February 7, 2014

Committee on Rules of Practice & Procedure of the Judicial Conference of the United States
Advisory Committee on Civil Rules

Dear Committee Members:

I write to comment on the proposed abrogation of Rule 84 and the Official Forms. I have deep admiration for the federal rulemaking process, so I am honored to take this opportunity to comment on this proposal. An essay I wrote about the proposed abrogation of Rule 84 and the forms is attached to this letter. In the interest of brevity, I have also summarized my arguments here.

I believe that the proposed abrogation of Rule 84 and the Official Forms is a violation of the Rules Enabling Act process. In short, the rules and the forms are one and the same. In order to understand the rule, one must look to the forms. This means that in order to change a form, the rule and the form to which it corresponds must be changed together. This is because a change to the form necessarily changes the rule to which it corresponds, meaning that both the form and rule must be considered and published under the Act. The proposed change to Rule 84 and the forms is being done without reference to any of the rules to which the forms correspond. This, I argue, is a violation of the Enabling Act process.

First, the history of Rule 84 itself shows that the rules and the forms are one and the same. When the rules were initially adopted in 1938, Rule 84 was there. However, it was amended in 1946 to clarify to courts and parties that the forms were not simply passive indications of what the rules meant. They were instead active illustrations of the rules. The 1946 modification was made in response to some courts that were not treating the forms as sufficient under the rules. The revised language states that the forms suffice under the rules, and shows how the rules and forms are connected.

Second, the way the forms have been amended since 1938 shows that the rules and forms are linked. Historically, the forms have only been amended in concert with their corresponding rules. So, when Rule 4 was amended to add a provision for waiver of service of process, the forms were also amended to abrogate the old service form (old form 18-A) and add new forms 1A and 1B (current Forms 5 & 6). This example of how the forms are amended is repeated throughout the history of the rules. When a form was not amended with a rule, it was amended due to some federal statutory change. For example, a change to the amount in controversy requirements by Congress in 1993 meant that a number of the forms had to be modified. But here again, the forms were changed in connection with federal law. The only instances where the forms have been amended

without a change to their corresponding rules or federal statutory law, according to my research, has been when a form is changed in some ministerial way. So, for example, changes correcting date designations from 19-- to 20--. This demonstrates that changing the forms without changing the rules is atypical.

Finally, we have a current example of how the proposed abrogation of the forms is problematic. *Twombly* and *Iqbal*, as the committee is well aware, have called Form 11 into question. Yet, the Court cited Form 11 approvingly in *Twombly*, and has said nothing about it since. The Civil Rules Committee's deliberations regarding the forms, and specifically Form 11, demonstrate the amount of confusion those cases have created. But, they also demonstrate how much Rule 8 and Form 11 are linked. We can certainly agree to disagree to about how much the form means to Rule 8. That is a debate that we probably do not need to rehash, but the very fact that Form 11 is part of Rule 8 means that the Committee cannot change the form without consideration of the Rule. Eliminating Form 11 will necessarily change Rule 8. Thus, to eliminate Form 11 without acknowledging Rule 8 is not just problematic, it is wrong under Enabling Act process.

So, first, historically Rule 84 has only been amended once to clarify and confirm that the forms were sufficient under the Rules. Further, the forms have only been meaningfully amended in conjunction with the rules or federal statutory law. Finally, the example of the connection between Rule 8 and Form 11 shows that the rules and forms are inextricably linked.

All of this leads me to the conclusion that the proper course under the Rules Enabling Act process would be to consider the rules and the forms together and take them through the Enabling Act process anew. I encourage the Advisory Committee to consider this option when it revisits its proposed abrogation of Rule 84 and the forms.

Sincerely,

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Abrogation Magic:
The Rules Enabling Act Process, Civil Rule 84, and the Forms

Brooke D. Coleman*

The Committee on the Federal Rules of Practice and Procedure seeks to abrogate Federal Rule of Civil Procedure 84 and its attendant Official Forms.[1] Poof—after seventy-six years of service, the Committee will make Rule 84 and its forms disappear. This Essay argues, however, that like a magic trick, the abrogation sleight of hand is only a distraction from the truly problematic change the Committee is proposing. Abrogation of Rule 84 and the Official Forms violates the Rules Enabling Act process.[2] The Forms are inextricably linked to the Rules; they cannot be eliminated or amended without making a change to the Rules to which they correspond. Yet, the proposal to abrogate Rule 84 and the Forms has received little attention, with commenters instead focused on proposed discovery amendments. This Essay argues that inattention to the proposed abrogation of Rule 84 and the Forms is a mistake, and that the Forms should not just disappear.

I. Rule 84 and the Official Forms

Before addressing how the proposed abrogation of Rule 84 and the Official Forms is problematic, this Essay will examine the adoption of Rule 84 and the forms. It will also briefly discuss how courts and scholars have viewed and utilized the forms over the past seventy-six years.

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[1] Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure, at 329-330, available at http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf. ("Preliminary Rule Draft").

[2] Act of June 19, 1934, ch. 651, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2071-77). The process for amending the rules under the Enabling Act is daunting. Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1673. Once the rules or amendments are drafted and approved by the Civil Rules Committee, the Standing Committee must approve them for public comment. *Id.* at 1663–75. Once the comment period is over, the committees must consider the rules once again in light of those comments before sending them on to the Judicial Conference for approval. *Id.* After the Judicial Conference approves of the changes, the Supreme Court must approve them. *Id.* The final step requires that Congress take no action on the rules so that they can go into effect. *Id.* At best, this process takes three years. *Id.* at 1673. At any point, a rule change can be defeated, delayed, or tabled. For these reasons, the process can be perceived as quite archaic and slow. Yet, the hallmark of the process is that it allows for thoughtful deliberation and engagement before any changes are made.

