Report on Local Rules

Standing Committee on Rules of Practice and Procedure

Judicial Conference of the United States

February 1, 2004

28 U.S.C. § 2071 authorizes district courts to promulgate local rule of procedure, but requires that such rules must be "consistent with" acts of Congress and the national rules of procedure. Fed.R.Civ.P. 83 provides further that local rules shall be "consistent with" but not "duplicative of" the national rules of procedure.

The Judicial Conference Standing Committee on Rules of Practice and Procedure has undertaken a Local Rules Project to assure that the local rules throughout the United States are in compliance with section 2071 and Fed.R.Civ.P. 83. The Standing Committee has conducted a review of local civil rules that pertain to or purport to implement selected national rules of civil procedure or federal statutes.

This report constitutes the final findings and recommendations of the Standing Committee, and as such it represents the completion of the Local Rules Project.

The Standing Committee has determined that the district courts should be made aware of local rules in their respective districts that fall within one of five categories: 1) a local rule that is in direct conflict with national law; 2) a local rule that is in arguable conflict with national law, i.e., the local rule does not present a direct textual conflict, but may create a conflict as applied or may be in tension with the principles and practices underlying national law; 3) a local rule that tries to duplicate national law but arguably does so in a confusing or unhelpful manner; 4) a local rule that is outmoded because it regulates a practice or form of action that no longer arises in the federal courts; and 5) local rules that do not conform with the uniform numbering system, as required by Rule 83.

This report provides a listing of and description of the local rules that appear to fit into the above categories. The report groups the local rules under their Federal analogs. The report is being sent to the Chief Judge of each district court in which one or more local rules in the above categories have been found.

It is important to note several provisos in this analysis of local rules:

1. Local rules are not included if they are inconsistent with case law, because neither section 2071 nor Rule 83 prohibits local rules that are inconsistent with case law.

2. Rule 83 states that local rules must not be "duplicative of" one of the Federal Rules. There are many local rules that *refer* to a national rule but do not *repeat* the text of that Rule. Those local rules are not problematic and are not prohibited by Rule 83. Moreover, the Standing Committee has determined that there is probably little harm and actually much good to be found in duplicating some of the Federal provisions, as it is possible that practitioners will look to the local rules first to determine the governing standards. On the other hand, if the local rule's attempt at "duplication" is flawed, i.e., by poor paraphrasing or selective duplication, the local rule may well do more harm than good. Thus, the list of "duplicative" rules in this report covers only those local rules that purport to replicate the text of a national rule in a way that might be more confusing than helpful to the practitioner.

3. The local rules were taken from the websites of the respective districts. The working assumption is that the local rules posted on the website are the actual rules currently applicable in the district.

4. The Standing Committee does not claim perfection. It is thus possible, if not likely, that the report is underinclusive in uncovering offending local rules. The fact that a local rule is not cited should not be taken as an absolute affirmation that the rules of a particular district are in compliance with section 2071 and Rule 83.

5. There are a large number of civil rules on which no report is made. Examples include local rules governing class actions and summary judgment. The Local Rules project tried to pinpoint those areas in which problematic divergence from a national standard was most likely. Time and resources did not permit a review of all of the local rules for every Federal Rule analog.

6. The local rules are a moving target. This report sets forth the problematic local rules as of February 1, 2004.

What follows is an analysis of local rules grouped under the Federal Civil Rule referent.

Rule 1

No local rules to report.

Rule 3–Filing Fee

No local rules to report.

Rule 3–Civil Cover Sheet

No local rules to report.

Rule 3–In Forma Pauperis

Arguable Conflict:

1. *Form Requirement:* Four courts have local rules requiring that a form application must be used in seeking *in forma pauperis* status.[1] These rules do not appear to allow for the use of an equivalent affidavit but rely solely on the form affidavit.

It could be argued that the form requirement is inconsistent with the *in forma pauperis* statute, which requires only the submission of an affidavit "that includes a statement of all assets such prisoner possesses [and a statement] that the person is unable to pay such fees or give security therefor."[2] On the other hand, it could be argued that these local rules require nothing but what the statute requires, albeit in a particular form; this is especially so if the actual practice in the jurisdiction allows the litigant to conform an original submission to the mandated form without prejudice.

Rule 5 – Proof of Service

Arguable Conflicts:

1. *Certificate of Service:* W.D.Pa. LR 5.2 provides that "the filing or submission to the court by a party of any pleading or paper required to be served by other parties pursuant to Fed.R.Civ.P. 5 shall constitute a representation that a copy thereof has been served upon each of the parties upon whom service is required. No further proof of service is required unless an adverse party raises a question of notice."

