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## Shopping for a Venue: The Need for More Limits on Choice

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# Shopping for a Venue: The Need for More Limits on Choice

KIMBERLY JADE NORWOOD\*

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*In an earlier article,<sup>1</sup> Professor Norwood questioned the wisdom of the Supreme Court's decision in Ferens v. John Deere Co.,<sup>2</sup> which allows plaintiffs to double forum-shop, i.e., to file a lawsuit in one jurisdiction and then, while retaining the advantages of that jurisdiction's laws, to transfer the lawsuit to the geographically preferred jurisdiction. There, Professor Norwood assumed that having choices about where to file lawsuits was a necessary component of America's judicial system. Below, however, Professor Norwood explores that assumption and concludes that parties should not have the unrestricted choices seemingly provided by most venue laws.*

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\* Professor of Law, Washington University, St. Louis, Missouri. I thank, first and foremost, Teri Doyle, my secretary, and Peggy McDermott, the assistant librarian for the Washington University School of Law, both of whom have been indispensable, efficient, and gracious assistants. Second, I thank my colleagues at Washington University and elsewhere—Susan Appleton, David Becker, Kathleen Brickey, Kathleen Clark, Clark Cunningham, John Drobak, Barbara Flagg, Katherine Goldwasser, Carol Needham, Daniel Keating, Richard Lazarus, Ronald Levin, Harold S. Lewis, Jr., Lynn LoPucki, Ronald Mann, Taylor Mattis, Frank Miller, Robert Thompson, Karen Tokarz and a half dozen anonymous reviewers for their comments on earlier drafts of this Article. Third, I thank my research assistants—Joel Samson and Keisha Lightbourne (both class of '97)—for their diligence, despite impossible research requests. Finally, I thank my husband, Ronald Alan Norwood, Esq., for providing the foundation for "Futrell," discussed in part I.

1. Kimberly Jade Norwood, *Double Forum Shopping and the Extension of Ferens to Federal Claims that Borrow State Limitation Periods*, 44 EMORY L.J. 501 (1995).

2. 494 U.S. 516 (1990).

## I. INTRODUCTION

Shopping is one of America's favorite pastimes. We shop for cars, homes, banks, investments, jobs, doctors, furniture, schools, clothes, food, and thousands of other things. Before making our purchase, we normally look at the same item in a variety of venues. But what role should choice play in America's judicial system? Should one be able to shop for a judge? To shop for juries? To choose the law that will apply in the litigation? To decide in what state or in what court one's lawsuit is to be filed? To forum-shop?

Forum-shopping "occurs when a party attempts to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict."<sup>3</sup> At the broadest level, forum-shopping includes liberal venue provisions, removal of cases by defendants from state to federal court, joining (or not joining) parties to litigation, selecting juries as a whole, as well as individual jurors, and shopping for judges. The term also includes choosing a particular venue based upon favorable (or unfavorable) procedural and substantive laws, judicial calendars, backlogs, and local rules.<sup>4</sup> Although the language contained in the clear majority of cases addressing forum-shopping issues reflects contempt for forum-shopping, many of these decisions actually promote and encourage forum-shopping, depending on the *type* of forum-shopping involved. Two questions arise. First, why does our judicial system generally favor certain types of forum-shopping over others? Second, why are plaintiffs generally given so much deference in their choice of forum?

Consider these questions in the context of the following illustration: X tortiously injures Y. After securing an attorney, Y and her attorney learn that a tort action may be filed against X in one of ten different states—all where venue is proper and personal jurisdiction exists over X. Y chooses to file her lawsuit in the state whose laws are most favorable to her. Or suppose instead that Y chooses a jurisdiction because juries in the chosen venue consistently render more plaintiff verdicts and higher monetary damage awards than juries in the other possible venues. As demonstrated below, most jurisdictions overwhelmingly support these forms of forum-shopping as a party's right and as valid tactical maneuvers.

The general view in favor of law-shopping and jury-shopping does not exist with respect to judge-shopping. Judge-shopping is a party's

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3. BLACK'S LAW DICTIONARY 655 (6th ed. 1990).

4. See, e.g., Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1677-80 (1990).

attempt to “manipulate the identity of the decision maker,”<sup>5</sup> presumably in one’s favor. Using the above illustration, if Y attempted somehow to choose the judge whom she believed would be most favorable to her case, our judicial system would condemn this action because it impairs the integrity of the judicial system and judicial process.

The first question, then, is why are law-shopping and jury-shopping treated differently from judge-shopping? In other words, if shopping for a judge is impermissible because such a policy would impair the integrity of the judicial system, why aren’t law-shopping and jury-shopping impermissible for the same reason?

This Article explores why selections based on laws and juries are allowed—and even encouraged—while selections based on judges are not. This Article, in finding that the same policy reasons against judge-shopping are also present with respect to law- and jury-shopping, then addresses another question: Why are plaintiffs given such wide deference in their venue choices anyway? Indeed, as explored later, not only does the deference given to the filing party’s venue choice rest on false foundations, but the judicial system’s current approach to venue selection violates the purpose of venue. Specifically, while the primary purpose of venue laws is to find a convenient place for the trial of a given matter, most courts do not evaluate venue selections with this focus. Rather, the typical court robotically pursues the list of possible venues in the given venue law and shuts off when it discovers that the chosen forum is a permissible venue option. But this approach is not correct. The proper venue inquiry should focus on convenience. Once courts begin to use convenience as the basis for all venue-selection decisions, a party’s ability to make filing decisions based on the location of favorable juries or favorable laws will decrease.

This call to reevaluate venue requires only a change of viewpoint. No new laws are required at either the federal or state level. The appropriate vehicles to institute reform are already at every court’s disposal. It is just a matter of getting judges to use them. In the federal system, this suggestion would require more vigorous use of the doctrine of *forum non conveniens*.<sup>6</sup> Thus, if a Pennsylvania-based action is filed in a Mississippi court by a Pennsylvania resident, the court should dismiss the lawsuit under the common law doctrine on the ground that Missis-

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5. *Jones v. City of Buffalo*, 867 F. Supp. 1155, 1163 (W.D.N.Y. 1994); see also Michael Vitt, *Shopping for Justice*, MPLS. ST. PAUL MAG., Dec. 1983, at 127.

6. The common law doctrine of *forum non conveniens* allows a court to dismiss matters, without prejudice to the filing party, when it determines that another, more convenient forum exists. See, e.g., *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Koster v. (American) Lumbermens Mut. Casualty Co.*, 330 U.S. 518 (1947); see also BLACK’S LAW DICTIONARY 655 (6th ed. 1990).

issippi is not a convenient forum for the trial of the Pennsylvania matter.<sup>7</sup> State court judges saddled with litigation having little or no connection with the chosen venue should do likewise. In cases where the state court determines that another venue in a different state is more convenient, the court should dismiss the lawsuit under the doctrine of forum non conveniens.<sup>8</sup> Thus, if a Missouri-based action is filed in an Illinois court by Missouri residents, the court should immediately consider dismissal.<sup>9</sup> Moreover, even if the more convenient venue is located within the same state, the current forum should either utilize any state transfer statutes to transfer the litigation to the alternative forum,<sup>10</sup> or dismiss the litigation on forum non conveniens grounds. Thus, when a resident of one city files a lawsuit in a different city in the same state, if the chosen city has no connection with the plaintiff or the litigation, the current forum should transfer or dismiss the lawsuit.<sup>11</sup>

This suggestion is designed to put substantive restraints on venue choices. It is designed to curtail the decision to file a lawsuit in a given forum simply to secure a more favorable jury or more favorable laws. It is designed to relieve forums of the burden of entertaining litigation with which they have little or no connection. Finally, it is designed to close the gaps in current interpretations of venue laws that allow virtually unfettered choices on where a given lawsuit may be filed.

## II. SHOPPING FOR LAWS AND JURIES

### A. *Examples of Venue-Shopping*

“Venue” is defined as

[t]he particular county, or geographical area, in which a court with jurisdiction may hear and determine a case. Venue deals with locality of suit, that is, with question of which court, or courts, of those that possess adequate personal and subject matter jurisdiction may

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7. See *infra* notes 20-41 and accompanying text. The Article will also discuss more vigorous use of the general federal transfer statute 28 U.S.C. § 1404(a).

8. The federal transfer statute is for use in the federal system only. A state court has no power to transfer a case to a federal court. See, e.g., *Bloom v. Fine*, 653 A.2d 1292, 1294-55 (Pa. Super. Ct. 1995). Nor can a state court transfer an action from one state court to a court in a different state. See, e.g., FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., *CIVIL PROCEDURE*, § 2.31, at 107 (3d ed. 1985) (“The courts of one state . . . may not transfer cases to courts of another state, and dismissal is the only device for implementing forum non conveniens on an interstate basis.”) (footnote omitted); see also *Norwood*, *supra* note 1, at 548 n.269. Thus, state courts determining that venue is more appropriate in either some federal forum or a state court forum outside of the state must rely on the doctrine of forum non conveniens. Virtually every state recognizes the doctrine of forum non conveniens. See *infra* note 265.

9. See *infra* notes 43-48 and accompanying text.

10. Several states have laws allowing in-state transfers. See *infra* notes 263-64, 270.

11. See *infra* notes 57-81.

hear the specific suit in question.<sup>12</sup>

Although venue is not a constitutional requirement, parties must comply with applicable federal and state laws when identifying jurisdictions where a lawsuit may be filed. Under the general federal venue statute, for example, a lawyer wishing to file a federal diversity action knows that there are at least three venues available:

(1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.<sup>13</sup>

Even though venue choices are often identical regardless of whether a case is founded on federal question jurisdiction or federal diversity jurisdiction,<sup>14</sup> venue options often vary depending upon the type of defendant involved.<sup>15</sup> Moreover, if the claim is a federal statu-

12. BLACK'S LAW DICTIONARY 1557 (6th ed. 1990).

13. 28 U.S.C. § 1391(a) (Supp. V 1993), *as amended by* Pub. L. No. 104-34, 109 Stat. 293 (1995).

14. Compare 28 U.S.C. § 1391(a) with the general federal venue provision controlling in actions not founded solely on diversity. The latter, 28 U.S.C. § 1391(b) provides:

(1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district, in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(b) (Supp. V 1993).

15. For example, actions against "aliens" may be brought in "any district." 28 U.S.C. § 1391(d) (1988). Actions against officers or employees, in their official capacity, or agencies of the United States may be brought in:

any judicial district in which (1) a defendant in the action resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved in the action.

28 U.S.C. § 1391(e) (Supp. V 1993). Actions against foreign states, as defined in 28 U.S.C. § 1603(a), may be brought in:

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United State District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

28 U.S.C. § 1391(f) (1988). Another section, 28 U.S.C. 1391(c) (1988), defines the residence of corporate defendants for venue purposes.

tory one, the statute giving rise to the action might contain its own venue provision.<sup>16</sup> Finally, if a state law action is filed in state court, the particular state's venue statutes and/or court rules control.<sup>17</sup> Once the options become clear, the lawyer must then make his or her selection.<sup>18</sup>

In making the where-to-file decision, the lawyer—normally the plaintiff's lawyer, because the plaintiff normally is the filing party—takes many factors into account. For example, venue choices are often based on: the party's geographical convenience; preference for judges in the chosen jurisdiction; preference for the substantive and/or procedural laws in a given venue; the belief that the potential jurors in a particular jurisdiction are more receptive to the filing party's position; and comparisons between the trial calendars (and/or backlogs) in the various venues.<sup>19</sup> Examples of some of these factors at work are described below.

1. USING VENUE RULES AND TRANSFER STATUTES TO SECURE BOTH  
MORE FAVORABLE LAWS AND MORE FAVORABLE  
GEOGRAPHICAL AREAS

In *Ferens v. John Deere Co.*,<sup>20</sup> the plaintiffs, husband and wife,

16. For example, for claims brought under Section 10 of the Securities Exchange Act of 1934, 15 U.S.C. § 78j (1988), the applicable venue provision provides in part:

Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business . . . .

15 U.S.C.A. § 78aa (West Supp. 1995). This type of venue statute is known as a "special," as opposed to a "general," venue provision. It is clear that whenever a special venue provision covers particular kinds of actions, the special provisions control over the general venue statute. *See, e.g.*, *Gulf Research & Dev. Co. v. Schlumberger Well Surveying Corp.*, 92 F. Supp. 16, 18 (S.D. Cal. 1950), *mandamus denied*, 185 F.2d 457 (9th Cir. 1950).

17. *See, e.g.*, MO. REV. STAT. ch. 508 (1994).

18. As explored *infra* notes 309-16 and accompanying text, the ethics rules governing attorney conduct typically require attorneys to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. 1 (1995). Thus, venue selections normally are made with the client's best interest in mind. *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7 (1983); *see, e.g.*, Brian R. Opeskin, *The Price of Forum Shopping: A Reply to Professor Juenger*, 16 SYDNEY L. REV. 14, 27 (1994) ("Few would argue with the proposition that lawyers are ethically bound to advise their clients of the best forum in which to present their case.").

19. Consider also the attorney's own financial interest if venue in a particular jurisdiction cannot be secured. The client may take the case to another attorney.

20. 494 U.S. 516 (1990). *Ferens* has been analyzed elsewhere. *See, e.g.*, Norwood, *supra* note 1; George D. Brown, *The Ideologies of Forum Shopping—Why Doesn't A Conservative Court Protect Defendants?*, 71 N.C. L. REV. 649 (1993); David E. Seidelson, 1 (Wortman) + 1 (*Ferens*) = 6 (Years): *That Can't Be Right—Can It? Statutes of Limitations and Supreme Court Inconsistency*, 57 BROOK. L. REV. 787 (1991); Candace J. Smith, *Plaintiff-Initiated Transfers*

filed two diversity actions—each based upon the same injury-producing event—in different federal courts against the same corporate defendant.<sup>21</sup> The first action, based on breach of contract and warranty claims, was filed in Pennsylvania, the state of plaintiffs' residence and also where the injury occurred.<sup>22</sup> Because the statute of limitations on a tort claim had expired under Pennsylvania law, the second diversity action was filed in Mississippi, where the applicable tort statute of limitations had not expired.<sup>23</sup> Plaintiffs were able to secure personal jurisdiction over the defendant in Mississippi because the defendant was licensed to do business there.<sup>24</sup> The Mississippi action was filed notwithstanding that: (1) plaintiffs resided in Pennsylvania; (2) the product was purchased in Pennsylvania; (3) the injury occurred in Pennsylvania; (4) the defendant did business in Pennsylvania; (5) all of the witnesses with any knowledge of either the accident or the injuries were in Pennsylvania; (6) all of the documents relating to the injuries were in Pennsylvania; (7) a related action was then pending in Pennsylvania; (8) Mississippi had no connection with the lawsuit; and (9) pursuing both actions simultaneously in different states would be highly inconvenient to the parties and witnesses.<sup>25</sup> Days after filing the second action in Mississippi, plaintiffs requested and received a transfer of the Mississippi lawsuit to Pennsylvania, under 28 U.S.C. § 1404(a), for the convenience of the parties and witnesses.<sup>26</sup> Plaintiffs hoped that upon transfer Mississippi's longer tort statute of limitations would follow them back to Pennsylvania.<sup>27</sup>

Once in Pennsylvania, the federal district court there and the Third

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*Under 28 U.S.C. § 1404(a)—The Solution to the Van Dusen v. Barrack Mystery:* Ferens v. John Deere Co., 19 N. KY. L. REV. 171 (1991); Ursula M. Henninger, Note, *The Plaintiff's Forum Shopping Gold Card: Choice of Law in Federal Courts After Transfer of Venue Under Section 1404(a)*—Ferens v. John Deere Co., 26 WAKE FOREST L. REV. 809 (1991); Stowell R.R. Kelner, Note, "Adrift on an Uncharted Sea": A Survey of Section 1404(a) Transfer in the Federal System, 67 N.Y.U. L. REV. 612 (1992); Christopher C. Osborne, Note, *The Applicable Law in Federal Court After Transfer of Venue by Plaintiff:* Ferens v. John Deere Co., 24 CREIGHTON L. REV. 397 (1990); Michael B. Rodden, Comment, *Is 28 U.S.C. § 1404(a) a Federal Forum-Shopping Statute?*, 66 WASH. L. REV. 851 (1991).

21. Ferens, 494 U.S. at 519.

22. *Id.*

23. *Id.*

24. Ferens v. Deere & Co., 819 F.2d 423, 424 (3d Cir. 1987), *vacated and remanded*, 487 U.S. 1212, *aff'd*, 862 F.2d 31 (3d Cir. 1988), and *rev'd sub nom.* Ferens v. John Deere Co., 494 U.S. 516 (1990).

25. Ferens v. Deere & Co., 639 F. Supp. 1484 (W.D. Pa. 1986), *aff'd on other grounds*, 819 F.2d 423 (3d Cir. 1987), *vacated and remanded*, 487 U.S. 1212 (1988), *aff'd*, 862 F.2d 31 (3d Cir. 1988), and *rev'd sub nom.* Ferens v. John Deere Co., 494 U.S. 516 (1990).

26. Ferens, 494 U.S. at 520. 28 U.S.C. § 1404(a) (Supp. V 1993) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

27. Ferens, 494 U.S. at 520.



Circuit resisted plaintiffs' attempt to transport Mississippi's favorable statute of limitations law to Pennsylvania.<sup>28</sup> The district court, relying on the specific language of section 1404(a), found that the Mississippi action could not have been brought in Pennsylvania because the latter's statute of limitations had expired<sup>29</sup> and that the " 'interest of justice' would be thwarted rather than served if . . . this type of 'legal foot-work' " was permitted.<sup>30</sup> The Third Circuit also rejected plaintiffs' law-shopping attempt, initially concluding that Mississippi could not constitutionally apply its longer limitations period to an action with no connection to Mississippi.<sup>31</sup> After reconsideration of this holding in light of the Supreme Court's decision in *Sun Oil Co. v. Wortman*,<sup>32</sup> the Third Circuit ultimately rejected plaintiffs' law-shopping attempt on the ground that it would violate earlier Supreme Court prohibitions against forum-shopping.<sup>33</sup>

In the Supreme Court, however, plaintiffs' law-shopping escapade was rewarded.<sup>34</sup> The Court did acknowledge the manipulative ploy inherent in the plaintiffs' conduct.<sup>35</sup> But it took an our-hands-are-tied

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28. *Id.* at 520-21.

29. *Ferens*, 639 F. Supp. at 1491. Section 1404(a) requires a finding that the requested transfer be "in the interest of justice."

30. *Ferens*, 639 F. Supp. at 1492 (quoting *Mata v. Budd Co.*, 44 F.R.D. 225, 226-27 (E.D. Pa. 1968)).

31. *Ferens*, 819 F.2d at 427.

32. 486 U.S. 717 (1988). *Sun Oil* involved the issue of whether a forum state with no connection to the litigation could constitutionally apply its own longer statute of limitations to matters whose substantive issues would be governed by the laws of another state. The Court found that "the Constitution does not bar application of the forum State's statute of limitations to claims that in their substance are and must be governed by the law of a different State." *Id.* at 722 (citations omitted).

33. *Ferens*, 862 F.2d 31, 35-36 (3d Cir. 1988). The Third Circuit stated:

[P]laintiffs are attempting to use § 1404(a) to forum shop. They are time-barred from bringing their action in the state courts of Pennsylvania or directly in a diversity action in the federal courts sitting in Pennsylvania. They hope to do indirectly what they cannot do directly. They hope to use § 1404(a) and a brief stop in Mississippi to achieve a result in the federal courts of Pennsylvania that they could not achieve in the state courts of Pennsylvania.

See also *Ferens*, 639 F. Supp. at 1491, where the district court stated:

The fact that Plaintiffs' original lawsuit in this District Court did not include the claims which were time-barred under Pennsylvania law unequivocally establishes that Plaintiffs were seeking to maneuver around this by intentionally filing a second action in an inconvenient forum to avail themselves of that forum's longer statute of limitations and its plaintiff-oriented borrowing statute. By filing a subsequent lawsuit in the Southern District of Mississippi to take advantage of that state's six-year limitation period and then moving to transfer that action with their pending action in this District Court for purposes of convenience, consolidation and efficiency, Plaintiffs are seeking the "best of both forums."

34. *Ferens*, 494 U.S. at 519, 531-33.

35. *Id.* at 531.

approach to the situation. After noting that plaintiffs have a congressionally granted right to forum-shop even without the benefit of 28 U.S.C. § 1404(a),<sup>36</sup> the Court focused on the key purpose of section 1404(a):

Th[e] legislative background supports the view that § 1404(a) was not designed to narrow the plaintiff's venue privilege or to defeat the state-law advantages that might accrue from the exercise of this venue privilege but rather the provision was simply to counteract the inconveniences that flowed from the venue statutes by permitting transfer to a convenient federal court.<sup>37</sup>

Thus, because plaintiffs had the right to file their noncontract action in Mississippi,<sup>38</sup> because the federal court in Mississippi would apply Mississippi's longer statute of limitations to that action,<sup>39</sup> and because section 1404(a) does not authorize "a change of a law as a bonus for a change of venue,"<sup>40</sup> the Court concluded that the laws of Mississippi properly followed the plaintiffs back to Pennsylvania.<sup>41</sup>

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36. *Ferens*, 494 U.S. at 527-28. The statutory provision governing venue in diversity cases, as it existed at the time *Ferens* was decided, 28 U.S.C. § 1391 (1976) (current version at 28 U.S.C. § 1391 (Supp. V 1993), as amended by Pub. L. No. 104-34, 109 Stat. 293 (1995), provided in relevant part:

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.

...

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

This statute, as interpreted, guaranteed plaintiffs the right to file their lawsuit in any state where the corporate defendant was, among other things, *licensed* to do business.

37. *Ferens*, 494 U.S. at 522 (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 635 (1964)). The quote concludes:

"We believe, therefore, that both the history and purposes of § 1404(a) indicate that it should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally intended, on the basis of convenience and fairness, simply to authorize a change of courtrooms."

*Id.* at 523 (quoting *Van Dusen*, 376 U.S. at 636-37).

38. *Id.* at 519.

39. *Id.* at 519-20; see also *Klaxon Co. v. Stentor Electronic Mfg. Co.*, 313 U.S. 487, 496 (1941) (holding that in cases based on diversity jurisdiction, federal courts must apply the conflict of laws principles of the state in which the district court sits).

40. *Ferens*, 494 U.S. at 522 (quoting *Van Dusen*, 376 U.S. at 636).

41. *Ferens*, 494 U.S. at 519, 532; accord *Muldoon v. Tropitone Furniture Co.*, 1 F.3d 964, 966 (9th Cir. 1993); *Washington v. Allstate Ins. Co.*, No. Civ. A. 91-3779, 1992 WL 167030, at \*5 (E.D. La. June 30, 1992). In *Frazier v. Commercial Credit Equip. Corp.*, 755 F. Supp. 163 (S.D. Miss. 1991), the court refused plaintiff's motion to transfer a case to the state of plaintiff's residence (and the site of the injury). The request to transfer was denied only because plaintiff waited too long before filing the request: When a party allows "a significant amount of time to pass before the request to transfer is made, the forum court has had the opportunity to involve itself in the management of the lawsuit and to familiarize itself with the issues presented by the case." *Id.* at 167. Transferring at such a late stage, then, "would greatly diminish the value of the

## 2. JOINING PARTIES TO LITIGATION TO SECURE FAVORABLE JURIES

*Ferens* may be the most extreme example of the quest to obtain the laws of choice.<sup>42</sup> Notice, however, that another avenue was available

judicial resources that had so far been expended in the matter, since the forum court's familiarity with the case would no longer be of benefit." *Id.*

Before the Supreme Court's *Ferens* decision, courts were split over which law—the transferor or the transferee—to apply in plaintiff-initiated transfers. See Norwood, *supra* note 1, at 523-24 n.121; Henninger, *supra* note 20, at 823-24; Smith, *supra* note 20, at 199-201; John D. Currihan, Note, *Choice of Law In Federal Court After Transfer of Venue*, 63 CORNELL L. REV. 149, 154-56 (1977). For further analysis of *Ferens*, see authorities cited *supra* note 20.

42. For another idea, see John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735, 781 n.166 (1991). Professor Oakley offers the following hypothetical:

Personal jurisdiction has always been fairly easy to establish in multiple forums as against major business enterprises, and now the same is true as to ordinary Joes and Janes who like to travel, thanks to the approval of transient jurisdiction in *Burnham v. Superior Court*, 110 S. Ct. 2105 (1990). Let's suppose that you want to sue my wife, Freddie, and me in New Mexico because New Mexico's substantive law looks good to you and your cause of action implicates New Mexico's interests significantly enough to allow New Mexico to apply its own law to your claim against us. Your only problem is our lack of minimum contacts with New Mexico. *Burnham* and your knowledge that we will soon be driving from Davis to Austin solves that problem for you. So be it. Forum-shopping is your right and privilege—but (formerly) only at a price. . . . If you wanted to try your case against us under New Mexico law, you had to try your case against us in New Mexico, and in a state court unless we removed the action. Your attempt to file a diversity suit against us in the a New Mexico federal court would allow us to transfer it under § 1406, with a resulting change in substantive law. So your forum-shopping might well leave you stuck in a New Mexico state court, at some considerable inconvenience.

But no longer. Bargain forum-shoppers, come to federal court for a 3-for-1 forum-shopping special. Sorry, this offer limited only to multiple-defendant suits qualifying for diversity jurisdiction. If you qualify, enjoy the federal courts' triple-value special. *First*, shop as you regularly would among the forums with personal jurisdiction over the defendants. Enjoy the special due process discount of *Burnham*, which may bring many more forums within your reach than you had ever thought possible. Then, as usual, pick the forum with the best substantive law. *Second*, enjoy the new Congressional waiver of any concern in multiple-defendant actions about that old federal courts bugaboo, proper venue. For diversity suitors Congress now says personal jurisdiction will suffice to establish venue over the hapless defendants if they can collectively be subjected to personal jurisdiction in the plaintiff's chosen forum, wherever that might be, even if the defendants were just driving through the forum when *Burnham* lowered the boom. After shopping for a New Mexico forum, for example, bring your suit under the familiar Federal Rules of Civil Procedure and enjoy the other conveniences of suit in the federal court system. *Third*, at no extra charge, you can now transfer that suit from silly old New Mexico, which had favorable law for you but little else to recommend it as a forum. Not only are you not stuck in New Mexico state court—you're not even stuck in New Mexico. Go to our special federal courts forum-shoppers convenience desk and exchange there your *Ferens* coupon for a free § 1404 transfer to that more convenient venue where you would have sued in the first place but for the favorable substantive New Mexico law—which of course will follow your lawsuit wherever it may go.

under the facts of *Ferens* that also would have allowed plaintiffs to secure favorable law. The plaintiffs could have litigated their Pennsylvania-based claim in Mississippi. This would have been yet another way to avoid the unfavorable law of one state, Pennsylvania, while securing the favorable law of another, Mississippi. In either instance, however, the plaintiff, simply by filing the lawsuit in a particular jurisdiction, has decisive control over the laws that will apply in the litigation.

Plaintiffs can also shop among multiple states to secure more favorable juries. Consider *Kemner v. Monsanto Co.*<sup>43</sup> In *Kemner*, a train car, which ruptured as a result of a derailment, leaked a teaspoonful of dioxin dispersed throughout 19,000 gallons of wood preservative.<sup>44</sup> Shortly thereafter, about sixty-five people near the area of the spill began complaining of headaches, depression, insomnia, and other maladies.<sup>45</sup> The subsequent lawsuit was filed not in Sturgeon, Missouri—where the accident occurred and the plaintiffs resided—but in St. Clair County, Illinois.<sup>46</sup> The applicable venue rules in Illinois provided:

§ 2-101. Generally. Except as otherwise provided in this Act, every action must be commenced (1) in the county of residence of any defendant who is joined in good faith and with probable cause for the purpose of obtaining a judgment against him or her and not solely for the purpose of fixing venue in that county, or (2) in the county in which the transaction or some part thereof occurred out of which the cause of action arose.

