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The New Second Circuit Local Rules: Anatomy and Commentary

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THE NEW SECOND CIRCUIT LOCAL RULES: ANATOMY AND COMMENTARY

*Jodi S. Balsam**

ABSTRACT

The New Second Circuit Local Rules provides a general account of the origins, accretion, and renewal of local rules in the federal appellate courts, and specific commentary on the wholesale revision of the Second Circuit's local rules, adopted in 2010. The Second Circuit local rules had not been holistically reappraised in over 100 years when, in 2008, the Court engaged me to spearhead a comprehensive review and rewrite. Among other things, the project undertook to comply with appellate local rulemaking strictures imposed by 1995 amendments to the Federal Rules of Appellate Procedure and by Judicial Conference mandates that originated in a burst of local rule study and superintendence during the 1990s. Notably, the Second Circuit is alone among the thirteen federal appellate courts to conduct such a comprehensive overhaul of its local rules in accordance with the new strictures. This ambitious project has met with great success and provides a role model for other courts considering rules reform.

The article has two objectives: (1) to explain the context of the Second Circuit local rules revision project by providing a history of local rulemaking in the federal appellate courts, including

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efforts at the national level to reform the circuits' fragmented collections of local rules, and the Second Circuit's response to those efforts; and (2) to supply a commentary on the new and revised Second Circuit local rules that details how the new rulemaking parameters were applied, and the practical effect of the resulting reforms. It is hoped that an account of how the Second Circuit local rules revision was accomplished may animate and facilitate other federal courts' efforts at local rules reform, and assist the practicing bar to understand the proper purposes of local rulemaking generally and to navigate the Second Circuit's new rules.

Table of Contents

| | |
|---|-----|
| INTRODUCTION | 472 |
| I. ANATOMY OF THE NEW SECOND CIRCUIT LOCAL RULES | 475 |
| A. Local Appellate Rulemaking | 475 |
| 1. History of Local Rulemaking Power | 475 |
| 2. The Standing Committee's Local Rules Project ... | 480 |
| 3. 1995 Amendments to FRAP 47 | 486 |
| 4. The Restyled FRAP and the Guidelines for Drafting and Editing Court Rules | 490 |
| B. History of Second Circuit Local Rulemaking | 494 |
| C. Methodology of the Second Circuit Local Rules Revision Project | 500 |
| II. COMMENTARY ON THE NEW SECOND CIRCUIT LOCAL RULES .. | 503 |
| A. Scope and Organization | 504 |
| B. Docketing the Appeal and Preparing the Record | 504 |
| C. Electronic Case Filing | 509 |
| D. Motion Practice | 511 |
| E. Briefing Schedules and Requirements for Briefs and Appendices | 516 |
| F. Criminal Appeals | 521 |
| G. Habeas Corpus | 524 |
| H. Civil Appeals Management Plan and Related Rules ... | 525 |
| I. Oral Argument | 527 |
| J. Post-Disposition Matters | 529 |
| K. Attorney Regulation | 531 |
| L. Local Rules Relating to the Organization of the Court | 533 |
| M. Rescinded Rules | 535 |
| CONCLUSION | 536 |

INTRODUCTION

Effective January 1, 2010, the Court of Appeals for the Second Circuit adopted new and revised Local Rules (LRs) and Internal Operating Procedures (IOPs) (collectively, the “local rules”).¹ The new and revised rules are the culmination of a wholesale review of Second Circuit Local Rules taking into account rulemaking strictures that the Federal Rules of Appellate Procedure (FRAP) introduced in 1995,² and contemporaneous guidance from the Judicial Conference of the United States (the “Judicial Conference”).³ Since this 1990s burst of local rulemaking study and superintendence, the Second Circuit is alone among the thirteen federal circuits to conduct such a comprehensive review and rewrite in accordance with the new parameters. The review also coincided with the Second Circuit’s implementation of a new case management system and electronic case filing, presenting an opportunity to issue a comprehensive set of rules that reflect and advance the prevailing methods of processing appeals and administering court business.

The Second Circuit’s local rules were perhaps most in need of an overhaul, given that they were first promulgated in 1892 and had not since been comprehensively audited. The review and revision process exposed an array of defects in this body of rules. The wording of some local rules had not changed for over one hundred years. Other local rules had been overtaken by national rules or federal statutes, and consequently were either impermissibly inconsistent or obsolete. Many rules existed in

¹ See 2D CIR. LR 1–47; 2D CIR. IOP A–I. All circuit rules cited in this article are current to December 1, 2010, based on the text of the local rules available on that circuit’s official website.

² FED. R. APP. P. 47(a) & Note to 1995 Amendments [hereinafter, all citations to the Federal Rules of Appellate Procedure will be abbreviated FRAP].

³ See, e.g., BRYAN A. GARNER, GUIDELINES FOR DRAFTING AND EDITING COURT RULES (1996 ed.); DANIEL R. COQUILLETTE & MARY P. SQUIERS, REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES ON APPELLATE PRACTICE (Jan. 14, 1991) [hereinafter APPELLATE LOCAL RULES REPORT] (report to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States) (on file with author). See *infra* Part I.A.

desuetude.⁴ Filling in the gaps were a patchwork of standing orders, instruction booklets, and website notices.⁵ The need to consult and reconcile multiple sources of guidance and instruction undoubtedly increased the expense and complexity of appellate practice in the Second Circuit, and impaired the court's efficiency in processing those appeals. In short, the Second Circuit local rules were no longer adequate to convey court policies or to impart necessary guidance to attorneys practicing before the court.⁶

How the court came to this pass is a cautionary tale that is best understood in the context of the history of local rulemaking generally and the Second Circuit's experience in particular. This article aims to illustrate this history and how it has been redeemed through an ambitious and auspicious project to rebuild a creaky apparatus of local appellate legislation. Over the course of eighteen months from Summer 2008 through the new rules' effective date on January 1, 2010, the Second Circuit met the challenges of totally revising its local court rules through the efforts and cooperation of its judges, court personnel, and an advisory committee of private attorneys.⁷ It is hoped that an account of how it was accomplished may animate and facilitate other courts' efforts at local rules reform, and assist the practicing bar to understand the proper purposes of local rulemaking generally and to navigate the Second Circuit's new rules.⁸

⁴ See *infra* Parts I.B, II.M.

⁵ See, e.g., COMM. ON FED. COURTS, THE ASS'N OF THE BAR OF THE CITY OF N.Y., APPEALS TO THE SECOND CIRCUIT 55–60 (9th ed. 2007) (deriving instructions for filing and serving briefs from the Civil Appeals Management Plan, the *CAMP Guidelines*, the *Second Circuit Handbook*, the Revised Plan to Expedite the Processing of Criminal Appeals, and forms available on the court's website).

⁶ “Local rules of a court are rules on rules. They had better be guides to navigation or they become submerged rocks and hidden shoals.” Interview with Chief Judge Dennis Jacobs, U.S. Court of Appeals for the Second Circuit, in N.Y., N.Y. (July 6, 2010).

⁷ See *infra* Part I.C.

⁸ See, e.g., JEANNE JOHNSON BOWDEN, FED. JUDICIAL CTR., A PRACTICAL GUIDE TO REVISION OF LOCAL COURT RULES (1988), available at [http://www.fjc.gov/public/pdf.nsf/lookup/pgrlcr.pdf/\\$file/pgrlcr.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/pgrlcr.pdf/$file/pgrlcr.pdf) (describing the rules revision process undertaken by the Northern District of Georgia to serve

Part I of this article presents an anatomy of federal courts local rulemaking in general and in the Second Circuit in particular. Section A of this anatomy charts the origins and history of local rulemaking in the federal circuit courts, describing the sources of this judicial power, and how its exercise led to fragmentation and disunity of appellate practice rules across the thirteen federal circuits. This section also reviews various reform efforts to unify and nationalize appellate practice, including statutory imperatives, survey projects, FRAP amendments to clarify local rulemaking authority, and Judicial Conference standardization of stylistic conventions. Section B of Part I traces the history of local appellate rulemaking in the Second Circuit, and the circuit's response to federal reform efforts, which has included periods of both inattention as well as innovative responses to the challenges of judicial administration. This section further describes the Second Circuit's deviation over time from rulemaking standards imposed by FRAP and the Judicial Conference. Section C of the anatomy describes the methodology and parameters the Second Circuit employed in conducting its review and renovation of the local rules.

Part II of the article presents commentary on the new and revised Second Circuit local rules. This part is essentially a catalogue of the practical effects of the alteration or introduction of particular individual rules on Second Circuit appellate practice and court operation, organized to correspond, categorically and chronologically, to how an appellate practitioner might interact with the rules during the course of a case. This section addresses how the governing parameters for revision were applied to particular rules, and how Second Circuit appellate practice differs in the new regime.

I conclude with practical suggestions for how the Second Circuit might maintain the freshness and vitality of its rules going forward and how other circuit courts might similarly take up this enterprise. Local appellate rulemaking may be necessary to accommodate the interpersonal dynamics among a court's members, its specialized docket management needs, or local

as a role model for other trial courts).

practitioners' expectations and relationships with the bench. However, variation among local appellate rules should be minimized and mitigated through regular review and compliance efforts that honor FRAP strictures and Judicial Conference guidance.

I. ANATOMY OF THE NEW SECOND CIRCUIT LOCAL RULES

A. Local Appellate Rulemaking

In 1968, the Federal Rules of Appellate Procedure became effective, unifying federal appellate procedure for the first time.⁹ FRAP 47, however, reserved the appellate courts' local rulemaking power.¹⁰ The history of this power and its exercise in the United States courts provide necessary context to a discussion of the Second Circuit's local rules revision project.

1. History of Local Rulemaking Power

It has long been accepted that courts have inherent power to prescribe local rules of practice and procedure that they deem necessary to conduct their business, so long as such rules are within the scope of the courts' jurisdiction and authority.¹¹ In the

⁹ See generally 43 F.R.D. 61 (1968) (announcing Federal Rules of Appellate Procedure as prescribed and adopted December 4, 1967, and effective July 1, 1968).

¹⁰ FRAP 47 (1968) (amended 1998):

Each court of appeals by action of a majority of the circuit judges in regular active service may from time to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules.

¹¹ *McDonald v. Pless*, 238 U.S. 264, 266 (1915) ("In the very nature of things the courts of each jurisdiction must each be in a position to adopt and enforce their own self-preserving rules."); *United States v. McSherry*, 226 F.3d 153, 155–56 (2d Cir. 2000) ("[F]ederal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." (quoting *United States v. Johnson*, 221 F.3d 83, 96 (2d Cir. 2000))). See also Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015,

Judiciary Act of 1789, the first Congress endorsed local rulemaking power, announcing that “all the said courts of the United States shall have power . . . to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States.”¹² Subsequent judiciary legislation has repeatedly acknowledged the power of courts to make rules necessary for the conduct of their business.¹³ When it established the Circuit Courts of Appeal in 1891, Congress again expressly acknowledged the power of each appellate court to specify local rules pertaining to its operation.¹⁴

Local rulemaking power survived even the 1934 passage of the

1040 n.102 (1982) (“‘Supervisory rulemaking’ refers to the promulgation of court rules for the conduct of proceedings in inferior courts and should be distinguished from local rulemaking, the promulgation of court rules for the conduct of proceedings in the promulgating court.”); Amy E. Sloan, *A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule*, 79 IND. L.J. 711, 737 n.125 (2004) (distinguishing between a court’s “inherent” power “to take action for itself that it deems necessary to process litigation to a conclusion,” and a court’s “supervisory” power “to make and review procedures used by a subordinate court”).

¹² Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83.

¹³ See, e.g., Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276 (regulating practice in equity and admiralty courts, “subject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient”); Process Act of 1828, ch. 68, § 1, 4 Stat. 278, 278–81 (regulating procedure in common law suits in federal court, “subject, however, to such alterations and additions, as the said courts of the United States respectively shall, in their discretion, deem expedient”); Act to Further the Administration of Justice (“Conformity Act”) of 1872, ch. 255, § 5, 17 Stat. 196, 197 (authorizing the district courts to “regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings”). See generally Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2012 & n.65 (1989) (noting that the Conformity Act did not nullify district court local rulemaking power).

¹⁴ Circuit Courts of Appeals Act of 1891, ch. 517, § 2, 26 Stat. 826, 827 (Each of said circuit courts of appeals “shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law.”), *amended by* Act of Mar. 3, 1911, ch. 231, § 122, 36 Stat. 1087, 1132.

Rules Enabling Act (REA), authorizing the Supreme Court to prescribe procedural rules for the lower courts subject to Congressional approval.¹⁵ The REA was the outcome of decades of efforts to reform the disunity, confusion, and complexity of federal rules of practice and procedure.¹⁶ The operative provision, Section 2072(a), currently provides: “The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.”¹⁷ The Supreme Court exercises its authority to create and amend federal court rules in cooperation with the Judicial Conference and its Committee on Rules of Practice and Procedure, commonly referred to as the “Standing Committee.”¹⁸

Although the 1934 REA was intended to centralize and unify federal practice and procedure, it did not abrogate or qualify courts’ authority to promulgate local rules, leaving intact the various provisions of the Judicial Code empowering specified

¹⁵ Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2071-2077 (2006)).

¹⁶ See generally Burbank, *supra* note 11.

¹⁷ Rules Enabling Act, 28 U.S.C.A. § 2072(a) (West 2010).

¹⁸ The Judicial Conference sits at the top of a three-level rulemaking hierarchy. For appellate rules, the first level is the Advisory Committee on Appellate Rules, which drafts proposed rule changes based on suggestions from interested individuals such as judges, clerks of court, lawyers, professors, and government agencies. The Advisory Committee recommends these rule changes to the second level, the Committee on Rules of Practice and Procedure (the “Standing Committee”). If the Standing Committee approves the rule changes, it then sends the rules to the public for a six-month comment period. After reviewing and synthesizing the public comments, the Advisory Committee meets again to refine the rule and submit it to the Standing Committee for re-approval. If the Standing Committee again approves the rule, it transmits them to the third level—the Judicial Conference. Only after the Judicial Conference approves the rules are they then submitted to the Supreme Court for final approval. If the Supreme Court approves the rules, Congress has a period of time to act to stop a rule adoption or amendment. See generally James C. Duff, *A Summary For the Bench And Bar: The Federal Rules of Practice and Procedure*, ADMIN. OFFICE OF THE U.S. COURTS (Oct. 2010), <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/SummaryBenchBar.aspx>.

courts, other than the Supreme Court, to make rules.¹⁹ REA amendments in 1948 consolidated the provisions authorizing local rulemaking in what is now codified at 28 U.S.C. § 2071(a).²⁰ The current version of Section 2071(a) authorizes local rulemaking as follows: “The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.”²¹

Procedural reform in the wake of the 1934 REA focused chiefly on adoption of Federal Rules of Civil Procedure governing practice in the district courts.²² Despite the call for national uniformity, the original version of the Federal Rules allowed for district court local rulemaking.²³ Appellate court local rulemaking did not make it onto the agenda of the Standing Committee for thirty more years, after still more complaints about idiosyncratic variations in practice.²⁴ Yet, when the Federal Rules of Appellate

¹⁹ See, e.g., 28 U.S.C. §§ 219, 263, 296, 307, 723, 731 & 761 (1940) (empowering circuit courts of appeals, Court of Claims, U.S. Customs Court, the Court of Customs and Patent Appeals, and the district courts to make local rules); 26 U.S.C. § 1111 (1940) (relating to the Tax Court).

²⁰ Act of June 25, 1948, ch. 646, § 2071, 62 Stat. 869, 961.

²¹ Rules Enabling Act, 28 U.S.C.A. § 2071(a) (West 2010).

²² See 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 1001–08 (3d ed. 2002) (discussing generally the history of the promulgation of the federal rules); see also generally Subrin, *supra* note 13; Burbank, *supra* note 11.

²³ Federal Rule of Civil Procedure 83, which in its original version provided: “Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.” FED. R. CIV. P. 83 (1937) (amended 1938). Although the rule has been supplemented over the years, the substance of this provision is unchanged. See FED. R. CIV. P. 83(a)(1).

²⁴ See 16A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3945 (4th ed. 2008) (quoting Senior Circuit Judge Albert B. Maris who in 1964 attributed “unnecessary delays” and “growing expenses” of appellate litigation to “outmoded rules” promulgated by the individual circuit courts); see also *id.* (describing procedural differences across the circuits in

Procedure took effect on July 1, 1968,²⁵ they also expressly reserved the appellate courts' local rulemaking power.²⁶ Both the REA and FRAP 47 limited local rulemaking power to those rules relating to a court's "practice" or "business" that are "consistent" with all other federal statutes.²⁷

The circuit courts of appeal, in the habit of defining their local rules of practice since their creation in 1891, were not significantly constrained by FRAP, especially given its explicit endorsement of local rulemaking. Local rules continued to multiply in both the district and circuit courts,²⁸ and practitioners complained about divergences of practice and profusion of rules.²⁹ In response, Congress amended the REA in 1988 to require public notice and an opportunity to comment before any federal court adopted local rules, and to empower the Judicial Conference to abrogate any appellate local rule it finds to be inconsistent with federal law.³⁰

areas such as motion practice, assembling the record, format of briefs and appendices, oral argument, petitions for rehearing, and issuance of mandate).

²⁵ See generally 43 F.R.D. 61 (1968).

²⁶ FRAP 47 (1968) (amended 1998). For the language of FRAP 47 as published in 1968, see *supra* note 10.

²⁷ Rules Enabling Act, 28 U.S.C.A. § 2071(a) (West 2010); FRAP 47(a)(1).

²⁸ See generally *supra* note 24 (discussing appellate local rulemaking).

