COMMENT

THE LOCAL RULES OF CIVIL PROCEDURE IN THE FEDERAL DISTRICT COURTS—A SURVEY

In conformity with the Federal Rules of Civil Procedure, each district court may specify its own specialized procedural regulations. In the subsequent exhaustive study the myriad of such local federal rules are collected and categorized into twenty-one subsections for purposes of critical analysis. The objective is not only to collate the various disparate rules but also to evaluate their efficacy, with each category treated in terms of its own particularized raison d'être. Attention is also directed toward those areas in which a national standard might profitably be considered, a factor which necessarily must be weighed against the desirability of local discretion. As such, this comment should be of interest to scholars and judges, in addition to practitioners, who are concerned with the development of procedural concepts in the federal courts.

ALTHOUGH THE practice and procedure of federal district courts in civil cases is governed primarily by a body of uniform rules promulgated by the Supreme Court pursuant to a Congressional mandate, Federal Rule 83 specifically authorizes district court judges to adopt additional, localized standards not inconsistent with the Federal Rules or other statutes. This power, though hedged with limitations, has been the imprimatur for a plethora of

1 Fed. R. Civ. P.
2 28 U.S.C. § 2072 (1964). The Enabling Act requires that the Federal Rules may not a bridge, enlarge, or modify any substantive right and must preserve the common law right of trial by jury insured by the seventh amendment to the Constitution. Ibid. A general power to enact procedural rules has been accorded by statute to all courts established by Congress, but these rules may not be inconsistent with federal statutes or commandments of the Supreme Court. 28 U.S.C. § 2071 (1964). Since the Supreme Court has utilized its more specific grant of power under § 2072 to adopt rules for the district courts, however, the scope of the general rule-making power under § 2071 is necessarily subordinate and ancillary.
3 Fed. R. Civ. P. 83 provides that each district court, by action of a majority of the judges thereof, may promulgate and amend procedural rules for local practice so long as they are not inconsistent with the Federal Rules. See Advisory Committee's Notes, 28 U.S.C. App. at 6171 (1964); 3A Barron & Holtzoff, Federal Practice and Procedure § 1711, at 179-80 (Wright ed. 1958) (hereinafter cited as Barron & Holtzoff).
4 The district courts may not formulate procedural rules which are: (1) Inconsistent with the Federal Rules. Fed. R. Civ. P. 83; see Leighton v. Paramount Pictures
individualized rules which have generally remained unchallenged and untested by subjection to the comprehensive scrutiny of judicial decision or scholarly inquiry. Indeed, one legal scholar has characterized the fruits of the power as the “soft underbelly” of federal procedure.

A cursory examination of the currently effective local district court rules reveals a maze of decentralized directives, encumbered by trivia and often devoid of explanation. Perhaps, however, a categorical examination of the common subject-matters of these rules, aided by scientific analysis of the particularized viewpoints of federal judges and practitioners, can uncover specific underpinnings and thus promote an interpretation of the advisability of variegated local standards in the context of an efficient federal court system. To this end, a comprehensive analysis of specific rules common to many districts has been undertaken with a view to discerning their efficacy in both a theoretic and pragmatic context. Complementing this analysis were two written questionnaires, one set to the judges of each federal district court and another to a sampling of the federal bar throughout the country. Approximately fifty per cent of


(3) Unreasonable. See United States v. Obermeier, supra; Woodbury v. Andrew Jergens Co., supra (dictum); Godfree v. Peak, 30 F.2d 989 (D.C. Cir. 1929) (local rule barring appeal from police court if both prosecutor and appellant fail to sign bill of exceptions held unreasonable and invalid); cf. Farmer v. Arabian American Oil Co., 285 F.2d 720 (2d Cir. 1960).


Only two scholarly articles bearing on the local rules have been published, and neither of these provides a broad-gauge examination of the rules. McAllister, Pre-Trial Practice in the Southern District of New York, 12 F.R.D. 373 (1952); Van Dusen, A United States District Judge's View of the Impartial Medical Expert System, 32 F.R.D. 498 (1965).

the questionnaires sent to each group were returned in completed
form, and the collated responses have been incorporated in the
analyses of specific rules below.\textsuperscript{7}

Within this interpretational framework, specific rules have been
isolated and examined in the following order:

1. Attorneys
2. Divisions within a District
3. Calendars and Motions
4. Pleadings
5. Notification of a Claim of Unconstitutionality
6. Orders Grantable by the Clerk
7. Bonds and Undertakings
8. Depositions and Discovery
9. Pre-trial
10. Stipulations
11. Continuances
12. Dismissal for Want of Prosecution
13. Trial Conduct and Procedure
14. Impartial Medical Examinations and Testimony
15. Exhibits, Records, and Files
16. Juries: Empaneling and Instructions
17. Costs and Fees
18. Motions for New Trials
19. Appeals
20. Bankruptcy and Receivership
21. Habeas Corpus Procedure

\textbf{ATTORNEYS}

The authority of the district courts to make rules regarding the
admission and discipline of attorneys is derived from act of Con-
gress\textsuperscript{8} as well as Federal Rule 83. In addition, courts have been
held to have inherent authority to act in this field apart from any
statutory grant of power.\textsuperscript{9} The district courts thus have broad dis-

\textsuperscript{7} A questionnaire was sent to each of the 89 districts in the United States, and 42
completed questionnaires were returned. 150 questionnaires were forwarded to a
sampling of the federal bar which included each district, and 75 returns were made
from 55 separate districts.

\textsuperscript{8} See 28 U.S.C. § 1654 (1964): “In all courts of the United States the parties may
plead and conduct their own cases personally or by counsel as, by the rules of such
courts, respectively, are permitted to manage and conduct causes therein.”

\textsuperscript{9} Ex \textit{parte} Garland, 71 U.S. (4 Wall.) 333 (1866); \textit{Ex parte} Burr, 22 U.S. (9
Wheat.) 529 (1824); Laughlin v. Clephane, 77 F. Supp. 105 (D.D.C. 1947); \textit{In re}
Shorter, 22 Fed. Cas. 16 (No. 12811) (D. Ala. 1865); \textit{cf.} Goldsmith v. United States
Bd. of Tax Appeals, 270 U.S. 117 (1925).

\textsuperscript{[The statutory provision giving the district courts of the District of Columbia
authority to prescribe qualifications for membership in the bar] . . . is a statutory}
cretion to deny and to prescribe conditions for admission to their respective bars, although this power may not be exercised arbitrarily.\footnote{11}

Practically all of the districts which have promulgated local rules have included prescriptions relating to the admission of attorneys to the federal bar. The substantive requirements are generally comprehensive, although the elaborateness of the machinery for enforcement varies considerably. Typical requirements for admission are that the candidate be a member of the bar of the state in which the district is located,\footnote{12} that he be of good character\footnote{13} and that he take the prescribed oath.\footnote{14} In addition, some districts require residence or maintenance of an office within the state,\footnote{16} and a few insist that the candidate pass an examination.\footnote{16} Many districts have established a committee of judges or members of the bar to ascertain a candidate's qualifications,\footnote{17} while others place this burden upon the judge before whom admission is moved.\footnote{18}

One questionable requirement for admission is that of membership in the bar of, or residence within, the state wherein the district lies. The ostensible reason for requiring membership in a state bar is that the federal courts rely to a great extent on the state courts with their more elaborate bar examination machinery to weed out undesirables. However, this practice does not necessitate limiting membership to the local state bar or residents of the state. While a non-member of the district bar may often appear specially

\footnote{10}See Ex parte Secombe, 60 U.S. (19 How.) 9 (1859); Ex parte Burr, supra note 9; Brooks v. Laws, 206 F.2d 18 (D.C. Cir. 1953); In re Chopak, 160 F.2d 886 (2d Cir.), cert. denied, 331 U.S. 835 (1947).

\footnote{11}In re Fisher, 179 F.2d 361 (7th Cir. 1950), cert. denied, 340 U.S. 825 (1950); see Konigsberg v. State Bar, 353 U.S. 252 (1957) (reviewing state proceeding); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) (same); In the Matter of Dreier, 258 F.2d 68 (3d Cir. 1958).

\footnote{12}E.g., D.N.J.R. 2 (B); D. ORE. (GEN.) R. 4 (a); E.D. TENN. R. 1 (a).

\footnote{13}E.g., D. KAN. R. 3 (b); W.D. LA. R. 2 (a); D. ME. R. 3 (b).

\footnote{14}E.g., D. M.D. R. 2; E.D. PA. R. 5 (c); W.D. WASH. (GEN.) R. 2 (a).

\footnote{15}E.g., S.D. CAL. R. 1 (b) (residence); D. KAN. R. 3 (b) (residence and office); E.D.N.C. (GEN.) R. 1 (B) (both); E.D. VA. R. 9 (I) (residence).

\footnote{16}E.g., E.D. & W.D. ARK. R. 1 (b) (court in its discretion may waive examination for members of Arkansas bar); D.D.C.R. 93 (b); S.D. OHIO R. 3 (7).

\footnote{17}E.g., N.D. ILL. (GEN.) R. 6 (a) (ii) (judges); D.N.M.R. 3 (b) (members of bar); E.D. OKLA. R. 4 (c) (members of bar).

\footnote{18}E.g., S.D. FLA. R. 14; D. Md. R. 2; E.D. & S.D.N.Y. (GEN.) R. 3 (a). D. MASS. R. 3 (b) places the burden on the United States Attorney for the district.
in a particular action, there seems to be little reason for requiring in every case the special appearance of an attorney who regularly appears in the district court but who, for example, is a member of the bar of a neighboring state. This argument obtains even where such permission is granted as a matter of course. Moreover, it would seem to be in the interests of the district court to require counsel who appear regularly to submit to the requirements of membership in that district's bar. Membership in the bar of any state should render an attorney eligible to apply for membership in the district bar, and the residence of the attorney should be immaterial.

Desirable innovation might also be made in those districts which provide little or no machinery for inquiring into the qualifications of applicants for membership in the bar. While doubtlessly some examination is made by the judge before whom admission is moved, a busy judge probably has little time to make a comprehensive inquiry into the candidate's qualifications and admission may tend to follow as a matter of course. The variance among the districts may reflect differing degrees of confidence in the local state court's admission procedure. However, by virtue of the somewhat distinctive substantive and procedural practice within the federal judicial system, it would seem that even where the state's machinery is adequate, the federal courts should be charged with making an independent and meaningful evaluation of applicants. The need for adequate machinery is doubly compelling where members of the bar of any state are eligible for membership in the district bar.

Most districts permit attorneys who are not members of the district bar to appear specially in a particular case. The language of the rules is generally permissive and extension of the privilege is within the discretion of the court. Practically all of these dis-

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19 W.D.N.C.R. 1 (A) expressly states that admission to the federal bar of a member of the North Carolina bar shall, upon the payment of the fee and the taking of the oath, follow as a matter of course.

All but three of the district judges responding to the questionnaire stated that admission to the bar of their district was virtually automatic for members of the state bar. 88% of the practitioners responding to the questionnaire felt that there was no need to impose requirements for admission to the bar of the district court beyond that of admission to the bar of the highest court of the state.


21 E.g., E.D. ILL. (Crv.) R. 1 (d); W.D. La. R. 2 (c); M.D. Pa. R. 2.

22 See, e.g., E.D. Mich. R. 1 (2); N.D.N.Y. R. 2 (d); D. Ore. (Gen.) R. 4 (c).

Permission to appear specially has been held a "privilege" rather than a "right," denial of which is reversible only upon an abuse of discretion. Thomas v. Cassidy,
Districts require an out-of-state attorney appearing specially to join with local counsel in the case. Joinder of local counsel is also generally required of members of the district bar who maintain no residence and/or office in the district. Supplemented these requirements, significant powers have been accorded local counsel to enable them to serve meaningfully as partners in the conduct of an action. For example, most districts provide that service of papers may be made upon local counsel. Further, many require local counsel to sign papers, enter appearances and/or possess authority to act for the client and to confer with the judge and opposing counsel. An occasional district requires that local counsel “meaningfully participate in the preparation and trial of the case.” The cases are split on whether nonjoinder carries the penalty of dismissal of the action.

249 F.2d 91 (4th Cir. 1957). The rule of discretion has been held to be inapplicable in criminal cases, the constitutional right to counsel being strictly interpreted to mean counsel of choice. United States v. Bergamo, 154 F.2d 51 (3d Cir. 1946).

E.g., N.D. GA. R. 1 (d); S.D. ILL. R. 1 (e); M.D. PA. R. 3. The only rule promulgated by the Middle District of Alabama requires joinder of local counsel in civil rights cases. M.D. ALA. R. 1.


A state court has been held not to be barred by the fourteenth amendment from requiring joinder of “exclusively” local counsel with attorneys who regularly practice in other states, even when they are also members of that state’s bar, regularly practice in its courts, and maintain both a residence and an office in the state. Martin v. Walton, 568 U.S. 25 (1961). Justices Black and Douglas dissented on the ground that the justifications for the rule advanced by the state court—to ensure presence of attorneys at the call of their dockets, service of papers without travel to another state, attendance of attorneys on “matters of urgency” and the presence of an attorney who is familiar with local procedure—“plainly have no relevance to petitioner who has an active practice in [the state] . . . .” Id. at 28 (dissenting opinion). These Justices viewed the requirement as violative of equal protection in that the attorney practicing in two states was singled out for discriminatory treatment by requirements having no rational connection with his fitness to practice law in the local state court. Id. at 29 (dissenting opinion).

E.g., N.D. IND. R. 1 (d); D. Md. R. 2, 3; E.D. & S.D.N.Y. (GEN.) R. 4 (a).

E.g., S.D. FLA. R. 15; N.D. ILL. (GEN.) R. 7 (a); E.D. & S.D.N.Y. (GEN.) R. 4 (a).

E.g., D. DEL. R. 4 (D); N.D.N.Y.R. 2 (d).

E.g., S.D. CAL. R. 1 (d); D. Del. R. 4 (D); E.D. VA. R. 9 (a).

E.g., S.D. CAL. R. 1 (d); N.D. & S.D. IOWA R. 8; D. NEB. R. 5 (f).

D. HAWAII R. 1 (e); D. ORE. (GEN.) R. 4 (c); see D. IDAHO R. 2 (d) (local counsel must appear on all matters heard and tried).

The practice of requiring joinder of local counsel with non-members of the bar appearing specially or members of the bar who do not reside or maintain an office within the district should be re-examined by the courts. The justifications for the requirement which may be abstracted from the various rules do not, with one exception discussed below, appear compelling.

One apparent justification may be that local counsel will be more familiar with local variances of procedure. However, if an attorney wishes to assume the obligation of informing himself of any local variances, there would seem to be no objection. Such a rule also ensures a local address to which papers may be mailed, but a nonresident attorney can be required to accept service by mail, and if he wishes to take the chance of delay because of distance there should again be no objection. The rule does ensure that someone is available locally to confer about the case with the judge or opposing counsel. However, this policy may be effectuated by requiring nonresident counsel to be available to confer with the judge upon stated notice and to accept collect long-distance telephone calls from opposing counsel for purposes reasonably calculated to advance the case, the expense of which would not be a taxable cost. In the latter instance a rule of reason such as is utilized in discovery proceedings would be necessary to avoid harrass-

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41.3% of the practitioners responding to the questionnaire thought that the local counsel rule had detrimental effects, such as increasing the cost of litigation (34.7% of all responding practitioners), increasing the difficulties of communication among the litigation team (14.7%), and increasing the possibility of conflict with a local counsel selected only because of the requirement (5.3%). Despite recognition of these effects, 82.7% of the practitioners responding to the questionnaire thought the rule served a needed purpose. See notes 32, 35 infra.

The Western District of North Carolina recognizes the problem of increased costs of litigation and provides that local counsel is not required where the amount in controversy or the importance of the case does not appear to justify double employment of counsel. W.D.N.C.R. 1 (B). The rule warns, however, that such special permission “will be the exception and not the rule,” and that “no out-of-state lawyer will be permitted to practice frequently or regularly in this court without association of local counsel.” Ibid.

Of the 82.4% of the responding practitioners who thought the local counsel rule served some useful purpose, 80.7% thought that local counsel were needed because they would have a better knowledge of local court procedures. 75.8% also felt that local counsel were needed because they would be better acquainted with “local conditions.”

See note 23 supra and accompanying text.


See note 28 supra and accompanying text. 77.4% of the responding practitioners who thought that the local counsel rule served a useful purpose were of the opinion that local counsel are needed because they may be more easily contacted.

See Fed. R. Civ. P. 30 (d).
ment, but its application should not be difficult and any doubts might properly be resolved against the nonresident attorney.

Another justification for the local counsel rule may be that a court has less control over the conduct of non-members of the district bar and a lesser knowledge of their character. Thus, it may be argued that if a member of the local bar is joined he will exert a restraining influence upon the non-member. This does not, however, provide a justification for the requirement that members of the bar of the state in which the court is seated, but who do not reside or maintain an office in the district, join with exclusively local counsel. Moreover, the argument that lack of control over non-members necessitates the local counsel rule appears specious. An attorney who appears before a given court would seem to submit to the authority of the court as fully in that particular case as a member of the bar and would be amenable to such disciplinary measures as dismissal of his case, contempt proceedings, compulsory withdrawal from the case, denial or suspension of the privilege of again appearing before the court and notice of the misconduct to bars of which he is a member. On the other hand, the inadequate knowledge of the character of non-members is a persuasive reason for requiring a local attorney to the extent that an adequate investigation is not made by the courts of whose bar the transient is a member. However, if and when all federal courts make adequate investigation of applicants, the local counsel requirement could be dropped for members of a federal bar; and even at present reciprocal agreements could be entered into between districts which do make adequate investigation, each withdrawing the local counsel requirement for members of the other bar.

Cf. N.D. & S.D. Iowa R. 3. "[W]here the action is one to recover damages for personal injuries sustained in Iowa by one who at the time was a resident of Iowa or the action is one to recover damages for the death of a resident of Iowa resulting from personal injuries sustained in Iowa, the Court may on its own motion, or on motion of a member of the bar of either District, before permitting a non-resident attorney to participate in the case, require a satisfactory showing that the connection of the said attorney, or the firm or attorney with which he is associated, was not occasioned or brought about in violation of the standards of conduct [specified by state law and the Canons of Professional Ethics of the American Bar Association] . . . ." Ibid.


See text accompanying note 19 supra.

Cf. E.D. & S.D.N.Y. (GEN.) R. 3(a). "A member in good standing of the bar of the State of New York . . . or a member in good standing of the bar of a United States district court in New Jersey, Connecticut or Vermont and of the bar of the
It is possible that a substantial purpose underlying the rule is to "make work" for local lawyers. In addition, it cannot be gainsaid that in certain instances district courts are antipathetic on principle to the interposition of outside counsel in local cases. This attitude is conspicuous in the few districts which require local counsel to "participate meaningfully" in the case. Such parochical attitudes, be they tacit or codified, have no place in the federal courts, although their influence is so subtle as to make such rules difficult to eradicate.

Most of the districts which have rules relating to the admission of attorneys have also made some provision for discipline and disbarment, although here again there is variation as to the extensive-ness of the provisions. Some districts merely provide that an attorney may be suspended or disbarred "for cause." Others specify in addition that an attorney who is disbarred in any other court or convicted of a felony will be disbarred unless he shows good cause otherwise. Many districts utilize a committee to recommend disbarment, often with specific provision for notice to the attorney and a hearing. Others are silent on this subject, apparently placing the responsibility of inquiry and of guaranteeing a fair hearing upon the judge before whom disbarment proceedings are brought.

A prescribed procedure for discipline and disbarment would seem to be desirable, although the specifics of such a procedure—

State in which such district is located, provided such district court by its rules extends a corresponding privilege to members of the bar of this court, may be admitted to practice in this court . . . . " Ibid.

50.1% of the responding practitioners expressed the opinion that the local counsel rule is possibly inspired by local counsel desiring additional business. An interesting fact is the correlation between a practitioner's opinion of the local counsel rule and the rule in his district. 82.8% of the practitioners from districts having a local counsel rule thought that it served a useful purpose. 100% of the practitioners from districts without the rule viewed it, perhaps wistfully, as salutary.

See note 29 supra and accompanying text.

E.g., D. IDAHO R. 1 (e); D. KAN. R. 3 (k).

E.g., S.D. CAL. R. 1 (f); D. NEB. R. 5 (k) (2); D. NEV. R. 1 (f); W.D. OKLA. R. 4 (e).

Some rules, such as D.N.J.R. 5 (A) and N.D.N.Y.R. 4, provide that disbarment or suspension in the district court ipso facto follows from disbarment or suspension by any court of record. There is no opportunity for the attorney to show cause why he should not be disciplined. These rules may be invalid as violative of due process. See note 48 infra and accompanying text; cases cited note 29 supra. Despite this ostensible unfairness, however, 45% of the responding judges indicated that disbarment in their courts would automatically follow from disbarment in the state court. 81.3% of the responding practitioners likewise approved of this practice.

E.g., S.D. CAL. R. 1 (g) (2); N.D. ILL. (GEN.) R. 8; W.D. OKLA. R. 4 (d).

E.g., S.D. CAL. R. 1 (g) (4); N.D. ILL. (GEN.) R. 8 (b)-(c); E.D.N.C. (GEN.) R. 1 (H).

See, e.g., E.D. Mich. R. 1 (d); W.D.N.C.R. 1; S.D.W. VA. R. 1 (e).
whether the investigation is made by the judge or a committee, for example—need not be uniform, so long as a fair hearing is insured. An investigation and minimal procedural safeguards, such as notice to the individual and opportunity for hearing, are guaranteed by constitutional requirements. As in any proceeding, however, it is desirable that needless uncertainty be avoided by local prescription of some systematic procedure rather than relying upon inchoate local custom.

In determining whether any of the local rules regarding attorneys should be the subject of a uniform Federal Rule, the two conflicting factors must be assessed: all attorneys should be treated equally in the federal courts, but it also appears desirable that admission and discipline should be within the province of the local court before whom the attorney seeks the privilege of practicing. In addition, some local variance may be necessary, given the desirability of allowing most members of the local state bar to be eligible for admission to the district bar. The latter factors, however, are most relevant as testimony to the necessity of allowing wide discretion to the district court in the formulation and application of substantive criteria for admission and discipline. They do not preclude a uniform procedure. As noted in the previous discus-


49 See notes 9-11 supra and accompanying text.

50 Except with regard to the requirement of residence or maintenance of an office within the state, see note 15 supra and accompanying text, there does not seem to be a great deal of substantive variance between districts as to the state bar's eligibility for admission to the federal bar. See note 12 supra and accompanying text.

51 Additionally, it might be desirable to consider making uniform the rule, e.g., S.D. Cal. R. 1 (d), that members of the bar of any federal court or the supreme court of any state are eligible to apply for membership in the bar of any district court.

52 It may be argued, however, that the use of the word "respectively" in the statute granting authority to the district courts to act in this field, quoted in note 8 supra, indicates that the entire question of admission and discipline is to be left to local discretion.

The practitioners were evenly split on the question of the desirability of a uniform rule on the subject of admission to the bar, 44% favoring uniformity, 45.3% favoring local handling of the question. The remainder either felt that it made no difference or failed to answer the question. Interestingly, 77.8% of the practitioners favoring requirements for admission in addition to membership in the state bar also favored uniformity, while only 39.4% of the practitioners who asserted that membership in the state bar should be sufficient favored uniformity.

A majority of practitioners (53.3%) were of the opinion that disbarment rules should be formulated locally rather than uniformly.
the inquiry into a candidate's qualifications may suffer from a lack of an adequate admission process, and needless uncertainty may result from a lack of prescribed disciplinary machinery. To avoid these consequences, it might well be salutary to establish a uniform national procedure for the admission and discipline of attorneys, which should at least include the establishment of local committees to deal with these matters in accordance with a prescribed procedure for investigation and with requirements of notice and a hearing.

A uniform procedure of admission and discipline or, alternatively, the creation of an autonomous national federal bar with strict requirements for acquisition and maintenance of membership, would have the added advantage of affording a pretext for the abolition of the local counsel rule as applied to attorneys who are members of a federal bar. As indicated above, the only justification for the rule is the local court's lack of knowledge regarding the character and qualifications of attorneys not members of its own bar. This argument is insubstantial to the extent that an adequate investigation is made by other federal courts, although local substantive divergences might militate in favor of retaining the rule.

DIVISIONS WITHIN A DISTRICT

The territorial separation of the federal district courts into jurisdictional units is specifically prescribed by federal legislation and has been effectuated by districting many states and further subdividing several districts into divisions. However, since Congress has declined to partition some districts on a divisional basis, several courts have achieved this dissection through local rules. These rules have been accepted as proper exercises of the rulemaking powers of the district courts, perhaps because Congress did not ex-
plicitly assert exclusive authority. Nevertheless, substantial attacks have been leveled against the recognition of locally created divisional boundaries in resolving questions of proper jurisdiction and venue.

These attacks have centered upon the application of the federal venue statutes, which demand that actions be brought in the division where the defendant resides. In *Standish v. Gold Creek Mining Co.* the Ninth Circuit reversed a decision of the Montana Federal District Court, which had held that it lacked jurisdiction to hear an in personam action where the defendant resided in another locally created division. The court of appeals disregarded the local rule dividing the district on the grounds that it improperly delimited the in personam jurisdiction directly conferred by Congress. The court discerned a congressional intent that Montana should have no divisions and therefore the district courts, by local rules, could not prevent the prosecution of the civil action anywhere in the district as long as personal service within that perimeter was effected. Despite the ostensible vitiation of the Montana local rule by this decision, the rule apparently remained formally in effect. However, it was challenged again twenty years later with regard to its effect upon a motion for a change of venue under section 1404(a) of the Judicial Code, which provides that an action may be transferred to a district or division where it might have been brought. The Montana Federal District Court considered the challenge in *McNeil Constr. Co. v. Livingston State Bank* and held that the transfer of an action under section 1404(a) could properly be made from one locally created division to another.

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59 28 U.S.C. § 1393 (1964) provides, inter alia: "(a) Except as otherwise provided, any civil action, not of a local nature, against a single defendant in a district containing more than one division must be brought in the division where he resides." See 28 U.S.C. § 1404 (1964) recognizing "divisions" for transfer purposes.

60 92 F.2d 662 (9th Cir. 1937), cert. denied, 302 U.S. 765 (1938).

61 The federal venue statute on which the district court relied was Act of March 3, 1911, 36 Stat. 1101, which was similar in all material respects to 28 U.S.C. § 1393 (a) (1964).

62 92 F.2d at 663.

63 Id. at 665-64.


66 Id. at 662.
In so holding, the court confined the vitality of *Standish* to its rejection of the rule as a device to abrogate jurisdiction obtained by personal service within the district. *Livingston* thus intimated that to interpret *Standish* as totally abnegating locally created divisions would constitute a misapprehension of the fundamental distinction between venue requirements and in personam jurisdiction. Significantly, the *Livingston* court also indicated that it was an open question whether in the situation where divisions are created by court rule, a trial court is bound by the federal venue prerequisite requiring “nonlocal” civil actions against a single defendant to be brought in the division where he resides if the district is one “containing more than one division.”67

The liberal result reached in *Livingston* appears to more nearly conform to the basic policy embodied in the federal venue statutes, which are designed to assist the defendant in achieving a convenient forum. This same policy could be further effectuated by an extension of the *Livingston* result to allow deference to the unity of locally created divisions on questions of proper venue. In many respects the local courts are in a better position than Congress to determine the most equitable division of intradistrict jurisdictional units for venue purposes. They are likely to have a more realistic knowledge of travel considerations and a more practical understanding of the possibility of clogging a particular locale with claims which could be more expeditiously adjudicated in other sections of the district. Consequently, it would seem advisable to vest discretionary authority in the district courts to formulate new or additional divisions within districts for venue purposes, and this power might be conferred either by an amendment to the Federal Rules of Civil Procedure or by direct federal legislation.

**Calendars and Motions**

The judicial task of overseeing the traditional maneuvering of litigants is most direct under the Federal Rules where the court must dispose of various motions interposed by the parties. To insure that motion practice does not become unduly burdensome, district courts have instituted several devices to expedite these preliminary procedures with a minimal consumption of judicial time. While such mechanisms may be evaluated pragmatically by the de-

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gree of economy which they afford, the dictates of due process may not be diluted: "the quest for speed and efficiency is balanced by the need to avoid perfunctory routine disposition, so as to defeat the very purpose of seeking justice." The interplay between these two ends is a common integer in the evaluation of most local rules, and the efficacy of the balance struck will be the gauge used below to assess motion requirements imposed by the district courts.

Two competing methods of motion expedition are the disposition of all motions at regular, periodic "motion days" and "the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition." Sanction for both these devices is conferred by Federal Rule 78, which neither compels nor precludes their coexistence within the same local matrix. The practice in many districts is to utilize both procedures although courts with regularized motion days are generally more lenient in affording the parties to a motion an oral hearing or argument. The advantages of each method, taken severally, would appear to vary with the exigencies of a given district, and "the optimum procedure for one district may not be the most efficient and economical for another." While an attempt to generalize is thus a tenuous endeavor, one district judge has noted that the motion calendar and its attendant oral accoutrement facilitate a faster disposition of motions, while the submission of motions on briefs alone encourages a more deliberative ruling and greater judicial control of motions. Given its emphasis upon speed, it is not surprising that the motion calendar is typically employed in those districts having an abnormally heavy docket.

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Typical calendar rules allot one motion day per session, D. ALASKA R. 5 (A), per week, D. ARIZ. R. 9, or per month, D. KAN. R. 11.

Federal Rule 78 requires district courts to establish regular scheduled motion calendars "unless local conditions make it impracticable." Ibid. The court may, "to expedite its business," also provide for a completely written advocacy procedure for motions. Ibid.

E.g., D. ARIZ. R. 9; S.D. CAL. R. 3; S.D. MISS. R. Designating Motion Days.

E.g., D.N.M.R. 9 (right to oral hearing upon request); S.D. OHIO R. 7 (no apparent limitation upon right to oral hearing). But see, e.g., S.D. CAL. R. 3 (c) (no oral argument without proper showing); D.D.C. (GEN.) R. 9 (f) (no oral hearing of certain classes of motions unless court otherwise directs).

Steckler, supra note 68, at 302.

Id. at 302-05.

While the relative propriety of each format is thus problematic, both types of rules have generated their own refinements and peculiar problems and these particularities will become the focus of the subsequent discussion. For example, several districts ameliorate the potential consumptive threat of oral argument by limiting the time which will be devoted to each motion.\textsuperscript{77} Further, in some "calendar" districts, a special motion judge or pre-trial examiner is assigned to hear all preliminary motions,\textsuperscript{78} a divergence from the normal practice of appointing a single judge to handle all aspects of a contested case.\textsuperscript{79} This practice has been castigated as engendering needless duplication\textsuperscript{80} and has precipitated such anomalies as intradistrict jurisdictional confusion\textsuperscript{81} and vacation by one motions judge of a prior order issued by a coequal colleague.\textsuperscript{82} While the egalitarian leveling of the caseload afforded by the motion court system may make it desirable in the most over-burdened courts, the potentialities for duplication, undue complexity and jurist-shopping would appear to make the practice an undesirable transplant for other districts.

A common requirement, even in districts which impose few barriers to oral argument, is that the movant file a supporting brief or memorandum containing the authority upon which reliance is posited. One commentator has asserted that such rules constitute a judicial reaction to the practitioner's alleged disregard of the requirement that motions state their supportive grounds with particularity.\textsuperscript{83} In \textit{Alaska v. American Can Co.},\textsuperscript{84} the court ruled that a

\textsuperscript{77} E.g., D.D.C. (Gen.) R. 9 (c) (ten minutes for each side); D.N.M.R. 9 (b) (thirty minutes for each side); E.D. Wash. R. 8 (d) (fifteen minutes each unless a final hearing).

\textsuperscript{78} N.D. Calif. R. 20 (a); D.D.C. (Gen.) R. 9 (a). In the latter district, a pre-trial examiner hears contests on a number of specified motions, many of them concerning discovery. His recommendations attain the status of a court order if not objected to within five days. D.D.C. (Gen.) R. 9 (i) (l). See 4 Moore, \textit{Federal Practice} ¶ 26.02[5], at 1042 (2d ed. 1963) (hereinafter cited as Moore).

\textsuperscript{79} E.g., D. Alaska R. 4 (D); S.D. Calif. R. 2 (d); D. Del. R. 13 (A); S.D. Fla. R. 4 (e); cf. D. Conn. R. 9 (g) (single judge for "long and complicated cases").


\textsuperscript{81} See \textit{In re Dunlap's Guardianship}, 36 F. Supp. 545, 546 (D.D.C. 1941), where a judge refused to hear a motion submitted to him after termination of his assignment in the Motions Division although it was coupled with a seasonably filed motion which he was required to rule upon.