If all defendants are nonresidents of the State, an action may be commenced in any county.<sup>47</sup>

Under this section, because the wood preservative that leaked during the derailment was made in and shipped from St. Clair County, Illinois,<sup>48</sup> venue in St. Clair County was proper. And because St. Clair County is nationally known for both its verdicts for plaintiffs and its large damage

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Some scholars believe that the situation described in Professor Oakley's hypothetical would be rare in light of the 1992 amendment to 28 U.S.C. § 1391(a)(3). See, e.g., 15 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS 2d § 3802 (2d ed. Supp. 1995).

43. 576 N.E.2d 1146 (Ill. App. Ct. 1991), *appeal denied*, 584 N.E.2d 130 (Ill. 1991).

44. Patrick E. Gauen, *Dioxin Plaintiffs May Appeal: 'We All Lose,' Their Attorney Says; 'Baloney,' Monsanto Counters*, ST. LOUIS POST-DISP., June 13, 1991, at 1A.

45. *Kemner*, 576 N.E.2d at 1150.

46. *Id.* at 1149.

47. ILL. ANN. STAT. ch. 735 § 5/2-101 (Smith-Hurd 1992) (emphasis added). Under the Illinois venue statute, if the defendant is not an Illinois resident, venue is proper in any county in that state. See Peter G. McAllen, *Deference to the Plaintiff in Forum Non Conveniens*, 13 S. ILL. U. L.J. 191, 198 n.15 (1995).

48. Patrick E. Gauen, *Dioxin Verdict Reversed: Appeals Panel Voids \$16 Million Judgment*, ST. LOUIS POST-DISP., June 12, 1991, at 1A; *Kemner*, 576 N.E.2d at 1150.

awards,<sup>49</sup> the county was, no doubt, preferred over a Missouri venue with no such reputation.

*Ferens* and *Kemner* involved choices among multiple states. But shopping for the venue of one's choice can also take place within the same state. In any given state, plaintiffs might prefer to file suit in certain cities over other cities, in certain counties over other counties, in certain counties over certain cities, or in certain cities over certain counties. Plaintiffs may choose one location over another because of convenience—to the plaintiff, the plaintiff's witnesses or evidence, or the plaintiff's attorney; or plaintiffs may choose a location because of its inconvenience to their adversary. Other reasons for choosing a site include favorable local rules, judicial calendars, and potential trial dates.<sup>50</sup> Another reason relates to the reputation of potential jurors (or judges) for giving favorable awards. Bay City, Texas, for example, was likened by some attorneys to the fabled City of Gold because of the large personal injury damages awarded there.<sup>51</sup> In the bankruptcy area, law firms have been known to file in Brownsville, Texas, rather than in available Dallas courts, to keep attorney "fee applications out of the hands of Dallas' notoriously stingy bankruptcy courts."<sup>52</sup> Madison and St. Clair Counties, Illinois, are nationally known for pro-plaintiff verdicts and very large damage awards.<sup>53</sup> Indeed, when the Illinois Legislature recently considered legislation that would limit noneconomic damages for certain tort-based injuries, "an 11th-hour stampede" took place in courts throughout the state.<sup>54</sup> But in Madison and St. Clair Counties, the results were even more astounding.<sup>55</sup> Note also Barbour

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49. See *infra* notes 53-55 and accompanying text.

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

51. See Gary Taylor, *Is It the Best Little Plaintiffs' City in Texas?*, NAT'L L.J., Dec. 8, 1986, at 8.

52. Diane B. Beckham & Amy Boardman, *Learning From Lorenzo: Weil, Gotshal Steers Greyhound to Friendly Turf*, LEGAL TIMES, June 18, 1990, at 2. For other relevant forum-shopping considerations in the bankruptcy area, see Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11.

53. See Meg Fletcher, *To Testify or Not: A Costly Question For Execs*, BUS. INS. June 13, 1994, at 3; John M. McGuire, *Full Contact Law: Who Stars In Courtroom Dramas? For John Jenkins, It's the Lawyers*, ST. LOUIS POST-DISP. MAG., Feb. 25, 1990, at 12; Stewart McBride, *Is It Libel If It's Never Printed?*, CHRIST. SCI. MON., June 25, 1981, at A1, A6.

54. Rob Thomas, *Illinois Bill Would Limit Damages In Lawsuits*, ST. LOUIS POST-DISPACH, Mar. 3, 1995, at 1, 6.

55. In the two days following word of the pending legislation, lawyers filed 20 times more lawsuits than usual in Madison and 160 more than usual in St. Clair. *Id.* The Governor of Illinois signed the bill into law on Mar. 9, 1995. The Civil Justice Reform Amendments of 1995, 1995 Legis. Serv. P.A. 89-7, § 15 (West) (codified at ILL. ANN. ST. ch. 735, § 5/2-1115.1) (Smith-Hurd 1995), puts a \$500,000 cap on noneconomic damages and virtually eliminates the doctrine of joint and several liability, among other things. In light of these changes, out-of-state attorneys should

County, a small county in Alabama, that is “nationally recognized [by defendants] as tort hell.”<sup>56</sup> But when trying to secure a venue based on the potential jury pool—whether the choice is among multiple states or within the same state—sometimes creative thinking is required. *Futrell v. Luhr Bros.*<sup>57</sup> is an example.

In *Futrell*, plaintiff was employed as a deckhand on a vessel owned by Luhr Bros.<sup>58</sup> In April 1990, plaintiff suffered personal injuries while working on the vessel.<sup>59</sup> The injuries occurred on navigable waters in Louisiana.<sup>60</sup> Plaintiff filed a state court action in St. Louis, Missouri, against the corporate owner of the vessel, Luhr Bros., and against a noncorporate defendant, the vessel’s captain, Raines.<sup>61</sup> The three-count petition alleged two violations of the Jones Act<sup>62</sup> against Luhr Bros. and one count of false imprisonment against Luhr Bros. and Raines.<sup>63</sup>

At all times relevant to the litigation, plaintiff lived in Cape Girardeau, Missouri.<sup>64</sup> Luhr Bros. was an Illinois corporation licensed to do business in Missouri.<sup>65</sup> Although Luhr Bros. maintained a registered agent in St. Louis for service of process purposes,<sup>66</sup> its principal place of business was in the city of plaintiff’s residence—Cape Girardeau.<sup>67</sup> Defendant Raines lived in Scott City, Missouri.<sup>68</sup> None of the parties to the lawsuit resided in St. Louis, and none of the events giving rise to the lawsuit occurred in St. Louis. Yet, plaintiff chose to file there. Probably not coincidentally, juries in the city of St. Louis render higher damage awards than juries in the counties of St. Louis.<sup>69</sup>

Had plaintiff sued only the corporate defendant, venue would not have been proper in the city of St. Louis, but only in Cape Girardeau, i.e., the county of plaintiff’s residence and the county where the corporation maintained an office or agent for the transaction of usual and cus-

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think twice about choosing an Illinois venue if their plaintiff-clients can file in states without these limitations.

56. Gregory Jaynes, *Where the Torts Blossom*, TIME, Mar. 20, 1995, at 38.

57. Second Amended Petition, *Futrell v. Luhr Bros.*, No. 91-9978 (Cir. Ct. St. Louis, Mo., filed Dec. 1991) (on file with author).

58. Defendant-Appellant’s Brief at 2, *Futrell v. Luhr Bros.*, No. 67863 (Mo. Ct. App. 1995) (on file with author).

59. *Id.*

60. *Id.*

61. *Id.* at 1.

62. 46 App. U.S.C.A. § 688 (Supp. 1995).

63. Second Amended Petition, *Futrell*, No. 91-9978.

64. Defendant-Appellant’s Brief at 7, *Futrell*, No. 67863 (Mo. Ct. App. 1995).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. See Mega Collins, *High Stakes Law: Injury Lawyers Risk Big Sums to Win Cases*, ST. LOUIS BUS. J. Oct. 26, 1987, at B1.

tomary business. Missouri's corporate venue statute provides, in relevant part, that "[s]uits against corporations shall be commenced either in the county where the cause of action accrued, . . . or in any county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business."<sup>70</sup> Missouri case law further established that in actions against corporate defendants, venue could not be based on the mere employment of a registered agent.<sup>71</sup> Thus, Luhr Bros.' employment of a registered agent in St. Louis would not have been sufficient to secure venue in St. Louis. Moreover, had plaintiff sued only Raines, venue would not have been proper in the city of St. Louis, but rather in Scott County—the county encompassing Raines' Scott City residence, or possibly in Cape Girardeau County, where plaintiff lived.<sup>72</sup>

By joining the two defendants in the action, plaintiff first convinced the court, rightly,<sup>73</sup> that Missouri's corporate venue statute did not apply.<sup>74</sup> Rather, Missouri's general venue statute for multiple defendants applied. The latter provides that "[w]hen there are several defendants, and they reside in different counties, the suit may be brought in any *such* county."<sup>75</sup> However, plaintiff then argued that because the corporate defendant employed a registered agent in St. Louis, St. Louis could be considered the residence of the corporation within the meaning of the general venue statute.<sup>76</sup> Although the employment of a registered agent could not have been used to secure venue against a sole corporate defendant under Missouri's corporate venue statute,<sup>77</sup> the court agreed that under Missouri's general venue statute employment of a registered agent was sufficient to secure venue.<sup>78</sup> By joining a noncorporate

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70. MO. REV. STAT. § 508.040 (Vernon Supp. 1995).

71. *State ex rel. Coca Cola Bottling Co. of Mid-Am. v. Gaertner*, 681 S.W.2d 445, 447 (Mo. 1984) (en banc), *overruled on other grounds by State ex rel. DePaul Health Cent. v. Mummert*, 870 S.W.2d 820 (Mo. 1994) (en banc).

72. MO. REV. STAT. § 508.010(1) (Vernon Supp. 1995), which applies only when a sole individual (i.e., one noncorporate defendant) is a party to the litigation, provides in relevant part that venue is proper "either in the county within which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found." Thus, venue clearly would exist in the county of Raines' residence. Venue also may have been proper in the county of plaintiff's residence. Finally, venue was clearly proper in Louisiana, where the accident occurred. *See infra* note 283.

73. Under Missouri law, once a noncorporate defendant is joined in the lawsuit, Missouri's corporate venue statute does not apply. *See, e.g., State ex rel. Turnbough v. Gaertner*, 589 S.W.2d 290, 291 (Mo. 1979) (en banc).

74. *Turnbough*, 589 S.W.2d 290.

75. MO. REV. STAT. § 508.010(2) (Vernon Supp. 1995) (emphasis added).

76. Second Amended Petition, *Futrell v. Luhr Bros.*, No. 91-9978, (Cir. Ct. St. Louis, Mo., filed Dec. 1991) (on file with author).

77. *See supra* note 70 and accompanying text.

78. This conclusion was reached because every one of the multiple motions to dismiss, to

defendant in the litigation, then, the St. Louis court allowed the *Futrell* plaintiff to do what he could not otherwise do with a lone corporate defendant.

After securing venue in St. Louis, and despite defense concerns that the noncorporate defendant was joined pretensively to obtain a jury more receptive to plaintiffs and higher damage awards,<sup>79</sup> plaintiff dismissed the noncorporate defendant from the lawsuit immediately after presenting his case to the jury.<sup>80</sup> Notwithstanding this dismissal, venue continued to be proper.<sup>81</sup>

### 3. UTILIZING PROCEDURAL RULES TO SECURE THE LAWS OF CHOICE

Whether trying to secure more favorable laws or more favorable juries, court procedural rules can facilitate the process. Attorneys have been known, for example, to try to manipulate federal or state court rules

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sever, to transfer, for mistrial, and/or for judgment notwithstanding the verdict based on the venue issue was denied. See Defendant-Appellant's Brief at 11-13, *Futrell*, No. 67863 (Mo. Ct. App. 1995). Until *Futrell*, Missouri law did not answer the question of whether the employment of a registered agent for service of process purposes was sufficient to secure venue under the general venue provisions. For example, the leading Missouri decision on the issue, *Coca Cola Bottling*, 681 S.W.2d at 447, decided only that such employment is an improper ground upon which to secure venue under the corporate venue statute.

79. Under Missouri law, pretensive joinder exists 1) where "the facts pleaded in the petition are not true;" or 2) "even if true, do not support a valid claim based on substantive law." State *ex rel.* Malone v. Mummert, 889 S.W.2d 822, 825 (Mo. 1994) (en banc). The applicable test in other jurisdictions is similar. See, e.g., Coker v. Amoco Oil Co., 709 F.2d 1433, 1440 (11th Cir. 1983), *superceded by statute*. In *Futrell*, plaintiff properly alleged all the elements of a false imprisonment claim against defendant Raines. (For a statement of the elements of such a claim, see Desai v. SSM Health Care, 865 S.W.2d 833, 836 (Mo. Ct. App. 1993).). Thus, defendants were not able to rely upon the second prong of the test. Although defendants alternatively argued that the first prong of the test was met, i.e., that the facts pleaded in the petition were not true, the trial court rejected that contention. See Defendant-Appellant's Brief at 2, 29-43, *Futrell*, No. 67863 (Mo. Ct. App. 1995).

80. *Id.* at 11.

81. There is authority for the proposition that once venue is properly secured, subsequent events will not retroactively destroy it. See, e.g., State *ex rel.* Kyger v. Koehr, 831 S.W.2d 953, 955 (Mo. Ct. App. 1992). Indeed, in Rakestraw v. Norris, 478 S.W.2d 409, 414-15 (Mo. Ct. App. 1972), there was neither fraudulent joinder nor retroactive destruction of venue when the very defendant whose residency permitted venue to be proper, a *relative* of the plaintiff, was dismissed *before* trial began.



on joinder of parties<sup>82</sup> to either secure<sup>83</sup> or defeat a particular venue.<sup>84</sup>

82. Two federal rules are relevant. The first, FED. R. CIV. P. 19(a), provides in part:

Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

The second, FED. R. CIV. P. 20(a), provides in part:

Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

Most state courts have parallel rules. For example, Mo. R. Civ. P. 52.04(a) provides in part:

Persons to be Joined if Feasible. A person shall be joined in the action if: (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Missouri Rule 52.05(a) provides in part:

Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrences or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action.

83. See *supra* notes 57-81 and accompanying text.

84. See *infra* note 97. See generally *Faucett v. Ingersoll-Rand Mining & Mach. Co.*, 960 F.2d 653, 654-55 (7th Cir. 1992); *Covington v. Indemnity Ins. Co. of N.A.*, 251 F.2d 930, 934 (5th Cir. 1958), *cert. denied*, 357 U.S. 921 (1958); *Arzehgar v. Dixon*, 150 F.R.D. 92, 94-95 (S.D. Tex. 1993); *Schwenn v. Pamida*, 392 F. Supp. 69, 70 (D. Wyo. 1975); *Jacks v. Torrington Co.*, 256 F. Supp. 282, 286 (D.S.C. 1966).

Another example of an attempt to join parties to litigation in order to secure the court of choice can be found in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). In *World-Wide*, the plaintiffs, New York residents, purchased a car in New York. *Id.* at 288. While driving to a new home in Arizona, they had a car accident in Oklahoma. *Id.* They subsequently brought a products liability action in a state court in Creek County, Oklahoma, against the German manufacturer of the car, the U.S. importer, the regional distributor, and the New York dealer that sold them the car. *Id.* Personal jurisdiction over the manufacturer and the importer existed because both conducted large amounts of business in Oklahoma. However, personal jurisdiction

Consider also Rule 41 of the Federal Rules of Civil Procedure. Rule 41 allows a plaintiff to dismiss a lawsuit voluntarily. Depending on the timing of the request, the plaintiff may<sup>85</sup> or may not<sup>86</sup> have to seek the court's permission to dismiss. But even when plaintiffs must seek leave of court to dismiss, many plaintiffs have been quite candid with the court about using Rule 41 for law-shopping purposes. It is not clear, though, whether the rule can be used this way. The only Supreme Court ruling

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did not exist over the regional distributor and the New York dealer because they lacked contacts with the state. Specifically, plaintiffs failed to show that either of these two defendants "ships or sells any products to or in [Oklahoma], has an agent to receive process there, . . . [or] that any automobile sold by [them] has ever entered Oklahoma with the single exception of the vehicle involved in the present case." *Id.* at 289. Thus, the Court held that the exercise of personal jurisdiction over these two defendants would offend the Due Process Clause of the Constitution. *Id.* at 294-95.

With respect to the plaintiffs' venue choice, Justice Blackmun, in his dissenting opinion, wondered why "the plaintiffs in this litigation are so insistent that the regional distributor and the retail dealer . . . be named defendants," particularly when the Oklahoma court had jurisdiction over two other solvent defendants. *Id.* at 317. As Professor Weintraub answered:

The answer to Justice Blackmun's question is a simple tactical move familiar to any litigator. "*Creek County, Oklahoma . . . is one of the best jurisdictions in the United States in which to try a plaintiff's lawsuit. It ranks on a par with Dade County, Florida, and Cook County[,] Illinois . . .*" Counsel for the [plaintiffs] did not want the defendants to be able to remove the case from this plaintiffs' paradise to the Federal District Court in Tulsa, Oklahoma. His theory was that, at the time suit was brought, the [plaintiffs] were still domiciled in New York, because they had not yet arrived in Arizona. They were, therefore, still residents of New York for the purposes of determining whether there was federal jurisdiction on the basis of diversity of citizenship. *By joining the dealer and regional distributor, both New York corporations, he could prevent the complete diversity of citizenship between plaintiffs and defendants that was necessary for removal.*

Russell J. Weintraub, COMMENTARY ON THE CONFLICT OF LAWS, § 4.8, at 125 (3d ed. 1986) (emphases added) (footnotes omitted).

85. FED. R. CIV. P. 41(a)(2) provides:

*By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

86. FED. R. CIV. P. 41(a)(1) provides in part:

*By Plaintiff; by Stipulation.* [A]n action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

on this issue, *Ex parte Skinner & Eddy Corp.*,<sup>87</sup> was decided before Rule 41 was enacted. *Ex parte Skinner* held that the motives behind a dismissal are irrelevant.<sup>88</sup> Although lower federal court opinions continue to say that motive is irrelevant,<sup>89</sup> these courts remain split on whether the Rule can be used to law-shop.

The conflict does not turn on whether a given plaintiff is attempting to shop for laws. Rather, the grant or denial of the motion turns on the dismissal's effect on the defendant.<sup>90</sup> Many courts apply a "clear legal prejudice to the defendant" standard in determining whether the court should allow the voluntary dismissal under Rule 41(a)(2), although the language of the rule does not require such a standard.<sup>91</sup> Under that standard:

The crucial question to be determined is, Would the defendant lose any substantial right by the dismissal. "In exercising its discretion the court follows the traditional principle that dismissal should be allowed unless the defendant will suffer some plain legal prejudice other than the mere prospect of a second lawsuit. It is no bar to dismissal that plaintiff may obtain some tactical advantage thereby."<sup>92</sup>

Starting from this premise, while some jurisdictions have found that a particular law-shopping attempt constitutes clear legal prejudice to the defendant,<sup>93</sup> other courts have not so found.<sup>94</sup> Courts are more apt to

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87. 265 U.S. 86 (1924). Rule 41 was enacted in 1937.

88. *Id.* at 93 ("The right to dismiss, if it exists, is absolute. It does not depend on the reasons which the plaintiff offers for his action. The fact that he may not have disclosed all his reasons or may not have given the real one can not affect his right.")

89. See, e.g., *Clubb v. General Motors Corp.*, 14 Fed. R. Serv. 2d (Callaghan), 1434, 1434 (4th Cir. 1971); *Spencer v. Moore Bus. Forms, Inc.*, 87 F.R.D. 118, 123 (N.D. Ga. 1980); *Kennedy v. State Farm Mut. Auto. Ins. Co.*, 46 F.R.D. 12, 14 (E.D. Ark. 1969).

90. See, e.g., Susan C. Taylor, Note, *Rule 41(a)(2) Dismissals: Forum Shopping for a Statute of Limitations*, 20 MEM. ST. U. L. REV. 629, 631-32 (1990).

91. For further analysis of the "legal prejudice" standard, as well as a discussion of other, less popular standards, see Lawrence Mentz, Note, *Voluntary Dismissal by Order of Court—Federal Rules of Civil Procedure Rule 41(a)(2) and Judicial Discretion*, 48 NOTRE DAME LAW. 446 (1972). For further analysis of Rule 41(a)(2) generally, see David J. Comeaux, Comment, *Avoiding Nonjudicious Nonsuits: Hearing the Defendant in Rule 41(A)(2) Motions*, 32 HOUS. L. REV. 159 (1995).

92. *Durham v. Florida East Coast Ry. Co.*, 385 F.2d 366, 368 (5th Cir. 1967), quoting 2B WILLIAM W. BARRON & ALEXANDER HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 912, at 114 (Charles A. Wright ed. 1961); see also *Phillips v. Illinois Cent. Gulf R.R.*, 874 F.2d 984, 986 (5th Cir. 1989); *McCants v. Ford Motor Co.*, 781 F.2d 855, 857 (11th Cir. 1986).

93. See, e.g., *Phillips*, 874 F.2d at 987-88; *Placid Oil Co. v. Ashland Oil, Inc.*, 792 F.2d 1127, 1134 (Temp. Emer. Ct. App. 1986); *Bamdad Mechanic Co. v. United Tech. Corp.*, 109 F.R.D. 128, 132-33 (D. Del. 1985).

94. See, e.g., *McCants*, 781 F.2d at 857-59; *Bolten v. GMC*, 180 F.2d 379, 381-82 (7th Cir. 1950), cert. denied, 340 U.S. 813 (1950); *Germain v. SEMCO Serv. Mach. Co.*, 79 F.R.D. 85, 86 (E.D.N.Y. 1978); *Klar v. Firestone Tire & Rubber Co.*, 14 F.R.D. 176, 176 (S.D.N.Y. 1953).

find legal prejudice where plaintiffs have sought to erase inadvertent jury waivers,<sup>95</sup> to change the *substantive* law to be applied at trial,<sup>96</sup> or to force remand of a case removed from the state court to the federal court “by a tactical dismissal of the federal claims.”<sup>97</sup> However, in cases where plaintiffs attempt to change the applicable statute of limitations, the results are not uniform. But most courts<sup>98</sup> have found that if plaintiff seeks a dismissal to secure a longer statute of limitations, legal prejudice to the defendant simply is not a concern.<sup>99</sup> Noting first that “within the

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95. See, e.g., *Germain*, 79 F.R.D. at 86.

96. See, e.g., *Kennedy v. State Farm Mut. Auto Ins. Co.*, 46 F.R.D. 12, 15 (E.D. Ark. 1969) (denying plaintiff-insured’s attempt to dismiss an Arkansas lawsuit and refile in Georgia in order to avoid Arkansas’ validation of anti-stacking provisions as contained in insurance policies); *Southern Md. Agric. Ass’n v. United States*, 16 F.R.D. 100, 102 (D. Md. 1954) (denying plaintiff-taxpayer’s attempt to dismiss Maryland action and refile in federal Court of Claims in order to avoid an adverse decision, reached after plaintiff filed suit, from the Fourth Circuit).

97. *Kerrin v. Federated Dep’t Stores, Inc.*, 100 F.R.D. 715, 717 (N.D. Ga. 1983); see also *Myers v. Hertz Penske Truck Leasing, Inc.*, 572 F. Supp. 500 (N.D. Ga. 1983). In *Myers*, after the defendant removed plaintiff’s state lawsuit to federal court, plaintiff filed another action in state court with one change: Plaintiff added resident defendants in order to prevent a second removal. On plaintiff’s subsequent Rule 41 motion in federal court to dismiss the first removed case, the court noted:

The issue is a sensitive one because of the delicate relationship between the state and federal judiciaries, the growing concern about the propriety of diversity jurisdiction, and increasing public impatience with tactical legal maneuvering which only delays resolution of cases on their merits. If there were no precedents in this area this court might well . . . allow the plaintiff to dismiss his case here and pursue his remedy in the state court. However, this court is bound to follow two recent cases which have dealt with this precise issue.

*Id.* at 502. Those two cases—*Frith v. Blazon-Flexible Flyer, Inc.*, 512 F.2d 899, 901 (5th Cir. 1975), and *Brown v. Seaboard Coast Line R.R. Co.*, 309 F. Supp. 48, 49 (N.D. Ga. 1969)—stand for the proposition that one cannot frustrate the purpose of the removal statute by such “cynical legal gamesmanship.” *Id.* at 503. Thus, the *Myers* court denied plaintiff’s Rule 41 motion to dismiss. *Id.*

98. See *supra* notes 94 for decisions granting Rule 41 motions to dismiss even though the movants clearly intended to refile the lawsuits in jurisdictions with longer limitations periods. For decisions to the contrary, see *supra* note 93. In *Phillips v. Illinois Cent. Gulf R.R.*, 874 F.2d 984 (5th Cir. 1989), the court stated:

We have not yet addressed the issue of whether loss of a statute of limitations defense constitutes the type of clear legal prejudice that precludes granting a motion to dismiss without prejudice. After reviewing the decisions of other courts on this issue we are persuaded, however, that those cases denying the motion to dismiss are better reasoned. We agree that the mere prospect of a second lawsuit on the same facts is not sufficiently prejudicial to the defendant to justify denial of a Rule 41(a)(2) motion to dismiss. In this case, however, the facts in the second lawsuit would differ in that the defendant would be stripped of an absolute defense to the suit—the difference between winning the case without a trial and abiding the unknown outcome of such a proceeding. If this does not constitute clear legal prejudice to the defendant, it is hard to envision what would.

*Id.* at 987 (citation omitted); cf. *Orleans Parish Sch. Bd. v. U.S. Gypsum Co.*, 892 F. Supp. 794, 803 (E.D. La. 1995) (“Voluntary dismissal should not be used to . . . forum shop . . . .”) (alteration in original) (citation omitted).

99. See, e.g., *McCants v. Ford Motor Co.*, 781 F.2d 855, 859 (11th Cir. 1986).

limits of jurisdiction and venue, plaintiffs are free to make strategic choices as to the forum which is most likely to apply law most favorable to them,"<sup>100</sup> these courts conclude that a defendant cannot complain of legal prejudice merely "by being asked to defend a suit that plaintiffs could properly have brought against it in [the now-preferred forum] in the first instance."<sup>101</sup> Thus, where plaintiff merely seeks "a tactical procedural advantage"<sup>102</sup> by trying to refile an action in a jurisdiction with a longer limitations period, most courts conclude that a Rule 41 dismissal is appropriate.<sup>103</sup>

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[W]e find no evidence in the record to suggest that appellee or her counsel acted in bad faith in filing this action . . . . Under the circumstances, we cannot find appellant to have suffered any plain legal prejudice other than the prospect of a second lawsuit on the same set of facts. The district court thus did not abuse its discretion in granting the dismissal without prejudice in this case.

*Id.*; see also *Germain*, 79 F.R.D. at 86. Recall in *Germain* that the court conditioned granting plaintiff's Rule 41(a)(2) request on the *reason* for the dismissal. Thus, although plaintiff's first reason for dismissal—that plaintiff would thereby "avoid an inadvertent waiver of the right to a jury trial"—was rejected, plaintiff's alternative reason—that such a dismissal would allow plaintiff "to take advantage of a longer statute of limitations in another forum"—served as a valid reason to grant the dismissal. *Id.*

100. *Gervasi v. Prudential Life Ins. Co.*, No. Civ. A. 86-4663, 1986 WL 14739, at \*2 (E.D. Pa. Dec. 29, 1986); see also *Watwood v. Barber*, 70 F.R.D. 1, 5 (N.D. Ga. 1975) (citation omitted). The *Watwood* court stated:

It is true that a reasonable inference may be drawn that plaintiffs' decision to move for a transfer to this district came as a direct consequence of defendants' raising the defense of Alabama's statute of limitations. However, where, as here, the plaintiffs could have proceeded at least equally as well in this forum as in Alabama, it does not seem unreasonable to allow them to "invoke the substantial state policies" of this state to which they were and are entitled.

