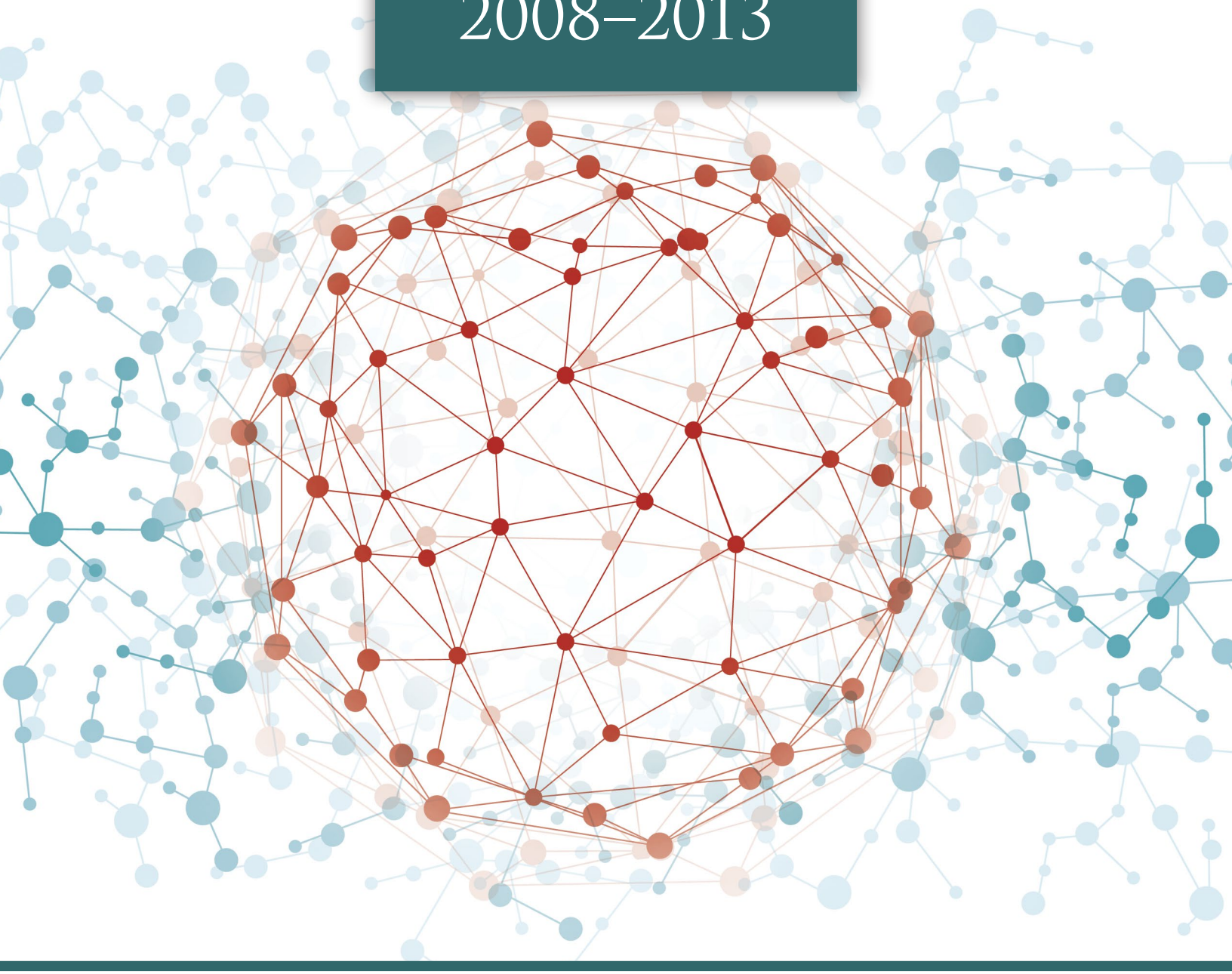
SUMMARY OF EMPIRICAL RESEARCH ON THE CIVIL JUSTICE PROCESS

2008–2013



RULE ONE INITIATIVE

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INSTITUTE for the ADVANCEMENT of the AMERICAN LEGAL SYSTEM
UNIVERSITY of DENVER

SUMMARY OF EMPIRICAL RESEARCH ON THE CIVIL JUSTICE PROCESS: 2008–2013

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IAALS, the Institute for the Advancement of the American Legal System, is a national independent research center at the University of Denver dedicated to continuous improvement of the process and culture of the civil justice system. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications, and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models, and will to advance a more accessible, efficient, and accountable civil justice system.

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Rule One is an initiative of IAALS dedicated to advancing empirically informed models to promote greater accessibility, efficiency, and accountability in the civil justice system. Through comprehensive analysis of existing practices and the collaborative development of recommended models, the *Rule One Initiative* empowers, encourages, and enables continuous improvement in the civil justice process.

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I. INTRODUCTION[1]

In 2007, fueled by concerns over declining access to civil justice, the American College of Trial Lawyers ("ACTL") Task Force on Discovery and Civil Justice ("Task Force"), in partnership with IAALS, embarked on a journey to define and address the problems of delay and cost in the system. While the mission was anything but new,[2] the Task Force met it with new fervor. Each member had counseled countless individuals and businesses leaders who, when facing a legal issue upsetting in its own right, also had to face a difficult choice between walking away from their cause at some point or becoming overwhelmed by the court process. Based on extensive personal experience, it was becoming increasingly clear to the Task Force that the American civil justice system, considered a fundamental aspect of our democracy and a model for the world, struggles to meet the needs of litigants today appropriately, including the needs of our family members, friends, neighbors, shops, restaurants, and charities. It also was becoming increasingly clear that something should—no, *must*—be done about it.

Following extensive background research, a survey of ACTL Fellows, and serious discussion and debate, the Task Force issued a "Final Report" in 2009, containing specific recommendations for improving the civil justice process. The Task Force's work sparked a national conversation about the future of our civil justice system, further research on the litigation process by a number of individuals and organizations, and the establishment of numerous pilot projects in state and federal courts around the country.[3]

These efforts are ongoing, and there is much more research to come in the next few years and beyond. Nevertheless, it is useful to pause and take stock of the data collected, analyzed, and disseminated since 2008, the onset of the Task Force's work. As procedural decision makers look to determine the shape of civil justice to come, they will be asking, "Where do we go from here to shape a just, speedy, and inexpensive process?" In making those decisions, it is critical to ask, "What have we learned in the last five years or so?"

II. SCOPE

This report provides a synthesis of the relevant empirical research on the civil justice process released from 2008 to 2013. In addition to IAALS research, it contains studies conducted by a variety of organizations and individuals, including the Federal Judicial Center, the National Center for State Courts, the RAND Corporation, and others. We, the authors, refer to 39 studies in total, representing a relatively even mix of case file/docket studies and surveys/interviews. Please refer to the included Index of Studies for an annotated list. This being a human endeavor, it is certainly possible that we have missed some relevant research, which we would be happy to incorporate in future editions if brought to our attention. To keep this document manageable, we have limited its scope in the following ways:

1) *Temporally*: By including only the research published since 2008, we necessarily exclude the extensive research predating that time period. We do not discount earlier works, but rather encourage readers to

[1] Much gratitude to Logan Cornett and Caitlin Anderson for their invaluable assistance in making this report a reality.

[2] *See* CARRIE J. MENKEL-MEADOW & BRYANT G. GARTH, CIVIL PROCEDURE AND COURTS, THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 679, 695-701 (Peter Cane & Herbert M. Kritzer, eds., 2010).

[3] IAALS, *Rule One Initiative*, http://iaals.du.edu/initiatives/rule-one-initiative/implementation; *see also* Rebecca Love Kourlis & Brittany K.T. Kauffman, *The American Civil Justice System: From Recommendations to Reform in the 21st Century*, 61 U. KAN. L. REV. 877 (2013).

consider these latest developments in their context. In addition, by ending our review with research released in 2013, we necessarily exclude a number of studies already released in 2014.[4] Although it would have been ideal to include *all* research to date, the practicalities of getting this report to press warranted an earlier cut-off. We encourage readers to use this document as foundation for reading and interpreting subsequent studies.

2) *Geographically*: Because the purpose of this summary is to illuminate what we have learned about the American legal system, we concentrate on research conducted on United States courts, both state and federal. We do so acknowledging the fact that there is much to be learned from studies of common and civil law systems in other countries, but we do not purport to summarize it here.

3) *Substantively*: We focus on the civil justice process, i.e., how a filed case moves through the system to resolution, and do not consider research on how substantive laws affect access to the courts. In addition, while we examine research on various courts and cases, we have not included highly specialized studies of particular case types, such as class actions, patent litigation, or bankruptcy proceedings.

4) *Philosophically*: We summarize data related to how procedures actually operate. On the whole, we have left out broad opinions (e.g., whether the process is too costly) or ideas concerning how it ought to function (e.g., whether attorneys should behave more cooperatively), even if there is broad agreement in these areas. In addition, we refrain from making our own normative judgments about the civil justice system. In short, the authors leave to the readers the hard work of generalizing.

Accordingly, this summary is but one source among many that may be helpful to understanding and improving the civil justice system. Other good resources for relevant literature include the Oxford Handbook of Empirical Legal Research (Cane & Kritzer eds., 2010), the Journal of Empirical Legal Studies (Cornell Law School and Wiley Periodicals, Inc.), and the IAALS *Rule One Initiative* "Research" and "Measurement" sections on our website (http://iaals.du.edu). We also refer readers to the National Center for State Courts (www.ncsc.org) and the Federal Judicial Center (www.fjc.gov).

Finally, the authors offer a word of caution about drawing sweeping conclusions from the data in this summary. Like the proverb about people exploring different parts of an elephant in the dark and coming to their own conclusions about its nature, these studies examine different procedures in different courts and therefore do not necessarily explain the whole system. As Judge Lee H. Rosenthal noted at the IAALS Second Civil Justice Reform Summit, the research sheds important light on dark areas. Nevertheless, it remains to be seen whether we have the whole picture.

All that said, we hope that this document will prove to be an asset to those engaged in the study and improvement of the American civil justice process. To be effective, changes should be empirically based to the extent possible, making the collection and absorption of the research absolutely essential. As empirical research on the civil justice process continues, our intent is to update this publication periodically. All comments and feedback are most welcome.

[4] These include the results of two state projects, as well as a preservation cost study: CORINA GERETY & LOGAN CORNETT, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., PRELIMINARY FINDINGS ON THE COLORADO CIVIL ACCESS PILOT PROJECT (2014); WILLIAM H. J. HUBBARD, PRESERVATION COSTS SURVEY: FINAL REPORT (2014); DEREK P. PULLAN, UTAH SUPREME CT. COMM. ON THE CIVIL RULES OF PROCEDURE, NEW UTAH RULE 26—A BLUEPRINT FOR CIVIL DISCOVERY REFORM UNDER THE FEDERAL RULES (2014).

III. THE RESEARCH

We have structured this summary of empirical research by topic for ease of reference, generally following how a case moves through the civil court process and leaving research that spans all phases for the end. To breathe life into the numbers, concepts, and issues presented by the research, we call upon you to pause and imagine that a new case has just come across your desk. It could be litigated in federal district court, or in a general jurisdiction state court. Depending upon your role, you could be filing, defending, or hearing the case. It could be any standard civil case type. The facts might be complicated or straightforward. The stakes might be high or low. Do you have your imaginary case firmly in mind? Now, let us look to the research to discover what the civil process has in store for it.

A. THE INITIAL PHASE

As the court process commences, what are the considerations for your imaginary case? What pleading standards apply, and what are the implications? Is any party likely to file a motion to dismiss, and if so, what are the chances that it will be granted or denied? Will the judge hold a hearing at this early stage? What information will the parties disclose and what effect will it have on the litigation?

1. PLEADINGS

Research in the area of pleadings has concentrated on the role of notice pleading versus fact-based pleading in focusing the litigation. The subject is one that prompts disagreement between plaintiff and defense lawyers. In two nationwide surveys, a majority of defense attorneys agreed that the notice pleading standard has become a problem because it requires extensive discovery to narrow claims and defenses, while a majority of plaintiff attorneys disagreed with this proposition.[5] Defense attorneys also agreed that fact pleading can narrow the scope of discovery, while plaintiff attorneys tended to disagree.[6] Generally, those who represent plaintiffs and defendants about equally answered consistently with defense attorneys on these issues.[7] There is more agreement when it comes to the question of the utility of the answer. The answer to a complaint in notice pleading jurisdictions is not viewed as particularly useful for the purpose of focusing the litigation, as both plaintiff and defense lawyers consistently disagreed that answers shape and narrow the issues.[8] While there is no consensus among state and federal judges on whether notice pleading requires extensive discovery to narrow the issues, a majority believe that fact pleading is an effective tool to narrow the scope of discovery.[9]

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[5] AM. BAR ASS'N, ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: FULL REPORT 51 (2009) [hereinafter AM. BAR ASS'N , ABA LITIGATION SURVEY]; KIRSTEN BARRETT ET AL., MATHEMATICA POLICY RESEARCH, ACTL CIVIL LITIGATION SURVEY: FINAL REPORT 35-36 and app. C, tbl. IV.I (2008) [hereinafter KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY] (on file with authors).

[6] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 52; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 35 and app. C, tbl. IV.I (it should be noted that 50% of plaintiff attorney respondents agreed with the statement, though the level of disagreement is higher than for defense attorneys).

[7] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 51-52.

[8] AM. BAR ASS'N, ABA LITIGATION SURVEY ABA LITIGATION SURVEY, *supra* note 5, at 50; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 35 and app. C, tbl. IV.I; *see also* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL BELONGING TO THE ASSOCIATION OF CORPORATE COUNSEL 23 (2010) [hereinafter INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., GENERAL COUNSEL SURVEY] (where 73% agreed that notice pleading "prevents the disputed issues from being identified early enough").

[9] CORINA GERETY, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., TRIAL BENCH VIEWS: FINDINGS FROM A NATIONAL SURVEY ON CIVIL PROCEDURE 38-39 (2010) [hereinafter GERETY, STATE AND FEDERAL JUDGE SURVEY].

Research from Oregon is particularly interesting in this context, as Oregon's fact-based pleading rule requires a "plain and concise statement of the ultimate facts constituting the claim for relief without unnecessary repetition."[10] A majority of Oregon survey respondents, including both plaintiff and defense attorneys as well as judges, agreed that this pleading standard reveals "pertinent facts early in the case" and helps to "narrow the issues early in the case," but most did not agree that the standard reduces the volume of discovery.[11] In addition, most respondents indicated that the standard increases counsel's ability to prepare for trial and increases the efficiency of the process,[12] without an adverse impact on time to resolution, litigation costs, or procedural fairness.[13] A majority disagreed that fact pleading generally favors defendants over plaintiffs.[14] Thus, overall, Oregon practitioners find the state's fact-based pleading rule to be beneficial. However, when separated by party represented, there tends to be stronger support for the standard, and belief in its positive effects, by defense attorneys.[15] The interrelationship between fact-based pleading and motions to dismiss is addressed later in this report.

The evaluation of New Hampshire's Proportional Discovery/Automatic Disclosure Pilot Project provides additional insights. The project changed the pleading standard—from a system where plaintiffs file a writ and defendants file an appearance acknowledging suit, with neither providing a factual basis for their claims or defenses—to fact pleading.[16] The rule change resulted in a significant increase in the proportion of cases in which an answer was filed (from 15% to 56% within 120 days of the complaint).[17] There was also a dramatic decrease in the number of cases disposed by default judgment, with the researcher hypothesizing that fact pleading provided defendants with more information on which to contest claims.[18]

The Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*[19] and *Ashcroft v. Iqbal*[20] have added complexity to the area of pleading standards over the last five years, with some debate over the extent to which the "plausibility" standard is a form of fact pleading now applicable in federal and some state courts. Exactly half of federal attorneys surveyed in one study reported changing their pleading practices after *Twombly* and *Iqbal*, while the other half reported that their pleadings practices had not changed.[21] Among those who had changed their pleading standards, there has been a strong shift toward including more factual detail in complaints.[22] A separate survey of attorneys who file employment discrimination cases found that two-thirds of respondents have changed how they structure

[10] OR. R. CIV. P. 18(A).
[11] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SURVEY OF THE OREGON BENCH & BAR ON THE OREGON RULES OF CIVIL PROCEDURE 15-16 (2010) [hereinafter INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON SURVEY].
[12] *Id.* at 18-19.
[13] *Id.* at 19-20.
[14] *Id.* at 16-17.
[15] *Id.* at 15-21.
[16] PAULA HANNAFORD-AGOR, ET AL., NAT'L CTR. FOR STATE COURTS, CIVIL JUSTICE INITIATIVE, NEW HAMPSHIRE: IMPACT OF THE PROPORTIONAL DISCOVERY/AUTOMATIC DISCLOSURE (PAD) PILOT RULES 2 (Aug. 19, 2013) [hereinafter HANNAFORD-AGOR, ET AL., NEW HAMPSHIRE REPORT].
[17] *Id.* at 10.
[18] *Id.* at 17.
[19] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).
[20] *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).
[21] EMERY G. LEE III, FED. JUDICIAL CTR., EARLY STAGES OF LITIGATION ATTORNEY SURVEY: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 8 (2012) [hereinafter LEE, EARLY STAGES OF LITIGATION].
[22] *Id.* at 8.

complaints in federal court, with a similarly high percentage of those respondents adding more factual allegations.[23] There is some question about the extent to which attorneys previously adhered to pure notice pleading in any event,[24] but nevertheless, the research reflects a trend toward including more facts in complaints.

II. RULE 12 MOTIONS

In one study, a solid majority of surveyed attorneys agreed that motions to dismiss for failure to state a claim are not effective tools to limit claims and narrow litigation.[25] That said, a study of cases in federal district courts reflected that a portion of cases settle shortly after a ruling on a motion to dismiss, suggesting that such motions provide information about the strength of claims and defenses.[26]

Multiple scholars have undertaken empirical studies to determine the effect of the Supreme Court's recent pleading jurisprudence on motions to dismiss under Federal Rule of Civil Procedure ("F.R.C.P.") 12(b)(6)—the number filed, the number granted, the number granted but providing leave to amend, and whether there has been a change in dismissal rates for parties or cases.[27] Two early studies of reported decisions in Westlaw concluded that *Twombly* had "at least a slight" upward effect on the likelihood that a 12(b)(6) motion would be granted, particularly in civil rights cases, although these studies did not consider motions granted with leave to amend separately.[28] A third review of Westlaw decisions following *Iqbal* found that motions granted *without* leave to amend declined somewhat while motions granted *with* leave to amend increased.[29] This study demonstrated some variability by case type (particularly constitutional civil rights) and by court (district and circuit), as well as an increased likelihood of dismissal in cases involving *pro se* plaintiffs.[30] However, holding all other variables constant, this study—as well as a robust update—found that a 12(b)(6) motion is more likely to be granted with leave to amend than denied, and more likely to be granted without leave to amend than denied, after *Twombly* and *Iqbal*.[31] These differences reached statistical significance.

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[23] REBECCA M. HAMBURG & MATTHEW C. KOSKI, NAT'L EMP'T LAWYERS ASS'N, SUMMARY OF RESULTS OF FEDERAL JUDICIAL CENTER SURVEY OF NELA MEMBERS, FALL 2009 10-11 (2010) [hereinafter HAMBURG & KOSKI, NELA SURVEY].

[24] *See* THOMAS E. WILLGING & EMERY G. LEE III, FED. JUDICIAL CTR., IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION 27-29 (2010) [hereinafter WILLGING & LEE, IN THEIR WORDS] (reporting attorney views that notice pleading is rare, as most plead with sufficient facts to tell a coherent and persuasive story; in jurisdictions where the state court requires fact pleading, practice in federal court tends to follow this practice).

[25] KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 35.

[26] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21ST CENTURY ANALYSIS 7, 51 (2009) [hereinafter INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., PACER STUDY].

[27] *See, e.g.*, Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553 (2010) [hereinafter Hatamyar, *Tao of Pleading*]; Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011 (2009); Kendall W. Hannon, *Much Ado About Twombly? A Study On the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811 (2008).

[28] *See* Seiner, *supra* note 27, at 1030-31; Hannon, *supra* note 27, at 1836-37; *see also* Hatamyar, *Tao of Pleading*, *supra* note 27, at 599, 606-08.

[29] Hatamyar, *Tao of Pleading*, *supra* note 27, at 598-99.

[30] *Id.* at 604, 606-08, 612-13, 615, 618, 622, 626.

[31] *Id.* at 620-21; Patricia Hatamyar Moore, *An Updated Quantitative Study of* Iqbal*'s Impact on 12(B)(6) Motions*, 46 U. RICH. L. REV. 603, 605-07, 621 (2012).

Looking beyond decisions in Westlaw, one study reviewed motions to dismiss filed in 2006 and 2010 throughout the federal district courts, excluding cases with *pro se* parties.[32] Comparing the two years, there was an increase in case filings, as well as an increase in motions to dismiss, both generally and for failure to state a claim.[33] In raw numbers, this study found that motions granted *without* leave to amend declined while motions granted *with* leave to amend increased.[34] Controlling for identifiable effects unrelated to *Twombly* and *Iqbal*, the study did not find a statistically significant increase in the rate at which 12(b)(6) motions were granted, with or without leave to amend, and no such increase in the rate at which these motions eliminated plaintiffs or terminated cases.[35] Further analysis related to amended complaints (filed in two-thirds of cases where the court granted leave to amend) and follow-up motions to dismiss for failure to state a claim (filed in 60% of cases with an amended complaint) confirmed these results.[36] The authors did note that the increased filing rate of such motions and a stable grant rate may mean an overall increase in the percentage of cases in which motions are granted.[37]

A more recent study of published and unpublished cases retrieved from Westlaw posits that the divergent findings on statistical significance may be due to limitations in the previous studies, which coded whole cases rather than separate claims and failed to distinguish between factual and legal sufficiency as the basis for dismissal.[38] This study found a statistically significant, though modest, increase in the overall dismissal rate from pre-*Twombly* to post-*Iqbal*.[39] The data showed that, although dismissals for factual insufficiency were not permitted pre-*Twombly*, trial courts dismissed on this basis about 25% of the time anyway.[40] Post-*Iqbal*, the factual insufficiency dismissal rate increased, while the legal insufficiency dismissal rate decreased.[41] The author of this study posited that this shift may provide plaintiffs with more opportunities to amend.[42] It is important to note that none of the *Twombly*/*Iqbal* studies have taken into account changes in pleading practice by attorneys in response to these decisions. Rather, they have analyzed only the change in the number of motions filed and the resulting grant/denial rate.

Despite the wealth of empirical data related to *Twombly* and *Iqbal*, it is important to remember that there are other alternatives to notice pleading. In Oregon, a different standard of fact-based pleading does not appear to lead to high amounts of satellite litigation or actual dismissals.[43] Moreover, the courts in that state tend to be flexible, allowing amendments to insufficient pleadings "almost always" or "often," according to a majority of survey respondents.[44]

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[32] JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 5-6 (2011).
[33] *Id.* at 8-11.
[34] *Id.* at 13 (the decline was from 45% in 2006 to 39.7% in 2010; the increase was from 20.9% in 2006 to 35.3% in 2010).
[35] *Id.* at 19, 21. The sole exception to the general findings relates to cases challenging financial instruments such as mortgage loans, which appears to be the result of changes in the housing market and new federal statutes rather than pleading standards. "If such cases had existed in 2006, it is likely that such motions would have been filed and granted at rates similar to those in 2010." *Id.* at 21-22.
[36] JOE S. CECIL ET AL., FED. JUDICIAL CTR., UPDATE ON RESOLUTION OF RULE 12(B)(6) MOTIONS GRANTED WITH LEAVE TO AMEND: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 1, 3 (2011).
[37] *Id.* at 5.
[38] Scott Dodson, *A New Look: Dismissal Rates of Federal Civil Claims*, 96 JUDICATURE 127 (2012).
[39] *Id.* at 134.
[40] *Id.* at 133.
[41] *Id.* at 132-133.
[42] *Id.* at 134.
[43] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON SURVEY, *supra* note 11, at 22-23; *see* OR. R. CIV. P. 18(A) (pleadings asserting a claim must contain "a plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition").
[44] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON SURVEY, *supra* note 11, at 21-22.

