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PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

## Keynote Address: Civil Justice at a Crossroads

Rebecca Love Kourlis\*

I really do believe that, as your title suggests, the civil justice system *is* at a crossroads and that, as a result, we all have new opportunities and old responsibilities.

Four years ago, concerns about skyrocketing costs, unprofessional gamesmanship, and long delays in civil litigation were the stuff of grouching and shoulder shrugs. We all had a level of fatalism or cynicism about our inability to change any of those factors. Now, that is not true. There is a window of opportunity that has opened—a convergence of various forces resulting in a willingness of decision-makers to consider change.

As a result, the wires are buzzing. In three weeks, there will be a national conference at Duke University sponsored by the Federal Advisory Committee on Civil Rules (the 2010 Conference on Civil Litigation), the stated goal of which is to harness:

[I]nsights and perspectives from lawyers, judges and academics concerning improvements that could be made in the federal civil litigation process to effectuate the purposes of the Civil Rules—‘to secure the just, speedy, and inexpensive determination of every action and proceeding.’ In addition to considering the results of the empirical research, panels of experts will consider the range of issues in the federal civil litigation process that could be used more efficiently to accomplish the purposes of the Rules, including the discovery process (particularly E-Discovery), pleadings, and dispositive motions. Other topics to be considered include judicial management and the tools available to judges to expedite the process, the process of settlement, and the experience of the states.

In anticipation of that conference, six nationwide surveys have been conducted, in addition to two statewide surveys and three empirical data survey analyses.<sup>2</sup> To date, over thirty other papers have been submitted and

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1. Federal Advisory Committee on Civil Rules, 2010 Conference on Civil Litigation Purpose Statement, <http://civilconference.uscourts.gov> (last visited Nov. 9, 2010), [hereinafter Advisory Committee on Civil Rules].

2. *See id.*

that number grows daily.<sup>3</sup> This conference at Pepperdine is taking place, another symposium sponsored by The Sedona Conference<sup>®</sup> Institute took place last week,<sup>4</sup> and other organizations around the country are dedicating time in their annual meetings to consideration of possible civil justice reform.

What has caused this national focus on the civil litigation system? I would suggest that the drivers include the advent of electronic discovery and the associated costs, the recession and the impact it has had on litigants' ability to sustain litigation costs, and the leadership of various entities in forwarding the idea that we need not and should not accept the status quo; that we can do much better.

At bottom, what is driving the surge toward reform is dissatisfaction: dissatisfaction among attorneys and, more importantly, among litigants themselves. In the last few years, the court system has increasingly come under attack. Some of the attacks have been the stuff of urban legend (the McDonald's hot coffee case, which was not at all as portrayed in the media), but other attacks have been grounded in a deep and widespread distrust of the system. For example, in a Harris Interactive Poll in 2005, 54% of those surveyed did not trust the legal system to produce fair results, and 56% suggested that a complete overhaul is necessary.<sup>5</sup>

Lawyers themselves bemoan the gamesmanship in the system, the delays, *and* the costs. Both a survey of the American College of Trial Lawyers (ACTL) and a survey of the American Bar Association (ABA) Litigation Section identify \$100,000 as the most commonly cited minimum amount in controversy before lawyers can afford to take a case.<sup>6</sup> In those two surveys, 75% of respondents believe that discovery costs have increased disproportionately due to the advent of e-discovery, and 45%–50% believe

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3. *See id.*

4. The Sedona Conference, Complex Litigation XII—The Future of Civil Litigation: Legislative and Behavioral Changes, <http://www.thesedonaconference.org/conferences/20100408> (last visited Nov. 9, 2010).

5. *See* JUDYTH PENDELL, THE PUBLIC'S PERCEPTION: PRESENTATION OF HARRIS POLL RESULTS AND OTHER POLLING RESULTS 3, 16 (2005), <http://commongood.org/attachments/149/Pendell+report.pdf>.

6. *See* AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, INTERIM REPORT & 2008 LITIGATION SURVEY OF THE FELLOWS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS B-1 (2008), <http://www.du.edu/legalinstitute/pubs/Interim%20Report%20Final%20for%20web1.pdf> [hereinafter ACTL/IAALS INTERIM REPORT]; AMERICAN BAR ASSOCIATION LITIGATION SECTION, ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT, 159 (2009), <http://www.abanet.org/litigation/survey/docs/detail-aba-report.pdf> [hereinafter ABA LITIGATION SURVEY].

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that discovery is abused in almost every case.<sup>7</sup> There is, thus, growing concern that the court system is pricing itself out of reach of ordinary Americans, that access to justice is not an issue confined to the indigent.

These concerns are not just cocktail party talk anymore, although there is still plenty of that. How many horror stories can each of you recite—either your own, your colleagues', or friends' experiences? Horror stories, such as companies that are forced to spend many millions of dollars in e-discovery review and production in a case where the amount in controversy is less than the e-discovery tab; such as parties who spend hundreds of thousands of dollars in expert depositions, flying attorneys around the country and suffering multi-day depositions of one expert; such as cases that languish in the courts for years with rotating judges and many continuances; or such as dueling discovery motions with allegations of blatant misconduct by one side or the other that is never addressed. At the very least, there is a national consensus that the system costs too much, and in many instances, takes too long.

This is not justice. It is not the efficient search for the truth and resolution on the merits. It is not our grandfather's legal system envisioned by the drafters of the Federal Rules of Civil Procedure (FRCP) in the 1930s.

My husband is a cattle and sheep rancher, and I use analogies from that world in my work from time to time. I analogize our civil justice system to what ranchers call "foundering." It is a phenomenon that occurs when livestock get too much good green grass; they can die from it. Green grass is life-giving—as is process. Too much process can overload the system, and I suggest to you that we have too much process in our civil justice system.

## I. INTERNATIONAL REFORM EFFORTS

There is another point we need to recognize. While we, as Americans, have been bellyaching about the problems in our civil justice system, other countries have been acting.

In England and Wales, significant reforms in the late 1990s resulted in an "overhaul of the civil justice system," centered on a rewrite and unification of the rules of civil procedure.<sup>8</sup> Lord Harry Woolf, the face

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7. ACTL/IAALS INTERIM REPORT, *supra* note 6, at A-4; ABA LITIGATION SURVEY, *supra* note 6, at 49, 76.

8. AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, FINAL REPORT ON THE JOINT PROJECT

behind these sweeping reforms, recognized that the key problems confronting the English civil justice system were cost, complexity, and delay resulting from unchecked adversarial practices.<sup>9</sup> Lord Woolf considered the rules themselves to be the most appropriate avenue of reform, stating: “It is often said that the existing rules and practice directions contain the solution to the present problems, if only litigation were to be conducted in accordance with them. But the present system does not ensure this. Instead the rules are flouted on a vast scale.”<sup>10</sup> The Woolf Reforms saw the advent of a procedure called “pre-action protocols” in England, which resembles an intensive, early reciprocal disclosure process.<sup>11</sup> They also institutionalized case management practices.<sup>12</sup> These reforms are under review now, and the Ministry of Justice is considering adjustments to the Woolf Reforms as appropriate.

In Canada, major reviews of the civil procedure rules have been undertaken in Ontario, British Columbia, and Alberta.<sup>13</sup> On January 1, 2010, Ontario implemented a number of reform measures included in the 2007 Civil Justice Reform Project final report, many of which are focused on concerns about proportionality and the cost of litigation.<sup>14</sup> Similar problems provided the impetus for rules reform in British Columbia where reform interests also focused on proportionality, fairness, public confidence, and justice.<sup>15</sup> The rules revisions will take effect on July 1, 2010.<sup>16</sup> The concerns prompting the review in Alberta were timeliness, affordability, and understandability of civil court proceedings—the new rules of court will be implemented on November 1, 2010.<sup>17</sup>

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OF AMERICAN COLLEGE OF TRIAL LAWYERS & THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, A-1 (2010), <http://www.du.edu/legalinstitute/pubs/ACTL-IAALS%20Final%20Report%20rev%208-4-10.pdf> [hereinafter ACTL/IAALS FINAL REPORT].

9. Harry Woolf, *Civil Justice in the United Kingdom*, 45 AM. J. COMP. L. 709, 709-10 (1997).

10. *Id.* at 710.

11. *Id.* at 722, 728. See also ACTL/IAALS FINAL REPORT, *supra* note 8, at A-1.

12. Woolf, *supra* note 9, at 723.

13. ACTL/IAALS *Final Report*, *supra* note 8, at 1.

14. See COULTER A. OSBORNE, CIVIL JUSTICE REFORM PROJECT: SUMMARY OF FINDINGS & RECOMMENDATIONS 1, 18-20 (2007), [http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report\\_EN.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf).

15. B.C. SUP. CT. CIV. R. 1-3, B.C. Reg. 168/2009 (Can.), available at [http://www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/168\\_2009\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/168_2009_01); B.C. SUP. CT. FAM. R. 1-3, B.C. Reg. 169/2009 (Can.), available at [http://www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/169\\_2009\\_00](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/169_2009_00).

