INTERIM REPORT

ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND CIVIL JUSTICE AND IAALS

RULE ONE INITIATIVE

IAALS

INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM
UNIVERSITY OF DENVER

Interim Report

(including 2008 Litigation Survey of the Fellows of the American College of Trial Lawyers)

ON THE JOINT PROJECT OF

THE AMERICAN COLLEGE OF TRIAL LAWYERS
TASK FORCE ON DISCOVERY

AND

THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM

August 1, 2008

AMERICAN COLLEGE OF TRIAL LAWYERS

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The Institute for the Advancement of the American Legal System (IAALS) at the University of Denver was the brainchild of the University's Chancellor Emeritus Daniel Ritchie, Denver attorney and Bar leader John Moye and United States District Court Judge Richard Matsch. IAALS Executive Director Rebecca Love Kourlis is also a founding member and previously served for almost twenty years as a Colorado Supreme Court Justice and trial court judge.

IAALS staff is comprised of an experienced and dedicated group of men and women who have achieved recognition in their former roles as judges, lawyers, academics and journalists. It is a national non-partisan organization dedicated to improving the process and culture of the civil justice system. IAALS provides principled leadership, conducts comprehensive and objective research, and develops innovative and practical solutions. IAALS' mission is to participate in the achievement of a transparent, fair and cost-effective civil justice system that is accountable to and trusted by those it serves.

In the civil justice reform area, IAALS is studying the relationship between existing Rules of Civil Procedure and cost and delay in the civil justice system and examining alternative approaches in place in other countries and even in the United States in certain jurisdictions.

The Institute benefits from gifts donated to the University for the use of IAALS. None of those gifts have conditions or requirements, other than accounting and fiduciary responsibility.

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JOINT PROJECT
OF THE
THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY
AND
THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM

INTERIM REPORT

The American College of Trial Lawyers Task Force on Discovery was appointed in June of 2007 by President David Beck to work jointly with the Denver-based Institute for the Advancement of the American Legal System (IAALS) to explore problems associated with discovery.

The Task Force and the IAALS staff have met in person four times and several times by conference call. Two of the meetings were hosted by IAALS in Denver, Colorado. All of the meetings, except for the first one, were two-day meetings.

The joint study grew out of a concern that discovery is increasingly expensive and that the expense and burden of discovery are having substantial adverse effects on the civil justice system. There is a serious concern that the costs and burdens of discovery are driving litigation away from the court system and forcing settlements based on the costs, as opposed to the merits, of cases. Recalling that one of the original purposes of the discovery rules was to avoid surprises and to streamline trials, many are now concerned that extensive and burdensome discovery jeopardizes the goal of Rule 1 of the Federal Rules of Civil Procedure and of the rules in those jurisdictions that have adopted similar procedures: a "just, speedy, and inexpensive determination of every action and proceeding." [1]

The Task Force was given a broad mandate by the College to examine the situation and to make recommendations. After the first meeting, at the request of the Task Force, additional Fellows of the College, notably those whose principal practice involves representing plaintiffs, were added to insure a balanced approach to its task.

The Task Force and the Institute also realized that they needed to take a systematic approach to the task so that they could more clearly define the problems, if any, that exist in the current system before making recommendations for change. Research presented by IAALS at the first Denver meeting on prior cost of litigation studies challenged some

[1] In fact, 81 percent of the respondents to the survey conducted by the Task Force said the civil justice system was too expensive and 69 percent said that it took too long to resolve cases.

of the participants' preconceptions about the impact of discovery[2] and emphasized the importance of additional research. Research presented by IAALS at the second Denver meeting helped orient the participants with respect to the history of the Federal Rules of Civil Procedure and prior attempts at reforms, as well as familiarizing them with existing academic literature commenting on and proposing changes to the Rules.