III. INITIAL PRETRIAL CONFERENCES

F.R.C.P. 16 and many state counterparts provide that the court may hold a pretrial conference for the purpose of ensuring early case management, expediting the action, discouraging wasteful pretrial activities, improving the quality of trial, facilitating settlement, and discussing a scheduling order.[45] The research illustrates that F.R.C.P. 16 pretrial conferences are regularly held in appropriate cases.[46] Federal court studies show that a substantial portion of cases terminate quickly or are not likely to remain with the court for long, which means that many cases do not have such a conference simply because the case resolves before a F.R.C.P. 16 pretrial conference is held.[47] A majority of federal judges report setting the conference within 60 days of the date of filing,[48] and believe that the sooner it is held the more quickly the case will be resolved.[49] About half of federal pretrial conferences are conducted by a magistrate judge.[50]

There appears to be general agreement among attorneys nationwide that the most important impact of the F.R.C.P. 16(a) initial pretrial conference is to inform the court of the issues in the case, although it can also identify and focus the issues.[51] There is not general agreement among attorneys that the conference has an effect on litigation time[52] or cost,[53] though judges appear to view the effect on litigation time more favorably.[54]

Most federal F.R.C.P. 16(b) scheduling conferences are held in person, but about one-third are held telephonically and about one-tenth are conducted on the papers only.[55] For in-person or telephonic conferences, lead counsel for both parties participate in about 85% of cases.[56] Only one in five federal judges requires party attendance as a matter of course.[57] A solid majority of conferences last 30 minutes or less, and substantive discussion of the case occurs in two-thirds of conferences.[58] Only one-quarter of conferences include a discussion of the proportionality of discovery, with a limitation on discovery imposed in approximately 15% of conferences.[59] Judges are divided between those who routinely discuss electronic discovery, or e-discovery, at the F.R.C.P. 16(b) conference and those

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[45] FED. R. CIV. P. 16(a), (b)(1)(B).
[46] LEE, EARLY STAGES OF LITIGATION, *supra* note 21, at 6; AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 134; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 13; INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., PACER STUDY, *supra* note 26, at 41-42; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 70.
[47] LEE, EARLY STAGES OF LITIGATION, *supra* note 21, at 6; INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., PACER STUDY, *supra* note 26, at 41-42.
[48] GERETY, STATE AND FEDERAL JUDGE SURVEY, *supra* note 9, at 10.
[49] *Id.* at 10-11.
[50] LEE, EARLY STAGES OF LITIGATION, *supra* note 21, at 6.
[51] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 135-36; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 13; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 70-71.
[52] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 138-39; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 70-71.
[53] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 141-42; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 70-71.
[54] GERETY, STATE AND FEDERAL JUDGE SURVEY, *supra* note 9, at 11.
[55] LEE, EARLY STAGES OF LITIGATION, *supra* note 21, at 6;
[56] *Id.*; Memorandum from Emery G. Lee III, Fed. Judicial Ctr., to Dist. Judge Shira A. Scheindlin, S. Dist. N.Y., Complex Litigation Survey Results 8 (Jan. 18, 2012) [hereinafter Lee, Complex Litigation Survey Memo] (on file with authors).
[57] GERETY, STATE AND FEDERAL JUDGE SURVEY, *supra* note 9, at 35.
[58] LEE, EARLY STAGES OF LITIGATION, *supra* note 21, at 6-7.
[59] *Id.* at 7; *see also* Lee, Complex Litigation Survey Memo, *supra* note 56, at 9.

who do not.[60] Scheduling orders are entered as a matter of course after the F.R.C.P. 16(b) conference in federal court, with most judges adopting the parties' discovery plan with "minor" modification.[61]

As a state court comparison to the federal experience, Arizona Superior Court has "comprehensive pretrial conferences."[62] A survey of Arizona attorneys and judges found that these conferences are considered cost-effective and are reported to enhance early judicial management, improve trial preparation, and expedite disposition.[63] However, practitioners are split on whether conferences encourage judicial involvement throughout the process and split on whether conferences focus discovery on the disputed issues.[64] Commenting respondents noted that the timing of the conference is important, as it must occur early enough to make a difference but not so early as to preclude a good understanding of the case.[65] The New Hampshire Proportional Discovery/Automatic Disclosure Pilot Project offers a unique perspective: the rules specify use of telephonic rather than in-court structuring conferences and eliminate the case structuring conference altogether where parties are able to reach agreement on all case structuring elements, with the goal of reducing costs and increasing efficiency.[66] The evaluation shows a significant reduction in the occurrence of structuring conferences, and a reduction in the proportion of in-person conferences.[67] Anecdotal reports reflect, however, that some judges are moving back to in-court hearings because of the logistics of scheduling telephonic calls and the lack of compliance by the attorneys with the requirements of the rule.[68]

IV. INITIAL DISCLOSURES

Regarding initial disclosures, there is agreement among attorneys and across the research. Surveyed attorneys nationwide generally do not believe that F.R.C.P. 26(a)(1) initial disclosures reduce discovery,[69] nor do they believe this requirement saves their clients money.[70] Moreover, very high percentages reported that additional discovery is required after initial disclosures.[71] There was no consensus, however, on the statement that initial disclosures add to the cost of litigation.[72]

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[60] GERETY, STATE AND FEDERAL JUDGE SURVEY, *supra* note 9, at 26.
[61] LEE, EARLY STAGES OF LITIGATION, *supra* note 21, at 7.
[62] ARIZ. R. CIV. P. 16(b) ("upon written request of any party the court shall, or upon its own motion the court may, schedule a comprehensive pretrial conference") (the rule provides a non-exhaustive list of 19 possible topics that may be addressed at the conference).
[63] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SURVEY OF THE ARIZONA BENCH & BAR ON THE ARIZONA RULES OF CIVIL PROCEDURE 16-17 (2010) [hereinafter INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ARIZONA SURVEY].
[64] *Id.* at 16-17.
[65] *Id.* at 18.
[66] HANNAFORD-AGOR, ET AL., NEW HAMPSHIRE REPORT, *supra* note 16, at 2.
[67] *Id.* at 14-15 (falling from 34% to 9% of cases in which any structuring conference was held within 270 days; falling from 31% to 2% of cases in which an in-person structuring conference was held within 270 days).
[68] *Id.*
[69] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 56; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 29; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 38.
[70] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 57; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 29; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 38.
[71] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 59; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 29.
[72] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 58; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 29.

In Arizona Superior Court, the parties are required to make full, mutual, and simultaneous disclosures at the outset of the case, and to supplement the disclosures as new information is obtained. In a survey in that state, attorneys and judges with federal experience preferred Arizona's extensive disclosure requirements, including the timing, content, and scope, at higher rates than they preferred the federal disclosure rule.[73] The requirements were reported to reveal pertinent facts early in the case and facilitate agreement on the scope and timing of discovery,[74] although respondents were split on whether disclosures reduce discovery volume or discovery time.[75] Moreover, Arizona practitioners do not believe the disclosures require too much early investment in the case, result in satellite litigation, or increase the cost of litigation.[76] In terms of adhering to the rules, however, only one-third reported that litigants "often" or "almost always" adhere to the initial time limit for disclosures,[77] and just under half reported that litigants "often" or "almost always" adhere to the content and scope of required disclosures.[78] Survey respondents also indicated that attorneys misuse the rules for gamesmanship purposes and that judges do not enforce the rules effectively or consistently.[79]

The same is true of Colorado's "simplified" procedure for actions under $100,000, which essentially replaces discovery with extensive disclosures. There is a level of frustration with disclosures under that procedure because of gamesmanship and the lack of enforcement.[80] Practitioners indicated that the rule has been more "aspirational" than practical because it requires full and complete automatic disclosures, without a mechanism to ensure completeness and accuracy.[81] Thus, the aspirational ideal of initial disclosures, juxtaposed against the difficulties of enforcement and effectiveness, is a common theme across the research.

B. Discovery

What are the considerations as your imaginary case moves into the discovery stage? How have the parties dealt with preservation obligations, and will the steps taken prove to be too much or too little? What will be the overall approach to the discovery process? How often will the attorneys confer and under what circumstances? What factors will influence the level of discovery conducted? What is the role of electronically stored information, or ESI? If disputes arise, how and when will they be resolved? What are the costs and who will pay them?

1. Litigation Holds & Preservation

According to a case-based survey of attorneys in federal court, defendants implement a litigation hold or "freeze" in response to the filing of a complaint at approximately twice the rate of plaintiffs (just over 40% as compared to nearly 20%).[82] In the one-third of cases with a request for production of ESI, litigants who *only requested* e-

[73] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ARIZONA SURVEY, *supra* note 63, at 21.
[74] *Id.* at 19.
[75] *Id.*
[76] *Id.* at 19-20.
[77] *Id.* at 23.
[78] *Id.*
[79] *Id.* at 23-26.
[80] CORINA GERETY & LOGAN CORNETT, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., MEASURING RULE 16.1: COLORADO'S SIMPLIFIED CIVIL PROCEDURE EXPERIMENT 41 (2012) [hereinafter GERETY & CORNETT, MEASURING RULE 16.1].
[81] CORINA GERETY, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SURVEYS OF THE COLORADO BENCH AND BAR ON COLORADO'S SIMPLIFIED PRETRIAL PROCEDURE FOR CIVIL ACTIONS 38 (2010) [hereinafter GERETY, COLORADO SIMPLIFIED PROCEDURE SURVEY].
[82] EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., FEDERAL JUDICIAL CENTER NATIONAL, CASE-

discovery (55% of plaintiffs and 13% of defendants) were found to be less likely to put a litigation hold in place than litigants who *only produced* e-discovery (4% of plaintiffs and 35% of defendants) and those who *both produced and requested* e-discovery (41% of plaintiffs and 53% of defendants).[83] Interestingly, quite a large percentage of respondents declined to answer these questions, so the actual proportions of parties and cases with litigation holds may differ from the reported results.[84]

In a national survey of chief legal officers and general counsel, nearly 85% of companies dealing with e-discovery in either state or federal court reported having a litigation hold policy in place, and three out of four companies reported having a records retention/destruction policy in place.[85] However, a majority of companies reported not having structures for internal education and coordination to understand and implement holds, or even structures for proactively understanding and managing their electronic data.[86] Nevertheless, two out of three respondents indicated that their company usually has enough information about a particular claim to implement an "adequate but targeted" litigation hold.[87] In this study, larger companies were found to be more likely to have litigation hold and records retention policies than smaller companies.[88]

In a separate study of only very large companies, key legal personnel reported that they do not have a clear understanding of whether their preservation decisions are legally defensible, due to limited and conflicting judicial decisions.[89] With respect to cost, all of the studied companies reported that preservation costs have become a "significant portion" of total e-discovery costs.[90] Nevertheless, most of the studied companies indicated that they do not track preservation costs and are unsure how to accomplish such tracking, while acknowledging the need for improved approaches to preservation for the sake of efficiency and effectiveness.[91]

The Seventh Circuit E-Discovery Pilot Program Principles directly address preservation and the possible contents of preservation letters. However, a strong majority of participating attorney survey respondents reported that the Principles had no effect on their preservation letters.[92] For about 15%, the Principles have resulted in more targeted letters.[93]

BASED CIVIL RULES SURVEY 18-19 (2009) [hereinafter LEE & WILLGING, CIVIL RULES SURVEY].
[83] *Id.* at 19-22.
[84] *Id.* at 18, 21.
[85] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., GENERAL COUNSEL SURVEY, *supra* note 8, at 29-30.
[86] *Id.*
[87] *Id.* at 31-32.
[88] *Id.* at 30.
[89] NICHOLAS M. PACE & LAURA ZAKARAS, RAND INST. FOR CIVIL JUSTICE, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY 90, 92-94 (2012) [hereinafter PACE & ZAKARAS, WHERE THE MONEY GOES].
[90] *Id.* at 98.
[91] *Id.* at 85.
[92] SEVENTH CIR. ELECTRONIC DISCOVERY PILOT PROGRAM COMM., SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM FINAL REPORT ON PHASE TWO MAY 2010-MAY 2012 app. F.2.a, tbl. A-35 (2012) [hereinafter SEVENTH CIR. ELECTRONIC DISCOVERY PILOT PROGRAM COMM., E-DISCOVERY REPORT].
[93] *Id.* at app. F.2.a., tbl. A-35.

II. SPOLIATION

One federal court study specifically examined, though electronic case record review, the role of motions for sanctions based upon spoliation of evidence. The study found that spoliation claims are rare, as only 0.15% of the cases had a motion related to spoliation, or just 209 out of the 131,992 studied cases.[94] In over half of the cases with such a motion, it was clear that the allegedly destroyed evidence included ESI, while nearly 40% of the cases involved only tangible evidence or paper records.[95] About two-thirds of the motions were brought by a plaintiff (typically an individual) and about one-third were brought by a defendant (typically a business entity).[96] Plaintiffs most frequently filed the spoliation motion against a business or governmental entity, while defendants generally filed the motion against an individual or a business entity.[97]

This same study found that, at least in federal court, spoliation usually becomes an issue late in the life of a case—513 days after filing, on average.[98] Correspondingly, in contrast to civil cases generally, cases involving spoliation claims take longer to resolve (649 days v. 253 days) and have a much higher trial rate (16.5% v. 0.6%).[99] Considering only filed motions and not those related to jury instructions and motions *in limine*, the court did not take any action on the motion in 30% of the cases, often because the case settled prior to a ruling.[100] In those cases with an order, the motion was denied 72% of the time.[101] When the court did impose a spoliation sanction, the sanction was most frequently an adverse jury instruction.[102] Other sanctions included the payment of costs, reopening discovery, precluding evidence or testimony, monetary sanctions, and striking part of a pleading.[103] Case-terminating sanctions were imposed in only one case, which involved the destruction of tangible evidence.[104]

In the Seventh Circuit E-Discovery Pilot Program, emphasizing reasonable and proportionate preservation, a plurality of participating judges[105] and a majority of participating attorneys[106] reported that the Principles had no effect on the number of allegations of spoliation or other sanctionable conduct. Notably, one in four attorneys reported that the Principles actually increased the number of these allegations.[107]

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[94] EMERY G. LEE III, FED. JUDICIAL CTR., MOTIONS FOR SANCTIONS BASED UPON SPOLIATION OF EVIDENCE IN CIVIL CASES: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 4 (2011) [hereinafter LEE, SANCTIONS MOTION STUDY] (in addition to standalone motions filed, the study included requests for sanctions related to motions for summary judgment, motions *in limine*, and motions on jury instructions).
[95] LEE, SANCTIONS MOTION STUDY, *supra* note 94, at 6 (the nature of the evidence could not be determined in 9% of cases).
[96] *Id.* at 7 (both parties moved for sanctions in 2% of cases; the moving party could not easily be classified as a plaintiff or a defendant in another 2% of cases).
[97] *Id.*
[98] *Id.* at 5.
[99] *Id.*
[100] *Id.* at 8.
[101] *Id.*
[102] *Id.*
[103] *Id.* at 8-9.
[104] *Id.* at 9.
[105] SEVENTH CIR. ELECTRONIC DISCOVERY PILOT PROGRAM COMM., E-DISCOVERY REPORT, *supra* note 92, at app. F.2.a., tbl. J-10.
[106] *Id.* at app. F.2.a, tbl. A-25.
[107] *Id.* at app. F.2.a, tbl. A-25.

III. PROPORTIONALITY & THE SCOPE OF DISCOVERY

Nationwide attorney and judge surveys reflect that counsel typically do not request limitations on discovery under the federal proportionality provisions of F.R.C.P. 26(b)(2)(C),[108] nor do judges generally invoke such limitations *sua sponte*.[109] In the Seventh Circuit E-Discovery Pilot Program, with a specific focus on proportionality, a majority of attorneys reported that the F.R.C.P. 26(b)(2)(C) standards did not play a significant role in the development of the discovery plan in their pilot case,[110] although most of the judges believe that the standards did play such a role.[111] In complex cases in the Southern District of New York, fewer than one in ten attorneys stated that the judge limited discovery to make it more proportional to the case.[112] The surveys do reflect that attorneys as well as state and federal judges agree that intervention by judges early in the case helps to limit discovery.[113]

More than half of respondents to a survey of attorneys in closed federal cases indicated that disclosure and discovery generated the "right amount" of information.[114] Interviewed respondents to that study cited the following factors as influencing how much discovery to conduct within a particular case: the monetary and non-monetary stakes,[115] client resources,[116] the time allowed for discovery,[117] and the limits contained within the pretrial order or rules (e.g., "I will go as far as the law will allow.").[118] In contrast, in a survey of chief legal officers and general counsel, there was no consensus on how often discovery requests focus on the core issues in dispute.[119] Very large (Fortune 200) companies reported that in cases that went to trial and exceeded $250,000 in outside litigation costs, the number of pages of produced documents compared to the number of exhibit pages was a ratio of 1,044 to 1, on average.[120] While there is no consensus on whether attorneys with limited trial experience use more discovery than experienced trial lawyers,[121] three separate surveys of attorneys nationwide show majority agreement that "economic models in many law firms encourage more discovery than is necessary."[122] These same studies found that attorneys generally

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[108] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 76; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 31; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 46.

[109] GERETY, STATE AND FEDERAL JUDGE SURVEY, *supra* note 9, at 31-32 (federal judge respondents only; it should be noted that the results are difficult to interpret precisely due to the lack of a standard baseline (i.e., all cases, cases in which disputed discovery is disproportionate, or cases in which disputed discovery is disproportionate and the parties themselves fail to invoke the rule)); AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 77; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 31; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 46.

[110] SEVENTH CIR. ELECTRONIC DISCOVERY PILOT PROGRAM COMM., E-DISCOVERY REPORT, *supra* note 92, at app. F.2.a., tbl. A-14.

[111] *Id.* at app. F.2.a., tbl. J-4.

[112] Lee, Complex Litigation Survey Memo, *supra* note 56, at 9.

[113] GERETY, STATE AND FEDERAL JUDGE SURVEY, *supra* note 9, at 10-11; AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 125.

[114] FJC LEE & WILLGING, CIVIL RULES SURVEY, *supra* note 82, at 27.

[115] WILLGING & LEE, IN THEIR WORDS, *supra* note 24, at 5-7.

[116] *Id.* at 24.

[117] *Id.* at 22-23.

[118] *Id.*

[119] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., GENERAL COUNSEL SURVEY, *supra* note 8, at 27.

[120] Lawyers for Civil Justice, Civil Justice Reform Group & U.S. Chamber Institute for Legal Reform, Litigation Cost Survey of Major Corporations 16 (May 10, 2010) [hereinafter Lawyers for Civil Justice, Litigation Cost Survey of Major Corporations] (statement submitted for presentation at the 2010 Conference on Civil Litigation sponsored by the Judicial Conference Advisory Committee on Civil Rules, Duke University Law School, May 10-11, 2010).

[121] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 79; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 31; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 46.

[122] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 155; HAMBURG & KOSKI, NELA SURVEY, *supra*

do not consider either client demands[123] or the fear of malpractice claims[124] to be driving unnecessary discovery. However, attorneys have raised malpractice concerns in an interview setting in two other studies.[125] Therefore, it cannot be discounted as a potential factor influencing discovery.

Some state courts impose more restrictions on discovery than the federal courts, and there are studies relating to three of those states: Arizona, Oregon, and Colorado. Arizona has presumptive limits on expert witnesses, depositions, interrogatories, requests for production, and requests for admission.[126] Oregon has presumptive limits on requests for admission, and does not have written interrogatories or expert disclosure or discovery.[127] Studies in those states revealed that a majority of survey respondent attorneys and judges believe the limits—considered as a whole—reduce total discovery volume and focus discovery on the disputed issues.[128] However, the studies did not show majority agreement that the limits reduce total litigation time or cost, make costs more predictable or reduce forced settlement.[129] It should be noted that sentiment (good or bad) with respect to individual limits may affect how these limits are viewed as a whole.[130] (*See* Section B.V., Discovery Tools.) In both Arizona and Oregon, survey respondents generally did not find that the presumptive limits favor defendants over plaintiffs[131] or that they force parties to go to trial with insufficient information.[132]

Colorado's voluntary procedure for actions under $100,000 essentially replaces discovery mechanisms with extensive disclosures.[133] A survey on that procedure showed that nine out of ten judges believe disclosures are sufficient to prove or disprove claims and defenses, but attorneys tend to disagree.[134] Both plaintiffs and defendants

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note 23, at 42 (a substantial 45% expressed strong agreement); KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 76.

[123] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 69 (79% disagree); HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 30; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 45.

[124] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 70 (59% disagree); HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 30; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 45.

[125] GERETY & CORNETT, MEASURING RULE 16.1 *supra* note 80, at 39; WILLGING & LEE, IN THEIR WORDS, *supra* note 24, at 10, 23.

[126] ARIZ. R. CIV. P. 26(b)(4)(D) (each side is entitled to only one independent expert witness per issue absent a court order); ARIZ. R. CIV. P. 30(a) (only parties, expert witnesses, and document custodians may be deposed automatically absent a stipulation or court order); ARIZ. R. CIV. P. 30(d) (depositions are limited to four hours absent a stipulation or court order); ARIZ. R. CIV. P. 33.1(a) (each party can serve no more than 40 interrogatories absent a stipulation or court order; note that F.R.C.P. 33(a)(1) limits interrogatories to 25 absent a stipulation or court order); ARIZ. R. CIV. P. 34 (requests for production are limited to 10 absent a stipulation or court order); ARIZ. R. CIV. P. 36(b) (each party can issue no more than 25 requests for admission absent a stipulation or court order).

[127] OR. R. CIV. P. 45(F) (each party may serve no more than 30 total requests for admission absent a court order finding good cause for additional requests). The Oregon rules have no provisions for interrogatories or expert disclosure/discovery.

[128] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ARIZONA SURVEY, *supra* note 63, at 36-37; INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON SURVEY, *supra* note 11, at 40-41.

[129] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ARIZONA SURVEY, *supra* note 63, at 36-37; INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON SURVEY, *supra* note 11, at 40-41.

[130] *See generally* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ARIZONA SURVEY, *supra* note 63, at 36-37.

[131] *Id.* at 38; INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON SURVEY, *supra* note 11, at 42.

[132] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ARIZONA SURVEY, *supra* note 63, at 39; INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON SURVEY, *supra* note 11, at 43.

[133] COLO. R. CIV. P. 16.1.