This local rule is arguably inconsistent with the text of Rule 5(d), which envisions a separate certificate of service to be filed with the court. But the inconsistency is not all that clear, because the local rule could be read as simply a way to define the form or content of proof of service by declaring that the filing *is* a proof of service. Moreover, the

[1] N.D.Cal. LR3-10; E.D.Mo. LR2.05(A); D.Utah LR3-2(a)(1)-(2); W.D.Wash. LRCR3(b).
[2] 28 U.S.C. §1915(a).

local rule contains a safety valve that allows an adverse party to raise a question of notice. Thus, the local rule arguably conflicts with the "spirit" of the Federal Rule, but there is no clear inconsistency with the text of the Federal Rule.

2. *Timeliness of service:* Rule 5(d) provides: "All papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court within a reasonable time after service…." Two courts have local rules that allow the proof of service to be filed anytime unless material prejudice would result.[3] One court's local rule provides that the court may refuse to take action on a document until the proof of service is filed.[4] Another court provides that the clerk may permit papers to be filed without proof of service but shall require such proof of service to be filed "promptly."[5] An argument can be made that these timing rules are inconsistent with the Rule 5 provision requiring that the filing occur "within a reasonable time after service." However, none of these rules are facially inconsistent with the "reasonable time" requirement of Rule 5; indeed they could be seen as giving more specific content to what is a "reasonable time," elaborating in a way that provides some guidance to practitioners.

Rule 5 – Filing of Discovery Materials

Conflict:

1. E.D.Wis. GR LR 5.1(a) provides that all papers in the action must be filed, with no exceptions for discovery materials. This provision conflicts with the recently amended Federal Rule 5(d), which provides that discovery materials "must not be filed until they are used in the proceeding or the court orders filing." The Standing Committee recognizes, however, that the change to Rule 5(d) was relatively recent and that the district may be in the process of changing its local rule to accord with the amendment to the national rule.

***Arguable Conflict*:**

1. Three courts have local rules providing that the original deposition must be maintained by the party seeking it. These courts are:

N.D.Ga. LR5.4(A); D.Idaho LR 5.4; M.D.Pa. LR5.4.

These rules may be inconsistent with Rule 30 (f)(1) as applied in certain cases. Rule 30(f)(1) provides that a deposition transcript or recording must be stored by the attorney who arranged for the transcript or recording. The attorney who arranged for the transcript or recording may not be the attorney who sought the deposition. Rule 30(f)(1) directs that "the deposition" be sent to the attorney who arranged for the transcript or

[3] D.Neb. LR5.2(b); D.Nev. LR5-1(b).
[4] D.Nev. LR5-1(a).
[5] W.D.Tex. CV-5(b).

recording. The local rule could therefore conflict when the attorney who arranged for the transcript or recording is not the one who noticed the deposition.

Rule 9 – Three Judge Courts

Conflict:

1. D.Ariz. LR 2.3 is a local rule concerning the number of copies to be filed in a three-judge court. This local rule complements federal practice; however, the text of that rule refers to "A District Court Composed of Three District Judges."[6] This definition is inconsistent with the clear language of 28 U.S.C. § 2284, governing the practice of three-judge courts. The statute requires three judges "at least one of whom shall be a circuit judge."

Rule 9 – RICO Cases

Arguable Conflict:

1. *RICO Case Statement:* Five courts have local rules relating to civil actions brought under the Racketeering Influence and Corrupt Organization Act (RICO).[7] For example, three of these courts have local rules explaining that a RICO case statement is needed within thirty days of filing the complaint.[8] Another court requires that the statement be filed with the complaint.[9] Five courts explain that the statement must include facts relied upon to initiate the claim.[10] One court provides a long list of the facts that must be set forth.[11] Two courts provide that a failure to submit a statement may mean dismissal.[12]

These rules may serve courts and litigants well in some instances, by emphasizing the particularized procedural requirements for RICO actions. On the other hand, some of these rules may be applied inconsistently with the detailed requirements of the statute or with the national rules governing pleading requirements, e.g., Rules 8, 9, 12(e) and 56.

Rule 9 – Social Security and Other Administrative Appeal Cases

***Conflict*:**

1. *Extension of Time to Answer:* Local rules in two jurisdictions purport to extend the time within which the Secretary of Health and Human Services may answer the

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[6] D.Ariz. LR2.3.
[7] S.D.Cal. LR11.1; S.D.Fla. LR12.1; S.D.Ga. LR9.1; D.Haw. LR 9.1, 9.2, 9.3; N.D.N.Y LR 9.2.
[8] S.D.Cal. LR11.1; S.D.Fla. LR12.1; N.D.N.Y. LR9.2.
[9] D.Haw. LR9.1.
[10] S.D.Cal. LR11.1; S.D.Fla. LR12.1; S.D.Ga. LR9.1; D.Haw. LR 9.1; N.D.N.Y. LR 9.2.
[11] S.D.Fla. LR12.1.
[12] S.D.Cal. LR11.1; D.Haw. LR 9.2.

complaint from sixty days to within thirty days after the record is filed[13] or within ninety days after service.[14] Both of these rules are inconsistent with Rule 12(a)(3)(A) of the Federal Rules of Civil Procedure, which requires the agency head to file an answer within sixty days after service. This is not to say that the local rules embody bad policy. But in the absence of amendment either to the Social Security Act or to the Federal Rule, a local rule extending time to answer is in conflict with the time period mandated by national law.