²⁹ See Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 68 U. COLO. L. REV. 1, 7–25 (1997) (describing the "remarkable disunity in rules of appellate practice among the federal courts of appeals, including notable instances of actual conflict between local practice and the FRAP"). Complaints about fragmentation of appellate procedure date back at least sixty years. See MARVIN SCHICK, *LEARNED HAND'S COURT* 85 (1970) (describing mid-nineteenth century commentary advocating uniformity of appellate procedure); see also Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 757 (1995) (observing that the trend toward localism is disrupting national civil rules uniformity).

³⁰ Rules Enabling Act, Pub. L. No. 100-702, § 403(a), 102 Stat. 4642, 4650–51 (1988) (codified as amended at 28 U.S.C. § 2071(b) (2010)). While the federal courts have generally complied with the notice and comment requirement, the Judicial Conference has yet to exercise its veto power over inconsistent local rules. See Sisk, *supra* note 29, at 51–52. The 1988 amendments also required each court, other than the Supreme Court, to appoint an advisory committee to study the court's rules of practice and internal

Meanwhile, as noted in the House Report accompanying the 1988 legislation, the Standing Committee was making progress on a special project to study the local rules problem.³¹

2. *The Standing Committee's Local Rules Project*

Congress had been complaining about the proliferation and inconsistency of local court rules since 1983, leading the Judicial Conference to commission a study of those rules later that year.³² Under the auspices of the Standing Committee, an initiative known as the Local Rules Project collected and analyzed all the local rules of the federal courts.³³ The Project began with the district courts,

operating procedures and make recommendations concerning them. § 403(a), 102 Stat. at 4648–49 (codified as amended at 28 U.S.C. § 2077(b) (2010)). See generally Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, 300–01 (1994) (discussing the 1988 amendments to the Rules Enabling Act).

³¹ See JUDICIAL IMPROVEMENTS AND ACCESS TO JUSTICE ACT, H.R. REP. NO. 100–889, at 28–29 (1988) (praising the “valuable work” of the Standing Committee on its special project to study “[t]he problem of proliferating local rules”), reprinted in 1998 U.S.C.C.A.N. 5982, 5988–90.

³² See, e.g., H.R. REP. NO. 100–889, at 26–29 (describing review of rulemaking process from 1983 to 1988), reprinted in 1998 U.S.C.C.A.N. 5982, 5986–90; RULES ENABLING ACT OF 1985, H.R. REP. NO. 99–422, at 14–17 (1985) (criticizing local rules as too numerous, often in conflict with national rules, and inaccessible to practitioners); see also REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 67 (Sept. 21–22, 1983); Minutes of Meeting of the Committee on Rules of Practice and Procedure, at 9–10 (Jun. 16–17, 1983). All Reports of the Proceedings of the Judicial Conference are available at <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings.aspx>. All Minutes and Reports of the Standing Committee and its Advisory Committees are available at <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules.aspx>.

³³ Minutes of Meeting of the Committee on Rules of Practice and Procedure, at 5–6 (Jan. 23, 1986) (describing generally the plan for the study of local rules). The Local Rules Project ultimately also studied local rules addressing admiralty and criminal cases, and the Advisory Committee on Bankruptcy Rules surveyed bankruptcy local rules. See Minutes of Meeting of the Advisory Committee on Federal Rules of Appellate Procedure, at 18 (Oct. 23, 1990); Minutes of Meeting of the Committee on Rules of Practice and

and in 1988 issued a comprehensive report on district court local rules.³⁴ The next phase included a survey of appellate court local rules, but by that time, the business of the Local Rules Project had taken on a statutory imperative. The 1988 REA amendments specifically obligated the Judicial Conference to review local appellate rules to identify and reform those in conflict with national rules.³⁵ The Judicial Conference delegated the responsibility to review local appellate rules to the Standing Committee's Advisory Committee on Appellate Rules, and deferred compliance with the statutory directive to abrogate inconsistent rules until completion of the Local Rules Project's report.³⁶

In January 1991, the Local Rules Project issued its report on appellate local rules (the "Appellate Local Rules Report" or "Report").³⁷ It contains two sections, each of which organizes local rules according to one of four categories: (1) rules that constitute permissible local variation; (2) rules that repeat existing law; (3) rules that are inconsistent with existing law; and (4) rules that may

Procedure, at 10 (Jan. 12–14, 1994).

³⁴ See DANIEL R. COQUILLETTE & MARY P. SQUIERS, REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES ON CIVIL PRACTICE (1988). This report identified over 5,000 local rules and included a treatise listing every rule that either conflicted with or duplicated national rules. Professor Squiers worked with district courts to reform their practices and most voluntarily deleted or modified their questionable rules. The Local Rules Project also developed a uniform numbering system for district court rules, a set of model local rules, and a manual of administrative rules and forms. See Minutes of Meeting of the Committee on Rules of Practice and Procedure, at 12–13 (Jan. 19–20, 1989). The Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471–82, reversed much of the Project's work because it encouraged the adoption of new local court rules. This led to renewed complaints about "balkanization" of federal district court practice and the proliferation of local rules. Accordingly, the Standing Committee initiated a second local rules project, using a similar methodology as the first study. See Minutes of Meeting of the Committee on Rules of Practice and Procedure, at 12 (Jan. 10–11, 2002).

³⁵ Rules Enabling Act, 28 U.S.C.A. § 2071(c)(2) (West 2010).

³⁶ See Minutes of Meeting of the Committee on Rules of Practice and Procedure, at 12–13 (Jan. 19–20, 1989).

³⁷ See APPELLATE LOCAL RULES REPORT, *supra* note 3.

be topics for FRAP amendment.³⁸ The Report's first section is arranged according to FRAP, considering all circuit rules that correspond to a national appellate rule, and analyzing them according to the four categories above. The second section is arranged by circuit, listing every local rule according to that appellate court's numbering system, and again assigning each to one of the four categories. The resulting compendium exposed layers of clutter and confusion.³⁹

As of the date of the Appellate Local Rules Report, the thirteen appellate circuits had promulgated over 1,300 local rules, imposing a major burden on an appellate practitioner with a national practice.⁴⁰ Furthermore, the Local Rules Project deemed 33 percent of those rules to be repetitive of national rules and 15 percent to be inconsistent with national rules.⁴¹ The Second Circuit was one of the more egregious offenders, with the Report identifying 53 percent of its local rules to be either repetitive or inconsistent.⁴²

Several categories of rules were especially susceptible to circuit court deviation. For example, nine circuits had local rules that contradicted aspects of FRAP 21 concerning extraordinary writs; twelve circuits' local rules contradicted FRAP 28 and 31 concerning the requirements for formatting, serving, and filing of briefs; and seven circuits' local rules contradicted FRAP 34 concerning oral argument.⁴³ This sort of end-run around the

³⁸ Minutes of Meeting of the Advisory Committee on Appellate Procedure, at 18 (Oct. 23, 1990).

³⁹ See APPELLATE LOCAL RULES REPORT, *supra* note 3.

⁴⁰ See *id.* The Appellate Local Rules Report calculated this number by counting each rule or part of a rule that its methodology required to be separately addressed.

⁴¹ See Memorandum from the Advisory Comm. on Appellate Rules to Chief Judges of the Circuits 2 (Apr. 19, 1991) (on file with author) (providing percentage breakdown of local rules according to the project's categories).

⁴² See APPELLATE LOCAL RULES REPORT, *supra* note 3, at Appendix for Court of Appeals for the Second Circuit.

⁴³ *Id.* at 31–32 (describing how nine courts have local rules that are inconsistent with portions of FRAP 21); *Id.* at 47–48, 55–56 (describing how twelve courts have local rules that are inconsistent with various subsections of FRAP 28 and 31); *Id.* at 62–63 (describing how seven courts have local rules that are inconsistent with portions of FRAP 34).

national rulemaking process was a principal reason Congress authorized the Judicial Conference to flush out inconsistent local rules.⁴⁴ Also troubling to the Advisory Committee was that many circuits differed in technical requirements, such as formatting of briefs and requirements for the number of copies of various documents.⁴⁵ These variations could lay traps for the unwary and increase the cost of appellate justice.⁴⁶ The Report also found fault with local appellate rules for failing to use numbering systems that correlate with FRAP, making it more difficult for litigants to figure out whether a circuit court locally regulates a particular procedural issue.⁴⁷

The Appellate Local Rules Report was distributed to the circuit courts to serve as a starting point for review of each circuit's local rules. The Advisory Committee asked the circuit courts to do three things: (1) for local rules identified as inconsistent with FRAP, take steps to eliminate the conflict; (2) for inconsistencies noted in the Report that were not clear to a circuit, obtain clarification from the Local Rules Project director; and (3) for those portions of the Report that a circuit believed to be incorrect, communicate with the project director.⁴⁸ The circuit courts were to report back to the Advisory Committee and twelve circuits did so.⁴⁹ However, their responses were as idiosyncratic as their local rules, quibbling with the Local Rules Project methodology, and with the desirability of the project's core objectives to improve the level of uniformity and decrease the amount of repetition.⁵⁰ Many of the circuits, including

⁴⁴ Rules Enabling Act, 28 U.S.C.A. § 2071(c)(2) (West 2011).

⁴⁵ See Minutes of Meeting of the Advisory Committee on Federal Rules of Appellate Procedure, at 6–8, 25–27 (Dec. 4–5, 1991).

⁴⁶ See Sisk, *supra* note 29, at 26–30.

⁴⁷ See Memorandum from the Local Rules Project to Comm. on Rules of Practice and Procedure, at 2 (Jan. 14, 1991) (on file with author).

⁴⁸ Minutes of Meeting of the Advisory Committee on Federal Rules of Appellate Procedure, at 21–22 (Apr. 17, 1991).

⁴⁹ ADVISORY COMM. ON APPELLATE RULES, REPORT ON LOCAL RULES PROJECT TO COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 4 (Jan. 8, 1992), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/AP01-1992.pdf>. Only the Federal Circuit did not respond. *Id.* at 4 n.6.

⁵⁰ See *id.* at 5–7. For example, the Eighth Circuit responded that, because it

the Second Circuit, opined that the project used too expansive a definition for inconsistency, venturing that where the national rules are silent, a local rule on the subject is not necessarily inconsistent or inappropriate. In the words of the Second Circuit's response, "the fact that a national rule sets a base line requirement need not be taken as implying that no greater or more stringent requirement may be imposed by a court of appeals."⁵¹ Not surprisingly, reform at the circuit level in response to the Report was limited and spasmodic, and virtually nonexistent in the Second Circuit.⁵²

At the national level, the Advisory Committee mined the Report and circuit reactions to it for topics that might be appropriate for FRAP amendment, in order to reduce the inefficiencies from unnecessary variation and to cull best practices of particular circuit courts into a uniform rule.⁵³ High priority items on this list included curtailing the authority of local circuit

had just revised its local rules prior to issuance of the Appellate Local Rules Report, it was not willing to embark on another similar project. *Id.* at 4 n.5. The Second Circuit rejected the recommended decimal numbering system because some national rules themselves contain decimals. *Id.* at 6. The Sixth Circuit maintained that repetition of federal rules was necessary to provide context. *Id.*

⁵¹ *Id.* at 5-6 (quoting from response of Judge Jon O. Newman on behalf of the Second Circuit's Committee on Rules).

⁵² Compare RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT SUPPLEMENTING FEDERAL RULES OF APPELLATE PROCEDURE (Meilen Press 1990), with RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT SUPPLEMENTING FEDERAL RULES OF APPELLATE PROCEDURE (Meilen Press 1995). These two editions of the Second Circuit's local rules, the first issued prior to Appellate Local Rules Report and the second issued sufficiently after the Report to permit opportunity for corrective amendment, illustrate that no such amendment occurred. See generally ADVISORY COMM. ON APPELLATE RULES, REPORT ON LOCAL RULES PROJECT TO COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 5-7 (Jan. 8, 1992) (discussing the reactions of the Courts of Appeals to the Local Rules Report); Carl Tobias, *Charles Alan Wright and the Fragmentation of Federal Practice and Procedure*, 19 YALE L. & POL'Y REV. 463, 466 n.19 (2001) (describing the Local Rules Project as "an exhaustive study that yielded revealing results on which little action has been taken").

⁵³ Minutes of Meeting of the Advisory Committee on Federal Rules of Appellate Procedure, at 21-22 (Apr. 17, 1991).

clerks to return or refuse to file documents that do not comply with national or local rules, clarifying procedures for prehearing conferences, and unifying standards for granting a stay of mandate.⁵⁴

The dialogue with the circuits also led the Advisory Committee to exhort the Judicial Conference to adopt specific requirements for local rules, including three items that later became the basis for amendment of FRAP 47: (1) a uniform numbering system under which the local rules would be keyed to the national rules, (2) the removal of language in local rules that repeats national rules, and (3) stricter observation of the distinction between local rules and internal operating procedures.⁵⁵ The Advisory Committee also recommended that the Judicial Conference establish a process to review new local rules before their implementation.⁵⁶ The Judicial Conference has not acted on this recommendation, nor has it ever exercised its authority, conferred by the 1988 REA amendments, to veto a local rule.⁵⁷

⁵⁴ See ADVISORY COMM. ON APPELLATE RULES, REPORT ON LOCAL RULES PROJECT TO COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 12–13 (Jan. 8, 1992). These three items were swiftly dealt with in the 1994 amendments to FRAP. See FRAP 33, 41 & 47 (1994).

⁵⁵ See ADVISORY COMM. ON APPELLATE RULES, REPORT ON LOCAL RULES PROJECT TO COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 9–10 (Jan. 8, 1992); Minutes of Meeting of the Advisory Committee on Federal Rules of Appellate Procedure, at 13 (Apr. 30, 1992).

⁵⁶ See ADVISORY COMM. ON APPELLATE RULES, REPORT ON LOCAL RULES PROJECT TO COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 19 (Jan. 8, 1992).

⁵⁷ See *supra* note 30 and accompanying text. See Carl Tobias, *Local Federal Civil Procedure for the Twenty-First Century*, 77 NOTRE DAME L. REV. 533, 566–67 (2002) (finding that the Judicial Conference “has instituted virtually no action to effectuate” the 1988 legislative mandate to monitor appellate local rulemaking). In 2003, the Judicial Conference commissioned a second appellate local rules project specifically to survey local circuit briefing requirements. See MARIE LEARY, FED. JUDICIAL CTR., ANALYSIS OF BRIEFING REQUIREMENTS ON THE UNITED STATES COURTS OF APPEALS: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON APPELLATE RULES 1 (Oct. 2004). The survey found great variation, and the Judicial Conference

3. 1995 Amendments to FRAP 47

The criticism implicit in the 1991 Appellate Local Rules Report, along with continuing pressure from the practicing bar,⁵⁸ led to the amendment of FRAP 47 in 1995 to clarify the prerogatives and boundaries of local rulemaking.⁵⁹ The amendment imposed three new strictures on local rulemaking:

- “A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order.”

- “A local rule must be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. § 2072.”

communicated with the circuits in an effort to persuade them to simplify and unify briefing requirements, with little success. *See generally* 16A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3945 (4th ed. 2009).

⁵⁸ *See Sisk, supra* note 29, at 4–5, 5 n.18.

⁵⁹ *See Amendments to Federal Rules of Appellate Procedure*, 161 F.R.D. 163, 166–67 (1995) (amending FRAP 47).

- “A local rule . . . must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.”⁶⁰

The amended FRAP 47 recognizes that even when a local rule is not facially inconsistent with FRAP, local rules require the practitioner to master both FRAP and the local rule and then to determine how the two sets of rules interact, thus imposing transaction costs that often outweigh whatever benefit might derive from the local rule.⁶¹ Thus, FRAP 47’s three new strictures were

⁶⁰ FRAP 47(a)(1). The full text of Rule 47 reads:

(a)Local Rules.

(1)Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.

(2)A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(b)Procedure When There Is No Controlling Law. A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of the circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

See *supra* note 10, for the text of FRAP 47 as adopted in 1968. The 1995 revision of FRAP 47 essentially codified the mandates in the 1988 amendments to the REA. See Carl Tobias, *A Note on the Neutral Assignment of Federal Appellate Judges*, 39 SAN DIEGO L. REV. 151, 153 n.11 (2002).

⁶¹ See Sisk, *supra* note 29, at 26 (opining that appellate local rules impose a disproportionate expense burden on litigants compared to district court local rules because an appeal proceeds on a faster schedule than a trial so “each hour

calculated to improve local rules' transparency, clarity and accessibility.⁶²

First, by requiring that a generally applicable direction be set out in a local rule, rather than in an internal operating procedure or standing order, the revision seeks to make it easier for practitioners to identify those local directives that govern practice before a court of appeals. Litigants should not be ambushed by provisional or hard-to-find procedural requirements.⁶³ And circuits should not be permitted to impose procedural burdens in internal operating procedures that, unlike local rules, have not been adequately identified and subject to public notice and opportunity for comment. This provision of FRAP 47 also implicitly delimits the appropriate content of internal operating procedures; they "should not contain directives to lawyers or parties; they should deal only with how the court internally conducts its business."⁶⁴ Adherence to this distinction between local rules and internal operating procedures also prevents cluttering the former with administrative minutiae that might obscure the import of instructions to practitioners.⁶⁵

Second, the prohibition against duplicating the language of the national rules strives for clarity as to which practices are truly local. A rule that contains both the national and local requirements "obscures the local variation."⁶⁶ Extirpating all reiterative language

of attorney time added by the need to discover, understand, and comply with idiosyncratic local rules meaningfully inflates the expense of an appeal").

⁶² See ADVISORY COMM. ON RULES OF APPELLATE PROCEDURE, REPORT TO THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 91-92 (June 2, 1992) [hereinafter June 1992 ADVISORY COMMITTEE REPORT] (proposed amendments to FRAP 47 and Committee Note regarding same).

⁶³ See *id.* at 92 ("Placing a practice oriented provision in the internal operating procedures may cause a practitioner, especially one from another circuit, to overlook the provision.").