[134] GERETY, COLORADO SIMPLIFIED PROCEDURE SURVEY, *supra* note 81, at 26. The survey asked whether the rule provides "adequate discovery" to prove or disprove claims and defenses in cases to which it is applied. Use of the term "discovery" was imprecise. The intent of the question was to assess whether Rule 16.1 nevertheless provides adequate information to effectively litigate cases.

expressed concern about having inadequate information under the rule, finding disclosures to be a poor substitute for discovery given the lack of trust in the completeness of the other party's disclosures and the lack of trust that the courts will enforce disclosure obligations.[135] (*See* Section A.IV., Initial Disclosures.) Lawyers opted out of the rule to preserve flexibility, seeing the discovery limitations as much a risk as a benefit.[136]

The Massachusetts Superior Court Business Litigation Session Pilot Project was implemented with the express goal of "limiting discovery (including electronic discovery) proportionally to the magnitude of the claims actually at issue."[137] In an evaluation of the project, a strong majority of attorneys indicated that the pilot was "somewhat better" or "much better" than non-pilot cases with respect to the absence of unnecessary burdens in producing discovery, and the timeliness and cost-effectiveness of discovery.[138]

IV. MEET & CONFER/RULE 26(F) CONFERENCES

Research across studies reflects that the parties meet and confer to plan for discovery (e.g., F.R.C.P. 26(f)) in a majority of cases (between 60% and 85%).[139] Generally, attorney survey respondents find this meeting to be helpful in managing the discovery process.[140] In contrast, only one-third of company general counsel believe that the parties confer about discovery early in the pretrial process "often" or "almost always."[141]

The most common reason for not conferring, according to a federal case survey, was resolution of the case before the meeting.[142] This survey also documented a conference rate of over 90% in cases that also had a F.R.C.P. 16(b) scheduling conference, suggesting that discovery planning occurs in almost all cases that reach the scheduling conference stage.[143] The most common method of conferring in federal cases is by telephone or video conference,

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[135] *Id.* at 29-30, 37-38.
[136] GERETY & CORNETT, MEASURING RULE 16.1, *supra* note 80, at 38-39.
[137] JORDAN SINGER, SUFFOLK SUPERIOR COURT BUSINESS LITIGATION SESSION PILOT PROJECT: FINAL REPORT ON THE 2012 ATTORNEY SURVEY 1 (Dec. 2012).
[138] *Id.* at 2, 8, 10.
[139] LEE, EARLY STAGES OF LITIGATION, *supra* note 21, at 9 (78% of survey respondents who provided a "yes" or "no" answer to the question reported a discovery planning conference); LEE & WILLGING, CIVIL RULES SURVEY, *supra* note 82, at 7 (for cases in which some discovery took place, 82% of plaintiff attorneys and 83% of defense attorneys reported a conference to plan discovery; the figure was 86% for survey respondents who provided a "yes" or "no" answer to the question (later figure cited in LEE, EARLY STAGES OF LITIGATION, *supra* note 21, at 3); Lee, Complex Litigation Survey Memo, *supra* note 56, at 5 (68% of survey respondents who provided a "yes" or "no" answer to the question reported a discovery planning conference) (figure cited in LEE, EARLY STAGES OF LITIGATION, *supra* note 21, at 9)); AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 96 (70% indicated Rule 26(f) conferences "frequently" occur); HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 33 (71% indicated Rule 26(f) conferences "frequently" occur); KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 51 (59% indicated Rule 26(f) conferences "frequently" occur).
[140] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 96 (58%); HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 33 (48% indicated helpful, 45% indicated not helpful, 7% indicated no experience); KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 51 (60%).
[141] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., GENERAL COUNSEL SURVEY, *supra* note 8, at 25.
[142] LEE, EARLY STAGES OF LITIGATION, *supra* note 21, at 3.
[143] *Id.*

with correspondence taking a far second.[144] Fewer than one in ten reported an in-person meeting.[145] Moreover, nearly three-quarters of these conferences last less than 30 minutes.[146]

Discussion of ESI was shown to occur in approximately 30% to 40% of federal discovery planning conferences.[147] That number rose to approximately 70% to 75% in cases involving an e-discovery request.[148] A majority of those who discussed preservation as part of the meeting reported that the discussion clarified obligations,[149] while a majority of those who did not discuss preservation reported that the obligations were already clear.[150]

The Seventh Circuit E-Discovery Pilot Program specifically encourages discussion of e-discovery issues. Based on their observations at the F.R.C.P. 16(b) scheduling conference, nearly three-quarters of judges in that program ranked the extent to which the parties had conferred in advance about e-discovery issues as a 3 or a 4 on a scale from 0 (no discussion) to 5 (comprehensive discussion).[151]

A study of "complex" cases in the Southern District of New York found that the topics most frequently discussed at the F.R.C.P. 26(f) meeting were:

- the scope and timing of production;
- the number of depositions and interrogatories;
- methods of producing ESI; and
- identification of key players.[152]

Cost issues do not appear to be at the forefront during the conference for this set of cases, as the following topics were less frequently discussed:

- preservation of ESI (method or cost);
- the cost of production; and
- the proportionality of discovery costs.[153]

This same study also found that the attorneys were much more likely to submit a discovery plan to the court in cases with an F.R.C.P. 26(f) meeting than in cases without, with the same topics as discussed tending to be included in the plan.[154] Cases with an F.R.C.P. 26(f) meeting also were found to be twice as likely to have an initial pretrial conference than cases without a discovery planning conference.[155] Majorities of plaintiff and defense attorneys reported that the F.R.C.P. 26(f) meeting had no effect on the total cost of discovery, disposition time, or the fairness

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[144] *Id.* at 3-4 (86% reported a telephone or video conference and 25% reported conferring by correspondence (respondents could indicate multiple forms of meeting)).
[145] *Id.*
[146] *Id.* at 10.
[147] LEE & WILLGING, CIVIL RULES SURVEY, *supra* note 82, at 15; LEE, EARLY STAGES OF LITIGATION, *supra* note 21, at 5.
[148] LEE & WILLGING, CIVIL RULES SURVEY, *supra* note 82, at 19.
[149] LEE, EARLY STAGES OF LITIGATION, *supra* note 21, at 5.
[150] *Id.* at 5-6.
[151] SEVENTH CIR. ELECTRONIC DISCOVERY PILOT PROGRAM COMM., E-DISCOVERY REPORT, *supra* note 92, at app. F.2.a., tbl. J-3.
[152] Lee, Complex Litigation Survey Memo, *supra* note 56, at 5.
[153] *Id.* at 5.
[154] *Id.* at 7 (reported by 54% of plaintiff attorneys and 74% of defense attorneys in cases with a conference, and reported by 19% of plaintiff attorneys and 7% of defense attorneys in cases without a conference).
[155] *Id.* at 8.

of the outcome.[156] However, of those reporting a resulting effect, the effect was more likely to be positive than negative (e.g., higher degree of fairness, shorter disposition time).[157]

V. Discovery Tools (Depositions, Interrogatories, Requests for Admission, & Requests for Production)

According to three nationwide surveys, attorneys tend to disagree with the general statement that current discovery mechanisms "work well."[158] When asked about specific discovery tools, however, strong majorities ranked the following as "very important": depositions of fact witnesses, requests for production of documents, and depositions of experts where expert testimony is not limited to the expert's report.[159] Interrogatories are considered to be a tool of some importance, while attorney opinion is mixed on whether requests for admission are important or not (those who prosecute employment cases indicated that requests for admission do have importance).[160] While no discovery tool is considered to be "very cost-effective" by more than 50% of respondents, solid majorities across the surveys indicated that each available tool is at least "somewhat cost-effective."[161] Overall, attorneys believe that requesting the production of documents is the most cost-effective tool, and deposing expert witnesses where testimony is limited to the expert report is the least cost-effective tool.[162]

In one survey of attorneys in federal cases, 86% of respondents reported at least one type of discovery in the case,[163] with a median of five types of discovery.[164] Interrogatories are used more frequently in federal court than requests for admission.[165] One interviewed federal attorney's discovery formula reflects an approach to discovery supported by the data: "1) interrogatories and production of documents; 2) depositions of key witnesses; and 3) supplemental requests and additional discovery to fill the gaps," except in less complex cases with lower stakes.[166]

Surveys concerning the Arizona and Oregon general jurisdiction courts provide feedback on certain express limits. Arizona has presumptive limits on the number of interrogatories (40 served on any other party), requests for production (10 distinct items or categories), requests for admission (25 per case), and the extent of deposition discovery (only parties, expert witnesses, and document custodians may be deposed and each deposition is limited to

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[156] *Id.* at 6.
[157] *Id.*
[158] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 61 (52% disagree or strongly disagree); HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 30 (65% disagree or strongly disagree); KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 45 (56% disagree or strongly disagree).
[159] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 86, 90, 94 (asking about hard copy and electronic documents separately); HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 32 (asking about hard copy and electronic documents separately); KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 47.
[160] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 82, 84; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 32; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 47.
[161] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 83, 85, 87, 89, 91, 93, 95; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 33; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 49.
[162] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 87, 93 (specifically referring to hard copy documents); HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 33 (specifically referring to hard copy documents); KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 49.
[163] LEE & WILLGING, FJC CIVIL RULES SURVEY, *supra* note 82, at 8.
[164] *Id.* at 11.
[165] *Id.* at 9-10 (74% of plaintiff attorneys and 76% of defense attorneys reported interrogatories in the subject case, while only 30% of plaintiff attorneys and 26% of defense attorneys reported requests for admission in the subject cases).
[166] WILLGING & LEE, IN THEIR WORDS, *supra* note 24, at 23-24.

four hours).[167] With the exception of the limit on requests for production, a majority of Arizona attorneys and judges would not modify any of these presumptive limits.[168] A substantial portion of respondents indicated a desire to raise the limit on requests for production,[169] a result consistent with the data on the perceived importance of this discovery tool. Considering Arizona attorneys and judges with federal experience, those with a preference would choose the Arizona rules over the F.R.C.P. on the extent of deposition discovery at a rate of two-to-one.[170] The Arizona rules also have a limit on the number of expert witnesses. For more information on that limitation, please refer to Section V.III. on expert discovery.

In Oregon, each party is allowed to serve only 30 requests for admission on an adverse party absent a court order.[171] Oregon attorneys and judges with comparative federal and/or neighboring state experience were evenly split on whether this limit decreases or has no effect on litigant costs.[172] A majority of these respondents did indicate that this limit has no effect on time to resolution, the ability to prepare for trial, the fairness of the process, the fairness of the outcome, or the efficiency of the litigation (although one-third indicated that the limit increases litigation efficiency).[173] Written interrogatories are unavailable as a discovery mechanism in Oregon. Nearly two out of three Oregon attorneys and judges with comparative federal and/or neighboring state experience find that this situation decreases litigation costs, and one in three find that it decreases time to resolution, without affecting the fairness of the process or the outcome.[174] However, responses were less clear concerning the effect, if any, on the efficiency of the litigation and the ability to prepare for trial.[175] Commenting respondents called for limited use of fact (not contention) interrogatories to learn basic information, such as relevant documents and witnesses, to streamline discovery.[176] The Oregon rules also contain no provision for any disclosure or discovery related to expert witnesses. For more information on that limitation, please refer to Section VIII on expert discovery.

VI. DISCOVERY TIMING

A majority of attorney survey respondents nationwide reported that counsel agree on the timing of discovery, as well as its scope, in most of their cases.[177] Similarly, strong majorities of federal and state trial judges view the parties as regularly agreeing about the proper amount of time needed to conduct discovery, with only a small portion of judges reducing the agreed-upon time on a regular basis.[178]

One federal court docket study found that the standard time from entry of the Rule 26 scheduling order to the discovery cut-off date contained in that order (without regard to any later-granted extensions) is over six months,[179]

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[167] ARIZ. R. CIV. P. 30(a), 30(d), 33.1(a), 34(b), 36(b).
[168] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ARIZONA SURVEY, *supra* note 63, at 29-30, 34.
[169] *Id.* at 34 (46% for raising the limit, 45% for no modification to the existing limit).
[170] *Id.* at 32.
[171] OR. R. CIV. P. 45(F).
[172] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON SURVEY, *supra* note 11, at 33 (42% indicated decreased costs and 43% indicated no effect on cost).
[173] *Id.* at 31-33.
[174] *Id.* at 35-36.
[175] *Id.* at 34-35 (37% indicated decreased efficiency and 21% indicated increased time to resolution).
[176] *Id.* at 36-37.
[177] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 75; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 31; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 46.
[178] GERETY, STATE AND FEDERAL JUDGE SURVEY, *supra* note 9, at 21-22.
[179] EMERY G. LEE III, FED. JUDICIAL CTR., THE TIMING OF SCHEDULING ORDERS AND DISCOVERY CUT-OFF DATES: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 3 (2011) [hereinafter LEE, TIMING OF SCHEDULING ORDERS] (median 6.2 months; mean 6.5 months).

with a standard time from case filing to that first-imposed discovery cut-off date of over ten months.[180] Importantly, the data reveal variation among districts and case types.[181] Generally, "civil rights," "consumer," and "labor" cases have shorter discovery periods, while "contract" and "complex" cases have longer discovery periods.[182] Another federal docket study revealed a strong correlation between the avoidance of additional discovery requests late in the discovery process and a shorter overall time to disposition.[183] In a survey of federal attorneys, just over 10% of those who had a scheduling conference in the subject case reported that the judge did not impose a discovery cut-off.[184]

In "complex" cases in the Southern District of New York, 35% of plaintiff attorneys and 40% of defense attorneys reported that discovery was stayed pending resolution of one or more motions to dismiss.[185] Such a stay was much more likely to be reported in securities than non-securities cases.[186] In cases with a discovery stay, the effects were perceived as follows: 1) there was a certain level of agreement between plaintiff and defense attorneys that the stay decreased costs; 2) opinion was more mixed on the stay's effects on time to disposition; and 3) plaintiff attorneys tended to believe that the stay decreased outcome fairness, while defense attorneys tended to believe that the stay increased outcome fairness.[187]

In the Seventh Circuit E-Discovery Pilot Program, with a focus on communication and cooperation in discovery, both judges and attorneys responded that the Principles have had no effect on the length of the discovery period.[188] However, the Suffolk Superior Court Business Litigation Session Pilot Project in Massachusetts state court appears to have had an effect. Over 70% of surveyed participating attorneys indicated that the project—which involves robust disclosures, proportional and staged discovery, and early and often party conferences early—improved the timeliness in obtaining discovery.[189]

VII. ELECTRONIC DISCOVERY

While ESI, and its role in litigation, certainly predates the period of this research summary, it appears that the role of ESI is increasing. Since 2009, a solid majority of surveyed attorneys nationwide have reported handling a case with e-discovery issues.[190] However, it appears that the prevalence of e-discovery has grown more quickly in federal courts than in state courts.[191]

In a federal case-specific study, over one-third of surveyed attorneys reported at least one request for ESI by at least one party in the case.[192] A majority of those e-discovery cases involved requests for production of ESI from both the

[180] *Id.* at 3-4 (median 10.2 months; mean 10.7 months).
[181] *Id.* at 3.
[182] *Id.*
[183] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., PACER STUDY, *supra* note 26, at 32-33.
[184] LEE, EARLY STAGES OF LITIGATION, *supra* note 21, at 7.
[185] Lee, Complex Litigation Survey Memo, *supra* note 56, at 11.
[186] *Id.* (between 68% and 69% for securities cases; between 22% and 28% for non-securities cases).
[187] *Id.* (note that the pool is relatively small here, with only 115 attorneys).
[188] SEVENTH CIR. ELECTRONIC DISCOVERY PILOT PROGRAM COMM., E-DISCOVERY REPORT, *supra* note 92, at app. F.2.a., tbls. J-11 & A-29.
[189] SINGER, *supra* note 137, at 8, 10.
[190] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 100; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 35; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 54.
[191] *See* GERETY, STATE AND FEDERAL JUDGE SURVEY, *supra* note 9, at 32-33 (About two-thirds of state trial court judges reported not having an e-discovery case, while about two-thirds of federal judges reported having at least one such case.).
[192] LEE & WILLGING, FJC CIVIL RULES SURVEY, *supra* note 82, at 19-20.

plaintiff and defense sides, and a majority of both plaintiff and defense attorneys reported that their client had requesting status.[193] When a party only requests or only produces, plaintiff attorneys request more often and defense attorneys produce more often.[194]

According to the same case-specific study, information technology staff internal to the client or the law firm generally collect ESI, as only about 15% of respondents reported use of a vendor and even fewer reported use of contract attorneys for review.[195] The ESI was most commonly used to prepare and depose witnesses, facilitate settlement, or interview clients or clients' employees.[196] Nearly 20% of attorneys reported that the e-discovery exchanged was not ultimately used at all in the subject litigation.[197] Discovery disputes appear to occur in about one-quarter of federal e-discovery cases.[198]

(A). From the Perspective of Attorneys

Survey data provide insight into the influence of ESI on the civil justice system, particularly from the perspective of attorneys. Surveyed attorneys nationwide with e-discovery experience generally believe that e-discovery has enhanced counsel's ability to discover all relevant information.[199] Interviewed federal court attorneys have expressed that there are a number of benefits to having electronic documents—such as better organization, search and sharing capabilities, and selective printing—although gathering and producing ESI can become more problematic with increasing volumes.[200] Notably, the level of experience indicated by some federal attorneys was limited to identifying and exchanging documents that originated electronically, and did not include more complex issues (e.g., producing ESI in native format).[201]

The nationwide survey data also reflect differing perceptions between plaintiff and defense attorneys regarding e-discovery. For survey respondents with ESI experience, the following breakdown shows which party's attorneys tended to agree with each statement (with attorneys on the other side tending to disagree or agree to a lesser extent).

[193] *Id.* at 20; Lee, Complex Litigation Survey Memo, *supra* note 56, at 12.
[194] LEE & WILLGING, FJC CIVIL RULES SURVEY, *supra* note 82, at 20; Lee, Complex Litigation Survey Memo, *supra* note 56, at 12.
[195] LEE & WILLGING , FJC CIVIL RULES SURVEY, *supra* note 82, at 22.
[196] *Id.* at 25.
[197] *Id.* (by 17% of plaintiff attorneys and 19% of defense attorneys).
[198] *Id.* at 24.
[199] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 101; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 36; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 56.
[200] WILLGING & LEE, IN THEIR WORDS, *supra* note 24, at 17-20.
[201] *Id.* at 16-17.

Plaintiff Attorneys Tend to Agree…
When properly managed, discovery of electronic records can reduce the costs of discovery.[202]
The costs and efficiency of e-discovery will become more reasonable as technology advances.[204]

Defense Attorneys Tend to Agree…
E-discovery has increased the cost of litigation.[203]
E-discovery has disproportionately increased discovery costs as a share of total litigation costs.[205]
E-discovery is generally overly burdensome.[206]
E-discovery is being abused by counsel.[207]
Discovery on the adequacy of e-discovery responses is used as a tool to force settlement.[208]
Courts do not understand the difficulties in providing e-discovery.[209]
Courts do not sufficiently limit or otherwise protect parties against unreasonably burdensome e-discovery demands.[210]

A majority of surveyed defense attorneys nationwide and a plurality of plaintiff attorneys agreed that the costs of outside vendors have increased the cost of e-discovery without commensurate value to the client.[211] Interviewed attorneys in federal cases noted that outside consultants are particularly expensive, and vendors are considered to go "long and hard" unless reined in, so they are best used to fill special needs (e.g., forensic analysis) or in bulk.[212] For a more specific discussion of e-discovery costs, please refer to Section III.B.x on discovery costs, and Section III.E.iv on litigation costs overall.

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[202] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 102; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 36; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 56 and app. C, tbl. VII.1.

[203] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 103; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 36; Lee, Complex Litigation Survey Memo, *supra* note 56, at 13; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 56 and app. C, tbl. VII.1.

[204] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 110; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 36.

[205] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 104 (but a minority of plaintiff attorneys agreed); HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 36; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 56 and app. C, tbl. VII.1.

[206] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 108; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 36.

[207] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 106 (but a minority of plaintiff attorneys agreed); HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 36 (54% disagreed, 34% agreed, 12% no opinion); KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 56 and app. C, tbl. VII.1.

[208] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 80 HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 31.

[209] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 107; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 36; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 56 and app. C, tbl. VII.1.

[210] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 109; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 36.

[211] Notably, defense attorneys tended to agree strongly, while plaintiff attorneys tended to have no opinion on the matter. AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 105 (but a minority of plaintiff attorneys agreed); HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 36 (43% agreed, 31% disagreed, 27% no opinion); KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 56 and app. C, tbl. VII.1 (though 60% of plaintiff attorneys also agreed).

[212] WILLGING & LEE, IN THEIR WORDS, *supra* note 24, at 20-21.

Attorneys nationwide indicated that the 2006 amendments to the federal rules allow for efficient and cost-effective discovery of ESI only some of the time, if at all.[213] In "complex" cases in the Southern District of New York, attorney survey respondents who expressed an opinion on the matter tended to indicate that e-discovery had no effect on disposition time or outcome fairness.[214]

(B). From the Perspective of the Courts

Respondent judges to a nationwide survey generally agreed that e-discovery has enhanced the ability for counsel to discover all relevant information.[215] A majority of judges with e-discovery experience reported that they are confident in their ability to address e-discovery issues, although 40% of state court judges and almost 30% of federal judges reported lacking such confidence.[216]

For surveyed judges, the four top issues giving rise to e-discovery disputes requiring court intervention are: 1) the scope of discovery, 2) costs, 3) time to complete discovery, and 4) spoliation.[217] In contrast to the attorney perspective, two out of three federal trial judges with e-discovery experience indicated a belief that the 2006 amendments to the federal rules provide adequate guidance to resolve disputes.[218]

(C). From the Perspective of the Litigant

Generally, the only first-hand litigant perspective reflected in the data is that of businesses. In a survey of general counsel, at least half of respondent companies with e-discovery in the five previous years reported utilizing litigation holds, operating under record retention policies, and having a culture of communication between IT, the legal department, and outside counsel.[219] Fewer of these companies have implemented structures to proactively understand and manage electronic data.[220] Larger companies appear to have mechanisms for dealing with ESI at higher rates than smaller companies.[221] This is consistent with a federal court attorney survey, which revealed that about 75% of producing plaintiffs and 40% of producing defendants do not have an enterprise content management system to handle ESI litigation.[222]

General counsel with e-discovery experience expressed more confidence in the ability (through in-house or outside resources) to implement adequate but targeted litigation holds without undue cost and delay, and less confidence in the ability to conduct e-discovery searches without undue cost and delay.[223] Moreover, they indicated a belief that both attorneys and judges have inadequate knowledge of e-discovery technologies. With respect to attorneys, a solid

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[213] KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 58 (54% some of the time, 34% no); AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 111 (50% some of the time, 37% no); HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 37 (50% some of the time, 21% no).
[214] Lee, Complex Litigation Survey Memo, *supra* note 56, at 13.
[215] GERETY, STATE AND FEDERAL JUDGE SURVEY, *supra* note 9, at 3.
[216] *Id.*
[217] *Id.* at 37-38.
[218] *Id.* at 36.
[219] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., GENERAL COUNSEL SURVEY, *supra* note 8, at 29-30.
[220] *Id.*
[221] *Id.* at 31.
[222] LEE & WILLGING, FJC CIVIL RULES SURVEY, *supra* note 82, at 23.
[223] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., GENERAL COUNSEL SURVEY, *supra* note 8, at 31-32 (58% expressed confidence in the former, while only 33% expressed confidence in the latter); *see also* Lee, Complex Litigation Survey Memo, *supra* note 56, at 12.

majority disagreed that attorneys have sufficient familiarity to know how to obtain information without undue cost and delay.[224] General counsel also expressed disagreement that outside counsel "embrace measures to make e-discovery more efficient."[225] With respect to judges, a solid majority disagreed that judges have sufficient familiarity with e-discovery technologies to rule appropriately in discovery disputes.[226] Nevertheless, nearly two-thirds indicated that a judge's involvement in the e-discovery plan before a dispute arises would improve the process.[227] Only about 10% of companies conducting e-discovery reported requiring someone with technical expertise to attend discovery hearings as a matter of policy.[228]

According to a study of large cases in very large companies, vendors play the largest role in collection and processing, while review is generally the purview of outside counsel.[229] This study found that the review process is by far the biggest piece of the discovery cost puzzle,[230] and outside counsel may need close supervision to prevent discovery from becoming "a runaway train wreck."[231] Companies are trying many different techniques to address the cost of review.[232] Predictive coding (the iterative process of human review of samples and computerized review of larger sets of documents) may provide some answer to reducing review time and costs.[233] Accuracy studies show that this process identifies at least as many documents of interest as the traditional eyes-on approach, with about the same level of consistency.[234] Early studies suggest that the cost savings could be considerable.[235] For example, one study estimated that the technique would have saved 80% in attorney review hours.[236]

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In terms of alternative means of handling e-discovery issues, the Seventh Circuit E-Discovery Pilot Program has implemented Principles to address e-discovery. The results are positive from the perspective of participating judges, who believe the Principles have increased counsel's familiarity with their clients' data and systems,[237] the fairness of the process,[238] and the parties' ability to obtain relevant documents.[239] Responses from participating attorneys are favorable, although greater percentages report that the Principles do not affect the ability to obtain relevant documents[240] and have no effect on discovery with regard to the other party's efforts to preserve or collect ESI.[241] Both judges and attorneys found that the "e-discovery liaison"—an individual with e-discovery knowledge

[224] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., GENERAL COUNSEL SURVEY, *supra* note 8, at 35-36.
[225] *Id.* at 37.
[226] *Id.* at 35-36.
[227] *Id.* at 37.
[228] *Id.* at 34.
[229] PACE & ZAKARAS, TIMING OF SCHEDULING ORDERS, *supra* note 89, at 37.
[230] *Id.* at 25, 42 (accounting for 73% of the total cost of production).
[231] *Id.* at 37.
[232] *Id.* at 41-55.
[233] *Id.* at 59-69.
[234] *Id.* at xviii. In fact, studies of human reviewers show high levels of inconsistency. *Id.* at 58.
[235] *Id.* at xviii.
[236] *Id.*
[237] SEVENTH CIR. ELECTRONIC DISCOVERY PILOT PROGRAM COMM., E-DISCOVERY REPORT, *supra* note 92, at app. F.2.a, tbl. J-19.
[238] *Id.* at app. F.2.a, tbl. J-16.
[239] *Id.* at app. F.2.a, tbl. J-9.
[240] *Id.* at app. F.2.a, tbl. A-24.
[241] *Id.* at app. F.2.a, tbl. A-26.

appointed by each party to participate in the meet and confer process and attend court hearings—contributes to a more efficient process.[242]

VIII. EXPERT DISCOVERY

In a survey of closed cases in federal court, about one-third of attorney respondents reported disclosure of expert reports,[243] but fewer than 15% reported expert depositions in the case.[244] In cases with disclosure of at least one expert, the median number of experts disclosed was two for plaintiffs and one for defendants.[245] In cases with at least one expert deposition, the median number of depositions taken by both plaintiffs and defendants was one.[246] Only an average of 0.2-0.3 depositions per case (as reported separately by plaintiffs and defendants) lasted more than seven hours.[247] This survey included cases regardless of the point at which resolution occurred.

