

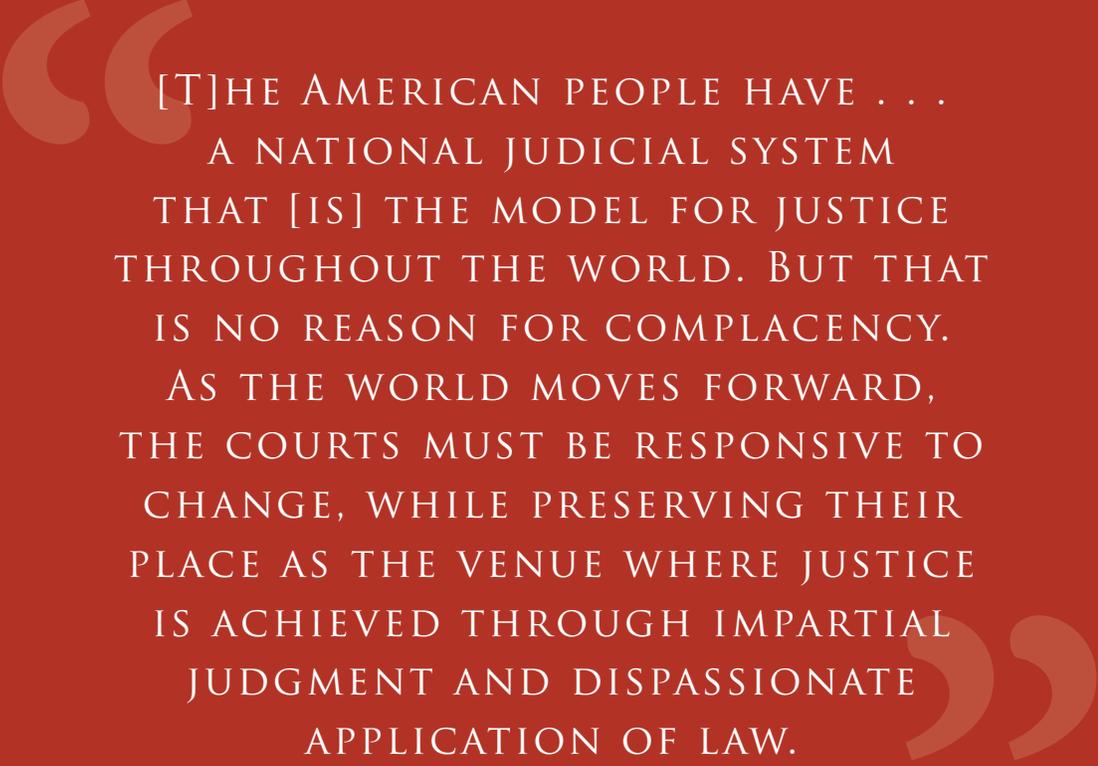


# EXCESS & ACCESS

CONSENSUS ON THE  
AMERICAN CIVIL JUSTICE  
LANDSCAPE

 UNIVERSITY OF  
DENVER

INSTITUTE *for the* ADVANCEMENT  
*of the* AMERICAN LEGAL SYSTEM



[T]HE AMERICAN PEOPLE HAVE . . .  
A NATIONAL JUDICIAL SYSTEM  
THAT [IS] THE MODEL FOR JUSTICE  
THROUGHOUT THE WORLD. BUT THAT  
IS NO REASON FOR COMPLACENCY.  
AS THE WORLD MOVES FORWARD,  
THE COURTS MUST BE RESPONSIVE TO  
CHANGE, WHILE PRESERVING THEIR  
PLACE AS THE VENUE WHERE JUSTICE  
IS ACHIEVED THROUGH IMPARTIAL  
JUDGMENT AND DISPASSIONATE  
APPLICATION OF LAW.

- *U.S. SUPREME COURT CHIEF JUSTICE JOHN ROBERTS*

# EXCESS & ACCESS

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CORINA GERETY

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*of the* AMERICAN LEGAL SYSTEM

# INTRODUCTION

This analysis highlights areas of substantial agreement among attorneys and judges as revealed in four recent studies. These studies consisted of surveys on the process of American civil justice (state and federal), as well as possibilities for its improvement. All of the surveys were national in scope, and the questions asked were general in nature. For illustration purposes, imagine flying over a forest. The trip would offer a sense of the general landscape – where the forest begins, the location of peaks and valleys, the overall color of the trees, etc. It would not offer the details – the height of each tree, the shade of color exhibited by each leaf, the animals that occupy the branches, etc. While a detailed view of the civil justice system is and should be the subject of additional empirical efforts, an aerial view is nevertheless quite useful if the bounds of this perspective are acknowledged. Considering the studies separately, each provides a bird’s-eye snapshot of the system from the perspective of a particular group of legal professionals. Considering the studies together and focusing on areas of agreement, we can begin to see a more complete picture.

