From: Lorna Schofield
Chair, ABA Section of Litigation 2009-2010

Amanda Ulrich
Associate, Debevoise & Plimpton, LLP

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Summary Memorandum of ABA Survey Narrative Responses

Introduction

The following memorandum summarizes the free responses to the 2009 ABA survey regarding the American Civil Justice System and the Federal Rules of Civil Procedure. There were seven separate fields in which respondents could offer written comments on survey sections. The categories were as follows: (1) comments regarding discovery; (2) trial dates (3) judges (4) general responses on saving costs (5) pleadings (6) federal and local rules (7) general comments.

Under each category, we have organized responses into subcategories to better organize and understand them. Next to the title of each sub-category, there is a count of how many plaintiffs' lawyers, defense, lawyers, and mixed practice lawyers offered responses relating to that sub-category. In each section, there are descriptions of common responses, some of which are organized by plaintiff, defendant, or mixed practice if that characterization was relevant to the response. The quotes included in the memo are those were the those that were representative of common responses, or those that were the most interesting or thoughtful in each field.

Many of the responses were not surprising, in light of the fixed response survey portions that we looked at in December. Defense lawyers were likely to respond that discovery and e-discovery were overly-burdensome, while plaintiffs' lawyers pointed out how important e-discovery is to obtaining justice for their clients, despite the associated burdens. Plaintiffs' lawyers were more likely to respond that the recent decisions by the Supreme Court in Twombly and Iqbal placed too high a burden on plaintiffs at the motion to dismiss stage, while defense lawyers look forward to seeing those decisions absorbed into the pleading system. Defense tend to believe there are too many frivolous complaints, plaintiffs' lawyers believe there are too many frivolous defenses raised.

There were a few areas where all respondents were in general agreement. All categories of respondents appear to agree that sanctions should be enforced more regularly (except spoliation sanctions, which several respondents suggested were too draconian). Respondents believe that Rule 26 disclosure is currently more of a burden than a benefit, and should either be expanded and enforced, or eliminated altogether.

Another area of agreement regards the involvement of judges. Many respondents from each group believe that one of the biggest problems with expense rests with judges delaying in deciding on dispositive motions. Lawyers frequently responded that the largest costs associated with litigation are incurred preparing for trial, and when judges wait until the eve of trial to decide motions, that it significantly increases the costs of litigation for their clients. Many respondents believe that judicial involvement, early and often (beginning by helping resolve disputes at the discovery phase), helps to keep cases on track and save costs.

Respondents were asked questions about the survey itself. A substantial number of individuals expressed concern that the survey seemed to call for a response which was defense / corporate oriented.

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1.

Rule 26 – P(6) D(18) MP (10)

Lawyers on all sides seem to think that Rule 26 disclosures are wasteful. Judges rarely enforce them and the information is duplicative of other information that would be uncovered by discovery.

Respondents generally suggest that either there should be much more required in initial disclosure and that it be actually enforced or that it should be dropped altogether since it's duplicative of much of what would go into an initial document request anyway.

Abuse – P(23) D(11) MP (10)

Plaintiffs seem to believe there are incentives built into the system to obstruct discovery and courts do not enforce the Rules against those who act unreasonably in the discovery process.

Defendants seem to think that Plaintiffs abuse the system with onerous e-discovery requests. Defense and mixed-practice lawyers believe that sometimes plaintiffs use overbroad discovery requests to force settlement.

Cooperation and Professionalism – P(10) D(10) MP (8)

Respondents on all sides believe that cooperation can bring down costs, and that it is especially important for attorneys to cooperate over e-discovery.

Economics– P(3) D(55) MP (32)

In relation to discovery, plaintiffs' lawyers did not offer many responses. Those that did made either the general response that discovery is too expensive, or stated that billable hours by defense attorneys cause discovery disputes.

Defense lawyers seem to believe that plaintiffs' lawyers make overly burdensome discovery and e-discovery demands, compliance with which drives up costs and forces settlement on cases that shouldn't necessarily settle. Because of this, many defense lawyers also argue for cost-sharing in discovery, especially e-discovery.

Mixed practice lawyers also focus on the costs and burdens of e-discovery in small cases, or the costs of discovery generally without reference to the merits of a case.

E-Discovery – P(47) D(59) MP (32)

Many respondents suggest that there is a general lack of understanding by judges and lawyers about the problems and costs associated with e-discovery.

Generally, it seems that retention and discovery holds makes lawyers very nervous about sanctions. The biggest fear of sanctions appears to come from potential spoliation sanctions which lawyers seem to believe are too frequently used or threatened.

Some Plaintiffs' lawyers acknowledge that E-Discovery is difficult to manage, costly, and burdensome, and that judges do not typically carefully manage it. However, there are many comments by plaintiffs' lawyers which emphasize the importance of e-discovery, despite the burdens.

- "E-discovery provides the purist and best evidence of a person's intent to defraud, discriminate, and injure another person"
- "E-discovery is very expensive and difficult to manage. However, that does not mean it should be limited."
- "Electronic data should be treated in the same manner as paper documents. Instead, because there may be the ability to pull old, and even deleted, data from back-ups, the tendency is to attempt to obtain every possible electron. If a party would not be asked to visit a garbage dump to try to recover paper documents thrown away years earlier, a party should not be put to the expense to dig up similarly old and discarded electronic data."

Defense lawyers generally focus on the disproportionate cost / benefit analysis and see e-discovery as a tool to force settlement.

- "E-discovery is not focused enough and requires a tremendous over-collection of records for potential production. There are diminishing marginal returns on the "extra" discovery"
- "Electronic discovery is killing litigation. Clients are unwilling to incur the burden and expense and the courts don't care what it costs. The costs often outweigh what is at stake in the case."

Federal Rules of Civil Procedure – P(7) D(58) MP (33)

Criticisms of the Rules generally deal with the lack of specificity of e-discovery amendments and the failure of courts to apply sanctions. Comments to this effect were:

- "They are poorly written, overly complex, and impossible to implement. There has never been a set of rules so completely ignored, or implemented inconsistently, as the e-discovery rules. They must be reformed."
- "Do not further limit discovery rights. The trade-offs borne in the 1990s were false and severely curtailed the ability of the average claimant to pursue their claim."
- "The Amendments have resulted in increased costs of discovery. The mere fact that a consultant must be retained results in additional costs."
- "Electronic discovery amendments were poorly conceived and have led to a de facto presumption that any electronic discovery, no matter the cost and without regard to the utility of the information requested, must be allowed."

Some identified issues that are not covered by the rules.

- "For example, how is the search for electronic documents to be made? Which party gets to pick the search terms? It is enormously expensive and time consuming to review electronic documents to weed out documents that are subject to attorney-client privilege or that are completely irrelevant but happened to pop up using whatever were the search terms. There are also numerous issues involving "litigation holds" that are not covered by the rules. While the possible relevancy of some types of electronic documents is obvious, many others are not. For example, emails between Ms. A and Mr. B

may have some relevant material and some not. In addition, the responsibility for implementing whatever is an appropriate litigation hold should be on the client, not on counsel. As serious misstep was made in involving counsel so deeply in the responsibility for managing e-discovery."

Other comments on the Rules are mixed. Some believe recent amendments have been helpful, others believe that they have only added to the burden of discovery. Some lawyers request that whatever changes occur, that discovery not be further limited.

- "The system overall works fairly well. Costs associated with discovery a large problem. To the extent that justice is a goal for the litigants and the courts, most litigants cannot afford reasonable access to judicial solutions to common problems."

One interesting one that echoes the themes we saw in the data was the following from a defense lawyer:

- "I don't think it's possible to craft rules that everyone will agree with. The current rules do a good job of meeting balancing concerns. The main issue is that most courts have gotten to the point where they don't want to deal with discovery disputes and thus don't take the time to truly understand the impact of over burdensome discovery requests but then sanction defendants (who typically bear the brunt of e-discovery costs) for non-material violations that were inadvertent."

Judges – P(12) D(13) MP (6)

Most respondents discussing judges believe that judges should become more involved in the discovery process, including more promptly ruling on discovery motions. Of course, some want judges to stay away from day to day management, but it is a small percentage of responses. Many responses also call for judges to enforce the Rules and available sanctions more frequently.

- "I realize they are busy but by leaving it to the lawyers to sort out, a lot of time and money is wasted. Judges (or magistrate judges) need to meet and confer with the attorneys from the start, in order to set up a detailed plan for discovery in the case. Don't leave it to the lawyers to bicker for days/weeks/months over a proposal and then have to litigate over its details. Judges need to manage their cases from the start of discovery... and lawyers will only improve their conduct under genuine threat of sanctions (sorry to say)."

Defense lawyers complain mostly about judges not understanding the burdens of e-discovery.

- "E-discovery per se is not the problem. The problem is that the scope of discovery is so broad that the mass of e-discovery becomes overwhelming. Judges simple don't appear to have any interest in controlling the scope of discovery. It seems like judges are indifferent to corporate costs and adopt an attitude that if it's too expensive, the corporate defendant may settle and the case will go away. In short judges use broad discovery as a means of forcing settlements and controlling their dockets. This may help their dockets but it breeds deep disrespect for our system of justice. Most of my corporate clients feel our system is broken and would favor a model more like that in the EU."
- "I believe that the 2006 amendments provide enough flexibility for handling e-discovery, but it is up to the judges and magistrate judges to apply the Rules appropriately (as the Supreme Court has done in Ashcroft and Twombly with pleading requirements). Considerable restraint must be exercised with e-

discovery and ESI, as the expense can be enormous. In hindsight, the "trial by ambush" of 40 years ago wasn't so unfair; it was much less expensive and at least we had trials."

