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# Attorneys' Perspectives on Choice of Forum in Diversity Cases

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# ATTORNEYS' PERSPECTIVES ON CHOICE OF FORUM IN DIVERSITY CASES

by

VICTOR E. FLANGO, PH.D.\*

## I. INTRODUCTION

What factors lead attorneys to choose either state court or federal court, when a choice is available? What role does fear of local bias and perception of the relative quality of state and local courts play in forum selection? Is it simply a matter of case outcome, since "Choosing the right forum for a lawsuit can mean the difference between winning and losing,"<sup>1</sup> or do non-outcome factors, such as cost and convenience to clients, play a part? Do litigating attorneys switch fora depending upon the characteristics of the client and the nature of the case, or do they file in one court system or the other out of habit? Answers to these questions have implications for the success of reform designed to readjust the boundaries between jurisdictions of state courts and federal courts. This report will first outline the arguments relating to proposals to change diversity of

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David Cook, Chief of the Statistical Analysis and Reports Division, Administrative Office of U.S. Courts assisted this research effort by providing a list of federal diversity cases filed in each of the eight sites. In addition, he and David Gentry were always available to provide telephone consultation to discuss peculiarities in the data and for that I am grateful. The project could not have been conducted without the cooperation of numerous state and federal court personnel at each of the eight sites. Craig Boersema, Hank Daley, Carol Flango, John Goerd, Steve Hairston, Chris Lomvardias, and Kristina Tehnunftel collected the data on site. Without their attention to detail and conscientious effort, this project could not have been done. Pamela Petrakis supervised data entry and created the tables used in this article. David Tevelin, Roger Hanson, Neal Miller and Stephen Wasby improved this article by suggesting changes to the first draft.

<sup>1</sup> Dees, *Finding the Forum for a Victory*, Nat'l. L. J. Feb. 11, 1991, at S3.

citizenship jurisdiction from the perspective of how additional empirical evidence can advance the arguments, and then provide data on lawyers' perceptions of factors that are important in the decision to file in either state or federal court. Whether justified or not, these perceptions play a large part in the decision of where cases are filed. Unless these perceptions are identified and understood, efforts to modify federal diversity jurisdiction may not address root concerns and, thus, may be misdirected.

## EMPIRICAL EVIDENCE AND DIVERSITY OF CITIZENSHIP JURISDICTION

Arguments over the scope and desirability of federal diversity of citizenship jurisdiction have existed ever since diversity jurisdiction was conferred upon federal courts by the Judiciary Act of 1789.<sup>2</sup> Despite the amount of time spent debating various proposals to modify diversity jurisdiction, the U.S. Congress and state court judges and legislators still have only a limited amount of empirical evidence upon which to make such decisions.<sup>3</sup> This lack of research appeared to Judge Bernard Meyer of the New York Court of Appeals to

<sup>2</sup> Judiciary Act of 1789, ch. 20, Sec. 11.1 Stat 73, 78. The constitutional grant of diversity jurisdiction was ". . . tepidly supported and vigorously opposed during the debates of the ratification of the United States Constitution," Chapin, *Federal or State Court: Should Diversity Jurisdiction Be Abolished?* 15 INTERGOVERNMENTAL PERSPECTIVE (Spring, 1989), at 29. Summaries of the arguments for and against diversity jurisdiction are contained in: Friendly, *The Historic Basis of Diversity Jurisdiction* 41 HARV. L. REV. 483 (1928); Joiner, *Corporations as Citizens of Every State Where They Do Business: A Needed Change In Diversity Jurisdiction* 70 JUDICATURE 291 (1987); Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts* 48 BROOKLYN L. REV. 197 (1982); Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1 (1964).

<sup>3</sup> Studies based upon empirical data are: Bumiller, *Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform* 15 LAW & SOC'Y REV. 749 (1980); Cameron, *Federal Review, Finality of State Court Decisions, and a Proposal for National Court of Appeals - A State Judge's Solution to a Continuing Problem*, 1981 B.Y.U. L. REV. 545, 550-553; Flango & Blair, *The Relative Impact of Diversity Cases on State Trial Courts* STATE COURT JOURNAL, (Summer, 1978), at 20; Flango and Boersema, *Are Federal Diversity Cases More Burdensome than State Cases?* STATE COURT JOURNAL, (Summer 1990), at 4; Flango & Boersema, *Changes in Federal Diversity Jurisdiction: Effects on State Court Caseloads*, 15 OF U. DAYTON L. REV. 405-55 (1990). Flango & Burns, *The Effect of Recent Changes in Federal Diversity Jurisdiction on the State Courts* STATE COURT JOURNAL (Spring 1989), at 4; Flango, *How Would the Abolition of Federal Diversity Jurisdiction Affect State Courts?* 74 JUDICATURE 35 (1990); Goldman & Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry* 9 J. LEGAL STUD. 93 (1980); McFarland, *Diversity Jurisdiction: Is Local Prejudice Feared?* LITIGATION (Fall, 1980), at 38; Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction* (1991), (unpublished manuscript). Perlestein, *Lawyers Strategies and Diversity Jurisdiction* 3 LAW & POL'Y Q. 321 (1981); Note, *The Choice Between State and Federal Court in Diversity Cases in Virginia* 51 VA. L. REV. 178, 179 (1965); Summers, *Analysis of Factors that Influence Choice of Forum in Diversity Cases* 47 IOWA L. REV. 933 (1962).

be ". . . surprisingly in view of the intensive debate in recent years over removal-of diversity cases from the federal courts."<sup>4</sup>

Some of the arguments for or against federal diversity jurisdiction are normative and do not require data, other arguments depend upon data for their resolution, and still others benefit from empirical evidence. The normative argument, pursued by the Federal Courts Study Committee and Chief Justice Lucas of California, (among others),<sup>5</sup> is that diversity cases involve the application of state law, not federal law, and therefore diversity cases belong in state courts.

For policymakers who take this position, data on the effects of an abolition of diversity jurisdiction on either state or federal courts is a secondary consideration. At the other extreme is the patently empirical argument that abolition or curtailment of diversity jurisdiction is necessary to reduce the excessive workload of federal courts, or the related argument that abolition or modification of jurisdiction would add too many cases to the already overburdened state courts.

The size of federal caseloads has indeed provided much of the impetus for change. McFarland called growth in federal court caseloads the "first and foremost reason" for abolishing diversity jurisdiction.<sup>6</sup> The question of how various proposed changes in federal diversity jurisdiction would affect state court and federal court caseloads demands data for their resolution. The Federal Judicial Center has conducted research to determine the impact on federal courts of changes in diversity jurisdiction, and the National Center for State Courts addressed the empirical question of how various proposed changes in diversity jurisdiction would affect the caseload of state courts.<sup>7</sup>

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<sup>4</sup> Meyer, *Justice, Bureaucracy, Structure and Simplification*, 42 MD. L. REV. 659, 672 (1983).

<sup>5</sup> M. Lucas, *Abolishing Diversity Jurisdiction* (unpublished position paper) (1989); Federal Courts Study Committee, *Working Papers and Subcommittee Reports* Vol. 1 417 (July 1, 1990). See also *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); Bratton, *Diversity Jurisdiction --An Idea Whose Time Has Passed* 51 IND. L. J. 347 (1976); AMERICAN LAW INSTITUTE (A. L. I.), *CONTINUATION OF THE STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 44, 99 (1968).

<sup>6</sup> McFarland, *supra* note 3. Charles Bricant said that "the principal argument surrounding diversity jurisdiction, and the argument currently feeding the fires for change is that elimination of diversity will somehow reduce congestion in the federal courts without appreciably increasing the burden on state courts" Bricant, *Diversity Jurisdiction: Why Does the Bar Talk One Way But Vote the Other Way With Its Feet?* N. Y. ST. B. J. (July 1989), at 20, 21; Chapin, *supra* note 2, at 33; The American Law Institute Report, *supra* note 5, was based on the need to limit caseload pressures and consequently the growth of the federal judiciary.

<sup>7</sup> A. Partridge, *THE BUDGETARY IMPACT OF POSSIBLE CHANGES IN DIVERSITY JURISDICTION* (The Federal Judicial Center (1988). Flango & Blair, *supra* note 3, at 20; Flango and Burns, *supra* note 3, at 4; Flango, *supra* note 3 at 35. Although this research was a crucial first step in determining the

If the proportion of diversity cases filed in federal courts conforms roughly to population size, a tactical decision is suggested--attorneys sometimes choose either state or federal court depending upon such case characteristics as the type of case, the type of litigant, the desired speed of processing, or the residence of litigants. Kastenmeier and Remington summed up this portion as "[b]asically, the bar likes forum shopping."<sup>8</sup> If trial attorneys just prefer to have a choice of forum and choose one forum over another depending upon the characteristics of the cases involved, the grounds of the diversity debate shift to the ethics of permitting forum shopping in some cases but not in others. Why should some litigants have the opportunity to go to federal courts and not others?<sup>9</sup>

An unusually high proportion of diversity filings in federal courts implies a preference for the federal forum and an unusually low proportion of diversity filings implies a preference for state courts. Either situation suggests purposive behavior on the part of attorneys--conscious forum selection. Why do attorneys choose to file cases in either federal or state courts when a choice is available? This question leads us to the third type of argument relating to diversity jurisdiction--one informed both by normative stance and empirical research.

The most common reasons given for choice of forum are fear of local bias and perceptions of the comparative quality of federal and state courts. These reasons behind choice of forum have implications for reform, but different implications than those suggested by the tactical decision to forum shop. If

impact on state courts of changes in federal diversity jurisdiction, it was based on the simplifying assumption that diversity cases filed in federal court are similar in burden to tort and contract cases filed in state courts of general jurisdiction. To the extent that federal diversity cases are different in composition, take longer to process, or are more likely to require trials, the impact of any change in federal diversity jurisdiction is likely to be underestimated. Further research undertaken to determine the relative burden of federal and state cases found that, with two exceptions, one diversity case eliminated from federal courts could be counted as one case added to the dockets of state trial courts. The exceptions were asbestos and high-dollar amount contract cases, which need to be "weighted" before their burden on state courts can be assessed. See Flango and Boersema, *supra* note 3, at 4; Flango & Boersema, *supra* note 3, at 405.

<sup>8</sup> Kastenmeier & Remington, *Court Reform and Access to Justice: A Legislative Perspective* 16 HARV. J. ON LEGIS. 301, 313 (1979).

<sup>9</sup> Note, *Forum Shopping Reconsidered* 103 HARV. L. REV. 1677 (1990). Because diversity jurisdiction is not available for most divorce, child custody or probate cases, claimants in these cases do not have the option to choose federal courts. See Note, *The Domestic Relations Exception to Diversity Jurisdiction*, 83 COLUM. L. REV. 1824 (1983); Note, *The 'Probate Exception' to Federal Diversity Jurisdiction: Matters Related to Probate* 48 MO. L. REV. 564 (1963); Note, *Federal Courts--The Continued Vitality and Questionable Validity of the Domestic Relations Exception to Diversity Jurisdiction*, 56 TEMP. L.Q. 228 (1983); See also REPORT TO THE FEDERAL COURTS STUDY COMMITTEE OF THE SUBCOMMITTEE ON THE ROLE OF THE FEDERAL COURTS AND THEIR RELATION TO THE STATES 448 (199) cited as unfair existing law which gives "some litigants the benefit of a federal forum that is denied to their neighbors solely because these litigants have the good fortune to face an adversary from another state." *Id.*

federal courts are selected because of attorneys' perceived bias against out-of-state residents, reform efforts need to focus on alternatives that deny in-state plaintiffs the opportunity to file in federal court. If federal courts are selected because corporations are concerned about bias, proposals to change diversity jurisdiction for individual litigants could be examined more closely. If federal courts are chosen because of better qualified judges and juries, less congestion, or better rules of procedure, specific state courts would be able to set agendas for reform.

It is important to note that attorneys' perceptions of the relative quality of justice received in state and federal courts may affect forum choice *regardless* of the accuracy of their perceptions or whether their perceptions conform to objective measures of court performance. Therefore, the most direct way to ascertain why attorneys chose to file in state or federal court is simply to ask them.<sup>10</sup> By examining attorneys' reasons for choice of forum and relating them to filing patterns, this research addresses the relevant issues of most concern to both proponents and opponents of change in federal diversity jurisdiction.

## II. METHODOLOGY

### A. Questionnaire Construction

A questionnaire was written to measure the attitudes of attorneys toward forum choice. The survey was built upon questions that prior surveys found to be most effective.<sup>11</sup> Questions from the Institute for Law and Justice Project on federal jurisdiction question were evaluated and used where appropriate, to facilitate comparisons and to extend the scope of both studies.<sup>12</sup> The first draft was reviewed and revised extensively by David Tevelin, Executive Director of the State Justice Institute, Dr. Neal Miller, Institute for Economic and Policy Studies, Dr. Scott Keeter of the Survey Research Laboratory at Virginia Commonwealth University, and seven senior National Center for State Courts (NCSC) staff members. The questionnaire was then pretested with the assistance of several staff attorneys at the NCSC who had not reviewed the earlier version.

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<sup>10</sup> Becker, *Surveys and Judiciaries, or Who's Afraid of the Purple Curtain?*, LAW & SOC'Y REV. 133-143 (1966). See also Glick, *Interviewing Judges: Access and Interview Setting*, 13 RES. REP. IN SOC. SCI. I (1970) and Grey *Interviewing at the Court*, 31 PUB. OPINION Q. 285 (1967).

<sup>11</sup> Bumiller, *supra* note 3, at 749; Goldman & Marks *supra* note 3, at 103; Perlstein, *supra* note 3 at 321; Note, *The Choice Between State and Federal Court in Diversity Cases in Virginia* 51 VA. L. REV. 178, 179 (1965); and Summers, *supra* note 3, at 937. In addition, Cameron, *supra* note 3 at 550-53, asked about lawyers perceptions of federal and state courts, but not in the context of diversity jurisdiction.

<sup>12</sup> Miller, *supra* note 3.

The questionnaire was designed to measure four things: (1) the number of factors involved in forum choice, (2) the importance of each factor (3) whether important factors work to the advantage of state courts, federal courts, or neither, and (4) the characteristics of litigating attorneys who usually prefer state or federal courts. Attorneys in the federal sample were asked why they selected federal court over state court, and attorneys in the state sample were asked if the reference case could have been filed in federal court. If so, they were asked why they chose to file in state courts. If not, they were asked to assume their client was an out-of-state resident, and then to choose between state and federal court.

Thirty-one closed-ended questions were used to evaluate the extent to which local bias, the perceived quality of courts, the importance of having a choice, and locational convenience influenced forum selection. Five questions asked attorneys about their backgrounds. The extensive review of the questions, the attractiveness of presentation as enhanced by printing the questionnaire commercially, and the use of bar endorsements and reminder letters were all intended to increase the rate of response. Copies of the questionnaires are attached as Appendix A.

### B. *Site Selection*

Based upon data from the year ending March 31, 1990, all 91 federal districts were rank ordered on the basis of diversity filings per 100,000 and the percent of total federal civil filings that were diversity cases. Figure 1 shows both measures for each federal district. From this list, the following three districts with disproportionately large numbers and percentage of diversity filings were chosen: the Eastern District of Texas, the Southern District of West Virginia, and the Northern District of Ohio. Similarly, three districts with a disproportionately small number and percentages of diversity filings were selected: the Eastern District of California, the Eastern District of North Carolina, and the Southern District of Ohio. Finally, to serve as a control group, two sites with an average number and percentage of diversity filings were chosen: the Northern District of Texas and the Western District of Virginia. The two Texas districts and the two Ohio districts were chosen deliberately to determine why filing rates should differ so much within states. The answer was straightforward: filings of asbestos cases in specific districts caused large disparities in districts within states.

### C. *Sample Selection*

The objective of this project was to solicit the opinions of attorneys who *litigate* in state and federal courts, since attorneys who potentially make the decision to file cases in federal or state court are the ones most likely to be

affected by changes in federal diversity jurisdiction. Therefore, the expediency of selecting a sample of names from Bar Association lists was not available because bar lists contain the names of lawyers who do not practice, as well as lawyers who practice only criminal law, probate law, or other types of law that would make it unlikely for them to be involved in a diversity action. To target the litigating attorneys, a two-stage sampling strategy was designed. This sampling strategy is more cumbersome than just sending questionnaires to a random sample of attorneys, but has the advantage of ensuring that the attorneys selected will be questioned about forum choice in the context of a specific case so that speculation is minimized and more accurate reasons for forum choice are identified.<sup>13</sup>

### 1. The Case Sample

The first step in the sampling design was to select a sample of cases. Table 1 shows the specifics of sample selection in each site. (A more complete description of sampling procedures is contained in Appendix B). In federal courts, the sample consisted of all diversity cases filed in the statistical year ending June 30, 1990. From state courts of general jurisdiction in the same counties, a sample was drawn of 400 tort and contract cases where the amount-in-controversy was greater than \$50,000. All attorneys who participated in the cases were identified, (both as counsel for the plaintiff and for the defense). Their addresses and telephone numbers were then found and recorded. A sample of 400 cases did not yield a list of 800 different attorneys' names because some litigating attorneys file multiple cases. Particularly in smaller counties, the names of some active litigators appeared in the case files repeatedly. When the number of questionnaires distributed was compared with attorneys whose names appeared in the cases, it showed the extent to which lawyers litigated multiple cases during the sample period.<sup>14</sup> Indeed, some attorneys' names appeared in the sample of cases filed in federal court as well as in the sample of cases filed in state courts. Because these attorneys practice in both court systems, and thus are in the best position to evaluate the federal and state courts comparatively, their responses are particularly important. These attorneys were sent both a state and a federal questionnaire, each with different case references, with a special appeal to respond.