The first study was a survey of attorney Fellows of the American College of Trial Lawyers (“ACTL”), an effort of the Joint Project of the American College of Trial Lawyers Task Force on Discovery<sup>1</sup> and the Institute for the Advancement of the American Legal System (“IAALS”) at the University of Denver. Eager to expand the pool of views and gather comparative data, IAALS supported the Federal Judicial Center’s administration of similar surveys on members of the American Bar Association (“ABA”) Section of Litigation and members of the National Employment Lawyers Association (“NELA”).<sup>2</sup> Finally, IAALS included the judicial perspective by partnering with Northwestern University School of Law’s Searle Center<sup>3</sup> to administer a survey on state and federal judges.

Together, these studies suggest a plausible theory: cost inefficiencies in the civil justice process reduce court access, delay contributes to unnecessary cost, and discovery procedure is a key factor with respect to both cost and delay. The survey results provide a starting point for further research on such a theory and on how the process might be improved without affecting fairness. As stewards of the American civil justice system, legal professionals should support a consistent effort to better understand it, appropriately evolve it, and ultimately protect it.

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<sup>1</sup> Now the Task Force on Discovery and Civil Justice.

<sup>2</sup> *Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation Submitted by the Judicial Conference Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure*, 2 (2010), available at <http://www.uscourts.gov/viewer.aspx?doc=/uscourts/RulesAndPolicies/rules/2010%20report.pdf>. As the ABA and NELA surveys were administered by the Federal Judicial Center, the survey results have been obtained from the official reports: American Bar Association Section of Litigation, *Section of Litigation Member Survey on Civil Practice: Detailed Report* (Dec. 11, 2009), available at <http://www.abanet.org/litigation/survey/docs/report-aba-report.pdf>; National Employment Lawyers Association, *Summary of Results of Federal Judicial Center Survey of NELA Members, Fall 2009* (March 26, 2010).

<sup>3</sup> The Center’s full name is The Searle Center on Law, Regulation, and Economic Growth.



THE SURVEY RESULTS REPRESENT THE OPINIONS OF APPROXIMATELY 6,800 ATTORNEYS AND JUDGES NATIONWIDE. THESE OPINIONS CAN BE GENERALIZED TO THE LARGER GROUPS FROM WHICH THEY COME, WITH COLLECTIVE MEMBERSHIP NUMBERING IN THE TENS OF THOUSANDS.

## WHOSE VIEWS?

### AMERICAN COLLEGE OF TRIAL LAWYERS

“Composed of the best of the trial bar . . . [and] dedicated to maintaining and improving the standards of trial practice, the administration of justice and the ethics of the profession.”

### AMERICAN BAR ASSOCIATION SECTION OF LITIGATION

The “largest specialty section” of the ABA, “dedicated to helping litigators become more effective advocates for their clients.”

### NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

“[T]he country’s largest professional organization that is exclusively comprised of lawyers who represent individual employees in cases involving employment discrimination and other employment-related matters.”

### STATE AND FEDERAL TRIAL JUDGES

The Searle Center’s judicial database is perhaps the most comprehensive list of all judges in the United States.

Before delving into the results of these studies, some discussion of their nature is warranted. Data collection in the social sciences, as compared to the physical sciences, poses unique challenges:

Measuring elusive, intangible phenomena derived from multiple, evolving theories poses a clear challenge to social science researchers. . . . Many—arguably, most—of the variables of interest to social and behavioral scientists are not directly observable; beliefs, motivational states, expectancies, needs, emotions, and social role perceptions are but a few examples.<sup>4</sup>

Studying such elusive phenomena requires systematic empirical techniques. Surveys are one well-established and widely-used technique for systematically gathering social science data. In the words of one expert on methodology, surveys produce statistics, or “quantitative numerical descriptions about some aspects of the study population.”<sup>5</sup> They are a structured means of standardizing measurement and obtaining comparable information from different study subjects.<sup>6</sup>

