STANDING ORDERS: A SURVEY OF INDIVIDUAL JUDGES' REGULATION OF PRACTICE IN ALL FUTURE CASES BEFORE THEM

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ABSTRACT

Federal district courts, after notice-and-comment process, can issue local rules to govern practice and procedure in all cases in a judicial district. An individual district judge can also regulate practice in cases assigned to that judge. Sometimes, a judge-specific regulation of practice issues for a particular case only. But a judge can also adopt a "standing" regulation of practice—one that stands for all cases now pending and all cases filed in the future. Judge-specific standing orders thus look like rules, and they are the focus of this Paper.

This Paper has three parts. Part I reviews the legal framework undergirding judge-specific standing orders ("JSOs") and prior commentary on them, noting that the last nationwide study of JSOs is over thirty-five years old. This Paper attempts to contribute to that body of knowledge by surveying the practices of every active-status federal district judge. Part II presents that nationwide review of JSOs by 603 district judges across the 94 federal judicial districts. It explains the study's methodology, how data points were selected for observation, and conclusions based on the statistics compiled. Part III then offers reflections and suggestions based on my observations.

 The author currently serves as United States District Judge for the Eastern District of Texas. Views expressed in this paper are the author's alone, not those of the federal judiciary. The author is grateful for the assistance of Nicole Cadenhead, Connor Kurtz, Roshan Rama, and Adam Smith in recording information about practices in numerous judicial districts.

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I. BACKGROUND

In this Part, I first review the legal authority for judge-specific standing orders ("JSOs") that regulate practice in federal court. I then review guidance and commentary on JSOs by the Judicial Conference of the United States, academics, and practitioners, all of which set the stage for the nationwide survey presented in Part II.

A. Legal Framework

Prospective rules for district-court litigation can come from five sources: the Constitution, Congress, the Supreme Court, district courts, and individual district judges. Since the Constitution's and Congress's rules arise outside the judiciary, they are not studied here.

Some rules arising outside the judiciary, however, are repeated in the judiciary's rules of procedure.[1] For example, United States Code Title 28, Part V, contains several civil-procedure provisions that are repeated in the Federal Rules of Civil Procedure. Likewise with United States Code, Title 18, Part II, and the Federal Rules of Criminal Procedure.

The fact that the judiciary's rules of procedure have chosen to repeat procedural commands imposed by statute or by the Constitution undercuts somewhat the objection, discussed later, that it is too confusing or burdensome for practitioners to comply with multiple commands of overlapping applicability. But it does not blunt the criticism wholly because Congress has authorized the federal rules, uniquely, to supplant federal statutes on nonsubstantive matters of practice and procedure in cases, thus giving the federal rules primacy.[2]

1. The Supreme Court's Federal Rules

Under federal law, the Supreme Court has authority to issue nationwide "rules of practice and procedure" for the federal district courts.[3] Pursuant to that authority, the Supreme Court regularly issues the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.

The federal rules are issued after a lengthy and statutorily required notice-and-comment procedure. Congress has directed the Judicial Conference of the United States to form a standing committee on federal rules, which reviews and acts on recommendations of advisory committees that assist within their areas of focus.[4] Specifically, the advisory committees put suggestions on a public agenda for discussion at a public meeting. Once an advisory committee recommends a new rule or a rule amendment, it publishes the proposal and holds a six-month period of public comment, during which public hearings are held. After addressing public comments, the advisory committee may submit a proposed rule to the standing committee for approval.

The standing committee may then accept the proposed rule (with or without modification), reject the rule, or send it back to the advisory committee. If the standing committee approves a proposed rule, it must then

1. *E.g.*, U.S. CONST. art. III, § 2 ("The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed . . . ."); FED. R. CRIM. P. 18 ("[T]he government must prosecute an offense in a district where the offense was committed.").

2. 28 U.S.C. § 2072(b) ("Such rules [the federal rules issued by the Supreme Court] shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.").

3. Rules Enabling Act, 28 U.S.C. § 2072(a); *see* Sibbach v. Wilson & Co., 312 U.S. 1, 9–10 (1941) (noting Congress's power to delegate to the courts the regulation of federal practice and procedure).

4. 28 U.S.C. § 2073(b).

be approved by the Judicial Conference of the United States and by the Supreme Court, after which Congress can veto the rule within a set time period.[5]

The Supreme Court has also noted its inherent supervisory power to create through adjudication rules of procedure for the federal courts, independent of the Rules Enabling Act.[6] And Congress provides, in 28 U.S.C. § 2106, that any "court of appellate jurisdiction may [review] any judgment, decree, or order of a court lawfully brought before it for review." That power includes a "supervisory authority over the application of a local rule of practice and procedure."[7] That supervisory power, exercised by the Supreme Court and the federal courts of appeals through adjudication, is outside of this Paper's focus on purely prospective rulemaking. Also outside of this Paper's focus are appellate rules that affect trial-court practice, such as Federal Rule of Appellate Procedure 8's direction that a party must ordinarily move first in district court for a stay pending appeal.

2. District Courts' Local Rules

Congress has authorized the federal district courts to issue local rules so long as they do not conflict with federal statutes or the federal rules of practice and procedure.[8] As with the federal rules, a district court's local rules must be adopted after notice-and-comment procedure.[9] Congress directs that "no rule may be prescribed" by a district court using any other procedure.[10]

Local rules are authorized, not only by statute, but also by the federal rules. Federal Rule of Civil Procedure 83(a) and Federal Rule of Criminal Procedure 57(a) allow a district court to adopt and amend local rules if

5. 28 U.S.C. §§ 2073–2075; *How the Rulemaking Process Works: Overview for the Bench, Bar, and Public*, U.S. CTS., https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public [https://perma.cc/S72K-2MRF].

6. *See* Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 338 (2006) (distinguishing "prospective court rules," such as federal and local rules, from "procedures adopted through adjudication").

7. United States v. Wecht, 484 F.3d 194, 204 (3d Cir. 2007).

8. 28 U.S.C. § 2071(a) ("[A]ll 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.").

9. *Id.* § 2071(b) ("Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment.").

10. *Id.* § 2071(f) ("No rule may be prescribed by a district court other than under this section.").

"acting by a majority of its district judges." But that voting directive may conflict with federal law in part and, to that extent, may be invalid.[11]

Both local rules and standing orders must be posted on a district court's website.[12] As to organization, local rules must adhere to a uniform numbering system prescribed by the Judicial Conference of the United States.[13] And the federal rules direct that a court may not deny a right (such as the right to a jury trial) merely because of a party's non-willful failure to comply with a local rule (such as a local rule requiring jury demands to be in the caption of a pleading).[14]

3. District Judges' Standing Orders Regulating Practice

The authority of individual district judges to regulate practice in the cases before them flows from a district court's judicial power: "the judicial power of a district court with respect to any action, suit or proceeding may be exercised by a single judge."[15] Due process is of course expected for a judge's order to be binding,[16] and the federal rules of procedure flesh out what is specifically required for a judge's order regulating legal practice:

> A judge may regulate practice in any manner consistent with federal law, [the federal rules], and the district's local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless

11. Insofar as a local rule would concern the division of a court's business among its district judges, Congress has provided specific voting rules: if "the district judges in any district are unable to agree" on rules or orders for how to "divide the business" of the court among its judges, then the circuit judicial council must decide. 28 U.S.C. § 137(a). Unlike the federal rules of procedure, the statute does not mention only "a majority" of district judges agreeing on rules for the division of business. It requires that the entire group of district judges, as a whole, be "able to agree." In contrast, the separate statute for bankruptcy courts does allow the issuance of work-division rules by a mere "majority vote." *Id.* § 154(a). That textual contrast between the two statutes, in discussing the same topic, indicates that all of a court's district judges must agree to local rules on the division of court business. That would create a voting mechanism akin to that for the permanent members of U.N. Security Council.

Congress does allow that some federal rules can trump federal statutes: The federal "rules of practice and procedure and rules of evidence for cases" in federal court can supersede non-substantive federal laws "in conflict" with those rules. *Id.* § 2072(a)–(b). But rules on how district judges vote upon the division of work are rules governing court management, not "practice and procedure . . . for cases." As such, work-division rules fall within the residual category of "rules for the conduct of the[] business" of a federal court. *Id.* § 2071(a). And Congress requires that rules for the conduct of a court's business "shall be consistent with Acts of Congress." *Id.*

12. E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899.

13. FED. R. CIV. P. 83(a); FED. R. CRIM. P. 57(a).

14. FED. R. CIV. P. 83(a)(2) & advisory committee note to 1995 amendment; FED R. CRIM. P. 57(a)(2) & advisory committee note to 1995 amendment.

15. 28 U.S.C. § 132.

16. U.S. CONST. amend. V.

> the alleged violator has been furnished in the particular case with actual notice of the requirement.[17]

As that rule shows, enforcement of a standing order regulating practice before a specific judge requires that notice of the order be given "in the particular case," unlike with enforcement of a district court's local rules. As for how that notice must be given, a separate federal rule requires that all court orders pertaining to a case be entered in the docket of a case.[18] That rule makes no exception for orders regulating practice. Under those provisions, a judge's standing order regulating practice that is simply posted online cannot support a "sanction" or even a "disadvantage" like denying a motion unless actual notice of the order was first provided, as by a docket entry.

Two other requirements for district-wide rulemaking are not applied to judge-specific standing orders: The federal rules do not require standing orders to adhere to a uniform numbering system, and they do not require that only willful violations of a standing order on a matter of form can result in a denial of rights.[19]

As a terminology matter, this Paper distinguishes "rules" and "orders" based on who issues the command: "rules" are practice regulations issued by a court as a whole, and "orders" are practice regulations issued by an individual judge for that judge's cases only. This Paper adopts that terminology to help classify and distinguish among the different sources of practice requirements, as different legal provisions and policy concerns apply to each.

To be sure, actual naming practices need not and do not always match this Paper's terminology. Many judges issue practice requirements that are labeled as something other than an "order," such as a judge's "rule" or "procedure."[20] Conversely, courts have issued district-wide practice requirements that are not themselves labeled as "rules," leading reviewing courts to hold that the necessities of district-court rulemaking (proper substance, notice-and-comment process) cannot be excused simply by styling a district-wide practice requirement as an "order" or "policy."[21]

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17. FED. R. CIV. P. 83(a); *accord* FED. R. CRIM. P. 57(b).
18. FED. R. CIV. P. 79(a); *accord* FED. R. CRIM. P. 55.
19. *See* FED. R. CIV. P. 83; FED. R. CRIM. P. 57.
20. *See infra* Section II.B.3.
21. Brown v. Crawford Cty., 960 F.2d 1002, 1009 n.8 (11th Cir. 1992) ("We stress that the name given to local procedures is irrelevant. If the purpose of such local procedures, practices or policies is to control practice in a district court in this circuit, such procedures effectively are local rules and must be created in accordance with Rule 83."); Antoine v. Atlas Turner, Inc., 66 F.3d 105, 108 (6th Cir. 1995) (rejecting application of district court's "policy" that had not been issued as a local rule).