A mixed practice lawyer suggested a system for handling discovery disputes:

- "At an early point in the case, the judge should hold a Rule 16 conference to carefully explore the factual allegations and defenses and thereupon order full disclosure (as in the Canadian system) of relevant documents and things and assign a trial date. Following such disclosures, the parties should be ordered to promptly mediate before a professional mediator. If mediation fails to resolve the dispute, another Rule 16 conference would be held early on to determine what further discovery may be conducted and the deadlines for all other pretrial events."

Miscellaneous Comments – P(5) D(5) MP (9)

Some comments were too general or unusual to categorize, or dealt with several different issues. The following are a few of the more specific suggestions that fell into this category:

- "The time to produce documents and e-documents is long and time consuming. Review of these documents is longer still. There should be an assumption that there is no waiver of privilege [and] that all documents are confidential and produced in quickly. The time spent reviewing documents for privilege waiver and confidentiality designations are burdensome, wasteful and unproductive."
- "1. The passage of Rule 26f has slowed down the case, rather than expediting it. Being forced to wait to start discovery until an initial conference which often doesn't happen for months, causes the case to stall from the moment of filing. It is a bad idea and should be dropped. 2. The real problem with discovery is the ability of parties (usually the defense) to play the "hide the ball" game, sending 'responses' which aren't, and which give no information at all. Equal to that problem is the corresponding unwillingness of courts to order discovery when this game-playing starts, and issue sanctions to back up those orders."
- "I believe the broadest discovery should be permitted. Even if it is sometimes burdensome, I agree with the philosophy of the discovery rules adopted in the 1960's that cases are resolved more fairly if all parties have the maximum amount of information."
- "Discovery has gotten out of hand. Attorneys are risk averse by nature (and often bill by the hour), which makes it hard to curtail discovery. Courts only get involved when there is a dispute, which is usually too late. All in all, the discovery explosion has contributed greatly making our litigation system deplorable. Technology can be used to help efficiency, but we need more judicial oversight and more constraint on attorneys."

Document Preservation – P(5) D(5) MP (2)

A few Plaintiff lawyers complain that preservation orders are skirted or abused.

Defense lawyers complain that the courts are ill-equipped to deal with requests for native format documents. They also believe that the document holds put in place are expensive and unreasonable. One mixed practice lawyer stated:

- "The case law that exists regarding spoliation sanctions make the most conservative course of action (preserve and produce even the most remotely relevant data and files), also the most boundlessly expensive course of action."

Several respondents believe that arguments over e-discovery distract from the case. One mixed practice lawyer stated:

- "In many cases, the issue over the preservation or destruction of emails can become the focus of the case even when there has been no real showing that what in now unavailable is relevant."

Privilege – P(3)

A few plaintiffs' lawyers commented on privilege.

- "All documents should be discoverable without regard to privilege. The manner of dealing with privilege under e-discovery should be applicable to all discovery."
- "[E-discovery] casts too broad of a net, requiring substantial review by counsel prior to production. Claw back provisions are not workable and can result in a breach of client confidence rules of the rules of professional conduct."
- "Many cases are now litigated almost exclusively through sealed papers. The litigants designate all documents as confidential and all motions, etc. need to be filed under seal. Either the courts or the rules need to put an end to this, and stop this practice of routinely designating all discovery documents and depositions as confidential."

Sanctions – P(6) D(12) MP (4)

Lawyers generally agree that judges applying sanctions would be helpful in controlling discovery abuses. However, a few are concerned about the sanctions for spoliation being "draconian and unnecessary" and too frequently applied in situation where information is unobtainable despite good faith.

Survey-Related Responses – P(8) D(2) MP (4)

Several people responded to questions about discovery by identifying a substantial "defense-bias" and worrying that the questions were tilted toward pushing respondents toward answers identifying discovery abuse in order to limit discovery.

One defense lawyer identified the same issue:

- "My comments about this survey once again is that it is biased, and obviously the product of defendants bar and conservative Federalist Society/Roberts type people. Most cases require energetic discovery to uncover the truth of allegations of misconduct or other bases for liability, which of course has been managed to avoid detection. It also is necessary to uncover fraud and the lack of basis for claims made by plaintiff or by any party. People lie, under oath and in every other way on both sides of the case. Even without prevarication, people's memories are always faulty as we are human- that takes discovery to point out."

A mixed practice lawyer stated:

- "Again, these questions do not seem balanced -- I feel more discovery is fairly efficient and electronic discovery has enhanced the efficiency of discovery. These questions seems designed to encourage answers that limit discovery or consider it to be an unnecessary hurdle -- it's the heart of litigation, however. This was strange to answer."

Time– P(2) D(1) MP (2)

Lawyers who discussed time responded that discovery problems could be more easily dealt with if judges would be more flexible with "arbitrary" deadlines and some suggested firm trial dates would speed resolution.

Discovery Tools– P(2) D(1) MP (2)

One lawyer's answer sums up the general sentiments about discovery tools pretty accurately for the few responses, except for the effectiveness of requests for admission, which one defense lawyers suggested was wasteful.

- "(1) Requests for admission are generally the most effective. (2) Attorneys routinely answer interrogatories in such a way as to make them pretty much useless. (3) Depositions are helpful. (4) Initial discovery is usually pointless and has to be followed with the usual discovery anyway. (5) E-discovery is out of control and creates tremendous financial pressure on small business clients. (6) Discovery is better than no discovery but attorneys, being attorneys, find numerous ways to reduce its effectiveness (i.e., no one wants to admit that their client loses so they come up with ways to write obscure answers). (7) The solution, which has not been found yet, is to find a way to require that counsel/clients provide brutally honest answers to a limited set of specific requests for admission and interrogatories that could probably be created as a patter discovery requests for certain type of cases; ambiguous or deliberately obscure answers should be sanctioned."

2. Dates

Agreements between counsel should control – P(7) D(22) MP (4)

Several respondents believe that the ability to continue trial dates is a matter for the parties to agree upon, rather than standards like "exceptional circumstances" which judges decide. Some identify "exceptional circumstances" as too subjective a standard.

Set trial dates early, but be flexible – P(22) D(28) MP (13)

Many respondents believe that trial dates should be set early in order to "help speed resolution of cases" but at the same time, recognize the need for flexibility.

- "An early trial date does help expedite the handling of the case, but given the fact that it is set early, it should not be "cast in stone" or used as a means to terrorize the parties."
- "Early trial dates give discipline to both sides. They should be given early and modified as needed, but not unnecessarily."

Make trial dates firm – P(22) D(23) MP (30)

Several respondents believe in "firm" trial dates, without mentioning flexibility as a necessary element.

- "Trial dates are key, and force both sides to focus. Tight trial schedules and time-controlled trials cut costs."

Ensure flexibility – P(41) D(47) MP (32)

Many respondents identified flexibility as key in setting trial dates. For example:

- "Setting trial dates assists with case management, but there are so many factors - professional & personal - that can cause conflicts. Reasonable flexibility is essential"
- "There must be some flexibility in setting and continuing trial dates to fit the circumstances. Early setting is helpful, as it sets the parameters and time frame of the case, but it is often necessary to adjust the trial date after more is known, so judges should be somewhat flexible in revisiting trial dates in appropriate cases."

A few respondents complain that trial dates are enforced too strictly by judges, ignoring the real needs of the parties. For example:

- "Judges should be more aware that the court is there to serve the public -- the litigants -- not for the benefit of the court personnel. There should be more reasoned decisions about time extensions than presently allowed. Particularly when the litigants agree on time extensions, the court should accept the extension unless there is abuse of the schedule."

Miscellaneous– P(17) D(20) MP (10)

Several plaintiffs' comments complain that discovery abuses undermine trail dates. Some request flexibility with discovery deadlines, and request that judges be more sensitive to the needs of the parties in scheduling trials and granting continuances.

Some lawyers on each side suggest that a court's criminal dockets make it difficult to schedule and keep civil cases on track.

Defense lawyers suggest that there needs to be better management of "exceptional circumstances" in granting continuances, and that continuances should be more freely granted if a trail date is set early. If it is set later, it should be held. Several also suggest that trial dates should not be set for settlement purposes.

Mixed practice lawyers generally echoed the same comments.

Rocket Dockets – P(3) D(7) MP (3)

Several lawyers commented on Rocket Dockets, like that in the E.D. Va. Responses vary significantly:

- "My experience on rocket dockets is limited but positive. More judges should adopt practices designed to keep cases moving. As long as parties know not to expect multiple extensions and leisurely discovery, they will plan accordingly and comply with the rules set by the court."

- "The EDVA works so well because parties know their trial date is set in stone from the start of the case. It forces parties to engage in reasonable discovery and avoid delay tactics."
- "Rocket dockets compress the expense of litigation and often drive litigants out of court because of their inability to handle the costs on a short-term cash-flow basis. That results in an adverse impact on access."
- "Rocket dockets that unfairly force parties to speed to trial at the cost of justice and time to adequately prepare a defense should not be allowed."
- "Rocket dockets only hurt plaintiffs (who have burdens of proof) and help defendants. Deadlines are music to obstructionists' ears. Deadlines encourage defendants to not supply discovery."