Arguable Conflict:

1. *Placing Social Security Numbers in the Complaint:* Nine courts have local rules requiring that the social security number be set forth in the complaint.[15] These rules appear to be in tension with the Social Security Administration Act, which discusses the confidential nature of the social security number:

> Social security account numbers and related records that are obtained or maintained by authorized persons pursuant to any provision of law, enacted on or after October 1, 1990, shall be confidential, and no authorized person shall disclose any such social security account number or related record.[16]

"Authorized persons" include employees of the federal government. Local rules requiring that the social security number be set forth in the complaint do not directly violate the statute, however, as the statute requires authorized persons to maintain confidentiality *once the record is obtained or maintained.* This would not explicitly prohibit a rule requiring a party to include a social security number on a filed document, so long as confidentiality were maintained thereafter.

Local rules requiring disclosure of a social security number are also in tension with the Judicial Conference policy adopted in 2002, which requires that social security numbers, though filed with the court, must be redacted or modified so that the full number is not available to the public. However, this Judicial Conference policy is not embodied in a Federal Rule or a federal statute, and therefore conflicting local rules are not violative of Rule 83. Nonetheless, it would seem that district courts would welcome notification that a local rule as applied might be in conflict with the published policy of the Judicial Conference. Redaction of social security numbers in court filings is also consistent with the policy embodied in the E-Government Act of 2002.

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[13] W.D.Mo. LR9.1(d) (defendant files answer within thirty days after filing record).
[14] D.N.H. LR9.1 (defendant files answer and record within ninety days after service of complaint).
[15] E.D.Cal. LR8-206; E.D.Ky. LR9.1(a); W.D.Ky. LR9.1(a); M.D.La. LR9.2; W.D.La. LR9.2; E.D.Mich. LR9.1(e); N.D.Ohio LR9.1; E.D.Okla. LR9.1(A); N.D.Tex. LR9.1(a).
[16] 42 U.S.C. §405(c)(2)(C)(viii).

Rule 15 – Amended and Supplemental Pleadings

Arguable Conflicts:

1. *Time for Answer*: The District Court of Nevada has a local rule providing that the date for a party to answer shall run from the date of filing the order allowing the pleading to be amended or, where there was no order, from the date of service of the amended pleading.[17] Specifically, the local rule provides:

> The time under Fed.R.Civ.P. 15(a) for an entity already a party to answer or reply to an amended pleading shall run from the date of service of the order allowing said pleading to be amended, or where no order is required under Fed.R.Civ.P. 15(a), from the date of service of the amended pleading.

This rule might create tension with Rule 15(a), which states that the responding party must plead "within the time remaining for response to the original pleading or within 10 days after service of the amended pleadings, whichever period may be longer…." The conflicts are indicated by three possible problems in the application of the local rule.

First Problem. The complaint is served on Day 0. On Day 2, the plaintiff files an amended complaint. On Day 5, the plaintiff moves for leave to amend. The motion is granted and the order is served on the defendant on Day 8. Rule 15(a) allows the defendant to answer as late as day 20 (or, if the United States is defendant, on day 60). The local rule seems to set the time to answer running from day 8, but does not say how much time there is: does it mean to allow the full time set by Rule 15(a), so the provision running from service of the order is irrelevant after all?

Second Problem. A complaint is filed and the defendant answers. The plaintiff moves for leave to amend without attaching an amended complaint. The order granting leave is served on the defendant. Fifteen days later the plaintiff serves an amended complaint on the defendant. Was the defendant supposed to file an answer 10 days after service of the order allowing amendment?

Third Problem. A complaint is served and an answer filed. The plaintiff attaches an amended complaint to the motion for leave to amend. The order granting leave to amend is served on the defendant. Because the defendant already has the amended complaint, it may make sense to set the time to answer running from service of the order.

All three of these questions arise because the Nevada local rule provides that "the time under Fed.R.Civ.P. 15(a)" runs from the date of serving the order allowing the amendment. But the time periods set by Rule 15(a) are measured by the time to respond to the original pleading (first problem) or (ten days) from service of the amended pleading (second problem and third variation). A time measured by service of the order allowing amendment is not the time under Rule 15(a). Thus, there is a problem in

[17] D.Nev. LR15-1(b).

matching the local rule to the time periods in Rule 15(a) that results in an arguable conflict, depending on how the local rule is applied.

