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EDWARD D. CAVANAGH*

INTRODUCTION

The federal civil justice system is in serious, if not critical, condition. There is a general consensus that federal litigation is unduly expensive and takes too long, and that many matters simply do not belong in federal court.1 Moreover, many thoughtful observers agree that these problems are caused largely by the following: an inadequate number of federal judgeships;2 the failure


2 Congress, having increased the number of federal judgeships under the Federal Judgeship Act of 1990, Pub. L. No. 101-650, tit. II, 104 Stat. 5089, 5098 (1990), is not likely to create additional judgeships in the near term. Two of the more intriguing and controversial proposals for increasing the amount of judge time devoted to civil cases have emanated from California. The Central District of California Advisory Group has proposed that its court be split into criminal and civil divisions, with civil division judges assigned only civil cases and criminal division judges assigned only criminal cases. Report of the Advisory Group of the United States District Court for the Central District of California Pursuant to the Civil Justice Reform Act of 1990, Final Report to the Honorable Malcolm F. Bennett, Chief Judge, Pursuant to the Civil Justice Reform Act of 1990, Concerning the Causes of Unnecessary Delay and Expense in Civil Litigation in the Central District of California, 1993 U.S. Dist. Ct. 1 (1993) [hereinafter CACR] ("[T]here is a strong sense among the judges in the central district of California that the central district is working at full capacity and that any additional judges would simply be more judges doing the same thing. If anything, recent efforts have been directed toward making judges more efficient rather than adding judges.").
to fill existing vacancies promptly; the Speedy Trial Act, which gives priority to criminal cases over civil cases; the Sentencing Guidelines, which limit judicial discretion in sentencing thereby discouraging plea bargaining; and the federalization of criminal law enforcement. There is, however, less of a consensus on how to deal with these problems, and finger-pointing abounds—judges blame lawyers, lawyers blame judges, the defense bar blames plaintiffs, and vice versa.

Congress has responded to the crisis in the federal courts with the Civil Justice Reform Act of 1990 ("CJRA"). At the same time, the judiciary proposed major reforms through the 1993 Amend-

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The Speedy Trial Act, which ensures criminal defendants of a speedy disposition of criminal indictments, has had a significant impact on civil litigation. This Act is frequently cited as being a primary reason for the interruptions and concomitant delays in civil litigation. The impact of these interruptions on complex proceedings such as patent disputes can be extremely costly, and can contribute to delays in reaching an eventual outcome of the litigation.

Possible solutions to the problems caused by the Speedy Trial Act include segregation of civil and criminal litigation into discrete courts, improvements in scheduling and case management, and expansion of judicial resources to manage civil and criminal litigation. One clearly undesirable trend has been the recent tendency of Congress to expand the scope of criminal jurisdiction of the Federal district courts. This has led to further clogging of the single docket system in the Federal courts.

Id.; see EDNY Report, supra note 1, at 199-213; see also C.D. Cal. Report, supra note 2, at 33-43 (citing heavy criminal caseloads and failure to fill judicial vacancies promptly as causes of excessive delay).

4 See, e.g., Paul L. Friedman, Speeding Up Justice at the District Court, Legal Times, Apr. 19, 1993, at 30-31 (identifying tactics of lawyers and judges that cause unnecessary delay).

ments to the Federal Rules of Civil Procedure. These two approaches address the perceived ills of the federal civil litigation system in markedly different ways. The 1993 Amendments seek to effectuate change through national rules applicable throughout the federal system, whereas the CJRA attempts to improve federal litigation practices at the local level by requiring each district to identify and address particular problems that have beset that district and to propose specifically tailored solutions. In short, the CJRA contemplates reform from the bottom up, through local rules, while the 1993 Amendments attempt to achieve reform from the top down, through national rules.

This Article examines and analyzes (1) the wisdom of addressing pervasive problems in the federal civil practice system through local rules and (2) the likely combined impact of the CJRA and the 1993 Amendments on litigation in the federal courts. As discussed below, the plans to be implemented in each district pursuant to the CJRA will engraft yet another layer of local rules on top of a system that is already saturated with rules. Plans currently in effect in some districts have already generated much confusion and uncertainty among members of both the bench and bar. The confusion and uncertainty are heightened by the overlay of the 1993 Amendments, which in some instances provide standards at variance with those embodied in CJRA plans. This collision of two different regulatory schemes threatens to impair any meaningful procedural reform in the federal litigation system for years to come.

I. BACKGROUND: THE CJRA

The CJRA, sometimes referred to as the “Biden Bill,” was signed into law by President Bush on December 1, 1990, as part of the Judicial Improvements Act of 1990. It was enacted with little fanfare—the product of an eleventh-hour compromise consummated in the waning hours of the 101st Congress. The CJRA is the outgrowth of a 1989 study by a joint task force from the Brook-

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6 H.R. Doc. No. 74, 103d Cong., 1st Sess. 98-110 (1993), reprinted in 113 S. Ct. orders 475 (1993). This approach is not without its critics. Justice Scalia argues that the amendments will increase litigation costs and burden the federal courts. Id. at 105-10, reprinted in 113 S. Ct. orders 581.

ings Institute and the Foundation for Change, which concluded that the costs of litigation in the federal system have become unreasonably high, thereby effectively limiting access to the courts to deep-pocket litigants.

Responding to the Brookings study, Senator Biden and others introduced legislation on January 21, 1990 which would have radically altered the face of federal civil litigation. Among other things, Biden's bill, as initially drafted, would have implemented a civil analogue to the federal Speedy Trial Act. It would have required that each district court implement procedures containing the following provisions: (1) separate tracks for differing types of cases; (2) mandatory discovery conferences within 45 days of the response to the complaint to be chaired by a judge, not a magistrate judge; (3) staged resolution of issues; (4) setting of a trial date within 45 days of the response of the complaint; (5) presumptive time limits for the completion of discovery; and (6) expanded judicial training program emphasizing case management. The bill was widely criticized by the federal judiciary and practitioners, thereafter redrafted, and later enacted in its present form.

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9 Justice for All, supra note 8, at 6, reprinted in Hearings, supra note 8, app.


13 See, e.g., Linda S. Mullenix, Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers, 77 Minn. L. Rev. 1283, 1285, 1314 (1993); Victoria Slind-Flor, Drug-War Gripes Set The Mood 9th Circuit Meeting, Nat'l J., July 2, 1990, at 2 ("Judges and lawyers alike said that they could see little sense in the Civil Justice Reform Act sponsored by [Senator Biden]."); Richard A. Rothman, Civil Justice Reform Act: Too Little, Too Fast, N.Y. L.J., Apr. 17, 1990, at 2; Stephen Labaton, Business and the Law Biden's Challenge to the Federal Courts, N.Y. Times, Apr. 16, 1990, at D2 ("Almost all of the judges are against it."); Ann Pelham, Judges Bristle at Biden's Civil Reform Plan, Legal Times, Mar. 5, 1990, at 1 ("They're out of touch with the real world" says one judge bitterly. 'We were never consulted at all.'").
Practices and procedures which had been mandatory in the earlier version of the bill became discretionary in the bill as enacted.

A. Mandates Under the CJRA

The CJRA is the first statutorily-mandated attempt to examine at the grass roots level the functioning of the federal civil justice system on a nationwide basis.\(^\text{14}\) It requires each of the ninety-four federal district courts to form an advisory group to assess the state of the civil and criminal dockets in its district, and to report to the chief judge the causes of unnecessary delay and expense in civil cases,\(^\text{15}\) along with proposals for remedial action.\(^\text{16}\) After reviewing the report of its advisory group, the court in each district is then required to promulgate a civil expense and delay reduction plan, which may or may not follow the advisory group recommendations.\(^\text{17}\) All courts must have a plan in effect by December 1, 1993.\(^\text{18}\) Ten courts, known collectively as pilot districts, were required to implement a plan by no later than December 31, 1991.\(^\text{19}\) Other courts, known as early implementation districts, were permitted to have plans in effect by January 1, 1992.\(^\text{20}\)

\(^\text{14}\) See Dessem, supra note 8, at 687. On the local level, the Eastern District of New York has undertaken a similar endeavor for nearly a decade. EDNY REPORT, supra note 1, at 195.