Trial Dates and Dispositive Motions – P(21) D(45) MP (14)

Many respondents also mentioned summary judgment in the context of trial dates. The following are representative responses:

- "A large cost of litigation is preparing for trial while a motion for summary judgment has been pending for months. It is quite common for such motions to be decided on the eve of trial, which eliminates the underlying purpose of summary judgments -- to avoid expense when only legal issues are at issue. This is, by far, the most important issue that needs to be addressed in any rule change."
- "Counsel and the parties should not be forced to prepare for trial before the Court has resolved case dispositive motions. The Judiciary should make every effort to resolve timely-filed case dispositive motions sufficiently in advance of their deadlines for joint pre-trial stipulations and the trial date."
- "Significant costs are incurred by the parties when the courts do not rule on summary judgment motions until the trial date is close at hand. Consequently, the parties are forced to incur the cost of trial preparation that often is unnecessary because the case is terminated on the eve of trial when summary judgment is granted, or the case goes forward on fewer claims when partial summary judgment is granted."

3.

Rule 16 – P(2) D(6) MP (1)

Very few lawyers commented on Rule 16 (a) or (e) conferences – so few that it is difficult to generalize. A few found 16(a) conferences to be too pro-forma to be useful, while others found them useful, but that they should be more informal, perhaps conducted over the phone.

Respondents found rule 16e conferences helpful, if held close to trial and if pre-trial orders are actually applied.

Judicial Bias– P(7) D(11) MP (11)

Two types of bias were identified by respondents: (1) a political bias

- "I believe there has been a discernable and marked increase in the number of Judges looking to reach a particular result. There's nothing worse than an ideologue on the bench."

(2) a bias towards settlement and away from trial

- "I have heard judges threaten parties that if they do not enter a plea and the jury finds them guilty, then they will be sentenced to full extent allowed by the sentencing guidelines. I am appalled by the arrogance of the Court in this regard. The presumption of innocence should be applied by the Court in fact."

Others mention judicial temperament as being a key factor in the outcome of the case:

- "It varies so much with the judge that it is impossible to make any generally applicable statement. Good and fair judges are a blessing; biased or mean judges are a hindrance. The majority fall into the first category; but there are still a lot in the second."

Delays and Dispositive Motions– P(17) D(9) MP (12)

Plaintiffs discussing dispositive motions generally believe that they are granted too frequently and that more matters should go in front of the jury; defense lawyers generally believe the opposite. One extremely common response, however, is that many respondents cited the delay in ruling on dispositive motions as a common and major problem, especially since there is no external pressure on judges to Rule promptly.

Less judicial interference– P(3) MP (3)

A few lawyers take the position that judges should stay out of case management unless they are asked by the parties to intervene. This is not a common response.

Miscellaneous Comments– P(21) D(15) MP (21)

Plaintiffs' lawyers expressed several different ideas involving judges. A few suggested that a single judge should see a case through from start to finish. Some suggested that trail judges shouldn't manage settlement conferences. A few suggest concerns that judges sometimes pre-determine the outcome of a case. A few suggest making trial the focus of a case, rather than summary judgment.

A few defense lawyers also suggested that the district judge manage the case from start to finish. A few also suggested keeping judges out of settlement discussions and ADR, and a few others suggest that there should be more trials. Others used the comment section regarding judges to complain that litigation and discovery are too expensive.

Mixed practice lawyers largely echo the same comments.

More judicial involvement– P(22) D(28) MP (33)

Many respondents stressed the need for more active involvement by judges in discovery issues.

Several gave answers similar to the following statements, looking for a more balanced approach.

- "I prefer a judge who takes an active role, not by taking over the case from the lawyers, but by being available, open minded and judicious and willing to dispose of cases on legal grounds early on." (defense perspective)

- "An involved judge who understands what is at stake in a lawsuit early and is meaningfully involved early will meet Rule 1's goals better than a judge that comprehends a case for the first time at the summary judgment or Rule 16(e) final pretrial stage."

Several identify the benefits of having magistrate judges involved in moving the case along, but a few believe that having magistrate judges involved in the process deprives the district judge of meaningful exposure to a case.

Also, some of the responses requesting more judicial involvement deal with more attention from judges on dispositive motions.

Pre-Trial Orders– P(6) D(22) MP (10)

Several lawyers who responded regarding pre-trial orders did not believe in their effectiveness, although even more complain that engaging in pre-trial orders is meaningless when dispositive motions are outstanding. For example:

- "In my experience, pretrial orders are an example of a burdensome piece of paper that is often ignored by everyone after it is filed. It is commonly a pro forma, fill-in-the-blank document where the parties include everything possible for fear that inadvertently leaving something out will bar them from using it at trial. As a result, it does not narrow the issues for trial."
- "Should not have to do a final pretrial order until there has been a ruling on summary judgment. Pretrial orders are expensive to produce."

Sanctions– P(4) D(2) MP (3)

A few lawyers mentioned sanctions with respect to judges in this section, suggesting that judges more willing to apply sanctions would move the litigation process along and save costs.

4. Free Responses on Costs

Rule 26 – P(63) D(99) MP (55)

Plaintiffs' lawyers and defense lawyers all lean towards expanding and actual enforcement of Rule 26 disclosures to production of documents, not just identification of documents. However, almost as many want it narrowed or eliminated.

Some suggest having certain types of mandatory discovery for certain types of cases, rather than requiring a broad, one size fits all initial disclosure.

Overall, it appears that much of the dissatisfaction expressed regarding Rule 26 was a result of a failure of actual compliance and failure of the "teeth" of mandatory disclosure.

Administrative Expenses / Burdens – P(12) D(10) MP (10)

Lawyers who mentioned administrative expenses often noted the extreme cost of court reporters when video / audio recorded depositions are possible. Others believe that documents should be routinely exchanged electronically, using secure PDFs, or some other electronic mechanism.

ADR – P(29) D(60) MP (41)

A lot more attorneys commenting in the "cost-saving" portion of the survey believe that there should be mandatory, early mediation. (as opposed to the "General Comments" part of the survey where many commented that mediation should take place after discovery).

Cooperation – P(69) D(84) MP (46)

Cost-saving suggestions involving cooperation are mainly focused on the ability of counsel to comply with discovery requests, narrow issues, generally cooperate, and act civilly towards each other. Many believe this will reduce the need for endless motions.

One respondent suggested the way to accomplish this is through better enforcement of discovery rules:

- "Certainty and uniformity of enforcement of discovery rules. With predictable outcomes, the parties would have more incentive to cooperate."

Several emphasize less "game playing" with discovery requests, and others believe that open and honest communication and cooperation over discovery will reduce costs.

Others emphasize face to face meetings of counsel to foster good relations and cooperation, through conferences. Although, one notable response was:

- "Less meeting and conferring regarding discovery disputes. No one caves. Let's just get on with the process."

General Discovery Issues – P(304) D(634) MP (295)

<u>Defense & Mixed Practice Lawyers:</u>

A number of lawyers responded looking to reduce discovery in smaller cases:

- "Limit discovery based on the size of the case as measured by the amount at issue."

Mixed practice lawyers focused on finding a way to control the scope of discovery by limiting the number of interrogatories, depositions, requests for admission, the time of depositions, and generally narrowing the scope of permitted discovery by either raising the standard of relevance or having the requesting party specify the reason that discovery is being requested. For example:

- "Change the discovery process from one where opponents to the discovery must establish undue burden to get relief to one where the proponent must demonstrate need and reasonableness of their demands once the other side has complied with required initial disclosures."
- "Narrow the scope of "discoverable" material; require closer nexus to allegations."

Related to this, some suggest a fee-shifting sanction:

- "Other than fairly limited (in time and scope) discovery requests on the basic claims, the burden for a broader scope of discovery should be on the requester. And there should be some realistic threat that, if the request proves to be materially unhelpful (in comparison to its costs), the requester will be subject to payment of the producer's fees and costs."

Others emphasize limiting the time over which discovery may be conducted.

Several respondents suggest written discovery plans, and planning phased discovery commensurate with the stage of the case, whether it is motion to dismiss, summary judgment, or trial preparation. Many request that the courts make quicker rulings on discovery disputes.

Some suggested modifying waiver of privilege rules such that documents could be produced more freely without fear of waiving privileges.

A number of defense lawyers suggest delaying discovery until a rule 12 motion is decided.

Plaintiffs' lawyers:

Plaintiffs' lawyers generally suggest abiding by "liberal rules of discovery" and encouraging active management of judges. Like defense and mixed practice lawyers, many encourage quick disposition of discovery motions and disputes with active court involvement. Also, several plaintiffs' lawyers endorsed the idea of an early discovery plan supervised and approved by the court.

Several respondents pointed to the failure of defendants in producing the information requested.

Unlike defense and mixed practice lawyers, plaintiffs' lawyers would rather not delay discovery until ruling on initial motions.

Plaintiffs' lawyers also agree that discovery should be more narrow, but generally state it in terms of document dumps by opposing counsel – so rather than "narrower requests," plaintiffs' lawyers look to the other side for narrower responses.

Several plaintiffs' lawyers also suggest eliminating interrogatories, limiting depositions, and a few even suggest eliminating requests for admission (although some find requests for admission helpful and would like more sanctions for abuses related to requests for admission).

Plaintiffs are more sensitive to "frivolous objections to discovery" than the other groups. Several believe that enforcement of the current rules would be enough to save costs.

Law Economics – P(64) D(172) MP (48)

Several plaintiffs' lawyers believe in a fee-shifting model for abuses of discovery and motions that are not granted. A few mention a "loser pays" model for overall litigation, but it's more limited to the context of motions or discovery disputes. A number of defense lawyers seem to favor a fee-shifting, English Rule model for attorneys fees generally. Many defense lawyers also favor a fee-shifting model for discovery costs for the

party requesting discovery. Mixed practice lawyers who mention economic models generally mention "loser pays" and discovery fee-shifting rules to encourage cost-benefit analysis.