B. Past Commentary on Judge-Specific Standing Orders

The history of and commentary on judge-specific standing orders are closely intertwined with those concerning district courts' local rules. For most of this nation's first century, district courts enjoyed broad local rulemaking power under the Judiciary Act of 1789.[22] In the 1872 Conformity Act, however, that power was limited somewhat by a federal requirement that district courts' local rules conform to state procedure in a given locale.[23] But that interest in state conformity waned after the turn of the century, and the Conformity Act was repealed in the 1940s.[24] Instead, the 1948 recodification of federal judiciary law[25] emphasized "the euphoric notions that under the new uniform Federal Rules, any lawyer could go to any federal court, and be secure that she could understand and master the procedure required, since that procedure would be at once uniform and simple."[26]

Around that same time, the Judicial Conference of the United States appointed a committee, led by District Judge John C. Knox, to examine district courts' local rules.[27] The Judicial Conference announced a goal that local rules "should be few, simple, and free from unnecessary technicalities" so that "the greatest practicable degree of uniformity throughout the country may be secured."[28] The Knox Committee thus analyzed local rules for civil cases adopted in 32 judicial districts from 1938 to 1940,[29] criticizing many of them as either repeating the federal rules, contradicting the federal rules, or adopting local rules on topics on which the federal rules were deliberately silent to promote simplicity. The Committee recommended that district courts repeal those local rules, as well as those dealing solely with internal, business relations among the court's members.[30] At the same time, the Committee acknowledged the need for some local variation and the value

22. *See* Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 73 (empowering federal courts to establish rules "for the orderly conducting [of] business"); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2012 (1989).

23. Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196, 197 (1872) (repealed 1948) (directing that local district rules conform to state practices).

24. Act of June 25, 1948, ch. 646, § 39, 62 Stat. 992.

25. An Act to Revise, Codify, and Enact into Law Title 28 of the United States Code entitled "Judicial Code and Judiciary," Pub. L. 80-773, 62 Stat. 869, 961 (1948) (enacting 28 U.S.C. § 2701).

26. Subrin, *supra* note 22, at 2018.

27. JOHN C. KNOX & ROBERT C. BALTZELL, REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON LOCAL DISTRICT COURT RULES 1 n.1 (1940) ("Knox Committee Report").

28. *Id.* at 1–2 n.1 (quoting CHARLES E. HUGHES, REPORT OF THE JUDICIAL CONFERENCE, SEPTEMBER SESSION 10 (1938)).

29. *Id.* at 11.

30. *Id.* at 12.

of the judicial districts' ability to suggest future amendments to the federal rules.[31]

As time went on, the expansion in district courts' local rules tracked the expansion in the federal judiciary and its workload.[32] One 1960s study used the results of questionnaires to categorize local rules into twenty-one categories for analysis, finding a "maze of decentralized directives, encumbered by trivia and often devoid of explanation."[33] And by 1964, the Fifth Circuit had referred to one district's local rules as "a series of traps" for lawyers who were not from that district.[34]

One observer noted that "the flourishing of local rules ha[d] apparently occasioned little objection" among local lawyers.[35] In contrast, "among scholars, the commentary on court rulemaking [was] almost uniformly critical."[36] That academic criticism applied not only to local rules but also to judge-specific standing orders.[37]

In the 1980s, both the Supreme Court and Congress attended to local rules and standing orders. The Supreme Court adopted amendments to Civil Rule 83 and Criminal Rule 57 to require public notice and an opportunity for comment before a district court may adopt or amend local rules.[38] Previously, the procedure for local rulemaking was unregulated.

The Supreme Court's amendments also required local rules to be furnished to the judicial council of the circuit, which could abrogate a local rule.[39] The Rules Advisory Committee stated its expectation that judicial councils would examine all local rules and decide whether they comport with the federal rules and promote inter-district uniformity.[40] The rule amendments did not empower any entity to review or veto a judge's standing orders. But the advisory committee expressed the hope that district

31. *Id.* at 13–15.

32. Subrin, *supra* note 22, at 2018. *See generally id.* at 2044 ("It is difficult to force a federal judge, or a group of them, not to have a local rule, standing order, or standing operating procedure if he, she, or they want one. Different judges will have different views about how to run their courts.").

33. Comment, *The Local Rules of Civil Procedure in the Federal District Courts—A Survey*, 1966 DUKE L.J. 1011, 1012.

34. Woodham v. Am. Cystoscope Co. of Pelham, N.Y., 335 F.2d 551, 552 (5th Cir. 1964).

35. Steven Flanders, *Local Rules in Federal District Courts: Usurpation, Legislation, or Information?*, 14 LOY. L.A. L. REV. 213, 214 (1981).

36. *Id.* at 215.

37. *See, e.g.*, 12 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3152 (3d ed. 2002) (noting that the "difficulties" with excessive and contradictory local rulemaking are "even more acute with regard to 'standing orders' adopted by individual district judges to regulate practice in their own courtrooms").

38. FED. R. CIV. P. 83 advisory committee note to 1985 amendment; FED. R. CRIM. P. 57 advisory committee note to 1985 amendment.

39. FED. R. CIV. P. 83(a); FED. R. CRIM. P. 57(a).

40. FED. R. CIV. P. 83 advisory committee note to 1985 amendment.

courts would adopt procedures "for reviewing single-judge standing orders."[41]

As the judiciary was considering those federal-rule changes in the 1980s, a House of Representatives subcommittee held oversight hearings on local rules and standing orders.[42] That legislative review led to a 1985 House committee report on amending the Rules Enabling Act.[43] The report noted several benefits of local rulemaking (efficiency, local flexibility, and notice of typical practices).[44] But it also found inadequacies, criticizing the lack of standards and structure for national review of local rules.[45] The report also criticized the proliferation of local rules, especially those in tension with the federal rules.[46] That legislative work resulted in a 1988 law that requires local rulemaking to undergo notice-and-comment procedure, local-advisory-committee input, and judicial-council review—all tracking the Supreme Court's federal-rule amendments of 1985.[47]

Around the same time, the federal judiciary started a Local Rules Project to study all ninety-four district courts' local rules. The project's report was said to be the first exhaustive study of local rules since the 1940 Knox Committee study.[48] The project counted around 5,000 local rules existing as of fall 1987, covering the spectrum of federal practice.[49] The project also found nationwide variance in the affinity for judge-specific standing orders, which ranged from only a single standing order in one district to 275 standing orders in another district.[50]

The Local Rules Project found a wide variety of numbering systems for local rules.[51] This led an advisory committee to recommend that the judiciary adopt a uniform numbering system to help attorneys and indexing

41. FED. R. CIV. P. 83 advisory committee note to 1985 amendment. As discussed below, only one court had such a formal procedure at the time of my study. *See infra* note 114 and accompanying text.

42. WRIGHT ET AL., *supra* note 37, § 3152; *see* H.R. REP. NO. 99-422, at 4 (1985).

43. H.R. REP. NO. 99-422.

44. *Id.* at 14, 15–16.

45. *Id.* at 15–16.

46. *Id.* at 16.

47. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702 § 401(b), 403(a), 403(b), 102 Stat. 4642, 4648, 4650 (1988) (codified as amended at 28 U.S.C. §§ 322(d)(4), 2071(b), 2077).

48. COMM. ON RULES OF PRAC. AND PROC., SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 2 (1988), https://www.uscourts.gov/sites/default/files/fr_import/ST09-1988.pdf [https://perma.cc/BYM8-YQ7V].

49. COMM. ON RULES OF PRAC. AND PROC., REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES CONCERNING CIVIL PRACTICE pt. I, at 1, 5 (1988) [hereinafter REPORT OF THE LOCAL RULES PROJECT].

50. *Id.* at 1; *accord* WRIGHT ET AL., *supra* note 37, § 3152 (citing REPORT OF THE LOCAL RULES PROJECT, *supra* note 49, at pt. I, at 1).

51. REPORT OF THE LOCAL RULES PROJECT, *supra* note 49, at pt. V, at 1; *accord* Subrin, *supra* note 22, at 2021.

services identify any local rules on a given subject.[52] The committee promulgated a list of 103 numbers for local rules, keyed to the closest corresponding federal rule.[53]

After the Supreme Court amended the federal rules in 1995 to require that local rules "conform to any uniform numbering system prescribed by the Judicial Conference of the United States,"[54] the Judicial Conference adopted the proposed uniform numbering system for local rules.[55] That uniform numbering system applies only to local rules, however, and not to individual judges' standing orders.

Around the same time, the Judicial Conference approved a long-range plan for the federal courts.[56] The plan's discussion of local rules and standing orders recognized their value in reflecting local conditions and allowing experimentation.[57] But the plan discouraged the "balkanization" of federal practice through the "proliferation of local rules imposing procedural requirements."[58] Accordingly, it recommended an effort "to reduce the number of local rules and standing orders."[59] The Local Rules Project responded by comprehensively reviewing all federal courts' local rules and, in 2002, issuing a lengthy report identifying which rules should be rescinded or modified.[60] That report addressed only local rules, however, not standing orders.

At the same time as that judicial study of local rules, the American Bar Association ("ABA") opined on local rules and judge-specific standing

52. SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 48, at 2–3.

53. *Id.* at 4. The system uses "LR" to indicate a local rule, followed by the number of the most closely related federal rule, followed by a decimal and the number assigned to the local rule on that topic. For instance, the first local rule corresponding to Federal Rule of Civil Procedure 65 would be LR65.1. And the first local rule on Federal Rule of Civil Procedure 65.1 would be LR65.1.1.

54. FED. R. CIV. P. 83(a); *accord* FED. R. CRIM. P. 57(a).

55. JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 34 (1996) (noting adoption); Memorandum from Comm. on Rules of Prac. and Proc. to Chief Judges, U.S. Dist. Cts., Chief Judges, U.S. Bankr. Cts., Clerks, U.S. Dist. Cts., and Clerks, U.S. Bankr. Cts. 1 (Apr. 19, 1996), www.uscourts.gov/sites/default/files/local_rules_uniform_numbering_1.pdf [https://perma.cc/3LG7-STKP].

56. *See* JUD. CONF. OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS (1995), https://www.uscourts.gov/sites/default/files/federalcourtslongrangeplan_0.pdf [https://perma.cc/93NH-652Q].

57. *Id.* at 59.