A. History of Rule 84

The original Federal Rules of Civil Procedure, adopted in 1938, included Rule 84. The original Rule 84 stated that the appendix of forms was "intended to indicate 'the simplicity and brevity of statement which the rules contemplate.'"[3] Some courts took this language to mean that the forms were merely suggestive.[4] In 1946, the Committee amended Rule 84 to state that "[t]he forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate."[5] The Advisory Committee Note further explained that most courts had understood the original Rule 84 to mean that the "forms … are sufficient to withstand attack under the rules under which they are drawn, and that the practitioner using them may rely on them to that extent."[6] The amendment, the Note explained, was meant to confirm this common understanding of Rule 84 and the forms.[7] It was also intended to tamp down the "isolated results" some courts had reached that were to the contrary.[8]

Thus, Rule 84 and its forms were an original part of the Civil Rules. More than just being part of the text, however, the forms were part of the rulemakers' ethos. Charles Clark explained,

> "We do not require detail. We require a general statement. How much? Well, the answer is made in what I think is probably the most important part of the rules so far as this particular topic is concerned, namely, the Forms. These are important because when you can't define you can at least draw pictures to show your meaning."[9]

Perhaps because the forms were so ingrained in the ethos of the rules, there has been little activity around Rule 84. In 1989, the Civil Rules Committee proposed an amendment to Rule 84 that would have replaced the appendix of forms with a practice manual.[10]

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[3] Ramsouer v. Midland Val. R. Co. 135 F.2d 101, 107 (8th Cir. 1943) (quoting then-Rule 84).

[4] Washburn v. Moorman Mfg. Co, 25 F.Supp. 546, 546 (D.C.Cal. 1938); Employers' Mut. Liability Ins. Co. of Wis. v. Blue Line Transfer Co., 2 F.R.D. 121 (D.C. Mo. 1941).

[5] Fed. R. Civ. P. 84.

[6] Fed. R. Civ. P. 84, Advisory Committee Note (1946).

[7] *Id.*

[8] *Id. See* U.S. v. Warner, 8 F.R.D. 196, 196 (1948) (confirming the sufficiency of the forms, as set forth in Rule 84).

[9] Charles E. Clark, Pleading Under the Federal Rules, 12 Wyo. L.J. 177, 181 (1958).

[10] Standing Committee Report to the Judicial Conference, 47-48, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST03-1989.pdf.

The manual would have included a set of forms similar to those found in the existing appendix of forms.[11] The Judicial Conference of the United States would have had the authority to amend the manual directly.[12] In other words, any changes to the manual or the included forms could have been implemented without resort to the Rules Enabling Act process. Academics, judges, and members of the bar argued that this amendment violated the Rules Enabling Act by giving the Judicial Conference rulemaking power that it did not have under the Act.[13] The amendment was ultimately abandoned, largely due to these concerns.

It was not until almost twenty years later that the Civil Rules Committee engaged in a renewed discussion of Rule 84 and the forms.[14] The October 2009 meeting was dominated by a discussion of how *Twombly v. Bell Atlantic*[15] and *Ashcroft v. Iqbal,*[16] had been received in practice.[17] Following that discussion, the Committee moved on to discuss whether the forms were necessary or whether, because of the passage of time, they had become irrelevant.[18] The Committee wondered whether it should update all of the forms to reflect some complexities of practice, namely those that had developed in patent litigation[19] and because of *Twombly* and *Iqbal.*[20] It ultimately decided that further study was necessary.[21]

In April 2011, the Civil Rules Committee once again discussed the forms.[22] The Committee noted that the forms, while important in 1938, did not carry the same import now because the

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[11] *Id.*

[12] *Id.*

[13] Stephen Burbank, *Hold the Corks: A Comment on Paul Carrington's 'Substance' and 'Procedure' in the Rules Enabling Act*, 1989 DUKE. L. J. 1012, 1040 n. 182 (1989). *See supra* note 2 for a discussion of the Enabling Act Process.

[14] Advisory Committee Meeting Minutes, October 8-9, 2009 ("October 2009 Civil Rules Minutes") available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV10-2009-min.pdf., at 14 ("The fundamental questions begin with the continuing need for illustrative forms.").

[15] 550 U.S. 544 (2007).

[16] 556 U.S. 662 (2009).

[17] October 2009 Civil Rules Minutes, *supra* note 14. These two seminal pleading cases are discussed in Section II.

[18] October 2009 Civil Rules Minutes, *supra* note 14, at 14 ("It must be asked whether illustration remains as important in the maturity of the rules as it was in their infancy.").

[19] *See infra* notes 60-62 and accompanying text.

[20] *Id.* at 14-15 ("Even if pleading forms are to be maintained in some form, it is possible even to attempt forms for more complex claims?").

[21] *Id.* at 16-17.

[22] Advisory Committee Meeting Minutes, April 4-5, 2011 ("April 2011 Civil Rules Minutes) available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/Civil-Minutes-2011-04.pdf.

rules are "mature."[23] The members once again struggled with whether the right action was to eliminate the forms altogether or whether it was appropriate to find some way to amend the forms to make them more useful.[24] The Committee concluded that further study was necessary.[25]

By the November 2011 meeting, the Committee launched a Forms Subcommittee.[26] In March 2012, the Committee encouraged the Forms Subcommittee to come to the next meeting with a proposal—abrogation, amendment, or steady-state.[27] In November 2012, the Subcommittee proposed abrogating Rule 84 and its forms entirely.[28] According to the subcommittee, it confirmed that "very few professionals or practitioners" use the forms.[29] Instead of using the Official Forms, the subcommittee concluded that most lawyers used other forms, such as those available in their law firms or through their local courts.[30] The Committee discussed pro se parties, but found that "there seems to be little indication that pro se parties often find the forms, much less use them."[31] Because the rulemaking process was not "nimble" enough, the Committee members discussed the advantage of having other bodies such as the Administrative Office of the Courts responsible for the promulgation of similar forms.[32] Ultimately, the Committee appeared to coalesce around abrogation as the appropriate solution, with the caveat that some forms like Form 5 (waiver of service of process) might be worth keeping and integrating into existing rules.[33]