A number of plaintiffs' lawyers suggested a "Ban the billable hour" to control costs. Several defense and mixed practice lawyers also joined that sentiment, suggesting that billable hours are not ideal forms of compensation.

One suggestion relating cooperation and economics was that lawyers be more candid with their clients about the strength of their position, which could lead to more reasonable settlements.

Several defense lawyers mentioned delaying the expensive portions of litigation – discovery, experts, etc. until decisions on dispositive motions.

E-Discovery – P(55) D(271) MP (109)

Plaintiffs' lawyers who mentioned e-discovery offered suggestions on controlling the scope and better managing document requests, generally suggesting an iteration of the following: An initial conference to agree upon search terms, adopting an early plan and claw-back procedures, a conference among "tech" people on each side to assess what is needed and available. Furthermore, some suggest allowing continued, informal access to these individuals.

Several plaintiffs' lawyers mentioned that documents should be produced in native format, rather than tiff or pdf. Some suggested production of native form documents should require special circumstances. One respondent suggested:

- "Permit "native format" e-discovery only when there is demonstrated reason to believe that documents have been tampered with."

As with discovery generally, several respondents suggested placing limitations on discovery based on the value of the case.

Many respondents believe that courts need to further-familiarize themselves with e-discovery.

- "Increased understanding by judges and magistrates of the technical aspects of e-discovery so that the burden-balancing provisions of the FRCP can be rationally applied to e-discovery disputes.**"**

Without offering much explanation or suggestions, many defense lawyers were generally in favor of "limiting e-discovery" as a cost control measure.

Defense and mixed practice lawyers focus more on limiting e-discovery to certain individuals, certain time periods, and some suggest applying a higher standard of relevancy, putting the burden on the requesting party to show need. They seem to generally favor restricting search terms to a court approved list, rather than "blanket" requests.

Defense respondents also encourage early discussion, early e-discovery planning, and cooperation by counsel and tech people create a discovery plan.

Some lawyers commented on treating e-discovery less like regular document discovery:

- "Treat email and electronic data less like a formal document and more like telephone or oral conversations in terms of retention, production, and discovery."

Experts – P(61) D(52) MP (17)

Respondents had varying suggestions about experts. Some suggested limiting the number of experts per party. Others suggested putting off production of the expert report until near trial. Others suggested limiting depositions of experts, when testimony is limited to their report. Some call for a general limitation on expert fees, or fee-setting by courts.

Several defense lawyers call for limiting expert testimony to their reports.

Several respondents suggest moving from an attorney-appointed expert system to a court-appointed expert system to save costs.

Federal Rules of Civil Procedure – P(55) D(87) MP (44)

Many responses directly mentioning the Rules suggest judges enforce the Rules as written, especially Rule 26 initial disclosure and discovery, and that lawyers follow the rules as written. Several respondents also mentioned "strict enforcement" of the rules and of sanctions.

Some also suggested that the Rules need to be more flexible, focusing on truth-seeking, rather than "ritualistic technicalities and forms that make little sense but cost big dollars."

- "Federal rules include too much detailed preparation and filing, which significantly increases the cost of litigation."

A few comments on the Rules themselves addressed discovery:

- "All discovery rules should be abolished and replaced by a single rule that says parties are only entitled to whatever discovery they can agree on or the court allows."

Several defense lawyers suggested better enforcement of rules limiting discovery, number of depositions and interrogatories, and discovery deadlines. Others mentioned stopping the "abuse of rule 30(b)(6)."

Some call for simpler rules, and others (especially plaintiffs' lawyers) mention simpler, more streamlined rules for cases where there is less money in dispute.

- "Find a way to ease up on smaller cases, such as diversity car wrecks or small businesses with contract disputes, and let the mega firms do their excessive thing for their mega corporate clients, subject only to how much the federal district judge can take. One size does NOT, and should not, fit all."
- "For small monetary value cases, may be better served to enact a Economic Litigation for Limited Civil Cases provision within the FRCP analogous to California Code of Civil Procedure sections 90-100."

Several plaintiffs' lawyers complained that the current system of pre-trial orders should be curtailed. One example:

- "Eliminate the pretrial order unless the case is REALLY going to trial. It only needs four elements. Witness list (nothing more), exhibits (not cross or impeachment documents or depo transcripts) pre-marked (work out admissibility in a pretrial conference), jury instructions or pretrial memo of law anticipating evidence, expert/Damage reports."

Some plaintiffs' lawyers also suggest getting rid of new discovery rules and going back to the "old system."

A few requested that no changes be made:

- "Don't change the rules. Every change creates a cottage industry in motions. Too much tinkering for marginal benefit offset by added fights makes no sense."

Comments on cost-savings involving local rules generally involved either adoption of uniform local rules for specific types of cases (as some states have local patent rules). Some lawyers commented that local rules should be eliminated altogether, and that local rules that make it more difficult to get in front of a judge should be eliminated.

Informal Discovery – P(22) D(25) MP (30)

A number of respondents suggested encouraging informal discovery and investigation rather than utilizing traditional discovery tools:

- "Informal investigation on the part of counsel, as opposed to subpoenas and depositions of everybody and everything and everybody that might bear some relationship to the case."
- "More informal discovery consistent with the intent of initial disclosures: exchanging relevant documents, identifying witnesses and stating the factual basis for claims."

Some tie informal discovery to cooperation and cost-savings:

- "Training of attorneys to be more collegial and realistic about their cases, which would foster more informal discovery and earlier settlement."

Several respondents also suggest more informal hearings on discovery disputes with the courts.

Judges – P(183) D(465) MP (289)

Several respondents suggested that courts focus more on the important issues, rather than just scheduling the next conference. As on plaintiffs' lawyer put it:

- "Courts should aggressively understand the case"

A few mentioned eliminating judicial bias or political influences on judges.

Several comments on judges suggested having either a magistrate or special master available to handle discovery disputes on an expedited basis. Many, many mention early involvement in the case, including discovery management, to ensure that disputes are handled promptly. Similarly, some suggest more judicial involvement in day to day disputes to avoid motion practice.

- “Early substantive case-conferencing to target discovery on actual disputed issues.”
- “Greater and more intensive judicial intervention at an early stage to narrow issues and focus discovery on facts and issues relevant to resolving those issues.”
- “We need rulings from the Court on discovery matters -- not "work it out." Make a decision, make the parties live with it, and don't complain when a discovery motion is brought before the court as if it is a "waste of time." It is not. It needs direction and control from the bench.”

Some defense lawyers suggest getting judges involved in settlement discussions early on in the process.

Several defense lawyers mentioned that judges should rule more quickly on dispositive motions, and others suggest quicker dismissal of weak cases early in litigation.

Many lawyers on both sides generally believe that either district judges or magistrate judges should become involved earlier; a few believe that the district judge should be the one to shepherd the case all the way through.

One mixed practice lawyer presented a comprehensive litigation planning strategy:

- “In my opinion, the trial judge should hold an initial conference within a month of the final pleading. At that time the parties should (1) identify the factual questions that they identified and agreed were factual questions, (2) identify which other factual questions a party thinks is relevant. The court should decide at the conference or after briefing if it is relevant. (3) At the initial conference, the parties should present the court with their written discovery (including their electronic discovery requests) and the court authorize such discovery or deny it (depending on the factual issues); and (4) the foregoing should be set forth in a contemporaneous scheduling order (without prejudice, because issues change as discovery develops facts).”

Other comments dealt with having more informal status conferences by telephone or e-conference.

Miscellaneous Comments – P(30) D(47) MP (27)

Several respondents suggested bifurcating trials for liability and damages.

Several respondents mentioned “fewer objections” and “fewer frivolous objections.” One suggested:

- “Do not allow the "objection but we'll go ahead and answer anyway" type of response. It has become very common.”

Some call for more client involvement, application of common sense, and a focus on substance rather than form in litigation.

Several mixed practice lawyers suggest better practical training for lawyers in law school.

A handful of respondents suggested separating Criminal and Civil courts, so that a criminal trial will not “bump” a civil trial, as final trial prep on civil cases is very expensive.

Motions – P(74) D(164) MP (60)

A majority of comments on motions requested that judges rule on dispositive motions sooner. This was a very common response – possibly the most common response in the survey.

- "If turn-around time on motions were increased, overall costs of litigation, including discovery would decrease because less money would be spent developing issues that are ultimately removed from the case."

Plaintiffs' lawyers generally complain that there are too many frivolous motions to dismiss.

Defense lawyers tend to suggest allowing dispositive motions earlier, may suggest staying discovery until initial dispositive motions are decided, and others mention granting more motions to dismiss when complaints are insufficient.

Pleadings – P(22) D(79) MP (33)

Several plaintiffs' lawyers complained that there are too many affirmative defenses pleaded that lack factual support.

Some acknowledge the need for fact based pleading, mainly in the Answer to the Complaint.

- "Stop requiring plaintiffs to plead with more specificity while allowing defendants to assert boilerplate and nonsensical answers and defenses which don't even make sense as a "just in case" defense."

Many respondents suggested finding a way to "narrow issues earlier"

Defense lawyers, on the other hand, suggest raising pleading standards.

- "Require complaints to meet threshold levels of particularity and allegations sufficient to state a claim before permitting discovery."

Almost every defense lawyer that commented on pleadings expressed the desire to either abolish notice pleading or adopt fact pleading. A few other miscellaneous comments suggested capping the number of times a Complaint may be amended.

Many mixed practice lawyers shared the view that pleadings standards should be raised, and a handful suggested truly limiting discovery to the scope of the pleadings.

Sanctions – P(129) D(143) MP (72)

Imposition of sanctions was probably the second most popular response in the survey overall, next to calling for judges to rule more promptly on dispositive motions.