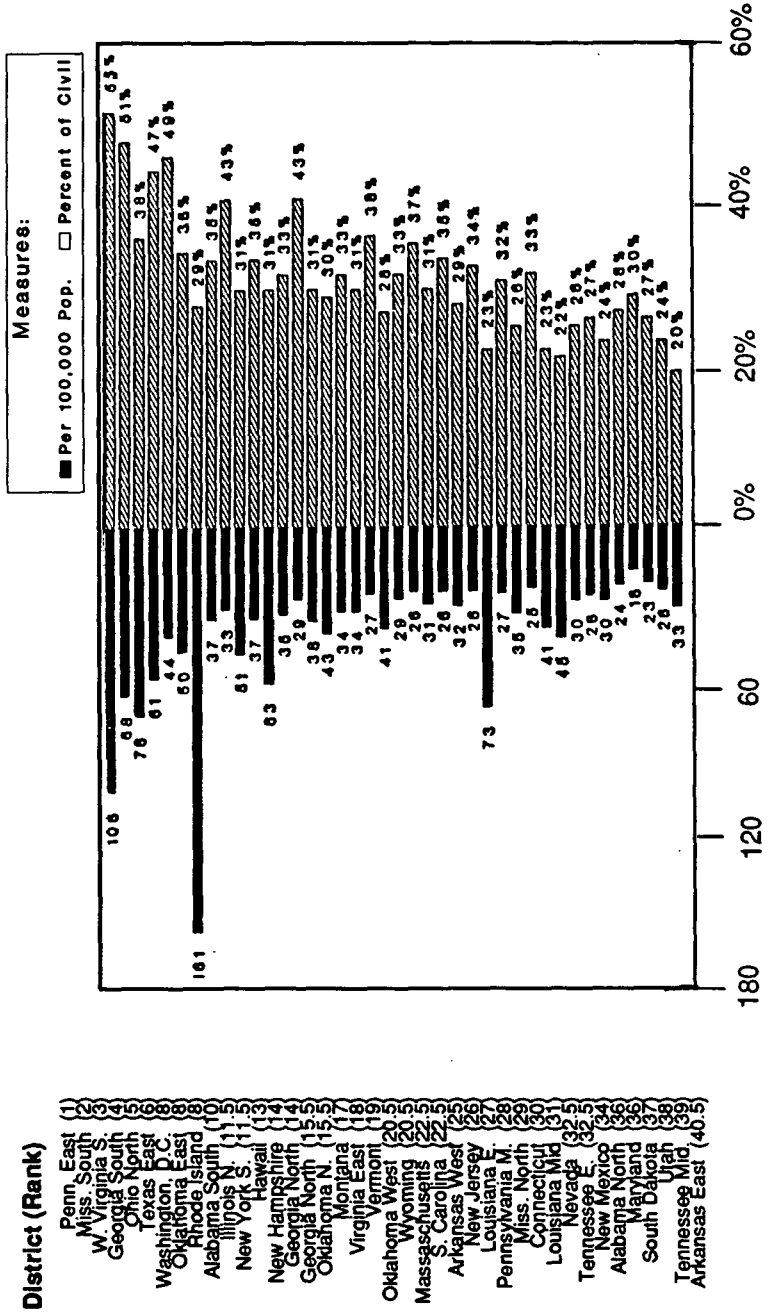
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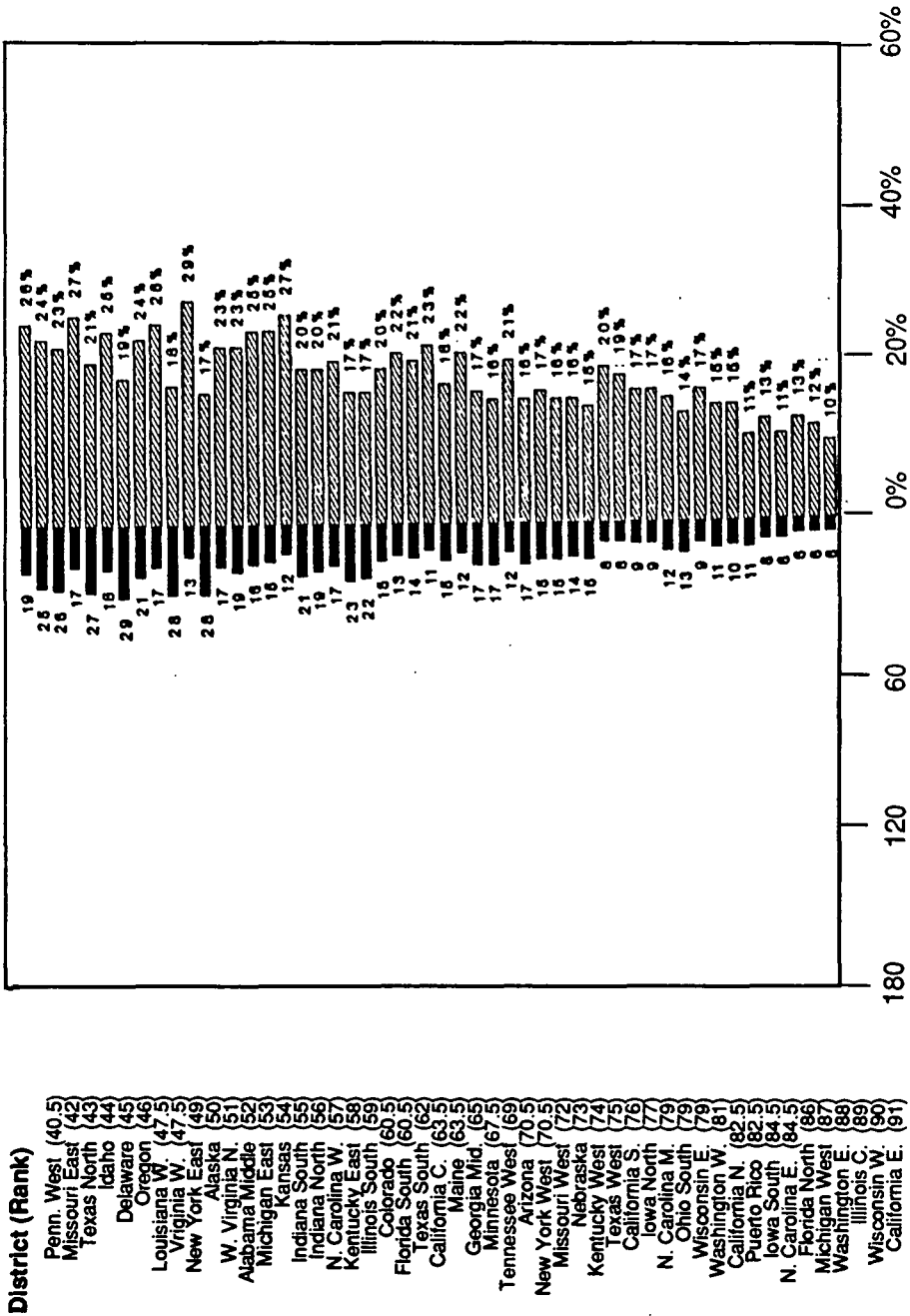
<sup>13</sup> Bumiller, *supra* note 3 at 754 initiated this practice and Miller, *supra* note 3 followed suit. Alternatively, Perlstein, *supra* note 3 and Cameron, *supra* note 3, based their findings upon general reasons for forum preference rather than setting the preference within the context of a specific case.

<sup>14</sup> The exception was Dallas where the number of duplicate names was small. If all questionnaires were sent, the sample size in Dallas would have been much larger than the size of the other samples. Accordingly, a random sample of names was chosen after duplicates were removed from the list of attorneys.



**Figure 1**  
**Diversity Filings**  
**By Federal District, 4/1/89-3/31/90**





## 2. Sample of Attorneys

The section above described how the case sample was used to identify litigating attorneys. A random number formula was used to select the specific case reference for attorneys who appeared as counsel on multiple cases. Except for attorneys whose names appeared in both state and federal samples, attorneys were sent only one questionnaire. For most sites, reminder post cards were sent to attorneys who did not respond two weeks after the initial mailing. For questionnaires that were returned as undeliverable, the addresses were checked and new addresses obtained from the information operator, the *Martindale-Hubbell Law Directory*, or the Attorney Registry for the relevant city. Only 18 of the 4,548 questionnaires were ultimately returned as undeliverable.

### D. Response Rate

All prior studies of choice of forum have relied upon mailed questionnaires, but many did not receive satisfactory rates of return.<sup>15</sup> Indeed, "mail surveys with response rates over 30 percent are rare."<sup>16</sup> The usable return rate of 36% reported in Table 2 was the average for mailed surveys, but comparatively lower than the 44% rate achieved by Miller.<sup>17</sup> Of course, the actual return rate (40%) was slightly higher because some attorneys returned questionnaires with explanations of why they could not respond. For example, some attorneys refused to respond because the referenced case was still pending. Some defense attorneys claimed that they did not remember the case, and others said they had no choice of forum. These attorneys were sent letters either containing a new case reference or a letter reminding them that defense attorneys can remove some state cases to federal courts. The letters asked each defense attorney to respond to the questionnaire as if a choice of forum were available. Of the usable response rate, more responses (58%) were received from plaintiff's attorneys than from defense attorneys (42% representing 721 attorneys).

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<sup>15</sup> Bumiller, *supra* note 3, at 754 reported a response rate of 64%, McFarland, *supra* note 3, reported a response rate of 15% in a survey of Virginia lawyers, and Perlstein *supra* note 3, a usable response rate of 30%.

<sup>16</sup> P. Alreck & R. Settle, *The Survey Research Handbook* (1985).

<sup>17</sup> Miller, *supra* note 3.

TABLE 1  
SAMPLE OF CASES

Sites	All Civil Cases	Number of State Cases Screened	Number of Cases in State Sample	Attorney Names: State Sample	All Federal Cases	Number of Cases in Federal Sample	Attorney Names: Federal Sample	Total Number of Attorney Names
Roanoke	1,500	1,500	246	445	141	153*	710	1,155
Charleston	?	900	327	350	133	133	735	1,085
Cleveland	20,430	2,450	417	1,054	4,565	426	848	1,902
Dallas	17,500	2,000	411	742	641	401	1,811	2,553
Tyler	750	288	128	281	182	182	334	615
Cincinnati	?	1,399	301	368	180	180	229	597
Raleigh	?	996	520	302	62	62	356	658
Sacramento	5,772	1,500	444	809	124	73	220	1,029
Totals	--	11,033	2,794	4,351	--	1,610	5,243	9,594

? Data not recorded.

\*More diversity cases identified on site than indicated by Administrative Office of U.S. Courts records.

Of the 1,642 different attorneys who responded to the survey, 1,494 were sent a single questionnaire which was returned. The others were sent two questionnaires--one referring to a state case and one referring to a federal case which included a special appeal to respond. Of the attorneys who received two questionnaires, 40 returned both questionnaires with identical or nearly identical responses, 44 returned only one questionnaire, and 64 returned both questionnaires with different reasons for filing in state court rather than federal court. Because this last set of 64 attorney responses were different, they were entered on the computer for a separate analysis. Therefore, the sample of 1642 attorneys yielded 1706 questionnaires for analysis. Attorneys identified from state cases had a return rate of 37% and attorneys identified from federal cases had a response rate of 34%. Attorneys who were asked to accept the extra burden of answering both a federal and a state questionnaire had the highest rate of response (38%), perhaps because they were sent a special letter noting how important they were to the research. Response rates ranged from 47% in Roanoke and Charleston, to 25% for Tyler. The rates did not seem to vary according to whether or not the survey was accompanied by a letter of support from the local bar association president or whether or not reminder post cards were sent.

### III. WHICH FACTORS ARE IMPORTANT TO FORUM CHOICE?

#### A. *Single Items*

An earlier NCSC study of forum choice in federal question cases found that the reasons given for forum choice were quite different for attorneys filing in federal and state courts.<sup>18</sup> Attorneys filing in federal court most often cited reasons pertaining to judges, including their philosophies, quality, and attention to the cases and law. Attorneys filing in state court cited convenient location, claims based on state law, and lesser expense of litigation.

The first step in the analysis is simply to determine which factors litigating attorneys considered relevant to forum selection. Table 3 shows that each of the 31 items was considered relevant by at least 12% or more of the sample. Apparently, the reasons for forum selection are quite varied.

The second step is to determine how important each of the factors are to forum choice. Does the fear of local bias dominate or is it the comparative quality of state or federal courts? Is it merely a matter of convenient court

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<sup>18</sup> Marvell, Galfo, & Rockwell, *Court Selection: Student Litigation in State and Federal Courts* 15-16 (Williamsburg, VA: National Center for State Courts, March, 1982) [hereinafter Marvell].

**TABLE 2**  
**SAMPLE OF ATTORNEYS: RESPONSE RATES**

Sites	State		Federal		Federal/State		Totals				
	Sent	Returned %	Sent	Returned %	Sent	Returned %	Sent	Returned %			
*Roanoke	111	72	160	47	29%	30	21	70%	301	140	47%
Charleston	189	59	149	85	57%	72	47	65%	410	191	47%
*Cleveland	522	203	345	114	33%	33	18	55%	900	335	37%
*Dallas	493	169	363	131	36%	78	26	33%	934	326	35%
*Tyler	122	39	313	65	21%	16	9	56%	451	113	25%
*Cincinnati	375	134	166	48	29%	38	12	32%	579	194	34%
Raleigh	133	90	162	67	41%	120	13	11%	415	170	41%
Sacramento	432	124	126	49	39%	-	-	-	558	173	31%
<b>Totals</b>	<b>2,377</b>	<b>890</b>	<b>1,784</b>	<b>606</b>	<b>34%</b>	<b>387</b>	<b>146</b>	<b>38%</b>	<b>4,548</b>	<b>1,642</b>	<b>36%</b>

\* Had endorsement letter from local bar president.

locations? Responses are separated according to whether the attorney's name was obtained from a sample of state court cases, a sample of federal court cases, or both.

The most important items to *all* attorneys when considering choice of forum are the overall competence of the judiciary and the non-residence status of the clients. To these factors, attorneys who practice before state courts added familiarity with court operations.

### B. *Factors: Question Clusters*

The item-by-item analysis presented in the section above is useful for obtaining an overview of the considerations important to forum choice. However, the individual questions on the survey are not unrelated to each other. Indeed, individual questions were arranged by subject matter in the questionnaire because the separate questions were intended to form an index of the broader concepts of convenience, court procedures, judges, awards/costs, and client characteristics. The next step in the analysis, then, is to determine how well the a priori clustering of questions worked out empirically, and to determine how well the clusters formed empirically from responses of attorneys selected from state court cases match those of attorneys from the federal sample.

Principal components analysis was used to cluster the questionnaire responses.<sup>19</sup> The 28 questions relating to reasons for forum selection and client characteristics (Questions 2 through 24, and 28 through 32) were reduced to nine separate clusters of questions. These are reported now as subcategories of five broader concepts in the debate over diversity jurisdiction: local bias, quality of courts, case outcomes, convenience, and opponent considerations.

#### 1. Local Bias

##### Client characteristics

- 28. Client non-resident of state
- 29. Opponent non-resident of state
- 30. Client non-resident of United States
- 31. Client is corporation
- 32. Opponent is a corporation

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<sup>19</sup> See, generally, RUMMEL, *APPLIED FACTOR ANALYSES* (1970); KIM & MUELLER, *INTRODUCTION TO FACTOR ANALYSIS* (1978).

## 2. Comparative Quality of State and Federal Courts

### a. Quality of Judges

16. Overall competence of the judiciary
17. Judges more familiar with substantive law
18. Quality of judges
19. Judges are less (more) sympathetic to local litigants

### b. Court Procedures

9. Court discovery rules favor client
10. Court rules for summary judgment favor client
11. Court evidentiary rules favor client
12. Court precedents favor client

### c. Jury Procedures

13. Court jury rules
14. Voir dire procedures favor client
15. Jury pool drawn from larger/smaller area

### d. Case Processing Time

6. Greater judicial pretrial involvement.
7. A faster processing was preferred and available

## 3. Awards/Costs

20. Lower litigation cost for client
22. Increased likelihood of higher damage award/settlement
23. Increased likelihood of out-of-court settlement
24. Increased likelihood of favorable appellate decision<sup>20</sup>

## 4. Convenience

2. Familiarity with court operations
3. Convenience for self or client
5. Onerous pretrial requirements<sup>21</sup>

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<sup>20</sup> Although these questions are correlated with others in their respective clusters, the relationship is marginal and so these are excluded from the respective indices.

<sup>21</sup> *Id.*



## 5. Opponent Considerations

4. Inconvenience for opponent
8. A slower pace to decision was preferred and available
21. Higher litigation costs for opponent

For example, questions relating to the residence of clients and opponents were correlated, which means that an index of importance of client characteristics could be constructed. Table 3 shows that 63% for the attorneys in the state sample, 71% of the attorneys in the federal sample, and 59% of the attorneys in both samples consider the fact that their client is a non-resident of the state in which the case is filed to be a significant factor in their choice of forum. The percentages are similar if clients are non-residents of the United States--66% for attorneys in the state sample, 61% for attorneys in the federal sample, and 63% for the attorneys in both samples. The fact that the opposing party is a non-resident was also considered important by over half of the attorneys in both the state and federal samples. (Because a significant number of respondents, however, did consider corporate status separate from state residency, this variable is analyzed separately below). Respondents were separated according to the degree of importance attached to client characteristics: 1) attorneys who believed that client characteristics are very important or important to choice of forum, 2) attorneys who say that client characteristics are somewhat important, and 3) attorneys who contend that client characteristics are not important to forum selection.

Of the most important individual reasons for forum choice (Table 3 above), attorneys listed two items that had to do with the quality of the judges: the quality of the judges themselves and the overall competence of the judiciary. These two items are highly correlated so that an attorney who listed one as a reason for forum choice would be likely to list the second as well. Attorneys also rated judges' familiarity with substantive law in this same cluster. Responses to these three questions are so interrelated that they can be added together to form an index of judicial quality. Attorneys who considered judicial quality to be important or very important to the selection of a court were separated from attorneys who considered judicial quality to be either somewhat important or not important to forum choice. Similarly, court procedures, jury procedures,<sup>22</sup> case processing time, costs/ awards, convenience and opponent considerations indices were created.

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<sup>22</sup> Respondents predisposed toward state courts were likely to regard jury and costs together as one aspect of state courts, whereas respondents favoring federal courts considered importance of juries and costs as separate reasons for choosing federal courts.

Substantial agreement occurred between attorneys in the state and federal sample on all clusters, and match fairly well with the a priori categories listed in the questionnaire. The cluster of items relating to judges and client characteristics are identical to the manner in which these items were arranged on the questionnaire. The cluster of items relating to juries and court procedures are subsets of the questions listed under "court procedures" in the questionnaires. Both samples of attorneys perceived a cluster of items related to awards and costs. The difference is that the attorneys in the state sample linked these items to the jury questions, and attorneys in the federal sample linked the likelihood of out-of-court settlement and a more favorable appeal process to the quality of the judges. To distinguish the importance of each, two separate indices (judicial quality and costs/awards) were constructed.

All attorneys saw greater judicial pretrial involvement and faster court processing as fitting together. Attorneys from the state sample perceived onerous pretrial requirements (question 5) to be linked with this cluster, while attorneys in the federal sample did not. Attorneys from the state sample were also more likely to regard the speed of case processing as a separate item apart from other procedural considerations.

### C. *Summary*

Of the clusters of items important to forum selection, quality of judges, client characteristics, and convenience are perceived to be the most important. Factors relating to the opponent, court procedures, and jury procedures are considered unimportant by nearly half of all respondents. The label "somewhat important" characterizes the perceived importance of the cost/awards and case processing time indices.

