH THE FEDERAL GOVERNMENT* 21-41 (3d ed. 1994) (discussing settlement of government appeals). Accordingly, the individual government attorney advocating the case in court generally will not have full settlement authority and, except in extraordinary circumstances, the court staff member directing the settlement program should not demand that the department official with settlement authority personally appear at a settlement conference. See *In re Stone*, 986 F.2d 898, 903-05 (5th Cir. 1993) (reversing, as abuse of discretion, a district court standing order routinely requiring a representative of the federal government with ultimate settlement authority to appear at all settlement conferences, recognizing that "the government is in a special category" both in terms of its "need for centralized decisionmaking" and because it is a party to a great number of cases on a nationwide basis).

189. See D.C. CIR. R. 28(f)(1) (stating that the court "disfavors" motions to extend time limits and will grant them "only for extraordinarily compelling reasons").

190. Nevertheless, the court should set briefing and argument schedules with a few days flexibility to allow routine short extensions of time when counsel demonstrates that unanticipated problems have arisen in production of the brief, such as the need to complete the table of authorities or difficulties in printing.

squared with the less discouraging standard of FRAP 26(b), which allows enlargement of time "for good cause shown."¹⁹¹

The D.C. Circuit, by taking affirmative action to expeditiously hear each case after docketing, can thereby justify its negative attitude toward briefing extensions that interfere with its approach. However, the common adoption of an "extraordinary circumstances" standard for briefing extensions by other circuits should not readily be accepted.¹⁹² There is nothing more annoying to counsel, or embarrassing to a court, than for the court to deny or reduce a motion for extension and then leave counsel waiting many months after completion of briefing before the court sets the case for oral argument. At the very least, FRAP 26(b), which allows extensions of time for "good cause," should be read *in pari materia* with FRAP 31(a), which allows a circuit by local rule to shorten the periods prescribed for filing briefs only if the court "is prepared to consider cases on the merits promptly after briefs are filed."¹⁹³ As concretely manifested by its scheduling of oral argument at the same time the briefing schedule is set, the D.C. Circuit plainly is so prepared. Most other circuits cannot make the same guarantee.

Accordingly, because it conflicts with FRAP 26(b)'s provision for extension of briefing time on the relatively low standard of "good cause,"¹⁹⁴ even such a progressive case management technique as the D.C. Circuit's advance scheduling of oral argument is questionable because it was adopted unilaterally. Instead, such an innovation should be implemented only pursuant to appropriately narrow accommodation and express provision in the FRAP. In that manner, the supremacy of the federal rules would be established, local innovation would be reviewed prior to implementation by the Judicial Conference for consistency with uniform standards, and exceptions to the federal

191. FED. R. APP. P. 26(b).

192. See *supra* Part II.D (discussing the diversity of local circuit rules on requests for extension of briefing time).

193. FED. R. APP. P. 31(a). The Judicial Conference's Advisory Committee on Federal Rules has proposed minor stylistic amendments to FRAP 31(a), which would emphasize that a shortened period for filing briefs may be required only by a court of appeals that is regularly prompt in considering cases. The proposal would permit a local rule to shorten the time period for brief filing only in a circuit that "routinely considers cases on the merits promptly after the briefs are filed." 1996 Proposed Amendments, *supra* note 39, at 102, 165 F.R.D. at 230 (emphasis added to indicate proposed revision).

194. See *supra* Part II.D.

procedures would be strictly defined. The D.C. Circuit's salutary scheduling approach could be approved through an amendment to FRAP 26(b) providing: "a motion for an enlargement of time to file a brief is disfavored once the date for oral argument has been set by court order."

B. Supplementation of the Federal Rules

The greatest danger to the primacy of the FRAP lies in the common suggestion that local circuits may *supplement* the federal rules with interstitial directives. Supplementation easily evolves into substitution. Moreover, even when local rules are truly supplemental—and do not overlap in any meaningful way with the federal rules—their adoption by individual circuits reduces the incentive to seek similar revision of the nationally-applicable procedures.¹⁹⁵ Moreover, every supplemental rule adds to the "bewildering array" of procedures faced by judges, lawyers, and litigants, which makes it difficult to "discover, comprehend, and satisfy" procedural requirements.¹⁹⁶

Nonetheless, within strictly defined and narrow parameters, supplementation of the federal rules may expand procedural opportunities for both court and counsel and allow some local experimentation at little expense to national uniformity. The FRAP should be understood to preempt the entire field upon which they play. That is, if the federal rules speak to an aspect of procedure, then they should be recognized as the exclusive provision governing that point. Supplementation should be allowed only in those areas where the federal rules are silent on a general subject or expressly contemplate elaboration through local rules. To be sure, a measure of uncertainty necessarily remains as to where the boundaries of the field lie and how closely a local rule may approach a matter addressed by the federal rules without trespassing. Still, a clear statement about the preeminence of the FRAP and a strong presumption against

195. See Tobias, *supra* note 1, at 1426 ("As [the procedural] system becomes increasingly local and disuniform, there may even be less perceived need for national rule revision.").

196. See Tobias, *supra* note 8, at 1589 ("Federal court judges, lawyers, and litigants confront a bewildering array of civil procedures, many of which conflict or are difficult to discover, comprehend, and satisfy.").

local rule interference would go a long way toward eliminating complications created by circuit rulemaking.¹⁹⁷

In fact, relatively few of the FRAP admit to local variation and then only for narrow purposes.¹⁹⁸ Most commonly, a federal rule allows circuits by local rule to provide for filing a different number of copies of documents; almost never do the federal rules permit the circuits to augment the burdens of appellate practice.¹⁹⁹ Most importantly, by the plain language of the federal rules, the restrained authorization of local rulemaking on certain defined points excludes the possibility of local variation where not expressly permitted.²⁰⁰

197. See Chemerinsky & Friedman, *supra* note 2, at 788 (taking “the general position that although there might be some narrow compass for interstitial local rules, such rules still should be the exception”).