Several lawyers suggested, in both this section and that on e-discovery, that sanctions for spoliation should be lessened in the case of inadvertent deletion, and that the Zublake standards are too harsh.

- "Impose spoliation orders only when true spoliation (deliberate or reckless destruction of relevant evidence)can be established by the party seeking the order)."

Many lawyers from all groups suggest that courts should apply sanctions when there are discovery abuses, including hiding discovery, frivolous claims of privilege, frivolous objections to discovery, or general recalcitrance. Several believe that sanctions should be tied in with failure to provide mandatory disclosures.

Some plaintiffs' lawyers suggested sanctions for non-meritorious motions for summary judgment. Several also suggest sanctions for frivolous defenses.

Summary Judgment – P(68) D(60) MP (25)

Plaintiffs' lawyers were fairly hostile towards the concept of summary judgment, putting forth statements like:

- "Allow judge automatically to deny motion for summary judgment if moving party relies on any obviously disputed facts"
- "Amend Fed. R. Civ. P. Rule 56 to permit summary judgment as to a defense, without requiring summary judgment on the related claim"
- "De-emphasize summary judgment as a dispositive device."

Several suggest delaying summary judgment until completion of discovery.

Defense lawyers, on the other hand, believe that summary judgment should be granted more frequently and should be allowed earlier on in the litigation process. Many comments again focus on the time it takes judges to turn around motions for summary judgment while expensive trial preparation takes place.

A few defense and mixed practice lawyers suggest eliminating local rules on statements of undisputed fact.

Mixed practice lawyers were more focused on prompt granting of summary judgment. Several requested that it be granted more frequently, a few suggested it be delayed until discovery has taken place.

Scheduling / Time / Trial dates – P(74) D(148) MP (89)

Plaintiffs' lawyers mentioning scheduling were most likely to suggest tighter deadlines on discovery and an several recommend an expedited path to trial. Many also suggested setting up litigation schedules and enforcing them.

Several defense lawyers suggested that courts be more flexible with scheduling if parties agree on a continuance; others suggested early trial dates, firm trial dates, and enforced schedules and time limits on discovery.

One interesting response by a mixed practice lawyer was as follows:

- "A deadline should be established for the abandonment of claims and defenses that parties do not realistically intend to pursue. If the claim or defense is not abandoned but then not pursues at trial, the opposing party out to be able to recover legal fees and costs for having had to prepare for the claim or defense that was not "sued."

5.

Answer – P(8) D(4)

A few plaintiffs' lawyers stated that Answers are basically boilerplate and do not help to narrow issues at all.

- "To really focus lawsuits, Answers to Complaints need to be taken much more seriously. Typically, many more allegations should be admitted, at least in part."
- "It is too easy to simply deny allegations in an Answer, or claim not to have knowledge."

A few defense lawyers agreed. As one defense lawyer stated:

- "Answers are…just a formal statement of the agreement to disagree."

Complaint – P(3) D(10) MP (3)

One mixed practice lawyer expressed that complaints should have facts sufficient to tailor discovery, but worried that Twombly and Iqbal give judges too much control.

- "A complaint should contain sufficient facts so that discovery can be tailored appropriately and so that defendants know what they are defending. I have some concerns over judges deciding whether a complaint is implausible under Twombly and Iqbal. The focus should be on whether facts are stated that address each element of the cause of action being pleaded."

Another mixed practice lawyer suggests that complaints should be short and simple, and if the level of specificity of facts must be raised in a complaint, then there should be a commensurate increase to the specificity required in a an answer.

Fact Pleading v. Notice Pleading – P(101) D(70) MP (59)

Many plaintiffs see problems with fact pleading because in many cases, defendants have the only evidence supporting certain types of claims. One specific type of claim noted is the products liability claim, where a plaintiff may not have enough facts in their possession to assert certain elements factually. Other claims mentioned were fraud and conspiracy.

- "The problem with "fact pleading" is that it will lead to the dismissal via motion to dismiss of otherwise valid claims that require discovery to establish the requisite mental state of the alleged bad actor. The documents needed to prove such claims are often only in the hands of the adverse party."
- "The PSLRA and Twombly & its progeny make it very difficult to allege claims even where fraud/wrongful acts/antitrust violations exist due to the heightened pleading requirements -- essentially forcing plaintiffs to prove their case in advance and conduct significant investigations prior to filing the lawsuit."

Some plaintiffs' lawyers complain that fact pleading allows too much discretion with judges and results in a systematic bias in favor of defendants. A few point out that fact pleading is could be very harmful to pro se plaintiffs, who have enough trouble with notice pleading.

Some believe that Twombly and Iqbal actually make litigation more expensive:

- "The Supreme Court's Twombly and Iqbal decisions interfere with the principal purpose of the Federal Rules of Civil Procedure to insure speedy and just resolution of suits, by injecting a new layer of motions practice, and re-pleading of complaints. They result in dismissal of meritorious as well as non-meritorious suits."

A few plaintiffs believe that fact pleading can be more helpful, especially as it would save money on summary judgment motions. Rather than completing discovery and finding a claim insufficient at the summary judgment phase, fact pleading could lead to earlier dismissals or partial dismissals. On the other hand, most that identify fact pleading as a benefit when possible also believe that there are many types of claims that need notice pleading since so much information is in the hands of defendants.

A few plaintiffs also complain that fact pleading requires heightened standards for Complaints, but defenses can be very vague and general.

- "Defendants' pleadings should be held to precisely the same standard as Plaintiffs' pleadings, in light of Twombly and Iqbal. This means simply listing affirmative defenses without any supporting facts should be forbidden and should cause answers to be struck."
- "While not required, file "fact pleadings" because they should be treated as the equivalent of a request for admission. Sadly, the defendant usually denies everything except jurisdiction and venue. In the answers, many defendants assert a laundry list of affirmative defenses despite a lack of evidentiary support. Double standards abound."

Many plaintiffs suggest that Congress should enact legislation to overturn Twombly and Iqbal. One expressed concern that:

- "We have gone back to bills of particulars and formalistic pleading instead of the reforms that the 1930's codification of the Federal Rules and notice pleading introduced."

One defense attorney acknowledged that fact pleading is more advantageous to his clients, but fears the effect of heightened pleading:

- "As a defense attorney, fact pleading is more advantageous to my clients. But, as an average citizen, I am concerned that a return to fact pleading risks denying litigants with meritorious cases their day in court. Rather than creating rules that limit access to the courts (or interpreting rules that way, a la Iqbal), the rules should work to limit discovery disputes. Perhaps, rather than allowing the moving party to request sanctions, the losing party to a discovery motion could be automatically required to pay the winning side's costs. That might better discourage litigants from frivolously running to the courthouse or refusing to produce something. Clamping down on bad behavior seems better than putting a lid on the ability to bring a claim."
- "Fact pleading would probably be more helpful in streamlining discovery and allowing non-meritorious claims to be weeded out earlier. But it is essential that well-pleaded facts be accepted as true at the pleading stage. The vague "plausibility" rule of the Iqbal case has a potential to cause great confusion over the applicable standard and may permit meritorious claims to be dismissed improperly."

However, the majority of defense lawyers discussing fact pleading seem to think it is a better standard for preventing frivolous claims and defenses.

- "Pleading standards under Iqbal are some improvement, but facts should be consistently required to be plead rather than conclusions."
- "Since Twombly and Iqbal, however, the pleading problems seem to be lessening."

Mixed practice lawyers tend to side with the majority of plaintiffs' lawyers, who find fact pleading unworkable in many cases. However, there are still a substantial number who believe that fact pleading is a better way to narrow issues. Some suggest that fact pleading will indeed help narrow issues earlier and reduce discovery expenses.

- "Fact-based pleading, expanded initial disclosures, court-ordered limits on the scope of discovery, and fair but firm calendaring of cases will have the most positive effect on the cost and efficiency of the system."

One defense lawyer, notably, asked for clarity:

- "I think the Supreme Court is re-writing notice pleading (i.e., Twombly and Iqbal). The rules should be amended either to support what the court's direction is (i.e. fact pleading) or should re-emphasize notice pleadings as being permissible. Right now, the Supreme Court has effectively overruled Rule 8. The Rule should reflect reality."

A few do not believe that fact pleading will help narrow claims or defenses at all.

- "Our state courts use fact pleading. Unfortunately, in practice, I see no narrowing of the issues for discovery in state court cases or federal cases. What I see is more artful pleading to try to fill in the gaps and obtain information. Motions to dismiss are infrequently granted even in our state courts where fact pleading is required."

Many defense and mixed practice lawyers suggest waiting to see how Twombly and Iqbal are adopted by the district courts before making any changes to the Rules regarding pleadings.

Some suggest a notice-based pleading system with a mechanism to "weed out claims" at the Rule 26 disclosure stage.

Systematic Biases – P(7) D(2)

A few plaintiffs' lawyers believe that the system is biased in favor of defendants, based on the requirement of undue specificity in certain pleadings and the uneven application of the rules in favor of large corporate defendants.

Frivolous claims or defenses – P(20) D(7) MP (10)

Plaintiffs' lawyers tend to believe that the cost of litigation precludes frivolous claims, despite the fact that the notion of frivolous claims comes up so frequently. A few mentioned an uptick in frivolous motions as a problem.

Several plaintiffs' lawyers also point out that frivolous defenses are a bigger problem than frivolous claims.

- "Having served as a judicial clerk in the federal system for 4 years before entering private practice (much of which was spent dealing with pro se cases) I believe that the complaints about "frivolous" cases are overblown; the truly frivolous cases is easily disposed of and the term is much more likely to be used as a way for shunting a distasteful case away from the consideration it deserves."

