

## LOCAL PROCEDURAL REVIEW IN THE EIGHTH CIRCUIT

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The resolution of substantive disputes is the responsibility that legal scholars, additional federal court observers and the public most closely associate with the United States Courts of Appeals. It is important to remember, however, that circuit judicial councils in each of the courts also discharge significant duties. These obligations are principally administrative, although their comprehensive implementation can be critical to the effective operation of the appellate courts and to the federal district courts within the circuits' purview. The review of local district procedures for consistency and redundancy with the Federal Rules of Civil Procedure and Acts of Congress is one important responsibility that Congress and the Supreme Court have assigned circuit judicial councils. Despite the duty's significance, relatively few of the councils have fully complied with their obligations to scrutinize the local procedures adopted by districts and judges within their jurisdiction and to abolish or modify those measures that conflict with or duplicate the Federal Rules or statutes. The comparatively limited implementation accorded these responsibilities warrants analysis. This article undertakes that effort by emphasizing effectuation of these duties in the Eighth Circuit.

The piece first briefly examines the provisions in the Judicial Improvements and Access to Justice Act of 1988 (JIA) and Federal Rule of Civil Procedure 83, which require circuit judicial councils to conduct local procedural review, as well as considers implementation of those obligations in the circuits. The article then evaluates how the United States Court of

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Appeals for the Eighth Circuit has discharged these responsibilities. Finding that the circuit council has partially complied with the commands imposed, the article concludes with suggestions for efficaciously fulfilling the council's duties.

## I. BACKGROUND ON LOCAL PROCEDURAL REVIEW

### A. *Requirements in the JIA and Rule 83*

The origins and development of the imposition of local procedural review requirements warrant comparatively limited examination in this article, as they have been accorded rather comprehensive treatment elsewhere.<sup>1</sup> Nevertheless, this historical background deserves considerable analysis because it enhances understanding of the reasons for scrutinizing local measures and explains why the mechanisms have received relatively little review to date.

Federal Rule of Civil Procedure 83, which the United States Supreme Court originally promulgated in 1938, provided for federal district courts and judges to adopt local procedures that were consistent with the Federal Rules and legislation.<sup>2</sup> The initial Advisory Committee on Civil Rules that drafted the proposal that eventually became Rule 83 apparently intended for districts and judges to invoke the provision infrequently when addressing peculiar, problematic local circumstances or conditions that the Federal Rules left untreated.<sup>3</sup>

Districts and judges, however, honored Rule 83's requirements in the breach. As early as 1940, the Knox Committee, an entity that the Judicial Conference of the United States appointed, ascertained that many districts maintained conflicting local measures, which they had adopted prior to the

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1. See, e.g., Walter W. Heiser, *A Critical Review of the Local Rules of the United States District Court for the Southern District of California*, 33 SAN DIEGO L. REV. 555, 557-64 (1996); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Patterns*, 137 U. PA. L. REV. 1999, 2011-26 (1989).

2. See FED. R. CIV. P. 83, 308 U.S. 765-66 (1938)(amended 1985); see also Subrin, *supra* note 1, at 2016-19.

3. See FED. R. CIV. P. 83 advisory committee's note; see also Subrin, *supra* note 1, at 2011-16.

1938 Rules' promulgation, or prescribed inconsistent local procedures after the promulgation of the initial Federal Rules.<sup>4</sup> These conflicting local strictures gradually expanded until the 1970s when a growing number of federal districts applied increasing numbers of local requirements, principally under the rubric of managerial judging, to treat mounting caseloads.<sup>5</sup>

The entities that are responsible for studying the Federal Rules and proposing changes responded to the phenomenon of proliferating local procedures in several ways. First, the Judicial Conference Committee on Rules of Practice and Procedure commissioned the Local Rules Project to undertake an analysis of all local measures and to develop recommendations for limiting proliferation.<sup>6</sup> In 1989, the Project issued a report in which it found that there were more than 5000 local rules and numerous additional local procedures, which were variously denominated as minute, standing or scheduling orders or individual-judge practices.<sup>7</sup> The Project ascertained that many of these local measures contravened the Federal Rules or Acts of Congress.<sup>8</sup> The Project offered several suggestions that it intended to solve or ameliorate the problems that proliferating local strictures were creating. For instance, the Project proposed that all ninety-four federal districts implement uniform systems of numbering that mirror the numbering of the Federal Rules.<sup>9</sup>

The Supreme Court correspondingly prescribed a 1985 amendment to Federal Rule 83, which required districts to

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4. See REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON LOCAL DISTRICT COURT RULES III 1-11 (1940). See generally Subrin, *supra* note 1, at 2016-19.

