COMMON PLEADING PROBLEMS

1. Southern District of Iowa's Local Rules.

Noncompliance with the Local Rules is not a frequent phenomenon, but it does occur. Below are some of the Rules most often overlooked.

Local Rule 5(c)

Filing Sealed Documents. Unless otherwise authorized by these rules, the ECF Procedures Manual, or a statute of the United States, a party seeking to file documents under seal first must file a motion requesting leave to do so. The documents sought to be filed under seal must not be attached to the motion or they will become part of the public case file. Instead, the documents must be described in the motion with sufficient particularity to enable the court to rule on the motion without reviewing the documents. Alternatively, in the Northern District the documents may be e–mailed to the Clerk of Court at ecfmail@iand.uscourts.gov for review by the court.

If an order is entered granting a motion to file documents under seal, or if the court enters a protective order or some other order directing the filing of documents under seal, then the parties thereafter must, without obtaining a further order from the court, docket and electronically file under seal all documents covered by the order. The parties also must file under seal all documents referring to or disclosing confidential information in the sealed documents.

Certain categories of documents, because of their nature, are sealed by the ECF system without a motion by a party or an order of the court. Most of these "system-sealed" filings are in criminal cases. (A current list of system-sealed filings is available from the Clerk of Court and on the court's website at the web address in Local Rule 1.i.) A party filing such a document must not file a motion for leave to file the document under seal, but must file the document under seal directly through the ECF system.

Generally, a document filed under seal is electronically accessible only to the court and counsel of record. Some documents filed under seal in criminal cases are electronically accessible only to the court.

A document filed electronically under seal must include at the beginning of the document the caption of the case and the notation "FILED UNDER SEAL." A paper document submitted to the court for filing under seal must be delivered to the Clerk of Court in a sealed envelope marked with the caption of the case and the notation "FILED UNDER SEAL." If these requirements are not met, documents intended to

be filed under seal could be filed in the public case file inadvertently.

Not less than one year after a judgment has become final in a civil case, or if an appeal from the judgment has been filed, not less than one year after the issuance of the mandate by the circuit court, the Clerk of Court may destroy and discard any sealed paper documents in the civil case file, unless, before the expiration of the one-year period, a party files an objection to the destruction of the documents, or the parties file an agreement to a disposition of the documents in lieu of their destruction.

Local Rule 7(c)

Oral Argument. A request for oral argument must be noted separately in both the caption and the conclusion of the motion or resistance to the motion, and must be supported by a showing of good cause.

Local Rule 7(d)

Briefs on Motions. For every motion, the moving party must prepare a brief *containing a statement of the grounds for the motion and citations to the authorities upon which the moving party relies*, except no brief is required for the following motions:

1. To amend a scheduling order and discovery plan;
2. To extend a deadline or continue any proceeding before the court;
3. For permission to file a brief longer than the length prescribed in the Local Rules;
4. For appointment of a next friend or guardian ad litem;
5. To compel discovery responses when no responses have been made (but the movant must comply with the requirements of Local Rule 37);
6. To substitute or withdraw counsel;
7. To substitute a party;
8. To amend or supplement a motion, brief, or other document.

A brief must be filed as an electronic attachment to the motion it supports under the same docket entry as the motion. If a brief is not filed on the same day as the motion it supports, it may be stricken by the court as untimely.

Local Rule 7(g)

Reply Briefs. [T]he moving party may, within 7 days after a resistance to a motion is served, file a reply brief, *not more than 5 pages in length, to assert newly-decided authority or to respond to new and unanticipated arguments made in the resistance.* In the reply brief, the moving party must not reargue points made in the opening

brief. A reply brief may be filed without leave of court.

Local Rule 10(c)(3)

> **Documents Filed in Paper Form.** If a motion, resistance, or reply, together with any supporting filings, totals more than 100 pages in length and is filed electronically, within 7 days after the document is filed, the filer must deliver to the Clerk of Court, for use by the presiding judge, a paper copy of the motion, resistance, or reply, together with any supporting filings, reproduced on one side of the page, bound or fastened at the left margin, and tabbed to facilitate ready reference.