## IV. WHICH FACTORS WORK TO THE ADVANTAGE OF STATE OR FEDERAL COURTS?

### A. *Client Characteristics: Local Bias*

#### 1. Resident Status

Historically, the protection of out-of-state litigants has been cited as the basic reason for retaining diversity jurisdiction in federal courts. This has been true since 1809, when Chief Justice John Marshall said that the Constitution

TABLE 3  
REASONS FOR FORUM SELECTION

	ATTORNEYS IDENTIFIED FROM STATE COURT CASES				ATTORNEYS IDENTIFIED FROM FEDERAL COURT CASES				ATTORNEYS IDENTIFIED FROM FEDERAL/STATE COURT CASES			
	Importance to Forum Selection				Importance to Forum Selection				Importance to Forum Selection			
	Very Important % (N)	Important % (N)	Somewhat Important % (N)	Not Important % (N)	Very Important % (N)	Important % (N)	Somewhat Important % (N)	Not Important % (N)	Very Important % (N)	Important % (N)	Somewhat Important % (N)	Not Important % (N)
<b>Convenience</b>												
1. My familiarity with court operations	40% (348)	34% (291)	14% (117)	12% (107)	21% (117)	29% (166)	24% (188)	26% (149)	25% (52)	29% (60)	17% (34)	29% (59)
2. Convenience for self or client	25% (213)	35% (299)	19% (166)	21% (185)	13% (74)	30% (169)	22% (125)	35% (202)	15% (30)	30% (62)	22% (45)	34% (69)
3. Inconvenience for opponent	5% (43)	12% (103)	25% (211)	58% (496)	7% (39)	12% (66)	21% (120)	60% (339)	7% (14)	5% (11)	22% (45)	66% (133)
<b>Court Procedures</b>												
6. Onerous pretrial requirements (e.g. from status calls)	19% (160)	30% (256)	26% (217)	25% (215)	9% (48)	20% (109)	25% (140)	46% (254)	15% (31)	22% (44)	20% (41)	43% (87)
6. Greater judicial pretrial involvement	12% (102)	30% (250)	30% (249)	29% (243)	17% (96)	34% (189)	27% (148)	22% (124)	15% (30)	29% (58)	24% (48)	33% (66)
7. A faster court process was preferred and available	25% (211)	32% (272)	19% (156)	25% (208)	22% (125)	30% (171)	15% (85)	33% (183)	18% (36)	27% (53)	17% (33)	39% (78)

TABLE 3 (Continued)  
REASONS FOR FORUM SELECTION

	ATTORNEYS IDENTIFIED FROM STATE COURT CASES				ATTORNEYS IDENTIFIED FROM FEDERAL COURT CASES				ATTORNEYS IDENTIFIED FROM FEDERAL/STATE COURT CASES			
	Very Important % (N)	Important % (N)	Somewhat Important % (N)	Not Important % (N)	Very Important % (N)	Important % (N)	Somewhat Important % (N)	Not Important % (N)	Very Important % (N)	Important % (N)	Somewhat Important % (N)	Not Important % (N)
8. A slower pace to decision was preferred and available	6% (48)	15% (127)	19% (154)	60% (498)	4% (22)	9% (50)	13% (74)	74% (408)	1% (2)	15% (30)	15% (29)	69% (138)
9. Court discovery rules favor client	10% (81)	26% (220)	19% (163)	45% (375)	11% (62)	21% (115)	16% (91%)	52% (266)	11% (21)	25% (50)	18% (36)	47% (94)
10. Court rules for summary judgment favor client	18% (151)	23% (194)	16% (134)	43% (366)	25% (136)	19% (105)	15% (85)	41% (230)	20% (230)	27% (54)	12% (24)	41% (82)
11. Court evidentiary rules favor client	12% (95)	24% (198)	18% (147)	47% (394)	14% (76)	16% (88)	17% (97)	53% (295)	13% (25)	25% (49)	11% (21)	52% (101)
12. Court precedents favor client	23% (192)	23% (193)	13% (107)	41% (348)	20% (105)	23% (126)	13% (72)	45% (252)	15% (29)	27% (54)	17% (34)	42% (83)
13. Court jury rules (size, non-unanimity) favor client	13% (106)	25% (211)	18% (152)	44% (364)	10% (56)	17% (92)	18% (98)	55% (304)	7% (13)	25% (49)	14% (27)	55% (110)
14. Voir dire procedures favor client	18% (147)	29% (244)	20% (170)	33% (273)	10% (57)	17% (91)	19% (103)	54% (297)	10% (20)	29% (57)	22% (43)	40% (79)
15. Jury pool drawn from larger area					13% (71)	19% (106)	25% (135)		7% (13)	30% (60)	17% (33)	47% (94)
Jury pool drawn from local area	14% (117)	30% (252)	23% (190)	33% (276)								

TABLE 3 (Continued)  
REASONS FOR FORUM SELECTION

	ATTORNEYS IDENTIFIED FROM STATE COURT CASES						ATTORNEYS IDENTIFIED FROM FEDERAL COURT CASES						ATTORNEYS IDENTIFIED FROM FEDERAL/STATE COURT CASES					
	Importance to Forum Selection			Importance to Forum Selection			Importance to Forum Selection			Importance to Forum Selection			Importance to Forum Selection			Importance to Forum Selection		
	Very Important % (N)	Somewhat Important % (N)	Not Important % (N)	Very Important % (N)	Somewhat Important % (N)	Not Important % (N)	Very Important % (N)	Somewhat Important % (N)	Not Important % (N)	Very Important % (N)	Somewhat Important % (N)	Not Important % (N)	Very Important % (N)	Somewhat Important % (N)	Not Important % (N)	Very Important % (N)	Somewhat Important % (N)	Not Important % (N)
<b>Judges</b>																		
16. Overall competence of the judiciary	29% (247)	36% (303)	18% (152)	18% (152)	18% (152)	18% (152)	45% (263)	34% (192)	12% (68)	9% (50)	23% (46)	43% (84)	14% (27)	20% (40)	23% (46)	43% (84)	14% (27)	20% (40)
17. Judges are more familiar with substantive law in this type of case	23% (193)	37% (316)	19% (165)	19% (165)	21% (177)	21% (177)	32% (180)	28% (155)	15% (84)	25% (137)	19% (38)	32% (62)	20% (39)	29% (58)	19% (38)	32% (62)	20% (39)	29% (58)
18. Quality of judges	28% (240)	36% (303)	18% (148)	18% (148)	18% (150)	18% (150)	44% (248)	35% (193)	10% (57)	11% (62)	25% (49)	41% (79)	13% (26)	21% (40)	25% (49)	41% (79)	13% (26)	21% (40)
19. Judges are less sympathetic to local litigants							25% (135)	19% (101)	17% (91)	40% (220)	11% (21)	20% (39)	18% (34)	52% (100)	11% (21)	20% (39)	18% (34)	52% (100)
Judges are more sympathetic to local litigant	13% (112)	25% (213)	20% (171)	20% (171)	41% (347)	41% (347)												
<b>Awards/Costs</b>																		
20. Lower litigation costs for client	18% (164)	35% (295)	23% (193)	23% (193)	25% (210)	25% (210)	11% (69)	23% (124)	23% (125)	44% (244)	16% (32)	22% (43)	17% (33)	45% (87)	16% (32)	22% (43)	17% (33)	45% (87)
21. Higher litigation costs for client	4% (30)	11% (88)	22% (183)	22% (183)	64% (540)	64% (540)	4% (23)	10% (57)	16% (88)	69% (378)	5% (10)	10% (19)	11% (22)	74% (144)	5% (10)	10% (19)	11% (22)	74% (144)
22. Increased likelihood of higher damage award/settlement	24% (202)	33% (279)	15% (125)	15% (125)	28% (230)	28% (230)	17% (94)	23% (124)	15% (80)	46% (249)	20% (38)	30% (58)	16% (30)	34% (66)	20% (38)	30% (58)	16% (30)	34% (66)

TABLE 3 (Continued)  
REASONS FOR FORUM SELECTION

	ATTORNEYS IDENTIFIED FROM STATE COURT CASES					ATTORNEYS IDENTIFIED FROM FEDERAL COURT CASES					ATTORNEYS IDENTIFIED FROM FEDERAL/STATE COURT CASES				
	Importance to Forum Selection					Importance to Forum Selection					Importance to Forum Selection				
	Very Important % (N)	Important % (N)	Somewhat Important % (N)	Not Important % (N)		Very Important % (N)	Important % (N)	Somewhat Important % (N)	Not Important % (N)		Very Important % (N)	Important % (N)	Somewhat Important % (N)	Not Important % (N)	
23. Increased likelihood of out-of-court settlement	17% (144)	39% (328)	17% (145)	27% (226)		16% (90)	34% (184)	20% (110)	30% (164)		14% (27)	37% (71)	17% (33)	33% (63)	
24. Increased likelihood of a favorable appellate decision (if necessary)	13% (107)	31% (263)	22% (178)	35% (288)		18% (96)	29% (169)	17% (94)	36% (186)		13% (25)	26% (51)	20% (39)	40% (78)	
<b>Client Characteristics</b>															
28. Client non-resident of state	27% (223)	36% (297)	22% (178)	16% (130)		38% (213)	33% (182)	17% (93)	12% (68)		26% (51)	33% (66)	22% (43)	20% (39)	
29. Opponent non-resident of state	21% (171)	39% (310)	26% (206)	16% (130)		19% (104)	34% (187)	25% (137)	22% (122)		15% (29)	33% (64)	31% (61)	21% (40)	
30. Client is a non-resident of United States	28% (222)	38% (308)	17% (138)	17% (140)		33% (177)	28% (152)	16% (86)	23% (126)		28% (63)	35% (65)	15% (29)	22% (41)	
31. Client is a corporation	9% (75)	28% (224)	25% (198)	39% (312)		16% (87)	25% (137)	17% (96)	42% (231)		10% (18)	27% (51)	27% (50)	37% (70)	
32. Opponent is a corporation	8% (65)	28% (219)	27% (212)	38% (300)		7% (35)	22% (117)	23% (124)	48% (259)		6% (11)	24% (45)	30% (58)	40% (77)	

Note: Percentages may not add to 100% because of rounding.

"entertains apprehensions" that local courts are biased in favor of local citizens.<sup>23</sup> The traditional and most often cited explanation of the purpose of diversity jurisdiction is to protect outsiders from state court discrimination.<sup>24</sup> A major study of federal jurisdiction undertaken by the American Law Institute at the request of Chief Justice Earl Warren concluded that diversity jurisdiction could be retained only if prejudice against out-of-state citizens continued to be a factor in litigation.<sup>25</sup>

Opponents of diversity jurisdiction argue that bias against out-of-state citizens is no longer important.<sup>26</sup> Professor Maurice Rosenberg of Columbia University's School of Law contends that many ". . . hard working judges and thoughtful academics believe those fears of hometown favoritism are not really a problem today."<sup>27</sup>

The Federal Courts Study Committee, appointed by Chief Justice Rehnquist, recommended that diversity jurisdiction be limited to cases involving multi-state litigation, interpleaders, or aliens.<sup>28</sup> Although the Committee acknowledged that local bias "may be a problem in some jurisdictions," it was not a "compelling justification" for retaining diversity jurisdiction in federal

<sup>23</sup> Chief Justice Marshall stated:

However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

*Bank of the United States v. Deveau*, 9 U.S. (5 Cranch) 61, 87 (1809).

<sup>24</sup> C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* §3601 at 338 (1984). As far back as 1911, critics of diversity jurisdiction have asserted bias against out-of-state citizens, Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L. Q. 499 (1928). See also *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938) ("Diversity of citizenship jurisdiction was conferred in order to prevent apprehensions of discrimination in state courts against those not citizens of the State."); *Guaranty Trust Co. v. York*, 326 U.S. 99, 111 (1945) ("Diversity jurisdiction is founded on assurances to non-resident litigants of courts free from susceptibility to potential local bias."); *Hearings before the Subcommittee on Improvements in Judicial Machinery*, 95th Cong., 2d Sess. 192 (1978) (statement of John R. Gibson, President of the Missouri Bar Association in which he expressed the fear that elected judges would favor local residents).

<sup>25</sup> A. L. I., *supra* note 5, at 1.

<sup>26</sup> See, e.g., FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 146 (1973); testimony of Charles Alan Wright quoted in Chapin, *supra* note 2, at 30.

<sup>27</sup> Coyle, *Time to Kill Diversity Jurisdiction*, 10 Nat'l L. J., Feb. 29, 1988 at 1, 40.

<sup>28</sup> REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 38, (1990). The Committee was authorized by the 100th Congress as part of the 1988 Judicial Improvements and Access to Justice Act, PUB. L. 100-702, Title 1.

courts.<sup>29</sup> Advocates of diversity jurisdiction agree that local bias is less of a problem today, but ". . . anyone who believes there is no local chauvinism in the state courts is hiding his head somewhere."<sup>30</sup>

Surveys designed to determine whether fear of prejudice was a major factor in lawyers' choice of forum have come to conflicting conclusions. Sixty percent of 163 Virginia lawyers cited potential prejudice as a reason for their choice of federal court, and 40 percent of 74 attorneys representing out-of state clients in federal cases found fear of local bias a consideration in choice of forum.<sup>31</sup> On the other hand, only six percent of the 82 Wisconsin lawyers cited "local bias against non-resident client" as a factor in their choice of forum.<sup>32</sup> However, given the methodological shortcomings of these studies and their limitation to one geographic area, it is not possible to generalize such findings about the importance of local bias. In her survey of attorneys from four federal districts, Kristin Bumiller found that fear of bias against out-of state clients influenced the decision to use federal courts in Milwaukee, Wisconsin and in Columbia, South Carolina. Equally striking, was the relative *unimportance* of perceived local bias in Los Angeles and Philadelphia.<sup>33</sup>

How are the specific questions of client characteristics related to forum advantage? Table 4 presents data on how perceived importance of client residence status affects forum choice.<sup>34</sup> Over 60% of all respondents, and 72% of the respondents in the federal sample, consider the fact that their client is a not a resident of the state in which the suit is filed to be a relevant factor. With a non-resident as a client, the overwhelming proportion of these attorneys (85% in the state sample and 96% in the federal sample) prefer to file in federal courts. If their opponent is from out of state, most attorneys (70% of the attorneys in the state sample and 63% in the federal sample) who consider resident status important prefer to file in state courts.

Interestingly enough, of the 14% of attorneys who dispute the importance of residence status, 80% or more perceive no difference between state and federal

<sup>29</sup> Kramer, *Few Reasons Exist for Keeping Diversity* 13 Nat'l L. J., October 1, 1990 at 12.

<sup>30</sup> Brieant, *supra* note 6, at 21.

<sup>31</sup> Note, *supra*, note 3, at 179; Goldman and Marks, *supra* note 3, at 98.

<sup>32</sup> Summers, *supra* note 3, at 937.

<sup>33</sup> Bumiller, *supra* note 3, at 760.

<sup>34</sup> The chi square ( $X^2$ ) test of significance indicates the probability that a relationship, in this case between resident status and forum advantage of this magnitude could have occurred by chance. The probability that a relationship of this magnitude could have occurred by chance is measured as five times in a hundred ( $p = .05$ ), one time in one hundred ( $p = .01$ ) or one time in a thousand ( $p = .001$ ), BLALOCK, SOCIAL STATISTICS (1960).



courts. One attorney from the Dallas federal sample commented, "State court judges are very biased against nonlocal attorneys and parties, particularly in the smaller rural counties." Another echoed the same sentiment, "I remove qualified cases to federal court when my client is sued in a smaller rural county to avoid being 'home-towned' by the judge and/or jury." These comments support Bumiller's observation that attorneys from rural areas are more likely to ". . . prefer federal courts to protect their clients from perceived local bias and poorer quality of judges."<sup>35</sup>

These opinions indicate that the state residence of the client may be less important than the rural or urban location *within* the state. This suggestion supports Robert Dames contention that Rosenberg's assurance of no hometown favoritism may be true for metropolitan areas, but "this is not the reality for most attorneys in most parts of the country."<sup>36</sup> Because this research did not ask a question about bias among rural and urban areas within states, this question cannot be resolved here. Future research must distinguish between perceptions of bias against non-state residents and bias against residents from rural or urban areas within states. If lawyers fear *within*-state bias, as much as bias against out-of-state residents, diversity jurisdiction is not a remedy.

## 2. Corporate Status

Those favoring the abolition or curtailment of federal diversity jurisdiction argue that bias against out-of-state parties is unlikely in modern times and whatever biases exist against out-of-state parties result from prejudices, such as those against large corporations, that have nothing to do with a litigant's citizenship.<sup>37</sup> Bumiller was able to isolate anti-corporate sentiment from local favoritism as separate influences on choice of forum and concluded that preference for the standards of federal court justice, rather than fear of local bias, was the motivating factor for clients.<sup>38</sup> Table 3 shows that fewer attorneys considered the fact that their client was a corporation in their calculus of forum choice. One Charleston attorney commented that ". . .when representing a local individual against an out-of-state corporation the judge presiding, who is an elected official, has a natural, inherent bias for the local voter." Only 37% of the attorneys in the state sample, 41% of the attorneys in the federal sample, and

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<sup>35</sup> Bumiller, *supra* note 3 at 752.

<sup>36</sup> Dames, *Diversity Is for Litigants, Not Courts or Judges*, Nat'l L. J., April 4, 1988 at 12.

<sup>37</sup> FRIENDLY, *supra* note 25, at 147-48; Rubin, *An Idea Whose Time Has Gone*, ABA J., (June 1984), at 16-17.

<sup>38</sup> Bumiller, *supra* note 3 at 773.

TABLE 4  
RESIDENT STATUS AND FORUM ADVANTAGE

Forum Advantage	Attorneys Identified From State Court Cases				Attorneys Identified From Federal Court Cases				Attorneys Identified From Federal/State Court Cases			
	Forum Advantage				Forum Advantage				Forum Advantage			
	State Court	Federal Court	No Difference	Total Number	State Court	Federal Court	No Difference	Total Number	State Court	Federal Court	No Difference	Total Number
Client: Non-Resident of State	% (N)	% (N)	% (N)		% (N)	% (N)	% (N)		% (N)	% (N)	% (N)	
Important	8% (41)	85% (430)	7% (36)	507	2% (9)	96% (371)	2% (8)	388	1% (1)	95% (110)	4% (5)	116
Somewhat Important	12% (20)	59% (101)	30% (52)	173	6% (5)	71% (82)	23% (20)	87	2% (1)	69% (28)	29% (12)	42
Not Important	11% (13)	8% (9)	81% (96)	118	6% (4)	9% (6)	80% (57)	67	3% (1)	0% (0)	97% (36)	37
Total Number	74	540	184	798	18	439	85	542	3	139	53	195
	$\chi^2 = .323$ p < .001				$\chi^2 = .312.9$ p < .001				$\chi^2 = .322$ p < .001			
Opponent: Non-Resident of State												
Important	70% (328)	25% (118)	6% (26)	472	63% (178)	30% (85)	7% (19)	282	75% (67)	16% (14)	9% (8)	89
Somewhat Important	67% (130)	13% (26)	20% (39)	195	61% (82)	19% (25)	20% (27)	134	66% (40)	12% (7)	23% (14)	61
Not Important	19% (23)	6% (7)	75% (90)	120	16% (18)	11% (12)	74% (84)	114	24% (9)	3% (1)	74% (28)	38
Total Number	481	151	155	787	278	122	130	530	116	22	50	188
	$\chi^2 = 298$ p < .01				$\chi^2 = 202$ p < .001				$\chi^2 = 247$ p < .001			

TABLE 5  
CORPORATE STATUS AND FORUM ADVANTAGE

	Attorneys Identified From State Court Cases				Attorneys Identified From Federal Court Cases				Attorneys Identified From Federal/State Court Cases							
	Forum Advantage				Forum Advantage				Forum Advantage							
	State Court	Federal Court	No Difference	Total Number	State Court	Federal Court	No Difference	Total Number	State Court	Federal Court	No Difference	Total Number				
Client is a Corporation	% (N)	% (N)	% (N)		% (N)	% (N)	% (N)		% (N)	% (N)	% (N)					
Important	20% (59)	58% (170)	22% (64)	293	6% (13)	78% (171)	16% (35)	219	7% (5)	64% (44)	29% (20)	69				
Somewhat Important	23% (43)	26% (49)	52% (98)	190	14% (13)	40% (37)	46% (43)	93	4% (2)	44% (64%)	52% (25)	48				
Not Important	5% (14)	2% (6)	93% (269)	289	1% (3)	4% (9)	95% (207)	219	2% (1)	3% (2)	95% (62)	182				
Total Number	116	225	431	772	29	217	285	531	8	67	107	182				
	$X^2 = 323$				$X^2 = 293$				$X^2 = 245$				$p < .001$			
Opponent is a corporation																
Important	61% (170)	17% (48)	21% (59)	277	48% (71)	34% (51)	18% (27)	149	50% (27)	24% (13)	26% (14)	54				
Somewhat Important	46% (93)	11% (22)	43% (88)	203	42% (49)	9% (11)	49% (57)	117	39% (22)	11% (6)	51% (29)	57				
Not Important	5% (14)	2% (6)	93% (258)	278	5% (13)	3% (8)	91% (222)	243	6% (4)	3% (2)	91% (64)	72				
Total Number	277	76	405	758	133	70	306	509	53	21	107	181				
	$X^2 = 297$				$X^2 = 230$				$X^2 = 240$				$p < .001$			

37% of the attorneys in both samples rated the corporate status of their client as an important or very important consideration in deciding where to file the court cases. An even smaller percentage of attorneys (36%, 29%, and 30% respectively) considered the corporate status of their opponent as an important consideration in the choice of forum.