That exact proposal—abrogating Rule 84 and nearly all of its forms—is what is now being circulated for public comment.[34] Forms 5 and 6, the forms for waiver of summons and service of process,

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[23] *Id.* at 32.
[24] *Id.*
[25] *Id.* at 33.
[26] Advisory Committee Meeting Minutes, November 7-8, 2011 ("November 2011 Civil Rules Minutes), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2011-min.pdf, at 35.
[27] Advisory Committee Meeting Minutes, March 22-23, 2012 ("March 2012 Civil Rules Minutes") available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV03-2012-min.pdf, at 40-41.
[28] Advisory Committee Meeting Minutes, November 2, 2012 ("November 2012 Civil Rules Minutes") available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2012-min.pdf, at 19-22.
[29] *Id.* at 19.
[30] *Id.* at 20.
[31] *Id.* at 20.
[32] *Id.* at 21.
[33] *Id.*
[34] Preliminary Rule Draft, *supra* note 1, at 277.

have been incorporated into Rule 4.[35] Otherwise, the current proposal has eliminated Rule 84 and all of the remaining forms.

B. The Forms

While Rule 84 has not often been part of the rulemaking agenda, the forms themselves have been modified roughly thirty times since their initial adoption in 1938.[36] The Committee has generally changed the forms in three different contexts. First, when the Committee has amended a rule, a change to the corresponding form is sometimes required. Thus, the forms are amended in combination with a specific rule amendment. Second, the Committee has made changes to bring the forms in line with changes in federal statutory law. Finally, the Committee has made ministerial changes to the forms—changes that are mostly administrative or technical.

The first context is the most significant. When a meaningful change is made to a form, that change is made in combination with an amendment to that form's corresponding rule. The changes made to Rule 4 and its attendant form provide an apt example of this point. Rule 4 was amended in 1993 to provide for waiver of service of process.[37] With Rule 4, Forms 1A and 1B[38] were adopted to illustrate

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[35] *Id.*

[36] It is somewhat difficult to determine how often the forms have been amended since 1938. When the forms were restyled in 2007, the numbering and content of the forms changed significantly. *See infra* notes 46-48 and accompanying text for discussion of the restyling project. The advisory committee notes that indicated how the forms had been changed to date were also eliminated in that project. However, pre-2007 versions of the forms include notations that indicate when changes were made to the forms. By counting the changes reflected in the pre-2007 version of the rules and the current version of the rules, the forms have been amended roughly thirty times. For ease, some major changes to the forms were counted as just one change. For example, in 1963, old Forms 3-13, 18, and 21 were amended to reflect changes Congress made to the jurisdictional amounts required for federal question and diversity cases. Standing Committee Report to the Judicial Conference, September 1962 ("September 1962 Standing Committee Report"), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-1962.pdf, at 11. While many forms were changed that year, there was only one real change so it was counted as such. Similarly, changes to the magistrate judge rules and forms in 1992 were counted as just one change. *See* Standing Committee Report to the Judicial Conference, September 1992 ("September 1992 Standing Committee Report"), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-1992.pdf, at 190-197.

[37] September 1992 Standing Committee Report, *supra* note 36, at 244-283.

[38] These forms are now Forms 5 and 6. The forms were renumbered following the Rules' re-styling in 2007. *See infra* notes 46-48 and accompanying text for discussion of the restyling project

how the summons and waiver of service of process worked.[39] With the addition of those forms, Form 18-A was abrogated. Form 18-A provided the service illustration before the 1993 amendments to Rule 4, but with the adoption of the modified Rule 4 and Forms 1A and 1B, Form 18-A was no longer necessary.[40]

There are additional examples of these kinds of changes to the forms. In 1993, Form 35, current Form 52, was modified to reflect changes made to Rule 26(f), namely the requirements for the parties' report regarding their Rule 26(f) planning meeting.[41] Form 52 was modified again in 2010 for the same reason. When the Committee amended Rule 14 to provide that a defendant did not need to obtain leave of court in order to bring in a third-party defendant, it amended Forms 22-A and 22-B, now Forms 4 and 16, to reflect that change.[42] When the Committee made changes to Rule 34 in 1970, it modified Form 24, current Form 50, to reflect those changes.[43]

All of these changes to the forms have one thing in common—they were made in concert with a change to the forms' corresponding rules. When a rule was changed in a way that necessitated modification of a form, that particular form was amended as well. The converse is not true. In other words, there does not appear to be one example of a form being significantly modified in the absence of a corresponding change to the rule.

The only other time meaningful changes have been made to the forms is in the second context. There have been a number of changes to the forms in order to reflect statutory changes made by Congress. For example, Form 2, now Form 7, was amended in 1993 to include changes to 28 U.S.C. §§ 1331 and 1332 that eliminated the amount in controversy for federal question cases and increased the amount in controversy for diversity cases to $10,000.[44] Form 16,

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[39] September 1992 Standing Committee Report, *supra* note 37, at 201-203.
[40] *Id.* at 205.
[41] *Id.* at 88, 209-211.
[42] September 1962 Standing Committee Report, supra note 36, at 12-13. In that same year, Rule 25 was amended to simplify the practice for notifying the court and parties of the substitution of parties upon death. *Id.* at 14-15. Form 30, current Form 9, was also added to illustrate that amendment. *Id.* Finally, the Rules 49, 52, 58, and 79 were amended the practice for entering judgment. *Id.* at 17. Forms 31 and 32 , current Forms 70 and 71, were added to illustrate those changes. *Id.*
[43] *See* Standing Committee Report to the Judicial Conference, October 1969, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST10-1969.pdf, at 137-138.
[44] September 1992 Standing Committee Report, *supra* note 37, at 204. In that same year, Forms 33 and 34 were modified to reflect changes made by Congress through

now Form 18, was amended in 1963 to reflect changes made by Congress to the patent statute.[45] While some of these changes have been made without modification of the forms' corresponding rules, the statutory changes, like the rule changes, drive the amendment of the forms. The forms, in this context, have been changed to reflect changes in the law, and thus, are not changes made in isolation.