2. *Limitation on Acts That Can Be included in the Motion:* Northern District of New York Local Rule 7.1.4 states that a motion to supplement a pleading must be limited to acts occurring after the filing of the original complaint. Civil Rule 15(d) provides that a court may permit the party to serve a supplemental pleading "setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." The Federal Rule is thus less inclusive as to the acts that can be included in a supplemental pleading. If the local rule is read literally, this might result in a conflict in certain circumstances. For example, assume the plaintiff files a complaint. One year later the plaintiff files an amended complaint. Still later the plaintiff seeks to supplement by adding something that happened between filing the original complaint and filing the supplemental complaint. The local rule would appear to permit this practice while the Federal rule would not.

It is unlikely, however, that the local rule means what it says, because it explicitly refers to Civil Rule 15(d):

> Where leave to supplement a pleading is sought under Fed. R. Civ. P. 15(d), the proposed supplemental pleading must be limited to acts that occurred subsequent to the filing of the original pleading.

Thus, any "conflict" may only be the result of imprecise drafting that may not have an effect on local practice.

Rule 16 – Arbitration

Conflicts:

1. *Automatic Arbitration:* At least six courts provide that some cases are automatically referred to arbitration[18] while three of those courts provide relief from the automatic referral for good cause.[19]

The rules providing for automatic arbitration, regardless of the parties' consent, would appear to be in conflict with the Alternative Dispute Resolution Act of 1998, which authorizes referral to arbitration only "when the parties consent."[20] However, 28 U.S.C. § 648 in effect "grandfathers" compulsory arbitration plans that existed under the original arbitration statute (Public Law 100-702). That statute established a pilot program of mandatory arbitration in a number of district courts. The districts in which mandatory arbitration is grandfathered include: N.D. Cal., M.D. Fla., N.J., W.D. Mich.,

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[18] D.Ariz. LR2.11(b); N.D.Cal. ADR 4-2(a); M.D.Fla. LR8.02(a); W.D.Mich. LR16.6(b); D.N.J. LR201.1(d); W.D.Okla.LR16.3 Supp R. 5.2(b).

[19] N.D.Cal. ADR 4; D.N.J. LR201.1(d); W.D.Okla. LR16.3 Supp.

[20] *See* 28 U.S.C. §652(a) ("Any district court that elects to require the use of alternative dispute resolution in certain cases may do so only with respect to mediation, early neutral evaluation, and, if the parties consent, arbitration.").

and W.D. Okla. Thus, the only district with a mandatory arbitration program that is not grandfathered is D.Ariz. That district's arbitration rule is in conflict with federal law, as it is mandatory rather than permissive.

2. Burdens on Seeking Trial de novo: Eight courts require a party to deposit an amount equal or approximate to the arbitrator's fee when seeking a trial de novo.[21] Four of these courts further provide that, if the trial de novo amount is not "substantially more favorable" than the award, the opposing party may be awarded costs and fees pursuant to 28 U.S.C. §655(e).[22] Eight of these courts explain that the arbitrator's fee is assessed to the party demanding a trial de novo if the trial award is not more favorable than the arbitration award.[23] One court provides a formula for preventing assessment of costs if award is rejected and trial de novo sought.[24] These local rules were undoubtedly passed to supplement the old statute that allowed the arbitrator's fee to be taxed as costs against the party demanding a trial de novo under certain enumerated circumstances.[25] Under the current Act, all of these rules, to the extent they impose a burden on seeking a trial de novo, are probably inconsistent with the statutory provision of 28 U.S.C. § 657(c)(2), which provides that on demand for trial de novo the action "shall be . . . treated for all purposes as it if had not been referred to arbitration."

Rule 17 – Parties Plaintiff and Defendant: Capacity

Arguable Conflict:

1. *Action by Guardian or Guardian ad litem:* The local rule in one court states that minors or incompetent persons may sue or defend only by a general or testamentary guardian or by a guardian *ad litem*.[26] To the extent this requirement seeks to distinguish between an appointed guardian as one who can bring an action and a "next friend" who cannot, this local rule might run afoul of Rule 17(c). Rule 17(c) seeks to eliminate any distinction between appointed guardians and a "next friend", permitting either to be a representative. It is unclear, however, whether this local rule actually purports to make that distinction. It may be that the rule is targeted only toward representative actions brought by guardians, and the question of an action brought by a "next friend" was simply not considered; next friend actions are not *explicitly* prohibited in the local rule. At any rate, local rules regulating representatives seem justified by the need to require some formal review of the purported representative–either by appointment under state law or confirmation by the federal court.