5. See STEVEN FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS (1977); Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REFORM 647, 657-78 (1988). See generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

6. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONF. OF THE U.S., REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES ON CIVIL PRACTICE (1989); Daniel R. Coquillette et al., *The Role of Local Rules*, A.B.A. J., Jan. 1989, at 62 (summarizing Project).

7. See REPORT OF THE LOCAL RULES PROJECT, *supra* note 6; see also U.S. DISTRICT COURT FOR THE DISTRICT OF MONTANA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 3-4 (1991) (applying unwritten measures).

8. See FED. R. CIV. P. 83; 28 U.S.C. § 2071(a) (1994); see also Subrin, *supra* note 1, at 2020-26. See generally *supra* note 6.

9. See REPORT OF THE LOCAL RULES PROJECT, *supra* note 6, at 1-3; see also *infra* note 14 and accompanying text.

regularize processes for adopting and revising local procedures.<sup>10</sup> The advisory committee note that accompanied the amendment admonished circuit judicial councils, districts and judges to review local measures for consistency with the Federal Rules and Acts of Congress and to abrogate or modify those found to conflict.<sup>11</sup>

Congress concomitantly responded to proliferation by passing certain provisions of the Judicial Improvements Act of 1988. This statute required that circuit councils undertake periodic review of local strictures prescribed by districts within their jurisdiction and abolish or change inconsistent or redundant procedures.<sup>12</sup> The statute also proscribed the adoption of measures that conflicted with or duplicated the Federal Rules or legislation.<sup>13</sup>

The Supreme Court revised Federal Rule 83 again in 1995 essentially to incorporate the mandates imposed by the 1988 JIA. The 1995 amendment requires, for instance, that local procedures not contravene or repeat the Federal Rules or United States Code provisions and that districts and judges abolish all measures that are inconsistent or redundant. It mandates that all local rules “conform to any uniform numbering system prescribed by the Judicial Conference of the United States.”<sup>14</sup>

### *B. Implementation of the JIA and Rule 83*

Relatively few circuit judicial councils have comprehensively implemented the mandates in the 1988 Judicial Improvements Act and Federal Rule 83.<sup>15</sup> Approximately half of the circuits have instituted minimal, if any, efforts to effectuate the commands.<sup>16</sup> Several councils have undertaken some review

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10. See FED. R. CIV. P. 83; *see also* FED. R. CIV. P. 83, 1985 advisory committee’s note.

11. See FED. R. CIV. P. 83, 1985 advisory committee’s note.

12. Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified in 28 U.S.C. §§ 332(d)(4), 2071-74 (1994)).

13. *Id.*

14. See FED. R. CIV. P. 83, 1995 amendment, *reprinted in* 150 F.R.D. 323, 400-01 (1993).

15. See generally Carl Tobias, *Local Federal Civil Procedure for the Twenty-First Century* (unpublished manuscript) (on file with author).