In the third category are changes made to the forms that are administrative. The style changes made in 2007 are an example.[46] The forms were modified stylistically and re-numbered.[47] The style project was not meant to make any kind of substantive change, so the Committee did not change the substance of the forms.[48] The other changes made to the forms in this context are purely ministerial, and thus, are often not put through the entire Enabling Act process. For example, in 2003, Forms 19, 31, and 32 were amended to substitute date references of "19__" with "20__."[49] This change was approved and adopted without public comment.

Finally, it is worth noting that abrogating a form is atypical. It seems that only two forms have ever been abrogated. As already noted, Form 18-A was abrogated in 1993 once revised Rule 4 and Forms 1A and 1B were adopted.[50] The only other form that has been abrogated is Form 27, the Notice of Appeal under Rule 73(b).[51]

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the Judicial Improvements Act of 1990. *Id.* at 205-209. Corresponding changes were made to Rules 72 and 73. *Id.* at 190-197.

[45] *See* September 1962 Standing Committee Report, supra note 42, at 19. That same year, Forms 3-13, 18, and 21 were amended to reflect changes made by Congress to the requisite jurisdictional amounts. *Id.* at 19.

[46] *See* Edward H. Cooper, *Restlying the Civil Rules: Clarity Without Change*, 79 NOTRE DAME L. REV. 1761, 1761 (2004) (discussing the style project and how its goal was to "translate present text into clear language that does not change the meaning"); Standing Committee Report to the Judicial Conference ("September 2006 Standing Committee Report"), September 2006, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2006.pdf, at 28-29 (discussing the restyling of the forms).

[47] September 2006 Standing Committee Report, *supra* note 46, at 29.

[48] *Id.* It noted, however, that some of the forms may have been inconsistent with "current practices." *Id.* ("For example, the 'complaint" forms call for allegations that are far briefer than are commonly found in cases filed in the district courts. Similarly, the advisory committee did not change the choice of examples in the forms; the 'negligence complaint' form continues to use the example of an automobile striking a pedestrian.").

[49] Standing Committee Report to the Judicial Conference, September 2002, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST9-2002.pdf, at 27.

[50] *See supra* notes 37-40 and accompanying text.

[51] *See* Standing Committee Report to the Judicial Conference, September 1967, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-1967.pdf, at 181.

That form was abrogated because the Federal Rules of Appellate Procedure were adopted in 1968, and those rules included a notice of appeal that made Form 27 unnecessary.[52]

C. Scholarly Treatment of the Forms

Early scholarship relating to Rule 84 and the Official Forms is quite sparse. With the exception of Charles Clark, early scholarship did not deeply explore the forms and their place in the civil justice system.[53] Like the Civil Rules Committee, scholars began paying more attention to the forms in the wake of *Twombly* and *Iqbal*.[54]

Even then, however, scholars have not focused extensively on the forms.[55] The forms are often a part of a larger discussion. For example, recent scholars have focused on how courts have used Form 30 to determine whether parties' affirmative defenses must meet the standards laid out in *Twombly* and *Iqbal*.[56] Other scholars have argued that the Court, in adopting *Twombly* and *Iqbal*, violated the Rules Enabling Act, in part because those cases are in contrast with Form 11 and, thus, Rules 8 and 84.[57] Still more have argued that the forms provide the baseline for understanding what the rules require, meaning that cases like *Twombly* and *Iqbal* have to be read in light of Form 11.[58] Or perhaps, as other scholars have argued, it is the case that Form 11 did not survive those cases.[59]

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[52] *Id.* at 2.

[53] *See* Clark, *supra* note 9. *See also* Hon. Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 460 (1943) (discussing the forms as an integral part of the Civil Rules).

[54] However, at least one article discussed Rule 84 in the context of pleading before *Twombly* was decided. *See* Mary Margaret Penrose & Dace A. Caldwell, *A Short and Plain Solution to the Medical Malpractice Crisis: Why Charles E. Clark Remains Prophetically Correct About Special Pleading and the Big Case*, 39 GA. L. REV. 971, 1006-08 (2005) (discussing the advantage of the "minimalist pleading approach" adopted in 1938).

[55] At least one commentator has argued that some of the forms can be to litigators. Thomas Allman, *Local Rules, Standing Orders, and Model Protocols: Where the Rubber Meets the (E-Discovery) Road*, 19 RICH. J.L. & TECH. 8, 2 -3 (2013) (Less visible but equally important efforts have been made to accommodate e-Discovery by amendments to standard forms. For example, there are now many useful forms available for Rule 26(f) reports and discovery plans, as well as for joint or individualized proffers of scheduling orders or case management orders.")

[56] Janssen and Michigan Law Review Comment. Melanie A. Goff and Richard A. Bales, *A 'Plausible' Defense: Applying Twombly and Iqbal to Affirmative Defenses*, 34 AM. J. TRIAL ADVOC. 603 (2011) (showing that courts have used Form 30 to determine whether Twombly and Iqbal apply to the pleading of affirmative defenses).

