COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

DATE: May 2, 2011

TO: Honorable Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure

FROM: Honorable Mark R. Kravitz, Chair, Advisory Committee on Federal Rules of Civil Procedure

RE: Report of the Civil Rules Advisory Committee

I. Introduction

The Civil Rules Advisory Committee met at the University of Texas School of Law on April 4 and 5, 2011. Draft Minutes of this meeting are attached.

Part I presents the Committee's recommendation to publish for comment revisions of Civil Rule 45.

Part II presents several matters on the Committee agenda for information and possible discussion. Part II A provides illustrations of approaches that might be taken to crafting a rule on preserving information for discovery. These illustrations have been prepared to stimulate discussion at a miniconference the Committee plans to hold in September. II B describes continuing study of pleading standards, including a report by the Federal Judicial Center. II C is an account of the work being done to carry forward the ideas and energy generated by the 2010 Litigation Review Conference at Duke Law School. Finally, II D describes two general questions posed by Rule 6(d):

the best approach to take when an inadvertent ambiguity has been created by applying Style Project principles in amending rule text, and whether the time has come to reconsider the decision to extend time periods by three days when service is made by e-mail or some of the other means that now support the extension.

Part III notes pending legislation that would directly amend or limit Civil Rules.

I ACTION ITEM: CIVIL RULE 45

Although separated from the comprehensive discovery provisions in Rules 26 to 37, Rule 45 covers both trial subpoenas and discovery subpoenas. The Advisory Committee and its Discovery Subcommittee have spent several years studying Rule 45. The work was prompted by suggestions submitted by the public, extended to a review of the pertinent literature, and generated further ideas within the Committee. This work produced a list of 17 different possible areas for amendment.

The Subcommittee and Committee were assisted by many representatives of the Bench and Bar. Careful analyses were submitted, for example, by the Magistrate Judges' Association, and by the ABA Section of Litigation. In addition, in October, 2010, the Subcommittee held a very informative miniconference on Rule 45.

The ideas drawn from these sources were winnowed down to a package that was unanimously endorsed by the Advisory Committee. Although there are a number of small changes included as well, the main features are:

Notice of service of subpoena: The 1991 amendments to Rule 45 introduced the "documents only" subpoena, and added a requirement in Rule 45(b)(1) that each party be given notice of a subpoena that requires document production. In 2007 this provision was clarified to direct that the notice be provided before the subpoena is served.

As it examined Rule 45 practice, the Committee was repeatedly informed that many lawyers were not complying with this notice requirement, and that this failure caused problems fairly frequently. It concluded that the requirement should be moved to a more prominent position, and as a result the amendment package proposes that it be transferred to become Rule 45(a)(4), entitled "Notice to other parties."

The Committee also determined that modest improvements in the notice requirement were in order. Thus, proposed Rule 45(a)(4) directs that the notice include a copy of the subpoena; in this way other parties can learn what materials should be forthcoming under the subpoena, determine whether they want to seek additional materials, and perhaps conclude that there is a ground for resisting or seeking protection with regard to production of some materials. And the notice requirement is extended to trial subpoenas by striking the words that now limit it to subpoenas that

command production "before trial." The advantages of notifying the parties before the subpoena is served seem equally important for trial subpoenas.

On a number of occasions during consideration of the notice provision, attorneys argued that notice should also be required on one or more occasions after service. Various proposals along this line included requiring the party that served the subpoena to provide a description of what was produced, that it give notice when materials were produced, that it notify the other parties of any modifications of the subpoena negotiated with the person on whom it was served, and that it supply or provide access to the materials obtained. Variations of these suggestions were discussed during the Standing Committee meeting in January, 2011. After the January meeting, the ABA Section of Litigation urged that a second notice be added to the rule. Spurred by that proposal and the Standing Committee's discussion, the Discovery Subcommittee reexamined the question and decided to adhere
to its earlier conclusion that adding such a requirement would not be desirable. The matter was explored at the Advisory Committee's April meeting. The points examined earlier were re-examined. The robust discussion added the observation that the current rules provide an opportunity to alleviate any anticipated problems. Lawyers concerned about such access could include it in their Rule 26(f) plans, and ask the court to include provision for further notice or access in the scheduling order.

In all of these discussions, it has been agreed that the parties should cooperate in communicating about materials obtained pursuant to a subpoena and providing access to those materials. But each time it was concluded that adding a specific requirement to the rule would not be desirable. Often, production is handled on a rolling basis, and the timing and nature of the additional notice and access could prove difficult. Rather than handle this problem through a rule provision, it seemed that the more sensible solution would lie with the lawyers who received the initial notice; they could persist in seeking the materials from the party who served the subpoena, and perhaps contact the nonparty served with the subpoena. That effort should bear fruit, and adding further notice requirements to the rule might cause problems. It could introduce "gotcha" efforts on the eve of trial, when parties might argue that other parties' notice efforts were inadequate, and that the materials obtained by subpoena should therefore be excluded from evidence.

Ultimately, the Advisory Committee unanimously approved the notice provision.

Transfer of subpoena-related motions: The amendments continue to direct that motions to enforce or quash a subpoena, or to obtain a ruling on whether privilege protects material that was allegedly produced inadvertently, be made in the district where compliance with the subpoena is required, even when the underlying action is pending in a different district. But experience has shown that on occasion there are strong reasons to have some issues resolved by the judge presiding over the main action. That judge may already have ruled on the same or closely related issues, or the issues may directly impact management of the underlying action. Subpoenas may have been served or may be expected in a number of districts, raising a possibility of inconsistent resolution of issues bearing on all of them. On occasion, the issue raised regarding enforcement of a subpoena

may overlap with the merits of the underlying case so that a judge deciding whether to enforce the subpoena is, in effect, "deciding" part of the case itself.

The current rules do not absolutely require the court where the discovery is sought to shoulder the burden to decide all such issues when raised in connection with a disputed subpoena. Rule 26(c)(1) explicitly permits a person from whom discovery is sought to seek a protective order in the court where the underlying action is pending. If a motion for protection is instead filed in the district where the subpoena requires compliance, the matter may nonetheless be sent to the judge presiding over the underlying action. As recognized by the Committee Note to the 1970 amendments to Rule 26(c), "[t]he court in the district where the deposition is being taken may, and frequently will, remit the deponent or party to the court where the action is pending." "Given the clear language of Rule 26 and the Advisory Committee Notes, there is no question that a Rule 26 motion for a protective order may be transferred or remitted from a court with ancillary jurisdiction over a discovery dispute to the forum court in which the underlying action is pending." Melder v. State Farm Mut. Auto. Ins. Co., 2008 WL 1899569 (N.D. Ga., April 25, 2008) at *4. Authority to transfer a motion to enforce a subpoena is less clearly addressed in the current rule. Although there is some conflict in authority on that point, a respected treatise opines that it is "within the discretion of the district court that issued the subpoena to transfer motions involving the subpoena to the district where the action is pending." 9A C. Wright & A. Miller, Federal Practice & Procedure § 2463.1 at 520 (3d ed. 2008).

These amendments remove any uncertainty about authority to transfer to the court where the action is pending by adding Rule 45(f), which permits a court asked to rule on a motion under Rule 45 to transfer the motion. The standard for transfer has evolved as the Subcommittee and Advisory Committee have studied the issues. The basic objective is to ensure that transfer is a rare event. The proposed amendment authorizes transfer if the parties and the person subject to the subpoena consent to it, and directs that absent consent transfer is authorized only in "exceptional circumstances." The Committee Note fleshes out the sorts of circumstances that would support transfer, stressing that such circumstances would be rare.

Proposed Rule 45(f) also addresses additional matters that may be important when transfer is granted. Although the motion will usually be fully briefed by the time transfer is ordered, it directs that any lawyer admitted to practice in the district where the motion is filed may file papers and present argument in the court where the action is pending. In addition, when needed to enforce the order rendered by the court where the action is pending, the rule authorizes retransfer to the court where the motion was filed.

Parallel amendments to Rule 45(g) and Rule 37(b)(1) make clear that disobedience of a subpoena-related order entered after transfer is contempt of the court that entered the order and of the court where the motion was filed.

Simplification of Rule 45: Rule 45 is long and complicated. In part, that is because it seeks

to encompass in one rule all the pertinent discovery directions for subpoena practice that correspond to the topics covered for party discovery in Rules 26 through 37.

But some features of the rule provide further complications. The present rule presents a variety of challenges that do not arise in party discovery. It is necessary to determine which court should be the "issuing court," to find where the subpoena may be served, and to parse provisions located in several parts of the rule to determine where a person subject to a subpoena can be required to comply. Together, these features produce what the Subcommittee came to call the "three-ring circus" aspect of the rule.

Those complications in the rule were early recognized by thoughtful analysts. Evaluating the amended rule in 1991, Professor Siegel carefully sorted through the variety of sometimes competing provisions and concluded, with some vehemence, that "the rule comes off like a Tower of Babel," and that "it sometimes appears to require at least a college minor in mathematics just to figure out safely what court to issue the subpoena 'from' and where to effect its service." Siegel, Federal Subpoena Practice Under the New Rule 45 of the Federal Rules of Civil Procedure, 139 F.R.D. 197, 209, 214 (1991). For two decades, lawyers have struggled with these difficulties.

These amendments seek to simplify the 1991 rule to reduce those difficulties. Proposed Rule 45(a)(2) provides that the subpoena should issue from the court where the action is pending. Under the 1991 version, any lawyer admitted in that court could issue a subpoena in the name of any district court, even though that court would never learn that it had "issued" a subpoena unless a dispute led to a motion being filed before it as the "issuing court." The Committee Note accompanying the 1991 amendment recognized the reality of what it was doing: "In authorizing attorneys to issue subpoenas from distant courts, the amended rule effectively authorizes service of a subpoena anywhere in the United States by an attorney representing any party." This amendment recognizes the reality established in 1991 while removing the guessing game on which court's name should be entered at the top of the subpoena.

Proposed Rule 45(b)(2) removes the uncertainty about where a subpoena may be served; in place of a four-part provision in the current rule, the amended rule simply authorizes service "at any place within the United States." The rule is modeled on Fed. R. Crim. P. 17(e), which provides for nationwide service of subpoenas in criminal cases.

But unlike Criminal Rule 17(e), the amended rule does not purport to require a person subject to a subpoena to comply in the issuing court. Instead, new Rule 45(c) collects the provisions on place of compliance that were formerly located in a number of provisions of Rule 45 and simplifies them. The current provisions about place of compliance have contributed to a split in authority about whether parties and party officers can be required to travel more than 100 miles from outside the state to testify at trial. As discussed below, Rule 45(c) resolves that split.

More generally, Rule 45(c) simplifies the task of a lawyer who wants guidance about where compliance with a subpoena can be compelled. For example, while the current rule sometimes

requires that state law be consulted to answer this question, the amended rule does not. By gathering together the previously dispersed provisions on place of compliance and simplifying them, the amendments attempt to respond to the concerns voiced two decades ago by Professor Siegel.

At the same time, the amendments preserve protections for a nonparty subject to a subpoena. Rule 45(c) conforms very closely to the scattered provisions of the current rule regarding place of compliance, and the amendments direct that subpoena-related motions be filed in the district in which compliance may be required. Although Rule 45(f) adds authority to transfer those motions, that is permitted only in exceptional circumstances.

Trial subpoenas for distant parties and party officers: Present Rule 45(c)(3)(A)(ii) directs that a subpoena be quashed if it "requires a person who is neither a party nor a party's officer to travel more than 100 miles" to attend trial (except that a nonparty can be required to attend trial anywhere within the state if so authorized in the state's courts and undue expense would not be incurred). Rule 45(b)(2) — relating to the place of serving a subpoena — provides that it is "subject to" Rule 45(c)(3)(A)(ii).

These provisions have produced conflicting interpretations in the courts, sometimes between judges in the same district. One interpretation is that subpoenas may only be served and enforced within the boundaries permitted by Rule 45(b)(2), and that the additional protections of Rule 45(c)(3)(A)(ii) operate within those limitations. See *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213 (E.D. La. 2008) (holding that opt-in plaintiffs in a Fair Labor Standards Act action could not be compelled to travel more than 100 miles from a place outside the state to attend trial because they were not served with subpoenas in the state in accordance with Rule 45(b)(2)). Another interpretation is that the exclusion of parties and party officers from the protections of Rule 45(c)(3)(A)(ii) means that attendance at trial of these witnesses can be compelled without regard to the geographical limitations on serving subpoenas contained in Rule 45(b)(2). See *In re Vioxx Products Liability Litigation*, 438 F.Supp.2d 664 (E.D. La. 2006) (requiring an officer of the defendant corporation, who lived and worked in New Jersey, to testify at trial in New Orleans even though he was not served at a place within Rule 45(b)(2)).

The Committee has concluded that the 1991 amendments were not intended to create the expanded subpoena power recognized in *Vioxx* and its progeny. The Committee is also concerned that allowing subpoenas on an adverse party or its officers without regard to the geographical limitations of Rule 45(b)(2) — Rule 45(c) under the amended rule — would raise a risk of tactical use of a subpoena to apply inappropriate pressure to the adverse party. Officers subject to such subpoenas might often be able to secure protective orders against having to attend trial, but the motions would burden the courts and the parties. In addition, in many cases a party's other employees, not its officers, are the best witnesses about the matters actually in dispute in the case. To the extent that a party's or officer's testimony is truly needed, there are satisfactory alternatives to compelling their attendance at trial. See, e.g., Rule 30(b)(3) (authorizing audiovisual recording of deposition testimony); Rule 43(a) (permitting the court to order testimony by contemporaneous transmission).

These amendments are intended to restore the original meaning of the 1991 amendments and make clear that all subpoenas are subject to the geographical limitations of Rule 45(c), which are modeled on those of former Rule 45(b)(2).

Appendix seeking comment on providing authority to require trial testimony from a party or party officer: Although the Committee decided to reject the line of cases finding authority under the current rule to command testimony at trial from distant parties and party officers, some lawyers supported creating some limited authority to order such testimony in appropriate cases. In addition, some of the courts that regard the rule as preventing them from ordering a party or its officer to testify at trial seem to regard that as a poor policy choice.

Responding to these concerns, the Committee is providing an Appendix that invites public comment on whether it would be desirable to include explicit authority for such orders under limited circumstances. The Appendix makes clear that this is not the Committee's proposal, and that it is being presented only to obtain public comment. At the same time, if the public comment shows that the addition of this authority would be a good idea, including the Appendix in the published preliminary draft could obviate the need to republish.

The Appendix offers for comment a new Rule 45(c)(3), which would permit a judge, for good cause, to order a party or its officer to attend trial and testify. The Committee Note makes clear that the prime consideration of the good-cause inquiry is whether there is a real need for this person's testimony at trial. Even if there is, the court is directed to consider alternatives such as a videotaped deposition or testimony by simultaneous transmission from another location. In addition, the added provision would empower the court to order that the person be compensated for the expense incurred in attending trial.

Rule 45. Subpoena

(a) In General.

(1) ***Form and Contents.***

(A) ***Requirements – In General.*** Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action~~, the court in which it is pending,~~ and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(d~~c~~) and (e~~d~~).

(B) *Command to Attend a Deposition – Notice of the Recording Method.* A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) *Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information*. A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out

in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) ***Command to Produce; Included Obligations.*** A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding person ~~party~~ to permit inspection, copying, testing, or sampling of the materials.

(2) ***Issuing ~~Issued from Which~~ Court.*** A subpoena must issue from the court where the action is pending. ~~as follows~~:

~~(A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;~~

~~(B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and~~

~~(C) for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.~~

(3) ***Issued by Whom.*** The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena if the attorney is authorized to practice in the issuing court. ~~as an officer of:~~

~~(A) a court in which the attorney is authorized to practice; or~~

~~(B) a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action~~

~~is pending.~~

(4) ***Notice to Other Parties.*** If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises, then before it is served, a notice and a copy of the subpoena must be served on each party.

(b) Service.

(1) ***By Whom and How; Tendering Fees; ~~Serving a Copy of Certain Subpoenas~~.*** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. ~~If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.~~

(2) ***Service in the United States.*** A subpoena may be served at any place within the United States. ~~Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:~~

~~(A) within the district of the issuing court;~~

~~(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;~~

~~(C) within the state of the issuing court if a state statute or court rule allows~~

~~service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or~~

~~(D) that the court authorizes on motion and for good cause, if a federal statute so provides;~~

(3) ***Service in a Foreign Country*****.** 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) ***Proof of Service*****.** Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Place of compliance.

(1) ***For a trial, hearing, or deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if

(i) the person is a party or a party's officer; or

(ii) the person is commanded to attend a trial, and would not incur substantial expense.

(2) ***For other discovery.*** A subpoena may command:

(A) Production of documents, tangible things, or electronically stored

information at a place reasonably convenient for the person commanded to produce.

(B) Inspection of premises, at the premises to be inspected.

(d)~~(c)~~ Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The ~~issuing~~ court for the district where compliance is required under Rule 45(c) must enforce this duty and impose an appropriate sanction – which may include lost earnings and reasonable attorney's fees – on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required*. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections*. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises – or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for

compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the ~~issuing~~ court for the district where compliance is required under Rule 45(c) for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required*. On timely motion, the ~~issuing~~ court for the district where compliance is required under Rule 45(c) must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

~~(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person – except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;~~

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iii~~v~~) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the ~~issuing~~ court for the district where compliance is required under Rule 45(c) may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.~~; or~~

~~(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.~~

(C) *Specifying Conditions as an Alternative*. In the circumstances described in Rule 45(d~~c~~)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e~~d~~) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents*. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must

organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Production.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced*. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court for the district where compliance is required under Rule 45(c) under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(f) Transfer of Subpoena-related Motions. When a motion is made under this rule in a court where compliance is required, and that court did not issue the subpoena, the court may transfer the motion to the issuing court if the parties and the person subject to the subpoena consent or if the court finds exceptional circumstances. Then, if the attorney for a person subject to a subpoena is authorized to practice in the court where the motion was made, the attorney may file papers and appear on the motion as an officer of the issuing court. To enforce its order, the issuing court may transfer the order to the court where the motion was made.

(ge) Contempt. The court for the district where compliance is required under Rule 45(c) -- or, after

transfer of the motion, the issuing court -- may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to the subpoena. ~~A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).~~

COMMITTEE NOTE[1]

Rule 45 was extensively amended in 1991. The general goal of these amendments is to clarify and simplify the rule. In particular, the amendments recognize the court where the action is pending as the issuing court, permit nationwide service of a subpoena, and collect in a new subdivision (c) the previously scattered provisions regarding place of compliance. These changes resolve a conflict that arose after the 1991 amendment about compelling a party or party officer to travel long distances to testify at trial; such testimony may now be required only as specified in new Rule 45(c). In addition, the amendments introduce authority in new Rule 45(f) for the court where compliance is required to transfer a subpoena-related motion to the court where the action is pending in exceptional circumstances or by agreement of the parties and the person subject to the subpoena.

Subdivision (a). As part of the simplification of Rule 45, subdivision (a) is amended to provide that a subpoena issues from the court in which the action is pending. Subdivision (a)(3) specifies that an attorney authorized to practice in the court in which the action is pending may issue a subpoena, which is consistent with current practice.

In Rule 45(a)(1)(D), "person" is substituted for "party" because the subpoena may be directed to a nonparty.

Rule 45(a)(4) is added to highlight and slightly modify a notice provision first included in the rule in 1991. The 1991 amendments added a requirement to Rule 45(b)(1) that prior notice of the service of a "documents only" subpoena be given to the other parties. Rule 45(b)(1) was clarified in 2007 to specify that this notice must be served before the subpoena is served on the witness.

The Committee has been informed that parties serving subpoenas frequently fail to give the required notice to the other parties. This amendment responds to that concern by moving the notice

[1] The following Committee Note was originally drafted before the rule language above was improved based on suggestions from the Standing Committee's style consultant. Some minor adjustments in Committee Note language may be necessary to take account of those style improvements.

requirement to a new provision in Rule 45(a), where it is hoped that it will be more visible. In addition, new Rule 45(a)(4) requires that the notice include a copy of the subpoena. This requirement is added to achieve the original purpose of enabling the other parties to object or to serve a subpoena for additional materials. The amendment also deletes the words "before trial" that appear in the current rule. Notice of trial subpoenas for documents is as important as notice of discovery subpoenas.

Parties desiring access to information produced in response to the subpoena will need to follow up with the party serving the subpoena or the person served with the subpoena to obtain such access. When access is requested, the party serving the subpoena should make reasonable provision for prompt access.

Subdivision (b). The former notice requirement in Rule 45(b)(1) has been moved to new Rule 45(a)(4).

Rule 45(b)(2) is amended to provide that a subpoena may be served at any place within the United States, thereby removing the complexities prescribed in prior versions of the rule.

Subdivision (c). Subdivision (c) is new. It has been added to collect the various provisions on where compliance can be required, and to simplify them. Unlike the prior rule, place of service is not critical to place of compliance. Although Rule 45(a)(1)(A)(iii) permits the subpoena to direct a place of compliance, that place must be selected under the provisions of Rule 45(c).

Rule 45(c)(1) addresses a subpoena to testify at a trial, hearing, or deposition. It provides that compliance is only required within 100 miles of where the person subject to the subpoena resides, is employed, or regularly conducts business in person. For parties and party officers, compliance may be required anywhere in the state in which the person resides, is employed, or regularly conducts business in person. Nonparty witnesses can be required to travel more than 100 miles within the state where they reside, are employed, or regularly conduct business in person only if "substantial expense would not be imposed on that person." When it appears that travel over 100 miles could impose substantial expense on the witness, one solution would be for the party that served the subpoena to pay that expense, and the court could condition enforcement of the subpoena on such payment.

These amendments resolve a split in interpretation of Rule 45 concerning subpoenas for trial testimony of parties and party officers. Compare In re Vioxx Products Liability Litigation, 438 F.Supp.2d 664 (E.D. La. 2006) (finding authority to compel a party officer from New Jersey to testify at trial in New Orleans), with Johnson v. Big Lots Stores, Inc., 251 F.R.D. (E.D. La. 2008) (holding that Rule 45 did not require attendance of plaintiffs at trial in New Orleans when they would have to travel more than 100 miles from outside the state). Rule 45(c)(1)(A) does not authorize a subpoena for trial to require a party or party officer to travel more than 100 miles from outside the state.

For other discovery, Rule 45(c)(2) directs that inspection of premises occur at the premises to be inspected, and that production of documents, tangible things, and electronically stored information occur at a place reasonably convenient for the producing person. The Committee is informed that under the current rule the place of production has not presented difficulties, and the flexibility of this provision is designed to ensure that it does not present difficulties in the future. For electronically stored information, for example, it may often be that the materials can be produced electronically. For documents and tangible things, the place for production must be reasonably convenient for the producing person. If issues about place of production arise, the party that served the subpoena and the person served with it should be flexible about a reasonable place for production, keeping in mind the assurance of Rule 45(d)(1) that undue expense or burden must not be imposed on the person subject to the subpoena. In some instances, it may be that documents or tangible things are located in multiple places and that producing them all in a single location would be unduly burdensome, but generally it is to be hoped that inspections at multiple locations can be avoided.

Subdivision (d). Subdivision (d) contains the provisions formerly in subdivision (c). It is revised to recognize the court where the action is pending as the issuing court, and to take account of the addition of Rule 45(c) to specify where compliance with a subpoena is required, which renders some provisions of the former rule superfluous.

Subdivision (f). Subdivision (f) is new. Under Rules 45(d)(2)(B), 45(d)(3), and 45(e)(2)(B), subpoena-related motions and applications are to be made to the court where compliance is required under Rule 45(c). Rule 45(f) provides authority for the court where compliance is required to transfer the motion to the court where the action is pending. It applies to all motions under this rule, including an application under Rule 45(e)(2)(B) for a privilege determination.

Subpoenas are essential to obtain discovery from nonparties. To protect local nonparties, local resolution of disputes about subpoenas is assured by the limitations of Rule 45(c) and the requirements in Rules 45(d) and (e) that motions be made in the court in which compliance is required under Rule 45(c).

Transfer to the court where the action is pending is sometimes warranted, however. If the parties and the person subject to the subpoena consent to transfer, Rule 45(f) provides that the court where compliance is required may do so. In the absence of such consent, the court may transfer in exceptional circumstances. Such circumstances will be rare, and the proponent of transfer bears the burden of showing that such circumstances are presented. Rule 45(d)(1) recognizes that nonparties subject to a subpoena should be protected against undue burden or expense; that consideration may often weigh heavily against transfer.

The rule authorizes transfer absent consent in "exceptional circumstances." A precise definition of "exceptional circumstances" is not feasible. Past experience suggests examples, however. On occasion the nonparty may actually favor transfer, and opposition to transfer may instead come from one of the parties to the underlying action, perhaps because that court has already

indicated a view -- or made a ruling -- on the issue raised in regard to the subpoena. More generally, if the issue in dispute on the subpoena-related motion has already been presented to the issuing court or bears significantly on its management of the underlying action, or if there is a risk of inconsistent rulings on subpoenas served in multiple districts, or if the issues presented by the subpoena-related motion overlap with the merits of the underlying action, transfer may be warranted. Other exceptional circumstances may arise, but the rule contemplates that transfers will be truly rare events.

If the motion is transferred, it should often be true that it has already been fully briefed, but on occasion further filings may be needed. In addition, although it is hoped that telecommunications methods can be used to minimize the burden a transfer imposes on nonparties, it may be necessary for attorneys admitted in the court where the motion is made to appear in the court in which the action is pending. The rule provides that if these attorneys are authorized to practice in the court where the motion is made, they may file papers and appear in the court in which the action is pending in relation to the motion as officers of that court.

After transfer, the court where the action is pending will decide the motion. If the court rules that discovery is not justified, that should end the matter. If the court orders further discovery, it is possible that retransfer may be important to enforce the order. One consequence of failure to obey such an order is contempt, addressed in Rule 45(g). Rule 45(g) and Rule 37(b)(1) are both amended to provide that disobedience of an order enforcing a subpoena after transfer is contempt of the issuing court and the court where compliance is required under Rule 45(c). In some instances, however, there may be a question about whether the issuing court can impose contempt sanctions on a distant nonparty. If such circumstances arise, or if it is better to supervise compliance in the court where compliance is required, the rule provides authority for retransfer for enforcement. It is possible that a nonparty subject to such an order would, after retransfer, try to persuade the judge in

the Rule 45(c) district to modify the order. But since that court originally transferred the motion to the issuing court, instances of refusal to enforce the resulting order should be rare.

Subdivision (g). Subdivision (g) carries forward the authority of former subdivision (e) to punish disobedience of subpoenas as contempt. It is amended to make clear that, in the event of transfer of a subpoena-related motion, such disobedience constitutes contempt of both the court where compliance is required under Rule 45(c) and the court where the action is pending. If necessary for effective enforcement, Rule 45(f) authorizes retransfer after the motion is resolved.

The rule is also amended to clarify that contempt sanctions may be applied to a person who disobeys a subpoena-related order, as well as one who fails entirely to obey a subpoena. In civil litigation, it would be rare for a court to use contempt sanctions without first ordering compliance with a subpoena, and the order might not require all the compliance sought by the subpoena. Often contempt proceedings will be initiated by an order to show cause, and an order to comply or be held

in contempt may modify the subpoena's command. Disobedience of such an order may be treated as contempt.

The second sentence of former subdivision (e) is deleted as unnecessary.

Conforming Amendment to Rule 37

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

(b) Failure to Comply with a Court Order.

(1) ***Sanctions Sought in the District Where the Deposition is Taken.*** If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

(2) ***Sanctions Sought in the District Where the Action is Pending.***

* * * * *

COMMITTEE NOTE

Rule 37(b) is amended to conform to amendments made to Rule 45, particularly the addition of Rule 45(f) allowing for transfer of a subpoena-related motion to the court where the action is pending. A second sentence is added to Rule 37(b)(1) to deal with contempt of orders entered after such a transfer. The Rule 45(f) transfer provision is explained in the Committee Note to Rule 45.

APPENDIX

New Rule 45(c) limits the geographic scope of the duty to comply with a subpoena in ways that eliminate the authority some judges found in the 1991 version of the rule to compel parties and party officers to testify at trial in distant fora. After consulting with practitioners and reviewing the relevant case law, the Committee concluded that the power to compel parties and party officers to testify at trial should not be expanded. Nonetheless, because some dissenting voices the Committee encountered during its consideration of these issues felt that in unusual cases there may be reason to empower the judge to order a distant party officer to attend and testify at trial, the Committee decided to seek public comment about adding such a power to the rules and to suggest rule language that could be used for that purpose.

This Appendix provides that language in the form of a new Rule 45(c)(3), which could be added to new Rule 45(c) proposed above by the Committee. The Committee invites comment on (a) whether the rules should be amended to include such power to order testimony, and (b) whether the following draft provision would be a desirable formulation of such power were it added to the rules. This is not a formal proposal for amendment, but instead an invitation to comment. If the public comment shows that this approach is strongly favored, the Committee will have the option of recommending it for adoption in substantially the form illustrated below without the need to republish for a further round of comment unless the testimony and comments suggest revisions that make republication desirable.

Rule 45. Subpoena

* * *

(c) Place of compliance.

(1) ***For a trial, hearing, or deposition.*** A subpoena may require a person to appear at a trial, hearing, or deposition as follows:

(A) For a party or the officer of a party, [subject to the court's power under Rule 45(c)(3),] within the state where the party or officer resides, is employed, or regularly transacts business in person, or within 100 miles of where the party or officer resides, is employed, or regularly transacts business in person;

(B) For a person who is not a party or officer of a party, within 100 miles of where the person resides, is employed, or regularly transacts business in person; except that such a person may be required to attend trial within the state where the person resides, is employed, or regularly transacts business in person, if substantial expense would not be imposed on that person.

(2) ***For other discovery.*** A subpoena may require:

(A) Production of documents, tangible things, or electronically stored information at a place reasonably convenient for the producing person.

(B) Inspection of premises, at the premises to be inspected.

(3) ***Order to party to testify at trial or to produce officer to testify at trial.*** Notwithstanding the limitations of Rule 45(c)(1)(A), for good cause the court may order a party to appear and testify at trial, or to produce an officer to appear and testify at trial. In determining whether to enter such an order, the court must consider the alternative of an audiovisual deposition under Rule 30 or testimony by contemporaneous transmission under Rule 43(a), and may order that the party or officer be reasonably compensated for expenses incurred in attending the trial. The court may impose the sanctions authorized by Rule 37(b) on the party subject to the order if the order is not obeyed.

COMMITTEE NOTE

[This Note language could be integrated into the Note above were this provision added to the amendment package]

Subdivision (c)

* * * * *

Rule 45(c)(1)(A) places geographic limits on where subpoenas can require parties and party officers to appear and testify. These amendments disapprove decisions under the 1991 version of the rule that found it to authorize courts to require parties and party officers to testify at trial without regard to where they were served or where they resided, were employed, or transacted business in person. The amended provisions in part reflect concern that unrestricted power to subpoena party witnesses could be abused to exert pressure, particularly on large organizational parties whose officers might be subpoenaed to testify at many trials even though they had no personal involvement in the underlying events.