In Arizona, each side is entitled to only one independent expert witness per issue, absent a court order.[248] A survey in that state revealed that three-quarters of Arizona attorneys and judges wish to maintain that limit[249] and, considering respondents with federal experience, those with a preference chose the Arizona rules over the federal rules on the number of expert witnesses by a ratio of three-to-one.[250]

In Oregon, there is no disclosure or discovery of independent experts.[251] A survey of Oregon attorneys and judges revealed that they generally find the complete absence of knowledge about expert witnesses before trial to have a negative impact on how the litigation functions.[252] A majority of survey respondents indicated that it has a detrimental effect on the ability to prepare for trial,[253] and a plurality indicated that it has a detrimental effect on the efficiency of the litigation[254] as well as on the fairness of the process and outcome.[255] While nearly 60% of Oregon practitioners believe that the state's approach to experts does reduce costs,[256] the same proportion believes that it has no effect on or increases time to resolution.[257] Some commenting respondents indicated that the lack of knowledge about opposing experts prevents an honest assessment of the case's strengths and weaknesses,[258] increasing the risks associated with going all the way to trial.[259] It can also lead to the preemptive hiring of experts due to the inability to

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[242] *Id.* at app. F.2.a, tbls. J-21 & A-33.
[243] LEE & WILLGING, FJC CIVIL RULES SURVEY, *supra* note 82, at 9.
[244] *Id.* at 9-10.
[245] *Id.* at 9.
[246] *Id.* at 10.
[247] *Id.*
[248] ARIZ. R. CIV. P. 26(b)(4)(D) (Multiple parties on the same side must agree on the expert, or the court will designate the witness. Additional experts require a court order.)
[249] *Id.* at 27.
[250] *Id.* at 28.
[251] *Stevens v. Czerniak*, 84 P.3d 140, 144, 147 (Or. 2004); *see also Poppino v. Columbia Neurosurgical Assocs., LLC*, 2006 WL 4041462 (Or. Cir. Ct. Aug. 5, 2006) ("To this court's knowledge, Oregon remains the only jurisdiction in the country which does not require some type of expert witness disclosure or discovery in civil litigation.")
[252] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON SURVEY, *supra* note 11, at 37.
[253] *Id.*
[254] *Id.*
[255] *Id.* at 39.
[256] *Id.* at 38.
[257] *Id.*
[258] *Id.* at 40.
[259] *Id.* at 39.

assess the necessity of counter-experts.[260] The most frequently expressed sentiment in the survey comments was a call for some reasonable level of disclosure and/or discovery of expert witnesses, as a route toward making the process more fair.[261] There are attorneys who follow an unwritten rule to informally exchange certain information.[262]

A strong majority of surveyed financial experts nationwide agreed that eliminating the production of draft reports during discovery has resulted in a more effective process.[263] A majority of these experts indicated that expert depositions frequently help them to refine the issues for the client and help the adverse party to understand the basis for their opinion.[264] However, most believe that, if limited to either a report or a deposition, a report is a more effective tool than a deposition for expressing their opinions and for narrowing the issues for trial.[265] There is not a consensus among financial experts on how often, in their view, expert depositions promote settlement.[266]

IX. DISCOVERY MOTIONS

The duty to confer with opposing counsel prior to filing a discovery motion appears to have some benefit, as only a minority of surveyed attorneys nationwide indicated that this duty "serves little purpose."[267] For surveyed judges nationwide, only one in five state judges and one in three federal judges reported requiring a telephone conference before a discovery motion can be filed,[268] although anecdotally this practice may be a growing trend.

A strong majority of the judges believe that their court prioritizes the resolution of discovery disputes on a timely basis.[269] Nevertheless, there is still a good percentage of judges who reported an average time of 30 days or more to rule on a motion to compel (19% of federal and 12% of state) and to rule on expert discovery motions (30% of federal and 16% of state).[270] According to a federal docket study, holding a hearing on a disputed discovery motion (either in court or telephonically) is associated with, on average, more than a 30% reduction in the time to ruling.[271]

The level of discovery allowed may impact discovery motions practice. In Oregon state court, where interrogatories and expert discovery are not permitted, and requests for admission are limited to 30, the filing rate for disputed discovery motions is very low (four per 100 cases) compared to Oregon federal court (31 per 100 cases).[272] The mean time from filing to ruling was also lower, at 25 days in state court and 45 days in federal court.[273]

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[260] *Id.*
[261] *Id.* at 39-40.
[262] *Id.* at 40.
[263] Am. Inst. of Certified Pub. Accountants, Findings from the Forensic and Valuation Services Survey 6 (Feb. 2012) (unpublished report on file with authors) [hereinafter Am. Inst. of Certified Public Accountants, AICPA Survey].
[264] *Id.* at 9-10.
[265] *Id.* at 11.
[266] *Id.* at 10.
[267] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 73; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 31; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 45.
[268] GERETY, STATE AND FEDERAL JUDGE SURVEY, *supra* note 9, at 23.
[269] *Id.* at 22.
[270] *Id.* at 23.
[271] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., PACER STUDY, *supra* note 26, at 53.
[272] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE OREGON COURTS: AN ANALYSIS OF MULTNOMAH COUNTY 25 (2010) [hereinafter INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON DOCKET STUDY].
[273] *Id.* at 6.

Several recent pilot projects have attempted to reduce discovery motions practice. The federal Seventh Circuit E-Discovery Pilot Program emphasizes the early identification, discussion, and resolution of discovery disputes. Participating judges reported that the Principles had a beneficial effect on discovery disputes at higher rates than participating attorneys, more of whom indicated that the Principles had no effect.[274] In the Suffolk Superior Court Business Litigation Session Pilot Project in Massachusetts state court, a majority of participating attorneys scored pilot project cases better than non-pilot cases on the "absence of unnecessary conflict over discovery."[275] This project involves robust disclosures, proportional and staged discovery, and party conferences early and often.[276] The New Hampshire Proportional Discovery/Automatic Disclosure Pilot Rules include automatic disclosures, a limited number of interrogatories and deposition hours, and meet-and-confer requirements related to case structuring and preservation.[277] The evaluation of this project did not detect a change in the proportion of cases with discovery disputes, although discovery disputes were already infrequent prior to the pilot project (occurring in fewer than 10% of cases).[278]

X. DISCOVERY COSTS

Generally, attorneys surveyed nationwide believe that discovery consumes two-thirds of the resources (time and money) expended for cases not going to trial, but they consider about 50% to be a more appropriate level.[279] Considering individual federal cases, including those going to trial, the median portion of total litigation costs incurred for discovery was reported to be 20% for plaintiffs and 27% for defendants, rising by approximately 5% for both parties in cases with ESI.[280]

The National Center for State Courts has modeled costs by phase of the litigation—based on attorney and paralegal time and prevailing billable rates—in six common state court case types: automobile tort, premises liability, professional malpractice, breach of contract, employment dispute, and real property dispute.[281] Aside from trial, discovery consumes the most legal fees.[282] The following table provides reported legal fees expended solely for discovery in a "typical" state court case.[283] It should be noted that these figures include only legal fees and not other

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[274] SEVENTH CIR. ELECTRONIC DISCOVERY PILOT PROGRAM COMM., E-DISCOVERY REPORT, *supra* note 92, at app. F.2.a., tbl. J-7 (judge responses on the extent to which counsel meaningfully attempted to resolve issues before seeking court intervention), tbl. J-8 (judge responses on the promptness with which unresolved discovery disputes were brought to the court's attention), tbl. J-13 (judge responses on the effect on the number of discovery disputes brought to the court), tbl. A-22 (attorney responses on the effect on the parties' ability to resolve e-discovery disputes without court involvement), & tbl. A-31 (attorney responses on the effect on the number of discovery disputes).

[275] SINGER, *supra* note 137, at 8, 10.

[276] *Id.* at 1.

[277] HANNAFORD-AGOR ET AL., NEW HAMPSHIRE REPORT, *supra* note 16, at 2.

[278] *Id.* at 16.

[279] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 98 (cases that do not go to trial but survive a 12(b)(6) motion); HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 34 (cases that do not go to trial and are not dismissed on an initial 12(b) motion); KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 51 (all cases that do not go to trial).

[280] LEE & WILLGING, FJC CIVIL RULES SURVEY, *supra* note 82, at 38-39 (cases with at least one reported type of discovery).

[281] Paula L. Hannaford-Agor et al., Nat'l Ctr. for State Courts, *Estimating the Cost of Civil Litigation*, 20 COURT STATISTICS PROJECT CASELOAD HIGHLIGHTS 1, 2, 4 (2013) [hereinafter Hannaford-Agor et al., *NCSC Estimating Cost*].

[282] *Id.* at 6.

[283] *Id.* at 5 and detailed tables available at www.ncsc.org/clcm.

discovery costs, such as the internal costs of document production, deposition reporter and transcript costs, or expert witness fees.

THE "TYPICAL" STATE COURT CASE: ESTIMATED LEGAL FEES FOR DISCOVERY (ROUNDED TO THE NEAREST $100)						
Case Type	Automobile	Premises Liability	Real Property	Employment	Contract	Professional Malpractice
25th Percentile	$2,400	$3,100	$5,800	$6,300	$6,800	$8,700
Median	$7,700	$8,100	$13,400	$17,500	$17,400	$22,300
75th Percentile	$19,100	$28,000	$28,700	$37,900	$38,200	$52,000

About 70% of attorney survey respondents who have been involved with the Suffolk Superior Court Business Litigation Session Pilot Project in Massachusetts state court (with robust disclosures, proportional and staged discovery, and early and frequent party conferences) reported that the project improved the "cost-effectiveness of obtaining necessary discovery."[284]

In interviews concerning federal cases, attorneys identified the deposition process as one of the leading components of discovery costs.[285] Document discovery can also be burdensome, depending upon the number and nature of the documents, as well as the opposing party's level of cooperation.[286] Attorneys interviewed in two different studies, one federal and one state, have expressed that in some circumstances targeted and tailored discovery can lead to a more efficient (i.e., less costly) resolution than little or no discovery, and cost-conscious lawyers are aware when the cost of obtaining marginal information will exceed the benefit.[287] The cost savings intended by broadly applicable discovery limits can also depend on adherence to the rules, as well as the cost of alternative methods of information exchange (i.e., disclosures).[288]

More than half of attorneys in federal cases—including cases that resolved prior to discovery—indicated that discovery costs were the "right amount" in relation to the client's stakes, while about one in three indicated that discovery costs were "too much."[289] In cases with at least one reported type of discovery prior to resolution, surveyed attorneys stated that discovery costs were less than 4% of the stakes in half of cases, with the level tending to be higher for defendants than for plaintiffs; for the top 5%, discovery exceeded 25% for plaintiffs and 30% for defendants.[290] Not surprisingly, the ratio of discovery costs to stakes was higher for litigants concerned with *non-monetary* consequences.[291]

From a revenue generation perspective, defense attorneys nationwide attributed half of their firm's civil litigation practice revenue to discovery (at the median), while plaintiff attorneys attributed one-quarter (at the median).[292]

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[284] SINGER, *supra* note 137, at 8, 10 (Dec. 2012).
[285] WILLGING & LEE, IN THEIR WORDS, *supra* note 24, at 15.
[286] *Id.* at 15-16.
[287] GERETY & CORNETT, MEASURING RULE 16.1, *supra* note 80, at 42; WILLGING & LEE, IN THEIR WORDS, *supra* note 24, at 24.
[288] GERETY & CORNETT, MEASURING RULE 16.1, *supra* note 80, at 42.
[289] LEE & WILLGING, FJC CIVIL RULES SURVEY, *supra* note 82, at 28.
[290] *Id.* at 43 (cases with at least one reported type of discovery).
[291] *Id.* at 44.
[292] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 99; HAMBURG & KOSKI, NELA SURVEY, *supra* note

Surveyed attorneys in federal court indicated that potential production costs did not influence the client's choice of forum.[293] However, plaintiff attorneys with smaller cases in Colorado state court have indicated electing a lower level court with more limited discovery to keep client costs down, in certain appropriate cases.[294]

Half of surveyed attorneys in a study of federal cases indicated that e-discovery consumes less than 5% of their practice.[295] In addition, in half of cases involving an ESI request, costs incurred in producing or requesting e-discovery constitute no more than 5% of discovery costs for plaintiff and no more than 10% of costs for defendants.[296] Only in the top 5% of cases did e-discovery costs constitute three-quarters or more of total discovery costs.[297] It should be noted that this study included cases resolved at all points in the process, not just cases tried.

However, large companies are feeling the effects of ESI discovery. They reported that preservation costs have become significant and may have even outpaced production costs (although there is no hard data on this).[298] For production costs, large companies stated that collection creates the least burden and review creates the greatest burden.[299] Where total production costs could be calculated, the amounts ranged from $17,000 to $27,000,000.[300] In most of the studied cases, outside counsel expenses constitute the "overwhelming majority" of e-discovery costs.[301] On average, the cost per gigabyte reviewed was around $18,000.[302] In fact, for a different set of large companies, attorney review in discovery was estimated to consume roughly one-fourth of total outside legal fees.[303]

XI. FEE SHIFTING & COST SHIFTING

Empirical research concerning both fee shifting and cost shifting is quite slim. With respect to fee shifting, interviewed federal court attorneys have suggested that it can affect the cost of litigation by encouraging plaintiffs to pursue discovery more vigorously, as a parallel to the effect of hourly billing by defense attorneys.[304]

With respect to cost shifting, data from the Seventh Circuit E-discovery Pilot Program provides a bit of insight. In that program, where there is a standing order encouraging the discussion of cost sharing in discovery for certain "upgrades" in production format, about one in four attorneys reported that a requesting party would bear a material portion of ESI production costs in their pilot cases.[305]

23, at 45; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at app. C, tbl. XI.7.
[293] LEE & WILLGING, FJC CIVIL RULES SURVEY, *supra* note 82, at 28-29 (specifically asking about costs to the producing party; 54% of defense attorneys responded "not applicable").
[294] GERETY & CORNETT, MEASURING RULE 16.1, *supra* note 80, at 45.
[295] LEE & WILLGING, FJC CIVIL RULES SURVEY, *supra* note 82, at 25.
[296] *Id.* at 41.
[297] *Id.* at 41.
[298] PACE & ZAKARAS, TIMING OF SCHEDULING ORDERS, *supra* note 89, at xix.
[299] *Id.* at xv.
[300] *Id.* at 17.
[301] *Id.* at 36.
[302] *Id.* at 20.
[303] Lawyers for Civil Justice, Litigation Cost Survey of Major Corporations, *supra* note 120, at 15.
[304] WILLGING & LEE, IN THEIR WORDS, *supra* note 24, at 6, 12-13.
[305] SEVENTH CIR. ELECTRONIC DISCOVERY PILOT PROGRAM COMM., E-DISCOVERY REPORT, *supra* note 92, at 61.

XII. SANCTIONS

In federal court, one study recorded just over three motions for discovery sanctions *filed* per 100 cases,[306] while another study found discovery sanctions *imposed* in about 2% of cases.[307] A third study specifically examined sanctions related to e-discovery, finding that although such sanctions are still few in federal court, both motions and awards have been trending up over the last 10 years along with sanctions generally.[308] E-discovery sanction motions are most prevalent in federal employment, contract, and intellectual property cases.[309] Defendants were sanctioned for e-discovery violations nearly three times more often than plaintiffs.[310] Just two cases per year were determined to meet the safe harbor requirements of F.R.C.P. 37(e) for ESI lost as a result of "routine, good faith operation" of an information system.[311] When imposed, federal e-discovery sanctions have fallen across a wide spectrum, from allowing additional computer system access to dismissal of all claims or defenses.[312] Monetary sanctions themselves have also been diverse, ranging from $250 to more than $8,800,000 in studied cases.[313]

Numerous studies document that a strong majority of attorneys, practicing in state and federal courts around the country, believe that the sanctions allowed by the disclosure and discovery rules are seldom imposed.[314] A study concerning Arizona state court showed a perceived link between judicial reluctance to address discovery misconduct meaningfully with sanctions and negative behavior by the bar, including gamesmanship, obstructionism, and an "anything goes" attitude.[315] As a group, company general counsel nationwide were shown to be of two minds with respect to the role of e-discovery sanctions: a slight majority do not find them to be a useful tool in responding to e-discovery abuse, but about the same portion find the threat of sanctions to be a significant consideration in their company's e-discovery decisions.[316] (See also Section B.II., Spoliation.)

C. MOTIONS

In your imaginary case, what is the accepted process for bringing issues to the court's attention? What is the impact of that process? How long will it take to resolve motions? Will your case be subject to a motion for summary judgment, and if so, what role will it play?

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[306] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., PACER STUDY, *supra* note 26, at 46.
[307] LEE & WILLGING, FJC CIVIL RULES SURVEY, *supra* note 82, at 14.
[308] Dan H. Willoughby, Jr. et al., *Sanctions for E-discovery Violations: By the Numbers*, 60 DUKE L. J. 789, 790-91, 793-794 (2010).
[309] *Id.* at 798 (such motions were filed in about one of every six cases in these three categories).
[310] *Id.* at 803.
[311] *Id.* at 828.
[312] *Id.* at 803-05.
[313] *Id.* at 814.
[314] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ARIZONA SURVEY, *supra* note 63, at 43; INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON SURVEY, *supra* note 11, at 51-52; AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 67; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 30; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 43.
[315] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ARIZONA SURVEY, *supra* note 63, at 43, 45. It is a similar story with respect to sanctions for non-compliance with the pretrial conference requirements in that state. *Id.* at 42.
[316] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., GENERAL COUNSEL SURVEY, *supra* note 8, at 35.

I. TIME TO RULE ON MOTIONS

A docket study of federal courts around the country found significant variation across courts with respect to the time it takes to rule on motions on disputed discovery, motions to dismiss, and motions for summary judgment.[317] However, judges do tend to hurry to complete rulings immediately prior to the semi-annual reporting deadline, suggesting that external reporting requirements provide an incentive to act.[318] Holding a hearing (in court or telephonically) is associated with more than a 30% reduction in time to ruling on average for disputed discovery motions; in contrast, hearings on dispositive motions are less frequent and any impact on efficiency is not clear.[319]

Attorney perceptions of motion ruling times are not particularly positive. In three nationwide surveys, a majority of attorneys agreed that judges (state or federal) "routinely fail to rule on summary judgment motions promptly."[320] In a study of "complex" cases in the Southern District of New York, attorneys consistently noted the sometimes lengthy delays in obtaining rulings, including rulings on motions to dismiss, on motions for class certification, on motions for summary judgment, and following *Markman* hearings.[321]

A study of Multnomah County Circuit Court in Oregon provides an example of the varied time for rulings even within a single jurisdiction. There, the average time to ruling on a motion for default judgment is less than two days, while the average time to ruling on a motion to dismiss for want of prosecution or to show cause why the case should not be dismissed is more than six weeks.[322]

II. FREQUENCY OF MOTIONS

While the frequency of motions can provide insight into both the substantive issues and the level of contentiousness in the litigation, it is also important in and of itself because of the attorney and court resources expended for briefing, arguing, and resolving motions. One docket study measured the number of motions per case in federal courts across the country, finding an average filing rate of: 23 Rule 12 motions per 100 cases, 27 discovery motions per 100 cases, and 30 summary judgment motions per 100 cases.[323]

There are two studied state court procedures under which the number of motions is much lower. Regarding contract and tort cases in Oregon's Multnomah County Circuit Court, the rate of filing for dispositive motions is about half the rate in the federal District of Oregon.[324] Moreover, the filing rate for motions to compel is one-eighth.[325] The low number of motions in state court is particularly interesting given the fact-based pleading and limited discovery in the Oregon rules. The research also reflects fewer motions in cases that proceed under Colorado's simplified procedure

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[317] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., PACER STUDY, *supra* note 26, at 5, 45, 48, 51.
[318] *Id.* at 8, 78.
[319] *Id.* at 6-7, 53-54. The reduction in time for disputed discovery motions amounts to an average of two and a half weeks for an open court hearing and nearly three weeks for a telephonic hearing.
[320] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 115; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 38; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 61.
[321] Lee, Complex Litigation Survey Memo, *supra* note 56, at unnumbered comments pages 4, 5, 7, 8. A *Markman* hearing is an evidentiary hearing in a patent infringement case whereby the judge determines the meaning of patent language as a matter of law. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996).
[322] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON DOCKET STUDY, *supra* note 272, at 17.
[323] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., PACER STUDY, *supra* note 26, at 45, 48, 51.
[324] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON DOCKET STUDY, *supra* note 272, at 23, 27. The rate for motions to dismiss includes motions to strike pleadings and motions for judgment on the pleadings.
[325] *Id.* at 2.

for cases under $100,000, where discovery is replaced with mandated disclosures.[326] However, this may be attributable to the kinds of cases that utilize the voluntary process (a majority are not contested and resolve by default judgment).[327]

III. SUMMARY JUDGMENT

Summary judgment practice appears to be more prominent in federal court than in state court. In a nationwide survey of judges, about two-thirds of federal judges agreed that summary judgment motions are filed in "almost every case," while only about one-third of state judges similarly agreed.[328] This may be particularly true in Oregon, where summary judgment motions were observed to be filed at the rate of 18 per 100 contract and tort cases in state court and 45 per 100 contract and tort cases in federal court.[329] In that state's court proceedings, however, summary judgment can be defeated simply with an attorney affidavit stating that an unnamed qualified expert is retained, available, and "willing to testify to admissible facts or opinions creating a question of fact."[330]

The research shows substantial differences in summary judgment practice across individual federal districts, even within the same case types.[331] Two separate studies found that just over 15% of federal cases had at least one F.R.C.P. 56 motion.[332] It should be noted that a substantial portion of cases resolve before reaching this phase of the litigation.[333] One of those studies also found that the average time from filing to resolution of the motion was 166 days (approaching six months),[334] with slightly more than half of such motions granted in whole or in part.[335] Consistent with this, attorney survey respondents nationwide believe that judges routinely fail to rule on summary judgment motions promptly.[336] In a study of "complex" cases in the Southern District of New York, fewer than one in six respondents reported a pre-motion conference on summary judgment,[337] and fewer than one in seven respondents reported oral argument on summary judgment.[338]

One study focused on a common federal local rule for summary judgment.[339] Nearly 60% of federal districts require the movant to state in separately numbered paragraphs only those material facts that are not in dispute and entitle the movant to judgment as a matter of law, and about 20% of those districts also require the respondent to address each of those facts in similarly numbered paragraphs.[340] Use of this structured format was not shown to make a

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[326] GERETY & CORNETT, MEASURING RULE 16.1, *supra* note 80, at 26, 34.
[327] *Id.* at 23.
[328] GERETY, STATE AND FEDERAL JUDGE SURVEY, *supra* note 9, at 40 (it is unknown whether respondents considered all cases or only those that make it to the summary judgment stage).
[329] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON DOCKET STUDY, *supra* note 272, at 27.
[330] OR. R. CIV. P. 47(E).
[331] Memorandum from Joe Cecil & George Cort to Judge Michael Baylson of the Advisory Committee on Civil Rules, Report on Summary Judgment Practice Across Districts with Variations in Local Rules 3 (August 13, 2008) [hereinafter Cecil & Cort, Summary Judgment Practice Memo].
[332] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., PACER STUDY, *supra* note 26, at 49-50; Cecil & Cort, Summary Judgment Practice Memo, *supra* note 331, at 2.
[333] *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., PACER STUDY, *supra* note 26, at 42.
[334] *Id.* at 51.
[335] *Id.*
[336] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 115; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 38; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 61.
[337] Lee, Complex Litigation Survey Memo, *supra* note 56, at 14.
[338] *Id.*
[339] Cecil & Cort, Summary Judgment Practice Memo, *supra* note 331.
[340] *Id.* at 1, 18.

difference.[341] It was observed that structured format motions are more likely to be resolved, but the resolution takes longer.[342] However, these differences could not necessarily be attributed to the local rule.[343] In "complex" cases in the Southern District of New York, only about 20% of respondents prepared and filed a statement according to this rule.[344] A respondent to that study commented that the process had become tedious, expensive, and counterproductive in complex cases.[345]

Summary judgment is another area reflecting divergent views between plaintiffs and defendants. Plaintiff attorney survey respondents nationwide tend to agree that "summary judgment motions are used as a tactical tool rather than a good faith effort to narrow the issues,"[346] that "summary judgment motions practice increases cost and delay without proportionate benefit,"[347] and that "judges grant summary judgment more frequently than appropriate."[348] Defense attorneys, in contrast, disagree with these propositions.[349]

Summary judgment motions play a particularly prominent role in employment discrimination cases.[350] In federal court, defense motions are more common in these cases, more likely to be granted, and more likely to terminate litigation.[351] A nationwide survey of plaintiff employment attorneys revealed a strong belief that discovery is used more to develop evidence for or in opposition to summary judgment than to understand the other party's claims and defenses for trial.[352] In interviews concerning federal cases generally, defense attorneys expressed the sentiment that summary judgment is often appropriate in employment cases due to the lack of evidence of pretext,[353] while plaintiff attorneys expressed the sentiment that judges often use the wrong standard to resolve such motions.[354]

D. Case Resolution

As your imaginary case moves toward resolution, what issues will you face? At what point will you know the trial date, and will that date be kept? What are the chances that the case will actually make it to trial? What are the considerations for settlement? What role, if any, will alternative dispute resolution play?