[57] Jeremiah J. McCarthy and Matthew D. Yusick, *Twombly and Iqbal: Has the Court 'Messed Up the Federal Rules?*, 4 FED. CTS. L. REV. 121, 121-22 (2011) ("Absent a convincing explanation from the Court as to how the pleading standard enunciated in *Twombly* and *Iqbal* is consistent with Rule 84, whether the promulgation of that standard was in conformity with the Rules Enabling Act will continue to be an open question.").

[58] Rex Mann, *What the Federal Rules of Civil Procedure Forms Say About Twombly and Iqbal: Implications of the Forms on the Supreme Court's Standard*, 41 U. MEM. L. REV. 501

Beyond Forms 11 and 30, a debate has developed over Form 18, the form that governs drafting a complaint for patent infringement.[60] There scholars argue that Form 18 is out of step with patent litigation practice.[61] Courts, as will be discussed in the following section, are similarly struggling with how to use Form 18 when assessing a complaint pleading patent infringement.[62]

Finally, very few scholars have weighed in as to whether abrogation of Rule 84 and the rules is appropriate. The proposal to abrogate Rule 84 and its forms altogether is a fairly recent one. The response, while sparse, has been to argue that the forms should stay in place. [63]

D. Courts and the Forms

It is beyond the scope of this Essay to engage in an exhaustive search of how courts are using the forms. However, some preliminary research in the context of pleading under Rule 8 and Form 11 reveals that courts utilize the forms when assessing complaints under the rules. In a search for pleading cases where the court used Form 11, 84 cases were found.[64] Because Form 11 was

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(2011) (arguing that forms like Form 11 create a "safe harbor" for pleading under Rule 8).

[59] Nathan R. Sellers, *Defending the Formal Federal Civil Rulemaking Process: Why the Court Should Not Amend Procedural Rules Through Judicial Interpretation*, 42 LOY. U. CHI. L.J. 327, 389 (2011) ("Rulemakers may also decide that some changes need to be made to Form 11 to honor Rule 84.").

[60] *See, e.g.,* Stacy O. Stitham and Devid Swetnam-Burland, *Fractious Form 18*, 45 CONNtemplations 1 (October 2012) (arguing that Form 18 should be eliminated or revised better reflect the complexity of patent litigation); Ricahrd A. Kamprath, *Patent Pleading Standards After Iqbal: Applying Infringement Contentions as a Guide*, 13 SMU SCI. & TECH. L. REV. 301 (2010) (arguing that the Federal Circuit's McZeal decision can be harmonized by recognizing that Form 18 has a limited purpose).

[61] *Id.*

[62] *See* Section IC, *infra*.

[63] Lonny Hoffman, *Rulemaking in the Age of Twombly and Iqbal*, 46 U.C. DAVIS L. REV. 1483, 1552 (2013) ("[I]t is as important for rulemakers to recognize the danger of making changes that would send the wrong signal. On several prior occasions since 2007, rulemakers have discussed the forms in the back of the rulebook, suggesting that it may be time to get out of the forms business. The counsel of those who have recognized that abrogation of forms now could send the wrong message should be heeded. Whatever the deficiencies of the forms may be, this is the wrong time to think about eliminating them from the rulebook."); A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710, 1737-38 (2013) ("I, for one, would pursue the abandonment of plausibility pleading by urging the rulemakers to restore notice pleading and revise other complementary Rules--such as … the Official Forms--to develop a more thoughtful, comprehensive, and effective approach to controlling initiation of actions and access to discovery. ").

[64] The search was conducted in ALLFEDS in Westlaw, with coverage of federal cases going back to 1790. The search used the following query: "pleading" and "Form 11." The search was limited to cases after 2007 because that is when Form

previously called Form 9, a similar search for pleading cases where the court referred to Form 9 resulted in 204 cases.[65] The numbers are low, but hardly insignificant. Courts are using the forms to resolve questions of how the rules apply.

For example, in a recent First Circuit case, *Garcia-Catalan v. United States*,[66] the court reversed the district court's dismissal of the plaintiff's complaint.[67] The plaintiff slipped and fell while visiting a commissary at Fort Buchanan in Guaynabo, Puerto Rico.[68] She filed her claim under the Federal Tort Claims Act, pleading that she "slipped and fell on liquid then existing there."[69] The district court dismissed the complaint because it found that she had failed to state a plausible claim under *Twombly* and *Iqbal*.[70] The First Circuit disagreed, specifically citing Form 11 and arguing that the plaintiff had "plainly modeled" her complaint on that form.[71]

Courts have cited the forms beyond Form 11 too. In the context of whether *Twombly* and *Iqbal* govern a parties' statement of an affirmative defense, courts have used Form 30 in their reasoning.[72] At least one appellate court has also used Form 13 in resolving

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9 became Form 11. A similar search was conducted in the US Federal Cases lexis database, with the search term pleading, and the search within those results of "Form 11." That search resulted in 86 cases.

[65] The search was conducted in ALLFEDS in Westlaw, with coverage of federal cases going back to 1790. The search used the following query: "pleading" and "Form 9" and "Federal Rules of Civil Procedure." The last search term was entered in order to eliminate criminal Form 9 from the search results. A similar search was conducted in the US Federal Cases lexis database, with the search term pleading, and the search within those results of "Form 9." That search resulted in 225 cases.

[66] 734 F.3d 100 (2013).

[67] *Id.* at 100.

[68] *Id.* at 101.

[69] *Id.*

[70] *Id.* at 102.

[71] *Id.* at 104.