\textsuperscript{83} \textit{Wright, Federal Courts} § 66, at 242-43 (1968) (hereinafter cited as \textit{Wright}). Fed. R. Civ. P. 7 (b) (l) imposes the requirement of particularity.

brief could be required even where the particularity of the motion conformed to Form 19, appended to the Federal Rules. Since the forms contained in the Appendix of Forms are deemed by Federal Rule 84 to be “sufficient under the rules,” the proviso of many local rules that failure to file a brief will result in waiver of the motion poses at the least a latent possibility of conflict with the authoritative source of district mandates.

In the situation where a motion does not correspond to an approved form, the waiver sanction may still be assailed both as applied to the movant and to the opponent who fails to file the reply brief required by many local rules. The Fifth Circuit has ruled that it is improper to grant by default a motion to dismiss pursuant to Federal Rule 12 (b) on the ground that the plaintiff failed to file a responding brief in opposition. Although the court skirted the issue of validity by construing the local rule as being devoid of a dismissal sanction, the decision clearly implied that this penalty is too stringent to conform to Federal Rule 1, which demands that the rules “be construed to secure the just, speedy and inexpensive determination of every action.” The discretionary power of the district court is tempered by this directive, asserted the court, and “the force of this first and greatest of the Rules should not be blunted by district courts’ exaggerating the importance of local rules and enforcing such rules through inappropriate, over-rigorous sanctions.”

While it is possible to construe this holding as prescriptive of waiver only where it results in dismissal or summary judgment, it clearly contains a germinal implication that such

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85 FED. R. CIV. P. 84.
86 E.g., D. ALASKA R. 5 (D) (4); D. ABIZ. R. 9; S.D. CAL. R. 3 (d) (I); E.D. & S.D.N.Y. (GEN.) R. 9 (b).
87 E.g., rules cited note 86 supra.
88 Woodham v. American Cystoscope Co., 335 F.2d 551 (5th Cir. 1964).
89 Fed. R. Civ. P. 1 (Emphasis added.)
90 335 F.2d at 557.
91 Where the opponent of a motion for summary judgment fails to file counter-affidavits traversing the movant’s affidavits, some courts have held that the facts contained in the supporting certifications must be taken as true. See Preveden v. Croatian Fraternal Union of America, 120 F. Supp. 33 (W.D. Pa. 1954); Allen v. Radio Corp. of America, 47 F. Supp. 244 (D. Del. 1942). The better rule, however, would appear to vitiate the force of this requirement to accord with the more permissive language of Federal Rule 56 (c), which provides that “the adverse party . . . may serve opposing affidavits.” Fed. R. Civ. P. 56 (c). Several circuits have so ruled. United States v. Kansas Gas & Elec. Co., 287 F.2d 601, 602-03 (10th Cir. 1961); Albert Dickinson Co. v. Mellos Peanut Co., 179 F.2d 265, 268 (7th Cir. 1950). Cf. N.D. Ind. R. 8 (b), requiring submission of a brief on a motion for summary judgment.
sanctions may be warranted, if at all, only in cases of flagrant disregard.\textsuperscript{92} Those rules which are less severe in their requisites\textsuperscript{93} or which allow waiver only in the discretion of the judge\textsuperscript{94} have erected a firmer bulwark against similar appellate exacerbation.

An analogous practice is the requirement that a movant for summary judgment accompany his motion with a statement of the material facts concerning which he contends there is no material issue.\textsuperscript{95} His opponent may,\textsuperscript{96} and in some districts must,\textsuperscript{97} respond with a statement of genuine issues. Such rules may not be immutable requisites, however, and one court has properly ruled that dismissal for failure to file proposed factual findings is unwarranted where the issue on motion is purely one of law.\textsuperscript{98} Proposed findings of fact, asserted the court, are purposively legitimized only by their function in revealing “specific facts deemed necessary to support the judgment.”\textsuperscript{99} Further, those rules which assert that claims of the movant, if standing uncontradicted by the opponent’s statement, will be deemed admitted\textsuperscript{100} are eminently assailable as transcending the bounds of Federal Rule 56(c).\textsuperscript{101} That rule allows summary judgment to be rendered upon consideration of the pleadings, depositions and interrogatories, and a party who chooses to rely upon averments in his pleading which contradict a movant’s assertions should not be subject to default for what is tantamount to an additional and possibly superfluous pleading requirement.\textsuperscript{102}

In some districts, these issue statements must correspond to the form of a judicial opinion\textsuperscript{103} and may be entered as an order of

\textsuperscript{92}The Fifth Circuit in the case under discussion placed emphasis on the fact that plaintiff’s counsel was from another district and was expectedly unfamiliar with the applicable local rules. “[T]he local rules turned out to be a series of traps for the free-of-fault plaintiff.” Woodham v. American Cystoscope Co., 335 F.2d 551, 552 (5th Cir. 1964).

\textsuperscript{93}See D.N.J.R. 10 (failure to file waives right to argue orally); S.D. Miss. R. Designating Motion Days (judge may, upon direction to counsel, require briefs of movants although briefing is not a mandatory matter).

\textsuperscript{94}This is the pattern most rules have followed. E.g., D. COLO. R. 9 (c); E.D. & S.D.N.Y. (GEN.) R. 9; M.D.N.C. (Civ.) R. 21.

\textsuperscript{95}E.g., S.D. CAL. R. 3 (d)(2); D.D.C. (GEN.) R. 9 (f).

\textsuperscript{96}E.g., rules cited note 95 supra.

\textsuperscript{97}E.g., E.D. LA. R. 4; E.D. & S.D.N.Y. (GEN.) R. 9 (g).

\textsuperscript{98}Dredge Corp. v. Penny, 338 F.2d 456 (9th Cir. 1964).

\textsuperscript{99}Id. at 465. (Emphasis added.)

\textsuperscript{100}E.g., S.D. CAL. R. 3 (d)(2); E.D. & S.D.N.Y. (GEN.) R. 9 (g); D. UTAH R. 7.

\textsuperscript{101}FED. R. CIV. P. 56 (c).

\textsuperscript{102}See note 91 supra, discussing the divergent positions of the courts concerning the failure to file counter-affidavits as tantamount to an admission of verity.

\textsuperscript{103}Steckler, supra note 68, at 309-10; see E.D.N.C. (GEN.) R. 4 (draft order may
This device has been saluted as quite advantageous in decreasing the volume of evidentiary detail which a judge must sift and reduce to writing when ruling upon a motion for summary judgment as to all or some formally controverted facts. Nevertheless, rigid enforcement of such a rule by waiving the delinquent party's position would be equally subject to objection as erosive of the dictates of both Federal Rule 1 and due process. Absent an unduly prejudicial sanction, however, the practice of litigant formulation of judicial opinions appears to be a novel and laudable method of conserving judicial effort and, concomitantly, of overcoming the reluctance of many courts to subject summary judgment motions to serious scrutiny.

In those districts which emphasize the use of written briefs and memorandums, a particularized statement of motion grounds is not the singular rationale for the requirement. Rather, many districts manifest a strong preference for deciding motions strictly on the basis of these documents and without an oral hearing or argument. Although hearings and argument are the usual practice in some federal courts, several local rules provide that oral motion proceedings will not be entertained unless the judge so directs. Other districts take a median position while encouraging the written submission and resolution of motions, they allow oral argument upon a "proper showing," presumably of "good cause," or discretionally permit it merely upon the request of one party. The

be filed at the parties' option); D. Ore. (Gen.) R. 5 (motions of over a page in length must be accompanied by separate form of order).

Steckler, supra note 68, at 309-10.

Id. at 308-10.

Many courts have been reluctant to utilize the summary judgment procedure for at least two reasons: "First, some judges believe that the lawyers do not give adequate help, and so consider excessive the labor necessary to decision; and second, some judges have a highly developed fear of reversal." Id. at 306. The "American affinity for the traditional trial by jury" may also be assigned as a causal factor of judicial reluctance. Ibid.

A hearing contemplates the presentation to the court of witnesses and other evidence, while oral argument subsumes advocacy of counsel before the judge. Compare N.D. Cal. R. 21 with D. Hawaii R. 2.

E.g., E.D. La. R. 4; D. Hawaii R. 2 (a) (1) (oral arguments on questions of law permitted without qualification).

E.g., S.D. Fla. R. 4; N.D. Ind. R. 6 (b); S.D. Miss. R. Designating Motion Days; S.D. N.Y. (Gen.) R. 9 (k).

E.g., S.D. Cal. R. 3 (c); W.D. Mo. R. 10.

E.g., D. Colo. R. 9 (d); E.D. Ill. (Civ.) R. 5; D. Md. R. 7; E.D.N.C. (Gen.) R. 4; M.D.N.C. (Civ.) R. 21. One court has asserted that even if a party under this mode of rule requests a hearing, the court may properly deny it. United States Fid. & Guar. Co. v. Lawrenson, 34 F.R.D. 121 (D. Md. 1964).
power to limit the right to an oral hearing is found in Federal Rule 78, which allows the court to promulgate rules for the "submission and determination of motions . . . upon brief written statements of reason in support and opposition."\textsuperscript{112} The Ninth Circuit has held, however, that a hearing may not be precluded on a motion for summary judgment.\textsuperscript{113} The court declined to rest its decision upon due process grounds,\textsuperscript{114} reasoning instead that Federal Rule 56 (c), which alludes to service of notice and affidavits prior to "the time fixed for hearing,"\textsuperscript{115} requires that an opportunity for a hearing be afforded.\textsuperscript{116}

Rule 12 (d), dealing with motions to dismiss,\textsuperscript{117} and rule 56 both allude to "hearings" upon these respective motions although neither rule in terms requires an oral hearing. It is arguable that these rules were impliedly those which were referred to in the first paragraph of rule 78, which is concerned with the dispatch on motion days of "motions requiring notice and hearing."\textsuperscript{118} Viewed with this perspective, the power to require written submission and determination might be read as limited to those motions which make no reference to a "hearing" attendant to their resolution. It is equally arguable, however, that "hearing" does not necessarily require an oral proceeding: rather, it may be construed as any procedure, written or oral, by which the court allows the parties to present the groundwork buttressing their positions.\textsuperscript{119} Such a construction would seemingly be a more logical reading of rule 78, which provides unqualifiedly for the processing of motions without oral hearing.

It is evident from the dearth of allusion to the question in the Advisory Committee's Notes to rules 12, 56 and 78 that the problem was not foreseen.\textsuperscript{120} Thus, any attempt to glean a definitive interpretation from the rules may be a delusive and misdirected undertaking. The due process dictates of the Constitution are likely a

\textsuperscript{112} Fed. R. Civ. P. 78.
\textsuperscript{113} Dredge Corp. v. Penny, 338 F.2d 456 (9th Cir. 1964).
\textsuperscript{114} Id. at 462 n.14.
\textsuperscript{115} Fed. R. Civ. P. 56 (c).
\textsuperscript{116} 338 F.2d at 461-62.
\textsuperscript{117} Fed. R. Civ. P. 12 (d).
\textsuperscript{118} Fed. R. Civ. P. 78. (Emphasis added.)
\textsuperscript{119} Cf. Sarelis v. Porikos, 320 F.2d 827, 828 (7th Cir. 1963), finding "no denial of hearing" where a motion for summary judgment was determined upon the complaint, affidavits and briefs. Accord, Skolnick v. Martin, 317 F.2d 855, 857 (7th Cir. 1963).
\textsuperscript{120} See Advisory Committee's Notes, 28 U.S.C. App. at 6092-94, 6135-36, 6166 (1964).
more fertile decisional source. Whether an oral hearing is a due process requisite in a given circumstance is problematic. The Supreme Court, in denying the right in an administrative context, asserted that it "varies from case to case in accordance with differing circumstances, as do other procedural regulations." The Court itself will not hear argument upon any motion unless it so chooses. It is likely that the judicial propensity to require oral proceedings is greatest where ultimate, dispositive motions such as summary judgment and dismissal are at issue, and the lower federal courts have divided on the propriety of the practice when such motions have been decided without oral hearing. A compromise is found in those rules which accord a party the right to stipulate his desire for an oral hearing and which deem the right waived if not requested. A local rule framed in this format has been upheld by the Eighth Circuit in a summary judgment case and the recalcitrant Ninth Circuit has also indicated its approval. The volition afforded the parties would thus appear to satisfy the requisites of due process while at the same time facilitating to some extent the quest for judicial efficiency. It is likely, however, that a requirement of "cause shown" accompanying the request would be more effective in reducing unnecessary argument. If discretion is posited in the judge to grant a hearing upon such "proper showing," it will presumably be exercised where due process requires, thus satisfying with more facility the flexible maxim tendered by the Supreme Court.

Several miscellaneous rules designed to streamline district procedures also warrant allusion in an exegesis of local motions practice. Some districts, for example, impose a time limit within which

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122 S. Cr. R. 35, ¶ 3.
123 See Council of Federated Organizations v. Mize, 339 F.2d 898 (5th Cir. 1964) (dismissal for failure to state a claim improper constitutionally without hearing); Sarelac v. Porikos, 320 F.2d 827 (7th Cir. 1963) (summary judgment may proceed without oral hearing); Harmon v. Superior Court, 307 F.2d 796 (9th Cir. 1962) (motion to dismiss for want of jurisdiction must be heard unless such defect appears on face of complaint and is incurable).
124 E.g., rules cited note 111 supra.
125 Bagby v. United States, 199 F.2d 233 (8th Cir. 1952).
126 Dredge Corp. v. Penny, 338 F.2d 456, 461-62 (9th Cir. 1964).
128 See United States Fid. & Guar. Co. v. Lawrenson, 34 F.R.D. 121 (D. Md. 1964), asserting that due process was not violated by the court's discretionary refusal of a request for a hearing.
certain motions must be filed.\textsuperscript{129} Such rules are rather extraordinary adjuncts to the Federal Rules and to the extent that these limitation periods are mandatory rather than discretionary, their validity has properly been questioned by the courts.\textsuperscript{130} An analogous practice is the discussion, hearing and ruling upon all motions at the pre-trial conference.\textsuperscript{131} Although a similar procedure has been recommended as desirable in the expedition of protracted and complex litigation,\textsuperscript{132} the rule has not enjoyed wide acceptance and one judge has asserted that it is not economical in ordinary cases where motions must be received "as counsel have the inclination to file them."\textsuperscript{133} Finally, in an attempt to vitiate the intransigence of attorneys who file unnecessary motions or refuse to compromise their positions with respect to a meritorious motion, many courts impose upon a counsel who files an unnecessary or frivolous motion the opponent's cost in resisting.\textsuperscript{134} Unwarranted opposition may meet with a similar sanction.\textsuperscript{135} These penalties have been upheld by one court as tending to bring "unfounded litigation . . . to an end" in accordance with the "whole tenor of the Federal Rules."\textsuperscript{136} As applied to attorneys, however, the Third Circuit has ruled that such sanctions partake of criminal contempt and require a hearing and

\textsuperscript{129} E.g., D.D.C. (Gen.) R. 11(f) (certain motions may not be raised when case is on ready calendar absent "extraordinary circumstances"); N.D. Ga. R. 9 (motions to dismiss or for summary judgment must precede pre-trial by 15 days); E.D. & S.D.N.Y. (Gen.) R. 9 (permission needed after trial calendaring for all motions other than for final relief); E.D. Pa. R. 19 (motions to bring in a third party defendant must be within six months).

\textsuperscript{130} McSparran v. Gable, 228 F. Supp. 127, 128 (E.D. Pa. 1963). In that case, a local rule prescribed a six-month period for motions for leave to bring in a third-party defendant. The court ruled that although framed in mandatory terms, the rule would be construed to admit the exercise of judicial discretion. Otherwise, the rule would, "probably [be] . . . illegal as in conflict with amended Fed. R. Civ. P. 14(a), which provides that a third party complaint may be served 'at any time after commencement of the action.'" \textit{Ibid.} See Edwards v. United States, 223 F. Supp. 1017, 1018 (E.D. Pa. 1963), characterizing the same rule as a "guide" to the discretion of the court.

\textsuperscript{131} E.g., W.D. La. R. 5(b)(2); W.D.N.C.R. 7. See E.D. La. R. 4(d).

\textsuperscript{132} The Handbook of Recommended Procedures for the Trial of Protracted Cases has recommended an early pre-trial where counsel must reveal and discuss the motions they intend to file. The pre-trial order then contains a schedule for filing and hearing motions. Steckler, \textit{supra} note 127, at 900. If mandatory, such a practice may be invalid. See note 150 \textit{supra} and accompanying text.

\textsuperscript{133} Steckler, \textit{supra} note 127, at 900.

\textsuperscript{134} E.g., S.D. Cal. R. 2(f); S.D. Fla. R. 5(h); D. Kan. R. 11(d); E.D Wash. R. 8; see M.D.N.C. (Civ.) R. 21(o).

\textsuperscript{135} E.g., S.D. Cal. R. 2(f); D. Kan. R. 11(d).

ruled to that effect before they may be imposed.\textsuperscript{137} The latter ruling appears unduly rigid, however, for the district court's inherent power to discipline the bar may be exercised by wielding a less stringent rod than the contempt power.\textsuperscript{138} The cogent dissent of Judge Goodrich is more compelling:

If a judge is going to organize, either alone or with fellow judges, the business of the court, there must be authority to impose reasonable sanctions for the breach of reasonable rules.\textsuperscript{139}

### Pleadings

Although a basic aim of the Federal Rules of Civil Procedure is to simplify the manner of pleading in the federal courts,\textsuperscript{140} several local rules prescribe potentially constricting formalities for the presentation of written claims. Most of these rules seek to aid the court either by demanding picayune uniformity in the physical arrangement of the pleadings or by requiring the tying of piecemeal claims or amendments to related allegations.

Physical requirements for pleadings generally encompass the size,\textsuperscript{141} weight,\textsuperscript{142} color\textsuperscript{143} and quality of the paper\textsuperscript{144} used therein; the method of printing;\textsuperscript{145} and the arrangement and binding of pages.\textsuperscript{146} Although these prescriptions may promote the drafting of

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  \item \textsuperscript{137} Gamble v. Pope & Talbot, Inc., 307 F.2d 729 (3d Cir.), cert. denied, 371 U.S. 888 (1962). In this case, an undue delay in filing a pre-trial memorandum resulted in a $100 fine upon counsel, payable to the Government as employer of the judicial personnel whose time had been wasted by the delay. The majority held that nowhere in the Federal Rules was such a power conferred upon the district courts and that Federal Rule 83 did not purport to accord such authority. 307 F.2d at 731-32.
  \item \textsuperscript{138} Id. at 735-36 and authorities cited in notes 5-11 therein (Biggs, C.J., dissenting).
  \item \textsuperscript{139} Id. at 737 (dissenting opinion).
  \item \textsuperscript{140} See 1A BARRON & HOLZOFF \S 251, at 31-33; 2 Moore \S 8.02, at 1612.
  \item \textsuperscript{141} E.g., D. DEL. R. 6 (A) (8½ x 13 inches); D. IDAHO R. 3 (b) (legal size paper); D. NEB. R. 6 (a) (8½ x 14 inches); D. Nev. R. 2 (b) (legal size paper).
  \item \textsuperscript{142} E.g., E.D. & W.D. ARK. R. 2 (a) (not less than 16 pounds); D. COLO. R. 7 (a) ("standard weight"); D. Nev. R. 2 (b) (not less than 16 pounds except ripple finish onion skin of 13 pounds).
  \item \textsuperscript{143} E.g., D. COLO. R. 7 (a) (white); D.D.C. (GEN.) R. 5 (b) (white opaque); D. MONT. R. 8 (a) (2) (white opaque); D. NEB. R. 6 (a) (white).
  \item \textsuperscript{144} E.g., D. MONT. R. 8 (a) (2) ("good quality"); D. NEB. R. 6 (b) ("not subject to unusual fading or deterioration"); D. Nev. R. 2 (b) ("good quality").
  \item \textsuperscript{145} E.g., E.D. & W.D. ARK. R. 2 (a) ("typewritten, mimeographed, or printed, in type not less than pica"); D. COLO. R. 7 (b) ("plainly and legibly typewritten, mimeographed or printed, without erasures or interlineations materially defacing them"); D. MONT. R. 8 (a) ("typed double spaced or printed").
  \item \textsuperscript{146} E.g., D.D.C. (GEN.) R. 5 (b) ("unfolded, without back or cover, fastened at top"); N.D. GA. R. 3 (b) ("flat and unfolded"); D. IDAHO R. 3 (b) ("no backs"); N.D. ILL. (GEN.) R. 9 (b) ("secured on the left margin").
\end{itemize}
legible and manageable pleadings within a particular district, they can create entanglements for counsel when disparate rules exist among districts.\textsuperscript{147} Courts should be and doubtless are lenient in the sanctions imposed for inadvertent transgressions, and a modicum of reasonable latitude would appear to be desirable in the content of such particularized rules.\textsuperscript{148}

Besides regulating the strict physical form of pleadings, some local rules demand presentation of isolated claims and amendments in the context of related allegations. Some of these rules command physical written incorporation of all amendments into the original pleadings to which they relate before presentation to the court.\textsuperscript{149} Others require that a responsive pleading contain a résumé of the particular pleading to which it responds.\textsuperscript{150} Finally, two districts require the plaintiff, at least one day before trial, to present to the court a copy of his complaint, accompanied by notations describing the defendant's response to each element therein.\textsuperscript{151} These rules tend to restrict the ease of pleading by imposing hitherto unnecessary burdens upon the parties, and to some extent duplicate the purposes of the pre-trial conference. Nevertheless, the rules may be pragmatically justifiable because of their maintenance of a clear and expansive expression of the formal pre-trial positions of the parties. This may augment a court's ability to rule on motions limited to the pleadings and avert misunderstandings by the parties as to the cogency of their legal positions and the need for additional amendments or motions.

Other districts tend to facilitate the ease of pleading in a complaint by hindering the presentation by the defendant of a crippling motion to dismiss for failure to state a claim under Federal Rule

\textsuperscript{147} Cf. Brown v. City of Meridian, 356 F.2d 602 (5th Cir. 1966) (district court dismissal of a removal petition because the out-of-state attorney had failed to file the three copies required by local rule held improper).

\textsuperscript{148} The practical difficulties of complying with divergent physical requirements for pleadings may at first blush indicate a need for uniformity among the districts in this area. However, the achievement of uniformity on the federal level may disturb existent parallelism of federal and local requirements within a few states. Some of the present disparity in rules of the district courts may in fact emanate from efforts to conform to state court rules. See N.D. Ga. R. 2. Consequently, although attorneys who practice in federal courts in several different states would be aided by a uniform federal rule, those whose practice is only statewide might be hampered. Perhaps, however, the adoption of homologous rules by the federal courts would prompt acceptance of identical measures by the states.

\textsuperscript{149} E.g., D. ALASKA R. 6 (C); D. IDAHO R. 3 (d); D. NEV. R. 2 (d).

\textsuperscript{150} E.g., N.D. ILL. (GEN.) R. 9 (a); N.D. IND. R. 7.

\textsuperscript{151} E.D. & S.D.N.Y. (GEN.) R. 6 (b).
These districts by local rule force the movant to state the specific basis of his claim under rule 12 (b) (6), requiring him to file a memorandum supporting his position with citations of authority. Otherwise, he could properly move to dismiss under rule 12 (b) (6) simply by a general motion without setting forth in detail the grounds upon which he relies. The latter procedure tends to promote a policy of the Federal Rules favoring liberal construction of the sufficiency of a complaint and may be proffered as a model for wider local adoption.

Finally, at least two districts have adopted local rules prescribing methods of verification as to the truth of the pleadings by the parties. These rules are somewhat ambiguous, for they do not specify the instances in which verification must be made: rather, this procedure is prescribed "whenever it shall become necessary to verify any pleading." However, the most reasonable interpretation is that these rules merely provide procedures for those extraordinary situations where verification is commanded either by the Federal Rules or by a statute. Since the need for specification of such procedures is contingent on the volume of these extraordinary cases within a particular district, local variance would seem entirely proper.

**Notification of a Claim of Unconstitutionality**

Several local rules require notice of claims asserting the unconstitutionality of federal statutes, thus enabling the district judges  

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1. W. ALASKA R. 5 (D); E.D. & W.D. ARK. R. 8 (b).
2. WRIGHT § 66, at 242 & n.43.
7. E.g., E.D. & W.D. ARK. R. 18; D. COLO. R. 23; D. DEL. R. 22; S.D. FLA. R. 11; E.D. ILL. (CIV.) R. 6(a); N.D. ILL. (GEN.) R. 22(a).
to comply with section 2403 of the Judicial Code\textsuperscript{163} and with Federal Rule 24 (c),\textsuperscript{161} which require them to notify the Attorney General of the United States when an act of Congress is challenged and the United States is not a party. Although most of the rules simply require that the party making the claim give detailed written notice to the court prior to trial,\textsuperscript{162} at least one rule imposes the additional duty of filing with the clerk an extra copy of the pleading containing the allegation and likewise to file specific instructions for notifying the Attorney General.\textsuperscript{163}

Besides promoting compliance with rule 24 (c), these local rules may have the additional utility of (1) alerting the judge of the necessity of a three-judge panel required for claims requesting injunction of a federal statute as unconstitutional;\textsuperscript{164} (2) informing the court that the case may pose difficult conceptual problems;\textsuperscript{165}

\textsuperscript{163}28 U.S.C. § 2403 (1964). The requirement of notice by the court provided by § 2403 enables the Attorney General to exercise his right to intervene in all actions "in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question . . . ." \textit{Ibid.} See Fed. R. Civ. P. 24 (a), providing for intervention by right when unconditionally authorized by a federal statute.

\textsuperscript{164}FED. R. Civ. P. 24 (c).

\textsuperscript{165}In addition to inclusion of the title of the case, the notification rules generally require references sufficient for identification of the statute questioned and the aspects of the statute upon which the claim of constitutionality is based. \textit{E.g.,} E.D. & W.D. Ark. R. 18; D. Colo. R. 23; D. Del. R. 22; S.D. Fla. R. 11; E.D. N.C. (Civ.) R. 4; E.D. Pa. R. 16. Some rules do not require a statement of the grounds of constitutional challenge. \textit{E.g.,} E.D. Ill. (Civ.) R. 6 (a); N.D. Ill. (Gen.) R. 22 (a); E.D. Wis. R. 10.

Only three of the twenty-two district judges from districts without a notification rule stated that they had experienced difficulty in providing the Attorney General with adequate notice of a claim of unconstitutionality.

\textsuperscript{166}W.D. Pa. R. 11. By this process the court shifts its duty of notifying the Attorney General to counsel, who performs the function through the conduit of the clerk. Although this eliminates administrative detail for the judge, it also removes his supervision of a mandatory responsibility.

\textsuperscript{164}A three-judge district court must hear claims for injunctions restraining enforcement of acts of Congress on grounds of unconstitutionality. 28 U.S.C. § 2282 (1964). At least five days prior to the hearing notice must be given to the Attorney General, the local United States Attorney and other persons who may be defendants. 28 U.S.C. § 2284 (1964). Neither the Federal Rules of Civil Procedure nor the apposite local rules specifically relate the notification procedures for claims of unconstitutionality to three-judge court requirements. Moreover, some districts have adopted separate rules requiring notice of claims requiring a three-judge court. \textit{E.g.,} N.D. Ga. R. 3 (f); N.D. Ill. (Gen.) R. 31.

\textsuperscript{166}All of the judges from districts requiring notice of a claim of unconstitutionality responding to the questionnaire felt that the principal purpose of the rule was to facilitate the giving of notice to the Attorney General. However, of the practitioners who favored such a rule, 56.5% felt that it was needed to inform the court of a potentially difficult case, while only 43.5% thought the rule was needed to assure notice to the Attorney General.
and (3) allowing consideration by the district judge who has the greatest affinity for constitutional questions. However, in spite of these justifications, sixty-five per cent of the federal practitioners polled objected to the notification rule. They intimated that such a rule is unnecessary because claims of unconstitutionality are generally included in the pleadings and that in any case the judge is likely to be cognizant of such claims. Consequently, many argued that a superfluous detailed burden is added to already burgeoning pre-trial requirements in several districts. However, the meritousness of these objections must depend to some extent upon the penalties for noncompliance. If the local rules merely seek to enlist the voluntary co-operation of counsel in facilitating a judicial duty, the prescriptions seem more palatable than if failure to accord notice results in waiver of the claim or the rigorous sanction of involuntary dismissal for failure to comply with an “order of the court” under Federal Rule 41(b).

On the other hand, strict enforcement of the requirement of notice to the court of a claim of unconstitutionality may in fact be in the best interest of the claimant if such notice aids the court in notifying the Attorney General under Federal Rule 24(c). Although neither the rule nor any reported case specifies the effect of failure of the court to give notice to the Attorney General, some commentators have suggested that this omission might, upon motion by the United States, warrant the invalidation of a judgment holding a statute unconstitutional. The justness of such a result

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166 It should be noted, however, that a majority of the practitioners who objected to the rules came from districts which do not require notice of a claim of unconstitutionality, while a plurality of the practitioners whose districts have such a rule favored it.

167 Written notice separate from the pleadings is more likely to direct the judge's attention to the specific claim. Consequently, separate notice is probably necessary under most of the notification rules, which make no acknowledgment that presentation of the claim in the pleadings will be sufficient notice. See rules cited note 159 supra. At least one rule specifically provides that notice shall only be contained in the pleadings, but an additional copy of the relevant pleading must be filed for the limited purpose of notifying the clerk of the claim. W.D. PA. R. 11.

168 Dismissal under rule 41(b) operates as an adjudication upon the merits. Fed. R. Civ. P. 41(b). However, rule 41(b) might be inapplicable, for the courts may refuse to hold that local rules have the force of an "order of the court" as contemplated by the rule. None of the rules contain sanctions for noncompliance, and there are no reported cases on the subject.

169 Legislation, 38 COLUM. L. REV. 153, 154 n.14 (1938). Although the United States could argue the merits of the constitutional attack on appeal, the attractiveness of this alternative is diminished by the absence of direct review by the Supreme Court, which is available only when the United States has been a party to or has
is questionable since the claimant is penalized because of the court's neglect of its affirmative duty. Nevertheless, the very magnitude of a constitutional claim suggests the reasonableness of requiring assistance of counsel in notifying an important adversary party not formally joined in the action. Perhaps an acceptable compromise would be a requirement that the claim be readily identifiable from the pleadings. Further, leave to amend the pleadings to include a claim of unconstitutionality should be available only within a period sufficient to allow the Attorney General to prepare for trial, and claims filed without the specified period should be waived.

ORDERS GRANTABLE BY THE CLERK

Although Federal Rule 77 (c) authorizes the clerk to grant orders routinely in only three specific instances and in general situations "which do not require allowance or order of the court," several district courts have substantially expanded the particular areas in which the clerk may act independently. For example, several local rules permit the clerk to grant orders where the parties have consented to substituting attorneys, extending the time to plead, satisfying a judgment or order for the payment of money, withdrawing stipulations, annulling bonds, exonerating sureties and discontinuing or dismissing a case. Moreover, absent consent of the parties, some local rules allow the clerk to appoint persons to serve process, approve subpoenas duces tecum and dismiss an intervened in the original action. See 28 U.S.C. §§ 451, 1252, 2403 (1964); 4 Fed. Rules Serv. 913 (1941).

The clerk is specifically empowered to execute mesne process; to issue final process to enforce and execute judgments; and to enter defaults or judgments by default. Fed. R. Civ. P. 77 (c). Moreover, he may under Fed. R. Civ. P. 58 enter final judgment upon the verdict of a jury and under Fed. R. Civ. P. 68 enter acceptance of an offer of judgment.

E.g., D. ALASKA R. 14 (D) (1); S.D. CAL. R. 7 (c) (2); D.D.C. (Gen.) R. 10 (2); D. HAWAI R. 4 (a) (3); W.D. WASH. (Civ.) R. 30 (a) (3).

E.g., D. CONN. R. 16 (1); D. HAWAI R. 4 (a) (2); E.D. ILL. (Civ.) R. 20 (a) (2); W.D. MO. R. 6 (a) (1); N.D. OKLA. R. 24 (b); W.D. WASH. (Civ.) R. 30 (a) (2).

E.g., D. ALASKA R. 14 (D) (2); S.D. CAL. R. 7 (c) (3); D. HAWAI R. 4 (a) (4); E.D. ILL. (Civ.) R. 20 (a) (5); D. KAN. R. 21 (c); W.D. LA. R. 9 (b) (2); D. MASS. R. 9 (2).

E.g., D. ALASKA R. 14 (D) (2); S.D. CAL. R. 7 (c) (3); E.D. ILL. (Civ.) R. 20 (a) (6); D. KAN. R. 21 (f).

E.g., D. ALASKA R. 14 (D) (2); S.D. CAL. R. 7 (c) (5); D. HAWAI R. 4 (a) (4); E.D. ILL. (Civ.) R. 20 (a) (6); D. MASS. R. 9 (2).

E.g., D. ALASKA R. 14 (D) (2); S.D. CAL. R. 7 (c) (3); D. HAWAI R. 4 (a) (4); E.D. ILL. (Civ.) R. 20 (a) (6); D. MONT. R. 16 (c).

E.g., N.D. ILL. (Gen.) R. 16 (c); S.D.N.Y. (Gen.) R. 12 (c).