58. *Id.*

59. *Id.*

60. Memorandum from Mary P. Squiers to Hon. Anthony J. Scirica and Members of the Comm. on Rules of Prac. and Proc. (Dec. 12, 2002), https://www.uscourts.gov/sites/default/files/fr_import/ST2003-01%282%29.pdf [https://perma.cc/SX6E-3W6V]; *see also* STANDING COMM. ON RULES OF PRAC. AND PROC., REPORT ON LOCAL RULES, JUDICIAL CONFERENCE OF THE UNITED STATES (2004) (adopting the Local Rules Project's recommendations on local-rule modifications by district courts and noting that the Local Rules Project's work was then complete).

orders, which the task force called "individual court rules."[61] The ABA noted positive attributes of local rules but also expressed concern that the "sheer volume of local rules and individual court rules in some districts combined with an inadequate reporting system have deprived many litigators of effective access to these rules."[62] The most important single goal, the ABA concluded, was that all litigants have online access to all local rules and individual court rules "in one central location."[63]

II. NATIONWIDE SURVEY

A comprehensive review of judge-specific standing orders has not been released since the Local Rules Project's 1988 report. This Paper attempts to update that thirty-five-year gap in knowledge by a nationwide survey of JSOs in federal court. My survey reviewed and recorded data about the usage and characteristics of JSOs by every federal district judge in active status (603 judges at the time of the survey). Section II.A of this paper explains the survey's methodology, and Section II.B then presents findings and conclusions from the survey.

A. Methodology

My survey adopted three criteria as necessary to identify language that is a judge-specific standing order regulating practice ("JSO"):

(1) it is judge-specific, as opposed to court-specific (the "J");

(2) it "stands" for all future cases, as opposed to an order tailored to a pending case (the "S"); and

(3) it is an order purporting to direct litigation practice, as opposed to language not directing party or attorney behavior (the "O").

Each criterion is explained in further detail below.

1. Judge-Specific

Commands issued by a district court, for all legal practice in that district, are classified as local rules. Only commands issued by a single judge, for cases assigned to that judge, are classified as JSOs in my survey.

61. H. Thomas Wells, Jr., *Report to the House of Delegates: Recommendation*, 107 A.B.A. SEC. LITIG. ¶ 1 (2000).
62. *Id.* at 1–2.
63. *Id.* at 12–13.

In a few instances, a regulation of practice applied to all cases filed in a division of a court for which only one judge handled the division's cases.[64] Such a regulation was therefore specific to a single judge and met this criterion for classification as a JSO.

Only active-status district judges were examined. Senior-status judges were not examined because the number of active-status judges was large enough to produce a healthy data set and because senior-status judges are entitled to take a reduced case load. Magistrate judges were not examined because most federal trials occur before district judges and because the data set was already sufficiently large. Lastly, and again to keep the data set manageable, the survey did not examine specialized federal trial courts such as bankruptcy courts, the Court of Federal Claims, or the Court of International Trade. Unless indicated otherwise, references below to a "judge" or "district judge" are to the surveyed, active-status district judges of the United States District Courts.

2. Standing

My concern in this paper is "standing" regulations of practice, meaning directives that "stand" for all future cases. Hence, my survey did not use electronic docket access to review orders entered in particular cases. Instead, the survey used the website for each district court to identify and analyze any JSOs.

3. Order

My survey focused on an individual judge's ability—in the language of the federal rules—to "regulate practice" by imposing a "requirement."[65] Hence, my survey identified a JSO only when a judge issued language purporting to direct litigation practice in a case. Only regulations of party or attorney conduct were counted as JSOs. A judge's order about internal court affairs, such as a judge's referral of matters to a magistrate judge, was not counted as a JSO. Neither were standing orders on attorney admission to a court's bar.

64. For example, the Western District of Texas has seven divisions. For three of those divisions (Del Rio, Pecos, and Midland–Odessa), only one district judge handled all cases filed in a given division at the time of this survey. *See* Amended Order Assigning the Business of the Court (W.D. Tex. Dec. 16, 2022). Standing orders "for" those single-judge divisions were thus counted as judge-specific standing orders.

For standing orders specific to a division in which a small subset of a district's judges handle all cases, an argument could be made for treating those standing orders as being judge-specific because they could present the same concerns about uniformity and the burdens of complexity.

65. FED. R. CIV. P. 83(b); FED. R. CRIM. P. 57(b).

When not expressly labeled, a judge's language was classified either as binding or as merely precatory based on the use or absence of imperative words such as "must" or "do not." Language that merely stated a preference or announced what a judge expects to do in a future case was not treated as an order. But imperative language was treated as an order even if it was in a document generally expressing preferences. For example, one court's document entitled "Judicial Preferences" contains nonbinding preferences but also judge-specific practice requirements such as: "Under no circumstances should correspondence, proposed Orders or any other filings of any kind be submitted by email without express consent of Chambers."[66] That directive was counted as a judge-specific standing order because of its imperative language.

As that example shows, my survey did not require a command to be in a separate document bearing the judge's signature to qualify as an order. Although many JSOs take that form, they may also take the form of a command on the judge's "information" page on a court's website or an online list of "protocols" required for practice before the judge. My choice to include those orders based on substance, regardless of form, followed from the principle that a judge issues an order simply by issuing any oral or written command with intended binding force.[67]

Approximately one-third of the judges surveyed had a template order on their court webpage that allows parties to download the template, add details about their specific case, and file the completed product as a proposed order for the judge to issue. My survey did not classify a mere template as a JSO because the judge's direction of party behavior would come from the entry of a completed order in a particular case, not from the online publication of the template. But if a judge directed all future parties to use a judge-specific template to submit a proposed order, that direction itself would qualify as a JSO.

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My choice of what data to collect about JSOs is explained below as survey results are presented. Survey data was collected for each court by

66. *Judicial Preferences*, U.S. DIST. CT. FOR THE DIST. OF N.J. (June 13, 2024), https://www.njd.uscourts.gov/sites/njd/files/JudgePreferences.pdf [https://perma.cc/A36N-R2GH] (entry by Hillman, J.).

67. *See, e.g.*, Ueckert v. Guerra, 38 F.4th 446, 451 (5th Cir. 2022) (asking whether a judge's oral pronouncement was "merely a prediction about how the court would rule sometime in the future" or instead used "definite language"); Penthouse Int'l, Ltd. v. Playboy Enters., Inc., 663 F.2d 371, 388 (2d Cir. 1981) ("The fact that the March 22 order was oral rather than written, and that it was not entered pursuant to a formal written Rule 37(a) motion, does not deprive it of any of its binding force and effect."); Burke v. Comm'r, 301 F.2d 903, 904 (1st Cir. 1962) (inquiring whether a court "intend[ed] its oral pronouncement from the bench to constitute its final determinative action").

first identifying the court's active-status district judges using the court's website or, as needed, the Federal Judicial Center's biographies of federal judges. Using the court's website, the characteristics of each judge's usage of JSOs were recorded in an Excel sheet for that court. Data about the district court's treatment of JSOs were also recorded in each court's Excel sheet. The district-court data was then compiled into a chart covering all district courts, from which nationwide statistics were computed. If a judge was appointed to and sat in two or more judicial districts, that judge was not counted in the totals for each additional district court to avoid double-counting.[68]

My survey counted judges, not orders. I did not attempt to count the number of JSOs issued by a given judge because I could not identify a uniform way to arrive at that count given the wide variety of form and substance in JSOs.

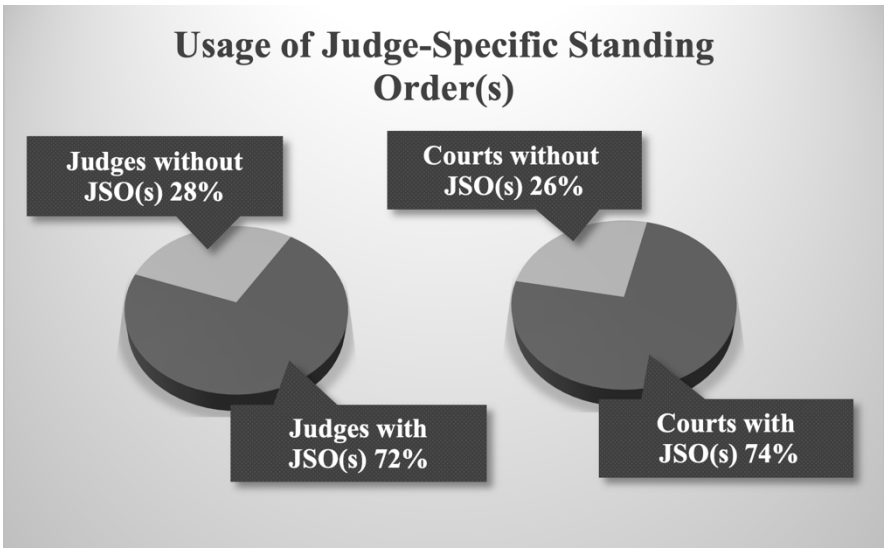
Survey data was entered and verified as of different dates throughout February 2023, resulting in statistics on 603 active-status district judges across the ninety-four federal judicial districts. My survey is a mere snapshot in time; survey data has not been updated after the verification date for each court. New practices and new judges are not included in the survey. Discontinued practices and judges who have since taken senior status will still be reflected in the survey.

A. Findings

1. Popularity of JSOs

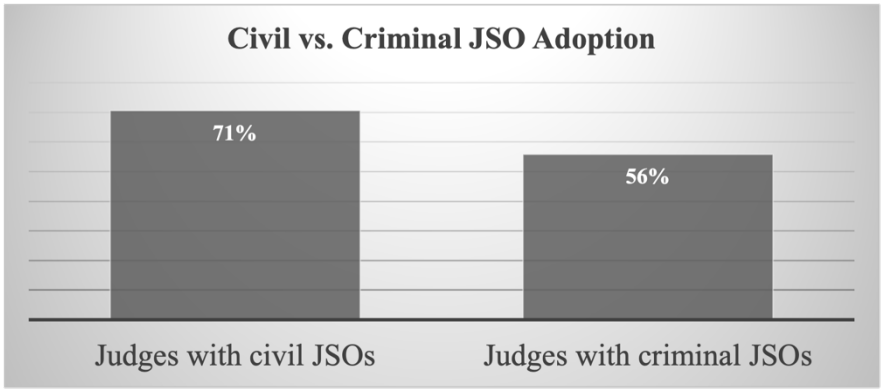
Judge-specific standing orders are popular: 434 of the 603 surveyed judges, or 72%, have at least one standing order, and 74% of district courts have at least one judge with a standing order:

68. *See Boom, Claria Horn*, FED. JUD. CTR. https://www.fjc.gov/node/4444651 [https://perma.cc/XU5Q-UTQC]; *Heil, John Frederick III*, FED. JUD. CTR. https://www.fjc.gov/node/8307871 [https://perma.cc/QCJ4-Z4LK]; *Wimes, Brian Curtis*, FED. JUD. CTR. https://www.fjc.gov/history/judges/wimes-brian-curtis [https://perma.cc/3CFN-W5G6].



This widespread usage highlights the practical need to check for JSOs whenever a litigator receives a judge assignment or reassignment in a case.

The popularity of JSOs varies slightly by case type. 76% of judges have at least one JSO applicable in civil cases, whereas only 56% of judges have at least one JSO applicable in criminal cases:



Possible reasons for the lower rate of criminal JSOs than of civil JSOs may include (1) that criminal procedure is articulated in existing law and rules in more detail than civil procedure, (2) the reduced complexity of the median criminal case in light of frequent plea agreements, (3) a lower perceived need to announce typical practices in criminal cases because of a more specialized bar already familiar with them, and (4) a heightened

reluctance to add procedural requirements when a criminal penalty is sought in a case.