[72] Barry v. EMC Mortg., 2011 WL 4352104, 3 (D.Md. 2011) ("Given Rule 84's focus on illustrating "the simplicity and brevity that these rules contemplate," the additional factual detail contained in Form 30 is hardly superfluous. In prohibiting conclusory, implausible allegations, Twombly and Iqbal thus merely made explicit principles long implicit in the general pleading requirements of the Federal Rules"); Falley v. Friends Univ., 787 F. Supp. 2d 1255, 1258 (D. Kan. 2011) (quoting the same "fails to state a claim" allegation in the Official Form, and concluding "the brief and simple nature of this language indicates that no more detail is required of a defendant in an answer"); Lane v. Page, 272 F.R.D. 581, 594 (D.N.M. 2011) (noting that "[t]he forms appended to the rules bolster the Court's analysis that rule 8(b) does not require defendants to provide factual allegations supporting defendants" because "Form 30 provides no factual allegations in support of the defense, and form 30 is sufficient under the rules"). *See also* William M. Janssen, *The Odd State of Twiqbal Plausibility in Pleading Affirmative Defenses*, 70 WASH. & LEE L. REV. 1573, 1635 (2013).

whether a complaint satisfied Rule 8.[73] Much of the debate regarding the forms, however, appears to have been centered in patent litigation. In 2012, the Federal Circuit found that "to the extent the parties argue that *Twombly* and its progeny conflict with the Forms and create differing pleadings requirements, the Forms control."[74]

This means that at least three circuit courts have found that the forms survived *Twombly* and *Iqbal* and have, in fact, incorporated the forms into their decisional law.[75] At the district court level, courts are similarly using the forms to decide cases.[76] It may be only a matter of time before more circuits act affirmatively with respect to the forms.

II. Abrogation Violates the Rules Enabling Act Process

Abrogation of Rule 84 and the Official Forms is a violation of the Rules Enabling Act process. That process requires that any change to the Rules be published for public consideration.[77] Because a change to a form necessarily changes the rule to which it corresponds, the two must be considered together. Yet, the proposed abrogation of Rule 84 and the forms is being done without reference to any of the rules to which the forms correspond. This failure to consider the rules and forms together is improper under the Act.

The Rules are concepts that are encapsulated by words, and those words guide the interpretation of their meaning. A form is part of that interpretive exercise because it is part of the rule itself.[78] Thus, for example, in determining what Rule 14 third-party practice means, the reader must necessarily read Form 16 and its form complaint. When a form is abrogated, it eliminates part of that

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[73] *Hamilton v. Palm*, 2010 WL 3619580 (8th Cir. 2010) (stating that Rule 84 states that the Forms in the Appendix to the Federal Rules of Civil Procedure "suffice under these rules" and that Form 13 makes clear that an allegation in any negligence claim that the defendant acted as plaintiff's "employer" satisfies Rule 8(a)(2)'s notice requirement for pleading employer status).

[74] 681 F.3d 1323, 1334 (Fed. Cir. 2012). *See also* Colida v. Nokia, Inc., No. 2009-1326, 2009 WL 3172724, at *2 & n.2 (Fed. Cir. Oct. 6, 2009) (concluding that the plaintiff's infringement claims were "facially implausible," but noting that he had not argued that the complaint was sufficient under Form 18 and Rule 84 of the Federal Rules of Civil Procedure). It appears that the issues with Form 18 may be solved through Congress, however. The House has passed the Innovation Act, which will supplant that form if the law goes into effect. See HR 3309 sec. 6(c).

[75] *See* K-Tech Telecomms., Inc. v. Time Warner Cable, Inc., 714 F.3d 1277, 1283-84 (Fed. Cir. 2013) (with regard to Form 18); Hamilton v. Palm, 621 F.3d 816, 818 (8th Cir. 2010) (with regard to Form 13); Garcia-Catalan v. United States, 734 F.3d 100 (2013) (with regard to Form 11).

[76] *See supra* notes 64-65.

[77] *See supra* note 2.

[78] *See supra* Section IA.

interpretive language and changes the meaning of the rule to which that form is linked. That abrogation is a change that must go through the Rules Enabling Act process. This means that if a form is going to be changed, both the form and corresponding rule must be considered by the Committee and published for comment. Because the proposed abrogation of Rule 84 and its attendant forms attempts to amend the forms without any proposed amendments to the rules to which the forms correspond, it violates the Enabling Act process.

The history of Rule 84 and the forms support this argument. First, the 1946 amendment to Rule 84 clarified that the forms and the rules to which they correspond are one and the same. That amendment explained that the forms "suffice under these rules" and are illustrative.[79] In other words, the amendment changed Rule 84's language from passive indication to active illustration.[80] As Charles Clark stated, the forms were intended to give meaning to the rules.[81] They are not simply forms in the nature of exemplars; they are part of the rules themselves. Therefore, if the Committee wishes to change the forms, it must do so pursuant to a rule change precipitated by the Committee itself or Congress.

Second, looking to how the forms have been changed historically further supports this point. When the forms have been changed, in almost every case, a corresponding rule change was made.[82] Changes to the forms that were not partnered with a rule change were done because federal statutory law changed and, thus, necessitated a modification of a rule, a form, or both.[83] It appears that the only changes to the forms that have occurred in the absence of a corresponding rule or statutory change have been mostly administrative.[84] In other words, amending or abrogating a form without a corresponding change to a federal rule or statute is unprecedented.

Finally, the current debate in the context of pleading further demonstrates why the forms cannot be changed without a proposed amendment to the rules. Because of Rule 84, Rule 8 and Form 11 are one and the same. Yet, Rule 8 has not been expressly considered by the Committee, nor has it been published for public comment with Form 11. This example aptly demonstrates why the proposed abrogation of Rule 84 and the forms violates the Enabling Act process.