*Id.* Several months later, the *Watwood* court, after reconsideration, dismissed the action for lack of personal jurisdiction over the defendants. *Id.* at 10.

101. *Gervasi*, 1986 WL 14739, at \*2.

102. *Kennedy v. State Farm Mut. Auto. Ins. Co.*, 46 F.R.D. 12, 15 (E.D. Ark. 1969). Recall that *Kennedy* did not allow plaintiff to dismiss under Rule 41 in order to gain any *substantive* law advantages. *Id.*; see also *supra* note 96. Indeed, the court stated:

It is clear that plaintiff by her motion is seeking something quite different from a tactical procedural advantage. She desires to have her new forum apply to this case another body of substantive law which would or might deprive the defendant of an apparently good defense at this forum. Thus, the shift of forum, if permitted, would or might seriously disadvantage the defendant, and the Court thinks that it would amount to legal prejudice to subject the defendant to the risk that plaintiff may succeed . . . .

*Id.* (emphasis added). Because statutes of limitations are considered "procedural", as opposed to "substantive", see *Norwood*, *supra* note 1, at 549-54, the rationale may be that one cannot be "legally prejudiced" by differences in mere procedural matters.

103. There may be some consolation to defendants. FED. R. CIV. P. 41(d) provides:

Costs of Previously-Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

#### 4. LACK OF UNIFORMITY AND ITS ROLE IN KEEPING THE SEARCH ALIVE

Lawyers are often given conflicting signals about the virtues of forum-shopping in general and of law-shopping in particular.<sup>104</sup> Some decisions criticize and even sanction such attempts,<sup>105</sup> others implicitly or expressly condone forum-shopping.<sup>106</sup> Indeed, it is not unusual to

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*See also Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1077 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988); *McCants*, 781 F.2d at 859; *Behrle v. Olshansky*, 139 F.R.D. 370, 375-76 (W.D. Ark. 1991); *Germain*, 79 F.R.D. at 87; *Klar v. Firestone Tire & Rubber Co.*, 14 F.R.D. 176, 176-77 (S.D.N.Y. 1953).

In *Simeone v. First Bank Nat'l Ass'n*, 971 F.2d 103, 108 (8th Cir. 1992) the court stated that costs imposed under Rule 41(d) "are intended to serve as a deterrent to forum shopping . . ."

104. There do not appear to be conflicting signals when jury-shopping is involved. Although cases are filed every day in certain counties across the country with the clear purpose of securing the jury pool, the author has been unable to find much authority addressing this strategy. *Accord McAllen*, *supra* note 47, at 241.

105. *See Phillips v. Illinois Cent. Gulf R.R.*, 874 F.2d 984, 987-88 (5th Cir. 1989); *Placid Oil Co. v. Ashland Oil Co.*, 792 F.2d 1127, 1134-35 (Temp. Emer. Ct. App. 1986); *Fransen v. Terps Ltd. Liab. Co.*, 153 F.R.D. 655, 660 (D. Colo. 1994); *In re Taxable Mun. Bond Sec. Lit.*, No. Civ. A. MDL-863, 1994 WL 599762, at \*4 (E.D. La. Oct. 31, 1994); *Marlow v. Winston & Strawn*, No. 90-C-5715, 1994 WL 171437, at \*3-4 (N.D. Ill. May 3, 1994); *Anderson v. California Rep. Party*, No. C-91-2091-MHP, 1991 WL 472928, at \*3 (N.D. Cal. Nov. 26, 1991), *aff'd sub nom. Anderson v. Davis*, 977 F.2d 587 (9th Cir. 1992); *Mitchell A. Kramer & Assocs. v. Robert S. Atkins & Assocs.*, No. 90-C-1941, 1991 WL 2419, at \*2 (N.D. Ill. Jan. 10, 1991); *Behrle*, 139 F.R.D. at 372; *Rojas v. DeMent*, 137 F.R.D. 30, 32-33 (S.D. Fla. 1991); *Bolivar v. Pocklington*, 137 F.R.D. 202, 205-06 (D.P.R. 1991), *aff'd and remanded*, 975 F.2d 28 (1st Cir. 1992); *U.S. Offshore, Inc. v. Seabulk Offshore, Ltd.*, 753 F. Supp. 86, 89 (S.D.N.Y. 1990); *Brandenburg v. City of Chicago*, 129 F.R.D. 159, 160-61 (N.D. Ill. 1989); *Simeone v. First Bank Nat'l Ass'n*, 125 F.R.D. 150, 156-57 (D. Minn. 1989), *aff'd in part and vacated in part*, 971 F.2d 103 (8th Cir. 1992); *Laine v. Morton Thiokol, Inc.*, 124 F.R.D. 625, 627-28 (N.D. Ill. 1989); *Naylor v. Lee's Summit Reorganized Sch. Dist.*, 703 F. Supp. 803, 819-21 (W.D. Mo. 1989); *Washington v. Williams*, 696 F. Supp. 237, 239 (S.D. Miss. 1988), *aff'd*, 884 F.2d 576 (5th Cir. 1989); *M.S. Chambers & Son, Inc. v. Tambrands, Inc.*, 118 F.R.D. 274, 277-78 (D. Mass. 1987); *Syncom v. Brooks*, No. 86-C-630, 1987 WL 14696, at \*2 (N.D. Ill. July 21, 1987); *Bamdad Mechanic Co. v. United Technologies Corp.*, 109 F.R.D. 128, 133-34 (D. Del. 1985); *In re Dahlquist*, 34 B.R. 476, 487 (Bankr. D.S.D. 1983); *Sheldon v. Amperex Elec. Corp.*, 52 F.R.D. 1, 12 (E.D.N.Y. 1971), *aff'd*, 449 F.2d 146 (2d Cir. 1971); *Plymouth Rubber Co. v. Minnesota Mining & Mfg. Co.*, 203 F. Supp. 595, 601 (D. Mass. 1962), *aff'd and modified*, 321 F.2d 151 (1st Cir. 1963); *Baker v. Sisk*, 1 F.R.D. 232, 237; *see also Michael C. Silberberg, Southern District Civil Practice Roundup—Rejection of Attempts at Forum Shopping*, N.Y. L.J., July 2, 1992, at 3; *Andrew Okun, Judge: Insurer Forum-Shopped*, L.A. DAILY J., May 15, 1992, at 2.

106. *See supra* notes 94; *see also United States v. Williams*, 809 F.2d 1072, 1083-84 (5th Cir. 1987), *cert. denied*, 484 U.S. 896 (1987); *McCants*, 781 F.2d at 857-59; *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1261 (5th Cir. 1983); *United States v. Bagnell*, 679 F.2d 826, 832 (11th Cir. 1982), *cert. denied*, 460 U.S. 1047 (1983); *United States v. Lustig*, 555 F.2d 737, 750 (9th Cir. 1977), *cert. denied*, 434 U.S. 1045 (1978); *Durham v. Florida E. Coast Ry. Co.*, 385 F.2d 366, 368 (5th Cir. 1967); *Bolten v. General Motors Corp.*, 180 F.2d 379, 381-82 (7th Cir. 1950); *Johnson v. Gegenheimer*, No. Civ. A. 92-2863, 1993 WL 205080, at \*3 n.1 (E.D. La. June 4, 1993); *Washington v. Allstate Ins. Co.*, No. Civ. A. 91-3779, 1992 WL 167030, at \*5 (E.D. La. June 30, 1992); *Kahn v. Wien*, No. Civ. A. 86-2416-RJD, 1989 WL 65449, at \*4 (E.D.N.Y. 1989); *Basic, Inc. v. Norfolk Southern*, 684 F. Supp. 123, 125 (E.D. Pa. 1988); *Storage Tech. Partners II v. Storage Tech. Corp.*, 117 F.R.D. 675, 679-80 (D. Colo. 1987); *Coast Mfg. Co., Inc.*

find conflicting signals within a single case.<sup>107</sup> The Supreme Court has not clarified this area. No Supreme Court decision addresses the virtues of filing lawsuits in particular jurisdictions in order to secure more favorable juries. In the law-shopping context, the Court promotes law-shopping ventures in some years,<sup>108</sup> but not in others.<sup>109</sup> Scholars and commentators hold conflicting views as well.<sup>110</sup>

This conflict cannot always be explained by factual distinctions in the cases. Of course, many courts routinely frown upon plaintiffs'

v. Keylon, 600 F. Supp. 696, 698 (S.D.N.Y. 1985); *Cheeseman v. Carey*, 485 F. Supp. 203, 215 (S.D.N.Y. 1980); *Germain*, 79 F.R.D. at 86; *Klar*, 14 F.R.D. at 176; see also Steven Greenhouse, *Class Actions: A Key Ruling*, N.Y. TIMES, Sept. 24, 1985, at D2.

107. Consider, for example, *Cheeseman*, 485 F. Supp. at 214. After noting that the purpose of 28 U.S.C. § 1404(a) is "to prevent forum shopping," the court went on to say that forum-shopping is no different from any other strategic decision made by an attorney on behalf of a client. Further, the court said that as long as a plaintiff forum-shops for the *right* reason, there is nothing wrong with the conduct. *Id.* at 215.

108. See, e.g., *Ferens v. John Deere Co.*, 494 U.S. 516, 527 (1990) ("[F]ew [commentators] attempt to explain the harm of forum shopping. . ."); *Keeton v. Hustler Mag., Inc.* 465 U.S. 770, 779 (1984) ("Petitioner's successful search for a State with a lengthy statute of limitations is no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations."). Consider also *North Star Steel Co. v. Thomas*, 115 S. Ct. 1927 (1995). There, in connection with choosing varying state limitations periods over one uniform federal limitations period for claims brought under the Worker Adjustment and Retraining Notification Act of 1988 ("WARN"), 29 U.S.C. §§ 2101-2109 (1988), the Court stated:

[Petitioners] are right of course that the practice of adopting state statutes of limitations for federal causes of action can result in different limitation periods in different states for the same federal action, and correct that some plaintiffs will canvass the variations and shop around for a forum. But these are just the costs of the rule itself . . .

*Id.* at 1931-32. The Court was referring to general rule that whenever a federal cause of action does not contain an express limitations period, Congress ordinarily intends, by its silence, that courts borrow state law. For further analysis of the concept of borrowing state statutes of limitations for federal claims that do not contain express statutes of limitations, see Kimberly Jade Norwood, 28 U.S.C. § 1658: *A Limitation Period With Real Limitations*, 69 IND. L.J. 477 (1994).

109. See *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992) ("Forum-shopping is thus of particular concern."); *Chambers v. Nasco, Inc.*, 501 U.S. 32, 52 (1991), quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) ("[T]he twin aims of the *Erie* rule [are] discouragement of forum-shopping and avoidance of inequitable administration of the laws."); *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 154 (1987) ("With the possibility of multiple state limitations, the use of state statutes would present the *danger of forum shopping* . . .") (emphasis added); *Van Dusen v. Barrack*, 376 U.S. 612, 636 (1964) ("If a change of law were in the offing, the parties might well regard the section primarily as a forum-shopping instrument.").

110. See, e.g., ROBERT C. CASAD, JURISDICTION AND FORUM SELECTION 1-2 (1988); Aaron J. Broder, *Forum Shopping in Asbestos Cases*, in 1982 PERSONAL INJURY DESKBOOK 755-57 (Louis R. Frumer & Marilyn Minzer eds., 1982); Brown, *supra* note 20; John B. Corr, *Thoughts on the Vitality of Erie*, 41 AM. U.L. REV. 1087 (1992); William A. Edmundson, *Lawyers' Justice*, 88 MICH. L. REV. 1833, 1845 (1990); John H. Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 710 (1974); Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553 (1989) [hereinafter Juenger, *Forum Shopping*]; Friedrich K. Juenger, *What's Wrong with Forum Shopping?*, 16 SYDNEY L. REV. 5 (1994) [hereinafter Juenger, *What's Wrong?*]; Opeskin, *supra* note 18; Note, *supra* note 4, at 1677-80.

attempts to air their grievances in courts of improper venue,<sup>111</sup> to force a remand to state courts by either dismissing federal claims or destroying diversity jurisdiction by adding or dropping certain parties,<sup>112</sup> and to circumvent state workers' compensation laws by transferring employees to other states before discharging them.<sup>113</sup> The most uniform rejection of law-shopping seems to occur when a party attempts to ignore earlier adverse decisions by attempting to have the same claims aired in different courts.<sup>114</sup> And courts have found it perfectly acceptable to choose a

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111. *Basic*, 684 F. Supp. at 125; *M.S. Chambers & Son, Inc. v. Tambrans, Inc.*, 118 F.R.D. 274, 277-78 (D. Mass. 1987); *Hot Locks, Inc. v. Ohh La La, Inc.*, 107 F.R.D. 751, 751-52 (S.D.N.Y. 1985); *Barton v. Williams*, 38 Fed. R. Serv. 2d (Callahan) 966, 967-68 (N.D. Ohio 1983).

112. *Brandenburg v. City of Chicago*, 129 F.R.D. 159, 160-61 (N.D. Ill. 1989); *Myers v. Hertz Penske Truck Leasing, Inc.*, 575 F. Supp. 500, 502 (N.D. Ga. 1993); *Kerrin v. Federated Dep't Stores, Inc.*, 100 F.R.D. 715, 717 (N.D. Ga. 1993). *But see Baddie v. Berkeley Farms, Inc.*, 64 F.3d 487 (9th Cir. 1995). In *Baddie*, the plaintiff filed an action in state court containing state law and federal law claims. After the defendant removed to federal court—another form of forum-shopping—the plaintiff dismissed all federal claims. The plaintiff then secured a remand back to state court. The district court, however, ordered the plaintiff to pay, under 28 U.S.C. § 1447(c), the fees defendant had incurred as a result of the removal. Section 1447(c) provides in part that “[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.” The district court justified its award of fees because of the plaintiff’s “manipulative pleading practices.” *Id.* at 489. The Ninth Circuit reversed, ruling that § 1447(c) does not authorize an award of fees when the initial removal from state court to federal court is proper. *Id.* at 491. Moreover, as for the notion that plaintiff should somehow be penalized for manipulating claims in order to secure a state court forum, the Ninth Circuit stated:

A plaintiff is entitled to file both state and federal causes of action in state court. The defendant is entitled to remove. The plaintiff is entitled to settle certain claims or dismiss them with leave of the court. The district court has discretion to grant or deny remand. Those are the pieces that comprise plaintiffs’ allegedly manipulative pleading practices. We are not convinced that such practices were anything to be discouraged.

The district court reasoned that plaintiffs had been “manipulative” because: “If plaintiffs wished to avoid federal court, they should have dropped their federal claims before ever filing a complaint.” We disagree. Filing federal claims in state court is a legitimate tactical decision by the plaintiff: It is an offer to the defendant to litigate the federal claims in state court. The defendant is not obligated to remove. . . . If the defendant rejects the plaintiff’s offer to litigate in state court and removes the action, the plaintiff must then choose between federal claims and a state forum. Plaintiffs in this case chose the state forum. They dismissed their federal claims and moved for remand with all due speed after removal. There was nothing manipulative about that straight-forward tactical decision, and there would be little to be gained in judicial economy by forcing plaintiffs to abandon their federal causes of action before filing in state court.

*Id.* at 490-91. The court also noted that sanction under FED. R. CIV. P. 11 would be improper because there was nothing “reprehensible about plaintiffs’ maneuvers.” *Id.* at 491.

113. *Gann v. Fruehauf Corp.*, 52 F.3d 1320, 1325 (5th Cir. 1995).

114. *Kapco Mfg. Co. v. C&O Enters.*, 886 F.2d 1485, 1490 (7th Cir. 1989); *Fransen v. Terps Ltd. Liab. Co.*, 153 F.R.D. 655, 660 (D. Colo. 1994); *Rojas v. DeMent*, 137 F.R.D. 30, 32-33 (S.D. Fla. 1991); *Bolivar v. Pocklington*, 137 F.R.D. 202, 205-06 (D.P.R. 1991); *Anderson v. California Rep. Party*, No. C-91-2091-MHP, 1991 WL 474928, at \*3 (N.D. Cal. Nov. 26, 1991);



court based upon its perceived "superior discovery procedures"<sup>115</sup> or because the chosen forum does not have the same "delays" that another "overburdened" forum has.<sup>116</sup> But many law-shopping cases resolve identical venue issues in contradictory manners. Thus, even if one focuses on decisions based upon virtually identical facts or relying upon identical federal rules, conflicting results often appear. For example, if the plaintiffs' attorney in *Ferens* had attempted either to litigate the Pennsylvania-based claim in Mississippi or to file in Mississippi but seek a transfer to Pennsylvania at some other time or in some other state, that attempt might well have been rejected.<sup>117</sup> Also recall those Rule 41 cases involving requested dismissals in order to refile in jurisdictions with longer statutes of limitations.<sup>118</sup> Some courts allow the maneuver;<sup>119</sup> others do not.<sup>120</sup> Finally, compare the cases concluding that as long as the action has been filed in a proper venue, law-shopping is

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U.S. Offshore, Inc. v. Seabulk Offshore, Ltd., 753 F. Supp. 86, 89 (S.D.N.Y. 1990); Naylor v. Lee's Summit Reorganized Sch. Dist., 703 F. Supp. 803, 819-21 (W.D. Mo. 1989); Syncom v. Brooks, No. 86-C-630, 1987 WL 14696, at \*1-2 (N.D. Ill. July 21, 1987).

115. Storage Tech. Partners II v. Storage Tech Corp., 117 F.R.D. 675, 679 (D. Colo. 1987).

116. Cheeseman v. Carey, 485 F. Supp. 203, 214 (S.D.N.Y. 1980).

117. One pre-*Ferens* Mississippi district court decision, *Washington v. Williams*, 696 F. Supp. 237, 239 (S.D. Miss. 1988), *aff'd*, 884 F.2d 576 (5th Cir. 1989), and one post-*Ferens* Mississippi district court decision, *Frazier v. Commercial Credit Corp.*, 755 F. Supp. 163, 167-68 (S.D. Miss. 1991), rejected plaintiffs' attempts to file lawsuits in Mississippi in order to gain procedural advantages under Mississippi law and then, while retaining such advantages, to transfer the lawsuits, under 28 U.S.C. § 1404(a), to other jurisdictions. *See also Laine v. Morton Thiokol, Inc.*, 124 F.R.D. 625, 625 (N.D. Ill. 1989). Plaintiff in *Laine* was sanctioned for filing a lawsuit in Illinois, a proper venue, where every event tied to the lawsuit had occurred in Utah. *Id.* at 627-28.

118. *See supra* notes 85-103.

119. *See supra* notes 93.

120. *See supra* note 94.

acceptable<sup>121</sup> with those reaching the opposite result.<sup>122</sup>

There are no uniform opinions on the acceptability of filing lawsuits in given venues in order to obtain more favorable laws or more favorable juries. But the overwhelming majority of decisions accepts these two types of forum-shopping as legitimate tactical maneuvers.<sup>123</sup>

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121. *See, e.g.,* *Sussman v. Bank of Israel*, 56 F.3d 450, 457 (2d Cir. 1995) (“ ‘Attorneys are not under an affirmative obligation to file an action in the most convenient forum; their only obligation is to file in a proper forum.’ ”) (quoting *Newton v. Thomason*, 22 F.3d 1455, 1463-64 (9th Cir. 1994)); *United States v. Bagnell*, 679 F.2d 826, 830-31 (11th Cir. 1982) (stating that despite the contention that the government chose to sue defendant in the jurisdiction it believed would be most favorable, defendant had no cause to complain because venue was proper). Consider also *Washington v. Allstate Ins. Co.*, No. Civ. A. 91-3779, 1992 WL 167030 (E.D. La. June 30, 1992), where the court stated:

Allstate complains that Washington has engaged in blatant forum shopping. The Court agrees, but finds in that accusation no warrant for Allstate’s indignation. The Supreme Court seems entirely willing to permit successful forum shopping in this context. Because the Supreme Court has fully considered the forum shopping argument in this context and has refused to alter the relevant doctrines in order to prevent it, this Court will not do so.

*Id.* at \*5. Finally, consider *Kahn v. Wien*, No. Civ. A. 86-2416-RJD, 1989 WL 65449 (E.D.N.Y. 1989). In response to a defense allegation that the only reason plaintiff filed in the venue at issue was to avoid assignment of its case to a judge in the most convenient and logical venue, the court stated:

In sum, it remains unclear whether plaintiff’s attorneys have actually engaged in forum shopping, but even if they have, such a finding is not conclusive of the transfer issue, since “[f]orum shopping is no more an evil than any other tactical determination a party makes in its behalf.” Indeed, “[a]ny competent lawyer chooses a forum with his or her client’s interests in mind.”

*Id.* at \*4 (alterations in original) (citations omitted).

122. *See supra* note 105; *see also* *Kinney Sys., Inc. v. Continental Ins. Co.*, No. 84329, 1996 WL 26554 (Fla. Jan. 25, 1996). Note also *Laine v. Morton Thiokol, Inc.*, 124 F.R.D. 625 (N.D. Ill. 1989), where the court stated:

But I see no predicate for haling three individual Utah citizens and residents into an Illinois district court, where *Utah* is where the complained-of conduct occurred and Illinois has no connection to this action at all. That is forum-shopping with a vengeance, and it ought to be discouraged with all the vigor at a court’s disposal.

*Id.* at 627-28; *see also* *Washington v. Williams*, 696 F. Supp. 237, 239 (S.D. Miss. 1988), *aff’d*, 884 F.2d 576 (5th Cir. 1989) (dismissing a lawsuit because the only connection with the forum was that one of the defendants was qualified to do business there).

123. Other examples of forum-shopping could also be explored. For example, in addition to striking potential jurors for cause, the federal court system allows, within defined numerical limits, *see, e.g.*, 28 U.S.C. § 1870 (1994) (civil cases); FED. R. CRIM. P. 24(b) (1988) (criminal cases); Jon M. Van Dyke, *JURY SELECTION PROCEDURES*, 282-84 (1977), litigators to dismiss potential jurors without cause as long as there are nonrace- or nongender-based reasons for the dismissal. The same holds true for the state system. *See, e.g.*, *Batson v. Kentucky*, 476 U.S. 79 (1986) (race); *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1430 (1994) (gender). Thus, the whole area of striking jurors arguably is a method of juror-shopping. *Accord* Note, *supra* note 4, at 1678-79. Moreover, there may be ways to get around race and gender prohibitions. Consider *Purkett v. Elem*, 115 S. Ct. 1769 (1995) (holding invalid a black male defendant’s objection to the prosecutor’s use of peremptory challenges to strike the only two black men from the venire where prosecutor explained he had challenged the two because, *inter alia*, both had facial hair); *see also*

Judge-shopping, however, is another matter. Consider the following.

### B. *A Comparison to Judge-Shopping*

As an administrative matter, every court in this country has some mechanism to assign incoming cases to the various judges. Many courts, in both the federal and state court systems, adopt random assignment procedures. The exact rules of random assignment vary from court to court. The idea, however, involves placing the names of all judges in a particular court on a wheel, so to speak, and spinning the wheel every time a new case is filed. When the wheel stops, it identifies the judge who will try the newly filed case.<sup>124</sup> The main purpose of random assignment is to “prevent[ ] judge shopping by any party, thereby enhancing public confidence in the assignment process.”<sup>125</sup> Another benefit of random assignment is to “ensure[ ] an equitable distribution of the case load among the judges of [the] court.”<sup>126</sup>

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*Too Fat to Serve, or Too Flamboyant?*, NAT'L L.J., Feb. 20, 1995, at A8. In this article about a California murder-and-robbery case, *People v. Galbert*, a prosecutor was allowed to exclude from service the only three black potential jurors because one wore her hair in braids; a second was “‘grossly overweight’ wearing ‘a skirt that’s hiked halfway up her thighs when she sits. . . .’”; and the third “was fat, wore a suit with big gold buttons and had long dangling earrings.” *Id.*

Examples of court-shopping or law-shopping can be found in cases where defendants remove cases filed in state court to federal court, pursuant to 28 U.S.C. § 1441; or, in cases where defendants attempt to secure a more favorable venue by moving to transfer the litigation from one federal court to another, pursuant to 28 U.S.C. § 1404 or 1406. See Neal Miller, *An Empirical Study of Forum Choice In Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369 (1992); Note, *supra* note 4, at 1679. Rampant forum-shopping also takes place in the review of administrative agency decisions under the “Race to the Courthouse” statute, as contained in 28 U.S.C. § 2112 (1994). See, e.g., Thomas O. McGarity, *Multi-Party Forum Shopping for Appellate Review of Administrative Action*, 129 U. PA. L. REV. 302 (1980). Finally, consider a recent possibility, suggested by *Shanaghan v. Cahill*, 58 F.3d 106 (4th Cir. 1995), where plaintiff brought an action based on diversity jurisdiction against the defendant to collect on three separate loans: one each for \$40,000, \$23,696, and \$14,700. After some discovery, the court dismissed the claim of \$40,000 because of plaintiff’s inability to overcome, inter alia, a statute of frauds defense. When that claim was dismissed, the jurisdictional amount fell below the requisite \$50,000. Thus, the trial court dismissed the remainder of plaintiff’s action for lack of jurisdiction. The Fourth Circuit, reversing and remanding, suggested that the district court consider retaining the matter under the doctrine of supplemental jurisdiction, as contained in 28 U.S.C. § 1367. *Id.* at 112-13. What if plaintiff’s counsel knew that the plaintiff would not be able to overcome a defense such as the statute of frauds? If so, the decision to seek a federal venue, knowing that the amount for diversity jurisdiction could not be met, would pay off.

124. See Daniel Wise, *Format Ends Judge-Shopping in Civil, Not Criminal, Cases*, N.Y. L.J., Dec. 9, 1987, at 1.

125. *United States v. Mavroules*, 798 F. Supp. 61, 61 (D. Mass. 1992); Alan Kohn, *Southern District Panel Studies Ways to End Judge-Shopping*, N.Y. L.J., Mar. 23, 1987, at 1 [hereinafter Kohn, *Southern District*]; Alan Kohn, *U.S. Court Revises Format to Curtail ‘Judge-Shopping,’* N.Y. L.J., May 1, 1987, at 1 [hereinafter Kohn, *U.S. Court*]; Daniel Wise, *Panel Seeks Reform of Case Assignment Rule: City Bar Committee Urges Change in Related-Cause Process to Curb Vestiges of ‘Judge-Shopping,’* N.Y. L.J., Mar. 15, 1989, at 1.

126. *Mavroules*, 798 F. Supp. at 61.

Additionally, courts employ other mechanisms purportedly to ensure the impartiality of the decision-maker. Several states allow "peremptory challenges"<sup>127</sup> of the first judge randomly assigned to the case.<sup>128</sup> A typical peremptory-challenge-of-judge statute or court rule allows a party to strike the first judge assigned to a case without specifying a reason.<sup>129</sup> The case is then randomly assigned to another judge. Parties can also remove judges "for cause," a term usually referring to bias or prejudice. Thus, because "[t]he right of all litigants to a fair and impartial trial is guaranteed by the due process clauses of the fifth and

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127. The term "peremptory challenge" is most commonly associated with a party's right to challenge or strike a prospective juror from a case. Black's Law Dictionary defines the term as

The right to challenge a juror without assigning, or being required to assign, a reason for the challenge. In most jurisdictions each party to an action, both civil and criminal, has a specified number of such challenges and after using all his peremptory challenges he is required to furnish a reason for subsequent challenges.

BLACK'S LAW DICTIONARY 1136 (6th ed. 1990). The term, however, is not confined to the striking of jurors, but can be applied to judges as well. *See, e.g.*, *United States v. Escobar*, 803 F. Supp. 611, 614 (E.D.N.Y. 1992) (citing court rules, state statutes, case law, and scholarly publications).