On occasion, however, it may be important for a party or party officer to testify at trial. New Rule 45(c)(3) therefore authorizes the court to order such trial testimony where a suitable showing of need is made. There is no parallel authority to order testimony by party witnesses at a "hearing," although in some cases a hearing may evolve into the trial on the merits.

The starting point in deciding whether to use the authority conferred by Rule 45(c)(3) is to determine whether there is a real need for testimony from the individual in question. The rule permits such an order only for good cause. The burden is on the party seeking the order to show that attendance of this specific witness is warranted. In evaluating that question, the court must consider the alternative of an audiovisual deposition or testimony by contemporaneous transmission. In some cases, the court may ask whether a different witness could be used to address the issues on which this witness would testify. The court should be alert to the possibility that a party may be attempting to place settlement or other pressure on the other party by seeking to force a busy officer to travel and to testify at trial.

Whether the witness is a party or the party's officer, the court's order is directed to the party. If the witness does not obey the order, the court may impose the sanctions authorized by Rule 37(b) on the party; the rule does not create authority to impose sanctions directly on a nonparty witness. In determining whether to impose a sanction for failure of a nonparty witness to appear and testify -- or which sanction to impose -- the court may consider the efforts the party made to obtain attendance of the nonparty witness at trial.

MEMORANDUM

DATE: December 15, 2010

TO: Discovery Subcommittee

FROM: Kate David

CC: Judge Mark Kravitz
Judge Lee H. Rosenthal
Professor Edward Cooper
John Rabiej

SUBJECT: Enforcing Subpoenas Nationwide

This memorandum addresses whether a rule can overcome jurisdictional issues that might arise when a court serves a subpoena in an out-of-state district. The Discovery Subcommittee is currently examining the possibility of amending Rule 45 to provide courts with the ability to serve subpoenas nationwide. The Discovery Subcommittee asked me to research whether a rule can constitutionally provide federal district courts with the ability to enforce subpoenas that are issued outside of the state where the district court is located. This memo summarizes my findings.

I. History of Limited Subpoena Power

From the beginning, subpoenas, inventions of the 14th Century English judicial system, had geographically limited enforceability which was tied to the jurisdiction of the issuing court. James B. Sloan and William T. Gotfried, *Eliminating the 100 Mile Limit for Civil Trial Witnesses: A Proposal to Modernize Civil Trial Practice*, 140 F.R.D. 33, 34 (1992) (citing Rhonda Wasserman, *The Subpoena Power: Pennoyer's Last Vestige*, 74 MINN. L. REV. 37, 43-46 (1989). At the time:

> [T]he trial process in England involved the selection of jurors qualified to serve by their being members of the community who either had personal knowledge of the matter brought before the tribunal or who could conduct an independent investigation of the incident. "Witnesses" as separate actors in the trial process were of lesser critical value than under modern justice systems.

Id.

In 1793, Congress enacted a statute enabling federal courts to issue subpoenas for trial witnesses residing within 100 miles from the site of the court. *Id.* at 35 (citing Act of March 2, 1973, ch. 22, § 6, 1 Stat. 333, 335 (1793)). In 1922, responding to protests by the Justice Department about its inability to assure the appearance and testimony of all necessary witnesses in actions against war materials contractors who had defrauded the United States, Congress amended the general subpoena statute to allow nationwide service of process, "upon proper application and good cause shown." *See id.* at 36 (citing 62 CONG. REC. 12,368 (Sept. 11, 1922) and Act of September 19, 1922, ch. 344, Pub. No. 310, 42 Stat. 848 (1921-23)).

Soon after, the Rules Enabling Act was passed, and the Federal Rules of Civil Procedure became effective as of 1938. *See id.* From the beginning, the Civil Rules incorporated the 100-mile-limit expressed in statute (thereby allowing service within 100 miles of the place of hearing or trial, regardless of state boundaries), and provided a general exception for other Acts of Congress expanding the court's ability to serve subpoenas. FED. R. CIV. P. 45(e)(1) (1934) ("A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena; and, when a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.").

Current Rule 45(b)(2) continues to impose the 100-mile-limit, despite the fact that Great Britain modernized its procedures in 1854, "to provide that in actions or suits pending in the courts of England, Ireland and Scotland, judges of those courts could compel the personal attendance at trial of witnesses by subpoena which could be served in any part of the United Kingdom." Sloan

and Gotfried, 140 F.R.D. at 36-37.

II. The Power To Authorize Nationwide Service

Unless expanded by Congress, the jurisdiction of district courts is limited to its territory. *See Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 622 (1925) ("Under the general provisions of law, a United States District Court cannot issue process beyond the limits of the district"); *State of Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 467 (1945) ("Apart from specific exceptions created by Congress the jurisdiction of the district courts is territorial.").

Congress has the power to extend a district court's reach by authorizing nationwide service: "Congress clearly has the power to authorize a suit under a federal law to be brought in any inferior federal court. Congress has the power, likewise, to provide that the process of every District Court shall run into every other part of the United States." *Robertson*, 268 U.S. at 622; *see Eastman Kodak Co. of New York v. S. Photo Materials Co.*, 273 U.S. 359, 403-04 (1927) ("That Congress may, in the exercise of its legislative discretion, fix the venue of a civil action in a federal court in one district, and authorize the process to be issued in another district in which the defendant resides or is found, is not open to question."); *Coleman v. Am. Export Isbrandtsen Lines, Inc.*, 405 F.2d 250, 252 (2d Cir. 1968) ("Congress has power to provide that the process of every District Court shall run into every part of the United States....") (internal quotation omitted). As one court explained:

> [I]t is a matter of general agreement that the discretion of Congress 'as to the number, the character, [and] the territorial limits' of the inferior federal courts is not limited by the Constitution. Congress might have established only one such court, or a mere handful; in that event, nationwide service would have been a practical necessity clearly consonant with the Constitution. That it was considered expedient to establish federal judicial districts in harmony with state boundaries, did not alter the scope of legislative discretion in this regard, and in fact Congress has, on occasion, provided for nationwide service.

Briggs v. Goodwin, 569 F.2d 1, 9-10 (D.C. Cir. 1977), *rev'd on other grounds sub nom, Stafford v. Briggs*, 444 U.S. 527 (1980); *see also U.S. v. Union Pac. R.R. Co.*, 98 U.S. 569, (U.S. 1878) ("It would have been competent for Congress to organize a judicial system analogous to that of England and of some of the States of the Union, and confer all original jurisdiction on a court or courts which should possess the judicial power with which that body thought proper, within the Constitution, to invest them, with authority to exercise that jurisdiction throughout the limits of the Federal government.").

A. Statutes Expanding Territorial Jurisdiction.

Congress has authorized nationwide service in "a few clearly expressed and carefully guarded exceptions to the general rule of jurisdiction *in personam*." *Robertson*, 268 U.S. at 624. Some early examples were described in *Robertson*:

> In one instance, the Credit Mobilier Act March 3, 1873, c. 226, § 4, 17 Stat. 485, 509, it was provided that writs of subpoena to bring in parties defendant should run into any district. This broad power was to be exercised at the instance of the Attorney Gengeral [sic] in a single case in which, in order to give complete relief, it was necessary to join in one suit defendants living in different States. *United States v. Union Pacific Railroad*, 98 U. S. 569, 25 L. Ed. 143. Under similar circumstances, but only for the period of three years, authority was granted generally by Act Sept. 19, 1922, c. 345, 42 Stat. 849 (Comp. St. Ann. Supp. 1923, § 1035), to institute a civil suit by or on behalf of the United States, either in the district of the residence of one of the necessary defendants or in that in which the cause of action arose; and to serve the process upon a defendant in any district. The Sherman Act (Act July 2, 1890, c. 647, § 5, 26 Stat. 209, 210 [Comp. St. § 8827]), provides that when 'it shall appear to the court' in which a proceeding to restrain violations of the act is pending 'that the ends of justice require that other parties should be brought before the court,' it may cause them to be summoned although they reside in some other district. The Clayton Act (Act Oct. 15, 1914, c. 323, § 15, 38 Stat. 730, 737 [Comp. St. § 8835n]), contains a like provision.

Robertson, 268 U.S. at 624.

Congress continues to enact statutes authorizing nationwide, and in some cases worldwide, service. *See, e.g.*, 15 U.S.C. § 22 (providing worldwide service of process in antitrust cases); 15 U.S.C. § 23 (providing nationwide subpoena power in antitrust cases); 15 U.S.C. § 49 (granting nationwide subpoena power to the Federal Trade Commission); 18 U.S.C. § 78aa (providing for nationwide service of defendants in securities cases); 18 U.S.C. § 1965(d) (providing for nationwide service of process in RICO cases); 25 U.S.C. § 1451(d) (providing for nationwide service on defendants in ERISA actions); 28 U.S.C. § 1695 (providing that, in derivative action, process may be served nationwide upon the corporation) 28 U.S.C. § 2361 (authorizing nationwide service in actions brought under 28 U.S.C. § 1335, statutory interpleader); 28 U.S.C. § 3004(b) (authorizing nationwide service in FDCPA actions); 29 U.S.C. § 521 (granting nationwide subpoena power to the Secretary of Labor); 29 U.S.C. § 1132(e)(2) (providing nationwide service of process in ERISA enforcement actions); 29 U.S.C. § 1451(d) (providing nationwide service in ERISA civil actions); 28 U.S.C. § 1692 (authorizing nationwide service of process in actions to recover property by a receiver appointed by the court); 38 U.S.C. § 1984(c) (authorizing nationwide service of subpoenas in suits involving claims for war risk insurance); 42 U.S.C. § 9613 (authorizing nationwide service in certain CERCLA actions); 47 U.S.C. § 409(f) (granting nationwide subpoena power to the Federal Communications Commission).

These provisions have been deemed to"comport with all constitutional requirements." *Board of Trustees, Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1035 (7th Cir. 2000) (collecting cases); *see Combs v. Adkins & Adkins Coal Co.*, 597 F.Supp. 122, 125 (D.D.C. 1984) ("The Congress may constitutionally authorize extraterritorial service of process.");

see also Federal Trade Comm'n v. Tuttle, 244 F.2d 605 (2d Cir. 1957) (holding that Federal Trade Commission Act's nationwide service provision is "not unconstitutional" and District Court for the Southern District of New York erred in refusing to compel Boston resident to comply with subpoena duces tecum); *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447, 473-77 (1894) (rejecting constitutional challenge to statute authorizing Interstate Commerce Commission to invoke the aid of any court of the United States in requiring the attendance of witnesses and the production of books and papers).

Courts around the country have repeatedly rejected arguments that a district court, after issuing service pursuant to a statute providing for nationwide or worldwide service, cannot exercise personal jurisdiction over an out-of-state defendant/witness. *See Busch v. Buchman, Buchman & O'Brien*, 11 F.3d 1255, 1258 (5th Cir. 1994) ("Given that the relevant sovereign is the United States, it does not offend traditional notions of fair play and substantial justice to exercise personal jurisdiction over a defendant residing within the United States."); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1056 (2d Cir. 1993) ("[T]he district court has personal jurisdiction over the defendants insofar as the MPPAA includes a provision for nationwide service of process."); *see, e.g.*, *Elite Erectors*, 212 F.3d at 1037 (holding that service pursuant to nationwide service statute provided Eastern District of Virginia with personal jurisdiction over Indiana company and resident "even on the assumption that neither has any 'contacts' with Virginia"); *Application to Enforce Admin. Subpoenas Duces Tecum of S.E.C. v. Knowles*, 87 F.3d 413 (10th Cir. 1996) (holding statute providing for worldwide service valid in connection with subpoenas duces tecum served in Nassau, Bahamas); *Bellaire Gen. Hosp. v. Blue Cross Blue Shield of Michigan*, 97 F.3d 822, 825-26 (5th Cir. 1996) (holding Southern District of Texas properly exercised personal jurisdiction over defendant

corporation operating exclusively within the State of Michigan when defendant was served pursuant to statute providing for nationwide service); *Fleming v. Montgomery Ward & Co.*, 114 F.2d 384 (7th Cir. 1940) (affirming Northern District of Illinois's order requiring Missouri plant to comply with subpoena issued pursuant to Fair Labor Standards Act); *Combs*, 597 F.Supp. at 125 (holding D.C. District Court had jurisdiction over Kentucky residents who were served pursuant to statute authorizing nationwide service of process).

There are also statutes giving certain courts nationwide jurisdiction. For example, the Court of Federal Claims has nationwide jurisdiction. *Scott Timber, Inc. v. United States*, 93 Fed. Cl. 498, 499 (Ct. Fed. Claims 2010); *see* 28 USC § 2505 ("Any judge of the United States Court of Federal Claims may sit at any place within the United States to take evidence and enter judgment."); *Union Pacific R.R.*, 98 U.S. at 603-04("The jurisdiction of the Supreme Court and the Court of Claims is not confined by geographical boundaries. Each of them, having by the law of its organization jurisdiction of the subject-matter of a suit, and of the parties thereto, can, sitting at Washington, exercise its power by appropriate process, served anywhere within the limits of the territory over which the Federal government exercises dominion."); *Sabella v. Sec'y of Dep't of Health & Human Servs.*, 86 Fed. Cl. 201, 205 n.2 (2009) ("the jurisdiction of the United States Court of Federal Claims is not limited to a particular geographic area within the United States."). "A concomitant aspect of that jurisdiction is the power to issue a subpoena requiring a witness to appear and testify at a trial to be held more, and in some instances considerably more, than 100 miles from the witness' residence." *Scott Timber,* 93 Fed. Cl. at 499.

The multidistrict litigation statute also authorizes federal courts to exercise nationwide personal jurisdiction. *Howard v. Sulzer Orthopedics, Inc.*, 382 Fed. Appx. 436, 442 (6th Cir. 2010)

("The MDL statute (28 U.S.C. § 1407) is, in fact, legislation 'authorizing the federal courts to exercise nationwide personal jurisdiction.'"); *see In re FMC Corp. Patent Litig.*, 422 F.Supp. 1163, 1165 (J.P.M.D.L. 1976) ("Transfers under Section 1407 are simply not encumbered by considerations of *in personam* jurisdiction and venue.").

Due process challenges to Section 1407 have been universally rejected. *See In re "Agent Orange" Prod.Liab.Litig. MDL No. 381*, 818 F.2d 145, 163 (2d Cir. 1987) ("Congress may, consistent with the due process clause, enact legislation authorizing the federal courts to exercise nationwide personal jurisdiction. One such piece of legislation is 28 U.S.C. § 1407 (1982), the multidistrict litigation statute.") (citations omitted); *see, e.g., Howard*, 382 Fed. Appx.at 442 (6th Cir. 2010) (rejecting Oklahoma plaintiff's due process challenge to jurisdiction of Ohio court exercising jurisdiction under § 1407); *In re Sugar Indus. Antitrust Litig.*, 399 F.Supp. 1397, 1400 (J.P.M.D.L. 1975) (per curiam) (rejecting due process challenge of "Eastern Defendants" to transfer from Eastern District of Pennsylvania to Northern District of California).

B. Rules Expanding Territorial Jurisdiction.

Territorial jurisdiction may also be extended by rule. *See Coleman*, 405 F.2d at 252 ("Since Congress has power 'to provide that the process of every District Court shall run into every part of the United States,' the Supreme Court as its delegate can provide that process shall be effective if served within 100 miles of the courthouse even if a state line intervenes....") (quoting *Robertson*, 268 U.S. at 622); *McGonigle v. Penn-Central Transp. Co.*, 49 F.R.D. 58, 62 (D. Maryland 1969) ("Nor is the validity of [the 100-mile bulge provision for federal service of process] drawn into question because it was enacted as a rule of procedure rather than a statute."); *see also Resolution Trust Corp. v. McDougal*, 158 F.R.D. 1, 2 (D.D.C. 1994) ("The Court may reach parties like Tucker who live

outside the jurisdiction only if it is authorized to do so by a federal statute, the local long-arm statute, *or the Federal Rules of Civil Procedure*.") (emphasis added).

As described above, the power to expand the territorial jurisdiction by rule has been exercised from the beginning. In civil cases, a district court's territorial jurisdiction has been extended to the 100-mile-limit, or further, when provided by statute. *See* FED. R. CIV. P. 45(b). And in criminal cases, Rule 17(e) authorizes district courts to exercise nationwide subpoena power: "A subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States."[1]

The validity of these rules has long been accepted. In 1833, the Circuit Court of the District of Columbia noted that a federal court has "a right to send its subpoena into another district in all cases. In criminal cases to any distance; in civil, to the extent of one hundred miles. And such has been the unquestioned practice of this court ever since its establishment in 1801." *U.S. v. Williams*, 28 F. Cas. 647, 657 (D.C. Cir. 1833).

The original, 1938, Federal Rules of Civil Procedure also provided for service of defendants located beyond the district court's territory. Federal Rule of Civil Procedure 4(f) provided that "[a]ll service other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state." Challenges to the expansion of district court jurisdiction to allow service outside of the district have been universally rejected.

For example, in *Mississippi Pub. Corp. v. Murphree*, the Supreme Court rejected the

---

[1] Bankruptcy Rule 7004(d) allows national service of process of "summons and complaint and all other process except a subpoena...." Courts have concluded that nationwide service of process under Rule 7004(d) is constitutional. *See In re Federal Fountain, Inc.*, 165 F.3d 600 (8th Cir. 1999) (en banc).

argument that Rule 4(f) could not authorize a district court to serve a defendant located in another district, where defendant was located in the southern district of Mississippi and was served by the District Court of the Northern District of Mississippi pursuant to former Rule 4(f). 326 U.S. 438, 439-40, 443 (1946). The Court first decided that Rule 4(f) was not inconsistent with Rule 82 of the Federal Rules of Civil Procedure, which provides that the rules "shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein." *Id.* at 443-45. The court explained:

> It is true that the service of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served. But it is evident that Rule 4(f) and Rule 82 must be construed together and that the Advisory Committee, in doing so, has treated Rule 82 as referring to venue and jurisdiction of the subject matter of the district courts as defined by the statutes, ss 51 and 52 of the Judicial Code, 28 U.S.C.A. ss 112, 113, in particular, rather than the means of bringing the defendant before the court already having venue and jurisdiction of the subject matter. Rule 4(f) does not enlarge or diminish the venue of the district court, or its power to decide the issues in the suit, which is jurisdiction of the subject matter, to which Rule 82 must be taken to refer. Rule 4(f) serves only to implement the jurisdiction over the subject matter which Congress has conferred, by providing a procedure by which the defendant may be brought into court at the place where Congress has declared that the suit may be maintained. Thus construed, the rules are consistent with each other and do not conflict with the statute fixing venue and jurisdiction of the district courts.

Id. at 444-45 (internal citation omitted); *see also Ransom v. Brennan*, 437 F.2d 513, 518 n.6 (5th Cir. 1971) ("Fed. R. Civ. P. 82 says that the Rules are not intended to affect the jurisdiction of the federal courts. But this relates only to subject matter jurisdiction rather than the means of bringing the defendant before the court."); *H & F Barge Co., Inc. v. Garber Bros., Inc.*, 65 F.R.D. 399, 405 (E.D. La. 1974) ("The term 'jurisdiction' as used in Rule 82 refers only to the subject matter jurisdiction

of the courts, not the method of exercising personal jurisdiction through service of process.").

The Court next decided that Rule 4(f) was "in harmony" with the Rules Enabling Act:

> Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 11-14, 655, 61 S.Ct. 422, 425-427, 85 L.Ed. 479. The fact that the application of Rule 4(f) will operate to subject petitioner's rights to adjudication by the district court for northern Mississippi will undoubtedly affect those rights. But it does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights. It relates merely to 'the manner and the means by which a right to recover ... is enforced.' *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S.Ct. 1464, 1470. In this sense the rule is a rule of procedure and not of substantive right, and is not subject to the prohibition of the Enabling Act.

Murphree, 326 U.S. at 445-46.

Other courts have acknowledged that the Rules of Civil Procedure can constitutionally extend a district court's reach beyond state boundaries. *See Quinones v. Pa. Gen. Ins. Co.*, 804 F.2d 1167, 1169, 1176 (10th Cir. 1986) (rejecting argument that Rule 4(f) was unconstitutional if interpreted so as to extend personal jurisdiction beyond a state's boundaries); *Coleman*, 405 F.2d at 252 ("Since Congress has power to provide that the process of every District Court shall run into every part of the United States, the Supreme Court as its delegate can provide that process shall be effective if served within 100 miles of the courthouse even if a state line intervenes...."); *Jacobs v. Flight Extenders, Inc.*, 90 F.R.D. 676, 679 (E.D. Penn. 1981) ("It is clear that Congress can extend the territorial jurisdiction of a federal district court, regardless of state boundaries."); *McGonigle*, 39 F.R.D. at 61-62 ("Given the power of federal Congress to extend, nationwide, the territorial

jurisdiction of a federal district court, regardless of state boundaries ... the constitutionality of the 100-mile bulge provision for federal service of process is, *a fortiori*, unquestionable."); *see also Diamond Healthcare of Ohio, Inc. v. Humility of Mary Health Partners*, 229 F.3d 448, 450 (4th Cir. 2000) ("Congress has authority constitutionally to permit service in federal court beyond any state's boundaries."); *Sprow v. Hartford Ins. Co.*, 594 S.W.2d 412, 416 (5th Cir. 1979) ("the 100 mile bulge provision has effectively expanded the territorial jurisdiction of a federal district court beyond state lines"); *Williams*, 28 F. Cas. at 656 (Each state, "by adopting the constitution of the United States," has given permission to the court of the United States to send their process into that state, "in all cases of which the judicial power of the United States has cognizance.").

These courts permit the exercise of jurisdiction over out-of-state defendants. *See, e.g.*, *Quinones*, 804 F.2d at 1172, 1178 (reversing trial court dismissal of third party complaint where third party resided and was served process in El Paso, Texas, within 100 miles of the United States District Courthouse in Las Cruces, New Mexico); *Coleman*, 405 F.2d at 252 (reversing trial court dismissal of third-party complaint filed in Southern District of New York, where third party defendant was served at its Philadelphia office, which was within 100 miles of the Southern District of New York); *Jacobs*, 90 F.R.D. at 679 (denying third party defendant's motion to dismiss plaintiff's complaint in Pennsylvania where third party defendant had minimum contacts with the "bulge area" in New Jersey); *McGonigle*, 49 F.R.D. at 61-62 (denying third party defendant's motion to dismiss where it was served in Pennsylvania, within the "100-mile bulge area" around the situs of the Maryland District Court).

C. Enforcing Subpoenas Nationwide

When a court serves a subpoena outside of the state in which it is located pursuant to a rule

or statute authorizing nationwide service, the court has the power to enforce the subpoena. *See Williams*, 28 F. Cas. at 654 ("The subpoena would be nugatory, if it could not be followed by an attachment; and it cannot be supposed that congress intended to authorize the court to issue a command, the obedience to which it could not enforce.").

The Supreme Court explained:

> There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt. *United States v. United Mine Workers*, 330 U.S. 258, 330-332(1947) (Black and Douglas, JJ., concurring in part and dissenting in part); *United States v. Barnett*, 376 U.S. 681, 753-754 (1964) (Goldberg, J., dissenting). And it is essential that courts be able to compel the appearance and testimony of witnesses. *United States v. Bryan*, 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884 (1950).

Shillitani v. United States, 384 U.S. 364 (1966)); *accord Spallone v. United States*, 493 U.S. 265, 276 (1990).

A subpoena is enforceable in the court which issued it. *In re Certain Complaints Under Investigation*, 783 F.2d 1488, 1495 (11th Cir. 1986); *see* FED. R. CIV. P. 45(f) ("Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued."); FED. R. CRIM. P. 17(g) ("Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate."). "Once [the court's] authority is invoked by service of the subpoena, the court under whose seal the subpoena was issued must have jurisdiction to enforce its subpoena and vindicate its own process, as Fed. R. Civ. p. 45(f) and Fed. R. Crim. P. 17(g) recognize." *In re Certain Complaints Under Investigation*, 783 F.2d at 1496.

When authorized by statute, courts other than the issuing court may enforce a subpoena even

if the enforcing court is in another state. For example, 28 U.S.C. § 1407(b) authorizes an MDL judge to "exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated proceedings.'" This includes the power to enforce a subpoena or rule on a motion to quash a subpoena. *See In re Clients & Former Clients of Baron & Budd, P.C.*, 478 F.3d 670, (5th Cir. 2007) (per curiam) (holding that MDL court in the Eastern District of Pennsylvania had power to rule on a motion to quash subpoena issued through the United States District Court for the Southern District of Texas); *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litiagation*, No. 07-20156, 2009 WL 5195783, at *1 n.1 (E.D.Pa. Dec. 22, 2009) ("As the court presiding over the MDL, we have authority to enforce the subpoena issued out of the Southern District of California."); *In re Sunrise Sec. Litig*., 130 F.R.D. 560, 586 (E.D.Pa. 1989) ("[A] multidistrict judge may decide a motion to compel a non-party in other districts even if he or she is not physically situated in those districts."); *see also Howard*, 382 Fed. Appx. at 442 ("The MDL statute (28 U.S.C. sec. 1407) in, in fact, legislation 'authorizing the federal courts to exercise nationwide personal jurisdiction.'"). As one treatise explains:

> [Section 1407(b)] therefore authorizes the transferee district court to exercise the authority of a district judge in any district: The transferee court may hear and decide motions to compel or motions to quash or modify subpoenas directed to nonparties in any district. Though the statutory language refers to "pretrial depositions," the statute wisely has been interpreted to embrace document production subpoenas as well.

9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 45.50[4], at 45-75 through 45-77 (Matthew Bender 3d ed. 2006) (footnotes omitted). This explanation was embraced by the Fifth Circuit in *Baron & Budd*, and is also supported "by the convincing analysis of myriad district courts." *Baron & Budd*, 478 F.3d at 672 (collecting cases).

III. Due Process Limits on Exercising Nationwide Personal Jurisdiction

While rules and statutes authorizing nationwide service of process confer a basis for jurisdiction, the exercise of such jurisdiction may be subject to basic due process limitations.

The United States Supreme Court has not yet defined Fifth Amendment due process limits on personal jurisdiction. *Peay v. BellSouth Med. Assistance Plan*, 205 F.3d 1206, 1211 (10th Cir. 2000); *see Omni v. Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 103 n.5 (1987) (plurality op.) (declining to address the constitutionality of the national contacts test); *Asahi Metal Industry Co. v. Superior Court of Cal.*, 480 U.S. 102, 113 n.* (same). And the circuit courts considering the issue have split over the scope of the limits imposed by the Fifth Amendment when jurisdiction is established via a nationwide service of process provision – some (Second, Fifth, Sixth, Seventh, Eighth, and Ninth) apply a pure national contacts approach and hold that due process is satisfied if the party has "minimum contacts" with the United States, while others (Fourth, Tenth, and Eleventh) consider minimum contacts plus whether a party would be unduly burdened if forced to appear or defend in an inconvenient forum.[2]

---

[2] While all of the cases discussing Fifth Amendment due process limits on personal jurisdiction do so in the context of determining whether the court has personal jurisdiction over an out-of-state defendant, a number of cases recognize that due process also imposes a limit on personal jurisdiction over nonparty witnesses. *See, e.g. First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 20 (2d Cir. 1998) (holding that service of a subpoena on a foreign nonparty physically present in the district satisfies due process); *In re Application to Enforce Admin. Subpoenas Duces Tecum of SEC v. Knowles*, 87 F.3d 413, 418 (10th Cir. 1996) (requiring that foreign nonparty subject to an administrative agency subpoena possess minimum contacts with the United States); *Ariel v. Jones*, 693 F.2d 1058, 1061 (11th Cir. 1982) (quashing a subpoena based on the nonparty's lack of contacts with the forum); *In re Jee*, 104 B.R. 289, 293 (Bankr. C.D. Cal. 1989) (acknowledging the need for personal jurisdiction over nonparty witnesses); *Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc.*, 45 F.R.D. 515, 516 (S.D.N.Y. 1968) (quashing document subpoena based on lack of contacts with the forum); *see also* 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 108.125 (3d ed. 2003) (stating that "[a] nonparty witness cannot be compelled to testify at a trial, hearing, or deposition unless the witness is subject to the personal jurisdiction of the court"). The burdens on a nonparty witness of testifying in a distant forum are arguably less than the burdens faced by a nonresident defendant. Rhonda Wasserman, *The Subpoena Power: Pennoyer's Last Voyage*, 74 MINN. L. REV. 37, 94-97 (1989); *see also Price Waterhouse*, 154 F.3d at 20 ("PW-UK is a non-party, but it is unclear which way that should cut; a person who is subjected to liability by service of process far from home may have better cause

A. Pure National Contacts Approach

Most circuits that have considered the issue have adopted the "pure national contacts approach" and hold that due process is satisfied when the party is served under a nationwide service of process provision and resides within the United States or has "minimum contacts" with the United States as a whole. *See, e.g.*, *Medical Mutual of Ohio v. deSoto*, 245 F.3d 561, 567 (6th Cir. 2001) (applying national contacts test); *Elite Erectors, Inc.*, 212 F.3d at 1035-36(same); *In re Federal Fountain, Inc.*, 165 F.3d 600, 601-02 (8th Cir. 1999) (en banc) (adopting national contacts test); *Bellaire General*, 97 F.3d at 825-826 (applying national contacts test); *Busch*, 11 F.3d at 1258 (holding due process satisfied when defendant resides within the United States); *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1330 (6th Cir. 1993) (deciding that "minimum contacts" with United States satisfies due process); *Go-Video, Inc. v. Akai Electric Co., Ltd.*, 885 F.2d 1406, 1416 (9th Cir. 1989) (applying national contacts test); *Fitzsimmons v. Barton*, 589 F.2d 330, 333 (7th Cir. 1979) (deciding that "there can be no question but that the defendant, a resident citizen of the United States, has sufficient contacts with the United States to support the fairness of the exercise of jurisdiction over him by a United States court"); *Mariash v. Morill*, 496 F.2d 1138, 1143 (2d Cir. 1974) (explaining that "where, as here, the defendants reside within the territorial boundaries of the United States, the 'minimal contacts,' required to justify the federal government's exercise of power over them, are present."); *see also Matter of Marc Rich & Co., A.G.*, 707 F.2d 663, 667 (2d Cir.), cert. denied, 463 U.S. 1215 (1983) (holding that authority to enforce a federal grand jury subpoena depends upon appellant's contacts with the entire United States, not simply the state of New York).

---

to complain of an outrage to fair play than one similarly situated who is merely called upon to supply documents or testimony.")