\(^\text{15}\) In identifying the principal causes of cost and delay, the Advisory Group is to "giv[e] consideration to such potential causes as court procedures and the ways in which litigants and their attorneys approach and conduct litigation. . . ." 28 U.S.C. § 472(c)(1)(C) (Supp. 1992).

\(^\text{16}\) In addition to "determin[ing] the condition of the civil and criminal dockets" and "identifying[ing] the principal causes of cost and delay in civil litigation," the advisory group is directed to "identify trends in case filings and in the demands being placed on the court's resources" and "examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts." 28 U.S.C. § 472(c)(1) (Supp. 1992).


\(^\text{19}\) Id. § 105, 104 Stat. at 5097. The CJRA directs the Judicial Conference to designate the ten pilot districts. These ten districts are: S.D. Cal., D. Del., N.D. Ga., S.D.N.Y., D. Okla., E.D. Pa., W.D. Tenn., S.D. Tex., D. Utah, and E.D. Wis. JUDICIAL CONFERENCE OF THE UNITED STATES, DEVELOPMENT OF PLANS BY EARLY IMPLEMENTATION DISTRICTS AND PILOT COURTS (1992).

\(^\text{20}\) Pub. L. No. 101-650, § 103(c), 104 Stat. 5096 (1990) as amended Pub. L. No. 102-572, tit. V, § 505, 106 Stat. 4513 (1992). A district court is designated an Early Implementation District ("EID") if it develops and implements a civil justice expense and delay reduction plan no earlier than six months and no later than twelve months after the CJRA's effective date. Id. This designation aims to encourage district courts and advisory groups to implement their plans with all deliberate speed without forcing them to move so rapidly that the spirit of the Act is undermined. S. REP. No. 416, supra note 5, at 64, reprinted in 1990 U.S.C.C.A.N. at 6853. In addition to the ten
In formulating its plan, each court must consider and may include the following concepts:\textsuperscript{21}

1. Systematic, differential treatment of civil cases which tailor the level of judicial management to the needs of the case;
2. Early, ongoing control of the pretrial process by the judicial officer;
3. Use of case management conferences in complex cases to (a) explore settlement possibilities; (b) identify disputed issues; (c) schedule discovery; and (d) set deadlines for motions;
4. Encouragement of cost-effective discovery through voluntary exchange of information;
5. Requiring that no discovery motion can be entertained unless the parties have first made a good faith effort to resolve their differences; and
6. Authorization to refer appropriate cases to alternative dispute resolution.\textsuperscript{22}

After the plan is approved by the district court, it is further reviewed by a committee consisting of the chief judge of the circuit and the chief judges of each district court within that circuit.\textsuperscript{23} That committee may suggest additional actions or recommend modifications to the plan.\textsuperscript{24} The plan is also reviewed by the Judicial Conference of the United States which is empowered to request a particular district to alter or amend its plan if the Conference determines that a district court has not adequately responded to the demands and conditions of its civil and criminal dockets, or to the recommendations of its advisory group.\textsuperscript{25}


\textsuperscript{21} 28 U.S.C. § 473(a). The six principles embodied in § 473(a) are aimed at: defining the issues to be litigated and limiting pretrial activity to relevant matters; controlling pretrial discovery and other activity to avoid unnecessary expense and burden; arriving at a settlement in appropriate cases as early as possible or attempting to identify methods for resolving it as expeditiously and economically as possible; facilitating an adjudication on the merits in appropriate cases; and ensuring that any trial will be well focused and well prepared. S. REP. No. 416, supra note 5, at 57, reprinted in 1990 U.S.C.C.A.N. at 6846.


\textsuperscript{24} Id.

\textsuperscript{25} Id. 474(b); see S. REP. No. 416, supra note 5, at 59, reprinted in 1990 U.S.C.C.A.N. at 6848.
dition to involvement in the review process, the Judicial Conference has in fact promulgated a Model Plan.26

The CJRA also requires that once a plan is in place, the court, consulting with its advisory group, must assess it annually.27 Thus, the statute contemplates ongoing oversight of the plan and amendment where appropriate. Pursuant to the Act, the Judicial Conference, with the Federal Judicial Center and the Administrative Office of the United States Courts, must also report on all plans by December 1, 1994.28 To this end, the RAND Corporation has been retained to assist in a comparative analysis of plans implemented in various districts. By these measures, Congress has indicated that it clearly expects results from the adoption of district-by-district plans. If tangible improvements in the problem of cost and delay are not achieved, Congress could choose to pursue more draconian measures upon the sunset of the CJRA in 1995.

B. Authority of the CJRA Plan

The plans promulgated pursuant to the CJRA function as de facto local rules.29 Therefore, in order to ascertain the governing procedural rules of the district in which their case is venued, attorneys and their clients must not only be aware of the Federal Rules of Civil Procedure, local rules, standing orders, and a judge’s individual rules, but the district’s expense and delay reduction plan as well. This creates three significant problems for litigants and their counsel. First, litigants must determine the

26 JUDICIAL CONFERENCE OF THE UNITED STATES, MODEL CIVIL JUSTICE DELAY AND EXPENSE REDUCTION PLAN (1992) [hereinafter MODEL PLAN].

27 28 U.S.C. § 475 (Supp. 1992). This is done to determine appropriate additional actions that may be taken by the court to reduce cost and delay in civil litigation and to improve the litigation management practices of the court. Id.

28 Id. § 471(a).

29 28 U.S.C. § 473 (Supp. 1992). The CJRA does not explicitly state that plan provisions will trump inconsistent provisions of the local rules and the Federal Rules of Civil Procedure. Nevertheless, a fair reading of § 473 would maintain the validity of any plan that conforms to the principles and guidelines set forth in the Act in the face of a conflicting Federal Rule of Civil Procedure. The drafters of the 1993 Amendments to the Federal Rules of Civil Procedure sought to avoid the problem of conflict by explicitly authorizing local variations pursuant to CJRA plans. See FED. R. CIV. P. 26 advisory committee note. Conflict between the plans and local rules should not occur. Presumably, the Advisory Group in each district has reviewed the local rules prior to proposing a plan. Any local rules in conflict with the plan should then simply be abrogated.
content of the plan in effect in that district. That is no easy task. Many districts adopted their plans on or near the December 1, 1993 deadline. At least initially, these plans have been available only through the promulgating district court. Despite recently improved accessibility of plans, for instance, through Westlaw, some information gap regarding the content of various plans still exists and results in an increase in transactional costs to ascertain the status and contents of plans in various districts.

Second, and more important, the CJRA, by encouraging local experimentation, has already spawned procedures which vary from court to court, thereby Balkanizing federal practice, and is likely to spawn even more variations in practice as more plans are implemented and refined. This arguably undermines the fundamental premise of the Federal Rules of Civil Procedure—uniformity of procedures and practices within the federal court system—and forces parties again to incur unnecessary transaction costs by necessitating use of local counsel and further training of retained counsel. Supporters of the CJRA acknowledge the potential for variation from court to court but urge that local experimentation is a healthy exercise which will encourage new approaches to the problems afflicting the federal civil justice system. In the long run, they argue, the worthwhile procedures will be widely adopted and the failed experiments will be forgotten, thereby encouraging uniformity. In the short run, however, this new layer of rules has led to confusion and uncertainty.