Attorneys who regard corporate status an important consideration in forum selection favor federal courts if their client is a corporation and state courts if their opponent is a corporation. Attorneys who do not regard corporate status as an important consideration see no difference between state courts and federal courts. This pattern, displayed in Table 5, is similar to that evidenced in resident status (Table 4) but is held by fewer attorneys.

Table 6 compares attorney perception of the comparative importance of resident and corporate status by sample.

TABLE 6

## Relative Importance of Residency Status and Corporate Status

	State Sample	Federal Sample	Federal/State Sample	Total
Both residency status and Corporate status important	31% (254)	38% (209)	30% (56)	34% (519)
Residency status important Corporate status not important	31% (253)	33% (178)	28% (52)	31% (483)
Corporate status important Residency status not important	5% (43)	3% (14)	6% (12)	4% (69)
Neither residency status nor Corporate status important	32% (257)	27% (146)	36% (67)	31% (470)
Total	807	547	187	1,541

The conclusion to be drawn is that a third of the attorneys take both residency status and corporate status into account when choosing a forum, another third say neither factor is important, and the remaining group considers state residency more important than corporate status. In other words, 65% of the respondents view residency status and corporate status together as either important or not important to forum choice. Of the remaining 35% of the attorneys, 31% perceive residency status as important, and corporate status less important. Only 4% of the respondents considered corporate status of clients

important, but residency status not important. Said another way, only 31% of the attorneys in this sample were not concerned about bias based on characteristics of their clients. Twice as many attorneys feared bias based on non-state residence status as feared bias based upon corporate status of their client.

Client characteristics are strongly associated with forum advantage. Of the respondents who considered both state residency and corporate status important to forum selection, half of the respondents to the state survey and three quarters of the respondents to the federal survey considered these client characteristics to be a reason to file in federal court. Of the respondents who considered state residency, but not corporate status to be important to forum selection, 65% of the attorneys in the state sample and 79% of the attorneys in federal sample were predisposed to favor federal courts. Because client characteristics work to the advantage of federal courts, if the client is an out-of-state resident or a corporation, and to state courts, if the opponent is an out-of-state resident or corporation, these two items will be reported separately and not as part of a client characteristics index in the remainder of this report.

## B. *Comparative Quality of State and Federal Courts*

Some commentators contend that litigants and their attorneys prefer to file in federal courts when a choice is available because the quality of justice is better in federal courts.<sup>39</sup> Others argue that state courts are on par with federal courts.<sup>40</sup> Moore and Weckstein contend that the higher quality of justice in federal courts is now the "common sense" contemporary justification for diversity jurisdiction.<sup>41</sup> This is an argument that is difficult to confirm or refute because of the ambiguity inherent in the terms "quality of justices" or "quality of courts". This study will use the four operational indicators to measure quality of justice: quality of judges, differences in court procedures, attitudes towards juries, and speed of case processing.

### 1. Quality of Judges

Bumiller found preference for perceived higher quality of federal judges an

<sup>39</sup> See, e.g., Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 328-29 (1977); Frank, *The Case for Diversity*, 16 HARV. J. LEGIS. 403, 410 (1979); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1120 (1977); Wright, Miller & Cooper, *supra* note 23, at 359.

<sup>40</sup> Solimanie & Walker, *Constitutional Litigation in Federal and States Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983); Feinberg, *Is Diversity Jurisdiction an Idea Whose Time Has Passed?*, N.Y. ST. B.J. (July, 1989), at 14,18.

<sup>41</sup> Moore & Weckstein, *supra* note 2.

important factor in choice of forum in all districts, but especially in the two more rural districts.<sup>42</sup>

Table 7 displays the forum advantage according to the questions that make up the quality index. Over half of the attorneys identified from state cases (55%) and 79% of the attorneys identified from federal cases regarded the overall competence of the judiciary and the quality of the judges as reasons for choosing federal court. One Charleston attorney who filed in federal courts said, "In state court, there was little chance of getting a judge capable of understanding the issue or willing to work hard enough to do so. The federal judges are simply brighter and 'more conscientious.'" On the other hand, a Cleveland attorney noted that ". . .the biggest drawback to Federal [courts] is the God complex of a number of judges resulting in arbitrary dictates."

Thirty-eight percent of the respondents in the state sample considered state judges to be more familiar with the substantive law in the type of case they filed and 57 percent of the respondents in the federal sample considered federal judges more familiar with substantive law. Nearly half of all respondents said there was no difference between state and federal judges in terms of sympathy to local litigants. Half of the attorneys in the state sample and 55% in both samples perceived no difference in sympathy to local litigants, but a little more than half of the attorneys in the federal sample believe that federal judges are less sympathetic to local litigants.

Although this question is related with the others in the quality of judge index, the correlation is marginal. That fact, in conjunction with the fact that the questions were asked in different ways to attorneys in the state and federal samples ("more sympathetic" versus "less sympathetic" respectively) led to the decision to exclude this item from the index. Three-quarters of the judges in the state sample who considered judges' sympathy to local litigants an important variable in forum selection favored state courts. Similarly, 83% of the attorneys in the federal sample who considered lack of local sympathy important would choose federal courts. It is interesting that perception of sympathy toward local clients correlated more closely with quality of judges rather than with fear of local bias as measured by the client characteristics index.

## 2. Court Procedures

Rules of procedure in many states are now similar to the federal rules.<sup>43</sup>

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<sup>42</sup> Bumiller, *supra* note 3, at 768.

<sup>43</sup> Oakley & Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1428-1429 (1986) shows that 23 states have adopted the federal

**TABLE 7**  
**FORUM ADVANTAGE: COMPARATIVE QUALITY OF FEDERAL AND STATE COURTS**

	Attorneys Identified From State Court Cases				Attorneys Identified From Federal Court Cases				Attorneys Identified From Federal/State Court Cases			
	Forum Advantage				Forum Advantage				Forum Advantage			
	State	Federal	No Difference		State	Federal	No Difference		State	Federal	No Difference	
% (N)	% (N)	% (N)	% (N)	% (N)	% (N)	% (N)	% (N)	% (N)	% (N)	% (N)	% (N)	% (N)
<b>Courts and Judges</b>												
Overall competence of judiciary	12% (98)	55% (452)	33% (275)		4% (24)	79% (447)	17% (97)		8% (16)	57% (112)	34% (66)	
Judges more familiar with substantive law in this type of case	38% (311)	27% (225)	35% (288)		9% (49)	57% (318)	35% (193)		19% (37)	41% (79)	40% (77)	
Quality of judges	12% (102)	52% (429)	35% (291)		5% (28)	78% (436)	17% (98)		9% (18)	55% (107)	36% (70)	
Judges are less sympathetic to local litigants					7% (39)	52% (286)	41% (221)		20% (38)	25% (47)	55% (106)	
Judges are more sympathetic to local litigants	44% (357)	6% (48)	51% (413)									

An examination of Table 8, which displays forum advantage according to the individual questions that make up the index, confirms the conclusion that regardless of sample, attorneys do not believe that there is much difference between procedures in state and federal courts.

Some attorneys prefer the familiarity of federal procedure to filing in a county where they do not regularly practice because "federal courts all speak the same language." A Cleveland lawyer noted that "Federal and Ohio Rules are almost identical, but Federal court follows them." On the other hand, a Dallas lawyer stated that "I view the Texas Rules of Civil Procedure superior to the Federal Rules of Civil Procedure." Another Dallas attorney commented "In state court you don't have to file a separate brief with every order and you can amend pleadings up to seven days before trial without leave of court; response is better in discovery suits."

### 3. Jury Procedures

Those who favor the abolition or curtailment of federal diversity jurisdiction point to the fact that federal and state juries are generally drawn from the same jury pools. Opponents argue that the jury pools in federal court are drawn from a larger area. Under the Seventh Amendment, the right to a trial by jury in federal courts includes a requirement of unanimity, whereas a unanimous verdict in civil cases is required in only 20 states.<sup>44</sup> Most respondents did not base their decision on jury rules, such as jury size or unanimity. A Cincinnati attorney noted that the "[the] requirement for [a] unanimous verdict would almost always make [the] choice of [a] federal court by plaintiff unwanted." The majority of attorneys did not regard jury rules as important in forum selection. Table 9, however, shows attorneys in all three samples preferred voir dire procedures in state courts. An attorney from the state samples in Cleveland noted that "voir dire participation is significantly better in state court." Most attorneys in the state sample either saw the narrower jury pool as making no difference or an advantage to state courts. Attorneys in the federal sample saw it as an advantage that federal jury pools are drawn from a larger area. A Roanoke attorney in the federal sample cited the larger jury pool and lower jury verdicts for defendants' cases as reasons for preferring federal courts. A Cleveland attorney commented that the plaintiff filed in a "local, liberal area" and "we moved him to Toledo [for a] more conservative jury."

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rules of civil procedure in some form. Thirty states have also adopted some version of the federal rules of evidence; S. Steinglass, SECTION 1983 LITIGATION IN STATE COURTS (Sec. 8.6, at 8-15 & n. 55 (1991); See also Rowe, *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms* 92 HARV. L. REV. 963, 984 (1979).

<sup>44</sup> Conference of State Court Administrators and National Center for State Courts, *State Court Organization 1987*, Table 25, at 329 (1988).



**TABLE 8**  
**FORUM ADVANTAGE: COURT PROCEDURES**

	Attorneys Identified From State Court Cases			Attorneys Identified From Federal Court Cases			Attorneys Identified From Federal/State Court Cases		
	Forum Advantage			Forum Advantage			Forum Advantage		
	State %	Federal %	No Difference %	State %	Federal %	No Difference %	State %	Federal %	No Difference %
<b>Court Procedures</b>									
Court discovery rules favor client	23% (184)	15% (119)	63% (512)	7% (36)	31% (172)	62% (342)	13% (26)	28% (56)	59% (116)
Court rules for summary judgment favor client	21% (175)	28% (224)	51% (417)	6% (33)	47% (261)	47% (261)	13% (25)	38% (76)	49% (97)
Court evidentiary rules favor client	19% (156)	15% (123)	66% (539)	6% (30)	28% (153)	67% (366)	10% (20)	25% (50)	65% (127)
Court precedents favor client	25% (199)	12% (94)	64% (515)	7% (39)	31% (170)	62% (342)	15% (28)	20% (38)	66% (127)

TABLE 9  
FORUM ADVANTAGE: JURY PROCEDURES

	Attorneys Identified From State Court Cases				Attorneys Identified From Federal Court Cases				Attorneys Identified From Federal/State Court Cases			
	Forum Advantage				Forum Advantage				Forum Advantage			
	State %	Federal %	Difference %	No (N)	State %	Federal %	Difference %	No (N)	State %	Federal %	Difference %	No (N)
<b>Jury Procedures</b>												
Court jury rules (size, non-unanimity) favor client	35% (284)	11% (91)	54% (433)		24% (128)	19% (100)	58% (308)		25% (47)	12% (23)	63% (120)	
Voir dire procedures favor client	57% (460)	6% (62)	37% (296)		50% (272)	8% (45)	42% (229)		51% (95)	10% (20)	39% (76)	
Jury pool drawn from local area	42% (343)	14% (110)	44% (359)						23% (45)	33% (64)	43% (83)	
Jury pool drawn from larger area					7% (36)	57% (310)	36% (195)					

#### 4. Case Processing Time

Eichner contends that lawyers should be able to choose the court system that can make the decisions more quickly.<sup>45</sup> Opponents of diversity jurisdiction observe that forum shopping also allows defendants to choose the slowest system, rather than the one that would resolve the dispute most expeditiously.

Using an experimental design to test the reactions of 977 (of 3,240) attorneys to several factors that might influence choice of forum, Perlstein found that court congestion was the only variable that significantly influenced the choice of forum.<sup>46</sup> Bumiller also found avoidance of delay a critical variable in choice of forum. Attorneys in her Philadelphia and Los Angeles samples ranked "faster disposition" and "court calendar more current" as the two most critical factors in choosing federal courts. These two factors were less important to attorneys in the Milwaukee, Wisconsin and Columbia, South Carolina samples.<sup>47</sup> Fifty eight percent of attorneys in Miller's sample expressed a concern for pace and cost of litigation.<sup>48</sup>

Table 10 shows that 43% of the attorneys in the state sample preferred state courts because they desired a faster process and 50% of the attorneys in the federal sample preferred federal courts for the same reason.<sup>49</sup> In other words, with regard to speed of case processing, attorneys who practice before state courts tend to view state courts as faster and attorneys who tend to litigate in federal courts perceive federal courts as faster. Table 13 does show that about a third of the respondents in all samples did choose state courts in order to obtain a *slower* pace of decision. Of the lawyers who practice before both courts, 41% see a federal court advantage, 27% a state court advantage, and 33% see no difference between the two. An attorney from the Tyler sample said, "I would never willingly file suit in federal court. The delays and paper mountains are absurd. You need a motion, cert. of conference and order to borrow a stapler." A Cincinnati attorney expressed the opinion that ". . .because of the volume of state court cases--state courts seem to handle them more efficiently." A Dallas

<sup>45</sup> Eichner, *Diversity Jurisdiction: An Idea Whose Time Has Not Gone*, VA. B. A. J. (Spring 1985), at 4.

<sup>46</sup> Perlstein, *supra* note 3, at 321.

<sup>47</sup> Bumiller, *supra* note 3, at 762.

<sup>48</sup> Miller, *supra* note 3, at 30.

<sup>49</sup> This finding is consistent with an earlier nationwide examination of forum choice in federal question litigation involving students, which found that attorneys in both federal and state samples gave delay as their reason for forum choice. Marvell, *supra* note 18. Eleven of 34 attorneys favoring federal courts and 48 of 193 attorneys favoring state courts "If there were no time or jurisdiction problems and you had a choice. . .", cited quicker disposition as the reason for forum choice. Cameron, *supra* note 3, at 576.

attorney opined that the slower pace in federal courts was a result of their becoming". . . too backed up with S & L removals and priority criminal cases." On the other hand, a Raleigh attorney stated that ". . . in federal court, you can rest assured that you will have a trial date within a year and the judge will stay and try your case even if you are the last case on the docket."

A plurality of judges in the state sample and a majority of judges in the federal and state/federal samples said that greater judicial involvement in pretrial proceedings works to the advantage of federal courts.

### C. *Outcomes: Awards and Costs*

The individual item analysis presented in Table 11 shows that approximately half of the respondents saw no difference between state and federal courts as far as likelihood of higher damage awards, out-of-court settlements, or favorable appellate decisions. Attorneys in the state sample perceived litigation costs were lower in state courts, whereas attorneys in the federal samples saw no difference in costs. One Charleston lawyer noted that lower verdicts would be found in federal courts. A colleague from the state sample said there is a ". . . greater likelihood that plaintiff in a personal injury action will be viewed by court and jury as more deserving of a higher award." Another noted that if the claim is relatively small ". . . Federal Court does not make a lot of sense because pre-trial requirements create more work than is justified for the amount involved. Approximately a quarter of all respondents, regardless of sample, however, did consider higher litigation costs for the opponent as a reason to file in federal court (Table 13). Attorneys from the federal sample perceived federal courts as more likely to promote out-of-court settlements, whereas attorneys in the state sample saw no difference between the two court systems.<sup>50</sup>

### D. *Convenience*

Convenience as used here includes geographic proximity as well as a psychological feeling of comfort. Bumiller's research found that familiarity with judges and familiarity with rules of procedure were most relevant to forum choice.<sup>51</sup>

When examining the individual items in Table 12, it appears that most attorneys perceived no difference between state and federal courts in terms of

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<sup>50</sup> Bumiller, *supra* note 3, at 755 included a question on "larger awards" in her survey, but did not ask about likelihood of out-of-court settlements or costs of litigation.

<sup>51</sup> Bumiller, *supra* note 3, at 770-72.

**TABLE 10**  
**FORUM ADVANTAGE: CASE PROCESSING TIME**

Case Processing Time	Attorneys Identified From State Court Cases			Attorneys Identified From Federal Court Cases			Attorneys Identified From Federal/State Court Cases		
	Forum Advantage			Forum Advantage			Forum Advantage		
	State %	Federal %	No Difference %	State %	Federal %	No Difference %	State %	Federal %	No Difference %
Greater judicial pretrial involvement	29% (244)	42% (345)	29% (241)	13% (72)	62% (345)	25% (138)	16% (32)	50% (101)	34% (68)
A faster process was preferred and available	43% (355)	29% (243)	28% (235)	20% (112)	50% (278)	30% (170)	27% (53)	41% (81)	33% (65)

**TABLE 11  
FORUM ADVANTAGE: AWARDS AND COSTS**

	Attorneys Identified From State Court Cases			Attorneys Identified From Federal Court Cases			Attorneys Identified From Federal/State Court Cases		
	Forum Advantage			Forum Advantage			Forum Advantage		
	State %	Federal %	No Difference %	State %	Federal %	No Difference %	State %	Federal %	No Difference %
Awards and Cost	(N)	(N)	(N)	(N)	(N)	(N)	(N)	(N)	(N)
Lower litigation costs for client	55% (460)	6% (46)	39% (324)	31% (171)	17% (92)	53% (292)	37% (71)	12% (23)	50% (96)
Increased likelihood of higher damage award/ settlement	35% (284)	19% (153)	46% (379)	18% (95)	29% (157)	54% (292)	30% (59)	21% (41)	47% (92)
Increased likelihood of out-of-court settlement	25% (200)	27% (218)	49% (398)	5% (28)	51% (277)	44% (239)	11% (21)	38% (74)	50% (98)
Increased likelihood of favorable appellate decision (if necessary)	30% (240)	20% (161)	50% (396)	12% (62)	40% (218)	48% (259)	15% (28)	31% (59)	53% (102)

geographical convenience. Sixty percent of the attorneys in the state sample cited familiarity with court operations as a factor predisposing them to choose state courts. A Sacramento attorney summarized, "State courts are more 'caring' (closer to litigants and attorneys); federal courts tend to be more aloof, distant." An attorney found the metal detection examination to enter the Cleveland federal court "humiliating." One Charleston attorney had a contrary view; "Federal courts are located on interstate highways--state courts are located in places which require travel on two-lane roads over mountains at considerable risk of being squashed by overloaded coal trucks or swallowed up by man-eating potholes."