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[21] D.Ariz. LR2.11(k)(4); M.D.Fla. LR8.06(a); W.D.Mich. LR16.6(j)(i); W.D.N.Y. LR16.2(i); N.D.Ohio LR16.7(j)(1); W.D.Okla. LR.Civ.R16.3 Supp. 5.10(b); E.D.Pa. LR53.2.7(E); D.N.J. LR201.1(h) (requiring a $150.00 deposit to be made upon request for a trial *de novo*).

[22] N.D.Ohio LR16.7(j)(4); W.D.Mich. LR16.6(j)(ii); D.N.J. LR 201.1(h); E.D.Wash.LR 16.2(c)(2)(d)(13).

[23] D.Ariz. LR2.11(k)(4); M.D.Fla. LR8.06(d); W.D.Mich. LR 16.6(j)(i); W.D.N.Y. LR16.2(i)(5); N.D.Ohio LR16.7(j)(2); W.D.Okla. LR16.3 Supp. 5.10(c); E.D.Pa. LR53.2; D.N.J. LR201.1(h).

[24] W.D.Mich. LR16.6(j)(ii).

[25] *See* 28 U.S.C. §655(d) (1988).

[26] M.D.N.Car. LR17.1(a).

Rule 24 – Intervention–Claim of Unconstitutionality

Conflict:

1. *Notice Requirement Imposed on Litigant:* Three courts have local rules that require the litigant to carry out the court's responsibility under Rule 24 to provide notice to the government of a claim of unconstitutionality. These rules require that notice be served on the judge, the parties, and the designated government official.[27] Currently, these local rules appear inconsistent with 28 U.S.C. § 2403 and Rule 24(c), both of which place the burden on the *court* to provide the government with notice of a claim of unconstitutionality. It should be noted, however, that the Civil Rules Committee has published a proposed amendment that would require both the litigant and the court to notify the attorney general of a claim of unconstitutionality.

Arguable Conflicts:

1. *Content of the Notice:* Twelve courts have local rules setting forth particular requirements for the content of the notice of a claim of unconstitutionality, e.g., that the notice must state the title of the cause, a reference to the questioned statute sufficient for its identification, the respect in which it is claimed that the statute is unconstitutional, and the like.[28] The relevant statute and Federal Rule do not set forth specific requirements for the content of the notice. But local rules setting forth specific requirements for the notice are not necessarily inconsistent with national law. These local rules generally do not require the particularized information to be set forth in a pleading, and so in that respect they do not appear to be inconsistent with the permissive pleading standards of Federal Rule 8. As to Rule 24, that Rule simply states that the party shall call the court's attention to its duty to inform the government of the claim of unconstitutionality. It does not prevent local courts from placing procedural requirements on the notice, and there appears to be no inconsistency between Rule 24 and procedural requirements that will assist the court in complying with its duty. More importantly, most of the notice requirements are written specifically with the intent of aiding the court in giving the notice required under the Federal Rule; and none appear to require excessive or onerous detail.

Rule 34 – Production of Documents, etc.

Arguable Conflict:

1. *Limiting the Number of Requests For Production:* Two courts have local rules that impose a limit on the number of requests for production that can be served, unless court permission is obtained. The limit in one court is 10,[29] and in the other is 30.[30] It could be argued that these numerical limits conflict with the "spirit" of the Federal Rules by reasoning that Rule 34 "intimates" that unlimited requests are permissible by referring to "any" documents or tangible things. One could also reason that Rule 34 has been

[27] E.D.Cal. LR 24-133; D.Colo. LR24(A).1; D.Kan. LR24.1.

[28] D.Ariz. LR2.4; E.D.Cal. LR24-133; S.D.Cal. LR24.1; D.Colo. LR24.1(A); N.D.Fla. LR24.1(A); S.D.Fla. LR24.1; D.Kan. LR24.1; D.N.J. LR24.1(a); W.D.N.Y. LR24; M.D.Pa. LR4.5(a); D.Utah LR24-1(a); E.D.Wash. LR24.1.

[29] M.D.Ga. LR34.

[30] D.Md. LR104.1.

amended recently and yet no limitation on the number of requests for production was added to the Rule.

On the other hand, it could be argued that nothing in the national rules specifically says that requests can be made in unlimited number; accordingly, there is nothing specifically in the national law that prohibits local courts from imposing such a number. But even more importantly, these local rules do not *prohibit* discovery requests beyond a certain number; rather, they require court permission for discovery requests beyond a designated number. There seems to be nothing in Rule 34 that specifically prohibits a local court from establishing a regime of court control over excessive discovery requests.

Rule 35 -- Physical and Mental Examinations

No local rules to report.