Third, the proliferation of various plans has further complicated the process of forum selection. No longer is the litigant faced with a simple choice between federal and state court or between a convenient and less convenient federal venue. The content of a particular district’s plan must be considered before opting for a specific forum. For example, does the plan feature mandatory disclosure? Does the plan significantly limit discov-

30 A search of Westlaw's CJRA database revealed that at least 45 plans are in effect.
31 A recent blue-ribbon commission study reform of patent law recognized that, while variations in local rules may be justified, “such variations should be restricted to those matters for which there is a clear local need.” PATENT LAW REFORM, supra note 3, at 85. The Commission further observed: “Inconsistencies in rules of practice between the different federal district courts introduces unnecessary transactional costs through the need for local counsel and additional training of retained counsel.” Id.; A.B.A. Conference on Civil Justice Reform Act, San Francisco California, Aug. 9, 1992 (remarks of Jeff Peck).
32 PATENT LAW REFORM, supra note 3, at 85.
ery? Is court-annexed mediation required? Without knowing the answers to these questions (and others), it is impossible to develop a strategic plan for the litigation prior to filing. Obviously, one familiar with the CJRA and the plans thereunder has a leg up on a less informed adversary.

These practical difficulties created by the CJRA, however, may only be manifestations of deeper problems caused by the grassroots approach to procedural reform. Professor Linda Mullenix, while recognizing that “[a]t the most pragmatic level, the grassroots local advisory groups are destined to create problematic local rules, measures, and programs,” identifies a much more fundamental concern with the CJRA. She views the act as effectuating a “revolutionary redistribution of the procedural rulemaking power from the federal judicial branch to the legislative branch.” The end result, she contends, “transform[s] the Advisory Committee on Civil Rules into a quaint, third-branch vestigial organ.”

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The central importance of the Civil Justice Reform Act is this: the Act has effected a revolutionary redistribution of the procedural rulemaking power from the federal judicial branch to the legislative branch. Congress has taken procedural rulemaking power away from judges and their expert advisors and delegated it to local lawyers. By the expedient of declaring procedural rules to be substantive law, Congress has effectively repealed the Rules Enabling Act. Congress has by fiat stripped the judicial branch of a power that uniquely bears on the judicial function: the power to prescribe internal rules of procedure for the federal courts. By legislative stealth in enacting the Civil Justice Reform Act, Congress is continuing to transform the Advisory Committee on Civil Rules into a quaint, third-branch vestigial organ.

The implications of this unheralded revolution will be dramatic and widespread for years to come. At the most pragmatic level, the grassroots local advisory groups are destined to create problematic local rules, measures, and programs. Although this “bottom up” approach to rulemaking is theoretically laudable, it can also be viewed as a politically cynical way of magically conferring a democratic patina on a rulemaking process that is not truly locally inspired, but federally orchestrated by Washington. Furthermore, local amateur rulemaking groups, however intelligent, diligent, and well-intentioned, are ill-equipped to perform the basic tasks the Act requires, such as conducting docket assessments and evaluating the reasons for cost and delay in the district. Bad social science will form the basis for bad rulemaking.

34 Id.

35 Id. Mullenix anticipates a decrease in the advisory committee’s influence on the rule-making process for reasons unrelated to the CJRA. See Linda S. Mullenix,
Professor Mullenix's conclusion that Congress has in fact wrestled away from the judiciary the power to make rules of procedure and practice in the federal courts may be premature. First, Congress has always had a say in the making of Federal Rules, since even rules promulgated pursuant to the Rules Enabling Act can be modified or vetoed by Congress. Second, Congress has traditionally legislated in areas which may be deemed areas of practice and procedure. In short, the courts and the legislature have a broad area of concurrent jurisdiction when regulating practice and procedure in the federal courts. With the enactment of the CJRA, Congress has clearly expressed its dissatisfaction with the current state of affairs in the federal civil justice system. Although some commentators might consider this step bold, it is too soon to declare the judiciary a "vestigial" organ in the realm of rulemaking.

Professor Mullenix, nevertheless, is correct in questioning the wisdom of the CJRA's grassroots approach at a time when major changes to national rules have been adopted by the Supreme Court. It is by no means clear that the path to true reform in the federal system lies in local rules and procedures established by CJRA plans.

II. DOES ANOTHER LAYER OF LOCAL RULES MAKE SENSE?

Local rules have always played a prominent role in governing practice and procedure in federal court. Prior to the adoption of the Federal Rules of Civil Procedure in 1938, practice and procedure in the federal system was governed by the Conformity Act which mandated that a federal court follow the procedural rules of the state in which it sits. On the equity side, Congress had adopted uniform rules of practice and procedure as early as 1842. Even under the Federal Rules of Civil Procedure, local rules are specifically authorized. Rule 83 permits promulgation of local rules of practice and procedure provided they do not conflict

37 See 28 U.S.C. § 1391 (1988 & Supp. 1992) (venue); Id. § 1404 (forum non conveniens); Id. § 1407 (judicial panel for multidistrict litigation).
with the Federal Rules.\textsuperscript{40} Thus, the drafters of the Federal Rules contemplated that various districts might choose to adopt local rules to complement the Federal Rules of Civil Procedure.

Procedural rules are generally of two types. The first type bestows on litigants their procedural rights in an action. This category includes rules specifying (1) the right to seek certain relief through motion; (2) the right to discovery; (3) the right to implead; (4) the right to intervene or assert counterclaims; (5) the content and sufficiency of pleadings; and (6) standards for sanctions. This category is largely, but not exclusively, the subject of national rules. The second type of procedural rules simply specifies the order in which the first category of rights is to be exercised. Included in this category are rules relating to the sequence and timing for the filing of briefs, discovery deadlines, and time limits for the filing of third-party claims. The second category is largely, but not exclusively, the subject of local rules.

\section{Benefits of Local Rules}

Indeed, local rules play an important role in the federal civil justice system in that they (1) flesh out the Federal Rules; (2) provide a degree of certainty as to the governing standards; (3) assure uniformity of practice throughout the district; and (4) offer an opportunity for experimentation and innovation.

\subsection{Fleshing Out the Federal Rules}

Local rules may serve to fill in the gaps left by national rules. The Federal Rules do not, and indeed should not, deal with minutiae, such as the time limits for filing and responding to motions, the form and content of briefs, the content of final pretrial orders, and whether the court will entertain oral argument on motions. By and large, the rules governing these matters turn on local custom. Because the need for nationwide uniformity is low, perhaps even non-existent, local rules adequately serve their gap-filling function.

\subsection{Certainty}

Second, local rules provide certainty. When relying on a specific local rule, litigants and their counsel will know that a motion

\textsuperscript{40}\textsc{FED. R. CIV. P. 83} (providing that "[e]ach district court . . . may from time to time . . . make and amend rules governing its practice not inconsistent with these rules").
must be made on X days notice with Y days to respond and Z days to reply. They will also know the local court's numerical limits on interrogatories or the requirements for the supporting papers for a summary judgment motion. If the rules are written down, search time is minimized and the anxiety about the propriety of a certain course of conduct may be relieved.

3. Uniformity

Third, and closely related to the second point above, local rules supply uniformity throughout a particular district. The value of uniformity can best be seen by examining the situation that would exist were there no local rules. In that situation, all practices not addressed by the Federal Rules would be determined by individual judges, and, quite obviously, would vary from chambers to chambers. This state of affairs would be inefficient and costly. Lawyers would have to acquaint themselves with varying sets of rules for each case assigned to a different judge. How would attorneys learn of the individual rules of each judge? Search costs alone are apt to be steep. Valuable time would be expended locating and complying with individual judges' rules. Wholly apart from efficiency concerns, just knowing where to look is likely to cause problems. If the judge's rules are hard to ascertain, attorneys will have difficulty familiarizing themselves with them. In turn, the quality of practice before the courts is likely to decline, while the attorneys' fees rise.

Publication of the judges' rules does not solve the problem. While having individual judges' rules published may make locating those rules easier, the lawyer would still be faced with a bewildering array of directives that vary from judge to judge. Moreover, even if rules are published, there are no guarantees that the practices of the judges will conform to their written rules. This concern is borne out by the experience of the federal district courts in the New York metropolitan area. New York is the only city in the country that houses two federal district courts—the Southern District and the Eastern District. The *New York Law Journal* regularly publishes the individual rules of federal judges in the Southern District and in the Eastern District. Nevertheless, some judges choose not to follow the rules as published. Other judges change their rules without notifying the publisher. These practices tend to compound the problem of locating and determining the applicable governing standards.
This is not to say that uniformity for the sake of uniformity is a desirable goal or that there is no room for variation in practices from chambers to chambers. Judges should have leeway to implement personal preferences in areas where uniformity is not important. For example, a judge should be able to decide individually whether to entertain oral argument on dispositive matters, conduct pre-motion conferences, or refer pretrial discovery matters to magistrate judges. At the same time, it is also clear that there is a broad area where uniformity would be beneficial to both bench and bar.