The surveys described in this report are within the accepted professional parameters for survey research. First, most of the questions employ a Likert Scale, which measures strength of agreement with a particular statement and is “one of the most common summative scales used in social sciences to rate evaluations or judgments on one dimension.”<sup>7</sup> Respondents rated statements on a balanced five-point scale, with two levels of agreement, two levels of disagreement, and a neutral option. Second, the response levels were sufficiently high to enable some conclusions to be drawn about the studied populations.<sup>8</sup> While the results cannot be over-generalized as applying beyond the four groups studied, the survey results do describe the views of ACTL Fellows, members of the ABA Section of Litigation, NELA members, and trial judges throughout the country. Focusing on instances in which the same (or very similar) questions were posed in the same way, we can have some confidence in identifying areas of general agreement. In fact, utilizing the same question in multiple surveys is the best way of gauging agreement on a topic, and the surveys reported upon here were purposefully designed with this in mind.

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<sup>4</sup> Robert F. DeVellis, *Scale Development: Theory and Applications*, 26 APPLIED SOC. RESEARCH METHODS SERIES, 7 (2d ed. 2003).

<sup>5</sup> Dr. Floyd J. Fowler, *Survey Research Methods (Applied Social Research Methods)*, 1 (2009).

<sup>6</sup> *Id.* at 3.

<sup>7</sup> Yuval Feldman and Doron Tivchman, *Are All Legal Probabilities Created Equal?*, 84 N.Y.U. L. REV. 980, 999 n.86 (2009).

<sup>8</sup> The general standard is a 5% or better margin of error at a 95% confidence interval. The following are the margins of error with 95% confidence, rounded to the nearest percentage point: ACTL Fellows Survey, +/-2%; ABA Litigation Section Survey (estimate), +/-2%; NELA Members Survey, +/-5%; National Trial Judge Survey (conservative estimate), +/-2%.

In reporting these results, there is an implicit assumption – which ought to be made explicit – that the considered opinions of attorneys and judges matter. With respect to research on any complex process, a logical starting point is to inquire of those with expertise in the process. Capturing the views, attitudes, and judgments of legal professionals, as part of a comprehensive examination of the civil justice system, is a legitimate research objective. While there is always a chance that what people think is different (in some manner and to some degree) from what actually occurs, it is also true that legal professionals have an important perspective on the way justice is obtained, a perspective that ought to be explored. For example, attorneys are probably in the best position to understand the extent to which litigation costs prevent the pursuit, or force the settlement, of a case that should be heard on its merits. Across multiple cases, attorneys are consistently involved in detailed cost-benefit analyses, are responsible for communicating that information to their clients, and are intimately involved in their clients’ decision-making processes. Moreover, the views of legal professionals have real effects: “While difficult to measure precisely, studies of lawyers and the legal profession make it clear that lawyers and judges often act to build the legitimacy of the system in which they operate.”<sup>9</sup>

The studies discussed in this report represent one contribution to the continual process of improving our civil justice system. The effort to identify challenges, and respond to those challenges as they present themselves, is ongoing. Certainly, there is much more systematic work that needs to be done, both quantitative (e.g., the aggregation of docket information and billing reports) and qualitative (e.g., in-depth interviews as part of case studies). “[M]any serious empirical scholars – particularly those trained in recent years – understand that both types of work are necessary to further the grand project of increasing human knowledge.”<sup>10</sup> Rather than serve as substitutes for one another, multiple methods can provide “parallel source[s] of distinct, rich, and pertinent information.”<sup>11</sup> Because these four studies identify matters worthy of deeper and more refined investigation, perhaps their most important function will be to shape future research. Accordingly, the survey results should be considered in conjunction with past and ongoing research initiatives in this field.<sup>12</sup>

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<sup>9</sup> Bryant G. Garth, *Observations on an Uncomfortable Relationship: Civil Procedure and Empirical Research*, 49 ALA. L. REV. 103, 113 (1997).

<sup>10</sup> Dan Filler, *Qualitative Empirical Legal Research* (blog post), CONCURRING OPINIONS, [www.concurringopinions.com](http://www.concurringopinions.com) (Feb. 20, 2006) (noting that “many people in the legal academy have come to conflate the idea of *empirical* work with *quantitative* work”).

<sup>11</sup> Evelyn Folch-Lyon and John F. Trost, *Conducting Focus Group Sessions*, 12 STUDIES IN FAMILY PLANNING 443, 444 (1981).

<sup>12</sup> It has been noted that “[s]ocial life is so complex, so unsystematically studied, and so fraught with data acquisition and measurement problems that there are huge gaps in the knowledge needed for realistic formalization”. Richard Lempert, *The Inevitability of Theory*, 98 CAL. L. REV. 877, 886 (2010). Nevertheless, “[t]hese gaps should be reasons to do more rather than less research on a question”. *Id.* at 889.