Less than 1% of judges (only four judges total) do not have a JSO for civil cases but do have a JSO for criminal cases. The distinctive need for a JSO in criminal cases was perceived to address four topics:

> Notice to the prosecution of the potential for a downward sentencing departure based on the 100:1 crack–cocaine ratio.[69]
>
> Appointment of a public defender to represent sentenced defendants who may raise a claim for retroactive application of the Supreme Court's 2015 decision holding unconstitutional certain applications of the Armed Career Criminal Act's sentencing enhancement.[70]
>
> Comprehensive pretrial and trial procedure, including discovery, motion practice, plea agreements, courtroom decorum, jury selection, exhibits, and witnesses.[71]
>
> The deadline for and submission of change-of-plea forms.[72]

2. Popularity Variations

My study next explored any correlation between JSO popularity and several variables: geographic region, years of practice before judicial appointment, and judicial workload. Only the third variable, judicial workload, showed any sign of a relationship to JSO popularity.

a. Geographic Region

To assess whether usage of JSOs may be based on norms specific to the judiciary in certain regions, I prepared a heatmap showing the JSO adoption rate by decile among district judges in each of the states and the District of

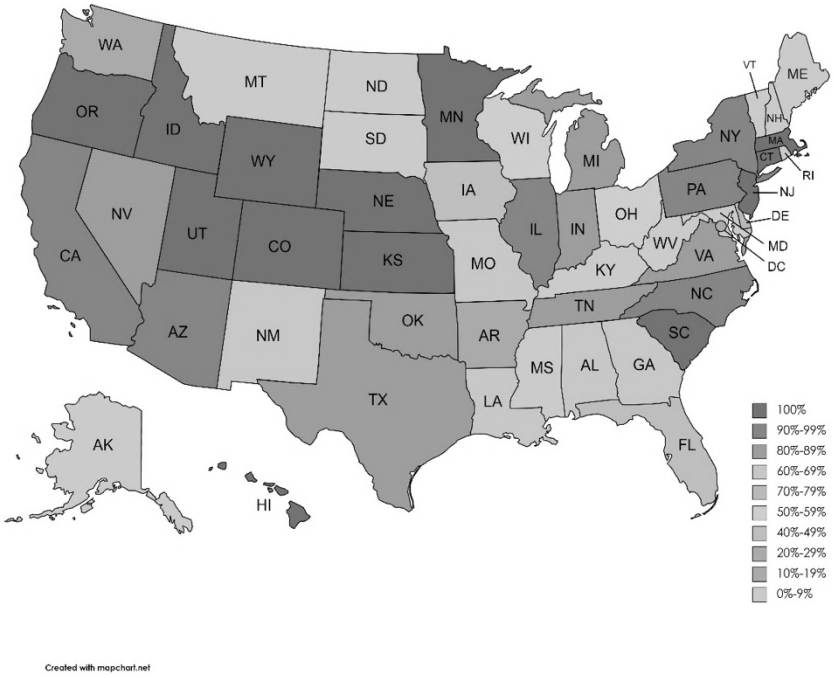
69. Robert J. Conrad, Jr., *Order in re: Honorable Robert J. Conrad, Jr. Presiding Judge Notice of Potential Variance in Crack Cocaine Cases*, U.S. DIST. CT. FOR THE W. DIST. OF N.C. (July 6, 2009), https://www.ncwd.uscourts.gov/sites/default/files/judge_orders/ConradOrder.pdf [https://perma.cc/MAQ6-AZE3].

70. Alia Moses, *In re: Potential Retroactive Application of the Supreme Court's* Johnson v. United States *Decision, Standing Appointment Order*, U.S. DIST. CT. FOR THE W. DIST. OF TEX., DEL RIO DIV. (Apr. 13, 2016), https://www.txwd.uscourts.gov/wp-content/uploads/2022/12/Standing-Appointment-Order-Regarding-Potential-Retroactive-Application-of-the-Supreme-Courts-Johnson-v.-United-States-Decision.pdf [https://perma.cc/7XSM-NU4E].

71. Hon. Jeffrey P. Hopkins, *Standing Order Governing Criminal Cases*, U.S. DIST. CT. FOR THE S. DIST. OF OHIO, W. DIV. (Feb. 1, 2023), https://www.ohsd.uscourts.gov/sites/ohsd/files//Standing%20Order%20Governing%20Criminal%20Cases%20%2B%20Appendix%20A%20%281-31-23%29.pdf [https://perma.cc/ZHW4-59Z6].

72. *Judges' Info: Chief Judge Ronald A. White*, U.S. DIST. CT. FOR THE E. DIST. OF OKLA., https://www.oked.uscourts.gov/content/chief-judge-ronald-white [https://perma.cc/G8VT-A2ST].

Columbia.[73] To my eyes at least, the map did not indicate any pronounced pattern based on geography, such as coastal homogeneity:



b. Experience Upon Taking the Bench

I next considered the possibility that JSO popularity might vary by a judge's years of legal practice upon taking the bench. Reasons for this might include the judge's degree of familiarity to the bar or a judge using JSOs to work through or announce procedures not encountered in practice. Publicly available data from the Federal Judicial Center includes the year of a judge's commission and the year of a judge's law degree. Subtracting the second year from the first year thus approximates the judge's years of practice, at least in the mine run of cases. Using that metric, I then calculated the average years of practice among judges with at least one JSO and among judges without any JSOs.

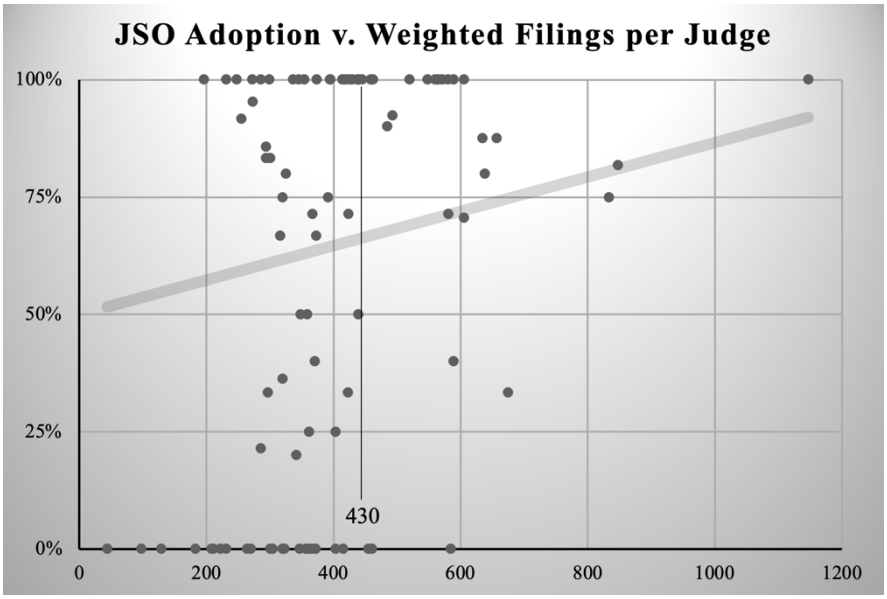
The resulting statistics did not show any significant difference between the two groups. The JSO judges had an average of 24.2 years of practice before taking the bench, and the non-JSO judges had an average of 22.3

73. The 30%–39% range is not shown because no locale fell within in.

years of practice before taking the bench. I did not find the difference to be appreciable.

c. Judicial Workload

Lastly, I considered the possibility that JSO popularity varies by judicial workload. To measure judicial workload, I used tables from the Administrative Office of the United States Courts giving each district court's weighted filings per judgeship in the twelve-month period ending September 30, 2022.[74] I then graphed the JSO-adoption rate for each district court against that court's weighted annual filings per judge. The resulting chart, fitted with a linear trendline set to a y-intercept of 50%, is as follows:



74. *See Federal Court Management Statistics—Profiles*, U.S. CTS. (Sept. 30, 2022), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0930.2022.pdf [https://perma.cc/X5GY-YC96]. Weighted filings are statistics intended to account for the different amounts of work needed to resolve different types of cases and are calculated per active-status judge in a district, matching my survey's scope. *See Federal Court Management Statistics, September 2022*, U.S. CTS. (Sept. 30, 2022), https://www.uscourts.gov/statistics-reports/federal-court-management-statistics-september-2022 [https://perma.cc/N6HY-GXFF] (see explanation of terms). For three districts (those for the Virgin Islands, Guam, and the Northern Mariana Islands), the Administrative Office did not calculate weighted filings, so unweighted filings were used. The weighted filings in one district (the Northern District of Florida) were more than five times more those in the next highest district, apparently due to a large multidistrict litigation being handled there. *See 3M Products Liability Litigation, MDL No. 2885*, U.S. DIST. CT. FOR THE N. DIST. OF FLA. (Jan. 9, 2024), https://www.flnd.uscourts.gov/3m-products-liability-litigation-mdl-no-2885 [https://perma.cc/ZR2N-MFXH]. To exclude that anomaly, I used for that court the average of the weighted filings in the other two judicial districts in Florida.

Up to approximately 400 to 450 weighted filings per judge, there appears to be no tight connection between a district court's workload and its JSO adoption rate. Above that workload range, however, only a few courts have no JSOs at all. Notably, that demarcation range includes the Judicial Conference's recommended workload for an active judge on an appropriately sized court—"430 weighted filings per authorized judgeship."[75]

Accordingly, I separated the district courts into two groups, those above and below the recommended workload amount. The JSO adoption rate was 85% in courts with more than 430 weighted annual filings per judge, compared to 61% in courts with less than that workload. So at least some correlation appears to exist between judicial workload and the popularity of JSO adoption.