Cameras in Courts Project

Although not connected with pleading one's case in any way, increasing awareness of this initiative is very important. Fourteen federal trial courts are taking part in the project, which started July 18, 2011, and will evaluate the effect of cameras in courtrooms. All 14 courts volunteered to participate in the three-year experiment. The participating courts are the Middle District of Alabama, the Northern District of California, the Southern District of Florida, the District of Guam, the Northern District of Illinois, **the Southern District of Iowa**, the District of Kansas, the District of Massachusetts, the Eastern District of Missouri, the District of Nebraska, the Northern District of Ohio, the Southern District of Ohio, the Western District of Tennessee, and the Western District of Washington.

No proceedings may be recorded without the approval of the presiding judge, and parties must consent to the recording of each proceeding in a case. The recordings will be made publicly available on uscourts.gov and may also be on local participating court websites at the court's discretion.

For more information, visit http://www.uscourts.gov/multimedia/cameras.aspx.

2. Failure to properly plead diversity jurisdiction.

Every attorney knows that a corporation is a citizen of the State of its incorporation and

the State of its principal place of business. *See* 28 U.S.C. § 1332(c). Some of the situations below are not so well-understood, however.

a. *Residency.*

Pursuant to 28 U.S.C. § 1332(a)(1), for diversity purposes an "averment of residence is not an averment of citizenship for purposes of jurisdiction in the courts of the United States." *Everhart v. Huntsville Coll.*, 120 U.S. 223, 224 (1887); *see also Texaco-Cities Serv. Pipeline Co. v. Aetna Cas. & Sur. Co.*, 283 F.2d 144, 145 (8th Cir. 1960).

b. *Limited partnership and limited liability partnership.*

"[T]he citizenship of a limited partnership is the citizenship of each of its partners, both general and limited." *Buckley v. Control Data Corp.*, 923 F.2d 96, 97 (8th Cir. 1991) (citing *Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990)). Similarly, a limited liability partnership has the citizenship of each of its partners. *Thompson v. Deloitte & Touche LLP*, 503 F. Supp. 2d 1118, 1122 (S.D. Iowa 2007) (internal citation omitted).

c. *Limited liability company.*

For purposes of diversity jurisdiction, a limited liability company has the citizenship of each of its members. *GMAC Commercial Credit, LLC v. Dillard Dep't Stores, Inc.*, 357 F.3d 827, 829 (8th Cir. 2004)

d. *John Doe defendants.*

The plaintiffs must show that none of the John Doe defendants is a citizen of the same State as any of the plaintiffs. *See Payich v. GGNSC Omaha Oak Grove, L.L.C.*, No. 4:12-cv-3040, 2012 U.S. Dist LEXIS 56982, at *10 (D. Neb. Apr. 24, 2012). Courts may not simply presume so. *Id.* Rather, the plaintiffs bear the burden of establishing facts that are

necessary to show that the court has jurisdiction over the lawsuit. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936).

3. Improper choice of venue.

a. *This problem is not encountered often.*

The vast majority of complaints involve a proper choice of venue. In most case, choosing the proper venue, as provided by § 1391, is fairly straight-forward. The cases where the proper venue is not immediately obvious are usually those involving § 1391(b)(2), which provides, in relevant part, that venue is proper in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." Cases involving complex fact patterns make it significantly more difficult to decide whether "a substantial part of the events or omissions giving rise to the claim occurred" in a given judicial district. To make matters worse, pursuant to § 1391(b)(2), venue may be proper in more than one district. *See Mitrano v. Hawes*, 377 F.3d 402, 405 (4th Cir. 2004). Furthermore, venue will properly lie in a judicial district even if there is another district having a closer connection to the claims at issue. *See Setco Enters. Corp. v. Robbins*, 19 F.3d 1278, 1281 (8th Cir. 1994) ("[W]e ask whether the district the plaintiff chose had a substantial connection to the claim, whether or not other forums had greater contacts."); *Advanced Logistics Consulting, Inc. v. C. Enyeart, L.L.C.*, No. 09-cv-720, 2009 U.S. Dist. LEXIS 50603, at *9 (D. Minn. June 16, 2009) ("[T]he Court need not decide that it is the 'best' venue or the one having the most significant connection to the claims at issue."). Under controlling Eighth Circuit precedent, in deciding whether a substantial part of the events or omissions giving rise to the plaintiff's claims occurred in a given district, courts focus only on the defendant's alleged wrongful activities. *See Woodke v. Dahm*, 70 F.3d 983, 985–86 (8th Cir.