Several suggest that sanctions should be more freely given for frivolous claims, defenses, and motions.

- "I would like to see sanctions levied on plaintiffs who file complaints that have no legal basis and on defendants who file 12(b)(6) motions that have no legal basis. Courts are too hesitant to penalize litigants for frivolous filings."

Defense lawyers point out that notice pleading can lead to frivolous claims.

A few mixed practice lawyers suggested that judges are usually good about not allowing frivolous claims, but some suggested that non-frivolous, but non-meritorious claims end up costing too much if brought all the way to summary judgment.

Miscellaneous – P(10) D(13) MP (9)

A few respondents in each category suggested that pleadings standards are more a function of the judge that handles the claim rather than the Rules themselves.

Motions – P(28) D(86) MP (28)

Plaintiffs' lawyers complain that defense lawyers file motions to dismiss too frequently, even when legally inappropriate. Many also complain that heightened pleading standards tilt motions to dismiss too far in favor of defendants, and that motions to dismiss are granted too frequently. Several complain that the motion to dismiss should not be used as a tool to narrow claims and defenses – but rather a tool to get rid of frivolous claims.

Defense lawyers believe that motions to dismiss are not granted frequently enough, and some hope that the new Twombly / Iqbal standards increase the frequency.

In suggesting that motions to dismiss should be used alongside sanctions to reduce frivolous claims, one defense lawyer stated:

- "Motions to dismiss and Rule 11 motions could effective control frivolous claims if judges were willing to grant such motions, rather than pushing everything into discovery."

Several respondents comment that the Iqbal "plausibility" standard is too subjective.

- "I disagree with some courts' approach to 12(b)(6) motions following the Supreme Court decisions in Twombly and Iqbal. A claim should not be dismissed prior to discovery merely because a federal judge finds the factual allegations "implausible"."

Several mixed practice lawyers expressed the idea that motions to dismiss could be effective if judges were willing to grant them when appropriate. Several of them recommend a wait and see approach to how the interpretation of the current Rules under Twombly and Iqbal effect pleadings and motions to dismiss.

Comments on the survey – P(15) D(2) MP (6)

A number of plaintiffs' lawyers believe that the survey questions are slanted significantly towards defense perspective and several characterize the survey as "desiring a particular result" or as "a push poll." Some of the milder responses regarding this bias were:

- "Questions seem slanted here. Designed to encourage more elaborate pleading? Is that your goal?"
- "This survey seems intended to produce a desired result of limiting notice pleading. This would be extremely unwise. Decisions such as Iqbal and Twombly, like the widespread abuses of summary judgment, close the doors of courthouses to litigants who do not start out with all the facts necessary to prevail. They favor the powerful and wealthy over the powerless and parties of modest means. The large question is whether a massive corporate advertising campaign on a supposed increase in frivolous litigation and supposed costs of discovery is improperly swaying the perceptions of judges. The ABA should stand firmly on the side of keeping open the doors of the Federal courts."

One of the "less mild" responses was as follows, from a defense respondent:

- "This looks like a biased survey organized by Roberts, Scalia, Alito, the Bush administration and the defense bar. I object strongly and will write a letter saying so to the ABA- this is outrageous and a set up."

6. Rules of Civil Procedure and Local Rules

Rules are too Complex – P(6) D(4)

A few lawyers commented that the discovery rules are too complex for most cases filed in federal court.

- "The discovery rules and their application do not adapt well to massive cases"
- "For the small firm or solo practitioner with a less sophisticated client base, the e-discovery rules are very complex and expensive, and in some case prohibitive, which is generally why I prefer the State Court system."

Discovery – P(9) D(35) MP (25)

A few lawyers, mainly on the plaintiff side, believe that the Federal Rules strike the correct balance between burden and cost.

- "In complex or significant litigation, discovery can be very expensive. I think the FRCP strike the correct balance between access to information and associated cost. The problem, in my opinion, is that Federal Judges and Federal Magistrate Judges do not utilize the tools at their disposal to remedy non-compliance with the Rules. When unreasonable positions are taken by clients, through their lawyers, there must be an appropriate cost in order to deter future misconduct."

However, many defense lawyers and some plaintiffs' lawyers believe that discovery is too broad, too liberal, and too expensive, especially where e-discovery is concerned.

- "FRCP need to be modified to curtail discovery fights and to expressly condition the "right" to discovery on the costs and amount at stake."
- "Expansive breadth of definition of relevance under Rule 26 makes civil litigation in the age of electronically stored information extremely cumbersome and unnecessarily expensive."
- "E-discovery issues and procedures are proving to be an unnecessarily confusing area for both judges and litigants and an extraordinarily source of expense for litigants."
- "I think the most problematic area is e-discovery. One size does not fit all. I think the rules and their application have to be tailored to permit sensible discovery with regard to the nature of the dispute."
- "The rules on e-discovery are not used so much for needed information as they are to foist huge costs onto defendants for purpose of leveraging settlement"

Several mixed practice lawyers complain that the Rules allow the expense of discovery to result in cases being decided on the grounds of cost, rather than the merits.

- "The area in which I believe the most careful review of the FRCPs (and local rules) needs to take place is discovery. It seems to me that there ought to be a happier medium between pre-FRCP "trial by ambush" and the current state of sometimes "death-by-one-thousand-slashes" discovery."

One mixed practice lawyer gave an example of a judge who he believed controlled discovery well:

- "I once had a case before Judge Milton Pollack in the SDNY. He didn't permit interrogatories beyond initial R.26 disclosures, as he said they were useless and wasted everyone's time. He was right. Use of interrogatories should be eliminated as they are more a breeding ground for discovery gamesmanship than a tool for moving a case forward.**"**

Some lawyers commented specifically on Rule 26 initial disclosure.

- "Initial disclosures do not improve case resolution or discovery, but merely increase expense. Also, electronic discovery rules do not further promote justice, but rather have become weapons in the hands of attorneys who use them to place economically unreasonable discovery burdens on other parties, thereby driving "transactional settlements" in which a party is forced to settle because it cannot incur the cost of complying with the electronic discovery demands."
- "Rule 26 has doubled the cost of litigation. Contrary to what some believe, I am convinced that insurance companies and large corporations successfully planned to have Rule 26 adopted for the purpose of increasing the cost of litigation, thus economically denying large portions of society any real access to justice. This is the single thing that most encourages the filing of pleadings, delay, incivility and bulldog tactics, all really for the purpose of both increasing costs and delaying trial dates. It is a significant cause of the decline in lawyers trying cases, and in the increase of lawyers who call themselves "litigators" and mean they pursue every avenue to avoid the possibility of a case being decided by a jury. This is because insurance companies and large corporations fear the democracy of the jury room."
- "Rule 26 is a very bad idea. It has added about 40% to the legal fees, has substantially increased the time it takes to get to trial or other resolution, promoted "gamesmanship", is rarely enforced by the

court, and is used by large corporations, particularly insurance companies has a way to deprive average or middle income citizens access to justice."

The Rules favor one party over the other – P(5) D(2)

A few lawyers mentioned that the Rules themselves are biased in favor of richer litigants, the following responses were from plaintiffs' and mixed practice lawyers.

- "The atmosphere is often threatening and less affluent litigants are at a disadvantage. The judges discourage innovation and creativity."
- "It is imperative that the notice pleadings requirement not be changed or the justice system will be absolutely worthless to plaintiff's civil litigants and will cease being a justice system and become completely biased in favor of defendants (which is how they are already leaning strongly)."
- "The problem is that some of the District Court Judges have not themselves tried big civil jury trials and frankly don't know what they are doing, and really don't want a substantial verdict returned in their court. This goes back generations, to Judge Hand, Judge Howard, and now Judge Granade. They make the case come out the way they want, and the notion of a civil jury trial in federal court in Mobile is a notion only. A plaintiff cannot get a fair shake in federal court in Mobile, and it has been that way for more than 20 years. This is no secret--it is why lawyers will do almost anything to avoid that court. It is truly pitiful."

Rules need more flexibility – P(2) D(6) MP (2)

A few respondents suggested that the Rules should be simple and flexible.

- "The FRCP should be short plain rules so that the court and the parties may adapt as needed."
- "One set of rules may apply to all cases but the rules must be flexible enough as implemented to distinguish between complex and simple cases."
- "There should be one set of rules in the nation although judges should have some flexibility to alter them for specific cases. But uniformity should be the goal to reduce the burden on litigants and counsel, bring predictability and lower cost to clients and fair competition for legal services."
- "Too many rigid process requirements. Too impersonal. Method of discovery disclosures way too rigid. Too many artificial benchmarks to meet during course of case and compliance is therefore perfunctory and not well thought out. Having lawyer's credit cards for charging filing fees is absurd, offensive and subject to being lifted and used by others."

Comments involving Local Rules – P(70) D(123) MP (74)

Respondents were mixed in their responses regarding local rules. Some see local and individual rules as benefits, allowing necessary flexibility from area to area. Several also see local rules as an area where individual districts can experiment to make the system better. There did not seem to be much difference in the responses between plaintiffs' lawyers, defense lawyers and mixed practice lawyers. Some of the more positive statements about local rules are as follows:

- "Local rules are a vital adjunct to the FRCP, which do not cover everything, and allow each district to manage its own docket in accord with local custom as they always do anyway; publishing the local

rules provides consistency and predictability even for non-local practitioners not familiar with those customs."

