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ARTICLES

INDIVIDUAL JUDGES’ PRACTICES: AN INADVERTENT SUBVERSION OF THE FEDERAL RULES OF CIVIL PROCEDURE

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INTRODUCTION

The original purpose of the Federal Rules of Civil Procedure (“Federal Rules”) was to promote consistency and efficiency within the federal judicial system.¹ These uniform rules were intended to provide practicing attorneys with consistent procedures for use in federal courts. Since their enactment in 1938, the Federal Rules have been refined to meet the changing needs of the federal court system. In recent years, however, individual judges, rather than

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local district courts or the Supreme Court, have promulgated their own "rules," "procedures," and "practices."\(^2\)

It is beyond cavil that the Federal Rules of Civil Procedure should be supplemented to adjust to local conditions within the federal court system. However, the goals of the Federal Rules require that individual judges not be allowed to either amend the Rules or to adopt their own inconsistent rules.\(^3\) This Article addresses the problems that occur when individual judges adopt "practices" which lack consonance with either the Federal Rules or local district court rules. The impact of individual judges' procedures in the area of motion practice, specifically pre-motion requirements, is particularly examined. Such procedures make it difficult, expensive, and occasionally, impossible for litigants to file pretrial motions, and inherently conflict with the Federal Rules.\(^4\) Moreover, these pre-motion procedures raise serious due process concerns that have been ignored in the inexorable drive towards increased judicial management. Planned and balanced judicial management should be encouraged, but not to the point of

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\(^2\) Cf. Fed. R. Civ. P. 83. This Rule states in pertinent part: "Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules." Id.; Fed. R. Civ. P. 83 advisory committee note ("[The Rule] attempts to assure that the expert advice of practitioners and scholars is made available to the district court before local rules are promulgated."). Rule 83 refers only to individual judges' "practices." However, case law and authors use the terms "rules" and "procedures" without differentiation in this context.

\(^3\) See Fed. R. Civ. P. 83 advisory committee note (stating that rules governing practice may be provided by district courts if not inconsistent with existing Federal Rules).

\(^4\) See, e.g., Richardson Greenshields Sec., Inc. v. Lau, 825 F.2d 647 (2d Cir. 1987) (serving as example of judges tailoring their pre-motion requirements to satisfy individual preferences, such that conflict with Federal Rules arises).

The requirement of pre-motion conferences or pre-motion screening procedures is especially widespread in the Federal District Courts of the Southern and Eastern Districts of New York. See generally George Hritz, Plan Will Increase Cost, Delay Outcomes, N.Y. L.J., Apr. 13, 1993, at 2 (citing wider use of pre-motion conferences by judges in Southern and Eastern Districts of New York). Approximately 20 of the 38 judges in the Southern District of New York require some type of pre-motion "procedure." See, e.g., Tentative Guide to the Southern District of New York Civil Justice Expense and Delay Reduction Plan; U.S. Dist. Ct. for the S. Dist. of N.Y., 3 (1993) (stating [a] pre-motion conference should be considered by the Court where advisable. This conference can be an efficient method of expressing the Court's view of the potential outcome of a dispositive motion and may dissuade a party from making the motion"). The Local Rules of the Eastern District of New York require a pre-motion telephone conference with the assigned judge. Still, six of fifteen Eastern District Court judges have promulgated additional pre-motion "procedures."
either conflict with the Federal Rules or infringement upon procedural due process.

I. THE ENACTMENT OF THE FEDERAL RULES OF CIVIL PROCEDURE

The Rules Enabling Act of 1934 granted the Supreme Court the authority to promulgate the Federal Rules of Civil Procedure. The Act empowered the Court to “prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law.” The Act was passed after a twenty-year campaign to bring uniformity to the federal court system. Supporters of a uniform federal procedure bill advocated “a simple court structure, flexible rules of procedure aimed at the elimination of technicalities and surprise, and . . . the shortening and improvement of trials by pretrial conferences and modernized rules of evidence.”

On the other hand, opponents of a uniform system of federal civil procedure argued that under such a system attorneys would have to acquire knowledge of both state and federal civil procedure. Federal practice at that time was based on the Conformity Act, which required that the pleadings and practice in federal court conform to those of the state in which the federal court sat.

Advocates for uniform federal rules responded by stating that, due to the myriad of federal statutes that affected procedure, federal judges often could not apply local state procedures anyway. They also argued that the nonconformity between federal and state practice led to a number of inefficiencies:

6 Id.
7 See generally 4 WRIGHT & MILLER, supra note 1, § 1001 (discussing history and federal procedures).
10 The Conformity Act of June 1, 1872, ch. 255 § 5, 17 Stat. 196, 197; Rev. Stat. § 914 (“[T]he practice, pleadings, and forms and modes of proceeding in [civil] causes in the circuit and district courts . . . shall conform . . . to the courts . . . of the State within which such circuit or district courts are held . . . ”).
1) the waste in time and money of judges and lawyers trying to ascertain when in a particular federal district court to conform or not to conform to state procedure; 2) the time and expense of appealing such decisions; and 3) the cost to clients... of having to retain different lawyers... in different states, since experts on the state procedure were required.\textsuperscript{11}

Supporters of a uniform procedural system hoped to avoid the same pitfalls created by conformity to state procedures. When the Rules Enabling Act was finally passed, in addition to proposing uniform procedure within the federal court system, it merged law and equity courts, creating a single system.