E.g., S.D. CAL. R. 7 (c) (1); D. HAWAI R. 4 (a) (1); E.D. ILL. (Civ.) R. 20 (a) (1);
action where a party has failed to answer interrogatories within a prescribed period of time.\footnote{180}

The power of the clerk under the general granting clause of rule 77 (c) may be extended to the exercise of the functions added by the aforementioned local rules. This power has traditionally rested upon the characterization of a function as "ministerial" rather than "discretionary."\footnote{181} The latter term generally refers to reasoned judgments which must emanate from the wisdom of the court.\footnote{182} Conversely, ministerial duties are conceived of as exercised pursuant to precise, confining guidelines prescribed by a higher authority\footnote{183} and thus may be executed by the clerk. Although some of the orders authorized by the local rules have "discretionary" overtones,\footnote{184} in most cases the clerk's latitude of choice is effectively

\footnotesize{D. Kan. R. 21 (a); D. Nev. R. 18 (c) (1); S.D.N.Y. (Gen.) R. 12 (a); D.N.D.R. XXI (1) (4).}
\footnotesize{\textsuperscript{179} E.g., E.D. Okla. R. 24 (2); W.D. Okla. R. 23 (2).}
\footnotesize{\textsuperscript{180} D. Mass. R. 9 (4).}
\footnotesize{\textsuperscript{181} See, e.g., Midwestern Developments, Inc. v. City of Tulsa, 319 F.2d 53 (10th Cir. 1963); Orange Theatre Corp. v. Rayherstz Amusement Corp., 130 F.2d 185 (3d Cir. 1942) (by implication).}
\footnotesize{\textsuperscript{183} E.g., Nealon v. Davis, 18 F.2d 175, 176 (D.C. Cir. 1927); Flournoy v. City of Jeffersonville, 17 Ind. 169, 174 (1861); Marc v. Pinkard, 133 Misc. 85, 85, 230 N.Y. Supp. 765, 766 (Munic. Ct. N.Y. 1928).}

"A ministerial act may, perhaps, be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done." Flournoy v. City of Jeffersonville, \textit{supra} at 174.

\footnotesize{\textsuperscript{184} Several districts permit the clerk to issue orders for the substitution of lawyers when the parties have consented to the change. \textit{E.g.}, rules cited note 171 \textit{supra}. The Canons of Professional Ethics provide that an attorney may withdraw from the case only upon a showing of good cause and with due notice to the client so as to allow sufficient time for the client to secure another lawyer. American Bar Association, Canon of Professional Ethics 44. Hence the decision to allow the withdrawal of a lawyer's services appears to be in essence a function of the court. Likewise, the decision regarding the substitution of lawyers would require discretionary judgment on matters dealing with the client's interest and delay in court proceedings. Such a decision seemingly demands that "judicial wisdom" which should be exercised only by the court. \textit{Cf.} United States v. Curry, 47 U.S. (6 How.) 113, 119 (1848).}

Under D. Mass. R. 9 (4), the clerk holds \textit{ex parte} authority to dismiss a case when interrogatories have not been answered within the automatic twenty-day extension added by that rule to the fifteen-day period within which Fed. R. Civ. P. 33 requires return. Rule 33 permits the enlargement of the answering period by the court only upon motion with notice and for good cause shown. Therefore, since the decision of whether to dismiss the case for failure to answer interrogatives involves questions of good cause, sufficient notice, and integral interests of the parties, it would appear that the clerk under D. Mass. R. 9 (4) has been vested with the power to make eminently judicial decisions.

In several districts the clerk is permitted to extend the time to plead where the
circumscribed. First, the power of the clerk is often qualified by the commandment of many of the local rules that the parties must consent to any proposed order. Moreover, the ability of the clerk to resolve questions with finality is limited by a provision of rule 77 (c) which empowers the court to alter, suspend or rescind a clerk's orders "upon cause shown." However, neither of these provisions fully limits the discretionary nature of the clerical duties permitted under local rules. For example, an attorney might attempt to withdraw from an action and seek to substitute another counselor in his place. However, adequate protection of the interests of a party might depend upon continued prosecution of the action by the withdrawing attorney. Since that party's adversary is not likely to be concerned with guarding these interests, the court becomes the only effective source of protection. Consequently, in spite of mutual consent, the proposed order would seem to demand judicial scrutiny rather than routine authorization by the clerk. Furthermore, the ability of the court to rescind the order of the clerk under rule 77 (c) appears to provide an inadequate solution. Unless the court initiated suspension or rescission of the order, the substituted attorney is the only logical source of proof that cause exists for reversal of the order, and he is placed in the anomalous position of arguing his own inability to represent the party adequately.

Despite the potential disadvantages of permitting an expansion in the kinds of orders grantable by the clerk in limited situations, minor delegations in some instances may eliminate part of the burdensome workload of a court and consequently promote careful

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185 (1) Substitution of attorneys: e.g., D. ALASKA R. 14 (D) (1); S.D. CAL. R. 7 (c) (2); E.D. ILL. (Civ.) R. 20 (a) (5).
(2) Satisfaction of judgments, payment of money, withdrawal of stipulations, annulment of bonds, exoneration of sureties: e.g., D. ALASKA R. 14 (D) (2); S.D. CAL. R. 7 (c) (3).
(3) Time to plead: e.g., D. HAWAII R. 4 (a) (5); E.D. ILL. (Civ.) R. 20 (a) (2); W.D. WASH. (Civ.) R. 30 (a) (2).

Some rules, however, do not specify consent as a prerequisite. E.g., E.D. ILL. (Civ.) R. 20 (a) (6) (withdrawal of stipulations, annulment of bonds, and exoneration of sureties); N.D. OKLA. R. 24 (b) (extending time to plead).

186 See notes 171, 184 supra and accompanying text.
scrutiny of more weighty and complex issues. Perhaps the accelerating abdication of judicial supervision could be made more palatable, however, by modification of local rules to require that the clerk submit brief, formalized notice of proposed orders to the court along with a statement of relevant circumstances. The district judge could, prior to issuance of the order, quickly ascertain whether the court's intervention was necessary. This procedure would promote the preservation of judicial time by the court and at the same time insure retention of judicial scrutiny of orders.

BONDS AND UNDERTAKINGS

The district courts may, under Federal Rule 83, promulgate rules relating to bonds, undertakings and the giving of security, although several statutes and rules limit this discretion in sev-

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188 Fed. R. Civ. P. 83.


20 U.S.C. §§ 1-13 (1964) provide for approval by the Secretary of the Treasury of corporate sureties which guarantee those bonds and undertakings required by law to be given.

28 U.S.C. § 1446(d) (1964) requires a bond to be given in all cases removed to the federal courts upon the condition that the defendant will pay costs if it should be determined that the case was not properly removed.

28 U.S.C. § 1915 (1964) authorizes the district courts to permit the commencement of any action without prepayment of fees and costs or security therefor by anyone who makes an affidavit that he is unable to pay costs or give security.

210 In cases where an appellant has not at an earlier stage of an action given security covering the total costs of the litigation, Fed. R. Civ. P. 73(c) requires, upon the filing of an appeal, a $250 cost bond from the appellant unless the court of appeals specifically fixes a different amount or unless the appellant is "not subject to costs" under the rules of the court of appeals. See Advisory Committee's Note, 86 Sup. Ct. (No. 11) 64 (1966).

Fed. R. Civ. P. 73(d) requires a superseded bond in order for judgment to be stayed on appeal, such bond "conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay," and sufficient in amount to cover such items.
eral particulars. The most frequent and significant exercise of this power by the district courts has been the requiring of security for costs.¹⁰² Some districts properly treat the imposition of security for costs as a matter for the court’s discretion, providing simply that security may be required of any party.¹⁰³ Others, however, have established inflexible rules as a substitute for the exercise of judgment.

Thus, many districts provide that security for costs shall be required of all nonresident plaintiffs.¹⁰⁴ Such an inclusive approach does not appear to be proper. The ostensible reason for such a rule is to ensure that a defendant who prevails will not be compelled to seek recourse outside of the district, possibly at some in-

¹⁰² Fed. R. Civ. P. 65.1 provides that a surety may be proceeded against summarily and shall agree to submit itself to the jurisdiction of the court enforcing the bond.

¹⁰³ Fed. R. Civ. P. 65 (c) requires security for potential costs and damages to be given by a party securing a preliminary injunction or temporary restraining order.

¹⁰⁴ In addition, many districts have made rules establishing requirements for sureties, such as: (1) The provision that any corporate surety approved pursuant to 6 U.S.C. §§ 1-13 (1964) may guarantee bonds or undertakings in the local court. E.g., N.D. Ga. R. 7 (c); D. Hawaii R. 7 (c); S.D.N.Y. (Gen.) R. 31 (b) (2). (2) The requirement that corporate sureties must file with the court a written authorization of their agents’ power to guarantee obligations. E.g., S.D. Cal. R. 8 (a); W.D. Wash. (Civ.) R. 21 (c) (required only of corporate sureties not approved by Secretary of Treasury). (3) The provision that no attorney or officer of the court may be surety. E.g., D. Alaska R. 16 (b); D. Mont. R. 15 (b); S.D.N.Y. (Gen.) R. 31 (d). (4) Rules requiring that individual sureties must be resident property holders within the district. E.g., N.D. Ga. R. 7 (c) (3); D. Hawaii R. 7 (c); S.D.N.Y. (Gen.) R. 31 (b) (3). (5) Rules allowing summary judgment to be had against sureties. E.g., D. Alaska R. 16 (D); S.D. Cal. R. 8 (c); D. Mont. R. 15 (c). (6) Rules permitting cash to be deposited in lieu of any bond. E.g., D. Alaska R. 16 (E); D. Hawaii R. 7 (c) (1); S.D.N.Y. (Gen.) R. 31 (b) (1); cf. Fed. R. Civ. P. 65.1.

Several districts require that the supersedeas bond imposed by Fed. R. Civ. P. 73 (d) be, in the case of a money judgment, in the amount of the judgment plus 11% to cover potential interest and damages for delay, plus $250 to cover costs. E.g., N.D. Ill. (Gen.) R. 28; S.D. N.Y. (Gen.) R. 35.

Several districts have specified the amount of the removal bond required by 28 U.S.C. § 1446 (d) (1964). E.g., D. Conn. R. 6 (b) ($250); D. Del. R. 25 (3) ($500); N.D. Ind. R. 9 (a) ($200).

Many districts require that where a judgment is recovered by a party who brought suit without prepayment of fees and costs or security therefor pursuant to 28 U.S.C. § 1915 (1964), the judgment shall be paid to the clerk, who may pay therefrom any outstanding fees and costs. E.g., D. Hawaii R. 7 (d) (clerk may also pay party’s attorney a fee approved by court); S.D. Ill. R. 3 (balance shall be paid to party and his attorney as ordered by court if notice is filed that contingent fee contract has been entered into); W.D. Wash. (Civ.) R. 22 (clerk may also pay party’s attorney a fee approved by court).

¹⁰² E.g., W.D. Ky. R. 4; E.D. La. R. 7 (D); S.D.N.Y. (Civ.) R. 2.

¹⁰³ E.g., N.D. Ga. R. 7 (a); E.D. Ill. (Civ.) R. 2 (a) (unless court otherwise orders); N.D. Ill. (Civ.) R. 2 (a) (same, on motion and for good cause shown). Such a rule has been upheld against the contention that it is discriminatory and thus void. Russell v. Cunningham, 238 F.2d 806 (9th Cir. 1956).
convenience and expense, to enforce an award of costs.\textsuperscript{195} This justification is inapposite to the case of a nonresident plaintiff who owns property within the district or situated not far from the defendant's place of residence although without the district. While the burden of giving security for costs is generally not great, and while the expense thereof is often a taxable cost borne by the defendant should the plaintiff prevail,\textsuperscript{196} it would still seem unfair that a plaintiff should be compelled to shoulder this burden because of nonresidence per se.

Another questionable provision appearing in some local rules is that security for costs will be required only of a party seeking affirmative relief.\textsuperscript{197} If good cause is shown, it is difficult to see the justification for exempting a party from giving security merely because he is a defendant. This practice may possibly be justified by the argument that, while it is not unfair to require one who chooses to bring another into court to give security to insure that such person will not be injured if the plaintiff's cause is meritless, one who is in court involuntarily should not be compelled to undergo this expense when it is not yet determined that he is under any liability. In rebuttal, however, it may be noted that a defendant utilizes the facilities of the court to resist a possible lawful claim and it is not unfair to require him to give security in order that the plaintiff will not be injured by an unjustified refusal to pay.

There appears to be no general rule that a defendant will, as a matter of course, be required in any type of case to tender security for the amount of the judgment prayed for. While an inflexible rule imposing this burden would work undue hardship in many instances, it may in some circumstances be necessary to protect a plaintiff's inchoate equity from dissipation. To the extent that the requiring of security for judgment is dependent upon the amount the plaintiff claims, some harassment would be a possible concomitant of requiring such a bond. It is submitted, however, that discretion should be afforded for the imposition of security upon a defendant where the plaintiff shows a probability that the judgment

\textsuperscript{195} Cf. Russell v. Cunningham, \textit{supra} note 194.
\textsuperscript{196} See, e.g., N.D. ILL. (Civ.) R. 11; S.D. Ind. R. 5; E.D.N.C. (Civ.) R. 11 (A); W.D. Wash. (Civ.) R. 31 (5).
\textsuperscript{197} See, e.g., D. Colo. R. 19; W.D. Mo. R. 4. Security for costs is, however, required of a defendant who removes the case to the district court. See note 190 \textit{supra}.
may otherwise be uncollectable in whole or in part. Irreparable injury may thus be averted in situations where it is most imminent.

In the light of the above shortcomings in the local rules, consideration should be given to the formulation of a uniform national policy with regard to the circumstances under which a bond shall be required. Such a policy is followed in the case of appeal and supersedeas bonds and although these rules require bonds in every case falling within their terms, no compelling policy considerations appear to preclude a grant of discretion in the trial judge in factual settings diverging from the mandate of these rules. A proper approach would require security for costs of any party upon a showing of cause, thus according desirable latitude to the district courts but ensuring that arbitrary rules will not be applied in cases where unnecessary hardship might result. In any event, it would be profitable to reformulate each local rule along these lines.

**DEPOSITIONS AND DISCOVERY**

Given the pervasive breadth of the discovery provisions enunciated in Federal Rules 26 through 37, it is less than surprising that the local rules implementing these federal precepts are not extensive. Nevertheless, generic local problems have precipitated a variety of district rules designed to ameliorate particularly troublesome contingencies. The desirability and, indeed, the validity of these local rules may be measured by the degree to which they facilitate the ambitious design of the federal discovery procedures, which were conceived with a view to a self-generating, extrajudicial process whose operation would eradicate the element of courtroom surprise. In furthering this design, various local rules have endeavored to serve discovery in the following ends: (1) to insure that the process is not unduly protracted; (2) to relieve the onerous conditions which discovery may impose in a given instance and thus preserve the fairness of the proceeding; (3) to inculcate a practice of extrajudicial resolution of pre-trial differences by counsel in order to reduce the burden of judicial hearings; and (4) to insure the full effectiveness of discovery as a device designed to avert surprise in the course of trial and to expedite the entire judicial process. The fruits of these endeavors will be explored below.

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198 See note 191 *supra*.
200 See Wright §§ 81, at 308.
1. **Time Allotted for Discovery.** Despite the admonition that a district court afford a modicum of latitude when determining a temporal allotment for discovery,\(^{201}\) many districts have imposed rigid timetables for the commencement and completion of discovery. Several rules encourage the immediate institution of discovery proceedings,\(^{202}\) either before the pleading process has been completed\(^{203}\) or upon notice sent to the parties by the clerk twenty days subsequent to filing of the complaint.\(^{204}\) Two districts have promulgated a rule apparently intended to operate as a grant of automatic leave for the taking of depositions immediately upon institution of an action.\(^{205}\) This latter provision purports to constitute the leave of court required of a plaintiff by Federal Rule 26 (a) where notice of deposition is sought to be served within twenty days after commencement.\(^{206}\) However, such a mandate is seemingly contrary to the spirit, if not the letter, of that rule in that it affords little latitude for postponing discovery where individual exigency would warrant a contrary result. Precipitate haste should not, in the absence of actual necessity, be allowed to work the inconveniences which the twenty-day rule was designed to avert\(^{207}\) and the rule would thus appear to be an undesirable commodity for interdistrict importation.

More stringent than the entreaties for rapid commencement are the local rules prescribing a fixed time for completion of all discovery. A provision fixing the allowance period at ninety days is not uncommon,\(^{208}\) although the usual referent is the date set for pretrial.\(^{209}\) While these limitation rules may be modified under cer-
tain exigent circumstances, they are quite positive in their assertion that discovery shall not be protracted beyond the designated period absent a showing of necessity. The consistency of these prescriptions with the Federal Rules is somewhat problematic. While the discovery provisions of the rules are devoid of allusion to the time to be consumed by pre-trial spading, Federal Rule 1 does direct that construction of the procedure delineated be designed "to secure the just, speedy, and inexpensive determination of every action." It cannot be gainsaid that these rules which fix a designated discovery period further the rapid resolution of causes at issue, but it is at least arguable that the court could concurrently further the mandate of justice by using its discretionary power to designate the apposite period as the facts demand in each individual case. Nevertheless, a majority of practitioners polled have indicated that such time limits are not inconsistent with the spirit and purpose of the discovery rules and several of the respondents asserted that these rules were quite salutary in preventing an adversary from using the discovery procedure as a means of delaying the trial. Given the apparent need for some finite termination date and the desirability of freeing the courts from a multitude of discovery motions, the provisions requiring completion at the time set for the pre-trial conference appear to be the most efficacious. In designating the conference date, the court retains an unburdensome yet flexible de facto control over the termination of discovery. Further, it is manifest that pre-trial operates with most facility where counsel are fully informed of the factual ramifications of their case and a requirement that such information be

210 E.g., D. ALASKA R. 9(C) (complete "wherever practicable"); E.D. ARK. R. 9 (e) (extension only "to prevent manifest injustice"); D. CONN. R. 10(a) (leave granted for "good cause shown"); W.D.N.C.R. 10 (exceptionally difficult case); E.D.N.C. (Civ.) R. 7(E) (four extra months for patent, anti-trust and trademark cases).

211 E.g., rules cited note 210 supra. See S.D.N.Y. (Cal.) R. 13(b)(1), which provides that where counsel files a notice that the case is ready for pre-trial or fails to object to such a notice when filed by an adversary, such action or inaction constitutes a certification to the court that "all discovery matters have been completed."

212 See M.D.N.C. (Civ.) R. 22(d)(1), which provides that counsel shall estimate at an initial pre-trial conference the needed time for discovery and such time may then be embodied in a pretrial order under M.D.N.C. (Civ.) R. 22(c).

213 52% of the responding practitioners so indicated, while 36% found such time limitations incompatible with the Federal Rules. 12% failed to answer the question.

214 E.g., rules cited note 209 supra.

215 Cf. former rule 7-1 of the District of Idaho, which required discovery to be completed before pre-trial and asserted that to "assure justice and expedite the disposi-
collected prior to the conference would appear to be a desirable inducement to that result.

2. Operational Fairness. Several local rules are designed to insure that the discovery process does not become too onerous to the litigants. Pursuant to the requirement that reasonable notice be afforded all parties when an oral deposition is sought,217 many districts have stipulated that five days shall constitute the requisite notification unless the court shall order otherwise.218 This latter qualifying proviso, which affords an allowable judicial discretion, would appear to be a necessary prerequisite to the validity of such rules, for “reasonable” traditionally has been measured in a circumstantial context and notices of four and seven days have in certain situations been ruled unreasonable.219 Given this caveat, however, such rules may constitute a desirable yardstick for use in the ordinary case and thus enable the court to dispose summarily of the minor yet irksome controversies concerning the reasonableness of notification.

Proceeding under the authority of Federal Rule 30 (b), which allows the district judge to render orders “which justice requires to protect the [deposed] party or witness from annoyance, embarrassment or oppression,”220 several local rules have made salutary provisions for the allocation of certain deposition costs under prescribed circumstances where special hardship may be extant. Thus, two districts have adopted identical rules empowering the court to order the applicant for an oral deposition which is to be taken more than one hundred miles from the courthouse to prepay opposing counsel the costs of transportation and a reasonable fee.221 A similar order may issue where an attorney must be appointed to represent an absent adverse party.222 Such rules have been held valid under the

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218 E.g., D. Colo. R. 10 (a); D. Kan. R. 14 (b); D.N.M.R. 8 (a); E.D. Okla. R. 14; W.D. Okla. R. 14.
219 See Mims v. Central Mfrs. Mut. Ins. Co., 178 F.2d 56, 59 (5th Cir. 1949) (where deponents were scattered across the country, four and seven day notices were not “reasonable”); Kilian v. Stackpole Sons, Inc., 98 F. Supp. 500, 506 (M.D. Pa. 1951) (two days was unreasonable notice and made deposition inadmissible).
221 E.D. & S.D.N.Y. (Civ.) R. 5.
222 Ibid.
mantle of rule 30 (b), and this protective imprimatur should also immunize those rules which allow the taxation of transcription and administration costs to the party requesting the deposition. The Federal Rules do not identify the party who is to bear the burden of deposition expenses and the usual tack is to commit this matter to the court's discretion. A local rule may remove the issue of expenses from the court's volition, however, and one district court has held that those depositions which are not read or offered in evidence at trial may not be taxed against the losing party. Nevertheless, given the normal discretion inhering in the court, specific rules which ameliorate unusually onerous conditions may not be necessary. The fact that these cost rules are not self-executing buttresses this argument, but it is likely that the provisions were promulgated with a considered view to remedying recurrent local problems, and the elements of fairness and certainty which they inject into the discovery process provide such rules with a valid raison d'être.

A final provision designed to protect the deponent, as well as a given party, from "annoyance, embarrassment or oppression" is the rule which precludes public attendance at depositions and seals the document from public scrutiny upon filing. Although many districts are not very solicitous of the privacy of the various deponents once the transcribed statements are filed with the court,

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229 E.g., N.D. ILL. (GEN.) R. 18 (b).
230 E.g., S.D. OHIO R. 16 (1); cf. Saper v. Long, 17 F.R.D. 491 (S.D.N.Y. 1955), where the cost of transcription was imposed upon the requesting party despite a local rule requiring the advancement of traveling funds to attorneys where the deposition is taken outside the district.
233 E.D. & S.D.N.Y. (Civ.) R. 5, dealing with attorney's costs for depositions 100 miles from court, require a court order. S.D. Otho R. 16 (1) requires the requesting party to pay the officer's fees for administering the deposition, which may be recovered as costs if proof of payment is filed. Contra, N.D. ILL. (GEN.) R. 18 (b), which imposes transcription costs on the party taking the deposition unless the court "orders a different apportionment of cost for good cause shown."
234 See 220-23 supra and accompanying text.
236 E.g., D. ALASKA R. 8 (A); S.D. CAL. R. 6; D. CONN. R. 7 (b); D. MASS. R. 14.
237 See N.D. IND. R. 21 (clerk to open deposition upon request of party unless otherwise ordered by court); N.D. & S.D. IOWA R. 17 (clerk opens after ten days).
such rules are clearly within the discretion accorded by rule 30 (b) and would appear quite desirable in averting prejudicial publicity prior to trial. In antitrust and patent cases, the confidential information which is often imparted is especially deserving of protection, and prospective district court draftsmen might well consider the institution of a specialized provision for such cases.

3. Mechanisms to Insure the Extrajudicial Operation of Discovery. One pervasive philosophical underpinning of the federal discovery rules is the desire to make the process operative upon the initiative of the parties, without judicial intervention. Further, one scholar has noted that "the medium of local court rules can be utilized to insure that the parties exercise private control of discovery." Several imaginative rules have been designed to further this end. The most widely adopted of these devices is the requirement that before any motion for discovery will be heard, counsel must confer in a good faith effort to resolve the issues raised in the motion. The requisites for compliance include "informal meetings among counsel to work out agreements with respect to voluntary withdrawals, redrafts of questions, and other methods of resolving difficulties and making reasonable accommodations without recourse to the court." This conciliation device may be ineffectual where the parties are predisposed to intransigence, and to avert unnecessary hearings in this event the Eastern District of Pennsylvania has taken the extraordinary step of adopting an approved set of interrogatories to be interposed "in appropriate cases." The content of these questions indicates that they were designed primarily for comprehensive use in personal injury actions, although the judges significantly refused to promulgate an inter-

233 "[T]he court in which the action is pending may make an order that . . . the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court . . . ." Fed. R. Civ. P. 30 (b). A local rule may prescribe in advance the order which a court shall otherwise have discretion to make. American v. Butte Copper & Zinc Co., 9 Fed. Rules Serv. 26a.71, Case 2 (D. Mont. 1945).

234 See International Prods. Corp. v. Koons, 325 F.2d 403, 407 (2d Cir. 1963) (deposition may be sealed by court order to avert pre-trial publicity).


236 Id. at 1041 & n.3.

237 Id. at 1041.

238 E.g., E.D. & S.D.N.Y. (Gen.) R. 9 (f); see D. Md. R. 17; W.D.N.C.R. 8 (a); E.D. Pa. R. 20 (d); W. D. Wash. (Civ.) R. 24.


240 See Ibid.

241 E.D. PA. STANDING ORDER (June 22, 1965).
rogatory inquiring into the extent of the defendant's liability insurance. 242 Although the rule cautions that the list is neither exclusive nor designed for use in all cases, it clearly states that all "appropriate" objections to the interrogatories will be overruled "unless the circumstances are truly exceptional." 243 By coupling this provision with the requirement of a good-faith attorney consultation, 244 this district has erected a model structure to house the extrajudicial operation of discovery.

Several other rules have been framed to the same effect. Thus, pre-trial hearing examiners have been used to oversee discovery proceedings 245 and may issue orders and impose sanctions. 246 Further, one local rule has endeavored to resolve the problem of jockeying and abuse which has emanated from the oft-assailed rule that depositions will ordinarily be taken in the order demanded. 247 In an attempt to unravel these entanglements, the Eastern and Southern Districts of New York provide for abrogation of the priority rule upon a lapse of forty days from the commencement of an action and allow depositions to be taken concurrently thereafter. 248 This novel provision has been construed to sanction concurrence in separate but related actions, 249 and a dissemination of this liberal philosophy to other districts would go far to eradicate the vexatious litigation which has been the progeny of priority. Consolidation of the examination of a deponent in a multiple-party suit in an effort to avert the duplication of numerous burdensome depositions and interrogatories would also appear to be a desirable subject for local and possibly uniform promulgation. 250

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242 The courts are sharply split over the propriety of allowing discovery of a party's liability insurance in a negligence case. See 4 Moore ¶ 26.16[3]. One case has held that a local rule could not incorporate by reference the state court practice of allowing disclosure of insurance, asserting that Fed. R. Civ. P. 26(b) did not permit such discovery and thus it was not a proper subject for district court rule. Bisserier v. Manning, 207 F. Supp. 476 (D.N.J. 1962).

243 E.D. PA. STANDING ORDER (June 22, 1965).

244 E.D. PA. R. 20 (d).


246 Ibid.

247 See 4 Moore ¶¶ 26.13[1]-[3].


4. Adjuncts Designed to Insure the Full Effectiveness of Discovery. Many districts regard the pre-trial hearing as "part of the warp and woof of discovery" and give substance to this attitude by making provision in their rules for the pre-trial exchange and examination of all documentary and physical exhibits to be offered at trial, as well as making extensive pre-trial elicitation of stipulations to resolve extant but illusory issues. This utilization of the pre-trial device does not appear objectionable, although undue reliance on the conference as the source of discovery may engender a dilatory local discovery practice. Such a danger may perhaps be averted by the preclusion of discovery subsequent to pre-trial, although several districts have still found it necessary to admonish counsel to "make full use of all discovery procedures as provided [in the Federal Rules] . . . instead of seeking information at the pre-trial conference."

To insure that information obtained by discovery remains currently reliable, one district requires that supplemental answers must be tendered with reasonable promptness upon uncovering any additional information which would render the response to a prior interrogatory inaccurate or untrue. It has been held that failing to make subsequent disclosure will result in a waiver of the right to adduce such evidence at trial. An identical penalty has been prescribed for the failure to disclose to opposing counsel any witnesses, writings, and exhibits which were discovered too late for revelation at pre-trial. Such provisions go far to eradicate the "element of ambush" from federal litigation and might well be examined with an adoptive eye by other districts.

Pre-Trial

Consistent with the premise of the rules governing pleading and discovery that cases should be decided on their merits rather than
according to technical procedural requirements or the histrionics of advocates, Federal Rule 16 affords a broad latitude to the pre-trial conference in order to facilitate the delineation of the issues in dispute and the ascertainment of the nature of evidence to be introduced at trial. Rule 16 states that the court may hold a pre-trial conference to consider such matters as "the simplification of the issues; the necessity or desirability of amendments to the pleadings; the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof; [and] . . . such other matters as may aid in the disposition of the action."

Most district courts have included in their local rules a provision for pre-trial conferences. Several of these local pre-trial rules merely reiterate the authority provided by rule 16; however, many contain significant departures from the basic format of rule 16. These departures, explored below, manifest an awareness of the potential infirmities of the pre-trial device.

Since one purpose of the pre-trial conference is to remove the element of surprise from the trial, it is necessary that the attorneys inform one another and the court of the nature of the evidence upon which they expect to rely to prove their contentions, and many local rules have promulgated detailed provisions to this effect. The pre-trial conference could, however, be abused if it were regarded as a substitute for the discovery process. To prevent one attorney from taking advantage of a more conscientious opponent’s preparation without previously preparing his own case, many local

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260 FED. R. CIV. P. 16.
262 See S. FED. R. CIV. P. 16.
263 At present 49 district courts have promulgated rules governing pre-trial procedure.
264 Thus many local rules require the attorneys to meet and discuss or exchange memoranda in which are included lists of witnesses with some indication of the testimony they will give, schedules of exhibits, and notations of documents or records to be offered in evidence at the trial. See D. ALASKA R. 9 (f) (9), (G); E.D. & W.D. ARK. R. 9 (f)(l), (2); N.D. CAL. R. 4(10), (11); D. IDAHO R. 10(d)-(g); D. KAN. R. 15(c)-(1), (2); W.D. LA. R. 5; D. MD. R. 15 (b) (6), (7); W.D. MO. R. 20 (d) (8), (9); D. MONT. R. 10 (a) (8), (9); S.D.N.Y. (Civ.) R. 13 (b) (1) (III); E.D.N.C. (Civ.) R. 7; E.D. OKLA. R. 17 (b) (2), (4); W.D. TEX. R. 26 (g) (1), (4). Other rules provide that the attorneys must be prepared to discuss these matters and present documentary evidence at the pre-trial conference. See D. COLO. R. 12 (b); D. CONN. R. 10 (a); D. ME. R. 17 (b); D.S.D.K. R. 11; E.D. TENN. R. 9 (c); W.D. WASH. (Civ.) R. 26 (c), (4).
267 See Berger v. Brannan, 172 F.2d 241 (10th Cir. 1949).
rules require discovery to be completed prior to the date fixed for pre-trial. Moreover, one rule states expressly that the pre-trial conference is not to be used as a substitute for discovery and others stipulate that attorneys shall make liberal use of discovery procedures instead of seeking information or admissions at pre-trial which could have been obtained prior thereto by discovery or simple request. Other jurisdictions provide that no further discovery will be permitted after pre-trial except by permission of the court and in order to prevent manifest injustice.