Rule 36 – Requests for Admission

Arguable Conflicts:

1. *Objections Made Earlier Than Responses:* E.D.Va. LR 26(C) requires that objections to requests for admission be made earlier than responses to the requests, unless the court otherwise provides.[31] To the extent the timing period in the local rule is not extended by the judge, it is inconsistent with Rule 36, which sets the same time limit for the parties to respond either by admitting, denying, or objecting. Thus, the local rule as applied has a potential to conflict with the national rule.

Arguably Problematic Duplication:

1. *Objections to Requests for Admission:* Rules in nine courts require that any objection to a request for admission must be specific and must contain the reasons for the objection.[32] These rules cover the same ground as Rule 36(a), requiring that the answer "shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter." Whether this is a problematic duplication or a helpful reminder is a matter for debate.

Rule 38 – Jury Trial of Right

No local rules to report.

Rule 39 – Trial by Jury or the Court

No local rules to report.

Rule 41 – Dismissal of Actions

Arguable Conflicts:

1. *Requirement of Seeking Leave to Refile:* Three courts have local rules that require a party to seek permission to refile after a voluntary dismissal.[33] This

[31] E.D.Va. LR26(C).
[32] E.D.Ark. LR33.1(b); W.D.Ark. LR33.1(b); E.D.Cal. LR36-250(b); S.D.Ga. LR26.5; D.Mass. LR36.1(a)(3); D.Or. LR36.2; M.D.Pa. LR36.2; D.R.I. LR13(b); E.D.Va. LR26(C).
[33] E.D.La. LR41.1; M.D.La. LR41.1; W.D.La. LR41.1.

requirement appears to be inconsistent with Rule 41, *unless* the practice in the court is to grant such permission as a matter of routine. Rule 41 provides that a voluntary dismissal is "without prejudice", and this at least implies that there is no constraint on the party's ability to file a subsequent action. However, Rule 41 does not specifically prohibit a requirement that the plaintiff seek permission to refile, and at any rate, if the permission is granted as a matter of course, there would seem to be no direct conflict between the local and national rule. In sum, there is a potential conflict in the rule as applied.

2. *Reversing the Presumption as to Involuntary Dismissals:* Rules in three jurisdictions indicate that an involuntary dismissal is made without prejudice unless the court states otherwise.[34] These rules reverse the presumption of Rule 41(b) that an involuntary dismissal is with prejudice unless the court orders otherwise. This could result in a conflict in the rules as applied. It would depend on the local practice.

Rule 42 – Consolidation – Separate Trials

No local rules to report.

Rule 47– Selection of Jurors

No local rules to report.

Rule 48 – Number of Jurors

No local rules to report.

Rule 51 – Instructions to Jury; Objections

Cautionary Note: Federal Rule 51 was amended effective December 1, 2003. It is possible that the districts with the local rules discussed below are in the process of amending their rules, if necessary to account for the change in Federal law. Almost all of the districts responded to the Federal discovery amendments within two years, and one could expect the same reaction to the amendment to Rule 51. The discussion below compares the local rules to the national rule as amended.

Arguable Conflicts:

1. *Limiting the Number of Instructions:* M.D.Pa. LR 51.1 provides that a party may submit more than 12 instructions only with leave of court. It can be argued that a rule limiting the number of instructions is inconsistent with the amended Rule 51, which allows a party to submit requests without any specific limit. The M.D.Pa. rule allows more requests upon leave of court, so there is no absolute limit on number. But unless leave of court is routinely granted, the requirement is a limitation in practice that is inconsistent with the Federal rule.

2. *Timing Requirements For Submitting Instruction Requests:* The amended Rule 51 states that the court may direct an "earlier reasonable time" for submission of requests for instructions. Four jurisdictions require that proposed instructions must be submitted at least five days before trial.[35] Four jurisdictions require they be submitted seven days before trial–though the Western District of Louisiana rule specifically states that the

[34] C.D.Cal.LR 41-2; S.D.Cal.LR41.1; E.D.Pa. LR41.1(a).

[35] C.D.Cal. LR 51-1 (unless the court otherwise provides); E.D.Va. LR51 (unless the court otherwise provides) ; E.D.Wash. LR51.1(c) (or such other time as fixed by the court); D.Wyo. LR51.1.

seven-day period "shall not be interpreted or enforced to prevent a party from filing written requests pursuant to FRCP 51 at the close of evidence or at such earlier time during trial as the court may reasonably direct".[36] One court requires that proposed instructions be submitted three days before the pretrial conference.[37] Three courts require them to be submitted ten days before trial.[38] The District of Idaho requires proposed instructions to be submitted fourteen days before trial.[39]

It could be argued that all of these timing rules are inconsistent with Rule 51, which provides that instructions should be submitted at the close of the evidence or at an earlier reasonable time that the court directs. But an argument can be made that most if not all of these local rules are not in conflict with the Rule as amended. First off, many of these rules (e.g., C.D.Cal., E.D.Wash.) allow the court to fix an alternative time period. Thus, the court can operate on a case-by-case basis, just as it does under Rule 51. At most, these rules add a presumption that might possibly be problematic under local practice. Second, the Rule in Western District Louisiana specifically provides for an alternative time period *if mandated by Rule 51*–no conflict there.