Although all three items on Table 12 clustered in terms of importance to forum choice, the different implications for forum advantage make it advisable to henceforth consider familiarity with court operations and onerous pretrial requirements as separate indicators of forum choice. State courts were preferred by attorneys who chose to avoid the onerous pretrial requirements of federal courts. A Dallas attorney recommended that federal courts ". . . get rid of pretrial orders that punish the diligent and aid the lackadaisical."

#### E. *Opponent Considerations*

Questions that focused on the opponent, rather than the client, did not fit into the expected pattern. Most respondents agreed on the factors that are not important to the decision of whether to file in state or federal courts--a preference for a slower pace of litigation, a court location inconvenient to opponents, and higher litigation costs for opponents. These questions are related because they are *not* important to forum choice. Consideration of the opponent is not one of the factors that enters into the calculus of forum choice.

Table 13 shows that the vast majority of respondents said opponent considerations were unimportant to the forum selection decisions and did not confer an advantage to either state or federal courts.

TABLE 12  
FORUM ADVANTAGE: CONVENIENCE

	Attorneys Identified From State Court Cases			Attorneys Identified From Federal Court Cases			Attorneys Identified From Federal/State Court Cases					
	Forum Advantage			Forum Advantage			Forum Advantage					
	State	Federal	No Difference	State	Federal	No Difference	State	Federal	No Difference			
	%	(N)	%	(N)	%	(N)	%	(N)	%	(N)		
Familiarity/Convenience	60%	(516)	33%	(285)	45%	(280)	44%	(88)	11%	(23)	45%	(90)
Familiarity with court operations	6%	(55)	33%	(285)	21%	(118)	31%	(179)	45%	(280)	11%	(23)
Convenience for self or client	40%	(336)	56%	(477)	18%	(103)	19%	(110)	63%	(357)	16%	(33)
Onerous pretrial requirements	56%	(468)	25%	(213)	34%	(186)	25%	(134)	41%	(225)	17%	(34)
	19%	(156)	25%	(213)	34%	(186)	25%	(134)	41%	(225)	17%	(34)



**TABLE 13**  
**FORUM ADVANTAGE: OPPONENT CONSIDERATIONS**

	Attorneys Identified From State Court Cases			Attorneys Identified From Federal Court Cases			Attorneys Identified From Federal/State Court Cases		
	Forum Advantage			Forum Advantage			Forum Advantage		
	State	Federal	No Difference	State	Federal	No Difference	State	Federal	No Difference
<b>Opponents</b>	% (N)	% (N)	% (N)	% (N)	% (N)	% (N)	% (N)	% (N)	% (N)
Inconvenience for opponent	12% (101)	15% (123)	79% (603)	8% (46)	22% (124)	70% (388)	14% (27)	17% (83)	70% (137)
A slower pace to decision was preferred and available	36% (287)	17% (135)	47% (371)	32% (168)	18% (95)	51% (271)	33% (61)	20% (37)	48% (89)
Higher litigation costs for opponent	10% (80)	28% (226)	62% (493)	9% (46)	27% (148)	64% (349)	6% (12)	23% (44)	70% (135)

## F. *Summary*

In Part III of this report, quality of judges, client characteristics, and convenience were found to be the three factors most important to forum choice. In this part, the question of importance is related to relative advantage for either state courts or federal courts.

Attorneys who consider competency of the judiciary as a major consideration in the forum selection decision tend to favor federal courts. Conversely, attorneys who consider familiarity with court operations important prefer state courts. Because the familiarity of court operations was much more important to the selection decision than was convenience, familiarity alone will be used to measure forum choice in subsequent tables.

Although all client characteristics were rated important by a significant number of attorneys, importance had different implications for state and federal courts. If clients are out-of-state residents, attorneys prefer federal courts. If their opponents are out-of-state residents, attorneys favor state courts. A similar pattern exists for corporate status, but a smaller proportion of attorneys consider corporate status important to forum selection. For that reason, the client characteristics index will no longer be used in this paper. Instead, the item "client not a state resident" will be used to represent residency status, and the item "client is a corporation" will be used to represent corporate status.

Opponent considerations, court procedures, and jury procedures were regarded as unimportant factors by more than half of the attorneys. Furthermore, most respondents said that these factors did not favor either state courts or federal courts. Accordingly, these factors will be dropped from subsequent tables, with one exception. Many attorneys preferred voir dire procedures in state courts and so this item will remain in the analysis to come.

## V. FACTORS GOVERNING GENERAL FORUM CHOICE

### A. *Factors Important to Selection and Forum Choice*

Question 27 asks attorneys which court they generally choose when a choice is available. This question differs from the forum advantage question because it calls for a general preference for forum, not associated with any particular case. Overall, Table 14 shows that attorneys identified from the sample of state cases have a predisposition to select state courts when a choice of forum is available, and attorneys identified from the federal sample of cases usually choose federal courts. Of the attorneys in the state sample who rated

client characteristics important, 69% expressed a preference for state courts. Of the attorneys in the federal sample who rated client characteristics important, 61% expressed a preference for federal courts. Of attorneys who were experienced in both courts and considered resident status important, 54% favored federal courts. Of the attorneys who considered client characteristics unimportant to forum choice, 84% of the lawyers in the state sample, 60% of the lawyers in the federal sample, and 87% in both samples would usually select state courts.

With respect to corporate status, the findings presented in Table 15 are similar. Most attorneys who believe status is important favor state or federal courts depending upon which court they usually practice before. Table 16 shows the relationship between the importance of the quality of the judges and usual forum preference. Of the respondents who considered the quality of the judges an important consideration in their choice of forum, 67% of the judges in the state sample expressed a preference for state courts and 64% of the judges in the federal sample expressed a preference for federal courts. Attorneys who litigate in both fora were equally split. Of the respondents who did not consider the quality of the judges an important factor, attorneys in the state sample, federal sample, and to a lesser extent those in both, expressed a preference for state courts, (80%, 62%, and 55%, respectively).

With regard to court procedures, all attorneys (in each sample) who considered "onerous pretrial requirements" important to their choice of forum, preferred state courts. Table 17 shows that attorneys not concerned about pretrial requirements favored the courts before which they usually practice. Table 18 shows the relationship between the importance of voir dire and general preference for forum. Respondents in both the state and federal samples who regard voir dire as an important factor in choice of forum preferred state courts. One Cleveland attorney said that the state courts' "Jury compositions more closely represents the socio-economic status of clients." Again, of the attorneys who did not consider voir dire important to forum choice, 71% of the attorneys in the state sample preferred state courts, and 60% of the attorneys in the federal sample preferred federal courts.

CHOICE OF FORUM

TABLE 14  
RESIDENT STATUS AND FORUM CHOICE

	State Sample						Federal Sample						Federal/State Sample					
	Would Usually Select						Would Usually Select						Would Usually Select					
	State Court	Federal Court	No Difference	Total Number	State Court	Federal Court	No Difference	Total Number	State Court	Federal Court	No Difference	Total Number	State Court	Federal Court	No Difference	Total Number		
Client Non-Resident of State	% (N)	% (N)	% (N)		% (N)	% (N)	% (N)		% (N)	% (N)	% (N)		% (N)	% (N)	% (N)			
Important	69% (346)	25% (127)	6% (30)	503	31% (119)	61% (286)	8% (31)	386	37% (42)	54% (61)	10% (11)	114	50% (24)	34% (14)	7% (3)	41		
Somewhat Important	79% (140)	11% (28)	5% (9)	177	39% (36)	45% (41)	16% (15)	92	60% (39)	32% (20)	8% (5)	65	87% (32)	14% (6)	0	37		
Not Important	84% (106)	11% (14)	6% (7)	127	194	298	51	543	98	80	13	192						
Total Number	592	169	46	897														

$X^2 = 17$

$X^2 = 30$

$X^2 = 29$

$X^2 = 30$

$X^2 = 30$

$X^2 = 30$

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$p < .001$

TABLE 15  
CORPORATE STATUS AND FORUM CHOICE

	State Sample					Federal Sample					Federal/State Sample				
	Would Usually Select					Would Usually Select					Would Usually Select				
	State Court	Federal Court	No Difference	Total Number	%	State Court	Federal Court	No Difference	Total Number	%	State Court	Federal Court	No Difference	Total Number	%
Client is a Corporation	67% (194)	29% (83)	5% (14)	291	(N)	28% (61)	66% (143)	7% (14)	218	(N)	% (N)	% (N)	% (N)		
Important	26% (146)	17% (32)	7% (14)	192	(N)	37% (34)	47% (43)	15% (14)	91	(N)	37% (25)	56% (33)	7% (6)	68	
Somewhat Important	78% (237)	16% (60)	6% (18)	305	(N)	43% (99)	47% (106)	10% (23)	228	(N)	55% (27)	39% (19)	6% (3)	49	
Not Important	577	165	46	788		194	292	51	537		95	73	14	182	

$\chi^2 = 17$

$p < .001$

$\chi^2 = 22$

$p < .001$

$\chi^2 = 14$

$p < .001$

$\chi^2 = 17$

$p < .001$

CHOICE OF FORUM

TABLE 16  
QUALITY OF JUDGES AND FORUM CHOICE

Quality of Judges	State Sample				Federal Sample				Federal/State Sample						
	Would Usually Select			Total Number	Would Usually Select			Total Number	Would Usually Select			Total Number			
	State Court	Federal Court	No Difference		State Court	Federal Court	No Difference		State Court	Federal Court	No Difference				
	% (N)	% (N)	% (N)		% (N)	% (N)	% (N)		% (N)	% (N)	% (N)		% (N)	% (N)	% (N)
Important	67% (289)	28% (119)	6% (25)	483	27% (96)	64% (226)	10% (34)	356	44% (41)	44% (41)	12% (11)	93	44% (41)	44% (41)	12% (11)
Somewhat Important	81% (175)	14% (29)	5% (11)	215	50% (57)	40% (46)	10% (12)	115	56% (30)	39% (21)	6% (3)	54	56% (30)	39% (21)	6% (3)
Not Important	80% (182)	13% (22)	7% (12)	166	62% (42)	32% (22)	6% (4)	68	55% (24)	41% (18)	5% (2)	44	55% (24)	41% (18)	5% (2)
Total Number	586	170	48	814	195	294	50	539	95	80	16	191	95	80	16

$\chi^2 = 4$  p = N.S.

$\chi^2 = 4$

p < .001

$\chi^2 = 43$

p < .001

$\chi^2 = 25$

TABLE 17  
ONEROUS PRETRIAL REQUIREMENTS AND FORUM CHOICE

	State Sample						Federal Sample						Federal/State Sample					
	Would Usually Select						Would Usually Select						Would Usually Select					
	State Court	Federal Court	No Difference	Total Number	State Court	Federal Court	No Difference	Total Number	State Court	Federal Court	No Difference	Total Number	State Court	Federal Court	No Difference	Total Number		
Onerous Pretrial Requirements	% (N)	% (N)	% (N)		% (N)	% (N)		% (N)	% (N)	% (N)		% (N)	% (N)	% (N)				
Important	81% (323)	16% (62)	4% (16)	401	48% (73)	44% (67)	9% (13)	153	66% (49)	26% (19)	8% (6)	74	66% (49)	26% (19)	8% (6)	74		
Somewhat Important	74% (155)	21% (45)	5% (11)	211	61% (45)	46% (63)	10% (13)	137	49% (20)	46% (19)	5% (2)	41	49% (20)	46% (19)	5% (2)	41		
Not Important	62% (128)	28% (59)	10% (21)	208	24% (59)	68% (166)	9% (22)	247	39% (32)	52% (43)	10% (8)	83	39% (32)	52% (43)	10% (8)	83		
Total Number	606	166	48	820	193	296	48	537	101	81	16	198	101	81	16	198		

$X^2 = 13.6$   
p < .001

$X^2 = 31$   
p < .001

$X^2 = 27$   
p < .001

$X^2 = 31$   
p < .001

$X^2 = 27$   
p < .001

$X^2 = 27$   
p < .001

CHOICE OF FORUM

TABLE 18  
VOIR DIRE AND FORUM CHOICE

	State Sample						Federal Sample						Federal/State Sample					
	Would Usually Select			Total Number	Would Usually Select			Total Number	Would Usually Select			Total Number	Would Usually Select			Total Number		
	State Court	Federal Court	No Difference		State Court	Federal Court	No Difference		State Court	Federal Court	No Difference		State Court	Federal Court	No Difference			
% (N)	% (N)	% (N)		% (N)	% (N)	% (N)		% (N)	% (N)	% (N)		% (N)	% (N)	% (N)				
Voir Dire	78% (301)	19% (71)	3% (12)	384	48% (69)	41% (60)	11% (16)	145	50% (45)	30% (23)	11% (6)	76	47% (36)	47% (36)	7% (5)	77		
Important	68% (112)	22% (36)	11% (18)	166	32% (37)	56% (55)	14% (7)	99	37% (15)	56% (23)	7% (3)	41	47% (36)	47% (36)	7% (5)	77		
Somewhat Important	71% (185)	23% (60)	7% (17)	262	31% (89)	60% (174)	9% (26)	289	47% (36)	47% (36)	7% (5)	77	47% (36)	47% (36)	7% (5)	77		
Total Number	598	167	47	812	195	289	49	533	96	82	16	194	96	82	16	194		

$\chi^2 = 16$  p < .001

$\chi^2 = 15$  p < .001

$\chi^2 = 9$  p = N.S.



Table 19 reveals that of the attorneys who consider "greater judicial involvement in pretrial processing" and "faster case processing" as important factors in choosing a forum, 69% of the attorneys in the state sample would choose state courts and 61% in the federal sample would choose federal courts. A parallel finding occurs with respect to attorneys who do not consider judicial involvement in pretrial processing and faster case processing to be important.

Table 20 shows no statistically significant relationship between importance of costs/awards and forum choice, except for attorneys in the federal sample. Of those attorneys who consider "costs and likelihood of awards as an important factor, three quarters of the attorneys in the state sample and half of the attorneys in the federal sample showed a predisposition towards state courts.

Attorneys filing cases in state courts consider "familiarity with court operations" as an important reason for bringing suit in state courts. Table 21 shows that attorneys in all samples perceived familiarity with court operations as a state court advantage. One Charleston attorney cited the inconvenience to attorneys and expert witnesses in federal courts. In the words of a Cincinnati attorney, "I feel more at home in state courts; less formal; less paper work; easier to reschedule dates and better arbitration procedures."

### B. *Predisposing Factors in Combination*

Section IV discussed eight factors that predispose attorneys to choose either state courts or federal courts. In this section, a multivariate technique will be employed to determine how these factors in combination affect forum choice.<sup>52</sup> In other words, of all the factors that are considered when making a choice between federal and state court, which are critical to the choice and which are peripheral? The second major question addressed is how these critical factors are affected by attorney characteristics and by site.

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<sup>52</sup> Logistic regression analysis is a multivariate statistical technique that can be used to predict a dichotomous dependent variable—in this research either a preference for state court or a preference for federal court. Lawyers expressing no preference between federal and state courts were excluded from this analysis. Logistic regression estimates the probability of an event occurring. In this case, the probability that a set of attorneys will choose state court over federal court when a choice is available given knowledge of how important each attorney believes each of the eight factors are. One way to evaluate this model is to use these factors to predict forum choice and then to compare the predictions with the questionnaire responses to question 27, "In your trial practice in general, when you have a choice of forum, which do you usually select?" Overall, 71% of the attorneys were correctly classified based upon knowledge of their beliefs of the importance of court convenience and quality of judges. The choice of state courts accounted for most of the correct classifications, the two factors could do no better than chance (50-50) in predicting the choice of attorneys who preferred federal courts. M. NORUSIS, SPSS/PC + ADVANCED STATISTICS 4.0 (1990). See also Hosmer & Lemeshow, APPLIED LOGISTIC REGRESSION (1989).

TABLE 19  
CASE PROCESSING TIME AND FORUM CHOICE

Case Processing Time	State Sample				Federal Sample				Federal/State Sample			
	Would Usually Select				Would Usually Select				Would Usually Select			
	State Court	Federal Court	No Difference	Total Number	State Court	Federal Court	No Difference	Total Number	State Court	Federal Court	No Difference	Total Number
	% (N)	% (N)	% (N)		% (N)	% (N)	% (N)		% (N)	% (N)	% (N)	
Important	69% (209)	25% (76)	6% (17)	302	33% (71)	61% (132)	7% (14)	217	45% (28)	50% (31)	5% (3)	62
Somewhat Important	81% (251)	16% (49)	4% (11)	311	40% (75)	47% (88)	12% (23)	186	48% (30)	38% (24)	14% (9)	63
Not Important	68% (134)	21% (42)	11% (21)	197	37% (50)	55% (75)	9% (12)	137	55% (38)	39% (27)	6% (4)	69
Total Number	594	167	49	810	196	295	49	540	96	82	16	194

$X^2 = 21$

$p < .001$

$X^2 = 9$

$p = N.S.$

$X^2 = 6$

$p = N.S.$

TABLE 20  
COSTS AND FORUM CHOICE

Costs	State Sample						Federal Sample						Federal/State Sample					
	Would Unusually Select			Total Number			Would Unusually Select			Total Number			Would Unusually Select			Total Number		
	State Court	Federal Court	No Difference	% (N)	% (N)	Total Number	State Court	Federal Court	No Difference	% (N)	% (N)	Total Number	State Court	Federal Court	No Difference	% (N)	% (N)	Total Number
Important	73% (227)	22% (68)	5% (17)	% (N)	% (N)	312	50% (60)	41% (49)	8% (20)	% (N)	% (N)	119	56% (29)	33% (17)	12% (6)	% (N)	% (N)	52
Somewhat Important	76% (226)	19% (56)	5% (16)	% (N)	% (N)	298	32% (61)	58% (111)	10% (18)	% (N)	% (N)	190	48% (31)	45% (29)	8% (5)	% (N)	% (N)	65
Not Important	72% (141)	21% (42)	7% (14)	% (N)	% (N)	197	32% (67)	59% (125)	10% (21)	% (N)	% (N)	213	47% (32)	46% (31)	7% (5)	% (N)	% (N)	68
Total Number	594	166	47			807	188	285	49			522	92	77	16			185

$\chi^2 = 2$        $p = N.S.$        $\chi^2 = 14$        $p = .007$        $\chi^2 = 3$        $p = N.S.$

CHOICE OF FORUM

TABLE 21  
FAMILIARITY WITH COURT OPERATIONS AND FORUM CHOICE

Familiarity	State Sample						Federal Sample						Federal/State Sample					
	Would Usually Select			Total Number	Would Usually Select			Total Number	Would Usually Select			Total Number	Would Usually Select			Total Number		
	State Court	Federal Court	No Difference		State Court	Federal Court	No Difference		State Court	Federal Court	No Difference		State Court	Federal Court	No Difference			
% (N)	% (N)	% (N)	% (N)	% (N)	% (N)	% (N)	% (N)	% (N)	% (N)	% (N)	% (N)	% (N)	% (N)	% (N)	% (N)			
Important	81% (496)	15% (92)	4% (26)	614	42% (116)	49% (135)	10% (26)	277	65% (71)	28% (31)	6% (7)	109	65% (71)	28% (31)	6% (7)	109		
Somewhat Important	63% (73)	28% (33)	9% (10)	116	29% (40)	60% (82)	10% (14)	136	23% (7)	55% (17)	23% (7)	31	23% (7)	55% (17)	23% (7)	31		
Not Important	44% (44)	45% (45)	25% (12)	101	32% (46)	60% (85)	8% (11)	142	39% (23)	58% (34)	3% (2)	59	39% (23)	58% (34)	3% (2)	59		
Total Number	613	170	48	831	202	302	51	555	101	82	16	199	101	82	16	199		

$\chi^2 = 31$

$\chi^2 = 9$  P = N.S.