It might be valuable, however, to circumscribe the issues in controversy prior to utilization of the discovery devices in order to avoid the expenditure of effort and funds required to prove facts which will ultimately be conceded or uncontested. This consideration would vary with the number and complexity of the issues presented in a particular case. Thus, it might be wise to empower the court in its discretion to hold more than one pre-trial conference if it appeared that additional conferences would be necessary or desirable and the burden of additional meetings would not be too great on the attorneys involved. This function might also be served by attorney conferences held prior to pre-trial but after some discovery had been completed. Many local rules provide for such a conference, the purpose of which is to simplify the issues and obtain any stipulations or concessions which the parties at an intermediate point in their preparation might be willing to make. However, elimination of the need for superfluous discovery may be a mere by-product of the attorney conference, for in many jurisdictions the principal purpose of this meeting is to consolidate the results of discovery into a proposed pre-trial order which is presented to the court at the pre-trial conference. Thus, it would appear that provision should be made for preliminary pre-trial pro-

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\[268\] E.g., D. ALASKA R. 9 (C) (wherever practicable); D. CONN. R. 10 (a) (except by special leave for good cause shown); D. Neb. R. 21 (a) (unless otherwise ordered).

\[269\] D. DEL. R. 11 (A).

\[270\] E.g., E.D.N.C. (Civ.) R. 7 (D); M.D.N.C. (Civ.) R. 22 (b); E.D. OKLA. R. 17 (b); N.D. OKLA. R. 17 (b); W.D. OKLA. R. 16 (b); W.D. TEX. R. 26 (d).

\[271\] E.g., E.D. & W.D. ARK. R. 9 (e); E.D. PA. STANDING ORDER (Oct. 28, 1958).


\[273\] E.g., E.D. & W.D. ARK. R. 9 (g); D. KAN. R. 15 (c); S.D.N.Y. (Cal.) R. 13 (b) (I) (III); E.D.N.C. (Civ.) R. 7 (G); W.D. PA. R. 5 (ll) (C) (5); W.D. TEX. R. 26 (g).

\[274\] E.g., D. KAN. R. 15 (c) (6); D. NEV. R. 11 (d); M.D.N.C. (Civ.) R. 22 (l); W.D. WASH. (Civ.) R. 26 (g).
ceedings to be held at the court's discretion where the complexity of the issues warrants a conference designed to limit the scope of discovery to facts which are actually in dispute.\textsuperscript{275}

A potential pitfall in utilizing the pre-trial conference to determine the issues to be litigated is the possibility that the attorney will be incapable of limiting the issues through either (1) unfamiliarity with the case itself or (2) lack of authority to enter into stipulations regarding facts which are not to be controverted at trial. The former contingency is anticipated by local rules which require the conferring attorney to be thoroughly versed in the nuances of his case\textsuperscript{276} or require attendance at the pre-trial conference by the attorney who will actually try the case.\textsuperscript{277} The potential hindrance to factual stipulations posed by an attorney's lack of authority to enter such accords is eliminated by rules of several district courts which require counsel to obtain prior and generalized authorization from their clients to enter into stipulations.\textsuperscript{278} While it is evident that an attorney should be familiar with his case in order to fulfill the purposes of pre-trial, it may be less obvious that the attorney should obtain a prior imprimatur from his client to stipulate whenever he may have reason to doubt his authority to act at the pre-trial conference. The attorney should not be permitted to frustrate efforts to remove issues from controversy by pleading lack of authority where this authority might have been obtained prior to the conference, and a local rule to this effect would appear to be a salutary addition to the provisions of those districts which make extensive use of the pre-trial device.

While settlement may properly be considered at the pre-trial

\textsuperscript{275}See authorities cited note 272 supra. Civil Rule 22 of the Middle District of North Carolina provides for initial and final pre-trial conferences unless counsel stipulate to the contrary and the court approves. At the initial conference the attorneys are to be prepared to estimate accurately, among other things, how much time will be required for completion of discovery; whether separation of issues would be feasible; and, if so, whether discovery should be limited to the issues first tried. M.D.N.C. (Civ.) R. 22(a), (d).

\textsuperscript{276}E.g., D. Del. R. 11 (C); N.D. & S.D. Iowa R. 16; E.D.N.C. (Civ.) R. 7 (H); W.D. Tex. R. 26 (b).

\textsuperscript{277}E.g., E.D. & W.D. Ark. R. 9 (d); S.D. Cal. R. 9 (a); D. Del. R. 11 (B); N.D. Ga. R. 11 (c); D. Kan. R. 15 (f); W.D. La. R. 5 (b) (I); D. Me. R. 17 (c); D. Md. R. 15 (a); W.D. Mich. R. 5 (d); W.D. Mo. R. 20 (e); D. Neb. R. 21 (b); N.D. Okla. R. 17 (b); W.D. Pa. R. 5 (II) (C) (5) (d); D.S.D.R. 11. Compare W.D.N.C.R. 7 (attendance of trying counsel suggested but not required).

\textsuperscript{278}E.g., N.D. & S.D. Iowa R. 16; D. Md. R. 15 (a); S.D.N.Y. (Cal.) R. 13 (b) (I) (VI); E.D. Wis. R. 12.
conference as a matter which may aid in the disposition of the case, care must be taken that this aspect of the discussion is not emphasized to the exclusion of all others.\textsuperscript{279} The purpose of pre-trial is to prepare for, not to avoid a trial.\textsuperscript{280} One local rule states expressly that "the primary objective of pre-trial should be to facilitate trial and a just judgment" and that "compromise settlement shall be regarded as a by-product of such procedure rather than the end sought."\textsuperscript{281} Further, the rules which provide for discussion of compromise either list possible settlement as one among many matters to be discussed,\textsuperscript{282} or circumscribe what might be regarded as objectionable consequences of a settlement discussion. For example, the Western District of North Carolina provides for the discussion of settlement with the proviso that "any party has the right to decline to discuss settlement and insist on an immediate trial."\textsuperscript{283} Other rules provide that the possibility of settlement may be explored but that any discussion shall not be mentioned in the pre-trial order which subsequently governs the conduct of the trial.\textsuperscript{284} A similar clause contained in several rules forbids mention of the compromise discussion in the pre-trial order, at trial, or in any motions or arguments.\textsuperscript{285} These provisions are ostensibly designed to insure that matters explored in the settlement discussion will not be utilized by the judge as the basis for the issuance of his pre-trial orders and will not be incorporated in the record. Such limitations should serve to allay misgivings as to the consequences of making an earnest effort to reach an accord.

Two major departures from the format of rule 16 which appear in several local court rules are a mandatory requirement for pre-


\textsuperscript{280} See \textit{Wright} \textsuperscript{\textsuperscript{\textsuperscript{}}}, at 349.

\textsuperscript{281} \textit{E.D.N.C. (Civ.) R. 7 (L) (4)}.

\textsuperscript{282} E.g., \textit{E.D. & W.D. Ark. R. 9 (f) (5)}; \textit{D. Colo. R. 12 (b) (13)}; \textit{E.D.N.C. (Civ.) R. 7 (G) (5)}; \textit{W.D. Pa. R. 5 (II) (C) (5) (c)}. See \textit{D. Idaho R. 10 (j) (4)}.

\textsuperscript{283} \textit{W.D.N.C.R. 7}.

\textsuperscript{284} E.g., \textit{D. Alaska R. 9 (I)}; \textit{D. Conn. R. 10 (d)}; \textit{D. Me. R. 17 (d)}.

\textsuperscript{285} E.g., \textit{D. Md. R. 15 (e)}; \textit{E.D.N.C. (Civ.) R. 7 (L) (4)}. \textit{E.D. Pa. Standing Order (Oct. 23, 1958)} provides for the discussion of settlement first at the attorney conference and again at the pre-trial conference with the court. However, no disclosure of the settlement discussions prior to pre-trial is permitted at pre-trial except by mutual agreement of all counsel made in advance of the pre-trial conference. This is another manifestation of the desire to encourage counsel to discuss settlement by removing the possibility of undesirable consequences, in this instance, using prior admissions of weakness to persuade the court to opt for a settlement.
trial conferences and an explicit authorization of the court to impose sanctions for noncompliance with the local pre-trial rule. Rule 16 provides that the court may at its discretion require counsel to attend a pre-trial conference, but those local rules which require pre-trial conferences in all civil cases deprive the court of this initiative with regard to the necessity or desirability of pre-trial. This might give rise to a proceeding which, if a particular judge were not enthusiastic about pre-trial or merely doubted the need for a pre-trial conference in a specific case, would be an annoyingly perfunctory and superfluous undertaking.

The second significant variance from the structure of the pre-trial provision contained in the Federal Rules is the authority assumed by many local courts to discipline departures from local pre-trial procedures. Rule 16 makes no provision for the imposition of sanctions, yet many local rules provide that for failure to appear or other noncompliance the court may impose such penalties as the circumstances warrant, including dismissal of the action, entrance of a default judgment, imposition of costs, exclusion of evidence, or striking the names of formerly qualified witnesses. Where a court

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286 E.g., W.D. LA. R. 5 (a); D. Me. R. 17 (a); W.D. Mich. R. 5 (a); D. Nev. R. 11 (a); E.D. Okla. R. 17 (a); W.D. Wash. (Civ.) R. 26 (a).

287 E.g., E.D. & W.D. Ark. R. 9 (c); N.D. Cal. R. 12; D. Conn. R. 10 (g); D. Del. R. 11 (B); D. Kan. R. 15 (j); D. Me. R. 17 (f); S.D.N.Y. (Cal.) R. 16; M.D.N.C. (Civ.) R. 22 (m); E.D. Okla. R. 17 (b); W.D. Pa. R. 5 (ll) (H); W.D. Tex. R. 26 (a); E.D. Wis. R. 12.

288 "In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider . . . such other matters as may aid in the disposition of the action." Fed. R. Civ. P. 16.

289 See note 282 supra. Many local rules leave the determination as to the necessity of a pre-trial conference to the court or to the court and counsel. Of the latter type, some provide that there will be a conference unless the parties stipulate to the contrary and the court approves. E.g., D. Kan. R. 15 (a); E.D.N.C. (Civ.) R. 7; M.D.N.C. (Civ.) R. 22. Others provide that the court may, and upon the application of any party will, hold a pre-trial conference. E.g., S.D. Ind. R. 17; N.D. & S.D. Iowa R. 16; D. Neb. R. 21 (a). Either rule reserves the decision to the court and counsel and their practical effect is the same as far as the parties are concerned, for if one party wants a conference under either approach, it will be held. The only real difference lies in the discretion accorded the court. Under the first rule the court's authority may be exercised positively to override the parties' determination that no conference is necessary, or not exercised at all if the court agrees with the joint stipulation. Under the second rule the court may call a conference, but it has no authority to veto one party's determination that a conference should be held.

290 1A BARRON & HOLZTOFF § 473, at 841 n.22.

291 E.g., N.D. Cal. R. 12; D. Conn. R. 10 (g); D. Me. R. 17 (f); E.D.N.C. (Civ.) R. 7 (F); W.D. Tex. R. 25 (s).

Local rules authorizing dismissal of the action are consistent with Federal Rule 41 (b), which authorizes the court upon motion by the defendant to dismiss for failure
is generally empowered to impose "penalties,"\textsuperscript{292} however, the utilization of this power to assess fines against counsel for noncompliance with the pre-trial provisions has been overturned absent a conviction for contempt.\textsuperscript{293} However, the facilitation of an efficacious pre-trial conference would appear to be enhanced by authorizing the imposition of fines against defaulting attorneys where more extreme sanctions, such as dismissal or orders precluding the use of certain evidence or witnesses, would unduly prejudice a party's position on the merits.\textsuperscript{294}

Local pre-trial rules vary widely with regard to the particularity they require of pre-trial memoranda and the specificity with which they prescribe the degree of pre-trial preparation by counsel. The Southern District of New York provides a detailed list of subjects to be considered at the attorneys' conference which precedes the pre-trial conference, and a comprehensive form is provided for the proposed pre-trial order which is to be submitted to the courts before the pre-trial conference.\textsuperscript{295} Further, two districts establish time schedules which govern the attorney's preparation with regard to discovery, filing of pre-trial memoranda, and the attorney conference prior to pre-trial.\textsuperscript{296} Conversely, several jurisdictions\textsuperscript{297} incorporate by reference the subjects for pre-trial consideration listed in Federal Rule 16\textsuperscript{298} but leave to judicial discretion such matters as scheduling and the content of any memoranda the court may require. Despite this divergence, it would appear that the docket may be such that precise pre-trial procedure is necessary to facilitate to prosecute or to comply with the Federal Rules. Fed. R. Civ. P. 41 (b). Moreover, provisions authorizing default judgment or imposition of costs are consistent with Federal Rules 55 and 54 (d) respectively. Fed. R. Civ. P. 55, 54 (d). Evidentiary preclusion orders authorized by the local rules are analogous to the sanctions which may be imposed for noncompliance under Federal Rule 37 (b). See Fed. R. Civ. P. 37 (b) (2) (ii).

\begin{itemize}
\item \textsuperscript{292} E.g., E.D. & W.D. Ark. R. 9 (c); D. Del. R. 11 (B). The Eastern District of North Carolina provides for "penalties" in addition to specified sanctions. E.D.N.C. (Civ.) R. 7.
\item \textsuperscript{293} See Gamble v. Pope & Talbot, Inc., 307 F.2d 729 (3d Cir.), cert. denied, 371 U.S. 888 (1962), where the District Court for the Eastern District of Pennsylvania was denied authority to impose a fine on an attorney for noncompliance with the pre-trial rule absent an adjudication of contempt.
\item \textsuperscript{294} See Note, 51 Geo. L.J. 309, 341-45 (1963); Note, 38 Notre Dame Law. 158 (1963).
\item \textsuperscript{295} S.D.N.Y. (Cal.) R. 13 (l).
\item \textsuperscript{296} S.D. Cal. R. 9 (e)-(j); W.D. Pa. R. 5 (II) (C) (l)-(6).
\item \textsuperscript{297} E.g., D. Me. R. 17; D.N.D.R. IV (5); see S.D. Ohio R. 10.
\item \textsuperscript{298} See text accompanying note 262 supra.
\end{itemize}
litigation and that comprehensive pre-trial rules are fully justified. However, where these factors are not present, there is no need for greater elaboration than is present in rule 16. Thus, it would appear that the form of pre-trial rules should be determined according to the particular needs of the jurisdiction rather than with regard to a uniform pattern, without discounting the possibility of incorporating provisions which have proven successful in meeting similar needs in other jurisdictions.

STIPULATIONS

Stipulations entered into by the respective parties are a frequently utilized and expeditious device designed to facilitate discovery, trial, and the final disposition of an action. Although there is no Federal Rule dealing with stipulations generally, several sections govern their use in specific contexts. This unsystematic approach to the subject of stipulations is likewise reflected by its cursory treatment in the various district court provisions.

Nine Federal Rules contain references to stipulations. For example, rule 29 provides that “if the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions.” In the absence of such a stipulation, depositions may be taken only in accordance with the relevant rules, which delineate the procedure for taking depositions in some detail. Rule 39 (a) provides that when a trial by jury has been demanded, the parties or their attorneys may consent to trial by the court sitting without a jury by written stipulation filed with

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299 Fed. R. Civ. P. 29, 39 (a) (l), 41 (a) (l) (ii), 48, 53 (c) (4), 59 (c), 71 A (l) (2), 73 (a), 75 (f), (g), (h); see also Fed. R. Civ. P. 30 (c), (e).

202 Rule 28 prescribes the qualifications for persons before whom depositions may be taken, for example, within the United States, an officer authorized to administer oaths or a person appointed by the court in which the action is pending. Fed. R. Civ. P. 28. Rule 30 lays down certain prerequisites for valid oral depositions, including reasonable notice in writing to every other party and the transcription of testimony which must be taken under oath. Fed. R. Civ. P. 30. Rule 31, governing the taking of depositions upon written interrogatories, provides that within ten days after being served with a notice that his testimony is to be taken a party may serve cross interrogatories upon the party proposing to take the deposition. Thereafter, within five days the latter may serve redirect interrogatories, and within three days after being served with redirect interrogatories the party initially served may serve recross interrogatories. Fed. R. Civ. P. 31.
the court or by oral stipulation made in open court and entered in the record. Enabling the parties to waive a jury trial even after it has been initially requested is consistent with the purpose of rule 39 "to permit the time-saving trial of legal and equitable issues at one time without loss or surrender of substantive rights." 304 Rule 41 (a) 305 authorizes the voluntary dismissal of an action by the plaintiff without court order by filing a stipulation of dismissal signed by all the parties who have appeared in the action. This rule thus permits the plaintiff to remove his case from court if no participating party will be prejudiced thereby. 306 As these illustrative provisions intimate, the desire to expedite proceedings through the use of stipulations is tempered by the need to afford protection to parties whose interests might be adversely affected. Thus, stipulations are frequently required to be written, filed, or made in open court and entered in the record.307

On the local level, in addition to providing for the use of stipulations in specific contexts, 308 the rules of many districts include a general provision to the effect that stipulations by or agreements between the parties or their attorneys will be recognized by the court only if in writing and signed or made in open court and entered in the record. 309 An occasional district rule also provides

304 2B BARRON & HOLTZOFF § 891, at 60. (Emphasis added.) Rule 48, another trial-expediting provision, permits the parties to stipulate "that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury." Fed. R. Civ. P. 48. Where a case is referred to a master under rule 53, the parties may stipulate that his findings of fact shall be final, and only questions of law arising upon his report may thereafter be considered. Fed. R. Civ. P. 71 (c) (4).


306 2B BARRON & HOLTZOFF § 911, at 102 & n.2.1.

A condemnation proceeding may be dismissed by stipulation prior to the entry of any judgment vesting title in the plaintiff by the filing of a stipulation of dismissal by the plaintiff and the defendant affected thereby. Fed. R. Civ. P. 71 (a) (2). To expedite a case on appeal "the parties by written stipulation filed with the clerk of the district court may designate the parts of the record, proceedings, and evidence to be included in the record on appeal." Fed. R. Civ. P. 75 (f).

307 With the exception of rules 48 ("the parties may stipulate . . . .") and 53 (c) (4) ("when the parties stipulate . . . . "), all of the Federal Rules governing stipulations require a writing, filing, or recording in open court. See Fed. R. Civ. P. 29, 39 (a) (1), 41 (a) (1) (ii), 59 (c), 71A (l) (2), 73 (a), 75 (f).

308 See e.g., N.D. CAL. R. 4 (21) (pre-trial statement); S.D. Ind. R. 23 (designation of omitted parts of record on appeal); N.D. & S.D. IOWA R. 16 (authority to stipulate at pre-trial conference); S.D.N.Y. (CAL.) R. 9 (dismissal or discontinuance of causes); M.D. PA. R. 29 (continuance by agreement); E.D. TENN. R. 14 (mandatory stipulation to all undisputed facts).

309 See D. ALASKA R. 12; D. ARIZ. R. 12 (written stipulations need be signed only by the party or his attorney against whom it is sought to be enforced); E.D. & W.D.
for court approval of stipulations. These general stipulation provisions of the several district courts have the salutary effect of insuring that whenever stipulations are utilized there will be certainty both with respect to the existence and the content of the agreements. In view of the slight burden imposed by requiring the parties to reduce their agreements to writing, it would appear that a uniform Federal Rule might well be considered along the lines of the provision of the District of Minnesota which makes a writing mandatory unless the agreement is made in open court and recorded in the minutes.

CONTINUANCES

The practice with respect to continuances in civil cases in federal district courts is almost exclusively governed by the well-accepted rule that the grant or refusal of a continuance rests with the sound discretion of the court to which the application is made. This rule is decisional in origin, for the Federal Rules of Civil Procedure are devoid of reference to continuances. Continuance as a matter of right, a familiar concept in state court proceedings by virtue of statutory mandate, is absent in federal courts except in those few districts which by local rule determine their practice with respect to continuances by reference to state law or where a rare federal

Ark. R. 6; D.D.C. (Gen.) R. 3; D. Idaho R. 17 (only those written or oral stipulations which do not disturb the orderly business of the court will be enforced); D. Minn. R. 18 (required only of stipulations relating to proceedings in court; certain stipulations binding only upon order of court); D. Neb. R. 14; D.N.D.R. XVII; D.N.H.R. 4 (no oral stipulations will be enforced); D. Ore. (Gen.) R. 8 (parol evidence of stipulation not made in open court considered only to prevent manifest injustice); E.D. Pa. R. 13 (a) (stipulations relating to business of court must be in writing and signed or made at the bar and recorded, but parol evidence of stipulations not made at the bar will be considered to prevent manifest injustice); M.D. Pa. R. 8; D.S.D.R. 6; W.D. Tex. R. 5.

D. Alaska R. 12; D. Ore. (Gen.) R. 8(a); see also D. Idaho R. 17.

D. Minn. R. 18.

District rules with similar requirements include the following: D.N.D.R. XVII; E.D. Pa. R. 13 (a); D.S.D.R. 6.

E.g., Grunewald v. Missouri Pac. R.R., 331 F.2d 983 (8th Cir. 1964); Scholl v. Felmont Oil Corp., 327 F.2d 697 (6th Cir. 1964); Pet Milk Co. v. Ritter, 323 F.2d 586 (10th Cir. 1963) (per curiam); Bostrom v. Seguros Tepeyac, S.A., 225 F. Supp. 222 (N.D. Tex. 1963), aff'd in part and rev'd in part on other grounds, 347 F.2d 168 (5th Cir. 1965).


Several districts have local rules expressly incorporating state practice as to continuances. E.D. Ill. (Civ.) R. 11; N.D. Ind. R. 11; S.D. Ind. R. 15; E.D. Wis. R. 9; W.D. Wis. R. 10. In each case a state statute authorizes continuances both as a matter of right and as a matter of discretion. Ill. Rev. Stat. ch. 110, § 101.14 (1960);
statute relating to continuances in specialized circumstances is applicable.316

Some forty districts have adopted local rules dealing with continuances.317 Unlike state statutes, which frequently enumerate a wide variety of grounds for granting a continuance,318 a majority of the local federal rules merely authorize a continuance when "good cause" is shown.319 A common ground for continuance in those districts without the "good cause" provision320 is the absence of

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318 E.g., Ill. Rev. Stat. ch., 110, § 101.14 (1960) (absent witness, absent evidence, party in military service in time of war, party or counsel a member of state legislature in session); see statutes cited note 314 supra.

319 E.g., E.D. & W.D. Ark. R. 11: "After a case is placed on the trial calendar no motion for continuance will be granted except for good cause shown."

witnesses or evidence,\textsuperscript{321} a provision which supplements the “good cause” stipulation in several jurisdictions.\textsuperscript{322} Finally, one district will grant a continuance to permit completion of discovery and four districts recognize other, conflicting engagements of counsel as a basis for dispensation.\textsuperscript{324}

Although in striking contrast to the specificity of the typical state statute,\textsuperscript{325} the singular “good cause” requirement in local rules does not appear to be a limitation on the power of federal courts to grant continuances. An examination of relevant decisions reveals that continuances under these rules have been sought and/or granted on a wide variety of grounds, including the absence of a party,\textsuperscript{326} lack of time for preparation,\textsuperscript{327} withdrawal of counsel,\textsuperscript{328} and need for discovery procedures.\textsuperscript{329} The “good cause” proviso thus emerges as an open-ended expression of the decisional con
derral of discretion upon the district judge to grant continuances for any reason which will facilitate the orderly and expeditious use of court manpower and time.\textsuperscript{330} Indeed, it may be unnecessary to promulgate any continuance provision, for a large number of cases have clearly established the \textit{ability} of a court to grant a continuance on grounds which appear exigent and without reference to the existence of a rule.\textsuperscript{331} Even the rules which expressly prescribe a continuance procedure for specified grounds are not worded in exclusive terms and would appear to allow a discretionary grant on other grounds.\textsuperscript{332} In terms of grounds, both the generalized and

\begin{itemize}
\item \textsuperscript{321} D.D.C. (GEN.) R. 15 (c) (absent witness); N.D. GA. R. 14 (b) (absent witness); W.D. LA. R. 15 (a) (absent witness); D. Mont. R. 17 (absent witness or evidence); E.D. Pa. R. 27 (absent witness); M.D. Pa. R. 19 (absent witness).
\item \textsuperscript{322} See E.D. LA. R. 5 (A)-(B); D. Minn. R. 5 (5) (b)-(c); D.N.D.R. IV (4) (a), (c); D.S.D.R. 10 (1)-(2).
\item \textsuperscript{323} E.D. PA. STANDING ORDER (May 2, 1958) (“only for exceptional good cause”).
\item \textsuperscript{324} E.D. ILL. (CIV.) R. 11; N.D. ILL. (GEN.) R. 14; E.D. Wis. R. 9; W.D. Wis. R. 10.
\item Each of these districts, however, also refers generally to state law. See note 315 \textit{supra}.
\item \textsuperscript{325} See notes 314, 318 \textit{supra}.
\item \textsuperscript{326} See, e.g., Kawaguchi v. Acheson, 184 F.2d 810 (9th Cir. 1950).
\item \textsuperscript{327} See, e.g., Sutherland Paper Co. v. Grant Paper Box Co., 183 F.2d 926, 931 (3d Cir. 1950), \textit{cert. denied}, 340 U.S. 906 (1951).
\item \textsuperscript{328} See, e.g., Grunewald v. Missouri Pacific R.R., 331 F.2d 983 (8th Cir. 1964).
\item \textsuperscript{330} See, e.g., Janousek v. French, 287 F.2d 616, 623 (8th Cir. 1961).
\item \textsuperscript{331} E.g., Cash v. Murphy, 339 F.2d 757 (5th Cir. 1964); Connecticut Gen. Life Ins. Co. v. Breslin, 332 F.2d 928 (5th Cir. 1964); Grunewald v. Missouri Pac. R.R., 331 F.2d 983 (8th Cir. 1964); Pet Milk Co. v. Ritter, 323 F.2d 586 (9th Cir. 1963) (per curiam).
\item \textsuperscript{332} See, e.g., D.D.C. (GEN.) R. 15 (b); N.D. GA. R. 14 (b); rules cited note 322 \textit{supra}.
\end{itemize}
enumerative rules are merely expressions of existing case law. Thus, their efficacy would appear to be largely a product of the procedural guidelines which these rules establish for the applicants, a topic which will be explored below.

A large number of local continuance rules establish some procedural requisites to be followed by parties applying for continuances. The wide variety of differences precludes an exhaustive elaboration, but some generalities can be developed. In terms of a required time within which application must be made, the rules are fraught with permissive qualification. Thus, for example, the most frequent requirements are five days preceding the trial date “unless otherwise permitted,” at the time of the calendar call unless the alleged cause occurs thereafter, or as soon as “diligence” or “necessity” appears to require a continuance. Other rules merely require an affidavit or application served on other parties followed by a hearing or personal appearance by the parties, but make no attempt to define the time at which the application must be made. Continuance on the eve of or during trial would thus appear to be permitted by all the local rules in the event that the circumstances so warrant. This does not appear objectionable when confined to exceptional situations, a likely result given the discretionary nature of the grant.

In order to insure that these procedural requirements are followed, the local rules also provide for certain sanctions. Thus, for example, where the local rule requires application five days before trial, an entreaty received less than five days before trial, if granted, may result in the imposition of one day’s jury fees upon the applicant in the discretion of the judge. Other sanctions include the imposition of costs, disciplinary action against the movant attorney, automatic denial of the application, or, where the facts

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333 Even this justification is questionable where the local rule does not specify the procedure required when applying for a continuance. E.g., D.N.H.R. 10.
335 D.N.D.R. IV (4) (a); S.D. Ohio R. 9 (4); D.S.D.R. 10 (3).
336 D.D.C. (Gen.) R. 15 (b); N.D. Ga. R. 14 (a); D. Ore. (Gen.) R. 16 (a); W.D. Tenn. R. 4 (f).
338 S.D.N.Y. (Cal.) R. 7 (b).
339 E.g., rules cited note supra.
340 E.g., D. Mont. R. 17.
341 E.g., D. Ore. (Gen.) R. 16 (a).
342 E.g., N.D. Ga. R. 14 (a).
demonstrate a want of prosecution, dismissal and default of the case.\textsuperscript{343} Imposition of costs as a condition of granting the application appears to be the most frequent condition, whether imposed by local rule or general discretionary power.\textsuperscript{344}

Where express grounds are stated in the local rule, such as absence of a witness or evidence, the procedural requisites are generally more detailed. The minimal requirement is an affidavit stating matters about which the absent witness is expected to testify.\textsuperscript{345} Additionally, however, most of the rules require proof of diligent efforts to secure the attendance of the witness and a showing of reasonable probability that the witness or evidence will be available at a later date.\textsuperscript{346} Further, each of these rules provides that if the adverse party admits that the witness would testify as alleged in his opponent's application for continuance, the delay may be denied and the admission subsequently admitted as evidence in lieu of personal testimony.\textsuperscript{347} The admission of anticipated testimony may, however, be prejudicial to the adverse party if it operates as a waiver of evidentiary objections such as competency of the testificant or hearsay. Foreseeing this difficulty, several rules have stipulated that the use of this "testimony" at trial will be subject to all proper objections at that time.\textsuperscript{348} The continuance hearing might be the best forum in which to raise such objections initially, however, for the judge could then determine whether the witness' presence at trial is necessary to rule on the evidentiary objection. If such necessity should appear, for example, on the question of the competency of an expert witness, a continuance may be warranted despite the admission.\textsuperscript{349}

\textsuperscript{343} E.D. & S.D.N.Y. (Cal.) R. 7, 16 (b), which appear to be in essence a dismissal for want of prosecution. See also Agrofasky v. Pennsylvania Greyhound Lines, 248 F.2d 829 (3d Cir. 1957) (per curiam); Dismissal for Want of Prosecution, notes 358-76 infra and accompanying text.


\textsuperscript{345} E.g., D.D.C. (Gen.) R. 15 (c).

\textsuperscript{346} E.g., E.D. La. R. 5 (B); W.D. La. R. 15 (a); D. Minn. R. 3 (5) (c); M.D. Pa. R. 19.

\textsuperscript{347} E.g., N.D. Ga. R. 14 (b); D. Mont. R. 17; E.D. Pa. R. 27.

\textsuperscript{348} Generally the rule still allows the trial judge to grant the continuance if it appears necessary to him. E.g., D. Mont. R. 17, which authorizes a denial of the continuance where the adverse party admits that the absent witness would testify in the manner alleged unless a trial without the witness or evidence would work an "injustice" upon the moving party.

\textsuperscript{349} E.g., D.D.C. (Gen.) R. 15 (c).

\textsuperscript{350} D.N.D.R. IV (4) (b); D.S.D.R. 10 (2).

\textsuperscript{351} Cf. D. Mont. R. 17; note 348 supra.
The advantage of a local rule with explicit procedural requisites is that it not only aids the litigants to prepare the application properly, but it also assists the trial court in expeditiously apportioning the use of judicial time. The local rules dealing with the time and manner of motion are commendable in this respect and may be especially salutary in thwarting the use of the continuance device as a deliberate delaying tactic, a practice which has not been infrequent.\textsuperscript{352} Strict enforcement of such provisions would go far to discourage the use of continuances for dilatory purposes.

One practice which has been the subject of several local rules is the voluntary agreement between counsel to continue a case without seeking approval of the court. Most districts do not favor such private accords and an order of court is usually an essential prerequisite.\textsuperscript{353} Even in those few districts which apparently allow an automatic continuance of right when accomplished by agreement, certain conditions such as imposition of jury fees or time limitations are imposed.\textsuperscript{354} While the prohibition may in some instances operate as an inhibition to eventual private settlement, it would appear warranted as a method of insuring the orderly expedition of crowded dockets and of averting delays attributable to the neglect of counsel. The rules apparently reflect this latter view.

A final matter of importance in this area is the absence in the rules of the effect of a continuance upon the status of a case on the docket. Only three rules make reference to this question. One rule merely notes that a continuance will have the effect of removing a case from the ready calendar unless the judge orders otherwise.\textsuperscript{355} A second states that when a continuance expires, the case resumes a subordinate position on the ready list.\textsuperscript{356} The third rule, that of the Northern District of Georgia, deals only with cases of indefinite continuances. It authorizes placing a case on the inactive list or

\textsuperscript{352} See, e.g., Scholl v. Felmont Oil Corp., 327 F.2d 697 (6th Cir. 1964); Agronofsky v. Pennsylvania Greyhound Lines, 248 F.2d 829 (3d Cir. 1957); Vevelstad v. Flynn, 230 F.2d 695 (9th Cir. 1956); Bostrom v. Seguros Tepeyac, S.A., 225 F. Supp. 222 (N.D. Tex. 1963), aff'd in part and rev'd in part on other grounds, 347 F.2d 168 (5th Cir. 1965).

\textsuperscript{353} E.g., D.N.D. R. IV (d) (c).

\textsuperscript{354} D. Ariz. R. 15; E.D. PA. STANDING ORDER (May 2, 1958); W.D. Wash. (Gen.) R. 9 (b).

\textsuperscript{355} D.D.C. (Gen.) R. 15 (d).

\textsuperscript{356} E.D. PA. STANDING ORDER (May 2, 1958) (case to have position no better than tenth on ready list).
dismissing without prejudice with the stipulation that the case may be reinstated at the request of either party at any time.\textsuperscript{357} On balance, there would seem to be little need for any rule development in this area. So long as the trial judge maintains control over the docket and calendar and has the inherent power to impose conditions upon any continuances granted, it would seem that any problem with respect to the docket effect of a continuance can best be handled by utilization of those discretionary tools on an \textit{ad hoc} basis.

\textbf{DISMISSAL FOR WANT OF PROSECUTION}

Federal Rule 41 (b) specifically authorizes dismissal for want of prosecution only upon \textit{motion by the defendant},\textsuperscript{358} but in practice the district courts have relied upon their inherent power to dismiss without being prompted by a party.\textsuperscript{359} Thus, several district courts have adopted local rules providing for the automatic dismissal of an action upon the expiration of a stated period of time after the commencement of a proceeding.\textsuperscript{360} The crucial periods vary in duration from six months to two years\textsuperscript{361} and these rules generally provide for a warning, frequently thirty days,\textsuperscript{362} before final entry of a dismissal order. A few courts, however, provide for no warn-

\textsuperscript{357} N.D. GA. R. 14 (c). Although the question has never been litigated, this rule may, by allowing a dismissal, subject the plaintiff to the hazards of a lapsed statute of limitations. This effect could be avoided by an express stipulation of the parties at the time of dismissal.

\textsuperscript{358} Fed. R. Civ. P. 41 (b).