⁶⁴ ADVISORY COMM. ON APPELLATE RULES, REPORT ON LOCAL RULES PROJECT TO THE COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 9 (Jan. 8, 1992).

⁶⁵ See *id.* at 10.

⁶⁶ *Id.*; see also FRAP 47 & Note to 1995 Amendments ("[L]ocal rules should not repeat national rules and Acts of Congress.").

flags the local variation.⁶⁷ Local rules that repeat national rules are also problematic because minor variations, poor paraphrasing, or selective duplication can introduce confusion.⁶⁸ The interpretative problems multiply when there is a change in one rule but not the other. Accordingly, the amended FRAP 47 restricts the content of local rules to only those directives that depart from or supplement national rules.

Third, the 1995 amendment mandates conformity to any local rules numbering system prescribed by the Judicial Conference. This amendment reflects the concern that “[l]ack of uniform numbering might create unnecessary traps for counsel and litigants,” and the desire to “make it easier for an increasingly national bar and for litigants to locate a local rule that applies to a particular procedural issue.”⁶⁹ In 1991, the Judicial Conference had issued a recommendation to all circuit chief judges that they adopt a numbering system for local rules that corresponds with FRAP, and that recommendation was later adopted as a formal prescription.⁷⁰ Accordingly, if a court of appeals promulgates, for example, a local rule governing motions, the court must number the local rule to correlate to FRAP 27, which sets out the national requirements for motions. Using the same number for the local rule and the federal rule covering the same topic improves notice of the existence of the local rule and accessibility to it.⁷¹ It was also hoped that linking the number of a local rule to the corresponding national rule would dispel the inclination to repeat language from the national rules in the local rules.⁷²

Remarkably, although the 1995 amendments to FRAP 47 are absolutely binding on the circuit courts, compliance has been

⁶⁷ June 1992 ADVISORY COMMITTEE REPORT, *supra* note 62, at 92.

⁶⁸ *Id.* (“[T]he restriction prevents the interpretation difficulties that arise when there are minor variations in the wording of a national and a local rule.”).

⁶⁹ FRAP 47 & Note to 1995 Amendments.

⁷⁰ See Memorandum from the Advisory Comm. on Appellate Rules to Chief Judges of the Circuits 2 (Jan. 14, 1991) (on file with author); JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS 34–35 (Mar. 12, 1996).

⁷¹ See June 1992 ADVISORY COMMITTEE REPORT, *supra* note 62, at 92.

⁷² *Id.*

virtually nonexistent.⁷³ Localism continues to advance, diversifying practice in such basic areas as appellate motions, briefing, and oral argument.⁷⁴ According to one commentator:

The appeals courts have expressly ignored the instructions of the High Court and lawmakers by prescribing even more local measures, many of which conflict with or reiterate the Federal Rules of Appellate Procedure or Acts of Congress. The Judicial Conference, however, has never undertaken the rigorous scrutiny of these mechanisms that the Supreme Court and legislators envisioned.⁷⁵

4. The Restyled FRAP and the Guidelines for Drafting and Editing Court Rules

While the 1995 amendments to FRAP 47 were wending their way through the rulemaking process, the Standing Committee, moving on a parallel track, established a Style Subcommittee to “clarify, simplify, and eliminate inconsistencies in proposed rules amendments.”⁷⁶ The ultimate objective of the Style Subcommittee was to unify the stylistic approaches of each of the advisory committees on appellate, bankruptcy, civil, criminal, and evidence rules, whose disparate modes of rules-drafting had led to “unnecessary ambiguity and the loss of simplicity.”⁷⁷ Respected legal-writing guru Bryan Garner led the style project and developed uniform drafting guidelines detailing a common set of

⁷³ See Tobias, *supra* note 57, at 567 (finding “very little evidence that the appellate courts had undertaken efforts to discharge the obligations which the 1995 revision of FRAP 47 or [Congress] imposed.”).

⁷⁴ See Sisk, *supra* note 29, at 7–24.

⁷⁵ See Tobias, *supra* note 60, at 153–54; see also Tobias, *supra* note 57, at 570–72 (offering possible explanations as to why the appeals courts and Judicial Conference have never fulfilled their duties under FRAP 47, including deference to local expertise, notions of professional courtesy, competing demands of increasingly large and complex caseloads, and lack of resources).

⁷⁶ See Proposed Amendments to Federal Rules of Appellate Procedure, 165 F.R.D. 117, 125 (1996) [hereinafter Proposed Amendments to FRAP] (Background Note of the Advisory Committee on Appellate Rules).

⁷⁷ *Id.*

style preferences.⁷⁸ Initially the Style Subcommittee applied these guidelines only to rules amendments, but eventually was charged with restyling the entire sets of civil and appellate rules.⁷⁹

The first set of rules to be tackled was FRAP. In 1996, the Style Subcommittee offered a comprehensive restyling in accordance with the uniform drafting guidelines.⁸⁰ The restyled rules sought to eliminate ambiguities and inconsistencies in FRAP, and generally make the rules more readable by breaking up long narrative passages with section dividers and headings.⁸¹ The changes were intended to be non-substantive,⁸² and quickly cleared through the Supreme Court and Congress to become effective on December 1, 1998.⁸³ As a side-by-side comparison of the redraft with the then-existing rules demonstrates,⁸⁴ simply manipulating the format achieved a much clearer presentation. The revision breaks down rules into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. These basic formatting changes graphically render the structure of the rules and make them easier to read and understand even where wording is essentially unchanged.⁸⁵

Possibly the most significant change is the redraft's elimination of the use of "shall," an inherently ambiguous term that can variously mean "must," "may," or something else, depending on context. Because "shall" is no longer generally used in spoken or clearly written English, its use exacerbated the potential for

⁷⁸ BRYAN A. GARNER, GUIDELINES FOR DRAFTING AND EDITING COURT RULES (1st ed. 1996) [hereinafter GUIDELINES], available at 169 F.R.D. 176 (1997). The booklet is now in its fifth printing. See BRYAN A. GARNER, GUIDELINES FOR DRAFTING AND EDITING COURT RULES (5th ed. 2007).

⁷⁹ Robert E. Keeton, *Preface* to GUIDELINES, *supra* note 78, at iii.

⁸⁰ Proposed Amendments to FRAP, *supra* note 76.

⁸¹ *Id.* at 123 (introductory note by Judge James K. Logan, Chair of the Advisory Committee on Appellate Rules).

⁸² *Id.*

⁸³ Amendments to Federal Rules of Civil Procedure, Criminal Procedure, Evidence and Appellate Procedure, 177 F.R.D. 530, 535–82 (1998) (style revision of FRAP). Restyled Criminal Rules took effect on December 1, 2002, and restyled Civil Rules took effect on December 1, 2007.

⁸⁴ Proposed Amendments to FRAP, *supra* note 76, at 129–273.

⁸⁵ See, e.g., *id.* at 161–65 (Rule 10).

confusion. The restyled rules replace “shall” with “must,” “may,” or “should,” depending on which one the context and established interpretation make correct in each rule.⁸⁶ The restyled rules also eliminate other ambiguous terms. For example, changing “receives” to “docketed” in FRAP 4(c) eliminates uncertainty as to the deadline for filing a cross-appeal: a court may “receive” a paper in the mail that is not processed for a day or two, making the date of receipt uncertain, while “docketing” is an easily identifiable event.⁸⁷

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies confuse the careful reader. For example, FRAP 1, 2, 5, 8, 13, 18, and 24 previously used the word “application” interchangeably with “motion” and “petition.”⁸⁸ The restyled rules achieve consistent expression without affecting meaning by eliminating “application” except when it is a term of art, for example, in the context of FRAP 15 applications for enforcement of an agency decision and FRAP 22 applications for a writ of habeas corpus.⁸⁹ In the same vein, “considered” replaces “deemed” in FRAP 3(a), 13(b), and 22(b), and “believed” in FRAP 10(b), to achieve consistent expression without changing meaning.⁹⁰

The restyled rules also replace redundant instructions with cross-references to the relevant rule. For example, document-formatting requirements in FRAP 5(c), 5.1(c), and 21(d) are replaced with a cross-reference to FRAP 32(a)(1) describing the required form for all paper submissions.⁹¹

Anticipating adoption of the restyled FRAP, the Style Subcommittee published Bryan Garner’s *Guidelines for Drafting*

⁸⁶ See *id.* at 129–273; see also WILSON FOLLETT, MODERN AMERICAN USAGE: A GUIDE 369 (1966) (“The auxiliaries *shall* and *should*, *will* and *would* lead the user of English into as confused a jungle as he is ever called on to clear a way through.”).

⁸⁷ Proposed Amendments to FRAP, *supra* note 76, at 146.

⁸⁸ *Id.* at 128–30, 147–51, 157–59, 171–72, 180–81, 193–95.

⁸⁹ *Id.* at 173–76, 189–90.

⁹⁰ *Id.* at 131, 161–63, 171, 190.

⁹¹ *Id.* at 147–51, 188, 23.

and Editing Court Rules (the “Guidelines”).⁹² The booklet served the dual purpose of explaining drafting and editing choices reflected in the revised FRAP, as well as establishing a standard going forward for any court engaged in a rules drafting and editing project.⁹³ Over time, the Guidelines has become the “accepted style for federal rules” and recommended for use in drafting substantive statutes, practice codes, and local rules.⁹⁴

The Guidelines first sets out “Basic Principles” summarizing its goals: clarity, readability and brevity.⁹⁵ The second chapter of the Guidelines lists general conventions to effectuate the basic principles, including drafting rules in the present tense, in the active voice, and in the singular number unless the sense is undeniably plural.⁹⁶ The general conventions also address syntax, instructing the drafter to place conditions, exceptions, and modifiers at the beginning or end of a sentence, and to avoid interruptive and prepositional phrases.⁹⁷ The Guidelines recommends minimizing “of-phrases” by replacing them with possessives and adjectives.⁹⁸ The Guidelines also prescribes short sentences of no more than 25–30 words, and specific punctuation to enhance readability.⁹⁹

The Guidelines’ third chapter establishes organizational principles that put the broadly applicable before the narrowly applicable, the general before the specific, more important items before less important, rules before exceptions, and contemplated

⁹² See GUIDELINES, *supra* note 78.

⁹³ See Alicemarie H. Stotler, *Foreword* to GUIDELINES, *id.* (statement of the Chair of the Standing Committee).

⁹⁴ See George C. Pratt, *Introduction* to GUIDELINES, *supra* note 78, at vi–vii (written by a retired judge and former chair of Style Subcommittee); see also Joseph Kimble, *How to Mangle Court Rules and Jury Instructions*, 8 SCRIBES J. LEGAL WRITING 39, 42–43 (2002) (recommending GUIDELINES for drafting court rules).

⁹⁵ GUIDELINES, *supra* note 78, at 1.

⁹⁶ See *id.* at 3–4.

⁹⁷ *Id.* at 5–12.

⁹⁸ *Id.* at 11–12. For example, GUIDELINES rewrites “the clerk of the court of appeals” as “the circuit clerk”; “statute of the United States” as “a federal statute”; and “failure of an appellant” as “an appellant’s failure.”

⁹⁹ *Id.* at 13–15.

events in chronological order.¹⁰⁰ Along with requirements for structural divisions and enumerations, this chapter of the Guidelines focuses on reformatting rules for clearer presentation.¹⁰¹ The fourth chapter of the Guidelines considers particular “Words and Phrases,” with specific pointers for achieving brevity, using the active voice, and avoiding legalese and jargon.¹⁰² The Guidelines also dictates rules for using words of authority, providing a glossary that disfavors the use of “shall,” replacing it with “must,” “may,” or “should.”¹⁰³

B. History of Second Circuit Local Rulemaking

Despite the 1995 amendment of FRAP 47 and the 1996 publication of the Guidelines, few circuit courts made efforts to comply with the new substantive prescriptions and style suggestions for local rules.¹⁰⁴ There is no record that the Second Circuit responded specifically to these developments prior to the comprehensive review that led to the 2010 local rules revision. Notably, the Second Circuit did not conform its local rules to FRAP 47(a)(1)’s new strictures on local rulemaking.¹⁰⁵ The 1991 Appellate Local Rules Report continued to be a relevant source of criticism in this regard—in particular as to repetitive and inconsistent local rules.¹⁰⁶

How the Second Circuit arrived at this juncture is largely a product of its history as one of the first intermediate federal courts,

¹⁰⁰ *Id.* at 17.

¹⁰¹ *Id.* at 19–25.

¹⁰² *Id.* at 27–35.

¹⁰³ *Id.* at 29; *see also* BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 939–42 (2d ed. 1995).

¹⁰⁴ *See* Tobias, *supra* note 57, at 555 & n.122. The one exception to this inattention was the requirement of uniform numbering of circuit rules. By the time the 1995 amendments to FRAP 47 took effect, all but one circuit had renumbered its local rules to correspond to FRAP’s numbering system. *See* Minutes of Meeting of Advisory Committee on Federal Rules of Appellate Procedure, at VI (Oct. 19–21, 1995).

¹⁰⁵ *See supra* note 60 and accompanying text.

¹⁰⁶ *See supra* Part I.A.2; APPELLATE LOCAL RULES REPORT, *supra* note 3, at Appendix for Court of Appeals for the Second Circuit.

created in 1789 and known simply as “circuit courts.”¹⁰⁷ For the first one hundred years of the republic, circuit courts were primarily trial courts of original jurisdiction with limited appellate jurisdiction.¹⁰⁸ There were no separate circuit judges; Supreme Court justices and district judges presided over the circuit courts.¹⁰⁹

Three circuit courts were initially established—eastern, middle and southern. Connecticut, New York, and later Vermont were part of a larger group of states comprising the eastern circuit.¹¹⁰ As the country expanded, more circuits were added, and existing ones were reorganized and numbered, resulting in grouping those three states alone as the “Second Circuit.”¹¹¹ The circuit courts’ appellate workload remained sparse; mercantile, patent, and admiralty trials occupied most of the Second Circuit’s docket.¹¹² To the extent the Second Circuit engaged in local rulemaking, its efforts were principally focused on trial administration.¹¹³

The burdens of travel and the Supreme Court’s own docket

¹⁰⁷ See generally JEFFREY B. MORRIS, *FEDERAL JUSTICE IN THE SECOND CIRCUIT: A HISTORY OF THE UNITED STATES COURTS IN NEW YORK, CONNECTICUT & VERMONT 1787 TO 1987* (1987).

¹⁰⁸ See Judiciary Act of 1789, ch. 20, § 21, 1 Stat. 73, 83 (giving appellate jurisdiction to circuit courts in “causes of admiralty or maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars”); *id.* § 22, 1 Stat. at 84 (permitting a “writ of error” from the district courts in civil actions exceeding “the sum or value of fifty dollars”).

¹⁰⁹ See *id.* § 4, 1 Stat. at 74–75. Subsequent judiciary legislation required that the justices only attend one term of circuit court in each year. See Act of June 17, 1844, ch. 96, § 2, 5 Stat. 676.

¹¹⁰ See § 4, 1 Stat. at 74–75. The eastern circuit originally comprised New Hampshire, Massachusetts, Connecticut and New York, and later Rhode Island and Vermont. See MORRIS, *supra* note 107, at 10.

¹¹¹ Judiciary Act of 1802, ch.31, § 4, 2 Stat. 156, 157.

¹¹² See MORRIS, *supra* note 107, at 44–48; see also SCHICK, *supra* note 29, at 40–41.

¹¹³ See, e.g., O. HALSTED, *RULES AND ORDERS OF THE UNITED STATES SUPREME COURT, CIRCUIT COURT FOR THE SECOND CIRCUIT AND THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK* (1829) (setting forth procedures governing federal trials); see also *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 460 F.3d 434, 439–40 (2d Cir. 2006) (noting the early adoption of local admiralty rules by district courts within the old Second Circuit).

increasingly kept the justices from participating in circuit court proceedings. It was common for a single district judge not only to conduct circuit court proceedings, but also to review his own prior rulings in a case.¹¹⁴ By 1869, circuit riding was placing such a strain on the justices that Congress created circuit judgeships to take on some of the caseload, specifically appeals from district courts.¹¹⁵ Calls for additional reform continued in the following decades as the country's population and industry expanded, increasing demands on the Supreme Court.¹¹⁶ Accordingly, in 1891, Congress severed the trial and appellate functions for most of the nation's federal courts. Congress situated all trials in the district courts and vested appellate jurisdiction in the regional circuit courts, which were staffed with circuit judges.¹¹⁷

The new Circuit Court of Appeals for the Second Circuit, as it was then styled, promulgated its first set of local appellate rules in 1892 soon after it was established.¹¹⁸ There were thirty-four "general rules" and another nineteen rules on admiralty.¹¹⁹ The Second Circuit's general practice rules adopted the Supreme Court's rules of practice, "as far as the same shall be

¹¹⁴ See David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN L. REV. 1710, 1721–22 (2007); MORRIS, *supra* note 107, at 93.

¹¹⁵ See Judiciary Act of 1869, ch. 22, § 2, 16 Stat. 44, 44–45; Morris, *supra* note 107, at 69–70. Appeals to circuit courts were still limited to civil and admiralty cases until 1879, when Congress conferred appellate jurisdiction over district court criminal cases. See Act of March 3, 1879, ch. 176, § 1, 20 Stat. 354.

¹¹⁶ Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1814–18 (2003).

¹¹⁷ See Evarts Act, ch. 517, 26 Stat. 826 (1891) (establishing circuit courts of appeal and appointing additional circuit judges but continuing the *nisi prius* jurisdiction of those courts); Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087 (abolishing circuit courts and transferring their jurisdiction to the district courts); Act of Feb. 13, 1925, ch. 229, 43 Stat. 936 (Judges Bill) (requiring the use of intermediate appellate judges and establishing general discretionary review at the Supreme Court level).