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[79] Fed. R. Civ. P. 84. *See also supra* notes 5-9 and accompanying text.
[80] *See supra* notes 5-6 and accompanying text.
[81] *See supra* note 9.
[82] *See supra* notes 37-43 and accompanying text.
[83] *See supra* notes 44-45 and accompanying text.
[84] *Id.*

Form 11 is well known to scholars, judges, and practitioners. It sets forth a simple pleading for a negligence claim involving a car accident.[85] In *Twombly*, the Court used Form 11 to explain why the *Twombly* plaintiffs had not met the pleading requirements of Rule 8. The Court explained that the lack of notice provided by the *Twombly* plaintiffs "contrast[ed] sharply with the model form for pleading negligence, Form [11]."[86] The *Twombly* dissent used Form 11 to argue that the Court had gone beyond its institutional role by changing the Civil Rules outside of the Enabling Act process.[87]

Thus, Form 11 has been a contentious part of the recent pleading debate. The Civil Rule Committee's commentary on Rule 84's abrogation indicates that the Committee understood that the relationship between Rule 8 and Form 11 is fraught. The transmittal letter from Judge Campbell of the Civil Rules Committee to Judge Sutton of the Standing Rules Committee noted that Form 11 "live[s] in tension with recently developing approaches to general pleading standards." In 2009, when the discussion of abrogating the forms began, the Committee decided to delay possible abrogation because "[i]mmediate abrogation of the pleading Forms might seem to send a message about the *Twombly* and *Iqbal* pleading opinions, no matter how strenuously the Committee might emphasize that the project is to abrogate all the Forms without taking or implying any position on the sufficiency of any Form."[88] Yet, in that same meeting, the Committee debated what *Twombly* and *Iqbal* required.[89] Was "'negligently' a legal conclusion, a threadbare recital of an element of the claim that fails the Iqbal pleading test?"[90] The Committee agreed that "[a]ttempting to frame pleading forms while pleading standards remained in flux could be difficult."[91] In other words, the Committee understood that *Twombly* and *Iqbal* might have changed Rule 8 to some degree and that Form 11 was a part of that change.

In the Civil Rules Committee's April 2011 meeting, the discussion indicates the same. The minutes state, "The intense focus on pleading brought on by the *Twombly* and *Iqbal* decisions has put the illustrative 'Rule 84' Forms back on the agenda."[92] At the same time, the members decided that enough time had passed since *Twombly* and *Iqbal* such that "[r]evising the whole framework need not

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[85] Form 11 reads in relevant part: "On date, at place, the defendant negligently drove a motor vehicle against the plaintiff."

[86] 550 U.S. at 565 n. 10. Form 11 was Form 9 when *Twombly* was decided. *See supra* notes 46-48 and accompanying text for discussion of the restyling project

[87] *Id.* at 575-76, 577 (Stevens, J. dissenting).

[88] Civil Rules October 2009 Minutes, *supra* note 14, at 16. The minutes go on to state that "[t]here is plenty of room to proceed deliberately." *Id.*

[89] *Id.* at 14.

[90] *Id.*

[91] *Id.*

[92] Civil Rules April 2011 Minutes, *supra* note 22, at 31-32.

be seen as implicit commentary on the *Twombly* and *Iqbal* decisions, but instead can be recognized for what it is – a program to shift the initiating responsibility for the forms away from the full Enabling Act process."[93] Yet, it is difficult to reconcile that *Twombly* and *Iqbal* could both put the Forms back on the Committee's agenda and also have nothing to do with the decision to abrogate them.

The Committee's struggle with Form 11 proves the point. Amending Form 11 to reflect *Twombly* and *Iqbal* would be a herculean task because it is not clear how to square the form with those cases. The Court acknowledged the sufficiency of Form 11 in *Twombly* and it refused to supplant the form in *Iqbal*.[94] Reasonable people continue to disagree about how *Twombly* and *Iqbal* changed pleading, if at all.[95] Regardless of that debate, however, Form 11 is a key piece of that puzzle. With Rule 8, it provides the baseline for pleading doctrine. If Form 11 is eliminated, Rule 8 will have necessarily been changed.

When *Twombly* and *Iqbal* were decided, the Civil Rules Committee took a wait-and-see approach with respect to Rule 8. True to its deliberative capacity, the Committee decided to allow the cases to work their way through the courts before intervening to change the pleading regime in any way.[96] While members of Congress attempted and failed to amend Rule 8 following *Twombly* and *Iqbal*,[97] the Committee decided to stay neutral and abstained from making any changes to Rule 8. With the proposed abrogation of the forms, however, the Committee is making a change to Rule 8, and that change must be published for consideration.

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[93] *Id.* at 32.33.

[94] *See also* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 n.4 (2002) (noting that Form 11 "exemplifie[s]" what is sufficient to meet the Rule 8 requirements).

[95] *See e.g.,* Adam Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1300 (2010) (contextualizing Twombly and Iqbal and arguing that while the decisions may not have been praiseworthy, they should not be taken to have upended existing federal pleading standards);); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008) (arguing that *Twombly* changed pleading practice); Authur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L. J. 1, 15-16 (2010) (arguing that *Twombly* and *Iqbal* are a departure from established federal pleading standards); Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1069 (2009) (arguing that *Twombly* was rightly decided).

[96] Civil Rules October 2009 Minutes, supra note 14, at 8. ("[A]ny hasty response [to *Twombly* and *Iqbal*] in the Enabling Act process or in Congress might miss the mark.").

[97] A Senate Bill attempted to codify Conley v. Gibson, 355 U.S. 41 (1957), the leading pleading case before *Twombly* and *Iqbal*, but it did not get out of the Judiciary Committee. Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. § 2 (2009). Another proposal by Senator Arlen Spector similarly failed. Notice Pleading Restoration Act of 2010, S. 4054, 111th Cong. (2010).