The advocates of uniform federal rules prevailed, and the Federal Rules of Civil Procedure were promulgated in 1938 under the authority of the Rules Enabling Act. The Federal Rules had a number of prominent goals. First, as Attorney General Homer Cummings stated when introducing the Rules Enabling Act to Congress: “This will have a tendency to make procedure subsidiary to the substantive law, as it should be, and will emphasize in the minds of bench and bar substantive rights rather than matters of form.”\textsuperscript{12} The drafters of the Federal Rules intended to encourage courts to reach the merits of a case rather than dismissing it solely on minor procedural technicalities. Second, the Federal Rules were intended to simplify procedure, thus making it easier for litigants to bring a cause of action in federal court and providing a “just, speedy, and inexpensive determination of every action.”\textsuperscript{13} Third, the Federal Rules were to create a system of open discovery to promote settlements through informed and realistic negotiations.\textsuperscript{14} Fourth, the Federal Rules were intended to be comprehensive so that there would be little need for additional input from the lower courts.\textsuperscript{15}


\textsuperscript{12} Current Events, 20 A.B.A. J. 457, 460 (1934).

\textsuperscript{13} Fed. R. Civ. P. 1; see Fed. R. Civ. P. 3 (“A civil action is commenced by filing a complaint with the court.”).

\textsuperscript{14} See Fed R. Civ. P. 26 (providing that, in general, discovery may be obtained regarding any relevant, unprivileged material).

\textsuperscript{15} See 28 U.S.C. § 2071 (1988) (“The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules... consistent with Acts of Congress and rules of practice and procedure prescribed under [the Rules Enabling Act].”).
In sum, the goals of the Federal Rules were to promote decisions on the merits and to eliminate procedural hurdles. The drafters allowed a significant degree of judicial discretion in order to accomplish these goals. In recent years, however, exercise of judicial discretion has begun to interfere with deciding cases on the merits, and threatens to undermine the objectives of the Federal Rules of Civil Procedure.

II. A "LITIGATION EXPLOSION" IN THE FEDERAL COURTS?

There has been significant commentary on whether the number of cases entering the federal court system has actually increased in recent years.\(^{16}\) The perceived increase in civil litigation can be attributed to two factors. First, there has been a noted increase in product liability actions and in litigation revolving around federal governmental policies, especially prison litigation\(^{17}\) and actions to recover social security benefits.\(^{18}\) Second, the increase can be attributed to the success of the Federal Rules as promulgated in 1938. The Federal Rules have accomplished the goals of the drafters, who "sought to air out the courts and let the sunlight of substance shine into them . . . ."\(^{19}\) Most significantly, the Federal Rules transformed the federal courts into a less imposing place for both attorneys and litigants. In reality, however, the number of civil cases entering the federal courts has decreased in recent years, while the size of the criminal docket has expanded as a result of increased crime and the trend towards the "federalization" of crimes that were formerly state actions. Most district

\(^{16}\) See Subrin, supra note 11, at 2018 ("The number of cases in the federal courts has risen dramatically . . . .") cf. Jack B. Weinstein, After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?, 137 U. Pa. L. Rev. 1901, 1907-10 (1989) (maintaining that "[s]ober attention to the statistical evidence indicates that we are no more overwhelmed now than at many times in the past"); Lambros, supra note 8, at 792 n.24 (noting that civil and criminal case filings rose from 46,914 in 1938 to 247,708 in 1983).


\(^{19}\) Weinstein, supra note 16, at 1906.
courts cite increases in criminal filings, lack of funds, and judicial vacancies as the main causes of any backlog in their courts.\textsuperscript{20} Despite these factors, the perceived "litigation explosion" has energized a movement advocating increased judicial management—sometimes by restricting access to the federal courts in order to lessen the burden.\textsuperscript{21} Instead of expanding the court system or improving its efficiency, advocates of this movement have altered or interpreted the Federal Rules to increase the judicial management of litigation. This trend towards increased judicial management is further evidenced by the recent amendments to the Federal Rules,\textsuperscript{22} as well as the district courts' Expense and Delay Reduction Plans, mandated by the Civil Justice Reform Act of 1990.\textsuperscript{23} Increased judicial management of the litigation process, however, has created conflicts with both the letter and the spirit of the Federal Rules.

Increased judicial management has to an extent been implemented through amendments to the Federal Rules. The need for amendments was anticipated by the drafters, who realized that the Federal Rules must respond to changes in the court system.\textsuperscript{24} Individual judges, however, by adopting a broad view of the dis-

\textsuperscript{20} See Judicial Conference of the United States, Civil Justice Reform Act Report, Development and Implementation of Plans by Early Implementation Districts and Pilot Courts (1992) (indicating that 17 of 34 district court advisory committees cited failure to promptly fill judicial vacancies as impediment to "expeditious civil case processing").