## SURVEY RESPONDENTS

To put the survey results into perspective, it is important to know some demographic information about the populations studied. The ACTL describes itself as an organization “composed of the best of the trial bar . . . [and] dedicated to maintaining and improving the standards of trial practice, the administration of justice and the ethics of the profession.”<sup>13</sup> Fellowship is extended “after careful investigation” and “only by invitation” to experienced trial lawyers who have maintained high professional standards.<sup>14</sup> Membership is limited to 1% of the total lawyer population in any state, but “all branches of trial practice” are represented.<sup>15</sup> Nearly 1,500 American attorney Fellows responded to the survey.<sup>16</sup> Responding attorneys averaged 38 years in legal practice. Three-quarters reported primarily representing defendants, while one-quarter reported primarily representing plaintiffs. Over half of responding Fellows selected state court as the forum in which most of their litigation takes place, less than 20% selected federal court as their primary forum, and the remainder (about 25%) indicated spending equal amounts of time in state and federal court. The types of cases most often litigated by responding ACTL Fellows were: complex commercial (42%); personal injury (35%); professional malpractice (32%); and general torts (32%).<sup>17</sup>

The Section of Litigation is the “largest specialty section” of the ABA, “dedicated to helping litigators become more effective advocates for their clients.”<sup>18</sup> Lawyer membership is open to those licensed to practice in the United States, upon payment of membership dues.<sup>19</sup> Approximately 3,300 Section members responded to the survey. Responding attorneys averaged 23 years in legal practice. One-half reported primarily representing defendants, while the other half were evenly divided between those who reported primarily representing plaintiffs (26%) and those who reported equal representation of plaintiffs and defendants (24%). Approximately one-third of responding attorneys selected state court as the forum in which most of their litigation takes place, one-third selected federal court, and one-third spend equal time in state and federal court. The types of cases most often litigated by responding Section members were: complex commercial (43%); contracts (22%); general torts (16%); and personal injury (15%).<sup>20</sup>

NELA describes itself as “the country’s largest professional organization that is exclusively comprised of lawyers who represent individual employees in cases involving employment discrimina-

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<sup>13</sup> American College of Trial Lawyers, *About Us – Overview*, [http://www.actl.com/AM/Template.cfm?Section=About\\_Us](http://www.actl.com/AM/Template.cfm?Section=About_Us) (last accessed Jan. 19, 2011).

<sup>14</sup> American College of Trial Lawyers, *About Us – Membership*, <http://www.actl.com/Content/NavigationMenu/AboutUs/Membership/default.htm> (last accessed Jan. 23, 2011).

<sup>15</sup> *Id.*

<sup>16</sup> The following groups were excluded from the population sample: judges, members on “emeritus status,” and Canadian lawyers.

<sup>17</sup> As respondents were permitted to select up to three areas accounting for at least one-third of their practice, the reported numbers will not total to 100%.

<sup>18</sup> American Bar Association, Section of Litigation, *About the Section*, <http://www.abanet.org/litigation/about/> (last accessed Jan. 19, 2011).

<sup>19</sup> American Bar Association, *Membership Options*, <http://www.abanet.org/join/> (last accessed Jan. 20, 2011).

<sup>20</sup> Respondents were permitted to select up to three areas accounting for at least one-third of their practice, and therefore the reported numbers will not total to 100%.

tion and other employment-related matters.”<sup>21</sup> Lawyer membership is open to members of the bar in the United States who subscribe to NELA’s purposes,<sup>22</sup> certify to representing employees in the majority of their employment law practice,<sup>23</sup> and pay membership dues.<sup>24</sup> Approximately 300 members responded to the survey. Responding attorneys averaged 21 years in legal practice and, by definition, primarily represent plaintiffs. Over half of responding NELA members selected federal court as their primary litigation forum, less than 20% selected state court as their primary forum, and the remainder (approximately 25%) indicated spending equal amounts of time in state and federal court. The types of cases most often litigated by responding attorneys were: employment discrimination (80%); civil rights (42%); labor (16%); and ERISA (9%).<sup>25</sup>

The judge survey was distributed to the Searle Center’s judicial database, which is perhaps the most comprehensive list of all judges in the United States.<sup>26</sup> Respondents include about 1,400 state trial judges and nearly 300 federal trial judges (both Article III and magistrate judges). The state trial judges averaged 13 years in their current position, and the federal trial judges averaged 16 years in their current position. The state judges indicated spending just over half of their time each month on civil matters, while the federal judges indicated spending two-thirds of their time on such matters.