198. See FED. R. APP. P. 5(c) (allowing local rule to set number of copies for petition for permission to appeal under 28 U.S.C. § 1292(b) (1994)), 5.1(c) (allowing local rule to set number of copies for petition for permission to appeal under 28 U.S.C. § 636(c)(4) (1994)), 6(b)(2)(iii) (allowing designation by local rule of parts of the record that need not be transmitted by the clerk of the district court and allowing local rule to provide for transmission of a certified copy of the docket entries in lieu of the record), 10(b)(1) (allowing local rule to except counsel from duty to order trial transcript), 11(b)(e) (allowing local rule for same purposes as under FRAP 6(b)(2)(iii) as described above), 21(d) (allowing local rule to set number of copies for petition for a writ of mandamus), 25(a) (allowing local rule to permit filing of documents by facsimile or other electronic means), 25(e) (allowing local rule to set number of copies for documents), 26.1 (allowing local rule to require filing of a corporate disclosure statement earlier than in the brief and to set the number of copies of the corporate disclosure statement), 27(d) (allowing local rule to set number of copies for motions), 28(g) (allowing local rule to set the permissible length of briefs), 30(a) (allowing local rule to set number of copies for the appendix), 30(b) (mandating local rule to provide for sanctions for “unreasonably and vexatiously increasing the costs of litigation through the inclusion of unnecessary material in the appendix”), 30(c) (allowing local rule to provide for use of deferred appendix in “classes of cases”), 30(f) (allowing local rule to dispense with appendix in all cases or classes of cases), 31(a) (allowing local rule to shorten the time period for filing briefs if the court is prepared to consider the case on the merits “promptly after briefs are filed”), 31(b) (allowing local rule to set number of copies for the appendix), 34(a) (allowing court by local rule to permit a panel of judges to unanimously agree to dispense with oral argument in a case), 35(d) (allowing local rule to set number of copies for suggestions for hearing or rehearing en banc), 39(c) (mandating local rule to fix the maximum rate at which costs of printing or producing briefs, appendices, and records are taxable as costs), 40(a) (allowing local rule to shorten or enlarge the time to file a petition for rehearing), 40(b) (allowing local rule to set number of copies for petitions for rehearing), 45(a) (allowing local rule to provide for clerk’s office to be open on Saturdays or certain legal holidays), 46(a) (allowing local rule to set fee for admission to practice before a court of appeals).

199. See *id.*

200. See Report of the Local Rules Project, *supra* note 18, at 45 (“When the Advisory Committee has intended that a court make . . . a regulation by local rule, it

Thus, for example, the individual circuits are ousted by the federal rules from interposing new requirements about the content of, form for, addenda to, or covers for appellate briefs. The federal rules expressly and comprehensively address those subjects; they do not allow any departure from the national standard by local rules.²⁰¹ Local rules on these points do not supplement, but conflict, with the federal rules. As discussed earlier,²⁰² the local rules of the various circuits probably vary more on the content and format of briefs than on any other point. Because the preparation of an appellate brief lies at the heart of appellate practice, diversity and disarray in the standards and expectations for the content and format of briefs are unacceptable.

Moreover, local rules should not be contemplated when the federal rules “implement value choices of consequence to the participants in a lawsuit.”²⁰³ For example, the maximum length fixed for an appellate brief reflects a value choice between the due process rights of a party to make a full and complete presentation of a case to the court and the practical concerns of the court about the burdens placed on judges who must read the briefs. The proper balance between the advocacy rights of litigants and the efficiency concerns of the courts of appeals should be struck at the national level, because it is a matter of general importance. The courts of appeals today frequently refuse to consider arguments

has clearly stated that intent.”); *see also* Roberts, *supra* note 17, at 553 (“Local rules should be permitted when they are expressly required or permitted to be made by statute or federal rule, and when regulation is accomplished better at the local than at the national level.”).

201. *See* FED. R. APP. P. 28, 32; *see also* Report of the Local Rules Project, *supra* note 18, at 47 (“If the Advisory Committee had intended that additional areas be discussed in the briefs, it could easily have amended Appellate Rule 28 to include these items. Further, such variations among the courts may unduly confuse practitioners.”).

202. *See supra* Part II.C.

203. *See* Robel, *supra* note 13, at 59 (arguing that a unified federal system is generally preferable and that “most procedural rules implement value choices of consequence to the participants in a lawsuit”); *see also* Miner v. Atlass, 363 U.S. 641, 648 (1960) (striking down a local rule that adopted a procedure that had been deliberately omitted from the federal rules, holding that the omission “must be taken as an advertent declination of the opportunity to institute” the procedure); Chemerinsky & Friedman, *supra* note 2, at 788 (stating that a rule cannot be considered “interstitial” if it differs in fundamental policy from the federal rules); Levin, *supra* note 17, at 1569 (stating that local rules “were to operate in the interstices, providing a little ‘play in the joints,’ without significant impact on the national scheme”).

that are not addressed at some length in the briefs and decide cases on grounds beyond those considered by the trial court, thus requiring parties to anticipate and address issues that may not have been central below.²⁰⁴ Accordingly, the permissible length of an appellate brief should not vary from one circuit to the next.

Admittedly, while providing generally for principal briefs of fifty pages and reply briefs of twenty-five pages, FRAP 28(g) expressly allows the circuits to adopt different limits by local rule.²⁰⁵ While this federal rule at least alerts the federal practitioner to the possibility of deviation in a circuit by local rule, the door to circuit variation on brief length may not be open very far. The Advisory Committee comments explain that FRAP 28(g) was made subject to local rule "to permit the courts of appeals to require that typewritten briefs be typed in larger type and permit a correspondingly *larger number of pages*."²⁰⁶ Thus, circuit rules reducing the permissible length of briefs stand contrary to the purpose of the local rule allowance in FRAP 28(g).²⁰⁷ Moreover, the Judicial Conference's Advisory Committee on Appellate Rules has proposed deletion of FRAP 28(g) and the substitution of detailed rules on length of briefs in a rewritten FRAP 32—with no allowance for variation by local circuit rule.²⁰⁸

By contrast, as an example of legitimate supplementation, several circuits have adopted rules authorizing summary disposition, on motion of the court or a party, in the extraordinary case where the appeal presents no substantial question.²⁰⁹ By providing for summary affirmance or reversal, a matter not addressed by the federal rules, a circuit promotes expeditious resolution of appeals without imposing additional procedural

204. See *Evaluation of the Seventh Circuit*, *supra* note 148, at 703 (criticizing the Seventh Circuit's stringent use of page limitations, even in complicated or multiple party cases, notwithstanding that the court "has frequently stated that it will not consider arguments that have not been discussed at some length in a brief" and that the court "sometimes decides cases on grounds not invoked by the trial court," thus requiring parties "to brief issues that may not have been central below").