\textsuperscript{21} See 12 Wright & Miller, supra note 1, § 3152. "At times, district courts have used their power under Rule 83 . . . to escape from the arduous but essential task of case-by-case analysis." Id. (quoting Note, Rule 83 and the Local Federal Rules, 67 Colum. L. Rev. 1251, 1252 (1967)).

\textsuperscript{22} See generally Randall Samborn, Derailing the Rules, Nat'L L.J., May 24, 1993, at 1 (citing system of automatic ratification of proposed rules unless Congress acts regarding amendments).


\textsuperscript{24} See 12 Wright & Miller, supra note 1, § 3152. "The expectation of the draftsmen was that the power to make local rules would be used only on rare occasions when the Civil Rules deliberately had left gaps to be filled in the light of recognized local needs." Id.
cretion afforded them by the rules, especially Rule 83, have created their own "practices," increasing judicial management, sometimes to the point of inhibiting decisions on the merits.

III. The 1985 Amendment to Rule 83 in Regard to Individual Judges’ "Practices"

Individual judges’ practices present a threat to the goals of the Federal Rules and to the constitutional rights of litigants. Rule 83 of the Federal Rules permits the promulgation of local rules to respond to conditions in individual district courts. Charles Clark, the reporter for the original Federal Rules, explained Rule 83 as follows: "Some such provision affording flexibility to the rules is necessary if they are to be adjusted easily and without friction to the differing habits and customs of lawyers throughout the country."25

Today, however, local district court rules and individual judges' procedures govern far more than "differing habits and customs."26 The drafters of the Federal Rules never intended that judicially-created rules provided for by Rule 83 do more than regulate the "machinery of running" the court.27 The drafters never anticipated the proliferation of individual judges' practices and procedures. They assumed that in order to create a local district court rule under Rule 83, a majority of judges of the district would have to approve of such a measure. There was no discussion of "individual judges' rules."

The advent of individual judges' rules can, however, be traced to the 1985 amendment of Rule 83, which now states:

Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public. In all cases

25 6 "Proceedings of Meeting of Advisory Committee on Rules for Civil Procedure" 1515 (Feb. 20-25, 1936).
26 Id.
27 Id.
not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.\textsuperscript{28}

Under the amended rule, individual judges can promulgate their own "practice," so long as it is not inconsistent with the Federal Rules. Rule 83 also provides that all local rules must be subject to public notice and comment prior to enactment.\textsuperscript{29} Although the Advisory Committee also noted in its comments to Rule 83 that it "hoped" all district courts would create procedures to monitor individual judges' practices and standing orders,\textsuperscript{30} the Rule does not require public notice or an opportunity for comment on individual judges' "practices."\textsuperscript{31}

The enactment of the Judicial Improvements and Access to Justice Act of 1988 created a procedure to monitor district court rules and individual judges' practices to ensure compliance with the Federal Rules.\textsuperscript{32} The Act amended 28 U.S.C. § 332\textsuperscript{33} to permit existing judicial councils to review district court rules and individual judges' "rules" for consistency with the Federal Rules.\textsuperscript{34} In addition, the Act gave judicial councils the power to modify or invalidate nonconforming rules.\textsuperscript{35} The procedure was intended to be

\textsuperscript{28} Fed R. Civ. P. 83.

\textsuperscript{29} See Fed. R. Civ. P. 83 (advisory committee's notes). "The new language subjects local rulemaking to scrutiny similar to that accompanying the Federal Rules, administrative rulemaking, and legislation. It attempts to assure that the expert advice of practitioners and scholars is made available to the district court before local rules are promulgated." Id.

\textsuperscript{30} Id.

The practice pursued by some judges of issuing standing orders has been controversial, particularly among members of the practicing bar. The last sentence in Rule 83 has been amended to make certain that standing orders are not inconsistent with the Federal Rules or any local district court rules. Beyond that, it \textit{is hoped} that each district will adopt procedures, perhaps by local rule, for promulgating and reviewing single-judge standing orders.

\textit{Id.} (emphasis added).

\textsuperscript{31} Id. "The amended Rule does not detail the procedure for giving notice and an opportunity to be heard since conditions vary from district to district. Thus, there is no explicit requirement for a public hearing, although a district may consider that procedure appropriate in all or some rulemaking situations." \textit{Id.}


\textsuperscript{34} Id. The rule provides in pertinent part: "Each judicial council shall periodically review the rules which are prescribed under section 2071 of this title by district courts within its circuit for consistency with rules prescribed under section 2072 of this title. Each council may modify or abrogate any such rule found inconsistent . . . " \textit{Id.} § 332(d)(4).

\textsuperscript{35} See id. § 332.
ongoing; thus, a rule initially accepted by the judicial council could later be rejected by the same council.\textsuperscript{36} As a result, rules that could previously be overturned only by appellate action can now be abrogated by the judicial council.