Accordingly, after extensive discussion, the Task Force and the Institute decided to administer a survey of the College's Fellows to create a data base for further study. The survey grew out of an understanding that the decision-makers could not implement change based purely on anecdotal information and the perception that since the time similar surveys had been conducted by the RAND Corporation and others, the dynamics of litigation have changed.

In short, before discussing proposed solutions, the Task Force and the Institute resolved to test their preliminary hypotheses about the nature and extent of the problem.

With the College's permission to use a survey of its Fellows to develop the needed database, IAALS thereafter contracted with Mathematica Policy Research, Inc. and agreed to bear the full cost of such a survey.

The questions that comprised the survey were developed in a series of in-depth discussions, in which the Task Force and the Institute sought to identify certain hypotheses about the civil justice system and to test whether, in fact, those hypotheses were correct. Once those hypotheses were identified, they crafted the questions for the survey, with professional guidance from Mathematica to assure the neutrality of the survey. Mathematica tested the proposed survey questions with a pilot group of Fellows of the College and prepared the survey to be administered in electronic form.

The survey was conducted over a four-week period beginning April 23, 2008. It was sent electronically to all of the Fellows of the College (other than judges, Emeritus Fellows, Honorary Fellows and Canadian Fellows) who could be reached by that medium. Of the 3,812 Fellows thus surveyed, 1,494 responded. The responses of 112 Fellows were not considered because they were not currently engaged in civil litigation. The 42 percent response rate was unusually large.

On average, the respondents had been practicing law for 38 years. Thirty-one percent represent defendants exclusively, 24 percent represent plaintiffs exclusively and 44 percent represent both, but primarily defendants. Nearly a third practice in California, Illinois, New York, Pennsylvania and Texas. Slightly more than half practice in a firm with only one office. About 40 percent of the respondents litigate complex commercial disputes, but less than 20 percent of them litigate primarily in federal court (although nearly a third split their time equally between federal and state court).

[2] For example, the 1965 report of the Project for Effective Justice at Columbia University Law School and a 1978 report by the Federal Judicial Center found, respectively, that discovery abuse was not widespread and that there was no discovery at all in 52% of litigated federal cases.

The survey consisted of 13 sections and asked questions about most aspects of the civil justice system. The Task Force and the Institute had decided that if the survey were to be limited only to questions relating to discovery, it might miss the context in which discovery abuse occurs and risk missing the true source of any problems that might be identified. Thus, the survey included questions about the Federal Rules of Civil Procedure in general and about pleadings, dispositive motions, the role of judges in litigation, costs and alternative dispute resolution.

Mathematica compiled the results of the survey and issued an 87-page report with four appendices.

IAALS staff prepared an Executive Summary of the survey results and reviewed them in detail with the Task Force at a meeting held at IAALS's office at the University of Denver on July 9 and 10, 2008. The participants reviewed some background data, including cross tabs, prepared by Mathematica, so that they could determine, for example, whether there were differences in the responses between plaintiff lawyers and defense lawyers. The Executive Summary is attached to this Report as Appendix A.

The survey respondents made extensive written comments in addition to answering the standard survey questions. Attached to this report as Appendix B is a sample of some of those comments. The comments, which are both illuminating and generally consistent, indicate that the survey prompted serious reflection by those who responded.

OVERVIEW OF THE SURVEY RESPONSES

Four major themes emerged from the survey.

1. Although the civil justice system is not broken, it is in serious need of repair. The survey shows that the system is not working; it takes too long and costs too much. Deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test, while meritless cases, especially smaller cases, are being settled rather than being tried because it costs too much to litigate them.

2. The discovery system is, in fact, broken. Discovery costs far too much and has become an end in itself. As one respondent noted: "The discovery rules in particular are impractical in that they promote full discovery as a value above almost everything else." Electronic discovery, in particular, clearly needs a serious overhaul. It is described time and time again as a "morass." Concerning electronic discovery, one respondent stated, "The new rules are a nightmare. The bigger the case, the more the abuse and the bigger the nightmare."