\textsuperscript{359} Link v. Wabash R.R., 370 U.S. 626 (1962); Hicks v. Bekins Moving & Storage Co., 115 F.2d 406 (9th Cir. 1940); 2B Barron & Holtzoff § 918, at 139 n.3. In Darlington v. Studebaker-Packard Corp., 261 F.2d 903 (7th Cir.), \textit{cert. denied}, 359 U.S. 982 (1959), the court approved a local rule allowing dismissal on the initiative of the court despite argument that Federal Rule 41 (b) demanded that motions for dismissal emanate solely from a party.

\textsuperscript{360} E.g., D. ALASKA R. 18; D. CONN. R. 15; N.D. ILL. (GEN.) R. 21; S.D.N.Y. (GEN.) R. 23; E.D. WASH. R. 11.

\textsuperscript{361} Six months: e.g., S.D. FLA. R. 9; N.D. ILL. (GEN.) R. 21; E.D. WASH. R. 11. One year: e.g., D. ARIZ. R. 14; D. COLO. R. 24; D. CONN. R. 15; N.D.N.Y.R. 11. Two years: E.D. PA. R. 18 (where an action has been docketed for a period of more than two years); D. MASS. R. 12 (same). See United States v. Thompson, 114 F. Supp. 874 (S.D.N.Y. 1953). Dismissals under Federal Rule 41 (b) have been ordered \textit{ex parte} where no action has been taken for an “unreasonable” period of time. 2B Barron & Holtzoff § 918, at 140 n.7.

A majority (50.3\%) of the practitioners polled were of the opinion that dismissal should not be ordered without the lapse of at least two years. It is interesting to note that 33\% of the responding practitioners were opposed to any rule imposing a sanction as harsh as dismissal.

\textsuperscript{362} E.g., D. COLO. R. 24 (b); N.D. ORLA. R. 30; M.D. PA. R. 21-A; D. WYO. R. 14. \textit{Cf.} D. DEL. R. 12 (reasonable notice); S.D. IND. R. 16 (ten days); D.N.M.R. 13 (fifteen days).
Arguably, the existence of the rule is sufficient notice of proposed action by the court, and as a matter of course a party should be diligent in prosecuting his claim. Nonetheless, the absence of a warning appears to be particularly onerous if the dismissal operates as an adjudication upon the merits, a result which Federal Rule 41(b) appears to command. Provisions contained in local rules may, however, avert dismissal with prejudice, for at least one case has upheld a local rule providing for a civil nol-pros without prejudice as not inconsistent with rule 41(b). One procedure which has been occasionally followed is that of a tentative entry of dismissal without prior warning, subject to future reinstatement of the action upon a showing of cause.

Some districts have provided for reinstatement. See, e.g., S.D.W. Va. R. 8, which allows reinstatement within six months after dismissal upon motion by any party affected and upon a showing of good cause. See United States v. Thomson, 114 F. Supp. 874 (S.D.N.Y. 1953).

Arguably, this result is authorized by rule 6(b)(2), which provides that when under the Federal Rules or "by order of court" an act is required to be done within a specified period of time, the court for cause shown may permit subsequent performance where a prior failure to act was the result of excusable neglect. Fed. R. Civ. P. 6(b)(2). But see Adams v. Jarka Corp., 8 F.R.D. 571 (S.D.N.Y. 1948), which stated that 6(b)(2) was applicable only to time periods specified in the Federal Rules.

One jurisdiction has made provision for the procurement of an order of general continuance where "special circumstances exist which warrant inactivity in a case." Upon the entry of such an order, the case would be immune from dismissal for want of prosecution. D. Kan. R. 17(b).

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363 See, e.g., D. ALASKA R. 18; D. ARIZ. R. 14; N.D. FLA. R. 7; W.D. WASH. (GEN.) R. 10. All but one of the practitioners who responded to the questionnaire felt that notice was necessary and should be afforded.

364 The rule provides that "unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits." Fed. R. Civ. P. 41(b). (Emphasis added.) Cf. United States v. Thompson, 114 F. Supp. 874, 875 (S.D.N.Y. 1953). It is interesting to note that 64% of those attorneys responding to the Law Journal questionnaire felt that dismissal for want of prosecution should be conclusive on the merits, although nearly all asserted that notice should precede dismissal.

365 Burns Mortgage Co. v. Stroudt, 2 F.R.D. 219 (E.D. Pa. 1942). The court distinguished "nol pros" as used in the local rule from "dismissal" within the meaning of Federal Rule 41(b). Id. at 220. However, this type of subtle labelling is unnecessary. Judicial characterization of a given dismissal as "without prejudice" should be sufficient, for under Federal Rule 41(b) a dismissal operates as an adjudication upon the merits "unless the court in its order" specifies otherwise. Further, it may be argued that the existence of a local rule providing that dismissals for want of prosecution are to be "without prejudice" constitutes a standing order to that effect and prevents the consequence of an adjudication upon the merits. For local rules authorizing dismissal without prejudice, see, e.g., D. Colo. R. 24; E.D. Pa. R. 18. None of the districts having rules which make no provision for warnings specify that dismissals are to be "without prejudice." See rules cited note 363 supra.

366 Some districts have provided for reinstatement. See, e.g., S.D.W. Va. R. 8, which allows reinstatement within six months after dismissal upon motion by any party affected and upon a showing of good cause. See United States v. Thomson, 114 F. Supp. 874 (S.D.N.Y. 1953).
requires that a party receive notice of the entry of a dismissal order,\textsuperscript{907} utilization of this tentative entry technique could at least insure some warning to the plaintiff before his rights are permanently resolved.

Besides attempting to afford general assurance of the diligent prosecution of actions, some local rules also provide for dismissal upon the failure of a plaintiff to comply with specific procedural requisites prior to trial. These rules encompass the failure to effectuate service of process within a specified period of time after the commencement of an action,\textsuperscript{908} failure to appear at the trial,\textsuperscript{909} a plaintiff's failure to "make ready" his case for docketing on the trial calendar,\textsuperscript{910} and failure to appear at a pre-trial conference or other hearing.\textsuperscript{911} Arguably, such omissions may be penalized without a specific local rule by invoking the edict of Federal Rule 41 (b), which provides for involuntary dismissal where a plaintiff has failed to obey an order of the court. However, a more desirable construction of this rule would call for its application only on a case-by-case basis where explicit court commands have been directed to a party. If all the mandates prescribed by local rules are viewed as "orders" within the ambit of rule 41 (b), the resultant conversion of these prescripts into an unyielding set of maxims enforced by the severe penalty of dismissal would lay a dormant trap for even a diligent plaintiff.\textsuperscript{912}

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\textsuperscript{907}Fen. R. Civ. P. 77 (d).

In Radack v. Norwegian America Line Agency, Inc., 318 F.2d 538 (2d Cir. 1963), the court invalidated a local rule which contained no provision for notice of a dismissal, holding that the rule was inconsistent with Federal Rule 77 (d), which requires notice of orders and judgments to the parties. Moreover, even though rule 77 (d) excludes such notice to parties who are in default for failure to appear, the court refused to construe this exception as dispensing with notice in all cases of dismissal for want of prosecution, reasoning that any appearance by a party is sufficient to avoid the limitation. Thus, notice may be dispensed with only as regards "parties who have never made an appearance" and must be furnished where dismissal is predicated upon a party's failure to appear at a subsequent stage of the proceedings. "Since appellees were plaintiffs here, they had made an appearance. This was sufficient to entitle appellees to notice of the dismissal of the action." \textit{Id.} at 542.

\textsuperscript{908}D. Ariz. R. 7 (one year); N.D. Ga. R. 21 (sixty days) (willful failure); D. Me. R. 7 (three months).

\textsuperscript{909}D.D.C. (Gen.) R. 14; N.D. Ill. (Gen.) R. 21 (b); E.D. Wash. R. 16.

\textsuperscript{910}N.D. Ga. R. 21 (willful failure).

\textsuperscript{911}Ibid.; cf. S.D. Ind. R. 17.

\textsuperscript{912}See Adams v. Jarka Corp., 8 F.R.D. 571 (S.D.N.Y. 1948). That case involved enforcement of Civil Rule I of the District Court of New York, which provided that summonses and complaints must be served on each defendant within three months of issuance. The action is to abate automatically without any warning by the
hearing, for example, appears particularly onerous when adopted in a jurisdiction which has established pervasive and detailed pre-trial procedures. Moreover, such rules tend to penalize the client for his lawyer's neglect.\textsuperscript{373} Although the same argument may perhaps be levelled against a rule imposing dismissal for a general failure to prosecute an action, it is more likely that a plaintiff would be prompted to make inquiry when his attorney has taken no action for a lengthy period than where he has failed to comply with a technical rule during a shorter period. The harshness of imposing automatic dismissal might be ameliorated by requiring the court clerk to give notice of default to the client before entry of dismissal,\textsuperscript{374} although this would entail additional administrative burdens. Moreover, it would appear salutary to mitigate all of these specialized dismissal rules by imposing a notice requirement prior to dismissal and a provision for reinstatement upon a showing of excusable neglect. The need for such mitigative provisions would appear especially pressing in view of the fact that most of the courts

\textsuperscript{373} This argument was rejected by the majority in Link v. Wabash R.R., 370 U.S. 626 (1962), on the ground that in a system of representative litigation a party is deemed bound by the knowledge and acts of his attorney. However, a vigorous dissenting opinion urged that this approach placed an unreasonable burden upon a layman plaintiff to supervise the daily professional duties of his counsel. \textit{Id.} at 643 (Black, J., dissenting). See also notes 291-94 \textit{supra}.

It is interesting to note that despite the potential severity of such a rule, 65\% of the practitioners polled asserted that dismissal for failure to appear at a pretrial conference was a proper sanction. Those who opposed such a rule, however, were almost uniform in commenting that it imposed an unduly harsh penalty upon a client for the dilatory actions of his attorney. A more appropriate remedy in the view of this latter group of practitioners would involve the imposition of disciplinary penalties against the culpable lawyer. See notes 30, 38 \textit{supra} and accompanying text.

\textsuperscript{374} See Link v. Wabash R.R., \textit{supra} note 373, at 642, 647 (Black, J., dissenting).
with dismissal rules have indicated that little discretion is exercised in their enforcement.\textsuperscript{375} It would seem that the modicum of latitude afforded by the proposed provisions would not unduly erode the paramount policy of furthering the prompt and orderly disposition of claims and would at the same time insure a measure of fairness to the plaintiff whose delay is reasonable or whose counsel has been dilatory.

**Trial Conduct and Procedure**

A variety of local court rules regulate the conduct of the trial and behavior in the presence of the court. In any one jurisdiction these rules are not usually so inclusive as to encompass the full range of impermissible conduct. Rather, the rules of a given district appear concerned with a narrow band on the spectrum of possible courtroom occurrences. Other, less overt factors, including tradition, the pressure of conformity, reason, and informal notification of required conduct,\textsuperscript{376} operate to supplement court rules in effecting the necessary goals of order and decorum while minimizing undesirable distractions. Conceptually, the rules regulating courtroom conduct may be separated into three categories: those which concern the conduct of the attorney in the presentation of his case, those which affect presentation of the cause of action, and those which regulate general courtroom decorum.

The local rules, to a greater or lesser extent in different districts, affect the three phases of the attorney's presentation by regulating the opening statement, the manner of presenting evidence and the final argument. Limitations on the opening statements to the jury are extremely divergent, generally specifying the content,\textsuperscript{377} duration,\textsuperscript{378} order of presentation\textsuperscript{379} and dispensability of introduc-

\textsuperscript{375} 84\% of the judges who responded to the questionnaire asserted that enforcement of the terms of local rules relating to dismissal for want of prosecution was strict and without discretion.

\textsuperscript{376} These informal notifications could range from the "no smoking" sign on the door to the admonition of a judge directed to a boisterous spectator.

\textsuperscript{377} \textit{E.g.}, W.D. LA. R. 13(a) ("full and fair opening of the case"); D. Me. R. 20 (b) (not "argumentative"); S.D. MISS. RULE ON OPENING STATEMENT (Dec. 22, 1965) (fair); M.D.N.C. (Civ.) R. 25 (no argument).

\textsuperscript{378} \textit{E.g.}, D. Me. R. 20 (b) (thirty minutes with extension by leave of court); M.D.N.C. (Civ.) R. 25 (authorizing judge to set time limits); W.D.N.C.R. 9 (same).

\textsuperscript{379} The standard procedure is to allow the party with the affirmative burden to make his statement and at the conclusion to allow the opponent to make his. \textit{E.g.}, D. IDAHO R. 14 (d); D. NEB. R. 22 (c); E.D.N.C. (Gen.) R. 7(A); M.D.N.C. (Civ.) R. 25; W.D.N.C.R. 9.

The party with the negative burden may be allowed the option of presenting his
In regulating the method of presenting evidence, the rules may restrict the number of attorneys who may examine or cross-examine witnesses, the position and posture of the attorney during such examinations and the number of persons who may be examined upon a given point at issue. Finally, local rules frequently establish guidelines and restrictions affecting summary argument by designating the order of presentation, the permissible number of participating attorneys for each side, the proper statement at the close of his opponent's evidence. E.g., D. Ariz. R. 16; D. Idaho R. 14(d); D. Me. R. 20(b). One rule allows the party with the affirmative burden to reserve time to rebut the opposing party's opening statement. E.D. Tenn. R. 17. One district would appear to reserve the opening statement as the sole prerogative of the party having the affirmative burden. W.D. La. R. 13(a).

E.g., compare D. Ariz. R. 16 (statement optional) with D. Idaho. R. 14(d) (statement may be "waived") and W.D. La. R. 13(a) (affirmative "shall" make opening statement). One district prohibits opening statements except by judicial permission. D. Conn. R. 11(c). In the absence of rule, the necessity of an opening statement should be left to the discretion of the court.

E.g., D. Alaska R. 13(A) (one attorney for each party may examine or cross-examine each witness except by leave of court); D. Ariz. R. 16 (same); D.D.C. (Gen.) R. 19 (same); D. Idaho R. 14(f) (same); D. Ore. (Gen.) R. 15(b) (same); E.D. Pa. R. 29(c)(2) (giving court power to regulate the number of actively participating attorneys); E.D. Tenn. R. 17 (no more than two attorneys per side).

E.g., D. Idaho R. 14(b) (remain at table or lectern except by leave of court); D. Minn. R. 5 (remain at table except to approach bench or witness with exhibits); D. Neb. R. 5(i) (remain at table or lectern except to approach bench or witness with exhibits); M.D.N.C. (Gen.) R. 2(g) (remain behind table or lectern except to approach bench or witness with exhibits); E.D. Okla. R. 31 ("suggestions" for conduct: "do not walk around").

E.g., D. Minn. R. 5(2) (standing); D. Neb. R. 5(j) (seated at table or standing at lectern except by leave of court); D.N.H.R. 2(5) (standing); D.N.D.R. III(2)(b) (seated or standing); E.D. Okla. R. 31(3) (standing where reporter can hear and not "walking around"); W.D. Tex. R. 28(19) (dignified posture).

Rules may regulate the number of witnesses who may testify on a particular issue. E.g., D. Mont. R. 10(g) (number of experts may be limited by the court); D. Ore. (Gen.) R. 15(e) (no more than two experts by a party except by leave of court); E.D. Pa. R. 29(a)(I) (court may regulate the number of witnesses); E.D. Tenn. R. 16 (limiting character, impeachment, and expert valuation witnesses to three except by leave of court). The local rules also regulate appearances by an attorney as a witness for his client. E.g., D. Alaska R. 13(B); D. Ariz. R. 19; D. Me. R. 20(d); D. Mont. R. 1(j); D.M.N.R. 1(g); D. Ore. (Gen.) R. 15(a); E.D. Pa. R. 28(a).

The usual practice is to allow the party with the affirmative burden to begin, followed by the negative, with an opportunity for the affirmative to close. E.g., D. Ariz. R. 16; M.D.N.C. (Gen.) R. 8. Where the negative offers no evidence in defense, some districts do not permit the affirmative to close. E.g., E.D.N.C. (Gen.) R. 8; E.D. Pa. R. 30(b). Some districts allow the court in its discretion to alter the standard order. E.g., E.D. Pa. R. 30(d) (multi-party and third-party actions). One district requires the negative to argue first. D. Minn. R. 10(6).

E.g., D. Alaska R. 13(A) (two except by leave of court); D. Ariz. R. 16 (one except by leave of court); D.D.C. (Gen.) R. 19 (two); N.D. & S.D. Iowa R. 19(b) (two except by leave of court); D. Nev. R. 1(e)(5) (same); D.N.H.R. 2(3) (one).
position and posture of the attorney\textsuperscript{887} and the time allotted.\textsuperscript{888}

These restrictions on the attorney's freedom to conduct his case are more than mere nuisances and may well operate to impair his effective presentation\textsuperscript{889} or hamper trial tactics.\textsuperscript{890} However, it is evident that many of the provisions are effectively designed to expedite the trial by eliminating dispensable, time consuming, or distracting influences. In pursuit of these objectives, however, the local rules affecting the presentation of a party's case constitute a patchwork quilt of often questionable pattern.

In addition to designating the conduct of the attorney in the presentation of his case, local rules of three districts have authorized substantial alteration in the trial of certain civil actions.\textsuperscript{891} Consistent with Federal Rule 42 (b), which authorizes a court to separate claims or issues for trial,\textsuperscript{892} the rules of these three districts permit the judge in his discretion to try separately the issues of liability and damages. The clear purpose of these rules is to expedite the administration of justice by avoiding unnecessary delay in the production of evidence on damages where the plaintiff is unable to establish liability.\textsuperscript{893} The second trial on the issue of damages may be before the same or a different jury,\textsuperscript{894} a provision which has prompted an unsuccessful attack on the ground that the plaintiff's right to a jury trial had been infringed.\textsuperscript{895} Before the court exercises

\textsuperscript{887} E.g., W.D. Mo. R. 18 (standing); W.D. Tex. R. 28 (b) (9) (from lectern facing jury).
\textsuperscript{888} E.g., D. ALASKA R. 13 (C) (one hour); N.D. & S.D. IOWA R. 19 (a) (one hour or as judge directs); W.D. LA. R. 13 (b) (court fixes time); D. ME. R. 20 (a) (same); D. MD. R. 4 (one hour).
\textsuperscript{889} For example, narrow limitations on the number of participating counsel and their freedom of movement may seriously preclude the use of an attorney's well-developed, effective style.
\textsuperscript{890} For example, restrictions on the number of witnesses to prove a crucial fact may affect trial preparation and the order of presenting evidence.
\textsuperscript{891} N.D. ILL. (CIV.) R. 21; M.D.N.C. (CIV.) R. 23; W.D. Tex. R. 25.
\textsuperscript{892} Fed. R. Civ. P. 42 (b).
\textsuperscript{893} Miner, Court Congestion: A New Approach, 45 A.B.A.J. 1265 (1959). See Note, 46 Iowa L. Rev. 815 (1961) for an interesting analysis of the considerations to be made in accomplishing a saving of time by separation of trials.
\textsuperscript{894} N.D. ILL. (CIV.) R. 21 provides that the jury shall be the same unless the parties stipulate otherwise. M.D.N.C. (CIV.) R. 23 provides that the jury may be the same or different as seems just and proper. W.D. Tex. R. 25 provides that the jury may be the same or different as the court deems conditions require.
\textsuperscript{895} In Hosie v. Chicago & N.W. Ry., 282 F.2d 639 (7th Cir.), cert. denied, 365 U.S. 814 (1960), the court affirmed a judgment from the district court of the Northern District of Illinois rendered upon a jury verdict for the defendant. The court had ordered that the issues of liability and damages be tried separately and consecutively.
its option to divide the trial, however, it should be convinced that there is likely to be a saving in time and also that there will be no hardship or expense resulting from separate actions.

The practice of separating liability from damages may also be adopted on an ad hoc basis by the presiding judge under rule 42(b) without the invocation of a preformed district rule. The added advantage of local rules on the subject would seem to lie in the establishment of more explicit guiding criteria for the courts and the clear enunciation of judicial policy. The language of newly promulgated Federal Rule 42(b) sanctions this type of separation with or without local rule "when separate trials will be conducive to expedition and economy." The notes of the Advisory Committee accompanying this amended rule explicitly state that the separation of issues for trial is to be "encouraged where experience has demonstrated its worth."

The local rules which assure the decorous behavior of persons in the courtroom are directed toward both the attorney and the general public. In many districts, conduct of the attorney is guided by explicit incorporation of the Canons of Ethics in local rules. Others require the counsel to be present at all times during the trial or purport to regulate the dress and manners of the bar.

Many districts have adopted rules proscribing certain behavior by any person inside or in the vicinity of the courtroom. The most

In holding that the preliminary trial on the issue of negligence did not abridge plaintiff's right to a trial by jury under the seventh amendment, the court clearly reserved judgment on the case where the same jury would not be used to try the subsequent issue of damages when the plaintiff succeeded on the issue of liability. 282 F.2d at 642. It is interesting to note that both parties originally objected to the splitting of the trial. Id. at 640. The plaintiff apparently felt that his chances of recovery would be better where the jury was allowed to assess his injuries. It is likely that the defendant objected because he thought that recovery would be nominal if the same jury who heard the evidence on fault awarded damages. See Weinstein, *Routine Bifurcation of Jury Negligence Trials*, 14 VAND. L. REV. 831 (1961).

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387 N.D. Ill. (Civ.) R. 21 expressly makes this significant reservation.
388 Advisory Committee's Note, 86 SUP. CT. (No. 11) 45 (1966).
389 E.g., D. Mont. R. 1 (f); E.D.N.C. (Gen.) R. 1 (j); E.D. PA. R. 7; E.D. Tenn. R. 3; W.D. Tex. R. 28 (b).
390 E.g., N.D. Ga. R. 15; D. Ore. (Gen.) R. 15 (c).
391 W.D. Tex. R. 28 (b) (19).
392 The local rules of the district courts of Oklahoma and those of the western district of Texas deal in some detail with the expected conduct of the bar. E.D. Okla. R. 31; N.D. Okla. R. 32; W.D. Okla. R. 29; W.D. Tex. R. 28. The picayune particularity of the treatment renders questionable the conductiveness of formalized court rules as opposed to custom to deal with such a subject.
common type of rule in this area regulates or restricts the use of photography, recording devices, and broadcasting systems.\textsuperscript{404} The remaining provisions dealing with courtroom behavior are less common and somewhat irascibly prohibit such conduct as reading, eating, or smoking.\textsuperscript{405} Other rules with more generality attempt to insure that respect for the court will be preserved.\textsuperscript{406}

The fact that the local rules in most jurisdictions do not contain definitive coverage of the conduct of persons during court proceedings suggests that order and decorum are accomplished by divergent means in different districts.\textsuperscript{407} The court has inherent discretionary power to regulate behavior in the courtroom where such action would expedite the trial, avoid distractions, and assure the dignity of the courts,\textsuperscript{408} and adoption of somewhat inflexible rules to accomplish these objectives may well be undesirable.\textsuperscript{409} The only important functions served by formalizing requirements of courtroom behavior into rules would appear to be the advance notice which they give\textsuperscript{410} and the announced guidelines which they delineate.

\textbf{Impartial Medical Examinations and Testimony}

Since Federal Rule 35 has explicitly authorized district courts, upon motion, to order an examination of a party whose mental or physical condition is in issue,\textsuperscript{411} district court rules imparting additional purposes and specifications into this area may exceed the per-

\textsuperscript{404} E.g., S.D. CAL. R. 34; N.D. GA. R. 45; D. NEB. R. 33. Many local rules allow photography for ceremonial proceedings such as naturalization, \textit{E.g.}, N.D. ILL. (GEN.) R. 34; D. KAN. R. 18; E.D.N.C. (GEN.) R. 11; W.D. TEX. R. 28(b)(20)(B).

In all federal criminal trials in the district courts the exclusion of photographers and broadcasters is guaranteed by \textit{Fed. R. Crim. P. 55}.

\textsuperscript{405} E.g., D.N.D.R. III (2)(a); W.D. TEX. R. 28(b)(20). The necessity of formal local rules in this area is doubtful since the same objectives may be reached by informal admonition to persons who, in their occasional or rare appearances as spectators in the courtroom, would not be apprised of the content or even of the existence of local court rules regulating their activities.

\textsuperscript{406} E.g., D. MONT. R. 24; D.N.D.R. III (1)(b); W.D. TEX. R. 28.

\textsuperscript{407} An alternative inference deducible from the lack of thorough regulation in the rules of any one district is that many of the rules reflect little more than the personal predilections of the particular judge.

\textsuperscript{408} E.g., \textit{In re Greene}, 160 F.2d 517, 518 (3d Cir. 1947).

\textsuperscript{409} In many cases, it would appear that the local rules on courtroom conduct are aimed at reducing recurring problems. See, \textit{e.g.}, note 404 \textit{supra} and accompanying text.

\textsuperscript{410} Advance notice to the attorney of peculiar local rules regulating trial conduct may well be essential to enable adequate presentation of his case, especially where he is unfamiliar with local practice.

\textsuperscript{411} \textit{Fed. R. Civ. P. 35}(a).
missible scope of local regulation.\textsuperscript{412} Most of the relevant local rules permit the appointment of an \textit{impartial} medical expert, upon motion of either the court or of a party, to make preliminary examinations and to give trial testimony.\textsuperscript{413} Although designation of the examining physician under rule 35 corresponds with the suggestion of the moving party,\textsuperscript{414} the rule might be construed to permit the court both to initiate a motion for the appointment of an expert and to name him without consulting either party.\textsuperscript{415}

Even assuming that rule 35 parallels the local rules by impliedly permitting the naming of an \textit{impartial} medical expert without the authorization of a permissive local rule, some of the district rules appear substantially inconsistent with rule 35 with regard to persons who may be subjected to examination. Federal Rule 35 refers to "any party,"\textsuperscript{416} but some local rules provide that "the injured person" may be examined.\textsuperscript{417} Although some commentators have advocated an expansion of the scope of examinable persons,\textsuperscript{418} this result has been deemed to be beyond the inherent powers of the courts in implementing rule 35.\textsuperscript{419} Therefore, it is unlikely that examina-

\textsuperscript{412} Cf. Miner v. Atlass, 363 U.S. 641 (1960); Farmer v. Arabian American Oil Co., 285 F.2d 790 (2d Cir. 1960). See note 414 infra. But see 2A BARRON & HOLTZOFF § 1723, at 54 n.18 (Supp. 1965), which discloses that the impartial medical testimony rule for the Eastern District of Pennsylvania was upheld by that court in an unreported decision. The Court of Appeals for the Third Circuit refused to review the decision, also in an unreported opinion, and the Supreme Court denied certiorari in Hankinson v. Van Dusen, 359 U.S. 925 (1959).

\textsuperscript{413} E.g., N.D. ILL. (Civ.) R. 20(a); E.D. OKLA. R. 16(1); N.D. OKLA R. 16(1); W.D. OKLA. R. 15-A(1); D. ORE. (Civ.) R. 37(a); W.D. TEX. R. 24(a); cf. E.D. PA. R. 22(a).

\textsuperscript{414} See 2A BARRON & HOLTZOFF § 822, at 480; WRIGHT § 88, at 340 & cases cited n.16.

\textsuperscript{415} Leach v. Grief Bros. Cooperative Corp., 2 F.R.D. 444 (S.D. Miss. 1942); cf. Darlington v. Studebaker-Packard Corp., 261 F.2d 903 (7th Cir.), cert. denied, 359 U.S. 992 (1959); 2A BARRON & HOLTZOFF § 825, at 494; WRIGHT § 88, at 540. Rule 35 provides that an order may be made "only on motion for good cause shown and upon notice to the party to be examined and to all other parties . . . ." Fed. R. Civ. P. 35(a). (Emphasis added.) However, it does not specify by whom the motion must be made.

\textsuperscript{416} Fed. R. Civ. P. 35(a). (Emphasis added.)

\textsuperscript{417} N.D. ILL. (Civ.) R. 20(a); E.D. OKLA. R. 16(a); N.D. OKLA R. 16(a); W.D. OKLA. R. 15-A(1); E.D. PA. R. 22(a); W.D. TEX. R. 24(a). (Emphasis added.) Compare D. ORE. (Civ.) R. 37, which uses language practically identical to that of the aforementioned local rules except for the substitution of "party" for "injured person."

\textsuperscript{418} Expansion would permit the examination of employees and other third persons who are not parties, but whose injuries are in issue in the case. See WRIGHT § 88, at 340 & n.13. Proposals have been advanced to amend Federal Rule 35(a) to authorize examination in cases involving the condition of a blood relative of a party or a person or agent under the legal control of the party. 2A BARRON & HOLTZOFF § 821.2, at 478.

tions could be extended to persons other than parties without an amendment of the Federal Rules. Hence the local rules achieving that end are seemingly invalid.420

Furthermore, using impartial experts as examiners and witnesses constitutes a substantial limitation on the adversary system, which may partially explain the failure of rule 35 to sanction specifically the use of such experts.421 Moreover, this limitation has been attenuated by supplementary requirements of some local rules. For example, rule 35 provides that where a party requests a copy of an examination taken by his adversary, he forfeits his right to withhold his own medical reports.422 However, some local rules force complete disclosure of the impartial reports,423 tacitly permitting a non-moving party, against whom the ordered examination may operate, to learn the basis for his adversary's position without disclosure of his own reports. Since additional medical witnesses may conceivably be permitted,424 the non-moving party is placed in an advantageous position by such knowledge. Furthermore, although the practice under rule 35 has been to allocate the expenses of a medical examination to the moving party,425 many local rules apportion these expenses either as costs,426 or to the losing party427 or equally between the parties.428 Therefore, a party opposed to the examination may be forced to finance disclosures which undermine his position.

Moreover, some local rules provide for an expansion of the role of the impartial medical expert during trials. Literally interpreted, rule 35 encompasses only expert testimony directly related to the

420 See note 412 supra and accompanying text.
421 See WAGG § 88, at 339. In jurisdictions without local provision for impartial experts, each party presents witnesses who give testimony favorable to his position. This procedure permits legitimate differences of opinion among the experts and recognizes variances in their schools of thought. Resolution of conflicting testimony rests with the jury. See Scott v. Spanjer Bros., 296 F.2d 928, 930-31 (2d Cir. 1962) (dissenting opinion); MCCORMICK, EVIDENCE § 17, at 35 (1954). McCormick criticizes utilization of adversary techniques for expert witnesses on the grounds that the parties are prompted to choose "the best witness" instead of "the best scientist" and that the method overemphasizes conflicts in scientific opinions which a jury is incapable of resolving. Ibid.
422 FED. R. CIV. P. 35 (b) (2).
423 E.g., N.D. ILL. (Civ.) R. 20 (a) (2); W.D. TEX. R. 24 (a) (2).
424 Cf. D. KAN. R. 12. None of the jurisdictions with rules authorizing appointment of impartial medical witnesses preclude the calling of additional experts during the trial.
425 See 2 A BARRON & HOLTZOFF § 825, at 494.
426 E.g., N.D. ILL. (Civ.) R. 20 (c); N.D. OKLA. R. 16 (2).
examination. However, most apposite local rules appear to permit the expert to render subsequent testimony which transcends the scope of the examination. Also, under rule 35 the expert may not be presented to the jury as impartial, but under some local rules he likely would be so identified. The aura of neutrality enshrouding a witness representing the court, coupled with his freedom to testify on all relevant medical questions, may be decisive in many trials where resolution of medical issues is the crux of the controversy. Consequently, the efficacy of the aforementioned local rules depends largely upon the problematical ability of the court to select an expert who is absolutely objective.

However, despite these inherent disadvantages, the appointment of impartial medical experts has been judicially justified as an effective means of enlightening the jury and the court on complex issues which are easily confused by partisan presentation. Consequently, commentators, judges, and legal committees have urged adoption of rules permitting impartial testimony in state and federal courts. Nevertheless, the momentum for reform should be accompanied by receptivity to methods of insuring the summoning of demonstrably objective expert witnesses. Draftsmen of future

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429 Federal Rule 35 (b) (1) provides that if an appointed expert fails to make a report on the examination, his testimony may be excluded at the trial. Fed. R. Civ. P. 35 (b) (1). This suggests that his testimony should be acceptable only insofar as it refers to the examination. The local rules, however, contain no such limitation, providing only that "either party or the court may call the examining physician . . . ." E.g., N.D. ILL. (Civ.) R. 20 (c); N.D. OKLA. R. 16 (3). Arguably, the expert could under these rules be asked hypothetical medical questions on issues which are relevant to the proceeding but which do not bear upon the examination.

430 2A BARRON & HOLTZOFF § 825, at 494.

431 See Van Dusen, A United States District Judge's View of the Impartial Medical Expert System, 32 F.R.D. 498, 502 (1963), where the following "leading authorities" are listed as advocates of neutral experts: Professors Wigmore, Morgan, and McCormick, Judge Learned Hand, and Judge Prettyman.

432 See id. at 513. Judge Van Dusen of the Eastern District of Pennsylvania argues that the credibility of expert testimony has been materially diminished by the consequences of partisan selection and use. Id. at 500.