205. See FED. R. APP. P. 28(g) (establishing page limitations for briefs "[e]xcept . . . as specified by local rule of the court of appeals").

206. 28 U.S.C. app. at 616 advisory committee's note (1994) (1979 Amendment to Federal Rule of Appellate Procedure 28) (emphasis added).

207. See *supra* Part II.C.2.

208. See 1996 Proposed Amendments, *supra* note 39, at 90, 107, 165 F.R.D. at 218, 235.

209. See 1ST CIR. R. 27.1; 3D CIR. R. 27.4; 4TH CIR. R. 27(g); 5TH CIR. R. 42.2; 8TH CIR. R. 47A (allowing summary disposition on motion of court and motion by party to dismiss for lack of jurisdiction); 9TH CIR. R. 3-6.

burdens upon counsel. Rather than uprooting existing procedures set forth in the FRAP, these courts have planted a new procedure in an open field. Even here, however, the preferable alternative would be cooperative laboring in the vineyard of the federal rules by grafting this new shoot onto the national procedural branch.

C. *Simplifying or Streamlining the Process*

Finally, individual circuits should not be precluded from adopting local rules that simplify or streamline the appellate process—provided that compliance with the national standard is not penalized.²¹⁰ Regardless of the local rules, compliance with the FRAP should always satisfy a party's obligation to the court. However, if a circuit, by local rule, has adopted a streamlined or simplified procedure, a party's adherence to that procedure may also satisfy a party's obligation to the court. In other words, a local rule enunciating a simplified procedure must be understood, and should be expressed as, an *alternative* to the federal rules.

For example, FRAP 30 establishes a complex procedure for preparing the record appendix that counsel must file with the court of appeals.²¹¹ However, some circuits permit a much simpler process of allowing the parties to file "record excerpts" with the court.²¹² Justice would not be served by precluding circuits from accommodating parties through more efficient alternatives, as long as parties would not be sanctioned if they chose to follow the more burdensome federal rule.²¹³ Even here, however, it would be disappointing should the motivation for national rule reform be dissipated through seriatim, and inevita-

210. I am indebted to Kenneth Servay, presently at Chaffe, McCall, Phillips, Toler & Sarpy of New Orleans, for suggesting this rationale for legitimate local rulemaking to our American Bar Association subcommittee study. See Letter from Kenneth J. Servay to Kathleen McCree Lewis 1 (Jan. 5, 1994) ("I propose amending Fed. R. App. 47 to establish the uniform Federal Rules of Appellate Procedure as the national standard that precludes courts from adopting requirements that are more onerous than allowed by the Federal Rules, but nevertheless, that allows the circuits to modify the national rules to simplify or streamline practice in the circuit, so long as compliance with the national standard is not penalized.") (on file with the *University of Colorado Law Review*).

211. See FED. R. APP. P. 30.

212. See *supra* Part II.E.

213. Again, I recognize Kenneth Servay for offering the "record excerpt" example of efficient local rulemaking that simplifies appellate practice. See Letter from Kenneth J. Servay to Kathleen McCree Lewis, *supra* note 209, at 1-2.

bly conflicting, adoption of innovations in individual circuits. In any event, circuits by local rule should not be permitted to unilaterally adopt procedures that are more onerous than those established by the uniform FRAP.

D. Conclusion

Having defined the proper and narrow role of local rules, and then compared those standards to the proliferating local rules described previously, it is beyond peradventure that most circuit rules fail to pass muster. As Professor Lauren Robel observes:

Local court tinkering with the Federal Rules is rarely inspired by the disutility of a Rule under local conditions. Rather, it is inspired by a belief that the rulemakers got it wrong. This position should be viewed with suspicion, both because there is a method of securing rule changes that respects national concerns and because deviations from that method are notoriously difficult to challenge.²¹⁴

The vast majority of local circuit rules fall into this category—local “tinkering” with the national rules—rather than that of responses to unique local situations. As a consequence, most local rulemaking reflects an attitude of circuit autonomy and promotes the disintegration of a unitary federal appellate system. This form of local experimentation is illegitimate and inconsistent with both the spirit and the letter of the FRAP.

V. RECOMMENDATIONS TO RESTORE A UNIFIED SYSTEM OF FEDERAL APPELLATE PRACTICE

A. Action by the Judicial Conference

For better or worse, the focal point of federal court rulemaking today is the Judicial Conference of the United States. The Supreme Court, although statutorily endowed with the power to prescribe procedural rules,²¹⁵ has adopted a deferential attitude toward the recommendations of the Judicial Conference. Most

214. Robel, *supra* note 6, at 1484.

215. See 28 U.S.C. § 2072(a) (1994) (“The Supreme Court shall have the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts . . . and courts of appeals.”).

recently, when the Court approved controversial rules in 1993 regarding discovery²¹⁶ and sanctions, Chief Justice Rehnquist distanced the Court from the substance of the amendments in the language of his letter to Congress:²¹⁷ “While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.”²¹⁸ Justice White published a separate statement explaining that the Judicial Conference and its committees, rather than the Court itself, drafts and proposes the rules, and that the Court has “hardly ever refused to transmit the rules submitted by the Judicial Conference.”²¹⁹ He emphasized that the Court has assumed “a much more limited [role,]” “transmit[ing] the Judicial Conference’s recommendations without change and without careful study, as long as there is no suggestion that the committee system has not operated with integrity.”²²⁰

Thus, the best hope for restoration of a unitary federal judicial system resides with the Judicial Conference. Because the Judicial Conference represents members of the federal judiciary from across the nation, and from each of the thirteen federal appellate circuits, that body possesses the broader vision necessary to sustain and reinvigorate a national regime of procedure.

216. See *supra* notes 9-16 and accompanying text (discussing 1993 amendments to discovery rules respecting mandatory disclosure).

217. See Oakley, *supra* note 170, at 436 (describing the Court’s action as “submitting these amendments to Congress with one arm outstretched and the other arm held to its nose”).