16. *Id.*

17. A. CT. R. 1.2 (Can.), available at <http://www.albertacourts.ab.ca/LinkClick.aspx?fileticket=MByVU6PXpqs%3d&tabid=310>.

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The 2002 amendments to the New Zealand High Court rules governing discovery were also motivated by concerns of proportionality.<sup>18</sup> A major review of that system was completed in 2004 and a comprehensive set of proposals was released, many of which have now been implemented.<sup>19</sup>

## II. STATE COURTS—ARIZONA AND OREGON

Some state courts closer to home have also been experimenting with reform over the last two decades.<sup>20</sup> The Zlaket Committee in Arizona was formed in the early 1990s to respond to widespread concerns that the system was becoming unaffordable and increasingly “uncivilized, burdened with rudeness, untrustworthiness, hostility[,] and bad manners . . . .”<sup>21</sup> The committee focused on discovery abuse, cost, delay, and a changing legal system that sharply diverged from the professionalism of the past.<sup>22</sup> As former Arizona Chief Justice Thomas Zlaket stated in 1993:

A new generation of ‘litigators’ who do not try cases has emerged. Indeed, a significant percentage of these attorneys would not even know how to try a case. What they know and do best is a great deal of discovery. Many do not recall, if they ever knew, that discovery was originally referred to as *pre-trial discovery*. It was one method, and certainly not the only one, by which trial lawyers prepared for the courtroom. Pre-trial discovery was not an end in itself, nor was it designed or intended to be a profit center for lawyers and law firms.<sup>23</sup>

That committee recommended sweeping changes to the Arizona Rules of Civil Procedure, including mandatory reciprocal disclosures and limits on experts, interrogatories, and depositions, which were ultimately adopted. We have studied those changes, and can now report—eighteen years later—that the Arizona bench and bar view the changes as very positive.<sup>24</sup>

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18. High Court Amendment Rules 2004, 2004 S.R. No. 320 (N.Z.), available at <http://www.legislation.govt.nz/regulation/public/2004/0320/latest/DLM288510.html>.

19. *Id.*

20. ACTL/IAALS FINAL REPORT, *supra* note 8, at A-3.

21. Thomas A. Zlaket, *Encouraging Litigators to Be Lawyers: Arizona’s New Civil Rules*, 25 ARIZ. ST. L.J. 1 (1993).

22. *Id.* at 2.

23. *Id.* at 3.

24. INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, IAALS SURVEY OF THE ARIZONA BENCH & BAR ON THE ARIZONA RULES OF CIVIL PROCEDURE 1 (2010), <http://www.du.edu/legalinstitute/pdf/IAALSArizonaSurveyReport.pdf> [hereinafter ARIZONA BENCH & BAR SURVEY].

Oregon never adopted the FRCP and has, for example, rules that require fact-based pleading.<sup>25</sup> Oregon has no rules for expert discovery. Oregon state courts do *not* require expert disclosure or reports.<sup>26</sup> We have studied that system as well, and found that the Oregon bench and bar like it and prefer it to the federal system and to other state systems.<sup>27</sup>

So, there are models for change, both international and domestic, that we should be looking toward and studying.

### III. WHERE ARE WE TODAY? WHAT HAS BEEN EVOLVING OVER THE PAST YEAR?

Let me return now to the sprouting of studies, papers, and empirical data that the American Civil Justice Reform movement has generated recently,<sup>28</sup> and let me try to identify some themes that emerge.

First, it is worth noting that the sheer number of empirical studies and critical commentary that materialized in the past year is truly impressive. In addition to the survey of the American College of Trial Lawyers that I referred to earlier, the American Bar Association Section of Litigation and the National Employment Lawyers Association have surveyed their respective memberships about their perceptions of the civil justice system.<sup>29</sup> The Federal Judicial Center completed a national closed case study and survey;<sup>30</sup> RAND is examining the costs of electronic discovery,<sup>31</sup> and my own institute has conducted surveys of the Arizona bench and bar, Oregon

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25. INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, IAALS SURVEY OF THE OREGON BENCH & BAR ON THE OREGON RULES OF CIVIL PROCEDURE 1, 4 (2010), <http://www.du.edu/legalinstitute/pdf/IAALSOregonSurvey.pdf> [hereinafter OREGON BENCH & BAR SURVEY].

26. *Id.* at 37.

27. *Id.* at 12-15; *see also* INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, CIVIL CASE PROCESSING IN THE OREGON COURTS: AN ANALYSIS OF MULTNOMAH COUNTY 5 (2010), <http://www.du.edu/legalinstitute/pubs/civilcase.pdf> [hereinafter OJIN STUDY].

28. *See infra* Appendix A for details on these studies.

29. ABA LITIGATION SURVEY, *supra* note 6, at 1; NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, SUMMARY OF RESULTS OF FEDERAL JUDICIAL CENTER SURVEY OF NELA MEMBERS 3 (2009), [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\\$defaultview/FE4312C5C76A7B6D852576F70051149D/\\$File/NELA%2C%20Summary%20oP%20Results%20of%20FJC%20Survey%20of%20NELA%20Members.pdf?OpenElement](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/FE4312C5C76A7B6D852576F70051149D/$File/NELA%2C%20Summary%20oP%20Results%20of%20FJC%20Survey%20of%20NELA%20Members.pdf?OpenElement) [hereinafter NELA SURVEY].

30. FEDERAL JUDICIAL CENTER, NATIONAL, CASE-BASED CIVIL RULES SURVEY RESULTS 1 (2009), [http://www.fjc.gov/public/pdf.nsf/lookup/FJC\\_Civil\\_Report\\_Sept\\_2009.pdf/\\$file/FJC\\_Civil\\_Report\\_Sept\\_2009.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/FJC_Civil_Report_Sept_2009.pdf/$file/FJC_Civil_Report_Sept_2009.pdf) [hereinafter FJC CIVIL RULES SURVEY].

31. JAMES N. DERTOUZOS ET AL., THE LEGAL AND ECONOMIC IMPLICATIONS OF ELECTRONIC DISCOVERY OPTIONS FOR FUTURE RESEARCH 7 (2008), [http://www.rand.org/pubs/occasional\\_papers/2008/RAND\\_OP183.sum.pdf](http://www.rand.org/pubs/occasional_papers/2008/RAND_OP183.sum.pdf).

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bench, national Chief Legal Officers and General Counsel, and now—in concert with the Searle Center at Northwestern—a survey of state and federal judges.<sup>32</sup> Our institute has also conducted its own closed-case docket analysis of eight federal district courts, as well as the state court servicing Portland, Oregon.<sup>33</sup>

*A. Current Status of the Civil Justice System*

First, there is significant agreement that the civil justice system is beleaguered by problems of cost, delay, and impaired access. Access is something of a tricky word because studies or authors can use it differently. We are *not* talking about access for the indigent (although that is certainly its own problem); and we are not just talking about access for those who have a case with under \$100,000 at issue. We are talking more broadly about access to the full system—to a determination on the merits by a judge or a jury. We are talking about being able to afford to stay the course and not being forced to fold because the ante is too high.

A very strong consensus emerged from the surveys that the system is too expensive. In all surveys in which the question was asked,<sup>34</sup> at least 77% of respondents indicated the belief that litigation generally was too expensive. The ABA, ACTL, and NELA surveys also asked about discovery costs, and more than 70% of respondents in all three surveys indicated their belief that it was too expensive.<sup>35</sup>

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32. OREGON BENCH & BAR SURVEY, *supra* note 25, at 4; ARIZONA BENCH & BAR SURVEY, *supra* note 24, at 1; INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL BELONGING TO THE ASSOCIATION OF CORPORATE COUNSEL 4 (2010), <http://www.du.edu/legalinstitute/pubs/GeneralCounselSurvey.pdf> [hereinafter GENERAL COUNSEL SURVEY].

33. INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURT 1-3 (2009), <http://www.du.edu/legalinstitute/pubs/PACER%20FINAL%20201-21-09.pdf> [hereinafter PACER STUDY]; OJIN STUDY, *supra* note 27, at 5.

34. ABA LITIGATION SURVEY, *supra* note 6, at 137; ACTL/IAALS INTERIM REPORT, *supra* note 6, at 4; ARIZONA BENCH & BAR SURVEY, *supra* note 24, at 44; FJC CIVIL RULES SURVEY, *supra* note 30, at 2; GENERAL COUNSEL SURVEY, *supra* note 32, at 17; NELA SURVEY, *supra* note 29, at 13; OREGON BENCH & BAR SURVEY, *supra* note 25, at 54.

35. ACTL/IAALS INTERIM REPORT, *supra* note 6, at 4; NELA SURVEY, *supra* note 29, at 8; ABA LITIGATION SURVEY, *supra* note 6, at 138.