433 Those practitioners polled by the Law Journal were divided upon the advisability of a rule requiring impartial medical testimony, although 61% favored such a precept. See A.B.A. COMM. ON IMPARTIAL MEDICAL TESTIMONY, REPORT (1956). The Committee concluded that appointment of impartial experts: (1) improves the process of finding medical facts and vastly increases the likelihood of reaching an accurate result; (2) relieves court congestion by bringing about settlements; (3) produces a prophylactic effect upon the formulation and presentation of medical testimony in court; (4) creates a positive economy in court administration even though a modest cost is incurred for payment of the experts.

434 A basic problem is the ability of the court to choose an "impartial" expert in
rules on the subject may rely upon expert medical panels to choose witnesses or require a finding of extreme disparity in the medical positions of the opposing parties before appointment is permitted.

EXHIBITS, RECORDS, AND FILES

Most of the districts rigorously seek to insure the safety of trial documents during related proceedings by prohibiting their removal from the custody of the clerk by all persons other than court officers. Relaxation of this supervision is discernible only in the willingness of one jurisdiction formally to permit photocopying of the documents, another district’s allowance of removal upon permission of the court, and avoidance of responsibility by a few other districts which require counsel to retain all exhibits.

However, the protection afforded disposition of the documents after termination of the trial is less guarded in several district courts. Some districts go so far as to permit destruction without notice to the parties of exhibits which have not been removed within a specified period of time, a practice which was excoriated by almost all of the practitioners polled. Other rules provide for destruction or sale by the marshal of documents which remain in the clerk’s custody without reclaim after notice has been given. Only a few

view of the variety in schools of medical thought. 2A BARRON & HOLZOFF § 825, at 87 (Supp. 1965). Many of the federal practitioners polled questioned the plausibility of constructing a reliable standard of impartiality.

E.g., N.D. ILL. (Civ.) R. 20 (a) (2); W.D. PA. R. 5 (III).

One district court has achieved a compromise between maintenance of an adversary system and the use of impartial witnesses. The Western District of Pennsylvania has adopted a rule allowing the appointment of an impartial medical expert only upon the presentation of an affidavit by a competent and objective medical authority that the position of one party is so biased that it cannot be accepted by reasonable medical experts. W.D. PA. R. 5 (III).

E.g., D. ALASKA R. 19 (A); S.D. CAL. R. 20; S.D. FLA. R. 12; D. HAWAII R. 5 (c).

D. Md. R. 12.

S.D.W. VA. R. 16 (limited to permanent members of the district court bar).

W.D.N.Y.R. 18; E.D.N.C. (GEN.) R. 14 (placed in custody of clerk unless court orders attorney to keep them).

E.g., D. CONN. R. 12 (may be destroyed six months after “final determination” of any case); E.D. OKLA. R. 15 (c) (exhibits not withdrawn after “final judgment” may be destroyed); N.D. OKLA. R. 15 (c) (same); W.D. OKLA. R. 15 (c) (same); E.D. PA. R. 32 (c) (destroyed sixty days after dismissal or final judgment or, if appealed, ninety days after disposition notification by appellate court).

E.g., W.D. Mich. R. 7 (notice given after actions “terminated and closed” and response necessary within thirty days); E.D. Mo. R. III (d) (2) (notice given four months after case decided unless appealed and response necessary within thirty days); D. MONT. R. 20 (b) (notice given thirty days after final judgment where no appeal taken and response necessary within “reasonable time”); D. NEM. R. 30 (b) (notice given sixty days after final judgment and response necessary within ten days); E.D.N.C. (GEN.)
districts place an affirmative duty upon the clerk to mail the exhibits
to the attorneys who have submitted them.\textsuperscript{444}

Those procedures which command destruction of documents either with or without notice may be justifiable because the expenditure of time, expense, and space attendant to storage could be obviated if the attorney were diligent in recovering his documents. Nevertheless, the harsh consequences which can flow from destruction may demand less rigid procedures. Among the reasons why preservation of the documents and exhibits in a given situation might be essential are (1) their usefulness in connected proceedings subsequent to the trial; (2) their relevance to other actions, civil and criminal; and (3) their inherent invaluability or irreplaceability. Two districts have sought to ameliorate the problem posed by the possible utility in related actions by providing that the documents must be retained until all appeals have become final.\textsuperscript{445} However, other districts permit destruction after a final judgment has been granted.\textsuperscript{446} Moreover, none of the districts allowing destruction explicitly recognizes the possible importance of the documents in supporting a collateral attack upon the judgment.\textsuperscript{447}

Where the documents may be needed for subsequent, unconnected civil and criminal proceedings, the need for such documents is most problematical, but the hardships attendant to loss may be especially acute. The failure to protect these documents in anticipation of their use in future criminal proceedings appears to be particularly onerous because of the severe penalties accompanying a finding of guilt, penalties which might conceivably be avoided if

\begin{itemize}
\item R. 14(b)(c) (notice given thirty days after final judgment and response necessary within thirty days); S.D. Onto R. 17 (notice given four months after final judgment and must respond in reasonable time); D.S.D.R. 14 (notice given after appeal time expires and must respond within ten days). Clerks may sell the exhibits and documents in some districts rather than destroy them. N.D. ILL. (GEN.) R. 32(c); E.D. WIs. R. 20(c).\textsuperscript{444}
\item E.g., D. DeL. R. 10(A) (unless court otherwise directs, mail mailable exhibits after final judgment and lapse of time for appeal); D.N.M.R. 5(b) (may be mailed by clerk after final judgment and time for appeal expires); D.N.D.R. 16(b) (returned after time for appeal expires); W.D. Wash. (GEN.) R. 6 (returned in civil, bankruptcy, and admiralty cases after time for appeal expires).\textsuperscript{445}
\item M.D. FLO. R. 12(B); E.D. PA. R. 32(e).\textsuperscript{446}
\item E.g., E.D.N.C. (GEN.) R. 14(b)-(c) (must be removed thirty days after "final judgment" or notice given pursuant to which a thirty-day extension is granted); E.D. OKLA. R. 15(c); N.D. OKLA. R. 15(c); W.D. OKLA. R. 15(c); E.D. PA. R. 32(e).\textsuperscript{447}
\item In those districts where destruction is forestalled for a substantial period of time or where return of the documents is guaranteed, the rules in effect operate to accommodate their preservation for collateral attacks. E.g., D. CONN. R. 12.\textsuperscript{448}
\end{itemize}
the documents were available. At least one district has recognized
the importance of preserving documents initially used in a criminal
proceeding by precluding their destruction or withdrawal absent an
order of the court. 448 Ostensibly, the same protection should be
extended to documents originally used in a civil proceeding but
having potential value in future criminal actions. 449 However, the
ability of the court or clerk to prophesy subsequent need for such
documents in criminal proceedings is necessarily limited and some
procedure which would afford an oral or written hearing appears
to be a necessary adjunct.

Destruction of inherently invaluable or irreplaceable items may
work the most hardship on the attorney and his client, but for this
reason the parties would be most likely to act diligently in claim-
ing such documents. Despite this likelihood, however, even infre-
cquent destruction of a valuable object by a clerk unaware of its
worth appears unjust to a party whose attorney has been guilty of
neglect. Moreover, where valuable items are sold by the court rather
than destroyed, the local rules invariably provide that the pro-
ceeds shall enter the court’s coffers. 450 However, a more equita-
ble solution under the judicial sales scheme would appear to call
for retention of the proceeds for the owner of the items, subject to
payment of a reasonable fine or fee to the court.

Despite the feasibility of various patchwork solutions to these
problems, however, a more general provision covering all disposi-
tions of records and exhibits appears necessary in view of the prob-
lems inherent in destruction or sale. It would appear desirable to
institute a new procedure whereby the clerk is required, upon the
rendering of a final judgment, to send a formal notice to attorneys
who have submitted documents and exhibits. This notice could
require the attorney to state in response (1) whether he intends to
claim the exhibits or (2) whether he wishes the court to destroy
them. If the latter course is chosen, the attorney would indicate
whether he consents to a sale of the documents by the court. Where
the attorney fails to comply with the notice, the clerk would be
commanded to return all of the exhibits at the attorney’s expense.

448 D. Neb. R. 30 (d).
449 Under D. Wyo. R. 20, the potential use of documents in subsequent criminal
proceedings could be taken into account before destruction since documents may be
withdrawn only upon order of the court.
450 E.g., N.D. Ill. (GEN.) R. 33 (c); E.D. Wis. R. 20 (c).
Moreover, all parties submitting exhibits could be required to post a deposit prior to trial which would be utilized to cover mailing costs either where the attorney requests return of the items or where they are automatically sent to him upon his failure to respond to the notice.

JURIES: EM PANELING AND INSTRUCTIONS

A. Voir dire

When the trier of fact is to be a jury, it becomes incumbent upon the court to see that the jury impaneled is impartial.\(^4\)\(^5\) Voir dire is directed at accomplishing that purpose by enabling biases of jurors to be uncovered before the court\(^4\)\(^5\) and by providing the parties with a basis for the exercise of their peremptory challenges.\(^4\)\(^5\) In implementing this procedure, the theory of the Federal Rules and of most district court rules bearing on the subject is that voir dire is best conducted by a variable procedure—either by the court alone, by the parties or their attorneys alone, or by both, as the court may see fit in the individual case.\(^4\)\(^5\)

The trial court often finds it expedient to have prospective jurors

\(^4\)\(^5\) See Brown v. New Jersey, 175 U.S. 172, 175 (1899); Hayes v. Missouri, 120 U.S. 68, 71 (1887); Sellers v. United States, 271 F.2d 475, 476-77 (D.C. Cir. 1959) (per curiam); Goodman, The New Spirit in Federal Court Procedure, 7 F.R.D. 449, 451 (1947); Holtzoff, Expediting Courtroom Procedure, 26 Pa. B.A.Q. 10 (1954). "It must be borne in mind that it is a right of the parties to secure a fair and impartial jury, but not to obtain a favorable jury." Id. at 11. See generally 2B HARRON & HOLTOFF § 1031.

\(^4\)\(^5\) See Spells v. United States, 263 F.2d 609, 611 (5th Cir.), cert. denied, 360 U.S. 920 (1959); Williams v. United States, 46 F.2d 731, 752-33 (5th Cir. 1931); Annot., 73 A.L.R.2d 1187, 1194 (1960).

\(^4\)\(^5\) See Spells v. United States, 263 F.2d 609, 611 (5th Cir.), cert. denied, 360 U.S. 920 (1959); Bailey v. United States, 53 F.2d 982, 983-84 (5th Cir. 1931); Annot., 73 A.L.R.2d 1187, 1191, 1193, 1195-98 (1960).

\(^4\)\(^5\) FED. R. Civ. P. 47 (a); D. COLO. R. 14 (a); S.D. IND. R. 19; D.N.M.R. 18; E.D.N.C. (GEN.) R. 6; W.D.N.C.R. 4. In addition, several district court rules provide essentially that unless otherwise ordered by the court, voir dire shall be conducted by the court, which effectively gives the court the same latitude of discretion as that provided by the Federal Rules. D. ARIZ. R. 17; D IDAHO R. 13 (a); D. MONT. R. 10 (e) (1); D. NEB. R. 22 (a); E.D. WASH. R. 15 (a); W.D. WASH. (Civ.) R. 28 (b).

Considerable discussion has been devoted to the proposition that voir dire should be limited as standard practice to examination by the court alone in order to avoid undesirable waste of time in the selection of a jury. See generally Goodman, supra note 451, at 451-52; Holtzoff, supra note 451, at 11-12. However, in at least one federal district court it appears that rules have been adopted which provide for attorney examination of prospective jurors as a matter of right. D.S.D.R. 12 (2). In support of such a right, see Annot., 73 A.L.R.2d 1187 (1960) (state legislation). Of the attorneys answering the questionnaire, 34.7% thought there should be a rule limiting the examination of prospective jurors to the court alone, while 61.3% favored some form of attorney questioning.
interrogated individually, but collective questioning is required in at least one federal district court. The local rules of that court provide that examination of prospective jurors by attorneys be limited "to general questions directed to the panel as a whole," and if such examination elicits a response from a juror which in the opinion of the court warrants further examination, leave may be granted the attorney to examine such juror specially. Prior to the promulgation of the Federal Rules, there was substantial authority supporting as error-free procedure a trial judge's refusal to allow individual examination of prospective jurors and it is certainly a tenable proposition that such a procedure is not inconsistent with the Federal Rules. However, Federal Rule 47 (a) vests the trial court with both the power and the duty to conduct an examination complete enough to be fair to both parties. Thus, should a situation arise in which the panel response, or lack thereof, to a collective examination is wholly unsatisfactory, the trial court would seemingly have the duty to question the prospective jurors individually (or permit the parties or their attorneys to do so), notwithstanding a local court rule to the contrary.

Rule 47 (a) provides that if the trial judge elects to conduct the voir dire himself, "the court shall permit the parties or their at-

456 D.S.D.R. 12 (2). The local rules in at least one other district court strongly suggest the mandatory use of collective questioning on voir dire. D. IDAHO R. 10 (a).
457 D.S.D.R. 12 (2).
458 Noland v. United States, 10 F.2d 768 (9th Cir. 1926); Shively v. United States, 299 Fed. 710, 714 (9th Cir.), cert. denied, 266 U.S. 619 (1924); Fredericks v. United States, 292 Fed. 856, 858 (9th Cir. 1923).
459 See Holtzoff, supra note 451, at 11-12.
461 An illustrative example is the unusual situation arising in Boothe v. Baltimore Steam Packet Co., 149 F. Supp. 861 (E.D. Va. 1957), where the plaintiff was the mother of an attorney "whose popularity in the Alexandria area is generally recognized." Id. at 863. The court realized that serious difficulties would be unavoidable in selecting a jury in that jurisdiction, but it overcame those difficulties by directing the interrogation of all prospective jurors "as to their relationships, associations, and business dealings, if any, with plaintiff, her son, and his law firm." Ibid. If a similar situation demanding individual interrogation of prospective jurors arose in a federal district court having a rule limiting voir dire to collective examination, that restriction of the court's power under those extraordinary circumstances would seemingly come into conflict with Rule 47 (a) and thus be abated by force of Fed. R. Civ. P. 83. In the case of D.S.D.R. 12 (2), however, it must be noted that no express restriction is placed on the court's power to examine prospective jurors individually if the voir dire is conducted by the court; hence, the attorneys and the court might agree that the court is to conduct separate examinations in an unusual situation such as the above.
torneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.\textsuperscript{462} The most common local procedure for effectuating this directive is to confer upon counsel the right, at the close of the court's examination, to request that certain additional questions be propounded to the panel.\textsuperscript{463} However, some local rules direct that supplemental questions shall be submitted by counsel prior to \textit{voir dire}, with no provision allowing further submission after the court's examination.\textsuperscript{464} In most cases it would seem that the operation of this latter procedure would be compatible with rule 47 (a), since counsel could be expected to foresee which questions necessarily must be propounded to provide a complete examination. However, in those unusual circumstances where an unexpected response is elicited from a prospective juror, such a procedure should not shield what would otherwise be the reversible error of a trial judge who has abused his discretion by failing to pursue an inquiry along a newly discovered avenue of pertinent investigation when requested to do so by counsel at the close of \textit{voir dire}.\textsuperscript{465}

In one federal district court the local rules direct that examination of prospective jurors be conducted by the court clerk, who administers to them a set of six standard questions plus additional questions submitted by the parties and approved by the court.\textsuperscript{466} In \textit{Stirone v. United States},\textsuperscript{467} the validity of this procedure was tested in the context of Federal Rule of Criminal Procedure 24 (a), which, like the corresponding civil rule, also provides for the conduct of \textit{voir dire} by either the court, the parties, or their attorneys.\textsuperscript{468} In upholding the clerical interrogatory procedure, the court indicated that a technical deviation in form from the prescribed practice would not constitute substantial error unless it

\textsuperscript{462} \textit{Fed. R. Civ. P.} 47 (a).
\textsuperscript{463} \textit{E.g.,} D. Aziz. R. 17; S.D. Ind. R. 19; W.D. La. R. 13 (c); D.N.M.R. 18; W.D.N.C.R. 4.
\textsuperscript{464} \textit{E.g.,} D. Mont. R. 10 (e) (l); W.D. Pa. R. 19; W.D. Wash. (Civ.) R. 28 (b).
\textsuperscript{465} See, \textit{e.g.,} \textit{Aldridge v. United States}, 285 U.S. 308 (1931); \textit{Casey v. Roman Catholic Archbishop of Baltimore}, 217 Md. 595, 143 A.2d 627 (1958).
\textsuperscript{466} \textit{W.D. Pa. R.} 19.
\textsuperscript{467} \textit{341 F.2d} 253 (3d Cir.), \textit{cert. denied}, 381 U.S. 902 (1965).
\textsuperscript{468} "The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination." \textit{Fed. R. Crim. P.} 24 (a).
caused demonstrable harm to one of the parties. Such a principle might, if given liberal application, effect undesirable results in many cases, but where the question concerns the proper functionary to propound a set of standard questions to prospective jurors, the ruling appears to be sound.

B. Jury Instructions

Pursuant to Federal Rule 51, written requests for instructions to the jury may be filed “at the close of the evidence or at such earlier time during the trial as the court reasonably directs.” By virtue of this last clause, those local rules which require that requests be submitted at various earlier times in the trial would appear to be inconsistent with the Federal Rules only if in an individual case they failed to satisfy the test of reasonableness. Furthermore, local rules requiring the submission of requests prior to trial, so long as they are reasonable in application, would likewise appear to be consistent with the Federal Rules, particularly where qualified by allow-

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469 341 F.2d at 255.
470 Fed. R. Civ. P. 51. Rule 51 does not make requests for instructions invalid because not in writing. Winstead v. Hildenbrand, 159 F.2d 25, 27 (D.C. Cir. 1947); Hower v. Roberts, 153 F.2d 726, 728-29 (8th Cir. 1946); Swiderski v. Moodenbaugh, 143 F.2d 212, 213 (8th Cir. 1944). See Sharp v. Root, 240 F.2d 519, 522-23 (5th Cir. 1957). However, virtually all local rules bearing on the subject do require written requests. D. Ariz. R. 20; S.D. Cal. R. 14; D. Colo. R. 15; D. Del. R. 14; N.D. Ga. R. 37; E.D. Ill. (Civ.) R. 10; N.D. & S.D. Iowa R. 18; D. Kan. R. 19(a); W.D. La. R. 13(d); D. Me. R. 22; E.D. Mo. R. IX; W.D. Mo. R. 9(b); D. Mont. R. 10(l); D. Neb. R. 23(a); D. Nev. R. 14; E.D.N.C. (Gen.) R. 9; E.D. Okla. R. 22(b); N.D. Okla. R. 22(b); W.D. Okla. R. 21(b); D. Ore. (Gen.) R. 14; D.S.D.R. 13(3); E.D. Wis. R. 14(a); W.D. Wis. R. 14(a).

At least four tenable arguments support a requirement that requests be in writing. First, since it is often difficult to follow lengthy oral instructions and to remain cognizant of a multitude of issues throughout the trial, written requests ward off a breakdown in communication between counsel and the court. Second, written requests produce a clearer record for purposes of appeal and eliminate possible error on the part of the court reporter. Third, written requests apprise opposing counsel of one another’s position, enabling each to formulate more appropriate objections. Furthermore, the requirement that counsel commit their desired instructions to writing often results in a more thoroughly prepared case and prevents counsel from “shooting from the hip” to the detriment of their clients. Several of the polled attorneys commented that the latter effect was the most salutary result of requiring written instructions.

92% of the practitioners responding to the questionnaire supported the requirement that requests for jury instructions be in writing. And of the practitioners who answered the query, 63% were able to answer affirmatively that there had been instances in their experience where oral requests had caused a breakdown in communication between judge and counsel. On the other hand, only four of the responding judges were benched in districts which did not require written requests and none of these felt that there had ever been a breakdown in communications because of orally submitted requests.
ing additional requests to be submitted in case of an unanticipated event and where opposing counsel are clearly apprised of each other's stand on the legal issues involved in the action. Many such rules have been promulgated, and their varying mandates may direct that requests be submitted prior to pre-trial conference, prior to the commencement of trial, at the close of the plaintiff's case, or before the conclusion of testimony by the defendant's first witness.

Failure to comply with the deadline set for submission of requests may, where the court's general charge was legally proper, result in a loss of the right to object to a subsequent refusal by the court to charge the jury specially on particular issues. Likewise, the right to object to one or more of the court's instructions to the jury is waived if the failure to submit requests for contrary instructions derives from the acquiescence of the parties in the validity of those charges. One case, for example, turned on the determination of fair market value of property which the Government had condemned for public use. On pre-trial both the Government and the owner apparently agreed that capitalization of net income was a proper method for evaluating the property but they disagreed as to the factors to be considered in the capitalization formula. Upon trial to the jury, both parties produced expert testimony supporting their respective positions; the court's instructions to the jury, while allowing a choice between various factors to be included in the formula, were consistent with the general capitalization of

\[\text{See } D. \text{ DEL. R. 14; D. NEV. R. 14 (a); E.D. OKLA. R. 22 (b); N.D. OKLA. R. 22 (b); D. OKLA. R. 21 (b); D. ORE. (GEN.) R. 14 (a).}\]
\[\text{See } D. \text{ DEL. R. 14; D. NEV. R. 14 (a); W.D. TEX. R. 26 (x).}\]
\[\text{W.D. TEX. R. 28 (x).}\]
\[\text{E.g., W.D. LA. R. 13 (d) (seven days); D. NEV. R. 14 (a) (five days); D. ORE. (GEN.) R. 14 (a) (one day in trials which counsel anticipate will require one day or less to try).}\]
\[\text{E.g., D. ARIZ. R. 20; D. COLO. R. 15 (a); D. DEL. R. 14; N.D. GA. R. 37; D. KAN. R. 19 (a); W.D. MO. R. 9 (b); D. MONT. R. 10 (f); D. NEB. R. 23 (a); E.D. OKLA. R. 22 (b); D. ORE. (GEN.) R. 14 (a).}\]
\[\text{E.D. MO. R. IX.}\]
\[\text{E.D. WASH. R. 17 (c).}\]
\[\text{E.g., Turner Constr. Co. v. Houlihan, 240 F.2d 435, 439-40 (1st Cir. 1957); Metropolitan Life Ins. Co. v. Talbot, 205 F.2d 529, 533 (5th Cir. 1953); Seeraty v. Philadelphia Coca-Cola Bottling Co., 198 F.2d 264-65 (3d Cir. 1952). See D. ARIZ. R. 20.}\]
\[\text{Sill Corp. v. United States, 343 F.2d 411 (10th Cir.), }\text{cert. denied, }382 \text{ U.S. 840 (1965).}\]
\[\text{Sill Corp. v. United States, }\text{supra note 479.}\]
\[\text{478 See supra note 479.}\]
income approach. On appeal the owner raised an objection to that part of the court's charge which permitted the jury to use its discretion in taking cognizance of various factors, but the appellate court stated that

[W]e think the challenge comes too late in view of the apparent pretrial agreement of the parties on the blueprint of the lawsuit embodying their respective theories of income capitalization and the introduction without objection of testimony in support of those respective theories. No one should be heard to object to an instruction on the law of the case on which it was tried and submitted by agreement of the parties.

The rationale of this holding has been incorporated in the local rules of the Arizona Federal District Court. There, requests for instructions are to be submitted prior to the taking of evidence, and within such time as the court shall allow, adverse parties must specify distinctly any objections they have to the requested instructions. Failure to object to any requested instruction may be taken by the court to be a stipulation that such instruction correctly states the law. This local rule implements Federal Rule 51, which requires the court to inform counsel of its proposed action on their requests prior to final argument so that they may argue the facts in the light of the law as the court intends to charge it. The logical extension of this policy would seem to be that embodied in the Arizona rule, which averts a last-minute objection to an instruction upon which the opposing party based the submission of his evidence. As a protection against unforeseen hardship, however, such a rule should be bounded by a power vested in the trial court to receive additional requests and/or objections and, indeed, the Arizona rule so provides.

**Costs and Fees**

Federal Rule 54 (d) provides that costs shall be allowed to a prevailing party other than against the United States as a mat-
party may be the prevailing party and entitled to recover costs even though he recovers only nominal damages, e.g., Western Elec. Co. v. Williams Sales Co., 236 F. Supp. 75 (M.D.N.C. 1964), or only part of his claim, e.g., Hines v. Perez, 242 F.2d 459 (9th Cir. 1957); S. A. Hirsh Mfg. Co. v. Childs, 127 F. Supp. 183 (W.D. Pa. 1957).

Where several actions were consolidated for trial and some but not all of the plaintiffs prevailed, part of the defendant's costs were imposed upon the unsuccessful plaintiffs. Modick v. Carvel Stores, Inc., 209 F. Supp. 261 (S.D.N.Y. 1962); see Cornell v. Gulf Oil Corp., 35 F. Supp. 448 (E.D. Pa. 1940); Brooklyn Union Gas Co. v. Transcontinental Gas Pipe Line Corp., 201 F. Supp. 679 (S.D. Tex. 1960), aff'd, 299 F.2d 692 (5th Cir.), cert. denied, 371 U.S. 887 (1962). However, in Thompson v. United Glazing Co., 36 F. Supp. 527 (W.D.N.Y. 1941), where two plaintiffs sued a single defendant and only one of the complainants recovered, the court refused to impose part of the costs upon the unsuccessful plaintiff, pointing out that a single answer had been served, that there had been a single trial and that the defendant would have been put to the same proof had the unsuccessful plaintiff not been a party.

Some courts have apportioned costs between the successful and unsuccessful parties in a given case. Such apportionment is generally within the discretion of the court. E.g., Dyker Bldg. Co. v. United States, 182 F.2d 85 (D.C. Cir. 1950); Prudence-Bonds Corp. v. Prudence Realization Corp., 174 F.2d 288 (2d Cir. 1949). Thus, in Cold Metal Process Co. v. Republic Steel Corp., 233 F.2d 828 (6th Cir.), cert. denied, 322 U.S. 891 (1956), where the defendant prevailed on one affirmative defense, but a large part of the trial was consumed in litigating another affirmative defense upon which he did not prevail, division of the costs between the plaintiff and the defendant was held not to be an abuse of discretion. Likewise, where an intervenor tendered claims totaling $65,000 and recovered only on a minor claim for $814.94, the imposition of ninety per cent of the costs upon the intervenor and ten per cent against the defendant was held not to be an abuse of discretion. United States ex rel. Chamberlain Metal Weatherstrip Co. v. Madsen Constr. Co., 139 F.2d 613 (6th Cir. 1943); accord, Steel Constr. Co. v. Louisiana Highway Comm'n, 60 F. Supp. 183 (E.D. La. 1945). However, this discretion may be abused. Where the plaintiff's charges were found to be groundless, but the defendant's very complicated business dealings made litigation expensive and difficult, imposition of one half of the costs upon the defendant was held to be an abuse of discretion. Chicago Sugar Co. v. American Sugar Ref. Co., 176 F.2d 1 (7th Cir. 1949).

48 "[C]osts against the United States, its officers, and agencies shall be imposed only to the extent permitted by law." Fed. R. Civ. P. 54(d). This provision is echoed by § 2412(a) of the Judicial Code, which provides that the United States shall be liable for fees and costs only when such liability is expressly provided for by act of Congress. 28 U.S.C. § 2412(a) (1964). Section 2412(b) then provides that if the United States puts in issue the plaintiff's right to recover, a district court or the Court of Claims may allow costs to the prevailing party in any action against the United States founded upon the Constitution, any act of Congress, any regulation of the executive department, any express or implied contract with the United States, or in any action praying for damages in cases not sounding in tort. Such costs are limited to those actually incurred for witnesses and fees paid to the clerk from the time of joining of issue. 28 U.S.C. § 2412(b) (1964). Section 2412(c) permits the allowance in all courts of costs to a successful claimant in a Federal Tort Claims Act case, such costs not to include attorneys' fees. 28 U.S.C. § 2412(c) (1964). See also 28 U.S.C. § 2465 (1964); Mohr v. United States, 168 F. Supp. 734 (E.D. Va. 1959), rev'd on other grounds, 274 F.2d 803 (4th Cir. 1960).

When the United States prevails, it may recover costs under rule 54(d) despite the fact that the other party could not recover costs had it been successful. Locke v. United States, 1 F.R.D. 431 (W.D. Mich. 1940); Solomon v. Welch, 28 F. Supp. 823 (S.D. Cal. 1939). Where the unsuccessful litigants are the United States and another party, half of the costs are imposed upon the other party, and half are not
term of course unless the court otherwise directs,\textsuperscript{489} except when express provision therefor is made by statute or rule. However, this rule makes no provision for what specific items are “taxable”—that is, may be assigned—as costs. The Supreme Court has held that rule 54 (d) grants the local court a measure of discretion in deciding what items are to be so taxed in a given case,\textsuperscript{490} although this discretion is to be “sparingly exercised” with regard to items not specifically allowed by the Federal Rules or by statute.\textsuperscript{491} Most of the

\textsuperscript{489} See Deering, Millikin & Co. v. Temp-Resisto Corp., 169 F. Supp. 453 (S.D.N.Y. 1959), where it was asserted that under rule 54 (d) a district court has the same discretion in awarding costs which courts of equity possessed before enactment of the Federal Rules. In Crutcher v. Joyce, 146 F.2d 518 (10th Cir. 1945), it was held that costs in an action in equity are not allowable to the prevailing party as a matter of course; rather, under the old federal common law rule a court of equity has a certain amount of discretion in awarding costs.

\textsuperscript{490} Farmer v. Arabian-American Oil Co., 379 U.S. 227, 232, 235 (1964). See also Angeroff v. Goldfine, 270 F.2d 185 (1st Cir. 1959) (allowance of costs to prevailing party not an absolute right but is within discretion of court); Adlung v. Gotthardt, 257 F.2d 199 (D.C. Cir. 1958) (assessment of costs determined by usage as well as statute); McWilliams Dredging Co. v. Louisiana Dep’t of Highways, 187 F.2d 61 (5th Cir. 1951) (allowance of particular items determined by statute, rule, order of court, or practice of court); Swalley v. Addressograph-Multigraph Corp., 168 F.2d 585 (7th Cir. 1948), cert. denied, 335 U.S. 911 (1949) (district courts may by rule declare what items are taxable as costs); Williams v. Sawyer Bros., Inc., 51 F.2d 1004 (2d Cir. 1931) (same); Deering, Millikin & Co. v. Temp-Resisto Corp., supra note 489 (under rule 54 (d) a district court has same discretion in awarding costs as courts of equity possessed before enactment of Federal Rules).

The district courts are not required to apply state law regarding costs in diversity cases. Gandell v. Fidelity & Cas. Co., 158 F. Supp. 879 (E.D. Wis. 1956). However, they will generally do so unless a federal statute or general rule of court is applicable. \textit{Ibid.}; Brown v. Consolidated Fisheries Co., 18 F.R.D. 433 (D. Del. 1955).

Since the imposition of costs is within the discretion of the court, judicial assessment of costs is ordinarily not appealable, e.g., Intertype Corp. v. Clark-Congress Corp., 249 F.2d 626 (7th Cir. 1957), unless the power of the court to tax a given item is in dispute, e.g., Association of W. Rys. v. Riss & Co., 320 F.2d 785 (D.C. Cir. 1963), or an abuse of discretion is alleged, e.g., Kemart Corp. v. Printing Arts Research Labs., 222 F.2d 897 (9th Cir. 1955), or the size of the judgment is also the subject of appeal, e.g., Swalley v. Addressograph-Multigraph Corp., supra. Cf. Howard v. Wilbur, 166 F.2d 884 (2d Cir. 1948).

\textsuperscript{491} E.g., Cohen v. Lovitz, 255 F. Supp. 302 (D.D.C. 1966) (court declined to exercise inherent power to award counsel fees). The general pattern of imposing costs upon the unsuccessful party is broken by a number of rules and statutory provisions which utilize the imposition of costs as a punitive sanction to effectuate a
given policy. Thus, in order to deter the filing of inflated claims framed in a manner designed to gain access to the federal courts, 28 U.S.C. §§ 1331 (b), 1132 (b) (1964) permit the district courts to deny costs to and to impose costs upon a plaintiff who recovers less than the jurisdictional amount.

Other provisions are aimed at the expeditious handling of cases and resolution of issues and at deterring delaying tactics. For example, 28 U.S.C. § 1927 (1964) provides that any attorney who so extends or burdens proceedings in a given case as to increase costs unreasonably and vexatiously may be required to pay such costs personally.