4. Experimentation and Innovation

Fourth, local rules provide district courts with the opportunity to experiment and innovate. Two prominent examples of local rules which have gained widespread following are limitations on the number of interrogatories propounded41 and local rules requiring mandatory pretrial disclosure prior to discovery,42 a procedure that is now part of the Federal Rules of Civil Procedure under the 1993 Amendments.43

Litigation is a dynamic process and the rules governing litigation need to be flexible to keep pace with the demands of an ever-changing landscape. Obviously, some local rules are experimental in nature, and not all experimental procedures will prove successful. Local districts, however, can provide a useful testing ground for rules that can be monitored and subsequently adopted by the Advisory Committee. For example, the technological advances that have made videotaping pretrial testimony convenient and cost-effective have first led local courts,44 and later the Federal Rules,45 to ease restrictions on nonstenographic recording of pretrial testimony.

41 D. Del. R. 26.1(b) (50 interrogatories); S.D. Cal. R. 33 (25 interrogatories); D. Idaho R. 33.1 (40 interrogatories); N.D. Ind. R. 14(c) (30 interrogatories).
43 Fed. R. Civ. P. 26(a) (providing for mandatory disclosure “[e]xcept to the extent otherwise stipulated or directed by order or local rule”).
44 See EDNY STANDING ORDER OF THE COURT ON EFFECTIVE DISCOVERY IN CIVIL CASES No. 7. Standing Order No. 7 states: “Motions in accordance with Fed. R. Civ. P. 30(b)(4) for leave to record the deposition of an adverse party or of a non-party witness by means other than stenographic recording, including tape recording or videotaping, shall be presumptively granted.” Id.
B. Criticisms of Local Rules

1. Adoption of Local Rules

Clearly, local rules offer many benefits and have, in fact, promoted good order in the conduct of federal civil litigation. Nevertheless, local rules have been the subject of criticism with respect not only to their substance but also to the process for their adoption. The latter problem was addressed by the 1985 amendment to Rule 83, which attempted to formalize and tighten the process for adoption and promulgation of local rules. Specifically, amended Rule 83 requires public notice and an opportunity to comment before the adoption of local rules so that the district court may benefit from expert opinions of scholars and practitioners before implementation. The amended rule also requires that local rules be forwarded to the judicial council of the Administrative Office where they are reviewed and collected.

In theory, formalizing the process of adopting local rules will promote thoughtfulness in their formulation and filter out those rules which may unfairly impact on a particular class of litigants. In reality, the process can be avoided by classifying local rules as standing orders of the court or by having an individual judge simply adopt a procedure as a rule of chambers. A standing order is simply an order of the court that applies in all cases. If all judges of a court adopt a standing order, it becomes in substance and effect a local rule, with the Rule 83 safeguards being bypassed.

2. Soundness of Local Rules

The soundness and validity of various local rules have also been criticized. A detailed study of the more than 5000 local rules, standing orders, regulations, and other directives governing practice in the federal system, prepared under the aegis of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States and completed in 1989 (the “Local Rules Project”), revealed, among other things that: (1) some local

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46 See infra notes 51-55 and accompanying text.
47 See FED. R. CIV. P. 83 advisory committee note (stating that Rule 83 was amended to provide for closer scrutiny of local rules “by requiring appropriate public notice of proposed rules and an opportunity to comment on them”).
48 Id.
49 Id.
rules were invalid because they were inconsistent with existing law;51 (2) many local rules merely repeated existing law and should be eliminated;52 (3) some local rules that had become obsolete or had otherwise fallen into disuse were still on the books in some districts;53 and (4) some local rules should be adopted as part of the Federal Rules of Civil Procedure.54 The Local Rules Project also identified model local rules and those rules which should remain subject to local variations.55 In addition, the committee recognized that local rules are largely a potpourri of directives and recommendations without any structure and proposed a standardized format for organizing and numbering local rules.56

3. The Eastern District of New York—A Patchwork of Rules

Perhaps in no place is the patchwork nature of local rules more evident than in the Eastern District of New York. In that court, there are no fewer than ten different sets of local rules and other governing principles that may pertain to a particular civil action,57 not including individual judges' rules or the plan adopted pursuant to the CJRA. The situation is complicated by the fact that some rules are jointly adopted with the Southern District of New York, while others are not. Even some of the so-called joint rules are in effect in one district but not the other.58 Furthermore, there is presently no centralized publication which lists in one place all the standards, however denominated, that may govern in a particular case.59 Accordingly, attorneys can never be truly con-

51 Id.
52 Id.
53 Id.
54 Id.
55 LOCAL RULES PROJECT, supra note 50, at 9-14.
56 LOCAL RULES PROJECT, supra note 50, at 6-7.
58 SDNY Rule 46, relating to limitations or use of interrogatories, was not adopted by the Eastern District. EDNY Rule 45, regarding exemptions from mandatory scheduling orders pursuant to FED. R. CIV. P. 16, is not in effect in the Southern District.
59 The EDNY Advisory Group is currently addressing this problem in the Eastern District of New York. The group is preparing a compilation of local rules, standing orders, practice guidelines and other governing standards, organized by subject matter, so that practitioners and judges can have before them in one place all procedural rules governing that action.
fident that they have consulted all the sources compiling the governing standards.

This is not to say that the local rules themselves are undesirable. Many local rules do expedite litigation. Nevertheless, the costs of locating the rules and ascertaining the governing standards may be significant. Potentially high search costs associated with local rules provide strong support for keeping local rules to a minimum. Even where the governing rules can be located quickly, the fact that local rules vary from district to district complicates federal civil litigation.

C. Effect of the CJRA on Practice

The CJRA presently seeks to stitch onto the patchwork quilt yet another set of local standards. The new procedures promulgated by the CJRA plans are not self-executing. The plans must be thoroughly studied and understood by bench and bar before they can have an impact on local practice. As a result, procedural reform at the local level proceeds at a glacial pace. As became clear at a conference of Eastern District Judges and Advisory Group members in mid-November 1992, some nine and one-half months after the plan became effective, attorneys in the Southern and Eastern Districts of New York have been slow to integrate procedures into their daily practice. Notwithstanding the best efforts by the judges, the Advisory Group and court personnel to publicize changes brought about by the plan, magistrate judges, who are generally responsible for the pretrial phase of most civil cases in the Eastern District, reported that few attorneys seemed familiar with the automatic disclosure obligations. At the same meeting, the ADR Administrator reported that very few cases had been referred to early neutral evaluation or court-annexed mediation pursuant to the plan.

This lack of familiarity with the plan on the part of litigants and judges will also make evaluation of the plan, as required by the CJRA, more difficult. The statute requires an evaluation by December 1, 1994, less than three years from the effective date of plans in early implementation districts, and only one year from

60 The author is the Reporter for the Eastern District Advisory Group.

61 At a second feedback conference in June 1993, the ADR Administrator reported that referrals had increased appreciably, thanks to the cooperation of the judges and magistrate judges in the District in identifying cases that might benefit from ADR.
the date that most plans will have become effective.\textsuperscript{62} While it was prudent for Congress to have provided an evaluation mechanism, it is unrealistic to assume that any meaningful conclusion can be drawn based on one year's experience under the plan.

III. THE CJRA AND THE 1993 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

As discussed, plans adopted pursuant to the CJRA have generated, and will likely continue to generate, confusion in federal civil litigation. In all likelihood, this confusion will be further compounded by the promulgation of the 1993 Amendments to the Federal Rules of Civil Procedure. The 1993 Amendments and the CJRA plans address many of the same issues, thereby creating a great potential for conflict.