Unfortunately, however, judicial councils have not taken an active role in reviewing the consistency of either local district court rules or individual judges' standing orders and practices with the Federal Rules. Therefore, despite the new procedure, litigants must still rely upon appellate courts to review the validity of individual judges' rules. The commentary to the 1988 revision of section 332 states:

> With a somewhat sturdier review procedure in place such as § 332 now enacts for all district court rule making, rules of the kind that it took case law—and a long time—to strike down in the past should find their way into the practice less frequently in the future. And any that do will presumably last only until the judicial council has had a chance to review it.\textsuperscript{37}

The commentator, David D. Siegel, assumed that the same review process applied to individual judges' rules. Indeed, the enactment of this review structure was motivated in part by a desire to control the proliferation of individual judges' standing orders and practices.\textsuperscript{38} Professor Siegel noted that before the 1988 revisions, appellate review was "impossible sometimes, impractical most times, and impolitic always."\textsuperscript{39} Although intended to reduce the difficulty of striking down or limiting inconsistent individual judges' rules, the revisions have done little to monitor or eliminate the proliferation of these rules.

Although Rule 83 does not explicitly define "inconsistent,"\textsuperscript{40} it is clear that an individual judge's rule need not directly contradict the Federal Rules to be deemed "inconsistent." An individual

\textsuperscript{36} See 28 U.S.C.A. § 332 commentary (West 1993). David D. Siegel writes, "The scrutiny is not to be limited, moreover, to the initial promulgations of rules. It is to be on-going." Id. at 36 (emphasis added).

\textsuperscript{37} Id.

\textsuperscript{38} Id. (maintaining that there is "widespread discontent, communicated to Congress, about a 'proliferation of local rules'"). This conclusion is consistent with the extensive discussion of the Second Circuit's decision in Richardson Greenshields Securities, Inc. v. Lau, 825 F.2d 647 (2d Cir. 1987), which involved Judge Shirley Wohl Kram's requirement of a pre-motion conference before filing a motion. This situation was cited as an example of what can be avoided if judicial council review is used effectively.

\textsuperscript{39} Id.

\textsuperscript{40} See Fed. R. Civ. P. 83.
judge's rule is inconsistent with the Federal Rules if it conflicts with the spirit of the Rules, needlessly repeats or restates a Federal Rule, is preempted by the Rules, or provides rigid procedural guidelines in areas deliberately unregulated. Unfortunately, district court judges have interpreted the term "inconsistent" narrowly. As a result, individual judges have promulgated standing orders or practices with apparent disregard for the letter or spirit of the Federal Rules. The impetus for the proliferation of individual judges' rules is the judicially-perceived need for increased management of litigation.

IV. MOTION PRACTICE IN THE FEDERAL COURTS

Individual judges' standing orders and practices have flourished in the area of motion practice. Rules limiting a litigant's right to file a motion demonstrate the problems caused by individual judges' practices. The Federal Rules governing motions invite local innovation. Therefore, it is not surprising that this area has been fertile ground for the proliferation of individual rulemaking. Local innovation has reached the point where almost every district and every judge has a different procedure regulating motion practice.

This sometimes bewildering variety in procedure is generally a consequence of judicial attempts to improve efficiency. Unfortunately, this often occurs at the expense of the original scheme of the Rules. Federal Rules 7, 12, 14, and 56 entitle a litigant

41 REPORT TO THE JUDICIAL CONFERENCE ON LOCAL DISTRICT COURT RULES III (1940).
42 Weinstein, supra note 9, at 27-28. "[O]ur faith in national uniformity has declined. More local rules are being drafted by more courts to the point that procedure... is significantly different [from court to court]...[T]he pressures for local control and initiative are great, and the costs... high." Id.
43 See, e.g., Earle v. United States, 152 F. Supp. 554, 555 (E.D.N.Y. 1957) (ruling that reargument of motion was prohibited because litigant did not file application within 14-day period prescribed by local rule), cert. denied, 358 U.S. 822 (1958); Bagby v. United States, 199 F.2d 233, 236 (8th Cir. 1952) (deciding that failure to request hearing on motion for summary judgment, as required by local rule, results in waiver of argument and no denial of opportunity to be heard).
44 Fed. R. Civ. P. 7(b)(1). This Rule provides: "[A]n application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Id.
45 Fed. R. Civ. P. 12. This Rule provides for various motions, including a motion for judgment on the pleadings, motion for a more definite statement, motion to strike insufficient defenses, impertinent or scandalous matters, and the consolidation of defenses in a motion. Id.
to file various specific motions. Further, Rules 77 and 78 were enacted to facilitate the ability of any litigant to file a motion. Rule 77 provides that the district courts shall always be open so that, inter alia, a litigant may file a motion. Likewise, Rule 78 states:

Unless local conditions make it impracticable, each district court shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as the judge considers reasonable may make orders for the advancement, conduct, and hearing of actions.