218. Letter from William H. Rehnquist, Chief Justice of the United States Supreme Court, to Thomas S. Foley, Speaker of the House of Representatives (Apr. 22, 1993), reprinted in 146 F.R.D. 403 (1993).

219. Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 501, 501-02 (1993) (Statement of White, J.).

220. *Id.* at 505-06; see also Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1674-75 (1995) (stating that “[o]n most occasions, the Court has deferred to the Judicial Conference and has prescribed without change proposed rules amendments submitted by the Judicial Conference,” although the Court has deferred a couple of rule proposals and approved others only over dissents during the 1990s); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 466 (1993) (finding little evidence that the Supreme Court has ever effectively participated in civil rulemaking). *But see* Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 501, 513 (1993) (Scalia, J., dissenting) (arguing that “categories of revision” of the rules that “rise to the level of principle and purpose” should be subject to careful review by the Court).

1. The Limited Progress of the 1995 Amendments to FRAP 47

The recent amendments to FRAP 47 proposed by the Judicial Conference and adopted by the Supreme Court in 1995²²¹ are an encouraging step in the right direction—but only a step. FRAP 47, as amended, (1) reaffirms that local appellate rules must be consistent with the federal rules, as well as with federal statutes; (2) requires renumbering of local rules to conform with a uniform numbering system; (3) precludes enforcement of a local rule “imposing a requirement of form in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement”; and (4) prohibits imposition of sanctions for failure to comply with a requirement that is not included in the local rules, unless the party or attorney has actual notice of the requirement.²²² Thus, the amended federal rule makes identification of pertinent rules somewhat easier by requiring circuit rules to follow the same format as the FRAP and alleviates injustice by preventing dismissal of an appeal or refusal to accept a brief as timely filed because of errors in form.

Although these amendments are an encouraging first step, their effect is likely to be limited. The amendments to FRAP 47 do not directly prevent circuits from imposing and enforcing technical and burdensome local requirements. To be sure, the amended rule expressly bars local rules that are inconsistent with the federal rules.²²³ However, the very same directive was included in the prior rule (and, not incidentally, it is commanded in the Rules Enabling Act²²⁴ itself), but the circuits have not fully honored it. Thus, despite renewal of this longstanding preclusion in the recent amendment to FRAP 47, the thirteen circuits are

221. Amendments to Federal Rules of Appellate Procedure, 161 F.R.D. 163, 175-76 (1995) (announcing amendments to FRAP 47 to be effective on December 1, 1995).

222. See FED. R. APP. P. 47.

223. See *id.* 47(a)(1) (“A local rule shall be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. § 2072 . . .”).

224. 28 U.S.C. § 2071(a) (1994) (authorizing courts to prescribe rules which “shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072,” which authorizes the Supreme Court to prescribe general rules of practice and procedure).

unlikely to be restrained from their continuous generation of conflicting local rules.²²⁵

Moreover, the new protection against loss of rights resulting from enforcement of local requirements of form²²⁶ prevents only the worst injustices but does nothing to lift the burden of those local requirements. Although a circuit court clerk must initially accept the filing of a non-conforming document to preserve timeliness,²²⁷ the party may still be required to revise the document before the appeal is allowed to proceed. For example, the Third Circuit by local rule provides that, while a document that does not comply with the FRAP or local rules will be filed, the clerk shall notify the party of "the need to promptly correct the deficiency."²²⁸ If the party fails or declines to revise the document, the Third Circuit local rule authorizes the court, in its discretion, to "impose sanctions as it may deem appropriate, including but not limited to the dismissal of the appeal, striking of the document, imposition of costs or disciplinary sanctions upon counsel."²²⁹

Finally, it remains to be seen which local variations on appellate practice will be regarded as mere "requirements of form," as opposed to more substantive rules that a court may enforce without opportunity for correction, even to the point of denying a party the right to file a brief or the ultimate sanction of dismissal of the appeal. The advisory committee comments to the FRAP 47 amendments state:

The proscription . . . is narrowly drawn—covering only violations that are not willful and only those involving local rules directed to matters of form. It does not limit the court's power to impose substantive penalties upon a party if it or its attorney stubbornly or repeatedly violates a local rule, even one involving merely a matter of form. Nor does it affect the

225. See *supra* Part II.

226. See FED. R. APP. P. 47(a)(2) ("A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.").

227. See FED. R. APP. P. 25(a)(4) ("The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rules or practices.").

228. 3D CIR. R. 107.3.

229. *Id.*

court's power to enforce local rules that involve more than mere matters of form.²³⁰

Thus, once an attorney is made aware of a local requirement, however technical or burdensome it may be, FRAP 47 does not excuse full compliance. The complications of local practice remain unaltered.

2. Further Revision of FRAP 47

If meaningful progress toward reunification of the federal appellate system is to be achieved, the 1995 amendments to FRAP 47 must be regarded as merely a first step. Repeated prohibitions on inconsistent local rules have not hindered the centrifugal tendency toward procedural autonomy among the circuits. Therefore, FRAP 47 should be revised to preclude, with even greater explicitness and elaboration, circuit adoption of local rules that conflict with the letter or spirit of the federal rules.²³¹ Unless a particular federal rule specifically contemplates supplementation, a federal procedural directive should be understood as exclusively occupying the field and allowing no localized deviation.²³² Local rules that impose more burdensome or onerous practice requirements, especially the confusing multiplication of technical mandates, should be definitively rejected. Nothing in a federal rule should preclude circuits from establishing alternative procedures that simplify or streamline the process, provided that compliance with the requirements of the FRAP shall satisfy a party's obligations to the court.²³³

Moreover, the circuits should be required to stand still once in awhile so that practitioners may come up to speed on the latest revisions of local practice rules.²³⁴ Compliance with the myriad

230. Amendments to Federal Rules of Appellate Procedure, 161 F.R.D. 163, 176 (1995) (advisory committee comments on amendments to FRAP 47).

