

Preserving Access and Identifying Excess: Areas of Convergence and Consensus in the 2010 Conference Materials

EXECUTIVE SUMMARY

In the months leading up to the 2010 Duke Conference on Civil Litigation, participants have submitted an extensive and impressive collection of surveys, empirical studies, papers and proposals concerning the American civil justice system. This paper is an attempt to collate the most salient information from these materials in one place, and identify the broad areas of agreement and disagreement among the survey respondents and conference participants.

And there are significant areas of agreement – both with respect to the current status of the civil justice system, and with respect to a vision of the system’s future. The conference materials reflect a general consensus, particularly (though not exclusively) with respect to complex cases, that the current system is too expensive and takes too long to bring cases to resolution. Discovery and summary judgment are identified as the primary culprits. In addition, the conference materials in large part support early and more extensive judicial management of civil cases.

On occasion the findings of one study or survey cut against findings of the other studies, and no single conclusion received unanimous concurrence. However, the conference materials generally reflect that:

- Certain types of civil cases are more prone to discovery disputes, dispositive motion practice, and general procedural complexity than others;
- For many cases, litigation costs may be disproportionate to the value of the case;
- When opposing attorneys act cooperatively, litigation costs tends to be lower;
- The civil justice system is seen as taking too long, and discovery is viewed as a primary contributor to delay;
- The longer a case goes on, the more it costs;
- The current tools of federal pleading practice (including answers and Rule 12 motions) do not usually narrow the issues in dispute;
- The Supreme Court’s recent decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* have generated significant concern about the future of pleading practice in the federal courts;

- The current federal initial disclosure regime under Rule 26(a)(1) does not reduce the total volume of discovery or the total cost of discovery in civil cases;
- Electronic discovery increases the cost of litigation for both plaintiffs and defendants;
- The costs associated with expert witnesses can often be an important factor in the decision to settle a case;
- Parties prefer a system in which a single judicial officer is assigned to a case from start to finish;
- Initial pretrial conferences are valuable to the parties and the court;
- Mediation (but not arbitration) currently carries several advantages over litigation with respect to time, cost, and perceived fairness of outcome; and
- Summary judgment motions add considerable costs to the litigation and are commonly seen as taking too long to resolve.

Other aspects of the conference materials reveal honest disagreements between plaintiffs' attorneys and defense attorneys, attorneys and their clients, and attorneys and judges about the best visions for the future of the civil justice system. Among the most significant areas where a divide was prominent:

- Whether notice pleading invites extensive discovery in order to narrow the issues, and whether fact-based pleading would focus discovery;
- Whether (further) limitations on the use of discovery devices should be adopted;
- Whether discovery should be stayed in certain cases when a motion to dismiss is pending;
- Whether electronic discovery is generally unduly burdensome and a disproportionate contributor to litigation cost—and whether the problem is likely to get better or worse;
- Whether routine cost-shifting should be introduced where the burden of producing electronically stored information is not equal;
- Whether a trial date should be set early in the litigation; and
- Whether summary judgment is used properly and with appropriate frequency.

While these are real disagreements, they nevertheless appear to stem from a common concern that the current process invites too much gamesmanship, with detrimental consequences. From the perspective of plaintiffs and their counsel, the system too often encourages obstructionist motion practice and obstructionist discovery, hampering the search for truth. From the perspective of defendants and their counsel, the system invites discovery that is unnecessary, unduly burdensome and expensive. Both plaintiffs and defendants worry that opposing parties will bleed them financially until they are forced to settle.

Viewed cumulatively, the conference materials provide a strong platform for constructive next steps as we all work together toward a civil justice system that is truly just, speedy and inexpensive. A detailed examination of these cumulative viewpoints follows.

I. INTRODUCTION

This paper represents an effort to synthesize in one place the remarkable amount of research and commentary submitted in recent months by the participants in the 2010 conference. It would, of course, be impossible to reflect every dimension and nuance of the materials provided, and our purpose here is much more limited. We aim simply to capture the broad areas of consensus and disagreement, as reflected in the many surveys, empirical studies, and conference papers. It is our hope that by collating opinions and positions in one document, it will be easier to identify and discuss trends and currents that run throughout the conference materials.

This paper attempts to account for materials submitted through the 2010 conference website as of April 29, 2010. We focus primarily on the following surveys and empirical studies:

1. The 2008 survey of the Fellows of the American College of Trial Lawyers (ACTL survey);
2. The 2009 survey of the American Bar Association Section of Litigation (ABA survey);
3. The 2009 survey of the National Employment Lawyers Association (NELA survey);
4. The 2009 National, Case-Based Civil Rules Survey administered by the Federal Judicial Center, including a companion multivariate analysis of litigation costs (FJC closed case survey);
5. The 2009 survey of the Arizona Bench and Bar on the Arizona Rules of Civil Procedure (Arizona survey);
6. The 2009 Survey of the Oregon Bench and Bar on the Oregon Rules of Civil Procedure (Oregon survey);
7. The 2009 Civil Litigation Survey of Chief Legal Officers and General Counsel Belonging to the Association of Corporate Counsel (General Counsel survey);
8. The 2009 IAALS study of Civil Case Processing in the Federal District Courts (Federal Case Processing Study);
9. The 2010 IAALS study of Civil Case Processing in the Circuit Court of Multnomah County, Oregon (Oregon Case Processing Study); and
10. The 2010 Report on Phase One of the Seventh Circuit Electronic Discovery Pilot Program (Seventh Circuit Report).

The diversity of practice and experience among the various survey groups is noteworthy. For example, the closed cases that were the subject of the FJC survey included a substantial number of civil rights cases, whereas the most common case type handled by NELA respondents was employment discrimination suits and the most common case type for ACTL and ABA respondents was complex

commercial litigation. Respondents to the NELA survey almost exclusively represent individual plaintiffs; respondents to the General Counsel survey reported that their companies acted as defendants in 70% of their cases over the past five years. The average respondent had many more years of practice and trial experience in the ACTL survey than in the FJC survey. Other variations are also evident; a full and more detailed breakdown of these surveys and studies is attached as Appendix 1.¹

Because the users of the civil justice system represented in the surveys and conference materials are diverse and deeply engaged in the subject matter, general agreement among the groups on a topic of interest may be seen as a fair indication that the civil justice system is seen as working – or not working – particularly well in a specific area. Where consensus is less evident, it is all the more important to identify and understand the differences in order to arrive at accurate conclusions. Disagreement in one area may herald a systemic imbalance; in other areas, it may simply be representative of the workings of an adversary system.

Not every survey, study or paper submitted for the conference addressed every issue discussed here. To synthesize findings as fairly and concisely as possible, we have grouped similar topics together, noting places in which survey questions are somewhat differently phrased. Where possible, as we digest these materials, we endeavor to add context to the statistical data by including representative comments from the surveys and conference papers. The next two sections attempt to consolidate the key findings of the conference materials within two broad areas: (1) perceptions and empirical findings on the current operation of the American civil justice system; and (2) perceptions and empirical findings concerning proposed changes to the system.

II. COLLECTIVE POSITIONS ON THE STATUS OF THE CIVIL JUSTICE SYSTEM

Cost

The collected survey research indicates a very strong consensus among nearly all respondent groups that broadly speaking, the civil justice system is too expensive. More than three-quarters of the respondents in each of the ACTL, ABA, NELA, Arizona, Oregon, and General Counsel surveys agreed with the statement (or a close variation of the statement) that “litigation is too expensive.” In the ACTL, ABA and NELA surveys, respondents were also asked about the cost of discovery, and at least 70% of respondents in each survey agreed that “discovery is too expensive.”

There was also strong consensus as to some of the consequences of high litigation cost. More than 80% of respondents in each of the ACTL, ABA and NELA surveys indicated that their law firms turn down some cases because it is not cost-effective to take them. In all three surveys, the most commonly cited monetary threshold for not taking a case was \$100,000. These figures were lower in the Arizona and Oregon surveys, in which one-third and one-quarter of the respondents, respectively, indicated that their firms turn down civil cases because it is not cost-effective to handle them.