There was also a very strong consensus that delays cost money. More than 90% of the ACTL Fellows,<sup>36</sup> 82% of the ABA survey respondents,<sup>37</sup> 79% of the General Counsel survey respondents,<sup>38</sup> and 73% of the NELA respondents<sup>39</sup> indicated that delays in litigation cost litigants more money. The FJC multivariate analysis supports this, finding that an increase in time from filing to disposition is associated with an increase in costs for both plaintiffs and defendants.<sup>40</sup> In fact, the increase in cost for plaintiffs resulting from delay is slightly higher than for defendants.<sup>41</sup>

The surveys indicated a strong consensus that some cases are not brought because they are not cost-effective. More than 80% of the respondents to the ACTL, ABA, and NELA surveys indicated that their law firms turn down certain cases because it is not cost-effective to take them.<sup>42</sup> In all three surveys, the most common threshold for turning down a case was a value of \$100,000.<sup>43</sup> The figures were lower in the Arizona and Oregon surveys, where one-third and one-quarter of respondents, respectively, indicated that their firms turn down cases.<sup>44</sup>

Similarly, the surveys show a strong consensus that some cases are settled primarily because of cost concerns. In the ACTL, ABA, and General Counsel surveys, more than 80% of all respondents indicated that costs drove cases to settle for reasons unrelated to the merits.<sup>45</sup> These feelings were very strongly held by those representing primarily defendants, although majorities of those representing primarily plaintiffs or representing both equally also indicated a direct causation between cost and settlement. Sixty percent of NELA respondents so indicated,<sup>46</sup> as did 53% of self-identified

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36. ACTL/IAALS INTERIM REPORT, *supra* note 6, at A-6.

37. ABA LITIGATION SURVEY, *supra* note 6, at 135.

38. GENERAL COUNSEL SURVEY, *supra* note 32, at 20.

39. NELA SURVEY, *supra* note 29, at 8.

40. EMERY G. LEE III & THOMAS WILLGING, LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS 2 (2010), [http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/\\$file/costciv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/$file/costciv1.pdf) [hereinafter FJC MULTIVARIATE ANALYSIS].

41. *Id.* at 5.

42. ACTL/IAALS INTERIM REPORT, *supra* note 6, at A-6; NELA SURVEY, *supra* note 29, at 14; ABA LITIGATION SURVEY, *supra* note 6, at 159.

43. ACTL/IAALS INTERIM REPORT, *supra* note 6, at B-1; NELA SURVEY, *supra* note 29, at 14; ABA LITIGATION SURVEY, *supra* note 6, at 159.

44. ARIZONA BENCH & BAR SURVEY, *supra* note 24, at 45; OREGON BENCH & BAR SURVEY, *supra* note 25, at 54.

45. ACTL/IAALS INTERIM REPORT, *supra* note 6, at A-6; ABA LITIGATION SURVEY, *supra* note 6, at 155; GENERAL COUNSEL SURVEY, *supra* note 32, at 19.

46. NELA SURVEY, *supra* note 29, at 8, 14.

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plaintiffs' attorneys in the ABA survey.<sup>47</sup> In the FJC survey, the numbers were more moderate: about 58% of defense lawyers and those representing both parties equally agreed that cases settle specifically for cost reasons, while those representing primarily plaintiffs were split, with 39% agreeing and 38% disagreeing.<sup>48</sup>

At least as to small cases, the surveys showed a strong consensus that litigation costs are disproportionate to the value of the case. Approximately 80% of respondents to both the ABA and NELA surveys indicated that for small cases, litigation costs are disproportionate.<sup>49</sup> Only half that number in each survey—40%—indicated the same belief as to large cases.<sup>50</sup> The ACTL and General Counsel surveys did not distinguish between small and large cases, but in both surveys substantial majorities—68% and 88%, respectively—indicated agreement that litigation costs are not proportional to case value.<sup>51</sup>

So, there is evidence of consensus about the problems, but what about the solutions?

*B. IAALS/ACTL Final Report Proposed Principles*

The IAALS/ACTL Final Report, published in March 2009, proposed a set of principles that would guide reform—designed to address the identified problems.<sup>52</sup> For purposes of analyzing and organizing the data and the areas of concern, I want to return to those principles. Broadly, they center on the following themes:

1. Reexamine the notion that one size fits all: trans-substantive rules, as distinguished from differentiated rules and procedures.<sup>53</sup>

2. Pleading: Is notice pleading contributing to the problem? Is it time for consideration of some form of fact-based pleading?<sup>54</sup>

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47. ABA LITIGATION SURVEY, *supra* note 6, at 150.

48. FJC CIVIL RULES SURVEY, *supra* note 30, at 33.

49. ABA LITIGATION SURVEY, *supra* note 6, at 140; NELA SURVEY, *supra* note 29, at 13.

50. ABA LITIGATION SURVEY, *supra* note 6, at 141; NELA SURVEY, *supra* note 29, at 13.

51. ACTL/IAALS INTERIM REPORT, *supra* note 6, at A-2; GENERAL COUNSEL SURVEY, *supra* note 32, at 19.

52. ACTL/IAALS FINAL REPORT, *supra* note 8, at B-1, B-2.

53. *Id.* at 4.

54. *Id.* at 5.

3. Discovery: Require initial disclosures—invite case type specific protocols that would govern disclosures; change the default—all facts not subject to discovery; limit discovery to that which proves or disproves claims or will be used to impeach a witness; and proportionality.<sup>55</sup>

4. E-discovery: early conferences, proportionality, and cost shifting.<sup>56</sup>

5. Expert witnesses: one expert per party; expert testimony limited to scope of report; is there a need for expert depositions?<sup>57</sup>

6. Judicial management and scheduling: single judicial officer from cradle to grave; early and firm trial date; prioritize resolution of motions.<sup>58</sup>

The ACTL/IAALS Principles did not address two additional themes, summary judgment and sanctions (because of inability to reach consensus), but those themes are emerging from the materials submitted for the Duke conference.<sup>59</sup>

## 1. Pleading

We begin, as we should, with pleading. It is the current focal point of much of the sound and fury surrounding discussions of rules changes. There is a national debate underway about the *Twombly* and *Iqbal* cases, centered in the United States Congress, which is considering legislation that would overrule those two cases—and perhaps do much more.<sup>60</sup> That political battle has spilled over into the discussion about rule changes and has caused some regrettable polarizing.<sup>61</sup> However, when we look at the data there are a number of conclusions that leap out.

First, there is general agreement that pleading requirements must be universally understood and susceptible to fair and consistent judicial application.<sup>62</sup> Second, there is a recognition that pleadings bear directly on discovery, and some commentators and respondents suggest that the way to narrow the issues at an early point in the litigation and control the scope and

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55. *Id.* at 7-12.

56. *Id.* at 12-17.

57. *Id.* at 17-18.

58. *Id.* at 18-24.

59. See Advisory Committee on Civil Rules, *supra* note 1.

60. See Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009), Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009).

61. *Id.*

62. PACER STUDY, *supra* note 33, at 1-2.

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cost of discovery is through tighter pleading standards.<sup>63</sup> The survey respondents tend to think that notice pleading (both the complaint and the answer) does *not* reveal facts early in the case.<sup>64</sup> However, the question of what the appropriate solution to that problem might be garners much more disagreement.

Lawyers from a state that has fact-based pleading, such as Oregon, believe that it does narrow the issues early in the case and increases efficiency.<sup>65</sup> In the nationwide surveys, there is more of a split: the ACTL<sup>66</sup> and ABA<sup>67</sup> surveys both reported more defense attorneys than plaintiffs' attorneys who think that fact pleading would narrow the scope of discovery. The two central concerns in this area are whether fact-based pleading would prevent access to the courts—slam the doors of the courthouse on meritorious plaintiffs—and whether fact-based pleading would increase motions to dismiss practice.<sup>68</sup> The Institute and the ACTL Task Force have recently put out a supplemental paper clarifying that our intent in suggesting fact-based pleading as part of the solution is not to suggest a sufficiency standard, but rather to suggest a way of fleshing out the issues at an earlier point in the litigation.<sup>69</sup> Indeed, that supplemental paper makes the point that motions to dismiss should *not* be entertained, and amendment should be liberally allowed.<sup>70</sup> When we move to the question of whether motions to dismiss in fact increase under a fact-based pleading standard, the answer appears to be “no.” The Institute’s Oregon Case Processing Study, which studied cases in Portland’s state court versus the comparable federal court, suggests that not to be true.<sup>71</sup> So, some reevaluation of what both parties must plead in the complaint and in the answer in order to begin the search for the truth with transparency and completeness is in order.

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63. *Id.* at 15.

64. *Id.* at 2-3; ACTL/IAALS INTERIM REPORT, *supra* note 6, at 4.