¹¹⁸ See 2D CIR. R. (1892), reprinted in ERASTUS C. BENEDICT, *THE AMERICAN ADMIRALTY, ITS JURISDICTION AND PRACTICE* 412–22 (3d ed. 1894). From the beginning, each circuit court of appeals had the authority to make its own rules of procedure. See § 2, 26 Stat. at 826.

¹¹⁹ BENEDICT, *supra* note 118, at 412–22, 423–27.

applicable,”¹²⁰ and otherwise regulated all matters great and small that might concern administration of court business, including: composition of the court’s seal, oath to be taken by court officers, preparation of the record on appeal, procedures for obtaining translations of documents in a foreign language, death of a party, format of briefs, oral argument, delivery of opinions, and citation of cases.¹²¹

Since the 1892 adoption of the circuit’s first set of local rules, the number and subject matter of the rules have expanded and contracted to adjust to ever-changing modes of practice, technology, and litigation environments. However, the court has handled local rules revisions and amendments piecemeal, as evidenced by the fact that the wording of a handful of the 1892 local rules remained virtually unchanged in 2008.¹²² Little effort was made over the years to recalibrate the overall structure of the rules or to harmonize existing rules with amendments or additions. For example, the 1910 edition of the rules added four new “general rules” some of which addressed topics already the subject of existing rules; these new rules were tacked on at the end rather than integrated with existing rules.¹²³

To be fair, the court occasionally engaged in housekeeping efforts. After the 1911 abolition of the old circuit courts, the Second Circuit excised its rules of admiralty trial administration.¹²⁴ However, the court’s attitude towards its local rules remained somewhat desultory, conceiving them as largely discretionary, to

¹²⁰ *Id.* at 413 (Rule 8).

¹²¹ *Id.* at 412–22.

¹²² Compare *id.* at 412, 414, 420–21 (2D CIR. R. 1, 2, 3, 4(1), 9, 28 (1892)), with 2D CIR. LR §§ 0.11, 0.12, 0.13, 0.14(1), 0.19, 0.20 (2008). For example, Local Rule 9 from 1892 and Local Rule §0.19 from 2008 read identically: “Process. All process of this court shall be in the name of the President of the United States, and shall be in like form and tested in the same manner as process of the Supreme Court.”

¹²³ See 2D CIR. R. (1910), reprinted in ERASTUS C. BENEDICT, *THE AMERICAN ADMIRALTY, ITS JURISDICTION AND PRACTICE* 501–02, 506 (4th ed. 1910). The rules reflect that the court adopted a new Rule 37 to address case citation form in briefs, rather than incorporating such instructions in existing Rule 24 on form and content of briefs.

¹²⁴ See Act of Mar. 3, 1911, ch. 231, § 301, 36 Stat. 1087, 1169.

be applied flexibly as circumstances warranted.¹²⁵ While this approach may have been intended to permit leniency toward litigants, it also led to a casual neglect of rulemaking standards. Little attention was paid to the format and arrangement of the rules, or to the consistent usage of style and language. Readability, accessibility and clarity all suffered.

By the time the Supreme Court adopted FRAP in 1968, the Second Circuit had trimmed its local rules to twenty-nine.¹²⁶ In response to FRAP, the Second Circuit whittled its local rules further down to twenty-one to eliminate redundancy. That round of revisions also resulted in re-categorizing the rules to distinguish between rules relating to the organization of the court and rules supplementing FRAP, which were renumbered to correlate to the national rules.¹²⁷ However, over the next forty years, with few exceptions, the Second Circuit local rules were not revised to take into account subsequent amendments to FRAP or other relevant statutory developments.¹²⁸ Rules gradually accreted over the years, increasing back to twenty-nine by 1982, and to thirty-eight by 2008.¹²⁹

The Second Circuit was often among the most responsive and innovative of the circuit courts when called upon to meet challenges confronting appellate productivity. The Second Circuit developed the first plan to expedite the processing of criminal appeals and the first mediation program for civil appeals.¹³⁰ Yet its

¹²⁵ See SCHICK, *supra* note 29, at 86 (“[T]he practice of the Second Circuit is to apply the [local] rules flexibly.”).

¹²⁶ COMM. ON FED. COURTS, ASS’N OF THE BAR OF THE CITY OF N.Y., *APPEALS TO THE SECOND CIRCUIT* (1966).

¹²⁷ COMM. ON FED. COURTS, ASS’N OF THE BAR OF THE CITY OF N.Y., *APPEALS TO THE SECOND CIRCUIT* (1970).

¹²⁸ See, e.g., FRAP 3(d) (amended in 1979 to require the district clerk to forward to the circuit court a copy of the notice of appeal in all appeals, rendering redundant a similar requirement in 2D CIR. LR 3(d) (2008)); FRAP 15.1 (adopted in 1986 to confirm existing practice in most circuits, thus superseding 2D CIR. LR 15.1 (2008)).

¹²⁹ COMM. ON FED. COURTS, ASS’N OF THE BAR OF THE CITY OF N.Y., *APPEALS TO THE SECOND CIRCUIT* 39 (1982).

¹³⁰ See generally MORRIS, *supra* note 107, at 170–71; Second Circuit Plan to Expedite the Processing of Criminal Appeals, 28 U.S.C.A., United States

local rules were not revised in any significant way in response to the 1991 Local Rules Project recommendations or the 1995 amended FRAP 47.¹³¹

As of 2008, the Second Circuit's local rules were organized in two parts: (1) Rules Relating to the Organization of the Court, and (2) Rules Supplementing Federal Rules of Appellate Procedure.¹³² The first section contained sixteen rules that were not numbered according to FRAP, as the Judicial Conference requires.¹³³ Instead, these sixteen rules used a numbering system dating from 1968 that denominated the rules using a section symbol and decimals, for example, "§ 0.14 Quorum."¹³⁴ The first section of rules also largely dealt with internal administrative matters rather than the type of generally applicable direction to litigants that is the proper subject of local rules.¹³⁵ The second section of rules contained twenty-two rules corresponding to FRAP counterparts, adopted at various times over the decades, inconsistently formatted and styled, a number of which were redundant or obsolete. Their deficiencies included misquoting FRAP, retaining rules that were superseded by statute, and failing to follow explicit FRAP directives.¹³⁶

The Second Circuit finally turned its attention to its local rules in 2008 when it embarked on a major technological upgrade in order to participate in the United States Courts' Case Management/Electronic Case Files (CM/ECF) project, which

Courts of Appeals Rules, Second Circuit, at 378 (West 1971); Civil Appeals Management Plan, 28 U.S.C.A., United States Courts of Appeals Rules, Second Circuit, at 487–93 (West 1980).

¹³¹ See *supra* note 52 and accompanying text.

¹³² See 2D CIR. R. (2008), reprinted in *United States Court of Appeals for the Second Circuit*, in *FEDERAL COURT OF APPEALS MANUAL: LOCAL RULES* 329–456 (West 2008).

¹³³ See *supra* note 68 and accompanying text.

¹³⁴ 2D CIR. L.R. § 0.14 (2008).

¹³⁵ See FRAP 47(a)(1).

¹³⁶ See, e.g., 2D CIR. LR 11 (2008) (purporting to quote language from FRAP 11(a) that had been amended in 1979); 2D CIR. LR § 0.26 (2008) (setting out rules for filing a category of petition eliminated with the repeal in 1996 of 28 U.S.C. § 636(c)(5)); 2D CIR. LR 30 (2008) (missing sanctions language required by FRAP 30(b)(2) since 1986). See also discussion *infra* Part II.M.

allows for the filing and accessing of electronic case files over the Internet.¹³⁷ In anticipation of this undertaking, which would significantly impact the administration of the court's business and require some degree of procedural reform, the court found it timely to launch a comprehensive revision of its local rules.

C. Methodology of the Second Circuit Local Rules Revision Project

From mid-2008 through 2009, the Second Circuit Local Rules Revision Project undertook a wholesale review of its local rules for revision, updating, and streamlining. The project aimed to take a fresh look at every rule and consider all suggestions for improvement and clarification. The court's Rules Committee assigned a staff working group¹³⁸ to take a first look at the local rules, and redraft them hewing to the strictures of FRAP and the Judicial Conference's style Guidelines. According to the project's methodology, the proposed revision then went through several rounds of vetting by, in order, the Attorney Advisory Committee to the Second Circuit Rules Committee, the Rules Committee, the full court, the public during a period of notice and comment, and finally, the full court again to assess and, if appropriate, incorporate any public suggestions.

As the reporter for the project, I initially undertook a number of preliminary tasks including:

¹³⁷ U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, HOW TO APPEAL A CIVIL CASE TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT 1 (2010), *available at* http://www.ca2.uscourts.gov/clerk/Forms_and_instructions/pdf/How_to_Appeal_Your_Civil_Case_12-09.pdf.

¹³⁸ The members of the Rules Committee at the time were Chief Judge Dennis Jacobs and Judges Jon Newman and Reena Raggi. The members of the staff working group were Catherine O'Hagan Wolfe, Clerk of Court, Andrew Contreras, Deputy Clerk of Court, Michael Jordan, Counsel to the Chief Judge, and the author, serving as initial drafter and reporter for the project.

- Researching relevant law, determining the history of existing court rules, and researching other courts' local rules;
- Reviewing historical documents and court files relating to local rules promulgation;
- Interviewing current and former members of the court's Rules Committee and staff in the Clerk's Office, Circuit Executive's Office, and Office of Staff Counsel; and
- Researching and communicating with the Federal Judicial Center regarding federal rulemaking guidelines.

I prepared a first draft of revised local rules strictly adhering to FRAP 47(a)(1) and the Guidelines' style recommendations, with due attention to the Judicial Conference Local Rules Project critique of the circuit's rules.¹³⁹ In somewhat abridged form, the governing parameters for revision were:

- All generally applicable directions to litigants must be in a local rule.
- A local rule must not deal with internal administrative matters, but the court may elect to publish such information in Internal Operating Procedures (IOPs) or practitioner manuals.
- A local rule must be consistent with national rules and federal law.
- A local rule must not duplicate information already provided in national rules and federal law.

¹³⁹ See *supra* note 42 and accompanying text.

- A local rule must be numbered to correlate to the FRAP rule that covers the same topic.
- A local rule must adhere to the style Guidelines and aim for clarity, consistency, readability, and brevity.

In addition, the first revision updated the substance of all local rules to reflect current actual practice and to accommodate the transition to electronic case filing.

The first revision also recommended a new format, arrangement, and numbering system, including relocating all administrative minutiae to a newly created category of IOPs.¹⁴⁰ Headings and subheadings were added to orient readers, with subparts of rules following parallel organization and syntax. Extensive commentary accompanied the revision during the multiple rounds of vetting to explain all revisions and recommendations. The staff working group refined and augmented the revision, making significant changes to Second Circuit forms and other addenda to the local rules.

Once the staff working group had prepared a complete set of revised local rules and IOPs, it distributed the revision and explanatory commentary to the Attorney Advisory Committee to the Second Circuit Rules Committee.¹⁴¹ The members of the Advisory Committee organized themselves into subcommittees to address specific sections of the revision and then, in a series of meetings, shared their reactions and recommendations with the entire Advisory Committee and the staff working group. The work product of the subcommittees was consolidated into a comprehensive Advisory Committee report including proposed edits, analysis, and commentary.

The staff working group reconvened to evaluate and determine

¹⁴⁰ IOPs correlating to FRAP were to be numbered accordingly, and those with no FRAP correlative were to be assigned a letter and appended at the end of the local rules. *See* 2D CIR. LR (2010).

¹⁴¹ The members of the Attorney Advisory Committee at the time were: Bruce R. Bryan, Daniel J. Capra, Ernest Collazo, Ira Feinberg, Michele Hirshman, Celeste Koeleveld, Hon. Gerald E. Lynch, Karen McAndrew, William J. Nardini, Varuni Nelson, and Edward Zas.

whether to incorporate the Advisory Committee's proposals into the revision. The staff working group then sent the court's Rules Committee a new version of revised local rules and commentary, assimilating many of the changes suggested by the Advisory Committee and explaining why certain proposals were not incorporated. The Rules Committee also received a copy of the Advisory Committee's final report. Assisted by the staff working group, the Rules Committee further revised the rules. The Rules Committee distributed its revision, along with the staff and Advisory Committee commentary, to the full court, which voted to publish the revised rules for public notice and comment. Public comments were few, and additional, non-substantive changes were made to the revision. The full court adopted the new rules effective January 1, 2010. The court, however, adopted only the actual rules and decided not to publish any of the commentary.

Over the course of 2010, the court and the appellate bar became familiar with the new rules in action. Their experience suggested the need for additional amendments—both technical and substantive. After a deliberative process echoing (albeit abbreviating) the earlier local rules revision project, the court published further revised rules, effective December 15, 2010, largely to fill gaps and clarify ambiguities.

II. COMMENTARY ON THE NEW SECOND CIRCUIT LOCAL RULES

This part presents commentary that explains how the Second Circuit local rules revision methodology was applied to alter and craft particular rules. The commentary focuses on the most critical reform objectives: (1) every generally applicable practice directive must be in a local rule and local rules are limited to that purpose; (2) local rules must be consistent with and not duplicate national law; and (3) the style and structure of local rules must be clear, consistent, and readable. This part discusses the rules in categories that correspond to how an appellate practitioner might interact with them chronologically during the course of pursuing an appeal.

A. Scope and Organization

The revised rules introduce LR 1.1 Scope and Organization to explain the new system of denominating and locating LRs and IOPs.¹⁴² In the revision, LRs and IOPs are numbered and titled to correspond to FRAP. If there is no FRAP counterpart, an LR is numbered to correspond to FRAP 47, and an IOP is assigned a letter and placed at the end of the rules.¹⁴³ The rule also directs litigants to the court's website for additional instructions and practice manuals. Arguably a redundant rule in itself, LR 1.1 was deemed a necessary prologue to a wholesale revision of the rules.

Local Rule 6.1 clarifies that the local rules and IOPs applicable to civil appeals are also applicable in bankruptcy cases.

B. Docketing the Appeal and Preparing the Record

Local Rules 12.1 Appeal Docketing Requirements in Civil and Agency Cases and 12.2 Appeal Docketing Requirements in Criminal Cases were introduced to provide notice of the obligation to file certain forms at the outset of the appeal and pay the docketing fee.¹⁴⁴ The rules set firm deadlines, and warn parties that noncompliance may result in dismissal of the appeal.¹⁴⁵ Previously, these instructions were publicized only in collections of guidelines and practice tips available in the clerk's office or on the court's website, in violation of FRAP 47(a)'s requirement that such generally applicable directions be in a local rule.¹⁴⁶

¹⁴² See 2D CIR. LR 1.1 (2010).

¹⁴³ Only one local rule was without a FRAP counterpart—the rule on death penalty cases, now designated 2D CIR. LR 47.1. Other circuits similarly locate local rules not corresponding to FRAP after FRAP 47, and locate non-correlative IOPs at the beginning or end of their local rules. See, e.g., 5TH CIR. LR 47 (2009) (“Other Fifth Circuit Rules”); 8TH CIR. IOP (2007) (attached as an appendix at end of local rules).

¹⁴⁴ See 2D CIR. LR 12.1, 12.2 (2010).

¹⁴⁵ See 2D CIR. LR 12.1(a), (d), 12.2 (2010).

¹⁴⁶ See, e.g., *How to Appeal Your Civil Case and Civil Appeals Management Plan*, in APPEALS TO THE SECOND CIRCUIT, *supra* note 5, at S170–85, S250–55.

Local Rule 12.3 Acknowledgement and Notice of Appearance in All Appeals clarifies and consolidates the court's former requirement that a party submit: (1) a form acknowledging the docketing of the appeal and (2) a notice of appearance of record counsel or individual appearing *pro se*.¹⁴⁷ These two now-supplanted forms significantly overlapped in the information they requested. Consolidating them reduces the paperwork and administrative burdens on the parties and the court. The new joint form must be filed at the outset of the case to accelerate the court's access to important information about the appeal, including any necessary corrections to the caption and appellate designations, information about related cases, and the identity of and contact information for counsel of record.¹⁴⁸ The form also satisfies the FRAP 12(b) requirement to file a representation statement.¹⁴⁹ Most saliently, the consolidated form no longer seeks information about oral argument preferences and availability. The new rules defer those inquiries to a later point in the case, after the filing of the final appellee brief, when the parties are better situated to provide accurate and reliable responses.¹⁵⁰

Local Rule 12.3 also clarifies that all counsel of record must be admitted to practice in the court from the outset of the appeal; the deadline for filing the Acknowledgment and Notice of Appearance form provides time for counsel to apply for regular or *pro hac vice* admission as necessary.¹⁵¹ In addition, all counsel appearing in a case in any capacity must file a Notice of Appearance form at the time they enter the case.¹⁵² The admission requirement represents a

¹⁴⁷ See 2D CIR. LR 12.3 (2010).

¹⁴⁸ See *Acknowledgement and Notice of Appearance form*, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT (DEC. 22, 2010), http://www.ca2.uscourts.gov/clerk/Forms_and_instructions/forms_home.htm (follow "Forms" hyperlink; then scroll down to "Attorneys" and the link for "Acknowledgement and Notice of Appearance" download).

¹⁴⁹ See FRAP 12(b) (requiring the attorney who filed the notice of appeal to "file a statement with the circuit clerk naming the parties that the attorney represents on appeal").

¹⁵⁰ See 2D CIR. LR 34.1(a) (2010); see also discussion *infra* Part II.I.

¹⁵¹ See 2D CIR. LR 12.3(a) (2010).

¹⁵² See 2D CIR. LR 12.3(b) (2010).

significant change from prior procedures that did not ask for a Notice of Appearance until counsel's first brief, that did not attend to the admission status of counsel presenting oral argument until that day, and that generally neglected the admission status of counsel appearing in other capacities.