3. Labeling Terminology

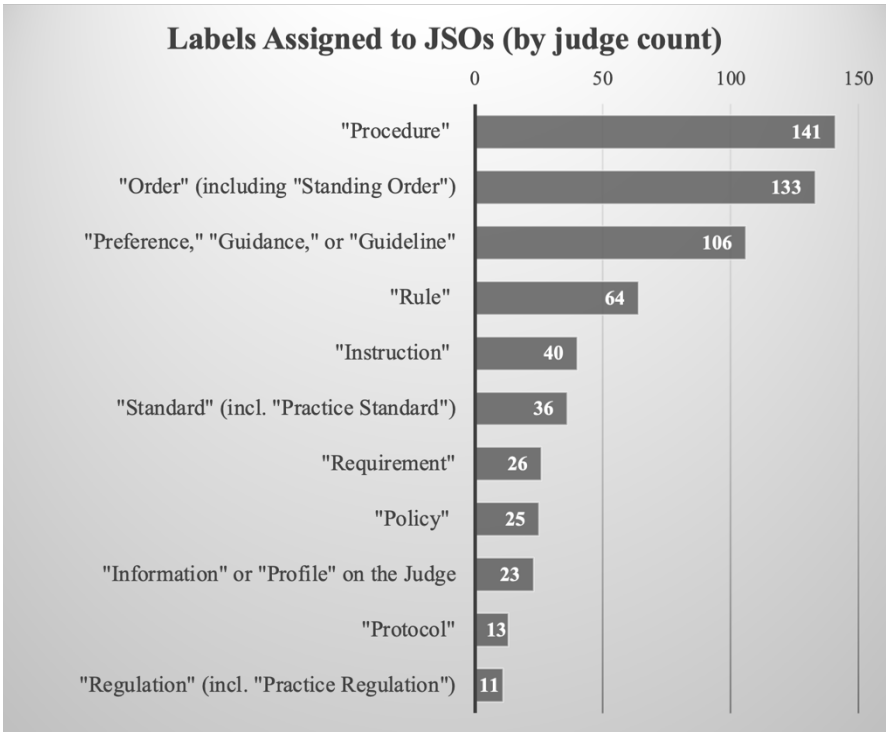
To get a sense of the labels being used for individual judges' regulations of practice (what this Paper calls JSOs), my survey counted how many judges assign particular labels to one or more of their JSOs. As my survey progressed and found a new label with any appreciable usage, I simply added that label to the categories being counted. The plural and singular of the same term were counted together, and my survey grouped labels according to the most significant operative word. For instance, the labels "Court Procedures," "Judge X's Procedures," and simply "Procedures" were all counted under the label "Procedure."

My survey counted the number of judges using each label, not the number of JSOs using each label, because the latter would present thorny and perhaps arbitrary counting issues. When a single judge used multiple names to describe his or her JSOs, the judge was counted once for each different name used. For example, the webpage for one judge contained a link to her "Preferences," and the link opened a document labeled as the judge's "Procedures" containing mandatory directives.[76] Because of the dual labeling, that instance added one to the count of judges using "Preference" and one to the count of judges using "Procedure." Because some judges had multiple labels, the total number counted across all labels

75. BARRY J. MCMILLION, CONG. RSCH. SERV., R45899, RECENT RECOMMENDATIONS BY THE JUDICIAL CONFERENCE FOR NEW U.S. CIRCUIT AND DISTRICT COURT JUDGESHIPS: OVERVIEW AND ANALYSIS 11 (2019), https://www.everycrsreport.com/files/20190903_R45899_ec24a05f6d227b4e272b2ff5de0359ac5d3e80b7.pdf [https://perma.cc/FAB8-HJZM].

76. *Judicial Preferences: Evelyn Padin*, U.S. DIST. CT. FOR THE DIST. OF N.J., https://www.njd.uscourts.gov/content/evelyn-padin [https://perma.cc/TA59-VVBD]; *Judge Evelyn Padin's General Pretrial and Trial Procedures*, U.S. DIST. CT. FOR THE DIST. OF N.J. (Nov. 13, 2022), https://www.njd.uscourts.gov/sites/njd/files/EPProcedures.pdf [https://perma.cc/UFC6-4DSJ].

did not match the total number of judges with JSOs. The complete, ranked list of labels assigned to JSOs is as follows:



Interestingly, the least popular label used for JSOs is the label used for them in the federal rules—"regulation."[77]

Of those labels, "rule" has the benefit of tracking the label for other directions that litigants must find outside a case's docket: the federal rules of procedure and a district court's local rules. But the label "rule" for a JSO also sets up a contradiction: (1) Congress directs that "no rule may be prescribed" by a district court without notice-and-comment process,[78] whereas (2) individual judges are exercising the judicial power of a district court[79] in issuing "rules" but are acting without notice-and-comment process. So that specific naming choice for a JSO may, at some level, create confusion.

Some JSOs are posted on a court's webpage for a judge's "information" or "profile." Other JSOs appear alongside merely precatory language on a

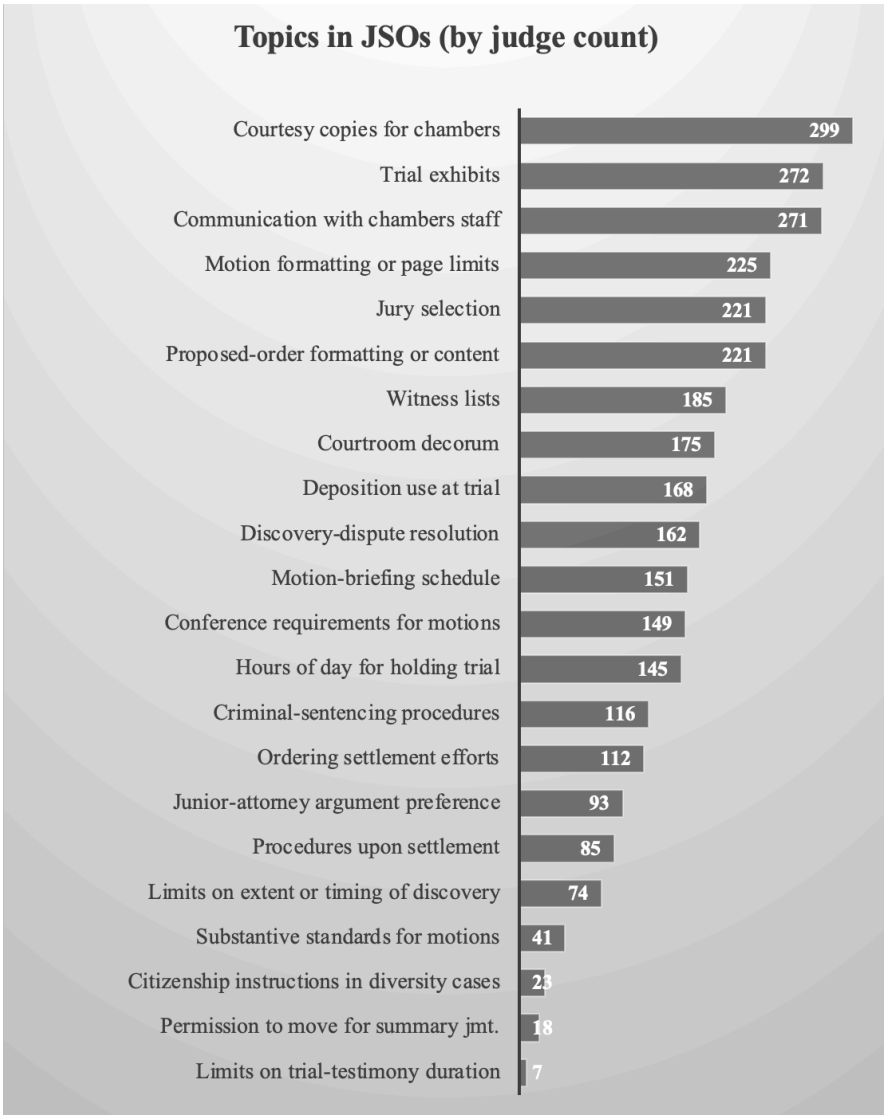
77. FED. R. CIV. P. 83(b); FED. R. CRIM. P. 57(b).
78. 28 U.S.C. § 2071(f).
79. 28 U.S.C. § 132.

webpage or document labeled as the judge's "preferences" or "guidance."[80] That labeling choice, juxtaposed with the use of imperative language, may be intended to promote ease of access over clarity regarding an intent to bind. Such a choice may be canny, as the posting on a website of even a signed and dated regulation of practice before a specific judge, without giving notice of the regulation in a particular case, does not have any legally enforceable effect.[81]

4. Topics Covered in JSOs

My survey next counted how many judges had a JSO on certain topics of interest. I chose the twenty-two topics of interest by balancing several goals: (1) covering different stages of litigation, (2) keeping the number manageable, (3) gauging the uniformity of JSOs by including some topics likely to be common, and (4) including a few topics that have attracted attention in recent years. In ranked order of popularity, the topics surveyed are as follows:

80. *See supra* notes 72, 76.
81. *See supra* notes 17–18 and accompanying text.



These topics are discussed below in groups, presented in the approximate order in which they may be expected to arise in a typical case.

a. General Topics

Three topics struck me as concerning litigation generally, not just one phase of a case: courtesy paper copies for chambers' use, the permissibility of communication with chambers' staff, and courtroom decorum. These

topics were respectively the first, third, and eighth most popular for judges to include in JSOs.

The courtesy-copies topic was defined as any direction on when or how parties should send chambers a paper copy of a court filing. This topic's popularity is unsurprising, as it is anodyne and confronted at almost all stages of litigation. Its popularity is underscored by the fact that some courts have a separate document collecting the courtesy-copy requirements of different judges.[82]

The chambers-communications topic was defined as any direction on permissible communication with chambers staff, such as a judicial assistant or law clerks. It was common for JSOs to direct litigants not to contact chambers staff except in limited circumstances, but JSOs varied in the scope of that exception and the specificity of its definition. A common exception was to allow contact with law clerks on minor matters of procedure. Even if such a general direction did not have further detail, it was popular as a way to establish norms and guide litigant behavior in a nonresponsive posture.

The courtroom-decorum topic was defined as any instruction or requirement for courtroom behavior, including where to stand when addressing the court, how to examine witnesses, and interaction with opposing counsel. A total of 176 judges included it in their JSOs, which comes to 40% of JSO judges. Several district courts also posted court-wide rules or guidance on decorum, but those were not counted because they were not judge-specific.[83]

b. Citizenship Disclosure in Diversity Cases

Federal courts have an independent obligation to assess their jurisdiction before exercising the judicial power.[84] When jurisdiction is asserted based on complete diversity of citizenship,[85] the court must ensure proper

82. *E.g.*, *Judges' Copy Requirements for Electronic Filing*, U.S. DIST. CT. FOR THE N. DIST. OF TEX., https://www.txnd.uscourts.gov/sites/default/files/documents/judgescopyrequirements.pdf [https://perma.cc/GB6D-6P3B]; *Court Locations*, U.S. DIST. CT. FOR THE E. DIST. OF VA., https://www.vaed.uscourts.gov/court-info/court-locations [https://perma.cc/6WHQ-3H85] (each division has one document for the requirements of judges stationed there).

83. *E.g.*, *Rule 5.03 – Courtroom Decorum*, U.S. DIST. CT. M.D. FLA., https://www.flmd.uscourts.gov/local-rules/rule-503-courtroom-decorum-0#:~:text=(a)%20PURPOSE.,Rules%20Regulating%20The%20Florida%20Bar.&text=(7)%20must%20not%20eat%20or%20drink%20anything%20except%20water [https://perma.cc/65XU-PWKG]; *Courtroom Etiquette*, U.S. DIST. CT. S.D. TEX. HOUS. DIV., https://www.txs.uscourts.gov/sites/txs/files/Courtroom%20Etiquette.pdf [https://perma.cc/LV9R-XL5Z].

84. *See, e.g.*, Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999).