3. Judges should take more active control of litigation from the beginning. Where abuses occur, judges are perceived to be less than effective in enforcing the rules. According to one respondent, "Judges need to actively manage each case from the outset to contain costs; nothing else will work."

4. Local Rules are routinely described as "traps for the unwary" and many think they should either be abolished entirely or made uniform.

There was, predictably, mixed sentiment as to whether or not there were too many rules in general, whether they were too rigid or too flexible and whether the system should be changed in its entirety. Lawyers are inherently conservative and the Task Force did not anticipate that the responding Fellows would call for radical surgery; only 35 percent said the Rules needed to be reviewed and rewritten in their entirety. Certain rules and practices, however, emerged as causes of significant discontent.

Nearly half of the respondents said that notice pleading has become a problem because extensive discovery is required to narrow the claims and defenses and 57 percent said that with notice pleading, motions to dismiss on the pleadings are not effective in limiting claims and narrowing litigation issues. More than 76 percent said that answers to complaints likewise do not accomplish the goal of narrowing issues. This suggests that a further look at notice pleading may be in order.

Initial disclosure, a relatively new device designed to reduce later discovery, does not appear to be accomplishing that objective. Only 34 percent of the respondents thought that such disclosure reduces discovery and only 28 percent said that it lowered litigation costs.

As for case management, an overwhelming majority, 89 percent, thought that a single judicial officer should handle a case from beginning to end. Sixty percent thought that trial dates should be set early and 67 percent thought that final pretrial orders serve a useful purpose and are helpful.

The survey asked a number of questions about the cost of litigation, and the responses were not unexpected. Ninety-two percent said that the longer a case goes on, the more it costs and, as noted above, 85 percent thought that litigation in general and discovery in particular are too expensive. Sixty-four percent said that the economic models of many law firms encourage more discovery than is necessary. Expert witness fees are a significant cost factor driving litigants to settle, ranking just slightly behind trial costs and attorneys fees in that respect.

Although the survey respondents felt that all of the existing discovery devices are cost-effective and important, almost half, 45 percent, believe that there is discovery abuse in almost every case.[3]

There was some disagreement about the impact of Local Rules. The respondents were evenly split as to whether Local Rules promote inconsistency and unpredictability and whether they provide necessary flexibility from one jurisdiction to the next, but they strongly agreed, 62 percent, that Local Rules are not always consistent with the Federal Rules.

[3] This response was essentially the same for both plaintiff and defense lawyers

Those surveyed were also of two minds about dispositive motions. Most did not feel that they are used merely as a tactical device. Fifty-eight percent, however, felt that judges take too long to decide dispositive motions. Equally, 58 percent thought that judges decline to grant summary judgment motions even if warranted, whereas only 13 percent thought that judges are granting them more frequently than appropriate. In short, the respondents appeared on balance to favor summary judgment as a procedural device and seemed to desire that more cases be decided in that fashion and that they need to be decided more promptly.

As one might expect, the survey makes it clear that the system works best when experienced lawyers are involved (they use discovery less or work out disputes themselves), when collegiality is encouraged and when competent, experienced judges play an active supervisory role. The respondents especially like judges to require ADR (55 percent said it has been a positive development in managing cases) and more than half thought arbitration is less expensive and faster than civil litigation.

It also seems clear that the respondents would like to see some major changes made with respect to discovery. The "tinkering around the edges" approach to changes in discovery rules in the past has been a failure ― 53 percent said that the cumulative effect of discovery-rule changes since 1976 has not reduced discovery abuse − and that more radical changes are required. In particular, 87 percent agree that electronic discovery, in particular, is too costly, and 76 percent agree that electronic discovery issues are not well understood by judges.

CONCLUSION

The survey results have confirmed that there are serious problems in many parts of the civil justice system, including both the rules under which we now operate, especially the rules governing discovery, and the way in which civil litigation is presently conducted and supervised. Whatever recommendations for change, including the manner in which change might be brought about, the Task Force will ultimately make will be informed by its continuing study of the civil justice system, including the results of the survey reported herein.