Therefore, the survey results discussed in this report are the collective opinions of approximately 6,800 legal professionals nationwide, involved in civil litigation, practicing in a variety of areas, and representing both plaintiffs and defendants in state and federal court. Moreover, these opinions can be generalized to the larger groups from which they come, with collective membership numbering in the tens of thousands. As noted earlier, the focus is on the same or very similar questions repeated in each of the surveys.

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<sup>21</sup> National Employment Lawyers Association, *Who We Are*, <http://www.nela.org/NELA/> (last accessed Jan. 19, 2011).

<sup>22</sup> NELA’s stated purposes include advancing the payment of a living wage, the provision of employment benefits, the protection of worker safety, and a work environment “free of discrimination, harassment, retaliation, and capricious employment decisions.” In addition, the organization seeks to promote the provision of “effective legal representation to enforce their rights to a fair and just workplace. . .” *Id.*

<sup>23</sup> National Employment Lawyers Association, *Membership: Join NELA*, <http://www.nela.org/NELA/index.cfm?event=showPage&pg=join> (last accessed Jan. 19, 2011).

<sup>24</sup> *Id.*

<sup>25</sup> Again, respondents were permitted to select up to three areas, but responses were not limited to areas accounting for at least one-third of one’s practice.

<sup>26</sup> The Searle Center conducted a large-scale review of its judicial database in June 2008. At that time, the database was compared to the lists of judges on the public websites of every state and federal court in the country and updated accordingly. Since then, it has been periodically updated.

## AREAS OF AGREEMENT

This analysis examines only areas of substantial agreement among the groups studied.<sup>27</sup> Ultimately, these areas fall into the broad themes of challenges to the civil justice system and possible solutions. Survey respondents identified the following challenges: 1) cost is a concern that affects court access, 2) delay increases cost, and 3) discovery is responsible for unnecessary cost and delay. Respondents also pointed to the following possible solutions: 1) more cooperative pretrial conduct by attorneys, 2) closer case management by judges, and 3) increased efficiency in electronic discovery.

ATTORNEYS WHO REGULARLY LEAD PARTIES THROUGH THE LITIGATION PROCESS POINTED TO INEFFICIENCIES IN THAT PROCESS, WHICH IS PARTICULARLY COMPELLING IN LIGHT OF THEIR OWN FINANCIAL INTERESTS.

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<sup>27</sup> Differences in how a question appeared in the various surveys, if any, are noted. Although only the aggregate results are reported, it should be noted that there were not large discrepancies between plaintiff and defense attorneys within each population for the questions discussed.

## IDENTIFIED CHALLENGES

The first theme to emerge from these studies is that, in the experience of all of the attorney groups, the cost of litigation does hinder access to judicial case determination on the merits.<sup>28</sup> A logical place to begin is with the most general survey question on the matter, which asked respondents to evaluate whether “[l]itigation is too expensive.” More than three out of four attorneys in every group expressed agreement with this statement (ACTL Fellows: 85%; ABA Litigation: 81%; NELA Members: 77%).

While the question itself leaves much to be desired and by no means concludes the inquiry into cost, it nevertheless conveys useful information. The question did not simply ask whether litigation is expensive, but whether litigation is too expensive (*i.e.*, relative to what it ought to cost). Thus, regardless of how and at what point one might conceive an appropriate price for litigation – whether a certain average dollar amount per case, a certain percentage of the stakes, or a certain level relative to costs in the past – within the organizations studied, attorneys who regularly lead parties through the litigation process perceive inefficiencies in that process, which is particularly compelling in light of the financial interests of private attorneys. This signals not only room for cost improvements, but the need to pursue such improvements.<sup>29</sup> In simple economic terms, if a product is too expensive, rational actors will cease to use it.

More specifically, attorney respondents indicated that the cost-benefit analysis affects whether some parties can commence and maintain a civil action. Over 80% of attorneys in every group answered “yes” to the following question: “In general, does your firm turn away cases when it is not cost-effective to handle them?” (ACTL Fellows: 81%; ABA Litigation: 82%; NELA Members: 88%). Majorities of attorneys in every group also answered affirmatively when asked: “Does the cost of litigation force cases to settle that should not settle based on the merits?” (ACTL Fellows: 83%; ABA Litigation: 83%; NELA Members: 59%). Accordingly, while the precise tipping points are unknown and will vary for different law firms and different litigants (and should be a topic for future research), one can hypothesize from these data that decreasing litigation costs ought to have a positive effect on court access for legitimate claims. Exploring ways to reduce costs, then, is a worthy endeavor.