¹ On April 17, 2008, the American Association for Justice (AAJ) was invited to administer to its own membership a version of the survey that was distributed to the ACTL Fellows, and later to the ABA and NELA membership. The AAJ leadership expressly declined to administer the survey to its members.

In most surveys, the majority of respondents indicated that litigation costs drove cases to settle for reasons unrelated to the substantive merits of the claims or defenses. More than 80% of the respondents to the ACTL, ABA, and General Counsel surveys felt this way. While this sentiment was most strongly held by attorneys who self-identified as primarily representing defendants, those who primarily represent plaintiffs or who represent plaintiffs and defendants equally also agreed that some settlements are driven by litigation cost. Sixty percent of NELA respondents² so indicated, as did 53% of self-identified plaintiffs' attorneys in the ABA survey.

In the FJC survey, the numbers were a bit lower: about 58% of defense lawyers and those representing plaintiffs and defendants equally agreed that cases settle specifically for cost reasons, while those representing primarily plaintiffs were split, with 39% agreeing and 38% disagreeing. More than half of all respondents to the FJC survey also reported that the cost of discovery had no effect on the likelihood of settlement in their specific closed case. Among those cases in the FJC survey that actually settled, however, almost 36% of plaintiffs' attorneys and 40% of defense attorneys reported that the costs of discovery increased or greatly increased the likelihood of settlement, or caused the case to settle.

On a more positive note, the survey respondents almost universally concurred that when opposing counsel cooperate throughout the litigation process, the results are less costly to the client. Ninety-five percent of respondents to the ABA survey believe that collaboration and professionalism by attorneys can reduce client costs, as do 97% of ACTL Fellows and 98% of NELA members. In the FJC survey, over 60% of respondents reported that they were able to reduce the cost and burden of discovery through cooperation.

Delay

The majority of respondents in each of the ABA, ACTL, NELA, Arizona, Oregon, and General Counsel surveys agreed that the civil justice system takes too long. Ninety percent of respondents in the General Counsel survey felt this way. In Arizona and Oregon, where the survey question was directed to the respondents' particular state court system, the agreement level was somewhat lower but still substantial – 70% in Arizona and 52% in Oregon.³ Respondents to the ACTL, ABA and NELA surveys further indicated that the discovery process was the primary contributor to delay in civil litigation. The IAALS Federal Case Processing Study provides some empirical support for this perception, finding that the single most strongly correlated variable with overall time to disposition in civil cases was the elapsed time from the Rule 16(a) conference to the filing of a motion for leave to conduct additional or

² NELA describes itself as “the country’s largest professional organization that is exclusively comprised of lawyers who represent individual employees in cases involving employment discrimination and other employment-related matters.” REBECCA M. HAMBURG & MATTHEW C. KOSKI, SUMMARY OF RESULTS OF FEDERAL JUDICIAL CENTER SURVEY OF NELA MEMBERS, FALL 2009, at 3 (2010)

³ As explained in greater detail throughout this paper, the Rules of Civil Procedure in Arizona and Oregon differ in some substantial ways from the Federal Rules. The levels of concern about system delay in those states may reflect that their respective civil justice systems are less prone to delay than the federal system or other state systems, but that, in the eyes of practitioners, there is still considerable room for improvement.

extraordinary discovery. In other words, cases in which a party sought the court's permission to conduct discovery late in the litigation were more likely to see longer overall case times.

There was a very strong consensus among survey respondents that delays in civil litigation cost clients money. More than 90% of ACTL Fellows, 82% of ABA respondents, 79% of general counsel, and 73% of NELA respondents agreed that the longer a case goes on, the more it costs. A multivariate analysis of data collected through the FJC closed case survey supports these observations, finding that a 1% increase in case duration is associated with a 0.32% increase in costs to plaintiffs and a 0.26% increase in costs for defendants, all else being equal.

Complexity

Most survey respondents were highly dissatisfied with the implementation and execution of Local Rules in federal district courts. In the NELA, ACTL, and ABA surveys, 20% or less of each respondent base agreed that "Local Rules are always consistent with the FRCP." Moreover, less than half of respondents in each of the three surveys agreed that "Local Rules are uniformly applied within the district to which they pertain." As one respondent to the NELA survey noted in an open-ended comment:

Individual practices may vary from the local rules or the Civil Rules. Local rules may not cover all of the local customs to which judges want litigants to conform. For people who handle cases across the country, this is a serious problem. Indeed, not all local lawyers are familiar with all the local customs with which counsel are expected to comply.

III. COLLECTIVE POSITIONS ON PROPOSED PRINCIPLES REGARDING CHANGES TO THE CIVIL JUSTICE SYSTEM

This section considers the level of agreement or disagreement in the conference materials as to proposed solutions or improvements to the civil justice system. In order to maintain a parallel structure to other papers submitted for the conference,⁴ the discussion here is organized to correspond broadly to the Principles contained in the 2009 Final Report of the American College of Trial Lawyers Task Force on Discovery and Civil Justice and the Institute for the Advancement of the American Legal System.⁵ For ease of synthesis and discussion, the principles are grouped here into six broad categories: (1) the transsubstantive nature of the rules; (2) pleading; (3) discovery; (4) electronic discovery; (5) expert witnesses; and (6) judicial case management. This is followed by a discussion of two additional categories not explored in detail in the Final Report but which have generated considerable commentary in the conference materials: summary judgment and sanctions. Each sub-section that follows sets forth

⁴ *E.g.*, AMERICAN BAR ASSOCIATION SECTION OF LITIGATION, SUMMARY COMPARISON OF BAR ASSOCIATION SUBMISSIONS TO THE DUKE CONFERENCE REGARDING THE FEDERAL RULES OF CIVIL PROCEDURE (April 2010); CENTER FOR CONSTITUTIONAL LITIGATION, NINETEENTH CENTURY RULES FOR TWENTY-FIRST CENTURY COURTS? (March 2010).

⁵ *See generally* FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (rev. Apr. 15, 2009).

the applicable ACTL/IAALS proposed principle(s), followed by data and commentary relevant to each principle.⁶

Transsubstantivity

Proposed Principle

- **The “one size fits all” approach of the current federal and most state rules is useful in many cases but rulemakers should have the flexibility to create different sets of rules for certain types of cases so that they can be resolved more expeditiously and efficiently.**

Data and commentary from the conference materials

As an empirical matter, under the current system certain types of cases are clearly more prone to motion practice and discovery than others. The IAALS Federal Case Processing Study concluded that antitrust, environmental, patent, securities, stockholder suits, torts to land and several categories of civil rights actions tended to far outpace the mean for all civil cases with respect to two or more of the following categories: filing rates for disputed discovery motions,⁷ filing rates for summary judgment motions, continuances of the discovery deadline, continuances of the dispositive motion deadline, and overall time to disposition. In three case types – antitrust, patent, and torts to land – the rate of disputed discovery motions and summary judgment motions was more than twice the average for all cases in the study. Employment discrimination cases, which are the subject of much discussion in the conference materials, were more likely than other cases in the IAALS study to engender discovery disputes, summary judgment motions, and trials – but less likely than the average case to engender Rule 12 motions to dismiss.

The surveys did not explore transsubstantivity as extensively as they did other areas, but there was general openness among survey respondents to developing different sets of rules, tracks, or even courts for different types of cases. The ACTL survey directly asked respondents whether they believed that the civil justice system works for some case types but not others, and 63% of respondents agreed. In the ABA survey, about 39% of respondents agreed that “one set of rules cannot accommodate every case type,” and a slight majority disagreed. Although the question of trans-substantive rules was not posed directly in the Arizona and General Counsel surveys, the open-ended comments to those surveys suggested a preference for assigning cases to differentiated tracks in Arizona, and a preference for specialized business courts among general counsel.