These courts reason that the test that developed in state litigation – whether a defendant has adequate contacts with the forum – related to the court's jurisdictional power over non-residents and that the same concern is not present when a federal court exercises jurisdiction over a United States resident. The *Elite Erectors* court explained:

> Linking personal jurisdiction to a defendant's "contacts" with the forum developed in state litigation. Due process limitations on adjudication in state courts reflect not so much questions of convenience as of jurisdictional power. Barrow, Alaska, is farther from Juneau than Indianapolis is from Alexandria, and travel from Barrow to Juneau is much harder than is travel from Indianapolis to Alexandria (there are no highways and no scheduled air service from Barrow to anywhere), yet no one doubts that the Constitution permits Alaska to require any of its citizens to answer a complaint filed in Juneau, the state capital, just as the United States confines some kinds of federal cases to Washington, D.C., on the eastern seaboard. Conversely Kentucky's proximity to southern Indiana (Louisville would be more convenient for residents of New Albany than tribunals in Indianapolis) does not permit Kentucky to adjudicate the rights of people who have never visited that state or done business there; its sovereignty stops at the border. Limitations on sovereignty, and not the convenience of defendants, lie at the core of cases such as *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985), and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980), and their many predecessors.
>
> No limitations on sovereignty come into play in federal courts when all litigants are citizens. It is one sovereign, the same "judicial Power," whether the court sits in Indianapolis or Alexandria. *Peay* did not deny this. Instead it relied on the observation in *Omni Capital*, 484 U.S. at 104, 108 S.Ct. 404, that restrictions on state adjudication enable litigants to preserve their liberty and property from arbitrary confiscation. No one doubts this; Congress could violate the due process clause by requiring all federal cases to be tried in Adak (the westernmost settlement in the Aleutian Islands), because transportation costs easily could exceed the stakes and make the offer of adjudication a mirage. But this principle is unrelated to any requirement that a defendant have "contacts" with a particular federal judicial district and does not block litigation in easy-to-reach forums. A defendant who lives in Springfield, in the territory of the United States District Court for the Central District of Illinois, may be

> required to defend in Chicago (part of the Northern District) without any constitutional objection on the ground of undue inconvenience - even if the defendant has never been to Chicago and has no "contacts" with the Northern District - just as Illinois could allocate the bulk of litigation among its citizens to Chicago (or require residents of Chicago to visit Springfield, where the Supreme Court of Illinois sits).

212 F.3d at 1036; *see also Federal Fountain*, 165 F.3d at 602 ("We think, in sum, that the fairness that due process of law requires relates to the fairness or the exercise of power by a particular sovereign and there can be no question that the defendant has sufficient contacts with the United States to support the fairness of the exercise of jurisdiction over him by a United States court.") (internal quotations omitted); *Mariash*, 496 F.2d at 1143 ("Indeed, the 'minimal contacts' principle does not, in our view, seem particularly relevant in evaluating the constitutionality of *in personam* jurisdiction based on nationwide, but not extraterritorial, service of process. It is only the latter, quite simply, which even raises a question of the forum's power to assert control over the defendant.")

B. Considering Fairness to Defendant

In addition to minimum contacts, when determining whether due process is satisfied, the Fourth, Tenth, and Eleventh Circuits consider whether the defendant would be unduly burdened or inconvenienced if forced to defend in an inconvenient forum. *See Peay*, 205 F.3d at 1212 ("[W]e hold that in a federal question case where jurisdiction is invoked based on nationwide service of process, the Fifth Amendment requires the plaintiff's choice of forum to be fair and reasonable to the defendant. In other words, the Fifth Amendment 'protects individual litigants against the burdens of litigation in an unduly inconvenient forum.'"); *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 626 (4th Cir. 1997) ("The Fifth Amendment's Due Process Clause not only limits the extraterritorial scope of federal sovereign power, but also protects the liberty interests of individuals

against unfair burden and inconvenience."); *Republic of Panama v. BCCI Holdings (Luxembourg),* 119 F.3d 935, 947 (11th Cir. 1997) ("A defendant's "minimum contacts" with the United States do not, however, automatically satisfy the due process requirements of the Fifth Amendment. There are circumstances, although rare, in which a defendant may have sufficient contacts with the United States as a whole but still will be unduly burdened by the assertion of jurisdiction in a faraway and inconvenient forum.").

In *Republic of Panama*, the court emphasized that "it is only in highly unusual cases that inconvenience will rise to a level of constitutional concern" because "modern means of communication and transportation have lessened the burden of defending a lawsuit in a distant forum." *Id*. at 947-48. And it placed the burden on the defendant "to demonstrate that the assertion of jurisdiction in the forum will 'make litigation so gravely difficult and inconvenient that [he] unfairly is at a severe disadvantage in comparison to his opponent.'" *Id*. at 948 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985) (citations omitted)). If the defendant makes this showing, "jurisdiction will comport with due process only if the federal interest in litigating the dispute in the chosen forum outweighs the burden imposed on the defendant." *Id.* "In evaluating the federal interest, courts should examine the federal policies advanced by the statute, the relationship between nationwide service of process and the advancement of these policies, the connection between the exercise of jurisdiction in the chosen forum and the plaintiff's vindication of his federal right, and concerns of judicial efficiency and economy." *Id.*

Applying these standards, the *Republic of Panama* court held that the Southern District of Florida erred in granting defendants' motion to dismiss for lack of personal jurisdiction because there was no "constitutional impediment" to jurisdiction where defendants were "large corporations providing banking services to customers in major metropolitan areas along the eastern seaboard"

who were properly served under the RICO statute authorizing nationwide service of process, despite the fact that defendants may not have had significant contacts with Florida. *Id*. at 948. In reaching this conclusion, the court noted that "the fact that discovery for the litigation would be conducted throughout the world suggests that Florida is not significantly more inconvenient than other districts in this country." *Id*.

Similarly, in *ESAB Group*, the Fourth Circuit held that the Fifth Amendment's Due Process Clause "protects the liberty interests of individuals against unfair burden and convenience," (126 F.3d at 626), but recognized that "it is only in highly unusual cases that inconvenience will rise to a level of constitutional concern." *Id*. (quoting *Republic of Panama*, 119 F.3d at 947). The *ESAB Group* court decided that the South Carolina District Court could constitutionally exercise personal jurisdiction over a New Hampshire company and a New Hampshire/Florida resident because there was no evidence of "such extreme inconvenience or unfairness" to either defendant as would outweigh the congressional policy choice to allow nationwide service in RICO actions. *Id*. at 627.

In *Peay*, the Tenth Circuit also analyzed whether plaintiff's choice of forum would be "fair and reasonable" to defendant, so as to satisfy due process. *Peay*, 205 F.3d at 1212 ("Like the Eleventh Circuit, we discern no reason why the Fourteenth Amendment's fairness and reasonableness requirements 'should be discarded completely when jurisdiction is asserted under a federal statute.'")

Like the Fourth and Eleventh Circuits, the *Peay* court emphasized that the inconvenience would rise to a level of constitutional concern "only in highly unusual cases." *Id.* And concluded that the defendants' liberty interests would not be infringed if defendants were forced to litigate in Utah, because the *Peay* defendants (headquarted in Alabama and Georgia) were "large corporations operating throughout the southeastern United States" and administering a multi-state insurance plan

regulated by federal law who "rendered benefits in Utah." *Id*.

II INFORMATION ITEMS
A DISCOVERY: PRESERVATION AND SPOLIATION

Discovery of electronically stored information commanded great attention at the Duke Conference. In this realm, anxiety bordering on anguish arises from uncertainty as to the beginning, scope, and duration of the duty to preserve and the concomitant risk of sanctions for spoliation. The panel chaired by Gregory Joseph proposed a thoughtful list of elements to be captured in a civil rule addressing these problems. The task of translating these elements into a workable rule is formidable, perhaps impossible. But the problems are so important that it is necessary to do everything possible to explore possible solutions. The Committee and more particularly the Discovery Subcommittee began work immediately after the Conference.

Three rough sketches of possible approaches were prepared by the Discovery Subcommittee and considered by the Committee at the April meeting. The first seeks to provide specific guidance, defining preservation obligations in considerable detail. The second is similar in outline, but substitutes general obligations of reasonable behavior for detailed directions. The third focuses on sanctions, relying on backward inference to shape preservation obligations. Each sketch is designed to provoke discussion in the expectation that much more work likely will be required before the Committee can decide whether to recommend publication of a proposed rule. The Advisory Committee has approved the suggestion of the Subcommittee that a miniconference be held to pursue the work further. The conference will gather lawyers with perspectives on all sides of a variety of litigation categories, including staff attorneys in private and government organizations. It also will include technology experts in search of current information about the most efficient methods of preserving, searching, and utilizing electronically stored information. It will be held on September 9, a date chosen to enable the Subcommittee to develop new models for consideration at the November Committee meeting.

The materials considered at the April Committee meeting are set out below to illustrate the nature of the issues that must be addressed. It is not too early to provide guidance for the next steps of this work. Suggestions will be welcome.

PRESERVATION/SANCTIONS ISSUES

Since the November full Committee meeting, the Discovery Subcommittee has continued to study preservation and sanctions issues. This study has included a conference call in early February and a meeting in late February. In addition, a panel of experts discussed these issues during the January, 2011, meeting of the Standing Committee. That panel included two members of the Discovery Subcommittee and several others who were on the Duke E-Discovery Panel. The ideas discussed during the Standing Committee meeting were among those considered by the Subcommittee.

[The agenda materials included the following items in addition to this memorandum, omitted from this Report:

[Notes on Feb. 20, 2011, Subcommittee meeting

[Notes on Feb. 4, 2011, Subcommittee conference call

[Three-page summary of elements of possible preservation rule provided by Duke E-Discovery Panel

[Dec. 15, 2010, memorandum from Katharine David providing illustrative examples of preservation obligations found in a variety of federal and state statutes and ordinances. This memorandum resulted from research that also included a memorandum done by Andrea Kuperman on case law on preservation and sanctions in various circuits that was included in the agenda materials for the November, 2010, Committee meeting.]

At its meeting on Feb. 20, 2011, the Subcommittee discussed the most productive way of proceeding toward possibly recommending rule amendments to deal with preservation and sanctions issues. Although there was some initial discussion of the possibility of proceeding with a sanctions rule proposal immediately, the consensus ultimately was that it would be preferable to proceed more deliberately.

By way of background, as the Committee has discussed, there are significant rulemaking challenges for a rule that attempts overtly and solely to regulate pre-litigation preservation. A "back end" sanctions rule might not present the same difficulties that could arise with a "front end" preservation rule. But to the extent the concerns voiced by those who favor a preservation rule could be addressed in the sanctions context, it might be that such a rule could provide much benefit without raising questions about the scope of rulemaking authority. On the other hand, it could be that such a "backward looking" sanctions rule might itself raise concerns about whether it intruded too far into pre-litigation preservation decisions. As before, the significance of limitations on rulemaking authority remain somewhat uncertain.

At the same time, the Subcommittee is also quite uncertain about the real-life dynamics of preservation problems and about whether rules would really provide significant solace for those concerned with these problems. As a very general matter, it seems clear that many are concerned that preservation obligations may often seem far too broad, and that huge expense has resulted from that overbreadth, particularly because the standard for severe sanctions is unpredictable and inconsistent across the nation. But the reasons for the huge expenses, and the components of them, are less clear, as are the nature of measures that would relieve these pressures. At least some preservation-rule ideas seem initially to be quite general, and perhaps they would not provide the solace sought. Others may be so specific that they would be superseded by technological change or would be inapplicable in broad categories of cases.

Given this variety of concerns, the Subcommittee's conclusion was that it needs more knowledge, and that the way to gain that needed insight is to hold a conference before the Fall full Committee meeting so that it can report back to the Committee, building on the knowledge base the conference would provide. Ideally, therefore, this conference would occur long enough before the next full Committee meeting so that the Subcommittee can react to what it learns and present the initial fruits to the Committee. Then, based on the Committee's discussion in Fall, 2011, the Subcommittee would hope to have a rule proposal to present to the Committee during its Spring, 2012 meeting, perhaps in a form that would be ready for public comment.

The general idea for the conference is that it include an array of those experienced in preservation and general E-Discovery issues, including specialists in technical and technological issues. Well in advance of the conference, the Subcommittee would provide attendees with illustrations of rule-amendment ideas falling into three general categories. The order of these categories does not indicate their priority or any preference in the eyes of the Subcommittee:

> Category 1: Preservation proposals incorporating considerable specificity, including specifics regarding digital data that ordinarily need not be preserved, elaborated with great precision. Submissions the Committee has received from various interested parties provide a starting point in drafting some such specifics. A basic question is whether it is necessary (or really useful) to include such specifics in rules to make them effective in solving the problems reportedly resulting from overbroad preservation expectations. At least, they could create very specific presumptions about what preservation is necessary. Perhaps they could be equally precise about the trigger. It might be that any such precision would run the risk of being obsolete by the time that a rule became effective, or soon thereafter.
>
> Category 2: A more general preservation rule could address a variety of specific concerns, but only in more general terms. It would, nonetheless, be a "front end" proposal including specifics about preservation in the form of directives about what must be preserved. Compared to Category 1 rules, then, the question would be whether something along these lines would really provide value at all. Are they too general to be helpful?
>
> Category 3: This approach would address only sanctions, and would in that sense be a "back end" rule. It would likely focus on preservation decisions, making the most serious sanctions unavailable if the party who lost information acted reasonably. In form, however, this approach would not contain any specific directives about specific preservation issues. By articulating what would be "reasonable," it might cast a long shadow over preservation without purporting directly to regulate it. It could also be seen as offering "carrots" to those who act reasonably, rather than relying mainly on "sticks," as a sanctions regime might be seen to do.

The conference could be educational for the Committee by explaining how preservation issues arise in real-life practice. By addressing the various categories of rules described above, it could provide insights about which category seems most promising to produce helpful

consequences, and about the specific features of rules that seem likely to produce helpful or harmful consequences.

Against that background, the remainder of this memorandum introduces an initial set of drafts of the three categories of rule exemplars. These drafts are provided for illustrative purposes only -- they do not represent the Subcommittee's considered views, and are offered only for purposes of fostering discussion. These exemplars build in part on an early set of possible amendment ideas included in the agenda materials for the November, 2010, full Committee meeting. Some provisions in the Category 1 sketch closely resemble those in the Category 2 sketch because they are in some ways parallel. Footnotes raise a number of questions, but should be included only once even though they focus on rule-amendment ideas that recur later in the package.

Before turning to the specific exemplars, it seems worthwhile to reiterate the Subcommittee has reached no conclusion on whether rule amendments would be a productive way of dealing with preservation/sanctions concerns, much less what amendment proposals would be useful. The purpose of the proposed conference is to provide a basis for making such judgments.

CATEGORY 1

Detailed and specific rule provisions

The concept behind this category is that rules with specifics would be beneficial. A key consequence of having such rules is that they can apprise parties about what they must do in ways that are very specific, providing a level of guidance that more general rules would not. But at the same time, this specificity may produce serious costs if it means that anything not specifically provided for is either beyond regulation or never required. Coupled with these concerns are concerns about transitory terms and technologies. To the extent the specifics are likely not to be important in five or ten years, or that other factors will be equally or more important, they may not be reasonable choices for rules that could not go into effect until the end of 2014 and that cannot be amended in less than three years.

Rule 26.1. Duty to Preserve Discoverable Information

(a) General Duty to Preserve. [In addition to any duty to preserve information provided by other law,][2] every person who reasonably expects [is reasonably certain][3] to be a party[4] to

---

[2] The goal of this rule is not to supersede any existing duty to preserve information. A Committee Note would probably illustrate some of the kinds of sources of law that may bear on particular situations but also say that the illustrative listing was just that, and not complete.

An alternative could be to prescribe a duty to preserve and then assert that it supersedes all other duties. But those duties are numerous and emanate from many sources, both state and federal. Purportedly nullifying them would be a difficult business, particularly since much litigation does not end up in federal court, and in some instances could not constitutionally end up in federal court.

Indeed, the entire notion of supersession may strain the limits of the Rules Enabling Act process. Could a rule supersede state law on preservation as asserted in litigation in state courts, or by state administrative agencies? Even with regard to litigation in the federal courts, it may be that a Civil Rules cannot limit remedies provided by state law for violation of a state preservation requirements.

Given these uncertainties about the effect of a Civil Rules, it is not clear whether such a rule could provide the sort of reassurance about preservation that some hope it could provide.

[3] Would the bracketed phrase be preferable?

[4] Should this be limited to prospective parties? Could a Civil Rule impose a preservation duty on a third-party witness to an accident? Some states have recognized a tort of "spoliation" under some circumstances, but that suggests Enabling Act issues. On the other hand, we probably would

an action cognizable in a United States court[5] must preserve discoverable [electronically stored][6] information as follows.

(b) Trigger for Duty to Preserve. The duty to preserve discoverable information under Rule 26.1(a) arises only if a person becomes aware of one of the following facts or circumstances that would lead a reasonable person to expect to be a party to an action [cognizable in a United States court]:[7] [8]

(1) Service of a pleading or other document asserting a claim;[9] or

---

say that, after service with a federal-court subpoena for specified information, such a third-party witness would have a duty to preserve the material requested by the subpoena even if it objected to producing it. The federal court's power to enforce subpoenas should reach that far.

[5] This formulation is modeled on Rule 27(a), which speaks of a petitioner who "expects to be a party to an action cognizable in a United States court" and of "persons whom the petitioner expects to be adverse parties."

[6] One question is whether this duty to preserve should be limited to electronically stored information. On the one hand, that appears to be the main focus of current concerns emphasized to the Committee. On the other hand, other material remains very important in much litigation, and many recent sanctions cases involve more traditional sources of information.

[7] At least one problem with this formulation is that it includes awareness that the action might be in a federal court. Since subdivision (a) imposes a duty only on those who reasonably expect to be a party of an action in federal court, saying that again here may be harmful; the only duty we are talking about here is the one in (a). For actions brought in state court, it seems fair to assume that some preservation duty would arise also, even though not based on this rule.

[8] The whole thrust of this approach is that it can identify in advance, at least by fairly specific category, all the events that would justify imposing a preservation duty. As noted below, including a "catch-all" final category may seem desirable because it would build in some flexibility, but that would seem to undermine the basic purpose of the rule. Absent that, however, one might expect fierce litigation about whether given events actually fall into one of the listed categories.

[9] This need not be a claim against this person, presumably. Under Rule 15(c)(1)(C), relation back may apply to a claim later asserted against an original nonparty who "should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." See Krupski v. Costa Crociere, S.p.A., 130 S.Ct. 2485 (2010) (applying Rule 15(c)(1)(C) to uphold relation back of claim against added defendant). Indeed, in this situation the need to preserve may arise after the commencement of the action but long before the formal assertion of a

(2) Receipt of a notice of claim or other communication -- whether formal or informal -- indicating an intention to assert a claim; or

(3) Service of a subpoena or similar demand for information; or

(4) Retention of counsel, retention of an expert witness or consultant, testing of materials, discussion of possible compromise of a claim[10] or taking any other action in anticipation of litigation;[11] or

(5) Receipt by the person of a notice or demand to preserve discoverable information;[12] or

(6) The occurrence of an event that results in a duty to preserve information under a statute, regulation, contract, or knowledge of an event that calls for preservation

---

claim against this party.

But the Rule 15(c)(1)(C) analogy is far from perfect. That rule is concerned primarily with limitations policies, not evidence preservation. Relation back does not involve a "duty" to preserve; it only preserves claims that would otherwise be barred by the passage of time when the party who could assert the limitations defense had adequate notice so that it should have taken precautions such as preserving its evidence. Put differently, the party who succeeds in obtaining relation back for an amended claim does not thereby also acquire a right under Rule 15(c) to argue that the other side therefore should have preserved the evidence it wants to use to support its added claim.

[10] This terminology is meant to track Evidence Rule 408.

[11] This provision draws on Rule 26(b)(3) for the general notion of "anticipation of litigation." It is worth noting that this is the one most likely to be important to plaintiffs, who do not usually await notice of a claim by others since they are the claimants. But whether the duty to preserve should arise at the same moment Rule 26(b)(3) protection attaches might be debated. Equating the inception of work product protection with the trigger for the preservation duty may mix two very different things.

[12] This is very open-ended. It does not purport to address the scope of the obligation to preserve, but only the trigger. It does not focus on the form of this notice, but does focus upon "receipt," which presumably means the demand is directed to the person to whom the duty will thereupon apply. It is worth noting, however, that delivery of such a notice to *A* might be regarded as sufficient to notify *B* of the need to preserve. At the same time, it could be that only a specific demand to preserve would be covered.

under the person's own retention program.[13]

[**(7)** Any other [extraordinary] circumstance that would make a reasonable person aware of the need to preserve information.][14]

(c) Scope of Duty to Preserve. A person whose duty to preserve discoverable information has been triggered under Rule 26.1(b) must take actions that are reasonable under the circumstances to preserve discoverable information [taking into account the proportionality

---

[13] Including this provision might be said somewhat to undercut subdivision (a) above, for that provision was designed to specify a duty to preserve imposed by the rules without regard to what other sources of law require. Yet it may well be that failure to comply with other legal requirements would be a legitimate consideration for a preservation requirement imposed by the rules. To the extent subdivision (c) below is the sole definition of the scope of the duty to preserve, making another law (which may have a different scope) the trigger could cause difficulties. Would that trigger also determine the resulting scope of preservation?

The reference to the person's own retention program was not suggested by the Duke panel, but does appear in cases. See Kerkendall v. Department of the Army, 573 F.2d 1318, 1325-27 (Fed. Cir. 2009) (upholding adverse inference for destruction of documents by government agency in violation of its own retention program).

Whether this category of triggers should be included is debatable on its merits. Would including it tend to deter parties from adopting preservation rules of their own? If the sole focus of this rule is on the preservation obligation that flows from the prospect of litigation, why does an entirely unrelated preservation obligation -- even if imposed by rule or statute -- matter? At least arguably, it would seem odd that a party who violates a statutory or regulatory obligation and as a result deprives the opposing party if material evidence, can claim that it had no pertinent duty to preserve.

[14] Because this rule is designed as an all-encompassing catalog of the triggers that invoke the rule's preservation obligation, it may be important to include such a "catch-all" provision to cover situations that did not occur to the drafters. But to the extent the catch-all is really flexible, it may rob the entire rule of its supposed value in protecting the party that does not preserve. How is the potential litigant to know whether something that occurs fits into this provision?

Would it be helpful to add the word "extraordinary"? Without the qualifier, item (7) could swallow the others. But does the qualifier really help? Can the person possibly subject to a preservation duty determine what a court will later regard as satisfying this standard? And how about the sloppy manufacturer whose goods often fail. Is it "ordinary" for another failure to occur, leading to serious personal injury? If so, does that mean these events are not really "extraordinary"?

criteria of Rule 26(b)(2)(C)] {considering the burden or expense of preservation, the likely needs of the case, the amount likely to be in controversy, the parties' resources, the importance of the issues at stake in the action, and the potential importance of the preserved information in resolving the issues}[15] as follows:

(1) ***Subject matter***. *[Alternative 1]* The person must preserve information relevant to any claim or defense that might be asserted in the action to which the person might become a party or to a defense to such a claim;[16]

(1) ***Subject matter***. *[Alternative 2]* The person must preserve any information that constitutes evidence of a claim or of a defense to a claim;[17]

(1) ***Subject matter***. *[Alternative 3]* The person must preserve any information that is relevant to a subject on which a potential claimant has demanded preservation;[18]

---

[15] The bracketed provision is intended to raise the issue of proportionality. Many agree that proportionality concepts should be crucial in determining what is a reasonable preservation regime. But merely saying that preservation should be "proportional" may not be very useful to a potential litigant who may have only the haziest notion what the claim involves and whether serious damages have occurred.

Assuming one wants to invoke proportionality, one could simply say the preservation must be "proportional." To add some specificity, however, the alternatives in text either invoke Rule 26(b)(2)(C) or paraphrase the criteria in Rule 26(b)(2)(C)(iii).

[16] The notion here is to invoke the scope of discovery or right under Rule 26(b)(1). Note that this scope may include such things as other similar incidents, impeaching material, and additional items that may not, on their face, relate to the claim raised.

[17] The effort here is to narrow the scope to what the rulemakers were trying to identify as "core information" in 1991 when initial disclosure was first proposed. This phraseology is different, and raises difficulties about deciding what is "evidence." For example, does that exclude hearsay? In general, hearsay is discoverable under Rule 26(b)(1) whether or not admissible.

[18] This would impose a very narrow requirement to preserve; unless a party giving notice of a claim has said something about preserving information there would be no duty. This sort of provision would seem to encourage broad demands to preserve in advance of litigation, probably not a desirable thing. Among other things, the person who receives such a demand has no immediate way to challenge the demand, as could happen in regard to undue demands during a Rule

(1) ***Subject matter***. *[Alternative 4]* The person must preserve information that a reasonable person would appreciate should be preserved under the circumstances;[19]

(2) ***Sources of information to be preserved***. *[Alternative 1]* The duty to preserve under Rule 26.1(a) extends to information in the person's possession, custody or control[20] that is reasonably accessible to the person;[21]

26(f) conference, for those can be submitted to the judge for resolution if needed. Perhaps more significantly, it would impose no duty to preserve unless a demand to preserve were made, seemingly disadvantaging those who don't have lawyers. A lesser point on that score is that it would cause uncertainty about whether there had been such a demand.

[19] This alternative invokes one of the suggestions of the Duke Panel. It may be circular, and seems to provide very little guidance to the party subject to the duty to preserve.

[20] This invokes Rule 34(a)(1)'s definition of the scope of the duty to produce in response to a Rule 34 request.

[21] The last clause invokes a version of Rule 26(b)(1)(B)'s exemption from initial discovery of electronically stored information that is "not reasonably accessible because of undue burden or cost."

It is debatable whether any such limitation should be included in a preservation rule. In the Committee Notes to Rules 26(b)(2)(B) and 37(e) in 2006, an effort was made to distinguish between the duty to preserve such information and the duty to provide it in response to discovery. The notion is that preservation imposes a smaller burden than restoration, and ensures that the material will be there if the court later orders production.

Another issue here (already mentioned above) is the question of preserving allegedly privileged material. To the extent that the trigger for the duty to preserve under Rule 26.1 corresponds to the "in anticipation of litigation" criterion of Rule 26(b)(3), for example, much material generated in trial preparation activity might fall within the duty to preserve. Does the fact that a party claims it need not produce this material exempt it from preservation? Ordinarily, as emphasized in Rule 26(b)(5), the decision whether a claim of privilege is valid is for the court, not the party; if the court cannot examine the material because it no longer exists, that is a problem.

Another issue has to do with whether it is desirable to expand the Rule 26(b)(2)(B) standard (at least as to preservation) to discoverable information that is not electronically stored. Hard copy information may be difficult to access or locate, but Rule 26(b)(2)(B) does not provide any exemption from providing it in response to a discovery request. Should preservation be treated differently?

(2) ***Sources of information to be preserved***. *[Alternative 2]* The duty to preserve under Rule 26.1(a) extends to information in the person's possession, custody or control that is routinely accessed in the usual course of business of the person;[22] the following types of information are presumptively excluded from the preservation duty unless otherwise agreed by the parties or ordered by the court:

(A) Deleted, slack, fragmented or unallocated data on hard drives;

(B) Random access memory (RAM) or other ephemeral data;

(C) On-line access data such as temporary internet files;[23]

(D) Data in metadata fields that are frequently updated, such as last opened dates;

(E) Information whose retrieval cannot be accomplished without substantial additional programming, or without transferring it into another form before search and retrieval can be achieved;

(F) Backup data that substantially duplicate more accessible data available elsewhere;

(G) Physical damaged media;

(H) Legacy data remaining from obsolete systems that is unintelligible on

---

[22] The idea here is to invoke something that was frequently discussed in relation to preservation around a decade ago -- limiting duties to provide discovery to that electronically stored information that is regularly used by the party. The phrasing used here is borrowed from Rule 34(b)(2)(E)(i) regarding production of electronically stored information.

A different issue is how this duty should be phrased for individual nonbusiness litigants, such as individual plaintiffs. The idea should probably be to look to what they access and use on a regular basis, such as their active email accounts. But what if they have a cache for discarded items. Should that be included?

[23] This provision would not preclude a court order that such information must be preserved. See, e.g., Columbia Pictures Indus. v. Bunnell, 245 F.R.D. 443 (C.D. Cal. 2007) (order directing defendant to preserve server access data on downloading of material protected by plaintiff's copyright that would otherwise not be preserved).

successor systems [and otherwise inaccessible to the person]; or

(I) Other forms of electronically stored information that require extraordinary affirmative measures not utilized in the ordinary course of business;[24]

(3) ***Types of information to be preserved***. The duty to preserve under Rule 26.1(a) extends to documents, electronically stored information, or tangible things within Rule 34(a)(1).[25]

(4) ***Form for preserving electronically stored information***. A person under a Rule 26.1(a) duty to preserve electronically stored information must preserve that information in a form or forms in which it is ordinarily maintained.[26] The person need not preserve the same electronically stored information in more than one form.[27]

(5) ***Time frame for preservation of information***. The duty to preserve under Rule 26.1(a) is limited to information [created during] {that relates to events occurring during}

---

[24] This specific listing is taken from submissions to the Advisory Committee. Besides asking whether it is sensible and complete, one might also ask whether a list this specific is likely to remain current for years.

[25] The Duke panel suggested including a provision about types of information to be preserved. It did not suggest limitations on the Rule 34(a)(1) scope of the duty to produce, and this initial effort therefore uses that provision as a guide. One possibility mentioned above is that backup tapes or the like could be excluded. But it may be that the scope of the duty provision already suffices for that purpose, and also that excluding backup materials may be unwise.

In a related vein, should preservation duties extend to "land or other property possessed or controlled" by the person, which is subject to discovery under Rule 34(a)(2)? Although that form of discovery is probably much rarer than document discovery, when it does matter preservation may be important.

[26] This provision is borrowed from Rule 34(b)(2)(E)(ii). If "ordinarily maintained" includes the form in which information is preserved for litigation purposes, this could be circular.

[27] This provision corresponds to Rule 34(b)(2)(E)(iii).

[Alternative 1] __ years prior to the date of the trigger under Rule 26.1(b)[28]

[Alternative 2] the period of the statute of limitations prior to the date of the trigger under Rule 26.1(b)[29]

[Alternative 3] a reasonable period under the circumstances.[30]

---

[28] This provision has at least two problems. One is that it tracks backward from the date of the triggering event. It is not necessarily obvious that this should be the pertinent event, but in one sense it seems logical -- ordinarily preservation can't be expected to occur until that triggering event occurs. Of course, there might be multiple triggers, which would probably present additional complications.

A second difficulty is that it calls for the rules to specify a time period for this duty. Statutes of limitation vary considerably for different kinds of claims, and from jurisdiction to jurisdiction. That variability suggests the difficulty that might attend an effort to set a specific all-encompassing limitation here. In addition, some cases -- such as a groundwater contamination case -- may concern events that occurred decades ago. A lawsuit for breach of an old contract likewise could require discovery regarding events that occurred many years in the past. Suggesting that information about such events need not be preserved because they are beyond a rule-specified time frame would present obvious problems. A time-period limitation also might foster arguments about the limits of the rulemaking power.