231. See *supra* Part IV.

232. See *supra* Part IV.B.

233. See *supra* Part IV.C.

234. See Letter from Thomas F. Strubbe, Clerk, United States Court of Appeals for the Seventh Circuit, to Sharon N. Freytag, Chair, Subcommittee on Local Rules, Appellate Practice Committee, ABA Section of Litigation (July 1, 1994) ("The frequent changing of rules, be they local or national, adds much uncertainty to practice before this, or any court; that, of necessity, creates problems regarding the education of the bar and enforcement of the unfamiliar new rules.") (on file with the *University of Colorado Law Review*).

of local rules is made even more difficult by the dizzying frequency of amendment.²³⁵ Even for attorneys practicing in their "home" circuit, the proliferation of local rules and the constancy of changes to them create stumbling blocks to practice and result in errors of non-compliance with new revisions. More than one appellate attorney has related the frustration felt when he or she has been unable to follow the form of a brief filed in a circuit in a recent case because of further evolution in the local rules during even a short intervening period.

FRAP 47 should be amended to allow each circuit to modify its local rules only once a year in the absence of exigent circumstances, with any changes to become effective on January 1 of the following year.²³⁶ However, allowance of annual rule changes should not be understood as an encouragement to revise procedure with regularity on a yearly basis.²³⁷

3. The Power to Veto Circuit Rules

Although little known, and seldom invoked, the Judicial Conference has the statutory power to modify or abrogate any rule prescribed by a circuit.²³⁸ In sum, the Judicial Conference may veto local appellate rules. On only one occasion, however, has the Conference been requested to overturn a circuit rule. In March 1994, the attorneys general of five states asked the Judicial Conference to set aside the Ninth Circuit's local rule governing death penalty appeals as inconsistent with federal law.²³⁹ Rather than formally exercising its power of abrogation, the Judicial Conference, through its Committee on Practice and Procedure, diplomatically expressed the sense that there was an inconsistency between the circuit rule and federal law and then

235. See *supra* Part III.C.

236. See Report of the Local Rules Project, *supra* note 18, at 79 (recommending that FRAP 47 be amended "to provide that local rule amendments and additions be made effective on only specified dates (*e.g.*, January 1 of each year only or January 1 and July 1 of each year)").

237. See Letter from Thomas F. Strubbe to Sharon N. Freytag, *supra* note 234, at 1-2 ("I particularly applaud your effort to have Rule 47 amended to provide that each circuit may modify its local rules no more than once a year in the absence of exigent circumstances. I have more-or-less sold our court on this principle . . .").

238. See 28 U.S.C. § 2071(c)(2) (1994) ("Any . . . rule prescribed by a court other than the Supreme Court . . . shall remain in effect unless modified or abrogated by the Judicial Conference.").

239. See McCabe, *supra* note 219, at 1690 n.182.

effectively remanded the matter to the Ninth Circuit by inviting it to reconsider the local rule.²⁴⁰

The Judicial Conference should vigorously and unapologetically exercise its statutory power, with the announced purpose of restoring the federal rules to their proper primary status and reducing the disarray in local circuit rules. The *Proposed Long Range Plan for the Federal Courts*, adopted by a committee of the Judicial Conference, recommends that the Conference invoke its oversight powers and reduce the number of local rules.²⁴¹ If the Judicial Conference fails to act *sua sponte*, then a credible entity, like the United States Department of Justice, should file a formal protest to start the ball rolling. As a good start, all circuit rules purporting to supplement FRAP 28, which prescribes the contents, length, references within, and addenda to appellate briefs,²⁴² are ripe for challenge. With the sole exception of its provision on the length of briefs,²⁴³ FRAP 28 makes no allowance for variation by local rule.²⁴⁴ Not only would the veto of the vast range of circuit rules setting idiosyncratic requirements for briefs set a strong precedent, but in one fell swoop a substantial amount of the clutter in federal appellate practice would be swept away.

Finally, to further ensure a national vision for appellate procedure, the Rules Enabling Act should be amended to transform the Judicial Conference's negative veto power into a positive power of approval. Deviant local rules would be discouraged if the circuits were barred from implementing any local rule without preclearance by the Judicial Conference.²⁴⁵ The Confer-

240. See Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Minutes of the Meeting of January 11-13, 1995, 1995 WL 811896, at *11-12; see also Carrington, *supra* note 3, at 978 (explaining that "the Judicial Conference has questioned a circuit rule adopted by a U.S. Court of Appeals and induced that court willingly to modify its rule to bring it into line with the Rules Enabling Act"). The Ninth Circuit issued an interim or draft rule as suggested by the Judicial Conference committee and has not yet adopted a final rule on death penalty appeal procedure. See 9th Cir. R. 22-1 to 22-6 and accompanying court comment.

241. See Committee on Long Range Planning, Judicial Conference of the United States, Long Range Plan for the Federal Courts recommendation 29, at 59 (1995); see also McCabe, *supra* note 219, at 1690-91.

242. See FED. R. APP. P. 28.

243. See *id.* 28(g) (setting the length of briefs "[e]xcept . . . as specified by local rule of the court of appeals").

244. See Report of the Local Rules Project, *supra* note 18, at 47 ("If the Advisory Committee had intended that additional areas be discussed in the briefs, it could easily have amended Appellate Rule 28 to include these items.").

245. See Chemerinsky & Friedman, *supra* note 2, at 792 (arguing that local rules

ence would be directed to pass upon requests for local rulemaking only after a serious screening for compatibility with the federal rules and national appellate practice.²⁴⁸

B. Action by the Supreme Court

Although the Supreme Court apparently has taken a "hands-off" approach to the initiation, drafting, and oversight of federal procedural rules,²⁴⁷ it always retains the power of adjudication. Thus, the Supreme Court may be called upon to evaluate the validity of procedural rules in the context of a particular case.²⁴⁸ Indeed, the Supreme Court has considered several cases involving challenges to the validity of local district court rules.²⁴⁹ Similarly, the courts of appeals evaluate district court procedures in the context of cases on appeal and not infrequently reject local district court rules as contrary to federal

should not be permitted to go into effect without approval of a central authority, that should be an adjunct to and under the control of the Judicial Conference).

246. Together with amendment of the Rules Enabling Act to confer preclearance power upon the Judicial Conference, Congress should appropriate sufficient funding to support and staff a local rules screening committee that would report to the Conference. The minimal additional funding required is amply justified by the importance of the problem of proliferation of local rules, a problem the Congress recognized and sought to address in the Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4650 (1988) (codified at 28 U.S.C. §§ 2071-74 (1994)). *See also infra* Part V.C.