- "FRCP and Local Rules are one primary reason I prefer federal court. They provide predictability to me and for my clients. My clients can make reasoned decisions based on these rules rather than haphazard guesses."
- "Local rules promote innovation. The FRCP should be revised to address: the scope and cost of discovery, especially in smaller cases; the confidentiality of communications with experts (including draft reports); and confidentiality orders (so they don't need to be negotiated and adjudicated anew in each case)."
- "To the extent local rules serve the purpose of experimentation (and development of new FRCP), they necessarily promote inconsistency."

A few respondents complained about the differences in ECF requirements between districts.

- "Although I don't mind differences in local rules, I think that electronic filing should be uniform in all districts with limited exceptions. You should not have to read the local district's 30-page dissertation on how to file in the district to avoid having your filing "kicked back.""
- "My real complaint is not so much the local rules as to civil practice, but the large, inexplicable variations in ECF requirements. For example, depending on the district, the supporting memorandum must either be part of the same e-filed document as the motion, or an attachment to the motion, or a document separately e-filed from the motion. Depending on the district, the form of order must be part of the e-filed motion or, instead, an attachment to the motion. It is impossible to keep track of all these small variations from district to district."

Others believe that local rules are more of a burden than a benefit.

- "The synonym for "experimentation" is COSTLY."
- "I don't mind some local rules, but I think that too many jurisdictions have gone off the reservation. My biggest concern - and this is most often a judge's rule as opposed to a local rule - is the idea that you have to ask permission before you can file a motion. I think that is wrong as a matter of law and promotes tyrannical behavior by judges and magistrates."
- "I think the local rules have a tendency to be too harsh and draconian in a way that the Federal Rules are not. Also, there are too many local rules and too much detail in those rules. It causes a lot of extra expense for clients to have to comply with all of them."
- "Federal courts, as a federal system, should be uniform. Local rules complicate matters and thus increase litigation costs, with no perceived benefit to the litigants. All courts should be uniform in for example, the number of interrogatories allowed, whether reply memoranda are allowed, and page limitations."
- "Extremely lengthy and multiple sets of local rules increase the cost of litigation (e.g., the local rules of the EDNY & SDNY). In addition many judges have lengthy, arbitrary sets of individuals rules which are burdensome." "It is frustrating to have such variation in both Local Rules and among judges' individual rules within the same district."
- "Local rules can be dangerous because they can make a jurisdiction a target for certain types of cases (example - Eastern District of Texas for IP)"

Miscellaneous – P(21) D(16) MP (18)

Several respondents made comments that didn't fit neatly into any categories. Some of the interesting responses were as follows:

- "Many clients are choosing ADR rather than state or federal courts because it is quicker, less expensive, confidential and the results are satisfactory. The federal and state rules are not litigant-friendly and are discouraging litigation in their courts."
- "The cost/benefit analysis is largely influenced by the subjective determination about whether the case, (or cases generally), has (have) merit. Someone who (correctly or incorrectly) believes that a case has no merit will obviously believe that the costs associated are "too expensive". Any changes to the Rules should NOT be based on such a premise (which, in my experience, is false)."
- "A model set of rules for Patent Litigation should be promulgated and some form of them adopted by federal district courts."
- "Rules of civil procedure are intended primarily serve the interest of judges, not the interest of litigants. We have a system of dispute resolution, not a system of justice. Smaller cases should be tried with NO discovery, so the litigants can afford their day in court and have access to at least some justice."
- "We attorneys have stolen the judicial system from the people. The rules are designed to ensure that non-attorneys, no matter how intelligent, cannot appear in proper and expect a fair result. This justifies large salaries for attorneys (us) whose basic function is to assist people in accessing a taxpayer funded system for dispute resolution. It is mind boggling that private dispute resolution can be less expensive than taxpayer funded dispute resolution."
- "One advantage in Pennsylvania's rules is the ability to file a suit by a "writ" which tolls the statute of limitations and permits discovery in order to formulate an appropriate complaint. This procedure is very useful, and sometimes necessary, especially in light of stricter pleading requirements in cases such as Twombly and Iqbal."

Rules should not be changed – P(9) D(9) MP (7)

A few plaintiffs' lawyers expressed the view that the Rules are mostly fair and well-drafted for the needs of today's litigants, and that they should be enforced as written. Others suggested that more time is needed to feel the full effects of recent amendments before making additional changes.

- "Modern discovery under the FRCP often shifts the focus and balance of a case to discovery, rather than merits. However, the FRCP are mostly fair. The alternative "informal" discovery is unworkable and susceptible to excessive gamesmanship and pre-determined outcomes. The stakes are often too high to trust the bar to fairly conduct discovery without the aid of the rules. The rules should be enforced."
- "The rules are carefully considered and drafted, and generally do an excellent job of anticipating and dealing with issues that arise in litigation. The main issues are in discovery - and the problems spring from human nature, which can be difficult to control by rule."
- "The 2006 amendments have just begun to secure their footing. It is premature at this time to determine whether they will work as intended but time should be permitted to make this assessment. Any intention to implement NEW changes now is premature."
- "There should be no rule or rule change that makes it more difficult to access the court and seek justice for your clients. The "revisions" of rules of procedures are often excuses to put up roadblocks for people who are injured. This diminishes the role that the court has in allowing everyone a day in court, even if in the view of the judge their time be better spent elsewhere."

Mixed Practice lawyers also suggested that the Rules should be given some time before additional adjustments are made. Several also suggested that problems with the Rules are a matter of enforcement, not drafting.

- "Please stop monkeying with the Civil Rules every year or so. Stability and predictability are very important to a civil justice system. Trying to fix every new problem with a new civil rule is making our system more complex expensive and Canonical. That is not a positive development."
- "By and large the Rule work fine, but they are not administered aggressively enough by the Court, which encourages counsel to play games. One particular weakness is the built in delay in discovery pending Rule 16 conference, which wastes time. In some districts this results in a two month wait or longer. There should be automatic disclosures in the first two weeks after an answer is filed, followed by discovery. Local rules frequently exacerbate that problem."
- "The rules work well in terms of efficiency and expediency. Having to submit legal memoranda on all motions, however, rather than having access to a judge for a brief hearing on a minor issues, greatly increases the cost of litigation and makes federal court practically inaccessible for individuals and small to medium businesses. This works a particular hardship on plaintiffs who file in state court but are removed to federal court by a defendant. Legitimate claims are extinguished, or forced into early settlement, by the sheer cost of litigation."

Defense respondents express similar sentiments.

- "The problem is not with the Rules as written but a few judges abuse their "discretion" to ignore them."
- "Do not blanket re-write the rules. Various interpretations of the rules are now settled within given circuits, and constant re-writing just injects confusion, even if intended only to be formal rather than substantive."
- "Most of the time the rules work and work well. Would like more clarity around e-discovery and a rule regarding bifurcation in class cases."
- "Overall very good. The recent 2008 amendments re-formatting the rules with more subdivisions was a much needed improvement."
- "It seems that with every new amendment to the FRCP new levels of unnecessary complexity are added. The fact that some of them now go on for pages is a travesty. At a minimum, they should be broken up and simplified."

Rules should be re-written – P(20) D(52) MP (20)

A few lawyers from each group believe that the Rules require substantial overhaul.

- "The discovery rules require a complete overhaul because of the prevalence of electronic communications."
- "The Federal Rules are arcane. For example, leave should not have to be sought to amend a complaint - or an answer. The complaint should not be turned into a request for admissions. General pleadings ("a TRUE short and plain statement of the case) should be all that is necessary. Depositions should be available for use at trial without regard to witness availability. We don't need to "meet and confer" on every case."
- "The discovery rules need major overhaul; otherwise, soon, the merits won't matter at all, and discovery will be the tail that wags the dog."

- "The e discovery rules are absurd. They were written by lawyers and are applied by judges who have no clue about the real world. They are simply a weapon of leverage for plaintiffs' counsel in complex cases."
- "Some rules need updating, to accommodate things like electronic filing, electronic discovery, screening of experts and expert opinion, and more wise and consistent enforcement of discovery abuse. Plus reject the current supreme court opinion on a short simple statement of claim- keep that provision and tell Roberts to resign before he ruins our system of justice."

Some believe that the Rules should be more trial-friendly. Others believe that the Rules as they stand keep too many disputes away from judges, who may be best equipped to handle them.

- "The local and federal rules should be geared toward pushing cases to trial, not providing non-trial lawyers endless reasons for fighting about the rules. Too often, counsel and the courts get caught up in disputes about non-substantive matters, instead over keeping in mind that the purpose of the rules is to serve substantive resolution of the case."
- "Summary judgment practice in federal court needs to be revamped to ensure the right to a jury trial, let credibility assessments be made by the trier of fact, and give meaning to FRCP 1. Summary Judgment has evolved since I began practicing to now drive the entire process, discourage early settlement and foster "law by the pound" rather than a method to "weed out" frivolous or truly untenable cases that it was intended to do."
- "Many of the amendments to the FRCP in the past 20 years have been designed to keep conflicts away from judges (e.g., requirements to consult before filing discovery or similar motions). What these rules do, in fact, is encourage obstreperous behavior because lawyers know that they can get a "first bite" by refusing to do that which is required, and then waiting to see if the other side takes them on. This increases cost and delay, and makes the side that complies with the rules question whether that is appropriate."

Some believe that the Rules need clarification in order to be effective.

- "Seemingly easy issues (like time to respond) are often more difficult than necessary to confirm because of the indexing of the rules (perhaps a publishing issue). It feels like I am always flipping pages."
- "We need more specifics and guidance about electronic discovery in the rules. No one really knows exactly what is required and it seems like a case of "gotcha."
- "Some rules, particularly dealing with discovery, need clarification and/or expansion to include more efficient and economic manner in which to conduct depositions."