There was also some support for testing simplified procedures that differ from the current Federal Rules. The FJC survey found general agreement with the statement, “The federal courts should test simplified procedures, with all parties’ consent, in a few select districts to determine whether such

⁶ For some of the ACTL/IAALS principles, there is a considerable relevant commentary from other conference participants; for other principles, the underlying substance of the principle was not the subject of survey, studies, or discussion. Accordingly, some principles are stated at the beginning of each section but not have their own breakout section for applicable data and commentary.

⁷ *I.e.*, motions to compel, quash, strike discovery responses, or for discovery sanctions.

an idea is feasible.” Sixty-six percent of attorneys who self-identified as primarily representing defendants agreed with the statement, along with 64% of attorneys who self-identified as representing both plaintiffs and defendants equally, and 49% of attorneys who self-identified as primarily representing plaintiffs. In response to questions about whether they would recommend simplified procedures to their clients over the existing rules, all three groups in the FJC survey most commonly responded “probably, depending on circumstances.”

Professor Steven Gensler notes that it is “undeniably true that there is an inverse relationship between substance-specific rules and case management.”⁸ In other words, the more a judge can customize the procedure for an individual case, the less the need for customized rules – or, stated in the converse, the more particularized the rules to the case type, the less a judge needs to manage the case.

Pleading

Proposed Principles

- **Notice pleading should be replaced by fact-based pleading. Pleadings should set forth with particularity all of the material facts that are known to the pleading party to establish the pleading party’s claims or affirmative defenses.**
- **A new summary procedure should be developed by which parties can submit applications for determination of enumerated matters (such as rights that are dependent on the interpretation of a contract) on pleadings and affidavits or other evidentiary materials without triggering an automatic right to discovery or trial or any of the other provisions of the current procedural rules.**

Data and commentary from the conference materials

Pleading regimes

1. Notice pleading

There are some areas of general agreement with respect to perceptions about pleading in civil cases, although there is a noticeable plaintiff/defendant divide in other areas. One area of widespread consensus is that current pleading tools do not sufficiently narrow issues for litigation. Only 21% of ACTL Fellows and 24% of ABA survey respondents believe that the answer in notice pleading shapes and narrows the issues in the litigation. Furthermore, 71% of ACTL Fellows and 56% of ABA respondents believe that motions to dismiss for failure to state a claim are *not* effective tools to narrow litigation. In addition, in the FJC survey both plaintiffs’ and defense attorneys most commonly indicated that issues are not adequately framed in a typical civil case until after fact discovery. As one plaintiffs’ attorney responding to the FJC survey noted, “I routinely get back answers with laughable responses, disputing everything, even the indisputable, and including 15-30 affirmative defenses, all boilerplate legal conclusions without any factual link to the case.”

⁸ Steven S. Gensler, *Judicial Case Management: Caught in the Cross-Fire* 19 (March 2010).

There was no clear consensus, however, as to the effect of notice pleading on discovery and overall litigation efficiency. In the ABA and ACTL surveys, those who self-identified as primarily representing defendants or as representing both plaintiffs and defendants largely agreed that notice pleading needs extensive discovery to narrow the issues, and that fact-based pleading could narrow the scope of discovery. By contrast, those who self-identified as primarily representing plaintiffs generally disagreed with these statements – more so in the ABA survey than in the ACTL survey.

2. Fact-based pleading

The State of Oregon has a fact-based pleading regime, and the Oregon survey was the only one submitted for this conference that asked directly about respondents' experience with an explicit fact-based pleading requirement. The majority of respondents to the Oregon survey indicated their belief that fact-based pleading reveals facts early, narrows issues early, increases the ability to prepare for trial, increases efficiency, decreases or has no effect on the overall time to disposition, and increases or has no effect on fairness. The IAALS Oregon Case Processing Study supported the perceptions expressed in the Oregon survey, finding that motions to dismiss and motions on disputed discovery were filed at much lower rates and granted at lower rates in Oregon state court than in the corresponding federal court.⁹

3. Twombly and Iqbal

The recent Supreme Court decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* set forth a gloss on the Rule 8 pleading standard that commonly has been referred to as “plausibility” pleading. This form of pleading is not the same as the fact-based pleading in use in Oregon or discussed in the ACTL/IAALS Principles,¹⁰ and was not the subject of direct questions in the ACTL or ABA surveys. However, many commentators and practicing attorneys have expressed particular concern with the *Twombly* and *Iqbal* holdings, especially as they relate to cases in which there may be an imbalance of information at the pleading stage. As one respondent to the NELA survey noted in the comments:

I do not feel that [the *Twombly/Iqbal*] decisions should apply in the employment arena. Liberal pleading requirements should stay in effect. Plaintiffs are generally at a disadvantage when it comes to having specific information/documents when compared

⁹ In the contract and tort cases (including discrimination cases) studied, Rule 12 motions were filed in the U.S. District Court for the District of Oregon at a rate of 21.64 motions per 100 cases and were granted nearly 63% of the time, while corresponding motions under Oregon Rule of Civil Procedure 21 were filed for the same case types in state court at a rate of 11.31 motions per 100 cases and were granted less than 47% of the time. The filing rate for motions on disputed discovery was even more stark – 4.16 such motions per 100 contract and tort cases in Oregon state court, as compared to 30.74 such motions per 100 contract and tort cases in Oregon's federal court.

¹⁰ For more on the distinction between fact-based pleading and the *Twombly/Iqbal* pleading standard, see REPORT FROM THE TASK FORCE ON DISCOVERY AND CIVIL JUSTICE OF THE AMERICAN COLLEGE OF TRIAL LAWYERS AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 4-7 (March 2010). For a more in-depth treatment of a new fact-based pleading standard proposed by IAALS to narrow issues earlier in litigation, see Rebecca Love Kourlis, Jordan M. Singer, and Natalie Knowlton, *Reinvigorating Pleadings*, 87 DENV. U. L. REV. 245 (2010).

to the employer who has free access to that information. Thus, sometimes, facts must be pled upon information and belief and/or without specifics until some minimal discovery can be had.

In his conference paper, Professor Arthur Miller offers the same perspective, asserting that “[i]f left unconstrained, demands for plausibility pleading may shut ‘the doors of discovery’ on the very litigants who most need the procedural resources the federal rules have made available in the past.”¹¹

The NELA survey attempted to probe some of these concerns more fully, and found that more detailed pleadings are now commonplace, but Rule 12 dismissals under the *Twombly/Iqbal* standard are not. In that survey, 70% of respondents agreed that the *Twombly/Iqbal* rule has affected how they plead employment discrimination cases (with 94% of these respondents saying that they include more factual allegations than before). However, only 7% of NELA respondents indicated that one or more of their employment discrimination complaints has been dismissed under the *Twombly/Iqbal* framework. One NELA survey respondent described his/her approach: “For strategic reasons, I typically file detailed complaints that undeniably go above and beyond the minimum requirements of ‘notice pleading’ set forth in the rules. Thus, the *Twombly/Iqbal* decisions have not impacted my practice significantly.” Similarly, a “typical” response to the FJC survey from an attorney specializing in employment discrimination claims noted:

No effect [from *Twombly/Iqbal*]. I fact plead and [the state where I practice] is a fact pleading state. I have never faced a serious challenge to a complaint in 20 years of practice and only have had 2-3 motions to dismiss for failure to state a claim filed (but always face summary judgment motions).

As an empirical matter, the IAALS Federal Case Processing Study concluded that employment discrimination cases are in fact not especially prone to motions to dismiss: looking at cases that closed in 2005 and 2006 (shortly before *Twombly* was decided), the study found that about 22 motions under Rule 12 were filed for every 100 employment discrimination cases, slightly lower than the overall average of 23.3 motions per 100 cases for all civil cases in the study.

