Uniformity of State and Federal Procedure

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Uniformity is a recurring theme of procedural reform. So deeply is the idea of uniformity embedded in American legal thought that many find it difficult or unnecessary to explain why uniformity is thought to be good. Indeed, reformers are inclined to speak of uniformity as if it were some excellence in itself — like health, happiness or virtue.

Whether because of the lure of simplicity, the appearance of neutrality, the likeness to science, the feel of efficiency, the imprimatur of professionalism, the suggestion of fairness or some combination of these, the norm of procedural uniformity enjoys widespread appeal. To be sure, there are critics of uniformity-inspired rules and reforms, but even these critics seldom take issue with the normative value of procedural uniformity. Rather, they dispute the notion that a proposed reform is necessarily just, wise, fair or efficient simply *because* it promotes uniformity.

One dimension of procedural uniformity is the quest for identical rules for federal and state courts. Intra-state uniformity was one of the advertised features of those who argued for and drafted the original Federal Rules of Civil Procedure (FRCP). For example, Senator Thomas Wall Shelton argued, "[G]ive the states an opportunity to follow the Federal government. That state which tries to live unto itself will suffer, if it does not perish. In spite of ourselves, we are all for one and one for all…. [A] simple, scientific, correlated system of rules, such as would be prepared and promulgated by the Supreme Court of the United States, would prove a model that would, for reasons of convenience as well as of principle, be adopted by the states."[1] What Shelton's argument lacked in modesty and nuance, it supplied in confidence and passion.

Nationwide, state adoption of the FRCP has occurred to some extent. A flurry of state reforms followed the promulgation of the original FRCP. Three of our southwestern sister states – Arizona, Colorado and New Mexico – were the first to replicate the FRCP — in 1940, 1941 and 1942, respectively. Throughout the next decade, Utah and handful of other states joined the list. And in 1953, the Nevada Rules of Civil Procedure (NRCP) took effect; the NRCP conformed to the federal model, with few exceptions. By 1960, state procedural systems were approximately evenly divided among procedural systems modeled on the federal rules, the common law and the Field Code. By 1980, more than half of the states had procedural systems that substantially conformed to the federal model. Naturally, the rhetoric of uniformity played a substantial role in the debate about these state reforms.

But state adoption of the FRCP then ground to a halt. Many states, like California, New York and most other highly populated states, have never adopted the FRCP. Importantly, however, even in states that never modeled their procedural systems on the FRCP, there are procedures that reflect the influence of the FRCP. For example, all states have adopted the summary judgment device, which is an innovation of the FRCP. Moreover, there can be uniformity *in practice* with respect to state and federal procedural systems even when the rules differ *in fact*. The first law review article that I ever wrote demonstrated how state courts that had not adopted the FRCP often applied their textually dissimilar rules

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in a manner that nevertheless tracked outcomes prescribed by the corresponding federal court's interpretations of the FRCP. Thus any practical assessment of uniformity requires more nuance than a comparison of texts.

Uniformity is a complicated picture even in states that once adopted the FRCP. States that conformed to the federal model were in lockstep only as of the date of replication; indeed, this is static, not dynamic conformity. The FRCP have been amended 39 times since 1938, including in each of 20 of the past 25 years. States like Nevada that adopted the original FRCP have not kept pace with the extraordinary number of amendments to the FRCP. Indeed, state adoption *vel non* of the many FRCP amendments is a hodge-podge. Notably, intra-state uniformity's loss is this procedural historian's gain. A tour of various states' procedures is like walking through a time machine that transports one to an earlier era of federal procedure. If one were to travel through New Mexico, Colorado and Utah state courts, for example, one could sample practice under the text of three different versions of Federal Rule 11, namely circa pre-1983, circa 1983-1993 and circa post-1993. Yet all three of these states are generally thought to be among the category of states that follow the federal model. One respected scholar observed in 2003 that the FRCP were "less influential in state courts today than at anytime [sic] in the past quarter-century" and that they "have lost credibility as avatars of procedural reform."[2] Put another way, the virus that has caused a feverish number of amendments at the federal level was not contagious.

Yet the lure of uniformity understandably persists. For practitioners or litigants who appear in Nevada federal and state courts, for example, eliminating superficial differences and traps for the unwary can be useful. And conforming state procedure to a corpus of rules that has multi-volume treatises and voluminous case law interpreting it is also of some benefit. Further still, the extended, cumbrous and transparent rulemaking process at the federal level presumably means that those rules are thoroughly vetted and, ideally, represent a fair balance of competing interests. Accordingly, the committee that the Nevada Supreme Court named to review and, if appropriate, to revise the Nevada Rules of Civil Procedure recognized the virtue of intra-state uniformity.

To be sure, many of the recent amendments to the NRCP aligned our state procedure with the FRCP. When a scholar next measures federal and state procedural conformity, Nevada will appear near the top of that list. Yet I can verify that the committee took pains to keep the norm of uniformity in perspective. As I reflect on my experience on the committee, I recall five reasons the committee rejected various aspects of the modern FRCP, and instead retained Nevada practice.

The number, the substantive mix and the stakes of federal and state caseloads are significantly different. Some practices and procedures that may be salutary for managing federal cases would be counterproductive in our state court.

State courts do not have the judicial resources that federal procedure presupposes. The dispersed and distinctive practices in the various parts of our state pose technical and budgetary challenges that the federal court system does not confront.

Many litigants do not have the resources that federal procedure presupposes. The rulemaking committee endeavored to simplify state practice and procedure, not make it more expensive or complicated to navigate.

Some of Nevada's substantive laws were enacted or have evolved with the expectation of a certain procedural foundation. Averse to revising substantive law (even if indirectly), the rulemaking committee did not disturb such procedural foundations.

In certain areas of practice and procedure, Nevada's approach was (and remains) normatively better than the FRCP. In this sense, our state procedure is a laboratory for experimentation where our unique approach has not only the obvious internal return, but also some external benefit as an example that other states or the federal courts could someday follow.

Procedural rulemaking is an important domain. Although procedure may have the veneer of an ancillary and perfunctory set of rules of etiquette designed to ensure the application of the more important rules of substantive law, in fact procedure is power. And the exercise of any power can be used for good or ill. This rule committee discharged its duties with a solemn appreciation of its responsibilities, and its work product reflects the compromise of competing interests and the calibration of myriad objectives, including intra-state uniformity. **NL**

1. Thomas Wall Shelton, *A New Era of Judicial* Relations, 23 Case & Comment 388, 393 (1916).
2. John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 Nev. L.J. 354, 355 (2003).

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