128. Nineteen states, either by statute or court rule, allow parties at least one peremptory challenge of a judge. *See Escobar*, 803 F. Supp. at 614. *See generally* Roger M. Baron, *A Proposal for the Use of a Judicial Peremptory Challenge System in Texas*, 40 BAYLOR L. REV. 49 (1988); Linda de la Mora, Note, *Statute Allowing Substitution of Judge upon Peremptory Challenge Does Not Violate Separation of Powers Doctrine*, *State v. Holmes*, 106 Wis. 2d 31, 315 N.W.2d 703 (1982), 66 MARQ. L. REV. 414 (1983); Robert A. Levinson, Comment, *Peremptory Challenges of Judges in the Alaska Courts*, 6 UCLA-ALASKA L. REV. 269 (1977); Kraig J. Marton, Comment, *Peremptory Challenges of Judges: The Arizona Experience*, 1973 LAW & SOC. ORD. 95; Jon B. Ables & Charles A. Thompson, Note, *Change of Judge in Indiana: A Continuing Dilemma*, 2 IND. LEGAL F. 164 (1968-69); Note, *Change of Venue and Change of Judge in a Civil Action in Indiana: Proposed Reforms*, 38 IND. L.J. 289 (1963). Similar legislation has routinely failed at the federal level. *See, e.g.*, H.R. 3125, 98th Cong., 1st Sess. (1983); H.R. 1649, 97th Cong., 1st Sess. (1981). An analysis of why Congress has failed to enact legislation that would allow parties to peremptorily challenge federal judges is beyond the scope of this Article. To learn the substance of the debate, however, see *Escobar*, 803 F. Supp. at 614-15 (citing numerous authorities on the issue). *See also* Edward G. Burg, Comment, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 CAL. L. REV. 1445 (1981); Peter A. Galbraith, *Disqualifying Federal District Judges Without Cause*, 50 WASH. L. REV. 109 (1974); Alan J. Chaset, *Disqualification of Federal Judges by Peremptory Challenge*, FED. JUD. CTR. 1 (Feb. 1981); John R. Bartels, *Peremptory Challenges to Federal Judges: A Judge's View*, 68 A.B.A. J. 449 (1982); Richard M. Coleman, *An Idea Whose Time Has Come*, L.A. LAW., Sept. 1981, at 6; Russell Iungerich, *The Time Has Come*, L.A. LAW., Sept. 1980, at 16; Martha Middleton, *'Peremptory Challenge' of Judges Proposed*, 68 A.B.A. J. 670 (1982); *A Proposal for Peremptory Challenges of Federal Judges in Civil and Criminal Cases*, 36 RECORD OF ASS'N OF BAR OF CITY OF N.Y. 231 (1981); Neal A. Jackson, *Allow Peremptory Challenges of Federal District Judges?*, LITIG. NEWS July 1981, at 3; Ruth Marcus, *A Defense Veto Over Judges?*, NAT'L L.J., Aug. 11, 1980, at 3; Becky Morrow, *Peremptory Challenges of Federal Judges Supported*, L.A. DAILY J., May 22, 1980, at 1; Daniel Wise, *Federal Bar Council Opposes Peremptory Challenge of Judge*, N.Y. L.J., June 2, 1986, at 1; *ABA Backs Defendant's Right to Request Change of Judge*, N.Y. L.J. June 16, 1980, at 2.

129. *See, e.g.*, MO. R. CIV. P. 51.05; IDAHO R. CIV. P. 40(d)(1); *see also* ILL. ANN. STAT. ch. 735 s. 5/2-1001 (Smith-Hurd 1995), quoted *infra* note 153.

fourteenth amendments to the United States Constitution[,]”<sup>130</sup> “[a]n impartial judge [is] an indispensable element of the due process right to a fair trial.”<sup>131</sup> In both the state and federal court systems, if a party can prove that the judge assigned to hear the lawsuit is biased or prejudiced against the party, or cannot otherwise be impartial, the party can move to remove the judge for cause.<sup>132</sup> Importantly, however, regardless of whether a judge is challenged for cause or struck under a peremptory

130. David C. Hjelmfelt, *Statutory Disqualification of Federal Judges*, 30 KAN. L. REV. 255, 255 (1982). The Fifth Amendment’s Due Process Clause provides: “No person shall . . . be deprived of life, liberty, or property, without due process of law . . .” U.S. CONST. amend. V. The 14th Amendment’s Due Process Clause provides “[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .” U.S. CONST. amend. XIV, § 1.

131. Gary L. Karl, Note, *Disqualification of Federal District Court Judges for Bias or Prejudice: Problems, Problematic Proposals, and a Proposed Procedure*, 46 ALB. L. REV. 229, 229 (1981) (footnote omitted); see also Hjelmfelt, *supra* note 130; Susan E. Barton, Note, *Judicial Disqualification in the Federal Courts: Maintaining an Appearance of Justice Under 28 U.S.C. § 455*, 1978 L. FORUM 863, 863; Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 HARV. L. REV. 1435, 1435 (1966).

132. See, e.g., *Ouachita Nat’l Bank v. Tosco*, 686 F.2d 1291, 1300-01 (8th Cir. 1982), *on reh’g*, 716 F.2d 485 (8th Cir. 1983); *Solberg v. Superior Court*, 561 P.2d 1148, 1154-55 (Cal. 1977); Baron, *supra* note 128, at 50-52; Robert H. Aronson, Comment, *Disqualification of Judges for Bias or Prejudice—A New Approach*, 1972 UTAH L. REV. 448; *Disqualification of Judges for Prejudice or Bias—Common Law Evolution, Current Status, and the Oregon Experience*, 48 OR. L. REV. 311 (1969).

In the federal system, two statutes control a party’s right to remove a federal judge for cause. The first, 28 U.S.C. § 144 (1994), provides in part:

Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The second statute, 28 U.S.C. § 455 (1988), which deals with impartiality in broader terms and does not require action by the parties, provides in part:

Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

challenge mechanism, the parties are *never* entitled to their judge of choice;<sup>133</sup> they are entitled only to impartiality.

Despite these rules designed to ensure assignment of impartial judges, lawyers still attempt to circumvent them. Some lawyers have filed lawsuits against presiding judges to try to force them to step aside.<sup>134</sup> Some have asserted baseless accusations against judges to try to force recusal.<sup>135</sup> Some have attempted to refile previously dismissed actions in hope of securing a judge of choice.<sup>136</sup> Some have filed motions for change of venue in order to avoid randomly assigned judges.<sup>137</sup> Some have filed cases in highly inconvenient jurisdictions to

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person;

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

133. *See, e.g.*, H.R. Rep. No. 1453, 93d Cong., 2d. Sess., reprinted in 1974 U.S.C.C.A.N. 6351, 6355. The report, which reflects the sentiment behind the enactment of 28 U.S.C. § 455, reproduced *supra* note 132, provides in relevant part:

[In] assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. *Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.*

(second emphasis added); *see also In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988), *cert. denied sub nom. Milken v. SEC*, 490 U.S. 1102 (1989); *In re Singh*, 123 F.R.D. 140, 148 (D.N.J. 1988); *Crider v. Keohane*, 484 F. Supp. 13, 15 (W.D. Okla. 1979); *Mavis v. Commercial Carriers, Inc.*, 408 F. Supp. 55, 61-62 (C.D. Cal. 1975).

134. *See, e.g.*, *Jones v. City of Buffalo*, 867 F. Supp. 1155, 1162-63 (W.D.N.Y. 1994); *In re Schaefer*, 154 B.R. 227, 230 (Bankr. S.D. Texas 1993); *Andersen v. Roszkowski*, 681 F. Supp. 1284, 1289 (N.D. Ill. 1988), *aff'd*, 894 F.2d 1338 (7th Cir. 1990).

135. *See, e.g.*, *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1443-44 (9th Cir. 1995); *Raffe v. Citibank, N.A.*, No. 84-C-0305, 1987 WL 10825, at \*2 (E.D.N.Y. May 1, 1987). It is clear that one cannot use motions to recuse or motions to disqualify as vehicles for judge-shopping. *See, e.g.*, *McCann v. Communications Design Corp.*, 775 F. Supp. 1506, 1522 (D. Conn. 1991); *U.S. v. Conforte*, 457 F. Supp. 641, 651-53 (D. Nev. 1978), *aff'd*, 624 F.2d 869 (9th Cir. 1980), *cert. denied*, 449 U.S. 1012 (1980); *Blizzard v. Fielding*, 454 F. Supp. 318, 321-22 (D. Mass. 1978), *aff'd sub nom. Blizzard v. Frechette*, 601 F.2d 1217 (1st Cir. 1979); *United States v. Baker*, 441 F. Supp. 612, 615 (M.D. Tenn. 1977).

136. *See Smith v. Mt. Sinai Hosp.*, No. 84-Civ.-9111-CSH, 1985 WL 561, at \*1 (S.D.N.Y. Apr. 22, 1985), *aff'd*, 857 F.2d 1461 (2d Cir. 1987).

137. *See, e.g.*, *Hader v. St. Louis Southwestern Ry. Co.*, 566 N.E.2d 736, 740-41 (Ill. Ct. App. 1991), *appeal denied*, 575 N.E.2d 914 (Ill. 1991); Theodore Postel, *Change of Venue: Judge-Shopping*, CHI. DAILY L. BULL., July 3, 1991, at 1; Theodore Postel, *Defendant Is a Judge*, CHI.

avoid judges in more convenient jurisdictions.<sup>138</sup> Some, by filing a given case first, have ensured that subsequent related cases are also assigned to the judge selected to preside over the first case.<sup>139</sup> And some lawyers, with the help of friendly filing clerks<sup>140</sup> or through their own guesswork,<sup>141</sup> have been able to secure a judge of choice.

Consider the attempt by two attorneys at the Chicago law firm of Mayer, Brown & Platt to secure decision-makers of their choice. The attorneys attempted to circumvent a court rule requiring random assignment of judges<sup>142</sup> by increasing the likelihood that their judge of choice would be assigned their case. The attorneys represented the Chicago Catholic Archdiocese in a lawsuit seeking to overturn an arbitration award to a construction company.<sup>143</sup> Although they were aware of the Cook County Court Chancery Division rule providing for random

DAILY L. BULL., Sept 30, 1986, at 1; John F. Rooney, *Venue Change Granted in Breast Implant Cases—Case Will Not Be Heard By a Woman Judge*, CHI. DAILY L. BULL., Apr. 27, 1992, at 3. In his article, Rooney wrote:

Circuit Judge Monica D. Reynolds, Cook County's only female chancellor, has granted a defendant's request for a change of venue in the breast implant class action litigation. "It is now guaranteed so long as [the case] remains in the Chancery Division it won't be heard by a woman judge," said Jewel N. Klein, one of the lead plaintiffs' lawyers and a past president of the Women's Bar Association of Illinois. "That's a disappointment.["]

*Id.* (alteration in original).

138. See, e.g., *Kahn v. Wien*, No. Civ.-86-2416-RJD, 1989 WL 65449, at \*3-4 (E.D.N.Y. June 6, 1989).

139. See Steven Brill, *When the Government Goes Judge Shopping*, AM. LAW., Nov. 1988, at 3.

140. Several litigators have told the author that it is not unusual to withdraw a lawsuit immediately after the name of an unwanted judge is chosen—but just before the case is "officially" assigned to that judge—and then to refile it.

141. See, e.g., Note, *supra* note 4, at 1678; Edward J. Burke, *Court to Probe Forum-Shoppers*, NAT'L L.J., Aug. 25, 1980, at 5; Kohn, *Southern District*, *supra* note 125; Kohn, *U.S. Court*, *supra* note 125; Vitt, *supra* note 5, at 129; Wise, *supra* note 124; see also Weyman I. Lundquist, *The New Art of Forum Shopping*, LITIG., Spring 1985, at 21, 22 ("Lawyers have been known to pass time in the clerk's office awaiting a file stamp showing that Judge Miserly has just drawn a case on the random selection list and then file on the statistically sound theory that seldom do the face of the dice repeat on the next roll.").

142. The applicable rule, General Order 3.1 of the Circuit Court of Cook County, provides in relevant part: "Assignment of Cases—Chancery . . . Each case filed in the Chancery Division of the Circuit Court of Cook County shall be assigned by the Clerk of the Circuit Court to a trial calendar using electronic data processing equipment. Such assignment shall be made by random electronic process as hereinafter provided." SULLIVAN'S LAW DIRECTORY 671c (118th ed. 1994). General Order 3.1 goes on to detail the exact procedures to be followed under the court's random assignment system. *Id.*

143. David Bailey, *OK for Lawyers Who Forum-Shopped to Seek Censure from Supreme Court: ARDC Panel*, CHI. DAILY L. BULL., Dec. 13, 1994, at 1; Laura Duncan, *Judge to Seek Probe of Forum Shopping*, CHI. DAILY L. BULL., Apr. 5, 1994, at 1; Sherrie F. Nachman, *What Kind of Judge Was Mayer, Brown Praying For?*, AM. LAW., June 1994, at 26; John F. Rooney, *'Forum-Shopping' Broke Ethics Rules, ARDC Complaint Alleges*, CHI. DAILY L. BULL., Aug. 1, 1994, at 1; Randall Samborn, *Chicago Judge Sanctions Firm*, NAT'L L.J., Apr. 18, 1994, at A4.

assignment of judges,<sup>144</sup> the attorneys nevertheless explored ways to circumvent the rule.<sup>145</sup> They prepared and filed five identical complaints<sup>146</sup> in the hope that the case would be assigned to one of three judges out of the eleven on the chancery court.<sup>147</sup> Along with the five complaints, the attorneys gave their law firm's docket clerk "the names of three judges they hoped would be assigned to the case and told the docket clerk to stop filing copies of the complaint if one of the judges was assigned to the case."<sup>148</sup> The docket clerk filed all five complaints within fourteen minutes.<sup>149</sup> Within two weeks the attorneys' attempt at foiling the court's random assignment rule was discovered.<sup>150</sup> The attorneys subsequently consented to censure and a fine.<sup>151</sup>

In Illinois, where the judge-shopping occurred, the law allows parties to remove judges for cause,<sup>152</sup> to peremptorily challenge the first judge assigned to a case,<sup>153</sup> and to seek venue changes and/or voluntarily

144. Petition to Impose Discipline on Consent at 3, *In re Gill and Marks*, Comm'n Nos. 94-CH-837 & 838 (Ill. filed Dec. 16, 1994). A copy of the Petition is on file with the author. See also Bailey, *supra* note 143, at 1.

145. See Petition, at 3-4, *Gill*.

146. See Nancy Zeldis, *Mayer Brown Admits to Judge-Shopping Scheme*, NAT'L L.J., Apr. 11, 1994, at A13; see also *supra* notes 144.

147. Nachman, *supra* note 143.

148. Rooney, *supra* note 137; see also Petition at 4, *Gill*. The attorneys also instructed the file clerk "to telephone [attorney] Marks for additional instructions in the event all five complaints were filed and none of the filings resulted in the assignment of a matter to one of the preferred judges." *Id.*

149. See *supra* notes 143-44.

150. See Petition at 5, *Gill*. The Petition does not reveal how the discovery was made.

151. *Id.* at 5-7.

152. See § 5/2-1001(a)(1) of the Illinois Code of Civil Procedure, which provides:

Involvement of judge. When the judge is a party or interested in the action, or his or her testimony is material to either of the parties to the action, or he or she is related to or has been counsel for any party in regard to the matter in controversy. In any such situation a substitution of judge may be awarded by the court with or without the application of either party.

ILL. ANN. STAT. ch. 735, § 5/2-1001(a)(1) (Smith-Hurd 1992); see also § 5/2-1001(a)(3) which provides:

Substitution for cause. When cause exists.

(i) Each party shall be entitled to a substitution or substitutions of judge for cause.

(ii) Every application for substitution of judge for cause shall be made by petition, setting forth the specific cause for substitution and praying a substitution of judge. The petition shall be verified by the affidavit of the applicant.

(iii) Upon the filing of a petition for substitution of judge for cause, a hearing to determine whether the cause exists shall be conducted as soon as possible by a judge other than the judge named in the petition.

ILL. ANN. STAT. ch. 735, 5/2-1001(a)(3) (Smith-Hurd 1992).

153. See § 5/2-1001(a)(2) of the Illinois Code of Civil Procedure, which provides in part: "Substitution as of right. When a party timely exercises his or her right to a substitution without cause as provided in this paragraph (2). (i) Each party shall be entitled to one substitution of judge



dismiss filed lawsuits.<sup>154</sup> It is not clear, then, why the attorneys in the Mayer, Brown case specifically rejected some or all of these options.<sup>155</sup> Also unclear is what kind of judge the attorneys were shopping for.<sup>156</sup> Although the attorneys and other members of the firm publicly stated that they were simply “looking for ‘a fair and even-minded judge,’ ”<sup>157</sup> others have opined, that the attorneys really wanted a Catholic judge.<sup>158</sup>

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without cause as a matter of right.” ILL. ANN. STAT. ch. 735, § 5/2-1001(a)(2) (Smith-Hurd 1992).

154. See § 5/2-1001.5(a) of the Illinois Code of Civil Procedure, which provides:

A change of venue in any civil action may be had when the court determines that any party may not receive a fair trial in the court in which the action is pending because the inhabitants of the county are prejudiced against the party, or his or her attorney, or the adverse party has an undue influence over the minds of the inhabitants.

ILL. ANN. STAT. ch. 735, § 5/2-1001.5(a) (Smith-Hurd 1992); see also § 5/2-1009 of the Illinois Code of Civil Procedure, which provides in part:

Voluntary dismissal. (a) The plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party’s attorney, and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause.

(b) The court may hear and decide a motion that has been filed prior to a motion filed under subsection (a) of this Section when that prior filed motion, if favorably ruled on by the court, could result in a final disposition of the cause.

(c) After trial or hearing begins, the plaintiff may dismiss, only on terms fixed by the court (1) upon filing a stipulation to that effect signed by the defendant, or (2) on motion specifying the ground for dismissal, which shall be supported by affidavit or other proof.

ILL. ANN. STAT. ch. 735 § 5/2-1009 (Smith-Hurd 1992). There is no statute, court rule, or case law in Illinois requiring that a refiled case be reassigned to the original judge. This is unlike rules in some states that require any matter refiled in the same court to be assigned to the originally selected judge. See, for example, *Smith v. Mt. Sinai Hosp.*, No. 84-Civ.-9111-CSH, 1985 WL 561 at \*1 (S.D.N.Y. Apr. 22, 1985), where the court stated:

Rule 4(b) of the Rules for the Division of Business Among District Judges is designed to prevent ‘shopping’ by litigants among the Judges of this Bench. The rule provides in pertinent part:

‘An action, case or proceeding may not be dismissed and thereafter refiled for the purpose of obtaining a different judge. If an action, case or proceeding, or one essentially the same, is dismissed and refiled, it shall be assigned to the same judge. It is the duty of every attorney appearing to bring the facts of the refiled to the attention of the clerk.’

155. The attorneys clearly were aware of the options of changing venue and voluntarily dismissing the lawsuit. See, e.g., *Petition*, at 4, *Gill*; see also *Bailey*, *supra* note 143, at 26.

156. Judge Arthur Dunne, who presided over the attorneys’ disciplinary hearing, never asked this question. “I wasn’t interested, . . . It wasn’t important to me[.]” the judge said. *Nachman*, *supra* note 143, at 26.

157. *Id.*

158. *Id.* Although another partner at Mayer, Brown dismissed this theory as “complete, unadulterated bullshit,” there were only three Catholic judges on the court. *Id.* Moreover, although “one of the judges they drew, Aaron Jaffe, was among the most highly rated Chancery Court judges by the Chicago Council of Lawyers when he was last evaluated in 1992 . . . Gill rejected him anyway.” *Id.* Judge Dunne stated he had heard a theory with a slight variation. He had been told that the attorneys were looking for an Irish judge. *Id.*

Similar cases exist.<sup>159</sup> In *Standing Committee on Discipline v. Yagman*,<sup>160</sup> for example, the filing attorney was suspended from practicing law before the U.S. District Court for the Central District of California for one month for filing five virtually identical lawsuits within eighteen minutes and subsequently dismissing all but one.<sup>161</sup> Unfortunately, no known empirical data exist to show how often attorneys have tried—successfully or unsuccessfully—to circumvent anti-judge-shopping rules. Although the Mayer, Brown case was the first of its kind in Illinois,<sup>162</sup> the Cook County Circuit Court Chancery Division adopted a procedure, effective January 1, 1995, requiring all newly filed cases to be investigated for similar conduct.<sup>163</sup> Notice, though, that in both Mayer, Brown and *Yagman* the attorneys were punished for their conduct.<sup>164</sup> Yet, we generally do not see the same treatment in either the law-shopping or jury-shopping contexts. Why?

### C. *Why The Difference?*

Courts consistently treat judge-shopping as an impermissible form of shopping for justice.<sup>165</sup> Indeed, random assignment rules are specifi-

159. See, e.g., John MacCormack, *Expensive Shopping*, NAT'L L.J., Nov. 27, 1995 (discussing the case of two attorneys who were fined \$10,000 each for filing the same lawsuit 17 times in two days, varying only the plaintiffs' names); *Lane v. City of Emeryville*, No. CV-93-01228-JPV (N.D. Cal. July 30, 1993), *vacated on other grounds*, 56 F.3d 71 (9th Cir. Mar. 17, 1995) (attorney sanctioned under Fed. R. Civ. P. 11 for judge-shopping by dismissing and refileing a complaint); *Mississippi Bar v. Strauss*, 601 So. 2d 840 (Miss. 1992) (same); *Grievance Adm'r v. August*, 475 N.W.2d 256, 258 (Mich. 1991) (attorney's romantic relationship with court clerk led to attorney's attempt "to manipulate the blind-draw system for assigning judges . . .").

160. *Standing Comm. on Discipline v. Yagman*, No. CV 82-5412-HBT, Stipulation Re Settlement and Order (C.D. Cal. Mar. 16, 1983).

161. *Yagman*, No. CV-82-5412-HBT, at 1-2. *Yagman* differed slightly from the Mayer, Brown case. *Yagman* named different plaintiffs in each of his five lawsuits. See James S. Granelli, *Shopping For a Judge*, NAT'L L.J., Apr. 11, 1983, at 2, 28. Additionally, *Yagman's* explanation, for what otherwise appeared to be an attempt to foil California's rule on random assignment of judges, differed. After all five actions were filed, *Yagman* said, four of the five " 'plaintiffs chose not to go forward with the suits because they didn't like the judges they got.' " *Id.* at 28.

In addition to being suspended, *Yagman* was fined \$500 and ordered to perform 25 hours of pro bono work. *Yagman*, No. CV-82-5412-HBT, at 4; see also *Standing Comm. on Discipline v. Yagman*, 856 F. Supp. 1384, 1393 (C.D. Cal. 1994) (findings of fact, conclusions of law, and order), *rev'd*, 55 F.3d 1430 (9th Cir. 1995).

162. See, e.g., *Duncan*, *supra* note 143; *Rooney*, *supra* note 13.

163. See *Duncan*, *supra* note 143. No similar rule to discover law-shoppers or jury-shoppers can be found.

164. See *supra* notes 151, 160-61, and accompanying text.

165. See *In re Anwiler*, 958 F.2d 925, 930 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 236 (1992); *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 839 F.2d 1296, 1302 (8th Cir. 1988), *cert. denied*, 488 U.S. 869 (1988); *Ouachita Nat'l Bank v. TOSCO Corp.*, 686 F.2d 1291, 1300 (8th Cir. 1982); *Kelley v. Metro County Bd. of Educ.*, 479 F.2d 810, 813 (6th Cir. 1973) (McCree, J., concurring); *United States v. El-Gabrowny*, 844 F. Supp. 955, 958-59 (S.D.N.Y. 1994); *United States v. Mavroules*, 798 F. Supp. 61, 61 (D.

cally designed to prevent judge-shopping.<sup>166</sup> A contrary policy would “imperil the perceived ability of the judicial system to decide cases without regard to persons.”<sup>167</sup> Courts have reasoned that allowing judge-shopping would invite public skepticism of the ability to receive justice in our court system and would cheapen the judicial process.<sup>168</sup> Thus, while the discipline imposed for judge-shopping varies from court to court<sup>169</sup>—an apparently unchangeable reality as long as different judges are evaluating conduct<sup>170</sup>—judge-shopping is still “‘universally condemned’”<sup>171</sup> by the courts.<sup>172</sup>

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Mass. 1992); *In re Betts*, 143 B.R. 1016, 1020 (Bankr. N.D. Ill. 1992); *McCann v. Communications Design Corp.*, 775 F. Supp. 1506, 1522 (D. Conn. 1991); *Avitia v. Metropolitan Club of Chicago, Inc.*, No. 88-C-6965, 1990 WL 205278, at \*3 (N.D. Ill. Dec. 13, 1990); *In re Singh*, 123 F.R.D. 140, 148-49 (D.N.J. 1988); *In re Letters Rogatory*, 661 F. Supp. 1168, 1172 (E.D. Mich. 1987); *Raffe v. Citibank, N.A.*, No. 84-C-0305, 1987 WL 10825, at \*2 (E.D.N.Y. May 1, 1987); *In re Westfall*, 73 B.R. 186, 192 (Bankr. W.D. Ark. 1986); *In re Crisp*, 64 B.R. 351, 356 (Bankr. W.D. Mo. 1986); *Smith v. Mt. Sinai Hosp.*, No. 84-CIV-9111-CSH, 1985 WL 561, at \*2 (S.D.N.Y. Apr. 22, 1985); *Alberti v. General Motors Corp.*, 600 F. Supp. 1024, 1025 (D.D.C. 1984); *In re Martin-Trigona*, 573 F. Supp. 1237, 1243 (D. Conn. 1983), *appeal dismissed*, 770 F.2d 157 (2d Cir. 1985), *cert. denied*, 475 U.S. 1058 (1986); *Dee v. Institutional Networks Corp.*, 559 F. Supp. 1282, 1284 (S.D.N.Y. 1983); *Mavis v. Commercial Carriers, Inc.*, 408 F. Supp. 55, 62 (C.D. Calif. 1975); *Hader v. St. Louis Southwestern Ry. Co.*, 566 N.E.2d 736, 740 (Ill. Ct. App. 1991).

166. See *supra* note 125 and accompanying text.

167. *Mason*, 916 F.2d at 386; see also *Burke*, *supra* note 141 (“Forum-shopping—directing cases toward or away from specific judges on the basis of their perceived prejudices toward certain crimes or litigating personalities—is anathema in judicial circles because it tends to undermine the image of judicial impartiality.”). Indeed, judges take an oath that requires them to adjudicate cases “solely on the facts admitted into evidence, in accordance with applicable law, without regard to identity of parties or their attorneys.” *In re Betts*, 143 B.R. at 1021.

168. *Westfall*, 73 B.R. at 192; *Crisp*, 64 B.R. at 356.

169. In the *Mayer, Brown* case, the Cook County Circuit Court fined the offending lawyers \$3,000 and “censured” them. Petition to Impose Discipline on Consent, at 2, 5, 7, *In re Gill and Marks*, Comm’n Nos. 94-CH-837 & 838 (Ill. filed Dec. 16, 1994). Censure is defined as “[a]n official reprimand or condemnation.” BLACK’S LAW DICTIONARY 224 (6th ed. 1990). Also, the *Mayer, Brown* law firm imposed sanctions, including 300 hours of pro bono service and \$55,000 in contributions to charitable organizations. Petition, at 6, *Gill*. For similar conduct, the U.S. District Court for the Central District of California suspended attorney *Yagman* from practicing law for one month, and ordered him to pay a \$500 fine and to perform 25 hours of pro bono service. Standing Comm. on Discipline v. *Yagman*, No. CV 82-512-HBT, Stipulation Re Settlement and Order, at 2 (C.D. Cal. Mar. 16, 1983); see also *MacCormack*, *supra* note 159.

170. See *infra* notes 190-91 and accompanying text.

171. *Lane v. City of Emeryville*, No. 93-16646, 1995 WL 298614, at \*2 (9th Cir. May 16, 1995) (citations omitted).