Still, the conference materials reflected generalized concern over the perceived impact of “heightened pleading” standards. The FJC survey found that 61% of attorneys who self-identified as representing primarily plaintiffs and 40% of attorneys who self-identified as representing primarily defendants believe that a generic heightened pleading standard would discourage some claims from being filed. The same survey found a significant split between the two sets of attorneys as to whether they believe that a generic heightened pleading standard would help narrow the issues early (72% of defense attorneys say yes, 71% of plaintiffs’ attorneys say no) or add disproportionate burden (65% of plaintiffs’ attorneys say yes, 62% of defense attorneys say no). Comments from FJC survey respondents

¹¹ Arthur R. Miller, *Pleading and Pretrial Motions – What Would Judge Clark Do?* 20 (2010).

reflect the different viewpoints. One respondent stated, “I do believe that the pleading requirements should be much less liberal as there are many meritless cases that proceed through the costly discovery and motions phase before the plaintiff is willing to settle or agree to a reasonable settlement.” Conversely, another respondent argued that “[a]ny steps to increase pleading requirements and decrease plaintiff’s access to relevant discovery would preclude many plaintiffs from pursuing meritorious claims.”

Summary procedure

Other than the ACTL and IAALS, only one organization has directly addressed the possibility of a summary procedure at the pleading stage. The Federal Courts Committee of the Association of the Bar of the City of New York (Federal Courts Committee) has proposed a Summary Adjudication Motion.¹² Under this proposal, if and to the extent that a party prevails on such a motion, further discovery in the adjudicated issue(s) or claim(s) would be prohibited and the court’s resolution on that matter would be the law of the case.¹³ Likewise, Professor Miller suggests the possibility of a “Motion to Particularize of a Claim for Relief,” which “would operate as something akin to the pre-Federal Rule discovery device known as a bill of particulars.”¹⁴ Without specifically addressing the possibility of a summary adjudication, other conference commentators also seem to have endorsed the sensibility of such a process. Judge Higgenbotham posited in his conference paper that “[p]erhaps we could move toward an initial opening to limited discovery followed by a look at likely merit for greater or full access.”¹⁵ Likewise, Gregory Joseph noted in his conference paper that “The Court should freely permit, and direct, discovery to address perceived weaknesses in the case. It may be time to accept that the trial should not occur only at the end of the case, but also, in a miniaturized version, at the beginning.”¹⁶

Discovery

Proposed principles

- **Proportionality should be the most important principle applied to all discovery.**
- **Shortly after the commencement of litigation, each party should produce all reasonably available nonprivileged, non-work product documents and things that may be used to support that party’s claims, counterclaims or defenses.**
- **Discovery in general and document discovery in particular should be limited to documents or information that would enable a party to prove or disprove a claim or defense or enable a party to impeach a witness.**

¹² SUMMARY COMPARISON OF BAR ASSOCIATION SUBMISSIONS TO THE DUKE CONFERENCE REGARDING THE FEDERAL RULES OF CIVIL PROCEDURE (Apr. 26, 2010) at 5-6 [hereinafter SUMMARY COMPARISON].

¹³ *See id.*

¹⁴ Miller, *supra* note 11, at 64.

¹⁵ Patrick E. Higgenbotham, *The Present Plight of the United States District Courts: Is the Managerial Judge Part of the Problem or of the Solution?* 7 (2010).

¹⁶ Gregory P. Joseph, *Electronic Discovery and Other Problems* (2010)

- **There should be early disclosure of prospective trial witnesses.**
- **After the initial disclosures are made, only limited additional discovery should be permitted. Once that limited discovery is completed, no more should be allowed absent agreement or a court order, which should be made only upon a showing of good cause and proportionality.**
- **All facts are not necessarily subject to discovery.**
- **Courts should consider staying discovery in appropriate cases until after a motion to dismiss is decided.**
- **Discovery relating to damages should be treated differently.**
- **Requests for admission and contention interrogatories should be limited by the Principle of Proportionality. They should be used sparingly, if at all.**

Data and commentary from the conference materials

Proportionality

Respondents to the ACTL, ABA, NELA and General Counsel surveys were generally in agreement that costs in civil cases are disproportionate to the amount at stake, especially for small cases. In the ACTL survey, 69% of Fellows agreed that litigation costs are not proportionate the value of the case. The ABA and NELA surveys asked respondents to consider both small and large cases: 89% of ABA respondents and 83% of NELA members agreed that costs were disproportionate as to small cases, and 40% of respondents in both surveys agreed that costs were disproportionate as to large cases. Three-quarters of respondents in the ABA and ACTL surveys also agreed that discovery costs have increased disproportionately because of electronic discovery. And in each of the ACTL, ABA, and NELA surveys, the estimated median percentage of litigation costs attributable to discovery in cases that do not go to trial was estimated at 70%.

The FJC survey revealed a different conclusion. That survey asked about the costs of discovery (as opposed to all litigation costs) relative to the stakes in the litigation, and found that the median estimated discovery cost was only 1.6% of estimated stakes in the case for plaintiffs and 3.3% of estimated stakes for defendants. Only about one-quarter of respondents in that survey said that discovery costs too much relative to the stakes in their specific closed case. The FJC survey also concluded that only 20-27% of total litigation costs are attributable to discovery, a figure much lower than in the other surveys. Notwithstanding these small percentages, several respondents to the FJC survey still reported that discovery was the main factor contributing to litigation cost. As one FJC respondent put it, “Discovery is the number one cost driver and there isn’t a close second.”

Limitations on discovery

Among the ABA, ACTL and NELA survey respondents, there was strong agreement that courts and parties are not limiting discovery on their own, and that the failure to do so has costly consequences. At least 70% of respondents to each of those three surveys agreed that discovery in general is too expensive. In those same surveys, between 54% and 74% of respondents agreed that counsel typically do not request discovery limits, and between 61% and 76% of respondents agreed that judges do not enforce proportionality limitations on their own. Between 51% and 71% of respondents in all three surveys agreed that “discovery is used as a tool to force settlement.”

Opinions were mixed as to discovery abuse. Only about 20% of the FJC survey respondents agreed that “discovery is abused in almost every case in federal court,” but the same basic question elicited agreement from 45% of ACTL Fellows, 51% of ABA respondents, and 65% of NELA members. As one NELA survey respondent stated in an open-ended comment, “Discovery abuse is rampant—parties (usually defendants) stonewall routinely and then negotiate over how many of their legal obligations they can avoid.”

Attorney reactions were similarly mixed with respect to implementing concrete limitations on discovery. Some conference papers have expressed concern that (as Daniel Girard and Todd Espinosa put it) “[w]hile the simplest and most effective way to control litigation costs would be to restrict or eliminate discovery, any savings would come at a high price” for truth-seeking.¹⁷ Other conference submissions strongly supported discovery limits. Based on two decades of experience in the Southern District of New York, for example, the Federal Courts Committee recommends strict limits on interrogatories at the outset of a case.¹⁸

In the FJC survey, 71% of respondents who primarily represent plaintiffs and 44% of attorneys who primarily represent defendants disagreed with revising the rules to limit discovery generally, although there was more support for rules to limit electronic discovery (especially among attorneys who primarily represent defendants or who represent both defendants and plaintiffs). Respondents to the Arizona survey generally indicated that they would not modify the state’s existing presumptive limits on deposition discovery (four-hour time limit, with depositions limited to parties, experts, and document custodians) and interrogatories (40 per party), although respondents were split on whether to keep or raise the state’s limit of ten requests for production. In Oregon, where interrogatories are not permitted, most survey respondents indicated that the lack of this discovery tool had no effect on their ability to prepare for trial or the fairness of the process or outcome, and decreased the cost to litigants.

¹⁷ Daniel C. Girard & Todd I. Espinosa, *Limiting Evasive Discovery: A Proposal for Three Cost-Saving Amendments to the Federal Rules*, 87 DENV. U. L. REV. 473, 473 (2010). See also Elizabeth J. Cabraser, *Uncovering Discovery 57* (2010) (“Plaintiffs’ lawyers dread that all discovery limitations will incentivize the concealment of crucial information – potential evidence – and will serve not to save costs and reduce delay, but which will subvert the process by fostering injustice when such tactics are successfully concealed, and by exponentially increasing costs and delay in the effort to expose them.”).

¹⁸ See SUMMARY COMPARISON, *supra* note 12, at 26.

Quite a few open-ended comments to the Oregon survey, however, expressed the desire to allow fact interrogatories to obtain basic information in the absence of disclosure requirements.