85. *See* 28 U.S.C. § 1332.

allegation of the citizenship of every person or entity attributed to each side of the dispute.[86]

Federal Rule of Civil Procedure 7.1 requires a party in a diversity case to identify the citizenship of "every individual or entity whose citizenship is attributed" to that party.[87] But it is not unusual for a party to erroneously identify citizenship by alleging a business association's state of formation and not the citizenship of each of the association's members.[88] I was curious how often judges adopt standing orders that provide specific instructions for alleging the citizenship of unincorporated entities like LLCs and LLPs. Surveying the adoption of those JSOs would also provide one indicator of how often judges use standing orders to steer parties away from mistakes of law, especially on jurisdictional defects that can negate all of a court's work on a case.

I selected the "citizenship instructions in diversity cases" topic for those reasons. It is defined as any requirement that parties in a diversity-jurisdiction case disclose specific citizenship details when a party is a noncorporate private organization.[89]

My survey showed adoption of such a JSO by twenty-three judges in total, or 5% of judges with JSOs. Of course, judges can always handle failures in diversity-of-citizenship pleading on a case-by-case basis. But the survey results show that relatively few judges use standing orders to attempt to prevent those errors in a systematic way.

c. Discovery Topics

My survey included two topics related to discovery. The first topic was any limitation on the extent or timing of discovery, such as a cap on the number of interrogatories, a timing limit on depositions, or early deadlines for some discovery. The second topic was any procedure required for the resolution of discovery disputes.

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86. *See* McLaughlin v. Miss. Power Co., 376 F.3d 344, 353 (5th Cir. 2004) (per curiam).

87. FED. R. CIV. P. 7.1(a)(2).

88. *See, e.g.*, MidCap Media Fin., L.L.C. v. Pathway Data, Inc., 929 F.3d 310, 313–14 (5th Cir. 2019); Harvey v. Grey Wolf Drilling Co., 542 F.3d 1077, 1080 (5th Cir. 2008) (collecting cases); WRIGHT ET AL, *supra* note 37, § 3630 n.40 (collecting further cases).

89. In one instance, a JSO required a party to disclose the citizenship of each member of a noncorporate business association, but that requirement applied only in diversity cases removed to federal court from state court, not those originally filed in federal court. *See Court Procedures Hon. Charles R. Eskridge III*, U.S. DIST. CT. FOR THE S. DIST. OF TEX., at 1 ¶ 1(f) (Feb. 14, 2024), https://www.txs.uscourts.gov/sites/txs/files/CRE%20Court%20Procedures%202020.06.22.pdf [https://perma.cc/Y53G-V3N4]; *Court Procedures of Hon. Charles R. Eskridge III*, *Form 1*, U.S. DISTRICT CT. FOR THE S. DIST. OF TEX., at 4 ¶ 2, https://www.txs.uscourts.gov/sites/txs/files/Form%201_Removed%20Actions.pdf [https://perma.cc/4MPU-S44Y]. I did not count that JSO under this topic because the trigger was not diversity jurisdiction per se.

Discovery-dispute protocols were more popular. Only 17% of judges with JSOs included a limit on allowable discovery. But 38% of judges with JSOs included requirements for the resolution of discovery disputes. The requirements were quite varied, ranging from a requirement to use a telephone hotline, to a requirement to confer with the judge or send a short summary of the dispute before filing a motion to compel, to requirements on which attorneys for the parties must confer about a discovery dispute. Given how frequently discovery disputes arise, one might be surprised that a higher percentage of JSOs did not include a provision on this topic. But case-management orders in individual cases often include discovery-dispute protocols, as do district courts' local rules.

D. Motion Practice

Two of the most popular topics in JSOs relate to motion practice. First, 52% of judges with JSOs included requirements for the formatting or page limits of any type of motion. Second, 51% of judges with JSOs included requirements for the formatting or content of proposed orders.

Both totals are around 37% of all active district judges. Simplifying slightly, a practitioner would need to comply with a judge-specific formatting requirement for somewhere around one out of every three motions filed in federal court. I also observed great variation in motion-formatting requirements. For example, a federal litigant's summary-judgment briefing might face no page limit at all or might be limited to fifteen pages.[90]

The next two most popular topics on motion practice were each included by 35% of judges with JSOs. Those topics are (1) requirements for conferencing a motion with opposing parties or for certifying the conferencing of a motion and (2) the establishment of a schedule for motion briefing, such as deadlines for a motion or responsive briefing on a motion. As to each topic, more than 150 judges of the 605 surveyed judges included it in a standing order. That suggests frequent, if not overwhelming, dissatisfaction with some aspect of federal and local rules on the subject.

Next, my survey counted forty-one judges whose JSOs included a substantive standard for deciding one or more types of motion. That is only 9% of judges with JSOs. Those substantive standards concerned motions

90. *See Practices and Procedures of Judge Arthur J. Schwab*, U.S. DIST. CT. FOR THE W. DIST. OF PA., at 3 ¶ II.B (2020), https://www.pawd.uscourts.gov/sites/pawd/files/Schwab_Practices_Procedures_1_20.pdf [https://perma.cc/K7G3-V873].

for relief such as summary judgment,[91] default judgment,[92] and recovery of litigation costs.[93]

Finally, my survey examined how many judges required court permission for a party to move for summary judgment. I selected this topic because views differ on whether summary judgment is mandatory if a movant has shown the absence of a genuine dispute as to material facts and entitlement to judgment as a matter of law.

The Administrative Office of the U.S. Courts has posted online a memorandum summarizing different views on the issue of a district judge's discretion to deny summary judgment even if Civil Rule 56's requirements are met.[94] As that memorandum notes, several district court opinions "contain statements that summary judgment is mandatory if the movant has shown entitlement to summary judgment."[95] But other case law "has determined that discretion to deny summary judgment exists even when the movant has made the proper showing," if circumstances so warrant.[96]

Aware of that divergence in views, I wondered how many district judges have identified circumstances that justify denying summary judgment when Rule 56 is satisfied. But because those circumstances could be numerous, I chose to simply focus on a judge's requirement that parties first obtain court permission (i.e., leave of court) before moving for summary judgment. This allowed my survey to avoid listing many possible reasons for denying a summary judgment authorized by Rule 56. Instead, I could simply ask how often standing orders place judges in a gatekeeping position that allows them to withhold access to summary judgment for reasons not stated in Rule 56. So I defined this topic as any requirement to obtain leave of court to file any type of summary-judgment motion. Not included was a mere direction to request a court conference before moving for summary judgment, if the direction allowed that summary judgment could still be sought without permission from the judge.

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91. *E.g.*, *Judge Gene E.K. Pratter's General Pretrial and Trial Procedures*, U.S. DIST. CT. FOR THE E. DIST. OF PA., at 25 (Oct. 2023), https://www.paed.uscourts.gov/sites/paed/files/documents/procedures/prapol2.pdf [https://perma.cc/TRC3-H3V7] (requiring inclusion of a full deposition transcript if any portion is used to seek or oppose summary judgment).

92. *E.g.*, *Hon. Josephine L. Staton: Judge's Procedures*, U.S. DIST. CT. FOR THE CENT. DIST. OF CAL., https://www.cacd.uscourts.gov/honorable-josephine-l-staton [https://perma.cc/49Y8-MK79] (addressing substantive law governing motions for default judgment).

93. *E.g.*, Robert W. Schroeder III, *Standing Order Regarding Bill of Costs for Cases Pending Before Judge Robert Schroeder*, U.S. DIST. CT. FOR THE E. DIST. OF TEX. (Jan. 15, 2016), https://txed.uscourts.gov/sites/default/files/judgeFiles/STANDING_ORDER_-_Bill_of_Costs_Jan_13_2016.pdf [https://perma.cc/HN34-R3UK] (standards for recovery of litigation costs).

94. Memorandum from Andrea Kuperman to Judge Mark Kravitz (Jan. 25, 2009), https://www.uscourts.gov/sites/default/files/rule_56_memo_1.pdf [https://perma.cc/M9DX-76WL] (entitled "Discretion to Deny Summary Judgment").

95. *Id.* at 32.

96. *Id.* at 43.

Only eighteen surveyed judges (4% of judges with JSOs) had a standing order requiring leave of court to move for summary judgment. One common requirement was leave of court if moving for summary judgment before the discovery deadline.[97] Another common requirement was leave of court to file any summary-judgment motion past the first.[98] Lastly, some judges provided that "[p]arties may not file an early motion for summary judgment . . . without leave from [the Court]" obtained by submitting a three-page letter "summarizing the party's substantive argument."[99]

Those results may have little relation to the prevalence of judges exercising discretion in particular cases to deny summary judgment. But they do show that few judges systematically express that preference in standing order.

e. Settlement

My survey looked at two settlement topics: (1) any standing order requiring certain procedures upon a case's settlement, such as notifying the judge within a set time period or moving to stay the case, and (2) any standing order requiring mediation or settlement negotiations in some or all types of cases.

The data show that both topics were somewhat common, but not overwhelmingly popular. About a quarter of judges with JSOs (26%) include a requirement for mediation or settlement negotiations, and one in five judges with JSOs (20%) include required procedures upon settlement.

f. Junior-Attorney Argument Preference

I also examined the popularity of JSOs meant to assist junior attorneys in obtaining oral-argument experience—the subject of recent discussion in

97. For example, three of the seven active district judges of one court had such a standing order. *Judge Nancy E. Brasel, Practice Pointers and Preferences*, U.S. DIST. CT. FOR THE DIST. OF MINN., https://www.mnd.uscourts.gov/sites/mnd/files/NEB.pdf [https://perma.cc/PHP5-DQVM]; *Judge Jerry W. Blackwell, Practice Pointers and Preferences*, U.S. DIST. CT. FOR THE DIST. OF MINN., at 2, https://www.mnd.uscourts.gov/sites/mnd/files/JWB..pdf [https://perma.cc/KDV6-4AN8]; *Judge Wilhelmina M. Wright, Practice Pointers and Preferences*, U.S. DIST. CT. FOR THE DIST. OF MINN., at 2 (Jan. 2019), https://www.mnd.uscourts.gov/sites/mnd/files/WMW.pdf [https://perma.cc/6RLZ-VPD5].