P < .001

$\chi^2 = 70$

Although all eight factors are important considerations for some attorneys in deciding to file cases in either state or federal court, some are obviously more important than others. Prior studies have listed the factors by percentages, assuming that those factors which were most often selected by the attorneys sampled were also the most influential. This assumption does not account for the fact that some factors may become more or less influential once others are accounted for.<sup>53</sup> For example, "convenience of court location" could be important if the client is a non-resident but unimportant if the client is a resident of the state in which the case is filed.

The multivariate analysis revealed that while all eight factors contributed to the explanation of general forum preference, "familiarity with court operations" and "quality of judges" were the two most associated with choice of forum.

Table 22 shows the relationship between responses to these two questions. Miller suggested that in cases where forum differences would have no impact on case outcome, considerations of convenience should be determinative.<sup>54</sup> His research indicated that attorneys considered convenience one of the most important reasons for choosing state courts. Table 22 shows that litigating attorneys in the state sample prefer state courts, (especially those who value familiarity with court operations). Attorneys in the federal sample, (especially those who value competence over familiarity), prefer federal courts. Attorneys litigating in both courts who emphasized the value of familiarity, or value both competence *and* familiarity tended to favor state courts. Attorneys who placed a higher value on competence, but not familiarity, tended to prefer federal courts.

Using all factors in combination improved the predictions, increasing the overall correct classifications five percentage points to, from 71% to 76%. The six additional factors raised the overall percentage by improving the percentage of attorneys who correctly classified courts by 16% (from 48% to 62%).

### C. *Predisposing Factors by Attorney Characteristics*

One mandate for good research is to account for as many competing explorations for the findings as possible. In this research, it is possible that

<sup>53</sup> Principal components analyses produced eight separate *independent* factors, listed in Part III above. "Independent" here means that the eight *clusters* are not related to each other, although some of the *individual items* in each cluster may be correlated. Indeed there is a relationship between court procedures and both jury procedures (.37) and quality of judges (.33)

<sup>54</sup> Miller, *supra* note 3, at 23.

**TABLE 22**  
**FAMILIARITY WITH COURT OPERATIONS QUALITY OF JUDGES AND FORUM CHOICE**

	Attorneys Identified From State Court Cases				Attorneys Identified From Federal Court Cases				Attorneys Identified From Federal/State Court Cases				
	Would Usually Select		No Difference		Would Usually Select		No Difference		Would Usually Select		No Difference		
	State Court	Federal Court	%	(N)	%	(N)	State Court	Federal Court	%	(N)	State Court	Federal Court	%
Both competence and Familiarity important	77% (313)	19% (78)	4% (16)		33% (73)	56% (126)	11% (25)	65% (26)	25% (10)	10% (4)			
Familiarity important Competence not important	88% (175)	7% (14)	5% (9)		83% (39)	15% (7)	2% (1)	62% (16)	39% (10)	0			
Competence important Familiarity not important	45% (56)	44% (53)	10% (12)		24% (50)	65% (134)	10% (21)	39% (12)	47% (15)	16% (5)			
Neither important	64% (61)	26% (25)	10% (10)		51% (36)	43% (30)	6% (4)	37% (7)	59% (11)	5% (1)			

certain types of attorneys, (e.g. plaintiffs' attorneys or defense attorneys, years of experience, or attorneys from large law firms or small law firms), are predisposed to either state or federal court because of the type of practice they have. This section of the research is designed to explore that possibility.

### 1. Type of Counsel

Table 23 shows how both plaintiffs' attorneys and defense attorneys compared in their relative evaluation of each of the eight factors as well as in their selection of a preferred forum. With regard to the importance of resident status, there was no statistical difference between plaintiff and defense attorneys.<sup>55</sup> Plaintiff and defense attorneys responses in the state sample *did* differ in their valuation of the quality of judges, corporate status, and pretrial requirements, with defense attorneys placing a higher value on the importance of these factors in all instances.<sup>56</sup> Plaintiffs' attorneys in the federal sample placed much more emphasis on case processing time and comparatively less emphasis on voir dire. Plaintiffs' counsel in the mixed sample also stressed costs and outcome more than defense attorneys.

The predilection to favor state courts or federal courts did not differ by type of counsel. The "preferred forum" question in Table 23 demonstrates how similar the responses of plaintiff and defense counsel were within each sample.

### 2. Attorney Experience

Another factor that might conceivably affect forum choice is the attorney's years of experience. The relationship between an attorney's experience and the eight factors used in evaluating forum selection is displayed in Table 24. Table 24 reveals that years of experience does not affect an attorney's perception of the importance of many of the factors. For attorneys in all samples, however, their experience did seem to affect their feelings toward the importance of "corporate status." Attorneys with less than 10 years experience tended to view corporate status as an important consideration in forum choice, as did attorneys with more than 21 years experience in practicing before both state and federal courts. Attorneys in the federal sample who had more years of practice tended to see "case processing time" and "pretrial requirements" as important considerations in forum choice. Experience was also related to forum preference only for

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<sup>55</sup> The chi square test of statistical significance, described *supra* note 33, was used to determine if the difference between plaintiffs' attorneys and defense attorneys was statistically significant.

<sup>56</sup> Defense attorneys did differ from plaintiffs counsel on the importance of court procedures, with defense counsel more likely to find differences in procedure important.

TABLE 23  
FACTORS IMPORTANT TO FORUM SELECTION BY PLAINTIFF AND DEFENSE COUNSEL

% Rating Following Factors as Important	State Sample		Federal Sample		Federal/State Sample	
	Plaintiff	Defense	Plaintiff	Defense	Plaintiff	Defense
1. Non-resident status	293 - 61%	225 - 65%	215 - 69%	180 - 74%	74 - 63%	43 - 54%
2. Corporate status	157 - 34%*	142 - 42%*	111 - 36%	113 - 47%	42 - 39%	27 - 34%
3. Quality of judges	222 - 46%*	225 - 64%*	194 - 63%	173 - 71%	56 - 47%	38 - 51%
4. Voir Dire	228 - 47%	163 - 47%	77 - 25%*	71 - 29%*	55 - 45%	22 - 29%
5. Case processing time	177 - 37%	133 - 38%	141 - 46%*	82 - 34%*	43 - 35%	21 - 28%
6. Pretrial Requirements	236 - 48%*	179 - 50%*	78 - 26%	79 - 32%	46 - 37%	29 - 37%
7. Awards/Costs	181 - 38%	142 - 41%	69 - 23%	54 - 23%	38 - 32%*	14 - 20%*
8. Familiarity	366 - 73%	272 - 76%*	148 - 46%	135 - 54%	73 - 68%	39 - 49%
9. Preferred Forum - State Court	372 - 76%	250 - 71%	119 - 37%	88 - 35%	60 - 50%	42 - 53%

\* Differences among sites are statistically significant according to X<sup>2</sup> tests.



**TABLE 24**  
**FACTORS IMPORTANT TO FORUM SELECTION BY ATTORNEY EXPERIENCE**

Percent Considering Following Factors Important	State Sample			Federal Sample			Federal/State Sample		
	1-10 Years	11-20 Years	21 - Plus	1-10 Years	11-20 Years	21 - Plus	1-10 Years	11-20 Years	21 - Plus
	% (N)	% (N)	% (N)	% (N)	% (N)	% (N)	% (N)	% (N)	% (N)
1. Non-Resident of State	69%* (258)	54%* (160)	65% (*97)	74% (174)	70% (161)	65% (58)	62%* (49)	57%* (46)	56%* (22)
2. Corporate Status	42%* (152)	30%* (88)	39%* (57)	45%* (105)	38%* (86)	37%* (32)	33%* (24)	30%* (33)	60%* (22)
3. Quality of Judges	57% (213)	51% (149)	51% (79)	68% (154)	64% (146)	69% (63)	49% (40)	48% (37)	46% (17)
4. Voir Dire	43%* (159)	53%* (154)	47%* (73)	21%* (47)	26%* (58)	45%* (41)	32% (26)	41% (32)	48% (19)
5. Case Processing	38% (141)	35% (103)	41% (62)	38% (87)	41%* (83)	43%* (39)	30% (25)	37% (25)	27% (10)
6. Pretrial Requirements	45% (169)	52% (157)	54% (85)	27%* (62)	24%* (55)	43%* (38)	28% (23)	39% (31)	51% (21)
7. Awards/Costs	40% (146)	40% (117)	36% (55)	19% (43)	21% (46)	37% (32)	27% (21)	24% (18)	34% (13)
8. Familiarity	72% (278)	76% (231)	76% (121)	48% (113)	49% (115)	57% (53)	44% (36)	56% (46)	73% (30)
9. Preferred Forum - State Court	68%* (256)	78%* (234)	81%* (129)	36% (84)	35% (83)	43% (40)	40% (32)	61% (49)	55% (22)

\* Differences among sites are statistically significant according to X<sup>2</sup> tests.

attorneys in the state sample. Attorneys with more than 10 years of experience tended to prefer state courts.

### 3. Litigation Experience

Years of experience as an attorney does not necessarily translate to years of experience as a litigator. The method of choosing the sample from case files ensured that all attorneys chosen would have extensive litigation experience. The average percentage of practice that involves litigation was 75% for the state court sample and 83% for the federal sample. Table 25 shows the relationship between litigation experience and the eight important factors. Differences in litigation experience overall does not seem to affect perceptions of the importance of the eight factors, with the exception of difference in pretrial requirements. Attorneys in the state sample who litigated more than 75% of the time, preferred state courts to a greater degree than attorneys who litigated less frequently.

### 4. Size of Law Firm

Corporate law has grown at a faster pace than other areas of law such that in 1980, total receipts from the corporate customers were greater than those from individuals. Do corporate lawyers view choice of forum differently from lawyers representing individuals or government agencies? Unfortunately, the number of corporate counsel in the sample was small (N=36), but the data available showed no differences in perceptions of importance based upon the type of practice.

Another way of looking at the type of counsel is to determine the size of the firm in which they practice. Do the same factors which lead lawyers to choose a large firm, small firm or private practice lead them to be predisposed toward state courts or federal courts? The relationship between the size of a firm and attorney perceptions of importance of the eight factors as well as preferred forum choice is shown in Table 26. Overall, it seems that the size of a firm is a significant factor in shaping attorneys' perceptions of the factors that are important to forum selection. In all samples, attorneys with larger firms believe that corporate status is more important than attorneys who work for smaller firms or attorneys that practice alone. In the federal sample, attorneys in larger firms place more value on the competence of the judges and less value on court costs and the likelihood of settlement than do attorneys in smaller firms. In terms of forum preference, the sole practitioners and attorneys from smaller law firms are more likely to prefer state courts, whereas the majority of attorneys in the largest firms prefer federal courts.

TABLE 25  
PERCENTAGE OF PRACTICE THAT INVOLVES LITIGATION

Percent Considering Following Factors Important	State Sample		Federal Sample		Federal/State Sample	
	<75%	75%+	<75%	75%+	<75%	75%+
1. Non-Resident of State	64% (217)	62% (300)	71% (100)	71% (295)	62% (28)	58% (89)
2. Corporate Status	33% (112)	40% (187)	36% (51)	42% (173)	24%* (11)	40%* (58)
3. Quality of Judges	50% (173)	56% (272)	69% (83)	69% (282)	48% (22)	48% (72)
*4. Voir Dire	42% (145)	51% (245)	23% (31)	28% (115)	33% (16)	41% (61)
*5. Case Processing Time	38% (127)	37% (183)	42% (60)	39% (161)	17% (8)	37% (56)
6. Pretrial Requirements	44%* (152)	53%* (262)	25% (36)	30% (121)	33% (16)	38% (59)
*7. Awards/Costs	43% (147)	37% (176)	25% (34)	22% (88)	35% (16)	25% (36)
8. Familiarity	80% (285)	70% (350)	49% (71)	50% (210)	54% (27)	55% (85)
9. Preferred Forum -State Court	14%* (48)	25%* (123)	48% (71)	57% (238)	28%* (14)	45%* (68)

\* Differences among sites are statistically significant according to  $\chi^2$  tests.

TABLE 26  
FACTORS IMPORTANT TO FORUM SELECTION BY SIZE OF LAW FIRM

Percent Considering Following Factors Important	State Sample				Federal Sample				Federal/State Sample			
	1	2-5	6-49	50+	1	2-5	6-49	50+	1	2-5	6-49	50+
1. Non-Resident of State	62% (66)	60% (167)	62% (190)	73% (95)	50%* (14*)	63%* (65)	69%* (144)	79% (170)	64%* (7)	46%* (17)	52% (36*)	69%* (55)
2. Corporate Status	35%* (36)	37%* (100)	34%* (102)	47%* (69)	26%* (7)	30%* (32)	40%* (82)	48%* (101)	37%* (4)	23%* (8)	35%* (24)	41%* (32)
3. Quality of Judges	47% (49)	53% (149)	54% (169)	59% (77)	36% (10)	58%* (63)	69%* (144)	73%* (48)	27%* (3)	57%* (21)	38%* (25)	56%* (44)
4. Voir Dire	42% (44)	51% (145)	47% (145)	42% (53)	19%* (5)	39%* (42)	28%* (57)	21%* (43)	55% (6)	32% (12)	51% (35)	29% (23)
5. Case Processing	36% (38)	40% (113)	36% (113)	35% (45)	30% (9)	46% (60)	40% (84)	38% (79)	18% (2)	27% (10)	29% (20)	39% (31)
6. Pretrial Requirements	55% (59)	54% (154)	47% (151)	39% (49)	28%* (8)	42%* (45)	31%* (65)	19%* (39)	64% (7)	37% (14)	41% (30)	30% (24)
7. Awards/Costs	50% (52)	40% (115)	35% (108)	35% (44)	29%* (8)	37%* (40)	24%* (49)	13%* (26)	36% (4)	35% (13)	27% (17)	22% (17)
8. Familiarity	87%* (96)	80%* (234)	70%* (225)	60%* (78)	47% (14)	45% (50)	55% (118)	47% (99)	64% (7)	60% (24)	67% (48)	41% (33)
9. Preferred Forum -State Court	88%* (95)	83%* (239)	72%* (227)	45%* (59)	70% (21)	67% (75)	33% (70)	19% (40)	83%* (10)	70%* (26)	62%* (44)	29%* (23)

\* Differences among sites are statistically significant according to X<sup>2</sup> tests.

Combining these attorney characteristics to determine which has the most impact on general predisposition for forum choice reveals that the size of a firm was the variable most associated with preference of courts. Indeed, as an explanatory variable, the size of a firm was as important as familiarity with court operations and quality of judges.

#### *D. Predisposing Factors by Sample Characteristics*

If the samples taken were deficient in any way, the results of this survey would naturally be skewed. To preclude that possibility, the factors that influence forum choice were related to sample variables that could influence the responses .

##### 1. Experience in Both Courts

Because attorneys who litigate exclusively in either state or federal court have different perceptions of the importance of the various factors than attorneys who litigate in both, most tables in this report have separated responses by sample. Because attorneys' names were drawn from samples of cases, it is not possible to identify all attorneys who may practice in both courts. Accordingly, it is not possible to know which of the attorneys in the state sample and federal sample indeed litigate in both courts. However, if an attorney's name surfaced in both samples of cases, it is possible to know that at least this subsample of attorneys have experience in both state and federal courts.

Table 27 shows that attorneys who litigate in state courts do differ from attorneys who litigate in federal courts, at least in their perceptions of the factors important to forum choice. Attorneys drawn from the federal sample place more emphasis on the residency status of their clients and on the quality of judges, whereas attorneys in the state sample are more likely to focus on familiarity with court operations, costs and outcome of litigation, and voir dire procedures. Attorneys with experience in both courts prefer federal courts to a greater degree than attorneys who practice before federal courts alone. These significant differences in patterns of response were the reason the sample was divided into three parts for analysis.

## 2. Location of the Sample

Courts from which case samples were taken were not chosen randomly, but purposively to maximize differences. Case samples were selected from three federal districts with an unusually high proportion of cases filed in federal court, and from three districts with an unusually low proportion of cases filed in federal court.<sup>57</sup> Therefore, attorneys identified from state court cases and attorneys identified from federal court cases may have more in common with each other than with their counterparts from other sites. Table 28 shows that the only differences in responses by site were in regard to the importance of voir dire procedures, case processing time, and awards/costs.

This finding may explain some of the apparent contradictions noted in Section B above. With respect to case processing, for example, this survey revealed that attorneys in the state sample preferred state courts because they desired a faster pace of litigation. Attorneys in the federal sample preferred federal courts because they processed cases more expeditiously. In actual fact, federal courts may have faster case processing times in some geographic locations, while state courts may be faster in others.<sup>58</sup> Table 28 shows that case processing time is important to more lawyers in Sacramento, Raleigh, Cleveland and Charleston and that respondents from Roanoke were least likely to consider disposition time as an important consideration in selecting a forum.

Further analysis reveals that the majority of Charleston attorneys, regardless of whether they practiced in state court, federal court or both, reported that the U.S. District Court for the Southern District of West Virginia had a faster case processing time than did its state counterpart. On the other hand, 64% of the respondents in Dallas counted faster disposition time as an advantage of state courts.

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<sup>57</sup> Perhaps proportion of cases removed from state court to federal might have provided a better measure of differences among sites than proportion of cases filed in federal court. Sites with unusually high removal rates may be expected to have more attorneys who favor federal courts and vice versa. As a practical matter, high removal rates in Cleveland (55%) and Charleston (46%) correspond to high proportions of filings in federal court and low removal rates in Raleigh (15%) and Cincinnati (16%) and a moderate removal rate in Dallas (27%) also conform to the original classification. Had removal rates rather than filing rates been used to classify sites, however, Sacramento (42%) would have been considered a site predisposed from federal courts, Tyler (27%) as control site, and Roanoke (8%) as a site predisposed to state courts. In all sites but Cleveland, at least half of the removals were contract cases. In Cleveland, 63% of the removals were asbestos cases and 26% were personal injury cases.