There was a reasonably strong consensus among survey respondents that requests for admission and contention interrogatories are generally not as helpful as other discovery tools, and that (like e-discovery) limits on those tools are more acceptable. More than 60% of respondents to the Arizona survey indicated that they would not raise that state's presumptive limit of 25 requests for admission. In the Oregon survey, the majority of respondents reported that the state's limit of 30 requests for admission has no effect on their ability to prepare for trial, the efficiency of the litigation, time to resolution, or fairness of the process or outcome. Oregon survey respondents also were careful to distinguish between fact interrogatories (which they generally supported) and contention interrogatories (which they did not). In the ACTL and ABA surveys, requests for admission were the least likely discovery tool to be deemed "important" and "cost-effective," although they still received those designations from more than 70% of respondents.

Early production of documents to support claims and defenses

Respondents to the ACTL, ABA and NELA surveys were not keen on the current federal initial disclosure regime: no more than 35% of respondents in any of the three surveys agreed that the current Rule 26(a)(1) initial disclosures reduce the total amount of discovery or save the client money. In addition, respondents to the FJC survey, especially defense attorneys, were cool to the idea of revising rules to require additional mandatory disclosures, with 55% of self-identified plaintiffs' lawyers and 33% of self-identified defense lawyers supporting the idea.

Arizona has adopted a somewhat different approach for its state courts. The applicable rule "basically states that at the outset of a case the parties must make a full, mutual and simultaneous disclosure of all relevant information known by or available to them and their lawyers,"¹⁹ and 70% of survey respondents agreed that such disclosures help narrow the issues in dispute early in a case. Furthermore, a plurality of respondents indicated a preference for the state's 40-day mandatory disclosure period. Arizona practitioners were more evenly divided as to whether that state's mandatory disclosure rule reduces the total amount of discovery.

Staying discovery in appropriate cases

Only one survey directly posed a question about stays of discovery, and that question posited a more extreme use of discovery stays than is proposed under the ACTL/IAALS Principles. The ABA survey asked, "Should there be an automatic stay of discovery in all cases, pending determination of a threshold motion to dismiss?" In response, 17% of self-identified plaintiffs' attorneys, and 77% of self-identified defense attorneys indicated "yes."

¹⁹ Thomas A. Zlaket, *Encouraging Litigators to Be Lawyers: Arizona's New Civil Rules*, 75 ARIZ. ST. L. REV. 1, 1 (1993).

Notwithstanding this divide, the Federal Courts Committee has recommended that a motion to dismiss or for summary adjudication operate to stay discovery “absent a court order based on a showing of good cause.”²⁰ The Committee notes further, however, that “protections need to be built in to ensure that those motions are not abused and that they are decided promptly.”²¹

E-discovery

Proposed Principles

- **Promptly after litigation is commenced, the parties should discuss the preservation of electronic documents and attempt to reach agreement about preservation. The parties should discuss the manner in which electronic documents are stored and preserved. If the parties cannot agree, the court should make an order governing electronic discovery as soon as possible. That order should specify which electronic information should be preserved and should address the scope of allowable proportional discovery and the allocation of its cost among the parties.**
- **Electronic discovery should be limited by proportionality, taking into account the nature and scope of the case, relevance, importance to the court’s adjudication, expense and burdens.**
- **The obligation to preserve electronically stored information requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation; however, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant electronically stored information.**
- **Absent a showing of need and relevance, a party should not be required to restore deleted or residual electronically stored information, including backup tapes.**
- **Sanctions should be imposed for failure to make electronic discovery only upon a showing of intent to destroy evidence or recklessness.**
- **The cost of preserving, collecting and reviewing electronically stored material should generally be borne by the party producing it but courts should not hesitate to arrive at a different allocation of expenses in appropriate cases.**
- **In order to contain the expense of electronic discovery and to carry out the Principle of Proportionality, judges should have access to, and attorneys practicing civil litigation should be encouraged to attend, technical workshops where they can obtain a full understanding of the complexity of the electronic storage and retrieval of documents.**

²⁰ SUMMARY COMPARISON, *supra* note 12, at 12.

²¹ *Id.*

Data and commentary from the conference materials

Proportionality limitations on e-discovery

There was a very strong consensus in the conference materials that the introduction of electronic discovery into a case increases the cost of litigation. More than 85% of the ABA and ACTL respondents, and more than 60% of the NELA respondents, agreed with this proposition. Respondents to the General Counsel survey who reported an increase in litigation costs over the last five years most commonly cited discovery in general, and e-discovery in particular, as the basis for that trend.

The FJC closed case study supports these shared perceptions. That study found that the median litigation costs for plaintiffs rose from about \$8000 in cases with no e-discovery to \$30,000 in cases with any e-discovery. Median litigation costs for defendants rose from \$15,000 in cases with no e-discovery to \$40,000 in cases with any e-discovery. The FJC study also found that, all else equal, if a case involves requests for electronically stored information (ESI) from both sides, costs increase for both plaintiffs (by 48%) and for defendants (by 17%). For both plaintiffs and defendants, each dispute involving ESI caused a 10% increase in overall litigation costs, all else being equal.

There was also strong evidence in the studies that the amount of ESI actually produced in response to discovery requests is far less than the amount collected by the responding party, and that the amount of ESI actually used at trial is much less than the amount produced. The FJC closed case study found that, on average, slightly over 50% of the ESI collected by a responding party is actually produced as responsive and not privileged. Furthermore, fewer than 10% of the FJC study respondents reported that the ESI produced in their case was used at trial, and almost 20% reported that the produced ESI was not used at all.

Most surveys reflected a concern that electronic discovery contributes disproportionately to litigation costs. At least 75% of respondents in both the ACTL and ABA surveys agreed that the advent of e-discovery has disproportionately increased costs, and 70% of ABA respondents indicated that e-discovery is generally overly burdensome. In the General Counsel survey, one-third of respondent companies stated that they have forgone relevance and privilege review of produced ESI in at least 10% of their cases in the last five years, in order to reduce the burden of discovery, and more than one respondent to that survey indicated in open-ended comments that the costs of e-discovery can rapidly exceed the value of any given case.²² The NELA membership, however, did not feel the same way on the proportionality issue: only 35% of respondents to that survey agreed that e-discovery has disproportionately increased costs, and less than 20% agreed that e-discovery is generally overly burdensome.

The Seventh Circuit e-discovery pilot program attempted to address the proportionality issue head on, by incorporating a pilot principle directing application of the Rule 26(b)(2)(C) standard in the

²² These findings are consistent with a recent government-sponsored cost study conducted in the United Kingdom, which identified e-discovery and its treatment as one of the general causes of excessive litigation costs. See *generally* THE RT. HON. LORD JUSTICE JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT (2010).

formulation of discovery plans. Surveys designed to gauge the effectiveness of the first stage of the pilot were supportive of the principle and “frequently identified the most useful aspects of the Principles as the encouragement of early focus on electronic discovery issues and the focus on proportionality.” Two-thirds of judge respondents indicated that the Rule 26(b)(2)(C) proportionality standard was considered in developing discovery plans for their pilot project cases.

All of the studies indicated broad dissatisfaction with the costs associated with e-discovery vendors. About 70% of the ABA and ACTL survey respondents, and a plurality (43%) of the NELA respondents, agreed that outside vendors increase e-discovery costs without commensurate value to the client.²³ General counsel felt the same way about outside counsel, with a majority of respondents to the General Counsel survey disagreeing with the premise that outside counsel embrace measures to make e-discovery more efficient.

Cost-shifting

While the surveys and studies did not directly address discretionary cost-shifting in the e-discovery context, they did explore perceptions about the value of routine cost-shifting when the burden of production between the parties is not equal. In the FJC survey, nearly 65% of respondents who self-identified as primarily representing defendants and 50% of respondents who represent both parties supported routine cost-sharing of ESI production when there is an unequal burden of production. However, only about 30% of respondents who self-identified as primarily representing plaintiffs agreed.