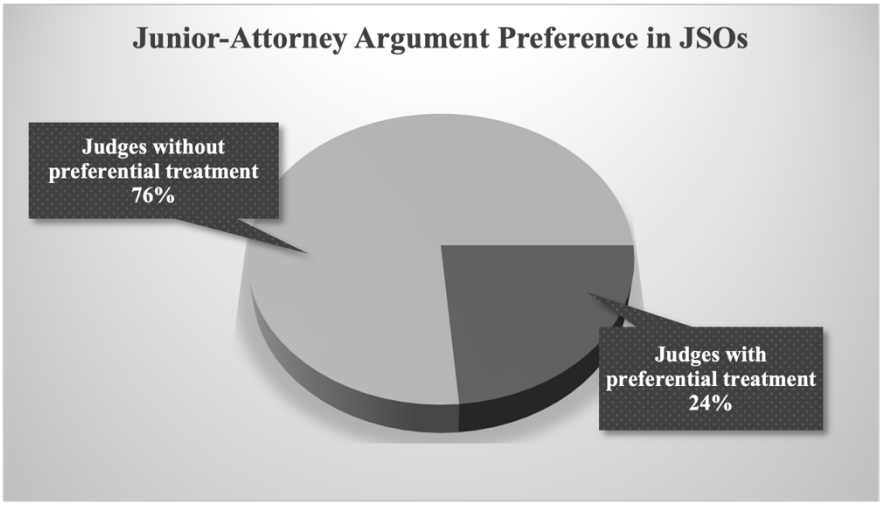
98. *See, e.g.*, *Honorable André Birotte Jr., Law and Motion Schedule*, U.S. DIST. CT. FOR THE CENT. DIST. OF CAL., https://www.cacd.uscourts.gov/honorable-andr%C3%A9-birotte-jr [https://perma.cc/9JFN-3SD6] ("The Court will allow only one motion for summary judgment per party in this case . . . ."); *Hon. Josephine L. Staton: Judge's Procedures*, *supra* note 92 ("A party may file only one summary judgment motion.").

99. *Zahid N. Quraishi: Judicial Preferences*, U.S. DIST. CT. FOR THE DIST. OF N.J., https://www.njd.uscourts.gov/content/zahid-n-quraishi [https://perma.cc/RK29-X2F7].

the profession.[100] This topic was defined as any preference given to oral argument by attorneys who are newer or more junior by years of practice.

My survey counted only orders that gave some preference or benefit to junior-attorney argument, such as a thumb on the scale in deciding whether to grant oral argument or grant more argument time than would otherwise be given. I did not count mere encouragement of junior-attorney argument if unaccompanied by a judge's grant of some preference upon notice that a junior attorney would be arguing.

A total of 105 judges (24% of those with JSOs) extended in their JSOs some preferential treatment to oral argument by a junior attorney:



A question raised by that finding is whether one should infer anything about the views of the other 498 district judges on the need for oral argument generally or by junior attorneys specifically. I find no such inference warranted for at least four reasons. The upshot is that litigants should not avoid requesting oral argument based simply on the negative implication of a given judge lacking a JSO on the topic.

First, even if a judge has expressed public encouragement for more argument opportunities for junior attorneys, a judge may view it as improper to use government power to influence how clients and law firms choose to

100. *See, e.g.*, Paula M. Bagger, *How the Judiciary Is Helping Younger Lawyers Close the Experience Gap*, 19 COM. & BUS. LITIG. 23 (2018); *Summary of Judicial Orders Promoting Next Gen*, NEXT GENERATION LAWS., https://nextgenlawyers.com/judicial-orders-promoting-next-gen/ [https://perma.cc/7ASS-SH4C]; *Policy Encouraging Opportunities for Attorneys Who Are Less Experienced or from Under-Represented Groups*, U.S. DIST. CT. FOR THE N. DIST. OF CAL., https://www.cand.uscourts.gov/attorneys/policy-encouraging-opportunities-for-attorneys-who-are-less-experienced-or-from-under-represented-groups/ [https://perma.cc/B6YS-AJHP].

staff their cases. There is a concern that, if a judge can use the judicial power to influence counsel's staffing decisions in ways generally deemed worthy, the door is opened to official influence over client–lawyer relations that may be viewed as more controversial. Another concern is that a client who gets oral argument by sending up a junior attorney might be perceived, even if subliminally, as receiving not only the benefit of a speaking opportunity but also preference on the merits.

Second, some judges may see a broader problem with oral-advocacy opportunities decreasing for attorneys of all experience levels. If a judge perceives that problem as to all attorneys, a JSO targeted at junior attorneys may be less compelling to that judge.

Third, some judges may see the number of years of bar admission as an imperfect proxy for attorneys who deserve a greater chance at oral argument. That proxy may exclude attorneys who changed practice areas to litigation after several years of bar admission or who spent time away from practice to care for family.

Finally, some judges may simply be concerned about the burden on parties of finding, staying abreast of, and complying with standing orders in general. For all of those reasons, the lack of a JSO granting argument preference to junior attorneys does not support any inference about a judge's view on junior-attorney training or oral argument generally.

g. Trial

The following four topics related to trial procedures were among the top ten most popular topics in JSOs:

1. Trial exhibits. This topic covered any requirement on the use of exhibits at trial, including when and how to submit exhibit lists to a judge, when and how to object to exhibits, and the required form for labeling or presenting exhibits.

2. Witness lists. This topic included any requirement for witness lists, including when and how to submit them, when and how to object to them, and their required form.

3. Deposition use. This topic covered any requirement for deposition use at trial, including when and how to exchange deposition designations, when and how to object to them, and the permissibility and mechanics of their use at trial.

4. Jury-selection protocols. This topic applied to any standard for jury selection, including restrictions on voir dire by counsel and how parties may exercise peremptory strikes.

One might expect JSOs to address those four matters at a similar frequency. Although JSOs did include provisions on witness lists and deposition use at roughly similar rates (about 40% of all JSO judges had them), jury-selection provisions were more common (about 50% of all JSO judges had them), and exhibit-list provisions were the most common (63% of JSO judges had them). This finding may indicate comparatively greater intricacy in working with exhibits at trial.

Two additional trial-related JSO provisions were surveyed. First, approximately a third of judges with JSOs (147 total) included provisions on the hours of day for holding trial, generally stating when counsel must be available each day. It seems that many judges are willing to announce a schedule in advance, which may give the parties better predictability about the burdens of trial.

Second, the survey examined how many JSOs addressed the topic of limits on trial duration. This topic was selected as a way to measure the effect of projects in the last two decades to enhance jury trials through various procedures, including limits on trial duration.[101] For the survey, this topic was defined as any JSO that imposed a trial-duration limit or that required the parties to confer with each other and propose a limit on trial duration.

The survey data shows that only seven judges (2% of judges with JSOs) have a JSO on trial-duration limits. This figure may underrepresent the penetration of this jury-trial innovation, however, as judges may prefer to address the topic in person at the final pretrial conference, as opposed to in a standing order.

h. Criminal Sentencing

The final topic examined was criminal-sentencing procedure. The survey data show that 117 judges (27% of those with JSOs) include a sentencing protocol in their JSOs. For example, some judges' JSOs state deadlines for sentencing memoranda and objections to presentence reports.[102] Other

101. *See* Stephen D. Susman & Richard L. Jolly, *An Empirical Study on Jury Trial Innovations*, CIV. JURY PROJECT 101, 103–06 (2017); AM. BAR ASS'N, PRINCIPLES FOR JURIES AND JURY TRIALS (2016), https://www.americanbar.org/content/dam/aba/administrative/american_jury/2016_jury_principles.pdf [https://perma.cc/U34X-KW4H]; U.S. DIST. & BANKR. CT., S. DIST. OF TEX., JURY INNOVATIONS PROJECT: AN EFFORT TO ENHANCE JURY TRIALS IN TEXAS STATE AND FEDERAL COURTS: PILOT PROGRAM MANUAL 16 (2011), https://www.txs.uscourts.gov/sites/txs/files/2011_Jury%20Innovations%20Project%20-%20An%20Effort%20to%20Enhance%20Jury%20Trials%20in%20Texas%20State%20and%20Federal%20Courts.pdf [https://perma.cc/BP6S-SZPQ].

102. *E.g.*, *Individual Rules of Practice in Criminal Cases: Gregory H. Woods, United States District Judge*, U.S. DIST. CT. FOR THE S. DIST. OF N.Y., at 4 ¶ 7(A) (May 19, 2022), https://www.nysd.uscourts.gov/sites/default/files/practice_documents/GHW%20Woods%20Criminal%20Practices

judges require a certain amount of advance notice if a sentencing hearing will include live testimony.[103]

5. Organization of JSOs

The federal rules of procedure require local rules to conform to the Judicial Conference's uniform numbering system.[104] Although that requirement does not apply to an individual judge's standing orders, I wondered how many judges voluntarily used that numbering system for their JSOs. My survey showed that only three judges (less than 1% of judges with JSOs) applied the Judicial Conference's numbering system.

6. Notice to Parties of JSOs

Even if a JSO is posted online, the federal rules do not allow it any enforceable effect if notice of it is not given in a particular case.[105] At least one court's local rules recognize as much.[106] Some judges may be comfortable with their online JSOs, despite using imperative language, being merely advisory until a need for prospective compliance arises and only then giving notice of the JSOs in a specific case. Other judges or courts may prefer to make JSOs enforceable more immediately by proactively providing notice in specific cases. I thus examined how the issue of JSO notice is handled in local rules and in JSOs themselves.

In examining notice mechanisms, I did not examine docket entries in individual cases. So my data do not reflect how many judges are automatically filing their standing orders in every civil or criminal case. Nor will it reflect the alternative practice of docketing in every case a notice of the judge's applicable standing orders.

I did not find any sizable portion of courts or judges with JSOs taking systematic steps to ensure notice of JSOs in particular cases. Only six district courts had a local rule directing a party to find standing orders issued

%20May%2019%202022.pdf [https://perma.cc/X93A-9BST]; *Practice Guidelines for Judge Thomas L. Ludington: Sentencing Practices*, U.S. DIST. CT. FOR THE E. DIST. OF MICH., at ¶¶ 3, 5, https://www.mied.uscourts.gov/altindex.cfm?pagefunction=pgToPDFAll&judgeID=21 [https://perma.cc/P834-B5B6].

103. *E.g.*, *Hon. Richard E. Myers II, Chief United States District Judge: Practice Preferences and Procedures*, U.S. DIST. CT. FOR THE E. DIST. OF N.C., at 6 ¶ IV(E), https://www.nced.uscourts.gov/pdfs/Judge_Myers_Preferences.pdf [https://perma.cc/AN3M-ULVS].

104. FED. R. CIV. P. 83(a)(1); FED. R. CRIM. P. 57(a)(1).

105. *See supra* notes 17–18 and accompanying text.

106. N.D. CAL. CIV. R. 1-5(o) ("It is the policy of the Court to provide notice of any applicable Standing Orders to parties before they are subject to sanctions for violating such orders.").

by the presiding judge. Three courts had such a local rule for all cases,[107] one court had it for only civil cases,[108] and two courts had it only on the issue of courtesy copies in civil cases.[109] Only one district court had a local rule requiring a case-initiating party to serve a copy of the presiding judge's JSOs on opposing parties.[110] I did not find any court whose local rules required a party to file the presiding judge's JSOs on the docket.

As for individual judges, my survey counted only twenty-two judges (5% of judges with JSOs) whose JSOs themselves required a party to serve those JSOs on the opposing party in a case. Those judges sit on a total of seven district courts.[111] I did not find any JSO that required a party to file the JSO on the docket in the party's case.

Based on those findings, it appears that the majority of judges with JSOs either (1) are achieving proactive notice in particular cases through mechanisms other than local rules or JSOs themselves, (2) are comfortable delaying enforcement of JSOs until after compliance issues arise and notice is given in a particular case, or (3) are comfortable enforcing JSOs even before notice is given in a particular case, contrary to the federal rules.