To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

Despite this mandate, individual judges have regulated motion practice by requiring pre-motion conferences or pre-motion screening procedures prior to filing any motion. This practice is relatively widespread and substantially differs among districts and judges. Some courts consider any motion, regardless of its purpose, to be an inefficient use of judicial time. Individual judges have adopted rules that call for a pre-motion conference for all motions, while others require a conference only for discovery motions or for dispositive motions. Although some judges require a conference between the parties before a motion is filed, others require a conference with a judge before filing.

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46 Fed. R. Civ. P. 14. This Rule provides for a third party plaintiff’s motion to join a third party defendant in the action. Id.

47 Fed. R. Civ. P. 56(a). This Rule provides for a motion for summary judgment stating that “at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, [a claimant may] move with or without supporting affidavits for a summary judgment in the party’s favor . . . .”

48 See Fed. R. Civ. P. 77(a) (providing in pertinent part that “district courts shall be deemed always open for the purpose of filing any pleading or other proper paper . . . .”); Fed. R. Civ. P. 78 (providing that “each district court shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard”).


51 See Richardson Greenshields Sec., Inc. v. Lau, 825 F.2d 647, 649 (2d Cir. 1987) (noting that judge required conference with litigants prior to filing of motions); see also 12 WRIGHT & MILLER, supra note 1, § 3154 (asserting that it is extremely common for judges to promulgate rules governing motion practice).
The effect of these practices is that judges have fewer motions to decide and fewer orders subject to appellate review.52 From the judges’ perspective, they have accomplished their stated objective of discouraging litigants from filing unnecessary motions. Judges contend that these pre-motion practices encourage settlements and create efficiency, and point to a decrease in the number of motions filed before their courts as an indication of increased efficiency and satisfaction among the parties.

Hearing fewer motions does not, however, demonstrate efficiency. Instead of arguing motions, litigants waste time scheduling and attending pre-motion conferences. Further, it seems the judiciary sometimes sacrifices justice for the sake of speed or simplicity, thus conflicting with the mandate that the Federal Rules “be construed to secure the just, speedy, and inexpensive determination of every action.”53 Requiring pre-motion conferences interferes with the goals of the original drafters of the Federal Rules,54 creates a real risk of judicial coercion, raises serious due process concerns, invades an area pre-empted by the Federal Rules, and obstructs litigants from filing motions in the manner provided in the Rules themselves.

V. THE RESPONSE OF THE APPELLATE COURTS TO INDIVIDUAL JUDGES’ RULES

Although there are a number of cases that question the validity of local district court rules, cases that consider the validity of individual judges’ rules are scarce. Consequently, the appellate courts have had little opportunity to rule on the issue.55 Litigants and attorneys are often reluctant to question the practices of a district court judge because they must deal with that judge in current or future litigation. In addition, appellate judges are seem-

52 See Richardson, 825 F.2d at 652. “This . . . may serve the useful purpose of narrowing and resolving conflicts between the parties and preventing the filing of unnecessary papers.” Id.
53 Fed. R. Civ. P. 1; see supra note 13 and accompanying text (discussing policy of simplifying procedure).
54 See Weinstein, supra note 16, at 1906-07. Weinstein recognizes that the drafters of the Federal Rules intended to facilitate the hearing of cases on the merits without the hinderance of undue procedural technicalities. Id. “The drafters’ commitment was to a civil practice in which all parties would have ready access to the courts and to relevant information, a practice in which the merits would be reached promptly and decided fairly.” Id. at 1906.
55 See 28 U.S.C.A. § 332 (West 1993) (maintaining that appellate level serves as “massive . . . barrier” to review).
ingly hesitant to undermine the procedures of their colleagues in the trial courts. Therefore, the issue of the validity of individual judges' rules rarely reaches the appellate level, and when it does, appellate courts are disinclined to criticize these procedures.

Aside from political considerations, the litigants' inability to pursue an interlocutory appeal under 28 U.S.C. §§ 1291 and 1292 imposes a further barrier to appellate review of individual judges' rules. If the district judge refuses to certify the issue, the party's sole remedy is to seek an extraordinary writ from the circuit court of appeals.

Recently, in Schoenberg v. Shapolsky Publishers, Inc., the Second Circuit ruled on the validity of individual judges' standing orders. In Schoenberg, an author, alleging that defendants published his manuscript without proper authorization, brought suit for copyright infringement, breach of contract, and inducing breach of contract. In their amended answer, the defendants asserted a defense of lack of subject matter jurisdiction. One day after the answer was served pursuant to the district court judge's rule, the defendants requested a pre-motion conference to present a motion to dismiss the complaint. At the subsequent pretrial conference, the judge refused to permit the submission of the motion to dismiss until defendants had complied with the plaintiff's document request. The court, however, allowed the plaintiff to file a motion to compel discovery, which the court granted. When defendants did not fully comply with this order, the court imposed sanctions and held defendants' attorney in contempt.