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[341] *Id.* at 1-2 (examining three groups of courts and finding very few differences; any differences could not be attributed to the presence or absence of the particular local rules).
[342] Cecil & Cort, Summary Judgment Practice Memo, *supra* note 331, at 2.
[343] *Id.* at 2.
[344] Lee, Complex Litigation Survey Memo, *supra* note 56, at 14.
[345] *Id.* at unnumbered comments page 10.
[346] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 113; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 38; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at app. C, tbl. VIII.1.
[347] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 114; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 38; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at app. C, tbl. VIII.1.
[348] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 116; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 38; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at app. C, tbl. VIII.1.
[349] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 113, 114, 116; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at app. C, tbl. VIII.1.
[350] HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 38 (95% agree that summary judgment motions are filed in almost every case, with 76% expressing strong agreement).
[351] Cecil & Cort, Summary Judgment Practice Memo, *supra* note 331, at 3.
[352] HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 30 (74% agree, 34% agree strongly).
[353] WILLGING & LEE, IN THEIR WORDS, *supra* note 24, at 31.
[354] *Id.* at 30-31.

I. TRIAL TIMING

There is slight majority support (50% to 60%) among attorneys nationwide for setting the trial date early in the case (e.g., before the discovery and summary judgment phases), though support appears to be stronger on the plaintiff side.[355] In fact, one federal docket study found that setting the trial date early in a case strongly correlates with a shorter overall time to disposition.[356] Nevertheless, arriving at a trial date earlier rather than later may not happen consistently, as illustrated by a survey of "complex" cases in the Southern District of New York, in which over half of respondents handling cases with an initial pretrial conference indicated that the court never set a trial in the case.[357] Although Colorado's simplified procedure for actions under $100,000 provides that such cases will receive expedited trial settings,[358] this differentiation reportedly does not occur in practice and many courts provide the first available date to all cases.[359]

With respect to trial date certainty, nine out of ten state and federal judges believe that a firm trial date leads to more prompt case resolution, and the same proportion consider their court's trial dates to be credible.[360] However, only 45% of federal trials were found to start by the originally scheduled trial date.[361] In addition, over half of attorneys nationwide do not agree that "extreme circumstances" should be the standard for moving the trial date.[362]

There is a growing movement around the country to establish short, summary, and expedited trial programs, one hallmark of which is a certain and fixed trial date.[363] Many of these programs include limits on trial length, as well. In Oregon, civil cases eligible for a jury trial can elect to be designated as an expedited case, and when so designated, the judge will set a "trial date certain no later than four months from the date of the order" designating the case.[364] Outside of this program, Oregon has a trial time requirement of one year for "normal" cases and two years for "complex" cases,[365] and a majority of attorneys estimate that these deadlines are extended in less than 25% of their cases.[366] A majority of Oregon attorneys and judges with comparative (federal or neighboring state court) experience indicated that the trial time requirement for normal and complex cases decreases time to resolution and increases the efficiency of the litigation,[367] with no adverse effect on fairness.[368] While more than three out of four

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[355] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 119; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 39; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 64.
[356] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., PACER STUDY, *supra* note 26, at 64.
[357] Lee, Complex Litigation Survey Memo, *supra* note 56, at 15.
[358] COLO. R. CIV. P. 16.1(i).
[359] GERETY & CORNETT, MEASURING RULE 16.1, *supra* note 80, at 42.
[360] GERETY, STATE AND FEDERAL JUDGE SURVEY, *supra* note 9, at 25-26.
[361] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., PACER STUDY, *supra* note 26, at 64.
[362] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 122; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 39; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 64.
[363] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., AM. BD. OF TRIAL ADVOCATES & NAT'L. CTR. FOR STATE COURTS, A RETURN TO TRIALS: IMPLEMENTING EFFECTIVE SHORT, SUMMARY, AND EXPEDITED CIVIL ACTION PROGRAMS 3 (2012); *see generally* PAULA L. HANNAFORD-AGOR ET AL., NAT'L CTR. FOR STATE COURTS, SHORT, SUMMARY & EXPEDITED: THE EVOLUTION OF CIVIL JURY TRIALS (2012) [hereinafter HANNAFORD-AGOR ET AL., SHORT, SUMMARY & EXPEDITED]. In this context, a certain and fixed trial date refers to a set trial date that is not susceptible to continuance, by either the court or the parties, except in extraordinary circumstances.
[364] OR. UNIF. TRIAL COURT R. (UTCR) 5.150(2)(b).
[365] *Id. R.* 7.020(5) and 7.030(4).
[366] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON SURVEY, *supra* note 11, at 27.
[367] *Id.* at 28-29.
[368] *Id.* at 30.

attorneys agreed that the requirement provides adequate time for trial preparation in most cases,[369] some commenting attorneys expressed frustration, noting that it is not realistic for certain types of cases or poorly resourced courts.[370]

II. TRIAL RATES

Overall, the American judicial system—state and federal—is witnessing a persistent and striking decline in the portion of civil cases resolved by trial, along with a decline in the absolute number of trials.[371] This decline is generally not confined to particular case types or particular geographic regions.[372] In 2010, there were just over ten federal trials per million in population and only about 0.25 trials per billion in GDP, a significant drop over the last quarter-century.[373] The federal trial rate is roughly half of what it was 10 years ago, with bench trials declining more steeply than jury trials.[374] Indeed, one federal study pegged the civil trial rate at 0.6%.[375] Between 1992 and 2001, state court civil jury trials decreased by 25%.[376] Even in Oregon state court, generally considered to try more cases, only 2.4% of contract and tort cases reached trial, with only 1.4% terminating with a trial verdict.[377]

It is fair to say that the decline in trials (both as a percentage of dispositions and in absolute number terms) "has become institutionalized in the practices and expectations of judges, administrators, lawyers, and parties," as well as policymakers.[378] The decline may also be "self-perpetuating," as fewer judges and attorneys gain trial experience.[379]

III. SETTLEMENT

Research in the area of settlement has examined influencing factors, including the interconnection with litigation costs and discovery. In nationwide attorney surveys, a majority of respondents agreed that litigation costs force cases to settle that should not settle based on the merits, though defense attorneys tend to hold this belief at higher rates than plaintiff attorneys.[380] Across the surveys, attorneys identified the following factors related to the process as important in driving cases to settle: attorney fees, overall discovery costs, motions practice costs, expert witness

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[369] *Id.* at 26-27.
[370] *Id.* at p. 30.
[371] Mark Galanter & Angela Frozena, Pound Civil Justice Inst., The Continuing Decline of Civil Trials in American Courts (2011) (presented at the 2011 Forum for State Appellate Court Judges); Thomas H. Cohen, *General Civil Jury Trial Litigation in State and Federal Courts: A Statistical Portrait*, 5 JOURNAL OF EMPIRICAL LEGAL STUDIES 593, 611-612 (2008) [hereinafter Cohen, *A Statistical Portrait*].
[372] Galanter & Frozena, *supra* note 371, at 10, 17, 21; Cohen, *A Statistical Portrait*, *supra* note 371, at 611-612 (it should be noted, however, that this study did not find a statistically significant decline in the number of medical malpractice trials in either the state or federal systems and did not find a decline in motor vehicle tort trials in state court).
[373] Galanter & Frozena, *supra* note 371, at 26-27.
[374] *Id.* at 3.
[375] LEE, SANCTIONS MOTION STUDY, *supra* note 94, at 5.
[376] Cohen, *A Statistical Portrait*, *supra* note 371, at 612.
[377] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON DOCKET STUDY, *supra* note 272, at 20.
[378] Galanter & Frozena, *supra* note 371, at 23.
[379] *Id*.
[380] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 157; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 43; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 79. *See also* LEE & WILLGING, FJC CIVIL RULES SURVEY, *supra* note 82, at 72-73 (58% of defense and mixed-practice attorneys indicated that at least one client had settled solely based on federal litigation costs, while only 39% of plaintiff attorneys indicated the same).

costs, and trial costs.[381] Further, the following aspects of discovery costs were specifically identified as influencing settlement: deposition costs; document production costs; and e-discovery costs.[382]

In fact, about one in three respondents to a case-specific federal court survey reported that discovery costs increased the likelihood of settlement in the subject case.[383] Some interviewed attorneys in federal cases have suggested that a better-resourced party can wear the other party into settlement, particularly when an hourly compensation structure provides law firms with a strong financial incentive to continue the litigation and lawyers are increasingly concerned about malpractice, leading to fear of narrowing the issues, over-discovery, and motions practice prior to settlement.[384] Interviewed attorneys also discussed the role of summary judgment. In terms of timing, a summary judgment motion can limit early settlement discussions.[385] In terms of substance, it can either serve as a "catalyst for settlement" or "polarize the parties" away from settlement.[386]

Surveyed attorneys (both state and federal) do not find that the costs of legal research or court appearances other than trial drive cases to settle.[387] In addition, most attorneys do not believe that judges inappropriately pressure parties to settle cases,[388] but many also have the impression that judges do not like taking cases to trial and therefore try to avoid it.[389] There is a consensus that court-ordered alternative dispute resolution increases settlement rates.[390]

Unrelated to the legal process, the likelihood of an unfavorable verdict or judgment and the possibility of unfavorable precedent are considered important factors in the settlement decision.[391]

IV. ALTERNATIVE DISPUTE RESOLUTION

There is a consistent belief among a majority of surveyed attorneys nationwide that court-ordered alternative dispute resolution (ADR) is a positive development for managing costs, that it results in earlier and more settlements, and that the increased settlement rate is a good thing.[392] Nine out of ten surveyed state and federal judges who conduct settlement conferences find them to be a good use of time and effort.[393] Likewise, practitioners in "complex" cases

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[381] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 157; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 44; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 80-81.
[382] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 157; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 44; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 80-81.
[383] LEE & WILLGING, FJC CIVIL RULES SURVEY, *supra* note 82, at 32-33.
[384] WILLGING & LEE, IN THEIR WORDS, *supra* note 24, at 9-12, 23, 30.
[385] *Id.* at 29.
[386] *Id.* at 29, 32-33.
[387] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 157; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 44; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 80-81.
[388] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 130; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 40; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 68.
[389] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON SURVEY, *supra* note 11, at 49; AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 131; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 40; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 68.
[390] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 191; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 49; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 86-87.
[391] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 157; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 44.
[392] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 190-93; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 49; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 86-87.
[393] GERETY, STATE AND FEDERAL JUDGE SURVEY, *supra* note 9, at 43.

in the Southern District of New York have expressed that mediation/settlement conferences conducted by a magistrate judge are helpful.[394] However, a federal court docket study found that court-sponsored settlement or court-ordered mediation tends to occur 300-400 days into the life of the case—the same amount of time for an average case to terminate completely.[395] In addition, for state court cases that ultimately went to trial, ADR referrals had no measurable impact on disposition times.[396]

When given a choice, most attorney survey respondents reported that their clients would not choose private ADR over litigation.[397] Nevertheless, a majority indicated that mediation provides "the greatest savings in time and expense over litigation" in comparison to early neutral evaluation ("ENE") and arbitration.[398] In fact, surveyed attorneys and general counsel nationwide believe that mediation has time and cost benefits over litigation, while leading to fair outcomes.[399] While fewer attorneys have experience with ENE, there is some suggestion that this method of ADR may also have time and cost benefits without sacrificing fairness.[400]

The opinions of attorneys and general counsel concerning arbitration are more mixed. It appears that it does shorten time to disposition, but there is not a consensus on costs and there is some indication of a negative impact on fairness.[401] In fact, with increasing discovery efforts, these dispute resolution methods may be taking on many of the attributes of regular litigation and losing their value.[402] In fact, attorneys are considering the resources required for a shortened trial as compared to an arbitration hearing, which can be just as extensive in discovery and preparation, if not more so.[403] Also, there appears to be considerable variation in the quality of the decision-maker, the procedures

[394] Lee, Complex Litigation Survey Memo, *supra* note 56, at unnumbered comments pages 8, 9, 11
[395] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., PACER STUDY, *supra* note 26, at 65.
[396] Thomas H. Cohen, *Civil Trial Delay in State Courts: The Effect of Case and Litigant Level Characteristics*, 95 JUDICATURE 158, 165-66 (2012) [hereinafter Cohen, *Civil Trial Delay*].
[397] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 178; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 47; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 86.
[398] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 188; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 49.
[399] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., GENERAL COUNSEL SURVEY, *supra* note 8, at 39, 41; AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 182-84, 189; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 48-49.
[400] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 185-87; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 48.
[401] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., GENERAL COUNSEL SURVEY, *supra* note 8, at 41 (63% reported a shorter time to disposition and 55% reported lower costs, but 47% indicated no difference in procedural fairness and 37% indicated decreased fairness); AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 179 (35% indicated a decrease in costs, while 35% indicated no difference, and 19% indicated an increase in costs; 46% reported that outcomes are less fair, while 44% reported no difference in outcome fairness); HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 47 (39% reported a cost increase, while 26% reported no difference, and 20% reported a decrease in costs; 74% reported less fair outcomes); KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 86 (67% reported a shorter time to disposition and 52% reported lower costs).
[402] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., GENERAL COUNSEL SURVEY, *supra* note 8, at 40-42 (although a majority of general counsel do believe that the volume and cost of discovery in arbitration is lower than discovery in litigation); INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ARIZONA SURVEY, *supra* note 63, at 50-51 (57% indicated that arbitrators almost never limit discovery during the arbitration process to ensure an efficient and inexpensive resolution).
[403] HANNAFORD-AGOR ET AL., SHORT, SUMMARY & EXPEDITED, *supra* note 363, at 25.

employed, and the extent to which the law is followed.[404] In addition, arbitration awards have become "more aligned with civil jury awards."[405]

In Oregon, cases requesting monetary relief of $50,000 or less are subject to mandatory arbitration,[406] although cases often settle prior to arbitration.[407] In Arizona, cases requesting monetary relief under a certain amount (which varies by county and ranges between $25,000 and $65,000) are also subject to compulsory arbitration.[408] In these two jurisdictions, most attorneys and judges reported faster disposition times, reduced costs, and no difference in procedural fairness.[409] However, the written comments on mandatory arbitration were quite negative.[410] In both Oregon and Arizona, commenting attorneys and judges mentioned wasted time and money in cases that can least afford it due to appeal provisions, as well as the poor quality of the arbitrators.[411] In Arizona in the early 2000s, attorneys tended to opt for an alternative short trial program as a result of dissatisfaction with mandatory arbitration, but the strong support for the short trial program has waned recently, and it is now seen as "just another" optional alternative dispute resolution track.[412]

E. Time & Cost

In your imaginary case, how much time and money will the parties likely spend overall? Will deadlines be credible? How long will it take for the case to resolve? Is there a relationship between the length of time that the case is pending and the costs? What other factors affect costs, and what is the cost burden at each stage?

1. Continuances & Extensions

According to a federal court docket study, the districts with the fastest average disposition times have fewer requests for continuances and extensions filed, and any additional time periods granted are of shorter length.[413] This holds true for both minor and major deadlines.[414] A motion to extend the time to answer is filed in almost 40% of cases,[415] while a motion to continue one of the four major case deadlines (close of discovery, dispositive motions, pretrial conference, and trial) is filed in one-fourth of cases, the largest number relating to the deadline for the close of discovery.[416] The overall grant rate for motions to extend or continue was found to be over 90%.[417]

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[404] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., GENERAL COUNSEL SURVEY, *supra* note 8, at 42.
[405] HANNAFORD-AGOR ET AL., SHORT, SUMMARY & EXPEDITED, *supra* note 363, at 25.
[406] *See* OR. REV. STAT. § 36.400 *et seq.*
[407] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON DOCKET STUDY, *supra* note 272, at 19.
[408] ARIZ. R. CIV. P. 72-77; ARIZ. REV. STAT. § 12-133.
[409] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON SURVEY, *supra* note 11, at 60; INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ARIZONA SURVEY, *supra* note 63, at 50.
[410] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON SURVEY, *supra* note 11, at 60; INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ARIZONA SURVEY, *supra* note 63, at 50.
[411] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON SURVEY, *supra* note 11, at 61 (also noting the perception that the program is a reflection of judicial laziness); INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ARIZONA SURVEY, p.50.
[412] HANNAFORD-AGOR ET AL., SHORT, SUMMARY & EXPEDITED, *supra* note 363, at 22, 28.
[413] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., PACER STUDY, *supra* note 26, at 7-8, 54-63.
[414] *Id.* at 7.
[415] *Id.* at 55.
[416] *Id.* at 59.
[417] *Id.* at 55-63.

These docket data are consistent with a nationwide judge survey, as more than 80% of federal and state judges reported that attorney requests for extensions and continuances are a "significant" cause of litigation delay.[418] Moreover, about 80% indicated granting more than 90% of stipulated requests for pleadings extensions.[419]

A majority of surveyed attorneys nationwide disagreed that requiring clients to sign all requests for extensions or continuances limits the number of such requests.[420] In addition, there is not a strong consensus among judges that this practice has such an effect.[421] However, a majority of attorneys agreed that continuances "cost clients money," with the level of agreement tending to be higher among defense and mixed practice attorneys than plaintiff attorneys.[422] Over 95% of financial experts indicated that hours of preparation time increase if there are one or more continuances in the litigation.[423] When there are delays in the process after an expert has prepared, there is a duplication of efforts as the expert gets back up to speed after the delay.[424] This lesson can apply equally to attorneys and judges.

In Oregon state court, there are virtually no motions to extend deadlines during the ordinary pretrial process.[425] This is because the court sets relatively few hard deadlines prior to trial, and allows settings and re-settings by stipulation or letter to the court, as long as the outside deadline for trial remains firm. Requests to continue the trial date must be accompanied by a certificate of client advisement and must set forth the reason, any previous postponements, and whether there are any objections.[426] While this structure appears to decrease motions practice before the court, it does not mean that deadlines are not modified, which may still have attendant costs.

II. OVERALL CASE TIMING

In federal court, the great majority of cases terminate after some court action but before a pretrial conference is held.[427] A study in eight district courts nationwide revealed that 20% of federal cases resolve within three months, 20% resolve between four and six months, 25% resolve between seven months and one year, and 35% take longer than one year to resolve.[428] While there is inconsistency between individual judges, the most efficient federal courts move quickly at every stage of the case.[429] The three fastest districts overall were also the fastest in holding F.R.C.P. 16 conferences, resolving discovery motions, resolving dispositive motions, and setting a trial date after the case was

[418] GERETY, STATE AND FEDERAL JUDGE SURVEY, *supra* note 9, at 20.
[419] *Id.* at 21.
[420] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 74; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 31; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 46.
[421] GERETY, STATE AND FEDERAL JUDGE SURVEY, *supra* note 9, at 27.
[422] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 147; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 42; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 76.
[423] Am. Inst. of Certified Public Accountants, AICPA Survey, *supra* note 263, at 3.
[424] AM. INST. OF CERTIFIED PUB. ACCOUNTANTS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ANOTHER VOICE: FINANCIAL EXPERTS ON REDUCING CLIENT COSTS IN CIVIL LITIGATION 5 (2012).
[425] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON DOCKET STUDY, *supra* note 272, at 13.
[426] *Id.* at 13-14.
[427] Galanter & Frozena, *supra* note 371, at 19.
[428] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., PACER STUDY, *supra* note 26, at 38. This study excluded certain case types, which do not carry the typical procedural posture, including "student loan cases, recovery of overpayment of enforcement of judgments, recovery of overpayment of veterans' benefits, forfeiture cases, social security cases, deportation proceedings, and most prisoner petitions." *Id.* at 23.
[429] *Id.* at 39, 83.

filed.[430] The following tables contain those factors shown to statistically correlate with shorter times to disposition in federal court, as well as those factors having a weak or non-existent relationship with disposition times.

Factors Associated with Shorter Time to Disposition in Federal Court
A shorter elapsed time between filing and the setting of a trial date[431]
The earlier filing of motions to resolve discovery disputes[432]
Avoidance of late discovery requests, as measured by a shorter time between the F.R.C.P. 16 scheduling conference and any request for additional or extraordinary discovery[433]
The earlier filing of dispositive motions (dismiss and summary judgment)[434]

Factors Not Associated with Shorter Time to Disposition in Federal Court
Time between filing and the F.R.C.P 16 conference[435]
Number of motions presented to the court[436]
Time to ruling on discovery disputes[437]
Time to ruling on substantive motions[438]
The decision to use or not use a magistrate judge to handle scheduling or discovery matters[439]

A nationwide study of state court tort, contract, and property cases *disposed by trial* demonstrated a high degree of variation in resolution times between courts.[440] In addition, by case type, the average time to verdict or judgment was slightly longer for tort cases (26 months) than contract cases (23 months) and real property cases (22 months), with the non-asbestos product liability and medical malpractice subcategories taking the longest of the tort cases to dispose.[441] Even within the contracts category, however, the time to verdict or judgment surpassed two years for employment disputes other than discrimination, fraud cases, and tortious interference cases, and the partnership disputes subcategory exceeded three years.[442] In addition, the average certified state class action takes 22 months longer to dispose by trial than the average of all other cases.[443] In one study of Colorado district courts, caseflow management was the most influential factor in terms of the percentage of cases that were resolved within the court's one-year time standard.[444] The following tables show factors from another study that have been shown to relate, or not relate, to shorter times to a trial verdict or judgment in state court.