<sup>58</sup> Compare case processing times in state courts (26 cities) in GOERDT, EXAMINING COURT DELAY, 13 (1989) with case processing times in federal courts, *Annual Report of the Director of the Administrative Office of the United States Courts*, Table C-5, at 216 (1988).

**TABLE 27**  
**FACTORS IMPORTANT TO FORUM SELECTION BY SAMPLE**

Percent Considering Following Factors Important	State Sample		Federal Sample		Federal/State Sample	
*1. Non-Resident of State	520	63%	395	71%	117	59%
*2. Corporate Status	299	37%	224	41%	69	37%
*3. Quality of Judges	447	54%	367	66%	94	48%
*4. Voir Dire	391	47%	148	27%	77	39%
*5. Case Processing Time	310	37%	223	40%	64	32%
*6. Pretrial Requirements	416	49%	157	29%	75	37%
*7. Awards/Costs	323	39%	123	23%	52	25%
*8. Familiarity	639	74%	283	50%	112	55%
*9. Preferred Forum-State Court	625	74%	207	36%	53	9%

\* Differences among sites are statistically significant according to X<sup>2</sup> tests.

TABLE 28  
IMPORTANCE OF FACTORS BY LOCATION OF THE SAMPLE

Percent Considering Following Factors Important	High Proportion of Diversity Cases				Small Proportion of Diversity Cases			
	Charleston	Cleveland	Tyler	Roanoke	Dallas	Cincinnati	Raleigh	Sacramento
1. Non-Resident of State	79 - 66%	76 - 66%	46 - 69%	38 - 62%	113 - 77%	38 - 76%	50 - 68%	34 - 77%
2. Corporate Status	47 - 41%	42 - 38%	27 - 41%	19 - 31%	69 - 47%	20 - 42%	21 - 29%	25 - 56%
3. Quality of Judges	50 - 44%	51 - 47%	38 - 57%	16 - 28%	85 - 60%	23 - 47%	35 - 47%	22 - 47%
*4. Voir Dire	13 - 11%	14 - 12%	7 - 10%	3 - 6%	14 - 10%	0 - 0%	12 - 16%	6 - 13%
*5. Case Processing Time	55 - 46%	56 - 49%	15 - 22%	19 - 32%	45 - 31%	16 - 32%	38 - 50%	27 - 59%
6. Pretrial Requirements	11 - 9%	10 - 9%	9 - 13%	6 - 10%	15 - 11%	3 - 6%	11 - 15%	3 - 7%
*7. Awards/Costs	18 - 16%	18 - 17%	24 - 40%	5 - 9%	35 - 25%	4 - 8%	18 - 26%	10 - 23%
8. Familiarity	34 - 28%	32 - 27%	12 - 17%	8 - 13%	25 - 17%	11 - 21%	14 - 18%	11 - 24%
9. Preferred Forum - State Court	46 - 37%	46 - 39%	26 - 39%	19 - 32%	52 - 36%	19 - 35%	40 - 52%	17 - 36%

\* Differences among sites are statistically significant according to  $\chi^2$  tests.



Similarly, the importance of the size of awards to forum choice varies by site, with awards meriting serious consideration to most lawyers in Tyler, Texas and considerably less consideration in determining forum choice in Cincinnati and Roanoke. All attorneys in the state sample reported that costs were a reason to file in state court (except Roanoke attorneys who saw no difference in costs between state and federal courts). Respondents in the federal sample perceived no difference in cost of litigation, except for attorneys in Raleigh who acknowledged that costs of litigation in state court are lower.

When the eight classification sites are aggregated into three categories according to whether they had unusually high, unusually low or an average proportion of cases filed in federal court, time and costs are still important, but voir dire procedures are not. Moreover, when responses from both state and federal samples are analyzed according to the three categories, rather than eight sites, other differences become clear.

Respondents from sites with a high proportion of diversity cases tended to place more emphasis on the quality of judges and corporate status, but less emphasis on familiarity with court operations. Not surprisingly, attorneys from sites with a smaller proportion of diversity filings tended to prefer state courts to a greater extent than did attorneys in the other sites. This finding demonstrates the importance of representative site selection for any research, and may even indicate a pattern in preference for state court or federal court. It certainly supports the notion that in some areas, state courts may be better than federal courts, while in other areas the opposite may be true.<sup>59</sup> With 50 distinct state court systems, it seems improper to lump all 50 states together and then compare them to federal courts.

## VI. CONCLUSIONS AND IMPLICATIONS

Most surveys of attorneys' attitudes toward diversity jurisdiction and choice of forum issues were conducted a decade ago. Current research is needed to see if the issues of concern in the late 1970's are still the issues of today; to determine how factors important to forum selection favor either state or federal courts; and to provide a baseline from which future changes in lawyers' attitudes can be measured.

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<sup>59</sup> Although progress is being made in establishing uniform measures of court performance, objective and comparative measures of court performance are still in the testing stage, see NCSC and Bureau of Justice Assistance, *Trial Court Performance Standards*, 1990.

**1. What factors do litigating attorneys consider important to forum selection?**

Of the various reasons attorneys give for choosing one forum over the other, three stood out: quality of judges, client characteristics, and convenience. Most respondents considered overall competence of the judiciary and the quality of judges to be very important. The fact that resident status is still important to 60% of the attorneys and corporate status is important to 35% of the attorneys shows that fear of bias is an important consideration in forum selection to some lawyers. The percentages also show that of the two, out-of-state residence is of greater importance than corporate status.

The fear of local bias is not confined to bias against out-of-state residents. There is also prejudice against in-state residents, (e.g. from urban as opposed to rural areas, etc.). Federal courts are not a solution to the fear of bias between rural and urban areas within states. Familiarity with court operations was an important consideration to attorneys who practice before state courts, but not for attorneys who practice before federal courts.

Three other factors were unimportant to most attorneys: opponent considerations, court procedures, and jury procedures. Most litigating attorneys do not make forum decisions based upon inconvenience or costs to opposing party, but a minority of attorneys do take these into consideration when making a decision. Most attorneys also do not consider discovery rules, evidentiary rules, or rules for summary judgment in their decision to file in state courts or federal courts. Similarly, jury rules, such as jury size, non-unanimity, and the size of the jury pool did not affect the selection decision. Of the jury procedures, only voir dire procedures were important to forum choice, and even then, only in some sites.

**2. Do factors important to forum selection advantage state courts, federal courts or neither?**

**Factors that lead attorneys to favor state courts:**

- **opponent is not a state resident**
- **familiarity with court operations**
- **lower costs to litigants**
- **voir dire procedures**
- **less onerous pretrial requirements**

**Factors that lead attorneys to favor federal courts:**

- client is not state resident
- competence of the judiciary important
- quality of judges important
- greater judicial pretrial involvement desired

**Factors that make no difference to forum selection:**

- court procedures
  - discovery rules
  - rules for summary judgement
  - evidentiary rules
  - more favorable appeal process
- court jury rules
- convenience
  - convenience for self or client
  - inconvenience for opponents

**Factors that make a difference in some sites and not in others:**

- case processing time
- litigation costs

When asked to name the factors most important to forum selection, other than jurisdictional considerations, about one-third of the attorneys identified from state cases listed factors related to familiarity with court operations, convenience, lower filing fees and availability of arbitration. These lawyers considered state courts "attorney friendly," and state judges more accessible, and down-to-earth. Paperwork and onerous pretrial requirements were also given as reasons to avoid federal court.

Attorneys identified from federal cases most often directed comments to the competence of the federal judiciary. Attorneys who usually practice before federal courts saw federal judges as better trained and better supported with clerks, interns and law libraries. This type of comment indicates that the greater resources available to federal courts is one reason that the "quality" of judges is perceived to be better. A second reason is the perceived impartiality in federal courts, because federal judges are appointed, not elected. A third reason for the perceived quality of federal judges is an assignment method whereby one judge handles a case from start to finish. Federal judges are then seen as being better acquainted with their cases. Perhaps because of the quality of the judges, many attorneys believed that asbestos cases and other complex litigation would be

better served if filed in federal courts.

In his analysis of removal cases, Miller finds significant differences between plaintiff counsel and defense counsel with respect to factors important to forum selection.<sup>60</sup> This research finds that these differences can be attributed to the nature of his sample, in which all plaintiffs' attorneys filed in state court and all defense attorneys removed cases to federal courts. By including defense counsel from state courts and plaintiffs' counsel from federal courts, this research found that the differences between plaintiffs' counsel and defense counsel were negligible. What was important, however, is what Bumiller called the stratification of the local legal community into a "state" and "federal" bar.<sup>61</sup> There are indeed differences between lawyers who usually litigate in state courts and lawyers who usually litigate in federal courts. This difference in "culture of attorneys" is as important to forum selection as is the size of the law firm in which an attorney practices.

Although this research has answered several crucial questions, more work is needed to answer remaining questions. First, attorneys should be asked explicitly about the importance of having a choice itself, rather than asking only how a series of factors affect a particular forum choice. Second, this research has determined that out-of-state residence is important to more attorneys than corporate status when the forum decision is made. However, many attorneys commented on local bias against attorneys from other parts of the *same* state, and about an urban-rural division. The relative importance of rural-urban bias should be compared to the bias against out-of-state residents to see which is stronger. Thirdly, competence of the judiciary was very important to attorneys in the federal sample. Differences in court procedures and jury procedures were not related to judicial competence, but comments from the attorneys indicated that the resources available to federal judges, (including clerks, interns and law libraries), and the method of selection were all relevant factors. Research is needed to determine the impact of resources on the perception of court quality.

## VII. EXECUTIVE SUMMARY

Efforts to readjust the boundaries between jurisdictions of state and federal courts must consider the perceptions of attorneys who litigate in either or both of the court systems. Whether justified or not, attorneys' perceptions of the comparative quality, convenience, and bias of state courts and federal courts affect their decision on which forum to use. Unless these perceptions are identified and understood, efforts to make further changes in federal diversity

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<sup>60</sup> Miller, *supra* note 3, at 27.

<sup>61</sup> Bumiller, *supra* note 3, at 772.

jurisdiction could be misdirected. For example, if federal courts are preferred because attorneys perceive bias against out-of-state residents, reform efforts could be directed to alternatives that would bar in-state plaintiffs from filing in federal court. If fear of local bias is confined to out-of-state corporations, reform efforts need not encompass individual litigants. If federal courts are chosen because of more qualified judges, less court congestion, or better rules of procedure, specific state courts could set agendas for reform. If trial attorneys just prefer to have a choice of forum, then none of the suggested changes in federal diversity jurisdiction may be relevant.

To obtain a sample of attorneys who *litigate* in state and federal courts, i.e. attorneys who actually make the decisions to file cases in state court or federal court when a choice is available, a two stage sampling strategy was employed. In the first stage, all diversity cases filed in eight federal district courts for the statistical year ending June 30, 1990 were identified. The eight sites are: the Eastern District of Texas, the Southern District of West Virginia, and the Northern District of Ohio representing districts with an unusually large proportion of diversity filings; the Eastern District of California, the Eastern District of Northern Carolina, and the Southern District of Ohio representing districts with an unusually small proportion of diversity filings; and the Northern District of Texas and the Western District of Virginia representing districts with a proportionate amount of diversity filings. Counterpart state courts in each of these districts were chosen and a sample of state tort and contract cases with dollar amounts-in-controversy in excess of \$50,000 were gathered to represent cases equivalent to federal diversity cases. Attorneys participating in these state cases as well as federal diversity cases were identified and recorded. For attorneys who participated in many cases, only one case was randomly selected as the case reference to be kept in mind while the attorney was answering the questionnaire. Questionnaires were sent to 4,548 attorneys and 1,642 (36%) sent back usable responses.

Although some attorneys considered each of the 31 items on the questionnaire important considerations in forum selection, three reasons predominated. Most lawyers consider the competence of the courts and the quality of the judges as important reasons for choosing one forum over another. Sixty percent of the attorneys regard resident status as an important consideration in forum choice; nearly twice as many as consider corporate status to be important. Finally, attorneys who practice before state courts regard familiarity with court operations as an important consideration in forum selection.

Most attorneys did not consider discovery rules, evidentiary rules, rules for summary procedure, jury rules or size of the jury pool to be relevant to forum selection, but pretrial requirements and voir dire procedures were considered

important. The large majority of attorneys did not take into account the cost or inconvenience of litigation to opponents to be important to forum selection.

Do these factors important to forum selection work to the advantage of state courts, federal courts, or neither?

Factors that lead attorneys to favor state courts:

- opponent is not a state resident
- familiarity with court operations
- lower costs to litigants
- voir dire procedures
- less onerous pretrial requirements

Factors that lead attorneys to favor federal courts:

- client is not a state resident
- competence of the judiciary important
- quality of judges important
- greater judicial pretrial involvement desired

Factors that make no difference to forum selection:

- court procedures
  - discovery rules
  - rules for summary judgement
  - evidentiary rules
  - more favorable appeal process
- court jury rules
- convenience
  - convenience for self or client
  - inconvenience for opponents

Factors that make a difference in some sites and not in others:

- case processing time
- litigation costs

When asked to name the factors most important to forum selection, other than jurisdictional considerations, about a third of the attorneys identified from state cases, who commented, listed factors related to familiarity with court operations, convenience, lower filing fees, and availability of arbitration. These lawyers considered state courts "attorney friendly" and state judges more

accessible, and down-to-earth. Paperwork and onerous pretrial requirements were given as reasons to avoid federal court.

Attorneys identified from federal cases most often directed comments to the competence of the federal judiciary. Attorneys who usually practice before federal courts saw federal judges as better trained and better supported with clerks, interns and law libraries. Greater resources available to federal courts is one reason that the "quality" of judges is perceived to be better. Another is perceived impartiality, because federal judges are appointed, not elected. A third reason for the perceived quality of federal judges is an assignment method that has one judge handle a case from start to finish. Federal judges are then perceived to be better acquainted with their cases. Many attorneys believed that asbestos cases and other complex litigation belong in federal courts.

This research found a difference between the "state" and "federal" bars. This difference in "culture of attorneys" is as important to forum selection as the size of the law firm in which an attorney practices is.

Further research is needed to determine: how important attorneys believe that a choice of forum is; how bias against rural and urban residents *within* states compares to bias against out-of-state residents; and how the importance of resources, such as the availability law clerks and law libraries, affect perceptions of court quality.

## APPENDIX A

### SAMPLE SELECTION

#### Western District of Virginia (Roanoke Federal)

**Date:** August 20-22, 1990

1. Court Contact Person: Ingrid Webb
2. Sample Selection: On August 20, the research team visited the Federal Court in Roanoke. The Clerk's Office identified the entire population of diversity cases for the fiscal year ending June 30, 1990. The face sheets were photocopied for use by the clerk's staff, which generated a total of 153 cases. These were retrieved on August 22, 1990.
3. Comments: Dollar amounts were not available.

#### Circuit Court (Roanoke, VA)

**Date:** August 20-22, 1990

1. Court Contact Persons: Patsy Testerman, Court Clerk  
Dale Hendrick and Cathy Golladay
2. Sample Selection: Cases comparable to federal diversity cases were found in the Circuit Court's Civil Division. Cases over \$50,000 were identified using the court's graduated filing fee:

<u>Amount Requested</u>	<u>Filing Fee</u>
\$ 500 - \$ 5,000	\$ 34
\$ 5,000 - \$ 50,000	\$ 44
\$ 50,000 - \$100,000	\$ 59
\$100,000 - \$500,000	\$ 79
\$500,000 +	\$129

Thus, if the filing fee was \$59 or more, staff knew the case was valued at least \$50,000 and could be selected for the sample. The population of cases that were reviewed included all civil and domestic relations matters (even name changes), so only one out of about 10 cases was eligible for the sample (i.e. a tort or contract for \$50,000 or more). Staff went through the entire population of cases (about 1500), about half in the pending section and about half in closed section, and drew a sample of 246 cases (about 16 percent of the population).

3. Comments: G. Marshall Mundy, President of the Roanoke Bar Association, provided a letter of endorsement.



**Southern District of West Virginia (Charleston Federal)**

**Date: September 18-21, 1990**

1. **Court Contact Person:** Ronald Lawson
2. **Sample Selection:** The Clerk's Office identified the entire population of diversity cases for the fiscal year ending June 30, 1990 and photocopied the face sheets. There were a total of 133 diversity cases.
3. **Comments:** Dollar amounts not available.

**Circuit Court (Charleston, West Virginia)**

**Date: September 18-21, 1990**

1. **Court Contact Person:** Cathy Gatson
2. **Sample Selection:** Cases comparable to federal diversity cases were found in the Circuit Court's Civil Division. The court was able to provide a list of tort and contract cases filed in the court during the fiscal year ended June 30, 1990. From this list, the research team collected data on 327 cases. About every third case was usable.
3. **Comments:** Ms. Gatson sent a diskette containing a file of attorney names. This diskette was used to produce mailing labels. There were so many attorney names that had to be deleted, however, that the time savings were marginal.

**Ohio North, Eastern Division (Cleveland Federal)**

**Date: October 1-3, 1990**

1. **Court Contact Person:** James S. Gallas, Clerk of Court  
Bill Johnson  
Supervisor of Data Processing
2. **Sample Selection:** Court staff identified the universe of diversity cases by providing printouts of diversity cases for the one-year period 7/1/89 - 6/30/90. The court uses two databases, SIRS and Civil (the Civil database is new and replaced SIRS, the conversion was completed in 1990), and has two dockets for diversity cases, one for asbestos and one for non-asbestos. Each of the four printouts contained the site number (e.g., Toledo or Cleveland), docket number, name of case, and date filed. By counting the number of cases from these printouts, a universe of 4565 diversity cases was established. (This number comports well with the number reported by the Administrative Office of U.S. Courts).

**TYPE OF CASE**

		Asbestos	Non-Asbestos
DATABASE	SIRS	1728	198
	Civil	2226	413
	TOTAL	3954	611

Staff estimated that as many as 3000 of the asbestos cases were removed from state court by one attorney, and the same attorneys would be listed for each of these cases (i.e. these 3000 cases were essentially the same "case"). Since there seemed no point in replicating the asbestos attorneys excessively, the sample of asbestos cases was limited to about 300 cases. Every 13th case was selected with a random start number of 1, for a total of 304 asbestos cases. For non-asbestos cases, every 5th case was selected using the same random start number of 1, for a total of 122 cases. The sample of cases in district court, then, is 426 (9 percent of 4565). Also, the 4565 universe includes cases from Toledo (Western Division of the Northern District which handles an estimated 500 of these cases). If a Toledo case was selected in the sampling process, it was skipped and the next non-Toledo case was selected.

The cases in the universe do not include maritime asbestos cases which are generally always brought by a Detroit attorney.

