LOCAL RULES

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Professor Subrin has done a distinguished job which I believe deserves a significant place in the literature. In planning my brief comments, I leave to my partner, Janet Napolitano, who chairs the local rules committee in our state, the task of stating a general philosophy for local rules. I, instead, shall begin with the general premise that local rules are the curse of the law-practicing classes.

Let me begin with an article of faith, which Professor Subrin has quoted directly in his paper, with specific application to my own state, Arizona. Arizona is the number one state in the Union for conformity to the Federal Rules. For the thirty or more years that I was on the state committee, we always tried to be the first to adopt the amendments, and we carried this alacrity to such an extreme that on rare occasions we beat the rulemakers and enacted the amendments before the federal government did. Our problem has been to key the Rules to the annual supplements of our codes.

Conformity has been an article of faith with us. We have carried this faith on occasion to the point of doing what we really did not want to do; I remind myself a little of a devout Catholic priest who after Vatican II switched to an English liturgy though he would have preferred to stay with the Latin.

The why of all this conformity was clear enough. Our goal was to make life as simple as possible for our lawyers, particularly the young ones as they came along, so that they could not make mistakes easily. We believed that uniformity was more valuable than the detailed merit of any particular rule—that the range of choice between rule alternatives was not great enough to warrant the hazard of a lawyer making a mistake by following the wrong rule.

Particularly with the diversity jurisdiction system, for which I have been a lifelong national champion, we have the same lawyers in both the state and federal courts. We in Arizona place a very high value on the lawyer who, for example, is handling a discovery problem in the office—relying, not uncommonly, on a paralegal—having only one rule to follow. There is no need to check whether the proceeding is

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in a matter which will be handled, in the physical case of my own office, in the federal building a block to the north or in the state building a block to the south. I will say only parenthetically that sometimes we are wrong, as we are bound to be; Rule 11, for example, is a disaster we wish we had never laid upon the state court system. But in fifty years, that is the only shrieking or howling mistake we have made in the name of uniformity; the benefits, however, have been enormous.

Local rules stick in the teeth of our objectives. To pick a trivial illustration, when we submit some pro forma application in the federal court, the order must be on a separate piece of paper; in the state court, the order may be on the same piece of paper as the motion. This difference generates pure waste. Quite a few papers come back to us from the federal courts because some secretary, ninety percent of whose work is in the state court, followed the state court practice instead of the federal court practice. This example does not matter much—but it matters some.

When the local rules vary from district court to district court within a jurisdiction, the situation becomes an outright abomination. I cannot report on the Denver situation at this moment, but the last time I looked into it, a litigation law office needed an entire wall plastered with the separate local rules for each of the district courts in that community. This kind of divergence, I would say bluntly, is the product of sheer arrogance and irresponsibility. I choose the word "arrogance" with deliberate care. In the fundamental terms of the cost of practicing law, it is more important to be uniform than to be right.

This is not to say that there is no function for local rules, but it is a narrow one. A tremendous weakness of local rules is the failure to give thought to all the values worth taking into account. Again, let me be concrete. Some district courts have held occasional status days or calendar calls when all the lawyers and all the matters before them were called into court simultaneously for a series of one-minute reports or equally brief orders. All those lawyers had to get to and from that courtroom and had to sit through everything else on the calendar. I personally have seen occasions when litigants were being charged, in the aggregate, somewhere between $10,000 and $20,000 for a ceremony which was operated exclusively for the convenience of the judge and which could have been handled just as well by postcards, clerks, or telephone calls.

I do not mean to focus on that particular practice. I do mean to focus on the fact that whoever made up the local rule underlying that practice clearly was not thinking of all the aspects of the operation. Local rules require as much thought as general rules.

One other point: we are inclined to think of local rules as a series of mandates on a piece of paper which can be tucked neatly into a rules pamphlet. These are not the only local rules. By their interpretations, the various courts, and particularly the courts of appeals, can make what amount to local rules for vast areas. Take Rule 11, for example. The Ninth Circuit Court of Appeals in *Zaldivar v. City of Los Angeles*[1] and *Golden Eagle Distributing Corp. v. Burroughs Corp.*[2] has given Rule 11 narrowing interpretations which in effect amount to local rules enacted by decision. So have a number of other circuits. The circuits' interpretations vary and, to the extent that they vary, they really are local rules. We need to keep as sharpened an eye on rulemaking by construction as on rulemaking by edict.

For concepts underlying local rulemaking, I pass the baton to my partner, Ms. Napolitano.

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[1] 780 F.2d 823, 832 (9th Cir. 1986) (stating that a pleading well grounded in fact and warranted by existing law cannot constitute Rule 11 harassment, even if the attorney's motive for filing it was improper).

[2] 801 F.2d 1531, 1539-40, 1541-42 (9th Cir. 1986) (stating that Rule 11 does not require attorneys to cite contrary authority or to differentiate arguments for extending the law from arguments for applying existing law).