Congress clearly has the power to enact laws affecting practice and procedure in the federal courts, and the CJRA is unquestionably a proper exercise of that power. The real question, however, is whether Congress should be active in micromanaging an enterprise that has been traditionally left to the judiciary or whether the federal civil justice system is better served by relying on the present mechanism for developing rules governing practice and procedure in federal courts. The Senate Report accompanying the CJRA argues for exclusive congressional authority to enact the reforms contained in the Act.\textsuperscript{63} Relying on \textit{Hanna v. Plumer},\textsuperscript{64} the Report first stresses congressional power to prescribe rules of practice and procedure for the federal court systems:

\begin{quote}
[The constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts . . . . [Subsequent cases] cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for the federal courts . . . .\textsuperscript{65}
\end{quote}

The Report further points out that while Congressional power is limited by the Constitution,\textsuperscript{66} the courts' power to regulate fed-

\textsuperscript{64} 380 U.S. 460, 472-73 (1964).
eral practice and procedure is limited by the Rules Enabling Act. The Rules Enabling Act provides that the Supreme Court, in regulating practice and procedure in the federal courts, may not promulgate rules which “abridge, modify or enlarge any substantive right.” The Senate Report asserts that the CJRA does indeed have substantive goals of improving fairness, efficiency, and access to the courts; therefore, only Congress is authorized to enact the reforms it contains.

This reasoning is of doubtful validity. Every procedural rule is to some extent designed to improve fairness, efficiency and access to the courts. When procedural rules work well, they have an incidental effect of encouraging enforcement of substantive rights. The Supreme Court has held that Federal Rules “which incidentally affect litigants’ substantive rights” do not violate the Rules Enabling Act. At most, the CJRA reforms embrace procedures that only incidentally affect substantive rights. In short, there is no compelling argument to support the view that Congressional involvement in designing housekeeping rules for the federal courts is constitutionally or statutorily mandated.

Nevertheless, Congress has enacted the CJRA, and the Supreme Court has promulgated the 1993 Amendments to the Federal Rules of Civil Procedure. These two regulatory schemes create a great potential for conflict in a number of areas, including: (1) mandatory disclosure; (2) discovery limitations; (3) differential case management; and (4) alternative dispute resolution.

A. Mandatory Disclosure

Perhaps the most controversial features of the 1993 Amendments are the provisions requiring mandatory disclosure of certain case information prior to discovery. The underlying ration-


\[68\] Id. § 2072(b).


\[70\] See Fed. R. Civ. P. 1 (“[The Federal Rules of Civil Procedure] shall be construed and administered to secure the just, speedy and inexpensive determination of every action.”).

\[71\] See Burlington Northern Railroad Co. v. Woods, 480 U.S. 1, 5 (1987) (holding that Alabama's mandatory cost-shifting statute in state appellate cases has no application to judgments entered by federal courts sitting in diversity).

\[72\] See Fed. R. Civ. P. 26(a) (effective Dec. 1, 1993). The provisions relating to mandatory disclosure are as follows:

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter.
(1) Initial Disclosures. Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosures, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party’s disclosure or because another party has not made its disclosure.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready.
Mandatory disclosure has several functions. First, it eliminates the need for parties to request via conventional discovery that to which they are clearly entitled, thereby reducing cost and delay at the outset of the action. Second, mandatory disclosure provides a framework in which additional discovery can be conducted and defines the boundaries of appropriate pretrial inquiry. Third, mandatory disclosure stresses the lawyer's professional responsibility as an officer of the court and de-emphasizes the lawyer's role as advocate of the client's cause, thereby encouraging cooperation on discovery. Cooperative and collegial discovery will lessen the incidents of expensive and drawn out discovery disputes.\(^\text{77}\)

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\(^{73}\) Id. \[^{73}\text{Fed. R. Civ. P. 26 advisory committee notes.}\]

\(^{74}\) See William W. Schwarzer, The Federal Rules, the Adversary Process, and Discovery Reform, 50 U. Prrr. L. Rev. 703, 721-24 (1989) (advocating mandatory disclosure and suggesting that adversary process should not apply to pretrial practice); Wayne D. Brazil, The Adversary Character of Civil Discovery: A Critique and Proposal for Change, 31 Vand. L. Rev. 1295, 1349 (1978) (proposing changes in discovery process which would shift counsel's obligation from client to court during discovery, including duty to disclose relevant information).

\(^{75}\) Id. \[^{75}\text{Fed. R. Civ. P. 26 advisory committee note; see Ralph K. Winter, In Defense of Discovery Reform, 58 Brook. L. Rev. 263, 271 (1992) (speculating that "mandatory disclosure rules" may reduce amount of discovery and promote early settlement).}\]

\(^{76}\) Id. \[^{76}\text{Fed. R. Civ. P. 26 advisory committee note.}\]

\(^{77}\) See Arthur R. Miller, The Adversary System: Dinosaur or Phoenix, 69 Minn. L. Rev. 1, 17-19 (1985) (indicating that adversary process during pretrial discovery is prominent factor in high cost of litigation and delays in settlement); see also Brazil, supra note 74, at 1348 (suggesting that discovery cannot be effective without changes to environment in which it is conducted).
Whether these benefits can be achieved in the real world has been hotly debated, and the issue of mandatory disclosure has spawned many skeptics. In response to criticism levied at public hearings on the proposed rules in Los Angeles in November 1991 and in Atlanta in February 1992, the Advisory Committee significantly narrowed the scope of the disclosure requirement in the spring of 1992. Time will prove or disprove the wisdom of mandatory disclosure. In the meantime, a number of districts have already adopted automatic disclosure requirements at variance with the 1993 Amendment to Rule 26. Two examples are the Southern District of New York and the Eastern District of New York. In the Eastern District, the CJRA plan, effective February 1, 1992, calls for automatic disclosure in all cases, excluding social security, habeas corpus, civil rights cases in which an immunity defense is available, government forfeiture cases, and pro se matters, for an eighteen-month experimental period. Under the plan, unless the court orders otherwise, the parties must disclose:

(a) the identity of all persons with pertinent information respecting claims, defenses and damages;
(b) a general description of all documents in the custody and control of the parties bearing significantly on claims and defenses;
(c) authorization to obtain medical, hospital, no-fault and worker's compensation records;

78 Compare George F. Hritz, Plan Will Increase Cost, Delay Outcomes, N.Y. L.J., Apr. 13, 1993, at 3 (predicting that automatic disclosure will prove costly and inefficient) and Griffin B. Bell et al., Automatic Disclosure in Discovery—The Rush to Reform, 27 GA. L. REV. 1, 39-48 (1992) (positing that mandatory disclosure will increase motion practice and overproduce documents of little relevance, thereby increasing litigation costs) and Linda S. Mullenix, Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking, 69 N.C. L. REV. 795, 820-21 (1991) (questioning viability of mandatory disclosure) and Laura A. Kaster & Kenneth A. Wittenberg, Rulemakers Should Be Litigators, Nat'l L.J., Aug. 17, 1992, at 15 (commenting that mandatory disclosure impinges on work product and attorney/client protections) with Charles P. Sifton, Experiment a Bold and Thoughtful Step, N.Y. L.J., Apr. 13, 1993, at 3 (noting that automatic disclosure in most cases will make civil discovery less adversarial) and Winter, supra note 75, at 267 (arguing that mandatory disclosure amendments to Rule 26 will reduce costs and delay).

79 Twenty-four of the thirty-five districts with plans in effect as of September 1, 1992 have adopted some form of mandatory or voluntary disclosure. JUDICIAL CONFERENCE OF THE UNITED STATES, CIVIL JUSTICE REFORM ACT REPORT (1992).