The second theme to emerge is the likely connection between delay and increased costs. More than 70% of attorneys in each group agreed with the statement that “[t]he longer a case goes on, the more it costs” (ACTL Fellows: 92%; ABA Litigation: 82%; NELA Members: 73%). Moreover, solid majorities disagreed with the proposition that “[e]xpediting cases costs more” (ACTL Fellows: 79%; ABA Litigation: 67%; NELA

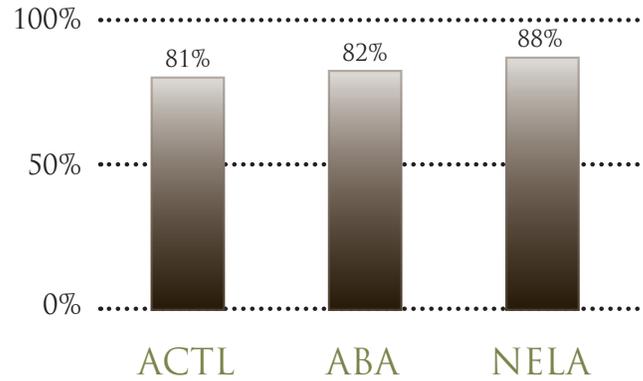
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<sup>28</sup> In an attempt to remain within a judge’s current realm of experience, the judge survey did not ask many of the questions relating to cost. If the results from a particular respondent group are not reported, it is because the survey did not contain the question and thus there is no data to report.

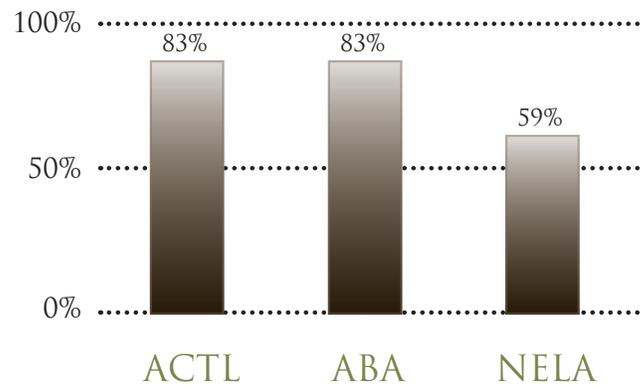
<sup>29</sup> The theme of improving upon the status quo appeared in the Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation Submitted by the Judicial Conference Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure. This report explained that one of the purposes of the Conference (held in May at Duke University) was to engage in an “exploration of the most promising opportunities to improve federal civil litigation.” *Report to the Chief Justice of the United States*, *supra* note 2, at 1.

# IDENTIFIED CHALLENGES

IN GENERAL, DOES YOUR FIRM TURN AWAY CASES WHEN IT IS NOT COST-EFFECTIVE TO HANDLE THEM?



DOES THE COST OF LITIGATION FORCE CASES TO SETTLE THAT SHOULD NOT SETTLE BASED ON THE MERITS?



Members: 64%).<sup>30</sup> In short, aside from the independent merits of prompt dispute resolution,<sup>31</sup> delay reduction techniques are worth exploring in any effort to identify and alleviate unnecessary costs.

The third theme is that respondents associate the discovery process with excess cost and delay. Initially, as with the litigation process generally, attorneys perceive cost inefficiencies in the discovery process. At least 70% of attorneys in each group expressed agreement with the statement that “[d]iscovery is too expensive” (ACTL Fellows: 87%; ABA Litigation: 82%; NELA Members: 70%). Again, this demonstrates a widespread belief that discovery is more costly than it needs to be.<sup>32</sup>

In terms of time, the attorney surveys asked respondents to identify one “primary cause of delay in the litigation process.” In all three organizations, attorneys identified the “time required to complete discovery” as the primary cause of delay over any other single cause (ACTL Fellows: 55%; ABA Litigation: 48%; NELA Members: 35%<sup>33</sup>). The judge survey asked a slightly different question, but with a generally consistent result. Judges were permitted to select multiple causes of “significant” delay, and requested to rank the causes selected on a scale from one (most significant) to five (least significant). Over 80% of trial judges identified the time required to complete discovery as a significant cause of delay (State Judges: 82%; Federal Judges: 84%), and this cause ranked the highest in significance (State Judges: 1.8 average rank; Federal Judges: 1.7 average rank).<sup>34</sup> It should be noted that the word “delay” entails not only the passage of time, but the passage of more time than is required or desired.<sup>35</sup> Here, too, is an area that deserves further exploration for making progress in the civil justice system.