Stated differently, if the Committee wishes to change Form 11, even if by deleting it, it must publish Rule 8 and the abrogated Form 11 together and take those amendments through the entire Rules Enabling Act process anew. Moreover, if the Committee wishes to abrogate all of the forms at once, it must do the same across the board. Each form must be changed in concert with its corresponding rule. As this section has demonstrated, historically, the rules and the official forms have been considered part and parcel of one another. The treatment of Rule 84 and the individual forms over time, as well as the example of Rule 8 and Form 11, demonstrate that it is not proper under the Rules Enabling Act process to abrogate a form without changing its corresponding rule.

III. Conclusion

The Rules Enabling Act process is necessarily deliberative. In this case, the Committee should undertake further study to determine which, if any, forms require an amendment and any such amendment should be made in concert with its corresponding rule. While the Committee has studied the forms, its inquiry has been short. A Forms Subcommittee was officially launched in November of 2011.[98] That committee met by phone and submitted a report to the Civil Rules Committee in March of 2012. In that five month period, the subcommittee determined that the forms for the Civil Rules caused the most consternation because they required amendment under the Rules Enabling Act and because there were so many forms as compared to other procedural rules.[99] The Civil Rule Committee decided that the Subcommittee should look into the Civil Forms specifically. In November 2012, a year after the forms subcommittee was launched and six months after the subcommittee was asked to look into the Civil Forms specifically, the subcommittee returned with the current proposal.[100]

The subcommittee reported that, according to its study, lawyers do not really use the forms, nor do pro se parties.[101] The Subcommittee's and Committee's determinations regarding the Forms may well be true, but the Enabling Act process requires more study before making such a significant change. The federal rulemaking process has been criticized in the past for proposing

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[98] Civil Rules November 2011 minutes, *supra* note 26, at 35.

[99] Civil Rules March 2012 minutes, *supra* note 27, at 39. The Bankruptcy and Criminal Rule forms do not go through the Enabling Act process. The Appellate Rules, while using the Enabling Act process to change, only have a few forms. *Id.*

[100] Civil Rules November 2012 minutes, *supra* note 28, at 19.

[101] *Id.* at 19-20. As to whether pro se parties might use the forms, the committee concluded that "there seems to be little indication that pro se parties find the forms, much less use them." *Id.* at 20. A committee member further opined that courts who are working with pro se parties do not use the forms, but instead use other resources. *Id.* at 22.

amendments without a strong empirical basis for change.[102] The Committee has worked hard to change this approach and has put the Federal Judicial Center to good use when making changes to the rules.[103] In the context of pleading, the Committee has relied greatly on both the Federal Judicial Center and the Administrative Office of the Courts for empirical work.[104] Rule 84 and abrogation of the forms should be no different.

Along those same lines, the decision to abrogate Rule 84 and the forms requires more time for public comment. Because of the breadth of the proposed discovery rule amendments, Rule 84 has gone largely unnoticed[105] The Rule 84 discussion started in 2009, but it did not take on a serious tone until November 2012. Only a year has passed since then, and to a large degree, it appears that the bench and bar have not quite caught up to the change. If the Committee were to change the text of Rule 8 itself, for example, it would engender a barrage of public comment. That the abrogation of Rule 84 has not created that amount of feedback is evidence that the rule change has gone—incorrectly so—unnoticed.

Addressing each form in concert with its rule will undoubtedly take significant time and effort. The Civil Rules Committee has discussed how revising the forms would be a meaningful project.[106] However, the Committee has not shied away

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[102] *See, e.g.,* Thomas E. Wilging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121 (2002) (discussing the Committee's use of empirical research and its limitations); Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841 (1993) (arguing that because of a lack of empirical research to support the adoption of Rule 11, the rulemaking process should be stopped until better study can be made of the process); Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991) (arguing that proposed Rule 26(a) was drafted without any empirical study to support its adoption).

[103] Wilging, *supra* note 102, at 1147-1153 (discussing, for example, the use of empirical work to support that adoption of a revised Rule 11). This is not to say the Committee's current use of empirical work is without criticism. *See id.* at 1204 (calling for more experimental research in order to improve rulemaking); Lonny Hoffmann, *Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1, 8–9 (2012) (challenging the findings of the Federal Judicial Center's *Twombly* and *Iqbal* study).

[104] *See* Joe S. Cecil, et al., *Fed. Judicial Ctr., Motions to Dismiss for Failure to State a Claim After Iqbal*, Report to the Judicial Conference Advisory Committee on Civil Rules (2011), available at http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf; Civil Rules October 2009 Minutes, *supra* note 14, at 8 (noting the start of Andrea Kuperman's project to "compil[e] and evaluat[e] lower-court decisions).

[105] A search of the comments made to date reveals that only two of the 378 comments discuss Rule 84 or abrogation.

[106] "Diversion of Committee resources to [the forms] task could exact a high price in discharging more important responsibilities." Civil Rules March 2012 Minutes, *supra* note 27, at 41. *See also* Civil Rules October 2009 Minutes, *supra* note 14, at 15

from large, daunting projects in the past. One need only look to the Style Project[107] and the time computation project[108] to see that the Committee can manage these large projects and not sacrifice its other important work. Indeed, the Committee is exceedingly capable of this task. Moreover, in the words of Charles Clark, such a project is demonstrative of the "need for a continuing rules committee to watch lest through habit and practice form comes to dominate substance."[109]

(stating that abrogation would "relieve the Committee of the responsibility that flows from present Rule 84").

[107] September 2006 Standing Committee Report, *supra* note 46, at 21 (noting that even before publication and comment, the process for the restyling project took "two and a half years and produced more than 750 documents").

[108] Standing Committee Report to the Judicial Conference, September 2008, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2008.pdf, at 27-29.

[109] Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 460 (1943).