[430] *Id.* at 83.
[431] *Id.* at 31.
[432] *Id.* at 33.
[433] *Id.* at 32-33.
[434] *Id.* at 34.
[435] *Id.* at 35.
[436] *Id.*
[437] *Id.* at 33.
[438] *Id.* at 34.
[439] *Id.* at 68-69.
[440] Cohen, *Civil Trial Delay*, *supra* note 396, at 167.
[441] *Id.* at 163.
[442] *Id.*
[443] *Id.* at 166.
[444] Peter M. Koelling, Caseflow Management and its Effect on Timeliness in the Colorado District Courts 156 (May

Factors Associated with Shorter Time to Verdict or Judgment in State Court Cases Disposed by Trial
Fewer plaintiffs[445]
Fewer defendants[446]
Individual rather than organizational defendants (business, government, hospital)[447]
Presence of a *pro se* litigant[448]
Absence of a third party claim[449]
Court trial rather than jury trial[450]
Plaintiff prevails[451]
Smaller damage awards in cases with an award[452]

Factors Not Associated with Shorter Time to Verdict or Judgment in State Court Cases Disposed by Trial
The presence of counter- and cross-claims[453]
Referrals to alternative dispute resolution[454]

It is important to note that, in addition to considering a different set of cases, these federal and state studies considered different factors in their analysis. One study compared federal and state case processing times for similar categories of cases tried by a jury, and found that the median time from filing to the jury's verdict was faster in federal court (18 months) than in state court (23 months).[455] While the difference was consistent across all case categories, it is important to remember that other factors—such as judicial caseloads, docket composition, and court resources—can influence case processing times and thus this is not an "all things being equal" comparison.[456]

2013) (unpublished Ph.D. dissertation, Northern Illinois University) (on file with authors). Caseflow management was analyzed in this study using a caseflow management index. The index was developed based on a survey of court administrators to determine the use and strength of various court management techniques within their districts. *Id.* at 146.

[445] Cohen, *Civil Trial Delay*, *supra* note 396, at 164.

[446] *Id.*

[447] *Id.*

[448] *Id.* at 166.

[449] *Id.*

[450] *Id.*

[451] *Id.*

[452] *Id.* at 166-67.

[453] *Id.* at 166.

[454] *Id. But see* Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 817 (2000) (although not within the time frame examined here, this article shows an association between alternative dispute resolution and longer disposition times).

[455] Cohen, *A Statistical Portrait*, *supra* note 371, at 606-07.

[456] *Id.* at 606, 608.

In Oregon state court, where the federal rules have never been adopted, the mean time to disposition (by trial or otherwise) for contract and tort cases was 296 days, as compared to 395 days in Oregon federal court.[457] A multitude of influences could account for this difference.

One survey shows that nine of out ten state and federal judges believe that firm trial dates lead to more prompt case resolutions.[458] According to that study, as well as several others, the time required to complete discovery is considered by attorneys and judges to be the most prevalent cause of delay in the litigation process, followed by attorney requests for extensions/continuances and delayed rulings on pending motions.[459]

Regarding special programs currently in place, a majority of the Colorado bench and bar believe that the state's simplified procedure for actions under $100,000 leads to shorter disposition times,[460] but there is not, in fact, a statistically significant difference.[461] This may relate to factors other than the merits of the procedure itself, such as a failure of implementation, the court's caseload and docket composition, or local legal culture. Within the Seventh Circuit E-Discovery Pilot Program, a majority of attorneys and judges reported that the principles have no effect on time.[462] The same is true of the New Hampshire Proportional Discovery/Automatic Disclosure Pilot Rules, based on the evaluation of that project, finding no evidence of an impact on time to disposition.[463] There is some indication that the use of special referees in South Carolina's summary jury trial program has assisted in reducing the backlog of cases by better utilizing available courtrooms, and jurors, and by freeing judges to try other cases, but there is currently no research on time to disposition.[464]

III. TIME & COST RELATIONSHIP

The research points to a relationship between the length of a case and its cost. At least three out of four attorneys surveyed nationwide agreed that "the longer a case goes on, the more it costs," with a substantial portion expressing strong agreement.[465] Attorneys and expert witnesses also recognize that continuances cost clients money,[466] and four out of five general counsel indicated that fewer delays in the litigation process mean more cost savings for their company.[467] Similarly, about two out of three surveyed attorneys disagreed that expediting a case costs more.[468]

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[457] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON DOCKET STUDY, *supra* note 272, at 22.
[458] GERETY, STATE AND FEDERAL JUDGE SURVEY, *supra* note 9, at 25.
[459] *Id.* at 20; AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 156; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 43; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 78.
[460] GERETY, COLORADO SIMPLIFIED PROCEDURE SURVEY, *supra* note 81, at 22-23.
[461] GERETY & CORNETT, MEASURING RULE 16.1, *supra* note 80, at 32.
[462] SEVENTH CIR. ELECTRONIC DISCOVERY PILOT PROGRAM COMM., E-DISCOVERY REPORT, *supra* note 92, at app. F.2.a., tbls. J-12 & A-30 (interestingly, nearly one-quarter of judges reported a decrease in time, while the same portion of attorneys reported an increase).
[463] HANNAFORD-AGOR ET AL., NEW HAMPSHIRE REPORT, *supra* note 16, at 9.
[464] HANNAFORD-AGOR ET AL., SHORT, SUMMARY & EXPEDITED, *supra* note 363, at 13-15.
[465] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 148 (between 24% and 34% of each respondent group strongly agreed); HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 42 (21% strongly agreed); KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 75-76 (32% strongly agreed).
[466] Am. Inst. of Certified Public Accountants, AICPA Survey, *supra* note 263, at 3; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 75-76.
[467] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., GENERAL COUNSEL SURVEY, *supra* note 8, at 21.
[468] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 149; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 42; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 75-76.

These opinions are fleshed out by the numbers. One federal court study found that every 1% increase in case duration is associated with a 0.32% increase in costs for plaintiffs and a 0.26% increase in costs for defendants, all else being equal.[469] A state court litigation cost model, built around the mid-range of "typical" cases in six common case types, confirms that costs accumulate as a case continues.[470]

Despite these findings, the research reminds us that the time and cost relationship is not one-dimensional. For example, nearly half of surveyed general counsel agreed that delays can sometimes save money by leveraging a more advantageous settlement.[471]

IV. LITIGATION COSTS OVERALL

Generally, a majority of attorneys surveyed believe that potential litigation costs can inhibit the filing of cases or force cases to settle that should not settle based on the merits.[472] There is also majority agreement for the proposition that litigation costs are not proportional to the value of cases, at least for "small" cases (opinions are mixed with respect to "large" cases).[473] However, the tipping point is not clear. Over 80% of surveyed attorneys in private practice indicated turning away cases "when it is not cost-effective to handle them," and some have a defined threshold amount in controversy, with $100,000 being the most common category selected (or median amount, depending on the study) among attorneys nationwide.[474] However, there is variability, as attorneys in Arizona reported a median amount of $25,000.[475]

Interviewed federal attorneys cited the volume of discovery as a primary factor driving the cost of litigation.[476] In a survey of federal closed cases resolved at any point in the process, attorneys reported that median litigation costs were $15,000 for plaintiffs and $20,000 for defendants, but ballooned to $280,000 to $300,000 at the top 5%.[477] All else being equal, the following tables include factors that have been shown to be associated, or not, with higher costs for both plaintiffs and defendants:

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[469] EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS 5, 7 (2010) [hereinafter LEE & WILLGING, FJC MULTIVARIATE ANALYSIS].
[470] Hannaford-Agor et al., *NCSC Estimating Cost*, *supra* note 281, at 5.
[471] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., GENERAL COUNSEL SURVEY, *supra* note 8, at 20.
[472] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 157; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 43; LEE & WILLGING, FJC CIVIL RULES SURVEY, *supra* note 82, at 72-73; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 18, 79.
[473] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., GENERAL COUNSEL SURVEY, *supra* note 8, at 19; AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 153-54; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 42 (considering only those who work in a private law firm environment); KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 75.
[474] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 172-73; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 45 (considering only those who work in a private law firm environment); KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 83.
[475] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ARIZONA SURVEY, *supra* note 63, at 45.
[476] WILLGING & LEE, IN THEIR WORDS, *supra* note 24, at 14-15.
[477] LEE & WILLGING, FJC CIVIL RULES SURVEY, *supra* note 82, at 35, 37.

Factors Associated with Higher Costs for Both Plaintiffs and Defendants in Federal Court
Higher stakes[478]
Concern with non-monetary consequences[479]
Case complexity (in particular number of parties & number of underlying transactions)[480]
Number of e-discovery disputes[481]
Number of non-expert depositions[482]
A ruling on summary judgment[483]
Resolution by trial[484]
Larger firms (some of this may be attributable to party or attorney characteristics)[485]

Factors Associated with Higher Costs for Plaintiffs But Not Defendants in Federal Court
Number of expert depositions[486]
Hourly billing[488]

Factors Associated with Higher Costs for Defendants But Not Plaintiffs in Federal Court
Number of reported types of discovery[487]
Contentiousness between the parties[489]
Case type[490]

Factors Not Associated with Higher Costs for Either Plaintiffs or Defendants in Federal Court
Class allegations[491]
Number of third-party subpoenas[492]
Judicial workload[493]

Outside the intellectual property context, case type did not generally account for cost differences in this study.[494] Other cost factors cited by respondents included the competence and attitude of counsel, as well as procedural complexity (e.g., *Markman* or *Daubert* hearings).[495]

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[478] LEE & WILLGING, FJC MULTIVARIATE ANALYSIS, *supra* note 469, at 5, 7 (1% increase leads to a 0.25% increase in costs).
[479] *Id.* at 6, 8 (42% higher for plaintiffs and 25% for defendants).
[480] *Id.* at 6-7.
[481] *Id.* at 5, 7 (each deposition leads to a 10% increase in costs).
[482] *Id.* at 6-7 (each type of discovery leads to a 5% increase in costs).
[483] *Id.* at 6, 8 (24% higher for plaintiffs and 22% higher for defendants).
[484] *Id.* at 5, 7 (53% higher for plaintiffs and 24% higher for defendants).
[485] *Id.* at 6, 8.
[486] *Id.* at 5-7 (each leads to an 11% increase).
[487] *Id.* (each leads to a 5% increase).
[488] *Id.* at 6, 8 (25% higher).
[489] *Id.* at 6-7.
[490] *Id.* at 8 (costs in intellectual property cases were 62% higher).
[491] *Id.* at 6, 8.
[492] *Id.* at 6-7.
[493] *Id.* at, 8.

With respect to e-discovery, federal plaintiffs and defendants who requested *and* produced ESI had higher costs, all else equal.[496] In addition, plaintiffs who only requested ESI experienced higher costs.[497] However, in an interesting pattern, those parties who only produced ESI did not report higher costs than respondents in non-ESI cases.[498] Disputes over ESI also increase costs for both parties.[499]

The National Center for State Courts has modeled costs by phase of the litigation—based on attorney and paralegal time, prevailing billable rates, and expert witness fees—in six common state court case types: automobile tort, premises liability, professional malpractice, breach of contract, employment dispute, and real property dispute.[500] The litigation phase that consumes the most hours is trial, followed by discovery.[501] The remaining stages (case initiation, settlement, pretrial motions, and post-disposition) each consume less than 15% of the total time billed.[502] Across virtually every stage of litigation, professional malpractice cases were the most expensive and automobile tort cases were the least.[503] The following table provides detailed cost figures reported for a "typical" state court case.[504]

THE "TYPICAL" STATE COURT CASE:
ESTIMATED LEGAL FEE AND EXPERT WITNESS COSTS FOR ALL PHASES OF LITIGATION COMBINED
(ROUNDED TO THE NEAREST $100)

Case Type		Automobile	Premises Liability	Real Property	Employment	Contract	Professional Malpractice
25th Percentile	Legal Fees	$15,100	$19,100	$26,700	$32,900	$29,900	$38,700
	Experts	$2,500	$3,000	$2,500	$3,000	$4,600	$15,000
	Total	**$17,600**	**$22,100**	**$29,200**	**$35,900**	**$34,500**	**$53,700**
Median	Legal Fees	$38,200	$44,000	$61,400	$82,500	$75,600	$89,100
	Experts	$5,000	$10,000	$5,000	$5,000	$15,000	$33,000
	Total	**$43,200**	**$54,000**	**$66,400**	**$87,500**	**$90,600**	**$122,100**
75th Percentile	Legal Fees	$94,400	$138,500	$137,500	$190,800	$170,500	$208,400
	Experts	$15,000	$16,000	$20,000	$20,000	$40,000	$120,000
	Total	**$109,400**	**$154,500**	**$157,500**	**$210,800**	**$210,500**	**$328,400**

"Based on these estimates," concluded the author of the study, "it becomes easy to see how litigation costs might affect access to the civil justice system. Few litigants would be willing to risk incurring such costs unless the expected return—damages awarded for plaintiffs or damages avoided for defendants—greatly exceed those costs."[505]

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[494] *Id.*
[495] WILLGING & LEE, IN THEIR WORDS, *supra* note 24, at 6, 7.
[496] LEE & WILLGING, FJC MULTIVARIATE ANALYSIS, *supra* note 469, at 5, 7 (costs were 48% higher for plaintiffs and 17% higher for defendants).
[497] *Id.* at 5 (costs were 37% higher).
[498] *Id.* at 5, 7.
[499] *Id.*
[500] Hannaford-Agor et al., *NCSC Estimating Cost*, *supra* note 281, at 1, 2, 4.
[501] *Id.* at 6.
[502] *Id.*
[503] *Id.* at 6-7; detailed tables available at www.ncsc.org/clcm.
[504] *Id.* at 5-6; detailed tables available at www.ncsc.org/clcm.
[505] *Id.* at 5.

A majority of respondents to a general counsel survey reported that the cost of pretrial litigation for the typical case has increased in recent years, as has the total yearly cost of pretrial litigation for their companies.[506] Larger companies (in terms of revenue and scope) were more likely to report an increase than smaller companies.[507] In a separate survey, very large (Fortune 200) companies reported a rise in average aggregate outside litigation costs from $66.4 million in 2000 to $115 million in 2008.[508] Respondents to both studies commonly attributed the trend to discovery in general, and e-discovery in particular.[509] Those reporting cost decreases in the first general counsel survey cited new in-house processes and technologies, as well as less litigation due to aggressive settlement and/or a focus on claim avoidance.[510] While more than 80% of general counsel believe that the system of hourly billing contributes disproportionately to costs,[511] attorneys in Oregon and Arizona were less likely to attribute excessive costs to this factor.[512]

There is no clear evidence that any specific procedural experiment (e.g., Colorado's Simplified Procedure, the Seventh Circuit E-discovery Pilot Program, or the Nevada Short Trial program) has reduced costs, although it is certainly possible. However, there is strong agreement from attorneys across multiple studies that cases cost less when all counsel are collaborative and professional.[513]

F. The Bench & Bar

How many judges will be involved in your imaginary case, and how will they manage it? What effect will the attorneys' attitudes and relationship have on the case? How closely will the parties adhere to the governing rules? Will consequences follow a failure to adhere?

1. Number of Judges per Case

According to a number of nationwide surveys, attorneys and judges generally believe that one judicial officer should handle a case from start to finish,[514] and that the trial judge should handle pretrial matters.[515] However, a smaller majority also indicated that the prompt handling of pretrial matters is more important than the issue of whether they are handled by the trial judge or a magistrate judge.[516]

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[506] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., GENERAL COUNSEL SURVEY, *supra* note 8, at 16-17.
[507] *Id.* at 17.
[508] Lawyers for Civil Justice, Litigation Cost Survey of Major Corporations, *supra* note 120, at 7.
[509] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., GENERAL COUNSEL SURVEY, *supra* note 8, at 16-17; Lawyers for Civil Justice, Litigation Cost Survey of Major Corporations, *supra* note 120, at 17.
[510] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., GENERAL COUNSEL SURVEY, *supra* note 8, at 16-17.
[511] *Id.* at 21.
[512] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ARIZONA SURVEY, *supra* note 63, at 44-45 (53% expressed agreement with the statement); INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON SURVEY, *supra* note 11, at 48-49 (49% expressed agreement with the statement).
[513] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 152; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 42; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 76.
[514] GERETY, STATE AND FEDERAL JUDGE SURVEY, *supra* note 9, at 13; AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 127; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 40; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 68-69.
[515] GERETY, STATE AND FEDERAL JUDGE SURVEY, *supra* note 9, at 14; AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 128; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 40; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 68-69.
[516] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 129; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 40; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 68-69.

According to federal judges, the best uses of magistrate judges are for settlement conferences and consent trials, either a phase separate from the litigation or the entire litigation.[517] They are least enthusiastic about special referral for discrete issues or referral for all pretrial matters only.[518]

II. JUDICIAL CASE MANAGEMENT

Four nationwide surveys show that solid majorities of attorneys and judges believe early judicial intervention (by judges or magistrate judges) helps to focus the litigation, by narrowing the issues and limiting discovery.[519] These and other surveys also show general agreement that early and active judicial involvement for the duration of a case is a positive development for the pretrial process and leads to more satisfactory results for clients.[520] In fact, a federal docket study concluded that efficient case processing is most likely where "the local legal community, steered by the expectations of the judiciary, embraces (or at least accepts) strong case management."[521]

In a survey regarding federal cases, the average attorney response for how actively the judge managed a particular case was 2.6 on a 5-point scale (2.9 in cases with an F.R.C.P. 16(b) scheduling conference).[522] Another study of federal cases calculated the median time from filing to issuance of the first F.R.C.P. 16 scheduling order to be 3.5 months, with a variability in median times between districts of 1.6 months.[523] The timeframe was generally shortest for tort cases and longest for "complex" cases.[524] Only 15% of initial scheduling orders were enforced without subsequent modification (an additional 30% had no modification but the case settled prior to the deadlines).[525]

With respect to the availability of judicial officers to resolve discovery disputes on a timely basis, about two-thirds of attorneys agreed that magistrate judges are available, while the same proportion indicated a belief that judges are *not available* for this purpose.[526] According to attorneys in federal court, the most common types of judicial discovery management are limiting the time for completing discovery and holding conferences to plan discovery.[527] About three-quarters of federal cases involving discovery had a court-adopted discovery plan.[528]

Only one-quarter of attorneys find final pretrial orders (for example, F.R.C.P. 16(e)) to be "very helpful" in preparing the case for trial, while a majority find them to be "somewhat helpful."[529] With respect to their timing,

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[517] GERETY, STATE AND FEDERAL JUDGE SURVEY, *supra* note 9, at 15-16.
[518] *Id.*
[519] *Id.* at 9-10; AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 124-25; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 40; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 68.
[520] Lee, Complex Litigation Survey Memo, *supra* note 56, at unnumbered comments pages 1-4, 8-10; INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON SURVEY, *supra* note 11, at 52-54; AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 126; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 40; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 68.
[521] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., PACER STUDY, *supra* note 26, at 9.
[522] LEE, EARLY STAGES OF LITIGATION, *supra* note 21, at 7.
[523] LEE, TIMING OF SCHEDULING ORDERS, *supra* note 179, at 2 (The median time is most likely within the rule's requirement of 120 days after service or 90 days after a defendant appears).
[524] *Id.* at 3.
[525] LEE, EARLY STAGES OF LITIGATION, *supra* note 21, at 7.
[526] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 63-64; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 30; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 43.
[527] LEE & WILLGING, FJC CIVIL RULES SURVEY, *supra* note 82, at 12-13.
[528] *Id.* at 11-12.
[529] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 145; HAMBURG & KOSKI, NELA SURVEY, *supra*

about 70% reported that the F.R.C.P. 16(e) order is more helpful after a ruling on summary judgment than before, while one in five reported that the timing makes no difference.[530] For "complex" cases in the Southern District of New York, 80% of respondents stated that there was no joint pretrial order filed in the case, which may be a result of when the cases ended, but this fact shows that such orders affect only about one in five complex cases in that jurisdiction.[531] Similarly, more than 85% indicated that a final pretrial conference was not held in the case.[532]

In Colorado, judges do not generally manage cases on the simplified procedure track differently from those with a standard pretrial process,[533] and there was no difference detected in the number of court appearances.[534]

III. JUDICIAL IMPLEMENTATION & ENFORCEMENT GENERALLY

Two nationwide attorney surveys revealed no strong consensus on whether, as a general matter, judges enforce the federal rules consistently or as written.[535] However, those and other studies did probe into the implementation and enforcement of specific provisions in various jurisdictions:

- **Federal Rule of Civil Procedure 26(f):** Federal judges report that they regularly enforce the meet and confer requirement for discovery planning.[536]
- **Federal Rule of Civil Procedure 26(b)(2)(C):** A majority of defense and mixed practice attorneys, as well as a plurality of plaintiff attorneys, find that judges do not enforce the proportionality provisions in Rule 26(b)(2)(C) to limit discovery.[537]
- **Arizona Rule of Civil Procedure 26.1:** Only one in five Arizona practitioners reported that courts "often" or "almost always" enforce the rule requiring disclosure of all known relevant information.[538]
- **Arizona Rule of Civil Procedure 26, 30, 33.1, 34, 36:** Only one in five Arizona practitioners reported that courts "often" or "almost always" enforce presumptive limits on discovery.[539]
- **Colorado Rule of Civil Procedure 16.1:** Colorado attorneys expressed frustration concerning lax enforcement of the simplified procedure's disclosure obligations, particularly without the availability of discovery to ensure the appropriate exchange of information prior to trial.[540]
- **Oregon Rule of Civil Procedure 18:** Commenting Oregon practitioners noted that some judges do not apply the fact-based pleading requirements in place, but rather tend to proceed as if notice pleading is in effect.[541]

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note 23, at 41; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 70.

[530] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 144; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 41.

[531] Lee, Complex Litigation Survey Memo, *supra* note 56, at 14.

[532] *Id.* at 15.

[533] GERETY & CORNETT, MEASURING RULE 16.1, *supra* note 80, at 40.

[534] *Id.* at 35.

[535] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 37-38; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 26.

[536] GERETY, STATE AND FEDERAL JUDGE SURVEY, *supra* note 9, at 28-29 (it is not clear whether respondents considered all cases or only those in which the parties do not meet and confer as required).

[537] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 78; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 31 (these surveys asked about "Rule 26(b)(2)(C)" and therefore, answers may relate not only to the federal rule but to state equivalents, as well); KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 44 and app. C, tbl. VI.1.

[538] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ARIZONA SURVEY, *supra* note 63, at 26.

[539] *Id.* at 41.

[540] GERETY & CORNETT, MEASURING RULE 16.1, *supra* note 80, at 41; GERETY, COLORADO SIMPLIFIED PROCEDURE SURVEY, *supra* note 81, at 37-38.