The Federal Courts Committee has recommended the wider use of cost-shifting in e-discovery, arguing that it “has the potential to encourage parties to engage in more reasonable discovery conduct.”²⁴ Similarly, many respondents to the General Counsel survey advocated for cost-shifting when the burden of an ESI request is disproportionate, either to the importance of the information or to the amount in controversy. Several respondents to that same survey indicated that cost-shifting is also warranted when a request seeks ESI not used in the ordinary course of business.

Technical workshops on ESI

A healthy majority of respondents to the ACTL, ABA, and General Counsel surveys expressed concern about judicial familiarity with the technical issues that pervade electronic discovery. At least 75% of respondents to both the ABA and ACTL surveys believe that courts do not understand the difficulties in providing e-discovery, and 70% of general counsel indicated that they do not believe that judges have sufficient familiarity with e-discovery technologies to rule appropriately in discovery disputes. Seven out of ten general counsel further indicated that they do not believe that attorneys have sufficient familiarity with e-discovery technologies to know how to obtain necessary information without undue cost and delay, and 65% of general counsel admitted that their own company does not

²³ Nearly 27% of the NELA respondents expressed no opinion on the issue.

²⁴ SUMMARY COMPARISON, *supra* note 12, at 16.

have sufficient expertise and infrastructure (either in-house or outside) to conduct an e-discovery search without undue cost and delay.

Attorneys who primarily represent plaintiffs were more optimistic about the ability of e-discovery to produce cost-effective results than attorneys who self-identified as primarily representing defendants. Over 65% of NELA respondents indicated that when properly managed, discovery of electronic records can reduce the costs of discovery, and only about one-third of NELA respondents agreed that courts do not understand the difficulties in providing e-discovery.

The Seventh Circuit pilot program developed principles directing judges and counsel to become more familiar with the fundamentals of electronic discovery. Over 90% of judges surveyed as part of the pilot said that these principles increased counsel's level of attention to the technologies affecting the discovery process, and nearly 70% of judges said that the principles increased their own level of attention to the relevant technologies.

Expert witnesses

Proposed Principle

- **Experts should be required to furnish a written report setting forth their opinions, and the reasons for them, and their trial testimony should be strictly limited to the contents of their report. Except in extraordinary circumstances, only one expert witness per party should be permitted for any given issue.**

Data and commentary from the conference materials

There was very strong consensus among respondents to the ACTL, ABA and NELA surveys as to the impact of expert costs on the decision to settle civil suits, with 85%, 82%, and 88% of respondents, respectively, agreeing that such costs are a factor in the decision to settle. The FJC's multivariate analysis of its closed case study data concluded that for plaintiffs, each additional expert deposition was associated with approximately 11% higher costs, all else being equal. (Defendants experienced approximately 5% higher costs with each additional reported type of discovery, although expert depositions did not independently impact defendant costs once other factors were accounted for.)

The ACTL, ABA and NELA surveys also asked respondents about the importance and cost-effectiveness of expert depositions – both when such depositions are limited to the content of the expert report and when the depositions are not so limited. Strong majorities in all three surveys agreed that expert reports were important under either circumstance, with slightly stronger majorities agreeing as to the importance where the deposition was not limited to the content of the expert report. There was less agreement as to the cost-effectiveness of expert depositions, especially when they were limited to the content of the expert report: only 62% of ACTL Fellows, 68% of ABA respondents, and 46% of NELA members agreed that such depositions were cost-effective. These figures suggest that the cost-

effectiveness and importance of expert depositions diminishes when the information available through a deposition is already presented in an expert report.

The state rule in Arizona entitles each side to only one independent expert witness per issue. If there are multiple parties on a side, they must agree on the expert, or the court will designate the expert for them. Additional experts require a court order. Respondents to the Arizona survey strongly agreed with this approach, with 77% indicating that they would not modify the rule, and only 12% indicating that they would raise the presumptive limit on expert witnesses.

The State of Oregon does not provide for any disclosure or discovery concerning independent expert witnesses. Oregon practitioners had mixed reviews on the complete absence of expert discovery in that state. The majority of respondents to the Oregon survey (58%) agreed that the absence of expert discovery decreases cost to litigants, and 69% of respondents indicated that such absence either decreases or has no effect on time to resolution. However, the majority of respondents (66%) also believed that the lack of expert discovery decreases the ability to prepare for trial, and a plurality of respondents indicated that the absence of expert discovery decreases the efficiency of the litigation, as well as the fairness of the process and outcome. In the open-ended comments, many Oregon respondents called for some form of expert discovery or disclosure, but among those comments were many suggestions to allow only a limited form of expert discovery – for example, including disclosures but not depositions, limiting expert depositions, or limiting testimony to the scope of an expert report.

Even where survey respondents expressed a belief that some form of expert discovery is important, the cost of experts was a recurring theme. As one respondent to the FJC survey put it, “[t]he biggest expense in civil cases is experts. Requiring reports by experts and then producing them for depositions causes the client to incur more than double the expense.” Another FJC survey respondent stated, “Electronic discovery is not the problem with expenses—detailed expert reports are the problem.” Perhaps due in part to these concerns about expense, fewer than one in seven respondents to the FJC survey reported any deposition of an expert in their closed cases.

Judicial management

Proposed Principles

- **A single judicial officer should be assigned to each case at the beginning of a lawsuit and should stay with the case through its termination.**
- **Initial pretrial conferences should be held as soon as possible in all cases and subsequent status conferences should be held when necessary, either on the request of a party or on the court’s own initiative.**
- **At the first pretrial conference, the court should set a realistic date for completion of discovery and a realistic trial date and should stick to them, absent extraordinary circumstances.**

- **Parties should be required to confer early and often about discovery and, especially in complex cases, to make periodic reports of those conferences to the court.**
- **Courts are encouraged to raise the possibility of mediation or other form of alternative dispute resolution early in appropriate cases. Courts should have the power to order it in appropriate cases at the appropriate time, unless all parties agree otherwise. Mediation of issues (as opposed to the entire case) may also be appropriate.**
- **The parties and the courts should give greater priority to the resolution of motions that will advance the case more quickly to trial or resolution.**
- **All issues to be tried should be identified early.**
- **These Principles call for greater involvement by judges. Where judicial resources are in short supply, they should be increased.**
- **Trial judges should be familiar with trial practice by experience, judicial education or training and more training programs should be made available to judges.**

Data and commentary from the conference materials

Only one survey – by the FJC – directly asked respondents about their general perceptions about the proper degree of case management in the federal courts. On that high level, there appears to be general support for the current amount of judicial case management. The FJC survey found that respondents were mixed in their support for increased judicial management, but also neutral or unsupportive of the idea of less judicial management.

Many other surveys and conference materials addressed more specific roles of the judge, including roles that would typically fall into the realm of case management such as holding hearings and conferences, setting and maintaining deadlines, and raising issues with the parties at the court’s own insistence. As discussed below, many of these more specific roles were encouraged by various segments of the bar. Professor Gensler has noted the importance of this development, explaining that “support from the bar is important, and perhaps critically so. The case management model probably could not work, and certainly could not very well, if lawyers and litigants overwhelmingly *disliked* or *distrusted* it.”²⁵

Single judicial officer

Among the areas of greatest consensus anywhere in the conference materials was support for early and continued involvement in the case by a single judicial officer. In the ACTL, ABA, and NELA surveys, between 80% and 90% of respondents favored having one judicial officer assigned to the case from start to finish. Similarly, at least 64% of respondents in each of the three surveys agreed that early judicial involvement produces more satisfactory results for the client. Although the Oregon survey did

²⁵ Gensler, *supra* note 8, at 8 (emphasis in original).

not ask directly about the assignment of a single judicial officer, a very common suggestion to improve that state's system in the open-ended comments was to assign a single judge to the case.

The respondents to the ACTL, ABA and NELA surveys were less likely to agree that a judge who will preside at trial should be required to handle all pre-trial matters (75% of ACTL Fellows, 65% of ABA respondents, and 56% of NELA members agreed). Of those who did agree, a primary reason offered in survey comments was the importance of having the trial judge educated about the key issues in the case throughout the pretrial process. One NELA survey respondent noted, "Having magistrates or special masters handle discovery disputes keeps the judge from learning important background and the case dynamics that may be essential where issues are raised in dispositive motions or at trial."