In practice, lax enforcement of admission requirements enabled non-admitted counsel of record to appear in a case for all purposes prior to filing the brief, and conceivably through resolution if the parties waived oral argument. Counsel serving in other capacities could easily evade admission requirements for the duration of the appeal. This system had several weaknesses, including the possibility that an appeal could be dismissed or otherwise resolved when a party is represented by a non-admitted attorney, that the court could decide the case on the basis of briefs submitted by a non-admitted attorney, or that it would be necessary to impose discipline on a non-admitted attorney. The urgency of reforming these procedures was sufficiently great that the new LR 12.3 and related amendments to the attorney admission rule at the time were implemented nine months ahead of the effective date of the other rules revisions.¹⁵³

The court clarified its procedures for forwarding the record on appeal in new LR 11.1 Duties Regarding the Record. The new rule codifies the existing Second Circuit practice of requiring the district clerk to retain the record on appeal in all counseled appeals.¹⁵⁴ Memorializing this practice finally puts the court in compliance with FRAP 11(e)(1) which requires each circuit court to announce in a local rule if its default practice is "that a certified copy of the docket entries be forwarded instead of the entire record."¹⁵⁵ The appellant's duty in connection with this step of the appeal is to do "whatever is necessary" in connection with forwarding the docket entries.¹⁵⁶

Local Rule 11.1 also lists two categories of cases where the

¹⁵³ See 2D CIR. INTERIM LR 12.1, 46.1 (2009), in *United States Court of Appeals for the Second Circuit*, in *FEDERAL COURT OF APPEALS MANUAL: LOCAL RULES* 331, 347–51 (West 2009).

¹⁵⁴ See 2D CIR. LR 11.1(a) (2010).

¹⁵⁵ See FRAP 11(e)(1).

¹⁵⁶ See 2D CIR. LR 11.1(a) (2010) (tracking the language of FRAP 11(a)).

district court still has to forward the record. First, in *pro se* cases, the court routinely needs ready access to the record on appeal as parties in those cases typically stint on providing appendices of record excerpts. Second, the court has decided, pursuant to FRAP 30(f), to authorize certain classes of appellants to proceed on the original record without appendices, in which case the procedure for the district court to retain the record on appeal does not apply.¹⁵⁷

Local Rule 11.2 Exhibits Retained by the Parties replaces a dense and duplicative prior local rule dealing with the handling of exhibits on appeal. The old rule's defects included: repeating parts of FRAP 11 and 30, quoting language from a superseded version of FRAP 11(a), employing a convoluted process for designating and transmitting retained exhibits to the circuit clerk, and imposing obligations on the parties that were superfluous after the advent of electronic filing and contrary to the circuit's now-codified practice of having the district court retain the record on appeal.¹⁵⁸ The new rule eliminates the requirement that parties forward retained exhibits to the circuit clerk with the record on appeal.¹⁵⁹ Local Rule 11.2 also eliminates the requirement that parties deposit retained exhibits with the district clerk once a notice of appeal is filed, sparing the district clerk the burden of cataloguing, storing, and transmitting exhibits that the parties prefer to retain and that the circuit court may never ask to see.¹⁶⁰

Local Rule 11.3 Duty of Court Reporters effects an even more significant change, placing squarely on court reporters the duty of timely transcript preparation and penalizing them for late delivery.¹⁶¹ This new rule brings the Second Circuit into compliance with FRAP 11(b) and Judicial Conference resolutions regarding late delivery of transcripts. In 1979, FRAP 11(a) was amended to circumscribe the appellant's duties with respect to forwarding the record, recognizing that "[a]side from ordering the

¹⁵⁷ See 2D CIR. LR 11.1(b) (2010); 2D CIR. LR 30.1(e) (2010) (authorizing appeals on the original record in *in forma pauperis* proceedings, social security cases, and immigration cases).

¹⁵⁸ See 2D CIR. LR 11 (2008); see also FRAP 11(a) (1979) & 1979 amend.

¹⁵⁹ See 2D CIR. LR 11.2 (2010); 2D CIR. LR 11.1 (2010).

¹⁶⁰ Compare 2D CIR. LR 11.2 (2010), with 2D CIR. LR 11(c) (2008).

¹⁶¹ See 2D CIR. LR 11.3 (2010).

transcript within the time prescribed the appellant has no control over the time at which the record is transmitted, since all steps beyond this point are in the hands of the reporter and the clerk.”¹⁶² Because preparing and delivering the transcript of proceedings is entirely within the court reporter’s power, it was nonsensical and unfair to ask the appellant to do more than place a timely order for the transcript. Amended FRAP 11(b)(1) therefore places the burden on the court reporter to notify the circuit clerk of receipt of the transcript order, to request any necessary extensions of time, and to risk the wrath of the district judge for delays that the circuit clerk now must report.¹⁶³ In 1982, the Judicial Conference added another layer of incentives to improve transcript delivery times when it adopted a resolution authorizing fee reductions for late delivery of transcripts.¹⁶⁴

Despite these developments, the Second Circuit continued to require the parties to monitor transcript readiness and move for any extensions of time when a transcript was delayed. Local Rule 11.3

¹⁶² FRAP 11(a) (1979) & 1979 amend.

¹⁶³ FRAP 11(b)(1)(A), (B), (D).

¹⁶⁴ See REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 10 (Mar. 11–12, 1982). The resolution provides:

That for [a] transcript of a case on appeal not delivered within 30 days of the date ordered and payment received therefor, or within such other time as may be prescribed by the circuit council, the reporter may charge only 90 percent of the prescribed fee; that for a transcript not delivered within 60 days of the date ordered and, payment received therefor, or within such other time as may be prescribed by the circuit council, the reporter may charge only 80 percent of the prescribed fee. No fee may be charged which would be higher than the fee corresponding to the actual delivery time. In the case of a transcript which is subject to F.R.A.P. Rule 11(b), the reduction in the fee may be waived by the clerk of the court of appeals for good cause shown. Nothing contained herein should be construed as sanctioning untimely delivery, nor should this provision be considered the only penalty that could be imposed by the court or circuit council on habitual offenders.

Id. The resolution was reaffirmed in September 1990 and is still in effect. See REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (Sept. 12, 1990); see also Reporters, 28 U.S.C.A. § 753(f) (West 2010) (subjecting to the approval of the Judicial Conference the rates charged by court reporters for transcripts).

cures this nonconformity in Second Circuit practice. First, it requires the court reporter to estimate a completion date no later than thirty days after receipt of the transcript order form.¹⁶⁵ Second, it requires the court reporter to request an extension if more time is necessary.¹⁶⁶ Third, a court reporter is obligated to update the circuit clerk in fourteen-day intervals until a late transcript is filed, and must charge reduced fees unless the court has excused the delay.¹⁶⁷ Although aspects of LR 11.3 repeat provisions of FRAP,¹⁶⁸ because the new local rule radically departs from existing practice, repetition was deemed necessary to ensure compliance.

New rule LR 4.2 explains an appellant's duties when a motion has been filed in the district court that extends the time to file a notice of appeal.¹⁶⁹ The appellant must notify the court upon the filing of such a motion, and again upon its disposition.

C. Electronic Case Filing

New rule LR 25.1 Case Management/Electronic Case Filing (CM/ECF) addresses the special issues that arise when court documents are filed and maintained in electronic form.¹⁷⁰ Local

¹⁶⁵ See 2D CIR. LR 11.3(a) (2010).

¹⁶⁶ See 2D CIR. LR 11.3(b) (2010).

¹⁶⁷ See 2D CIR. LR 11.3 (c), (d) (2010). In adopting LR 11.3, the Second Circuit joined seven other circuits that have acknowledged and elaborated on FRAP 11's regulation of court reporters. See 4TH CIR. LR 11(a), (b), IOP 11.1; 5TH CIR. LR 11.1; 6TH CIR. LR 11(b), IOP 11(c); 7TH CIR. LR 11(c); 9TH CIR. L.R. 11.1–3; 10TH CIR. LR 10.1(C) & App. B; 11TH CIR. LR 11-1, IOP 11-1. Four of those circuits—the Fourth, Sixth, Ninth, and Tenth—also refer in their local rules to the mandated fee reductions for late delivery of transcripts.

¹⁶⁸ Compare 2D CIR. LR 11.3(a) (2010) with FRAP 11(b)(1)(A) (court reporter to state expected completion date); compare 2D CIR. LR 11.3(b)(1) (2010) with FRAP 11(b)(1)(B) (court reporter duty to request extension of time); compare 2D CIR. LR 11.3(c) (2010) with FRAP 11(b)(1)(D) (circuit clerk to notify district judge if transcript is delayed).

¹⁶⁹ See 2D CIR. LR 4.2 (2010); FRAP 4(a)(4), (b)(3), 6(b)(2).

¹⁷⁰ See 2D CIR. LR 25.1 (2010). This rule borrows much from the Administrative Office of the U.S. Courts' model local appellate rules for electronic filing.

Rule 25.1 makes electronic filing the norm in the Second Circuit, to increase efficiency, reduce costs, and maximize the anticipated benefits of enhanced public access to court documents.¹⁷¹ The rule nonetheless comports with FRAP 25's requirement of reasonable exemption from electronic filing for particular documents and particular cases upon showings of good cause.¹⁷² All counsel admitted to practice in the court must register as a Filing User with PACER, and pro se parties may do so with permission.¹⁷³ By registering, a Filing User consents to electronic service of documents.¹⁷⁴ A Filing User's manual signature is no longer required; the personal log-in and password constitutes a signature.¹⁷⁵ Signally, the new rule prohibits the submission of paper copies for every document other than a brief, an appendix, and certain motions, writs and petitions for rehearing.¹⁷⁶

The Second Circuit had inched toward electronic filing in 2005 when it permitted submission of PDF (Portable Document Format) versions of briefs and appendices.¹⁷⁷ The success of this pilot program led to the May 2008 adoption of a rule requiring submission of a PDF for every document filed except appendices.¹⁷⁸ The requirement of submitting PDF appendices was added in January 2009.¹⁷⁹ In the 2010 comprehensive local rules revision, all of these provisions on PDF submissions were collapsed into LR 25.2 Submission of PDF Documents. Local Rule 25.2 retains the PDF submission requirement for cases that predate the CM/ECF system and for cases exempt from electronic filing.¹⁸⁰

¹⁷¹ See 2D CIR. LR 25.1(a)(2) (2010).

¹⁷² See FRAP 25(a)(2)(D); 2D CIR. LR 25.1(j) (2010).

¹⁷³ See 2D CIR. LR 25.1(b) (2010).

¹⁷⁴ See 2D CIR. LR 25.1(h) (2010).

¹⁷⁵ See 2D CIR. LR 25.1(f) (2010).

¹⁷⁶ See 2D CIR. LR 25.1(g) (2010); *see also* 2D CIR. LR 21.1, 27.1(a)(4), 30.1(b), 31.1, 35.1(c), (remove "and") 40.1(b) (2010).

¹⁷⁷ See 2D CIR. INTERIM LR 32(a)(10), 25 (2005); 2D CIR. INTERIM LR (2005) (on file with author).

¹⁷⁸ See 2D CIR. LR 25 (2008), *available at* http://findarticles.com/p/articles/mi_qn4180/is_20051101/ai_n15832316/.

¹⁷⁹ See 2D CIR. INTERIM LR 25.2 (2009).

¹⁸⁰ See 2D CIR. LR 25.2 (2010).

As in LR 25.1, LR 25.2 largely dispenses with paper copies, requiring only the original document to be filed.¹⁸¹ However, LR 25.3 Additional Paper Copies authorizes the clerk to request additional paper copies for any document filed, whether electronically or otherwise.¹⁸²

D. Motion Practice

Another dramatic change was to the rule on motion practice, now styled LR 27.1 Motions.¹⁸³ The prior rule dated in large part from 1972, and had not been revised to respond to material amendments to FRAP 27 in 1998, 2002, or 2005.¹⁸⁴ For example, the prior local rule repeated FRAP 27's content and format requirements for motions, but failed to reflect the 2005 FRAP amendment requiring that motion papers follow FRAP 32's typeface and style requirements.¹⁸⁵ The new local rule eliminates repetition of FRAP and expressly reinstates the authority of the national rule's form requirements.¹⁸⁶ The new local rule also eliminates the old rule's four separate mentions of the unavailability of oral argument for motions, which were rendered superfluous with the 1998 addition of FRAP 27(e) directing that motions "will be decided without oral argument unless the court orders otherwise."¹⁸⁷

Most significantly, the new LR 27.1 expressly disfavors the two most common motions made in the Second Circuit—to extend the time to file a brief and to file oversized briefs—and sets more

¹⁸¹ See 2D CIR. LR 25.2(d)(4) (2010).

¹⁸² See 2D CIR. LR 25.3 (2010).

¹⁸³ See 2D CIR. LR 27.1 (2010).

¹⁸⁴ See 2d CIR. LR 27 (2008); FRAP 27 & Notes to 1998, 2002, and 2005 Amendments.

¹⁸⁵ See 2D CIR. LR 27(a) (2008).

¹⁸⁶ See 2D CIR. LR 27.1(a)(1) (2010).

¹⁸⁷ H.R. DOC. NO. 105-269, at 52 (1998) (providing the amended language of FRAP 27(e)). The new rules relegate the only mention of oral argument on motions to IOP 27.1 Oral Argument on Motions, to advise the date normally appointed for argument in those limited cases when the court orders it. See 2D CIR. IOP 27.1 (2010).

rigid standards for granting such motions. Under the old regime, these two types of motions constituted a significant percentage of all motions filed in the circuit and imposed substantial burdens on court personnel. The revision follows the example of other circuits that similarly discourage these requests.¹⁸⁸

With respect to motions for extensions of time, LR 27.1(f) works in conjunction with LR 31.2 Briefing Schedule; Failure to File, a new rule on briefing schedules that establishes longer but firm time periods for the preparation of briefs to reduce the incidence of extension motions.¹⁸⁹ Local Rule 27.1 provides that motions seeking to extend the time to file will not be granted “[a]bsent an extraordinary circumstance, such as serious personal illness or death in counsel’s immediate family.”¹⁹⁰ This greatly contrasts with the previous practice of nominally adhering to FRAP’s briefing scheduling but granting virtually automatic sequential 30-day extensions on request. Furthermore, a party seeking an extension of time can no longer assume that making the motion tolls the brief’s deadline—the brief is due at the time originally set until the court orders otherwise.¹⁹¹ A motion for an extension of time must be filed “as soon as practicable after the extraordinary circumstance arises,” thus short-circuiting any attempts to reconstruct distant events as an emergency in view of an imminent brief deadline.¹⁹²

Local Rule 27.1 also expressly disfavors motions to file an oversized brief, and significantly changes the procedures for such motions.¹⁹³ The new rule eliminates the prior requirement that a party submit page proofs with a motion to file an oversized brief, and instead requires a party to explain the reasons for exceeding FRAP’s size limitations.¹⁹⁴ The page proof requirement was

¹⁸⁸ See, e.g., 7TH CIR. LR 26 (2010); 9TH CIR. LR 28-4 (2010); 10TH CIR. LR 27.4 (2010); D.C. CIR. LR 27(h)(3) (2010).

¹⁸⁹ See 2D CIR. LR 27.1(f), 31.2(d) (2010); discussion *infra* notes 209–17 and accompanying text (explaining LR 31.2).

¹⁹⁰ See 2D CIR. LR 27.1(f)(1) (2010).

¹⁹¹ See *id.*

¹⁹² See 2D CIR. LR 27.1(f)(3) (2010).

¹⁹³ See 2D CIR. LR 27.1(e) (2010).

¹⁹⁴ See FRAP 32(a)(7); 2D CIR. LR 27.1(e)(2) (2010); 2D CIR. LR 27(g)

particularly inefficient, because it required parties to wait before filing a motion for an oversized brief until the brief was essentially completed. Consequently, counsel had to complete a brief of the desired length without knowing whether it would be accepted. This policy often required the party to write its brief twice, once to submit the page proofs and again to comply with the court's ruling if the request was not granted in full. The new rule recognizes that a party's need to file an oversized brief will be obvious long before page proofs are ready—for example, a multi-defendant criminal appeal from a lengthy trial, or a complicated civil or regulatory dispute. Requiring an adequate explanation for the brief's additional length, rather than page proofs, encourages parties to resolve the size issue at the earliest opportunity, especially given the risks of waiting too long and then being pressed for time to reduce the brief size if the motion is denied. In any event, a party must move to file a motion for an oversized brief no later than fourteen days before the brief is due, and untimely motions will be evaluated under the same “extraordinary circumstances” standard as motions for an extension of time.¹⁹⁵

The new affirmative obligation imposed on parties to notify their opponents when filing a motion has the potential to streamline motion practice.¹⁹⁶ Previously, the local rule was silent on this subject, and the court's motion form asked only if the movant had sought the other parties' consent to the motion.¹⁹⁷ Prior practice did not mandate either that the movant seek consent or even alert the other parties that a motion would be made. Now the movant must communicate with the other parties about the motion or state why the movant was unable to do so. In this communication the movant must inquire as to opposing counsel's position on the motion and whether opposition papers will be filed, and then report this information to the court.¹⁹⁸ This process is

(2008).

¹⁹⁵ See 2D CIR. LR 27.1(e)(3), (f)(1) (2010).

¹⁹⁶ See 2D CIR. LR 27.1(b) (2010).

¹⁹⁷ See 2D CIR. LR 27 Motion Information Statement (2008), *United States Court of Appeals for the Second Circuit*, in *FEDERAL COURT OF APPEALS MANUAL: LOCAL RULES 381* (West 2008).