APPENDIX A

2008 LITIGATION SURVEY OF FELLOWS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS

IAALS EXECUTIVE SUMMARY

Introduction

In June 2008, the Institute for the Advancement of the American Legal System at the University of Denver (IAALS), in collaboration with the American College of Trial Lawyers (ACTL) Task Force on Discovery, completed a survey of ACTL Fellows currently practicing in the area of civil litigation. The survey asked about the Fellows' experiences with and perceptions of the civil justice system in the United States, focusing primarily on issues of cost and delay. The survey was administered by Mathematica Policy Research, Inc. (MPR).

The survey yielded some significant key findings. The Fellows were overwhelmingly in agreement that the current civil justice system is too expensive (especially with respect to discovery), that notice pleading fails to shape the issues in a case, and that increased cost and delay forces early settlement of cases that should not be settled on the merits, or prevents meritorious cases from being filed in the first place. Further, almost two thirds of the Fellows believe that the Federal Rules of Civil Procedure are not conducive to the "just, speedy and inexpensive determination" of actions. At the same time, however, the Fellows are closely divided on whether the Rules are too complex, whether they should be more flexible, and whether they are only in need of minor amendment. Lastly, the Fellows value all current discovery tools but acknowledge that some are more cost-effective than others.

Survey Methodology

The survey was conducted electronically. MPR sent survey invitations to 3,621 Fellows with valid e-mail addresses, including all Fellows except for judges, emeritus members, Canadian residents, or participants in a pilot test of the survey. A random sub-sample of approximately 1,000 Fellows was selected for more intense follow-up; the sub-sample adequately represented the age and years as a Fellow of the entire ACTL membership eligible for the study.

The web-based survey was fielded over a four-week period beginning April 23, 2008. The overall response rate was approximately 42%. Because MPR determined that those responding to the survey were more likely to be younger and have fewer years as ACTL Fellows than non-responders, certain responses were weighted to reflect the balance of age and years as a Fellow across the entire ACTL membership more accurately.

Key Findings

The Fellows and Their Practice

The survey reflects responses from Fellows practicing in all fifty states, Puerto Rico, and the District of Columbia. Approximately three-fourths of the Fellows primarily represent defendants, and approximately one-fourth primarily represent plaintiffs. About one-half of the Fellows work in firms with multiple office locations, and about 30% work in firms with at least 100 total attorneys. The median hourly rate for Fellows is $350, with a range from $120 to $1000.

Slightly more than half of the Fellows primarily litigate in state court, and 18% primarily litigate in federal court. Most of the rest litigate in both jurisdictions relatively evenly. The Fellows most commonly identified the advantages of litigating in state court as lower expense and less hands-on management by judicial officers, and most commonly identified the advantages of litigating in federal court as the quality of judges, more careful consideration of dispositive motions, and more substantive legal knowledge of the case type among the judges.

The Civil Justice System

Fellows were asked a number of questions about the perceptions of the civil justice system. Overall, the Fellows overwhelmingly agreed that the current system is too expensive and time-consuming, and that potential costs impact access to the courts. However, most Fellows stopped short of saying that the civil justice system is "broken." Specifically:

- 81% of Fellows agreed that the civil justice system is too expensive;
- 69% of Fellows said that the civil justice system takes too long;
- 68% of Fellows agreed that the potential of litigation costs inhibits the filing of civil cases; but
- 23% of Fellows indicated that the civil justice system is broken.

Overall, 63% of Fellows agreed that the civil justice system works better for certain types of cases but not others. Fellows most commonly identified personal injury, torts (generally), and product liability as the types of cases in which the system works well. Case types least commonly identified as working well under the current system were ERISA, labor, administrative law, and mass torts. In addition, less than 30% of Fellows agreed that the system works well when the primary relief sought is Constitutional or injunctive relief rather than monetary damages.

