EMPIRICAL RESEARCH PANEL PART II:
OVERVIEW OF SATISFACTION OR DISSATISFACTION WITH THE CURRENT SYSTEM AND SUGGESTIONS FOR CHANGE RAISED BY THE DATA

PANEL MODERATOR:
Justice Rebecca Love Kourlis

PANELISTS:
Alexander Dimitrief, Theodore Eisenberg, Marc Galanter, Emery Lee, Nick Pace, Paul Saunders, Jordan Singer, Tom Willging

EXECUTIVE SUMMARY

Vanishing Trial Data

Professor Marc Galanter's updated data on the vanishing jury trial shows that the long term decline of civil trials in absolute numbers has proceeded without interruption for a quarter century and no major category of cases is exempt. According to Professor Galanter, the decline has become institutionalized in the practices and expectations of judges, administrators, lawyers, and parties and the decline is self-reinforcing, as fewer lawyers gain extensive trial experience and opportunities for doing so are shrinking. Professor Galanter notes that the combination of media attention to trials and folklore about litigation has concealed the shrinking number of trials from the wider public. Furthermore, because most cases do not proceed past the pretrial phase, the role of the judge is changing. The public does not yet appreciate this change, so it remains to be seen how it will affect public regard for judges.

American College of Trial Lawyers (ACTL) Task Force Data

Paul Saunders spoke about the work of the ACTL Task Force on Discovery and Civil Justice. Mr. Saunders recounted how the Task Force was asked to examine the civil justice system and to consider potential changes as if they were not bound by any constraints. As part of its initial work, in April 2008 the Task Force (in connection with the Institute for the Advancement of the American Legal System) administered a survey to all Fellows of the ACTL that looked at the civil justice system generally, not specifically the federal system.

Mr. Saunders reported that a majority of respondents thought the civil justice system is too expensive, takes too long, and that the Federal Rules of Civil Procedure are not conducive to the goals of Rule 1. There was not a high level of satisfaction with the current system of initial disclosures and a majority of respondents reported that electronic discovery has increased costs. The survey also showed support for early and active judicial involvement and appreciation for attorney cooperation.

Institute for the Advancement of the American Legal System (IAALS) Data

Presenting the preliminary results of an IAALS survey of chief legal officers and general counsel belonging to the Association of Corporate Counsel, Justice Rebecca Love Kourlis reported that respondents overwhelmingly indicated the belief that litigation is too expensive. Survey respondents reported increases in individual case costs and yearly litigation costs over the last five years, attributing the cost increase to discovery generally, and e-discovery in particular. Most of the respondents' cases did include discovery, which might suggest that this group is reporting on a different group of cases than respondents to the Federal Judicial Center (FJC) closed case survey.

In a survey of judges undertaken by IAALS in partnership with the Searle Center on Law, Regulation, and Economic Growth at Northwestern (Searle Center), the federal judge respondents generally expressed that the rules can be conducive to the goals of Rule 1, but agreed that the system often takes too long and is not cost effective. Respondents thought the system works better for some cases—such as civil rights, contract and employment discrimination cases—than other kinds of cases, and there was agreement that there should be different discovery rules for different kinds of cases. However, opinions varied with respect to whether these criteria should be associated with the amount in controversy, or with the complexity of the case. The survey found that early trial dates do help move cases along, and firm trial dates help even more.

Searle Center Cost Study

Alexander Dimitrief presented the results of the cost study administered by the Searle Center. The results likely understate what companies are experiencing and demonstrate that despite efforts to reduce outside litigation costs, they have in fact gone up—total litigation costs are up by nearly 73% from 2000, excluding awards and settlements. The cost study shows that as a company's revenues increase, litigation fees in terms of percentages are increasing as well.

Discovery costs were surprisingly low, which Mr. Dimitrief views as a reflection of the anticipation of higher discovery costs—and corresponding settlement driven by this concern. The study showed that e-discovery costs are increasing. Mr. Dimitrief concluded that the results show troubling signs that large U.S. companies face disproportionately burdensome litigation, especially in asymmetrical litigation where the discovery disputes are all on one side. He believes this data requires a sobering look at this reality, as we think about how well the rules are doing in 2010.