65. OREGON BENCH & BAR SURVEY, *supra* note 25, at 15-16.

66. ACTL/IAALS FINAL REPORT, *supra* note 8, at 5.

67. ABA LITIGATION SURVEY, *supra* note 6, 39.

68. ACTL/IAALS INTERIM REPORT, *supra* note 6, at A-3.

69. AMERICAN COLLEGE OF TRIAL LAWYERS & INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, REPORT FROM THE TASK FORCE ON DISCOVERY AND CIVIL JUSTICE OF THE AMERICAN COLLEGE OF TRIAL LAWYERS AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM TO THE 2010 CIVIL LITIGATION CONFERENCE 6-7 (2010), [http://www.du.edu/legalinstitute/pubs/2010Conference\\_CivilLitigation.pdf](http://www.du.edu/legalinstitute/pubs/2010Conference_CivilLitigation.pdf) [hereinafter ACTL/IAALS REPORT TO 2010 CONFERENCE].

70. *See id.* at 5.

71. OJIN STUDY, *supra* note 27, at 2.

## 2. Discovery

When we turn to discovery, the conference papers and empirical data concerning discovery suggest an eclectic picture of the discovery phase. For some, discovery lies at the heart of the problems associated with civil litigation, fueling disproportionate costs, long delays, and unnecessary motion practice.<sup>72</sup> For others, discovery is much ado about nothing; a problem limited to a small percentage of high-stakes cases, and in any event nothing that cannot be handled through attorney cooperation, judicial management, and sanctions.<sup>73</sup> A careful look at the conference materials demonstrates that, in fact, both views have some grounding.<sup>74</sup>

Initially, it should come as no surprise to anyone familiar with the civil justice system that not every case encounters discovery or discovery disputes. Some cases never reach the discovery phase, settling or being dismissed before the discovery process kicks in. Other cases have relatively limited discovery, either because there is not much to discover, or because the parties do not dispute the exchange of the relevant facts. It is not enough, however, simply to note that some cases do not experience discovery; the real question is why. From an access perspective, failure to conduct discovery because the parties settled or otherwise disposed of the case on the merits without the need for discovery is an acceptable result, but settlement motivated by fear of discovery's toll on the parties—financial, emotional, or otherwise—is not. Discovery, in other words, should drive the parties toward a fair resolution rather than inhibit it.

There is, in fact, significant consensus in the empirical studies that the cost of discovery is a potentially dangerous tool influencing settlement decisions.<sup>75</sup> Especially with respect to small cases, many of the groups surveyed indicated very strong agreement that litigation costs, including discovery costs, are not proportionate to the value of the case.<sup>76</sup> Furthermore, there is strong consensus among the surveyed groups that neither attorneys nor judges are doing enough to enforce existing proportionality limitations.<sup>77</sup> Perhaps most telling, strong majorities of both the plaintiffs' bar and the defense bar think that discovery simply costs too much.<sup>78</sup>

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72. ACTL/IAALS FINAL REPORT, *supra* note 8, at 7-12.

73. *Id.*

74. *Id.*

75. *Id.* at 2.

76. GENERAL COUNSEL SURVEY, *supra* note 32, at 19.

77. *Id.* at 3.

78. *See generally* ACTL/IAALS FINAL REPORT, *supra* note 8, at 10.

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Many of the conference papers and surveys have teased out the causes of problematic discovery. They include: (1) the opposing party's ability to exploit an imbalance of information (primarily against plaintiffs) or an imbalance of cost (primarily against defendants);<sup>79</sup> (2) differing expectations about e-discovery obligations;<sup>80</sup> (3) failure to create a sense of proportionality in discovery requests and responses;<sup>81</sup> (4) no credible threat of sanctions or other punishments for unethical discovery behavior;<sup>82</sup> and (5) the propensity to view discovery as an end in itself rather than as a means to an end, resulting in the discovery process approximating a negotiation rather than a fact-finding process.<sup>83</sup> Some of these problems are behavioral and some are structural. Often they work in combination to exacerbate frustration with discovery.

Almost every civil justice reform effort that we have studied has proposed solutions tailored to problems with discovery. Many of those proposed solutions are already in use in some states and in selected federal district courts. Among these possible solutions are: (1) self-executing automatic discovery or disclosure;<sup>84</sup> (2) limits on the use of discovery tools;<sup>85</sup> (3) close judicial management of discovery to ensure proportionality;<sup>86</sup> (4) more specific rules on preservation and exchange of electronically stored information;<sup>87</sup> and (5) a more robust sanctions regime.<sup>88</sup>

We have studied one state in which many of those changes are in place—Arizona. The data from that study demonstrates that after a period of acclimatization, those solutions appear to work.<sup>89</sup>

The Duke Conference materials highlight the fact that there is agreement that discovery can be abusive and entail disproportional costs in some or many cases. However, there is disagreement as to whether rules

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79. ABA LITIGATION SURVEY, *supra* note 6, at 58-59.

80. ACTL/IAALS FINAL REPORT, *supra* note 8, at 12-13.

81. ABA LITIGATION SURVEY, *supra* note 6, at 67.

82. *Id.* at 54.

83. NELA SURVEY, *supra* note 29, at 77.

84. ARIZONA BENCH & BAR SURVEY, *supra* note 24, at 29.

85. *Id.* at 32-35.

86. OREGON BENCH & BAR SURVEY, *supra* note 25, at 52-54.

87. FULBRIGHT & JAWORSKI L.L.P., FULBRIGHT'S 6TH ANNUAL LITIGATION TRENDS SURVEY REPORT 62 (2009), <http://amlawdaily.typepad.com/fulbrightreport2009.pdf> [hereinafter FULBRIGHT SURVEY].

88. ARIZONA BENCH & BAR SURVEY, *supra* note 24, at 42-43.

89. *Id.* at 51-52.

changes can or should attempt to remedy those problems, or whether they should be cured by early and consistent judicial management.<sup>90</sup>

### 3. Judicial Management of Cases

One area in which there seems to be quite a bit of agreement is increasing judicial involvement in civil cases from an early stage.<sup>91</sup> The surveys strongly support having a single judicial officer assigned to a case from filing to final disposition, and most survey respondents felt that an initial pretrial conference helps inform the court of the issues at stake and ultimately narrows the issues in contention.<sup>92</sup>

There is also broad support for prioritizing the resolution of motions that will move a case to resolution more quickly. Most survey respondents across the board agree that judges fail to rule on summary judgment motions promptly.<sup>93</sup> And our institute's federal docket study demonstrated that even when summary judgment motions are denied, 40% of cases settle within ninety days after the ruling.<sup>94</sup> Early judicial involvement and judicial attention to dispositive motions are widely accepted as an important part of the solution.

### 4. Summary Judgment

The remaining major focus of the conference materials is summary judgment. The surveys, empirical studies, and commentary presented for the 2010 conference are divided as to whether the motivation behind most summary judgment motions remains a good faith effort to narrow the disputed issues in advance of trial.<sup>95</sup> However, there is a much stronger and more uniform suggestion that the *impact* of filing a summary judgment motion is to drive the parties toward settlement.

Judge Higginbotham stated as much in his conference paper, noting the growth of a new shared culture in which fewer trials, fewer lawyers with trial experience, and fewer judges taking the bench with trial experience are tied to the presumption that civil cases are to be resolved either by summary judgment or by settlement.<sup>96</sup> The IAALS federal docket study provides

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90. See ABA LITIGATION SURVEY, *supra* note 6, at 51-54, 64-65.

91. ACTL/IAALS FINAL REPORT, *supra* note 8, at 2.

92. *Id.* at 18-19.

93. *Id.* at 22-23.

94. PACER STUDY, *supra* note 33, at 7.

95. ACTL/IAALS FINAL REPORT, *supra* note 8, at 18.

96. Patrick E. Higginbotham, The Present Plight of the U.S. District Courts 10 (May 10, 2010) (paper presented at Duke Law Journal 2010 Litigation Review Conference).

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strong empirical support for Judge Higginbotham's observation. Of 743 cases in which a summary judgment motion was denied in its entirety, "24.2% still terminated within 30 days of the ruling and nearly 40% terminated within 90 days of the ruling."<sup>97</sup> Similarly, of 396 cases in the IAALS study in which a motion for summary judgment was granted only in part, more than 15% terminated within thirty days of the ruling and more than one-third terminated within ninety days of the ruling.<sup>98</sup> The IAALS study concluded that "these figures strongly suggest that the parties look to the court to provide answers that affect settlement discussions."<sup>99</sup>

Once again, recent empirical studies shine some light on how time-consuming and expensive summary judgment practice can be. The IAALS federal docket study found that across eight federal district courts the median time from filing to ruling on summary judgment motions was 126 days—and in many districts the median time was considerably longer.<sup>100</sup> The IAALS study also confirmed that the case types with the highest rates of summary judgment filings were (in descending order): constitutionality of state statutes, environmental matters, the Freedom of Information Act, patent, property damage, product liability, foreclosure, antitrust, and insurance.<sup>101</sup> The considerable time taken to prepare, argue, and rule on summary judgment motions is joined by a considerable increase in costs to all parties. The FJC's recent multivariate analysis of litigation costs in civil cases determined that any ruling on a summary judgment motion was associated with plaintiffs' reported costs increasing by approximately 24% and defendants' reported costs increasing by approximately 22%, controlling for all other factors.<sup>102</sup>

One last note that relates to summary judgment: in Oregon, where fact-based pleading is in place and where disclosure and discovery of experts is not required, summary judgment motions can be defeated by an affidavit from opposing counsel averring that an expert will testify to a particular disputed issue.<sup>103</sup> As a result, summary judgment practice is a less significant procedure in that court.