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57 971 F.2d 926 (2d Cir. 1992).
58 Id. at 928.
59 Id.
60 Id. Judge Edelstein's rule required a pre-motion conference. Id.
61 Id. The motion to dismiss for lack of subject matter jurisdiction was filed pursuant to Rule 12 of the Federal Rules. Id. at 926.
62 Schoenberg, 971 F.2d at 929.
63 Id. The motion to compel discovery was filed pursuant to Rule 37 of the Federal Rules of Civil Procedure. Id. at 927.
64 Id. After a number of requests to the court to reconsider its decision to prohibit defendants from filing a motion to dismiss, the defendants filed a petition for a writ of mandamus in the Second Circuit. Id. The petition to vacate the order compelling discovery and to permit defendants to file their motion was denied. Id. Despite this de-
In disposing of the defendants' attorney's appeal from the contempt order, the Second Circuit only briefly addressed the propriety of the district court judge's pre-motion requirement. In disapproving of the district court's practice of requiring compliance with plaintiff's discovery request prior to filing a substantive motion, the circuit court explained: "Whenever a court directs a lawyer that he or she may not make a motion, it is in effect cutting the lines of communication between the court and the litigants." The Second Circuit held that only in "extraordinary" situations should litigants be prohibited from filing motions. By not permitting defendants to file their motion, the district court, in effect, multiplied the number of necessary proceedings, and dramatically increased the amount of time and money the parties expended.

The Eleventh Circuit, in Brown v. Crawford County, thoroughly addressed the validity of individual judges' standing orders and practices. In Brown, a real estate developer brought suit under 42 U.S.C. §§ 1983 and 1985 against county officials, alleging that they had conspired to prevent him from developing a mobile home subdivision. The developer further alleged that city officials had imposed a moratorium on development, thereby violating his Fifth and Fourteenth Amendment rights on theories of uncompensated taking, and denials of equal protection and sub-

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65 Id. at 935. "Furthermore, we are deeply troubled by the district court's requirement that defendants comply with plaintiff's discovery request before being permitted to submit their motion to dismiss the complaint for lack of subject matter jurisdiction." Id. at 935-36 (emphasis added).

66 Id. at 936.

67 Id. (quoting Richardson, 825 F.2d at 652). "Absent extraordinary circumstances, . . . a court has no power to prevent a party from filing pleadings, motions, or appeals authorized by the Federal Rules of Civil Procedure." Richardson, 825 F.2d at 652.

68 See Schoenberg, 971 F.2d at 936. "This elimination of dialogue can result, as is the case here, in the multiplication of proceedings, especially when a party is seeking to raise a threshold issue." Id.

69 960 F.2d 1002 (11th Cir. 1992).

70 Id. at 1005.
stantive and procedural due process. The defendants wanted to file a summary judgment motion, but an individual judge’s rule adopted by certain judges within the Middle District of Georgia required pre-motion, judicial approval. In particular, the rule governing motions for summary judgment outlined the following procedure:

[T]he filing of motions for summary judgment is frequently a waste of your time, opposing counsel’s time, our clerk’s time, and the court’s time—not to mention the expense of each party and the taxpayers. To assist you in avoiding the filing of summary judgment motions that have no possible merit, the court requests that before filing such a motion you advise the court and opposing counsel in person (call the judge for an appointment) or by letter if you desire to file such motion and your factual and legal reasons, succinctly stated, for believing you will prevail on the motion. Opposing counsel can then respond in person or by letter and the court can suggest whether or not the case seems to be appropriate for summary judgment. This is not intended to prohibit your filing such motions; it is only intended to facilitate your doing so.

In considering the filing of a summary judgment motion, prepare to include proposed findings of undisputed material facts (with reference to source of facts) and conclusions of law in your motion. This will be required.

The defendants complied with the judge’s rule, but the judge denied approval for filing the motion, stating that: “I do not believe this is a case that should be decided on motion for summary judgment.” The defendants, frustrated by an individual judge’s rule that did not facilitate, but rather prohibited, the filing of a motion, filed a motion to dismiss.

On appeal, the Eleventh Circuit, inquiring into defendant’s reasons for not filing a motion to dismiss instead of a motion for summary judgment, focused its attention on the rule’s validity. Troubled by the absence from the record of the correspondence between the trial court and the litigants leading to the judge’s decision, the court stated:

71 Id.
72 Id. at 1007.
73 Id. (stating district court judge’s procedures and policies).
74 Id. at 1008 (quoting letter from district court judge to counsel for defendants).
75 Brown, 960 F.2d at 1008.
We emphasize to the district court that it is essential that communications between the trial court and the parties to an action as well as all rulings affecting the procedural rights of parties be shown on the docket and contained in the record to afford complete review by this court. Parties’ procedural rights cannot be sacrificed in the interest of moving busy dockets.76

Turning to the relationship of individual judges’ rules to the Federal Rules, Senior Circuit Judge Morgan noted that Rule 83 provided for local district court rules so long as they are not inconsistent with the Federal Rules.77 Although the court acknowledged that the individual judge’s rule at issue was not a local rule, the court held that these “local procedures” should be reviewed by the same procedure as local rules. Noting that Federal Rule 56 governing motions for summary judgment does not require preliminary procedures prior to the filing of a motion, the court held that the trial court’s pre-screening of the summary judgment motion violated the litigant’s procedural and substantive rights under Rule 56 and was therefore invalid.78