RAND Institute for Civil Justice Data

Nick Pace presented the initial data from RAND's study of electronic discovery, with the caveats that the work is ongoing and more information is being collected, and the study did not review the costs of preservation. The preliminary findings suggest that the major driver of expense is the review for privilege and relevancy, which consumes more than half of all expenditure, and that external legal expenses remain significant—60% or more of all

discovery costs. Mr. Pace does believe that automation is a technological solution to the problem of costly review and warned that it will be very difficult for litigants to deal with future e-discovery burdens if automated review does not become accepted methodology. Mr. Pace suggests that additional effort should be expended by the judiciary to take review costs into account in both individual cases and when setting system-wide policy, especially with respect to encouraging automated review. The rulemaking process should take into account the effects of e-discovery rules on every aspect of litigants' cost, from the whole continuum of preservation to presentation at trial, as focusing on only a few sections may result in costs saved in one area to pop up in another.

Commentary on the Data

Jordan Singer began by offering observations on where the empirical data seem to converge, highlighting six areas of apparent agreement: attorney cooperation keeps cost and delay down; attorneys want increased judicial intervention, particularly as it pertains to limiting discovery and costs; attorneys believe that issues are not sufficiently focused by the end of the pleading stage; there is low enthusiasm for initial disclosures; there is agreement that costs—particularly those associated with e-discovery and expert witness—can be high and can impact settlement, although this is not necessarily true in every case; and certain case types are more prone to cost, complexity and motion practice than others. Mr. Singer suggested that these themes all relate to how parties narrow disputed issues and recommends that one way to narrow issues early and promote a better process in the "non-cooperation" cases is to explore variations in rules and procedures that are tailored to the type and complexity of a case.

Professor Theodore Eisenberg noted that an area of surprising agreement is that counsel and their clients do not view arbitration favorably. With respect to the surveys, Professor Eisenberg suggested the survey responses be broken down by business-to-business litigation vs. business-to-individual litigation, which would shed more light on where costs lie than responses by attorney type. Professor Eisenberg notes that the surveys show universal agreement on costs, but points out that the surveys do not consider the benefits—e.g., increased quality of consumer products contrasted with the cost of product liability litigation. With respect to pleading standards, evidence suggests that rights in the U.S. are massively under-enforced and Professor Eisenberg believes they will be even less so with pleading standards that cut back on the ability to get to court.

Professor Galanter contrasted the FJC closed-case study and the ABA Section of Litigation survey, noting that the former asked lawyers for an account of what they did, while the latter asked for a general opinion on the current status of the civil justice system. Professor Galanter is of the view that lawyers and judges are not good students of actual patterns of behavior. Furthermore, the division in response rates between attorney type does not go far enough because the thing that is most determinative of attorney behavior/attitudes is not what side the attorney is on, rather who the clients are. This is the crucial variable. Professor Galanter suggests that the notion of early judicial involvement and a firm trial date ought to be separated, as the effects of a firm trial date may be quite profound with very little additional judicial involvement.

THEMES THAT EMERGED FROM THE PANEL

Cost: There was overwhelming agreement in the ACTL Fellows survey, IAALS general counsel survey, and IAALS/Searle Center judges' survey that the system is too expensive. The IAALS general counsel survey and Searle Center cost study illustrate that corporate litigation costs are increasing, excluding awards and settlements. With respect to e-discovery, the RAND study showed that external legal expenses remain significant, and the primary driver of costs is review.

Tailored Procedure: The benefits of attorney cooperation with respect to reduced costs and delay, and a desire for early judicial involvement were expressed in the ACTL survey, IAALS general counsel survey and IAALS/Searle Center judges' survey, as was the idea that the civil justice system may work better for some cases than others. These results support the notion that procedure should be tailored to the needs of each case early in the pretrial process, through a combination of attorney cooperation, judicial management, and case type-specific rules and protocols.