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97. PACER STUDY, *supra* note 33, at 52.

98. *Id.*

99. *Id.*

100. *Id.* at 51.

101. *Id.* at 50.

102. FJC MULTIVARIATE ANALYSIS, *supra* note 40, at 6, 8.

103. OR. R. CIV. P. 46(e).

#### IV. PILOT PROJECTS

From our point of view the best news is that these principles, reports, and papers are not gathering dust on a shelf. During this past year pilot projects to test these principles have been put in place in both federal and state courts, and other courts are developing pilot projects even before the Duke conference. I will discuss the pilot projects in more detail in this afternoon's panel discussion, but briefly, the projects include:

- The Business Litigation Session (BLS) Pilot Project in Suffolk County Superior Court, Massachusetts, is a voluntary project experimenting with case management and proportionality principles.<sup>104</sup>
- The Seventh Circuit Electronic Discovery Pilot Program in Illinois, effective October 2009, includes early and informal information exchange on commonly encountered issues relating to evidence preservation and discovery as required by Rule 26(f)(2).<sup>105</sup>
- The Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules Project will be launched in October 2010 in Strafford and Carroll County Superior Courts, New Hampshire. They implement five changes to the Superior Court pleading and discovery rules, including replacing notice pleading with fact-based pleading, requiring early initial disclosures after which only limited additional discovery should be permitted, and assignment of a single judge to each case who will stay with the case through its termination.<sup>106</sup>

The National Center for State Courts will be measuring some of these pilot projects and publishing the data derived from those measurements so we can all learn from one another's mistakes and successes.

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104. Press Release, Massachusetts Court System, Superior Court Implements Discovery Pilot Project (December 1, 2009), *available at* <http://www.mass.gov/courts/press/pr120109.html>.

105. SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM COMMITTEE, SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM: REPORT ON PHASE ONE 18 (2010), <http://www.du.edu/legalinstitute/pdf/Chicago.pdf>.

106. N.H. SUP. CT., SUPERIOR COURT PAD PILOT RULES - PROPORTIONAL DISCOVERY/AUTOMATIC DISCLOSURE PILOT PROJECT FOR CARROLL AND STRAFFORD COUNTY SUPERIOR COURTS 2-11 (2010).

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## V. CONCLUSIONS

Let me summarize where we are: there is dissatisfaction with our civil justice system that is broad and deep. However, as we move into this fertile environment where jurisdictions are experimenting and considering alternatives, we must all be very mindful of our obligations to the system. This country functions the way it does because we have a court system that promises justice for all which should be accessible for the resolution of disputes in a trusted and trustworthy way. As we negotiate and advocate for change, we must keep our eye firmly fixed on creating a level playing field—a system in which each of us could find ourselves as a plaintiff or as a defendant and be assured of procedural fairness. Now is not the time to line up behind old banners and square off against one another. Now is the time to put our most creative and balanced ideas into the mix.

Hopefully, what will come out of the 2010 Conference is a continuing mandate for the collection of data about reforms in place, and a vehicle for carrying the process of considering changes to the Federal Rules to the next level. Meanwhile, the states will continue to act as laboratories and that data will inform the national discussion.

We live in an exciting time. It is ripe with opportunity and responsibility. May we look back in ten years with pride and celebrate the achievement of a better system. Thank you.

## APPENDIX A

### SUMMARY OF EMPIRICAL STUDIES

#### *IAALS/ACTL Survey of Fellows of the American College of Trial Lawyers*

As part of a joint project, the ACTL Task Force on Discovery and Civil Justice and IAALS designed and conducted a survey of ACTL Fellows to determine whether there are problems in the civil justice system and, if so, to determine their dimensions.<sup>107</sup> The survey was administered from late April to late May of 2008, and garnered 1,490 valid responses (a response rate of over 40%).<sup>108</sup>

#### *IAALS Civil Case Processing in the Federal District Courts: A 21st Century Analysis*

IAALS conducted a civil case processing study in federal district courts by examining docket data from nearly 7,700 civil cases that closed in eight districts between October 1, 2005, and September 30, 2006.<sup>109</sup> This study is sometimes called the “PACER Report,” based on the name of the system from which the information was obtained.

#### *FJC National Case-Based Rules Survey*

The FJC conducted a national survey of attorneys listed as counsel in federal civil cases terminated in the last quarter of 2008, with a response rate of 47%.<sup>110</sup> Most questions focused on experiences in the recently terminated “subject” case; some questions addressed general opinions.<sup>111</sup> In many respects, this survey paralleled the one administered in 1997.

#### *ABA Section of Litigation Survey*

The ABA Litigation Section surveyed its members about their practice and satisfaction with the current system, using a variation of the ACTL Fellows Survey instrument.<sup>112</sup> The FJC administered the survey from late

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107. ACTL/IAALS REPORT TO 2010 CONFERENCE, *supra* note 69, at 1-2.

108. *Id.* at 2.

109. PACER STUDY, *supra* note 33, at 2.

110. FJC CIVIL RULES SURVEY, *supra* note 30, at 5.

111. *See id.*

112. *See* ABA LITIGATION SURVEY, *supra* note 6, at 1-3.

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July to early September of 2009 and received approximately 3,300 responses.<sup>113</sup>

*National Employment Lawyers Association Survey*

The FJC conducted a survey of members of the National Employment Lawyers Association in October and November of 2009, also using a survey instrument adapted from the ACTL Fellows Survey.<sup>114</sup> Approximately 300 individuals responded.<sup>115</sup>

*IAALS Survey of the Arizona Bench and Bar on the Arizona Rules of Civil Procedure*

In September of 2009, IAALS surveyed judges and attorneys with civil litigation experience in Arizona Superior Court, to examine the innovative aspects of the Arizona Rules of Civil Procedure.<sup>116</sup> IAALS received 767 responses.<sup>117</sup>

*IAALS Survey of the Oregon Bench and Bar on the Oregon Rules of Civil Procedure*

In September and October of 2009, IAALS surveyed judges and attorneys with civil litigation experience in Oregon Circuit Court, to examine the unique aspects of the Oregon Rules of Civil Procedure.<sup>118</sup> IAALS received 485 responses.<sup>119</sup>

*IAALS Civil Case Processing in the Oregon Courts: An Analysis of Multnomah County*

IAALS conducted a civil case processing study in Oregon state court by examining docket data from 500 contract and tort cases in Multnomah County Circuit Court that closed between October 1, 2005 and September

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113. *Id.* at 1.

114. NELA SURVEY, *supra* note 29, at 3.

115. *Id.*

116. ARIZONA BENCH & BAR SURVEY, *supra* note 24, at 4.

117. *Id.* at 7.

118. OREGON BENCH & BAR SURVEY, *supra* note 25, at 6.

119. *Id.* at 7.

30, 2006 (the same timeframe as the PACER study).<sup>120</sup> Because IAALS obtained the information from the Oregon Judicial Information Network, the study is sometimes called the “OJIN Report.”<sup>121</sup>

*IAALS Civil Litigation Survey of Chief Legal Officers and General Counsel*

From November 2009 to January 2010, IAALS conducted a survey of Chief Legal Officers and General Counsel belonging to the Association of Corporate Counsel—one per company—in an effort to capture how businesses experience the American civil justice process.<sup>122</sup> IAALS received 367 responses from representatives of companies averaging one or more civil cases per year in the last five years.<sup>123</sup>

*Fulbright & Jaworski’s 6th Annual Litigation Trends Survey Report*

The law firm of Fulbright & Jaworski commissioned an independent research firm to survey senior corporate counsel about litigation and related matters, including expectations for the future.<sup>124</sup> There were 408 responses (about two-thirds from U.S. companies and one-third from U.K. companies).<sup>125</sup>

*E-Discovery Trends: E-Discovery Findings from the 2005-2009 Fulbright & Jaworski Litigation Trends Survey*

Fulbright & Jaworski compiled and summarized five years of responses to e-discovery and information management questions, asked as part of its annual litigation trends survey.<sup>126</sup>

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120. OJIN STUDY, *supra* note 27, at 2.

121. *Id.*

122. See GENERAL COUNSEL SURVEY, *supra* note 32, at 1.

123. *Id.* at 8.

124. FULBRIGHT SURVEY, *supra* note 87, at 2.

125. *Id.* at 5.

126. FULBRIGHT & JAWORSKI L.L.P., E-DISCOVERY TRENDS: E-DISCOVERY FINDINGS FROM THE 2005-2009 FULBRIGHT & JAWORSKI LITIGATION TRENDS SURVEY 1 (2009), [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\\$defaultview/F873BA28DC4854F38525767E004A4F9A/\\$File/Fulbright%27s%20E-Discovery%20Trends.pdf?OpenElement](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/F873BA28DC4854F38525767E004A4F9A/$File/Fulbright%27s%20E-Discovery%20Trends.pdf?OpenElement) (hereinafter FULBRIGHT E-DISCOVERY TRENDS).