To date, the Eleventh Circuit’s ruling in Brown is the most noteworthy disapproval of individual judges’ rules. Many courts, however, have not been as critical of such practices, and have even condoned pre-motion screening procedures. For example, in Richardson Greenshields Securities, Inc. v. Lau,79 District Court Judge Kram of the Southern District of New York required a pre-motion conference to consider the defendant’s request to file a motion for leave to file an amended answer, in accordance with her rule of practice regarding all motions.80 However, Judge Kram’s chambers refused to schedule the conference before the statute of limitations had run on the counterclaims the defendants wished to assert in their amended answer. The defendants were finally able to file their motion after the conference was held, some four months after the statute expired.81 Judge Kram denied the motion on the ground that the defendants “offered no justifiable excuse for [the]...
delay.282 In this instance, Judge Kram's standing order went beyond administrative regulation. It directly interfered with the party's right to file a motion provided by the Federal Rules, in particular Rules 77 and 78,83 and possibly prejudiced a viable claim.

On appeal, the Second Circuit did not condemn the individual judge's rule, stating that “[w]e do not suggest that district judges cannot require a conference prior to the filing of motions as a means of managing litigation . . . .”84 At the same time, however, the court noted that individual judges' rules must not be inconsistent with the Federal Rules, and stated that “[a]bsent extraordinary circumstances . . . a court has no power to prevent a party from filing pleadings, motions or appeals authorized by the Federal Rules of Civil Procedure.”85

VI. PROBLEMS ARISING FROM REQUIRING PRE-MOTION PROCEDURES

A. Inconsistency with the Federal Rules

The Federal Rules were adopted to eliminate procedural traps, ensure decisions upon the merits, and improve the speed and efficiency of litigation. Local rules requiring pre-motion procedures hinder these goals in two ways. First, failure to follow local rules governing such pre-motion procedures has resulted in the dismissal of parties' claims, rather than decisions on the merits.86 Judicial discretion afforded by the Federal Rules was meant to allow judges to rule upon the merits, while providing needed flexibility to control the procedure of the court. The Federal Rules

82 Id. at 650 (quoting district court order denying defendant's motion to amend).
83 See supra text accompanying notes 48-49 (discussing FED. R. Civ. P. 78 and 79).
84 Richardson, 825 F.2d at 652.
85 Id. Local rules, likewise, cannot supplant the Federal Rules. See Wilson v. City of Zanesville, 954 F.2d 349, 352 (6th Cir. 1992) (citing Carver v. Bunch, 946 F.2d 451, 453 (6th Cir. 1991)). In Wilson, the circuit court stated that Federal Rules 26(b)(1) and 34(a)(1) superseded the local rules. Id. Judge Martin held that the district court "erred in denying Wilson's motion to compel discovery based on his failure to adhere to local court rules in a situation clearly governed by the Federal Rules." Id. at 353.
86 See, e.g., Wilson, 954 F.2d at 349. In Wilson, the plaintiff's failure to attach an affidavit to his motion resulted in the denial of his motion to compel production of a tape. Id. As a result, the plaintiff was unable to meet his burden of proof and the district court granted the defendant's motion for summary judgment. Id. at 350.
were not intended to permit judges to create their own pre-motion procedures which prevent decisions upon the merits.

Second, pre-motion procedures often delay the litigation process. In many cases, a judge can dispose of a motion in less time than it takes to schedule and attend a pre-motion conference or similar procedure. Thus, in implementing their pre-motion procedures, some judges have failed to recognize that the goals of the Federal Rules and of our judicial process can be compromised through overzealous judicial management.87

B. Additional Risks of Pre-Motion Procedures

Aside from interfering with the goals of the Federal Rules, pre-motion procedures create certain practical problems.88 In a conference, the judge sometimes takes an active, or even coercive, role, arguably altering the dynamics of the litigation to the combined detriment of the parties. In this posture, the judge exercises an inappropriate amount of influence upon the course of the litigation.89 This influence is amplified since all conversations at these conferences are not on the record, so that much of the judge’s conduct will be difficult, if not impossible, to review.90 The increased managerial role of judges was meant to facilitate the parties’ ability to bring a case to trial,91 not to permit judges to take a coercive role in the litigation.

87 See Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 376, 431 (1982) (outlining increased role of judges as managers and warning that this brings inherent risk). “Although the sword remains in place, the blindfold and scales have all but disappeared.” Id.

88 See generally id. at 424-31 (setting forth proposed aims of increased judicial oversight).

89 See id. at 425-26. “Transforming the judge from adjudicator to manager substantially expands the opportunities for judges to use—or abuse—their power . . . . [D]ecisions [are] made privately, informally, off the record, and beyond the reach of appellate review.” Id.