247. Should the Court determine to play a more active role in the rulemaking process, the disintegrating effect of local rules upon the fundamental procedural unity of the federal courts would constitute one of those matters of "principle and purpose" that Justice Scalia, joined by two other members of the Court, has argued justify the attention and review of the Court. *See* Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 501, 513 (1993) (Scalia, J., dissenting). A directive from the Court to the Judicial Conference to further review the proliferation of local rules, at the district and circuit court level, and consider appropriate responsive revision of the federal rules would certainly ensure that the subject was placed high on the Conference's agenda.

248. *See, e.g.,* Hanna v. Plumer, 380 U.S. 460 (1965) (upholding validity of Federal Rule of Civil Procedure 4); Sibbach v. Wilson & Co., 312 U.S. 1 (1941) (upholding validity of Federal Rule of Civil Procedure 35(a)).

249. *See, e.g.,* Frazier v. Heebe, 482 U.S. 641 (1987) (striking down local district court rule barring admission of nonresident attorneys to the court's bar); Colgrove v. Battin, 413 U.S. 149 (1973) (upholding validity of local district court rule authorizing six-member juries in civil cases); Miner v. Atlass, 363 U.S. 641 (1960) (striking down local district court rule providing for discovery by deposition in admiralty case when the federal admiralty rules did not then provide for depositions for the purpose of discovery).

rules.²⁵⁰ Not surprisingly, however, the courts of appeals have not subjected their own circuit rules to the same scrutiny for consistency with the FRAP.²⁵¹

A court of appeals, removed from the parochialism of individual district practices, is better situated than a district court to compare a local district court innovation to the corresponding federal procedural standard. Likewise, the Supreme Court, as the only truly national tribunal, may best appreciate both the value of uniform federal appellate practice and the fragility of the federal rules should local circuit rules further proliferate. If the Supreme Court invalidated a circuit rule as inconsistent with the corresponding federal rule, that precedential decision would prompt each circuit to reexamine its practices and encourage the Judicial Conference to exercise greater vigor in its statutory duty of oversight of local court rules.

There are, however, two obstacles to obtaining a Supreme Court disposition on this point. First, a case must arise in which a local circuit rule plays a sufficiently predominate role and has a significantly adverse effect as to prompt a party to seek further review. That prospect is uncertain. Unless an obstreperous and foolish attorney willfully refuses to follow a local rule, thereby invoking the ultimate sanction of dismissal, the complications created by local circuit rules will likely be resolved through correction of procedural errors before the conclusion of the proceedings in the court of appeals.²⁵² Local rules add to expense and, through diffusion of attorney resources, weaken the quality of advocacy, but seldom serve as the pivot upon which the result on the merits turns.²⁵³ The best prospect for a case presenting the

250. See, e.g., *Partee v. Buch*, 28 F.3d 636, 637-38 (7th Cir. 1994); *United States v. Hess*, 982 F.2d 181, 185 (6th Cir. 1992); *Brown v. Crawford Cty.*, 960 F.2d 1002, 1006-10 (11th Cir. 1992); *Holloway v. Lockhart*, 813 F.2d 874, 880 (8th Cir. 1987).

251. *But see* *United States v. Samuels*, 808 F.2d 1298, 1299 (8th Cir. 1987) (separate statement of Lay, C.J., on order denying motion for rehearing en banc) (suggesting that Eighth Circuit's rule allowing a judge to request hearing or rehearing en banc is inconsistent with FRAP 35(b), which provides only for a "party" to seek hearing or rehearing en banc).

252. See Levin, *supra* note 17, at 1576 (arguing that appellate review is not a realistic option to challenge local rules as inconsistent with the federal rules and asking "[w]hat litigant, what litigator, would willingly suffer an adverse final judgment by flouting a rule promulgated by the majority of judges of the court in which the case is being tried, no matter how clear the inconsistency may appear").

253. See Roberts, *supra* note 17, at 553 ("The impact of the rules on individual litigants is usually too glancing to warrant appeal, and so they remain unchallenged."). *But see* *Mortell v. Mortell Co.*, 887 F.2d 1322, 1327 (7th Cir. 1989)

issue would be one where the counsel suffered a monetary sanction for non-compliance with a circuit rule,²⁵⁴ although the generally minimal amount of such sanctions would rarely justify further appeal in and of itself.

Second, even if such a case were to arise, the Supreme Court must agree to hear it. Ordinarily, an arcane dispute over the application of a local circuit rule would be unlikely to attract the attention of the justices. Moreover, even if a local circuit rule became a key point of contention in a case, appellate counsel must have expressly raised the specific issue of the rule's validity in order to preserve that issue for Supreme Court review. However, if a well-presented petition for review educated the Court about the threat that local rule proliferation poses to the unitary federal judicial system and the general deleterious effects on appellate practice, the Court might find such a case to be "certworthy."

The Supreme Court's attention to the impact of local circuit rules was obtained in one recent case, where the impact was upon the Court itself. In *Austin v. United States*,²⁵⁵ the Court granted the application of an attorney, appointed as counsel to a criminal defendant, to withdraw without filing a petition for certiorari on grounds that he believed were frivolous.²⁵⁶ The Court recognized that a Fourth Circuit local rule required appointed counsel to file a petition for a writ of certiorari at the request of a defendant, notwithstanding the Supreme Court's contrary rule sanctioning counsel for filing frivolous petitions.²⁵⁷ The Court expressed concern that counsel might feel "encouraged or perhaps bound" by the circuit rule to file petitions that rest on frivolous claims, and that such circuit rules "may explain, in part, the dramatically increased number of petitions for certiorari on direct appeal from

(holding that the filing of a false certificate of compliance with local circuit rule, which requires attachment to brief of opinion or oral statement by lower court supporting the judgment under review, was sufficient reason to affirm without reaching the merits of the appellant's claim).

254. See, e.g., *Faras v. Hodel*, 845 F.2d 202, 204-05 (9th Cir. 1988) (approving \$250 sanction for failure to file a timely civil appeals docketing statement as required under local circuit rule); *Kalombo v. Hughes Market, Inc.*, 886 F.2d 258, 259-60 (9th Cir. 1989) (imposing sanction against counsel for failure to comply with circuit rules regarding contents of the brief and excerpts of record, as well as for filing a frivolous appeal).

255. 115 S. Ct. 380 (1994) (per curiam).