A few believe that there should be different sets of Rules for small cases and large cases.

- "Biggest complaint I have is that small dollar cases are treated like major litigation. After serving a complaint, no discovery is allowed until initial disclosures that are months down the road. Initial disclosure system does NOT work; defs disclose whatever suits them. ADR program is good in the N.D., but after that the pre-trial rules are 200% overkill for a small case. Jury trials are set out YEARS in advance. Way too much delay in the N.D., seems worse in the E.D. of California."

Several mentioned adjustments to the Rules to better manage costs, and others believe that the Rules need periodic review to keep up with technology (mainly defense and mixed practice lawyers).

- "As the character of cases evolves, so must the rules. The mechanism for regular, periodic review is prudent."
- "The Rules need to be written in a way that helps attorneys manage legal costs. Inherent in the FRCP, plus the local rules and the individual part rules, are so many places where there is extra time spent, asking for permission and going to court for conferences that could just as easily be handled by phone. Parties/counsel should not be made to wait for hours to be heard, especially on applications that take 5 minutes to present. Rule 11 has no teeth. The rules should be written in a way that forces judges to stop, not reward, vexatious, harassing, fee-draining conduct by litigant"

Some respondents mentioned specific Rules that they believe need adjustment.

- "FRCP 16 needs to give judges clearer, explicit authority to limit dispositive issues in a case at the early stages. Judges should be able to order and/or narrow the issues to be litigated so parties do not have to expend resources on wide-ranging discovery when only one or two key issues truly can determine the outcome of a case."
- "The two most inconsistently applied Rules are 56 and, now, 8. Both operate to dismiss cases without trial, so it would seem that they should be the most strictly-construed, with fidelity to the words of the Rules. That hasn't been the practice at all, and has led to significant distrust of the federal courts, as well as the perception that case assignment is a lottery and justice is not consistent."

Rules should be more strictly followed. – P(12) D(20) MP (17)

- "Mandatory disclosures pursuant to Rule 26 are not working, but have become a royal pain. There should be one firm, strongly enforced rule that any witness or document not disclosed or identified/produced by 30 days before the discovery cutoff cannot be used at trial absent extraordinary good cause shown for not complying. The same is true of an award of fees against the party that loses on a motion to compel. Former Chief Judge of the Northern District of Alabama, Sam Pointer (may God rest his soul) used to assess and routinely announced he would, usually and automatically, assess at least $500 against the loser on such motions; that really cut back on discovery disputes resulting in a motion to compel in cases before him. That is my perception and I am curious whether the court tracked such matters and whether the data is in accord with my perception."
- "The problem with any rules--Fed. R. Civ. P. or Local Rules-- is the failure of Judges to enforce them."
- "Although I believe that the Rules should be simplified and better coordinated (i.e. FRCP and Local Rules) the primary need is for more attention to enforcement of discovery rules. Proper enforcement of discovery rules would result in more settlements, shorter and fairer trials and would reduce time and costs."
- "In a case where there are badly behaved counsel, a grater burden is placed upon those following the rules. The courts seldom enforce the rules sternly enough against the attorneys not following the rules, thereby imposing greater burden and cost upon those who do."
- "The problem is not in the Rules but in the inconsistent application, especially in matters like discovery that are largely discretionary. While elimination of discretion would be bad (as it was in the sentencing guidelines) individual judges should try to be more aware of what is done in their district, and perhaps subordinate their egos to some notion of a common standard."

7. **Comments**

Alternative Dispute Resolution– P(33) D(37) MP (105)

Most of the times when arbitration is mentioned, the characterization is negative:

- "Arbitration has produced some outrageously unfair, but unreviewable, outcomes without much cost saving."

Negative views about mediation are generally expressed in criticizing the costs of failed mediation, or that mediation is for lawyers who haven't developed negotiation skills for settling cases.

- "A lot of the previous "cost" questions depend on the outcome of mediation. If the mediation is successful, then costs are avoided. If mediation is not successful, then the client must pay for the mediation and continued litigation. Overall, I am in favor of either court-ordered mediation or private mediation, but not arbitration. Arbitration does nothing to ease the cost and has discovery rules that are less favorable to clients."

Another sentiment shared by all three groups:

- "ADR should be voluntary, not court-ordered. ADR is much less effective if the parties are ordered to participate involuntarily."

Many of the plaintiffs responded that binding, mandatory arbitration is not a positive development. A number also commented that ADR is a benefit, if it is done fairly. Others believe that any alternative to a jury trial is less fair than a traditional trial. One response which identified both benefits and problems with ADR is as follows:

- "Forcing parties to spend time and money on ADR before discovery, as required in the Western District, just increases costs and disadvantages the parties by forcing them to disclose weaknesses in their cases too early. ADR should occur during or after discovery, and the parties should be given the option."

Several plaintiffs' respondents shared the belief that ADR, especially mediation, is better after completing discovery or ruling on dispositive motions. Others see it as a flat benefit:

- "Early evaluation and Mediation are GREAT! Individuals in P.I. damage suits don't see both sides until that setting."

Several defense respondents complained that mediation is often too cookie cutter, and that ADR too many times leads to a "split the baby" approach. Defense lawyers shared largely the same views:

- "ADR works best if it follows meaningful discovery and the parties and counsel know the issues and the evidence. Court-ordered ADR before this occurs is ineffective 95% of the time."

Some put forth a very negative view of Arbitration:

- "As to arbitration - the cost/benefit is not always easy to assess - costs can be exorbitant with three-judge panels and the process is often just as lengthy as trial - yet with uncertain outcome and fewer safeguards and less chance to settle. On the other hand, it can be quicker to get to a resolution (but not

always) and the informality and lack of formal discovery can be a plus or a minus. Depends on the case."

One mixed practice lawyer believes that it depends on the type of case:

- "ADR is good when the law is not in dispute and the facts are in issue. Where the case lends itself to development of the law, then ADR is not a good option."

Civility and Cooperation– P(4) MP (8)

A few respondents mentioned that the practice of law has become "meaner" and less civil than it used to be. Others emphasized that cooperation and professionalism can help litigation proceed more smoothly.

Economics– P(8) D(11) MP (40)

Several plaintiffs' lawyers believe that the billable hour creates perverse economic incentives for lawyers and that big firms with big clients have every incentive to run up costs and "bully plaintiffs out of litigation." One plaintiff expressed concern over expert costs, others suggested that frivolous claims and defenses cause cost increases.

Defense lawyers talking about economics bring up the enormous cost burdens of litigation, and the pressure to settle that goes along with that, noting that more cases should go to trial, but settle because of the costs. Several also brought up the notion that lawyers are more interested in running up their billable hours rather than actually solving a problem.

Several mixed practice lawyers suggest fee-shifting. Several mention that the reality of the court system often meets perception: the side with more money eventually gets to buy out the other side to win.

FRCP & the Federal Civil Litigation System– P(12) D(11) MP (25)

Several lawyers seem generally satisfied, expressing views consistent with the following:

- "The civil litigation system is much complained about but it has always been much complained about. I believe that enforcement of such rules as no speaking objections and hands-on efforts by Judges to keep cases moving have, in recent years, caused discovery and cases to move along more quickly and fairly than they did even, say, 10 years ago. To me, the system seems to be working better and I'd be wary with changes for (what often seem to be) the sake of change. I am concerned about the limitations that now seem to crop up in electronic discovery situations because that appears to be a sure road to misuse and, ultimately, lack of justice."

A large number of respondents who mentioned the overall Civil Litigation system are concerned about the lack of trials and the inability of lawyers to obtain trial experience practicing in federal court.

Some respondents also mentioned that the rules cannot eliminate expense and burdens of litigation, but rather, if lawyers avoid abusing discovery and working for delay rather than resolution, and if judges do their jobs properly and rule on motions more quickly, the system will work better.

Miscellaneous– D(3) MP (12)

Some interesting comments, as follows:

- "As long as corporations are allowed to form in different states and get treated as "foreign" unfairness is likely to continue as these corporations are not held accountable in Federal Court as they would be in a State Court where they are injuring people of that State."
- "Given ECF and other technology available, the Federal courts should revisit the classic bars to appearance by counsel from foreign jurisdictions."
- "Enforcement of judgments in the federal courts is extremely difficult, if not impossible, due to the limited availability, or unavailability, of the US Marshal Service."
- "Third parties (Insurance companies) should not be allowed to control any facet of litigation."

Some mentioned that law schools should offer more practical, training-oriented, trial-based courses.

Desire to see more trials– P(4) D(9) MP (10)

Several lawyers suggested more trials will lead to fairer outcomes and a more just system. All three groups believe that lawyers are losing trial skills, that trials are ultimately the fairest way for an individual to be heard, and that settlement pressures are too high because of costs.

Summary Judgment and Dispositive Motions– P(4) MP (3)

Plaintiffs' lawyers tend to believe that summary judgment is "broken and unfair." Defense lawyers did not comment on it, and mixed practice lawyers had mixed feelings, some feel that it should be liberalized, others feel that the motions are a waste of money.

General Comments about the Survey Itself– P(21) D(7) MP (28)

Other than commenting that the survey is too long (which many did), several plaintiffs' lawyers and mixed practice lawyers believe that the questions were couched in language looking for a particular result – that discovery is abused, that ADR is fair, and that it was a very defense-oriented survey, desiring a result of cost-savings over access to justice.

Several stated that the survey was too general:

- "Survey does not allow responses to reflect all the variables. Particularly the yes no and shorter longer. Sometime ADR works, sometimes it doesn't. Some judges properly administer the rules, promptly rule on motions, etc., while others don't."