But more importantly, all of these rules can be seen as simply defining the "reasonable" time period set forth in Rule 51. There seems to be nothing objectionable about local rules that give definition to an open-ended federal standard, so long as the rule chosen is itself reasonable. It can certainly be argued that all of the time periods set forth in these local rules are reasonable.

Rule 54 – Jury Cost Assessment

No local rules to report.

Rule 65 – Temporary Restraining Orders

Arguably Problematic Duplications:

1. *Affidavit Requirements:* Two courts require that a party seeking a TRO must submit an affidavit that speaks to irreparable injury.[40] One of these courts also requires that the affidavit explain any efforts used to give notice to the opposing party.[41] These rules repeat requirements that currently are found in Rule 65. Such duplication could be seen as helpful, however, given the presumably emergency circumstances that surround the filing of a TRO. It may be useful to have a ready source of authority and applicable standards in two separate places. [Note also that the E.D. Cal. Local Rule may be in tension with Rule 65, as the local rule provides that the statement about irreparable injury is to be made in an affidavit, while Rule 65 allows it to be made in a verified complaint as well; the M.D. Fla. Rule does permit the filing in a verified complaint.]

2. *Standard for Issuing a No-notice TRO:* Local rules in five courts require that no temporary restraining order issue without notice except in extraordinary circumstances.[42] Rule 65(b) provides that a TRO may be issued without notice "only if (1) it clearly

[36] D.Guam LR 51.1; D.Haw. LR51.1; W.D.La. LR51.1; D.Vt. LR51.1(a).
[37] D.Del. LR51.1(a).
[38] D.Alaska LR 51.1(a); N.D.Miss. LR51.1(A); S.D.Miss. LR51.1(A).
[39] D.Idaho LR51.1(a).
[40] E.D.Cal. LR65-231(c); M.D.Fla. LR4.05(b)(4).
[41] E.D.Cal. LR65-231(c).
[42] E.D.Cal. LR65-231(a) ("most extraordinary of circumstances"); D.D.C. LR65.1(a) ("emergency"); M.D.Fla. LR4.05(a) ("emergency"); M.D. La.LR 65.1 ("emergency"); W.D.La. LR65.1 ("emergency").

appears … by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result … [before any hearing in opposition] and (2) the applicant's attorney certifies to the court in writing the efforts, if any, … made to give notice and the reasons … that notice should not be required."

There is no indication in any of these local rules that there is an intent to provide a standard different from that set forth in Rule 65. So if these local rules are problematic at all, it would have to be on grounds of unhelpful duplication. One could argue that these local rules serve as helpful reminders that no-notice TRO's are to be a rarity. But one could also argue that if the local rule is to be a reminder, it should refer specifically to the national rule or use the same terminology as is used in the national rule.

Rule 81 – Naturalization

Outmoded Rules:

1. *Naturalization Petition Procedures:* The district court's role with respect to naturalization petitions is to administer the oath of allegiance if requested by the applicant.[43] Seven courts have more extensive rules concerning naturalization petitions, enacted at a time when such petitions were heard in the district court.[44] Those rules purport to govern practices other than administering the oath of allegiance. Although these courts may only be administering the oath of allegiance in practice, the rules themselves are outmoded and should be abrogated or amended to clarify the actual practice of the court. This should probably include general provisions, such as found in Alaska and in all the districts of Louisiana, that "All petitions for naturalization shall be heard as directed by the court."

Rule 81 – Jury Demand in Removed Case

Conflicts:

1. *Different Time Limits:* N.D.Okla. LR 81.2 sets forth time periods for filing a jury demand after removal that differ from those set forth in Rule 81(c). As such it conflicts with the Federal Rule.

2. *Obligation to Reassert a Jury Demand:* Local rules in two district courts require a party to reassert its demand for a jury trial after removal. A rule requiring a jury demand to be made in a removed case, no matter the circumstances, does conflict with Rule 81(c), which provides that a party is under no obligation to reassert a demand for jury trial if a demand was properly made under state law. The Nebraska rule (D.Neb. LR 81.2), which appears to admit of no exception, therefore conflicts with federal law. But, the N.D.Okla. rule is not so clearly in conflict on this point. It states that a demand need not be made if the demand "is in the removed case file."[45]

[43] *See* 8 U.S.C §§ 1421, 1445-47.
[44] D.Alaska LR81.2; N.D.Ga. LR83.10(A); E.D.La. LR83.1; M.D.La. LR83.1; W.D.La. LR83.1; M.D.N.Car. LR77.1(c); D.Wyo. LR83.8.
[45] N.D.Okla. LR81.2.