172. Although the courts condemn judge-shopping, discipline for that conduct is not always imposed. See, e.g., *In re Anwiler*, 958 F.2d 925, 930 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 236 (1992); *Jones v. City of Buffalo*, 867 F. Supp. 1155, 1162-63 (W.D.N.Y. 1994); *Avitia v. Metropolitan Club of Chicago, Inc.*, No. 88-C-6965, 1990 WL 205278, at \*3 (N.D. Ill. Dec. 13, 1990); *Raffe v. Citibank, N.A.*, No. 84-C-0305, 1987 WL 10825, at \*2 (E.D.N.Y. May 1, 1987); *Smith v. Mt. Sinai Hosp.*, No. 84-CIV-9111-CSH, 1985 WL 561, at \*2 (S.D.N.Y. Apr. 22, 1995); *In Re Martin-Trigona*, 573 F. Supp. 1237, 1242-43 (D. Conn. 1983); *Hader v. St. Louis S.W. Ry. Co.*, 566 N.E.2d 736, 740-41 (Ill. Ct. App. 1991). Consider also *Murray v. Sevier*, 145 F.R.D.

When the issue is shopping for laws or juries, however, universal condemnation is far from the norm. While thousands of cases contain general unsupported dicta criticizing forum-shopping as wrong,<sup>173</sup> our judicial system, in practice, supports shopping for juries and laws.<sup>174</sup> Opponents of law-shopping argue that law-shopping undermines state substantive law;<sup>175</sup> overburdens the courts, disrupts efficiency, and causes unnecessary expense;<sup>176</sup> manipulates the court system's loopholes and creates public doubt about fairness in the system;<sup>177</sup> and highlights differences and inconsistencies among the states, while "expos[ing] the tension between the ideal of the rule of law and the reality of a system created and administered by human beings."<sup>178</sup> But proponents of law-shopping argue that plaintiff, as "master of his forum,"<sup>179</sup> has a right to shop for laws;<sup>180</sup> thus, it is an appropriate litigation strategy.<sup>181</sup> Indeed, it is said to be "no more an evil than any other

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563 (D. Kan. 1993). In *Murray*, members of an unincorporated association of anglers brought six lawsuits against the same group of defendants. After reviewing the judges assigned to the actions, the members dismissed all but one of the suits. Although the court's opinion clearly recognized the judge-shopping attempt, no sanction was imposed. *Id.* at 596. The "preferred" judge, however, re-assigned the case to another judge. *Id.* at 565.

173. See, e.g., *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 154 (1987); *Van Dusen v. Barrack*, 376 U.S. 612, 636-37 (1964). Westlaw offers access to thousands of cases that mention the term "forum-shopping." Although most of these cases contain references to the dangers of forum-shopping, very few provide any analysis to support that conclusion. Note, *supra* note 4, at 1681. Further, courts apply the term "forum-shopping" selectively to suit their purposes. "A court will call a practice 'forum shopping' when it wishes to paint it as an unsavory machination designed to thwart public policy and achieve an unmerited goal. By contrast, it will avoid the label when it considers the reasons behind the forum selection reasonable or justified." *Id.* at 1683 (footnote omitted). If there really is nothing wrong with forum-shopping, why do so many cases start from the premise that forum-shopping is wrong?

174. See *supra* notes 20-81, 94, 98, 106, and accompanying text; *North Star Steel Co. v. Thomas*, 115 S. Ct. 1927, 1931-32 (1995); *American Dredging Co. v. Miller*, 114 S. Ct. 981, 993 (1994) (Kennedy & Thomas, JJ., dissenting) (arguing that by sanctioning a state law that prevents a defendant's use of the doctrine of forum non conveniens in claims brought in state court under the Jones Act, "the Court condones the forum shopping and disuniformity that the admiralty jurisdiction is supposed to prevent"); *Ferens v. John Deere Co.*, 494 U.S. 516, 527 (1990); *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 779 (1984).

175. Note, *supra* note 4, at 1684.

176. *Id.*; see also *Brown*, *supra* note 20, at 666-67.

177. *Brown*, *supra* note 20, at 668; Note, *supra* note 4, at 1684.

178. Note, *supra* note 4, at 1686.

179. *Brown*, *supra* note 20, at 669.

180. See, e.g., *Conlon v. Sea-Land Serv., Inc.*, No. 94-CIV-0609-KMW, 1995 WL 20321, at \*3 (S.D.N.Y. Jan. 19, 1995).

181. *Keeton*, 465 U.S. at 779; *Moorco Int'l, Inc. v. Eltag Bailey Process Automation, N.V.*, 881 F. Supp. 1000, 1006 (E.D. Pa. 1995). In *Moorco*, in response to a defense contention of fraudulent joinder, in that a co-party was joined in order to secure a state court forum and thus defeat federal diversity jurisdiction, the court stated: "[T]here is nothing improper about formulating and executing an effective litigation strategy, including selecting the most favorable forum for the client's case. Thus, [the non-diverse defendant's] joinder cannot be deemed

tactical determination a party makes in its behalf."<sup>182</sup> Some contend that venue-shopping is an attorney's job,<sup>183</sup> indeed, that attorneys are ethically bound to venue-shop,<sup>184</sup> lest they find themselves defending malpractice actions.<sup>185</sup> Others simply conclude that there is nothing wrong with filing a lawsuit in any state as long as venue is proper and personal jurisdiction over the defendant exists.<sup>186</sup> One court even concludes that forum-shopping "is as American as the Constitution, peremptory challenges to jurors, and our dual system of state and federal courts."<sup>187</sup> So while our judicial system appears to disdain those who would shop for judges, it generally looks favorably upon those who shop for juries or laws. But if judge-shopping cheapens the judicial process and erodes public confidence in the court system,<sup>188</sup> why doesn't the quest for favorable juries or the quest for favorable laws have the same effect?

The judge-shopping decisions are actually quite contradictory. On the one hand, the opinions promulgate the fiction that judges preside neutrally and without bias over each case simply by being faithful to their oath of office.<sup>189</sup> On the other hand, we all know that judges are

fraudulent [simply] because [the plaintiff] finds it advantageous to pursue these . . . claims in . . . state court."

182. Kahn v. Wien, No. CIV-86-2416-RJD, 1989 WL 65449, at \*4 (E.D.N.Y. June 6, 1989) (quoting Cheeseman v. Carey, 485 F. Supp. 203, 215 (S.D.N.Y. 1980)).

183. See *id.* at \*4; Conlon, 1995 WL 20321, at \*3 ("There is nothing per se improper in an attorney's choosing between available venues based on his calculation that the selection of one may benefit his client because the courts in that district may be more favorably disposed to his legal theory.").

184. See Juenger, *Forum Shopping*, *supra* note 110, at 570; Juenger, *What's Wrong?*, *supra* note 110, at 12-13; Opekin, *supra* note 18, at 14-15, 27; Note, *supra* note 4, at 1690. Consider also CASAD, *supra* note 110, at 1:

[T]o the extent that legal rules permit a different outcome in a case when it is brought in court A as compared to court B, it can be said that there is a policy of permitting forum shopping. In the latter instance, a lawyer has done nothing unethical or reprehensible in choosing the forum that is most advantageous to the client's case. Indeed, it could be said that it is part of the advocate's responsibility to seek the best place to try the case.

185. Juenger, *Forum Shopping*, *supra* note 110, at 572.

186. See *supra* notes 100, 121. Indeed, as the Supreme Court stated in *Ferens v. John Deere Co.*, 494 U.S. 516 (1990) Congress—via liberal venue provisions—gives plaintiffs the right to forum-shop. *Id.* at 527. If a given law specifically allows the conduct at issue, how can the conduct be improper? See also Juenger, *What's Wrong?*, *supra* note 110:

"Forum-shopping" is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favorably presented: this should be a matter neither for surprise nor for indignation.

*Id.* at 12.

187. *McCuin v. Texas Power & Light Co.*, 714 F.2d 155, 1261 (5th Cir. 1983).

188. See, e.g., *United States v. Mavroules*, 798 F. Supp. 61, 61 (D. Mass. 1992).

189. For two such opinions, see *Litky v. United States*, 114 S. Ct. 1147, 1160 (1994) (Kennedy, Blackmun, Stevens & Souter, JJ., concurring) ("Judges, if faithful to their oath, approach every aspect of each case with a neutral and objective disposition. They understand

not equal—not in intelligence, experience, or perception.<sup>190</sup> More importantly, we also know “that, by putting the black robe on, a person doesn’t change his or her personality; [judges] bring their biases, prejudices, their good qualities, and bad qualities with them.”<sup>191</sup> Indeed, the very existence of laws allowing parties to seek the removal of judges for cause demonstrates that the power of the judicial oath is not enough to ensure neutrality.<sup>192</sup> Moreover, we acknowledge that the oath does not guarantee an open mind when presidents nominate federal judges to the bench. When we speak of “Reagan-Bush” appointees or “Clinton” appointees, we are not merely noting that a particular person was nominated by a particular president. Rather, we are referring to our belief—indeed, the belief of the nominator—that the appointee shares (or is thought to share) most, if not all, of the political, social, and economic beliefs of the appointor.<sup>193</sup> No one really believes that the oath eliminates partiality. Thus, our judicial system punishes judge-shopping because if judge-shopping were allowed the public would conclude that the judicial system was unfair and biased and the public would lose confidence in the court system; our courts also punish judge-shopping for

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their duty to render decisions upon a proper record and to disregard earlier judicial contacts with a case or party.) and *In re Betts*, 143 B.R. 1016, 1021 (Bankr. N.D. Ill. 1992).

190. See, e.g., *Judge-Shopping? Why Not?*, N.J. L.J., Feb. 24, 1992, at 14 (editorial arguing that judges individual differences make judge-shopping inevitable).

The fact is that every judge is not capable of presiding over every case. A few may be incapable of presiding over most cases. Judicial decisions are affected by the knowledge, intelligence, dedication and philosophy of the deciding judge. These characteristics vary with the individual. Criminal sentencing practices illustrate the point. Judges tested with identical hypothetical questions often exhibit striking differences. In one county, years ago, convicted marijuana users sentenced by one judge went to jail always, sentenced by another, never. What lawyer, properly representing such a defendant, would fail to judge-shop?

*Id.* Recall the rejected arguments of attorneys “caught” judge-shopping. They said they were seeking a fair-minded judge or one more equipped to handle the complexity of the case. See *supra* note 157 and accompanying text. Similarly, the attorney caught filing 17 lawsuits in two days justified his actions, saying, “My ultimate responsibility is to my clients. What I think we were doing is getting the best, most experienced court to hear a toxic tort case.” MacCormack, *supra* note 159, at A4.

191. Vitt, *supra* note 5, at 129; see also Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257 (1995) (citing the authors’ statistical data in arguing that there is “surprisingly little evidence that the identity of the judge hearing a particular case influences the case’s outcome”). Indeed, in other contexts, many people believe that diversity on the bench is good for justice and society. See, e.g., Georgia Dullea, *Women as Judges: Nationwide, Their Numbers Increase—Some Observers Think Male-Female Differences in Viewing Issues Will Change Courts*, L.A. DAILY J., May 23, 1984, at 4.

192. See *supra* note 132 and accompanying text.

193. See, for example, Beverly B. Cook, *Should We Change Our Method of Selecting Judges?*, JUDGES’ J. Fall 1981, at 20, 22, where the author stated: “The enduring reality of political considerations was epitomized in a statement by President Reagan during the 1980 campaign. When a reporter asked for his standards for choosing a justice he said: ‘You look for a certain compatibility with your own philosophy.’”

fear that judge-shopping would undermine the image of judicial impartiality.<sup>194</sup> There is no conclusive evidence to support these beliefs. Yet these are the reasons courts express in opposition to judge-shopping.

Assuming, *arguendo*, that these beliefs are true, should they form the basis for distinguishing between shopping for judges on the one hand and shopping for juries and laws on the other? In other words, if it is inappropriate to allow a party to choose the judge she believes most favorable to her cause, shouldn't it also be inappropriate to allow her to choose the law or jury pool she believes most favorable to her cause? Wouldn't either scenario have a negative effect on public perceptions about justice and cause a loss of confidence in the system?<sup>195</sup> This author thinks so. Further, this author does not think that the average layperson distinguishes shopping for a judge from shopping for a jury or for laws.<sup>196</sup> The author has no empirical data to support this opinion. She can only submit that her conversations with attorneys and laypersons show that, while the attorneys can make arguments that justify the distinction, laypersons generally do not make the distinction. For example, while the vast majority of both groups condemned the attorneys'

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194. See *supra* notes 165-68; see also *In re Crisp*, 64 B.R. 351, 356 (Bankr. W.D. Mo. 1986) ("The crippling potential for justice is obvious."); cf. *Liteky*, 114 S. Ct at 1162 ("[J]ustice should not only be done, but should manifestly and undoubtedly be seen to be done.") (emphasis added) (alteration in original) (quoting *Ex parte McCarthy*, 1 K.B. 256, 259 (1923)) ("[J]ustice must satisfy the appearance of justice.") (alteration in original) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

195. See Note, *supra* note 4, at 1684 n.58 (suggesting that, because venue practices are not commonly known the public cannot have a negative impression of them). But like judge-shopping cases, law- and jury-shopping cases also make headlines. See, e.g., newspaper and magazine articles cited *supra* notes 44, 48, 51-54, 56, & 69; see also Claudia MacLachlan, *Move to Texas Spurs A Spat Over Venue—Lawyers Seeking Lenient Jurors Start a Tug-of-War*, NAT'L L.J., June 13, 1994, at B1.

196. Consider how lawyers have redefined the word "ethics" as an example of the differing views of laypersons and lawyers. The word "ethics" is defined as "[o]f or relating to moral action, conduct, motive or character . . ." BLACK'S LAW DICTIONARY 553 (6th ed. 1990). Yet the term "legal ethics" has a different definition: "Usages and customs among members of the legal profession, involving their moral and professional duties toward one another, toward clients, and toward the courts." *Id.* at 894 (emphases added); see also Peter Margulies, Review Essay, *Progressive Lawyering and Lost Traditions*, 73 TEX. L. REV. 1139, 1139 (1995) ("Legal ethics, as traditionally understood, explains why actions that violate our sense of ordinary ethics . . . are appropriate from the standpoint of professional roles."); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 9 (1975). Wasserstrom states:

[F]or most lawyers, most of the time, pursuing the interests of one's clients is an attractive and satisfying way to live in part just because the moral world of the lawyer is a simpler, less complicated, and less ambiguous world than the moral world of ordinary life. There is, I think, something quite seductive about being able to turn aside so many ostensibly difficult moral dilemmas and decisions with the reply: but that is not my concern; my job as a lawyer is not to judge the rights and wrong of the client or the cause; it is to defend as best I can my client's interests.

*Id.*

judge-shopping attempt in the Mayer, Brown case, these groups split when the issue involved the attorney's conduct in *Ferens*. Virtually all plaintiff attorneys vigorously defended the law-shopping in *Ferens*, while defense attorneys generally deplored it. Virtually every layperson, however—even law students—could not believe that the Supreme Court allowed the attorney in *Ferens* to “get away with” the law-shopping depicted there.<sup>197</sup> This informal survey, coupled with the author's own beliefs, have strengthened the author's opinion that the current distinctions are unsatisfying.

### III. REEVALUATING THE CURRENT APPROACH TO VENUE

#### A. For the Sake of “Public Confidence”

The judicial system seems to deplore judge-shopping in every form. Although some judge-shopping goes undetected,<sup>198</sup> once discovered, it will generally be punished.<sup>199</sup> Jury- and law-shopping, however, are viewed differently. The legal community generally believes that it is good to seek favorable courts and laws.<sup>200</sup> With some minor exceptions,<sup>201</sup> the legal community does not seem to care how those results are obtained. But all shopping—for judges, laws, and juries—should be considered equally deplorable. We should not condone the quest for favorable laws and juries simply because the methods used to secure them are within the bounds of the law, while deploring the quest to secure a judge of choice, regardless of the method used, because judge-shopping somehow is just plain wrong.

Law- and jury-shopping not only erode public confidence in the court system, but they also reward manipulation and exploitation of loopholes.<sup>202</sup> If the appearance of justice, the integrity of the profession,

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197. The phrase “get away with” is not the author's, but rather was repeatedly used by laypersons upon hearing the author's account of *Ferens*. Although all the listeners understood that the double forum-shopping in *Ferens* was legal, the question remained as to why it was considered legal. Similarly, although the method employed in *Ferens* to secure favorable law was within the bounds of our judicial system's current interpretation of venue choices—in contrast to the Mayer, Brown case, where the method to secure the judge of choice was not within legal bounds—this does not satisfactorily address the relevance of the similarities. Both cases involved laws that prohibited the sought-after results. In *Ferens*, Pennsylvania law barred plaintiffs' non-contract claim; in the Mayer, Brown case, a random-assignment-of-judges procedure prohibited the attorneys from attempting to choose the judge of choice. And both cases involved circumvention of those rules.

198. Consider the methods of judge-shopping detailed *supra* notes 134-161 and accompanying text. Obviously, not all judge-shopping can be eradicated; some will always slip through the cracks.

199. See *supra* notes 151, 160, and accompanying text.

200. See *supra* notes 20-41, 43-81, 94-95, 98, 106, and accompanying text.

201. See *supra* notes 111-114 and accompanying text.

202. Neither does such shopping provide much predictability to lawyers making forum-



and public confidence in the judicial system mean anything, we should move away from the view that shopping for juries and laws are "rights." Obtaining the best bargain for one's dollar is natural.<sup>203</sup> But problems regarding confidence in the system and the integrity of the profession arise when this behavior is carried over into the court system. The legal profession is in serious need of a boost.<sup>204</sup> In the name of advocacy, it

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shopping decisions either. See *supra* part II.A.4 for examples of the conflicting signals litigators get every day; see also Gideon Kanner, *Shopping for Justice: Growing Reliance on Private Judging Reflects Shortfalls in Court System*, PA. L. WKLY., June 13, 1994, at 6. Professor Kanner argues that, because the law applicable to a given lawsuit depends on where the lawsuit is filed, and because of open conflict among courts over the interpretation of law, "litigants are increasingly feeling alienated from the courts which are more and more perceived as failing in their primary function of principled dispute resolution, heedless of the law, and enamored of ideological sallies or even personal ad hoc result orientation." *Id.* at 6, 27. Attorneys simply must take a chance. Indeed, consider how many litigators decided not to engage in the kind of law-shopping condoned in *Ferens* before that decision was handed down because they were afraid such conduct would lead to sanctions. Before *Ferens*, some doubted that an attorney would even attempt to do what the plaintiff's attorney in *Ferens* did. See, e.g., Currihan, *supra* note 41, at 154-58.

But if the attorney gambles and gambles right, then both the attorney and the client are victorious; the only real "loser" may be the system as a whole. But if the attorney gambles and gambles wrong, then the ramifications of such conduct can range from nothing at all to discipline of some sort. Consider the legal malpractice implications to the attorney engaging in or refusing to engage in forum-shopping. As defined, "legal malpractice" "[c]onsists of failure of an attorney to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in performance of tasks which they undertake, and when such failure proximately causes damage it gives rise to an action in tort." BLACK'S LAW DICTIONARY 959 (6th ed. 1990); see also DUKE N. STERN, AN ATTORNEY'S GUIDE TO MALPRACTICE LIABILITY 210-245 (1977); Francis M. Dougherty, Annotation, *When Statute of Limitations Begins to Run upon Action Against Attorney for Malpractice*, 32 A.L.R. 4th 260, 268-345 (1984). So when deciding what to shop for, how to shop, and where to shop, the attorney should keep in mind potential malpractice liability. Recall the concern, for example, when the Illinois courts were flooded with newly filed lawsuits after word of a pending bill limiting noneconomic damages hit the press. See *supra* notes 54-55. Explaining the flood, a nationally prominent personal injury lawyer said, "Every lawyer who isn't going to be guilty of malpractice will want to have their lawsuit on file." Rob Thomas, *Illinois Bill Would Limit Damages in Lawsuits*, ST. LOUIS POST-DISP., Mar. 3, 1995, at 1A, 6A. Indeed, opponents of peremptory challenges of federal judges believe that "[i]f the system is available, attorneys feel compelled to invoke the challenge for even the slightest of reasons, fearing that if they do not they will be open to malpractice suits by clients who are unsuccessful in their litigation." Larry Berkson & Sally Dorfmann, *Judicial Peremptory Challenges: The Controversy*, STATE CT. J., Summer 1985, at 12, 14 (footnote omitted); see also Committee on Federal Courts, *A Proposal for Peremptory Challenges of Federal Judges in Civil and Criminal Cases*, 36 THE RECORD 231, 237 (1981) ("Inherent in these administrative objections is the stated belief that the filing of challenges would become commonplace on the part of defense attorneys in criminal cases, who would be concerned that they would be charged with failing to provide effective assistance of counsel if they did not frequently exercise the challenge.") (footnote omitted).

203. Judges, for example, shop for the best law clerks on the market. See Marcia Chambers, *Clerk-Shopping Shows Judges at Their Worst*, NAT'L L.J., Apr. 4, 1988, at 13. And law professors shop for the "best" placement of their articles. See Lisa Anderson, *Law Journals Attack 'Shopping' of Manuscripts*, N.Y. TIMES, July 12, 1995, at B6.

204. Witness the public dissatisfaction in the criminal law area resulting from the O.J. Simpson

has virtually abandoned civility<sup>205</sup> and the notion that lawyers are officers of the court.<sup>206</sup> The goal today is to win and to win at any cost. The practice of law is becoming a game, and the notion of the lawyer as hired gun is alive and well.<sup>207</sup> But it does not have to be this way. Nothing requires the profession to maintain its current course. The legal profession can do little things, such as narrowing procedural loopholes in the court system, to aid in restoring public trust in the system. Although limiting lawyers' ability to shop for juries or laws is not, alone, enough to reverse the public perception of the judicial system, it would help.

Most courts now allow law- and jury-shopping,<sup>208</sup> even if some do so reluctantly.<sup>209</sup> If the proposed shopping venture cannot pass muster

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trial. See, e.g., Steven Keeva, *Circus-like Trial Colors Expectation: Lawyers Must Re-educate a More Cynical Public*, A.B.A. J. Nov. 1995, at 48C. The public has concluded, among other things, that justice can be bought. See, e.g., Charles B. Rosenberg, *The Law After O.J.*, A.B.A. J. June 1995, at 72, 73; Steven Keeva, *Storm Warnings*, A.B.A. J. June 1995, at 77. The public also has become disgusted with lawyer's tricks, loopholes, and manipulation. *Id.* at 77-78. Clearly public confidence in the court system can use a boost. See, e.g., Joe Holleman, *Lawyers Not Liked, Survey Shows*, ST. LOUIS POST-DISP., Apr. 20, 1995, at 1B.

205. For an interesting article on the lack of civility among lawyers in the profession today, see Gail D. Cox, *Lawyers Still Wage Uncivil War: Civility Codes Are in Vogue, but Insults, Threats, Lies and Hardball Haven't Stopped*, NAT'L L. J., July 17, 1995, at A1; see also James E. Brill, *Save the Whales: Among the Many Worthy Causes, Let's Also Save the Profession*, A.B.A. J. Oct. 1993, at 110; Kathleen P. Browe, Comment, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751 (1994); Geoffrey C. Hazard, *ABA Eyes Hardball Play*, NAT'L L.J., Oct. 30, 1995, at A21-22 (reporting on an American Bar Association plan to study litigation tactics); James Podgers, *Changes Sought in Civil Justice System*, 80 A.B.A. J., Feb. 1994, at 111-12 (quoting Justice Sandra Day O'Connor's call to "put civility back in our profession").

206. See, e.g., ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993); see also MacCormack, *supra* note 159 (attorney is quoted saying his primary responsibility is to his client).

207. For interesting reading on the legal profession's obsession with victory and the gamesmanship mentality that abounds, see generally Kronman, *supra* note 206, and *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* (David Luban ed., 1983); Kenneth Lasson, *Lawyering Askew: Excesses in the Pursuit of Fees and Justice*, 74 BOSTON U. L. REV. 723 (1994). See also John J. Flynn, *Professional Ethics and the Lawyer's Duty to Self*, 1976 WASH. U. L.Q. 429 (1976). In discussing the deficiencies contained in the Model Code, *infra* note 301, Professor Flynn stated:

By ignoring the lawyer's relation to himself and instead emphasizing only the lawyer's relation to others and the profession, the Code allows lawyers to rationalize many forms of conduct which would otherwise transgress their duties to self and, consequently, widely held moral values. The emphasis on duty to others leads naturally and dangerously to the "hired-gun" model for deciding ethical questions. The rules that define immorality may reinforce the dangers of amorality, and allow an attorney to justify almost any conduct that promotes the interests of the client.

*Id.* at 436.

208. See *supra* notes 20-41, 43-81, 94-95, 98, 106, and accompanying text.

209. See, e.g., *Muldoon v. Tropiton Furniture Co.*, 1 F.3d 964, 966 (9th Cir. 1993); see also *Washington v. Allstate Ins. Co.*, No. CIV-A-91-3779, 1992 WL 167030, at \*5 (E.D. La. 1992).

in one jurisdiction, it certainly can in another.<sup>210</sup> So the incentive to seek out the jurisdiction handing out the "pass" always exists.<sup>211</sup> Finding more acceptable limits on law- and jury-shopping is important. Once those limits are determined, even if lawyers continue to shop for favorable juries or favorable laws, a court truly will be at liberty to determine "whether the choice of forum is a *proper* one under the law."<sup>212</sup>

### B. *Through the Prism of Convenience to All*

If the author is correct that the reasons courts advance against judge-shopping apply with equal force to jury- and law-shopping, one question still remains: How do we align the treatment of jury- and law-shopping closer to that of judge-shopping?<sup>213</sup> The prime solution is already at the disposal of every court in America: Analyze venue choices keeping in mind the purpose of venue—to find a *convenient* forum for trial.

Before discussing this approach, however, several other, less viable, options must be addressed. First, one might argue for elimination of choice: A party could file suit in only one jurisdiction. This is not really a solution. It might be impossible,<sup>214</sup> or unfair,<sup>215</sup> to identify only one state, or one jurisdiction within a state, where venue would be proper.

210. See, for example, Kanner, *supra* note 202, at 6, where Professor Kanner observed:

We now confront a situation where intermediate appellate courts openly disagree with one another, so that "the law" that is said to govern our lives depends on what part of the state your client lives. The situation is no better in the federal courts where we have grown accustomed to judges solemnly announcing that "it is the rule in this circuit, that . . ." In this circuit? Whatever happened to the sensible idea that the purpose behind federal courts is to give us a coherent body of uniform, nationwide federal law? Not only that, but in both state and federal jurisdictions, the respective Supreme Courts are unable to resolve conflicts of decision and to maintain the law as a reasonably clear guide to human conduct, so that confusion is rampant.

211. That laws vary from state to state is a consequence of federalism. See, e.g., U.S. CONST. amend. X; *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

212. *Texas Instruments, Inc. v. Micron Semiconductor, Inc.*, 815 F. Supp. 994, 996 (E.D. Tex. 1993) (emphasis added).

213. It could certainly be argued that judge-shopping should be accorded treatment similar to that currently given to law- and jury-shopping. Because this argument does not appeal to the author, she does not explore it in this article.

214. Suppose, for example, we identify the state of plaintiff's residence as the only proper venue. What happens if plaintiff is injured in another state but personal jurisdiction cannot be had over the defendant in plaintiff's state of residence?

215. What if we identified the place of injury as the only proper venue? Aside from recreating the horrors experienced with that notion in the choice-of-law area, see generally EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* (2d ed. 1992), plaintiffs would suffer irreparable injustice where the place of injury is far from the plaintiff's residence and plaintiff does not have the resources to litigate in such a distant forum.