Federal Rules of Civil Procedure

Significantly, 65% of Fellows believe that the Federal Rules of Civil Procedure are <u>not</u> conducive to meeting the goal of a "just, speedy, and inexpensive determination

of every action." However, the Fellows split on whether there are too many Rules (54% disagree) or whether they are too complex (51% disagree).

The Fellows view the Rules as internally consistent, and are not disposed to suggest that the Rules should be more rigid (81% disagree). 52% of the Fellows believe that the Rules need not be reviewed in their entirety and rewritten to address the needs of today's litigants; however, 35.5% think that step is necessary and 9.5% are undecided

Slightly more than 50 percent of the Fellows believe that the Rules as a whole should be more flexible. Over 51 percent indicated that Local Rules provide necessary flexibility from one jurisdiction to the next.

Other questions concerning Local Rules in federal jurisdictions demonstrate concern by the Fellows about uniformity and predictability. Specifically:

- Only 40% of Fellows felt that Local Rules are uniformly applied within the district to which they pertain;
- 43% of Fellows stated that Local Rules promote inconsistency and unpredictability; and
- Only 20% of Fellows indicated that Local Rules are always consistent with the Federal Rules of Civil Procedure.

Pleadings

The Fellows expressed concerns about the effectiveness of the current system of notice pleading under the Federal Rules of Civil Procedure. Specifically:

- Only 21% of Fellows agreed that the answer to a complaint (as distinguished from affirmative defenses or counterclaims) shapes and narrows the issues in a case;
- Over 64% of Fellows indicated that fact pleading can narrow the scope of discovery; and
- Nearly 71% of Fellows stated that motions to dismiss for failure to state a claim are not effective tools to limit claims and narrow litigation.

Initial Disclosures

Fellows were asked about the effectiveness of the initial disclosures mandated under Federal Rule of Civil Procedure 26(a)(1). Nearly two-thirds of the Fellows expressed their belief that initial disclosures did not reduce discovery or save the client money. Specifically, only 34.7% of the Fellows agreed that Rule 26(a)(1) reduces discovery, and only 28.4% of Fellows agreed that Rule 26(a)(1) saves the client money.

Discovery

The Fellows deemed every major discovery tool currently available under the Federal Rules to be important. In particular, fact witness depositions and requests for the

production of documents were overwhelmingly said to be "very important" by the Fellows. Even requests for admission, which generated the least enthusiasm, were considered to be "very important" or "somewhat important" by nearly 79% of Fellows.

The importance of a discovery tool, however, does not necessarily reflect its cost-effectiveness. Eighty-eight percent of Fellows deemed interrogatories to be important, but only 73% consider them cost-effective. Similarly, 99.8% of Fellows consider fact witness depositions to be important, but only 84% consider them cost-effective.

Fellows also indicated that the current civil justice system promotes excessive discovery. Specifically:

- Nearly 86% of Fellows say discovery sanctions are seldom imposed;
- Nearly 71% of Fellows believe counsel use discovery as a tool to force settlement;
- Only 34% of Fellows think that the cumulative effect of changes to the discovery rules since 1976 has significantly reduced discovery abuse, and 45% of Fellows still think discovery is abused in every case;
- Less than 44% of Fellows believe current discovery mechanisms work well; and
- Only 11% of Fellows think that clients, rather than attorneys, drive excessive discovery.

Electronic Discovery

Nearly 60% of Fellows reported having cases that raise electronic discovery issues. Of that group, over 86% have issued or received a discovery request for electronically stored information since the new Federal Rules on e-discovery went into effect on December 1, 2006.

The Fellows offered somewhat conflicting views on the effectiveness of e-discovery. Nearly 66% of Fellows with e-discovery experience stated that they believe that the 2006 e-discovery amendments allow for efficient and cost-effective discovery of electronically stored information at least some of the time. But at the same time:

- Over 87% of Fellows indicated that e-discovery increases the costs of litigation;
- Nearly 77% of Fellows say that courts do not understand the difficulties in providing e-discovery;
- Over 75% of Fellows agreed that discovery costs, as a share of total litigation costs, have increased disproportionately due to the advent of e-discovery;
- 71% of Fellows say that the costs of outside vendors have increased the cost of e-discovery without commensurate value to the client;
- 63% of Fellows say e-discovery is being abused by counsel; and
- Less than 30% of Fellows believe that even when properly managed, discovery of electronic records can reduce the costs of discovery.