One area in which the use of a single judicial officer may have less of an impact is a case's overall time to disposition. The IAALS Federal Case Processing Study found no clear connection between the trial judge (as opposed to a magistrate judge) presiding over discovery disputes and the overall length of the case.

Initial pretrial conferences

There was considerable agreement in the conference materials that early initial pretrial conferences are valuable to the parties and the court. In the ACTL, ABA and NELA surveys, at least 61% of each respondent base agreed that a Rule 16(a) pretrial conference helps to inform the court of the issues in the case. (About half of each respondent base agreed that the Rule 16(a) conference also helps to narrow issues.) In the Arizona survey, 71% of respondents agreed that the state version of Rule 16 conferences establish early judicial management of cases, 59% agreed that such conferences improve trial preparation, 62% agreed that the conferences are cost-effective, and 52% agreed that the conferences expedite case dispositions.

Realistic dates for completion of discovery and start of trial

Respondents to several of the surveys identified the time required to complete discovery as the most significant contributor to delay in civil cases. Fifty-six percent of the ACTL Fellows so indicated, as did a plurality of ABA survey respondents (48%) and the NELA respondents (35%). In fact, extensions to the discovery deadline were commonplace. The IAALS Federal Case Processing Study found that across the eight district courts studied, on average 47 motions to continue the deadline to complete discovery were filed per 100 civil cases. The filing rate varied considerably by district, with one district seeing fewer than three such motions per 100 cases, and another district seeing almost 145 motions per 100 cases. Regardless of the filing rate, every district in the study granted at least 80% of motions to continue the discovery deadline, with a mean extension of over 100 days.

There is robust debate with respect to when a trial should be scheduled, and the effect of the scheduling on the overall efficiency of the case. Judge Baylson opines that setting a trial date at the Rule 16 conference "requires the lawyers and their clients to focus on this date from the start. Although an initially-scheduled trial date can be and often is postponed, a trial date always on the calendar conveys a

message that trial is the goal.”²⁶ Judge Higgenbotham does not directly disagree, but focuses instead on the firmness of the trial setting (whenever it occurs), arguing that “[h]istorically firm trial settings with pretrial access to the judge who tries the case produces a 90% settlement rate with shorter time from trial to disposition.”²⁷

The IAALS Federal Case Processing Study supports Judge Baylson’s position, concluding that one of the variables most strongly correlated with overall time to disposition is the elapsed time from the filing of the case to the day when the trial date is set.²⁸ In other words, cases in which a trial date was set earlier tended to have shorter overall disposition times. However, survey respondents were less sure about the advantages of an early setting of a trial date. Between 50% and 60% of respondents to the ACTL, ABA and NELA surveys agreed that the court should set a firm trial date early, and fewer than half the respondents in each group agreed that the trial date should be continued only under exceptional circumstances. In Oregon, where the state rules require that trial normally take place within one year from the filing date,²⁹ 78% of respondents agreed that they had adequate preparation time before trial.

Greater priority to certain motions

Commentary and reaction related to this principle is discussed in the summary judgment section below.

Alternative dispute resolution

The surveys indicated a strong consensus about the advantages of mediation, but there was no such consensus for arbitration. The ABA, NELA and General Counsel surveys asked respondents about cost, time, and fairness of outcomes for mediation and arbitration as compared to traditional litigation. In each survey, respondents indicated a strong belief that mediation lowered cost and time to resolution, and either increased the likelihood of a fair outcome or made no difference as to fairness. Respondents were generally much less supportive of arbitration, with less than 15% of respondents in any survey agreeing that arbitration increased the fairness of the outcome. In Arizona and Oregon, which have mandatory arbitration for many cases under \$50,000 at issue, a majority of respondents in both states indicated that arbitration decreases cost and time to resolution. However, in both states only 8% of respondents agreed that arbitration creates a fairer result.

²⁶ Michael M. Baylson, *Are Civil Jury Trials Going the Way of the Dodo? Has Excessive Discovery Led to Settlement as an Economic and Cultural Imperative: A Response to Judge Higgenbotham* 13 (2010)

²⁷ Higgenbotham, *supra* note 15, at 16.

²⁸ For all cases in the study, $r = 0.69215$, $p < .0001$. For cases in the study that actually went to trial, $r = 0.70453$, $p < .0001$.

²⁹ Cases deemed “complex” in Oregon state court are required to be tried within two years of filing, absent a showing of good cause.

Judicial experience and training

The ACTL, ABA and NELA respondents strongly agreed that individuals with significant trial experience should be chosen as trial judges (85% ACTL, 63% ABA, 69% NELA). Furthermore, 70% of respondents in both the ABA and ACTL surveys who preferred federal court over state court indicated that one reason for their preference was the quality of the federal bench. This sentiment was shared by respondents to the General Counsel survey.

Summary judgment

In the surveys, attorneys who primarily represent plaintiffs voiced a sharply different view of the nature and purpose of summary judgment than did attorneys who primarily represent defendants. From the plaintiffs' attorney perspective, summary judgment is requested and granted much too frequently, and is rarely used by defendants in good faith. In the NELA survey, for example, 88% of respondents agreed that summary judgment practice increases cost and delay without proportionate benefit, 92% expressed the belief that summary judgment motions are used as a tactical tool rather than in a good faith effort to narrow the issues, and 74% agreed that discovery is used more to develop evidence for or in opposition to summary judgment than it is used to understand the other party's claims and defenses for trial. Several comments to the NELA survey reflected the same viewpoint. One representative comment noted:

Summary judgment practice should be substantially curtailed. Defendants will seek summary judgment notwithstanding the existence of disputes of material facts that all parties know about, usually because they consider summary judgment practice a form of roulette – they may spin the wheel and turn out lucky.

Self-identified plaintiffs' attorneys in the ABA survey did not feel as strongly on these issues as their NELA counterparts, but nevertheless the majority of respondents agreed that summary judgment is used as a tactical tool (73%) and that summary judgment increases cost and delay without proportionate benefit (62%).

Defense attorneys, as well as attorneys representing both plaintiffs and defendants, disagreed with the characterization of summary judgment as a tactical tool or a source of disproportionate cost and delay. In the ABA survey, defense attorneys and attorneys who represent both plaintiffs and defendants agreed that summary judgment practice increases cost and delay without proportionate benefit only 11% and 26% of the time, respectively, and agreed that summary judgment is used as a tactical tool rather than a good faith effort to narrow issues only 22% and 39% of the time, respectively. In the ACTL survey, only 30% of all Fellows agreed that summary judgment increased cost and delay without proportionate benefit, and only 36% agreed that summary judgment is used as a tactical tool.

Defense attorneys responding to the FJC survey indicated in open-ended comments that their use of summary judgment motions depends in part on the type of civil case. As one attorney explained:

We use summary judgment only when it's warranted and we have had success with it. We only file for summary judgment in 10%, maybe 20%, of our cases. We always file for summary judgment in employment cases because those are often legal issues. Filing for summary judgment is the norm in employment cases.

Despite these differences between plaintiffs' and defense attorneys, there is considerable consensus in the surveys, studies and papers that the *impact* of filing a summary judgment motion is to drive the parties toward settlement. Judge Higgenbotham stated as much in his conference paper, noting the growth of a new shared culture in which fewer trials, fewer lawyers with trial experience and fewer judges taking the bench with trial experience are tied to the presumption that that "civil cases are to be settled if summary judgment is not granted." The IAALS Federal Case Processing Study provides strong empirical support for Judge Higgenbotham's observation. Of 743 cases in the study in which a summary judgment motion was denied in its entirety, more than 24% still terminated within 30 days of the ruling, and nearly 40% terminated with 90 days of the ruling. Similarly, of 396 cases in the IAALS study in which a motion for summary judgment was granted only in part, more than 15% terminated within 30 days of the ruling and more than one-third terminated within 90 days of the ruling.³⁰ The IAALS study concluded that "these figures strongly suggest that the parties look to the court to provide answers that affect settlement discussions."