16. See Tobias, *supra* note 15, at 42-43.

of local procedures adopted by districts in their purview but have not abrogated or altered violative local provisions.<sup>17</sup>

A few councils have completed rather thorough scrutiny of local district procedures. The District of Columbia Circuit reviewed the measures prescribed by the District of Columbia District and recommended that some strictures be abrogated or changed, and the district court implemented those suggestions.<sup>18</sup> During the 1990s, the Seventh Circuit has commissioned the director of the Local Rules Project to annually review procedures adopted by districts within its jurisdiction.<sup>19</sup> The director has scrutinized those measures and made recommendations regarding their abolition or alteration, which the circuit council has typically followed.<sup>20</sup>

The Ninth Circuit Judicial Council assigned responsibility for local procedural review to its Chief District Judges Conference, which created a District Local Rules Review Committee (LRRC).<sup>21</sup> This committee, comprised of several chief district judges, two law professors, the clerk of the Northern District of California and a practicing attorney, recruited law faculty or attorneys who evaluated measures adopted in each of the Ninth Circuit's fifteen districts.<sup>22</sup> The LRRC then compiled reports with recommendations regarding the procedures to which every district responded, often by eliminating or changing the measures in question.<sup>23</sup> The committee considered those responses and prepared a final report with suggestions for the circuit judicial council.<sup>24</sup> The council in turn did not abrogate or modify conflicting or

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17. *See id.*

18. *See id.* at 38-39.

19. Telephone interview with Mary P. Squiers, Project Director of Local Rules Project (Feb. 18, 1998).

20. *Id.*

21. *See Tobias, supra* note 15, at 39-41.

22. Telephone interview with David Pimentel, Assistant Circuit Executive, U.S. Courts for the Ninth Circuit (July 22, 1994); *see Heiser, supra* note 1, at 563; *see also* Carl Tobias, *Suggestions for Circuit Court Review of Local Procedures*, 52 WASH. & LEE L. REV. 359, 365 (1995).

23. *See* Carl Tobias, *Contemplating the End of Federal Civil Justice Reform in Montana*, 58 MONT. L. REV. 281, 283-84 (1997); Carl Tobias, *Ongoing Federal Civil Justice Reform in Montana*, 57 MONT. L. REV. 511, 515 (1996).

24. *See Tobias, supra* note 15, at 40-41.

redundant local procedures but urged districts to abolish or alter them.<sup>25</sup>

A few additional circuit judicial councils instituted some scrutiny of the measures promulgated by districts within their purview but did not complete comprehensive reviews. Illustrative is the Sixth Circuit.<sup>26</sup> During the early 1990s, lawyers in the Staff Attorneys Office undertook a preliminary examination of the consistency and redundancy of procedures prescribed by districts within the circuit's jurisdiction, prepared a list of potentially conflicting local strictures, and submitted suggestions respecting inconsistent measures to the circuit council. In a November 1993 meeting, the council considered the staff's report but deferred consideration pending the December issuance of the 1993 federal rule revisions and of numerous districts' civil justice cost and delay reduction plans under the Civil Justice Reform Act of 1990 (CJRA).<sup>27</sup> The Office subsequently continued its review but found that numerous courts' adoption of inconsistent or repetitive measures under the Civil Justice Reform Act complicated its efforts and sought the advice of the circuit judicial council. In May 1994, the Sixth Circuit Judicial Council voted unanimously to suspend local procedural review pending further guidance from Congress, the courts or the Judicial Conference on whether the CJRA took precedence over the Federal Rules of Civil Procedure.<sup>28</sup>

In sum, most of the circuit judicial councils have conducted little, if any, scrutiny of local procedures adopted by the federal districts within their purview under the 1988 Judicial Improvements Act or Federal Rule of Civil Procedure 83. In fairness, some of these councils may have believed: (1) that the Civil Justice Reform Act, which encouraged districts to adopt local measures for reducing expense and delay in civil litigation, essentially suspended effectuation of the commands in the JIA

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25. *See id.* at 41.

26. *See generally* Carl Tobias, *A Sixth Circuit Story*, 23 FLA. ST. U. L. REV. 983, 989 (1996).

27. *See* Tobias, *supra* note 15, at 42; Tobias, *supra* note 26, at 989-90; *see also* 28 U.S.C. § 471 (1994).

28. *See* Judicial Council of Sixth Circuit, U.S. Court of Appeals, Minutes of Meeting 3-4 (May 4, 1994).

and Federal Rule 83; or (2) that it would be wasteful or duplicative to conduct local review until experimentation under the 1990 statute concluded. Other councils, which have many duties, may have lacked the requisite resources to scrutinize local measures, especially because Congress appropriated no funding for councils to discharge that responsibility. The second section of this essay evaluates how the Eighth Circuit Judicial Council has implemented its obligations to perform local procedural review.