[29] This approach might be preferred to setting a specific limit in a rule because it would borrow from other sources of law. But the borrowing experience for limitations periods has sometimes been an unhappy one. For limitations periods for federal claims lacking congressionally-set limitations, the task produced much disarray and finally Congress adopted the four-year limit in 28 U.S.C. § 1658. But that statute applies only to federal claims created by Congress after its effective date; for those already in existence, borrowing of limitations periods remains the rule.

An additional difficulty here is that the person subject to the duty to preserve must make predictions to use this approach. One is to determine what claim would be asserted; a pre-litigation notice may suggest a variety of claims that have different limitations periods. And the limitations period for a given claim may differ significantly in different jurisdictions, so there is a potential choice-of-law guess involved in the forecast. Beyond determining the pertinent limitations period there is also the possibility that a court would rule that the limitations period was tolled until prospective plaintiffs discovered their claims, or on grounds of estoppel or fraudulent concealment. Predicting how a court might resolve those issues would be very difficult.

[30] Given the difficulties mentioned in relation to the other two approaches, this might be preferred. But one could object that it provides limited or no guidance.

(6) ***Number of key custodians whose information must be preserved***.[31] The duty to preserve under Rule 26.1(a) is limited to information [possessed by] {under the control of} the [number] {a reasonable number of} key custodians in the person's organization who are [most likely to possess] {best positioned to identify} information subject to preservation under Rule 26.1(c).[32]

---

[31] This sort of provision was suggested by the Duke Panel. It is not clear that "key custodian" is a definite enough term, but it is the one proposed by our panelists. If we want to adopt something along this line, there should be careful consideration about what term to use. The Committee Note could elaborate on what is meant. For one court's use of the "custodian" term, see Edelen v. Campbell Soup Co., 265 F.R.D. 676, 684 (N.D.Ga. 2010) ("Plaintiff then proposed a request that encompasses 55 custodians and 55 search terms over a three-year period.").

[32] This provision is a very halting first effort that bristles with issues. The question of how to define "key custodian" has already been mentioned. The question whether we are talking about "possession" or "control" of the information or something else seems somewhat tricky.

Choosing a number is another challenge. Shouldn't that depend on the size and makeup of the organization? In addition, might it not depend on the type of information involved? Isn't there always a risk that 20/20 hindsight will suggest that somebody else is an obvious choice who was overlooked? The alternative of saying "a reasonable number" may be more reasonable but not reassuring to the person seeking certainty about what to do to satisfy preservation obligations. How is the person to make this determination with confidence? Perhaps the answer is to designate twice as many as are minimally necessary. But even then there is the argument that somebody really important was overlooked.

A different question is whether this should excuse preservation by anyone who is not a "key custodian." Are those the individuals who were most involved in the events that matter in the suit, or the individuals who are officially designated as "custodians" in the organization? If the latter, could it be that there is no need to preserve information possessed by the people most involved? Does that bear on what is an adequate litigation hold?

It seems that what we are talking about is the whole scope of information to be preserved pursuant to Rule 26.1(c). Are there likely to be different custodians for different types of information?

This topic seems to relate to the time factor identified in Rule 26.1(c)(5). Are we talking about holders of specified positions in the organization, or the specific individuals? If the former (more likely), how should we deal with the hiring, promotion, and firing of specific holders of these positions, and with revisions in the organizational structure during the pertinent period?

(d) Ongoing duty. *[Alternative 1]* The person must take reasonable measures to continue to preserve information subject to preservation under Rule 26.1(c) from the date the obligation to preserve is triggered under Rule 26.1(b) until [the expiration of the statute of limitations if no suit is filed by that date] {the termination of litigation if a suit is filed}.[33]

(d) Ongoing duty. *[Alternative 2]* The person must take reasonable measures to preserve information received after the trigger date specified in Rule 26.1(c) unless it notifies [the person requesting preservation] {all reasonably identifiable interested persons} that it is not engaged in ongoing preservation.[34]

(e) Remedies for failure to preserve. The sole remedy for failure to preserve information is under Rule 37(e).[35]

Another question has to do with a litigation hold. Does the listing in this rule identify the only people who should be directed to retain information in a litigation hold? Our sense is that normally the notice of a hold should be directed to a larger group, but perhaps the goal here is to guard against requiring that effort.

Finally, how would this provision apply to parties that are not organizations? Are family members of individual litigants also custodians?

[33] The need to specify how long the duty to preserve remains in effect would seem to arise in situations where litigation is not filed. Where litigation is filed, the duration of the duty is more clear. And yet, as noted above, determining when the statue of limitations expires presents difficult issues about which limitations period to apply and whether it has been tolled.

[34] This alternative attempts to provide an out for those who wish to curtail the ongoing burden. But one serious difficulty is determining who should be notified that preservation is not ongoing. Does it apply only when the trigger is a demand for preservation? It does not seem to answer the question what the preserving person must do when the person who is notified objects to cessation of preservation. If anyone can dispense with preservation by giving notice, would everyone (who is advised by a lawyer) immediately give such notice?

[35] This hypothetical provision is designed as a bridge to possible amendments to Rule 37, as explored more fully below. The goal is to make clear that Rule 26.1 does not purport to do more than set ground rules in relation to litigation that actually occurs in federal court. Thus, one could not argue for any adverse consequence due to failure to preserve except in a pending case in federal court. By the time that argument occurs, there is no big problem with the authority of a federal court to address the problem. And there seems to be no problem with the idea that it may apply federal

Rule 37. Failure to Make Disclosures

or to Cooperate in Discovery; Sanctions

* * * * *

(e) Sanctions for failure to preserve [electronically stored] {discoverable} information. A court may not impose sanctions[36] [under these rules][37] on a party for failure to preserve information if the party has complied with Rule 26.1. The following rules apply to a request for sanctions for violation of Rule 26.1:[38]

---

legal principles in determining whether a person has failed to preserve. So Rule 26.1 becomes more an advance warning that may limit federal principles of preservation than an all-purpose intrusion into the already crowded realm of preservation.

[36] A perennial question is to determine what is a "sanction." For example, to what extent is a directive to restore backup tapes to locate materials that were inappropriately deleted a "sanction." To many, it might seem a curative measure. For a thoughtful examination of such issues under the current rule, consider Major Tours, Inc. v. Colorel, 720 F.supp.2d 587 (D.N.J. 2010), in which Judge Simandle was presented with plaintiffs' argument that because defendants had failed to preserve emails they had to restore all backup tapes to see if some of the lost emails could be found on the tapes. Judge Simandle rejected this argument that failure to preserve is dispositive on the question under Rule 26(b)(2)(B) whether to order restoration of backup tapes. Instead, that is just one of many factors, and he declined to make such an order in this case, upholding the magistrate judge's decision that good cause did not exist for restoring the tapes despite the failure to preserve. Turning the situation around, would the conclusion that the preservation rule was not violated preclude ever ordering restoration of backup tapes?

[37] This phrase was inserted in Rule 37(e) by the Standing Committee in 2004, and permits sanctions pursuant to "inherent authority" or based on other sources of law while limiting sanctions under Rule 37(b) or other Civil Rules. Whether that limitation should endure if the rules themselves include a more expansive (and affirmative) set of preservation provisions, like hypothetical Rule 26.1, is not certain.

[38] Note that including a provision like this could obviate reliance on "inherent authority" to support sanctions like those listed in Rule 37(b) in cases in which failure to preserve did not violate any court order. A Committee Note could presumably say something like: "Given the introduction of a specific basis in Rule 37 for imposition of sanctions, and specific provisions in Rule 26.1 regarding the scope of the preservation duty, there should no longer be occasion for courts to rely on inherent authority to support sanctions in cases in which a party has failed to preserve discoverable information."

(1) ***Burden of proof***. The party seeking sanctions has the burden of proving that:

(A) a violation of Rule 26.1 has occurred;

(B) as a result of that violation, the party seeking sanctions has been denied access to specified electronically stored information, [documents or tangible things];[39]

(C) no alternative source exists for the specified electronically stored information [documents or tangible things];[40]

(D) the specified electronically stored information [documents or tangible things] would be [relevant under Rule 26(b)(1)] {relevant under Evidence Rule 401}

---

[39] This criterion was suggested by the Duke Panel. The abiding problem is that one does not know what was there before the inappropriate deletion occurred; that makes it rather difficult for the party seeking sanctions (which has presumably not breached its responsibilities under the rules) to specify what it lost.

This factor seems to address the same thing as the harmlessness provision in current Rule 37(c)(1), but to put the burden with regard to that issue on the party seeking sanctions. Perhaps harmlessness is a better way of putting it; doing so would presumably shift the burden of proof to the party resisting sanctions.

Relatedly, it might be noted that this factor can cut differently for parties with and without the burden of proof. In at least some instances, parties with the burden of proof may lose *because* they no longer have evidence they lost. True, parties without the burden of proof may find their cases weakened due to loss of evidence that would have been helpful to them, but in at least some instances there may be an important difference between parties depending on who has the burden of proof.

[40] This resembles the current harmlessness criterion, and seems an important focus; to the extent alternative sources of information (or sources of alternative information) exist, there seems little reason for the sorts of sanctions listed in Rule 37(b)(2)(A). As noted above, however, measures designed to extract such information from those sources (e.g., backup tapes) might be called "sanctions" by some. Moreover, since the exact contours of the lost information are usually unknowable, it may be impossible to determine whether there is an alternative source of that information.

[material] to the claim or defense of the party seeking sanctions;[41]

(E) the party seeking sanctions promptly sought relief in court after it became aware of the violation of Rule 26.1.[42]

(2) ***Selection of sanction***. If the party seeking sanctions makes the showings specified in Rule 37(e)(1), the following rules apply to selection of a sanction:

(A) the court may employ any sanction listed in Rule 37(b)(2)(A)(i)-(vi) or inform the jury of the party's failure to preserve information,[43] but must select the least severe sanction necessary to redress [undo the harm caused by] the violation of Rule 26.1;[44]

---

[41] Again, the moving party's difficulty in specifying what was lost presents something of a conundrum on this subject.

It is not clear that this provision adds usefully to (B), which focuses on the harm to the party seeking sanctions.

[42] This provision does not call for initial attempts to confer with the other side to obtain the nonjudicial solution to the problem. It might be said in a Committee Note that informal communication seems like a good way to explore the availability of other sources of information, but given that hypothetical subdivision (e) is only about sanctions of a rather serious sort, it may be that the time for conferring has passed.

[43] As noted, an adverse inference instruction is not included in the Rule 37(b)(2) listing. It is therefore addressed separately, but that does not explain how it should be ranked among the others in terms of "severity." Another issue might be the extent to which Fed. R. Evid. 301 (on presumptions) affects the use of this sanction.

In the same vein, one could consider listing other possible "sanctions" in this new provision. No effort has yet been made to chart these waters.

[44] This is a first effort to stratify sanctions. It seems from the ordering in Rule 37(b)(2)(A) that the list there goes from less severe to more severe. It is worth re-emphasizing, however, that an adverse inference instruction is not explicitly included on the list in Rule 37(b). Presumably that sanction is available also. Should sanctions be limited to those listed in Rule 37(b)?

Calibrating the severity of sanctions might sometimes be difficult. Consider, for example, Judge Gershon's reaction to arguments against using an adverse inference instruction:

(B) *[Alternative 1]* the court may not impose a sanction listed in Rule

---

> In its papers, defendant repeatedly refers to adverse inferences and deemed findings as "severe" sanctions, but the case law is clear that these sanctions are not properly considered "severe." In this context, the term "severe" refers to sanctions of dismissal and contempt, not to the more limited sanctions imposed here.

Linde v. Arab Bank, Inc. 269 F.R.D. 186, 199 n.11 (S.D.N.Y. 2010).

Another point with regard to adverse inferences is that they are not all the same. Some may command the jury to find certain facts established, or even to find certain claims established. Others may be entirely permissive, simply telling the jury that if they find that a party lost something it should have retained the jury may infer that this lost item would help the other side if it concludes that the party was trying to get rid of harmful evidence. Even without an instruction, a lawyer could make that argument to the jury; having the judge endorse the possibility with a jury instruction is no doubt important to the lawyer but very different from a "severe" adverse inference instruction.

In re Oracle Corp. Securities Litig., 627 F.3d 376 (9th Cir. 2010), illustrates the range of adverse inferences possible, and also points out that they can be important at the summary judgment stage, not just in jury instructions. Plaintiffs in that securities fraud suit established that defendants willfully failed to preserve the email and other materials from Larry Ellison, Oracle's CEO. When defendants moved for summary judgment, the district court therefore gave the plaintiffs the benefit of an adverse inference that the lost materials would have proved Ellison's knowledge of any material facts plaintiffs were able to establish. But plaintiffs did not persuade Judge Illston that there were any material factual disputes, and she granted defendants' summary-judgment motion.

On appeal, plaintiffs urged that the district court should have used an adverse inference sufficient to establish their prima facie case and therefore to defeat the summary-judgment motion. The 9th Circuit disagreed (id. at 386):

> Over 2.1 million documents were produced during discovery. Although Ellison's email account files were not produced, the documents that were produced contained numerous email chains in which Ellison's correspondence was contained. If there were material issues of fact supporting securities fraud, Plaintiffs should have been able to glean them from the documents actually produced, the extensive deposition testimony, and the written discovery between the parties. An adverse inference would then properly apply to establish that Ellison must have known of those damaging material facts. Plaintiffs' problem here lies in the dearth of admissible evidence to show fraud.

The court added that an adverse inference sanctions "should be carefully fashioned to deny the wrongdoer the fruits of its misconduct yet not interfere with that party's right to produce other evidence." Id. at 386-87.

37(b)(2)(A)(i)-(vi) or inform the jury of the party's failure to preserve information unless the party seeking sanctions establishes that the party to be sanctioned violated Rule 26.1 [negligently] {due to gross negligence} [willfully] {in bad faith} [intending to prevent use of the lost information as evidence];[45]

(B) *[Alternative 2]* the court must not impose a sanction if the party to be sanctioned establishes that it acted in good faith in relation to the violation of Rule 26.1;[46]

(C) the court must be guided by proportionality, making the sanction proportional to the harm caused to the party seeking sanctions and the level of culpability[47] of the party to be sanctioned.

(3) ***Payment of Expenses***. Instead of or in addition to imposing a sanction, the court must order the party in violation of Rule 26.1, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the violation, unless the violation was substantially justified or other circumstances make an award of expenses unjust.

---

[45] This is an effort to incorporate a showing of state of mind into the criteria for sanctions. Either here or in a Committee Note, one could address the significance of a litigation hold. That is not included in the draft rule language in part because it seems so difficult to determine what a "litigation hold" is, and also because the question whether adequate follow-up occurred could often be important.

The Duke panel urged that "[t]he state of mind necessary to warrant each identified sanction should be specified." Doing that seems quite difficult -- given the range of sanctions listed in Rule 37(b)(2)(A), the range of states of mind identified above, and the variety of facts arising in different cases.

[46] This is an effort to shift the state-of-mind inquiry from being a matter to be proven to support sanctions into being a matter of defense for the party resisting sanctions.

[47] This phrase is far from ideal, but attempts to capture what is meant.

CATEGORY 2

The concept behind this category is that it may be desirable and possible to devise more general rules regarding preservation. A key consideration here is whether rules of such generality will actually be useful to parties making preservation decisions, particularly before litigation begins. (After litigation begins, they can at least apply to the court for clarification about what they should be doing.)

Rule 26.1. Duty to Preserve Discoverable Information

(a) General Duty to Preserve. [In addition to any duty to preserve information provided by other law,] every person who reasonably expects [is reasonably certain] to be a party to an action cognizable in a United States court must preserve discoverable [electronically stored] information in as follows.

(b) Trigger for Duty to Preserve. *[Alternative 1]* The duty to preserve discoverable information under Rule 26.1(a) arises when a person becomes aware of facts or circumstances that would lead a reasonable person to expect to be a party to an action [cognizable in a United States court].

(b) Trigger for Duty to Preserve. *[Alternative 2]* The duty to preserve discoverable information arises when a person becomes aware of facts or circumstances that would lead a reasonable person to expect to be a party to an action [cognizable in a United States court] such as:

(1) Service of a pleading or other document asserting a claim; or

(2) Receipt of a notice of claim or other communication -- whether formal or informal -- indicating an intention to assert a claim; or

(3) Service of a subpoena or similar demand for information; or

(4) Retention of counsel, retention of an expert witness or consultant, testing of materials, discussion of possible compromise of a claim or taking any other action in anticipation of litigation; or

(5) Receipt of a notice or demand to preserve discoverable information; or

(6) The occurrence of an event that results in a duty to preserve information under a statute, regulation, contract, or the person's own retention program.

(c) Scope of Duty to Preserve. A person whose duty to preserve discoverable information has been triggered under Rule 26.1(b) must take actions reasonable under the circumstances to preserve [discoverable information][48] in regard to the potential claim of which the person is or should be aware, [taking into account the proportionality criteria of Rule 26(b)(2)(C)] {considering the burden or expense of preservation, the likely needs of the case, the amount likely to be in controversy, the parties' resources, the importance of the issues at stake in the action, and the potential importance of the preserved information in resolving the issues}.[49]

(d) Ongoing duty. The person must take reasonable measures to continue to preserve information subject to preservation under Rule 26.1(c) for a reasonable period after the date the obligation to preserve is triggered under Rule 26.1(b).

(e) Remedies for failure to preserve. The sole remedy for failure to preserve information is under Rule 37(e).

Rule 37. Failure to Make Disclosures

---

[48] One suggestion from the Duke panel was to specify a different preservation duty for parties and nonparties. In the pre-litigation context, this seems particularly challenging since nobody is yet a party. Whether there should be a distinction on this ground is debatable in any event. For example, should it matter if, under Rule 15(c), the nonparty is one that should have realized it would have been sued?

[49] The idea here is to invoke the concept of relevance as a defining factor for the duty to preserve. Using it might raise several problems. For one thing, the claim involved has not been made in a formal way. For another, relevance is a very broad concept. Indeed, one might need to address whether this means relevant to the claim or defense or to the subject matter, topics last addressed in the 2000 amendments to Rule 26(b)(1).

Another question that might arise at this point is whether allegedly privileged materials must be preserved. Those are not within the scope of discovery, but the court can't pass on whether discarded materials were indeed privileged. This problem will be mentioned again below.

or to Cooperate in Discovery; Sanctions

* * * * *

(e) Sanctions for failure to preserve [electronically stored] {discoverable} information. A court may not impose sanctions [under these rules] on a party for failure to preserve information if the party has complied with Rule 26.1. The following rules apply to a request for sanctions for violation of Rule 26.1:

(1) ***Burden of proof***. The party seeking sanctions has the burden of proving that:

(A) a violation of Rule 26.1 has occurred;

(B) as a result of that violation, the party seeking sanctions has been denied access to specified electronically stored information, [documents or tangible things];

(C) no alternative source exists for the specified electronically stored information [documents or tangible things];

(D) the specified electronically stored information [documents or tangible things] would be [relevant under Rule 26(b)(1)] {relevant under Evidence Rule 401} [material] to the claim or defense of the party seeking sanctions;

(E) the party seeking sanctions promptly sought relief in court after it became aware of the violation of Rule 26.1.

(2) ***Selection of sanction***. If the party seeking sanctions makes the showings specified in Rule 37(e)(1), the following rules apply to selection of a sanction:

(A) the court may employ any sanction under Rule 37(b)(2)(A)(i)-(vi) or inform the jury of the party's failure to preserve information but must select the least severe sanction necessary to redress [undo the harm caused by] the violation of Rule 26.1;

(B) *[Alternative 1]* the court may not impose a sanction under Rule

37(b)(2)(A)(i)-(vi) or inform the jury of the party's failure to preserve information unless the party seeking sanctions establishes that the party to be sanctioned violated Rule 26.1 [negligently] {due to gross negligence} [willfully] {in bad faith} [intending to prevent use of the lost information as evidence];

(B) *[Alternative 2]* the court must not impose a sanction if the party to be sanctioned establishes that it acted in good faith in relation to the violation of Rule 26.1;

(C) the court must be guided by proportionality, making the sanction proportional to the harm caused to the party seeking sanctions and the level of culpability of the party to be sanctioned.

(3) ***Payment of Expenses***. Instead of or in addition to imposing a sanction, the court must order the party in violation of Rule 26.1, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the violation, unless the violation was substantially justified or other circumstances make an award of expenses unjust.

CATEGORY 3

This approach relies entirely on a "back end" rule provision and has no specific preservation provisions. It is intended to authorize Rule 37(b) sanctions whenever a party does not reasonably preserve, and so should generally make reliance on inherent authority unimportant.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

(g) FAILURE TO PRESERVE DISCOVERABLE INFORMATION; REMEDIES

(1) If a party fails to preserve discoverable information that reasonably should be preserved in the anticipation or conduct of litigation, the court may[, when necessary][50]:

(A) permit additional discovery;

(B) order the party to undertake curative[51] measures; or

(C) require the party to pay the reasonable expenses, including attorney's fees,[52] caused by the failure.

(2) Absent extraordinary circumstances [irreparable prejudice],[53] the court may not impose

---

[50] Whether this qualification is helpful could be debated. The idea is to authorize various responses to the loss of data that would not be characterized as "sanctions." Saying they may be used only "when necessary" might suggest that discovery orders more generally are subject to that limitation. Even Rule 26(b)(2)(B) would not necessarily condition an order to restore inaccessible sources on a showing of "necessity," much as that consideration could matter to judges considering what to do about backup tapes and the like.

[51] Does "curative" have a commonly understood meaning? Would "other remedial" give greater flexibility? The goal here is to emphasize that orders that otherwise not be made are justified due to the loss of data. Again, this is not a "sanction," but an effort by the court to minimize the possible harm to a litigant's case resulting from another party's loss of data.

[52] Would this possibility tend to encourage claims of spoliation? It might be that one could, by succeeding on a spoliation argument, get a "free ride" for discovery one would otherwise be doing at one's own expense. Hopefully, it should be clear that discovery is made necessary by the loss of data, and not something that would happen in the ordinary course. But will there be many instances in which that is not clear?

[53] This proviso is designed to authorize sanctions in the absence of fault in cases like Silvestri v. General Motors Corp., 271 F.3d 583 (4th Cir. 2001), where the loss of the data essentially preclude effective litigation by the innocent party. One question is whether such instances are truly extraordinary. If they happen with some frequency, this may be the wrong phrase.

any of the sanctions listed in Rule 37(b)(2) or give an adverse-inference jury instruction[54] unless the party's failure to preserve discoverable information was willful or in bad faith and caused [substantial] prejudice in the litigation.

(3) In determining whether a party failed to preserve discoverable information that reasonably should have been preserved, and whether the failure was willful or in bad faith,[55] the court may consider all relevant factors, including:

(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;[56]

(B) the reasonableness of the party's efforts to preserve the information, including the use of a litigation hold and the scope of the preservation efforts;[57]

(C) whether the party received a request that information be preserved, the clarity

---

The term irreparable prejudice may be preferable to focus on the real concern here. It would be important, however, to ensure that this be limited to extremely severe prejudice. Most or all sanctions depend on some showing of prejudice. Often that will be irreparable unless the "curative" measures identified in (g)(1) above clearly solve the whole problem. The focus should be on whether the lost data are so central to the case that no cure can be found.

[54] Is this too broad? Adverse inference instructions can vary greatly. General jury instructions, for example, might tell the jury that it could infer that evidence not produced by a party even though it should have had access to the evidence supports an inference that the evidence would have weakened the party's case. Is that sort of general instruction, not focusing on any specific topic, forbidden? How about the judge's "comment on the evidence" concerning lost evidence but not in the form of a jury instruction? Would this rule forbid attorney argument to the jury inviting to make an adverse inference if there were no instruction at all on the subject?

[55] Combining an evaluation of reasonableness and willfulness or bad faith in one set of factors is attractive. Often the circumstances that bear on reasonableness also will bear on intent. Would it help to add other factors that bear directly on intent, but also may bear on reasonableness? Examples might include departure from independent legal requirements to preserve, departure from the party's own regular preservation practices, or deliberate destruction.

[56] Is this treatment sufficient to substitute for provisions about "trigger" like the ones in Category I or Category II. If those provide useful detail, would it be desirable to add similar detail here?

[57] The use of "scope" is designed to permit consideration of a variety of factors. The Committee Note would elaborate about breadth of subject matter, sources searched (including "key custodians:), form of preservation, retrospective reach in time, and so on. Cases are likely to differ from one another, and "scope" will hopefully permit sensible assessment of an array of circumstances.

and reasonableness[58] of the request, and — if a request was made — whether the person who made the request or the party offered to engage in good-faith consultation regarding the scope of preservation;

(D) the party's resources and sophistication in matters of litigation;[59]

(E) the proportionality of the preservation efforts to any[60] anticipated or ongoing litigation; and

(F) whether the party sought timely guidance from the court[61] regarding any unresolved disputes concerning the preservation of discoverable information.

* * * * *

Besides the footnoted questions, the Category 3 approach is intended generally to permit consideration of the extent to which the backwards shadow of such a rule would reassure and give direction to those making preservation decisions. Would it only do so if it absolutely precluded sanctions (absent "irreparable prejudice") in the absence of proof of bad faith or willfulness? Would it adequately ensure a uniform treatment of these issues nationwide, or possibly be interpreted in keeping with the existing (and seemingly inconsistent) precedents in the area?

---

[58] Does this mean that an unreasonable request imposes a lesser duty than a reasonable request? Should clarity be the test here, since reasonableness of preservation efforts is already addressed in (B)?

[59] This consideration seems important to address the potential problem of spoliation by potential plaintiffs who may realize that they could have a claim, but not that they should keep their notes, etc. for the potential litigation. Are resources a useful consideration here? A wealthy individual might be quite unfamiliar with litigation. Is this somewhat at war with considering whether the party obeyed its own preservation standards? Making those relevant to the question of whether preservation should have occurred may be seen to deter organizations from having preservation standards. It is unclear how many organizational litigants -- corporate or governmental -- actually have such standards. Does the fact they exist prove that this litigant is "sophisticated"?

[60] This is broad, but probably the right choice. If the party reasonably anticipates multiple actions, proportionality is measured in contemplating all of them. A party to any individual action should be able to invoke the duty of preservation that is owed to the entire set of reasonably anticipated parties.

[61] This implicitly applies only when there is an ongoing action. Do we need anything more than a Committee Note to recognize that it is difficult to seek guidance from a court before there is a pending action? What if there is a pending action, and the party reasonably should anticipate further actions — is it fair to consult with one court (perhaps chosen from among many), pointing to the overall mass of pending and anticipated actions, and then invoke that court's guidance when addressing other courts?

B PLEADING STANDARDS

Lower courts continue to respond to the Supreme Court's rulings on pleading standards in the Twombly and Iqbal opinions. The memorandum prepared by Andrea Kuperman, Chief Counsel to the Rules Committee Support Office, continues to grow. More than 500 pages of case summaries, focused primarily on the more interesting published opinions of the courts of appeals, suggest that what once seemed a shifting target may be stabilizing.

Recent observations about pleading standards in Supreme Court opinions may reinforce the sense of convergence. *Skinner v. Switzer*, 2011 WL 767703 (March 7, 2011), upheld a state prisoner's complaint claiming a denial of due process in the district attorney's refusal to allow access to biological evidence for purposes of DNA forensic testing. The Court stated that on a motion to dismiss for failure to state a claim, the test is not whether the plaintiff will ultimately prevail, "but whether his complaint was sufficient to cross the federal court's threshold, see Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 * * * (2002). * * * [A] complaint need not pin plaintiff's claim for relief to a precise legal theory. Rule 8(a)(2) * * * generally requires only a plausible 'short and plain' statement of the plaintiff's claim, not an exposition of his legal argument." This passage seems to reinvigorate the Swierkiewicz rejection of "heightened pleading," and to apply it outside the employment-discrimination context.

Two weeks later the Court decided *Matrixx Initiatives, Inc. v. Siracusano*, 2011 WL 977060 (March 22, 2011). The sufficiency of the complaint claiming securities fraud was challenged on two issues: whether the facts not disclosed by the defendant were material, and whether the defendant's failure to disclose involved the required scienter. The defendant sold a cold remedy. It had reports suggesting that use of its product can cause loss of the sense of smell. The information did not amount to a statistically significant showing of causation. The question of materiality was whether investors might think the information important even if not statistically significant. The Court found reasonable investors might fear that consumers would switch to other cold remedies when confronted with the risk of losing the sense of smell. Quoting Twombly, the Court thought the allegations "'raise a reasonable expectation that discovery will reveal evidence'" satisfying the materiality standard. Quoting Iqbal, the allegations sufficed to "'allo[w] the court to draw a reasonable inference that the defendant is liable for the misconduct alleged.'" Turning to scienter, the Court invoked the Tellabs decision. The inference that Matrixx acted recklessly (or intentionally) "is at least as compelling, if not more compelling, than the inference that it simply thought the reports did not indicate anything meaningful about adverse reactions." Scienter was adequately pleaded; whether plaintiffs "can ultimately prove their allegations and establish scienter is an altogether different question."

These two Supreme court opinions do not clearly reset the rhetoric of the Twombly and Iqbal decisions. But they do reinforce the belief that context matters. How much fact is required to support a reasonable inference of liability varies with context, and in many types of action can be rather scant.

Taken together, moreover, the lower-court decisions may suggest that not much has changed in actual practice. That hypothesis finds support in the first detailed study done by the Federal

Judicial Center, although a follow-up study has been undertaken in the hope of providing additional important information. Still, there is ample reason to evaluate ongoing pleading practices with an eye to possible rules responses. The prospect of even subtle or subject-specific changes is viewed with fear by some observers and with hope by others. The Committee continues its close study of pleading standards and related discovery rules.

The FJC Study is attached. Joe Cecil will present it at this meeting, as he presented it to the Advisory Committee. The study sought to compare disposition of Rule 12(b)(6) motions to dismiss complaints before the Twombly decision and after the Iqbal decision, focusing not only on overall rates of motions and dismissals but also on the rates in broad categories of cases. The study proved complicated because of the need to make statistical adjustments to compensate for other developments occurring in the same time period that affect the raw count of motions and dispositions. "A lot changed between 2006 and 2010 that was unrelated to Twombly and Iqbal." A succinct but potentially misleading statement of the central finding would be that the rate of filing 12(b)(6) motions has increased, while the rate of granting the motions as held constant. A natural conclusion would be that a constant rate of granting an increased number of motions means that more cases are dismissed for failure to state a claim. But the comparison is made between two data sets, and it is difficult to confirm or deny this possible conclusion.

One major complication is an increase in the percentage of orders that grant a 12(b)(6) motion, but with leave to amend. This study did not undertake to determine what happens after leave to amend is granted — whether an amended complaint is filed, whether the amended complaint is challenged by a renewed motion to dismiss, whether discovery continues while any renewed motion remains pending, and whether any renewed motion is eventually granted. All of these questions need be answered to develop a better picture. The next study will attempt to answer them.