1995); *Catipovic v. Turley*, No. C 11-3074, 2012 U.S. Dist. LEXIS 79824, at *52–53 (N.D. Iowa June 8, 2012) (citing *Woodke*, 70 F.3d at 985).

b. *Having personal jurisdiction over the defendants does not ensure that venue is proper.*

Deciding whether a substantial part of the events or omissions occurred in a given judicial district, in a way, blurs the distinction between personal jurisdiction and venue inquiries. Occasionally, attorneys "fall in this trap." Personal jurisdiction and venue may be closely related in some lawsuits, but they nevertheless remain separate concepts.

"The test for determining venue is not the defendant's 'contacts' with a particular district, but rather the location of those 'events or omissions giving rise to the claim . . . .'" *Cottman Transmission Sys. v. Martino*, 36 F.3d 291, 294 (3d Cir. 1994). "It would be [an] error . . . to treat the venue statute's 'substantial part' test as mirroring the minimum contacts test employed in personal jurisdiction inquiries." *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 357 (2d Cir. 2005); *accord United States ex rel. Rudick v. Laird*, 412 F.2d 16, 20 (2d Cir. 1969) ("The concepts of personal jurisdiction and venue are closely related but nonetheless distinct."). Therefore, reciting facts that establish the defendants' minimum contacts with the forum State is irrelevant to the venue analysis.

4. Failure to include sufficient facts supporting the asserted claims.

a. *New pleading standard after Twombly and Iqbal.*

In his recent law review article published in the New York University Law Review, Arthur Miller analyzed the effects of *Twombly* and *Iqbal* as follows:

> [T]hese two cases represent a procedural "sea change" in plaintiffs' ability to survive the pleading stage. They turn their back on over sixty years of federal pleading jurisprudence . . . The two cases . . . have created heightened opportunities for

> defendants to seek dismissal or, at a minimum, a deferral of discovery and any real consideration of the merits. Not surprisingly, the Federal Judicial Center reports that motions to dismiss are now being invoked with increased frequency, which indicates that the [United States Supreme] Court's decisions have magnified litigation costs and affected lawyer behavior. . . .
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> The Court essentially rewrote Rule 8 without anyone's assistance or any pretense of honoring the statutorily prescribed—and far more transparent and democratic—rulemaking process. The Rule effectively has been changed. Initially, it required "notice" of the claim. Now it requires facts—not conclusions—"showing" (a word in the Rule never previously judicially focused on or accorded any significance) a "plausible" claim, with little guidance as to what that means.

Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U.L. REV. 286, 331–34 (2013).

b. *This new pleading standard encourages motions to dismiss.*

Following *Twombly* and *Iqbal*, courts have been more inclined to grant motions to dismiss because the new pleading standard ushered by these two cases actually requires that judges look into the merits of the case to assess complaints for facial plausibility. In his recent article on the deformation of federal procedure, Arthur Miller wrote:

> The process described in *Iqbal* appeals too much to judicial subjectivity, which inevitably depends (at least in part) on an individual judge's background, values, preferences, education, and attitudes . . . . One does not have to be paranoid to be concerned that these highly individualistic considerations are at work and impacting a district judge's thinking on a motion to dismiss, particularly with regard to assessing the complaint's plausibility and the hypothesized innocent explanations for the defendant's conduct. There is simply too much potential for inappropriate merit determinations—based only on the complaint—in the *Iqbal* regime.
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> Thus, it is not unreasonable to assume that the new plausibility regime may lead to judges resolving fact issues on a motion to dismiss . . . , thereby intruding on a domain historically committed to the trial process and juries . . . . The motion to dismiss and its antecedents—for hundreds of years—have been viewed as procedures that only determine the legal sufficiency of the statements in the complaint. The

motion asks a simple question—does the complaint state a claim the law recognizes? Miller, *supra*, at 336–37.

5. Overpleading.

a. *Disclaimer.*

> *"To tell people what to read is, as a rule, either useless or harmful; for, the appreciation of literature is a question of temperament not of teaching . . . . But to tell people what not to read is a very different matter . . . ."*

Letter from Oscar Wilde to the Editor of the Pall Mall Gazette (Feb. 8, 1886) *in* THE ESSAYS OF OSCAR WILDE at 596 (1916).

Following Oscar Wilde's admonition, I would never tell a lawyer what to do to try a case successfully, for that would be "either useless or harmful." Telling a lawyer "what not to . . . [do] is a very different matter[, however]." The latter is what I strive to do, and my reflections boil down to this: Do not overplead your case. In other words, do not assert more claims in any given lawsuit than you need to. This is one instance where, to use a familiar cliche, less is more.

You are probably wondering why you, as lawyers, should care about anything that Oscar Wilde had to say about literature. This fair question has a simple answer: because, when it comes to pleading claims, at least some judges in this Circuit apply the same logic when evaluating pleadings. Here is what Judge Lay had to say about overpleading one's case:

> I can fully understand plaintiff's frustration. He was a loyal employee who performed his job for over twenty-eight years. Why was he suddenly discharged as he neared retirement age? Unsure of the reason, his lawyer obviously "shot-gunned" his claims-not knowing which one would work. In other words, the plaintiff "protests too much." The plaintiff[']s multiplicity of claims against the defendant backfired, not only weakening but defeating some of his legitimate claims. Although the timing of the discharge seems questionable, there is not enough evidence to support any of the plaintiffs claims. The result here leaves the plaintiff feeling an injustice has been done and, although I lack a legal basis for saying so, I am not so sure that I disagree.

Montgomery v. John Deere & Co., 169 F.3d 556, 563 (8th Cir. 1999) (Lay, J., concurring).

b. *What is "overpleading?"*

The practice that I am counseling against is the one where lawyers, in addition to asserting viable claims, also plead claims that even they do not believe that they can prevail on, and these weak claims are based on the same set of facts as the viable claims but do not afford the plaintiffs additional remedies or relief.

c. *Possible negative consequences of overpleading.*

1. Causes you to lose credibility with opposing counsel and the judge

2. Detracts attention from the meritorious claims in the lawsuit

3. Drains your firm's resources by having to defend these weak claims on a motion to dismiss or a summary judgment motion, especially considering that lawyers tend to be defensive when it comes to their choice of a litigation strategy

4. Increases the possibility for a jury confusion when trying the case and prevents you from having a more focused approach in presenting evidence to the jury

5. Wastes judicial resources because the judge needs to rule on the defendant's dispositive motions concerning the weak claims and/or jury instructions

6. Increases the litigation costs to your clients without also increasing their chance of success

d. *Overpleading and Twombly-Iqbal.*

The importance of the admonition not to overplead one's case is ever increasing, at least in the federal courts, in light of the Supreme Court decisions in *Twombly* and *Iqbal*. *See* Miller, *supra*, at 331–48 (arguing that *Twombly* and *Iqbal* changed Rule 8's pleading standard and "producing more pleading motions, more delays, more costs, more appeals, and potentially more

inappropriate dismissals”). Thus, overpleading one’s case would almost certainly invite a motion to dismiss in response.