Dispositive Motions

Overall, over 58% of Fellows agree that judges routinely fail to rule on summary judgment motions promptly. In responding to this question, there was not a major difference between Fellows who primarily represent defendants (60% in agreement) and Fellows who primarily represent plaintiffs (53% in agreement). However, there was significant variation based on the primary practice jurisdiction of the Fellows. When the responses are broken out based on primary practice jurisdiction, there is a great deal of variation. Comparing state jurisdictions with 30 or more Fellows responding, there was a range from 16.1% to 80.8% of Fellows who agreed with the statement that judges routinely fail to rule on summary judgment motions promptly. Among federal jurisdictions with significant response, the spread was virtually identical.

There was considerable variation between attorneys who primarily represent defendants and attorneys who primarily represent plaintiffs with respect to other issues concerning summary judgment. Specifically:

- Nearly 64% of plaintiff's attorneys agreed that summary judgment motions are used as a tactical tool rather than a good faith effort to narrow the issues in the case, while only 28% of defendants' attorneys agreed with the same statement;
- 61% of plaintiffs' attorneys, but only 20% of defendants' attorneys, agreed that summary judgment practice increases cost and delay without proportionate benefit;
- 40% of plaintiffs' attorneys felt that judges are granting summary judgment more frequently than appropriate, whereas only 5% of defendants' attorneys felt the same way;
- Nearly 69% of defendants' attorneys say that judges decline to grant summary judgment even when warranted, whereas only 27% of plaintiffs' attorneys reached the same conclusion; and
- Over 51% of plaintiffs' attorneys think summary judgment motions are filed in almost every case; whereas only 36% of defendants' attorneys hold the same opinion.

Trial Dates

The Fellows largely favored early trial dates, with over 60% agreeing that trial dates should be set early in a case, and only 37% agreeing that trial dates should not be set until discovery is completed. Again, there was variation by jurisdiction. Of the fifteen state jurisdictions with at least 30 Fellows responding, the level of support for early trial dates ranged from 41% to 85%. Similarly, in the same fifteen state jurisdictions, those Fellows agreeing that a trial date should not be set until discovery is complete ranged from 12.5% to 59%.

Judicial Role in Litigation

The Fellows overwhelmingly agreed that early and regular involvement of a judicial officer in a case results in lower costs (67% in agreement), a narrower range of issues in dispute (74% in agreement), and greater client satisfaction (71% in agreement). Further, nearly 90% of Fellows agreed that one judicial officer should handle a case from start to finish, and 75% agreed that the judge who is to try a case should handle all pretrial matters.

The Fellows also indicated a very strong belief that judicial officers should have significant trial experience. Nearly 85% of Fellows said that only individuals with significant trial experience should be chosen as trial judges, and 67% said that judges with expertise in certain types of cases should be assigned to those cases. Interestingly, nearly 57% of Fellows indicated their belief that judges do not like taking cases to trial.

Nearly 78% of Fellows stated that pretrial conferences under Rule 16(a) are regularly held. The most commonly identified benefits of the 16(a) conference were informing the court of the issues in the case (67% of Fellows responding), identifying and narrowing the issues (53%), encouraging settlement (37%) and improving time management (36%).

Costs

Fellows were asked a series of questions about delay and cost in civil litigation. With respect to delay, 56% of Fellows said that the time required to complete discovery is the primary cause of delay in the litigation process, and another 20% of Fellows cited the primary cause of delay as attorney requests for extensions of time and continuances. Fellows also overwhelmingly agreed that delay and cost are related: 92% agreed that the longer a case goes on, the more it costs, and nearly 83% agreed that continuances cost clients money.