Other questions elude the capacities of even the most careful docket studies. It is not possible to identify cases that would have been filed under earlier understandings of pleading standards but were not filed for fear of heightened pleading standards. (Removal rates were studied; no differences were found.) It is not possible to determine whether cases were dismissed for want of pleading facts that could be known only by discovering information available only by discovery from the defendant. It would be difficult to assess the quality of the differences between initially unsuccessful complaints and successful amended complaints, or to measure the advantages of an amended complaint in working toward ultimate resolution. And it is similarly difficult to distinguish pleadings that fail for want of factual sufficiency alone and those that fail in whole or in part for advancing an untenable legal theory.

The FJC study — and the promise of its next study — combines with the review of judicial decisions to suggest there is no urgent need for immediate action on pleading standards. The courts are still sorting things out. There is reason to hope that the common-law process of responding to and refining the Supreme Court's invitation to reconsider pleading practices will arrive at good practices. An attempt to anticipate the process and capture it in reworded pleading rules might easily prove less effective. The first challenge that must be met whenever rule text is drafted is to determine whether there has been any significant change in practice, and whether any changed standards are too high, too low, or just about right. If the standards seem about right, there would

be little point in courting disruption by attempting to capture them in new rule text; Rule 8(a)(2), the subject of the Supreme Court's interpretation, would be doing good work. If the standards seem too high or too low, the array of possible drafting responses will be enormous.

Rather than revise general pleading standards, it might prove desirable to adopt specific standards for particular categories of cases. Since 1993 the Committee has periodically considered the possibility of adding more claims to the list of matters that must be pleaded with particularity under Rule 9(b). An alternative might be to list categories of claims that can be pleaded with less detail than most claims. Either approach would demand careful definitions. Either would raise potentially troubling questions of favor or disfavor for substantive, not procedural, reasons.

Other pleading approaches might be taken. One possibility, seriously considered but put aside shortly before the Twombly decision, would be to carry on with general notice pleading but reinvigorate the motion for a more definite statement.

Affirmative defenses may also become a subject for pleading reform. Why not expressly require a "short and plain statement" of an affirmative defense?

Apart from pleading standards, it may be desirable to integrate discovery more closely with pleading practice. Those who oppose heightened pleading requirements constantly point to circumstances of "information asymmetry," in which facts needed to plead the context that makes a claim plausible are known only to the defendant. Major variations are possible. Provision could be made for pre-filing discovery in aid of framing a complaint. Or discovery could be made available to a plaintiff who files an initial complaint together with a request for identified discovery to support an amended complaint. Or discovery could be made available — perhaps on terms similar to the summary-judgment practice in Rule 56(d) — to facilitate response to a motion to dismiss. If dismissals on the pleadings come to be a subject for rules revisions, these discovery possibilities will deserve serious development.

For all of these intriguing possibilities, the approach to pleading practice remains what it has been since 2007. The Committee will closely monitor developing practice, it will encourage and heed further rigorous empirical work, and it will listen carefully to the voices of bench, bar, and academy. Procedural ferment is exciting, but it does not justify an excited response.

Motions to Dismiss for Failure to State a Claim After *Iqbal*

Report to the Judicial Conference
Advisory Committee
on Civil Rules

Joe S. Cecil, George W. Cort,
Margaret S. Williams & Jared J. Bataillon

Federal Judicial Center
March 2011

Contents

Acknowledgments

The authors are grateful to so many of our colleagues for the excellent assistance they provided throughout the course of this study. Matthew Ward and Shelia Thorpe of the Federal Judicial Center assisted us in structuring this study through the data they collected as part of our pilot projects. Matthew Ward and Jill Curry prepared a supplemental assessment of cases removed from state court. Professor David Rindskopf of the City University of New York Graduate Center provided guidance concerning the statistical analyses. We are especially grateful to Professor Steven Gensler and our conscientious coding team of recent graduates of the University of Oklahoma School of Law: Amanda Janssen, Cale Drumright, Conor Cleary, Jackie Campbell, Lauren Lindsey, Terra Lord, Michael Cromwell, Jared Weir, and John Reid. Jackie Campbell continued to assist us with this project after coming to the Federal Judicial Center.

Executive Summary

This report presents the findings of a Federal Judicial Center study on the filing and resolution of motions to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The study was requested by the Judicial Conference Advisory Committee on Civil Rules. The study compared motion activity in 23 federal district courts in 2006 and 2010 and included an assessment of the outcome of motions in orders that do not appear in the computerized legal reference systems such as Westlaw. Statistical models were used to control for such factors as differences in levels of motion activity in individual federal district courts and types of cases.

After excluding cases filed by prisoners and pro se parties, and after controlling for differences in motion activity across federal district courts and across types of cases and for the presence of an amended complaint, we found the following:

- There was a general increase from 2006 to 2010 in the rate of filing of motions to dismiss for failure to state a claim (see *infra* section III.A).
- In general, there was no increase in the rate of grants of motions to dismiss without leave to amend. There was, in particular, no increase in the rate of grants of motions to dismiss without leave to amend in civil rights cases and employment discrimination cases (see *infra* section III.B.1).
- Only in cases challenging mortgage loans on both federal and state law grounds did we find an increase in the rate of grants of motions to dismiss without leave to amend. Many of these cases were removed from state to federal court. This category of cases tripled in number during the relevant period in response to events in the housing market (see *infra* section III.B.1). There is no reason to believe that the rate of dismissals without leave to amend would have been lower in 2006 had such cases existed then.
- There was no increase from 2006 to 2010 in the rate at which a grant of a motion to dismiss terminated the case (see *infra* section III.B.1).

I. Origin of the Study

In October 2009, the Judicial Conference Advisory Committee on Civil Rules asked the Federal Judicial Center to undertake an analysis of changes in the filing and resolution of motions to dismiss filed under authority of Federal Rule of Civil Procedure 12(b)(6). This request was prompted by two recent Supreme Court decisions—*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. _, 129 S. Ct. 1937 (2009)—that interpreted Rule 8(a) by stating that a plaintiff must present a "plausible" claim for relief. A number of commentators expressed concern about whether lower courts would apply *Twombly* and *Iqbal* to dismiss claims that, had discovery proceeded, would have been shown to be meritorious.[1]

This study was designed to assess changes in motions to dismiss and decisions on such motions over time in broad categories of civil cases. Of course, this study could not fully capture all of the factors affecting motions to dismiss. In particular, it could not fully reflect the appellate court case law that continues to develop and that provides specific guidance for district courts.

At the request of the Advisory Committee, the Administrative Office of the U.S. Courts (AO) developed a series of tables that track the numbers of motions to dismiss filed and decided across all federal courts.[2] These tables do not indicate a clear change in filing patterns or disposition patterns after *Twombly* or *Iqbal*. But they include all types of motions to dismiss[3] and do not permit a precise assessment of Rule 12(b)(6) motions to dismiss for failure to state a claim. They also do not distinguish between orders granting motions to dismiss with leave to amend and orders granting motions without leave to amend.

Three scholars have undertaken four empirical studies to assess changes in pleading practice following the *Twombly* and *Iqbal* Supreme Court decisions.[4]

1. *See, e.g.*, Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 Notre Dame L. Rev. 849, 878–79 (2010) (expressing concern that plaintiffs will be unable to survive the pleading stage and have access to discovery when the defendant has critical information, especially in civil rights cases); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 14, 34 (2010) (*Twombly* and *Iqbal* may well have come at the expense of access to the courts and the ability of citizens to obtain adjudication of their claims' merits).

2. Statistical Information on Motions to Dismiss re *Twombly/Iqbal* (Rev. 12/3/10), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/NOS-Motions Quarterly December 031611.pdf. These tables are discussed in William M. Janssen, Iqbal *"Plausibility" in Pharmaceutical and Medical Device Litigation*, 71 La. L. Rev. 541, 575 (2011).

3. In addition to Rule 12(b)(6) motions to dismiss, the tables include other Rule 12(b) motions and Rule 12(c) motions. We are presently exploring the differences in the AO database and the databases developed for our study.

4. Kendall Hannon compared orders responding to motions to dismiss for failure to state a claim immediately before and soon after the *Twombly* decision. He found that such motions were more likely to be granted following *Twombly* in civil rights cases (41.7% prior to *Twombly*, 52.9% after *Twombly*), and that there was little change in other types of cases. *See* Kendall W. Hannon, *Much Ado About* Twombly, 83 Notre Dame L. Rev. 1811 (2008). This study did not distinguish between motions granted with leave to amend the complaint and those granted without leave to amend.

These four studies share two characteristics that limit their findings. First, each study was based on opinions appearing in the Westlaw database, which is likely to overrepresent orders granting motions to dismiss when compared with orders appearing on docket sheets.[5] Second, each of these studies reviewed district court orders decided soon after the Supreme Court decisions and before interpretation of the decisions by the courts of appeals. The courts of appeals have since reversed a number of the early district court decisions[6] and have issued a growing

Joseph Seiner has published two studies focusing on the outcome of motions to dismiss for failure to state a claim in civil rights litigation. His first study examined employment discrimination cases before and after *Twombly* and found increases in the rate at which motions were granted that did not reach levels of statistical significance. *See* Joseph A. Seiner, *The Trouble With Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. Ill. L. Rev. 1011, 1032. Seiner's study of motions to dismiss was based on searches for cases appearing in the Westlaw database. Seiner's second study examined motions in cases alleging discrimination under Title 1 of the Americans with Disabilities Act. Again, he found an increase in motions granted that did not meet standards of statistical significance. *See* Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. Rev. 95 (2010).

Patricia Hatamyar examined orders responding to motions to dismiss for failure to state a claim two years before *Twombly*, two years after *Twombly*¸ and immediately after *Iqbal*; she found an increase in motions granted (46% to 48% to 56%, respectively). The greatest increases were in motions granted with leave to amend. Orders granting motions in civil rights cases also increased during the three periods (50% to 53% to 58%, respectively, without distinguishing leave to amend). *See* Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 Am. U. L. Rev. 553, 607 (2010). Hatamyar also presented a series of multinomial regression models that appear to confirm this increase over time in the rate at which motions are granted with leave to amend while controlling for pro se status, circuit, and type of case.

In addition to these four studies, there have been a number of empirical studies of motions to dismiss that are not directly related to an assessment of the effects of *Twombly* and *Iqbal*. Alexander Reinert examined cases from the 1990s in which grants of Rule 12(b)(6) motions have been reversed by the courts of appeals. Reinert regards such cases as similar to cases that would be dismissed and affirmed on appeal after *Iqbal.* He determined that after remand, these cases were as likely to succeed as all civil cases terminated during that period. *See* Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 Ind. L.J. 119 (2011). The strength of this analysis rests on the assumption that cases with motions reversed on appeal are comparable to all civil cases, including those in which a motion to dismiss was never filed. Adam Pritchard and Hillary Sale have examined the effects of the Private Securities Litigation Reform Act on motions to dismiss. *See generally* Adam C. Pritchard & Hillary A. Sale, *What Counts as Fraud? An Empirical Study of Motions to Dismiss Under the Private Securities Litigation Reform Act*, 2 J. Empirical Legal Stud. 125, 128 (2005).

5. *See* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?* 1 J. Empirical Legal Stud. 591, 604 (2004) (asserting that reliance on published cases alone results in a distorted assessment of case activity); Brian N. Lizotte, *Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts*, 2007 Wis. L. Rev. 107, 130 (reporting differences in published and unpublished orders granting summary judgment motions). A preliminary assessment found some evidence that orders granting motions to dismiss may be overrepresented in orders appearing in the Westlaw database. *Infra* note 47.

6. *See, e.g.*, Gonzalez v. Kay, 577 F.3d 600 (5th Cir. 2009) (reversing dismissal of claimed violation of the Fair Debt Collection Practices Act), *cert. denied*, 130 S. Ct. 1505 (2010); Siracusano v. Matrixx Initiatives, Inc., 585 F.3d 1167 (9th Cir. 2009) (reversing dismissal of complaint alleging violation of federal security laws), *aff'd*, ___ S. Ct. ___, No. 09-1156, 2011 WL 977060,

body of case law that requires district courts to be cautious and context-specific in applying *Twombly* and *Iqbal*.[7] Both recent Supreme Court decisions[8] and emerging appellate case law may reassure those concerned about the impact of *Twombly* and *Iqbal*.

at *12 (March 22, 2011); Braden v. Wal-Mart Stores, Inc., 588 F.3d 585 (8th Cir. 2009) (reversing dismissal of claim that defendants violated fiduciary duties imposed by the Employee Retirement Income Security Act (ERISA)); Sanchez v. Pereira-Castillo, 590 F.3d 31 (1st Cir. 2009) (reversing the dismissal of the Fourth Amendment claims by a prisoner against two correctional officers and a doctor); Swanson v. Citibank, N.A., 614 F.3d 400 (7th Cir. 2010) (reversing in part, finding that plaintiff stated a claim for racial discrimination); DiFolco v. MSNBC Cable L.L.C., 622 F.3d 104 (2d Cir. 2010) (reversing in part, finding that plaintiff stated a claim for breach of contract and defamation); Speaker v. U.S. Dep't of Health & Human Servs. Ctrs. for Disease Control & Prevention, 623 F.3d 1371 (11th Cir. 2010) (reversing dismissal of claims under the Privacy Act); West Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85 (3d Cir. 2010) (reversing dismissal of antitrust claims); Gee v. Pacheco, 627 F.3d 1178 (10th Cir. 2010) (reversing dismissal of pro se prisoner's claims of violations under 42 U.S.C. § 1983). These cases and others are summarized in Memorandum from Andrea Kuperman to Civil Rules Comm. and Standing Rules Comm., Review of Case Law Applying Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal (December 15, 2010), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Iqbal_memo_121510.pdf (last visited February 25, 2011).

7. *See Kuperman*, *supra* note 6.

8. *See* Skinner v. Switzer, ___ S. Ct. ___, No. 09-9000, 2011 WL 767703, at *6 (March 7, 2011) ("Because this case was resolved on a motion to dismiss for failure to state a claim, the question below was 'not whether [Skinner] will ultimately prevail' on his procedural due process claim, but whether his complaint was sufficient to cross the federal court's threshold, see Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002). Skinner's complaint is not a model of the careful drafter's art, but under the Federal Rules of Civil Procedure, a complaint need not pin plaintiff's claim for relief to a precise legal theory. Rule 8(a)(2) of the Federal Rules of Civil Procedure generally requires only a plausible 'short and plain' statement of the plaintiff's claim, not an exposition of his legal argument." (alteration in original) (internal citations omitted)); *see also* Matrixx Initiatives, Inc. v. Siracusano, ___ S. Ct. ___, No. 09-1156, 2011 WL 977060, at *12 (March 22, 2011) (unanimously affirming the circuit court's reversal of dismissal at the pleadings stage of a securities fraud class action).

II. Methodology

This study examined motion activity in 2006 and 2010. Using these periods allows an assessment that neither anticipates the decision in *Bell Atlantic Corp. v. Twombly* nor responds to the decision in *Ashcroft v. Iqbal* in the absence of appellate court guidance. This study also assessed changes in orders using records of the federal district courts rather than opinions published in computerized legal reference systems. We used the courts' CM/ECF codes indicating the filing of motions to dismiss and related orders to identify electronic documents with relevant motions and orders that were in PDF format and were linked to the civil case docket sheets. We then translated these documents into text format and searched electronically for terms that identified Rule 12(b)(6) motions and orders that respond to the merits of such motions.[9] This procedure is intended to be equivalent to identifying motions and orders through docket sheet entries and then reviewing documents linked to the docket entries. It provides a more complete assessment of motion activity than reliance on computerized legal reference systems.

We selected the 23 federal district courts to be included in the study by identifying the 2 districts in each of the 11 circuits with the largest number of civil cases filed in 2009. We also included the U.S. District Court for the District of Columbia. On occasion we were unable to obtain access to some of the courts' codes necessary to identify all of the relevant motions. In such cases, we chose the court in the circuit with the next greatest number of civil filings. These 23 district courts account for 51% of all federal civil cases filed during this period.

Two data sets were developed using these methods. To assess changes in filing patterns, we identified those cases with motions to dismiss for failure to state a claim filed in the first 90 days from among all civil cases filed in the selected districts from October 2005 through June 2006, and October 2009 through June 2010. To assess the changes in the outcomes of motions to dismiss for failure to state a claim, we identified orders responding to motions decided in January through June of 2006 and 2010. We coded these orders to identify the nature of the parties, whether the motion responded to an amended complaint, the presence of other Rule 12 motions, and judicial action taken in response to the motion. We indicated whether a motion was denied, was granted as to all relief requested by the motion, or was granted as to some but not all of the relief requested by the motion. These last two categories were often combined in the analyses and we simply noted that the motion was granted. In those instances in which the court granted at least some of the relief requested by the motion, we also coded whether the plaintiff was allowed to amend the complaint, and whether the motion eliminated only some claims or all claims of one or more plaintiffs.

9. We performed text searches using the following terms: "facts sufficient"; "sufficient facts"; "plausible claim"; "fails to state a claim"; "failed to state a claim"; and "failing to state a claim". We also searched for the phrase "12(b)(6)" with and without spaces separating the three elements of the phrase.

We excluded from these analyses all prisoner cases and cases with pro se parties.[10] We also excluded motions responding to counterclaims and affirmative defenses from the analysis of judicial actions on motions. The methodology and coding standards used in this study are described in greater detail in Appendices B and C.

10. We excluded prisoner cases because of the distinctive characteristics and procedural requirements of such litigation, and because they were concentrated in only 4 of the 23 districts included in this study. We also excluded pro se cases, which are governed by standards other than *Twombly* and *Iqbal*. Pro se pleadings are to be liberally construed, "however inartfully pleaded." Hughes v. Rowe, 449 U.S. 5, 9 (1980). The Supreme Court reaffirmed this standard soon after the *Twombly* decision. *See* Erickson v. Pardus, 551 U.S. 89 (2007). We were also concerned that our method for identifying motions to dismiss for failure to state a claim based on text searches would miss motions saved as static images in PDF format, which we suspect may be more likely to appear in prisoner and pro se filings. *See infra* note 46.

III. Results

Our assessment of the effect of *Twombly* and *Iqbal* on the filing and outcome of motions to dismiss was complicated by many changes that affected civil litigation between 2006 and 2010 in addition to the Supreme Court decisions. In 2008, the economy experienced a marked downturn that affected the housing market in particular. This change, along with many others, resulted in a shift in the case mix over this period. There was a general increase in cases challenging mortgages and other forms of financial debt instruments. Individual courts also experienced changes in filing patterns: most courts showed an overall increase in case filings. The courts in this study vary in size and contribute differently to the overall differences in activity from 2006 to 2010. We also found that the orders decided after *Iqbal* were different in nature from the orders decided before *Twombly*. Multiple motions to dismiss were resolved in 20% of the 2010 orders, down from 26% of the 2006 orders.[11] Previously amended complaints were considered in 48% of the 2010 motions, up from 38% of the 2006 orders.[12]

11. The resolution of multiple motions to dismiss for failure to state a claim by a single order is difficult to interpret, since the motions themselves are highly variable. One motion may be filed by multiple defendants and directed at multiple claims by one or more plaintiffs. Multiple motions may be filed by a single defendant, or multiple defendants may file separate motions attacking the same claim. For these reasons, we placed little weight on the drop in orders resolving multiple motions in 2010, and coded all motions resolved by a single order as though they were a single motion.

12. These differences achieved conventional levels of statistical significance ($p \leq 0.05$). Plaintiffs are likely to amend a complaint soon after a substantive change in pleading standards. Courts may be more likely to dismiss without leave to amend when a complaint has been amended to take new standards into account. Both before *Twombly* and after *Iqbal*, the number of times a plaintiff has amended the complaint is a factor a court considers in deciding whether to dismiss with prejudice. *See In re* Vantive Corp. Sec. Litig., 283 F.3d 1079, 1098 (9th Cir. 2002) ("In this case, the plaintiffs had three opportunities to plead their best possible case. It was therefore not unreasonable for the district court to conclude that it would be pointless to give the plaintiffs yet another chance to amend."), *abrogation on other grounds recognized by* South Ferry LP, No. 2 v. Killinger, 542 F.3d 776, 784 (9th Cir. 2008); Chudnovsky v. Leviton Mfg. Co., 158 F. App'x 312, 314 (2d Cir. 2005) ("Chudnovsky already has had one opportunity to amend his complaint. Moreover, in his motion for leave to amend below, Chudnovsky did not indicate that he could allege additional facts that would cure the deficiencies in his already-amended complaint. Therefore the complaint should be dismissed with prejudice."); Prasad v. City of New York, 370 F. App'x 163, 165 (2d Cir. 2010) (finding that the district court acted within its discretion in denying leave to amend after the plaintiffs had already amended once); Mann v. Brenner, 375 F. App'x 232, 240 n.9 (3d Cir. 2010) ("Mann suggests that the District Court should have granted him leave to amend his complaint. Because Mann was permitted to do so twice before the present motions to dismiss were filed, we think the District Court was well within its discretion in finding that allowing Mann a fourth bite at the apple would be futile."); Atkins v. City of Chicago, 631 F.3d 823, 832 (7th Cir. 2011) ("The plaintiff's lawyer has had four bites at the apple. Enough is enough."); Destfino v. Reiswig, 630 F.3d 952, 958–59 (9th Cir. 2011) ("Plaintiffs had three bites at the apple, and the court acted well within its discretion in disallowing a fourth."). In addition, a court's action on a motion responding to an unamended complaint soon after a substantive change in pleading standards may not provide a reliable indication of how courts will respond in the future. For these reasons, our statistical models control for the presence of an amended complaint.

These factors can affect the filing and resolution of motions to dismiss for reasons that are unrelated to the Supreme Court decisions themselves. To assess the effects of the Supreme Court decisions apart from these other factors, we developed a series of statistical models, presented in Appendix A, that attempt to control for these unrelated factors and identify those effects that may properly be attributed to reactions to the Supreme Court decisions. In this section we first present the straightforward comparisons of motion practice in 2006 and 2010. These comparisons reflect not only the effects of the Supreme Court decisions, but also changes in types of cases and the presence of an amended complaint. We then present the adjusted estimates of changes over time after controlling for factors unrelated to the Supreme Court decisions, as indicated by the statistical models in Appendix A. These later estimates offer the more accurate assessment of the federal district courts' reactions to the Supreme Court decisions.

A. Filing Rates for Motions to Dismiss for Failure to State a Claim

Motions to dismiss for failure to state a claim were more common in cases filed in late 2009 and 2010, after *Iqbal*, than in cases filed in late 2005 and 2006, before *Twombly*.[13] We identified motions filed within the first 90 days in cases either filed originally in federal court or removed from state court during the two nine-month periods ending in June 2006 and June 2010.[14] As indicated in Table 1, motions to dismiss for failure to state a claim were filed in 6.2% of all cases in 2009–2010, an increase of 2.2 percentage points over the filing rate for such motions in cases in 2005–2006.[15] This increase is especially notable in cases challenging financial instruments, which increased by more than five percentage points.[16]

In civil rights cases other than employment discrimination cases, the likelihood of a motion to dismiss increased 0.4% from 2005–2006 to 2009–2010. This increase did not reach conventional levels of statistical significance. Three-fourths of the cases in the civil rights category were designated on the cover sheet as

13. Our unit of analysis for this study of filing rates is an individual case. The figures resulting from our analysis understate the overall likelihood of motions to dismiss, since multiple motions may have been filed during this period and motions may be filed after the 90-day cutoff used in this study, often in response to amended complaints. We were limited to considering those motions filed within the first 90 days by our data collection timetable, which ended 90 days after the last case was filed on June 30, 2010. No meaningful differences were found in the length of time that elapsed from the filing of the case to filing of the motion to dismiss within the first 90 days; in 2009–2010, such motions were filed on average 40 days after the cases were filed or removed from state court, 2 days less than in 2005–2006.

14. This restriction excluded cases remanded from the courts of appeals, cases reopened or transferred from another district, and cases consolidated within the district as part of a multidistrict litigation proceeding. This restriction applied only to the study of motion filing rates.

15. Unless otherwise noted, the effects mentioned in this discussion are statistically significant at less than the 0.05 level using a two-tailed Goodman and Kruskal *tau*-b directional test with judicial action taken on the motion or motions as the dependent variable.

16. As indicated in Table 1, total case filings in these districts increased by 3,482 cases in 2010, and filings of financial instrument cases alone increased by 3,266 cases. Filings of contract cases also increased during this period, while filings of torts cases, civil rights cases, and "other" cases decreased. Filings of employment discrimination cases remained about the same.

"Other Civil Rights." We know from past research that many of these cases are brought under 28 U.S.C. § 1983, alleging constitutional violations. This narrower category of "Other Civil Rights" cases showed a statistically significant increase in the likelihood that a motion to dismiss for failure to state a claim would be filed, up from 10.5% of cases in 2006 to 12.4% of cases in 2010.[17]

The "Other" category includes the greatest number of cases. It combines a wide range of cases, typically based on statutory causes of action. Employee Retirement Income Security Act (ERISA) cases constitute 20% of the cases in this category. Other common types of cases include Social Security cases (14%), Fair Labor Standards Act cases (8%), trademark cases (6%), and copyright cases (6%). The remaining cases are scattered across a wide range of statutory actions.[18]

Table 1: Percentage of Civil Cases with a Motion to Dismiss for Failure to State a Claim Filed Within 90 Days of the Filing of the Case (Excluding Prisoner and Pro Se Cases)

	2005–2006 Percentage (and Number) of Cases	2009–2010 Percentage (and Number) of Cases	Difference
Total	4.0% (49,443)	6.2% (52,925)	+2.2%*
Contract	5.6% (8,651)	8.3% (9,139)	+2.7%*
Torts	2.3% (10,604)	4.1% (9,947)	+1.8%*
Employment Discrimination	6.9% (3,795)	9.0% (3,871)	+2.1%*
Civil Rights	9.7% (4,214)	10.1% (4,976)	+0.4%
Financial Instrument	4.3% (1,524)	9.6% (4,790)	+5.3%*
Other	2.5% (20,657)	4.1% (20,202)	+1.6%*

*$p < 0.01$.

Table 2 presents the adjusted estimates of changes in filing rates. The multivariate statistical models presented in Appendix A confirm an increase in the rate at which Rule 12(b)(6) motions were filed while controlling for overall differences

17. This difference just meets the conventional level of statistical significance ($p \leq 0.05$). Other types of cases in the civil rights category included cases brought under the Americans with Disabilities Act designated as "other" (14%) or designated as "employment" (7%). The remaining cases raised civil rights issues concerning accommodations (3.5%), voting (0.6%), and welfare (0.2%). None of these separate types of civil rights cases showed a statistically significant increase in filing rate from 2006 to 2010.

18. Another 14% of these cases were designated as "Other Statutory Action." No other specific case type constituted more than 5% of this category. A complete listing of case types that this category comprises is presented in Appendix B.

in filing rates across federal districts and across types of cases.[19] These adjusted estimates indicate that the probability of a motion to dismiss being filed in an individual case increased from a baseline of 2.9% of the cases in 2006 to 5.8% of the cases in 2010.[20] The table also shows a wide range of probabilities across types of cases.

Table 2: Adjusted Estimates of the Likelihood that a Motion to Dismiss for Failure to State a Claim Will Be Filed Within the First 90 Days

Type of Case	2006	2010
Torts	0.029	0.058
Contract	0.071	0.101
Civil Rights	0.117	0.127
Other	0.029[a]	0.046
Financial Instrument	0.053	0.104
Employment Discrimination	0.077	0.101

a. Estimated as the base rate in the absence of a significant effect for type of case.

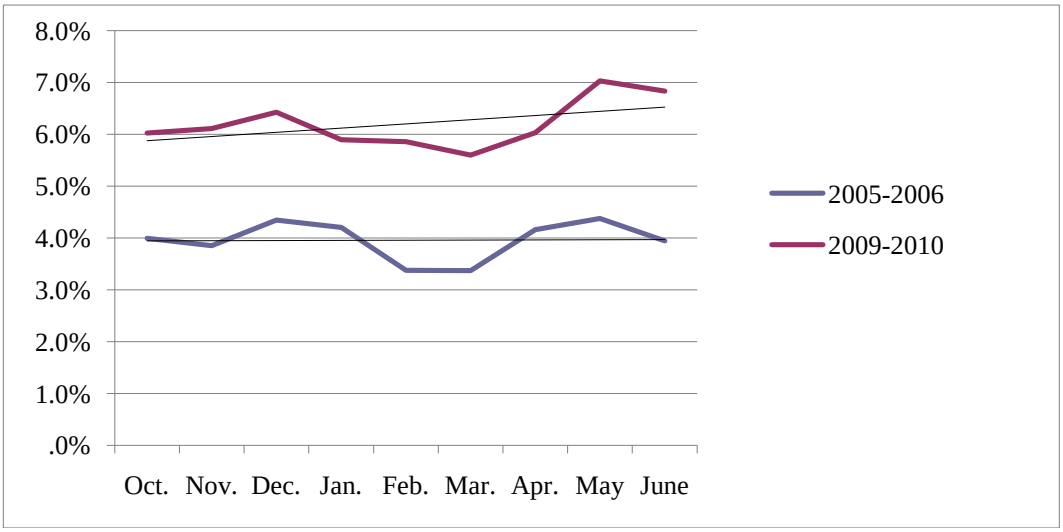
Confirmation of the increase in the rate at which motions were filed is also evident in the monthly trend in the percentage of cases with such motions. As indicated in Figure 1, the percentage of cases with one or more motions to dismiss for failure to state a claim was higher in each month of 2009–2010 than in each month of 2005–2006. Moreover, in 2009–2010 there appeared to be a modest increase over time in the percentage of cases with such motions. The trend line for the percentage of cases in 2005–2006 with motions to dismiss was flat over time at just under 4%.[21]

19. The results in Table 2 are based on the statistical model presented in Table A-1 in Appendix A. This model shows considerable variations in filing rates across federal district courts, controlling for year and type of case.

20. The baseline serves as an initial reference point for assessing changes over time and across types of cases in these statistical models. The baseline is distinct from the percentages listed in Table 1. This particular model uses as a baseline the likelihood that a motion is filed in a tort case in the District of Rhode Island, the Eastern District of Michigan, or the District of Maryland in 2006 (i.e., 2.9%). We chose torts cases for the baseline because of the low likelihood of a motion to dismiss. We chose to combine these three districts because they had few motions to dismiss. We chose 2006 so that increases over time would appear as a positive effect. The baseline rate was substituted for effect estimates where the model indicated that the case type did not depart from that rate. The adjusted estimate for torts cases in Table 2, which takes district and the presence of an amended complaint into account, shows an increase from 2.9% in 2006 to 5.8% in 2010. The effect of the statistical adjustment can be seen by comparing these figures with the unadjusted estimate for torts cases in Table 1, which shows an increase from 4.0% in 2006 to 6.2% in 2010.