256. See *id.* at 380.

257. See *id.* at 380-81.

federal courts of appeals filed by persons *in forma pauperis*.²⁵⁸ For this reason, the Court directed the circuits to reexamine their rules to ensure that they do not conflict with the Supreme Court's rules.²⁵⁹ Thus, under certain circumstances, the Court will consider challenges to the validity of circuit rules and reject procedures that conflict with the rules it has promulgated.

Nevertheless, while a Supreme Court precedent could be a powerful unifying action, the contingencies necessary to achieve Supreme Court review remain uncertain in the near future. Thus, it would be unwise to wait, possibly in vain, for the ideal opportunity to arise for Supreme Court consideration.

C. Action by Congress

As the role of the Supreme Court in procedural rulemaking declines,²⁶⁰ the role of Congress has increased, but not without controversy. Congressional action threatens to politicize the process,²⁶¹ submerges the greater expertise of judges in civil rulemaking,²⁶² and provokes the objection that congressional intervention in court procedures constitutes an unconstitutional intrusion upon the prerogatives of the independent Judicial Branch.²⁶³

258. *Id.* at 381.

259. *See id.*

260. *See supra* Part V.A.

261. *See* Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1287 (1993) (arguing that the Civil Justice Reform Act "will irretrievably politicize federal procedural rulemaking"); Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161, 164 (1991) ("[C]ivil justice in the federal courts today is more vulnerable than it has ever been to impositions by factional interests.").

262. *See* Walker, *supra* note 219, at 459-60 (arguing that "the merits of judicial rulemaking far outweigh the demerits, largely because trial and appellate judges typically bring great expertise to the task").

263. *See* Carrington, *supra* note 3, at 966-75 (concluding "that Congress lacks constitutional authority to disable the Supreme Court from performing its constitutional responsibilities for the direction of 'inferior' courts to ensure their fidelity to law," including a core of authority to ensure each district court does not "become a law unto itself with respect to matters that are procedural"); Mullenix, *supra* note 261, at 1297-98 (arguing that Congress acts unconstitutionally when it "involv[es] itself deeply in the internal operations of the federal judiciary," including establishing a process for implementing procedural rules that is "controlled by forces other than the established decision makers within the federal court system"); Mullenix, *supra* note 17, at 382 (arguing that the Civil Justice Reform Act's supervision of rulemaking constitutionally "impairs the ability of the federal courts to control their internal processes and the conduct of civil litigation"). *But see* Robel,

Moreover, Congress's recent forays into this area have been schizophrenic. In 1988, Congress enacted the Judicial Improvements and Access to Justice Act²⁶⁴ precisely to address the proliferation of local rules.²⁶⁵ The Act requires each federal court, other than the Supreme Court, to appoint an advisory committee to review that court's rules and further empowers the judicial councils of the circuits and the Judicial Conference to modify or abrogate local court rules.²⁶⁶ However, just two years later, Congress enacted the Civil Justice Reform Act of 1990,²⁶⁷ which, by directing each district court to develop its own civil justice reform plan for reducing litigation expense and delay,²⁶⁸ initiated an unprecedented level of experimentation and confusion at the local district court level. Thus, Congress has been an uncertain friend of federal court uniformity and an unstable supporter of procedural unity.²⁶⁹

Nevertheless, resort to Congress may be necessary in the event that the Judicial Conference declines to take firm and active measures to suppress the chaos in federal appellate procedure. Congress could be an indispensable provocateur in a new revolution to unify federal practice. Indeed, even introduction and committee consideration of legislation, short of actual

supra note 6, at 1480 (arguing that the Supreme "Court's implied rulemaking authority, although generally recognized, should be subservient to Congress' except where the Court exercises its power in defense of judicial authority or integrity"); Martin H. Redish, *Federal Judicial Independence*, 46 MERCER L. REV. 697, 724-25 (1995) (concluding that congressional involvement in the prescription of procedural rules does not violate constitutional protection of separation of powers).

264. See Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified at 28 U.S.C. §§ 2071-74).

265. See generally McCabe, *supra* note 219, at 1662-63; Tobias, *supra* note 8, at 1599-1601.

266. See 28 U.S.C. §§ 2071(b), (c), 2077(b) (1994).

267. See Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified at 28 U.S.C. §§ 471-82).

268. See 28 U.S.C. §§ 471-82 (1994).

269. See McCabe, *supra* note 219, at 1664 ("Ironically, while Congress attempted to promote national uniformity and limit the proliferation of local court rules in 1988, it took an entirely different approach just two years later in enacting the Civil Justice Reform Act of 1990."); Tobias, *supra* note 8, at 1623-27 (observing that, when Congress enacted the Judicial Improvements Act in 1988, "Congress accurately perceived local procedural proliferation to be a major problem that was contributing significantly to the erosion of uniformity, simplicity, and trans-substantivity in federal civil procedure; facilitating expanded judicial discretion; and increasing the cost of and delay in litigation," but when Congress enacted the Civil Justice Reform Act in 1990, it "encouraged local procedural innovation" to address the problem of cost and delay and thereby "effectively suspended efforts to reduce local procedural proliferation").

enactment, might motivate the courts to act and thus avoid pre-emption by Congress.

If Congress has authority to act in the area of judicial procedure, its power is at its greatest when it acts to ensure that the federal courts that Congress has created maintain a *federal* orientation.²⁷⁰ Congress surely has an interest in preserving a unitary federal judicial system, especially if judicial entities prove incapable of or timid in controlling individual hyperactive elements that disrupt national uniformity and procedural simplicity. By mandating the primacy of the federal rules adopted by the Judiciary itself through its national decision-making bodies, Congress would not usurp the Judiciary's inherent powers or alter the allocation of rulemaking authority between the Legislative and Judicial Branches.²⁷¹ If the Judicial Conference fails to amend FRAP 47 to resoundingly reject spurious local innovation or to veto discordant local circuit rules to preserve federal uniformity, then Congress should consider legislative reform. The Rules Enabling Act could be amended to even more explicitly prohibit local tinkering with the federal rules that are adopted in conformity with that Act.