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## APPENDIX B

### I. STATUS OF THE CIVIL JUSTICE SYSTEM

**System takes too long: MODERATE CONSENSUS.** Majorities in every survey indicated agreement with the proposition that the civil justice system takes too long, but those majorities were not as strong as in other areas. Sixty-nine percent of ACTL Fellows<sup>127</sup> and 90% of in-house counsel<sup>128</sup> agreed generally with that proposition. Interestingly, majorities in both Arizona<sup>129</sup> (70%) and Oregon<sup>130</sup> (52%) felt that their state courts take too long. In the ACTL, ABA, and NELA surveys discovery was universally the most common reason cited for delays. The PACER study found that the overall mean time to disposition for civil cases (discounting procedurally atypical cases like prisoner petitions and student loan cases) was just under one full year.<sup>131</sup>

**System works for some case types but not others: WEAK CONSENSUS.** Only the ACTL survey asked this question directly, and 63% of respondents agreed. However, the PACER study provides support for the notion that some case types are much more prone to delay, motion practice, and continuances of major deadlines than other case types.<sup>132</sup> In particular, antitrust, environmental, patent, securities, stockholder suits, torts to land, and several categories of civil rights actions tended to far outpace the mean with respect to two or more of the following categories: overall time to disposition, filing rate of disputed discovery motions, filing rate of summary judgment motions, discovery deadline continuances, and dispositive motion deadline continuances.<sup>133</sup> Although the question was not asked directly, comments to the Arizona survey suggest a preference for multiple tracks,<sup>134</sup> and comments to the General Counsel survey suggest a preference for specialized business courts.<sup>135</sup>

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127. ACTL/IAALS REPORT TO 2010 CONFERENCE, *supra* note 69, at 2.

128. GENERAL COUNSEL SURVEY, *supra* note 32, at 1.

129. ARIZONA BENCH & BAR SURVEY, *supra* note 24, at 3.

130. OREGON BENCH & BAR SURVEY, *supra* note 25, at 54.

131. PACER STUDY, *supra* note 33, at 4.

132. *See id.*

133. *See id.*

134. *See* ARIZONA BENCH & BAR SURVEY, *supra* note 24, at 45-46.

135. *See* GENERAL COUNSEL SURVEY, *supra* note 32, at 2.

**Current rules not conducive to meeting the goals of Rule 1: NO CLEAR CONSENSUS.** Only a minority of ACTL Fellows<sup>136</sup> (35%) and NELA respondents (40%) believe that the FRCP are conducive to meeting the goals of a “just, speedy[,] and inexpensive” determination.<sup>137</sup> However, a majority of ABA respondents (63%) do believe that the Rules are conducive to these goals.<sup>138</sup>

**System/Rules are too complex: WEAK CONSENSUS AGAINST.** Most survey respondents indicated that they do *not* believe that the civil justice system or the Rules are too complex. Only the General Counsel survey respondents had a majority (55%) indicate this belief.<sup>139</sup> To the extent complexity can be measured by motion practice, the PACER study found that certain case types are much more prone to disputed discovery motions and summary judgment motions than an average civil case.<sup>140</sup> In three case types—antitrust, patent, and torts to land—the rate of disputed discovery motions and summary judgment motions were more than twice the average for the overall study.<sup>141</sup>

## II. SYNTHESIS PAPER: CONCLUSIONS ON CONSENSUS REGARDING PRINCIPLES

### A. *General Principles*

**Re-examine “one size fits all”: NO CLEAR CONSENSUS.** Sixty-three percent of the ACTL Fellows agreed that the civil justice system works well for some case types but not for others, but no other survey addressed this issue specifically.<sup>142</sup> Only about 49% of ACTL Fellows,<sup>143</sup> 39% of ABA respondents,<sup>144</sup> and 39% of NELA respondents<sup>145</sup> agreed that one set of rules cannot accommodate every case type. At the same time, several conference papers suggest that there are differences between small and large cases. Large cases are believed to be the most prone to delay, cost, and discovery

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136. See ACTL/IAALS INTERIM REPORT, *supra* note 6, at A-2.

137. See NELA SURVEY, *supra* note 29, at 9.

138. ABA LITIGATION SURVEY, *supra* note 6, at 19.

139. GENERAL COUNSEL SURVEY, *supra* note 32, at 17.

140. PACER STUDY, *supra* note 33, at 44-45, 97-100.

141. *Id.* at 44.

142. ACTL/IAALS INTERIM REPORT, *supra* note 6, at A-2.

143. See *id.* at A-3.

144. ABA LITIGATION SURVEY, *supra* note 6, at 31.

145. NELA SURVEY, *supra* note 29, at 26.

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abuse, but small cases are more likely to see costs that are disproportionate to the overall value of the case.

*B. Pleading Principles*

**Notice pleading should be replaced by fact-based pleading: CONSENSUS ON SOME ISSUES.** There is a fairly strong divide between plaintiffs and defendants with respect to perceptions about pleading, although there are areas of general agreement. Significant majorities in both the ABA<sup>146</sup> and ACTL<sup>147</sup> surveys do not agree that the answer in notice pleading shapes and narrows the issues. The FJC survey shows that both plaintiff and defense attorneys most commonly believe that issues are adequately framed in a typical case after fact discovery. There is also considerable agreement in the ABA<sup>148</sup> and ACTL<sup>149</sup> surveys that motions to dismiss are not effective tools to narrow litigation.

As for issue-narrowing, discovery, and overall efficiency, there was no clear consensus. In the ABA<sup>150</sup> and ACTL<sup>151</sup> surveys, those primarily representing defendants or both parties equally largely agreed that notice pleading needed extensive discovery to narrow the issues, and that fact-based pleading could narrow the scope of discovery. Those primarily representing plaintiffs disagreed—more so in the ABA survey.<sup>152</sup> The majority of respondents in the Oregon survey indicated that fact pleading reveals facts early, narrows issues early, increases the ability to prepare for trial, increases efficiency, decreases or has no effect on cost and time to disposition, and increases or has no effect on fairness.<sup>153</sup> Oregon was the only survey that asked about direct experience under a fact-based pleading system.<sup>154</sup> The OJIN study supported the Oregon survey, finding that motions to dismiss and motions on disputed discovery were filed at much lower rates and granted at lower rates in state courts than in federal courts.<sup>155</sup>

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146. ABA LITIGATION SURVEY, *supra* note 6, at 37.

147. ACTL/IAALS INTERIM REPORT, *supra* note 6, at 4.

148. ABA LITIGATION SURVEY, *supra* note 6, at 41.

149. ACTL/IAALS INTERIM REPORT, *supra* note 6, at 4.

150. ABA LITIGATION SURVEY, *supra* note 6, at 38.

151. *See* ACTL/IAALS INTERIM REPORT, *supra* note 6, at A-3.

152. ABA LITIGATION SURVEY, *supra* note 6, at 38.

153. OREGON BENCH & BAR SURVEY, *supra* note 25, at 15-16.

154. *See id.*

155. OJIN STUDY, *supra* note 27, at 23-25.

*Twombly*<sup>156</sup> and *Iqbal*<sup>157</sup> are not the same as fact-based pleading, but there is some agreement as to the ramifications of those cases as well. Most NELA survey respondents indicated that they have beefed up their complaints, although only 7% indicated that one of their employment discrimination complaints has been dismissed under the *Twombly* and *Iqbal* framework.<sup>158</sup> The PACER report shows that prior to *Twombly*, the filing rate for Rule 12 motions in employment discrimination cases was actually quite low.<sup>159</sup>

Still, there is generalized concern about “heightened pleading” standards. The FJC survey found that a majority of plaintiff attorneys and 40% of defense attorneys believe that a generic heightened standard would discourage some claims from being filed, and found a significant split between plaintiff and defense lawyers as to whether they believe that a generic heightened standard would help narrow issues early or add disproportionate burden.<sup>160</sup>

**Summary procedure prior to discovery: NO EVIDENCE.** The surveys and studies do not address this issue directly.

### C. Discovery Principles

**Proportionality: STRONG CONSENSUS THAT COSTS ARE DISPROPORTIONATE, ESPECIALLY AS TO SMALL CASES.** Sixty-nine percent of ACTL Fellows agreed that litigation costs are not proportionate to the value of the case.<sup>161</sup> The ABA<sup>162</sup> and NELA<sup>163</sup> broke that question into small and large cases and overwhelming majorities in both surveys agreed that costs were disproportionate in small cases, and 40% of respondents in both surveys felt the same way about large cases. About one-quarter of FJC study respondents said that discovery costs too much relative to the stakes in their specific closed case.<sup>164</sup> Finally, three-quarters of respondents to the ABA<sup>165</sup> and ACTL<sup>166</sup> surveys agreed that discovery costs

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156. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

157. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

158. NELA SURVEY, *supra* note 29, at 10.

159. *See* PACER STUDY, *supra* note 33, at 97.