This is particularly true today in light of the multijurisdictional nature of many lawsuits. Further, it is simply impractical to eliminate all forms of venue-shopping. Indeed, as the Fifth Circuit has remarked:

In a perfect judicial system forum-shopping would be paradoxical. The same results would obtain in every forum and after every type of trial. But the actual litigation process is not a laboratory in which the same result is obtained after every test. . . . In recognition both of this and of the nature of the adversary, client-serving process, we tolerate a certain amount of manipulation without inquiry into motive.<sup>216</sup>

So we must live with choice. But this does not mean, however, that we should allow the system to be tested daily to see how much choice it can withstand.<sup>217</sup>

Others might propose that courts and/or legislatures devise a list of

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216. *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1262 (5th Cir. 1983). Consider also the effect of varying choice-of-law rules in the quest for more favorable law. See, e.g., *CASAD*, *supra* note 110, at 2:

If the law of choice of law were a matter of federal law, applicable uniformly throughout the country, then there would not be many situations in which different substantive law would apply to a case if it should be brought in state A rather than state B. But choice of law in the United States is state law, and at this point in time there is probably more variation among the states in the area of choice of law than there ever has been in our history. There are, accordingly, many situations in which different substantive law will be applied to a case if the suit is brought in state A rather than state B. So long as those differences exist, forum choice may have a profound effect on the outcome of a case.

217. Consider another recent attempt to expand use of the federal transfer statutes. Specifically, in *Spar, Inc. v. Information Resources, Inc.*, 956 F.2d 392 (2d Cir. 1992), plaintiff filed an action in a New York state court for breach of an employment contract. After removing to federal court, defendant sought to dismiss the suit as barred under the applicable New York statute of limitations. Plaintiff then sought a transfer from New York to Illinois, under 28 U.S.C. § 1406, where the applicable statute of limitations had not expired. Section 1406(a) provides: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." *Id.* at 393. Venue was clearly proper in New York. *Id.* at 392. Thus, a literal reading of § 1406 might lead one to wonder why plaintiff moved for transfer under that statute. Plaintiff most likely sought a § 1406(a) transfer for two key reasons: 1) Many courts of proper venue have, notwithstanding the language of § 1406, used that section to transfer cases from one proper venue to another, see, e.g., *id.* at 394; and 2) transfers under § 1406—based on the assumption that venue in the transferor court was improper—normally result in the application of the law of the transferee forum. See, e.g., *Smith, supra* note 20, at 200; *Curivan, supra* note 41, at 159-63.

Plaintiff certainly could have sought transfer under 28 U.S.C. § 1404(a). See *supra* note 26 for the text of § 1404(a). The problem for the plaintiff, however, was that New York's choice-of-law rules would have followed the plaintiff to Illinois. See *Ferens v. John Deere Co.*, 494 U.S. 516, 519 (1990). Thus, a danger may have existed that New York's statute of limitations would have followed plaintiff to Illinois. Plaintiff sought to circumvent *Ferens*, but the attempted expansion did not work. The Second Circuit, recognizing plaintiff's motion for transfer as an inappropriate form of forum-shopping, upheld the granting of defendant's summary judgment motion to dismiss on statute of limitations grounds. *Spar*, 956 F.2d at 395. But see *Porter v. Groat*, 840 F.2d 255, 258 (4th Cir. 1988) (allowing the identical maneuver).

permissible and impermissible forms of forum-shopping. This approach is not pursued here for three reasons. First, such a list would be impossible to reach consensus on. Second, even if such a list could be created, some crafty lawyer might discover a loophole. Third, the purpose of this Article is to encourage debate of law- and jury-shopping as legitimate strategies.

Another approach might be to focus on the filing party's motives and then impose sanctions against that party if the court determined that the motive was to seek a more favorable jury or law. This approach has already been suggested in other procedural areas of the law.<sup>218</sup> While this approach works well in theory, it would have dismal effects in practice. There is no proven method of getting inside someone's head. Moreover, although some cases might be resolved easily,<sup>219</sup> most would be enigmatic.<sup>220</sup>

A fourth, and highly desirable, approach would require legislative action in the form of a call to Congress and state legislatures to amend all venue laws to narrow the ability to make venue choices based upon favorable juries or laws. Although this is an ideal solution, it is not pursued in this Article because relief would be painfully slow in coming: This solution would require legislative action by more than fifty autonomous and highly political bodies.

More importantly, though, nationwide legislative action is unnecessary: The tools for change are already at the courthouse steps. We need only change how judges interpret venue laws. Viewing venue decisions with the purpose of venue in mind will curtail the current wave of successful quests for more favorable juries or laws by any lawful means. True, reevaluating venue selections will not necessarily point to one state or one jurisdiction within a state. Indeed, such reevaluation will clearly require more judicial analysis when multiple states have contacts with the litigation. Neither is there a guarantee that every court will apply the same factors in the same way for determining the most convenient venue. But our judicial system can resolve these issues.<sup>221</sup>

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218. See, e.g., Smith, *supra* note 20, at 202-03 (arguing that the motives underlying a plaintiff's request for transfer under 28 U.S.C. § 1404(a) should determine whether the law of the transferor court should follow the plaintiff to the transferee court).

219. See, e.g., *Ferens* discussed *supra* notes 20-41 and accompanying text.

220. See, e.g., *Shanaghan v. Cahill*, 58 F.3d 106 (4th Cir. 1995), discussed *supra* note 123. How would one ever determine whether plaintiff's counsel filed the lawsuit in federal court knowing that the jurisdictional amount for diversity actions could not be met?

221. Under 28 U.S.C. § 1391(a)(2) & (b)(2) (Supp. V 1993), courts must frequently determine where a substantial part of the events or omissions giving rise to a given claim occurred. See *supra* notes 13-14. Courts are already learning to struggle with similar inquiries. See, e.g., *School Dist. v. Pennsylvania Milk Mktg. Bd.*, 877 F. Supp. 245 (E.D. Pa. 1995). The court observed:

Furthermore, this approach will neither eliminate choice nor prevent parties from maintaining litigation in jurisdictions that happen to offer favorable juries or laws. For example, where multiple jurisdictions have contacts with the litigation, if the plaintiff were to file the action in the one state whose laws were most favorable, a court might easily determine that, all things being equal, one venue is no more convenient than any other. This should remain a viable option. Thus, the suggestions here merely are designed to restrict the current unfettered ability of plaintiffs to burden forums with little or no connection to the litigation. Ultimately, it should become very difficult—even impossible—for a plaintiff to litigate an action in New York when every connection with that lawsuit is in California.<sup>222</sup> The most viable solution, then, calls for a focus on the purpose of venue.

Despite current views to the contrary, choice of venue is not a

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Defendants' argument ignores the fact that under the 1990 Amendments to (b)(2), a case need not be tried in the *best* place, but merely a place with substantial contacts. The "'fact that substantial activities took place in district B does not disqualify district A as proper venue as long as substantial activities took place in A, too . . . even if it is shown that the activities in B were more substantial.'"

*Id.* at 249 (citations omitted). This is not to say, however, that the place where a substantial part of the events or omissions occurred should necessarily be the most convenient venue. One could easily imagine an action arising in state X, although both plaintiff and defendant live in state Y; or an action in which all parties and/or important witnesses have moved after the acts or omissions giving rise to the claim occurred. In these cases, it would not necessarily be appropriate to focus on the place where a significant amount of the contacts occurred. For a study on the timing-of-contacts issue as it relates to venue, see Christian E. Mammen, Note, *Here Today, Gone Tomorrow: The Timing of Contacts for Jurisdiction and Venue Under 28 U.S.C. § 1391*, 78 CORNELL L. REV. 707 (1993), and Diane P. Wood, Comment, *Federal Venue: Locating the Place Where the Claim Arose*, 54 TEX. L. REV. 392, 403-15 (1976), for the various approaches taken by federal courts in determining the place where the "cause of action arose" within the meaning of 28 U.S.C. § 1391 prior to the 1988 amendments. The 1988 Amendments to 28 U.S.C. § 1391 shifted the focus from where the cause of action arose to where a substantial part of the events or omissions giving rise to the claim occurred. See *supra* notes 13-14 for the text of § 1391 as it exists today. See *infra* note 233 for the text of § 1391 prior to the 1988 amendments.

222. Consider *Conlon v. Sea-Land Serv., Inc.*, No. 94-CIV-0609-KMW, 1995 WL 20321, at \*3 (S.D.N.Y. Jan 19, 1995), where, although plaintiff did not reside in New York, the accident did not occur in New York, and New York had no connection with plaintiff or the subject matter of the litigation, these facts were insufficient to convince the New York court "that plaintiff's filing of [the] suit in [New York] should be deemed unworthy of any weight . . ." See also *Gauntt v. United Ins. Co.*, No. 1940591, 1996 WL 55604, at \*18 (Ala. Feb. 9, 1996) (Maddox, J., dissenting), where in disagreement with the majority's finding of proper venue, Judge Maddox noted the following:

I close this dissent by asking this question: How can permitting 23 plaintiffs to sue individual and corporate defendants in a county where none of the individual plaintiffs and none of the individual defendants resides, and where none of the alleged wrongful acts occurred, be "in the interest of justice"? It would seem to me that the most convenient forums would be the counties where the individual plaintiffs reside and where the corporate defendants apparently did the business that led to these disputes, and where the alleged wrongful acts occurred.

party's right. Federal venue statutes, as well as most state venue laws,<sup>223</sup> were *not* enacted to provide plaintiffs with plentiful venue choices. The leading Supreme Court case on the purpose of the general federal venue statutes, *Leroy v. Great Western United Corp.*,<sup>224</sup> ruled that venue statutes were designed "to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial."<sup>225</sup> They were not designed "to give the plaintiff the right to select the place of trial that best suits his convenience" nor "to give that party an unfet-

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223. See, e.g., *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 874 n.34 (5th Cir. 1993) (stating that "[besides protecting] civil defendants from inconvenient forums, the [Texas venue] rules strive to ensure that local matters are tried in local courts") (citations omitted), *cert. denied*, 114 S. Ct. 878 (1994); *Gross v. General Motors Corp.*, 528 N.W.2d 707, 711 (Mich. 1995) ("Venue rules traditionally have served to ensure that proceedings are held in the most convenient forum.") (citations omitted); *RJR Nabisco Holdings Corp. v. Dunn*, 642 N.E.2d 538, 540 (Ind. Ct. App. 1994) ("It is the general spirit and policy of many venue statutes to give the defendant the right to have the action tried in the county of his or her residence. *Such statutes are also intended to provide a convenient, logical and orderly forum for litigation.*") (emphasis added); see also *Lowe v. Morrison*, No. CA-88-192, 1989 WL 10071, at \*4 (Ark. Ct. App. Feb. 8, 1989); *County of San Bernardino v. Superior Court*, 35 Cal. Rptr. 2d 760, 766 (Cal. Ct. App. 1994); *Barry Cook Ford, Inc. v. Ford Motor Co.*, 571 So. 2d 61, 61 (Fla. 1st DCA 1990); *Tipton v. Estate of Cusick*, 651 N.E.2d 635, 637 (Ill. App. Ct. 1995); *Hill v. Hill*, 575 So. 2d 886, 888 (La. Ct. App. 1991); *In re Lynn M.*, 540 A.2d 799, 804 (Md. 1988); *Solum v. Solum*, No. C4-93-1099, 1993 WL 480180, at \*1 (Minn. Ct. App. Nov. 23, 1993); *Flight Line, Inc. v. Tanksley*, 608 So. 2d 1149, 1157 (Miss. 1992); *Judy v. Insurance Co. of Pa.*, 892 S.W.2d 647, 650 (Mo. Ct. App. 1994); *Team Bank v. Meridian Oil, Inc.*, 879 P.2d 779, 782 (N.M. 1994); *Sherman v. Babylon Recycling Ctr., Inc.*, 631 N.Y.S.2d 25, 28 (N.Y. App. Div. 1995); *City of Danville v. Virginia State Water Control Bd.*, 446 S.E.2d 466, 468 (Va. Ct. App. 1994); *Hronek v. St. Joseph's Children's Home*, 866 P.2d 1305, 1310 (Wyo. 1994). *But see* *Conner v. Willet*, 91 So. 2d 225, 226-27 (Ala. 1956); *McClellan v. Kenai Peninsula Borough*, 565 P.2d 175, 178 (Alaska 1977); *Belcher v. Raines*, 636 P.2d 1246, 1247 (Ariz. Ct. App. 1981); *Gibson v. Department of Revenue*, 566 P.2d 1086, 1087 (Colo. Ct. App. 1977); *State v. Orsini*, 445 A.2d 887, 890 (Conn. 1982); *Delmarva Power & Light Co. v. City of Seaford*, 523 A.2d 973, 975 (Del. Super. Ct. 1987); *Biddinger v. Fletcher*, 162 S.E.2d 414, 417 (Ga. 1968); *Alamida v. Wilson*, 495 P.2d 585, 588 (Haw. 1972); *Banning v. Minidoka Irrigation Dist.*, 406 P.2d 802, 804 (Idaho 1965); *Wilde v. Swanson*, 548 A.2d 837, 843-44 (Md. 1988); *Lake County's Obligation v. Hutchin*, 724 P.2d 183, 184-85 (Mont. 1986); *State Dep't of Env'tl. Protection v. Middlesex County Freeholders Bd.*, 502 A.2d 1188, 1191 (N.J. Super. Ct. Ch. Div. 1985); *State v. Cote*, 58 A.2d 749, 751 (N.H. 1948); *Davis v. Smith*, 209 S.E.2d 852, 854 (N.C. Ct. App. 1974); *North Valley Water Ass'n v. Northern Improvement Co.*, 415 N.W.2d 492, 496 (N.D. 1987); *Varketta v. General Motors Corp.*, 295 N.E.2d 219, 223 (Ohio Ct. App. 1973); *Lane v. Hughes*, 408 P.2d 281, 285 (Okla. 1965); *Mutzig v. Hope*, 158 P.2d 110, 123 (Or. 1945); *County Constr. Co. v. Livengood Constr. Corp.*, 142 A.2d 9, 13 (Pa. 1958); *In re Asbestosis Cases*, 266 S.E.2d 773, 776 (S.C. 1980); *Kreager v. Blomstrom Oil Co.*, 298 N.W.2d 519, 521 (S.D. 1980); *Louisville & Nashville R.R. Co. v. Hooper*, 375 S.W.2d 868, 872 (Tenn. Ct. App. 1963); *Gerdel v. Gerdel*, 313 A.2d 8, 9 (Vt. 1973); *Isho v. Angland*, 397 P.2d 422, 423 (Wash. 1964); *Brent v. Board of Trustees*, 256 S.E.2d 432, 434-35 (W. Va. 1979); *Voit v. Madison Newspapers, Inc.*, 341 N.W.2d 693, 698 (Wis. 1984).

224. 443 U.S. 173 (1979).

225. *Id.* at 184 (footnote omitted); see also *National Micrographics Sys., Inc. v. Canon U.S.A., Inc.*, 825 F. Supp. 671, 679 (D.N.J. 1993) (citing 15 WRIGHT ET AL., *supra* note 42, §§ 3801 at 257, 3826 at 4; *Delta Air Lines, Inc. v. Western Conference of Teamsters*, 722 F. Supp. 725, 727 (N.D. Ga. 1989) (also citing WRIGHT ET AL., *supra* note 42, § 3802 at 7).

tered choice among a host of different districts."<sup>226</sup> Rather, the intent was twofold: To protect the defendant against local bias and prejudice,<sup>227</sup> and, more importantly, to ensure the convenience of all witnesses, and other relevant evidence;<sup>228</sup> i.e., to try the litigation in "the most convenient forum."<sup>229</sup>

The intent of the Congress that originally enacted the general federal venue statutes remains controlling today, despite numerous amendments to those statutes.<sup>230</sup> Many commentators believe that the amendments were designed to widen venue choices.<sup>231</sup> This may be true, but it does not necessarily follow that a plaintiff has an unlimited right to

226. *Leroy*, 443 U.S. at 184-85 (citation omitted); see also *League of United Latin Am. Citizens*, 999 F.2d at 874 ("Venue rules preserve judicial fairness by preventing forum-shopping and diminishing the chances of biased adjudication."); *Lamont v. Haig*, 590 F.2d 1124, 1134 (D.C. Cir. 1978) ("[A] proliferation of permissible forums is staunchly to be avoided[.]" (footnote omitted)); *Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp.*, 291 F. Supp. 252, 260 (E.D. Pa. 1968) (stating that, with 28 U.S.C. § 1391(b), "Congress was . . . interested in seeing to it that plaintiffs do not have virtually unlimited power to bring actions in any forum—to 'give plaintiffs free reign [sic] to haul defendants hither and yon at their caprice' ") (quoting *United States v. National City Lines*, 334 U.S. 573, 588 (1948)). Note that while *Leroy* specifically dealt with the venue statute contained in 28 U.S.C. § 1391(b), other courts have extended their *Leroy* analysis to 28 U.S.C. § 1391(a). See, e.g., *Wilson v. Wilson-Cook Medical, Inc.*, 720 F. Supp. 533, 540 (M.D.N.C. 1989).

227. *Leroy*, 443 U.S. at 184; see also *Schwartz v. Electronic Data Sys., Inc.*, 913 F.2d 279, 287 (6th Cir. 1990) (Merritt, C.J., dissenting) (stating with regard to the purpose of diversity jurisdiction, that "[t]he framers and the First Congress intended to provide a tribunal in which a foreigner or citizen of another state might have the law administered free from the local prejudices or passions which might prevail in a state court against them as 'outsiders' ") (citations omitted); *Welch Foods, Inc. v. Packer*, No. 93-CV-0811E(F), 1994 WL 665399, at \*2 (W.D.N.Y. Nov. 22, 1994); *Honda Assocs. v. Nozawa Trading, Inc.*, 374 F. Supp. 886, 889 (S.D.N.Y. 1974).

228. *Leroy*, 443 U.S. at 185. Specifically, *Leroy* notes that when multiple forums are implicated the "plaintiff may choose between those . . . districts . . . in terms of the availability of witnesses, [and] the accessibility of other relevant evidence[.]" *Id.* at 185 (emphasis added). See also *Arnold v. Smith Motor Co.*, 389 F. Supp. 1020, 1024 (N.D. Iowa 1974) ("Venue has been considered as the place where jurisdiction may be exercised, and while it affords some protection to defendants, it is designed to facilitate the maximum convenience for all the litigants.") (citation omitted).

229. Cass R. Sunstein, *Participation, Public Law, and Venue Reform*, U. CHI. L. REV. 976, 980 (1982); see also *Lamont*, 590 F.2d at 1133. In addressing the purpose behind 28 U.S.C. § 1391(b), the *Lamont* court stated:

The portion of Section 1391(b) extending venue to a district "in which the claim arose" was added by amendment in 1966, and the resulting "enlargement of venue" was intended merely to "facilitate the disposition of . . . claims by providing, in appropriate cases, a more convenient forum to the litigants and the witnesses involved."

(alteration in original) (footnotes omitted).

230. *But see, e.g., Bates v. C&S Adjusters, Inc.*, 980 F.2d 865, 867 (2d Cir. 1992); *Trowbridge v. Empire of Am. Realty Credit Corp.*, No. 93-C-5507, 1995 WL 311425, at \*3 (N.D. Ill. May 18, 1995); *Woodke v. Dahm*, 873 F. Supp. 179, 197-98 (N.D. Iowa 1995), *aff'd*, 70 F.3d 983 (9th Cir. 1995).

231. See, e.g., *Henninger, supra* note 20, at 832-34.



pick and choose from the expanded list.<sup>232</sup> Rather, convenience to all remains the purpose of venue.<sup>233</sup> Nevertheless, it is rare to find federal

232. See, e.g., Oakley, *supra* note 42, at 769-782; see also David D. Siegel, *Commentary on 1988 and 1990 Revisions of Section 1391*, 28 U.S.C.A. § 1391, at 7-22 (West 1993). But see *Marine Midland Realty Credit Corp. v. Del Am. Properties, Inc.*, No. 93-CV-0692E(F), 1995 WL 128978, at \*1 (W.D.N.Y. Mar. 15, 1995) (rejecting defendant's contention that the 1990 and 1992 congressional amendments to 28 U.S.C. § 1391 were designed to "prevent forum shopping and the imposition upon defendants of the inconvenience of being sued in districts with little or no connection to the underlying litigation" in light of defendant's failure to cite authority in support of that proposition); *Berube v. Brister*, 140 F.R.D. 258, 260 (D.R.I. 1992) ("In most questionable venue circumstances the new statute *actually appears to have liberalized the venue requirements.*") (emphasis added).

233. Consider the following. As originally enacted in 1948, 28 U.S.C. § 1391 provided:

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

(d) An alien may be sued in any district.

Act of June 25, 1948, ch. 646, § 1, 62 Stat. 935. In 1966, subsections (a) and (b) of 28 U.S.C. § 1391 were amended to read:

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

Act of Nov. 2, 1966, Pub. L. No. 89-714, §§ 1-2, 80 Stat. 1111. Comparison of the original 1948 statute with the 1966 amendments, might suggest that the 1966 amendments were designed to offer plaintiffs more venue choices. But this is not accurate. Although venue options were expanded, the expansion was merely to "facilitate the disposition of both contract and tort claims by providing, in appropriate cases, *a more convenient forum to the litigants and the witnesses involved.*" S. REP. NO. 1752, 89th CONG., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 3693 (emphasis added). *Accord Leroy*, 443 U.S. at 185.

The next amendment to § 1391 relevant to this Article came in 1988. The amendment reads:

(c) For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

Act of Nov. 19, 1988, Pub. L. No. 100-702, Title X, § 1013(a), 102 Stat. 4669. While this section clearly widens venue options when corporations are defendant parties to litigation, no evidence indicates Congress sacrificed the convenience factor in favor of a plaintiff's exclusive right to choose a venue. See, e.g., Oakley, *supra* note 42; Siegel, *supra* note 232.

decisions *discussing*, let alone *implementing*, this purpose.<sup>234</sup> Federal courts typically peruse the possible choices detailed in the relevant statutes and typically stop when the chosen forum fits into the list of choices provided.<sup>235</sup> There is little, if any, discussion on whether plaintiff has

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The last major change to 28 U.S.C. § 1391 relevant to this article came in 1990. Subsections (a) and (b) were amended to read:

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only if (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

Act of Dec. 1, 1990, Pub. L. No. 101-650, title III, § 3111, 104 Stat. 5114. Again, the legislative history does not indicate that convenience was sacrificed in favor of the plaintiff's unlimited choice. *See School Dist. v. Pennsylvania Milk Mktg. Bd.*, 877 F. Supp. 245, 249 (E.D. Pa. 1995). The court stated:

It is clear that the 1990 Amendments changed the venue rules as to (b)(2) so that venue can now be laid in more than one district, so long as each has a substantial relationship to the action. *What did not change, however, was that the venue rules are designed to be fair to the defendant, so that one is not "haled into a remote district having no real relationship to the forum."*

*Id.* (emphasis added) (citation omitted). Moreover, all evidence suggests that the 1990 amendments were merely intended to address the difficulties courts had in applying the "in which the claim arose" language of the 1966 amendment. *See also Oakley, supra* note 42; *Siegel, supra* note 232.

234. *See, e.g.*, cases cited *supra* notes 226-228, 230; *Missouri Hous. Dev. Comm'n v. Brice*, 919 F.2d 1306, 1309-12 (8th Cir. 1990). None of these decisions relies on the convenience of all concerned as the deciding factor. Some even conclude that the convenience factor has diminished in importance. *See, e.g., Bates*, 980 F.2d at 867; *see also Newton v. Thomason*, 22 F.3d 1455, 1463-64 (9th Cir. 1994).

235. *Ferens v. John Deere Co.*, 494 U.S. 516 (1990) represents an excellent example of this. *See supra* notes 20-41 and accompanying text. When the Pennsylvania residents filed the Pennsylvania-based claim in a state having no connection with the plaintiffs or the lawsuit, why didn't the chosen court—assuming it reviewed the complaint before receiving plaintiffs' transfer motion—dismiss the lawsuit on the grounds that it was inconvenient forum to try the litigation for the court, the potential jurors, the parties, the witnesses, and all evidence relevant to the underlying claim?

Dismissal would have precluded the *Ferens* plaintiffs from pursuing their claim because the applicable statute of limitations in Pennsylvania had expired. But whether the claim can be pursued is not—nor should it be—relevant to the inconvenient forum inquiry. *See infra* notes 236-92 and accompanying text. Nevertheless, the *Ferens* Court seems to have used plaintiff's predicament to support plaintiffs' request to transfer! For example, the Court expressed the following concern if the litigation were to stay in the inconvenient forum:

"Administrative difficulties follow for courts when litigation is piled up in

filed in a jurisdiction convenient with regard to the residence of parties and location of evidence, including witnesses. Current implementation of venue statutes, then, condones a plaintiff's unfettered right to choose among a host of different districts.<sup>236</sup>

Once judges are reminded of the purpose of venue and begin approaching venue selection with convenience as the primary criterion, the notion that it is proper to base a filing decision on where the preferred laws or juries are will disappear. Admittedly, this analysis runs counter to the practice of many courts, which are rejecting underlying legislative history in favor of the plain meaning of the statutory language.<sup>237</sup> Such a notion should disappear. No party should have the right to hale parties, documents, and witnesses "hither and yon"<sup>238</sup> in pursuit of the most favorable laws or juries. The purpose of venue laws is to find a convenient place to try a given lawsuit.<sup>239</sup> The only way to enforce this purpose—without modifying every venue law—is to return to the spirit of venue laws.

This task is easy to implement. No federal statute has to be

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congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflicts of laws, and in law foreign to itself."

*Id.* at 529-30 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947)).

236. Limitations based on personal jurisdiction still apply. But where corporations, in particular, national corporations, are parties to the litigation, jurisdictional limitations become meaningless. Recall that the reason the *Ferens* plaintiffs were able to secure jurisdiction in Mississippi was because the corporate defendant had done business in that state, "as it had in many other states . . ." *Ferens v. Deere & Co.*, 819 F.2d 423, 424 (3d Cir. 1987). Even though that defendant had qualified itself to do business in many states, that status should not necessarily mean that that defendant can be sued in a state on a matter wholly unconnected with that state.

237. *See, e.g., Free v. Abbott Lab.*, 51 F.3d 524, 528 (5th Cir. 1995) (finding that the plain meaning of statutory language governed despite conclusive proof that the legislature intended the opposite result); *see also* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990). But consider, for example, the venue-shopping cases decided under FED. RULE CIV. P. 41. Even when it is clear that a party is attempting to forum-shop, the cases do not analyze that issue. Rather, they focus on the purpose behind, and not just the language contained in, the rule. Consider also cases dealing with the federal removal statute, 28 U.S.C. § 1441. When parties have attempted to forum-shop by dropping federal claims and/or by adding or dismissing parties either to defeat jurisdiction or to secure a remand, courts have focused on the purposes behind the removal statute. *See, e.g., Frith v. Blazon-Flexible Flyer, Inc.*, 512 F.2d 899, 901 (5th Cir. 1975); *Kerrin v. Federated Dep't Stores*, 100 F.R.D. 715, 717 (N.D. Ga. 1983); *Myers v. Hertz Penske Truck Leasing*, 572 F. Supp. 500, 502 (N.D. Ga. 1983).

238. *United States v. National City Lines*, 334 U.S. 537, 588 (1948).

239. *See supra* notes 223-29, 233 and accompanying text. *Contra Sussman v. Bank of Israel*, 56 F.3d 450, 457 (2d Cir. 1995); *Newton v. Thomason*, 22 F.3d 1455, 1463-64 (9th Cir. 1994).

amended. No Supreme Court action is necessary.<sup>240</sup> In the federal system, courts should return to the use of the common law doctrine of *forum non conveniens*, which allows a court to refuse to exercise jurisdiction over a case that “may be more appropriately and justly tried elsewhere.”<sup>241</sup> Thus, a court may “resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.”<sup>242</sup> Under the doctrine, a court will consider the private interests of the litigant—presumably the plaintiff—as well as public interest factors. The private interest factors include:

the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial.<sup>243</sup>

Public interest factors focus on the burden to the forum. Thus:

Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.<sup>244</sup>

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240. Recall that the Supreme Court has found no constitutional problem with a forum unrelated to the litigation applying its own law. See *supra* note 32 and accompanying text.