Those answers may come in the form of what Judge Hornby has called "fact-sorting." As he explains, a judge must sort through a series of facts (and factual disputes) presented by the parties, and determine which facts "are undisputed and which facts matter, thus discarding other facts, whether the outcome is judgment or trial."³¹ While at least some aspects of this fact-sorting role might better be allocated to a jury or to the attorneys themselves, the current practice eschews these responsibilities and instead looks to the judge to assess for the parties the strength of their respective claims and defenses. The efficiency of this process is certainly in doubt; as Judge Hornby notes, "[t]he complexity of many federal cases makes this [fact-sorting] process both time-consuming and hugely expensive."³²

Survey respondents agreed that the summary judgment process was time-consuming, and primarily laid the problem at the feet of the judiciary. Where asked, the majority of every respondent group agreed that judges fail to rule on summary judgment motions promptly (54% of ACTL Fellows, 61% of ABA respondents, and 70% of NELA respondents agreed). Some comments to the General Counsel Survey also suggested earlier and more serious consideration of dispositive motions. Judge Baylson gave voice to these concerns in his conference paper, stating that:

Some judges are not interested in moving cases, compelling parties to focus on trial, and adjudicating pretrial motions in a timely manner. In these instances, lawyers and their clients don't know what will happen next, or when a trial is likely to occur. Lawyers are

³⁰ *Id.*

³¹ D. Brock Hornby, *The Business of the U.S. District Courts*, 10 GREEN BAG 2D 453, 460 (2007).

³² *Id.* at 461.

used to winning and losing motions; the only decision that is unfair to a lawyer and a client is the one that was never made.³³

Judge Hornby agrees that summary judgment decisions often take significant time, but suggests that it is in part a resource issue: “busy judges and magistrates cannot easily assemble sufficient blocks of time to produce a decision, especially when confronting many motions simultaneously.”³⁴ He suggests that the “large segments of uninterrupted time” needed to write a “decent opinion” is an “often unavailable luxury.”³⁵

Still, the discontent among attorneys about the time taken to rule on summary judgment motions is palpable. As one NELA survey respondent put it:

While I think trial dates should be set early, I do think it is incumbent on judges to either rule timely on dispositive motions or move the trial date. Far too often, parties incur thousands of dollars in expenses submitting pretrial reports only to have the court grant a motion for summary judgment just days before the trial setting. This is not efficient for either side.

The IAALS Federal Case Processing Study found that across eight federal district courts, the median time from filing to ruling on summary judgment motions was 126 days – and in many districts, the median time was considerably longer. The IAALS study also confirmed that counsel in traditionally complex cases are more likely to ask the court to engage in “fact-sorting” through summary judgment: the case types with the highest rates of summary judgment filings were (in descending order) constitutionality of state statutes, environmental matters, the Freedom of Information Act, patent, property damage product liability, foreclosure, antitrust, and insurance. To this innate case complexity, Judge Hornby adds an observation on the procedural complexity at the summary judgment stage: “At trial, experienced lawyers strategically simplify the facts for juries, and allow judges to narrow legal issues in jury instructions. Those same dynamics do not operate at summary judgment, at least with less-experienced lawyers.”³⁶

The considerable time taken to prepare, argue, and rule on summary judgment motions is accompanied by a considerable increase in costs to all parties. The FJC’s recent multivariate analysis of litigation costs in civil cases determined that any ruling on a summary judgment motion was associated with plaintiffs’ reported costs increasing by approximately 24% and defendants’ reported costs increasing by approximately 22%, controlling for all other factors.

³³ Baylson, *supra* note 26, at 14.

³⁴ D. Brock Hornby, *Summary Judgment Without Illusions*, 13 GREEN BAG 2D 273, 279 (2010).

³⁵ *Id.* at 278.

³⁶ *Id.* at 282.

Sanctions

One longstanding suggestion to controlling perceived abuses in pleadings and discovery is a more robust use of sanctions. However, there was very strong agreement among the various survey respondents that sanctions allowed by the discovery rules are rarely imposed. Almost 87% of ABA survey respondents shared this belief, as did 84% of ACTL Fellows and 87% of NELA respondents. The FJC survey did not ask specifically about the frequency of imposing sanctions, but a majority of all three respondent groups in the FJC survey (attorneys primarily representing plaintiffs, those primarily representing defendants, and those representing both equally) supported revising the rules to enforce discovery obligations more effectively.

The Arizona and Oregon surveys found similar frustration with the underutilization of discovery sanctions in those state courts. In Arizona, almost 74% of respondents indicated that litigants requested sanctions for discovery misconduct at least “occasionally,” but 83% of respondents also indicated that, when requested, the courts “almost never” or only “occasionally” impose such sanctions. In addition, almost 86% of Arizona respondents indicated that the state court “almost never” or only “occasionally” imposed sanctions of its own accord. In Oregon, 88% of survey respondents who self-identified as having experience with sanction requests indicated that the state courts “almost never” or at most “occasionally” impose sanctions for discovery misconduct. Respondents in both states expressed a desire for more consistent enforcement of discovery rules.

Empirical studies are inconclusive on the extent to which discovery sanctions are requested and granted. The IAALS Federal Case Processing Study found only 3.19 motions requesting sanctions per 100 civil cases, only 26% of which were granted. The conference paper submitted by Dan Willoughby and Rose Hunter Jones examined over 400 cases involving motions for sanctions for e-discovery violations, and concluded that “the overall number of e-discovery sanction cases is clearly increasing, that motions for sanction are being filed in all types of cases and all courts, and that in many cases the sanctions imposed against parties are severe, including dismissals, adverse jury instructions and significant monetary awards.”³⁷ Willoughby and Hunter further conclude that defendants have been sanctioned three times more frequently for e-discovery conduct than have plaintiffs.³⁸

A separate (and as yet unpublished) IAALS study of 458 civil cases from 1970 to 2009 in which Rule 37 sanctions were imposed³⁹ found that defendants receive the bulk of sanctions in contract disputes (64.8% of sanctions levied) and intellectual property cases (55.2%), but that plaintiffs are sanctioned more frequently in civil rights cases (74.5% of sanctions), employment discrimination cases (71.3%), and tort cases (61.6%). The most frequent type of sanctions levied were dispositive (53% of the

³⁷ Dan H. Willoughby and Rose Hunter Jones, *Sanctions for E-Discovery Violations: By the Numbers* at 3 (2010).

³⁸ *Id.* at 9.

³⁹ All the cases in the IAALS sanctions study were published and drawn from two annotated sources: Wright & Miller and American Law Reports. The selected cases were drawn from 75 federal district courts in 45 states. Over 80% of the sanctions recorded in the study were imposed before 1990.

total), including default judgments and dismissing, precluding or striking a claim or defense. Nearly 30% of sanctions in the IAALS study were of the monetary variety.

CONCLUSION

An objective review of the conference materials reinforces that there is something more than a low level of dissatisfied “buzz” about the civil justice system, as would be expected in an adversary climate. Defense attorneys and general counsel tend to report greater levels of dissatisfaction than plaintiffs’ attorneys – but all groups agree that the system takes too long and costs too much. Legitimate cases are not being brought because they are not cost-effective, and significant percentages of attorneys representing both plaintiffs and defendants report abusive and costly tactics by opposing counsel.

Some respondent groups think that the rules of civil procedure need to be amended in order to address these problems. Others think the rules are sufficient but are not appropriately enforced. Almost all of the attorneys surveyed would welcome greater involvement from the judges in managing cases, and empirical studies suggest that when judges do set and maintain firm deadlines, cases come to resolution faster and with less expense.

Specific next steps will be the product of concerted discussion, but there is little doubt that most everyone believes improvements are necessary and possible. Broadly stated, our common goal is to preserve access, eliminate excess, and achieve a just, speedy and inexpensive resolution of all civil disputes filed in our courts.