160. FJC CIVIL RULES SURVEY, *supra* note 30, at 48-53.

161. *See* ACTL/IAALS INTERIM REPORT, *supra* note 6, at 1 n.1.

162. ABA LITIGATION SURVEY, *supra* note 6, at 140-41.

163. NELA SURVEY, *supra* note 29, at 13, 42.

164. *See* FJC CIVIL RULES SURVEY, *supra* note 30, at 28.

165. ABA LITIGATION SURVEY, *supra* note 6, at 91.

166. ACTL/IAALS FINAL REPORT, *supra* note 8, at 16.

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have increased disproportionately because of e-discovery (and General Counsel<sup>167</sup> survey comments echoed that sentiment), although only 35% of NELA respondents<sup>168</sup> felt the same way.

**Early production of documents to support claims and defenses: STRONG CONSENSUS THAT CURRENT INITIAL DISCLOSURES DO NOT WORK; NO CONSENSUS ON ADDITIONAL OR REVISED EARLY DISCLOSURES.** No more than 35% of respondents in any of the ABA,<sup>169</sup> ACTL,<sup>170</sup> or NELA<sup>171</sup> surveys agreed that the current Rule 26(a)(1) governing initial disclosures reduces the total amount of discovery or saves the client money. Arizona practitioners were evenly divided on whether that state's mandatory initial disclosures reduce the total amount of discovery, but 70% agree that such disclosures help narrow the issues earlier.<sup>172</sup> A plurality of the Arizona respondents indicated a preference for the state's forty-day mandatory initial disclosure rule.<sup>173</sup> However, FJC survey respondents were lukewarm to the idea of revising rules to require additional mandatory disclosures, with 55% of plaintiffs' lawyers and 33% of defense lawyers supporting the idea.<sup>174</sup>

**Limit discovery to that which proves or disproves claims, or will be used to impeach a witness: NO EVIDENCE.** The surveys and studies do not address this issue directly.

**Early disclosure of prospective trial witnesses: NO EVIDENCE.** The surveys and studies do not address this issue directly.

**Limited discovery after initial disclosures: STRONG CONSENSUS THAT COURTS AND PARTIES ARE NOT LIMITING DISCOVERY ON THEIR OWN, BUT NO CONSENSUS ON ACTUAL RULES LIMITATIONS.** At least 70% of respondents in each of the ABA,<sup>175</sup>

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167. See GENERAL COUNSEL SURVEY, *supra* note 32, at 30.

168. NELA SURVEY, *supra* note 29, at 36.

169. ABA LITIGATION SURVEY, *supra* note 6, at 43-44.

170. ACTL/IAALS FINAL REPORT, *supra* note 8, at 7.

171. NELA SURVEY, *supra* note 29, at 29.

172. ARIZONA BENCH & BAR SURVEY, *supra* note 24, at 19.

173. *Id.* at 21.

174. FJC CIVIL RULES SURVEY, *supra* note 30, at 64.

175. ABA LITIGATION SURVEY, *supra* note 6, at 138.

ACTL,<sup>176</sup> and NELA<sup>177</sup> surveys agreed that discovery is too expensive. In those same surveys, 54%–74% of respondents agreed that counsel typically do not request discovery limits, and 61%–76% of respondents believe that judges do not enforce proportionality limitations on their own.<sup>178</sup> Furthermore, 45%–65% of respondents in those surveys as well as the FJC survey agreed that discovery is abused in almost every case.<sup>179</sup> Between 51%–71% of respondents in the four surveys agree that discovery is used as a tool to force settlement.<sup>180</sup>

With respect to concrete limitations on discovery, however, attorneys' reactions are more mixed. In the FJC survey, 71% of respondents disagreed with revising the rules to limit discovery generally, although there was more support for rules to limit e-discovery (especially among attorneys who primarily represent defendants or who represent both defendants and plaintiffs).<sup>181</sup> The Arizona respondents generally indicated that they would not modify the state's existing limits, although respondents were split on whether to keep or raise the state's limit of ten requests for production.<sup>182</sup> Several Oregon respondents noted a desire for fact interrogatories and at least some basic expert discovery.<sup>183</sup>

**Limit requests for admission and contention interrogatories: STRONG CONSENSUS.** More than 60% of Arizona respondents would not raise the state's presumptive limit of twenty-five requests for admission.<sup>184</sup> Oregon attorneys reported across the board that the state's limit of thirty requests for admission has no effect on their ability to prepare for trial, efficiency of the litigation, time to resolution, cost to litigants, or fairness of the process or outcome.<sup>185</sup> In the ACTL<sup>186</sup> and ABA<sup>187</sup> surveys,

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176. ACTL/IAALS REPORT TO 2010 CONFERENCE, *supra* note 69, at 2.

177. NELA SURVEY, *supra* note 29, at 8.

178. ABA LITIGATION SURVEY, *supra* note 6, at 63-65; ACTL/IAALS REPORT TO 2010 CONFERENCE, *supra* note 69, at 2; NELA SURVEY, *supra* note 29, at 11-12.

179. ABA LITIGATION SURVEY, *supra* note 6, at 49; ACTL/IAALS REPORT TO 2010 CONFERENCE, *supra* note 69, at 3; NELA SURVEY, *supra* note 29, at 11; *see* FJC CIVIL RULES SURVEY, *supra* note 30, at 71.

180. ABA LITIGATION SURVEY, *supra* note 6, at 55; ACTL/IAALS REPORT TO 2010 CONFERENCE, *supra* note 69, at 2; NELA SURVEY, *supra* note 29, at 11; FJC CIVIL RULES SURVEY, *supra* note 30, at 33.

181. FJC CIVIL RULES SURVEY, *supra* note 30, at 61-62.

182. ARIZONA BENCH & BAR SURVEY, *supra* note 24, at 26, 34.

183. OREGON BENCH & BAR SURVEY, *supra* note 25, at 36, 39-40.

184. ARIZONA BENCH & BAR SURVEY, *supra* note 24, at 35.

185. OREGON BENCH & BAR SURVEY, *supra* note 25, at 31-33.

186. ACTL/IAALS INTERIM REPORT, *supra* note 6, at A-4.

187. ABA LITIGATION SURVEY, *supra* note 6, at 69-70.

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more than 70% of respondents deemed requests for admission important and cost-effective, but as compared to other discovery tools, requests for admission received the lowest levels of enthusiasm.

**Stay discovery in appropriate cases: MODERATE CONSENSUS AS TO DISCOVERY COST.** The estimated median percentage of litigation costs attributable to discovery in cases that do not go to trial was 70% in each of the ABA, ACTL, and NELA surveys.<sup>188</sup> However, the FJC study found that only 20%–27% of total costs are attributable to discovery.<sup>189</sup> The ABA survey was the only one that asked directly about an automatic stay of discovery pending a motion to dismiss, and there was a significant divide between plaintiff attorneys (17%) agreeing and defense attorneys (77%) agreeing.<sup>190</sup>

**Damages discovery is different: NO EVIDENCE.** The surveys and studies do not address this issue directly.

*D. Expert Witness Principles*

**One expert per party: WEAK CONSENSUS.** Relatively few surveys asked about this issue directly. In the Arizona survey, 77% of respondents said they would not modify the one expert per party rule.<sup>191</sup> One comment in the General Counsel survey also advocated for the one expert rule.<sup>192</sup> Oregon respondents disfavored the practice of no expert discovery, so perhaps the one expert per party rule is a reasonable compromise.<sup>193</sup>

**Expert testimony limited to report: NO CLEAR CONSENSUS.** The ACTL, ABA, and NELA surveys asked about the importance and cost-effectiveness of expert depositions, both when they are limited to the scope

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188. INSTITUTE FOR THE ADVANCEMENT OF THE LEGAL SYSTEM, PRESERVING ACCESS AND IDENTIFYING EXCESS: AREAS OF CONVERGENCE AND CONSENSUS IN THE 2010 CONFERENCE MATERIALS 13 (2010), [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\\$defaultview/7B6B047956592D3A8525771900011F6A/\\$File/IAALS,%20Preserving%20Access%20and%20Identifying%20Excess.pdf?OpenElement](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/7B6B047956592D3A8525771900011F6A/$File/IAALS,%20Preserving%20Access%20and%20Identifying%20Excess.pdf?OpenElement) [hereinafter PRESERVING ACCESS].

189. *Id.*

190. ABA LITIGATION SURVEY, *supra* note 6, at 86.

191. ARIZONA BENCH & BAR SURVEY, *supra* note 24, at 27.

192. GENERAL COUNSEL SURVEY, *supra* note 32, at 42.

193. OREGON BENCH & BAR SURVEY, *supra* note 25, at 37.

of an expert report and when they are not limited to that scope.<sup>194</sup> In each group, expert depositions were deemed more important and more cost-effective when they are not limited.<sup>195</sup> Presumably, depositions limited to the scope of the report are deemed less important and less cost-effective because they merely reiterate what is already known.