When asked to provide “the percentage of total expenses and time spent...in connection with discovery (including discovery motions and other discovery related disputes)” in “typical cases that do not go to trial,” the aggregate responses within all three attorney organizations were nearly identical. Half of respondents reported that discovery consumes at least 70% of expenditures in cases that are not tried; on average, respon-

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<sup>30</sup> See also Emery G. Lee III & Thomas E. Willging, *Litigation Costs in Civil Cases: Multivariate Analysis, Report to the Judicial Conference Advisory Committee on Civil Rules*, FEDERAL JUDICIAL CENTER, 5, 7 (March 2010) (all else being equal, a 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).

<sup>31</sup> For example, the stress of a pending dispute can take an emotional and psychological toll on litigants. See Thomas G. Gutheil, M.D. et al., *Preventing “Citogenic” Harms: Minimizing Emotional Injury From Civil Litigation*, 28 J. OF PSYCHIATRY & L. 5, 10-11 (2000).

<sup>32</sup> See also Emery G. Lee III & Thomas E. Willging, *Federal Judicial Center National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules*, FEDERAL JUDICIAL CENTER, 32 (2009) (In 2009 survey of attorneys in closed federal cases, over one-quarter of plaintiff attorneys (27%) and nearly one-third of defendant attorneys (30%) “indicated that the costs of discovery increased, to some extent, the likelihood of settlement in the closed case.”).

<sup>33</sup> For the NELA membership, there was only a small percentage difference between first and second place, as 33% of respondents selected “delayed rulings on pending motions” as the primary cause of delay.

<sup>34</sup> Indeed, commentators are noting that: “[J]udges are particularly distressed by the time expended in resolving pretrial discovery disputes.” John B. Snyder, III, *Dispositions Unsettled: What Tax Court Procedure Can Teach Us About Federal Procedure*, 36 OHIO N.U. L. REV. 359, 371 (2010) (citing John Lande, *How Much Justice Can We Afford?: Defining the Courts’ Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice*, 2006 DISP. RESOL. 213, 220-222 (2006) and Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 405 (1982)). Moreover, there is evidence to suggest that discovery disputes are increasing over time. See John S. Beckerman, *Confronting Civil Discovery’s Fatal Flaws*, 84 MINN. L. REV. 505, 508 (2000) (noting the number of opinions in which courts have addressed discovery disputes has risen significantly compared with the prior decade).

<sup>35</sup> See The American Heritage® Dictionary of the English Language (4th ed. 2010).

## IDENTIFIED CHALLENGES

dents reported that two-thirds of expenditures are discovery related (ACTL Fellows: 70% median; 67% average; ABA Litigation: 70% median; 66% average; NELA Members: 70% median; 66% average).<sup>36</sup> The ABA and NELA surveys went further and requested an assessment of total time and expenses that *should* be incurred in connection with discovery in such cases. Responses were again similar, and identified an appropriate level of discovery expenditures lower than the current level reported (ABA Litigation: 50% median, 50% average; NELA Members: 50% median; 53% average). The consistency among these groups is remarkable, and shows that attorneys believe there is room for improvement with respect to the time and cost required to complete discovery.

Regarding these discovery inefficiencies, respondents generally hold attorneys more responsible than the litigants themselves. Overall, not more than one in ten respondents agreed with the statement that “[litigants], not attorneys, drive excessive<sup>37</sup> discovery”<sup>38</sup> (ACTL Fellows: 11%; ABA Litigation: 11%; NELA Members: 6%; State Judges: 7%; Federal Judges 7%). Accordingly, it does not appear that the market for legal services is propelling unnecessary discovery practice, and the market should support efforts to obtain the same or better results at a lower cost.<sup>39</sup>

This is a sentiment echoed by The Sedona Conference<sup>®</sup>, a diverse and balanced group of “leading jurists, lawyers, experts, academics and others,”<sup>40</sup> which has officially stated: “Over time, discovery has evolved into a complicated, lengthy procedure requiring tremendous expenditure of client funds, along with legal and judicial resources. These costs often overshadow efforts to resolve the matter itself.”<sup>41</sup> Indeed, based on the ACTL, ABA, and NELA surveys, the federal rulemaking committees<sup>42</sup> have concluded that from the plaintiff’s perspective, “efforts to evade and ‘stonewall’ clear and legitimate requests”

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<sup>36</sup> The question was changed slightly in the ABA and NELA surveys, to specify that respondents should consider cases that “do not go to trial *and are not dismissed on an initial 12(b)(6) motion.*”

<sup>37</sup> The term “excessive” refers to going beyond “a normal, usual, reasonable, or proper limit.” The American Heritage<sup>®</sup> Dictionary of the English Language (4th ed. 2010). It is true that disagreement with this statement could indicate a belief that excessive discovery does not exist.