21. These filing rates are lower than rates indicated by previous studies of federal courts that considered motions to dismiss filed after the 90-day period used in this study. *See* Paul Connolly & Patricia Lombard, Judicial Controls and the Civil Litigative Process: Motions (Federal Judicial Center 1980) (finding that around 15% of civil cases terminated in 1975 included motions to dis-

Figure 1. Trend in Cases Filed with Motions to Dismiss Filed Within 90 Days



Motions to dismiss were more likely to be filed in cases removed from state court to federal court. As indicated in Table 3, motions to dismiss were more common in cases removed from state courts than in cases originally filed in federal courts both before *Twombly* and after *Iqbal*. This difference was greater in cases filed in 2009–2010 than in cases filed in 2005–2006. But a supplemental analysis of removal rates from January 2005 through December 2009 found no increase in rates of removal to federal courts in states with notice pleading standards in comparison with rates of removal in states using fact pleading.[22]

Table 3: Cases with Motions to Dismiss for Failure to State a Claim in Original and Removed Filings

	2005–2006	2009–2010	Difference
Original Filing	3.4% (41,698)	5.0% (44,298)	+1.6%*
Removed Filing	7.2% (7,745)	12.4% (8,627)	+5.2%*

* $p < 0.01$.

miss for failure to state a claim); Thomas E. Willging, Use of Rule 12(b)(6) in Two Federal District Courts 8 (Federal Judicial Center 1989) (finding that around 13% of the cases terminated in two federal districts courts included motions to dismiss for failure to state a claim).

22. We have no way of determining if cases that would have been filed in the federal courts before *Twombly* have been diverted to state courts because of concern over pleading standards. However, a supplemental study failed to find evidence of an increased rate of removal of cases to federal court after *Twombly* and *Iqbal* from states with notice pleading standards, compared with the rate of removal from states with fact pleading standards. Memorandum from Jill Curry and Matthew Ward to James Eaglin, Comparing Rates by States: Are *Twombly* and *Iqbal* Affecting Where Plaintiffs File? (February 14, 2011) (on file with the authors).

Finally, we note the distinctive nature and marked changes over time in cases challenging financial instruments. The "financial instrument" category of cases combines nature-of-suit codes indicating case categories for negotiable instruments, foreclosure, truth in lending, consumer credit, and "other real property." The great majority of these cases involve claims by individuals suing lenders and/or loan servicing companies over the terms of either an initial residential mortgage or a refinance of an existing residential mortgage. These cases include federal claims under statutes such as the Truth in Lending Act, the Real Estate Settlement Procedures Act, and the Fair Debt Collection Practices Act. These cases typically also raise a number of state law claims, often including fraud, negligence, unfair business practices, breach of fiduciary duty, and wrongful foreclosure. Plaintiffs generally seek rescission of the mortgage or loan, damages, and declaratory or injunctive relief.

Cases challenging financial instruments increased by 214%, from 1,524 cases in 2006 to 4,790 cases in 2010, apparently due in large part to the economic downturn in the housing market.[23] Such cases were especially likely to be removed from state court, increasing from 12% of all such cases in 2006 to 16% in 2010. Those cases that were removed from state court showed an increase in the percentage of cases with motions to dismiss, rising from 9.1% of such cases in 2005–2006 to 27.7% of such cases in 2009–2010, the largest increase in filing rates detected.

B. Outcome of Motions to Dismiss for Failure to State a Claim

1. Motions Granted with Leave to Amend

We assessed the outcome of motions to dismiss for failure to state a claim by identifying and coding court orders responding to the merits of such motions filed in January through June of 2006 and 2010 in the same 23 federal district courts.[24] We recorded whether an order denied the motion to dismiss in its entirety, granted all of the relief requested by the motion, or granted some but not all relief requested by the motion.[25] A single order resolving motions to dismiss filed by dif-

23. This downturn was especially sharp in some of the districts included in this study, such as districts in California, Florida, Georgia, Illinois, and Michigan, which are among the top 10 states with the highest number of residential mortgage foreclosures. *See* http://www.statehealthfacts.org/comparetable.jsp?cat=1&ind=649 (last visited February 22, 2010).

24. Ideally, the database of motions that was discussed in the previous section would have been followed over time through the motions' resolution. Time constraints did not permit an adequate opportunity to obtain the orders resolving those motions. This second database of orders was developed instead.

25. The unit of analysis for our study of outcomes of motions is a written judicial opinion or order disposing of the merits of at least one motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Of course, a single motion to dismiss may be directed at multiple claims, and an order may resolve multiple motions. Coding conventions for multiple motions and motions in which only some of the relief was granted are discussed in Appendix C. In addition to excluding pro se cases and prisoner cases, for this analysis we excluded motions to dismiss for failure to state a claim filed in response to counterclaims and affirmative defenses. We implemented this limitation by excluding the 70 orders responding to motions filed by a party other than a defendant or directed toward claims raised by a party other than the plaintiff. Scholars are

ferent parties was coded as resolving a single motion. If the court allowed amendment of the complaint with regard to at least one claim that was dismissed, we coded the motion as granted with leave to amend.

As indicated in Table 4, it first appears that motions to dismiss for failure to state a claim were more likely to grant all or some of the relief requested in 2010 than in 2006. In 2010, 75% of the orders responding to such motions granted all or some of the relief requested by the motion, compared with almost 66% of the orders in 2006.[26] But closer inspection reveals that the increase extends only to motions granted with leave to amend. No increase was found in motions granted without leave to amend.

As indicated above, it would be misleading to attribute this overall change only to the Supreme Court decisions. The rate at which motions were granted differs by type of case, and the mix of types of cases changed from 2006 to 2010. For example, cases challenging financial instruments were far more common in 2010, and motions to dismiss in such cases were more likely to be granted. The rate at which motions were granted also varied by district court, and some of the districts with the highest grant rates were also the districts that showed the greatest increase in the number of orders. Orders in 2010 were also more likely to respond to motions directed toward amended complaints. Courts are generally more willing to grant motions to dismiss after a plaintiff has already amended the complaint. All of these factors may contribute to differences over time that are unrelated to the Supreme Court decisions.

An important reason for caution in interpreting these differences is that in 2010, orders granting motions to dismiss were far more likely to allow the plaintiff to amend the complaint, leaving open the possibility that the plaintiff might cure the defect in the complaint and the case might proceed to discovery. In 2010, 35% of the orders granted motions to dismiss with leave to amend at least some of the claims in the complaint, compared with 21% of the orders in 2006.[27] The percentage of orders granting the motion without an opportunity to amend the complaint declined in 2010 in all types of cases other than those challenging financial instruments. This shift toward an increase in grants with an opportunity to amend and a decrease in grants with no opportunity to amend suggests that these two outcomes should be assessed separately.

only beginning to consider the effect of *Twombly* and *Iqbal* in such circumstances. *See, e.g.*, Melanie A. Goff & Richard A. Bales, *A "Plausible" Defense: Applying* Twombly *and* Iqbal *to Affirmative Defenses*, 34 Am. J. Trial Advoc. ___ (forthcoming Spring 2011); Joseph A. Seiner, Twombly, Iqbal, *and the Affirmative Defense*, available at http://ssrn. com/abstract=1721062 (last visited February 8, 2011).

26. This increase was due primarily to orders granting all relief sought by the motion, which increased from 36% of the orders in 2006 to 46% of the orders in 2010. Orders granting motions with regard to only part of the relief sought remained stable over time, constituting 30% of the orders in 2006 and 29% of the orders in 2010. Differences in the rates at which motions were denied were not entered into the table, but are the inverse of the rates at which motions were granted.

27. The increase in opportunity to amend complaints was almost entirely in orders granting all the relief requested by the motion (i.e., 19% in 2010 vs. 9% in 2006). This increase is especially notable, since, as indicated above, in 2010 the orders were more likely to respond to previously amended complaints.

Table 4: Outcome of Motions to Dismiss for Failure to State a Claim

	Action on Motion	2006	No. of Orders	2010	No. of Orders	Difference
Total	Denied	34.1%	(239)	25.0%	(305)	
	Granted All or Some Relief	65.9%	(461)	75.0%	(916)	+9.1%*
	With Amendment	20.9%	(146)	35.3%	(431)	+14.4%†
	Without Amendment	45.0%	(315)	39.7%	(485)	-5.3%
Contract	Denied	35.1%	(65)	33.6%	(81)	
	Granted All or Some Relief	64.9%	(120)	66.4%	(160)	+1.5%
	With Amendment	21.1%	(39)	30.3%	(73)	+9.2%†
	Without Amendment	43.8%	(81)	36.1%	(87)	-7.7%
Torts	Denied	30.0%	(21)	28.2%	(31)	
	Granted All or Some Relief	70.0%	(49)	71.8%	(79)	+1.8%
	With Amendment	21.4%	(15)	29.1%	(32)	+7.7%
	Without Amendment	48.6%	(34)	42.7%	(47)	-5.9%
Civil Rights	Denied	27.9%	(51)	22.0%	(51)	
	Granted All or Some Relief	70.3%	(121)	78.0%	(181)	+7.7%
	With Amendment	21.1%	(38)	32.8%	(76)	+11.7%
	Without Amendment	48.3%	(83)	45.3%	(105)	-3.0%
Employment Discrimination	Denied	32.6%	(31)	29.4%	(35)	
	Granted All or Some Relief	67.4%	(64)	70.6%	(84)	+3.2%
	With Amendment	17.9%	(17)	23.5%	(28)	+5.6%
	Without Amendment	49.5%	(47)	47.1%	(56)	-2.4%
Financial Instruments	Denied	52.9%	(9)	8.1%	(19)	
	Granted All or Some Relief	47.1%	(8)	91.9%	(216)	+44.8%*
	With Amendment	24.4%	(5)	54.9%	(129)	+30.5%
	Without Amendment	17.6%	(3)	37.0%	(87)	+19.4%
Other	Denied	38.5%	(62)	31.0%	(88)	
	Granted All or Some Relief	61.5%	(99)	69.0%	(196)	+7.5%
	With Amendment	19.9%	(32)	32.7%	(93)	+12.8%†
	Without Amendment	41.6%	(67)	36.3%	(103)	-5.3%

* $p \leq 0.01$, relative to the likelihood that the motion will be denied.
† $p \leq 0.05$, relative to the likelihood that the motion will be granted without leave to amend.

Motions granted with leave to amend leave open the questions whether the complaints were, in fact, amended; whether there were subsequent motions to dismiss; whether action was taken in response to the subsequent motions; and the extent to which these cases proceeded to discovery. We are presently undertaking a supplemental study to answer these questions.

Table 5 presents statistical estimates for the probability that Rule 12(b)(6) motions to dismiss would be granted in an individual case while controlling for factors unrelated to the Supreme Court decisions.[28] The baseline indicates that around 56% of the motions would be granted without leave to amend the complaint in torts cases in 2006 in the baseline districts.[29] The table lists only those districts in which the rate at which motions were granted, with or without the opportunity to amend the complaint, show a statistically significant difference from the baseline districts, as indicated in Table A-2 in Appendix A. Marked differences in grant rates and the opportunity to amend the complaint were found across the individual courts. Such motions were more likely to be granted with leave to amend in the Eastern and Northern Districts of California, and granted without leave to amend in the Eastern and Southern Districts of New York.[30]

Table 5: Estimated Values for Statistically Significant Variables in Multinomial Model Describing Whether a Motion Would Be Granted With or Without an Opportunity to Amend the Complaint

Variable	Deny	Grant and Amend	Grant and No Amend
Baseline	**0.298**	**0.145**	**0.557**
Districts			
Eastern District of California	0.149	0.613	0.238
Northern District of California	0.158	0.614	0.229
Middle District of Florida	0.358	0.449	0.193
Northern District of Illinois	0.409	0.266	0.324
Eastern District of New York	0.211	0.289	0.500
Southern District of New York	0.183	0.280	0.537
Eastern District of Pennsylvania	0.404	0.227	0.369
Northern District of Texas	0.461	0.254	0.285
Presence of Amended Complaint	0.244	0.115	0.641
Financial Instrument Cases in 2010	0.040	0.068	0.892

28. As indicated in Appendix A, we used multinomial logit and probit models to assess changes over time in the likelihood that motions to dismiss would be denied, granted with leave to amend, or granted without leave to amend. These models also allowed us to control for the differences across individual courts, for differences across types of cases, and for the presence of an amended complaint. Using the techniques described in the appendix, we then computed the adjusted estimates of effects presented in the table.

29. The baseline for the model is the outcome of an order deciding one or more Rule 12(b)(6) motions to dismiss filed in the District of Rhode Island, the Eastern District of Michigan, or the District of Maryland in 2006 in a tort case, responding to an unamended complaint.

30. The Eastern and Southern Districts of New York also had very low filing rates for motions to dismiss. A number of judges in these districts have procedures calling for premotion conferences at which the judges discuss with attorneys whether a motion will be appropriate.

Some of the significant differences over time indicated in Table 4 can be accounted for by controlling for differences across districts and the presence of an amended complaint. As shown in the last line of Table 5, we found that only in cases challenging financial instruments did the adjusted rate at which motions were granted without leave to amend increase in 2010. In such cases, the adjusted estimate indicates 90% of the motions were granted with regard to at least some of the relief requested, controlling for the effects of the other variables. We found no other significant increase over time in other types of cases in the adjusted rate at which motions were granted.[31]

The fact that cases with motions to dismiss granted with leave to amend remain unresolved is also reflected in the absence of a statistically significant increase in 2010 in the rate at which such cases terminated. We examined the percentage of cases that terminated after 30 days, 60 days, or 90 days following an order granting all or some of the relief requested by the motion to dismiss. Such orders may not address all of the claims in the litigation. Nevertheless, if the district courts were interpreting *Twombly* and *Iqbal* to significantly foreclose the opportunity for further litigation in the case, we would expect to see an increase in cases terminated soon after the order. However, as indicated in Table 6, we found no statistically significant increase in 2010 in the percentage of cases terminated in 30 days, 60 days, or 90 days after the order granting the motion. Nor did we find differences in termination rates across individual types of cases.

Table 6: Percentage of Cases Terminated 30, 60, and 90 Days After an Order Granting All or Some of the Relief Requested by a Motion to Dismiss

Percentage of Cases Terminated After:	**2006**	**2010**
30 days	26.6%	27.5%
60 days	30.6%	33.1%
90 days	34.2%	37.7%
Total orders	448 orders	897 orders

31. We also found that the presence of an amended complaint increased the likelihood that a motion would be granted without leave to amend. The details of the analysis are presented in Appendix A. Such an effect existed both before *Twombly* and after *Iqbal. See supra* note 12.

2. Motions Granted on All Claims Asserted by One or More Plaintiffs

Although we found no broad increase over time in the likelihood that a motion to dismiss would be granted without leave to amend, we also explored the possibility that, when granted, motions to dismiss may be more likely to exclude all claims by one or more plaintiffs, even if the litigation continues with claims by other plaintiffs.[32] As indicated in Table 7, in 2010, approximately 31% of the orders granting motions to dismiss appeared to eliminate all claims by one or more plaintiffs from the litigation, compared with approximately 23% of such orders in 2006.[33] The rate at which the grant of motions to dismiss eliminated some claims, but not all, by one or more plaintiffs increased by only one percentage point during this period. Of course, these figures include the effects of factors unrelated to the Supreme Court cases, such as differences across district courts, differences across types of cases, and differences in the presence of an amended complaint.

32. There was also a greater opportunity in 2010 to amend the complaint after the motion to dismiss was granted as to all claims by one or more plaintiffs (22% in 2006; 46% in 2010). We initially attempted to determine if the grant of a motion to dismiss had the effect of removing a defendant from the litigation, thereby limiting the opportunity for further discovery of that defendant under the standards of Rule 26. However, we had difficulty developing a reliable coding practice, especially in cases with multiple plaintiffs and defendants. Instead, we decided to focus on the effect of the motion on the ability of plaintiffs to continue in the litigation, which proved easier to study.

33. These figures include the effects of orders granted both with and without leave to amend the complaint. If the financial instrument cases are removed from the analysis, orders granting motions to dismiss that eliminate all claims by one or more plaintiffs increase to 28% in 2010. Unfortunately, we cannot determine what percentage of this increase is due to cases that involved only one plaintiff, thereby ending the case. Determining that a grant of a motion to dismiss for failure to state a claim excluded all claims by a plaintiff can be a difficult task. A plaintiff may have raised claims that were not challenged by the motion to dismiss and therefore not addressed by the order. Since our knowledge of the cases is limited to the single order that was included in the study, we must make a series of assumptions when determining that a grant of a motion to dismiss for failure to state a claim excludes all claims. Unless otherwise indicated in the order, we assumed that the motion to dismiss addressed all claims by a plaintiff, and that granting a motion as to all claims by a plaintiff would terminate the plaintiff's role in the litigation unless the plaintiff was permitted to amend the complaint. As a result, our analysis may overestimate the number of cases in which an order eliminates all claims by a plaintiff.

Table 7: Extent of Exclusion of Plaintiff Claims

	Action on Motion	2006	No. of Orders	2010	No. of Orders	Difference
Total	Denied	34.1%	(239)	25.0%	(305)	
	Granted All or Some Relief	65.9%	(461)	75.0%	(916)	+9.2%*
	Some Claims	43.3%	(303)	44.5%	(543)	+1.2%
	All Claims	22.6%	(158)	30.5%	(373)	+8.0%†
Contract	Denied	35.1%	(65)	33.6%	(81)	
	Granted All or Some Relief	64.9%	(120)	66.4%	(160)	+1.5%
	Some Claims	44.3%	(82)	40.7%	(98)	-3.7%
	All Claims	20.5%	(38)	25.7%	(62)	+5.2%
Torts	Denied	30.0%	(21)	28.2%	(31)	
	Granted All or Some Relief	70.0%	(49)	71.8%	(79)	+1.8%
	Some Claims	50.0%	(35)	47.3%	(52)	-2.7%
	All Claims	20.0%	(14)	24.5%	(27)	+4.5%
Civil Rights	Denied	27.9%	(51)	22.0%	(51)	
	Granted All or Some Relief	70.3%	(121)	78.0%	(181)	+6.2%
	Some Claims	44.2%	(69)	46.4%	(111)	+2.2%
	All Claims	25.1%	(52)	29.1%	(70)	+4.0%
Employment Discrimination	Denied	32.6%	(31)	29.4%	(35)	
	Granted All or Some Relief	67.4%	(64)	70.6%	(84)	+3.2%
	Some Claims	51.6%	(49)	43.7%	(52)	-7.9%
	All Claims	15.8%	(15)	26.9%	(32)	+11.1%
Financial Instruments	Denied	52.9%	(9)	8.1%	(19)	
	Granted All or Some Relief	47.1%	(8)	91.9%	(216)	+44.9%*
	Some Claims	29.4%	(5)	48.5%	(114)	+19.1%
	All Claims	17.6%	(3)	43.4%	(102)	+25.8%
Other	Denied	38.5%	(62)	31.0%	(88)	
	Granted All or Some Relief	61.5%	(99)	69.0%	(196)	+7.5%
	Some Claims	39.1%	(63)	40.8%	(116)	+1.7%
	All Claims	22.4%	(36)	28.2%	(80)	+5.8%

* $p \leq 0.01$, relative to the likelihood that the motion will be denied.
† $p \leq 0.05$, relative to the likelihood that the motion will be granted without leave to amend.

Table 8 presents statistical estimates for the rates at which granted motions dismiss some claims or all claims by a plaintiff (with or without leave to amend), while controlling for factors unrelated to the Supreme Court decisions. As indicated in Appendix B, we again used a similar multinomial probit model to control for other factors while assessing differences in the likelihood that motions to dismiss would be denied, granted to eliminate one or more plaintiffs/respondents

from the litigation,[34] or granted to eliminate only some claims while leaving all of the plaintiffs to pursue the remaining claims.

After using the multinomial probit model to control for differences across districts, types of case, and the presence of an amended complaint, we found that in 2010, only orders responding to motions in cases challenging financial instruments were more likely to be granted, both with respect to all claims by at least one plaintiff and with respect to only some claims, all else being equal. No statistically significant increase in the likelihood that motions would be granted was found for other types of cases. These results are consistent with the results in Table 7. There are differences across federal districts: the Northern and Eastern Districts of California were more likely to grant motions with regard to some claims, and the Southern District of New York was more likely to grant motions with regard to all claims by at least one plaintiff. Finally, responding to an amended complaint increased the likelihood of granting a motion with respect to some claims only, relative to those motions not based on an amended complaint.

Table 8: Estimated Values for Statistically Significant Variables in Multinomial Model of Whether a Motion Would Be Granted with Regard to Some or All Claims by At Least One Plaintiff

Variable	Deny	Grant as to Some Claims	Grant as to All Claims by at Least One Plaintiff
Baseline	**0.289**	**0.400**	**0.311**
Districts			
Eastern District of Arkansas	0.435	0.439	0.126
Eastern District of California	0.162	0.539	0.299
Northern District of California	0.171	0.494	0.335
Middle District of Florida	0.377	0.409	0.214
Southern District of New York	0.178	0.329	0.493
Eastern District of Pennsylvania	0.404	0.420	0.175
District of South Carolina	0.489	0.351	0.160
Northern District of Texas	0.464	0.343	0.193
Presence of Amended Complaint	0.246	0.493	0.261
Financial Instrument Cases in 2010	0.052	0.496	0.451

34. Such orders indicated that all claims raised by one or more plaintiffs were dismissed. We interpret this as dismissing all claims by the plaintiffs, but it is possible that the plaintiffs raised other claims that were not the subject of the motion to dismiss.

IV. Discussion and Conclusion

Assessing changes in the outcomes of motions that are attributable to *Twombly* and *Iqbal* is complicated. A thorough assessment must consider those cases that do not appear in computerized legal reference systems, since such databases may underrepresent cases in which motions have been denied. It is also necessary to take into account increases in case filings and changes in types of cases, which may vary across the federal district courts. Civil case filings themselves increased in the 23 federal district courts examined in this study by 7% in the past four years; more motions will be reported even without changes in motion practice. Changes in the case mix affect the types, numbers, and likely outcomes of motions to dismiss.

The data show a general increase in the rate at which motions to dismiss for failure to state a claim were filed in the first 90 days of the case. We found that motions were more likely to be filed across a wide range of case types, though the size of the increase depended on the type of case. We found the largest increase in filing rates of motions to dismiss in cases challenging financial instruments, such as mortgages and other loan documents. Such cases were rare in 2006, and this increase is most likely related to changes in the housing market and the increasing rate of foreclosure actions. We found no increase in filing rates over time in civil rights cases.

After controlling for identifiable effects unrelated to the Supreme Court decisions, such as differences in caseload across individual districts, we found a statistically significant increase in the rate at which motions to dismiss for failure to state a claim were granted only in cases challenging financial instruments. More specifically, we found an increase in this category of cases in motions to dismiss granted without leave to amend. We found no increase in the rate at which motions to dismiss were granted, with or without opportunity to amend, in other types of cases. We also found no increase in the rate at which motions to dismiss for failure to state a claim eliminated plaintiffs in other types of cases.

Again, the rise of cases challenging financial instruments and the increase in the rate at which motions were filed and granted in such cases appear to be due to changing economic conditions involving the housing market and are unrelated to the recent Supreme Court decisions. The prevalence of motions to dismiss in such cases and the high rate at which such motions are granted is often due to a failure to meet the pleading requirements established by federal statutes, not a failure to plead sufficient facts.[35] If such cases had existed in 2006, it is likely that such mo-

35. Courts in every circuit have dismissed homeowners' claims under the Truth in Lending Act (TILA), 15 U.S.C. § 1691 *et seq.*, and the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601, under Rule 12(b)(6) for various reasons unrelated to *Twombly* and *Iqbal*. *See, e.g.*, Jones v. ABN Amro Mortg. Grp., 606 F.3d 119, 125 (3d Cir. 2010) (affirming 12(b)(6) dismissal of a RESPA claim because the defendant was not subject to RESPA); Taggart v. Chase Bank USA, N.A., 375 F. App'x 266, 268–69 (3d Cir. 2010) (affirming dismissal of a TILA claim on *res judicata* grounds after a 12(b)(6) dismissal on limitations grounds in a previous case filed by the plaintiff); Heil v. Wells Fargo Bank, N.A., 298 F. App'x 703, 705–07 (10th Cir. 2008) (affirming dismissal of TILA claims on limitations grounds); Frazile v. EMC Mortg. Corp., 382 F. App'x

tions would have been filed and granted in such cases at rates similar to those in 2010.

We also found that motions were more likely to be granted without leave to amend when they were directed at an amended complaint. This was true both before and after the Supreme Court decisions. This finding is unsurprising; courts take earlier amendments into account in deciding motions to dismiss. Motions directed to amended complaints were more common in 2010 than in 2006.

Even if the rate at which motions are granted remains unchanged over time, the total number of cases with motions granted may still increase. The 7% increase in case filings combined with the increase in the rate at which motions are filed in 2010 may result in more cases in recent years with motions granted, even though the rate at which motions are granted has remained the same. Such cases are especially likely to find their way into computerized legal reference systems and published reports, resulting in the impression that the rate at which motions are granted is increasing. But these increases can be largely a result of increases in filing rates for cases and motions, and not due to an increase in the rate at which courts are granting motions after *Twombly* and *Iqbal*.

This study has several limitations worth noting. Most important, our study did not examine the substantive law that formed the basis of the court orders resolving the motions. This study must be interpreted in the context of ongoing development of the case law in both the Supreme Court and the lower courts.[36]

This study did not take into account changes in pleading practice. Survey data indicate that plaintiffs may be including more factual allegations in their com-

833, 838–39 (11th Cir. 2010) (approving 12(b)(6) dismissal of some, but not all, TILA claims on limitations grounds); Wienke v. Indymac Bank FSB, No. CV 10-4082, 2011 WL 871749, at *7–8 (N.D. Cal. Mar. 14, 2011); Franz v. BAC Home Loans Servicing, LP, Civ. No. 10-2025, 2011 WL 846835, at *2–4 (D. Minn. Mar. 8, 2011) (dismissing under 12(b)(6) because the RESPA defendant was not a "servicer" under the Act, because the finance charges complied with TILA, and because TILA does not allow offensive assertion of a recoupment claim); Gordon v. Home Lone Ctr., LLC, No. 10-10508, 2011 WL 795037, at *3 (E.D. Mich. Feb. 28, 2011); Koehler v. Wells Fargo Bank, No. 10-1903, 2011 WL 691583, at *2 (D. Md. Feb. 18, 2011) (dismissing TILA and RESPA claims on limitations grounds); Davis v. GMAC Mortg., LLC, No. H-11-09, 2011 WL 677359, at *3 (S.D. Tex. Feb. 16, 2011) (dismissing a TILA claim based on limitations); Obi v. Chase Home Fin., LLC, No. 10 C. 5747, 2011 WL 529481, at *3–4 (N.D. Ill. Feb. 8, 2011); Cebrun v. HSBC Bank USA, N.A., No. C10-5742BHS, 2011 WL 321992, at *2 (W.D. Wash. Feb. 2, 2011) (dismissing RESPA claim because the defendant was the trustee, not the servicer); Morris v. Bank of Am., No. C 09-02849 SBA, 2011 WL 250325, at *5 (N.D. Cal. Jan. 26, 2011) (dismissing RESPA claim because the allegations showed that the defendant timely responded to the plaintiff's qualified written letter); Mantz v. Wells Fargo Bank, N.A., Civ. A. No. 09-12010-JLT, 2011 WL 196915, at *3–4 (D. Mass. Jan. 19, 2011); Wheatley v. Reconstruct Co. NA, No. 3:10CV00242 JLH, 2010 WL 4916372, at *4 (E.D. Ark. Nov. 23, 2010) (dismissing TILA claims on limitations grounds and dismissing a RESPA claim because the defendant was not subject to the Act); Hughes v. Abell, __ F. Supp. 2d __, 2010 WL 4630227, at *10–11 (D.D.C. 2010) (dismissing TILA claims on limitations grounds); Done v. HSBC Bank USA, No. 09-CV-4878 (JFB) (ARL), 2010 WL 3824142, at *1–2 & n.5 (E.D.N.Y. Sept. 23, 2010) (dismissing TILA and RESPA claims on limitations grounds).

36. *See* Kuperman, *supra* note 6, at 4.

plaints, at least in employment discrimination cases.[37] We examined motions only if they were filed within the first 90 days of a case, and we cannot determine if the increase in motions filed during this period would be sustained throughout the duration of the cases. We were not able to study certain case types. For example, our study found only 21 orders involving antitrust litigation, and we were not able to develop a statistical model that would test for changes in so few cases. Our study included motions that challenged claims for reasons other than the sufficiency of the factual pleadings, and a more focused study of these types of cases may reveal changes that our study failed to detect.

Finally, the prevalence of motions granted with leave to amend requires further study. Our follow-up on the outcome of cases in which the plaintiff had an opportunity to amend the complaint has just begun. This effort may provide a more precise assessment of the extent to which complaints that are amended are challenged by subsequent motions to dismiss, and the extent to which those motions are granted without leave to amend.

37. Emery G. Lee III & Thomas E. Willging, Attorney Satisfaction with the Federal Rules of Civil Procedure: Report to the Judicial Conference Advisory Committee on Civil Rules 12 (Federal Judicial Center March 2010) (Seventy percent of plaintiffs' attorneys who had filed employment discrimination cases after *Twombly* indicated that they have changed the way they structure complaints in employment discrimination cases. Almost all of those attorneys (94%) indicated that they include more factual allegations in the complaint than they did prior to *Twombly*. Seventy-five percent indicated that they have had to "respond to motions to dismiss that might not have been filed prior to *Twombly*/*Iqbal*." Seven percent of those attorneys indicated that they had cases dismissed for failure to state a claim under the standard announced in *Twombly* and *Iqbal*.

Appendix A: Multivariate Statistical Models

In order to understand the impact of the *Twombly* and *Iqbal* decisions on the filing and outcome of Rule 12(b)(6) motions for failure to state a claim, we developed two separate data sets, both of which excluded all prisoner cases and cases with pro se parties. The means by which we developed these two data sets are described in Appendices B and C.

A. Filing of Motion to Dismiss for Failure to State a Claim

The first data set examined civil cases filed in 23 federal district courts in the months October 2005 through June 2006, and October 2009 through June 2010. From among these we identified cases with one or more Rule 12(b)(6) motions to dismiss for failure to state a claim filed within the first 90 days after the case was either filed originally in federal court or removed from state court.