80 CIVIL JUSTICE EXPENSE AND DELAY PLAN, U.S. DIST. CT. FOR THE E. DIST. OF N.Y. § II(A)(1) (1991) [hereinafter EDNY PLAN]. The experimental period has been extended by the court for an additional twelve months. Id.
(d) the documents relied on by the parties in preparing the pleadings or documents that are expected to be used to support allegations; and
(e) the contents of any insurance agreements.\(^{81}\)

The operative language of the disclosure in the EDNY plan varies from the 1993 Amendments. The EDNY plan requires disclosure of information “bearing significantly on claims and defenses” and further requires disclosure of all documents relied on by the parties in preparing the pleadings or documents that are expected to be used to support allegations.\(^{82}\) In the 1993 Amendments, on the other hand, the operative language is “relevant to disputed facts alleged with particularity in the pleadings.”\(^{83}\) Thus, under the 1993 Amendments, the disclosure requirement is much narrower than the EDNY formulation. The 1993 Amendments effectively place the decision of whether to impose automatic disclosure on the pleader. Specificity in pleading will create mandatory disclosure obligations; generality in pleading will not.

The Southern District of New York, on the other hand, requires automatic disclosure only in limited circumstances. Under the differentiated case management system adopted as part of the Southern District Plan, all cases are channelled to one of three tracks: complex, standard, or expedited.\(^{84}\) Automatic disclosure is required only in expedited cases.\(^{85}\)

The mechanics of automatic disclosure in the Southern District remain something of a mystery. The plan itself provides only that “[i]n cases to be expedited, defined categories of relevant documents will be produced automatically.”\(^{86}\) The user’s guide to the Southern District Plan, prepared by the Southern District Advisory Group, provides:\(^{87}\)

1. Expedited Cases-Automatic Disclosure
   In any case designated as Expedited by the Court at the Case Management Conference, within 21 days of filing a complaint a plaintiff must serve on each defendant legible copies of

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\(^{81}\) Id.

\(^{82}\) Id.


\(^{85}\) Id.

\(^{86}\) Id.

all documents relevant to the subject matter of the complaint. See Fed. R. Civ. P. 26(b)(1). Within 21 days of receiving such material, following designation by the Court, each defendant must serve on each plaintiff legible copies of all documents relevant to the subject matter of the answer. See Fed. R. Civ. P. 26(b)(1). A document is relevant to the subject matter of a pleading if it either (1) supports the material averments of the pleading or (2) contradicts or otherwise makes less probable the material averments of the pleading. In any case designated as Expedited by the court, the parties shall promptly thereafter carry out the automatic disclosure described above. (Citation omitted).

After this automatic disclosure by plaintiff and defendant, the case will be treated as described elsewhere in the Plan.88

Although the automatic disclosure requirement is limited to expedited cases, the mandated disclosures are far broader than those under the 1993 Amendments or under the Eastern District Plan.

The Southern District adopts a broadly defined “relevant to the subject matter” standard.89 The Eastern District requires disclosure of all documents relied on in preparing the pleadings and documents that are expected to be used to support allegations.90 Further, as noted above, a party in the Eastern District must also disclose “a general description of all documents . . . bearing significantly on claims and defenses.”91 By comparison, the 1993 Amendments, retrenching from earlier proposals, require disclosure of documents relevant to “disputed facts alleged with particularity in the pleadings.”92

Moreover, the timing of the disclosures differ. For example, under the Southern District Plan, it is contemplated that plaintiff must make automatic disclosure within twenty-one days of the designation of the case as expedited by the court.93 The defendant must make its disclosures within twenty-one days or receiving disclosure materials from the plaintiff.94 In the Eastern District,

88 Id.
89 See SDNY Guide, supra note 87, at 11.
90 See supra text accompanying notes 85-86.
91 See supra text accompanying notes 85-86.
93 See SDNY Guide, supra note 87, at 11. In any case designated as expedited, plaintiff must serve each defendant legible copies of all documents which are relevant to the complaint within 21 days of filing. Id.
94 Id.
both plaintiff and defendant must disclose relevant materials within thirty days of service of an answer.95 Any other party who has appeared in the case must make disclosures within thirty days of receiving a written demand from another party.96 The 1993 Amendments provide that disclosures should be made within ten days after the discovery planning conference held pursuant to Rule 26(f).97

The CJRA Model Plan prepared by the Judicial Conference of the United States,98 provides that disclosure should be in accordance with amended Rule 26(a) of the Federal Rules of Civil Procedure and recommends that approach to district courts.99 Assuming the current proposed language [of Rule 26(a)] becomes effective December 1, 1993, continuity and consistency can be achieved by adopting that language in the courts' expense and delay reduction plans.100

The drafters of the Federal Rules have been cognizant of developments under the CJRA and the variations in mandatory disclosure requirements that currently exist. Amended Rule 26(a) specifically allows district courts to vary mandatory disclosure requirements or exempt certain classes of cases from mandatory disclosure in order to accommodate plans adopted under the CJRA.101

Authorization of these local variations is, in large measure, included in order to accommodate to [sic] the Civil Justice Reform Act of 1990, which implicitly directs districts to experiment during the study period with differing procedures to reduce the time and expense of civil litigation. The civil justice delay and expense reduction plans adopted by the courts under the Act differ as to the type, form, and timing of disclosures required. Section 105(c)(1) of the Act calls for a report by the Judicial Conference to Congress by December 31, 1995, comparing experience in twenty of these courts; and section 105(c)(2)(B) contemplates that some changes in the Rules may then be needed. While these studies may indicate the desirability of further changes in Rule 26(a)(1),

95 See EDNY PLAN, supra note 80, ¶ II(A)(2).
96 EDNY PLAN, supra note 80, ¶ II(A)(2).
97 FED. R. CIV. P. 26(a)(1).
98 See 28 U.S.C. § 477 (Supp. 1992). The Judicial Conference was given the authority to develop a model civil justice expense and delay reduction plan based on the plans developed by the early implementation districts. Id.
99 See MODEL PLAN, supra note 26, ¶ 3(I)(A) commentary.
100 MODEL PLAN, supra note 26, ¶ 3(I)(A) commentary.
these changes probably could not become effective before December 1998 at the earliest. In the meantime, the present revision puts in place a series of disclosure obligations that, unless a court acts affirmatively to impose other requirements or indeed to reject all such requirements for the present, are designed to eliminate certain discovery, help focus the discovery that is needed, and facilitate preparation for trial or settlement. 102

The fact that the Advisory Committee anticipated probable variation from district to district and authorized these variations, thereby eliminating any technical claims of conflict, is beside the point. The real problem is that, under the CJRA plans, a variety of automatic disclosure provisions have come into existence which conflict with each other and with the 1993 Amendments to Rule 26. 103 This has created mass confusion in federal practice, which has been heightened by the lack of quick access to the plans. Moreover, the variations in disclosure requirements are likely to complicate the threshold question of forum selection as between state and federal courts and as between different federal district courts. Equally important, there is little, if any, case law on automatic disclosure. For this reason, it is almost impossible to predict a court's reaction to disputes involving automatic disclosure. In this regard, the unavailability of resources will once again result in significant information costs. Whether the information costs associated with forum selection and related issues are outweighed—or even offset—by any concomitant benefits through reduction in discovery costs remains unclear.

B. Discovery Limitations

The 1993 Amendments for the first time introduce presumptive limitations on the number of depositions and the number of interrogatories. Depositions are presumptively limited to ten per side. 104 Interrogatories are presumptively limited to twenty-

104 Fed. R. Civ. P. 30. Amended Rule 30 provides in pertinent part:
Rule 30. Depositions Upon Oral Examination
(a) When Depositions May Be Taken; When Leave Required.

(1) A party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by subpoena as provided in Rule 45.

(2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties,

(A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants;

(B) the person to be examined already has been deposed in the case; or

(C) a party seeks to take a deposition before the time specified in Rule 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave the United States and be unavailable for examination in this country unless deposed before that time.

(b) Notice of Examination: General Requirements; Method of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to, or included in, the notice.

(2) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means.

(3) With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.

(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes (A) the officer's name and business address; (B) the date, time, and place of the deposition; (C) the name of the deponent; (D) the administration of the oath or affirmation to the deponent; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through
camera or sound-recording techniques. At the end of the deposition, the
officer shall state on the record that the deposition is complete and shall
set forth any stipulations made by counsel concerning the custody of the
transcript or recording and the exhibits, or concerning other pertinent
matters.