241. BLACK'S LAW DICTIONARY 655 (6th ed. 1990); see also *supra* note 6 and accompanying text.

242. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947). In his dissent in *Gulf Oil*, Justice Black stated that once personal jurisdiction exists and venue is proper, a court should not—indeed, cannot—dismiss on the ground that another, more convenient forum exists. Specifically, he stated, “Neither the venue statute nor the statute which has governed jurisdiction since 1789 contains any indication or implication that a federal district court, once satisfied that jurisdiction and venue requirements have been met, may decline to exercise its jurisdiction.” *Id.* at 513 (Black, J., dissenting). Clearly, however, federal venue statutes, as well as most state venue statutes, are based on the convenience of all. See, e.g., *supra* notes 223-29, 233 and accompanying text. Thus, even where personal jurisdiction is proper and the sought-after venue is a permissible option under the venue statute, the court should not be obligated to hear the case. Rather, the convenience issue must still be addressed.

243. *Id.* at 508.

244. *Id.* at 508-09.

More vigorous use of the common law doctrine would clearly limit the practice of picking and choosing among venues to secure favorable laws or juries. Indeed, when a forum is unconnected with the litigation, application of these factors would routinely lead to dismissal.

Although the *forum non conveniens* doctrine is the ideal mechanism for restraining unjustifiable venue choices, one problem exists. Since enactment of 28 U.S.C. § 1404(a), the Supreme Court has generally taken the view that § 1404 replaced and codified that common law doctrine in the federal arena.<sup>245</sup> Thus, *forum non conveniens*—in practice—is limited to the international setting.<sup>246</sup> But this conclusion is wrong. The Supreme Court has interpreted transfer and *forum non conveniens* differently: Transfers result in no change in the law applicable to the case; dismissals based on *forum non conveniens* result in application of the law of the new forum.<sup>247</sup> Thus, because different results obtain, § 1404(a) cannot be a codification of the common law doctrine<sup>248</sup> and both transfer and *forum non conveniens* should be available. In cases where the forum has contacts with the litigation, but other jurisdictions also have contacts, transfer should remain an option. If, however, the forum has no connection with the lawsuit, the court should consider only dismissal under the doctrine of *forum non conveniens*.<sup>249</sup>

Alternatively, federal courts might give more serious consideration to motions to transfer under 28 U.S.C. § 1404(a).<sup>250</sup> Section 1404(a) allows the court to transfer a suit to another jurisdiction for the convenience of all parties and in the interest of justice. In deciding the merits of transfer, the court considers factors identical to those considered under the *forum non conveniens* doctrine.<sup>251</sup> Those factors—including access to sources of proof, location of important witnesses, the need to view the premises, congestion of the court's docket, imposition of jury duty on a community with no connection to the litigation, and familiar-

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245. See *American Dredging Co. v. Miller*, 114 S. Ct. 981, 986 n.2 (1994).

246. "[T]he federal doctrine of *forum non conveniens* has continuing application only in cases where the alternative forum is abroad." *Id.*

247. See, e.g., *Norwood*, *supra* note 1, at 556-60; see also *McAllen*, *supra* note 47, at 202-08.

248. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 233, 253 (1981), where the Court states: "Congress enacted § 1404(a) to permit changes of venue between federal courts. Although the statute was drafted in accordance with the doctrine of *forum non conveniens*, it was intended to be a revision rather than a codification of the common law." (citation omitted).

249. Courts clearly have equitable powers to refuse to exercise jurisdiction. See, e.g., *McAllen*, *supra* note 47, at 231. But because such relief is extremely rare, it is not appropriate to rely on a court's use of its equitable powers to dismiss a case. *Id.* at 232.

250. See *supra* note 26 for the text of § 1404(a).

251. See, e.g., *Paradis v. Dooley*, 774 F. Supp. 79, 82 (D.R.I. 1991) ("Although the *Gilbert Piper Aircraft* analysis was formulated to address the issue of *forum non conveniens*, the same factors apply when a court is deciding a motion to transfer [under 28 U.S.C. § 1404(a)]."); *Levitt v. State of Md. Deposit Ins. Fund*, 643 F. Supp. 1485, 1492-93 (E.D.N.Y. 1986).

ity with the governing law<sup>252</sup>—are crucial for identifying a convenient place for trial.

Because of current interpretations of transfer statutes, however, merely transferring more cases under § 1404(a) will probably not resolve this Article's law-shopping concerns. The Supreme Court has held that whenever a case is transferred under § 1404(a), the law of the transferring court will follow the case to the new forum.<sup>253</sup> So while granting transfers obviously will result in a change of jury pool and thus thwart jury-shopping, granting transfers would do nothing to prevent a party from seeking to secure the transferring forum's procedural laws.<sup>254</sup> Thus, it is necessary to rely primarily on the common law doctrine in order to respond appropriately to law- and jury-shopping concerns.

But another problem exists. Specifically, because of an unexplained policy that a plaintiff's choice of forum is entitled to *substantial* deference,<sup>255</sup> it remains difficult to obtain either a dismissal or a transfer.<sup>256</sup> But substantial deference is not always justified. This notion of deference to plaintiff's choice of forum developed in an era when plaintiffs usually filed suit in their home courts. It was presumed that the

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252. See *American Dredging Co. v. Miller*, 114 S. Ct. 981, 985-86 (1994) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947)); see also *Bradbury v. St. Mary's Hosp.*, 652 N.E.2d 1228, 1231 (Ill. App. Ct. 1995); *Ford Motor Co. v. Insurance Co. of N. Am.*, 41 Cal. Rptr. 2d 342, 345-47 (Cal. Ct. App. 1995). See generally authorities cited *infra* note 265.

253. See *Ferens v. John Deere Co.*, 494 U.S. 516, 532 (1990); *VanDusen v. Barrack*, 376 U.S. 612, 639 (1964).

254. See, e.g., *SCOLES & HAY*, *supra* note 215, at 49; Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277 (1990). This is true even for lawsuits filed in a state having no connection with the plaintiff or the litigation. See, e.g., *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988). This is not a problem, however, in the intrastate setting, i.e., where a case is transferred from one venue to another within the same state. Neither is this a problem for any case, federal or state, dismissed under the doctrine of forum non conveniens. See *Norwood*, *supra* note 1, at 556-60. Moreover, while choice-of-law doctrines may resolve some law-shopping conduct when plaintiffs attempt to secure the more favorable substantive laws of a forum with no connection with the litigation, choice-of-law theories will have no effect on parties seeking the forum's procedural laws, interpretations of laws, or juries.

255. See, e.g., *McAllen*, *supra* note 47, at 237-38 (arguing that like *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), the later case of *Piper Aircraft v. Reyno*, 454 U.S. 235 (1981) "offers no account as to why there should be deference at all to the plaintiff, much less any particular amount of deference"). Numerous cases, however, support this unexplained policy of deference to plaintiffs. See, e.g., *Creative Technology, Ltd. v. Aztech Sys. Pte., Ltd.*, 61 F.3d 696, 703 (9th Cir. 1995); *Bhatnagar v. Surrendra Overseas, Ltd.*, 52 F.3d 1220, 1226 n.4 (3d Cir. 1995); *Ticketmaster-N.Y., Inc. v. Alioto*, 26 F.3d 201, 211 (1st Cir. 1994); *TooGood v. Pangloss, Ltd.*, No. 93-1061, 1993 WL 52642 (4th Cir. Dec. 20, 1993); *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 836 n.12 (5th Cir. 1993), *cert. denied*, 113 S. Ct. 2963 (1993); *Blanco v. Banco Industrial*, 997 F.2d 974, 979 (2d Cir. 1993).

256. However, a plaintiff seeking transfer encounters no such difficulty. See, e.g., *Ferens*, 494 U.S. at 539 (Scalia, J., dissenting) (stating that as long as plaintiff is careful to file suit in "a really inconvenient forum," he is assured of winning a motion to transfer).

home forum was convenient for the plaintiff.<sup>257</sup> Today, however, more and more suits are filed in forums with no connection to the plaintiff, much less with the litigation. Thus, the presumption that the plaintiff's choice of forum is based on convenience—and so deserves great deference—should no longer arise automatically. Moreover, although many federal courts *say* that a plaintiff's forum choice deserves *less* deference when there is an "absence of any material connection or significant contact between the forum state and the events allegedly underlying the claim,"<sup>258</sup> few courts *act* accordingly. If courts truly are giving plaintiffs' forum choices "less" deference, why do parties still file in states unconnected with the litigation or in inconvenient states?<sup>259</sup> And why do cases continue to be *litigated* in jurisdictions with little or no connection with the forum? This appears to be another example of courts saying one thing but doing another in practice.<sup>260</sup> Moreover, the giving of *less* deference is not adequate. Why should a plaintiff's forum choice deserve *any* weight when plaintiff is not a resident of the chosen venue or when the litigation has little or nothing to do with the chosen venue? The party seeking the requested venue should have to justify its choice by demonstrating the venue's connection to the claim.

Similar options exist at the state court level. Although Section 1404(a) is not available,<sup>261</sup> and state courts cannot transfer to federal courts or to state courts in other states,<sup>262</sup> most state courts can transfer litigation to other courts within the same state.<sup>263</sup> Such power is granted

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257. See, e.g., *Koster v. (American) Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 524 (1947); cf. *Norwood v. Kirkpatrick*, 349 U.S. 29, 41 (1955) (Clark, J., dissenting).

258. *Levitt v. State of Md. Dep. Ins. Fund Corp.*, 643 F. Supp. 1485, 1493 (E.D.N.Y. 1986). See also *Creative Technology*, 61 F.3d at 704; *Ticketmaster-N.Y.*, 26 F.3d at 211; *Baumgart*, 981 F.2d at 836 n.12; *Curiale v. Tiber Holding Corp.*, No. 94-CIV-4770, 1995 WL 479474, at \*3 (S.D.N.Y. Aug. 11, 1995); *Elf Atochem N. Am., Inc. v. Allegheny Ludlum Corp.*, No. CIV-A-92-7459, 1995 WL 472099, at \*2 (E.D. Pa. Aug. 9, 1995); *Americas Ins. Co. v. Engicon, Inc.*, 894 F. Supp. 1068, 1075 (S.D. Tex. 1995); *Bhd v. Sternberg*, No. 95-C-1574, 1995 WL 348136, at \*1 (N.D. Ill. June 7, 1995). Other authorities support the proposition that any deference to a plaintiff's choice of a particular forum is inappropriate where plaintiff has already freely contractually chosen a different forum. See, e.g., *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 880 (3d Cir. 1995).

259. Even if the judicial system were to adopt this Article's suggestion to return to the purpose behind venue laws when resolving venue issues, *Ferens* would still allow a plaintiff to file suit in an inconvenient forum for the purpose of obtaining that forum's more favorable procedural laws. Such a plaintiff would be assured of a transfer and of "winning" the benefits of obtaining the sought-after law. This is a key reason why *Ferens* should be overruled. See *Norwood*, *supra* note 1, at 543-67. Moreover, if courts were to start routinely sanctioning attorneys who filed in forums unconnected in at least some way to the litigation, attorneys might actually think twice before engaging in such conduct.

260. See *supra* notes 189-94 and accompanying text.

261. See *supra* note 8; see also *supra* note 26 for the text of § 1404(a).

262. See *supra* note 8.

263. See, for example, FLA. STAT. ch. 47.122 (1993) and ALA. CODE § 6-3-21.1(a) (1993),

by state statutes, court rules or both.<sup>264</sup> Additionally, virtually every state recognizes the doctrine of *forum non conveniens*.<sup>265</sup> Thus, regard-

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both of which parallel the language of 28 U.S.C. § 1404(a); *see also* Gauntt v. United Ins. Co., No. 1940591, 1996 WL 55604, at \*18 (Ala. Feb. 9, 1996) (Maddox, J., dissenting); Makar v. Makar, No. FA95-032-16-80-S, 1995 WL 276117, at \*1 (Conn. Super. Ct. May 4, 1995); McCrory v. Abraham, 657 A.2d 499, 501 n.2, 504 (Pa. Super. Ct. 1995); State *ex rel.* Smith v. Maynard, 454 S.E.2d 46, 49 n.4, 50-51 (Ct. App. W. Va. 1994).

264. *See* cases cited *supra* note 263.

265. *See, e.g.*, Swift Loan & Fin. Co. v. Shepard, No. 1940384, 1995 WL 473493, at \*1-2 (Ala. Aug. 11, 1995); Crowson v. Sealaska Corp., 705 P.2d 905, 907-08 (Alaska 1985); Coonley & Coonley v. Turck, 844 P.2d 1177, 1180-83 (Ariz. Ct. App. 1993); Life of Am. Ins. Co. v. Baker-Lowe-Fox Ins. Mktg., Inc., 873 S.W.2d 537, 539 (Ark. 1994); Ford Motor Co. v. Insurance Co. of N.A., 41 Cal. Rptr. 2d 342, 345-47 (Cal. Ct. App. 1995); People *ex rel.* A.T.W.S., 899 P.2d 223, 225 (Colo. Ct. App. 1994); Gager v. Gager, No. 0126054, 1995 WL 534237, at \*1-3 (Conn. Super. Ct. Aug. 10, 1995); Macklowe v. Planet Hollywood, Inc., No. Civ. A 13689, 1994 WL 586835, at \*3 (Del. Ch. Oct. 4, 1994); Jimmerson v. Kaiser Found. Health Plan, Inc., 663 A.2d 540, 542-43 (D.C. Cir. 1995); Kinney System, Inc. v. Continental Ins. Co., No. 84329, 1996 WL 26554, at \*8 (Fla. Jan. 26, 1996) (recognizing the doctrine, but stating that the right of access to Florida courts "has never been understood as a limitless warrant to bring the world's litigation here"); Allen v. Allen, 645 P.2d 300, 307 (Haw. 1982); Nelson v. World Wide Lease, Inc., 716 P.2d 513, 518 n.1 (Idaho Ct. App. 1986); Bradbury v. St. Mary's Hosp., 652 N.E.2d 1228, 1230-31 (Ill. Ct. App. 1995); RJR Nabisco Holdings Corps. v. Dunn, 642 N.E.2d 538, 540 (Ind. Ct. App. 1994) (stating that although the doctrine of *forum non conveniens* is limited to the interstate setting, identical considerations apply in the intrastate setting); *In re* Marriage of Kimura, 471 N.W.2d 869, 878-79 (Iowa 1991); Environmental Ventures, Inc. v. Alda Servs. Corp., 868 P.2d 540, 546-47 (Kan. Ct. App. 1994); Skidmore v. Meade, 676 S.W.2d 793, 794 (Ky. 1984); Wallace v. Wallace, 631 So. 2d 40, 41-42 (La. Ct. App. 1994); Corning v. Corning, 563 A.2d 379, 380-81 (Me. 1989); Cronin v. Camilleri, 648 A.2d 694, 698-99 (Md. Ct. Spec. App. 1994); Catalogna v. Copley Pharm., Inc., No. Civ. A 94-6662, 1995 WL 510145, at \*4-5 (Mass. Super. Ct. Aug. 11, 1995); Russell v. Chrysler Corp., 505 N.W.2d 263, 264-66 (Mich. 1993); First State Ins. Co. v. Minnesota Mining & Mfg. Co., 535 N.W.2d 684, 689 (Minn. Ct. App. 1995); Hunt v. Hunt, 629 So. 2d 548, 553-54 (Miss. 1992); Connour v. Burlington N. R.R., 889 S.W.2d 138, 143 (Mo. Ct. App. 1994); Woodmen of the World Life Ins. Soc'y v. Kight, 522 N.W.2d 155, 158 (Neb. 1994); Cariaga v. Eighth Judicial Dist. Court, 762 P.2d 886, 888 (Nev. 1988); Stankunas v. Stankunas, 582 A.2d 280, 281-82 (N.H. 1990); Buccilli v. Timby, Brown & Timby, 660 A.2d 1261, 1266 (N.J. Super. Ct. App. Div. 1995); Marchman v. NCB Tex. Nat'l Bank, 898 P.2d 709, 718-24 (N.M. 1995); Sambee Corp. v. Moustafa, 628 N.Y.S.2d 664, 665 (N.Y. App. Div. 1995); Motor Inn Mgmt., Inc. v. Irvin-Fuller Dev. Co., 266 S.E.2d 368, 370-72 (N.C. Ct. App. 1980); North Valley Water Ass'n v. Northern Improvement Co., 415 N.W.2d 492, 496 (N.D. 1987); R.E. Condit Co. v. United Tractor Co., No. 14945, 1995 WL 547072, at \*2 (Ohio Ct. App. Sept. 13, 1995); Stevens v. Blevins, 890 P.2d 936, 938-40 (Okla. 1995); C.O.W., Inc. v. Motor Vehicles, 586 P.2d 107, 108 n.2 (Or. Ct. App. 1978); Keuther v. Snyder, 664 A.2d 168, 169 (Pa. Super. Ct. 1995); Federal Land Bank v. Davant, 355 S.E.2d 293, 297 (S.C. Ct. App. 1987); People *ex rel.* J.J. and S.J., 454 N.W.2d 317, 329-30 (S.D. 1990); Smith v. Priority Trans., Inc., No. 02A01-9203-CV-00074, 1993 WL 29021, at \*4 (Tenn. Ct. App. Feb. 9, 1993); A.P. Keller Dev., Inc. v. One Jackson Place, Ltd., 890 S.W.2d 502, 505-08 (Tex. Ct. App. 1994); Kish v. Wright, 562 P.2d 625, 628 (Utah 1977); Burrington v. Ashland Oil Co., 356 A.2d 506, 509-10 (Vt. 1976); Norfolk & Western Ry. Co. v. Williams, 389 S.E.2d 714, 715 (Va. 1990); J.E. Lynch v. Pack, 846 P.2d 542, 543 (Wash. Ct. App. 1993); Cannelton Indus., Inc. v. Aetna Cas. & Sur. Co. of America, 460 S.E.2d 1, 5-17 (W. Va. 1994); Hoffman v. Memorial Hosp., 538 N.W.2d 627, 630 (Wis. Ct. App. 1995); West Tex. Utils. v. Exxon Coal USA, Inc., 807 P.2d 932, 935 (Wyo. 1991). The author found no state court opinions for Rhode Island. "Montana has yet to apply the common law doctrine of *forum non conveniens* in any non-FELA case." State of Montana *ex rel.* Burlington N. v. Eighth Judicial Dist. Court, 891 P.2d 493, 498 (Mont. 1995). Finally, the status of the doctrine



less of whether a state court has the power to transfer a case to another court in the same state, the court may use the doctrine of *forum non conveniens*.<sup>266</sup> State courts, then, through their power to transfer or dismiss cases using state statutes, court rules, or common law, may also start viewing all venue filing decisions with one primary inquiry in mind: Is the host forum a convenient forum for trial?<sup>267</sup>

State courts also give great deference to plaintiff's forum choice,<sup>268</sup> and like some federal courts, several states will not even consider a transfer or a dismissal unless the defendant shows that an alternative forum will hear the case.<sup>269</sup> Some states also do not allow cases filed in proper venues to be transferred merely because another, more convenient venue exists.<sup>270</sup> Furthermore, some states require that the movant

is unclear in Georgia. *See, e.g., Smith v. Board of Regents*, 302 S.E.2d 124, 125 (Ga. Ct. App. 1983) (stating that the doctrine of *forum non conveniens* "has never been expressly sanctioned in Georgia courts").

266. *See, e.g., Kennedy v. Henderson*, 794 P.2d 754, 754 (Okla. 1990) (holding that courts may use common law doctrine of intrastate *forum non conveniens* despite legislative enactments on venue changes). The doctrine of *forum non conveniens* has been codified in some states. *See, e.g., Ill. Sup. Ct. Rule 187* (Smith-Hurd 1993). In the federal system, few cases apply *forum non conveniens* for either interstate or intrastate transfers; rather, § 1404, drafted in accordance with that doctrine, is primarily used. *See, e.g., 28 U.S.C. § 1404(a)* historical notes (Supp. V. 1993); H.R. REP. NO. 308, 80th CONG., 1st Sess. A132 (1947); H.R. REP. NO. 2646, 79th CONG., 2d Sess. A127 (1946); *see also American Dredging Co. v. Miller*, 114 S. Ct. 981, 986 n.2 (1994) (stating that "the federal doctrine of *forum non conveniens* has continuing application only in cases where the alternative forum is abroad").

267. *See supra* note 223; *see also Kristine Roszak, Note, Forum Non Conveniens—Illinois Judges Granted Authority to Curb Intrastate Forum Shopping*. *Torres v. Walsh*, 98 Ill.2d 338, 456 N.E.2d 601 (1983), 1983 So. ILL. U. L. REV. 395.

268. *See, e.g., Marchman*, 898 P.2d at 720 (N.M. 1995); *Tipton v. Estate of Cusick*, 651 N.E.2d 635, 636 (Ill. App. Ct. 1995); *Scola v. AC & S, Inc.*, 657 A.2d 1234, 1241 (Pa. 1995). Like federal courts, state courts also give "less deference" to "foreign" plaintiffs. *See, e.g., Bradbury*, 652 N.E.2d at 1231; *Ford Motor Co.*, 41 Cal. Rptr. 2d at 346.

269. *See, e.g., Coonley*, 844 P.2d at 1181. For a federal court that maintains this view, *see Mizokami Bros. v. Mobay Chem. Corp.*, 660 F.2d 712, 719 (8th Cir. 1981). Compare *Piper Aircraft Co. v. Reyno*, 454 U.S. 233 (1981), where the Court stated:

We do not hold that the possibility of an unfavorable change in law should never be a relevant consideration in a *forum non conveniens* inquiry. Of course, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice.

*Id.* at 254. Notice that where the applicable statute of limitations has expired in the more convenient forum, this requirement might sound the death knell for the sought-after transfer or dismissal. To avoid this issue, some courts have conditioned transfer or dismissal on the defendant's promise to waive the statute of limitations defense in the new forum. *See, e.g., Mizokami Bros.*, 660 F.2d at 719; *Revelle v. Davis*, 653 N.E.2d 443, 445 (Ill. App. Ct. 1995); *Marchman*, 898 P.2d at 724; 731. *See generally JAMES & HAZARD, supra* note 8, § 2.31, at 105; *see also Jeffrey J. Kanne, Note, The Doctrine of Forum Non Conveniens: History, Application, and Acceptance in Iowa*, 69 IOWA L. REV. 975, 988-89 (1984).

270. In some states, a case cannot be transferred to another venue unless venue in the

show oppression before transfer or dismissal can be obtained.<sup>271</sup> Finally, some states do not allow trial judges to transfer a case *sua sponte* but rather require them to wait until a party requests such relief.<sup>272</sup>

But once the focus on venue returns to convenience, these questionable conclusions should disappear. As suggested earlier, the notion that a plaintiff's choice of forum deserves any deference is not a proper starting point when neither the plaintiff nor the litigation has any connection with the chosen venue.<sup>273</sup> In such cases, *no* deference should be given to the choice.<sup>274</sup> Moreover, once convenience becomes the appropriate

transferor court is improper. *See, e.g., In re Marriage of Engler*, 532 N.W.2d 747, 749 (Iowa 1995). But this does not mean that the court is prohibited from using the doctrine of forum non conveniens to *dismiss* the case.

271. *See, e.g., Scola*, 657 A.2d at 1241 (stating that a plaintiff should not be deprived of her choice of forum unless defendant establishes "such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience.") (citation omitted). The "oppression" factor derives from the Supreme Court. In *Koster v. (American) Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 524 (1947), the Court states:

Where there are only two parties to a dispute, there is good reason why it should be tried in the plaintiff's home forum if that has been his choice. He should not be deprived of the presumed advantages of his home jurisdiction except upon a clear showing of facts which either (1) *establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience*, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems. In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown.

*Id.* at 524 (emphasis added).

272. *See, e.g., Steven v. Blevins*, 890 P.2d 936, 939-40 (Okla. 1995). The court, citing authority from Pennsylvania, Nebraska, New York, and Texas, stated that where the chosen forum is a proper venue, the trial judge has no authority to transfer the case *sua sponte* to another proper forum. *Id.*

273. *See supra* notes 255-61 and accompanying text. This notion probably derives from the concept of plaintiff as master of his complaint, *see generally* Robert A. Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 HASTINGS L.J. 273 (1993); Stanley Blumenfeld, Jr., Comment, *Artful Pleading and Removal Jurisdiction: Ferreting Out the True Nature of a Claim*, 35 UCLA L. REV. 315 (1987), and thus, as master of his forum. *See supra* note 179 and accompanying text; *see also* Comeaux, *supra* note 91, at 173 ("A long-standing tradition in American courts has been that 'the plaintiff is the master of the complaint.' Because of this tradition, many courts follow the notion that plaintiffs should have the right to file in whichever forum they deem most appropriate, and the lawsuit should be tried in that forum.") (footnote omitted).

274. When a plaintiff is not a resident of the United States, courts are much more willing to apply a "less deference" standard. *Piper Aircraft Co. v. Reyno*, 454 U.S. 236, 255-56 ("When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable."). Even where the plaintiff is a resident of the United States but not a resident of the chosen venue, many opinions purport to apply a "less deference" standard. *See, e.g., supra* notes 258, 268. But, in fact, courts are not applying that standard. Nothing else explains the litigation of cases in forums with little or no connection to either the plaintiff or the subject matter of the lawsuit. Great deference is still being given to plaintiff's forum choice.

inquiry, transferring a case from one proper venue to another proper venue should no longer be considered improper.<sup>275</sup> As long as the proposed venue is more convenient than the hosting venue, transfers or dismissals under the doctrine of forum non conveniens should not only be encouraged but also made as fast and as early in the litigation as possible. Similarly, a court should not have to wait to act until a party requests transfer or dismissal.<sup>276</sup> Nor should a showing of oppression be required.<sup>277</sup> If the inquiry is whether a forum more convenient to *all* exists, the requesting party should not have to prove the oppressive results of maintaining the litigation in the current forum. As the Supreme Court has stated, oppression is relevant only when the defendant seeks to deprive the plaintiff of plaintiff's *home* forum.<sup>278</sup> This is clearly not the case when neither the plaintiff nor the litigation has any connection to the chosen forum.

In practice, this revised approach to venue will allow communities affected by the conduct underlying the litigation to resolve that litigation. In *Kemner v. Monsanto Co.*,<sup>279</sup> for example, where the accident occurred in Sturgeon, Missouri, and the plaintiffs and a clear majority of the witnesses were located in that community, the action should not have been filed and litigated in St. Clair County, Illinois.<sup>280</sup> Rather, the courts and potential jurors of Sturgeon, Missouri, should have been asked to resolve that lawsuit. Similarly, in *Futrell v. Luhr Bros.*,<sup>281</sup> neither the St. Louis courts nor community had any connection with the facts underlying the plaintiff's claims. Because the plaintiff and the clear majority of witnesses resided in Cape Girardeau, Missouri,<sup>282</sup> venue should have been in that community. At a minimum, St. Louis should have been

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275. See, e.g., *supra* note 270 and accompanying text. Courts can use the doctrine of forum non conveniens to dismiss the matter. Transfer has more advantages to the plaintiff than dismissal. See, e.g., *Norwood*, *supra* note 1, at 556. But if the statute at issue does not provide for transfers between proper venues, then only dismissal remains. Maybe this approach would encourage legislatures to take immediate action. It might also force filing parties to think twice before filing in a jurisdiction unrelated to the lawsuit.

276. See *supra* note 272 and accompanying text.

277. See *supra* note 271 and accompanying text.

278. In *Koster v. (American) Lumbermens Mut. Casualty Co.*, 330 U.S. 518 (1947), the Supreme Court found that plaintiff's choice of his *home* forum should not be disturbed unless, among other things, defendant establishes "such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience." *Id.* at 524. See also *supra* note 271 for the full text of this quotation. The Court undoubtedly used the word "home" for a particular reason. It would have been easy to say just "forum." The oppression element was not discussed in the context of plaintiff's choice generally, but rather was limited to plaintiff's "home."

279. 576 N.E.2d 1146 (Ill. App. Ct. 1991).