- **Oregon Uniform Trial Court Rule 7.020:** An Oregon docket study revealed that judges do not dismiss cases promptly in accordance with the rule requiring service within a certain period after filing.[542]

The importance of judicial enforcement to prevent gamesmanship and the wrongful withholding of information was a consistent theme to come out of a study of the Arizona rules.[543] Similarly, a study of the Oregon rules noted strong sentiment that courts should do more to "hold attorneys accountable to the expectations of the . . . rules, which would allow those rules to have their intended effects."[544]

IV. LEGAL CULTURE (COOPERATION VS. GAMESMANSHIP)

The research shows that attorneys and judges are of two minds concerning the legal culture, particularly with respect to discovery. On one hand, there is acknowledgement of the benefits of cooperation and civility. More than 95% of attorneys agreed that "when all counsel are collaborative and professional, the case costs the client less."[545] According to both attorneys and judges, counsel agree on the scope and timing of discovery in most cases,[546] and a majority of attorneys find that the duty to confer with opposing counsel before filing a discovery motion does serve a purpose.[547] A majority of attorneys also agreed that cases involving informal discovery are less expensive.[548] Although informal discovery is certainly not the rule,[549] this type of information exchange does occur.[550] In fact, over 90% of surveyed attorneys in federal cases indicated that cooperation does not inhibit zealous advocacy,[551] and over 60% reported that they were able to reduce the cost and burden of discovery in the subject case through cooperation.[552]

On the other hand, there is a perception that litigation can be contentious and abusive. Between 50% and 70% of attorneys believe that counsel use discovery as a tool to force settlement, though this sentiment is stronger for defense attorneys than for plaintiff attorneys.[553] Similar proportions of state and federal judges agree.[554] In fact, a

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[541] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON SURVEY, *supra* note 11, at 25.
[542] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON DOCKET STUDY, *supra* note 272, at 17.
[543] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ARIZONA SURVEY, *supra* note 63, at 41, 43.
[544] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON SURVEY, *supra* note 11, at 50, 52.
[545] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 152.; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 42; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 75.
[546] GERETY, STATE AND FEDERAL JUDGE SURVEY, *supra* note 9, at 29; AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 75; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 31; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 46.
[547] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 73; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 31 (46% of this group agreed, while 53% disagreed); KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 45.
[548] KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 45.
[549] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 65; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 30; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 45.
[550] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON SURVEY, *supra* note 11, at 47; LEE & WILLGING, FJC CIVIL RULES SURVEY, *supra* note 82, at 9 (in federal cases, 59% of plaintiff attorneys and 56% of defense attorneys reported an informal exchange of documents in the subject case, while 52% of plaintiff attorneys and 47% of defense attorneys reported the informal exchange of other materials).
[551] *Id.* at 62-63.
[552] *Id.* at 30-31.
[553] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 68; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 30; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 45 and app. C, tbl. VI.1.
[554] GERETY, STATE AND FEDERAL JUDGE SURVEY, *supra* note 9, at 28.

notable portion of attorneys reported that discovery abuse reaches almost every case.[555] In addition, a majority of general counsel expressed agreement that opposing counsel are generally uncooperative,[556] reporting high levels of discovery misconduct in the form of overusing discovery procedures and harassing or obstructing the opposition.[557] Attorneys do not appear to hold clients or the rules responsible, as most do not see clients as driving excessive discovery[558] or consider the federal rules to promote unnecessary conflict between counsel.[559]

Regarding information on processes around the country that diverge from the federal rules model:

- More than 20 years ago, Arizona attempted to address a problematic legal culture by instituting comprehensive pretrial conferences, extensive disclosures, and presumptive discovery limits.[560] However, attorneys and judges continue to express the need for less gamesmanship and more civility in state court litigation.[561]
- In Colorado, attorneys and judges do not perceive a difference in the level of attorney cooperation between the standard procedure and the voluntary simplified procedure for cases under $100,000.[562] However, there is a perception that some attorneys opt eligible cases out of the simplified procedure for the purpose of making the case more difficult to litigate and raising the price of litigation.[563]
- In Oregon, attorneys and judges believe that both the state's procedural rules and its legal culture enhance the civility of litigation in the state, which is viewed as high.[564]
- Many of the short, summary, and expedited jury trial procedures around the country require a higher level of cooperation and collaboration than is traditionally required in litigation, although these procedures are often used in less complex cases and the effects are unclear.[565]
- The Seventh Circuit E-Discovery Pilot Program appears to be having a positive effect on the level of cooperation exhibited by counsel,[566] without affecting counsel's ability to zealously represent the client.[567]

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[555] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 62 (51% agreed); HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 30 (65% agreed); LEE & WILLGING, FJC CIVIL RULES SURVEY, *supra* note 82, at 70-71 (21% of plaintiff attorneys, 23% of plaintiff and defense attorneys, and 16% of defense attorneys agreed); KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 45 (45% agreed).
[556] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., GENERAL COUNSEL SURVEY, *supra* note 8, at 22.
[557] *Id.* at 27-28.
[558] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 69; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 30; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 45.
[559] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 43; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 26; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 28.
[560] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ARIZONA SURVEY, *supra* note 63, at 4.
[561] *Id.* at 14-15, 44-45.
[562] GERETY & CORNETT, MEASURING RULE 16.1, *supra* note 80, at 40.
[563] *Id.* at 40.
[564] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON SURVEY, *supra* note 11, at 46, 49-50.
[565] HANNAFORD-AGOR ET AL., SHORT, SUMMARY & EXPEDITED, *supra* note 363, at 36, 72. For example, in Charleston County, South Carolina, the attorneys jointly decide upon a *pro tempore* judge and determine trial timing and details. *Id.* at 11.
[566] SEVENTH CIR. ELECTRONIC DISCOVERY PILOT PROGRAM COMM., E-DISCOVERY REPORT, *supra* note 92, at app. F.2.a, tbls. J-5 & A-20.
[567] *Id.* at app. F.2.a, tbls. J-15 & A-21.

G. Differentiation by Case & Court

Is your imaginary case subject to a different process due to its size or type? If not, should it have been? How would your case fare in different courts?

1. Case Differentiation: Simplified or Small

In nationwide surveys, attorneys expressed strong agreement that litigation costs are not proportional to "small" cases (those with smaller amounts in dispute).[568] Not surprisingly, then, there has been interest around the country in alternate processes and procedures aimed at solving the issues of cost and delay for smaller cases. The research demonstrates that the use and success of these programs often hinges on their details.

One program with a specific dollar-value limit is Colorado's Rule 16.1, a voluntary "simplified" procedure for actions with less than $100,000 in controversy against any one party, with recovery under the rule similarly limited.[569] The process, which applies unless a party opts out, replaces discovery with extensive disclosure obligations.[570] Although more than 60% of cases on the district court docket proceed under Rule 16.1, these cases are mostly consumer credit collection actions and other straightforward contract actions with few parties and fixed or liquidated damages.[571] In the majority of Rule 16.1 cases, there is no appearance by any defendant, and these cases are more likely be resolved by entry of default judgment, closed for lack of progress, or dropped by the parties.[572] Overall, the perception among interviewed attorneys and judges is that the cap on damages and the need to rely on disclosures, combined with the early point at which the decision concerning participation must be made, discourage represented parties in contested actions from using the procedure and even lead to inflation of damages claimed.[573] In addition, judges do not appear to handle Rule 16.1 cases in an expedited manner.[574]

Maricopa County, Arizona established a voluntary short trial program in the late 1990s as an alternative to mandatory arbitration for cases under $50,000 (although it can be used in cases not subject to arbitration).[575] The trial is usually scheduled within 3 months of referral to the program, and is heard by a *pro tempore* judge working on a *pro bono* basis.[576] Each party has two hours and can use one live witness to present their case to four jurors, three of whom must agree for a binding verdict that cannot be appealed absent fraud.[577] Most short trial cases have been personal injury actions with low amounts in dispute; in many cases liability is not an issue and damages are subject to a high-low agreement.[578] While this program was quite popular during its early years and provides

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[568] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 153 (89% of respondents agreed, with 41% expressing strong agreement); HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 42 (83% of respondents agreed, with 43% expressing strong agreement).
[569] COLO. R. CIV. P. 16.1.
[570] COLO. R. CIV. P. 16.1(k)(1)(A).
[571] GERETY & CORNETT, MEASURING RULE 16.1, *supra* note 80, at 14-16, 19, 37; *see also* GERETY, COLORADO SIMPLIFIED PROCEDURE SURVEY, *supra* note 81, at 28-29.
[572] GERETY & CORNETT, MEASURING RULE 16.1, *supra* note 80, at 20-21.
[573] *Id.* at 38-39, 41, 44; GERETY, COLORADO SIMPLIFIED PROCEDURE SURVEY, *supra* note 81, at 29-31.
[574] GERETY & CORNETT, MEASURING RULE 16.1, *supra* note 80, at 40, 42; GERETY, COLORADO SIMPLIFIED PROCEDURE SURVEY, *supra* note 81, at 38.
[575] HANNAFORD-AGOR ET AL., SHORT, SUMMARY & EXPEDITED, *supra* note 363, at 22-23.
[576] *Id.* at 23.
[577] HANNAFORD-AGOR ET AL., SHORT, SUMMARY & EXPEDITED, *supra* note 363, at 24.
[578] *Id.* at 24.

lawyers an opportunity for professional development, it has more recently fallen out of favor.[579] Reasons include: the alignment of arbitration awards with jury verdicts combined with the additional effort required to involve a jury, concern that the procedural restrictions are too stringent, the lack of evidence of an earlier trial date, and the loss of the program's biggest champion in the judiciary.[580]

Charleston County, South Carolina's summary jury trial program, while created for a wide range of actions, has mostly been used in simple automobile tort cases.[581] This program arose out of scarce judicial time but an abundance of courtrooms and jurors.[582] Participation is by mutual consent, the parties jointly select and pay a special referee to hear the case, evidence presentation can be condensed, trials generally last one day, and the six-person jury's unanimous verdict is binding.[583] The "consensus opinion" among the program's users is that it is beneficial and successful, providing a pretrial conference and an early, certain trial date (considered luxuries in this jurisdiction), while giving the litigants their "day in court" without the high price tag.[584]

The Bronx County, New York summary jury trial program, a local variation on a program throughout the state, appears to be "best suited to cases involving relatively straightforward evidentiary matters."[585] The program involves a one-day jury trial with strict time and witness limits, facilitated by a dedicated summary jury trial judge and heard by six to eight jurors.[586] With an emphasis on cooperation, attorneys exchange evidentiary packets in advance of trial and the parties often work out damages caps or high-low agreements.[587] The verdict is binding, but there is no record, appeal, or judicial enforcement of the judgment.[588] Insurance companies and other defense litigants "favor the program [because] it provides an opportunity to resolve low-value cases without significant litigation expense."[589] However, verdicts are evenly split between plaintiffs and defendants.[590]

For cases under $50,000 in Nevada's Eighth Judicial District, the short trial program provides both an alternative to and a mechanism for appeal from mandatory arbitration.[591] These cases are scheduled for a jury or bench trial within 240 days of entry into the program, are heard by an assigned *pro tempore* judge, and are administered by the ADR commissioner.[592] Each party has three hours to present their case, and all such trials have reached a verdict within one day.[593] A district court judge must approve the result before the judgment becomes final, and the parties have all standard appeal rights.[594] The most typical short trial case is an automobile personal injury and property damage claim, generally with liability admitted and a high-low agreement for damages.[595] "Key stakeholders" agree that the

[579] *Id.* at 25-27.
[580] *Id.* at 25-28.
[581] *Id.* at 13.
[582] *Id.* at 8, 11.
[583] *Id.* at 10-12.
[584] *Id.* at 8, 13-14.
[585] *Id.* at 32.
[586] *Id.* at 32-33.
[587] *Id.* at 33.
[588] *Id.* at 32, 37.
[589] *Id.* at 34.
[590] *Id.* at 35.
[591] *Id.* at 44.
[592] *Id.*
[593] *Id.* at 44-45.
[594] *Id.* at 46, 49.
[595] *Id.* at 47.

program has met its objectives by delivering a faster trial date (six months vs. four years) and a valid jury verdict with limited litigation costs, while providing educational opportunities for less experienced lawyers.[596]

Under Multnomah County, Oregon's expedited civil jury trial program, cases designated as "expedited" by a joint motion granted by the judge are tried within four months of the case entering the program.[597] The program arose out of interrelated concerns for small cases, including: questions about the fairness of mandatory arbitration, the high cost of standard litigation, and the vanishing jury trial.[598] Therefore, participation in the program exempts litigants from otherwise mandatory (but non-binding) arbitration for cases under $50,000.[599] Unless otherwise stipulated by the parties, a default discovery plan sets forth both required and limited additional discovery, including disclosure of expert witnesses before trial, a significant departure from current practice.[600] Contrary to the usual practice in this jurisdiction, a single judge is assigned to the case, who is available to address issues without formal motions practice.[601] Absent any stipulation to restrictions or variations, however, the trial proceeds much like any other civil trial.[602] Due to the four-month timeline, attorneys believe that the program is best suited for single-issue personal injury cases; however, ready access to a single judge would be more useful in complex cases.[603] While early reviews have been positive, the program has been slow to catch on, and has attracted mostly seasoned lawyers rather than provided a training opportunity for new lawyers.[604]

California's expedited jury trial program is designed to streamline the trial itself, providing a one-day jury trial for lower-value cases.[605] These cases generally follow the standard pretrial procedure, with the voluntary election to use the program occurring 30 days before trial and all pretrial aspects taking place during that window.[606] Each side has three hours to present its case to an eight-person jury, high-low agreements are explicitly permitted (but withheld from the jury), and appeal is available only for fraud or misconduct.[607] Orange and Riverside Counties have had low numbers of expedited jury trials, as education about the program has been hampered by the state's budget crisis and parties are reluctant to relinquish their appeal rights.[608] Cases in the program do not always follow its provisions—for example, by making the election to participate on the eve of trial and thus dispensing with the pretrial provisions along with some of the potential cost savings.[609] In addition, few of these trials have actually been completed in one day.[610] Nevertheless, judges, attorneys, and jurors with expedited jury trial experience view the program in a positive light.[611]

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[596] *Id.* at 50.
[597] *Id.* at 55, 57.
[598] *Id.* at 55.
[599] *Id.* at 55-56.
[600] *Id.* at 57, 60, 62.
[601] *Id.* at 57.
[602] *Id.*
[603] *Id.* at 58-59.
[604] *Id.* at 60-63.
[605] *Id.* at 68, 70.
[606] *Id.* at 70.
[607] *Id.* at 70-71.
[608] *Id.* at 71-73.
[609] *Id.* at 73-74.
[610] *Id.* at 74.
[611] *Id.* at 76.

II. CASE DIFFERENTIATION: GENERALLY

There is generally no consensus among attorneys nationwide on whether one set of rules can or cannot accommodate every case type.[612] Attorneys are also split on whether local rules provide necessary flexibility from one jurisdiction to the next and on whether they promote inconsistency and unpredictability.[613] There is a sense, however, that local rules are not necessarily applied uniformly in the jurisdiction to which they pertain.[614] In Colorado, which has standard and simplified procedure tracks, attorneys reported that it is burdensome to track multiple rules schemes with different obligations and deadlines in the same court.[615]

One nationwide attorney survey asked whether the system "works well" for certain types of cases but not others, and nearly two out of three respondents answered affirmatively.[616] Of those, over half stated that the amount in controversy is a factor in how well the system works; using the median range for the lower and upper limits provided, the system is perceived to work better for cases between $100,000 and $5 million.[617] With respect to case types, attorneys and judges both indicated that the current system works well for at least personal injury and general tort cases.[618]

III. COMPARISON OF COURTS

Empirical studies have not only examined how processes and procedures are working within the courts, but also the differences between courts. The most obvious comparison is state versus federal court. In making this comparison, it is important to keep in mind the differences and similarities between the two systems. The volume of state court cases is much larger than the volume in the federal courts and, in fact, close to 98% of civil jury trials occur in state courts.[619] Looking only at jury trials, while the median damage award is substantially higher in federal court than in state court (not surprising on account of jurisdictional mandates), only about 4% of the total amount awarded to plaintiffs results from federal trials.[620] The greatest proportion of trials in both systems are personal injury torts, but the federal courts tend to try more contract cases than the state courts.[621]

Attorney survey respondents nationwide are somewhat mixed on whether they prefer state or federal court, though it appears defense attorneys have more of a preference for federal court than plaintiff attorneys.[622] Among general counsel, just over half prefer federal court to state court, and one-third have no preference.[623]

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[612] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 44; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 26; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 28.
[613] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 45-46; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 27; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 31.
[614] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 47; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 27 (note: there is a mistake in the reporting, as the numbers do not add to 100%); KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 31.
[615] GERETY & CORNETT, MEASURING RULE 16.1, *supra* note 80, at 45.
[616] KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 19.
[617] *Id.* at 23.
[618] *Id.* at 21 (56% for personal injury and 55% for general torts); GERETY, STATE AND FEDERAL JUDGE SURVEY, *supra* note 9, at 17 (state judges: 75% personal injury and 77% general torts; federal judges: 63% personal injury, 62% general torts).
[619] Cohen, *A Statistical Portrait*, *supra* note 371, at 599, 608 (the number of civil jury trials is about 44 times greater in state court than in federal court).
[620] *Id.* at 603, 610.
[621] *Id.* at 599, 601.
[622] AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 25 (for plaintiff attorneys, 42% state preference and

Generally, the advantages of federal court cited by attorneys include the quality of judges, more careful consideration of dispositive motions, greater substantive legal knowledge of the case type, and more hands-on management of cases.[624] Attorneys and judges have also noted more consistent adherence to the rules and the law, along with less fear of enforcing standards or making difficult decisions.[625] In one study of federal court, more than two-thirds of the attorneys surveyed agreed that court procedures are generally fair, and a majority agreed that case outcomes are generally fair.[626]

Generally, the advantages of state court cited by attorneys include greater accessibility, flexibility, and convenience, along with less hands-on management of cases and lower costs.[627] General counsel pointed to the Delaware Chancery Court and New York's commercial division as examples of preferred state courts.[628] Almost half of plaintiff attorneys in employment actions stated that state courts are "more favorable to plaintiffs,"[629] and nearly two-thirds indicated that the F.R.C.P. are not conducive to the just, speedy, and inexpensive determination of actions.[630] However, setting aside what occurs during the pretrial process, for cases that make it to a jury verdict, plaintiff win rates are "strikingly similar" in state and federal courts, and the damages awarded across various case types show similar patterns in the two systems.[631]

Comparisons have also been made by attorneys and judges in specific jurisdictions. In Arizona, where the rules diverge from the federal model, nearly half of those with federal experience prefer the state system (as compared to one-quarter who prefer the federal system).[632] Those who prefer the state system point to the state's disclosure and discovery rules, reporting that state court is faster, less costly, and more accessible.[633] Arizona respondents also find state court more relaxed, collegial, and user-friendly.[634]

In Oregon, which has never followed the federal model, 43% of attorneys and judges with federal experience prefer the state system while 37% prefer the federal system.[635] Those who prefer state court believe that it is simpler and less onerous than federal court, with less paperwork and more management by attorneys (rather than

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42% federal preference; for mixed practice attorneys, 20% state preference and 56% federal preference; for defense attorneys, 13% state preference and 74% federal preference); HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 22 (42% state preference, 44% federal preference); KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 11 (43% state preference, 40% federal preference).

[623] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., GENERAL COUNSEL SURVEY, *supra* note 8, at 23.

[624] *Id.* at 24; AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 30; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 24; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 14.

[625] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., GENERAL COUNSEL SURVEY, *supra* note 8, at 24; INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ARIZONA SURVEY, *supra* note 63, at 12-13.

[626] LEE & WILLGING, FJC CIVIL RULES SURVEY, *supra* note 82, at 68-69.

[627] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., GENERAL COUNSEL SURVEY, *supra* note 8, at 24; AM. BAR ASS'N, ABA LITIGATION SURVEY, *supra* note 5, at 27; HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 23; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 5, at 13.

[628] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., GENERAL COUNSEL SURVEY, *supra* note 8, at 24.

[629] HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 23.

[630] HAMBURG & KOSKI, NELA SURVEY, *supra* note 23, at 25.

[631] Cohen, *A Statistical Portrait*, *supra* note 371, at 601-03, 605

[632] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ARIZONA SURVEY, *supra* note 63, at 12.

[633] *Id.* at 13.

[634] *Id.*

[635] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OREGON SURVEY, *supra* note 11, at 12.

"micromanagement" by judges).[636] Consistent with the nationwide surveys, Oregon respondents listed the following reasons for preferring federal court: clearer procedures; more predictability; and more consistently applied and enforced law.[637] Oregon attorneys and judges with experience litigating in neighboring states prefer Oregon state court at a three-to-one ratio,[638] stating that the process is straightforward, streamlined, and efficient.[639] Those who prefer the systems in other states cited the more liberal disclosure and discovery rules, finding that they lead to more transparency.[640]

It should be noted that litigation practices can cross over between the state and federal courts. For example, one federal court study mentioned that fact-based pleading requirements in state courts influence pleading practices in the federal courts.[641] At the same time, there can be substantial variation within a state system and within the federal system, particularly where pilot projects are in place. For example, survey feedback on the voluntary Superior Court Business Litigation Session Pilot Project in Massachusetts state court shows that a solid majority of participating attorneys found the project to increase their overall satisfaction with the litigation experience.[642]

IV. CONCLUSION

How do the findings of the studies described here compare to your expectations for your imaginary case? And what does the research tell us about the civil justice system as a whole? Examples of pressure points identified by the research include the role of early case settings, initial disclosures, limits on discovery, summary judgment motions, and the effect of case differentiation (both by judges and attorneys) on time and cost factors. In addition, there are certainly areas not examined by the research within the last five years. Areas for future research include the use of mandatory conferences prior to any discovery motions in an attempt to reduce cost and delay, as well as the effectiveness of various methods of differentiated case management, or even separate discovery or disclosure protocols tailored by case type. The challenge is to learn from the research that has been collected, understand its limitations and applications, and make wise choices for the civil justice system of the future. We hope this summary proves useful in furthering the discussion. In addition, we look forward to incorporating new research as it becomes available.

[636] *Id.* at 12-13.
[637] *Id.* at 13.
[638] *Id.* at 14.
[639] *Id.*
[640] *Id.*
[641] WILLGING & LEE, IN THEIR WORDS, *supra* note 24, at 29.
[642] SINGER, *supra* note 137, at 8, 10.

INDEX OF STUDIES

(LISTED ALPHABETICALLY BY AUTHOR)

AM. BAR ASS'N, ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: FULL REPORT (2009).

This survey was designed as a companion to the 2008 survey of Fellows of the American College of Trial Lawyers. The Federal Judicial Center administered the survey to assist the Civil Rules Advisory Committee in its evaluation of the civil litigation process under the F.R.C.P. In mid-2009, approximately 3,300 members of the American Bar Association Litigation Section nationwide submitted responses. About half of the respondents represent primarily defendants, about one-quarter represent primarily plaintiffs, and the remaining one-quarter represent plaintiffs and defendants about equally.

AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, FINDINGS FROM THE FORENSIC AND VALUATION SERVICES SURVEY (Feb. 2012) (unpublished report) (on file with authors), with portions summarized in AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS FORENSIC AND VALUATION SERVICES EXECUTIVE COMMITTEE CIVIL JUSTICE TASK FORCE, ANOTHER VOICE: FINANCIAL EXPERTS ON REDUCING CLIENT COSTS IN CIVIL LITIGATION (not dated).

This study was designed to leverage the unique perspective of financial expert witnesses in civil litigation. In total, 111 members of the American Institute of Certified Public Accountants Forensic and Valuation Services Section responded to a survey administered in January and February of 2012. Respondents are certified public accountants with experience as expert witnesses providing forensic accounting services in state or federal court.

KIRSTEN BARRETT ET AL., MATHEMATICA POLICY RESEARCH, ACTL CIVIL LITIGATION SURVEY: FINAL REPORT (June 27, 2008) (unpublished report) (on file with authors).

This survey was aimed at examining perceived problems in the civil justice system. Mathematica Policy Research, Inc. administered the survey on behalf of IAALS, the Institute for the Advancement of the American Legal System at the University of Denver, and the American College of Trial Lawyers (ACTL) Task Force on Discovery and Civil Justice. In the spring of 2008, nearly 1,495 attorney ACTL Fellows from all over the United States and Puerto Rico submitted responses (judges and retired members were not included in the survey). ACTL membership is limited to experienced trial lawyers, not to exceed 1% of the total lawyer population of any state or province. Three-quarters of the survey respondents primarily represent defendants, while one-quarter primarily represent plaintiffs.

JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011).

This study was designed to assess the application and effect of the *Twombly* and *Iqbal* cases on motions to dismiss under F.R.C.P. 12(b)(6) in broad categories of civil cases. The Federal Judicial Center used multivariate statistical models to compare motion activity within the first 90 days of filing, as revealed in orders filed in 23 federal district courts during 2006 and 2010. Just over 1,900 orders were studied (700 from 2006 and 1,222 from 2010). The study excluded cases filed by prisoners and *pro se* parties. (It should be noted that in the process of conducting a follow-up study, the researchers discovered missing motions and orders, which necessitated verification of the findings. The authors "have no reason to believe that inclusion of the missing orders will change the findings of our study of outcomes of motions.")

JOE S. CECIL ET AL., FED. JUDICIAL CTR., UPDATE ON RESOLUTION OF RULE 12(B)(6) MOTIONS GRANTED WITH LEAVE TO AMEND: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011).

This study was a follow-up to the Federal Judicial Center's earlier report on motions to dismiss for failure to state a claim after *Iqbal* (2011). Based on the previous study's finding that such motions were granted more frequently with

leave to amend the complaint in 2010 than in 2006, this study examined 543 of those cases (143 from 2006 and 400 from 2010) to determine the frequency and outcomes of amended complaints and subsequent motions to dismiss.

Memorandum from Joe Cecil & George Cort to Judge Michael Baylson of the Advisory Committee on Civil Rules, Report on Summary Judgment Practice Across Districts with Variations in Local Rules (August 13, 2008) (on file with authors).

This study examined summary judgment practice to assess the impact of a local rule requiring the movant to state separately in numbered paragraphs only those material facts that are not in dispute and entitle the movant to judgment as a matter of law, as well as the impact of the respondent to address each of those facts in similarly numbered paragraphs. The study compared three groups of federal courts: 1) districts that place the requirements on both movant and respondent (20); 2) districts that place the requirement only on the movant (34); and 3) districts with no such requirement (37) (three districts—W.Wis., Northern Mariana Islands, Virgin Islands—were excluded due to the inability to obtain usable information from the system). Researchers identified 23,332 cases (of 139,247 reviewed cases) containing at least one motion for summary judgment. In total, the study analyzed 45,827 separate motions for summary judgment.

PAULA HANNAFORD-AGOR, ET AL., NAT'L CTR. FOR STATE COURTS, CIVIL JUSTICE INITIATIVE, NEW HAMPSHIRE: IMPACT OF THE PROPORTIONAL DISCOVERY/AUTOMATIC DISCLOSURE (PAD) PILOT RULES (2013).

The Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules were implemented in the Superior Courts in two counties in New Hampshire on October 1, 2010, applying to all newly filed non-domestic civil cases. This study sought to determine the impact of the PAD Rules by examining 2,947 cases. The study utilized a pre-post design for the docket data, where the pre-implementation set included cases filed between July 1, 2008 and June 30, 2010 and the post-implementation set included cases filed between October 1, 2010 and September 30, 2012. In addition to quantitative measures, NCSC staff conducted interviews with stakeholders involved in the project's implementation and attorneys who litigated under the PAD Rules.

Thomas H. Cohen, *General Civil Jury Trial Litigation in State and Federal Courts: A Statistical Portrait*, 5 JOURNAL OF EMPIRICAL LEGAL STUDIES 593 (2008).

This study provides a comparison between state and federal courts with respect to jury trials concluded in tort, contract, and real property cases during three separate years: 1992, 1996, and 2001. It examines data from the Civil Justice Survey of State Courts for a sample of state courts, as well as data from the Administrative Office of the U.S. Courts for all federal district courts. The state sample included "either 45 or 46 of the nation's 75 most populous counties" during the relevant years. The federal data set included only diversity jurisdiction cases. One of the goals of the study was to examine trial litigation trends.

Thomas H. Cohen, *Civil Trial Delay in State Courts: The Effect of Case and Litigant Level Characteristics*, 95 JUDICATURE 158 (2012).

The goal of this study was to enhance and update understanding of the factors to consider when constructing systems to differentiate cases into separate tracks. This study examined data from the 2005 Civil Justice Survey of State Courts, which is sponsored by the Bureau of Justice Statistics. It examined 26,881 tort, contract, and real property cases disposed in 2005 by bench or jury trial in a national sample of state trial courts. This sample included 156 counties, 46 of which represent the nation's 75 most populous counties and 110 of which represent the remainder of the nation.

Scott Dodson, *A New Look: Dismissal Rates of Federal Civil Claims*, 96 JUDICATURE 127 (2012).

This study examined motions to dismiss under F.R.C.P. 12(b)(6) in federal district courts based on Westlaw searches. The study selected 100 pre-*Twombly* and 100 post-*Iqbal* cases for reading and coding, coding each claim and each ruling separately (factual sufficiency or legal sufficiency). This is in contrast to previous studies, which coded whole motions and made no determination regarding the grounds for the ruling on the motion to dismiss. As the study did not account for amended complaints, the dismissal rate is based on the initial ruling rather than the ultimate outcome.

Mark Galanter & Angela Frozena, Pound Civil Justice Inst., The Continuing Decline of Civil Trials in American Courts (2011) (unpublished report) (presented at the Pound Civil Justice Institute 2011 Forum for State Appellate Court Judges).

This study sought to shine light on a long-term downward trend in civil trial rates and its implications. It examined U.S. District Court civil cases that terminated through 2010 and state court data from both the National Center for State Courts (22 general jurisdiction courts between 1976 and 2002) and the Bureau of Justice Statistics (the 75 most populous counties from 1992 to 2005). The state data include only tort, contract, and real property cases, rather than the full gamut of cases heard in general jurisdiction courts.

CORINA GERETY & LOGAN CORNETT, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., MEASURING RULE 16.1: COLORADO'S SIMPLIFIED CIVIL PROCEDURE EXPERIMENT (2012).

As a follow-up to the 2010 survey, this study examined Colorado's voluntary "simplified" pretrial procedure for actions seeking $100,000 or less from any one party. Specifically, the study aimed to determine how often and under what circumstances the procedure is used, its impact, and how it is perceived by attorney and judges. Data were collected on 785 Colorado state district court civil cases closed in 2010 across 14 Colorado counties, as well as 691 cases designated as part of an initial pilot project that began in 2000. Additionally, in-depth interviews were conducted with 29 attorneys and judges who responded to an earlier survey (2010) and volunteered to participate in further studies.

CORINA GERETY, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., TRIAL BENCH VIEWS: FINDINGS FROM A NATIONAL SURVEY ON CIVIL PROCEDURE (2010).

This study aimed to add the judicial perspective to the national dialogue on the civil justice process. The survey was designed to provide a snapshot of collective judicial opinion at the macro level and lay the groundwork for more targeted research on judges' assessments of the civil justice system. Respondents included a total of 1,432 state trial judges and nearly 293 federal trial judges (both Article III and magistrate judges) whose names appeared as of Spring 2010 on the Northwestern University School of Law Searle Center's judicial database, which is perhaps the most comprehensive list of U.S. judges.

CORINA GERETY, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SURVEYS OF THE COLORADO BENCH AND BAR ON COLORADO'S SIMPLIFIED PRETRIAL PROCEDURE FOR CIVIL ACTIONS (2010).

This survey, administered in the summer of 2010, provided Colorado judges and attorneys an opportunity to express their views on the state's voluntary "simplified" pretrial procedure for actions seeking $100,000 or less from any one party. Responses were received from 50 sitting Colorado district court judges who handled civil cases after implementation of the procedure (90% had presided over at least one simplified procedure case). Responses were also received from 272 attorney members of the Colorado Bar Association Litigation Section with district court civil litigation experience after implementation of the procedure (two-thirds had at least one simplified procedure case).

REBECCA M. HAMBURG & MATTHEW C. KOSKI, NAT'L EMP'T LAWYERS ASS'N, SUMMARY OF RESULTS OF FEDERAL JUDICIAL CENTER SURVEY OF NELA MEMBERS, FALL 2009 (2010).

This survey was designed as a companion to the 2008 survey of Fellows of the American College of Trial Lawyers. The Federal Judicial Center administered the survey to assist the Civil Rules Advisory Committee in its evaluation of the civil litigation process under the F.R.C.P. In October and November of 2009, 296 members of the National Employment Lawyers Association (NELA) submitted responses. NELA members practice extensively in federal court and devote substantial portions of their practice to defending employee rights arising under federal statutes. Nearly all respondents practice in private law firms.

Paula L. Hannaford-Agor et al., Nat'l Ctr. for State Courts, *Estimating the Cost of Civil Litigation*, 20 COURT STATISTICS PROJECT CASELOAD HIGHLIGHTS (2013).

This Civil Litigation Cost Model was developed to estimate litigation costs by phase of the case, based on attorney and paralegal time and prevailing billing rates (assuming appropriate staffing). The estimates were obtained through a survey of the entire membership of the American Board of Trial Advocates (members have tried at least 10 cases to verdict), administered in the summer of 2012. A total of 202 members submitted complete responses, and another 110 members submitted partial responses, concerning the time spent to resolve a "typical" automobile tort, premises liability, professional malpractice, breach of contract, employment dispute, or real property dispute. These case types comprise nearly 60% of non-domestic relations civil cases filed in state courts. The model also documents the number of expert witnesses and their related fees. Challenges included envisioning a "typical" case and pinpointing hourly rates given the variety of billing practices.

PAULA L. HANNAFORD-AGOR ET AL., NAT'L CTR. FOR STATE COURTS, SHORT, SUMMARY & EXPEDITED: THE EVOLUTION OF CIVIL JURY TRIALS (2012).

This monograph examined the development, evolution, and operation of short, summary, and expedited jury trial programs in six jurisdictions: Charleston County, South Carolina; New York; Maricopa County, Arizona; Clark County, Nevada; Multonomah County, Oregon; and California. The National Center for State Courts conducted interviews with trial judges, attorneys, and court staff during a series of site visits in 2011. Each case study describes the institutional and procedural structure of the program and, when available, objective information about the number of cases assigned to these programs and their respective outcomes.

Kendall W. Hannon, *Much Ado About* Twombly*? A Study On the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions,* 83 NOTRE DAME L. REV. 1811 (2008).

This study aimed to answer the question of whether the federal district courts applying *Twombly* require more from pleadings than they did prior to the decision, by examining motions to dismiss. The study included cases in the Westlaw federal district court database that cited either *Conley* or *Twombly* and included the phrase "failure to state a claim" or "12(b)(6)" within a paragraph of the citation. Cases with a pro se litigant, Private Securities Litigation Reform Act cases, and cases mentioning F.R.C.P. 9 were excluded from the study. After further review, 3,297 cases were analyzed from the following time periods: (1) June-September 2006, October-December 2006, February-May 2007, and June-September 2007 (representing the control *Conley* set) and (2) June-September 2007 and October-December 2007 (representing the post-*Twombly* set). The study examined the granted, denied, and mixed outcome rates.

Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553 (2010).

The goal of this study was to examine the impact of the *Twombly* and *Iqbal* decisions on F.R.C.P. 12(b)(6) motions to dismiss in federal district courts. The researcher studied cases in the Westlaw research database that were decided

in the two years immediately preceding *Twombly* (i.e., *Conley* cases), the two years following *Twombly*, and the three months since *Iqbal*. After eliminating certain cases (e.g., Private Securities Litigation Reform Act cases), the study analyzed 444 *Conley* cases, 422 *Twombly* cases, and 173 *Iqbal* cases, coded based on six major case type categories (contracts, torts, civil rights, labor, intellectual property, and all other federal and state statutes). The study recognizes the limited time frame for the *Iqbal* cases, and thus recommends caution in drawing inferences from these data.

Patricia Hatamyar Moore, *An Updated Quantitative Study of* Iqbal*'s Impact on 12(B)(6) Motions*, 46 U. RICH. L. REV. 603 (2012).

This analysis builds on Moore's prior study (2010), by adding federal district court decisions on Rule 12(b)(6) motions from the twelve months after *Iqbal*. The updated database includes 1,326 cases: 444 decided under *Conley*, 422 decided under *Twombly*, and 460 decided under *Iqbal*. This study used the same design as the previous study, including only cases on Westlaw. This larger set of cases was compared to the original database to glean the additional impact of *Iqbal*.

INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21ST CENTURY ANALYSIS (2009).

This study examined 7,688 civil cases that closed between October 1, 2005 and September 30, 2006 in eight federal district courts: the Districts of Arizona, Colorado, Delaware, Idaho, Eastern Missouri, Oregon, Eastern Virginia, and Western Wisconsin. These districts were selected based on number of judges, judicial caseload, geographic diversity, and willingness to grant a waiver of PACER system access fees. Most civil case types were included, such as contracts, real property, torts, civil rights, labor, bankruptcy, intellectual property, tax, and other federal statutes. Student loan, prior judgment, veterans' benefits, forfeiture, social security, deportation, and prisoner petition cases were excluded. To help interpret the docket study, relevant findings were also discussed in conference calls with court representatives.

INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE OREGON COURTS: AN ANALYSIS OF MULTNOMAH COUNTY (2010).

The Oregon Rules of Civil Procedure are significantly different from the rules in other state courts and the federal courts. This is the third in a series of studies examining Oregon courts, following a docket study involving Oregon federal court (2009) and a survey of Oregon attorneys and judges (2010). This study examined docket records in a sample of 495 Multnomah County, Oregon Circuit Court contract and tort cases that closed between October 1, 2005 and September 30, 2006 (including cases that were reopened and reclosed during that time frame). It tracked motion practice, requests to deviate from scheduled events, time between key events, and overall time to disposition.

INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL BELONGING TO THE ASSOCIATION OF CORPORATE COUNSEL (2010).

This study explored the opinions of those who lead corporate legal departments regarding how businesses experience the American civil justice process. In the winter of 2009-2010, survey responses were received from 367 companies with an individual whose email address appeared on the Association of Corporate Counsel's Chief Legal Officer/General Counsel list as of the fall of 2009 (the survey was administered on only one high-level individual per company, so the results speak for the company through the eyes of the individual). Companies included in the study have had at least one civil court case per year, on average, in the last five years.

INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SURVEY OF THE ARIZONA BENCH & BAR ON THE ARIZONA RULES OF CIVIL PROCEDURE (2010).

The goal of this study was to examine the 1992 amendments to the Arizona Rule of Civil Procedure, diverging from the federal model. The survey was sent in the fall of 2009 to all attorney and judge members of the State Bar of Arizona (a mandatory bar association) with an email address on file. In total, 767 responses from those with civil litigation experience in Arizona Superior Court were received.

INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SURVEY OF THE OREGON BENCH & BAR ON THE OREGON RULES OF CIVIL PROCEDURE (2010).

This study aimed to examine the practical impact of the significant rules variations between the Oregon Rules of Civil Procedure and the rules utilized in other state and federal courts. The survey was sent in the fall of 2009 to all attorney and judge members on the public lists of the Oregon State Bar Association (a mandatory bar association). In total, 485 responses from those with civil litigation experience in Oregon Circuit Court were received.

Peter M. Koelling, Caseflow Management and its Effect on Timeliness in the Colorado District Courts (May 2013) (unpublished Ph.D. dissertation, Northern Illinois University) (on file with authors).

This study examined the effect of caseflow management on timeliness in the Colorado District Courts for fiscal year 2009 to 2010. The study surveyed the district court administrators for 17 districts to determine the usage of caseflow management techniques within each district. The surveys were scored to create a caseflow management index. The study also measured the timeliness of cases among the districts, and then analyzed the results in comparison to various variables, including the caseflow management index, to determine if there was any correlation.

Lawyers for Civil Justice, Civil Justice Reform Group & U.S. Chamber Institute for Legal Reform, Litigation Cost Survey of Major Companies (May 10, 2010) (unpublished report) (on file with authors) (statement submitted for presentation at the 2010 Conference on Civil Litigation sponsored by the Judicial Conference Advisory Committee on Civil Rules, Duke University Law School, May 10-11, 2010).

This study was conducted to help inform the discussion of litigation transaction costs at the Conference on Civil Litigation, held at Duke University in May of 2010. The survey sought detailed information from very large companies about litigation cost trends, including legal fees and discovery costs as well as U.S. versus non-U.S. costs, in "major" closed cases (defined as cases with litigation costs greater than $250,000). The survey was sent to all Fortune 200 companies in the winter of 2009-2010. In total, 37 companies responded to at least portions of the survey. The respondent population was fairly representative of the population of Fortune 200 companies, although the food and beverage industry was substantially underrepresented and respondents were slightly skewed toward larger companies.

EMERY G. LEE III, FED. JUDICIAL CTR., EARLY STAGES OF LITIGATION ATTORNEY SURVEY: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2012).

This study examined the early stages of litigation in federal court, focused on F.R.C.P. 26(f) (meet and confer) and F.R.C.P. 16(b) (scheduling conference). Specifically, the survey examined the incidence of the two conferences, how they are conducted, topics discussed, and orders issued, as well as the impact of *Twombly/Iqbal* on pleading practices. In total, 3,552 attorneys in cases terminated between July and September of 2011 submitted responses. The portion of plaintiff and defense attorney respondents is not apparent from the report.

Memorandum from Emery G. Lee III, Fed. Judicial Ctr., to Dist. Judge Shira A. Scheindlin, S. Dist. N.Y., Complex Litigation Survey Results (Jan. 18, 2012) (on file with authors).

The Federal Judicial Center conducted this study to assist the Southern District of New York in developing and implementing a pilot program for managing complex cases. The study surveyed attorneys in "complex" cases pending for at least 90 days and closed between January of 2010 and September of 2011. Complex cases were defined as certain nature of suit categories (products liability, trademark, patent, securities, and few others), class actions, multi-district litigation cases. There were 313 respondents who confirmed in a threshold question that their closed case was complex. Respondents were fairly evenly split between plaintiff (52%) and defense (48%) attorneys.

EMERY G. LEE III, FED. JUDICIAL CTR., MOTIONS FOR SANCTIONS BASED UPON SPOLIATION OF EVIDENCE IN CIVIL CASES: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011).

This study aimed to determine how often allegations of spoliation are raised by motion, describe the cases in which spoliation is alleged, and provide information on how courts rule on motions for sanctions. The study examined docket records of civil cases filed in 2007 and 2008 in 19 federal districts (at least one district in every circuit except the District of Columbia). Upon review of cases meeting text-based search criteria, it was determined that the issue of spoliation had been raised in a motion (motion for sanctions, motion in limine, motion related to jury instructions, or motion for summary judgment) in 209 subject cases.

EMERY G. LEE III, FED. JUDICIAL CTR., THE TIMING OF SCHEDULING ORDERS AND DISCOVERY CUT-OFF DATES: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011).

This study considered the operation of F.R.C.P. 16 and F.R.C.P. 26(f) in the federal district courts. Specifically, the study examined the timing of Rule 16 scheduling orders and, drawing from those scheduling orders, also examined the timing of the first discovery cut-off date imposed, without regard to any extension. The study included over 11,000 civil cases filed in 11 federal districts in 2009 and 2010, excluding cases in which the discovery cut-off date was not noted in the scheduling order docket entry. The study districts ranged from high-volume to medium-volume, with one rather low volume district. The case types were (from largest to smallest): civil rights, contracts, torts, labor, other, complex, and consumer.

EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS (2010).

This study is a follow-up to the Federal Judicial Center's Case-Based Civil Rules Survey (2009) and presents the results of a multivariate analysis of factors associated with litigation costs as reported by respondents to the original case-based survey. The analysis was limited to the responses of attorneys working in private law firms. Due to the belief that costs in a given case vary depending on whether a party is a plaintiff or a defendant, researchers estimated separate models for plaintiff attorneys and defense attorneys. Overall, 828 plaintiff attorney responses and 715 defense attorney responses were included in the analysis. One caveat is that the models are only as good as the estimates of cost provided by respondent attorneys.

EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY (2009).

This study is a national, case-based survey of attorneys of record in federal civil cases terminated in the fourth quarter of 2008. It sought to examine discovery and electronic discovery activities, costs, and attorney attitudes toward the F.R.C.P. and specific reform proposals. The survey was administered in May and June of 2009, and received a total of 2,690 responses. This report presents preliminary results and was intended primarily as a framework for discussion.

NICHOLAS M. PACE & LAURA ZAKARAS, RAND INST. FOR CIVIL JUSTICE, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY (2012).

This study employed a case study method to gather cost data from large companies with the goal of understanding: (1) the costs associated with different phases of e-discovery production; (2) how these costs are distributed across internal and external sources of labor, resources, and services; (3) how these costs can be reduced without compromising the quality of the discovery process; and (4) what litigants perceive to be the key challenges of preserving electronic information. Researchers identified eight large and diverse corporations and asked participants to choose a minimum of five cases in which they produced data and electronic documents to another party as part of an e-discovery request. The case study analyzes e-discovery cost data from 57 cases and supplements the data with a literature review and interviews with company representatives.

Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011 (2009).

The goal of this study was to determine if judges relying on *Twombly* were more or less likely to dismiss a Title VII case than judges relying on *Conley*, thereby determining whether *Twombly* had any impact on the likelihood that an employment discrimination case would be dismissed. After performing a search of Westlaw cases and including those cases with a motion to dismiss, the author analyzed 191 pre-*Twombly* (*i.e.*, *Conley*) and 205 post-*Twombly* cases. The author recognized that because the data are limited to the year following *Twombly*, there are a limited number of decisions, making it difficult to draw concrete mathematical conclusions.

SEVENTH CIR. ELECTRONIC DISCOVERY PILOT PROGRAM COMM., SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM FINAL REPORT ON PHASE TWO MAY 2010-MAY 2012 (2012).

The goal of this study was to assess the effectiveness of and satisfaction with the Seventh Circuit E-Discovery Pilot Program Principles, as utilized in Phase Two of the program. The Federal Judicial Center administered two surveys from February to March of 2012. Participating judges were asked to complete a one survey covering all of their cases in the program, while participating attorneys were asked to complete a survey specific to each of their cases in the program. Overall, 27 judges and 234 attorneys responded to the survey. Additional e-filer baseline surveys administered in 2010 and 2012 captured the responses of over 6,000 attorneys (of over 25,000) throughout the seven districts in the circuit.

JORDAN SINGER, SUFFOLK SUPERIOR COURT BUSINESS LITIGATION SESSION PILOT PROJECT: FINAL REPORT ON THE 2012 ATTORNEY SURVEY (2012).

This study aimed to examine attorney experiences with the Suffolk Superior Court (Boston) Business Litigation Session Pilot Project, which ran from January 2010 through December 2011. In the summer and early fall of 2012, a survey was sent to all attorneys with valid e-mail addresses with at least one case in the project since its inception. In total, 44 attorneys completed the survey, a 25% response rate (approximately).

THOMAS E. WILLGING & EMERY G. LEE III, FED. JUDICIAL CTR., IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION (2010).

This study was conducted as a follow-up to the Federal Judicial Center's Case-Based Civil Rules Survey (2009) and Multivariate Analysis (2010). Specifically, the study aimed to present attorneys' general experiences and thoughts about the factors found to be associated with costs in a broad spectrum of litigation. Researchers conducted 20-30 minute telephone interviews with 35 attorneys (16 plaintiff, 12 defense, and 7 with a mixed practice) who had responded to the original case-based survey. While the findings do not represent a random cross-section of the views of respondents to the case-based survey, they do provide valuable insights.

Dan H. Willoughby, Jr. et al., *Sanctions for E-discovery Violations: By the Numbers*, 60 DUKE L. J. 789 (2010).

This study examined 230 sanctions awards in 401 cases involving motions for sanctions relating to the discovery of electronically stored information in federal courts prior to January 1, 2010. Cases were analyzed for a variety of factors including the sanctioning court, sanctioning authority, sanctioned party, sanctioned misconduct, and sanction type.