Table A-1 presents the results of a logit model predicting the presence of a motion to dismiss given the year the case was filed, the district, and the type of case. As indicated in the table, there is great variation in motion activity across federal district courts and across types of cases. For the combined two periods, the Northern District of California, the District of Columbia, and the Northern District of Illinois all have higher filing rates than the baseline districts (Rhode Island, Eastern Michigan, and Maryland combined). The districts in the baseline are a combination of typical districts and those with too few cases to merit a separate variable. A number of courts have lower combined filing rates; the Eastern and Southern Districts of New York have especially low filing rates.[38]

As indicated by the predicted probabilities, motions to dismiss were more likely to be filed in 2010, when we controlled for type of case and federal district; these motions doubled from an adjusted estimate of 2.9% in 2006 to 5.8% in 2010. Filing rates also differed greatly across types of cases. Contract cases were more than twice as likely as torts cases to have motions filed; torts cases set the baseline for case types. Civil rights cases had the highest level of filing activity, with an overall adjusted estimate of 11.7%. In 2010, this rate rose to 12.7%, which suggests a leveling off in the rate of filing of motions in civil rights cases. Motions in employment discrimination cases increased from 7.7% to 10.1%.

38. While the filing rates in the Eastern and Southern Districts of New York are very low, the likelihood that motions would be granted without leave to amend in these districts was among the highest of the districts. We believe this may be due to pretrial practices in these districts, in which the judges confer with the attorneys early in the case and provide an indication of the likelihood of success of a motion to dismiss. Such a practice would be similar to the practices of many judges in these districts who require a pretrial conference prior to the filing of a motion for summary judgment. *See, e.g.*, Individual Practices of Judge John G. Koeltl 2, http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=385 (last visited February 22, 2011) (requiring a premotion conference before making a motion for summary judgment).

Table A-1: Presence of a Motion to Dismiss for Failure to State a Claim Within 90 Days of Case Filing

Variable	Coefficient	Standard Error	Predicted Probability
			Baseline = 0.029
Eastern District of Arkansas	**-0.489**	0.153	0.018
Northern District of California	**0.163**	0.069	0.033
Eastern District of California	0.024	0.083	0.029
District of Colorado	-0.044	0.092	0.029
District of the District of Columbia	**0.704**	0.086	0.056
Middle District of Florida	0.058	0.067	0.029
Northern District of Georgia	-0.081	0.082	0.029
Northern District of Illinois	**0.185**	0.060	0.034
Southern District of Indiana	**-0.342**	0.108	0.021
District of Kansas	**-0.254**	0.129	0.022
District of Massachusetts	0.092	0.086	0.029
District of Minnesota	**-0.703**	0.092	0.014
District of New Jersey	**-0.626**	0.080	0.016
Eastern District of New York	**-2.001**	0.134	0.004
Southern District of New York	**-1.258**	0.082	0.008
Southern District of Ohio	0.093	0.089	0.029
Eastern District of Pennsylvania	0.106	0.065	0.029
District of South Carolina	0.070	0.089	0.029
Northern District of Texas	**-0.291**	0.093	0.022
Southern District of Texas	**-0.247**	0.077	0.022
Year 2010	**0.740**	0.083	0.058
Contract	**0.956**	0.081	0.071
Civil Rights	**1.507**	0.085	0.117
Other	0.029	0.080	0.029
Financial Instrument	**0.635**	0.144	0.053
Employment Discrimination	**1.050**	0.093	0.077
Contract x 2010	**-0.354**	0.103	0.101
Civil Rights x 2010	**-0.647**	0.109	0.127
Other x 2010	**-0.262**	0.101	0.046
Financial Instrument x 2010	0.090	0.161	0.104
Employment Discrimination x 2010	**-0.442**	0.120	0.101
Constant	-3.533	0.079	0.029

Note: N = 102,368; PCP = 95%. Statistically significant effects ($p < 0.05$) appear in bold print. The baseline for the model is a tort case filed in the District of Rhode Island, the Eastern District of Michigan, or the District of Maryland in 2006. The baseline probability sets all variables to zero. PCP is the percentage correctly predicted by the model and is an estimate of model fit. Where the variables were not statistically significant we list the predicted probability as the same as the value for the baseline, with one exception. For financial instruments in 2010, the predicted probability includes the main effect for these two significant variables. We also employed a rare event analysis, and the results were unchanged.

B. Outcome of Motions to Dismiss for Failure to State a Claim

The second data set examined the outcome of motions to dismiss for failure to state a claim as indicated by court orders responding to the merits of such motions issued from January through June in 2006 and 2010. Again, we removed all orders in cases involving prisoners and pro se parties. We also removed orders responding to Rule 12(b)(6) motions in which the movant and respondent were not the original defendant and plaintiff, respectively, which resulted in the elimination of orders involving counterclaims and affirmative defenses.

We modeled the outcome of the order in two ways. First, we modeled the choice of granting some or all of the relief requested by the motion, either with or without leave to amend. Second, we modeled the choice of granting all or some of the relief requested by the motion with respect to either some but not all claims by one or more plaintiffs, or all claims by one or more plaintiffs.

1. Motions Granted With or Without Leave to Amend

These models implicitly assume that judges are making decisions from among three outcomes. In this first model, the judges are choosing from among denying the motion, granting the motion with leave to amend, and granting the motion without leave to amend. Using a multinomial probit model, we predicted the outcome of the motion given the year in which the order was filed, the district, the type of case, and if the motion responded to an amended complaint. The multinomial probit model allows us to assume that the introduction of a third choice does not draw judges proportionately from the other two choices (i.e., giving the judges the choice of granting the motion with leave to amend does not draw evenly from those who would grant with no leave to amend and those who would deny the motion). Judges choose whether to grant or deny the motion, and if they choose to grant, then they decide whether to allow leave to amend the complaint or not. The two choices of granting the motion are clearly similar to each other, and substantially different from denying the motion. Multinomial probit models account for those differences. In fact, statistical tests show that this is the appropriate model for these data.[39]

As indicated in Table A-2, there was great variation across districts in the probability of granting the motion with leave to amend. The Eastern District of California, the Northern District of California, the Middle District of Florida, the Eastern District of New York, and the Southern District of New York all had a higher probability of granting *with* leave to amend than the baseline districts did, all else being equal. On the other hand, the Middle District of Florida, the Northern District of Illinois, the Eastern District of Pennsylvania, and the Northern Dis-

39. One might also think of this decision making as a nested or conditional process. Judges make the decision to grant or deny, and then if they decide to grant, they decide the issue of giving leave to amend. While this model is certainly possible, its estimation requires some difference in the independent variables used in the analysis. Here the variables are the same, making multinomial probit the appropriate model for this analysis. We also ran logit models on subsets of variables and obtained the same results.

trict of Texas were all less likely than the baseline districts to grant *without* leave to amend, all else being equal.

Additionally, we found that orders filed in 2010 responding to motions in cases challenging financial instruments had a higher probability of being granted without leave to amend than those filed in 2006, all else being equal. We found no significant difference in the outcomes of motions in other types of cases and no other significant interactions between type of case and year of order. Finally, responding to an amended complaint increased the probability that the motion would be granted without leave to amend, all else being equal.

Table A-2: Multinomial Probit Model of Granting All or Some of the Relief Requested by the Motion With and Without Opportunity to Amend the Complaint

Variable	Grant and Amend		Grant and No Amend	
	Coefficient	**Std. Error**	**Coefficient**	**Std. Error**
Eastern District of Arkansas	-0.068	0.469	-0.668	0.391
Northern District of California	**1.625**	0.274	-0.191	0.243
Eastern District of California	**1.589**	0.250	-0.260	0.212
District of Colorado	-0.300	0.436	-0.519	0.329
District of the District of Columbia	-0.657	0.663	0.146	0.405
Middle District of Florida	**0.704**	0.256	**-0.983**	0.221
Northern District of Georgia	0.639	0.359	-0.054	0.304
Northern District of Illinois	0.179	0.283	**-0.709**	0.238
Southern District of Indiana	-0.363	0.420	-0.266	0.306
District of Kansas	0.274	0.357	-0.500	0.303
District of Massachusetts	0.160	0.467	0.251	0.364
District of Minnesota	0.206	0.400	-0.063	0.324
District of New Jersey	0.269	0.305	0.060	0.245
Eastern District of New York	**0.748**	0.329	0.157	0.279
Southern District of New York	**0.825**	0.376	0.324	0.324
Southern District of Ohio	0.217	0.333	-0.064	0.270
Eastern District of Pennsylvania	0.072	0.318	**-0.596**	0.261
District of South Carolina	-1.085	0.651	-0.626	0.395
Northern District of Texas	0.044	0.376	**-0.909**	0.333
Southern District of Texas	-0.200	0.416	-0.318	0.322
Year 2010	0.235	0.337	-0.115	0.300
Contract	-0.223	0.313	-0.289	0.272
Other	-0.545	0.320	-0.346	0.275
Civil Rights	-0.066	0.314	0.008	0.273
Financial Instrument	-0.163	0.540	-1.075	0.556
Employment Discrimination	-0.202	0.354	-0.049	0.303
Amended Complaint	-0.006	0.102	**0.283**	0.095
Contract x 2010	0.040	0.396	0.005	0.354
Other x 2010	0.335	0.397	0.077	0.353
Civil Rights x 2010	0.190	0.401	0.225	0.358
Financial Instrument x 2010	0.836	0.604	**1.828**	0.615
Employment Discrimination x 2010	0.104	0.454	0.126	0.399
Constant	**-0.752**	0.345	**0.636**	0.286

Note: N = 1,915. Statistically significant effects ($p < 0.05$) appear in bold print. The baseline for the model is an order deciding one or more Rule 12(b)(6) motions to dismiss filed in the District of Rhode Island, the Eastern District of Michigan, or the District of Maryland in 2006 in a tort case, responding to an un-amended complaint.

To understand the substantive impact of these factors, we estimated marginal effects. Table A-3 shows the results of these effects.

Table A-3: Marginal Effects Estimates for Multinomial Probit Model (Deny vs. Grant with Leave to Amend vs. Grant Without Leave to Amend)

Variable	Deny	Grant and Amend	Grant and No Amend
Baseline	**0.298**	**0.145**	**0.557**
Districts			
Eastern District of California	-0.149	0.468	-0.319
Northern District of California	-0.140	0.469	-0.328
Middle District of Florida	0.060	0.304	-0.364
Northern District of Illinois	0.111	0.121	-0.233
Eastern District of New York	-0.087	0.144	-0.057
Southern District of New York	-0.115	0.135	-0.020
Eastern District of Pennsylvania	0.106	0.082	-0.188
Northern District of Texas	0.163	0.109	-0.272
Amended Complaint	-0.054	-0.030	0.084
Financial Instrument x 2010	-0.258	-0.077	0.335

Table A-3 indicates the marginal effects of individual variables when other variables were held constant. These effects estimates allow for an assessment of the impact of each of the variables by adding the baseline probability of each outcome and the effects estimate for each variable that was statistically significant. For example, while the probability of orders granting a motion with leave to amend was only 15% (i.e., 0.145) in the baseline districts, the probability of orders granting motions with leave to amend in the Eastern and Northern Districts of California was 61% (0.145 + 0.468 in the Eastern District of California and 0.145 + 0.469 in the Northern District of California), when other variables were held constant. While granting motions without leave to amend was the most likely outcome (56% adjusted baseline probability), orders responding to motions challenging financial instruments had an 89% adjusted probability of being granted without leave to amend in 2010 (0.557 + 0.335). Responding to an amended complaint increased the adjusted probability of granting a motion without leave to amend to 64% (0.557 + 0.084).

2. Motions Granted with Respect to Only Some or All of the Claims of a Plaintiff

Motions may also be granted with respect to only some claims by plaintiffs, or with respect to all claims by at least one plaintiff, thereby eliminating one or more plaintiffs from the case (at least with respect to the issues addressed by the order). Table A-4 shows the results of the model estimating these two outcomes.

Table A-4: Multinomial Probit Model of Granting Motion with Respect to Some or All Claims by a Plaintiff

Variable	Grant with Respect to Claims Only		Grant with Respect to All Claims of at Least One Plaintiff	
	Coefficient	Std. Error	Coefficient	Std. Error
Eastern District of Arkansas	-0.251	0.389	**-0.974**	0.480
Eastern District of California	**0.675**	0.241	0.387	0.252
Northern District of California	**0.559**	0.212	**0.438**	0.221
District of Colorado	-0.429	0.340	-0.431	0.364
District of the District of Columbia	0.062	0.417	-0.053	0.440
Middle District of Florida	-0.193	0.218	**-0.489**	0.234
Northern District of Georgia	0.267	0.307	-0.001	0.330
Northern District of Illinois	-0.397	0.241	-0.453	0.255
Southern District of Indiana	-0.140	0.312	-0.454	0.345
District of Kansas	-0.375	0.314	-0.140	0.321
District of Massachusetts	0.315	0.371	0.110	0.393
District of Minnesota	0.074	0.332	-0.073	0.352
District of New Jersey	0.031	0.253	0.194	0.260
Eastern District of New York	0.343	0.284	0.308	0.296
Southern District of New York	0.198	0.337	**0.733**	0.335
Southern District of Ohio	0.088	0.277	-0.123	0.294
Eastern District of Pennsylvania	-0.226	0.264	**-0.687**	0.295
District of South Carolina	-0.535	0.406	**-0.911**	0.465
Northern District of Texas	-0.508	0.333	**-0.737**	0.363
Southern District of Texas	-0.120	0.327	-0.486	0.361
Year 2010	-0.044	0.298	0.138	0.328
Contract	-0.251	0.271	-0.247	0.304
Other	-0.504	0.276	-0.278	0.307
Civil Rights	-0.204	0.275	0.256	0.301
Financial Instrument	-0.796	0.520	-0.439	0.564
Employment Discrimination	0.002	0.302	-0.278	0.347
Amended Complaint	**0.297**	0.093	-0.015	0.100
Contract x 2010	0.002	0.351	0.041	0.387
Other x 2010	0.186	0.351	0.138	0.385
Civil Rights x 2010	0.330	0.357	0.019	0.387
Financial Instrument x 2010	**1.311**	0.580	**1.429**	0.624
Employment Discrimination x 2010	-0.010	0.397	0.327	0.443
Constant	0.302	0.289	-0.082	0.315

Note: N = 1,916. Statistically significant effects ($p < 0.05$) appear in bold print. The baseline for the model is an order deciding one or more Rule 12(b)(6) motions to dismiss filed in the District of Rhode Island, the Eastern District of Michigan, or the District of Maryland in 2006 in a tort case, responding to an un-amended complaint.

Using the same baseline discussed above, we found that the Eastern and Northern Districts of California were again more likely than the baseline districts to grant motions with respect to some of the claims by a plaintiff. The Northern District of California and the Southern District of New York were also more likely than the baseline districts to grant one or more motions with respect to all claims by one or more plaintiffs. On the other hand, the Eastern District of Arkansas, the Middle District of Florida, the Eastern District of Pennsylvania, the District of South Carolina, and the Northern District of Texas were less likely than the baseline districts to grant motions with respect to all claims by one or more plaintiffs.

Similarly, in 2010, orders responding to motions in cases challenging financial instruments were more likely to be granted, both with respect to all claims by at least one plaintiff and with respect to only some claims, all else being equal. As before, we found no statistically significant increase in the likelihood that motions were granted for other types of cases. Finally, responding to an amended complaint increased the likelihood of granting a motion with respect to claims only.

Table A-5 shows the marginal effects of these models. While granting a motion with respect to claims only was the most likely of the three outcomes overall, none of the baseline outcomes had a probability over 50%. Again, this effect varies by district. In the Eastern and Northern Districts of California, the probability of granting a motion with respect to claims only was approximately 50% (0.399 + 0.137 in the Eastern District of California, and 0.399 + 0.095 in the Northern District of California). Granting motions with respect to claims was also a more likely outcome in the Middle District of Florida and the Eastern District of Pennsylvania, though still not as likely as it was in the Eastern and Northern Districts of California. In the Northern District of Texas, denials of motions were more common than the other two outcomes. Orders filed in 2010 responding to motions challenging financial instruments had a higher probability of being granted in both categories, all else being equal. Finally, responding to an amended complaint increased the probability of granting a motion with respect to claims by approximately 49%.

Table A-5: Marginal Effects Multinomial Probit Model (Deny vs. Grant of Motion Dismissing Claims Only vs. Grant of Motion Dismissing All Claims of At Least One Plaintiff)

Variable	Deny	Only Claims	All Claims by a Plaintiff
Baseline	**0.289**	**0.400**	**0.311**
Districts			
Eastern District of Arkansas	0.146	0.039	-0.185
Eastern District of California	-0.127	0.139	-0.012
Northern District of California	-0.118	0.094	0.024
Middle District of Florida	0.088	0.009	-0.097
Southern District of New York	-0.111	-0.071	0.182
Eastern District of Pennsylvania	0.115	0.020	-0.136
District of South Carolina	0.200	-0.049	-0.151
Northern District of Texas	0.175	-0.057	-0.118
Amended Complaint	-0.043	0.093	-0.050
Financial x 2010	-0.237	0.096	0.140

C. Summary

Together these three analyses indicate that the likelihood of a motion to dismiss for failure to state a claim being filed has increased since 2006 across a wide range of types of cases. After controlling for differences across districts and the presence of an amended complaint, we found that motions to dismiss were more likely to be granted without an opportunity to amend the complaint in cases challenging financial instruments. Motions in such cases were rarely denied in 2010, and were split almost evenly between motions granted with respect to all claims by at least one plaintiff and motions granted with respect to only some claims by plaintiffs. We found no increase in the likelihood that motions to dismiss for failure to state a claim would be granted across other broad case types. The presence of an amended complaint also increased the likelihood that the motion would be granted without an opportunity to amend the complaint, and granted with regard to only some claims by a plaintiff.

Appendix B: Identification of Cases and Designation of Case Types

This study examined the filing and resolution of Rule 12(b)(6) motions to dismiss for failure to state a claim as revealed in orders filed in 23 federal district courts in January through June of 2006 and 2010. The courts included in this study represent each of the 12 federal circuits, often including the 2 districts in the circuits with the greatest number of civil filings in 2009.[40] The districts included in this study are listed in Table B-1.

Table B-1: Orders Resolving the Merits of Rule 12(b)(6) Motions

District	Order Year		Total
	2006	2010	
Eastern District of Arkansas	14	13	27
Eastern District of California	33	204	237
Northern District of California	100	238	338
District of Colorado	23	19	42
District of the District of Columbia	9	17	26
Middle District of Florida	84	124	208
Northern District of Georgia	47	13	60
Northern District of Illinois	44	86	130
Southern District of Indiana	24	28	52
District of Kansas	26	29	55
District of Massachusetts	14	23	37
District of Maryland	8	13	21
Eastern District of Michigan	38	58	96
District of Minnesota	16	31	47
District of New Jersey	45	71	116
Eastern District of New York	35	47	82
Southern District of New York	16	38	54
Southern District of Ohio	27	55	82
Eastern District of Pennsylvania	58	31	89
District of Rhode Island	0	7	7
District of South Carolina	9	18	27
Northern District of Texas	14	30	44
Southern District of Texas	16	29	45
Total	700	1,222	1,922

40. Several of the largest districts in some of the circuits were excluded because of problems in collecting the data necessary to conduct the study. Characteristics of the districts are found in the Administrative Office of the U.S. Courts publication Federal Court Management Statistics, http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx (last visited February 6, 2011).

We wanted to examine motion practice during periods that neither anticipated a change in pleading practice nor reacted to the Supreme Court opinions in the absence of appellate court guidance. January through June of 2006 was selected as a period of stable motion practice before the Supreme Court decision in *Bell Atlantic Corp. v. Twombly* in May 2007. January through June of 2010 was selected as a period after which each of the circuits had had a chance to publish at least one appellate court opinion interpreting *Ashcroft v. Iqbal* and offering guidance to the district courts. This analysis does not address motion activity in the interim period from July 2006 through December 2009.

This study is unlike other recent studies of motions to dismiss for failure to state a claim that rely on cases that appear in the computerized legal reference systems.[41] This study identified judicial orders resolving the merits of such motions in each of the selected districts by first identifying orders responding to one or more general motions to dismiss, as indicated by codes entered by the court clerks of the individual districts into the CM/ECF database.[42] These codes relate to the entries on the docket sheets of individual cases and point to documents related to the docket entry. Using a Structured Query Language (SQL) program, we identified all orders responding to all motions to dismiss filed in the selected district courts for the designated dates.[43] Next, we ran a Practical Extraction and Report Language (PERL) program to identify text indicating that the order resolved at least one Rule 12(b)(6) motion to dismiss for failure to state a claim.[44] This process identified 4,725 orders that included variations on the search terms and that were included in the coding task.[45] The PERL program was unable to convert certain types of non-text documents, such as PDF documents stored as static images, and we were unable to identify orders resolving motions to dismiss in such documents.[46] We believe this procedure is equivalent to identifying motions to dismiss on the docket sheets, then searching the text of the motions and responding orders to identify motions to dismiss for failure to state a claim.

A variation on this methodology was used to identify Rule 12(b)(6) motions to determine changes in filing rates. We expanded the case selection window to include cases filed as early as October 1, 2005, for the 2006 cohort, and as early as October 1, 2009, for the 2010 cohort. Again, we used the CM/ECF codes and an SQL program to identify motions to dismiss filed within three months of the case

41. *See supra* note 4 and accompanying text.

42. Our study relied on data in a backup database in order to avoid disrupting CM/ECF service.

43. We excluded all sealed records and other documents that were unavailable on the courts' electronic public access system (PACER).

44. *See supra* note 8.

45. As a result of an early error in framing the search request, a few hundred of these were cases that included only the term "pro se" without other terms indicating the presence of a Rule 12(b)(6) motion. These cases were identified and removed from the sample.

46. We presently do not know the extent to which motions and orders are stored as static images, and are not able to estimate the extent to which we may have failed to identify such motions and orders in our text search. However, we believe such images are more common in motions than in orders, and are more common in submissions by prisoners and pro se parties than in other cases.

being filed in federal court. We then used a PERL program to identify text indicating that the motion was brought under authority of Rule 12(b)(6).

This is the first time we are aware of that this particular research methodology has been used. We believe this methodology for identifying Rule 12(b)(6) motions and related orders represents an improvement over methods that rely on computerized legal reference systems, since this method relies on data prepared by the district courts to identify all orders responding to all motions to dismiss in all cases, and thereby includes cases that do not appear in the computerized legal reference systems.[47] We believe this methodology is also an improvement over methods that identify such motions on the basis of only the text of docket entries, since such docket entries often combine all Rule 12 motions and motions for voluntary dismissal under a single general docket entry.

However, this technique also has some disadvantages. These programs cannot convert motions and orders that appear as a non-text scanned image into searchable text. Also, the programs that convert the PDF formatted motions and orders into searchable text on occasion have difficulty recognizing relevant text, especially where the quality of the PDF document is poor. For example, we found a few instances in which the program overlooked a relevant motion or order because it read the text "12(b)(6)" as "12(b1(6)." We have not estimated the extent of these problems, but we believe they do not affect the accuracy of these results, since the text misinterpretations would not be related to the outcome of the motions. In other words, we believe such errors would be equally likely in orders granting motions and orders denying motions; in contrast, computerized legal reference systems are less likely to include a routine order denying a motion to dismiss.[48]

47. We found that the presence of 12(b)(6) orders in the Westlaw database varied greatly across federal districts. We searched in the Westlaw "allfeds" database for 30 to 40 Rule 12(b)(6) orders in each of three federal district courts: the Eastern District of Arkansas, the District of Colorado, and the District of Kansas. For the Eastern District of Arkansas, we found 87% of the orders on Westlaw, and for the District of Colorado, we found 82% of the orders. However, for the District of Kansas, we found only about 18% of the orders on Westlaw. These findings suggest that Westlaw may publish the majority of orders for some districts, but far less than the majority for other districts. In addition, whether an order was granted or denied may be related to its likelihood of publication. In the Eastern District of Arkansas, 65% of published orders were granted, and 100% of unpublished orders were granted (though there were only 4 unpublished orders). In the District of Colorado, 86% of published orders were granted, while only 62% of unpublished orders were granted. In the District of Kansas, about 71% of published and unpublished orders were granted. A search of Westlaw for a particular term or type of order may not present an accurate picture of the number or disposition of those cases in the district. We interpret these differences in publication rates and differences in grant rates as indicating a need for caution in basing conclusions regarding court practices on studies of orders appearing in the Westlaw federal court databases.

48. *See supra* note 5.

We linked the cases we identified with records from the Administrative Office of the U.S. Courts[49] to allow further specification of the origin and type of case. These origin codes allowed us to restrict our analyses to cases filed as an original proceeding or removed from the state court to the district court. In doing so, we excluded from our analyses cases remanded from the courts of appeals, reopened or reinstated for additional action, transferred from another federal district court, or transferred as part of a multidistrict litigation proceeding, as well as appeals from a magistrate judge's decision.

We also relied on data from the Administrative Office to identify types of cases. The AO data include a "Nature of Suit" code that is designated by the party filing the case or removing the case to federal court. We then combined these codes into seven categories for purposes of analysis. Table B-2 presents the number and types of cases included in each of the categories for the full database.

49. *See* Administrative Office of the U.S. Courts, Federal Court Cases: Integrated Database Series, available at http://www.icpsr.umich.edu/icpsrweb/NACJD/series/00072. These are administrative data prepared by the clerks in the individual federal district courts. For critiques of the usefulness of this data set for research purposes, see Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 Notre Dame L. Rev. 1455, 1460 (2003) (finding errors in recorded award amounts in torts and prisoner civil rights cases); Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 Stan. L. Rev. 1275, 1309–11 (2005) (problems with codes indicating voluntary and other dismissals); and Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Non-Trial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. Empirical Legal Stud. 705 (2004) (finding other coding errors).

Table B-2: Classification of Nature of Suit Codes into Broad Case Types

Case Types		2006	2010	Total
Contract	Insurance	37	43	80
	Marine Contract Actions	0	3	3
	Miller Act	1	0	1
	Stockholders Suits	5	5	10
	Other Contract Actions	100	152	252
	Contract Product Liability	1	6	7
	Franchise	2	3	5
	Securities, Commodities, Exchange	39	29	68
	Total	185	241	426
Torts	Torts to Land	2	5	7
	Airplane Product Liability	0	3	3
	Assault, Libel, and Slander	4	6	10
	Federal Employers Liability	0	1	1
	Marine Personal Injury	2	2	4
	Motor Vehicle Personal Injury	1	3	4
	Motor Vehicle Product Liability	1	1	2
	Other Personal Injury	16	24	40
	Medical Malpractice	2	1	3
	Personal Injury—Product Liability	9	27	36
	Other Fraud	29	19	48
	Other Personal Property Damage	3	12	15
	Property Damage—Product Liability	1	7	8
	Total	70	111	181
Civil Rights	Other Civil Rights	150	209	359
	Civil Rights Voting	1	1	2
	Civil Rights Accommodations	8	3	11
	Americans with Disabilities Act Employment	4	10	14
	Americans with Disabilities Act Other	9	9	18
	Total	172	232	404

Table B-2: Classification of Nature of Suit Codes into Broad Case Types (continued)

Case Types		2006	2010	Total
Employment Discrimination	Civil Rights Jobs	95	119	214
	Total	95	119	214
Financial Instrument	Negotiable Instruments	0	64	64
	Foreclosure	2	49	51
	Other Real Property Actions	3	35	38
	Truth in Lending	5	34	39
	Consumer Credit	7	53	60
	Total	17	235	252
Other	Overpayments & Enforcement of Judgment	2	2	4
	Overpayments Under the Medicare Act	0	1	1
	Recovery of Overpayments of Vet Benefits	2	0	2
	Rent, Lease, Ejectment	0	2	2
	Antitrust	7	9	16
	Bankruptcy Withdrawal 28 U.S.C. § 157	0	6	6
	Banks and Banking	2	9	11
	Interstate Commerce	2	1	3
	Other Immigration Action	0	1	1
	Civil (RICO)	15	25	40
	Cable and Satellite TV	1	4	5
	Other Forfeiture and Penalty Suits	0	1	1
	Fair Labor Standards Act	4	15	19
	Labor/Management Relations Act	4	7	11
	Railway Labor Act	2	0	2
	Other Labor Litigation	7	13	20
	Employee Retirement Income Security Act	28	42	70
	Copyright	11	11	22
	Patent	7	19	26
	Trademark	8	16	24
	Social Security Disability Claim	0	1	1
	Tax Suits	2	2	4
	Other Statutory Actions	49	79	128
	Agricultural Acts	1	0	1
	Environmental Matters	6	13	19
	Freedom of Information Act of 1974	1	1	2
	Constitutionality of State Statutes	0	4	4
	Total	161	284	445
Grand Total		700	1,222	1,922

Appendix C: Coding and Analysis of Motions and Orders

We loaded relevant orders resolving Rule 12(b)(6) motions to dismiss for failure to state a claim into a FileMaker Pro database, along with identifying information and Administrative Office data related to the case. We assigned the cases random numbers, then sorted the cases by those numbers to ensure that coding assignments would be randomly assigned to coders across groups and districts. On two occasions we added additional cases to the database following the same randomization procedure.

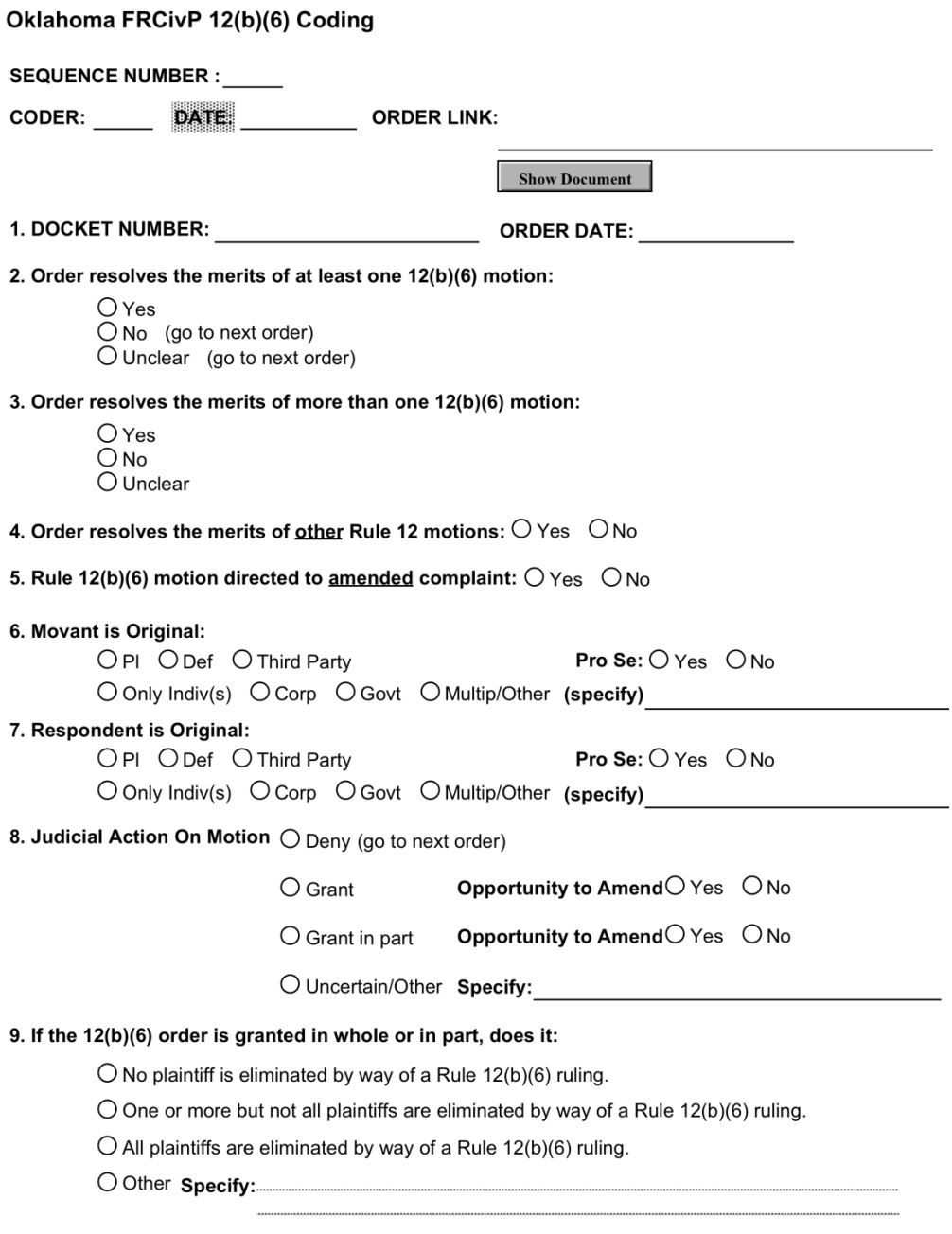
A team of 10 recent law school graduates reviewed the judicial orders. Relying on remote access to the FileMaker Pro database, they coded information contained in the order indicating the nature and resolution of the motion.[50] The FileMaker Pro database allowed the coder to link to the relevant document and directly enter codes into the database. In reviewing the motions, the coders first confirmed that the order resolved the merits of at least one motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), noted characteristics of the movant and respondent, and indicated judicial action taken in response to the motion. If the order granted all or some of the relief requested by the motion, the coder indicated whether the order appeared to exclude all claims by one or more plaintiffs, and whether the order indicated that the respondent would have an opportunity to amend the complaint. Intercoder reliability checks for 25 orders revealed that the coders agreed on 89% to 97% of the coding choices, depending on the nature of the specific question. A copy of the code sheet appears as Figure C-1.