The Mardoc (also known as maritime asbestos) cases may or may not be diversity cases, and some may be in our population. They appear to be randomly scattered on the diversity docket.

The docket "face" sheet and additional pages of attorney's names and addresses had to be specially generated. They are usually not generated until all defense attorneys have made an appearance. The complete sample of non-asbestos cases was ready by October 3, but asbestos cases were mailed to Williamsburg on October 15. Only the face sheet (first page) for asbestos cases was sent because the defendants listed (often 40-50) were typically "unrepresented." Mr. Johnson said that it is usually a year after an asbestos case is filed before most parties are represented. Even if the 50 attorneys were listed, they would nearly all be duplicates. Instead, the court's mailing list of all asbestos attorneys in the Northern District was used.

3. **Coding Conventions:** Only the front page of the docket was provided. Therefore, if the number of plaintiffs exceeded one page they could not be counted. The number of defendants was coded as not available. Third party defendants were not counted; nor were counter suits. If the award amount was 0, it was coded not available. The following case types were

coded as "other": real property, rent lease/ejectment, foreclosure, civil (RICO), other fraud, diversity, constitutionality of state statutes, shareholders derivative action, diversity--fraud, declaratory judgment, diversity--property damage, and Jones Act. The following type of plaintiff/defendant were coded as "other"--limited partnerships, restaurant (not incorporated) and rapid transit.

4. Comments: No dollar amounts were available.

### **Cuyahoga County, Court of Common Pleas (Cleveland, Ohio)**

**Date.**      **October 2-3, 1990**

1. Court Contact Person: Ron Ball
2. Sample Selection: After reviewing the coding sheets, Mr. Ball determined that all of the information required could be obtained from the computer system. The first case of 7/1/89 docket #172259 and the last case of 6/30/90, #192689 were identified, yielding a universe of 20,430 cases. Staff members each reviewed a series of 100 cases to determine the "yield" needed to estimate the number of cases for a sample of 400 filings. Twenty percent of the 200 cases were eligible for coding, i.e. met the minimum dollar amount of \$50,000 and were tort or contract cases. Therefore, an estimated 2000 cases would have to be examined to get 400 codeable cases. Using the same random start number of 1 as in federal court, every 10th case was selected. Because 42 additional cases were needed to make 400, another sample of 400 cases was drawn (every 50th case with a random start number of 32) to identify 59 cases suitable for coding. In total, 2,450 (2043 + 407) cases were examined for a sample of 417 cases (17%).
3. Comments: Cases with dollar amounts unspecified were not included in the sample frame and to that extent there may be some bias in the sample. State court personnel at the Judicial Center appeared to be very busy.

Mark O'Neil, President of the Cleveland Bar Association, provided a letter of endorsement.

### **Northern District of Texas (Dallas Federal)**

**Date:**      **October 15, 19, 1990**

1. Court Contact Person: Michael Simon, Deputy Clerk
2. Sample Selection: The Administrative Office of U.S. Courts provided a list of all cases filed in Dallas County for the fiscal year ending June 30, 1990. This 14-page printout listed a universe of 641 cases. To reduce the number of cases to be sampled to about 400, 5 pages of the printouts were randomly selected for exclusion (pages 1, 2, 3, 4, and 13). This left 401 cases was given to Michael Simon on October 15, who arranged for

photocopying of the face sheet. Photo-copied face sheets were retrieved on October 19. Eleven cases could not be located, so the Dallas federal sample consists of 390 cases.

3. **Coding Conventions:** Cases were coded in Williamsburg, Virginia. The following cases were coded in the "other" category: real property, rent lease/rejectment, foreclosures, civil (RICO), other fraud, diversity, constitutionality of state statues, declaratory judgement, property damage, and Jones Act. Third party defendants and counter suits were not counted.
4. **Comments:** Because there were fewer duplicate attorney names in Dallas than existed in other cities, removing duplicate names did not reduce the sample to a manageable size. In order to make the sample size in Dallas comparable to that of other sites, a sample of attorney names was drawn, and only these received the questionnaire.

### District Court (Dallas Texas)

**Date:** October 15-19, 1990

1. **Court Contact Persons:** Kay Howard, Linda Goodwin
2. **Sample Selection:** The universe of cases, estimated from the *1989 Texas Annual Report*, for Dallas County District Court is about 17,500. These cases include: Motor Vehicle Damages, Damages, Notes, and Other Civil (i.e. contracts). Pending cases in Dallas District Court are randomly distributed among 13 civil courts located on the 3rd and 4 th floors. Ms. Goodwin suggested that pending cases from a cluster of four 3rd floor courts be sampled: 44th, 298th, 116th, and 14th. Assuming that about 50 percent of cases filed during the sampling time frame were still open, staff randomly selected entire shelves of cases in each court. The distribution of pending cases in the sample is as follows:

14th	90 cases
298th	14 cases
44th	68 cases
116th	28 cases
Total Pending	200 cases

Closed cases are located on the main floor in the clerk's office. Shelves of cases were again randomly selected for 1989 (column 3 row 8, column 2 row 1, and column 8 row 1), and these shelves were again used for 1990. Remaining shelves were randomly selected to achieve the desired yield of 200 closed cases. Each shelf yielded about 20-25 good cases. This process yielded 211 closed cases in the sample for a total of 411 cases from state court.

3. **Comments:** Staff indicated that all asbestos cases are handled by the 162nd court. In fact, the asbestos files are randomly distributed among all 13 civil courts (motions, hearings, etc. are heard by the 162nd judge but

are not "housed" there). A review of asbestos cases in the 162nd netted only two cases filed during the sampling time frame. Our sampling methodology, then, should have captured a representative distribution of asbestos cases ( $31 \text{ asbestos cases} / 17500 \text{ total cases} = 0.2\% \times 411 \text{ cases in the sample} = 0.8 \text{ cases (or 1 case expected.)}$ )

Court staff in the 162nd court were able to supply the research team with a list of the names, addresses, and phone numbers for all 26 asbestos defense attorneys. In addition, one attorney handles cases for all asbestos plaintiffs in Dallas County. There are a total of 127 asbestos cases pending, 31 filed during our sampling time frame.

Mr. Douglas S. Lang, President of the Dallas Bar Association, provided a letter of endorsement.

### Eastern District of Texas (Tyler Federal)

**Date:** October 16, 1990

1. **Court Contact Person:** Frank Monge, Chief Deputy Clerk
2. **Sample Selection:** Mr. Monge provided us with a list of all cases *pending* (about 2700 for the entire district and 182 for Tyler). According to data from the Administrative Office of U.S. Courts, there were 1450 cases filed in the Eastern District, so this appears to be the universe of pending cases as of June 30, 1990, rather than the universe of cases filed during the one year period ending June 30, 1990. Also, many of the docket numbers are prior to 1989.

The printout provided by the clerk listed most of the information we needed for the 182 cases, but did not give the attorney names, addresses and phone numbers. He agreed to do another computer run to generate this additional data and send it to us by mail. Many of the 182 cases were outside the time frame for this study and others were not diversity cases. Data for 14 cases were omitted from the printout and were requested. In all, a total of 99 cases were coded and the federal attorneys' list drawn from these cases.

3. **Coding Conventions:** The print out did not list dollar amounts requested. Attorneys for counter-claimants were not included in the sample. Cases filed prior to 1989 were not coded.
4. **Comments:** After meeting with Clerk Monge, the research team met with Chief Judge Robert Parker in his chambers. Judge Parker and Judge Thomas Lamros (Ohio North) recently ordered a national class action of all federal and state asbestos lawsuits (this order was recently overturned by the Court of Appeals, see *ABA Journal*, October 1990, p. 14). Judge Parker was interested in knowing about the NCSC's research in federal

diversity jurisdiction. He explained that federal diversity jurisdiction should be eliminated because the purpose for which it was created no longer exists: local bias in state courts and better judges in federal courts. He said the fact that eliminating diversity jurisdiction would reduce federal workload and expenditures was absolutely not a justifiable reason for the elimination of diversity jurisdiction. Judge Parker also noted the major difference between state and federal courts is that federal courts have a greater "aura" about them: courthouses and court rooms are more dignified, rules and procedures have more structure, and the general attitude in the courthouse is more formal.

### District Court (Tyler, Texas)

Date: October 16-17, 1990

1. Court Contact Person: Brad Burger, Clerk of Court
2. Sample Selection: The universe of cases, estimated from the *1989 Texas Annual Report*, for Smith County District Court is about 750. These cases include: Motor Vehicle Damages, Damages, Notes, and Other Civil (i.e. some contracts, but most of these 200 cases are domestic relations and estate cases). On October 16, the research team went through three docket books covering the period July 1, 1989 to June 30, 1990, and found 438 usable cases. They compiled a list of case docket numbers to be reviewed. Mr. Burger pulled closed case files (N=213) from the clerk's office and brought them to the team for coding (N=109 usable cases). When the coding was completed on closed cases, staff went to the largest of three civil courts, the 114th ("B") and reviewed another 75 cases which yielded another 20 codeable cases. Altogether, 128 cases were coded and 288 cases were reviewed, resulting in a high yield rate of 44 percent. About 150 cases could not be located because they were in courts A and C, and because a portion of cases were in judges' chambers (these cases are characterized as being most recent and most complex).
3. Comments: There are a high proportion of medical malpractice cases in the sample because Tyler is the center for several regional hospitals. Motor vehicle cases generally did not give dollar amounts, so staff had to estimate whether or not these cases were worth more than \$50,000 from the nature of the injury.

**Southern District of Ohio (Cincinnati Federal)****Date: December 3, 1990**

1. **Court Contact Persons:** Daniel Lyons
2. **Sample Selection:** A list of diversity cases filed during the year which ended June 30, 1990 was obtained for the Administrative Office of U.S. Courts and sent to Mr. Lyons. His staff photocopied the civil cover sheet containing the names and addresses of both plaintiff and defense attorneys. All diversity cases filed were included in the sample.
3. **Comments:** Exact dollar amounts in controversy were absent in many cases. The defense attorneys were not always listed. In some cases, they may not have been engaged, as yet. A few cases did not have exact filing dates. Declaratory judgments and property torts were coded in the "other" category.

**Hamilton County, Court of Common Pleas (Cincinnati, Ohio)****Date: December 3-7, 1990**

1. **Court Contact Persons:** Mark Schweikert, Court Administrator  
William Schoenfeld, Assistant Court Administrator
2. **Sample Selection:** Mr. Schoenfeld provide us with a list of all cases filed in the 1989-1990 time period of the study. From these, torts and contracts were chosen. Ohio case categories that were included in the same were: personal injury, auto injury, malpractice, product liability cases were accepted as torts and breach of contract cases were accepted in the contract category. All tort, malpractice and contract cases pending in 89 and 90 were sampled. These cases were listed by judge, and the number of cases drawn that were above the \$50,000 limit (yield rate) is listed below.

<u>All Cases</u>	<u>89</u>	<u>ARB</u>	<u>90</u>	<u>ARB</u>	<u>YIELD</u>
Bateman	64	7	87	3	35
Kraft	58	3	65	7	37
Nurre	51	7	83	9	39
Matthews	20	1	-	-	10
Cartolano			86	12	18
Crush			97	7	19
Morrissey			74	7	17
Murdock			91	22	12
Nadel			78	4	17
Niehaus			84	2	18
Ruehlman			80	15	21

<u>All Cases</u>	<u>89</u>	<u>ARB</u>	<u>90</u>	<u>ARB</u>	<u>YIELD</u>
Sunderman			86	17	17
Tracy			80	8	19
Winkler			79	5	22
					301

After samples were drawn from the first three judges, the yield rate was determined. The choice was to sample cases from selected judges for the entire year or to select cases from all judges for part of the year. Given the yield rate, staff decided to sample all cases filed in 1990.

3. Coding Conventions: A problem arose in how to code cases with multiple plaintiffs each suing for dollar amounts under \$50,000 but together totalling over \$50,000. Because federal courts usually have single plaintiffs, staff decided to exclude these cases unless one single plaintiff demanded more than \$50,000. The addresses of Cincinnati Attorneys were coded in Williamsburg using an ABA Directory of names supplied by the court.

Harry H. Stanten, President of the Cincinnati Bar Association, provided a letter of endorsement.

### **Eastern District of North Carolina (Raleigh Federal)**

**Date: December 17, 1990**

1. Court Contact Persons: J. Rich Leonard, Court Clerk
2. Sample Selection: A list of diversity cases filed during the year ending June 30, 1990 was obtained from the Administrative Office of U.S. Courts and sent to Mr. Leonard. His staff photocopied the civil cover sheet containing the names and addresses of both plaintiff and defense attorneys. All diversity cases filed were included in the sample.

### **Wake County Superior Court (Raleigh, North Carolina)**

**Date: December 17-19, 1990**

1. Court Contact persons: Sallie Dunn, Court Administrator
2. Sample Selection: Ms. Dunn provided a list of all pending (as of September 30, 1990) CVS (Civil Superior Court) cases which were filed between June 5, 1989 and August 8, 1990. CVS case types include the following: motor vehicle negligence, other negligence (e.g. slip and fall), contract, real property, administrative appeals, and other (e.g. restraining orders and injunctions). Cases filed between July 1, 1989 and June 30, 1990 were selected.



First, all pending contract cases (345 cases) were listed, of these, 312 folders were pulled (33 folders were unavailable), screened and coded.

Second, the pending negligence cases which were filed between July 1, 1989 and April 3, 1990 were listed. Of these, 224 cases, 196 folders were pulled (28 folders were unavailable), screened and coded.

A list of *all* CVS cases filed was needed because the disposed cases were missing. A list of *all* CVS filings was obtained, but unfortunately, the new printout did not identify the type of each case. In order to prevent duplication and minimize the work load, all cases which had been previously identified were scratched off the new list, as well as all of the "invalid" cases which were identified on the original "pending" list. All 488 negligence and contract cases filed in 1990 were pulled. In sum, the total number of cases which were screened was 996. There was insufficient time to pull and code the approximately 470 1989 filings which had been disposed.

3. **Coding Conventions:** State law mandates that "in all negligence actions and in all claims for punitive damages in any civil action, wherein the matter in controversy exceeds the sum or value of ten thousand dollars (\$10,000), the pleading shall not state the demand for monetary relief, but shall state that the relief demanded is in excess of ten thousand dollars (\$10,000)." This presented a significant problem in identifying claims which might exceed \$50,000. The impact of this law on the language of the complaint was that attorneys were extremely vague about the severity of injuries, damages and costs which plaintiffs were claiming to have incurred. Estimates of damages from a thorough reading of the complaints and other papers for language which suggested serious, permanently disabling or disfiguring injuries in negligence cases. The predominance of "boiler-plate" language may have caused researchers to miss cases which might have been appropriate to code. Most contract cases did specify actual damages, so there was little trouble in identifying codeable contract cases.

### **U.S. District Court, Central District of California (Sacramento Federal)**

**Date: February and March of 1991**

1. **Court Contact Person:** James R. Gundstaff, Clerk  
Mark Lchette
2. **Sample Selection:** A universe of diversity cases filed in the Central District of California was obtained from the Administrative Office of U.S. Courts.
3. **Comments:** The Clerk of Court recommended that a private firm be engaged to photocopy the civil court face sheets because court staff could

not photocopy more than 20 files. Interceptor was hired to photocopy the civil cover sheets. Security measures prompted by the Gulf War limited access to the court. It was therefore necessary to request specific files from judges because, many of the cases were pending. Therefore, it was necessary to look up the name of the judges to whom the cases were assigned and to add their initials to the request for files. Some disposed cases had already been removed to off-site storage facilities--some were retrieved and some were not. To further complicate the collection, the court was in the process of automating the recordkeeping system. In some instances, the deputy clerk had to copy some of the cover sheets when the public counter activity was low.

### **Sacramento County Superior Court (Sacramento, California)**

**Date: January 9-16, 1991**

1. **Court Contact Person:** William Brown, Executive Officer, Superior Court
2. **Sample Selection:** As part of the recently implemented California Delay Reduction measures, all civil cases which are of interest to the NCSC Diversity Project are now filed under the Accelerated Civil Trial (ACT) Program. The case numbers for the period between July 1, 1989 and June 30, 1991 began with CV509197 and ended with CV514969, yielding a population of 5,772 cases. The same period was further limited because: (1) A yield rate of 20% was common across the other project sites, which if true in Sacramento, would have yielded a sample size over 1,000 cases; (2) the minimum jurisdiction in California is \$25,000, higher than that in other states, and so the dollar amount-in-controversy was expected to exceed \$50,000, in a larger percentage of cases; (3) survey respondents may have difficulty remembering the particulars relating to the older cases in their court's sample. For these three reasons, the sample period was limited to the last six months of the year--from January 1, 1990 to June 30, 1991, yielding a population of 2,993 cases to sample. The ACT files are filed in terminal digit order, the terminal digit is the last two numbers on the file. This was helpful for our purposes, because it enabled us to draw a sample across all six months of the population. We began screening cases at 00 and stopped at 49, for a total of approximately 1,500 cases (59 cases filed were unavailable, either in trial or arbitration, etc.). These 1,500 cases yielded an actual sample of 444 cases.

All case level data except the attorney names and addresses were obtained from the manual files. The attorney names were obtained from a computerized list of the most recent attorneys of record for each case during the sample period.

3. **Coding Conventions:** As indicated above, only the names and addresses of the most attorneys were available from the computer system. Due to

time constraints, prevented the collection of attorney data from the manual files, thus there are missing data on attorneys who may have represented a party earlier in the processing of a case. The amount in controversy in contract cases was generally explicitly stated in the complaint, but was not as clear in tort cases. Both from the California Court Rules (Rule 201.5(a)(12) and Rule 209(b)(3)), and from statements by several clerks, it appears that attorneys are prohibited from specifying a dollar amount in a tort complaint. The files seemed to bear out this, even though in some exceptions damages were specified in the complaint. Whether the dollar amount in controversy exceeded \$50,000 could be estimated in most tort cases from either a "statement of damages" which was sometimes filed separately, or more often from an order assessing whether the case was appropriate for arbitration. Although there is a maximum \$50,000 eligibility limit for case to qualify for arbitration, in practice, it would appear that this limit is generally waived. Additionally, the fact that a case could proceed to arbitration with no limit did not necessarily mean that the amount-in-controversy exceeded \$50,000. Therefore, only cases where the extent of the personal injuries was potentially severe enough to warrant its inclusion, or the paperwork specifically represented that the amounts-in-controversy exceeded \$50,000 were included in the sample. Use of these criteria may have resulted in the exclusion of some cases. The use of a standardized form available in the California Court Rules, and the prevalence of boiler-plate language in complaints further undermined our ability to determine not only the amount in controversy, but also the specific circumstances and injuries underlying the complaints.

4. Comments: The terminal digit filing system was very useful. Interestingly enough, the Executive Officer wants to change the filing system, from one where all cases, open and disposed, are kept together, to one where the disposed cases are moved to a location outside the clerk's office. This will have a negative impact on the ability of researchers to conduct this type of data collection. One clerk commented on the volume of paperwork which they must now deal with as a result of the Delay Reduction Program. The clerk stated that with the new changes, he must now process nineteen new pieces of paper for each case.