280. See *supra* notes 43-49 and accompanying text.

281. No. 91-9978 (Cir. Ct. St. Louis, Mo., filed Dec. 1991).

282. See *supra* notes 57-81 and accompanying text.

ruled out as a proper venue.<sup>283</sup>

Not all cases will be so easy to resolve. For example, how does one determine the convenient forum when the litigation is multijurisdictional? Easy resolution, however, is not the goal. Courts resolve similar issues every day.<sup>284</sup> This inquiry would be neither impossible nor overly burdensome.<sup>285</sup>

Finally, a true focus on convenience would eliminate the requirement that the party requesting transfer or dismissal demonstrate that the newly proposed venue will actually *hear* the litigation.<sup>286</sup> In some cases—particularly when the filing party seeks to secure a longer statute of limitations—a return to convenience may bar a party from pursuing its claims. In *Ferens v. John Deere Co.*,<sup>287</sup> for example, if the district court in Mississippi had dismissed the Ferenses' lawsuit on the ground that Pennsylvania was a more convenient forum, the Ferenses' claim would have been barred if filed in Pennsylvania by that state's statute of limitations.<sup>288</sup> But this is not the problem of the inconvenient forum. Is it fair to the court in the inconvenient forum to be required to entertain litigation it has little or no connection with merely because the real party in interest delayed bringing the claim, or because the party's attorney felt that the inconvenient forum would be more receptive to the client's position, goals, and/or desires? Why should the burdens of jury duty "be imposed upon the people of a community which has no relation to the litigation?"<sup>289</sup> Isn't there any "local interest in having localized controversies decided at home?"<sup>290</sup> Isn't there "an appropriateness too, in hav-

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283. Because the accident occurred in Louisiana, a Louisiana venue also would have been proper. *See, e.g.,* *Giannoulas v. Phoenix Maritime Agencies, Inc.*, 621 So. 2d 1131, 1133 (La. Ct. App. 1993).

284. *See, e.g., supra* note 222.

285. *See, e.g.,* *Nesladek v. Ford Motor Co.*, 46 F.3d 734, 738 (8th Cir. 1994) (resolving a venue issue where plaintiffs admitted moving from Nebraska to Minnesota, in part, to secure more favorable Minnesota laws).

286. *See supra* note 269 and accompanying text.

287. 494 U.S. 516 (1990).

288. *See supra* notes 20-41 and accompanying text. *See generally* authorities cited *supra* note 20.

289. *Ferens*, 494 U.S. at 529-30 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947)).

290. *Id.* at 530; *see Kinney Sys., Inc. v. Continental Ins. Co.*, No. 84329, 1996 WL 26554 (Fla. Jan. 25, 1996). In *Kinney*, the plaintiff-insurance company was a New Hampshire corporation with its principal place of business in New Jersey and doing business in Florida. The defendant was a Delaware corporation, headquartered in New York, and doing business in Florida. The lawsuit centered on the plaintiff's potential liability to the defendant under a worker's compensation insurance policy, negotiated in New York City. In upholding the dismissal of the lawsuit under *forum non conveniens*, the Supreme Court of Florida observed:

While Florida courts sometimes may properly concern themselves with a suit essentially arising out-of-state, they nevertheless must take into account the impact of such practices will have if not properly policed—an impact with substantial

ing the trial . . . in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflicts of laws, and in law foreign to itself"?<sup>291</sup> Why should courts and jurors in the inconvenient venue have to rise to the filing parties' occasion?<sup>292</sup>

These suggestions can be enforced through Rule 11 of the Federal

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effect on the taxpayers of this state and on the appropriation of public monies at both the state and local level to pay for the costs of judicial operations.

We must rightly question expenditures of this type where the underlying lawsuit has no genuine connection to the state. Florida's judicial interests are at their zenith, and the expenditure of tax-funded judicial resources most clearly justified, when the issues involve matters with a strong nexus to Florida's interests. But that interest and justification wane to the degree such a nexus is lacking.

*Id.* at \*4. The court continued:

[Thus, t]he use of Florida courts to police activities even in the remotest parts of the globe is not a purpose for which our judiciary was created. *Florida courts exist to judge matters with significant impact upon Florida's interests, especially in light of the fact that the taxpayers of this state pay for the operation of its judiciary. Nothing in our Constitution compels the taxpayers to spend their money even for the rankest forum shopping by out-of-state interests.*

*Id.* at \*8 (emphasis added).

291. *Id.*

292. Several state courts require the party requesting transfer or dismissal to waive any defenses available in the proposed forum that might accrue to it if the inconvenient forum grants the request. *See, e.g., supra* note 269. This requirement is unnecessary. If the reason that the inconvenient forum was chosen was to avoid the laws and/or courts of the convenient forum, it would be senseless to condition transfer or dismissal on defendant's waiver of any defenses available to it in the convenient forum.

Rules of Civil Procedure,<sup>293</sup> Rule 11's state counterparts<sup>294</sup> and the

293. Rule 11, amended by Congress in 1993, provides in relevant part:

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

...

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

FED. R. CIV. P. 11(a), (b) & (c). Under the 1993 amendment, the alleged Rule 11 offender is given 21 days to respond or correct the challenged conduct. Specifically, Rule 11(c)(1)(A) provides:

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

FED. R. CIV. P. 11(c)(1)(A). This "safe harbor" provision, as it is referred to in Rule 11's Notes of Advisory Committee on Rules, has caused concern among some. *See, e.g.,* Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 IND. L.J. 171, 207 (1994):

Some attorneys, however, may be tempted to employ the safe harbor device for inappropriate tactical benefits. For instance, counsel could base notice of potential violations on the refined parsing of a paper or questionable challenging of a factual contention which might ultimately have evidentiary support. Service of notice would require that targets unnecessarily expend substantial resources in order to respond within three weeks. Upon receipt, targets are given only twenty-one days to conduct a great deal of activity, such as analyzing the notification afforded, reconsidering the allegedly offensive behavior or papers, and undertaking greater research.

*See also* Christopher D. Wolek, Comment, *Practice and Procedure: The "Safe-Harbor" Amendment to Rule 11 . . . Any Port in a Storm?*, 47 OKLA. L. REV. 319, 332 (1994) (arguing that the "safe harbor" provision "subverts Rule 11's entire purpose by effectively placing the duty to discover the inadequacies of a filing upon the other party or upon the court"). In March, 1995, the U.S. House of Representatives also passed the Attorney Accountability Act of 1995. H.R. REP. NO. 62, 104th Cong., 1st Sess. 1 (1995). Among other things, the Act "would eliminate the safe harbor provision of Rule 11." Jeffrey A. Parness, *Safe Harbor Provision Should Be Preserved*, NAT'L L.J., Apr. 24, 1995, at A21. The Act is awaiting debate in the Senate. *Id.*

294. Most state statutes and/or procedural rules parallel Rule 11. Byron C. Keeling, *Toward a Balanced Approach to "Frivolous" Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067 (1994).

forum's own ethics rules in appropriate cases.

Rule 11, originally adopted in 1937,<sup>295</sup> is "aimed at curbing abuses of the judicial system."<sup>296</sup> In law-shopping cases, Rule 11 sanctions have rarely been imposed against the attorney or party.<sup>297</sup> Courts

295. In its original form, Fed. R. Civ. P. 11, 28 U.S.C.A. (1960) provided:

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

296. *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, 498 U.S. 533, 542 (1991) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 397 (1990)); see also Edward D. Cavanagh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499, 499-500 (1986); Keeling, *supra* note 294, at 1075; Karen K. Cain, Comment, *Frivolous Litigation, Discretionary Sanctioning and a Safe Harbor: The 1993 Revision of Rule 11*, 43 KAN. L. REV. 207, 207 (1994).

297. For cases involving the filing of multiple identical lawsuits, see *Bolivar v. Pocklington*, 975 F.2d 28, 32 (1st Cir. 1992); *Hapaniewski v. City of Chicago Heights*, 833 F.2d 576 (7th Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990); *Kapco Mfg. Co. v. C&O Enters.*, 886 F.2d 1485, 1492-93 (7th Cir. 1989).

In *Kapco*, the court also imposed sanctions on the attorney under 28 U.S.C. § 1927. Section 1927 provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

For cases involving attorneys who knowingly filed in improper venues, see *Barton v. Williams*, 38 Fed. Rules Serv. 2d (Callaghan) 966, 967-68 (N.D. Ohio 1983); cf. *Hasty v. Paccar, Inc.*, 583 F. Supp. 1577 (E.D. Mo. 1984). In *Hasty*, plaintiff filed suit in Missouri against a defendant with no connection to the state. After dismissing plaintiff's claim, the court states:

[I]n view of plaintiff's utter failure to come forward with evidence of even the slightest connection between [the defendant] and the State of Missouri, so as to satisfy the long-arm statute and the requirements of the due process clause, [the defendant] may wish to file a motion to impose sanctions against plaintiff's counsel, . . . in the amount of [the defendant's] costs and attorney's fees in defending this action to date.

It appears that [plaintiff's counsel] violated [Rule 11] as to [the defendant] by failing to make a reasonable inquiry as to the nature, quality or quantity of [the defendant's] contacts with Missouri or compliance with the long-arm statute. It matters not that this action was first filed in state court. The joinder of [the defendant] was not based upon a good faith inquiry into either the facts or the law supporting the exercise of in personam jurisdiction over [the defendant] by Missouri courts. As a

have imposed sanctions upon finding that an attorney's court document was filed for an improper purpose<sup>298</sup> or otherwise evidenced an attempted fraud or deceit upon the court.<sup>299</sup> However, courts have not imposed Rule 11 sanctions for filing suit in a given forum in order to gain access to more favorable juries or laws. Indeed, some courts have found that Rule 11 sanctions cannot attach for mere law-shopping as long as the chosen venue is proper.<sup>300</sup> But maybe this conclusion is wrong. Maybe Rule 11 sanctions should be imposed when an attorney

result, [the defendant] has been put to considerable and unnecessary expense and trouble in obtaining the dismissal of plaintiff's complaint against it.

*Id.* at 1580. As a general rule, however, courts remain reluctant to impose Rule 11 sanctions for fear of chilling vigorous advocacy. *See, e.g., Yagman v. Republic Ins.*, 987 F.2d 622, 625-28 (9th Cir. 1993) (holding that despite questionable basis for attorney's motion to recuse judge and other conduct, Rule 11 sanctions were not warranted); *Lamborn v. Dittmer*, 726 F. Supp. 510, 519 (S.D.N.Y. 1989) (stating that "the purpose of Rule 11 is not to dampen robust advocacy").

298. Rule 11 does not define the term "improper purpose." It does indicate, however, that improper purpose would include such things as attempts to "harass or to cause unnecessary delay or needless increase in the cost of litigation." FED. R. CIV. P. 11(b)(1). Because the list is not exclusive, however, "attorneys and judges need more guidance as to what constitutes 'any improper purpose.'" Sonya Scates & Richard L. Coffman, Note, *The Abuse of Rule 11 and Forum Non Conveniens: Fast, Effective Relief for Federal Docket Congestion?*, 7 REV. LITIG. 311, 332 (1988).

299. Rule 11 sanctions are not limited to conduct expressly prohibited by court rule or statute. For example, in *Itel Containers Int'l Corp. v. Puerto Rico Marine Management, Inc.*, 108 F.R.D. 96 (D.N.J. 1985), the plaintiff, a Delaware corporation, brought a breach of contract suit against the defendant, thought to be a Puerto Rico corporation with offices in New Jersey, based on federal diversity jurisdiction. *Id.* at 97. Two years later, and well after the filing of its answer, the filing of several motions on other issues, and the filing of carefully worded discovery answers, defendant moved to dismiss for lack of subject matter jurisdiction. *Id.* at 99. As then revealed, no diversity existed because the defendant was incorporated in Delaware. *Id.* Even though Rule 12(b)(1) allows a party to raise subject matter jurisdiction at any time, including for the first time on appeal, Rule 11 sanctions were imposed (and rightly so) against the defendant.

Moreover, in response to counsel's suggestion that not raising the jurisdictional issue was in the client's best interest, the court said:

The adversary system commands vigorous and zealous representation of one's client. The "battle" should be fought hard—but fought fairly. Vigorous advocacy is not inconsistent with decent behavior toward one's adversary and respect for the court and does not mean the advocate may dishonor the judicial system and demean the court simply because it will advance his client's cause.

. . . Thus, defense counsel here cannot validly claim that what they and their client did is excused on the basis of the "duty to client" contention.

*Id.* at 101, 104.

300. *See, e.g., Newton v. Thomason*, 22 F.3d 1455 (9th Cir. 1994) (district court imposed Rule 11 sanctions in the amount of \$10,000 against plaintiff's counsel for filing in a state with virtually no connection to the lawsuit). In reversing, the Ninth Circuit stated:

We conclude that the district court abused its discretion by sanctioning [plaintiff's] attorney . . . for an 'unnecessary and frivolous' choice of venue.

. . . Attorneys are not under an affirmative obligation to file an action in the most convenient forum; their only obligation is to file in a proper forum.

*We hold that filing in an inconvenient but proper forum is not a legitimate ground for Rule 11 sanctions.*

*Id.* at 1463-64 (emphasis added) (footnote omitted).



files suit in a forum having no connection with either the parties, witness, or the subject matter of the litigation. Maybe filing a lawsuit in a forum with no connection to either the plaintiff or the litigation should be considered an "improper purpose" within the meaning of the Rule.

Individual state's ethics rules might also be used to enforce the new approach to venue selection suggested here. Some states follow the Model Code of Professional Responsibility, adopted by the American Bar Association in 1969;<sup>301</sup> other states follow their own "revised" versions of the Model Code. Similarly, some states follow the Model Rules of Professional Conduct,<sup>302</sup> adopted by the ABA in 1983; other states follow their own individually tailored versions of the Model Rules. Additionally, some states adopt various combinations of the Model Code and Model Rules.<sup>303</sup> Finally, most state courts and all federal courts have their own local rules.<sup>304</sup> The local rules applicable in a given court may further define (or confuse) the ethical parameters of attorney conduct.<sup>305</sup> These distinctions may be of no relevance to the practitioner with an extremely localized practice. But for any attorney who practices or litigates in multiple states,<sup>306</sup> these differences are crucial.<sup>307</sup> Indeed, these differences alone might spur a party to shop for the

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301. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, *reprinted in* REGULATION OF LAWYERS 423 (Stephen Gillers & Roy D. Simon, Jr. eds. 1996).

302. MODEL RULES OF PROFESSIONAL CONDUCT, *reprinted in* REGULATION OF LAWYERS 3 (Stephen Gillers & Roy D. Simon, Jr. eds. 1996).

303. *See* Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 339 (1994).

304. *See* *Rand v. Monsanto Co.*, 926 F.2d 596, 601-03 (7th Cir. 1991) (observing that 18.18% of federal courts have no identifiable set of ethics rules; 31.82% have adopted some version of the Model Rules; 26.14% have adopted some version of the Model Code; and 9.09% have adopted some combination of the Model Code and Model Rules).

305. *See id.* at 600-03; Eli Richardson, *Demystifying the Federal Law of Attorney Ethics*, 29 GA. L. REV. 137, 153-55.

306. *See, e.g.*, Committee on Counsel Responsibility, *Risks of Violation of Rules of Professional Responsibility by Reason of the Increased Disparity Among the States*, 45 BUS. LAW. 1229, 1229 n.1 (May 1990) ("The fact that ever-increasing numbers of lawyers are admitted in two or more jurisdictions or are in partnerships with lawyers admitted in different states has been well documented.")

307. For example, an attorney licensed in New York must comply with that state's ethics rules. But this attorney might also litigate a case in a state where she is not licensed. *See* Committee on Counsel Responsibility, *supra* note 306, at 1229-30 n.1. While litigating in the latter state, the attorney must comply with that state's ethics rules. *Id.* This is simple. Now add the fact that there are no federal ethics rules. *See supra* note 304. Suppose, for example, that an attorney is litigating a matter in federal court. Whether or not the attorney is licensed in the state where the federal court sits is of no moment. The federal court will borrow the ethics laws of *some* state. *See, e.g.*, Stephen B. Burbank, *State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform*, 19 FORDHAM URB. L.J. 969, 970-73 (1992); Richardson, *supra* note 305, at 142 n.14; *United States v. Marcus*, 849 F. Supp. 417, 420-22 (D. Md. 1994). Which state the federal court will choose is rarely clear. *See generally* Kathleen Clark, *Is Discipline Different? An Essay on Choice of Law and Lawyer Conduct*, 36 S. TEX. L. REV. 1069 (1995).

most favorable ethics rules!<sup>308</sup> Because of the virtually unintelligible variance in ethics rules based upon the state hosting a given litigation, the author speaks more generally here.

Several rules contained in the Model Code and Model Rules require an attorney to act in the client's best interest. Model Rule 1.3 states "A lawyer shall act with reasonable diligence and promptness in representing a client."<sup>309</sup> Canon 7 of the Model Code states, "A lawyer should represent a client zealously within the bounds of the law."<sup>310</sup> Attorneys frequently rely on these rules to justify law-shopping and jury-shopping conduct.<sup>311</sup> But an attorney certainly is not free to do anything he or she chooses—even though within the bounds of the law—under the guise of the clients' best interest.<sup>312</sup> Moreover, other rules operate to curb any such temptations. For example, Canon 1 states, "A lawyer should assist in maintaining the integrity and competence of the legal profession,"<sup>313</sup> Canon 9 states, "A lawyer should avoid even the appearance of professional impropriety,"<sup>314</sup> and Model Rule 8.4 prohibits a lawyer from, among other things, engaging in conduct that is dishonest, fraudulent, deceitful, or prejudicial to the administration of justice.<sup>315</sup> These rules

308. The defendant in *Marcus*, 849 F. Supp. 417, contended that the plaintiff Justice Department filed suit in Maryland, instead of in the state where the events giving rise to the litigation occurred, in order to secure more favorable interpretations of the ethics rules governing the government's conduct in the underlying litigation. *Id.* at 420-21.

309. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1995).

310. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1983).

311. Recall also the attorney's concern with potential malpractice liability for failure to forum-shop. *See supra* note 202; *infra* note 316.

312. *See supra* note 298 and accompanying text; *see also* *Fitzhugh v. Committee on Professional Conduct*, 823 S.W.2d 896, 899 (Ark. 1992). The *Fitzhugh* court stated:

We are not insensitive to the demands made on or perceived by lawyers to protect the interests of their clients. Nevertheless, if the legal profession is to retain the unique privilege of self-regulation, our ethical standards must not be compromised under the guise of protecting the interests of clients.

Moreover, other ethics rules restrain the general duty to act in the client's best interest. For example, Model Rule 3.1 states in part "A lawyer shall not bring or defend a proceeding . . . unless there is a basis for doing so that is not frivolous . . ." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1995). Disciplinary Rule 7-102(A)(2) under the Model Code is similar. It states, "[A] lawyer shall not: (2) Knowingly advance a claim or defense that is unwarranted under existing law . . ." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(2) (1983). Several courts have interpreted these rules to encompass the filing of multiple identical complaints or petitions. *See, e.g.,* *Petition to Impose Discipline on Consent at 6, In re Gill and Marks*, Comm'n Nos. 94-CH-837 & 838 (Ill. filed Dec. 16, 1994) (on file with author). Thus, while it may be in the client's best interest to secure a particular judge to try a matter, it would be a violation of Model Rule 3.1 to file multiple identical petitions in an effort to secure the judge of choice.

313. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 1 (1983).

314. *Id.* Canon 9 (1983).

315. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4 (1995). For an example of a forum-shopping case dealing with Model Rule 8.4 that does not involve the filing of multiple identical pleadings or the pursuit of frivolous claims or contentions, *see Sollenbarger v. Mountain States*

help ensure that a lawyer does not focus solely on the client's best interest.<sup>316</sup> They also may be used to curb jury- and law-shopping.

Neither the Model Code nor Model Rules contain provisions that either expressly prohibit or condone forum-shopping in any form. And although some courts have found particular instances of judge-shopping to be unethical, no courts appear to have specifically addressed the ethics of jury- or law-shopping.<sup>317</sup> The author cannot explain this. Nor can

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Tel. & Tel. Co., 706 F. Supp. 776 (D.N.M. 1989). A defendant who knew at the outset of the litigation that the judge trying the case had financial interests in nonparty operating companies owned by the defense waited eight months after the lawsuit had been filed and until after several adverse rulings to file a motion to recuse the judge based on the judge's financial interest. *Id.* at 784-85. Although recusal was granted, the manipulative nature of the defendant's conduct, led the court to let stand all prior rulings of the recused judge. *Id.* at 785. Insofar as potential ethics violations were concerned, the court, first recognizing the defense maneuver as judge-shopping, *id.* at 784, refused to allow the defendant to just "walk away from the table after it has sampled the judicial fare and found the taste unpleasant." *Id.* The court then stated:

The inescapable conclusion is that [the defense] chose to wait and see how this court would rule before playing its trump card. This conduct is blameworthy and dilatory and seemingly may implicate *Model Code of Professional Conduct* Rule 8.4(d) (prohibition to "engage in conduct that is prejudicial to the administration of justice") or *Model Code of Professional Responsibility* DR 1-102(A)(5) (same).

*Id.* at 785. The potential ethics violations in *Sollenbarger* were not discussed further in the opinion. Nor has the author located any subsequent opinions dealing more specifically with the ethical ramifications of the defense conduct in *Sollenbarger*.

316. Consider also the attorney who is not as concerned with the client's best interest as she is with her own sense of ethics and morals. For example, what if an attorney refuses to shop for juries or laws? Might this attorney be subject to ethical discipline for failure to proceed in the client's best interest? See, for example, Model Rule 1.3 and Model Code Canon 7. Might she subject herself to malpractice liability? See *supra* note 202. The author has found four cases dealing with legal malpractice actions based on an attorney's failure to forum-shop. See, e.g., *Woodruff v. Tomlin*, 616 F.2d 924, 930-31 (6th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980); *Mims v. Wardlaw*, 338 S.E.2d 866 (Ga. Ct. App. 1985); *Holland v. State*, 444 N.E.2d 1190, 1192 (Ind. 1983); *Stricklan v. Koella*, 546 S.W.2d 810, 812 (Tenn. Ct. App. 1976). The courts decided in the attorneys' favor in all four cases. In *Stricklan*, the court held that no cause of action lies against an attorney for "the manner in which he honestly chooses to present his client's case," *id.* at 814, including the attorney's decision not to move for a change of venue. See generally Ronald E. Mallen, *Legal Malpractice: The Legacy of the 1970s*, 16 FORUM 119, 127-29 (1980). For identical reasons, the *Woodruff* court again rejected plaintiffs' attempt to sue an attorney in malpractice for failure to seek a change of venue. 616 F.2d at 931. Moreover, the district court in *Woodruff* noted the difficulty in having a malpractice jury attempt to decide what would have happened if counsel had requested and secured a change of venue. See *Woodruff v. Tomlin*, 423 F. Supp. 1284, 1287 (W.D. Tenn. 1976), *rev'd on other grounds*, 593 F.2d 33 (6th Cir. 1979), *on reh'g*, 616 F.2d 924 (6th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980). Similarly, in *Holland*, a criminal defendant's claim of ineffective assistance of counsel was rejected in light of evidence "that the failure to move for a change of judge was a tactical decision in which petitioner participated." 444 N.E.2d at 1192. In *Mims*, the defendant-attorney, who swore she had represented the plaintiff "with the requisite degree of skill and care," won summary judgment because of "the failure of plaintiff to counter the defendant's evidence with expert legal testimony establishing the parameters of the acceptable professional representation[.]" 338 S.E.2d at 866. However, even though all four cases were decided in the attorney's favor, these cases should convince practitioners of the very real prospect of being a defendant in a malpractice case.

317. The author searched extensively for any such cases. After discovering only several cases

the author explain why there is a greater reluctance among judges to impose sanctions under ethics rules than under Rule 11.<sup>318</sup> But clearly the ethics rules mentioned here can and should be considered by the courts as possible enforcement options.

#### IV. CONCLUSION

Our judicial system currently believes—at least in practice—that as long as the methods are lawful, vigorous pursuit of favorable laws and juries are appropriate goals. Under current enforcement of venue statutes, then, most courts conclude that as long as the venue is an available choice under the applicable venue statute, the inquiry is at an end. But this is a misuse of venue laws. And the misuse negatively impacts upon public perceptions of justice and fairness and upon public confidence in the judicial system.

An appropriate means of redress can be found by reevaluating venue choices with the purpose of venue in mind. That purpose—convenience to all—is a concept already familiar in our judicial system.

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involving judge-shopping, the author contacted ETHICSearch, a division of the A.B.A.'s Center for Professional Responsibility. The director of ETHICSearch, Peter H. Geraghty, conducted several search requests in an attempt to locate any cases, decisions, or ethics opinions dealing with judge-shopping, venue-shopping or forum-shopping. Aside from the cases cited *supra* note 159, he found only seven other decisions. Of the seven, five involve the attorney in the *Yagman* matter, discussed *supra* notes 160-61. The sixth decision, *In re Discipline of Stuhff*, 837 P.2d 853 (Nev. 1992), involves an attorney who was fined and publicly reprimanded for trying to force a judge's recusal by personally serving the judge, who was in the process of trying the attorney's client's criminal case, with a judicial complaint. *Id.* at 854. The seventh decision, *Liker v. Grossman*, 573 N.Y.S.2d 749 (N.Y. App. Div. 1991) is the only decision involving venue-shopping. Although both the attorney and client were fined in that case, the fines were not specifically related to the client's 20-year battle to seek a forum willing to rule in his favor. Rather, the court levied the fines in response to the filing of an appeal deemed frivolous and devoid of merit. *Id.* at 751. All correspondence between the author and ETHICSearch is on file with the author.

318. See generally Victor H. Kramer, *The Appearance of Impropriety Under Canon 9: A Study of the Federal Judicial Process Applied to Lawyers*, 65 MINN. L. REV. 243 (1980) (arguing that because Canon 9 is so vague, it is too dangerous); see also Wasserstrom, *supra* note 196 (arguing that attorneys should be provided with more clarity and guidance than is currently contained in the ethics rules). Judges are clearly reluctant to find ethics violations for what they perceive to be litigation strategies. In several cases judges imposed Rule 11 sanctions against attorneys who law-shopped, but they did not even consider sanctions under the ethics rules. See, e.g., *supra* note 297 and accompanying text. Even when a court specifically raises the ethics issue, further exploration rarely occurs. See *Sollenbarger*, 706 F. Supp. 776, discussed *supra* note 315; see also *Itel Containers Int'l Corp. v. Puerto Rico Marine Management, Inc.* 108 F.R.D. 96 (D.N.J. 1985), discussed *supra* note 299. The conduct of the defense attorneys in *Itel* certainly violated MODEL RULE OF PROFESSIONAL CONDUCT 3.3, which addresses the lawyer's duty of candor toward the court, as well as MODEL RULE OF PROFESSIONAL CONDUCT Rule 3.4, which addresses the lawyer's duty of fairness to opposing parties and their counsel. Maybe the answer to why judges are so reluctant to impose sanctions for ethics violations requires exploration of this question: Can the bar adequately police itself?

Both traditional and contemporary interpretations of that term—specifically in the venue context—encompass the very issues relevant to the mission of finding the *most appropriate* home of the litigation. Thus, in lieu of suggesting change in the fifty-plus venue laws currently on the books, returning to convenience is clearly a workable and viable solution already at the judicial system's disposal. All that remains is the task of scrutinizing each venue choice accordingly.

This should not be viewed as an issue of penalizing the filing party or that party's attorney. It should be viewed as an issue of fairness: Fairness to the inconvenient forum asked to entertain the matter, fairness to the jurors of that forum, fairness to any nonfiling parties, and fairness to any witnesses called to testify. Thus, as once observed, the demands of justice are not met

whenever a plaintiff can find a forum in which full recovery is permitted, notwithstanding that his or her connection with the chosen forum is slight. A system of law that maximizes the plaintiff's recovery is not necessarily a just system of law. [Rather] courts should be concerned to try cases in "the interests of all the parties and the ends of justice," and not in the interests of the plaintiff alone.<sup>319</sup>

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319. Opeskin, *supra* note 18, at 22.