(7) The parties may stipulate in writing or the court may upon mo-
ton order that a deposition be taken by telephone or other remote elec-
tronic means. For the purposes of this rule and Rules 28(a), 37(a)(1),
and 37(b)(1), a deposition taken by such means is taken in the district
and at the place where the deponent is to answer questions.

Id. \textsuperscript{105} See \textit{FED. R. CIV. P. 33} (effective Dec. 1, 1993). Amended Rule 33 provides in
pertinent part:

\textbf{Rule 33. Interrogatories to Parties}

(a) Availability. Without leave of court or written stipulation, any party
may serve upon any other party written interrogatories, not exceeding 25 in
number including all discrete subparts, to be answered by the party served
or, if the party served is a public or private corporation or a partnership or
association or governmental agency, by any officer or agent, who shall fur-
nish such information as is available to the party. Leave to serve additional
interrogatories shall be granted to the extent consistent with the principles
of Rule 26(b)(2). Without leave of court or written stipulation, interrogato-
ries may not be served before the time specified in Rule 26(d).

(b) Answers and Objections.

(1) Each interrogatory shall be answered separately and fully in
writing under oath, unless it is objected to, in which event the objecting
party shall state the reasons for objection and shall answer to the extent
the interrogatory is not objectionable.

(2) The answers are to be signed by the person making them, and
the objections signed by the attorney m 'ing them.

(3) The party upon whom the interrogatories have been served shall
serve a copy of the answers, and objections if any, within 30 days after
the service of the interrogatories. A shorter or longer time may be di-
rected by the court or, in the absence of such an order, agreed to in writ-
ing by the parties subject to Rule 29.

(4) All grounds for an objection to an interrogatory shall be stated
with specificity. Any ground not stated in a timely objection is waived
unless the party’s failure to object is excused by the court for good cause
shown.

(5) The party submitting the interrogatories may move for an order
under Rule 37(a) with respect to any objection to or other failure to an-
swer an interrogatory.

(c) Scope; Use at Trial. Interrogatories may relate to any matters which
can be inquired into under Rule 26(b)(1), and the answers may be used to the
extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable
merely because an answer to the interrogatory involves an opinion or con-
tention that relates to fact or the application of law to fact, but the court may
order that such an interrogatory need not be answered until after designated
The Eastern District Plan contains a slightly different mechanism for limiting depositions and interrogatories. Under the Eastern District approach, limitations are to be determined by agreement of the parties and, failing that, by order of the court.106 If the parties cannot agree and the court does not prescribe limits, then the Plan presumptively limits depositions to ten per side and interrogatories to fifteen per side.107

The limitations set forth in the 1993 Amendments and in the Eastern District Plan are not cast in concrete. Nor can it be fairly said that the limits reflect a judgment with respect to how much discovery is ordinarily sufficient in a given case. The purpose of the limitations is to encourage the parties, either together or in consultation with the court, to map out a cost-effective discovery plan tailored to the needs of the particular case.108 In actuality, the limitations are default provisions—designed to come into play only when parties cannot agree on, and the court does not order, the amount of discovery in the case. The presumptive limitations are obviously inappropriate in complex commercial matters and complex product liability litigation. They are less significant in personal injury cases. In all cases, complex and simple, the limitations are designed to encourage cooperation, not to thwart the prosecution of meritorious claims and defenses.

The Southern District Plan does not address the issue of numerical limitations on depositions and interrogatories directly. It does, however, appear to contemplate some indirect limitations on discovery. For instance, the Guide to the Southern District of New York Civil Justice Expense and Delay Reduction Plan defines an expedited case as one “where it is believed that there will be no more than one or two depositions by each party; where the documents to be exchanged are clear-cut in nature and relatively small in volume; [and] where the use of interrogatories will be minimal.”109 In addition, by local rule, the Southern District limits the

discovery has been completed or until a pre-trial conference or other later time.

Id.

106 See EDNY PLAN, supra note 80, ¶ II (C)(1).
107 EDNY PLAN, supra note 80, ¶ II (C)(1)-(2).
108 FED. R. CIV. P. 30 advisory committee notes (stating that objective of Rule 30 is to entice counsel to develop discovery plan which is mutually cost-effective).
109 See SDNY GUIDE, supra note 87, at 2.
point in time at which certain types of interrogatories may be served without a court order.\textsuperscript{110}

The Judicial Conference's approach in its Model Plan ties discovery limitations to the track to which a particular case is assigned.\textsuperscript{111} It provides:

Upon the filing of each case, the Court will assign the case to one of six tracks. Each track will carry presumptive discovery limits as set forth below. These limits shall govern the case and may not be changed by the parties or their attorneys by agreement or otherwise. The judicial officer to whom the case is assigned may, upon good cause shown, expand or limit the discovery.

| Track One: | No discovery |
| Track Two: | Disclosure only |
| Track Three: | Disclosure plus 15 interrogatories, 15 requests for admission, depositions of the parties, and depositions on written questions of custodians of business records for third parties. |
| Track Four: | Disclosure plus 15 interrogatories, 15 requests for admission, depositions of the parties, depositions on written questions of custodians of business records for third parties, and three other depositions per side (i.e., per party or per group of parties with a common interest.) |
| Track Five: | A discovery plan tailored by the judicial officer to fit the special management needs of the case. |
| Track Six: | Specialized treatment and program as determined by the judicial officers.\textsuperscript{112} |

Tailoring discovery to meet the needs of a particular case is unquestionably a worthy goal. Once again, the problem lies in the variations from district to district. As with mandatory disclosure, these variations generate additional expense in terms of search and information costs.

C. Tracking

The CJRA requires advisory groups and courts to consider implementing a system of differentiated case management ("DCM"),

\textsuperscript{110} SDNY Plan R. 46(c) ("At the conclusion of each party's discovery, and prior to the discovery cut-off date, interrogatories . . . may be served unless the court has ordered otherwise.").

\textsuperscript{111} See Model Plan, supra note 26, § 3(I)(D).

\textsuperscript{112} Model Plan, supra note 26, § 3(I)(D).
featuring separate litigation tracks for various types of cases. The underlying rationale of DCM is that not all civil cases in the federal system are alike and that the perceived "one size fits all" approach of the Federal Rules is not the most efficient mechanism for resolving cases that vary markedly in scope, in factual complexity, and in the degree of legal sophistication.

As discussed, the Southern District of New York has developed a three-tier tracking system: expedited, standard, and complex. The Model Plan has embraced a five-track plan implemented by the Northern District of Ohio. These tracks are as follows:

1. "Expedited" - Cases on the Expedited Track shall be completed within nine (9) months or less after filing, and shall have a discovery cut-off no later than one-hundred (100) days after filing of the [case management plan] ("CMP"). Discovery guidelines for this track include interrogatories limited to fifteen (15) single-part questions, no more than one (1) fact witness deposition per party without prior approval of the Court, and such other discovery, if any, as may be provided for in the CMP.

2. "Standard" - Cases on the Standard Track shall be completed within fifteen (15) months or less after filing, and shall have a discovery cut-off no later than two-hundred (200) days after filing of the CMP. Discovery guidelines for this track include interrogatories limited to thirty-five (35) single-part questions, no more than three (3) fact witness depositions per party without prior approval of the Court, and such other discovery, if any, as may be provided for in the CMP.

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115 See supra note 10 and accompanying text.

116 See SDNY Plan, supra note 84, at 3.


118 Model Plan, supra note 26, § 1(II)(A).
3. "Complex" - Cases on the Complex Track shall have the discovery cut-off established in CMP and shall have case completion goal of no more than twenty-four (24) months.

4. "Administrative" - Cases on the Administrative Track shall be referred by Court personnel directly to a Magistrate Judge for a report and recommendation. Discovery guidelines for this track include no discovery without prior leave of Court, and such cases shall normally be determined on the pleadings or by motion.