D. Circuit Self-Restraint

The least promising, but most readily available, mechanism for control of local rule proliferation and restoration of federal unity is self-restraint by the individual circuits in withholding adoption of new local rules and vigor in reexamining existing procedural practices. Indeed, this process is not only available, it is statutorily mandated. Under the Judicial Improvements Act of 1988,²⁷² Congress "imposed a continuing duty on the [circuit] councils to scrutinize the local procedures that existed . . . and all procedures subsequently adopted."²⁷³ However, as is always true,

270. See Chemerinsky & Friedman, *supra* note 2, at 784 ("The premise of the federal courts is that they reflect one court system doing the nation's business.").

271. See Mullenix, *supra* note 261, at 1331-32 (concluding that the Judicial Improvements Act of 1988, which revised the procedures of the rulemaking process, did not "alter[] the constitutional allocation of rulemaking authority between the legislative and judicial branches").

272. See Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified at 28 U.S.C. §§ 2071-78).

273. Tobias, *supra* note 8, at 1601 (describing, in particular, provisions of 28 U.S.C. § 2071(c)). But see Carl Tobias, *Suggestions for Circuit Court Review of Local Procedures*, 52 WASH. & LEE L. REV. 359, 362 (1995) ("Unfortunately, very few circuit

reliance upon self-policing of behavior is sufficiently doubtful as to counsel hesitation and skepticism. As has been true at the district court level, local rules committees comprised of judges and practitioners from within a single circuit are "probably less concerned about maintaining national uniformity than about accommodating the needs of local federal judges, attorneys, and parties."²⁷⁴ The difficulty of overcoming parochialism, in the absence of a strong national oversight process, cannot be underestimated.²⁷⁵ The current state of affairs is ample evidence that the courts of appeals have been unable to see past the borders of their individual circuits to coordinate federal appellate practice.

Perhaps such pessimism is not warranted. With the light shed upon the problem of proliferation of local circuit rules in this and other recent studies, circuit councils²⁷⁶ may be more poignantly aware of the disarray that has resulted and view the matter from a broader perspective that reaches beyond their own circuits. The balkanization of federal appellate practice has grown incrementally. Thus circuit judges and members of circuit councils may only now begin to appreciate the cumulative and national effects of local experimentation. If the individual circuits should be motivated to join the cause of unification (and even if not so motivated, accept their statutory duty), their mission is to ensure the consistency of their local rules with the FRAP and to prune their rules in the national interest of uniformity and simplicity.²⁷⁷ Local rules that deviate from or expand upon the

judicial councils in the twelve United States Circuit Courts of Appeal have fully implemented the requirements relating to appellate court oversight that are found in the [federal rules and the Judicial Improvements Act].").

274. Tobias, *supra* note 8, at 1606 (discussing local rules committees in the district courts).

275. See Tobias, *supra* note 273, at 364 (observing that "numerous district judges are very protective of their prerogatives to adopt and apply local procedures").

276. The "circuit council" is the governing body within a circuit. See 28 U.S.C. § 332 (1994). The chief judge of the circuit chairs the circuit council, which is composed of an equal number of circuit and district judges. See *id.* § 332(a)(1). The circuit council "is the chief administrative agency within a circuit, [although] responsibility for court administration within a circuit is shared to a degree with the court of appeals and the various district courts in the circuit." William W. Schwarzer, *The Federal Judicial Center and the Administration of Justice in the Federal Courts*, 28 U.C. DAVIS L. REV. 1129, 1149 (1995).

277. See Tobias, *supra* note 8, at 1632 (arguing that as part of the local procedural revision process, "the major priority should be instituting processes for reviewing all local procedures, abrogating those measures that are unnecessary or inconsistent, limiting the number of local procedures and including as many as possible in local rules, and reducing each local procedure to writing").

federal rules, that do not simplify or streamline appellate practice, or that do not pertain to matters of uniquely local concern narrowly defined, should be eliminated. Moreover, each circuit should designate a rules officer to whom questions by counsel concerning local rules would be referred for an authoritative answer.

In this regard, the First Circuit stands as a model of the possible. The First Circuit notably has found little need to supplement the federal rules with respect to briefing, properly finding the FRAP quite adequate for efficient and just disposition of appellate litigation. Unfortunately, even the First Circuit has been tempted by the prevailing culture of variation. Thus it has departed to a limited degree from the briefing requirements of FRAP 28²⁷⁸ in its adoption of a specific rule on citation of authorities²⁷⁹ and a requirement that an addendum of the district court's judgment and certain other district court documents be attached to the brief.²⁸⁰ However, these minor failings should not detract from the significance of the First Circuit's general and successful reliance upon the federal rules as sufficient unto the day.

VI. CONCLUSION

The rationale behind local supplementation of the federal rules is to permit each court of appeals to address individual concerns unique to that circuit, but in a manner consistent with the policies embodied in the federal rules. As Professor Shirley A. Wiegand has said, local rules are authorized for the purpose of "address[ing] a problem or situation unique to a particular locale."²⁸¹ Each circuit should not be allowed to go its own way and devise its own procedures for federal appellate practice based, not upon local exigencies, but rather upon its autonomous views of the wisest or most efficient procedures.

That a procedural innovation may be a good one does not mean that an individual circuit should unilaterally adopt it. If the judges of a particular circuit believe they have devised a

278. FED. R. APP. P. 28.

279. See 1ST CIR R. 28.1.

280. See *id.* 28.2.

281. Shirley A. Wiegand, *A New Light Bulb or the Work of the Devil? A Current Assessment of Summary Jury Trials*, 69 OR. L. REV. 87, 109 (1990) (discussing district court local rules).

better mousetrap, they should submit their invention to be patented by the Judicial Conference and the Supreme Court. If the idea is indeed a good one, the appropriate process for a federal court system is for the idea to be proposed, debated, carefully formulated, and adopted as an amendment to the *federal* rules. The uniformity of the federal court system is destroyed when individual elements of the system unilaterally revise the process to their own preferred specifications.

The pendulum has swung heavily away from national uniformity and too far in the direction of local experimentation with little coordination among the circuits. Rule 1 of the Federal Rules of Civil Procedure explicates the purpose of all rules of procedure: "to secure the just, speedy, and inexpensive determination of every action."²⁸² Today, that procedural goal can best be achieved in the United States Courts of Appeals by the revitalization of the FRAP as the unitary and primary regime governing federal appellate practice.

282. FED. R. CIV. P. 1.