The Federal Rules contain several measures imposing costs upon parties as a sanction for certain prescribed conduct. For example, Fed. R. Civ. P. 37 (c) requires a party who refuses to admit the truth of any matters of fact or the genuineness of any document the truth or genuineness of which is subsequently proven to pay to the other party the reasonable expenses of making such proof unless the court finds that there was good reason for the refusal or that the admissions sought were of no substantial importance. Requiring payment of expenses is the only sanction for refusal to admit; a party may not be ordered to make an admission. United States v. Watchmakers of Switzerland Information Center, Inc., 25 F.R.D. 197 (S.D.N.Y. 1959). See United Mfg. & Serv. Co. v. Holwin Corp., 15 F.R.D. 510 (N.D. Ill. 1958); Akins v. McKnight, 15 F.R.D. 9 (N.D. Ohio 1952). Payment of expenses may not be required under this rule, however, where the admissions sought constitute the ultimate issue, Tyler State Bank & Trust Co. v. Bullington, 179 F.2d 755 (5th Cir. 1950), are conclusions of law, or are not part of the plaintiff's prima facie case but are related solely to the defendant's affirmative defense, Fidelity Trust Co. v. Village of Stickney, 129 F.2d 506 (7th Cir. 1942).

Another proscriptive provision, Fed. R. Civ. P. 37 (a), states that a deponent who refuses to answer any question or interrogatory and is thereafter ordered to answer by the court shall be required to pay to the examining party the reasonable cost of obtaining such order if the refusal was without substantial justification. See Lizza & Sons, Inc. v. Diminico & Pallotta, Inc., 23 F.R.D. 143 (D. Mass. 1959); cf. Keogh v. Pearson, 35 F.R.D. 20 (D.D.C. 1964). Other Federal Rules relating to deposition costs include Fed. R. Civ. P. 30 (d) (discretion to impose "reasonable" costs when granting or denying a motion to limit deposition); Fed. R. Civ. P. 30 (g) (costs taxable to party who, after giving notice, fails to attend).

One significant impetus toward settlements is contained in Fed. R. Civ. P. 68, which provides that a party who recovers a judgment less favorable than a rejected offer of judgment made more than ten days before the trial must pay the costs incurred after the offer was made. There must be a formal offer of judgment in order to impose costs under this rule, not merely an offer of compromise. Maguire v. Federal Crop Ins. Corp., 9 F.R.D. 240 (W.D. La. 1949).

Another significant provision is Fed. R. Civ. P. 41 (d), which provides that a plaintiff who institutes an action which he has previously dismissed in any court may in the discretion of the court be required to pay the costs of the prior action. See Gregory v. Dimock, 286 F.2d 717 (2d Cir. 1961) (no tax upon plaintiff where defendant's delaying tactics in prior action multiplied costs); Ayers v. Conner, 26 F. Supp. 95 (E.D. Tenn. 1938) (same).

Other provisions relate to the following: (1) the manner in which costs are to be claimed and imposed: 28 U.S.C. § 1924 (1964) (verification of bills of costs); Fed. R. Civ. P. 54 (d) (costs may be taxed by the clerk on one day's notice, and his action may, on motion, be reviewed by the court); Fed. R. Civ. P. 58 (entry of judgment shall not be delayed for the taxing of costs); (2) Special items or circumstances: Fed. R. Civ. P. 71A (1) (costs in condemnation proceedings); see Advisory Committee's Notes, 28 U.S.C. App. at 6149-56 (1964); 28 U.S.C. § 1961 (1964) (interest on money judgments); 28 U.S.C. § 1919 (1964) (costs on dismissal for want of jurisdiction); 28 U.S.C. § 1918 (a) (1964) (costs in civil action imposing statutory fine or forfeiture); 28 U.S.C. § 1928 (1964) (costs in patent infringement action).
district courts have been content to exercise this discretion on a case-by-case basis, relying on precedent and local custom. However, two districts, the District of Alaska and the Southern District of California, have enacted comprehensive identical rules specifying what items are taxable as costs payable to the prevailing party.\footnote{D. ALASKA R. 15 (A), (B); S.D. CAL. R. 15 (a), (b). Other districts have scattered provisions concerning particular items. See E.D. ILL. (Civ.) R. 14 (witness fees); N.D. ILL. (Civ.) R. 4 (expense of attending distant depositions), 11 (bond premiums); N.D. INDIANA R. 16 (bond premiums); S.D. INDIANA R. 5 (same); E.D. & S.D.N.Y. (Civ.) R. 5 (a) (expense of attending distant depositions), 6 (d) (masters' fees), 9 (stenographic transcripts); N.D.N.Y.R. 22 (masters' fees), 25 (stenographic transcripts); E.D.N.C. (Civ.) R. 11 (A), (B) (bond premiums and witness fees); M.D.N.C. (Civ.) R. 27 (a), (b) (same); E.D. WASH. R. 23 (l) (witness fees); W.D. WASH. (Civ.) R. 31 (l) (witness fees, bond premiums, necessary incidental expenses ordered by court).

A number of districts have provided for the manner in which costs shall be claimed, dealing with such matters as the time within which costs must be claimed, the form of the bill of costs and notice to the other party. See, e.g., D. ARIZ. R. 25 (costs must be claimed within ten days after entry of judgment); D. IDAHO R. 19 (a) (claim within five days after entry of judgment); D. NEV. R. 18 (a) (same); E.D. MO. R. X (e) (bill of costs must be verified, be on form provided by clerk and contain proof of mailing to adverse party); D. MONT. R. 14 (a) (1) (cost bill must contain itemized schedule of costs with verification by attorney that schedule is correct and that costs were necessarily incurred); D.N.M.R. 11 (b) (cost bill must be itemized, verified, and contain proof of service on counsel of adverse party); E.D. PA. R. 35 (c) (opposing party must be given forty-eight-hour written notice if he resides or his counsel maintains an office in Philadelphia; otherwise five-day written notice); E.D. WASH. R. 23 (a) (one-day written notice if notice served in Spokane, otherwise five-day written notice); W.D. WIS. R. 25 (a) (three-day notice).

\footnote{28 U.S.C. § 1920 (1964).}

\footnote{Such fees are provided for in 28 U.S.C. § 1914 (a) (1964) (filing fee) and 28 U.S.C. § 1917 (1964) (fee on notice of appeal). See also 28 U.S.C. §§ 1914 (b), (d) (1964).}

\footnote{Such fees are specified in 28 U.S.C. § 1921 (1964).}

\footnote{Such fees are specified in 28 U.S.C. § 1921 (1964).}


\footnote{Such fees are specified in 28 U.S.C. § 1923 (1964).}

\footnote{While express statutory provision is not necessary in order for an item to be taxable, see note 490 supra and accompanying text, the allowance of a given item

\footnote{While express statutory provision is not necessary in order for an item to be taxable, see note 490 supra and accompanying text, the allowance of a given item
The rules of the District of Alaska and the Southern District of California add further substance to this statutory mandate by specifying in detail the circumstances under which the reporter's fee, 400 witness fees, 500 fees for copies of papers and various other items.

Generally finds some basis in a specific provision. For example, the taxing of an unofficial reporter's fee for taking a deposition has been justified by analogy to the taxing of the official court reporter's fee authorized by § 1920. United States v. Kolesar, 313 F.2d 835 (5th Cir. 1963); Cooke v. Universal Pictures Co., 135 F. Supp. 480 (S.D.N.Y. 1955); Perlman v. Feldman, 116 F. Supp. 102 (D. Conn. 1953).

Conversely, the existence of a specific statutory provision for given items has formed the basis for a denial of the taxing of a related item. For example, extra expenses for expert witnesses have been denied as taxable costs due to the fact that ordinary witness fees, mileage, and subsistence are specified by statute with no mention of an additional fee to expert witnesses. Scaramucci v. Universal Mfg. Co., 234 F. Supp. 290 (W.D. La. 1964); Firtag v. Gentleman, 152 F. Supp. 226 (D.D.C. 1957). In Braun v. Hasenstien Steel Co., 23 F.R.D. 169 (D.S.D. 1959), it was held that special fees for expert witnesses could not be taxed, because in actions at law the courts have no discretion regarding the imposition of costs and are limited to items specified by statute. The court also asserted that costs statutes, being in derogation of the common law, are to be construed strictly, and no item may be allowed if it is not specifically mentioned by statute. Id. at 167. This rationale seems clearly inconsistent with the Supreme Court's holding that the district courts have discretion in the taxing of costs. See note 490 supra and accompanying text.

Only the reporter's fee for a copy of the transcript furnished to the court upon request or by stipulation of the parties is taxable. Mere acceptance by the court does not constitute a request, and counsel's copies are not taxable. D. ALASKA R. 15 (B) (2); S.D. CAL. R. 15 (b) (2) (a); see also E.D. & S.D.N.Y. (Civ.) R. 9; N.D.N.Y.R. 25.

Witness fees, mileage, and subsistence are taxable even though the witness appears voluntarily and does not take the stand, provided the witness “necessarily attends the court.” D. ALASKA R. 15 (B) (4); S.D. CAL. R. 15 (b) (3). E.D. WASH. R. 23 (f) (1) and W.D. WASH. (Civ.) R. 31 (f) (1) provide that if attendance is not under subpoena and if the witness does not actually testify, fees are taxable only upon order of the court. E.D. ILL. (Civ.) R. 14 states that a witness who appears voluntarily is entitled to fees for attendance and travel “as if regularly subpoenaed,” provided he files an affidavit as to miles necessarily traveled and days of actual attendance. See Spiritwood Grain Corp. v. Northern Pac. Ry., 179 F.2d 338 (8th Cir. 1950). Where the witness comes from outside the district the mileage is based upon the most direct route to the court. See notes 514-20 infra and accompanying text. Witness fees and subsistence are taxable only for the reasonable period during which the witness is within the district. Where a witness appears on the same day in related cases requiring appearance in the same court, one set of fees is taxable, to be divided equally among the cases. No party is to receive witness fees for testifying in his own behalf and witness fees for officers of a corporate party are taxable if the officers are not defendants and recovery is not sought against them individually. D. ALASKA R. 15 (B) (4); S.D. CAL. R. 15 (b) (3).

Allowance of fees to a witness on a deposition does not depend upon whether the deposition is offered into evidence. Where the fee of the witness is taxable the reasonable fee of an interpreter is taxable, as is the reasonable fee of a translator if the translated document is necessarily filed or admitted into evidence. Bennett Chem. Co. v. Atlantic Commodities, Ltd., 24 F.R.D. 200 (S.D.N.Y. 1959); Gotz v. Universal Prods. Co., 9 F.R.D. 153 (D. Del. 1945); D. ALASKA R. 15 (B) (4); S.D. CAL. R. 15 (b) (3).

The cost of copies of exhibits attached to a document necessarily filed and
may be included in the bill of costs.

Another desirable provision contained in the local rules of these two districts relates to expenses in the taking of depositions, which expenses have received no general statutory treatment. The transcription expense and the fee of the presiding official are stated to be taxable. These rules then provide that counsel fees and the expense of arranging and attending the taking of the deposition are not taxable “except as otherwise provided by statute or by the Federal Rules of Civil Procedure.” The reference is evidently served is taxable when admitted into evidence in lieu of an original which is unavailable or not introduced at the request of opposing counsel, but the cost of such copies submitted to facilitate the convenience of offering counsel or his client is not taxable. Notary fees are taxable only for documents required to be notarized and necessarily filed. D. ALASKA R. 15 (B) (5); S.D. CAL. R. 15 (b) (4).

The cost of compiling summaries, computations, and statistical comparisons is not taxable, and the cost of models is taxable only by order of the court. The cost of photographs eight by ten inches or less in size is taxable if admitted into evidence or attached to documents necessarily filed and served, but the cost of larger photographs is taxable only by order of the court. D. ALASKA R. 15 (B) (6); S.D. CAL. R. 15 (b) (5).

Fees to masters, receivers, and commissioners are taxable unless otherwise ordered by the court. D. ALASKA R. 15 (B) (7); S.D. CAL. R. 15 (b) (6). The statutory docket fees for counsel specified in 28 U.S.C. § 1923 (1964) are taxable in default as well as contested cases. Cf. Fed. R. Civ. P. 55 (b) (1). Such fees are deemed attorneys' fees not taxable against the United States in Federal Tort Claims cases. North Atlantic & Gulf S.S. Co. v. United States, 209 F.2d 487 (2d Cir. 1954); McConville v. United States, 197 F.2d 680 (2d Cir.), cert. denied, 344 U.S. 877 (1952); see note 488 supra.

Cost of premiums on bonds or undertakings is ordinarily taxable where such security is expressly required by law or order of court or is necessarily required to enable the party to secure some right accorded him in the action. D. ALASKA R. 15 (B) (9); S.D. CAL. R. 15 (b) (8); see also N.D. ILL. (Civ.) R. 11 (reasonable premiums on all bonds); S.D. IND. R. 5 (same); E.D. & S.D.N.Y. (Civ.) R. 6 (c); N.D.N.Y.R. 22. See Fed. R. Civ. P. 53 (a).

In removed cases, various specified costs incurred in the state court prior to removal are taxable. D. ALASKA R. 15 (B) (10); S.D. CAL. R. 15 (b) (10).

to rules 30 (d)\textsuperscript{506} and 30 (g),\textsuperscript{508} which permit the court to order payment of expenses upon the grant or denial of a motion to limit examination of a deponent and upon the failure of a deposition to be taken as scheduled.

A salutary practice followed by several cases\textsuperscript{507} and local rules\textsuperscript{508} has been ignored by the comprehensive scheme adopted by the two districts. In several instances, a party giving notice of the taking of a deposition at a place far distant from the place of trial has been ordered to pay the expenses of attendance incurred by the other party or his attorney.\textsuperscript{509} The purpose of this practice is to avoid hardship and harassment and also to secure the right of the other party to oral cross-examination.\textsuperscript{510} The authority for such an order is usually predicated upon Federal Rule 30 (b), which provides that with regard to the taking of depositions "the court may make any . . . order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression."\textsuperscript{511} While this proviso seemingly empowers the District of Alaska and the Southern District of California to make such an order despite the absence of a specific local rule, courts without a rule on this point have in general been reluctant to make such an order, although they might do so if "special circumstances" were present.\textsuperscript{512} In the interests of clarification, it would appear advantageous for the districts to promulgate a specific provision on this point, and two possible tacks appear feasible. One model is posed by the Northern District of Illinois, the rules of which provide that a party giving notice of the taking of a deposition more than one hundred fifty

\textsuperscript{506} Fed. R. Civ. P. 30 (d).
\textsuperscript{508} Fed. R. Civ. P. 30 (g).
\textsuperscript{507} See, e.g., Gibson v. International Freighting Corp., 175 F.2d 591 (3d Cir.), cert. denied, 338 U.S. 832 (1949).
\textsuperscript{508} See N.D. Ill. (Civ.) R. 4; E.D. & S.D.N.Y. (Civ.) R. 5 (a).
\textsuperscript{509} E.g., Detsch & Co. v. American Prods. Co., 141 F.2d 662 (9th Cir. 1944); Deep South Oil Co. v. Metropolitan Life Ins. Co., 21 F.R.D. 340 (S.D.N.Y. 1958). E.D. & S.D.N.Y. (Civ.) R. 5 (a) specify that the applicant may be required to pay an adverse party's expense of attendance, including a reasonable counsel fee, at a deposition more than 100 miles from the courthouse. The Northern District of Illinois permits imposition of such costs only when the distance exceeds 150 miles. N.D. Ill. (Civ.) R. 4.
\textsuperscript{510} Vareltzis v. Luckenbach S.S. Co., 20 F.R.D. 383 (S.D.N.Y. 1956); cf. Fed. R. Civ. P. 31 (d) (court may order testimony of witness sought to be taken on written interrogatory not to be taken except on oral examination).
\textsuperscript{511} Fed. R. Civ. P. 30 (b); see Vareltzis v. Luckenbach S.S. Co., supra note 510.
miles from the place of trial may be ordered to pay the reasonable expenses of attendance incurred by the other party or his attorney. Alternatively, several cases hold that payment of expenses of attendance will be ordered only where there are special circumstances demonstrating hardship or oppression. If the latter example is incorporated in local rules, a specification of the elements constituting "special circumstances" would appear desirable in order that counsel may determine in advance the most efficacious and economic method of pre-trial discovery.

The local rules of the District of Alaska and the Southern District of California also contain sections relating to the cost computation of mileage allowances payable to a witness. Where the witness comes from outside the district, the mileage taxable is based upon the most direct route to the court, "subject to the additional provisions of the Federal Rules of Civil Procedure." This latter reference may be to the analogous provision of Federal Rule 45 (e) (1) that, absent special statutory authorization, a subpoena compelling attendance at trial may be served outside the district only within one hundred miles of the place of trial and to the line of cases which hold that taxable mileage for the travel of a witness from without the district is limited to one hundred miles, since that is the greatest distance outside the district from which attendance may be compelled.

While the "hundred-miles rule" seems inconsistent with the provision in these local rules that attendance of a witness under subpoena is not required in order for that witness' mileage to be taxable, it is defensible as a measure to prevent inflated costs. It is submitted, however, that a better method of control would

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N.D. ILL. (Civ.) R. 4.
D. ALASKA R. 15 (B) (4); S.D. CAL. R. 15 (b) (3).
FED. R. CIV. P. 45 (e) (1).
D. ALASKA R. 15 (B) (4); S.D. CAL. R. 15 (b) (3).
In Gotz v. Universal Prods. Co., 3 F.R.D. 153 (D. Del. 1943), mileage from Germany was unsuccessfully sought to be taxed. In Consolidated Fisheries Co. v. Fairbanks, Morse & Co., 106 F. Supp. 714 (E.D. Pa. 1952), the court refused to tax the cost of a 1900-mile round trip from Alaska.
allow the court to exercise its discretion in the light of the facts of a particular case, balancing the necessity of a witness' appearance against the expense of procuring attendance. Such a method would evidence recognition of the fact that the purpose of the rule is to assess costs equitably rather than to parallel the subpoena requirements.\textsuperscript{619} Once this is recognized, the arbitrary designation of a given distance for cost purposes is difficult to justify.\textsuperscript{620} The Supreme Court has held\textsuperscript{621} that the district courts are not bound by the "hundred-miles rule," but are to use the discretion granted by rule 54 (d) in determining whether and to what extent to limit the mileage taxable in a given case. While on the facts of that case the limitation of taxable mileage to one hundred miles was found not to be an abuse of discretion, the case clearly holds that such a determination is to be made by the application of reasonable discretion rather than arbitrary rule.

Despite these shortcomings in the local rules of the District of Alaska and the Southern District of California, they appear to be the best and most comprehensive local federal rules regarding the items taxable as costs. It would appear that the discretion granted by rule 54 (d) in this area should be exercised through local rules which clarify local policy rather than through case-by-case reliance upon often amorphous local customs. A party who has prevailed in an action should not have to resort to extended litigation in order to determine his right to compensation for expenses incurred and the risk of bearing such costs should be assessable by the parties in advance.

**Motions for New Trials**

Although Federal Rule 59\textsuperscript{622} authorizes motions for new trials, proper grounds therefor are described only in the most general terms,\textsuperscript{623} because the draftsmen of the rule considered an accurate

\textsuperscript{619}Reliance upon the subpoena requirements seems particularly inapprise in the typical case dealing with mileage expense for travel from a foreign country since 28 U.S.C. § 1783 (1964) provides for the requiring by subpoena of the attendance as a witness of a United States citizen in a foreign country, upon order of the court and tender of travel expenses.

\textsuperscript{620}The 100-mile distance is relevant, however, to a consideration of the necessity of the appearance of the witness, due to Fed. R. Civ. P. 26 (d) (3), which provides that the deposition of a witness who is not within 100 miles of the place of trial may be used by any party for any purpose.


\textsuperscript{623}Fed. R. Civ. P. 59.

\textsuperscript{623}In cases involving trial by jury, new trials may be allowed "for any of the
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and comprehensive delineation to be impractical. Nevertheless, a few district courts have adopted local rules enumerating such grounds, though they are not propounded as exclusive.

The grounds generally specified in these rules include the following: (1) irregularity in the proceeding of the court, jury or adverse party, or any order of the court or abuse of discretion by which the losing party was deprived of a fair trial; (2) misconduct of the jury; (3) accident or surprise which ordinary prudence could not have averted; (4) newly discovered evidence, material to the party making the application, which he could not with reasonable diligence have discovered and produced at the trial; (5) excessive or inadequate damages seemingly awarded under the influence of passion or prejudice; (6) insufficiency of the evidence to justify the verdict or other decision by court or jury; and (7) error in law occurring at the trial. Although the terms of the first and last provisions are probably broad enough to subsume most of the generally accepted reasons for granting new trials, the adopting districts, by declining to delineate these grounds explicitly, have to some extent sidestepped their assumed task of giving specificity to rule 59. Moreover, the enumeration of more precise grounds in the other, less inclusive provisions noted above raises the question of whether they occupy a preferred position. The courts demonstrate willingness to specify some grounds, but at the same time relegate

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reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Identical phraseology is used in connection with new trials in non-jury actions except the word "equity" is substituted for the word "law." Fed. R. Civ. P. 59(a).


E.g., D. ALASKA R. 17; S.D. CAL. R. 17.

E.g., rules cited note supra. Significantly, one district court has declined to prescribe enumerated grounds even though it has substantially copied the content of other provisions in the Alaska and Southern District of California rules. D. Nev. R. 17. Moreover, another court which once had the most extensive new trial rules of any district has, in a recent revision, deleted a comprehensive list of enumerated grounds. Compare obsolete rule 48 of the Western District of Washington with W.D. WASH. (Civ.) R. 29.

When this ground is utilized, most of the local rules demand an informative presentation of the content of the evidence, an explanation of the efforts expended before its discovery, and why with reasonable diligence the evidence could not have been presented at the trial. E.g., D. ALASKA R. 17 (B)(3); S.D. CAL. R. 17 (b)(3); D. NEV. R. 17 (3); M.D. PA. R. 29. Besides effectuating substantiation of the claim, such requirements promote the presentation of all known material evidence during the trial.

See § BARNON & HOLTZOFF § 1304 for an enumeration of grounds which have been regarded by the courts as adequate for obtaining new trials.
equally specifiable and acceptable grounds to possible recogni-
zance under the generalized catchall categories. Consequently, not
unlike the advocate laboring under the common law theory of forms
of action, counsel might feel constrained to fit his objections into
one of those favored, or at least more secure, niches which have been
carved with definitude. This result would have the undesirable
consequence of discouraging flexibility in the presentation of objec-
tions and hence lessen the effectiveness of efforts to obtain new trials.

If, however, legitimate efforts by litigants to obtain new trials
are not effectively impeded, the enumeration of grounds might be
justifiable as a means of eliciting specificity in the presentation of
motions for new trials. By listing examples of the kinds of claims
which are considered meritorious, the court discourages motions
which are strictly pro forma or uninformative and consequently
fatally defective. Moreover, the parties are warned prior to trial
of specific hazards which they must avoid in order to achieve an
unimpeachable verdict.

In addition to an enumeration of grounds, some local rules pre-
scribe supplementary procedural requirements for motions under
rule 59. The rule simply provides that motions for new trials must
be served within ten days from the entry of judgment and
must be accompanied by affidavits when necessary to support the
claim. Some of the local rules insist that the requisite service extend to
the adverse party and at least one district requires memoranda

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629 Among the well-recognized grounds which could have been specified are: (1) erroneous instruction of the jury; (2) substantial error in the admission or rejection of evidence; (3) erroneous submission of the case to the jury; (4) inconsistency of the verdict on its face; (5) improper or prejudicial argument of counsel. Ibid.

630 Many of the local rules dealing with new trials explicitly require specifications of claims of insufficiency of the evidence and errors of law and provide that all unspecified grounds will be disregarded. E.g., D. ALASKA R. 17 (B) (1); S.D. CAL. R. 17 (b) (1); D. Nev. R. 17 (1).

631 See 3 BARRON & HOLTZOFF § 906, at 178 (Supp. 1965). One eminent comment-
ator, however, argues that in most cases motions for new trials should be broadly construed and "reasonable" specification of grounds should be held sufficient. WRIGHT § 95, at 367.


633 FED. R. CIV. P. 59 (c). The opposing party has ten days after service of the affidavits to file opposing affidavits, but the period may be extended by as much as twenty days either by the court for good cause shown or by the parties upon written stipulation. Reply affidavits are permissible. Ibid.

634 E.g., D. ALASKA R. 17 (B) (1); S.D. CAL. R. 17 (b) (2); D. Nev. R. 17 (1). Such a requirement might be implied from the language of rule 59 without the aid of a
of supporting authorities when motions are based upon questions of law. These provisions promote consideration of the claims in an adversary climate and effectuate a reasoned judgment by the court. Furthermore, in a meticulous effort to test comprehensively the validity of the original trial, some local rules provide that motions may be heard with the aid of the pleadings, papers on file, supporting affidavits, and the “minutes of the court,” which include the clerk’s minutes, any notes and memoranda kept by the judge and the reporter’s transcript of his shorthand notes. Finally, some local provisions command hearing of the motions whenever practicable by the trial judge, who because of his direct observance of the proceedings is perhaps in the best position to evaluate and correct deficiencies. Although the judge's ability to view his own errata with an impartial eye may be limited, the alternative of permitting another judge, who can rely only on the relative sterility of a printed record, to rule on the motion seems less reliable.

In summary, it would appear that all of the aforementioned procedural requirements tend to promote rule 59 by effectuating a considered second look at the conduct and outcome of the trial. However, the adoption of such rules probably should evolve on a local basis, for an inquiry which is broad enough to test the fairness of a complete proceeding necessarily demands flexible examining techniques.

**Appeals**

Under the Federal Rules an appeal to a court of appeals may be taken in appropriate cases by filing a notice of appeal with the district court within thirty days after the entry of judgment by the lower court. Thereafter, the failure of the appellant to file the record, docket the appeal, or take any further steps necessary to secure appellate review does not affect the validity of the appeal. This failure to act does constitute an occasion for the invocation

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359 E.g., D. Alaska R. 17 (b) (2); S.D. Cal. R. 17 (b) (2).
360 D. Alaska R. 17 (b) (6); S.D. Cal. R. 17 (b) (6); D. Nev. R. 17 (6).
361 Fed. R. Civ. P. 73 (a); see generally 3A BARRON & HOLTZOFF §§ 1551-60.
362 E.g., United States v. Fujiaski, 198 F.2d 747 (9th Cir. 1952); United States v. Krause, 197 F.2d 729 (9th Cir. 1952); Fong v. James W. Glover, Ltd., 197 F.2d 710 (9th Cir. 1952); Ispass v. Pyramid Motor Freight Corp., 152 F.2d 619 (2d Cir. 1945), remanded on other grounds, 330 U.S. 695 (1947); 3A BARRON & HOLTZOFF § 1551, at 55.
of the remedies specified in Federal Rule 73, or if no remedy is specified, for such action as the court of appeals may deem appropriate, including dismissal of the appeal. With one exception, the district court rules governing appeals add little to the appellate procedures set out in Federal Rules 73 through 76. Some local provisions prescribe time limits for designation of the portions of the record upon which the appeal is based and provide technical filing requirements intended to simplify the clerk’s task of giving notice of appeal.

The one exceptional district court regulation, rule 37 of the Southern District of California, provides that where eight months have elapsed after the filing of a notice of appeal and the appellant has failed to docket the appeal or file the record, the district court will order the appellant to appear and to show cause why he should not be directed “either to docket the appeal in the Court of Appeals or to file with the Clerk of [the district court] . . . a motion to dismiss the appeal pursuant to Rule 73 (a) . . . ” Arguably, however, it is

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540 Fed. R. Civ. P. 73 (a); 3A BARRON & HOLZOFF § 1560, at 93; see cases cited note 529 supra.
541 Fed. R. Civ. P. 73 (notice, bond, docketing and record on appeal), 74 (joint or several appeals, summons and severance abolished), 75 (contents of record on appeal), 76 (agreed statement as to record on appeal).
542 S.D. Cal. R. 37 (b); D. Colo. R. 27 (b); N.D. Ill. (Civ.) R. 17; E.D. & S.D. N.Y. (Civ.) R. 13; N.D. N.Y.R. 31; W.D. N.Y.R. 30.
543 S.D. Cal. R. 37 (d).

The rules of seven district courts include specific provisions governing appeals.


5S.D. Cal. R. 37 (b); D. Colo. R. 27 (b); N.D. N.Y.R. 31 (b); W.D. N.Y.R. 30 (b). These rules are obsolete as the amended rule 75 dispenses with the designation procedure and provides that the original papers and exhibits, the transcript of proceedings, and the docket entries from the district court shall constitute the record on appeal unless the parties by written stipulation agree that specific parts of the record need not be transmitted to the court of appeals. Fed. R. Civ. P. 73 (a) (as amended July 1, 1966).

55 Fed. R. Civ. P. 73 (b) requires the clerk to mail copies of the notice of appeal to the attorney of record of each party to the judgment, other than the party taking the appeal; all the seven local rules, supra note 541, provide that notice filed by the party taking the appeal contain the names of all the parties to the judgment and the names and addresses of their respective attorneys, and that each party filing a notice of appeal furnish a sufficient number of copies of such notice to enable the clerk to comply with rule 73 (b). Similarly, all but one of the seven local rules, S.D. Cal. R. 37, provide that a party making a motion to enforce the liability of a surety upon an appeal or supersedeas bond pursuant to Fed. R. Civ. P. 73 (f) serve an additional copy of the motion upon the clerk, a provision formulated expressly for the purpose of enabling the clerk to mail the extra copy to the surety as required by Fed. R. Civ. P. 65.1.

544 S.D. Cal. R. 37.
545 S.D. Cal. R. 37 (d). Subsection (c) of Rule 37 requires the clerk to ascertain whether the record on appeal has been filed with the court of appeals and the appeal there docketed after four months have elapsed from the date of the filing
ever, this unique scheme collides with Federal Rule 73 (a) 546 which provides that "if an appeal has not been docketed, . . . [the district] . . . court may dismiss the appeal upon motion and notice by the appellant." It is generally recognized that filing a notice of appeal perfects the appeal and that thereafter the district court is without jurisdiction to proceed further with the case or to dismiss it for want of prosecution. 547 The dismissal provision of rule 73 is an exception to this general principle 548 and is designed to eliminate "the useless formality and expense of docketing the appeal and then dismissing it in the appellate court . . . ." 549 Although rule 37 of the Southern District of California may expedite appeal procedure, it would appear to be inconsistent with Federal Rule 73 by authorizing the district court to compel an appellant to justify his failure to docket the appeal at the risk of being ordered to move for dismissal. 550 Both the language and the purpose of rule 73 indicate that the initiative with respect to moving for dismissal before the appeal has been docketed is to remain with the appellant. The appellant's failure to take further action without good reason may provide cause for dismissal, but this matter is within the discretion of the appellate, not the district, court. 551

Although the discretionary latitude afforded the district courts by the detailed nature of Federal Rules 73 through 76 is scant, the recently revised Federal Rules suggest several significant areas of appeal procedure which could be profitably supplemented by the

of the notice of appeal. Subsection (d) provides that whenever a case appears for a second time on the list of undocketed appeals prepared by the clerk pursuant to subsection (c) (presumably four months after the preparation of the first list), the clerk shall forthwith prepare and present for the signature of the judge to whom the case was assigned an order directing the appealing party to appear and show cause why he should not be directed to docket the appeal or move for dismissal.

547 E.g., Miller v. United States, 114 F.2d 267 (7th Cir. 1940); Piascik v. British Ministry of War Transport, 83 F. Supp. 518 (S.D.N.Y. 1949); 3A BARRON & HOLTZOFF § 1558, at 85-86 & n.97.
548 Id. § 1560, at 95.
549 Ibid.
550 Rule 73 does not sanction an order by the district court to an appellant to docket his appeal after a notice of appeal has been filed with the court of appeals. Fed. R. Civ. P. 73; see authorities cited note 547 supra. Moreover, if an appellant refused to move for dismissal and the district court dismissed the appeal on its own motion, this action would clearly be inconsistent with rule 73 (a), which authorizes the district court to dismiss only upon motion and notice by the appellant. Fed. R. Civ. P. 73 (a).
551 Authorities cited note 547 supra.
formulation of local regulations. For example, the new rule 75 (d) provides that if a difference arises as to whether the record on appeal truly discloses what occurred in the district court, that court shall settle the difference and revise the record accordingly. Further, the district court may of its own initiative correct omissions from or misstatements of the record. The powers thus accorded might well be expedited by a locally established procedure for hearing such controversies and making the appropriate corrections. Given the possibility that witnesses and other evidence may become unavailable soon after the termination of a particular proceeding, a local rule which required such motions and modifications within a short time subsequent to trial would appear to be salutary. Furthermore, in the event that no stenographic report of the evidence or proceedings at a hearing or trial was made, rule 75 (c) allows the appellant to prepare from his recollection or other means a statement of those matters and serve it on the appellee, who may tender objections or propose amendments thereto, after which the district court shall settle what disputes exist on the record and approve it. This provision, rarely invoked, is in a sense ancillary to the court's corrective power under rule 75 (d), but it may in addition be necessary to submit affidavits and even evidence where no record has been preserved. A local directive designating the procedure to be followed and the evidence admissible in such a proceeding would appear most desirable in this regard, despite the infrequency of an apposite situation.