The coding instructions resolved a number of difficult questions. We excluded a number of cases in which Rule 12(b)(6) motions were granted for reasons other than a failure to state a claim. For example, we excluded cases in which motions were granted on the basis of sovereign or qualified immunity, which we regarded as a jurisdictional issue and which was usually raised as an affirmative defense. When a respondent failed to file a timely response and the court granted the Rule 12(b)(6) motion, thereby dismissing the claim, we coded the order as resolving the merits of the Rule 12(b)(6) motion, since we regarded the failure to respond in a timely manner as an admission that the respondent was unable to state a claim.

Coders often encountered circumstances in which a single order resolved more than one motion, or a single motion was directed at multiple claims. We also found multiple motions by multiple defendants directed at a single claim. For our purposes, we counted *all* Rule 12(b)(6) motions resolved by a single order as resolving a single 12(b)(6) motion addressing multiple claims.

50. The coders were former law review students who had recently graduated from the University of Oklahoma School of Law. The coders underwent a three-hour training program, and used a 12-page coding manual to aid in the process. E-mail exchanges, with copies to all members of the group, allowed coders to raise questions and seek clarification throughout the process. Steven Gensler, a professor of the University of Oklahoma School of Law and a member of the Judicial Conference Advisory Committee on Civil Rules, participated in the orientation program and supervised the coding process on-site.

Figure C-1: Code Sheet for Recording Action on Rule 12(b)(6) Motion



Oklahoma FRCivP 12(b)(6) Coding

SEQUENCE NUMBER : _____

CODER: _____ **DATE:** _____ **ORDER LINK:** _____

Show Document

1. DOCKET NUMBER: _____ **ORDER DATE:** _____

2. Order resolves the merits of at least one 12(b)(6) motion:

- ○ Yes
- ○ No (go to next order)
- ○ Unclear (go to next order)

3. Order resolves the merits of more than one 12(b)(6) motion:

- ○ Yes
- ○ No
- ○ Unclear

4. Order resolves the merits of <u>other</u> Rule 12 motions: ○ Yes ○ No

5. Rule 12(b)(6) motion directed to <u>amended</u> complaint: ○ Yes ○ No

6. Movant is Original:

○ Pl ○ Def ○ Third Party **Pro Se:** ○ Yes ○ No

○ Only Indiv(s) ○ Corp ○ Govt ○ Multip/Other **(specify)** _____

7. Respondent is Original:

○ Pl ○ Def ○ Third Party **Pro Se:** ○ Yes ○ No

○ Only Indiv(s) ○ Corp ○ Govt ○ Multip/Other **(specify)** _____

8. Judicial Action On Motion ○ Deny (go to next order)

○ Grant **Opportunity to Amend** ○ Yes ○ No

○ Grant in part **Opportunity to Amend** ○ Yes ○ No

○ Uncertain/Other **Specify:** _____

9. If the 12(b)(6) order is granted in whole or in part, does it:

- ○ No plaintiff is eliminated by way of a Rule 12(b)(6) ruling.
- ○ One or more but not all plaintiffs are eliminated by way of a Rule 12(b)(6) ruling.
- ○ All plaintiffs are eliminated by way of a Rule 12(b)(6) ruling.
- ○ Other **Specify:** .....

.....

Rule 12(b)(6) motions directed toward multiple claims often were granted as to some claims and denied as to others. If an order granted any relief requested by the motion, we coded the motion as being granted as to some claims and then determined whether the order indicated an opportunity to amend the complaint with regard to the dismissed claims. Similarly, if the order resolved multiple Rule 12(b)(6) motions by granting some motions and denying others, the multiple motions were regarded as a single Rule 12(b)(6) motion for our purposes and coded as granting some of the relief requested. If an order granting any relief requested by a motion allowed an opportunity to amend the complaint, we coded the order as allowing an opportunity to amend.

If the order granted any relief sought by the Rule 12(b)(6) motion, the coder indicated whether the grant appeared to eliminate all claims by one or more plaintiffs, thereby excluding those plaintiffs from the litigation. If an order dismissed some but not all claims by a plaintiff, then the coder indicated that no plaintiff was eliminated by way of the ruling. This coding was somewhat imprecise, since the breadth of the litigation was sometimes difficult to interpret in the context of the order alone. The categories listed as responses in Question 9 on the code sheet were developed after pilot work revealed inconsistencies in our attempt to code for the effect of the motion on defendants. Unfortunately, after we changed the response categories, the language of the question no longer fit the revised categories. This fact was called to the attention of the coders, and we agreed that the question would be interpreted as asking how an order that granted at least some of the relief requested would affect the role of one or more plaintiffs.

Coding was reviewed by Center staff for completeness and consistency on an ongoing basis. Responses designated as “unclear,” “uncertain,” and “other” were reviewed and resolved in discussion with the coder. Data were then loaded into the SPSS (version 17) statistical analysis program. Multivariate statistical models were analyzed using STATA 11 SE. CLARIFY was used to estimate the predicted probabilities for the logit models.

The Federal Judicial Center

Board

The Chief Justice of the United States, *Chair*
Judge Susan H. Black, U.S. Court of Appeals for the Eleventh Circuit
Magistrate Judge John M. Facciola, U.S. District Court for the District of Columbia
Judge James B. Haines, Jr., U.S. Bankruptcy Court for the District of Maine
Judge James F. Holderman, Jr., U.S. District Court for the Northern District of Illinois
Judge Edward C. Prado, U.S. Court of Appeals for the Fifth Circuit
Chief Judge Loretta A. Preska, U.S. District Court for the Southern District of New York
Judge Kathryn H. Vratil, U.S. District Court for the District of Kansas
James C. Duff, Director of the Administrative Office of the U.S. Courts

Director

Judge Barbara J. Rothstein

Deputy Director

John S. Cooke

About the Federal Judicial Center

The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The organization of the Center reflects its primary statutory mandates. The Education Division plans and produces education and training programs for judges and court staff, including satellite broadcasts, video programs, publications, curriculum packages for in-court training, and Web-based programs and resources. The Research Division examines and evaluates current and alternative federal court practices and policies. This research assists Judicial Conference committees, who request most Center research, in developing policy recommendations. The Center's research also contributes substantially to its educational programs. The two divisions work closely with two units of the Director's Office—the Systems Innovations & Development Office and Communications Policy & Design Office—in using print, broadcast, and on-line media to deliver education and training and to disseminate the results of Center research. The Federal Judicial History Office helps courts and others study and preserve federal judicial history. The International Judicial Relations Office provides information to judicial and legal officials from foreign countries and assesses how to inform federal judicial personnel of developments in international law and other court systems that may affect their work.

C RULE 84 FORMS

The Forms in the Civil Rules Appendix are venerable, familiar, and often useful. They have the imprimatur of the full Enabling Act process. It may seem startling to suggest that the time has come to consider basic changes in the means of generating and maintaining the Forms. But the Civil Rules Committee plans to undertake this chore. And because other advisory committees have followed different practices in respect to forms, it may prove useful to establish a joint project under the Standing Committee's guidance. The reasons for taking on the Forms are sketched below.

Rule 84 demonstrates in a single sentence the virtues it hopes to illustrate through the Forms:

> The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.

The Forms cover a variety of topics. Many of them serve useful purposes. Forms 1 and 2 provide a uniform caption and signature line. Form 3 is a summons. Form 5 provides a notice of a lawsuit and request to waive service — this form was developed with great care to implement Rule 4(d), and was thought so important that Rule 4(d)(1)(D) requires that the text prescribed in Form 5 be used to inform the defendant of the consequences of waiving and not waiving service. The Form 52 Report of the Parties' Planning Meeting was drafted with equal care, and was amended in 2010, to guide parties through the topics that should be considered in a Rule 26(f) conference. Form 80, the Notice of a Magistrate Judge's Availability, includes a paragraph designed to avoid any hint of pressure to consent to trial before a magistrate judge. Other forms are similarly useful or even important.

Forms 10 through 21 and 61 are complaints. They were revised, but not much revised, in the Style Project. The original purpose was to translate the abstract pleading standard of Rule 8(a)(2) into "pictures" showing that a remarkably short and plain statement can show the pleader is entitled to relief. The Form negligence complaint, then Form 9 and now Form 11, won honorable mention in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1970 n. 10 (2007): "A defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer."

The form complaints have gained prominence in the wake of the Twombly and Iqbal decisions. This increased visibility brings conflicting pressures to bear on any project to reconsider the Forms. Caution is supported by the considerations that counsel delay in any project to adjust pleading, discovery, or yet other rules to respond to the Twombly and Iqbal decisions. Rule 84 commits the courts to the proposition that these Forms suffice. Lower courts, however, are often puzzled about the contrast between this much "simplicity and brevity" and the seemingly elevated levels of contextual pleading described by the Supreme Court. A succinct statement was provided in *Tyco Fire Products, LP v. Victualic Company*, Civil Action 10-4645 (E.D.Pa. April 12, 2011), slip p. 26. In ruling that a counterclaim to declare a patent invalid must be more detailed than the "conclusory complaints of direct infringement" contemplated by Form 18, Judge Robreno said this:

> Put simply, the forms purporting to illustrate what level of pleading is required do not reflect the sea change of Twombly and Iqbal. Rule 84, however, instructs that the forms "suffice" such that pleaders who plead in accordance with the forms are

> subject to a safe harbor. * * * This inconsistency between the Supreme Court's interpretation of Rule 8(a) and the forms Rule 84 validates should be remedied: either by modifying or eliminating Rule 84 or by updating the forms to clearly comply with existing law.

Although the Forms cover only a small fraction of the varieties of claims that can be brought to a federal court, the backward implications of these pictures could have an important bearing on pleading standards across the board. Acting on the Forms now, without yet beginning a broader consideration of pleading, could easily be seen as an indirect or even covert attempt to set more general pleading standards.

The increased prominence of the pleading Forms, on the other hand, also prompts a fresh look at them. They do not all look good. The Form 18 complaint for patent infringement is a clear example. It does not even designate which claims are alleged to be infringed, nor the features of the defendant's acts that correspond to the claim limitations.

If there are persuasive reasons to believe a better form could be developed for patent-infringement complaints, there are powerful reasons to doubt the capacities of the Enabling Act process to devise a suitable form. A deep knowledge of the opportunities and challenges of pleading an infringement claim is required. The question is not merely one of substantive patent law. Imagine patents on a simple mechanical device, a complex biological process, an intricate computer system, or a design. Consider the possibility that several patents may bear on a single course of alleged infringement. Add in the prospect that the plaintiff may face a problem common in other kinds of litigation — it seems highly improbable the defendant could produce a particular product without infringing the plaintiff's process patent, but only access to the defendant's operations can provide the information.

One more illustration confirms the point. How could a Committee draft a form complaint that would adequately plead a "contract, combination, * * * or conspiracy" among the defendants in the Twombly case? If the form were devised, would it be useful for any other plaintiff, defendant, or court?

Apart from the form complaints, the Forms cover some parts of the Rules, but far from all. Forms 50 and 51 illustrate requests to produce documents under Rule 34 and to make admissions under Rule 36; there are no forms for a deposition notice, a subpoena to produce, an interrogatory (nor when a multiple question becomes a discrete subpart), or a motion to compel a physical examination. It may be possible to construct reasons for this pattern, but the same question could be asked throughout the Forms.

Of course the answer could be that the Forms are important, and the Rules Committees are obliged to generate and maintain more Forms, with greater care. But this answer prompts a counter-answer.

The historic fact is that the Committees have not devoted sustained attention to the Forms. Until the revisions effected in the Style Project, effective in 2007, many of the forms marked their pristine originality by using illustrative dates ranging from 1934 to 1936. In the Style Project itself,

the Forms received much less attention than the rules texts. This neglect does not reflect callous indifference. It reflects the continuing press of more important business. There is little reason to hope that the future will bring a period of relative calm, when the settled satisfactory operation of all the Civil Rules affords time to tend to the Forms in a comprehensive way.

It is not inevitable that the Forms be generated through the Enabling Act process. The statutes do not mention Forms. The Criminal Rules forms are generated by the Administrative Office, with advice from the Criminal Rules Committee but without invoking the Enabling Act process. The Administrative Office generates and maintains a large number of forms for civil actions that do not become Rule 84 Enabling Act Forms. These processes seem to have worked well.

Reliance on the Administrative Office is not the only possible alternative to full Enabling Act treatment. Other systems can be devised, and the alternatives should be explored.

If the Forms come to be separated from the Enabling Act process, it will be necessary to reconsider Rule 84. It does not seem wise to delegate authority to adopt forms that "suffice under these rules," even if the Enabling Act permits delegation. Rule 84 might be recast to tout the virtues of a set of "official" forms, by whatever process created, without endorsing them as sufficient under the rules. It might be better to withdraw Rule 84.

All of these considerations combine to make the Rule 84 Forms ripe for review. The outcome is not clear, nor is it clear that the same process is suitable for each Advisory Committee. Bankruptcy Forms may well require a unique process. But much can be learned by considering all of the rules, and all of the different Committees' processes, together.

D DUKE CONFERENCE

Rules amendments are but one of several paths to pursue in working to implement the many important lessons learned at the 2010 Litigation Review Conference. The theme that reappeared constantly was that the most important needs are for utilizing procedural opportunities in proportion to the reasonable demands of the case, for cooperation among lawyers, and for active and hands-on judicial management. Most participants believed that the basic framework of the Civil Rules can work well without drastic changes if, under active judicial guidance, lawyers cooperate in proportional litigation activity. Education of the bench and bar, best-practices guides, empirical research — often in conjunction with carefully planned and supervised pilot projects — can accomplish a great deal. The Federal Judicial Center is actively engaged in working with the Advisory Committee to pursue these goals. Much of the Subcommittee's work will lie in this area.

This optimistic view of the Civil Rules was not universal. The Duke Conference Subcommittee and the Advisory Committee have considered the possibility that dramatic reform, even drastic reform, is needed now. Some Committee members believe that work should begin to develop important changes in the Civil Rules. Whatever may be the lot of "average" actions in federal court, a significant number encounter forbidding, even prohibitive, costs and delay. On this view, the Committee is required to determine whether meaningful improvement is possible, and is responsible to recommend whatever seems possible. Potential projects may be identified to begin this work. But many have little enthusiasm for beginning now a task so difficult and contentious. One obstacle is the lack of persuasive alternative models that might prove acceptable within our traditions of open access, adversary litigation, jury trial, and reliance on private actors to enforce basic social policies through the courts. Another is the sense that present rules work reasonably well for most actions brought to federal court. The median figures on the cost and duration of civil actions reported by the FJC study for the Conference are reassuring. The cases that generate severe problems command attention and vigorous efforts toward improvement, but they are a relatively small portion of all cases. It is important to work as well toward improving procedures for all types of litigation, but many of these efforts will be made within the basic structure established in 1938. These efforts will be pursued actively, looking toward changes that can be achieved in the short run. More aggressive proposals also will be considered, but with the recognition that truly fundamental reform is likely only over the course of many years, only with strong showings of fundamental failures in administering civil justice or with powerfully persuasive new models.

One open-ended project will be to determine whether inspiration can be found in the "rocket docket" practices in the Eastern District of Virginia. The time from filing to disposition in the Eastern District is second shortest in the country. Deference to the local practices is reflected in Rule 26(f)(4), which authorizes a court to adopt a local rule accelerating the time for the Rule 26(f) conference of the parties and for reporting after the conference. Some or all of the local practices may be transferrable to other districts, perhaps by national rule provisions, perhaps by other means. The process of learning about these practices will begin with panel presentations by Eastern District judges and lawyers at the November Advisory Committee meeting.

A much more specific project is well underway. A group of lawyers who typically represent plaintiffs or defendants has been formed to develop a protocol of initial discovery requests that will be accepted without objection. Agreement has been reached as to many matters, and another meeting to be held this summer may be all that is needed to complete the work. It is expected that a good number of willing judges can be found to adopt the protocol in scheduling orders. The FJC is prepared to participate in a way that will ensure rigorous evaluation of the results. If this project succeeds, it may become a model that can be followed for other well-developed categories of litigation.

Working within the present framework, a long menu of possible rules amendments was generated by the Conference panels and papers. The Subcommittee has worked to establish priorities among these possibilities, without yet beginning drafting work on any of them. One goal common to some of the proposals is to better realize the capacities of the present rules. Among them are bolstering Rule 16, both for scheduling orders and pretrial conferences; adding a pre-motion conference requirement; reconsidering the rule that ordinarily discovery cannot begin until the parties have had a Rule 26(f) conference; and adding an explicit duty to cooperate. More detailed revisions also are being considered.

Rule 16(b) directs that a scheduling order issue in every case except in categories of actions exempted by local rule. The judge must consult with the parties "at a scheduling conference or by telephone, mail, or other means." Some of the information provided by the FJC study for the Conference suggests that scheduling orders may not always be issued — there was no discovery cutoff in nearly half the cases studied, even though Rule 16(b)(3)(A) requires that the order limit the time to complete discovery. Nor is it clear whether the parties consistently comply with the conference requirements imposed by Rule 26(f). Beyond education efforts to impress the directions of the present rule, some amendments might prove useful. It might be required that the parties and court confer directly, at least by telephone, in framing the order; the requirement might be excused if the parties agree on a joint scheduling order, although even then it may be helpful to confer with the judge to establish early familiarity and control.

Scheduling order practice raises another question — whether too much delay is permitted by the timing requirement, which supplements the hope that the order issue "as soon as practicable" by setting the outer limit as "the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared." Particularly in the era of electronic filing, it may prove possible to shorten the outer time limits as a step toward reducing delay.

In addition to focusing on scheduling-order practice, general pretrial-conference practice is being considered. It may be useful to require at least one conference in addition to a scheduling-order conference, although docket pressures in some districts may make this idea infeasible.

Pretrial-conference practices might be developed still further. One possibility would be to require a conference with the court before filing any motion. A survey of local rules and standing orders by the Administrative Office suggests that only a few judges impose a general pre-motion conference; there seems little reason to suggest a rule. On the other hand, pre-discovery-motion conferences are required by local rule or standing order of at least one judge in 37 districts. A

variation is found in the practices of many judges who announce that they are available to resolve discovery disputes at any time. For many years the Committees have heard that judges who do this find two benefits — many fewer discovery disputes come to the court at all, and most of those that do are resolved immediately by the phone call. Pre-motion conferences can work in much the same way. This may be an area in which much can be accomplished by ensuring that judges are aware of these approaches to keeping discovery under control. But revision of the national rules remains a possible alternative.

Rule 26(d) directs that a party may not seek discovery before the parties have conferred as required by Rule 26(f), with specified exceptions. The idea was that the conference will enable the parties to establish practical discovery plans proportional to the needs of the case, and ideally to achieve cooperative exchanges of information without the need for formal discovery requests and responses. There is a contrary view, however, suggesting that it would be useful to allow discovery requests to be served before the conference, deferring any obligation to respond. Knowing what at least the first wave of discovery will be may support better-informed discussion at the conference. This possibility remains open for further consideration.

The FJC is planning further research on the early phases of litigation. The results will inform the decision whether to work toward amending rule 16 and related provisions.

The need for cooperation among the parties is in large part served or defeated by the culture of the bar, as shaped by rules of professional responsibility. Nonetheless, it may be worthwhile to add an explicit rule provision. One possibility would be to add to Rule 1: "[These rules] should be construed and administered by the court, parties, and attorneys to secure the just, speedy, and expensive determination of every action and proceeding." Or: "should be construed and administered, with the cooperation of the parties and attorneys, to secure * * *."

Proportionality, a close cousin of cooperation in the elements of effective litigation, could be addressed in similarly general terms. Most of the concern about proportionality, however, focuses on discovery. What is now Rule 26(b)(2)(C) was added in 1983 "to guard against redundant or disproportionate discovery." The sponsors' high hopes have not been realized. The FJC study for the Conference did reconfirm the findings of several earlier empirical studies — in most actions in federal court there is little or even no discovery, and the overall cost seems reasonable for many actions. But it also reconfirmed the common lament that in some cases — enough cases to be truly worrisome — discovery can be very expensive, even as measured without accounting for the burdens shouldered by the parties themselves and the disruption of the parties' normal affairs. A cross-reference to Rule 26(b)(2) was later added to Rule 26(b)(1), and retained in the Style Project over objections of redundancy, in an effort to reinforce the command. But all too often courts address discovery disputes without seeming to mention proportionality. Still more emphatic rule language is possible, incorporating proportionality into the scope of discovery as defined by Rule 26(b)(1). Judge Grimm has undertaken to develop a set of materials that will provide guidance. This work, and the work of other groups, will support continuing education efforts. In the hope that efforts along these lines will prove effective, the possibility of recommending rules amendments has been deferred.

Other discovery topics have been considered. Daniel Girard advanced three specific proposals at the Conference to curtail evasive discovery responses. These proposals remain under active consideration. The initial disclosure requirements of Rule 26(a)(1), as diluted by amendments in 2000, provoked three sets of reactions at the conference: disclosure is not useful, it is useful sometimes, or it could become useful if restored to the more powerful version adopted in 1993. The division of views, and a sense that some good flows from at least some of the initial disclosure requirements, has led to deferring any further consideration in the near term. Specific presumptive numerical limits on the number of discovery requests might be added to Rule 34 document discovery and Rule 36 requests to admit, similar to the limits in Rules 30, 31, and 33. There is some broader concern with contention interrogatories and requests to admit. These topics remain on the agenda, but are not yet being developed.

Still other topics that veer toward radical reform have been suggested, but remain at the outer edge of possible active consideration. Rule 56 summary-judgment procedures were substantially revised by amendments that took effect on December 1, 2010. That project deliberately bypassed any attempt to reconsider the standards for summary judgment or the allocation of summary-judgment burdens. Dissatisfaction with Rule 56 remains, particularly among plaintiffs who believe that it contributes far more to cost and delay than it saves and may at times lead to improvident termination of valid claims. It seems too soon to revisit Rule 56, and the reasons that limited the scope of the recent project remain powerful. But this may be a good example of the issues that may provoke more sweeping projects over a period of several years.

E RULE 6(D): A STYLE GLITCH AND 3-ADDED DAYS

Eventually it will prove wise to amend Rule 6(d) as follows:

> **(d) Additional Time After Certain Kinds of Service.** When a party may or must act within a specified time after ~~service~~ being served and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

This amendment corrects a misstep taken when Rule 6(d) was amended in 2005 to establish a uniform rule for calculating the 3 added days. Until 2005, it was clear that the 3 added days were available only when an act was required within a time measured after service "upon the party." "[B]eing served" conveys the same meaning. "[A]fter service," however, can be read to include situations in which a party is allowed to act within a specified time after that party has made service on another party. Times to act after making service are included in Rule 14(a)(1) for joining a third-party defendant, Rule 15(a)(1)(A) for amending a pleading once as a matter of course, and Rule 38(b)(1) for demanding jury trial. No one thought of these provisions when Rule 6(d) was amended. It makes no sense to allow a party to control the time it has to act by choosing the means of service — for example, to gain an added 3 days to amend a pleading by choosing to serve it by mail or e-mail. The fix is simple.

If the fix is simple, why not do it now? Two sets of concerns counsel deferring action. The more general concern arises from the prospect that other missteps may be found in translating former rule language into the conventions adopted by the Style Project, either as part of the Style Project or independently. The more specific concern arises from the prospect that it may be time to reconsider the choice among the modes of service that do, or do not, win the 3 added days. Reconsideration most likely should be approached by coordinating work among Appellate, Bankruptcy, Civil, and Criminal Rules Committees.

Concern about style missteps has been expressed for many years. They seem almost inevitable, no matter how carefully the Style Projects have been implemented, and no matter how much care is taken with drafting outside the Projects. The Rule 6(d) contretemps was identified and explored at length by Professor James J. Duane in *The Federal Rule of Civil Procedure That Was Changed By Accident: A Lesson in the Perils of Stylistic Revision*, 62 S.C.L. Rev. 41 (2010). As the title suggests, the article expresses skepticism about the feasibility of implementing new style conventions without inadvertently changing meaning. Rule 6(d) is an example of restyling accomplished independently of the Style Project, but possible candidates from the Style Project have been suggested and others may appear.

The approach to correcting style missteps may be affected by the consequences of the misstep. Rule 6(d) is a good example of a misstep that is not likely to generate grave consequences. No cases have yet been found that allow a party to extend its own time to act by choosing the mode of service. If the issue does arise, there is a reasonable chance that a court will apply the caution expressed in the Committee Notes for each rule, even when the style changes were made outside the Style Project: style changes should not be read to change the rule's meaning. This prospect is enhanced by the lack of any reason to read the rule otherwise. But Rule 6(d) may be read as

Professor Duane argues. The consequences are not likely to be severe — a party wins 3 added days to act, usually in the early stages of an action. The most severe prospect is that a party will deliberately delay action to the end of the 3 added days, relying on that interpretation of Rule 6(d), only to confront a court that rejects the interpretation. Even then it seems unlikely that the court would deny leave to act if there were good reason to implead a third-party defendant, amend a pleading, or demand jury trial.

Absent the prospect of serious consequences, it may be wise to allow style missteps to accumulate for a while, to be addressed in a package. A continual parade of minor amendments should be avoided when possible. If only one or two appear, little is lost by delay. If a few appear, a package can be timed for publication in light of the apparent importance of one or more corrections, the possibility that publication with more important amendments might dilute the value of public comment, and the benefits of allowing a year or more to go by without any new rules.

Reconsideration of the 3-added days provision is most often suggested in the belief that service by electronic means does not merit the added time. Still, even e-mail from the court is not always delivered, and the concerns that prompted including electronic service in Rule 6(d) may survive in some measure. Service by mail, on the other hand, may well merit the 3 added days. The other modes of service specified in Rule 6(d) present intermediate questions — "leaving it with the court clerk if the person has no known address," or "delivering it by any other means that the person consented to in writing."

The 3-added-days questions affect other sets of rules intrinsically. What modes of service, if any, warrant increasing the time to act?

Even the style misstep may have some bearing on other rules. Appellate Rule 26(c) allows 3 added days only "after service." Apparently no Appellate Rule specifies a time to act after making service, so the style question does not arise. But the question of service by electronic means does arise. Criminal Rule 45(c) is nearly verbatim the same as Civil Rule 6(d), but apparently no Criminal Rule specifies a time to act after a party makes service. (The Criminal Rules Reporters suggest that Criminal Rule 12.1(b)(2) might be affected, but doubt that any possible problem is serious.) Bankruptcy Rule 9006(f) is similar to Rule 6(d); using language adopted long before Rule 6(d) was amended, it provides added time after a paper "is served by mail." The Bankruptcy Rules incorporate Civil Rules 14, 15, and 18 either for adversary proceedings or for all litigation. There to not appear to be any cases addressing the effect of the "served by mail" language in the context of Rules 14, 15, or 18.

If the 3-added-days question is to be revisited, most likely with some means of coordination among the Advisory Committees, the style issue can be dealt with in that context. Otherwise it will be moved ahead for action when there is no other reason to delay.

F CIVIL-APPELLATE RULES INTERSECTIONS

The Appellate Rules were liberated from the Civil Rules many years ago, but the Civil Rules continue to reflect the intertwining interests of trial courts and appellate courts. The Advisory Committees frequently work together to develop coordinated proposals that integrate related rules. A joint Civil-Appellate Rules Subcommittee has been formed to bring the perspectives of both Committees to bear on at least two current projects.

One project deals with problems that may arise from the effects of some post-judgment motions that suspend and then, on final disposition of the last such motion, "reset" or "restart" appeal time afresh. A pervasive problem in this area was corrected several years ago by parallel amendments of Civil Rule 58 on entering judgment and Appellate Rule 4. But, in the seemingly inevitable fashion of Rule 4, some possible problems linger on.

The second project deals with efforts to "manufacture" finality after adverse rulings that do not dispose of an entire action. Different circuits take different approaches to dismissal without prejudice, dismissal with prejudice, and dismissal with "conditional" prejudice that allows revival of the matters dismissed if the order giving rise to the appeal is reversed. These questions could be addressed, at least in part, through Civil Rule 41 on dismissal or Civil Rule 54(b) on partial final judgments. For that matter, it would be possible to craft an entirely new Civil Rule to complement Appellate Rules provisions.

The Appellate Rules Committee considered these matters at its April meeting, as discussed in their Report. The Civil Rules Committee will rely on the Subcommittee for initiating the next steps toward work on the Civil Rules.

III PENDING LEGISLATION

The Committee continues to monitor the progress of bills that affect the Civil Rules. The most prominent examples are the Sunshine in Litigation bills and the Lawsuit Abuse Reduction Act. Each set carries forward proposals that have been introduced regularly for many years — to curtail the use of discovery protective orders in actions that may affect public health or safety, and to restore Rule 11 to the version that was in effect from 1983 to 1993.

Andrea Kuperman's Legislative Report adds more detailed information.