¹⁹⁸ See 2D CIR. LR 27.1(b) (2010). Three other circuits have similar local

intended to expedite the handling of motions, especially procedural motions that may be disposed of without awaiting a response from the non-moving parties.¹⁹⁹

Three other new provisions were added to the motions rule. The first authorizes the Second Circuit clerk to decide routine, unopposed motions, thereby complying with FRAP 27's requirement that if an appellate court delegates authority to its clerk to decide motions, it must do so by rule.²⁰⁰ The second provision lists mandatory procedures for filing emergency motions.²⁰¹ These procedures provide for early notification to the clerk's office and plain labeling and explanation of the emergency, in part to avoid situations where a grant of *ex parte* relief would be inconsistent with normal principles of due process and notice. A third new provision sets a 14-day time limit for seeking reconsideration of a decision on a procedural motion, a timeframe consistent with FRAP 40's deadline for a motion for panel rehearing.²⁰² This provision also repeats FRAP 27's admonition

rules that require the movant to contact opposing counsel and report whether opposition papers will be filed. *See* 4TH CIR. LR 27(a); 5TH CIR. LR 27.4; 10TH CIR. LR 27.3(c).

¹⁹⁹ *See* FRAP 27(b) ("The court may act on a motion for a procedural order . . . at any time without awaiting a response.").

²⁰⁰ *See* 2D CIR. LR 27.1(c) (2010). Except for the Sixth Circuit, each circuit has adopted a similar rule, but they have taken different approaches in explaining the clerk's authority. The Second Circuit's LR 27.1(c) follows the broad, categorical approach that six other circuits have employed. *See* 1ST CIR. LR 27.0(d); 3D CIR. LR 27.6; 4TH CIR. LR 27(b); 9TH CIR. LR 27-7; D.C. CIR. LR 27(e); FED. CIR. LR 27(h). Four circuits itemize the specific motions that the clerk may decide. *See* 5TH CIR. LR 27.1; 7TH CIR. IOP 1(c)(2); 10TH CIR. LR 27.3; 11TH CIR. LR 27-1(c). One circuit uses a blended approach, describing a category of motions the clerk may decide and providing specific examples of those motions. *See* 8TH CIR. LR 27B.

²⁰¹ *See* 2D CIR. LR 27.1(d) (2010). Seven circuits have similar local rules addressing emergency motions. *See* 1ST CIR. LR 27.0(b); 3D CIR. LR 27.7; 4TH CIR. LR 27(e); 5TH CIR. LR 27.3; 6TH CIR. LR 27(c), IOP 27(b); 9TH CIR. LR 27-3; 11TH CIR. LR 27-1(b).

²⁰² *See* 2D CIR. LR 27.1(g) (2010); FRAP 40(a)(1). At least six other circuits have local rules establishing a similar time frame. *See* 4TH CIR. LR 27(b) (14 days); 8TH CIR. LR 27B(d) (14 days); 9TH CIR. LR 27-10(a)(2) (14 days); 11TH CIR. LR 27-2 (21 days); D.C. CIR. LR 27(e)(2) (10 days); FED. CIR. LR

that response papers filed after the original motion was decided do not constitute a motion for reconsideration.²⁰³ This repetition was necessary to clarify that the new rule effectively rescinds the court's former standing direction that allowed the clerk to treat response papers as a motion for reconsideration when timely filed but arriving after the original motion was decided.²⁰⁴

Many deletions from the old motions rule are also notable. For example, the revision eliminates provisions detailing the timing and mechanics of how motions are heard and decided, as these provisions are largely obsolete and concern internal court procedures as opposed to matters of appellate practice.²⁰⁵ The streamlined approach preserves administrative flexibility.²⁰⁶

Newly catalogued as a motions-related rule, LR 27.2 Certification of Questions of State Law was relocated from the section of the old rules titled "Rules Relating to the Organization of the Court."²⁰⁷ The rule allows the court on its own or a party's motion to certify a question of state law to a state's highest court.²⁰⁸ The rule required only minor revision to clarify that the court technically does not issue a stay when it certifies a question of state law, but rather retains jurisdiction and holds in abeyance that much of the case that is dependent on the results of certification.²⁰⁹

27(k) (14 days).

²⁰³ See FRAP 27(b); 2D CIR. LR 27.1(g) (2010).

²⁰⁴ See Compilation of Standing Directions to the Clerk of the Second Circuit Court of Appeals, ¶ 27, Aug. 12, 2002 (on file with author).

²⁰⁵ See, e.g., 2D CIR. LR 27(b), (c), (f) (2008). The new rule no longer itemizes and explicates: motions to be heard at regular sessions of court, motions to be heard by a panel which has rendered a decision, motions for leave to appeal, motions to be determined by a single judge, pro se motions, and miscellaneous motions.

²⁰⁶ See 2D CIR. LR 27(b)–(f), (h), (j) (2008).

²⁰⁷ See 2D CIR. LR 27.2 (2010); 2D CIR. LR § 0.27 (2008).

²⁰⁸ See 2D CIR. LR 27.2 (2010).

²⁰⁹ See, e.g., *Tunick v. Safir*, 209 F.3d 67, 89, 90 (2000) (noting that the court would retain jurisdiction over the case during the certification process).

E. Briefing Schedules and Requirements for Briefs and Appendices

Effecting a radical change in the procedure for establishing briefing schedules, LR 31.2 Briefing Schedule; Failure to File, sets brief deadlines according to the parties' proposed dates, within an outer time limit, removing the justification for routine extensions of time.²¹⁰ This innovation also removes the need for the court to issue and docket scheduling orders, which had imposed a significant administrative burden given that few appeals were briefed in accordance with their original timetables. Second Circuit practice had long contravened FRAP 31's briefing timetable, which allows forty days to appellant, followed by thirty days to appellee, for filing briefs.²¹¹ The Second Circuit routinely extended these deadlines at a party's request, with the result that by 2009, the typical appeal took nine months to brief.²¹² Because the Second Circuit has endured significant backlogs over the last decade largely due to the explosion of its immigration docket, protracted briefing schedules did not materially affect the court's operations and calendar. To the contrary, timely briefs often had the drawback of being stale by the time the court heard the case.

Nonetheless, the practice of granting serial extensions of time to file a brief was problematic for many reasons, including that: (1) multiple motions for extensions for time within each case and across all cases imposed significant burdens on court personnel and resources, and increased the risk of docketing errors; (2) irregular and indeterminate briefing schedules made the appellate process less predictable and efficient; and (3) the routine availability of extensions of time made the appellate process more vulnerable to manipulation for purposes of adversarial advantage and delay. In response to these concerns, in January 2009, the court implemented a pilot program for criminal appeals, adopting procedures for establishing briefing schedules similar to those later

²¹⁰ See 2D CIR. LR 31.2(a) (2010).

²¹¹ See FRAP 31(a).

²¹² Telephone Interview with Catherine O'Hagan Wolfe, Second Circuit Clerk of Court, U.S. Court of Appeals for the Second Circuit (July 14, 2010).

codified in LR 31.2. The success of the pilot program led to the adoption of the new local rule extending the “pick-your-own-deadline” scheduling approach to all appeals.²¹³

Local Rule 31.2(a) now requires the parties, rather than the court, to set the schedule through a notification procedure keyed to certain events. For appellant, the event in most cases is the delivery date of the last transcript, known as the “ready date.”²¹⁴ The appellant must notify the clerk of its proposed brief deadline, which must be within ninety-one days of the ready date. Upon filing of the last appellant’s brief, the appellee must notify the clerk of its proposed brief deadline, which must be within ninety-one days after that filing.²¹⁵ Later deadlines are available “only if the case involves a voluminous record or extreme hardship would result.”²¹⁶ If a party fails to submit the required notification, it must abide by FRAP’s default—and much shorter—briefing deadlines.²¹⁷ Reply briefs must be filed roughly in the same time that FRAP requires—fourteen days after the last appellee’s brief.²¹⁸ Thus, in cases where the parties set the briefing schedule at the outermost acceptable limits, the typical appeal will take six-and-a-half months to brief.

The new brief scheduling rule also addresses motions regarding briefing,²¹⁹ in a manner arguably redundant of the new LR 27.1.²²⁰ This redundancy was deemed necessary, however, to signal and reaffirm to parties that the new procedures do not countenance routine extensions of briefing deadlines. Similarly made plain is

²¹³ See Notice to the Criminal Law Bar, Jan. 14, 2009 (on file with author).

²¹⁴ See 2D CIR. LR 31.2(a)(1)(A) (2010).

²¹⁵ See 2D CIR. LR 31.2(a)(1)(B) (2010). The version of the new local rules, effective on January 1, 2010, originally set the outer time limit for appellant’s and appellee’s briefs at 120 days, but concomitant efforts to reduce the court’s backlog were sufficiently successful to require reducing the outer limit to 91 days, effective as of the December 15, 2010 rules amendments. It is conceivable that future backlog reductions will result in recalibrating the outer limits of briefing deadlines to further shorten the duration of the average appeal.

²¹⁶ 2D CIR. LR 31.2(a)(1)(D) (2010).

²¹⁷ See 2D CIR. LR 31.2(a)(1)(A)–(B) (2010).

²¹⁸ See 2D CIR. LR 31.2(a)(2) (2010).

²¹⁹ See 2D CIR. LR 31.2(c) (2010).

²²⁰ See *supra* notes 187–94 and accompanying text

the court's *sua sponte* authority to dismiss an appeal in the case of default under the rule.²²¹

Local Rule 31.2 also establishes a new Expedited Appeals Calendar (XAC) to expedite handling of appeals from threshold dismissals of a complaint.²²² The clerk's office will automatically place on the XAC all appeals from a judgment or order of a district court dismissing a complaint solely for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6), or filing a frivolous complaint or for any other ground specified in 28 U.S.C. § 1915(e)(2).²²³ Briefing schedules are abbreviated to thirty days per side for an initial brief, and fourteen days for a reply brief. The new calendar appears to be a reaction to the U.S. Supreme Court's recent tightening of pleading standards in federal civil cases.²²⁴ The Second Circuit seeks to return promptly to the district courts cases where it disagrees with the dismissal ruling, to get those cases back on track with as little disruption to the flow of the litigation.

Other requirements for briefs are materially unchanged in the new rules. Local Rule 31.1 Number of Copies of Brief to be Filed with Clerk reduces the number from ten to six to reflect changing needs in connection with electronic case filing.²²⁵ The first paragraph of LR 28.1 Briefs continues to warn parties to be concise and logical, but does so in a more succinct and less repetitive fashion.²²⁶ The Appellate Local Rules Report had

²²¹ 2D CIR. LR 31.2(d) (2010).

²²² See 2D CIR. LR 31.2(b) (2010).

²²³ See 2D CIR. LR 31.2(b)(1) (2010).

²²⁴ See generally *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

²²⁵ 2D CIR. LR 31.1 (2010); 2D CIR. LR 31 (2008).

²²⁶ See 2D CIR. LR 28.1(a) (2010); 2D CIR. LR 28(a) (2008). Consideration was given to rescinding this provision because case research unearthed only two instances in the thirty-one-year history of LR 28's first paragraph when the court invoked the provision, suggesting that the provision may be unnecessary. See *Jian Chen v. Gonzales*, 216 F. App'x 121, 122 (2d Cir. 2007) (warning counsel of possible disciplinary proceedings for continuing to submit briefs that "fall[] far below the standards identified in Federal Rule of Appellate Procedure 28 and Local Rule 28"); *Singh v. Gonzales*, 211 F. App'x 33, 34 (2d Cir. 2007)

criticized the second paragraph of the old LR 28 as inconsistent with FRAP 28 because it imposed the additional content requirement of a “preliminary statement” naming the judge or agency member who rendered the decision below and a citation to that decision.²²⁷ The new local rule nonetheless retains the requirement because of the utility of the information it seeks, contrasted with the minor imposition on litigants. To ameliorate the inconsistency with FRAP 28, the revision eliminates the need for a separate “preliminary statement,” which has no FRAP 28 counterpart, and locates the additional content in the brief’s “statement of the case” that the national rule already requires.²²⁸

The rule for citing summary orders in briefs and other court filings, LR 32.1.1 Disposition by Summary Order, was reorganized and streamlined.²²⁹ The revised rule trims and relocates to an IOP the description of the provenance of the court’s practice of issuing non-precedential summary orders, now that the practice is well-established.²³⁰ The summary order legend was also relocated to an IOP, and shortened to track the rule’s simplified language.²³¹ The revision also clarifies that the rule regulates only the citation of Second Circuit summary orders in that court, and not the citation of summary or unpublished dispositions of other courts, or the

(concluding that “meaningful appellate review [was] impossible” because of petitioner’s failure to follow the requirements of LR 28). Because the provision may nonetheless have some deterrent value, it was retained with only stylistic changes.

²²⁷ See FRAP 28(a); 2D CIR. LR 28(2) (2008); APPELLATE LOCAL RULES REPORT, *supra* note 3, at 47 (criticizing former 2D CIR. LR 28 as “inconsistent” because “[i]f the [Judicial Conference] Advisory Committee had intended that additional areas be discussed in the briefs, it could easily have amended Appellate Rule 28 to include these items. Further, such variations among the courts may unduly confuse practitioners.”). This criticism was repeated in a 2004 Judicial Conference Report. See MARIE LEARY, FED. JUDICIAL CTR., ANALYSIS OF BRIEFING REQUIREMENTS ON THE UNITED STATES COURTS OF APPEALS: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON APPELLATE RULES 4–14 (Oct. 2004).

²²⁸ See 2D CIR. LR 28.1(b) (2010); FRAP 28(a)(6).

²²⁹ See 2D CIR. LR 32.1.1 (2010); 2D CIR. LR § 0.23 (2008).

²³⁰ See 2D CIR. IOP 32.1.1(a) (2010).

²³¹ See 2D CIR. IOP 32.1.1(b) (2010); 2D CIR. LR § 0.23 (2008).

citation of Second Circuit summary orders in other courts.²³² As a practical matter, the Second Circuit cannot prevent how and under what circumstances its rulings, whatever the form, are cited in other courts. There is no mechanism to police this practice and no remedy available to the court when it happens. Another change of particular interest to counsel litigating against a pro se party is that citation of a summary order automatically triggers the obligation to serve a paper copy on the pro se party. Formerly, a paper copy was required only if the summary order was not publicly accessible on line.²³³ At the suggestion of the Attorney Advisory Committee, the new rule recognizes that reliance on an electronic database version is unfair given that many pro se parties may not have ready access to computers or the Internet, or sufficient computer skills to readily locate a summary order.²³⁴

Requirements for appendices underwent even more revision than those for briefs. Local Rule 30.1 Appendix was restructured for clarity and readability by reordering the items to appear in the same order as FRAP 30.²³⁵ To deter a party from inappropriately including exhibits and other items that are not part of the record on appeal, the rule now expressly limits the contents of the appendix to materials listed in FRAP 30(a)(1) plus the notice of appeal.²³⁶ As with the number of copies of briefs, in light of electronic filing the number of copies of the appendix to be filed with the clerk is reduced from ten to three.²³⁷ Procedures for relying on the original record without an appendix are greatly simplified, also in light of electronic filing.²³⁸ Most significantly, the new version of this local rule adds a provision²³⁹ to comply with FRAP 30's mandate that

²³² Compare 2D CIR. LR 32.1.1(b) (2010), with 2D CIR. LR § 0.23 (2008).

²³³ Compare 2D CIR. LR 32.1.1(d) (2010), with 2D CIR. LR § 0.23(c)(1)(B) (2008).

²³⁴ See generally *Lebron v. Sanders*, 557 F.3d 76 (2d Cir. 2009) (per curiam) (recommending reconsideration of local rules that rely on pro se party access to electronic databases when opposing briefs cite unpublished opinions).

²³⁵ See 2D CIR. LR 30.1 (2010); 2D CIR. LR 30 (2008).

²³⁶ See 2D CIR. LR 30.1(a) (2010).

²³⁷ See 2D CIR. LR 30.1(b) (2010); 2D CIR. LR 31(b) (2008).

²³⁸ See 2D CIR. LR 30.1(e) (2010).

²³⁹ See 2D CIR. LR 30.1(f) (2010).

“[e]ach circuit must, by local rule, provide for sanctions against attorneys who unreasonably and vexatiously increase litigation costs by including unnecessary material in the appendix.”²⁴⁰ Since this mandate was added to FRAP in 1986, nine circuits complied by adopting a local rule providing for sanctions.²⁴¹ The local rules revision brings the Second Circuit into compliance with the 1986 FRAP amendment.

Local Rule 32.1 Form of Brief and Appendix was modified to elaborate on pagination rules that will make it easier for court personnel to refer to a PDF version of these documents.²⁴² Dividing an appendix into separate volumes is now expressly required when an appendix exceeds three hundred pages.²⁴³ Requirements for a special appendix were simplified to make it clear that one is required only when the appendix exceeds three hundred pages.²⁴⁴

The court added a new provision to LR 29.1 Brief of an Amicus Curiae, acknowledging the FRAP 29 amendment that requires disclosure of party interests in amicus curiae briefs.²⁴⁵ Such disclosure will assist judges in assessing those submissions, and deter counsel from using an amicus brief to circumvent page limits. The Second Circuit twist on the amendment is that the disclosure must appear in the first footnote on the first page of the amicus brief.²⁴⁶

F. Criminal Appeals

Local Rule 4.1 Continuation of Counsel in Criminal Appeals represents a substantial revision of the previous rule addressing the

²⁴⁰ FRAP 30(b)(2).

²⁴¹ See 1ST CIR. LR 30.0(f); 3D CIR. LR 30.5; 4TH CIR. LR 30(a); 5TH CIR. LR 30.1.8, 32.5; 6TH CIR. LR 30(o); 8TH CIR. LR 30A(c); 9TH CIR. LR 30-2; 10TH CIR. LR 46.6(a); D.C. CIR. LR 30(b).

²⁴² See 2D CIR. LR 32.1(a)(3) and (b)(3) (2010); 2D CIR. LR 32(b) (2008); see also H.R. DOC. NO. 99-179, at 16 (1986).

²⁴³ See 2D CIR. LR 32.1(b)(2) (2010).

²⁴⁴ See 2D CIR. LR 32.1(c) (2010).