Finally, rule 76 provides the district court with the power and the duty to approve, add to, and certify short-form appeal statements of the case prepared by the parties. As Professor Moore notes, the language of this rule does not in terms require the inclusion of findings of fact or conclusions of law in this stipulated record, but given the appellate court's need for a clear elucidation of the case, "the district court should normally require their inclusion."

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503 Ibid.
504 Fed. R. Civ. P. 75 (c).
505 7 Moore ¶ 75.22.
506 See Hawkins v. Missouri Pac. R.R., 188 F.2d 348 (8th Cir. 1951), where the court refused to accept the affidavits of courtroom spectators.
507 Fed. R. Civ. P. 76.
508 7 Moore ¶ 76.03[2], at 3903.
A local rule which delineated certain requisites for any agreed record would clarify and efficaciously resolve such practice.

Bankruptcy and Receivership

An unusual addition to the power of the local federal court to promulgate rules not inconsistent with the Federal Rules is found in rule 66,560 which governs the appointment of receivers566 by federal district courts.561 It provides in part that the procedural practice in the administration of estates by receivers and by similar officers shall accord with previous practice before the district court or with prescriptions formulated by local district courts.562 Actions in which the appointment of a receiver is sought, however, must be prosecuted in accordance with the Federal Rules, as must actions brought by or against a receiver.

The permissive mandate regarding "administrative procedure" is nevertheless quite broad and is qualified only by the requirement that no action in which a receiver was appointed by a federal court may be dismissed without the consent of a federal court.563 The latter proviso thus insures that interested parties will not secure a

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560 "An action wherein a receiver has been appointed shall not be dismissed except by order of the court. The practice in the administration of estates by receivers or by similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts. In all other respects the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these rules." Fed. R. Civ. P. 66.

561 Generally, a receiver is a person appointed by the court to take custody of and to control or manage property involved in litigation. See Commissioner v. Owens, 78 F.2d 768 (10th Cir. 1935). The receiver is an officer of the court who may be appointed as an incident to other proceedings, such as foreclosure, wherein certain ultimate relief is sought. In re Granada Hotel Corp., 9 F. Supp. 909 (E.D. Ill. 1935).

562 For a federal court to appoint a receiver, the complaining party must allege a proper foundation for federal jurisdiction. Initially he must show either a federal question or diversity of citizenship. The proper jurisdictional amount in controversy must also be pleaded. See 2 Moore ¶ 8.11, at 1666; 3 id. ¶ 23.13, at 3477. There may also be some special basis for jurisdiction. E.g., Garden Homes v. United States, 200 F.2d 299 (1st Cir. 1950) (receivership action brought by United States); 7 Moore ¶ 66.09[1], at 1950 n.5 (receiver sought for national bank).

563 See Rotwein, Pleadings and Practice Under the New Federal Rules, 8 Brooklyn L. Rev. 188, 209 (1938). This broad delegation of rule-making power was in part due to the reluctance of the draftsmen of the Federal Rules to undertake a revision of federal receivership practice. Bicknell v. Lloyd-Smith, 109 F.2d 527, 529 (2d Cir. 1940). See 3 Barron & Holtzoff § 1451, at 512.

564 "The first sentence added to Rule 66 prevents a dismissal by any party, after a federal equity receiver has been appointed, except upon leave of court. A party should not be permitted to oust the court and its officer without the consent of that court." Advisory Committee's Note of 1946 to Amended Rule 66, 10 Fed. Rules Serv. cxxiv (1948).
dismissal before all claims are settled, a practice which would severely prejudice creditors who had not yet applied for relief.\textsuperscript{564} Aside from these directives, however, receivership practice is completely a creature of local conception. The sagacity with which the district courts have implemented their power will thus become focal.

An interesting threshold question is posed by the scope of the rule 66 grant, which allows local rules to govern receivership practice in the "administration of estates." One commentator\textsuperscript{565} is of the opinion that this is merely expository of the grant of rule 83, which permits district courts to formulate rules not inconsistent with the federal rules.\textsuperscript{566} However, by virtue of the inclusion of the clause in rule 66, it is equally arguable that the power accorded the district court in the "administration of estates" transcends what would be permissible under rule 83.\textsuperscript{567} Should this interpretation prevail, receivership rules could permissibly conflict with the Federal Rules, a result which is seemingly allowed by the language of rule 66\textsuperscript{568} and by the illogic of enumerating the power specifically with respect to receiverships if it were only designed to be coextensive with the general authority granted in rule 83. Nonetheless, absent any express indication by the draftsmen, it could readily be contended that the language of rule 66 is to be narrowly construed and thus constitutes a limitation upon rules which the local district may promulgate in the area of receiverships.

The fact that the district court's rule-making authority under rule 66 is limited to the "administration of estates" poses a further

\textsuperscript{564} See Brown v. Lake Superior Iron Co., 134 U.S. 530 (1890), where the Supreme Court stated that when a court has taken jurisdiction of a debtor's property and has appointed a receiver, the court may in its discretion retain such jurisdiction for the benefit of other creditors, even though the claim of the petitioning creditors may have been satisfied.

\textsuperscript{565} See 7 Moore ¶ 66.02, at 1907.

\textsuperscript{566} "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules." Fed. R. Civ. P. 83.

\textsuperscript{567} This seems to be the attitude of several districts as reflected in "preambles" to local rules governing receivership practice. "The foregoing rule is promulgated in the exercise of the authority vested in this court by Federal Rule of Civil Procedure 66 for the administration of estates by receivers or other similar officers appointed by the court." D. Kan. R. 23(d).

\textsuperscript{568} Fed. R. Civ. P. 83 restricts local rules, requiring them to be consistent with the Federal Rules. Fed. R. Civ. P. 66, however, contains no such limitation. Rather, the rule sanctions the use of rules formulated by the district courts or comporting with previous practice. Absent an express statement to the contrary, previous practice arguably may by implication continue \textit{regardless} of possible conflicts with the Federal Rules. See notes 586-88 \textit{infra} and accompanying text.
definitional problem in an attempt to delimit the scope of local prerogative. In *Phelan v. Middle States Oil Corp.*,\(^{569}\) the Second Circuit in dictum construed “administration” as including the activities of the receiver in disposing of the property, spending money, protecting the property, and distributing it among creditors, lien holders, and the like. However, the court deemed it a “strained and improper construction” to consider such things as a receiver’s final accounting and discharge as subsumed within the term “administration,” and expressed some doubt as to the inclusion of his application for an allowance.\(^{570}\) “In short,” ruled the court, “the ‘practice’ [in administration] means the procedure by which he gets the power to do those things which an owner of the property would have without court authorization.”\(^{571}\) Other matters would, under this ruling, be governed by the Federal Rules or local rules in conformity therewith. It should be noted, however, that the term “administration of estates” does not expressly preclude such activities as the final accounting, a fact which the dubious *Phelan* court was constrained to acknowledge.\(^{572}\) Thus, the ambiguity of the phrase remains unresolved.

Despite this uncertainty as to the extent of unfettered rule-making authority, thirty-one districts have promulgated rules touching receivership practices, dealing both with the “administration of estates” and with other areas of receivership practice.\(^{573}\) These rules are far from uniform, even when focused upon similar problems.\(^{574}\)

\(^{569}\) 210 F.2d 360 (2d Cir. 1954).

\(^{570}\) Id. at 363.

\(^{571}\) Ibid.

\(^{572}\) Ibid.


\(^{574}\) These rules are far from uniform, even when focused upon similar problems.
Because of the lack of uniformity and the uncertainty as to the permissible scope of such rules under the unrestricted authority granted by rule 66, the validity of many of the local rules may be seriously questioned. For example, rule 66 was framed to apply only to equity receiverships and was not designed to regulate or affect receivers in bankruptcy.\textsuperscript{575} Several districts have specific rules regulating bankruptcy receivership practice,\textsuperscript{576} and their validity is thus contingent upon consistency with the Federal Rules and the Bankruptcy Act itself.\textsuperscript{577}

Assuming that rule 66 is not meant to be viewed as exclusively defining and thus pre-empting a district’s power under rule 83, it would be entirely consistent with rule 83 for district courts to promulgate local rules beyond the mere “administration of estates.”\textsuperscript{578} Thus, many districts have formulated rules encompassing all equity receivership actions.\textsuperscript{579} Surprisingly few districts make any reference to the procedure to be followed in the appointment of a receiver,\textsuperscript{680} despite the importance of affording adequate procedural safeguards to affected persons. Those local appointment rules which have been framed are essentially designed to insure the adequacy of notice and hearing prior to appointment.\textsuperscript{581} This preoccupation with notice may stem from the fact that the appointment of a receiver is considered to be in the nature of a quasi in rem proceeding,\textsuperscript{682} thereby

\textsuperscript{575} Advisory Committee’s Note of 1946 to Amended Rule 66, 10 FED. RULES SERV. cxxiv (1948).
\textsuperscript{576} D.N.M.R. 14; E.D. TENN. R. 23; W.D. TEX. R. 21.
\textsuperscript{577} The Federal Rules are to be followed in bankruptcy proceedings insofar as they are not inconsistent with the Bankruptcy Act. 2 COLLIER, BANKRUPTCY ¶ 18.03, at 14-15 (14th ed. 1960). Local rules may be particularly pertinent in regard to the powers of bankruptcy receivers. See 8 id. ¶ 5.10, at 883.
\textsuperscript{578} See 7 MOORE ¶ 66.02, at 1905-07.
\textsuperscript{579} The only district rules which seemingly limit themselves to the “administration of estates” are D. COLO. R. 30; N.D. IND. R. 14; S.D. IND. R. 24; D. KAN. R. 25.
\textsuperscript{680} Cf. N.D. ILL. (Civ.) R. 9(a), specifying only to whom application must be made and when.
\textsuperscript{581} S.D. CAL. R. 18 (a); D. MINN. R. 17 (1); D. MONT. R. 21 (a); D. NEV. R. 19 (a).
\textsuperscript{682} See Meyer v. Superior Court, 200 Cal. 776, 795, 254 Pac. 1108, 1116 (1927); Ex parte International Harvester Co., 137 S.C. 124, 140-41, 134 S.E. 530, 535 (1925). Equity has traditionally operated in personam and in an indirect way upon property. Thus, since the appointment of a receiver is an equitable proceeding it is conceptually difficult to appoint a receiver except in an adversary hearing. Nevertheless, the order of appointment has the effect of placing the res under the jurisdiction, control and possession of the court and the order appointing the receiver is deemed to bind not only those who are parties to the appointive hearing, but also all others who may interfere with the control and possession of receivership property located within the territorial jurisdiction of the court. See 1 CLARK, RECEIVERS §§ 82, 82.2, 4, 5 (3d ed. 1959) (notice requirements for receivership proceedings).
requiring notice to all persons who might have an interest in the subject property. As a result, some rules delineate the usual in rem requirement that the party seeking the appointment of a receiver must give notice in accordance with court directions to all known "interested parties"—creditors and litigants comprising the most patent category—before the appointment will be made.\textsuperscript{583} Provision has also been made in some districts for the \textit{ex parte} appointment of receivers in extraordinary circumstances.\textsuperscript{584} To avert possible prejudice emanating from the waiver of procedural safeguards, however, the conditions under which an \textit{ex parte} appointment may be made are usually and properly limited to emergency situations,\textsuperscript{585} and the receiver's term is, under several rules, only temporary.\textsuperscript{586}

Once a creditor receives notice of receivership proceedings, he is usually required to file a claim with the court or the receiver.\textsuperscript{587} Unfortunately, however, the local rules provide no guidance regarding what the creditor's claim must state, the form it is to take, or the seasonability of presentation. Although a judicial decree authorizing the presentation of claims will often clarify some of these ambiguities, the extent to which they remain unresolved constitutes a gap which future amendments to local rules might efficaciously

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\textsuperscript{583} E.g., S.D. Cal. R. 18 (a); D. Minn. R. 17 (1).
\textsuperscript{584} S.D. Cal. R. 18 (a); D. Mont. R. 21 (a); D. Nev. R. 19 (a). An \textit{ex parte} appointment is rare, but there are situations in which a receiver must be appointed before notice is given to defendants or creditors. Such appointments are analogous to the principle that an injunction will sometimes issue before actual notice and service. In such cases it must be shown that relief and protection can be provided in no other way and that (1) notice is impractical, or (2) that the greatest emergency exists, or (3) that subsequent tender of notice will operate to nullify the appointment. See Pennsylvania v. Williams, 294 U.S. 176, 181 (1935); Shapiro v. Wilgus, 287 U.S. 348, 356 (1932). Cf. Taylor v. Easton, 180 Fed. 363 (9th Cir. 1910).

\textsuperscript{585} See S.D. Cal. R. 18 (a) (immediate appointment "absolutely necessary"); D. Minn. R. 17 (1) (emergency); D. Mont. R. 21 (a) (good cause); D. Nev. R. 19 (a) (absolutely necessary).

\textsuperscript{586} S.D. Cal. R. 18 (a); D. Mont. R. 21 (a); D. Nev. R. 19 (a). Cf. Fed. R. Civ. P. 65 (b), prescribing the requisite procedure for obtaining a temporary restraining order. It is arguable that provisions for the \textit{ex parte} appointment of receivers should be gauged by the same standard. See note 584 supra, which explores the analogy of temporary receivers and injunctions.

\textsuperscript{587} As an aid to administrative convenience, a court generally will grant an interlocutory order fixing the time within which creditors' claims should be filed. Such an order does not prevent the court, however, from permitting a late-filing creditor to share in the distribution of the remaining assets. Chicago Title & Trust Co. v. Fox Theatre's Corp., 91 F.2d 907, 911 (2d Cir. 1937). Some local rules incorporate administrative practice respecting bankruptcy estates, S.D. Cal. R. 18 (e); D. Nev. R. 19 (e), which may have the effect of imposing upon receivership creditors the six-month limitation period for filing claims which is required of a bankrupt's creditor. Bankruptcy Act § 57 (n), 52 Stat. 867 (1938), as amended, 11 U.S.C. § 93 (n) (1964); 3 Collier, \textit{Bankruptcy} ¶¶ 57.26–28 (14th ed. 1966).
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Moreover, the receiver himself is seldom afforded guidelines for passing on the validity, legality, and fairness of the claims presented or for determining any order of preference among the various claims. Again, however, the ostensible infirmity may be illusory insofar as the court's instructions to the receiver provide him with sufficient guidelines.

The receiver is also obligated in most districts to present to the court a periodic inventory of the assets of the receivership estate and, at regular intervals, a current report of the receiver's transactions. Such rules vary substantially in their detail, a fact which does not appear anomalous in view of their ministerial nature. Also, the local rules commonly make provision for the receiver's compensation, which is usually set by the court after an appropriate hear-

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588 See 3 Clark, Receivers § 651 (3d ed. 1959). See note 587 supra for an exegesis of the possibility of incorporating bankruptcy rules regarding the seasonable filing of creditor claims. See Del. Ct. Ch. R. 153-55, which specify the state procedure for filing receivership claims.

589 Three districts require the receiver to petition for instructions:

"Every permanent receiver shall . . . file with the court a report and petition for instructions. Said report shall contain a brief summary of the operations of the receiver, an inventory of the assets, a schedule of all receipts and disbursements, and a list of all known creditors, with names, addresses, and amounts of claims, including taxes of all kinds, conditional sales contracts and contingent claims, known or which it is believed possibly exist.

"The petition for instructions shall contain the receiver's recommendations for a continuance or discontinuance of the receivership and, if an appraisal of the assets of the receivership shall not have theretofore been ordered, his recommendations as to the desirability of such an appraisal . . . ." S.D. Cal. R. 18 (b); D. Nev. R. 19 (b). See D. Mont. R. 21 (e).

590 E.D. & W.D. Ark. R. 15 (b); S.D. Cal. R. 18 (b); D. Colo. R. 30 (a); D. Hawaii R. 9 (a); E.D. Ill. (Civ.) R. 13 (a); N.D. Ill. (Civ.) R. 14 (b); N.D. Ind. R. 14 (a); S.D. Ind. R. 24 (a); D. Kan. R. 23 (a); W.D. Mich. R. 9 (a); D. Minn. R. 17 (b); E.D. Mo. R. XII (a); W.D. Mo. R. 17 (a); D. Mont. R. 21 (e); D. Nev. R. 19 (b); D.N.H.R. 15 (a); D.N.D.R. XVIII (a); N.D. Ohio R. 9 (A); E.D. Pa. R. 38 (a); W.D. Pa. R. 17 (a); E.D. Wash. R. 26 (a); W.D. Wash. (Civ.) R. 33 (a); E.D. Wis. R. 16 (a); W.D. Wis. R. 17 (a).

591 E.D. & W.D. Ark. R. 15 (a); 15 (a); S.D. Cal. R. 18 (b), (d); D. Hawaii R. 9 (b); E.D. Ill. (Civ.) R. 13 (b); N.D. Ill. (Civ.) R. 9 (c); N.D. Ind. R. 14 (b); S.D. Ind. R. 24 (b); D. Kan. R. 23 (b); W.D. Mich. R. 9 (b); D. Minn. R. 17 (a); E.D. Mo. R. XII (b); W.D. Mo. R. 17 (b); D. Mont. R. 21 (e); D. Nev. R. 19 (b), (a); D.N.H.R. 15 (b); D.N.M.R. 14 (b); D.N.D.R. XVIII (b); N.D. Ohio R. 9 (b); E.D. Pa. R. 38 (b); W.D. Pa. R. 17 (b); E.D. Wash. R. 26 (b); W.D. Wash. (Civ.) R. 33 (b); E.D. Wis. R. 16 (a), (b); W.D. Wis. R. 17 (a), (b).

592 Such variances include: (1) the time in which the inventory is to be made: e.g., S.D. Cal. R. 18 (b) (sixty days after appointment); D. Kan. R. 23 (a) (twenty days after appointment); D.N.H.R. 15 (a) (ten days after taking possession of the property); (2) the method, contents and form of the inventory: e.g., D. Kan. R. 23 (a); (schedule to include known liabilities of the estate); (3) periodicity of receiver's report: e.g., D. Colo. R. 30 (b) (four-month intervals); E.D. Ill. (Civ.) R. 13 (b) (nine-month intervals); W.D. Mich. R. 9 (b) (one-month intervals).
ing.\textsuperscript{563} Again, variance regarding such practices appears unobjectionable.

Although many of the local rules contain elaborate provisions respecting the appointment of and administration by receivers, a common provision will specify that in the event the local rules are silent, the acts of the receiver or the court are to accord as nearly as is possible with bankruptcy practice.\textsuperscript{564} Thus, such districts, given the power to formulate their own rules, have reverted to a uniform body of law for guidance. This does not appear undesirable to the extent that the purposes of the Bankruptcy Act and those of equity receivership do not diverge, but where considerations are not coterminous care should be taken to avoid the imposition of an inapposite bankruptcy proviso.\textsuperscript{565}

\textbf{HABEAS CORPUS PROCEDURE}

In recent years, the federal district courts have received increasing numbers of petitions for writs of habeas corpus,\textsuperscript{566} often pre-

\footnotesize{\textsuperscript{563} E.D. & W.D. ARK. R. 15 (c); S.D. CAL. R. 18 (c) (4); D. HAWAII R. 9 (c); E.D. ILL. (Civ.) R. 13 (c); N.D. ILL. (Civ.) R. 14 (d); N.D. IND. R. 14 (c); S.D. IND. R. 24 (c); D. KAN. R. 23 (c); W.D. MICH. R. 9 (c); D. MINN. R. 17 (2); E.D. MO. R. XII (c); W.D. MO. R. 17 (c); D. MONT. R. 21 (c), (f) (4); D. NEV. R. 19 (c) (4); D.N.H.R. 15 (e); D.N.D.R. XVIII (c); N.D. OHIO R. 9 (C); E.D. PA. R. 38 (c); W.D. PA. R. 17 (c); E.D. WASH. R. 26 (c); W.D. WASH. (Civ.) R. 33 (c); E.D. WIS. R. 16 (c); W.D. WIS. R. 17 (c).

Compare N.D. OHIO R. 9 (Q) stating that application for compensation shall be in accordance with Bankruptcy Rule 12, and D. HAWAII R. 9 (e) leaving the matter of compensation to the discretion of the court.\textsuperscript{564}

\footnotesize{\textsuperscript{564} E.g., S.D. CAL. R. 18 (c); S.D. IND. R. 24 (d); E.D. MO. R. XII (d); D. NEV. R. 19 (e).

\footnotesize{\textsuperscript{565} For example, the six-month period for filing claims in bankruptcy may be unduly long in regard to a receivership which is administering only one property. See note 587 supra. Likewise, considerations in the appointment of receivers may vary with respect to the two actions; notice, for example, need not be as extensive in bankruptcy as some local rules require for receivership. See Bankruptcy Act, \textsection 2(a) (3), 52 Stat. 842 (1938), as amended, 11 U.S.C. \textsection 11(a) (3) (1964); notes 580-86 supra.

\footnotesize{\textsuperscript{566} U.S. Judicial Conference Comm. on Habeas Corpus, \textit{Report, Habeas Corpus and Post Conviction Review}, 33 F.R.D. 363, 410-11 (1962) [hereinafter cited as \textit{Habeas Corpus Report}]. Recent Supreme Court cases such as Gideon v. Wainwright, 372 U.S. 335 (1963), holding denial of counsel unconstitutional, have precipitated a flood of the petitions. See 1965 DUKE L.J. 395 & n.1. The writ of habeas corpus is issued to test the lawfulness of custody of the petitioner. \textit{Sokol, A Handbook of Federal Habeas Corpus} 3 (1965) [hereinafter cited as \textit{Sokol}]. In the federal courts the writ extends to prisoners who are (1) in custody under the authority of the United States or committed for trial before some court thereof; (2) in custody for an act done or omitted in pursuance of a federal statute or court order; (3) in custody in violation of the Constitution or laws or treaties of the United States; or (4) citizens of foreign states in custody for an act done or omitted under any right claimed under the sanction of a foreign state and international law is involved.
pared by prisoners without the assistance of counsel. The formal substantive requirements for these petitions are not rigorous, and the courts have liberally construed the allegations thereunder in order to conform their contents to the required elements of the petition. Nevertheless, some home drawn petitions, reflecting deficient legal skill, have been rejected because they lacked information requisite to issuance of the writ. The result in many cases

The writ is also available to allow the release of a person so that he may be brought into court to testify or to be tried. 28 U.S.C. § 2241 (1964). However, 28 U.S.C. § 2255 (1964) provides a substitute procedure for habeas corpus for federal prisoners in custody under sentence of a court established by Congress. The federal prisoner may not seek relief by a writ of habeas corpus unless he has made a motion to vacate sentence under 28 U.S.C. § 2255 (1964) or unless this remedy is inadequate.

The federal habeas corpus statute provides that either the petitioner or someone acting in his behalf may apply for the writ. 28 U.S.C. § 2242 (1964). Similar provisions are embodied in 28 U.S.C. § 2255 (1964). Consequently, many federal and state prisoners have sought the writ, aided only by a fellow prisoner. See Habeas Corpus Report 368. Although the appointment of counsel has not been held constitutionally required in habeas corpus proceedings, some commentators intimate that this result is likely in view of the liberality of the Supreme Court decisions on the subject of right to counsel. See Sokol 154. Arguably, under this reasoning the right to counsel would also extend to the filing of a petition for the writ in order to invoke the proceeding. A committee of distinguished federal jurists has urged that the states and the federal government provide for assistance of legal counsel in the drafting of habeas corpus petitions. Habeas Corpus Report.

The petition must contain allegations of (1) the fact of custody, which is generally satisfied by a statement that the petitioner is in prison; (2) the name of the custodian; (3) the reason for the detention; and (4) facts showing the unlawfulness of the custody. Sokol 50-51. The federal habeas corpus statute simply requires allegations of "facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority." 28 U.S.C. § 2242 (1964).


has been a delay in the consideration of claims and a debilitating waste of time for both petitioners and the courts. However, the situation has been ameliorated by novel local rules, adopted by several district courts, which list the specific questions that must be answered in an acceptable petition and require inclusion of the answers in writing on forms furnished by the court.

The questions which these rules detail seek to elicit the following information: the name of the petitioner; the name of his custodian; the place of the petitioner’s detention; the name and location of the court which imposed sentence; the offenses for which sentence was imposed; the date upon which sentence was imposed and the terms of the sentence; the specific pleas of the

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603 E.g., S.D. Cal. R. 19(a); D. Colo. R. 29; S.D. Fla. R. 19; N.D. Ill. (Gen.) R. 23; N.D. & S.D. Iowa R. 27; W.D. Mo. R. 22; N.D. Ohio R. 11; D. Ore. (Gen.) R. 19; W.D. Tex. R. 15. This type of rule was originated by the Northern District of Illinois avowedly for the purpose of (1) curing administrative difficulties in examining a wide variety of petitions, many of which were hand-drawn, lengthy and incomplete, and (2) overcoming difficulty in discovering the occasional meritorious petition in a mass of heterogeneous applications. Habeas Corpus Report 382. Some districts have local rules prescribing habeas corpus procedure only in general terms. E.g., D. Ariz. R. 36; D. Me. R. 9; D. Nev. R. 20.

602 Forms used in the Northern District of Illinois are reprinted in Appendix II, Habeas Corpus Report 593-408. Some of the district courts have automatic procedures for mailing a copy of the forms or a copy of the local habeas corpus rules to petitioners whose applications are defective. S.D. Cal. R. 19(a)(10); N.D. & S.D. Iowa R. 27(9).

This is required by 28 U.S.C. § 2242 (1964).

604 Under the federal habeas corpus statute, the proper respondent is the petitioner’s immediate custodian. The latter must have power to bring the petitioner before the court and to discharge him from custody. Moreover, he must be within the territorial jurisdiction of the court in which the writ is sought. Sokol 39. The statute specifically demands that the application contain both the name of the custodian and authority under which the petitioner is being detained. 28 U.S.C. § 2242 (1964). Seemingly, this requires that the petition include the name of the specific person responsible for custody and his official position. Perhaps the local rules on this point could be more effective if they specifically explained whether the petitioner is to list the name of an individual, his official position, or both.

606 This provision aids the court in determining jurisdiction, for the petitioner must be within the territorial jurisdiction of the court at the time the petition is filed. Ahrens v. Clark, 335 U.S. 188 (1948).

608 This requirement assists the court in obtaining access to trial court records for the purposes of testing the credibility of the petition and for ascertaining whether the petitioner got a “full and fair evidentiary hearing” if required under the standards of Townsend v. Sain, 372 U.S. 293 (1963). See note 609 infra. Moreover, in the case of motions to vacate sentence under 28 U.S.C. § 2255 (1964), which must be made before habeas corpus may be sought, the sentencing court is the only court with jurisdiction to issue the writ. An underlying reason for adoption of the latter procedure was to avoid the plethora of claims in districts located near federal detention centers. See Sokol 128.

609 Information involving offenses and terms of sentences is important in determining whether the petitioner is in “custody,” a prerequisite to issuance of the writ.
accused; whether the finding of guilt was made by a jury or by a judge;\textsuperscript{608} whether the petitioner has appealed and the names of such appellate courts;\textsuperscript{609} whether he has completed an affidavit for \textit{forma pauperis};\textsuperscript{610} whether previous petitions for the writ have been filed;\textsuperscript{611} and the ground upon which the claim of unlawful custody is based, accompanied by facts which support each ground.\textsuperscript{612} Some rules also seek information as to whether the petitioner was repre-

For example, if the sentences have been suspended or if the petitioner has been released on bail, some cases indicate that he would not be considered in custody. See 1966 \textit{DUKE L.J.} 588, 590 & nn.11-12. \textit{But see} id. at 590-98; Jones v. Cunningham, 371 U.S. 236 (1963). Furthermore, the court may be informed of the need for rapid facilitation of the petition, as in the case of a petitioner subject to immediate execution. Finally, the date of imposition of the sentence is helpful to the court's consideration of the possible mootness of the petition. If the petitioner's sentence is about to end, the writ would likely be denied. Cf. Johnson v. Hoy, 227 U.S. 245 (1913); Burrett v. Gladden, 228 F. Supp. 527 (D. Ore. 1964).

\textsuperscript{608} The court is thus apprised of the possible necessity of an independent evidentiary hearing, for where the facts are disputed the federal court must hold such hearing if the applicant did not receive a full and fair hearing in the trial court. Townsend v. Sain, 372 U.S. 293 (1963). In Townsend, the court held that a federal court must grant an evidentiary hearing if (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reasons it appears that the state trier of fact did not afford the petitioner a full and fair evidentiary hearing. \textit{Id.} at 313. A finding of guilt by a judge might indicate the possible presence of one of the aforementioned grounds. Moreover, the court may be informed of a potential constitutional infirmity in the denial of right to trial by jury under the fourth and fourteenth amendments.

\textsuperscript{609} The court must be notified of all appeals from the trial court, for if the petitioner has failed to exhaust all of his available state remedies, the writ will be denied. 28 U.S.C. \textsection 2254 (1964). See Brown v. Allen, 344 U.S. 443 (1953); \textit{Ex parte Hawk}, 221 U.S. 114 (1911); \textit{Ex parte Royall}, 117 U.S. 241 (1886).

\textsuperscript{610} For the petitioner to proceed without costs to himself, he must file an affidavit stating his inability to pay such costs or give security therefor. 28 U.S.C. \textsection 1915 (1964).

\textsuperscript{611} If the legality of the petitioner's detention has been decided on a prior application by a judge or court of the United States, and the new petition contains no new grounds, the writ will be denied. 28 U.S.C. \textsection 2244 (1964).

\textsuperscript{612} This requirement, by demanding a statement of supporting facts, alleviates the problem of insufficiently drafted petitions which merely assert bare legal objections to the detention. Nonetheless, the provision is potentially a Charybdis for the unwary petitioner because he is not told what kinds of facts are relevant. See text accompanying note 617 infra.

Most of the rules require a \textit{concise} statement of the grounds upon which the petitioner relies. \textit{E.g.}, S.D. CAL. R. 19 (a) (4) (b), 5 (b), 6 (b); D. COLO. R. 29 (3) (b), 4 (b), 5 (b); S.D. FLA. R. 19 (c) (2), (d) (2), (e) (2). The requirement, although perhaps idyllic, seeks to prevent the petitioner from filing an unmanageable and unnecessarily long application. See Passic v. State, 98 F. Supp. 1015 (E.D. Mich. 1951), where the petitioner filed a 2,000-page petition. The average petition should be four or five pages in length and without supporting legal precedent. SOKOL 51.
presented by counsel at his trial and, if so, the names and addresses of
counsel. Additional information must be supplied by federal
prisoners seeking writs of habeas corpus or moving to vacate their
sentences under section 2255 of the Judicial Code.

Besides aiding the unskilled petitioner in drafting his own
claim, these detailed requirements effectuate faster and more pre-
cise preparation by counsel for other claimants. Moreover, the dis-

613 Notice of absence of counsel pointedly apprises the court of a probable con-
stitutional infirmity in the petitioner's trial, whether or not he raises the question
in attacking the detention. See Gideon v. Wainwright, 372 U.S. 335 (1963). Knowl-
edge of the names of counsel, if the petitioner was represented, may aid the court
either for appointment purposes or for more penetrating inquiry into the petitioner's
claim.

614 The petitioner must state (1) whether he has filed previous petitions for
habeas corpus or a motion to vacate sentence under § 2255; (2) the ground upon
which the custody is allegedly unlawful; and (3) the reason why the petitioner's
remedy under § 2255 is inadequate or ineffective to test the legality of his detention.


The petitioner must disclose the name of the judge who imposed sentence (see
the discussion of § 2255 in note 606 supra), the grounds supporting the claim of
invalidity of the sentence, and whether the petitioner has filed any petitions for
habeas corpus, motions pursuant to § 2255, or any other petitions.

616 The Committee on Habeas Corpus of the United States Judicial Conference
recommended that these rules be adopted by all of the federal district courts. The
Committee asserted that the rules would "afford a constructive approach toward
the disposition of habeas corpus petitions, not only more expeditiously, but also on
a sounder factual basis . . . " Habeas Corpus Report 382. Moreover, the prescrip-
tions have been applauded by the commentators. See 3A Barron & Holtzoff §
1713, at 54 n.19. (Supp. 1965); Sokol 53. Finally the rules have operated success-
fully in the lower federal courts. Federal Judge Hubert Will (Ill., N.D.), who
helped originate these rules, reported that they had proved "quite satisfactory" and
that petitions prepared thereunder "almost always contain the necessary basic in-
formation together with the grounds and factual allegations in support thereof . . . ."
Habeas Corpus Report 384. He disclosed that since the rule was adopted his court
very rarely received "the kind of hybrid federal-state habeas corpus petition with
civil rights allegations thrown in which were not uncommon in the past." Ibid.
be alleged to support the substantive claim of unlawful custody. Finally, the court rules might well prescribe procedures for addressing inquiries to the court clerk when the petitioner is unable to discern what is required in one of the detailed specifications.

\[ a.l.s., \text{co-ordinator} \]
\[ w.r.b. \]
\[ j.a.f. \]
\[ d.d.n. \]
\[ r.a.c.p. \]

\[^{617}\text{See note 612 supra.}\]