*E. Judicial Management Principles*

**Note: As a general matter, the FJC survey found mixed support for increased judicial case management, but neutral or negative reactions to decreased judicial case management.**

**Single judicial officer: STRONG CONSENSUS.** The ABA, ACTL, and NELA surveys asked several questions about early and consistent judicial involvement. In all three surveys, at least 80% of respondents favored having one judicial officer per case from start to finish.<sup>196</sup> Similarly, at least 64% of respondents in each survey agreed that early judicial involvement produces more satisfactory results for the client.<sup>197</sup> The Oregon survey did not ask about a single judicial officer directly, but the most frequent suggestion to improve that system was to assign a single judge to the case.<sup>198</sup> However, survey respondents were less enthusiastic about requiring the judge, who will preside at trial, to handle all pretrial matters (75% ACTL,<sup>199</sup> 65% ABA,<sup>200</sup> 56% NELA<sup>201</sup>), and the PACER study found no clear connection between a single judge resolving discovery disputes and the overall length of the case.<sup>202</sup>

**Early initial pretrial conferences: STRONG CONSENSUS.** Substantial majorities in the ACTL,<sup>203</sup> ABA,<sup>204</sup> and NELA<sup>205</sup> surveys agreed

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194. PRESERVING ACCESS, *supra* note 188, at 19.

195. *Id.*

196. ABA LITIGATION SURVEY, *supra* note 6, at 114; ACTL/IAALS INTERIM REPORT, *supra* note 6, at A-6; NELA SURVEY, *supra* note 29, at 8, 40.

197. ABA LITIGATION SURVEY, *supra* note 6, at 113; ACTL/IAALS INTERIM REPORT, *supra* note 6, at A-6; NELA SURVEY, *supra* note 29, at 40.

198. OREGON BENCH & BAR SURVEY, *supra* note 25, at 62.

199. ACTL/IAALS INTERIM REPORT, *supra* note 6, at A-6.

200. ABA LITIGATION SURVEY, *supra* note 6, at 115.

201. NELA SURVEY, *supra* note 29, at 40.

202. PACER STUDY, *supra* note 33, at 39, 46.

203. ACTL/IAALS INTERIM REPORT, *supra* note 6, at A-6.

204. ABA LITIGATION SURVEY, *supra* note 6, at 111-12.

205. NELA SURVEY, *supra* note 29, at 40.

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that early judicial intervention in the case helps narrow issues and limit discovery. At least 61% of each respondent base agreed that a Rule 16(a) pretrial conference helps to inform the court of the issues in the case.<sup>206</sup> Only about half of each respondent base, however, agreed that the Rule 16(a) conference helps narrow issues by itself.<sup>207</sup> The Arizona survey revealed that 71% respondents thought Rule 16 conferences establish early judicial management of cases, 59% agreed that such conferences improve trial preparation, 62% agreed that the conferences are cost-effective, and 52% agreed that the conferences expedite case dispositions.<sup>208</sup>

**Early firm trial date: WEAK CONSENSUS.** The PACER study found that one of the variables most strongly correlated to overall time to disposition was the elapsed time from the filing of the case to the setting of a trial date.<sup>209</sup> However, survey respondents were less sure. Between 50%–60% of the respondents to the ABA, ACTL, and NELA surveys agreed that the court should set a firm trial date early, and fewer than half agreed that the trial date should be continued only under exceptional circumstances.<sup>210</sup> In Oregon, where there is a one-year trial time requirement for standard civil cases, 78% of respondents agreed that they had adequate preparation time.<sup>211</sup>

**Required conferences/reports on discovery: WEAK CONSENSUS.** In the ACTL, ABA, and NELA surveys, only 48%–60% of respondents agreed that Rule 26(f) conferences were helpful for managing the discovery process.<sup>212</sup> The PACER study suggests that holding a hearing on disputed discovery motions is associated with faster resolutions.<sup>213</sup>

**Mediation/ADR: STRONG CONSENSUS FOR MEDIATION, BUT NOT ARBITRATION.** The ABA, NELA, and General Counsel surveys

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206. ACTL/IAALS INTERIM REPORT, *supra* note 6, at A-6; ABA LITIGATION SURVEY, *supra* note 6, at 123; NELA SURVEY, *supra* note 29, at 41.

207. ACTL/IAALS INTERIM REPORT, *supra* note 6, at A-6; ABA LITIGATION SURVEY, *supra* note 6, at 122; NELA SURVEY, *supra* note 29, at 41.

208. ARIZONA BENCH & BAR SURVEY, *supra* note 24, at 16-17.

209. PACER STUDY, *supra* note 33, at 31.

210. ABA LITIGATION SURVEY, *supra* note 6, at 106, 109; ACTL/IAALS INTERIM REPORT, *supra* note 6, at A-5; NELA SURVEY, *supra* note 29, at 39.

211. OREGON BENCH & BAR SURVEY, *supra* note 25, at 26-27.

212. ACTL/IAALS INTERIM REPORT, *supra* note 6, at A-3; ABA LITIGATION SURVEY, *supra* note 6, at 83; NELA SURVEY, *supra* note 29, at 33.

213. PACER STUDY, *supra* note 33, at 40-43.

asked respondents about cost, time, and fairness of outcomes for mediation and arbitration as compared to litigation. In each survey, respondents strongly believed that mediation lowered cost and time to resolution, and either increased the likelihood of a fair outcome or made no difference as to fairness.<sup>214</sup> Respondents were generally much less supportive of arbitration, with less than 15% of respondents in each survey agreeing that arbitration increased fairness.<sup>215</sup> In Arizona and Oregon, which have mandatory arbitration for many cases under \$50,000 at issue, a majority of respondents in both states indicated that arbitration decreases cost and time to resolution.<sup>216</sup> However, in both states only 8% of respondents agreed that arbitration creates a fairer result.<sup>217</sup>

**Prioritize resolutions of motions that will move case to resolution more quickly: STRONG CONSENSUS.** Between 58%–70% of respondents to the ABA, ACTL, and NELA surveys agreed that courts fail to rule on summary judgment motions promptly.<sup>218</sup> Some comments to the General Counsel survey also suggested earlier and more serious consideration of dispositive motions.<sup>219</sup> The PACER study found wide variation across courts in ruling time on dispositive motions, which ranged from a median time of forty-eight days from filing to ruling in the fastest court to a median time of 191 days from filing to ruling in the slowest.<sup>220</sup> The PACER study also found that nearly 25% of cases in which a summary judgment motion was denied settled within thirty days of the ruling, and 40% settled within ninety days of the ruling.<sup>221</sup>

**Identify all issues to be tried early: NO EVIDENCE.** None of the surveys or studies addressed this principle directly.

**Increase judicial resources where needed: NO EVIDENCE.** None of the surveys addressed this issue directly, although some comments to the

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214. ACTL/IAALS INTERIM REPORT, *supra* note 6, at A-6, A-7; ABA LITIGATION SURVEY, *supra* note 6, at 169-71; NELA SURVEY, *supra* note 29, at 14.

215. ACTL/IAALS INTERIM REPORT, *supra* note 6, at A-6, A-7; ABA LITIGATION SURVEY, *supra* note 6, at 166-68; NELA SURVEY, *supra* note 29, at 15.

216. ARIZONA BENCH & BAR SURVEY, *supra* note 24, at 49-50; OREGON BENCH & BAR SURVEY, *supra* note 25, at 59-60.

217. ARIZONA BENCH & BAR SURVEY, *supra* note 24, at 49-50; OREGON BENCH & BAR SURVEY, *supra* note 25, at 59-60.

218. ABA LITIGATION SURVEY, *supra* note 6, at 102; ACTL/IAALS INTERIM REPORT, *supra* note 6, at A-5; NELA SURVEY, *supra* note 29, at 12.

219. GENERAL COUNSEL SURVEY, *supra* note 32, at 43.

220. PACER STUDY, *supra* note 33, at 51.

221. *Id.* at 52.

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Oregon survey noted that there are not enough resources to satisfy the state's time trial requirement in all jurisdictions.<sup>222</sup>

**Experienced and trained trial judges: STRONG CONSENSUS.** Between 63%–85% of the respondents to the ABA, ACTL, and NELA surveys agreed that individuals with significant trial experience should be chosen as trial judges.<sup>223</sup> Furthermore, 70% of respondents in both the ABA and ACTL surveys who preferred federal court to state court indicated that one reason for their preference was the quality of the federal bench.<sup>224</sup>

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222. OREGON BENCH & BAR SURVEY, *supra* note 25, at 30.

223. ABA LITIGATION SURVEY, *supra* note 6, at 120; ACTL/IAALS INTERIM REPORT, *supra* note 6, at A-6; NELA SURVEY, *supra* note 29, at 13.

224. ABA LITIGATION SURVEY, *supra* note 6, at 16; ACTL/IAALS INTERIM REPORT, *supra* note 6, at A-2.