## II. LOCAL PROCEDURAL REVIEW IN THE EIGHTH CIRCUIT

The Eighth Circuit Judicial Council has not conducted the type of thoroughgoing, backward-looking evaluation of local procedures for consistency and redundancy that some councils have undertaken.<sup>29</sup> However, the Eighth Circuit has performed limited review in two important contexts. First, the circuit judicial council has scrutinized local measures when determining whether the ten districts have heeded the command in the 1995 amendment of Rule 83 that their local rules comport with a uniform numbering scheme based on the Federal Rules, which the Judicial Conference promulgated in 1996.<sup>30</sup> The Conference required that districts number local rules to correspond with similar Federal Rules by April 1997. For example, local provisions governing discovery were to conform with their analogues in Federal Rules 26 through 37. The council, through the District Court Committee, helped the ten districts align the numbering of the courts' local rules with the Federal Rules, and most of the ten districts have now come into compliance.<sup>31</sup> In the context of this process, the District Court Committee had the opportunity to review many local procedures, and districts apparently abolished or changed some of those measures that were inconsistent or repetitive.

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29. Telephone interview with David Day, Professor of Law, University of South Dakota (Apr. 10, 1997); telephone interview with Millie Adams, Circuit Executive, U.S. Courts for the Eighth Circuit (Aug. 24, 1998).

30. Adams interview, *supra* note 29; telephone interview with Robin Weinberg, Staff Attorneys Office, U.S. Courts for the Eighth Circuit (Aug. 24, 1998).

31. For example, the Eastern and Western Districts of Arkansas have complied, but the Eastern District of Missouri has not.

Second, the circuit judicial council has also been able to scrutinize local procedures when districts have forwarded amendments in their local rules to the council for consideration.<sup>32</sup> When districts have submitted these local rule revisions to the council for its perusal, the council in turn has tendered the rules to the District Court Committee for its examination. The Staff Attorneys Office of the Eighth Circuit Executive Office considers the amendments and makes suggestions regarding them to the District Court Committee, which concomitantly reviews the recommendations and makes final decisions respecting the revisions.

This committee and the circuit judicial council do not instruct the districts but rather point out inconsistencies and redundancies in local rules and attempt to prevent direct conflicts.<sup>33</sup> One important reason for this approach is that the council has responsibility for monitoring ten federal districts, each of which may have a somewhat different philosophy about the operation and purposes of local measures.<sup>34</sup>

In short, much of the local procedural review in the Eighth Circuit has been performed under the auspices of the District Court Committee. The scrutiny, though not comprehensive, has apparently resulted in the elimination or modification of some inconsistent and redundant local procedures. Indeed, one individual in the Staff Attorneys Office believes that the local rules of the Eighth Circuit's districts are not overdone and have relatively few conflicts with the Federal Rules or United States Code provisions.<sup>35</sup>

My brief examination of the local rules promulgated by the ten districts of the Eighth Circuit confirms this assessment. Scrutiny suggests that most of the courts have adopted comparatively few rules that contravene the Federal Rules or Acts of Congress, but they have prescribed more rules which repeat those provisions. Virtually all of the districts have promulgated local rules that proscribe filing with the courts of discovery documents, such as deposition transcripts, provisions

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32. Adams interview, *supra* note 29; Weinberg interview, *supra* note 30.

