

Procedural Values and the Mechanics of Federal Appeals

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Marin K. Levy, [The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts](#), 61 **Duke L.J.** 315 (2011).

Some federal judges think that they do not have much to learn from legal academics. At the very least, though, perhaps these judges could learn from legal academics some fruitful ways to learn from other judges. A good start down that road could begin with a recent article by [Marin Levy](#), [The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts](#), in the [Duke Law Journal](#).

In *Mechanics*, Levy offers a descriptive, analytical, and normative examination of case management practices in the federal circuit courts of appeals. These practices guide determinations about, among other things, “whether a case will receive oral argument or be decided solely on the briefs, whether its disposition will be drafted by judges and their law clerks or by staff attorneys, and whether it will be resolved by a published opinion or an unpublished, non-binding order.” Levy describes significant variations in these and other case management practices among the circuits that she has studied in depth. (P. 317.) For example, staff attorneys are heavily involved in screening cases for oral argument in the D.C., First, and Fourth Circuits, but “play almost no role in screening” in the Second and Third Circuits. (P. 339.) To pick another example, in the Fourth Circuit, only 13.1% of cases terminated on the merits have oral argument, whereas close to half of all such cases in the D.C. Circuit receive hearings. (Pp. 359-60.)

The Federal Judicial Center has gathered some of the types of information that Levy presents, although its latest study is over a decade old. Much has changed in that time, Levy observes, and there are limits on what the FJC can do. Levy nevertheless calls on the FJC to take a more active role in gathering and sharing information on case management practices. To be sure, though, circuit judges are not all of one mind about the desirability of shining a light on their courts’ management practices. Levy observes that “several judges have said that it would be helpful to learn of the practices of other courts,” which can provide “[t]he opportunity to learn of a useful or efficient practice that can then be emulated in one’s own court.” (P. 385.) But Levy also tells of a judge who, shortly after joining the bench, shared with another judge her interest in learning more about the case management practices of the other circuits, only to be told “not to bother” because each circuit was already convinced about the comparative desirability of its practices. (P. 376.)

Levy’s analysis of the causes of disuniformity in case management practices points not only to the differences in caseload and type of appeals that one would expect, but also to differences in norms and culture in the circuits that she studied. She recognizes that it is difficult to identify the underlying values of a given circuit from its case management practices. But her interviews certainly suggest variation in the weight ascribed to differing values such as collegiality, legitimacy, the appearance of legitimacy, efficiency, and fairness. Turning to a normative assessment of the disuniformity she has identified, Levy offers several powerful examples (relating to the treatment of immigration appeals and to the treatment of pro se appeals) to suggest that “total uniformity may be impossible to achieve, and attempts to achieve it will often prove too costly.” (P. 382.) With practical constraints duly noted, Levy argues that disuniformity in case management is more difficult to accept the more that it is attributable to differences in values across the circuits. “In simplified terms,” Levy writes, “it might become difficult to accept the divergent case management practices of the Second and Fourth Circuits, for example, if the Second Circuit were being driven by the value of perceived legitimacy and the Fourth Circuit were being driven by the value of efficiency.” (P. 383.)

This portion of Levy’s analysis ends with a promise for “[f]uture normative work, building on the qualitative and explanatory accounts” offered in this article (P. 383.) The prospect is promising indeed. As Levy notes near the end of

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the article, “case management practices are currently so opaque, [that] few people even have a basis for evaluating them.” (P. 389.) Levy is already one of those few, but thanks to *Mechanics*, the number can increase.

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