7. Archival and Review of JSOs

My survey next examined whether any courts archive past versions of JSOs. Archiving expired JSOs would allow for public analysis and for review by an appellate court if the JSO is enforced in a specific case but not filed on that case's docket.

I did not find any courts that have a comprehensive archive of expired JSOs. I did find one court, however, with multiple judges who post redline

107. S.D. ALA. GEN. R. 1.1 ("Attorneys should check with the Clerk to ascertain whether a particular Judge has any such printed rules."); N.D. CAL. CIV. R. 1-5(o) (counted because it mentions sanctions for violating judge-specific standing orders); N.D. CAL. CRIM. R. 2-1 (cross-reference to the civil rule on standing orders); S.D. OHIO CIV. R. 1.1(f) (directing parties to the court's website for the "standing orders of any Judge"); S.D. OHIO CRIM. R. 1.2 (applying the civil local rules to criminal actions).

108. W.D. TEX. CIV. R. 1(f) (directing parties to the court's website "for any rules or requirements adopted by any judge").

109. N.D. ILL. GEN. R. 5.4 (the local rule itself does not mention standing orders as opposed to case-specific orders, but the index to the local rules cites that rule as concerning "Standing Order . . . Individual Judges"); W.D. WASH. CIV. R. 10(e)(9) ("Parties should consult their assigned judge's web page at www.wawd.uscourts.gov for standing orders and guidance regarding courtesy copies."); W.D. WASH. CIV. R. 65(b)(6) (using the same language).

110. N.D. CAL. CIV. R. 4-2(b) (requiring service of "[a]ny pertinent Standing Orders of the assigned Judge").

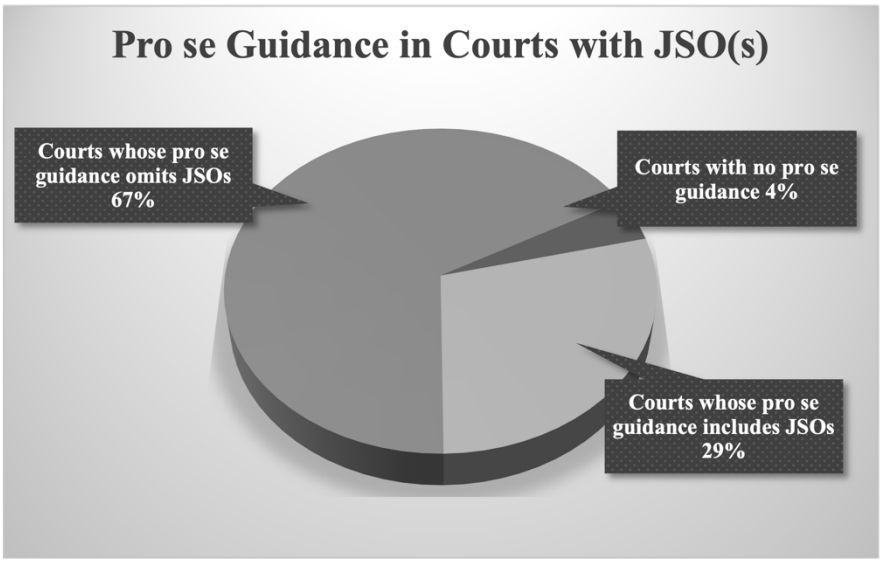
111. Those were the district courts for the Central District of California, Northern District of California, District of Connecticut, District of the District of Columbia, Western District of North Carolina, District of South Carolina, and Southern District of Texas.

versions of their JSOs, showing the changes from the last version of each JSO.[112]

My study also examined how many courts have a local rule directing periodic review of individual judges' JSOs, as recommended by the rules advisory committee.[113] I found only one court with a such a local rule.[114]

8. Guidance to Pro Se Litigants About JSOs

Finally, my survey examined courts' guidance to pro se litigants on the existence of JSOs and the need to comply with them. The data showed that two-thirds (67%) of courts with one or more JSO did not mention the existence of those orders in the court's pro se guidance:



That finding suggests room for improvement in courts that seek to promote access to justice by publishing guidance for pro se litigants.

9. Distinctive JSOs

I conclude by noting a few JSO provisions or other judge-specific details encountered during the survey that stood out as thoughtful or memorable:

112. *See, e.g.*, *Judge Regina M. Rodriguez*, U.S. DIST. CT. FOR THE DIST. OF COLO., http://www.cod.uscourts.gov/JudicialOfficers/ActiveArticleIIIJudges/HonReginaMRodriguez.aspx [https://perma.cc/C64J-G958].

113. *See supra* note 41 and accompanying text.

114. E.D. TEX. CIV. R. 83(c) ("The court will periodically review all standing orders for compliance with Rule 83(b) and for possible inclusion in the local rules.").

A memorable introduction: "At the risk of sounding like Jerry Seinfeld, did you ever notice that procedures allegedly designed to streamline litigation often don't?"[115]

Although many judges would likely grant a request on this basis, one JSO provides a guaranteed continuance of trial settings for lead counsel after the birth or adoption of a child.[116]

A topical song can be enjoyed on one judge's website if music autoplay is enabled in browser settings.[117]

A reminder that briefs are not law-review articles: "Any brief with more than 10 footnotes will be stricken."[118]

A colorful resort to history and tradition in briefing guidance: "This Court is informed and guided by the deep legal traditions of Louisiana. For example, in filing briefs with this Court, counsel are reminded that, under Spanish law once controlling in Louisiana, 'a lawyer who intentionally miscited the law could be sent to exile, and his property could be confiscated.'"[119]

III. REFLECTIONS

Based on my review of practices surrounding JSOs, I offer three ideas that district courts may wish to consider:

District courts with webpages that include guidance to pro se litigants may wish to consider ensuring that the guidance mentions the existence of, and need to comply with, any judge-specific standing orders regulating practice.

District courts may wish to consider the wisdom of allowing individual judges to regulate practice in any manner,

115. U.S. Dist. Ct. for the N. Dist. of Ill., Judge Iain D. Johnston, Case Procedures: Summary Judgment Motions, https://www.ilnd.uscourts.gov/PrintContent.aspx?cmpid=769 [https://perma.cc/7CLU-NN6E].

116. U.S. Dist. Ct. for the S. Dist. of Tex., Court Procedures and Practices of Judge Alfred H. Bennett, at 5 ¶ B(3), https://www.txs.uscourts.gov/sites/txs/files/Judge%20Alfred%20H.%20Bennett%20Proc%20revised%20212023.pdf [https://perma.cc/WP32-7QXJ].

117. U.S. Dist. Ct. for the S. Dist. of Tex., *United States District Judge Jeffrey V. Brown*, https://www.txs.uscourts.gov/page/united-states-district-judge-jeffrey-v-brown [https://perma.cc/U8C8-J7QP] (playing the instrumental version of Glen Campbell's "Galveston").

118. U.S. Dist. Ct. for the E. Dist. of Mich., Practice Guidelines for Judge Laurie J. Michelson: Case Management Requirements, at 3 ¶ III(A), https://www.mied.uscourts.gov/pdffiles/MichelsonCaseManagementRequirements.pdf [https://perma.cc/GW4Z-KX9B].

119. U.S. Dist. Ct. for the Middle Dist. of La., Judge John W. deGravelles: Communication, https://www.lamd.uscourts.gov/content/judge-john-w-degravelles [https://perma.cc/W23D-6LLV].

> "[n]otwithstanding the local civil rules."[120] Federal Rule of Civil Procedure 83(b) provides that individual judges may regulate practice in any manner "consistent . . . the district's local rules." Federal Rule of Criminal Procedure 57(b) provides the same. That at least suggests the inverse, that judges may not regulate practice in a manner inconsistent with the district's local rules.
>
> District courts may wish to implement a formal procedure for "reviewing single-judge standing orders," as encouraged by the rules advisory committee.[121] Some JSOs may warrant consideration for inclusion in the district's local rules.

I also offer a few ideas that new judges may wish to consider in deciding whether and how to draft judge-specific standing orders:

> Judges may wish to consider the benefits and drawbacks of regulating practice through case-management orders posted to the docket automatically at the beginning of a case as opposed to standing orders posted online. The docket-based approach would ensure actual notice to the parties and archival for any appellate review. It could also reduce a litigant's hesitation to ask the judge to modify a standing order based on the needs of a particular case.
>
> If individual judges place mandatory language regulating practice on their court websites, judges may wish to consider expressly stating whether or not their directives are meant as a binding regulation of practice, citing Federal Rule of Civil Procedure 83(b) or Federal Rule of Criminal Procedure 57(b).
>
> In keeping with the recommendation of the Judicial Conference's long-term plan to "reduce the number of . . . standing orders,"[122] judges considering adoption of a JSO may wish to reflect on, not just the benefits of guidance to parties and counsel, but also the potential burdens of mastering different, judge-specific orders and staying abreast of directives that are merely posted online.
>
> If a judge is considering reprimanding, sanctioning, or adversely affecting a party for noncompliance with a judge-specific standing order posted online, the judge should consider whether notice of the

120. N.D. TEX. CIV. R. 83.1 (allowing judge-specific practice regulations "[n]otwithstanding the local civil rules"); *see also* S.D. OHIO CIV. R. 1.1(c) (providing that the local rules do not govern practice if "a Judge orders otherwise in a given case").

121. *See supra* note 41 and accompanying text.

122. *See supra* note 59 and accompanying text.

> JSO was provided in the particular case, such as by service of the JSO or the JSO's entry on the docket.
>
> If a judge takes adverse action based on a party's noncompliance with a JSO, the judge should consider quoting or filing on the docket the version of the JSO in effect at the time of the relevant conduct. That practice would protect appellate review if the JSO is later withdrawn or superseded.
>
> Judges may wish to consider including in their JSOs an explanation of the reasons for each order, to answer the past critique that JSOs can be devoid of explanation.[123]

A final reflection is prosaic: Our judicial system is structurally incompatible with full uniformity in federal practice and procedure. The federal judicial system empowers over 600 district judges to decide for themselves how to balance the need for standing regulations of practice and the goal of simplicity of federal procedure. Unsurprisingly, there is great variation in how that balance is drawn.

The finding that over 70% of active-status district judges use JSOs suggests that district judges, as a group, are far from convinced of the relative value of goals previously expressed by congressional and national judiciary committees—that lawyers can go to any federal court in the nation and expect much the same required procedure under local requirements that are few and simple. It appears that, today, a more widespread emphasis is on the goal of announcing the procedures that individual judges find most beneficial. That may say something about the relative popularity of judges moving in a group as opposed to expressing individual will. That emphasis may also reflect our era of online how-to guides, which district judges may seek to offer in an attempt to help practitioners or promote transparency about typical practices. When those guides take the form of mandatory orders, however, judges may wish to weigh their benefits against the burdens to practitioners of finding and adhering to a range of online directions.

123. *See supra* note 33 and accompanying text.