33. Weinberg interview, *supra* note 30.

34. *See id.*

35. *See id.*



which contravene Federal Rule 5.<sup>36</sup> A few districts have correspondingly adopted discovery rules which relieve litigants in several categories of cases from compliance with the 1993 federal rule revisions prescribing automatic disclosure; however, that amendment expressly authorizes districts to depart from it.<sup>37</sup> Some courts have concomitantly promulgated strictures governing motion practice which duplicate certain aspects of Federal Rule 7.<sup>38</sup>

More specific examples can be afforded. For instance, the District of Nebraska provides that in determining the number of interrogatives which may be filed, “each inquiry that endeavors to discover a discrete item of information shall be counted as a separate interrogatory.”<sup>39</sup> The local rule elaborates: “For example, a question which states: ‘Please state the name, address, and telephone number of any witness to the accident set forth in the complaint’ shall be counted as three (3) interrogatories.”<sup>40</sup> This local provision may conflict with Federal Rule 33 because it appears more restrictive than the federal provision.<sup>41</sup>

The District of South Dakota has correspondingly adopted a local rule which imposes a deadline for settling civil cases of ten days prior to the trial date and empowers the court to consider imposing sanctions on parties or counsel in any case settled after the deadline.<sup>42</sup> This local rule might conflict with Federal Rule 68 by permitting the imposition of more onerous sanctions than the analogous federal provision authorizes.<sup>43</sup> The Western District of Missouri similarly provides for the imposition of sanctions when litigants and attorneys fail to

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36. See, e.g., D. MINN. R. 26.4; E.D. MO. R. 3.02; W.D. MO. R. 26.4; see also FED. R. CIV. P. 5; *infra* note 47.

37. See, e.g., D. MINN. R. 26.1(a); D.N.D.R. 26.1; see also FED. R. CIV. P. 26(a)(1).

38. Compare E. & W.D. ARK. R. 7.2 and D. NEB. R. 7.1 with FED. R. CIV. P. 7. In fairness, Federal Rule 7 provides only minimally for motion practice.

39. D. NEB. R. 33.1.

40. *Id.*

41. See FED. R. CIV. P. 33.

42. See D.S.D.R. 68.1.

43. See FED. R. CIV. P. 68; see also *Ashland Chem., Inc. v. Barco, Inc.*, 123 F.3d 261 (5th Cir. 1997); *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 885 F. Supp. 934 (E.D. Tex. 1995).

notify the clerk of court of settlement in time to advise the jurors that their attendance will be unnecessary.<sup>44</sup>

There are also more particular illustrations of local rules which repeat features of various Federal Rules of Civil Procedure. For instance, some districts have prescribed local rules governing the demand for a jury trial that duplicate in certain ways Federal Rule 38.<sup>45</sup> A few courts have concomitantly promulgated local rules covering motions to amend pleadings that somehow repeat Federal Rule 15.<sup>46</sup>

In sum, the Eighth Circuit Judicial Council has partially complied with the requirements for monitoring local procedural review in the 1998 JIA and in Federal Rule 83 in the context of guaranteeing district court conformity with the uniform numbering system prescribed by the Judicial Conference and of approving recent amendments in district local rules. The scrutiny undertaken has led to the elimination or modification of some conflicting and redundant local procedures; however, a number of inconsistent and repetitive measures seemingly remain applicable in the district courts of the Eighth Circuit. Moreover, the review performed is not the type of systematic, retrospective examination of local procedures as well as concomitant abrogation or alteration of measures found inconsistent or duplicative that Congress and the Supreme Court apparently envisioned when imposing the requirements for local procedural review in the JIA and Federal Rule 83. The Eighth Circuit Judicial Council, therefore, may want to consider implementing certain suggestions for completing the type of local review contemplated, which I offer in the third section of this essay.

### III. SUGGESTIONS FOR THE FUTURE

The Eighth Circuit Judicial Council should undertake a thoroughgoing, retrospective assessment of the local procedures that apply in the ten districts within its jurisdiction and abrogate

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44. *See* W.D. MO. R. 83.10.

45. *Compare* D. MINN. R. 38.1; W.D. MO. R. 38.1; D. NEB. R. 38.1 *with* FED. R. CIV. P. 38.

46. *Compare* D. MINN. R. 15.1; D. NEB. R. 15.1; D.S.D.R. 15.1 *with* FED. R. CIV. P. 15.

or change those measures that the council finds are inconsistent or redundant. The judicial council can most felicitously complete this review by capitalizing on the effort that it has already expended and on the scrutiny performed to date by the other regional circuits.