Rule 83 – Promulgation of Local Rules

Arguable Conflicts:

1. *Amendments:* D.Mass. LR 83.1 states that the court, by majority vote, may amend or rescind local rules.[46] It could be argued that this rule conflicts with Federal Rule 83 because it omits any reference to the need for public comment, as required for local rulemaking under Rule 83. Reasonable minds can differ about whether this is a conflict on paper. It is not, however, a conflict in application, as research indicates that the district has complied with the public comment requirements in promulgating amendments.

2. *Suspending or Modifying Local Rules:* N.J. LR 83.2 permits the Chief Judge, after a recommendation from the advisory committee and with court approval, to relax or modify a local rule on a temporary basis for up to one year. It can be argued that this rule is in conflict with the national law, which provides that once a local rule is enacted, it remains in effect "unless modified or abrogated by the judicial council of the relevant circuit."[47] The D.N.J. rule allowing the chief judge to suspend a local rule on a temporary basis may be quite useful in some circumstances; and because it is part of all of the local rules and qualifies them all, it may not be inconsistent with § 2071. The part of the rule that allows the chief judge to modify a local rule on a temporary basis does seem inconsistent with § 2071.[48]

[46] D.Mass. LR83.1(a).
[47] 28 U.S.C. § 2071(c)(1).
[48] *See* 28 U.S.C. § 2071(e) ("If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment.").

Conclusion

The Local Rules that are clearly in conflict with Federal law are as follows:

1. E.D.Wisc. GR LR 5.1: requires all papers in the action to be filed, with no exception for discovery materials. This is an apparent conflict with Rule 5(d).

2. D.Ariz. LR 2.3: refers to "A District Court Composed of Three District Judges" and so is inconsistent with the clear language of 28 U.S.C. § 2284, governing the practice of three-judge courts. The statute requires three judges "at least one of whom shall be a circuit judge."

3. W.D.Mo.LR 9.1 and D.N.H. LR 9.1: extending the time to answer in a Social Security action, inconsistent with Rule 12(a)(3)(B).

4. D.Ariz. LR2.11: providing for mandatory arbitration, in conflict with the Alternative Dispute Resolution Act of 1998. This district was not grandfathered as a pilot district for mandatory arbitration..

5. D.Ariz.LR2.11(k)(4); M.D.Fla. LR8.06; W.D.Mich. LR16.6(j); D.N.J. LR 201.1(h); W.D.N.Y. LR16.2(i); N.D.Ohio LR16.7(j); W.D.Okla. LRL.Civ.R 16.3 Supp. 5.10; E.D.Pa. LR53.2; E.D.Wash. LR 16.2(c)(2)(d)(13): imposing burdens on trial de novo after arbitration, in conflict with the Alternative Dispute Resolution Act of 1998.

6. E.D.Cal. LR 24-133; D.Colo. LR24.1; D.Kan. LR24.1: requiring the litigant to carry out the court's responsibility under Rule 24 to provide notice to the government when there is a claim that a statute is unconstitutional. These local rules conflict with 28 U.S.C. § 2403 and Rule 24(c), both of which place the burden on the court to provide notice to the government of a claim of unconstitutionality.

7. N.D.Okla. LR 81.2: establishes a time period within which the parties must file jury demands after removal, which time periods are different from those set forth in Rule 81(c).

8. D.Neb. LR 81.2: requiring a party to reassert a demand for jury trial in a removed case, apparently even if a jury trial was properly demanded in state court. This rule conflicts with Federal Rule 81, under which a new demand is not required if a demand was properly made in state court.

The Local Rules purporting to govern practice no longer occurring in the Federal Courts are as follows:

> D.Alaska LR81.2; N.D.Ga. LR83.10; E.D.La. LR83.1; M.D.La. LR83.1; W.D.La. LR83.1; M.D.N.Car.LR77.1(c); D.Wyo. LR83.8: referring to naturalization proceedings that are no longer conducted in the federal district courts.

In addition, the following districts do not comply with the Uniform Numbering System, as required by federal law:

1. **District of Arizona**
2. **Middle District of Florida**
3. **District of Maryland** (though it does have a cross-reference to the Uniform Numbering System on its website).
4. **Middle District of Tennessee**
5. **Southern District of West Virginia**

Other rules listed in this report as "arguably in conflict" or "arguably problematic duplication" should be considered by the respective districts on a case-by-case basis. Whether the local rules cited under these headings are in fact problematic will usually depend on how the rules are actually applied by the respective districts.