5. "Mass Torts" - Cases on the Mass Torts Track shall be treated in accordance with the special management plan adopted by the Court. 119

The Model Plan also endorses a six track plan adopted by the Western District of Michigan, which provides: 120

1. "Super Fast Track" - Voluntary; few legal issues, parties; agreement to waive trial before Article III judge, forego alternative dispute resolution ("ADR"), and participate in speedy pre-discovery disclosure.

2. "Fast Track" - Cases historically concluded in less than nine months; litigants and legal issues relatively few; ADR use rare; discovery limited in number of depositions and interrogatories; case may be assigned to an alternate Article III judge to preserve the trial date if necessary.

3. "Standard Track" - Cases historically concluded in nine months to a year; decision on assignment to this track to rest with judge and litigants; mediation and arbitration frequently used; summary jury trials rarely used; discovery tailored to the individual case.

4. "Complex Track" - Cases that historically take more than two years to resolve; involve complicated legal issues or a large number of parties; evaluated by a judicial officer and parties to require extended processing time; will almost always be subjected to range of ADR techniques; discovery tailored to the individual case.

5. "Highly Complex Track" - Cases that historically take two or more years to complete; are exceptionally complex; involve large numbers of parties, extensive pre-trial motions or proceedings; includes class actions; a magistrate judge will normally be assigned to make reports, recommendations, and assist in resolv-

119 MODEL PLAN, supra note 26, § 1(II)(A).
120 MODEL PLAN, supra note 26, § 1(II)(A); DIFFERENTIATED CASE MANAGEMENT PLAN OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN; U.S. DIST. CT. FOR THE W. DIST. OF MICH. (1992), available in 1991 WESTLAW 525138.
ing pre-trial and discovery disputes; very few cases will be placed on this track.

6. "Minimally Managed Track" - Approximately 10% of all cases will be randomly assigned as a control group for the system; judicial involvement minimal and reactive; extensive pre-trial statements, joint case management orders, or other documentation are not contemplated; ADR used only on motion or agreement of the parties; the judicial officer will not be directly involved in supervising discovery or managing trial preparation.\textsuperscript{121}

The Eastern District of New York did not adopt a formal tracking system, but its plan does codify an informal tracking system under which social security, habeas corpus, and complex cases receive special treatment; and all cases involving $100,000 or less are referred to court-annexed arbitration.\textsuperscript{122}

The 1993 Amendments also do not address the DCM issue. The Federal Rules leave the management of each case to the individual judge assigned.\textsuperscript{123} Ten years ago, the 1983 Amendments to the Federal Rules, particularly the changes in Rule 16, were designed to encourage the assigned judge to take an active role in managing the docket,\textsuperscript{124} but the exact degree of hands-on control was left to the discretion of the individual judge. The 1993 Amendments reinforce this approach. Under proposed rule 16(c)(6), the court at a pretrial conference may consider: "the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rules 29 through 37."\textsuperscript{125}

A program for tracking of cases may be sound in theory, but in reality, tracking is likely to prove impractical and costly. First, every case has unique aspects, and the mere fact that the theories of recovery are the same in two cases does not mean that they should be treated the same. Second, the single claim complaint is a rarity, if not an endangered species, in federal practice. Most complaints contain a variety of claims joined into one action. Attempting to assign such multi-claim complaints a track may prove time-consuming and costly. Disputes between the parties as to

\begin{itemize}
\item \textsuperscript{121}Model Plan, supra note 26, § 1(II)(A).
\item \textsuperscript{122}See EDNY Plan, supra note 80, ¶ I(A) (choosing not to revise court's existing system).
\item \textsuperscript{123}Fed. R. Civ. P. 16(b) (effective Dec. 1, 1993) (giving district judges limited scheduling and planning authority).
\item \textsuperscript{124}See Fed. R. Civ. P. 16(a) (stating that object of Rule 16 is expedition of cases).
\item \textsuperscript{125}Fed. R. Civ. P. 16(c)(6) (effective Dec. 1, 1993).
\end{itemize}
which track is appropriate have already arisen, forcing judicial in-
tervention in a new area and again proving costly. Moreover,
there is at least anecdotal evidence that courts and the parties
have been slow to integrate the tracking system into their pretrial
practice. This evidence supports the contention that tracking is
not a practical tool to address litigation in the federal system.

D. Alternative Dispute Resolution

The CJRA encourages broader use of alternative dispute reso-
lution ("ADR") techniques. The CJRA also directs that districts
consider adopting "a neutral evaluation program for the presenta-
tion of the legal and factual basis of a case to a neutral court rep-
resentative selected by the court at a nonbinding conference con-
ducted early in the litigation." Most plans have followed through on this suggestion and have
attempted to encourage litigants to make greater use of ADR, for example, the Eastern District of New York has introduced pro-
gams for court-annexed mediation and early neutral evaluation
("ENE") to be administered by the newly-established post of ADR Coordinator. In addition, all matters involving damages of
$100,000 or less are referred to a pre-existing program of court-
annexed arbitration. Unlike court-annexed arbitration, which
is mandatory, court-annexed mediation may be ordered only
upon consent of the parties. The parties, by consent or at direc-
tion of the court, may also initiate ENE.

The Southern District has established a two-year program of
court-annexed mediation for all expedited cases and for a sam-
pling of other civil cases. This program applies only to those
cases where money damages are sought, and excludes social se-
curity cases, tax matters, prisoners' civil rights cases, and pro se

127 Id. § 473(b)(4).
129 See EDNY PLAN, supra note 80, ¶ III(A)-(B).
130 See EDNY PLAN, supra note 80, ¶ III(A)-(B).
131 See EDNY PLAN, supra note 80, ¶ III(A)-(B).
132 See EDNY PLAN, supra note 80, ¶ III(A)-(B).
133 See EDNY PLAN, supra note 80, ¶ III(A)-(B).
134 SDNY PLAN, supra note 84, at 5.
The Southern District has also designated a civil case manager to supervise the mediation process.\textsuperscript{136}

The Model Plan sets forth a sampling of ADR programs involving court-annexed mediation, ENE, and arbitration.\textsuperscript{137} It also proposes additional ADR techniques, including summary jury trials, summary bench trials, minitrials, and settlement weeks with neutral attorneys.\textsuperscript{138}

The 1993 Amendments do not address ADR. Indeed, very little is said in the Federal Rules about ADR, although the Rules have always provided for some alternative mechanisms for resolving disputes.\textsuperscript{139} The 1983 Amendments to the Federal Rules authorized courts to consider recommending at pretrial conferences the use of extrajudicial procedures to resolve the dispute.\textsuperscript{140} This dearth of discussion is not surprising, since the Federal Rules are intended to address only practices and procedures in federal courts.

The question is not whether the Federal Rules should address ADR but whether the Federal Rules should provide the courts with the same tools that make ADR attractive to many litigants—limited discovery, summary presentations of evidence, early trial dates, and prompt decisions. Nevertheless, before ADR is embraced as a panacea, we should keep in mind that, although ADR has been available for many years and ADR techniques have been employed in many cases, the court backlog has worsened.\textsuperscript{141} Moreover, ADR may, in the long run, only add to problems of expense and delay.

**Conclusion**

The CJRA, by encouraging local experimentation and variations in federal practice and procedure, has created significant confusion and uncertainty. Although in theory the procedures mandated by various plans may in the long run inure to the benefit of all courts in the federal system, the short run costs for the marginal gains likely to be achieved are simply too high. Reform

\textsuperscript{135} SDNY Guide, supra note 87, at 14-15.

\textsuperscript{136} SDNY Guide, supra note 87, at 15.

\textsuperscript{137} Model Plan, supra note 26, § 4(I).

\textsuperscript{138} Model Plan, supra note 26, § 4(I).

\textsuperscript{139} See, e.g., Fed. R. Civ. P. 53 (allowing court to appoint special master).

\textsuperscript{140} Fed. R. Civ. P. 16(c)(7).

\textsuperscript{141} See Dayton, supra note 128, at 914-28.
at the national level rather than at the grassroots is a more sound and desirable course.