The Eighth Circuit should rely substantially on the work that the council has undertaken thus far. For example, lawyers in the Staff Attorneys Office have already acquired considerable familiarity with the local procedures prescribed by the ten districts, and their expertise should be applied to the identification of those measures that may conflict with or duplicate Federal Rules or United States Code provisions. The circuit judicial council concomitantly may want to depend on the District Court Committee, particularly to formulate recommendations for local rules that warrant elimination or modification.

The Eighth Circuit should also capitalize on the other local procedural review efforts performed to date. For instance, instructive insights can be derived from the recent review conducted by the Ninth Circuit. The circuit judicial council placed primary responsibility in the Chief Judges Conference, an entity that is apparently analogous to the District Court Committee. The Conference and the Local Rules Review Committee to which the Conference further delegated important duties were able to secure considerable cooperation from the district courts, and this cooperation proved critical to the successful completion of the effort. More specifically, the districts seemed very responsive to requests for information regarding local rules and receptive to suggestions that specific rules be abolished or altered.

The Ninth Circuit also recruited law faculty and practicing attorneys to conduct preliminary reviews of the procedures being applied by the fifteen districts within its jurisdiction. These professors and lawyers were valuable resources, partly because they were knowledgeable about the local legal cultures of the districts, and partly because they enabled the Ninth Circuit to conclude an onerous task rather expeditiously with a relatively small expenditure of money.

The Eighth Circuit might want to assign responsibility for conducting local procedural review to its District Court

Committee or an entity created under the auspices of that committee. The institution responsible for review must collect and analyze for consistency and redundancy all local procedures. If this assignment proves overly burdensome, the entity might follow the Ninth Circuit's approach of recruiting law professors or attorneys for each of the ten districts and having one or two individuals assume responsibility for conducting preliminary evaluation of local measures. This scrutiny should yield a list of possibly conflicting or redundant local procedures that the committee can review and use to make final determinations regarding inconsistency and duplication. The entity should then send the results of its analysis to the judges of each district for their responses. The judges in every court should promptly examine the committee's work and (1) abolish or change those procedures found to be conflicting or repetitive, (2) explain why they believe that the measures are consistent or not duplicative, or (3) justify why the district needs to apply the procedures even though they conflict or are redundant.

Once the committee has received the responses, it should develop recommendations for the circuit judicial council. The committee must state which procedures it believes warrant elimination or modification, why they deserve either treatment, and how the measures could be altered. The inconsistent or repetitive procedures that the entity finds have received widespread or efficacious application may warrant suggestion to the Advisory Committee on Civil Rules for consideration in the national rule revision process.<sup>47</sup>

Upon receipt of these recommendations, the Eighth Circuit Judicial Council should review the suggestions, but it might defer substantially to the expertise of the committee that conducted local review. This means, for example, that the council should afford the districts an opportunity to eliminate or alter those local rules as to which the committee recommends such action; however, if the courts refuse to make changes or

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47. This procedure was followed with a recently issued proposal to amend Federal Rule 5. See Memorandum from Judge Paul V. Niemeyer, Chair, Advisory Committee on Rules of Practice and Procedure, to Alicemarie Stotler, Chair, Committee on Rules of Practice and Procedure, 15 (June 30, 1998), *reprinted in* 181 F.R.D. 18, 38 (1998).

cannot justify continued application, the Council must abrogate or modify the rules.

#### IV. CONCLUSION

Several circuit judicial councils have thoroughly implemented the responsibilities to conduct review of local procedures adopted by the federal districts within their purview that the Judicial Improvements Act of 1988 and Federal Rule 83 impose. However, some councils have not fully complied. The Eighth Circuit has partially effectuated the obligations by insuring that districts within its jurisdiction have instituted the uniform numbering system prescribed by the Judicial Conference and in considering amendments in the courts' local rules. If the circuit judicial council follows the suggestions offered above, it can efficaciously conclude the local review required by the JIA and Rule 83, eliminate inconsistent and redundant procedures applied in the ten districts and perhaps reduce the expense and delay in civil litigation that conflicting and repetitive local measures can cause.