²⁴⁵ See 2D CIR. LR 29.1(b) (2010); FRAP 29(c)(5).

²⁴⁶ See 2D CIR. LR 29.1(b) (2010).

duties of counsel in criminal cases. The revision removes language that may have suggested that counsel's obligation to continue representing the defendant on appeal extends only to conviction after a trial.²⁴⁷ The revised rule clarifies that this obligation applies in all circumstances, including appeals after conviction on a guilty plea. The new rule cleans up the instructions for motions to withdraw as counsel on appeal, including how such motions interact with electronic filing requirements. Provisions of the old rule that referred to a superseded plan to implement the Criminal Justice Act were deleted.²⁴⁸

In addition, two new provisions individually address motions to withdraw: (1) on the ground that the appeal is frivolous and (2) on the ground that the court has rendered an adverse decision.²⁴⁹ The frivolous appeal provision of LR 4.1 codifies circuit practice in response to the Supreme Court's *Anders* decision, which delimited counsel's duty to prosecute a criminal appeal that counsel has determined to be devoid of merit.²⁵⁰ *Anders* mandates that counsel request permission to withdraw in such cases, accompanied by a brief explaining the possible issues that could be raised on appeal and why those issues are frivolous. The local rule now formally requires the submission of *Anders* briefs, and compliance with any other mandates of subsequent case law on this subject.²⁵¹ The adverse decision provision of LR 4.1 addresses appointed counsel's obligations regarding petitions for certiorari, which had previously been delineated only in the Second Circuit's Plan to Implement the Criminal Justice Act of 1964.²⁵² The local

²⁴⁷ See 2D CIR. LR 4.1(a) (2010); 2D CIR. LR 4(b) (2008).

²⁴⁸ See 2D CIR. LR app. A (2010) (amended Plan to Supplement the Plans Adopted by the Several District Courts Within the Circuit, as Required by the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, as Amended).

²⁴⁹ See generally 2D CIR. LR 4.1(b), (c) (2010).

²⁵⁰ See *Anders v. California*, 386 U.S. 738 (1967).

²⁵¹ See 2D CIR. LR 4.1(b) (2010).

²⁵² See 2D CIR. LR app. A ¶XI.C (2009) (Amended Plan to Implement the Criminal Justice Act of 1964), available at www.ca2.uscourts.gov/Docs/CJA/CJA_plan.pdf. The Criminal Justice Act, 18 U.S.C.A. § 3006A (West 2010), requires each federal court to adopt a plan for furnishing representation to eligible persons financially unable to obtain adequate representation.

rule codifies the existing procedures for counsel to move to be relieved of the obligation to file a certiorari petition if counsel has reasonable grounds to believe that the petition would have no likelihood of success.²⁵³

The local rule on death penalty cases was substantially revised and renumbered LR 47.1.²⁵⁴ The old rule repeated provisions of both FRAP and statutory law, often in a manner that could lead to confusion as to how to proceed. For example, the old provision dealing with the duration of an automatic stay of execution misstated FRAP 41's mandate rules and purported to continue the stay of execution beyond the court's mandate. Once the court issues its mandate, however, it has no jurisdiction to stay execution of the death sentence.²⁵⁵ As originally worded, LR 47.1 did not effect a stay of the mandate and therefore could not, despite proclaiming otherwise, effect a stay of execution through Supreme Court review. This could set a trap for litigants who might overlook the need to move for a stay of the mandate. The new rule also recognizes the distinction between direct review of a federally-imposed death sentence and collateral review of a death sentence (whether imposed in state or federal court). The former situation does not pose the same exigencies because no execution date is set until after completion of direct review, and Federal Rule of Criminal Procedure 38(a) already imposes a stay.²⁵⁶ Moreover, the need for advance notice and monitoring of proceedings is much more acute in the latter case, when an execution date has been set and a stay of execution is sought.

In addition, the new death penalty rule reorganizes the subparts to put contemplated events in chronological order, and eliminates provisions regarding original petitions and certificates of appealability which repeated FRAP 22. Provisions dealing with

²⁵³ See 2D CIR. LR 4.1(c) (2010).

²⁵⁴ See 2D CIR. LR 47.1 (2010); 2D CIR. LR § 0.28 (2008). The old rule was renumbered to correspond to FRAP 47, the protocol for local rules that have no FRAP counterpart. See 2D CIR. LR 1.1 (2010).

²⁵⁵ See *United States v. Rivera*, 844 F.2d 916, 921 (2d Cir. 1988) ("Simply put, jurisdiction follows the mandate.").

²⁵⁶ See FED. R. CRIM. P. 38(a) (imposing an automatic stay of a death sentence pending appeal).

preparation and transmittal of the record were similarly excised as repetitive of FRAP and obsolete in an era of electronic case filing.²⁵⁷ The details of the clerk's internal docketing procedures and of the composition of death penalty case pools and panels now reside in IOP 47.1.

G. Habeas Corpus

Revised LR 22.1 Certificate of Appealability now comports with federal standards on habeas petitions, and specifically the requirement that ordinarily the district court must rule first on the appealability of a petition it denied.²⁵⁸ The Second Circuit's former local rule on certificates of appealability (COA) introduced ambiguity on this point by suggesting that a habeas petitioner may bypass the district court and request a COA in the first instance from the circuit court.²⁵⁹ Four other circuits acknowledge in their local rules the requirement that a district judge first issue or deny a COA, and they ordinarily will decline to consider a COA application without a district judge ruling.²⁶⁰ The revised LR 22.1

²⁵⁷ See FRAP 10, 11.

²⁵⁸ See R. GOVERNING § 2244 CASES IN U.S. DIST. CTS. 11(a), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2254_2255_Rules.pdf; R. GOVERNING § 2255 PROCEEDINGS FOR U.S. DIST. CTS. 11(a), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2254_2255_Rules.pdf. See also 2D CIR. LR 22.1(a) (2010) (“[T]his court will not act on a request for a [COA] unless the district court has denied a COA.”).

²⁵⁹ See 2D CIR. LR 22(a) (2008) (instructing that “where an appeal has been taken but no [COA] has been issued by the district judge or by this court or a judge thereof, the appellant shall promptly move in this court for such a certificate”).

²⁶⁰ See 1ST CIR. LR 22.0(a) (“ordinarily neither the court nor a judge thereof will act on a request for a certificate of appealability if the district judge who refused the writ is available and has not ruled first”); 3D CIR. LR 22.2 (instructing clerk to enter a remand if the district court does not make a determination); 6TH CIR. LR 22(a) (allowing an application for a COA in circuit court only after it has been denied by the district court); 9TH CIR. LR 22-1(a) (“A motion for a certificate of appealability (“COA”) must first be considered by the district court.”). Seven circuits are silent on the subject. See 5TH CIR. LR 22; 7TH CIR. LR 22, 22.2; 8TH CIR. LR 22A, 22B; 10TH CIR. LR 22.1; 11TH CIR. LR 22-1(b); D.C. CIR. LR 22; FED. CIR. LR (showing the repealed LR 22). The

also adds a time limit for seeking a COA—twenty-eight days after the later of the district court denial or the filing of the notice of appeal.²⁶¹

Local Rule 22.2 Second or Successive Applications Under § 2254 and § 2255 is a new rule intended to facilitate processing of motions to authorize a second or successive habeas application. The rule requires applicants to complete a detailed form describing all prior applications and to attach copies of those applications and any resulting district court decision.²⁶²

H. Civil Appeals Management Plan and Related Rules

Local Rule 33.1 codifies the Second Circuit’s Civil Appeals Management Plan (CAMP).²⁶³ CAMP dates back to a 1973 pilot program to mediate settlements of cases on appeal.²⁶⁴ By 1980, CAMP had evolved into a routine pre-argument conference for civil appeals to explore the possibility of settlement and attempt to narrow the issues on appeal.²⁶⁵ Despite the program’s status as a “generally applicable direction” to parties, it was never previously codified as a local rule. Its substance was distributed between two addenda to the local rules titled “Civil Appeals Management Plan” and “Guidelines for Conduct of Pre-Argument Conference under CAMP,”²⁶⁶ neither of which stated that it had the force of a local

Fourth Circuit’s COA rule contains ambiguous language akin to the old Second Circuit rule in that it does not explicitly bar the circuit court from ruling on the COA when the district judge has not yet done so. *See* 4TH CIR. LR 22(a)(1) (permitting a petitioner to seek a COA in the circuit court “in cases in which the district court has not granted a certificate”).

²⁶¹ *See* 2D CIR. LR 22.1(a) (2010).

²⁶² *See* 2D CIR. LR 22.2 (2010). Seven other circuits have adopted similar requirements of disclosure. *See* 1ST CIR. LR 22.1(a); 3D CIR. LR 22.5(a); 4TH CIR. LR 22(d); 6TH CIR. LR 22(b); 7TH CIR. LR 22.2(a); 8TH CIR. LR 22B; 9TH CIR. LR 22–4.

²⁶³ *See* 2D CIR. LR 33.1 (2010).

²⁶⁴ *See* MORRIS, *supra* note 107, at 171.

²⁶⁵ Civil Appeals Management Plan, 28 U.S.C.A., United States Courts of Appeals Rules, Second Circuit, at 487–93 (West 1980).

²⁶⁶ *Civil Appeals Management Plan and Guidelines for Conduct of Pre-Argument Conference under Camp*, available at United States Court of Appeals

rule.²⁶⁷ Those two documents overlapped and duplicated information in FRAP and other local rules concerning civil appeals, including how to docket the appeal, forward the record, arrange for the transcript, apply for indigent status, and establish a briefing schedule. This imposed unnecessary burdens on counsel who needed to parse multiple sources of information about CAMP and the civil appellate process to identify any local variations from national requirements, and any CAMP commands that supplemented or varied from other local rules.

Local Rule 33.1 consolidates all information specific to appeal conference procedures and eliminates redundant material, reducing clutter and bringing the CAMP procedures into compliance with FRAP 47(a). The new rule has one new requirement—counsel must anonymously submit a post-conference survey, designed to provide information to the court about CAMP’s effectiveness.²⁶⁸

Another new rule clarifies the requirements for a procedural device often used in conjunction with CAMP—dismissal of an appeal without prejudice to later reinstatement. Local Rule 42.1 formally recognizes this expedient, which the court has used for many years to accommodate parties who wish to suspend activity on their appeal pending, for example, settlement negotiations or a decision in another case.²⁶⁹ The rule requires the parties to set an outside date for reinstating the appeal, modifying existing practice, which allowed stipulations that relied on indefinite dates. Indefinite dates were difficult for the clerk’s office to track and contributed to the years-long idling of some appeals.²⁷⁰ The requirement of a limiting date will facilitate tracking cases and

for the Second Circuit, in FEDERAL COURT OF APPEALS MANUAL: LOCAL RULES 397–401 (West 2009).

²⁶⁷ Prior to the 2010 local rules revision, the only statement that CAMP “has the force and effect of a local rule” were court decisions making that assertion. *See, e.g.,* *Adkins v. Gen. Motors Acceptance Corp.*, 562 F.3d 114, 117 (2d Cir. 2009) (quoting *Lake Utopia Paper, Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 929 (2d Cir. 1979)).

²⁶⁸ *See* 2D CIR. LR 33.1(c)(4) (2010).

²⁶⁹ *See* 2D CIR. LR 42.1 (2010).

²⁷⁰ Telephone Interview with Catherine O’Hagan Wolfe, Clerk of Court, U.S. Court of Appeals for the Second Circuit (July 14, 2010).

reduce the time that a case may languish.

I. Oral Argument

The court permanently adopted, with some refinement, new procedures for oral argument that had previously been implemented on an interim basis.²⁷¹ Under LR 34.1 Oral Argument and Submission on Briefs, within fourteen days after the filing of the final appellee brief, each party is required to submit an Oral Argument Statement. Failure to do so will allow the court to infer that the party does not seek oral argument.²⁷² And even if the parties request oral argument, the court reserves the prerogative to decline to hear argument and take a case on submission, as authorized under FRAP 34(a)(2).²⁷³ The revised rule eliminates, however, the provision that expressly invited parties, in cases where oral argument is deemed unnecessary, to file a statement of reasons to hear oral argument.²⁷⁴ FRAP does not require an opportunity to object to having a case heard on submission, and no other circuit court provides such an opportunity.

The Second Circuit's Oral Argument Statement form also requests information about who will be arguing the case, and dates of the parties' unavailability for argument.²⁷⁵ This replaces the inquiries no longer made in the revised Notice of Appearance form.²⁷⁶ The timing of filing the Oral Argument Statement form is keyed to the filing of the final appellee brief for two reasons. First, parties are better able to make an informed decision whether to

²⁷¹ See 2D CIR. INTERIM LR 34 (2008).

²⁷² See 2D CIR. LR 34.1(a) (2010). The interim rule had required the parties to file a Joint Oral Argument Statement that required them to consult as to the necessity of oral argument, but did not require the form to be filed until after the deadline for reply briefs. See 2D CIR. LR 34 (2008).

²⁷³ See 2D CIR. LR 34.1(b) (2010).

²⁷⁴ See 2D CIR. LR 34(d) (2008).

²⁷⁵ See Second Circuit Oral Argument Statement Form, available at http://www.ca2.uscourts.gov/clerk/Forms_and_instructions/pdf/LR%2034%20ORAL%20ARGUMENT%20STATEMENT%20revised%20December%202010.pdf.

²⁷⁶ See *supra* note 148 and accompanying text.

forgo oral argument when briefing is close to complete. Second, the court needs to obtain the parties' unavailability dates reasonably close to the likely argument date.

Once a case has been set down for oral argument, the court will grant requests for postponement only upon a showing of "extraordinary circumstances, and not by stipulation of the parties."²⁷⁷ The same "extraordinary circumstances" standard appears in LR 27.1 on motions, where the rule provides as examples of such circumstances personal illness or a death in counsel's immediate family.²⁷⁸ Local Rule 34.1 refines this definition to note that "[e]ngagement of counsel in another tribunal (other than the U.S. Supreme Court) is not an extraordinary circumstance."²⁷⁹

The local rules revision also made permanent the previously interim rule establishing a non-argument calendar.²⁸⁰ Local Rule 34.2 Non-Argument Calendar makes explicit that oral argument is not available as a general rule in certain immigration cases.²⁸¹ The court originally promulgated this rule in 2005 to address docket management issues arising out of the increasing and overwhelming number of asylum filings in the circuit.²⁸² The local conditions that

²⁷⁷ 2D CIR. LR 34.1(e) (2010). Every other circuit that has promulgated a local rule regarding postponement of oral argument requires some level of cause for granting relief. Five circuits require "good cause." *See* 3D CIR. LR 34.2; 4TH CIR. LR 34(c); 5TH CIR. LR 34.6; 6TH CIR. LR 34(c); 11TH CIR. LR 34-4(f). Three circuits require "extraordinary cause" or extraordinary circumstances." *See* 7TH CIR. LR 34(e); 10TH CIR. LR 34.1(A)(3); D.C. CIR. LR 34(g). *See also* 1ST CIR. LR 34.1(d) ("grave cause"); 9TH CIR. LR 34-2 ("good cause" except that a request made within fourteen days of argument date requires "exceptional circumstances").

²⁷⁸ 2D CIR. LR 27.1(f)(1) (2010).

²⁷⁹ 2D CIR. LR 34.1(e) (2010).

²⁸⁰ *See* 2D CIR. INTERIM LR § 0.29 (2008).

²⁸¹ 2D CIR. LR 34.2(a) (2010).

²⁸² *See* JOHN M. WALKER, CHIEF JUDGE'S REPORTS OF THE SECOND CIRCUIT (2005), available at <http://www.ca2.uscourts.gov/Reports/05/open.htm> (addressing in the introduction the dramatic increase in immigration appeals affecting the Second Circuit); *see also generally* COMM. ON FED. COURTS, THE ASS'N OF THE BAR OF THE CITY OF N.Y., THE SURGE OF IMMIGRATION APPEALS AND ITS IMPACT ON THE SECOND CIRCUIT COURT OF APPEALS (2004), available at <http://www.abcnyc.org/pdf/report/AppealSurgeReport.pdf> (documenting the

justified the rule have not abated, warranting its transition to permanent status. Besides some scrubbing of the rule's language to excise jargon and eliminate administrative nonessentials, the biggest change to LR 34.2 is the declaration that the court may at some future time identify other classes of cases as appropriate for the Non-Argument Calendar.²⁸³

J. Post-Disposition Matters

Procedures for en banc and panel rehearing did not undergo any significant substantive change, although their status as interim rules was upgraded to permanent.²⁸⁴ The language of LR 35.1 En Banc Procedure now clarifies that a simultaneous petition for both a panel rehearing and a rehearing en banc should be made in a single document.²⁸⁵ A sanctions provision was added to LR 35.1 to parallel the one already included in LR 40.1 Panel Rehearing, which was revised substantially.²⁸⁶ In both rules, the sanctions provision no longer sets a ceiling on the amount that can be assessed against a party that files a frivolous petition for rehearing.²⁸⁷ In addition, sanctions are no longer awarded in favor of the petitioner's adversary.²⁸⁸ Because FRAP does not permit the adversary to respond to a petition unless ordered to do so,²⁸⁹ it was anomalous to award sanctions for a meritless petition to an adversary who likely did not respond and did not incur related expense.

Matters of internal court administration concerning en banc polls and decisions were streamlined to abate duplication of statutory and national rule requirements, and relocated in an

rise and effect of immigration cases in the Second Circuit).

²⁸³ See 2D CIR. LR 34.2(a)(2) (2010).

²⁸⁴ See 2D CIR. LR 35.1, 40.1 (2010); 2D CIR. INTERIM L.R. 35, 40 (2008).

²⁸⁵ 2D CIR. LR 35.1(a) (2010).

²⁸⁶ 2D CIR. LR 35.1(d), 40.1(c) (2010).