Fellows also strongly agreed that discovery is too expensive (87% in agreement), as is litigation generally (85% in agreement). These costs impact both the initiation of lawsuits and settlement. Specifically:

- Nearly 81% of Fellows report that their firms turn away cases when it is not cost-effective to handle them;
- 83% of Fellows believed that litigation costs drive cases to settle that should not settle on the merits; and
- Over 94% of Fellows believed trial costs are an important factor in driving cases to settle, and a nearly equal number believe the same about attorney fees.

Alternative Dispute Resolution

For the most part, the Fellows move their cases through the court system rather than alternative dispute resolution (ADR) processes. Nearly 73% of Fellows report that

one-fourth or fewer of their cases are processed through ADR. Furthermore, only 41% of Fellows report that their clients choose arbitration or another private ADR process over litigation if they have a choice.

That said, the Fellows found many positives in ADR. Nearly 67% report that arbitration generally shortens time to disposition, and over 52% say that arbitration generally decreases the costs to their clients. Finally, over 82% of Fellows view cases settling without trial due to court-ordered ADR as a positive development.

APPENDIX B

SELECTED COMMENTS FROM SURVEY RESPONDENTS

- "The new rules on discovery of e-mail will make litigation too expensive."
- "Most attorneys try to avoid federal court due to the many requirements of discovery, easier to work within the State court system."
- "We have sacrificed the prospect of attainable justice for the many in the interest of finding that one needle in the forest of haystacks."
- "The biggest problem in our civil litigation system is that judges permit lawyers to ignore the rules and otherwise abuse the system."
- "E-discovery is a morass ─ to quote Justice O'Connor."
- "The civil justice system is relatively too expensive for disputes under $100,000."
- "More Judges need to take better control over the progress of litigation to minimize a waste of time and increase in expenses."
- "In many cases the cost of doing e-discovery may run into the millions of dollars (in some cases to each side). The cost of complying with e-discovery has become an impediment in the way to the doors of the Court House."
- "The new rules concerning electronic discovery are a nightmare. The bigger the case, the more the abuse and the bigger the nightmare."
- "The total lack of control of discovery including excessive depositions, over broad interrogatories, unfocused requests for admissions as permitted by the rules without any court control is killing civil litigation. This whole situation is further compounded by the rules and judges failing to control electronic discovery. This discovery has caused us to create several generations of 'civil discovery lawyers' and not trial lawyers! I started practice when most of my files were about a 1/2 inch thick with maybe one deposition. The results today with all of this discovery aren't any better or fairer or more just. The results are just more expensive for both plaintiffs and defendants without any increase in justice for either."
- "My principal complaint is that discovery is abused and is far too costly."
- "The Federal Rules are not used or enforced to provide the most efficient resolution of a matter, but rather to allow the most use of them conceivable to bludgeon a case to settlement."
- "Rules and Court interpretation allow for too much expensive discovery."

- "The worst abuses are in the areas of civil discovery--interrogatories are nearly worthless, document production is designed to obfuscate and complicate, depositions are most effective but often a complete waste of time."

- "My belief is that the greatest change that could be made is to reduce the scope and expense of discovery. The latest e-discovery adds incredible layers of work at the client's business and with its staff, as well as the lawyers, and has spawned a new layer of consultants all its own (a very bad sign), if one is looking to speedy and inexpensive, while being fair, justice."

- "The electronic discovery rules are the biggest problem with the system. They are designed to provide a perfect, not a fair, trial."

- "Judges need to actively manage each case from the outset to contain costs; nothing else will work."

- "The rules governing electronic discovery need to be re-thought. They cannot be fairly applied to all cases across the board."

- "The courts need to get a better grip on e-discovery. The expense involved for all concerned in handling the massive amounts of data threatens to swamp the entire system by turning litigation into nothing but an e-discovery donnybrook."