90 Id. “The extensive information that judges receive during pretrial conferences has not been filtered by the rules of evidence. Some of this information is received ex parte, a process that deprives the opposing party of the opportunity to contest the validity of information received.” Id. at 427. Judges may also develop personal prejudices against an attorney as there is much interaction during the “management” phase. Id.

91 See Fed. R. Civ. P. 16(a)(2). The purpose of the pretrial conference is to establish “early and continuing control so that the case will not be protracted because of lack of management . . . .” Id.; see also supra text accompanying notes 21-22 (discussing increased judicial management).
This coercive judicial influence threatens a party’s due process rights. The Federal Rules provide for litigants to file motions freely. However, litigants are often unable to even reach the merits of a motion because of the coercive and overriding influence of the judge. Also, the delay inherent in trying to schedule (and often to reschedule) such a conference may inhibit litigants from making just and proper motions. When litigants are not afforded the opportunity to file a motion because of a judge’s coercive influence, express prohibition, or unnecessary delay, the litigant’s due process rights are violated. As Judge Robert E. Keeton stated: “Trial and preparation for trial should not become a game of moves in which the judge, as umpire, calls players out for not touching bases, and in the right sequence.” Furthermore, by promulgating rules that require extensive pre-motion procedures, judges dilute the adversarial nature of litigation and deny the parties the opportunity to aggressively promote their interests. This is in apparent conflict with the “bedrock premise of the federal rules . . . that cases filed in a federal district court are

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92 See U.S. Const. amend. XIV, § 1. The Fourteenth Amendment provides, in pertinent part, that no “state [shall] deprive any person of life, liberty, or property, without due process of law.” Id. It has been held that a cause of action is a species of property protected by the Due Process Clause. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

93 See Fed. R. Civ. P. 7(b)(1) (providing generally for filing of motions). It is understood that few restrictions should be placed on movants. See Richardson, 825 F.2d 647, 653 n.6 (“A motion to amend should be denied only for such reasons as ‘undue delay, bad faith, futility of the amendment, and . . . the resulting prejudice to the opposing party.'”)(citation omitted). Nonetheless, a motion must be grounded in fact and warranted by existing law or good faith argument. See Fed. R. Civ. P. 11.

94 See supra text accompanying notes 63-74 (discussing Brown where district judge summarily and arbitrarily concluded that case was not amenable to summary judgement); see also Beary v. City of Rye, 601 F.2d 62 (2d Cir. 1979) (reversing trial court decision for placing administrative interests over principles of fairness).

95 See Logan v. Zimmerman Brush Co., 455 U.S. 422, 429 (1982) (finding lack of due process when claimant’s wrongful discharge claim was dismissed due to state agency’s failure to convene hearing within 120 days as mandated by statute); Lindsey v. Normet, 405 U.S. 56, 66 (1972) (“Due process requires that [defendants be provided] an opportunity to present every available defense” (quoting American Surety Co. v. Baldwin, 287 U.S. 156, 168 (1932))); Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (procedural due process requires that party have opportunity to be heard “at a meaningful time and in a meaningful manner.”).


97 See Resnik, supra note 87, at 429 n.209 and accompanying text. Professor Resnik posits that the “norms that operate in most negotiations are absent when judges sit at the bargaining table.” Id.
to be resolved through adversarial litigation before the court . . . . "98

A judge's ability to limit the filing of motions is also con-
stricted by pre-emption through the Federal Rules. Section
2072(a) of title 28 of the United States Code authorizes the
Supreme Court to "prescribe general rules of practice and proce-
dure . . . for cases in the United States district courts (including
proceedings before magistrates thereof) and courts of appeals."99
Section 2072(b) then states that "[a]ll laws in conflict with such
rules shall be of no further force or effect after such rules have
taken effect."100 Arguably, some individual judges' rules are
therefore pre-empted by the Federal Rules.101

CONCLUSION

The role of judge as manager and the goal of promulgating
individual judges' rules that are consistent with the Federal Rules
can coexist within the federal court system. The Federal Rules
encourage judicial discretion in order to achieve decisions upon
the merits. Unfortunately, some judges have abused this discre-
ction by raising procedural hurdles, forcing cases off their dockets,
and discouraging decisions upon the merits. Judge Jack Wein-
stein observed that a more appropriate response to the "litigation
explosion" was to increase the number of judges and the capacity
of the system to handle the cases.102 This has not been the courts'
reaction. Instead, courts have discouraged parties from litigating
by promulgating rules that distort the adversary system. The
elimination of individual judges' rules that are inconsistent with
the Federal Rules would be an important step towards restoring
the Federal Rules and the system they govern to that which was
eveloped by the original drafters.

Civil Rule 83 and District Court Local Rulemaking Powers, 8 U. Puget Sound L. Rev.
537, 545 (1985).
100 Id. § 2072(b).
101 See Carver v. Bunch, 946 F.2d 451, 454 (6th Cir. 1991) (ruling that district
court improperly expanded its authority when its interpretation of local rule super-
seded domain of Federal Rule 41(b)).