²⁸⁷ Compare 2D CIR. LR 35.1(d) (2010), and 2D CIR. LR 40.1(c) (2010), with 2D CIR. L.R. 40(c) (2008).

²⁸⁸ See 2D CIR. INTERIM LR 40(c) (2008).

²⁸⁹ FRAP 35(e), 40(a)(3) (2009).

adjoining IOP.²⁹⁰ One potentially contentious issue newly resolved in IOP 35.1 is when to determine eligibility to vote in an en banc poll.²⁹¹ It is well-settled that only active judges may vote to determine whether a case should be heard or reheard en banc.²⁹² However, given that there is often a time gap (sometimes substantial) between the date an en banc poll is requested and the date the en banc order is entered, it is necessary to specify when to determine active status. A judge may be active at the time of casting a vote in an en banc poll, but may have taken senior status by the time all votes are cast. The IOP determines the judge's eligibility to have a vote counted as of "the date of entry of the en banc order."²⁹³ This choice coincides with the most likely reading of the en banc statute, which allows for en banc hearings only when "*ordered* by a majority of the circuit judges of the circuit who are in regular active service."²⁹⁴ Because the operative verb in the statute is "*ordered*," the better reading of the statute is to determine a judge's eligibility at the time an en banc hearing is ordered.

Even if the en banc statute were ambiguous, as a policy matter, the best option for determining a judge's status for the purpose of counting votes in an en banc poll is the date of entry of the en banc order. Until an order is actually entered, judges can (and often do) change their vote. Majorities shift back and forth. Thus, measuring a judge's eligibility at the latest possible date ensures that only active judges cast a vote. Furthermore, before the close of voting, a retiring judge could be replaced by a newly appointed judge who would be entitled to vote on the en banc poll. Because the circuit cannot have more active votes than it has authorized judgeships, the retired judge should give up the en banc vote to the new

²⁹⁰ See 2D CIR. IOP 35.1 (2010); see also 28 U.S.C. § 46(c) (1996) (establishing procedures for a rehearing en banc, including the basis for determining the majority necessary for ordering en banc consideration); FRAP 35(a) (2009) (same).

²⁹¹ See 2D CIR. IOP 35.1(b) (2010).

²⁹² See Assignment of Judges, 28 U.S.C.A. § 46(c) (West 2010); *Moody v. Albemarle Paper Co.*, 417 U.S. 622, 626 (1974).

²⁹³ See 2D CIR. IOP 35.1(b) (2010).

²⁹⁴ 28 U.S.C. § 46(c) (emphasis added).

judge.²⁹⁵

The instructions for applications under the Equal Access to Justice Act were renumbered LR 39.2, corresponding to FRAP 39 Costs.²⁹⁶ Half the old rule was purged as obsolete because of amendments to the underlying statutory authority. What remains deals only with the application's format. The provision on the clerk's entry of orders was renumbered LR 45.1 Clerk's Authority to correspond to FRAP 45 Clerk's Duties. The local rule's lengthy and detailed enumeration of the clerk's authority to sign orders was reduced to a single sentence, as the old rule no longer accurately reflected the court's procedures and repeated multiple provisions of FRAP.²⁹⁷

K. Attorney Regulation

In conjunction with the implementation of electronic filing, the court overhauled its system for storing and accessing attorney

²⁹⁵ Although no other circuit has adopted a rule addressing the issue of when to assess a judge's status in determining whether to count his vote on an en banc poll, the Third, Fifth, and Ninth Circuits have introduced some ambiguity on the subject by allowing a judge who takes senior status after the en banc poll to continue to participate in the argument and the subsequent decision. *See* 3D CIR. IOP 9.6.4 (2010) ("Any judge participating in an en banc poll, hearing, or rehearing while in regular active service who subsequently takes senior status may elect to continue participating in the final resolution of the case."); 5TH CIR. LR 35.6 (2009) (same); 9TH CIR. LR 35-1 (2009) advisory committee note 2 ("[A] judge who takes senior status during the pendency of an en banc case for which the judge has already been chosen as a member of the en banc court may continue to serve on that court until the case is finally disposed of."). These three approaches arguably conflict with 28 U.S.C. § 46(c) by allowing a senior judge who was not a member of the panel, and did not hear the en banc case while in regular active service, to participate in the resolution of the case.

²⁹⁶ *See* 2D CIR. LR 39.2 (2010) (formerly 2D CIR. LR § 0.25 (2008)). The only change to LR 39.1 Reproduction Costs was to eliminate the clerk's authority to increase copy rates from time to time to reflect prevailing rates, to clarify that the clerk does not have unilateral authority to do so and a rule amendment is required. 2D CIR. LR 39.1 (2010).

²⁹⁷ *See* 2D CIR. LR 45.1 (2010); 2D CIR. LR § 0.18 (2008) (repeating provisions of FRAP 27(b), 31, 36, 41, 42(b)).

admissions information and revised Local Rule 46.1 Attorney Admission to require periodic renewal of admission.²⁹⁸ The new system will improve the court's ability to track and communicate with an increasingly mobile and national bar, and to vet the professional credentials of lawyers who appear before the court.²⁹⁹ Consistent with this goal, the rule also explicitly requires that attorneys keep the court apprised of changes in contact information.³⁰⁰

Another material change to the rule concerns *pro hac vice* admission. The old rule purported to allow *pro hac vice* admission only under "exceptional circumstances,"³⁰¹ but counsel frequently sought admission at oral argument without making the necessary showing, and the court routinely granted such requests. This phenomenon was largely the consequence of the prior regime's failure to inquire into counsel's admission status until oral argument was imminent.³⁰² As mentioned above, new LR 12.3 cures this lapse by requiring counsel of record to be admitted and to file a notice of appearance attesting to their admission status at the outset of the case.³⁰³ Non-admitted attorneys must immediately seek full admission or make a written motion for *pro hac vice* admission.³⁰⁴

Local Rule 46.2 Attorney Discipline radically reorganizes the previous rule, eliminating provisions that duplicate FRAP 46, repeat other local rules, or discuss purely internal administrative matters.³⁰⁵ The rule's new architecture first discusses the

²⁹⁸ See 2D CIR. LR 46.1(a) (2010) (requiring renewal of admission every five years).

²⁹⁹ Two circuits similarly have implemented an attorney re-registration requirement, requiring renewal every five years. See 5TH CIR. LR 46.1; 11TH CIR. LR 46-2.

³⁰⁰ See 2D CIR. LR 46.1(b) (2010).

³⁰¹ See 2D CIR. LR 46(d) (2008).

³⁰² See 2D Cir. Notice of Appearance form (2008); see also *supra* text accompanying notes 151–53.

³⁰³ See 2D CIR. LR 12.3(a) (2010); see also source cited *supra* note 151.

³⁰⁴ See 2D CIR. LR 46.1(d) (2010) (*Pro hac vice* admission is available only to attorneys acting for indigent parties or able to demonstrate exceptional circumstances).

³⁰⁵ See 2D CIR. LR 46.2 (2010) (formerly 2D CIR. LR 46(f)–(h) (2008)).

provisions addressing the structure and procedures of the court's grievance and disciplinary mechanisms.³⁰⁶ Second, the rule addresses specific disciplinary matters, such as those arising out of suspension and disbarment orders of other licensing authorities, and those arising out of criminal convictions.³⁰⁷

In addition to discipline for attorney misconduct, the court may sanction parties for delay under LR 38.1 Sanctions for Delay.³⁰⁸ This rule was revised to expand the court's authority beyond sanctions merely for late filing of a record, brief, or appendix.³⁰⁹ Under the new rule, sanctions are available for any action that unnecessarily delays an appeal, such as late filing of other documents, failure to file required forms and notices, or the filing of frivolous motions. The new rule also removes language specifying the types of sanctions that might be ordered. Use of the broad term "sanctions," without qualification, in this provision and elsewhere throughout the rules, conveys that all the types of sanctions may be ordered, and avoids the implication that one sanctions provision is more or less punitive than another.³¹⁰

L. Local Rules Relating to the Organization of the Court

The Second Circuit local rules revision dispenses with the category of rules formerly known as "Local Rules Relating to the Organization of the Court." Most of the provisions listed in that section are redesignated as IOPs, with a few deleted as obsolete, and a few retained as local rules and renumbered to correspond to FRAP.³¹¹

The provisions redesignated as IOPs address basic descriptive information about the court such as its name, seal, term, and sessions.³¹² Also relocated to IOPs were administrative details about what constitutes a quorum, the location and hours of the

³⁰⁶ See *See* 2D CIR. LR 46.2(a), (b) (2010).

³⁰⁷ See 2D CIR. LR 46.2(c), (d) (2010).

³⁰⁸ See 2D CIR. LR 38.1 (2010).

³⁰⁹ See 2D CIR. LR 38 (2008).

³¹⁰ See 2D CIR. LR 27.1(h), 30.1(f), 33.1(g), 35.1(e), 40.1(d) (2010).

³¹¹ See 2D CIR. LR 27.2, 34.2, 39.2, 45.1, 47.1 (2010).

³¹² See 2D CIR. IOP A, B, C, D (2010).

clerk's office, library access, court fees, and circuit judicial administration.³¹³ The Appellate Local Rules Report had also criticized former Second Circuit LR § 0.17 as unnecessarily redundant of the Court of Appeals Miscellaneous Fee Schedule set forth in 28 U.S.C. § 1913.³¹⁴ Redesignated as IOP G, this provision now simply refers parties to the statute without reiterating its fee schedule, eliminating the need to continually update the local rule to keep current with fee schedule revisions.³¹⁵ However, despite the Report's comment that local rules stating a court's name are unnecessary, the Second Circuit retained its name provision.³¹⁶

The IOPs were also recalibrated to comply with the revision project's parameters. For example, the new "quorum" provision³¹⁷ reduces repetition of the federal quorum statute³¹⁸ and of FRAP 27(b)'s provision permitting a single judge to issue procedural orders.³¹⁹ The new "clerk" provision eliminates both outdated procedures for lending and preserving original papers, and confusing instructions for certifying the record to the Supreme Court (which is covered more comprehensively and authoritatively in the Supreme Court rules).³²⁰ The IOP on Circuit Judicial Administration was trimmed of excessive detail, providing greater flexibility in the administration of the circuit's periodic judicial conference, the format of which can vary with budgetary and personnel constraints.³²¹

³¹³ See 2D CIR. IOP E, F, G, H, I (2010).

³¹⁴ APPELLATE LOCAL RULES REPORT, *supra* note 3, Appendix for the Court of Appeals for the Second Circuit 2.

³¹⁵ 2D CIR. IOP G (2010).

³¹⁶ APPELLATE LOCAL RULES REPORT, *supra* note 3, at 1 (observing that rules setting forth a court's name repeat 28 U.S.C. §§ 41, 43(a)).

³¹⁷ See 2D CIR. IOP E (2010).

³¹⁸ See 28 U.S.C. § 46 (1996).

³¹⁹ See FRAP 27(b).

³²⁰ See SUP. CT. R. 12(7), 16(2); 2D CIR. IOP F (2010); 2D CIR. LR § 0.16 (2008).

³²¹ See 2D CIR. IOP I (2010); 2D CIR. LR § 0.22 (2008). The revision is similar to the simplified approach taken by six other circuits. See 1ST CIR. LR 47.1; 3D CIR. L.A.R. MISC. 105.0; 5TH CIR. OTHER IOPS; 8TH CIR. IOP I.B.3; 9TH CIR. IOP D; FED. CIR. LR 53.

M. Rescinded Rules

The revision eliminates a number of local rules superseded by FRAP amendments. The rescission of LR 3(d) comes thirty years late, as the rule was superseded by a FRAP amendment that took effect in 1979.³²² Prior to 1979, FRAP 3(d) required the district clerk to forward to the circuit clerk a copy of the notice of appeal only in criminal cases and habeas corpus proceedings. Accordingly, Second Circuit LR 3(d) was designed to fill the gap and require the district clerk to forward a copy of the notice of appeal in all other civil cases as well. In 1979, FRAP 3(d) was amended to extend the forwarding requirement to all civil cases, thus eliminating the need for LR 3(d).

Also long overdue was the deletion of LR 9 listing five items necessary to an application for release of a criminal defendant pending appeal. This local rule had been redundant since the wholesale revision of FRAP 9 in 1994, which in combination with various national rules and statutes already requires a release application to include old LR 9's first four items.³²³ As to LR 9's fifth item—counsel's certification that the appeal is not taken for delay—the Appellate Local Rules Report specifically criticized this requirement as both inconsistent with FRAP 9(b)'s instructions on the materials comprising a release application and duplicative of a virtually identical statutory requirement.³²⁴

The now-expunged LR 15, dealing with party designations in National Labor Relations Board enforcement proceedings, was superseded in 1986 with the amendment of FRAP 15.1 to conform national practice to "the existing practice in most circuits."³²⁵ Rescinded LR 21's directives regarding extraordinary writs were similarly superseded when FRAP 21 was amended in 1996 to

³²² See FRAP 3(d) & Note on 1979 Amendments.

³²³ See FRAP 9(b), 9(c), 27(a); FED. R. CRIM. P. 32(k), 46(c); 18 U.S.C. §§ 3143, 3145(c) (2006); 2D CIR. LR 9(1)-(4) (2008).

³²⁴ See 18 U.S.C. § 3143(b)(1)(B) (1992) (requiring a finding that "the appeal is not for purpose of delay" to release a defendant pending appeal); APPELLATE LOCAL RULES REPORT, *supra* note 3, at 18.

³²⁵ See FRAP 15.1 & Note to 1986 Addition; 2D CIR. LR 15 (2008).

adopt procedures already in force in most circuits.³²⁶ Now all that remains of the rule is the provision for filing paper copies under certain limited circumstances.³²⁷

The court repealed LR 41, authorizing immediate issuance of the mandate upon disposition of: (1) cases decided in open court, (2) extraordinary writs, and (3) cases dismissed for default in filing.³²⁸ This rule was unnecessary because FRAP 41 permits the court on its own to shorten or extend the time to issue the mandate in any case.³²⁹ This rule was also inconsistent with FRAP 41 because, according to the Appellate Local Rules Report, the court must “make a determination in individual cases of whether the mandate should issue immediately. The [Second Circuit] local rule is inconsistent with this procedure in permitting the immediate issuance of the mandate in whole classes of cases without any individual examination.”³³⁰ Furthermore, each of the three situations LR 41 marks for an immediate mandate are no longer pertinent. Cases which are decided in open court have become exceedingly rare, and the panel can always include in their order that the mandate must issue immediately. Mandamus or other extraordinary relief is also sufficiently rare as to make LR 41 irrelevant. As for defaults in filing, most are non-willful and parties cure them when given the opportunity. An immediate mandate would lead to motions for reinstatement and recall of the mandate, generating additional work for the court and staff without any offsetting efficiencies.

CONCLUSION

With the adoption of the 2010 Second Circuit Local Rules, counsel and parties in the Second Circuit will encounter much clearer direction in satisfying the procedural requirements of appellate practice. The goals of transparency, clarity, and

³²⁶ See 2D CIR. LR 21 (2008); FRAP 21 & Note to 1996 Amendments.

³²⁷ See 2D CIR. LR 21.1 (2010).

³²⁸ See 2D CIR. LR 41 (2008).

³²⁹ See FRAP 41(b).

³³⁰ APPELLATE LOCAL RULES REPORT, *supra* note 3, at 73.

accessibility have been largely achieved. Granted, a handful of the local rules continue to repeat national directives, but only to the extent deemed necessary to provide the bar with adequate notice of some of the more radical changes represented by this wholesale revision.³³¹ Inconsistencies have by and large been eradicated. Additions to and departures from FRAP exist for the most part only when FRAP itself invites a local rule³³² or when local variations justify legislating in an area.³³³

The enduring challenge is for the Second Circuit to maintain the vitality and congruity of its rules both in their particular applications and when read as a whole. Three undertakings, of varying frequency, will enable the court to meet this challenge. First, the court should regularly monitor amendments to national rules, statutory developments, and Judicial Conference directives as they implicate the local rules. No less than annually, the court should determine whether any developments on the national level require corresponding attention to local rules. However, except in the face of a specific national mandate or urgent administrative need, amendments to the local rules should be prudently timed to avoid imposing on the bar a continual burden of learning and adjusting to new practice protocols. Thus, for routine, technical, or stylistic amendments, the court might consider issuing rules revisions no more frequently than every other year.

Second, the court should periodically audit the operation of its local rules. No less than every three to five years, Clerk's Office staff and regular practitioners should be surveyed as to whether particular rules are having their intended effect and are responding to local needs in the most efficient manner. Rules should be regularly reassessed to determine if they have become obsolete, impose unnecessary or undue costs and burdens on parties or the court, or simply do not work in the manner intended. New rules might be proposed to address the changing litigation environment and the court's dynamic docket management needs.

Third, no less than every ten years, the court should reappraise

³³¹ See, e.g., *supra* notes 142, 170, 203 and accompanying text.

³³² See, e.g., *supra* notes 155, 162, 200 and accompanying text.

³³³ See, e.g., *supra* notes 281–82 and accompanying text.

the entire body of local rules and internal operating procedures, and adjust them as needed. Although it may not be necessary to embark on the scopic overhaul that led to the 2010 revision, a decennial holistic survey of the rules will avert the degree of disorder and atrophy that requires such an overhaul.

Efficiency should be a circuit court's ultimate goal in local rulemaking. The geographic, environmental, and cultural differences among the thirteen federal circuits suggest that some local rules variation will always be necessary. Local appellate rules variation is soundly motivated when it arises out of the court's internal collegial relationships, its unique docket management needs, or the local legal culture and bench/bar relations. However, those differences are best honored by local rules that comply with FRAP strictures and Judicial Conference guidance. At this writing, no appellate court other than the Second Circuit has voluntarily scrutinized its local rules to ensure such compliance. With the adoption of the 2010 revised Second Circuit local rules, a roadmap for compliance is now available to the other circuits.