- "Far and away, the biggest problem with the Rules are the discovery provisions. Discovery is way too long, expensive and complicated. The discovery rules are often impractical, particularly as they pertain to preliminary disclosures and e-discovery. I don't believe the drafters have enough sensitivity to the burden and expense they impose. They also create an incentive for lawyers to play 'gotcha' rather than efficiently getting to the merits of the case."

- "The expert witness rules are completely overdone. A pure mistake."

- "Discovery must be limited."

- "The standard for discovery is too broad and creates expense for the parties far beyond the utility of the information obtained."

- "The problem is discovery."

- "Limits on the number and length of depositions need to be uniform and enforced. Huge amounts of time are wasted in endless depositions."

- "Strict enforcement of rules would recover cost and promote prompt/efficient administration of justice."

- "The discovery rules for voluntary disclosures are a joke."

- "The discovery rules have gotten too complex and make discovery too costly."
- "Interrogatories should be limited to witness and expert disclosures. Document discovery is far too broad."
- "E-Discovery is so expensive, it could ruin the system."
- "The biggest issue facing litigants today is how to handle e-discovery. It can be incredibly expensive, and costs are not routinely passed on to the requesting party. The rules are trying to address this, but there has to be a better solution with more certainty."
- "I believe the rules work, but I am very concerned at the trend of judicial officers to expand their scope (such as electronic discovery rules) has caused the potential for blackmail suits, due to the extremely high cost of discovery searches."
- "The discovery rules, or the way they sometimes are not enforced, permits overly broad and very expensive discovery."
- "Discovery should be completely overhauled. In the 'bad old days' of little or no discovery, litigation was a game. Now, it is also a game, only a different game: lengthier, more expensive, discouraging to litigants. And the outcome is probably no more just."
- "Discovery rules and Rule 26 add significantly to cost of litigation, therefore diminishing access to justice."
- "The rules on e-discovery are completely out of touch with the costs of such discovery."
- "FRCP and LR generally work well except in newly emerging issues such as electronic discovery."
- "When the litigation process becomes a weapon and the discovery process becomes the focus of the pretrial proceedings (as opposed to the method by which to discover necessary information), the FRCP are usually being abused by the litigants and the judicial officers who are permitting that conduct by the litigants."
- "E-discovery rules are a disaster."
- "The discovery rules in particular are impractical in that they promote full discovery as a value above almost everything else, thus driving the costs of litigation up enormously. Interrogatories are particularly bad from a cost/benefit standpoint."
- "Discovery rules are the primary problem; document discovery is much too broad and almost limitless; much too costly."

- "The Local Rules need to be more uniform from jurisdiction to jurisdiction. As presently drafted, they can be a trap for the unwary."
- "Compliance with the present rules for electronic discovery is cumbersome and extraordinarily expensive."
- "The primary problem with today's litigation environment is discovery."
- "Judges seem to understand they can force parties to settle when the discovery will require so much time and expense."
- "I believe Rules 26 through 37 should be abrogated. Discovery and the abuses thereof have destroyed litigation. Hard on lawyers. Unconscionable for clients, who have to pay for it."
- "When lawyers were required to plead with precision they spent more time thinking about their cases prior to filing."
- "Notice pleadings are worthless in narrowing the issues."
- "Keep trial dates early and firm."
- "Setting trial dates one year from filing, coupled with curtailing discovery abuse, is the most effective cost saving tool."
- "Early judicial intervention as allowed by the rules could narrow issues and scope of discovery, which could help reduce the cost of litigation."
- "If [there are] competent, honorable attorneys on both sides, [the judge's] role is to set an early trial date, stay out of the way and be available to resolve disputes; if attorneys are not, the judge needs to be pro active and hold frequent status conferences."
- "Quality of the judges makes or breaks the system."
- "One set of rules cannot accommodate all cases."
- "Still think the system is the best in the world."
- "E-discovery is crushing the system."
- "Civil litigation has priced itself out of the market."