<sup>38</sup> The attorney surveys employed the term “clients,” while the judge survey employed the term “parties.”

<sup>39</sup> The legal market may, in fact, demand it. As one commentator wrote: “Clients are also losing patience with protracted litigation. . . . They want the process streamlined, they want quick results. The challenge is how to do this without sacrificing thoroughness and care [and] the answer is focus.” Joyce S. Meyers, *Focusing: When Less is More*, 28(2) LITIGATION 6, 10 (2002).

<sup>40</sup> The Sedona Conference<sup>®</sup>, *TSC Mission*, [http://www.thesedonaconference.org/content/tsc\\_mission/show\\_page\\_html](http://www.thesedonaconference.org/content/tsc_mission/show_page_html) (last accessed Jan. 24, 2011); *see also* The Sedona Conference<sup>®</sup>, *Frequently Asked Questions*, <http://www.thesedonaconference.org/content/faq/#10001100> (last accessed Jan. 24, 2011) (“Our hallmark is our unique use of the dialogue process to reach levels of understanding and insight not otherwise achievable. . . . TSC brings together the brightest minds in a think-tank setting with the goal of creating practical solutions and recommendations. Their findings are developed and enhanced through a substantive peer review process. . . .”).

<sup>41</sup> The Sedona Conference<sup>®</sup>, *The Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J., 331-32 (2009 Supp.) (referring inclusively to “overreaching, obstruction, and extensive, but unproductive discovery disputes”).

<sup>42</sup> Specifically, these committees are the Judicial Conference Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure.

increase costs, while from the defense perspective, “contested issues are not identified early enough to forestall needlessly extensive and expensive discovery.”<sup>43</sup>

Moreover, those who engage in discovery misconduct may not see consequences for their behavior. A consistent, strong majority in every attorney group agreed that “[s]anctions allowed by the discovery rules are seldom imposed” (ACTL Fellows: 86%; ABA Litigation: 87%; NELA Members: 87%). This observation is generally supported by the judges, as at least three out of four reported that they impose sanctions in 25% or fewer of motions filed (State Judges: 75%; Federal Judges: 84%). Indeed, an IAALS study of 2005-2006 docket data in eight federal districts concluded that “discovery sanctions were sought rarely and granted even more rarely. The study recorded only 3.19 motions seeking discovery sanctions per 100 cases . . . . Slightly less than 26% of sanction motions were granted in all or in part.”<sup>44</sup>

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<sup>43</sup> *Report to the Chief Justice of the United States*, *supra* note 2, at 4.

<sup>44</sup> See Institute for the Advancement of the American Legal System, *Civil Case Processing in the Federal District Courts: A 21st Century Analysis*, 46 (2009), available at [www.du.edu/legalinstitute](http://www.du.edu/legalinstitute).

## IDENTIFIED SOLUTIONS

In addition to the challenges described, respondents pointed to some solutions for reducing unnecessary expense, time, and discovery. Initially, there is overwhelming agreement that cooperative conduct by counsel can increase cost efficiency. Over 95% of respondents in every attorney group agreed with the statement that “[w]hen all counsel are collaborative and professional, the case costs the client less” (ACTL Fellows: 97%; ABA Litigation: 96%; NELA Members: 98%). Majorities also agreed that “[c]ases involving informal discovery are less expensive” (ACTL Fellows: 82%; ABA Litigation: 64%; NELA Members: 61%). The idea is that adversarial conduct in pre-trial discovery places an unnecessary burden on litigants, as well as on public resources.<sup>45</sup> On this issue, The Sedona Conference® has declared that “[a]bsent a more cooperative posture in the discovery process, the cost of litigation and the burden imposed as courts are forced to attempt to resolve more and more discovery disputes, will ultimately bring the system to a halt.”<sup>46</sup>

There is also a good deal of agreement on certain judicial case management issues. First, at least three-quarters of respondents in every group agreed that “[o]ne judicial officer should handle a case from start to finish”<sup>47</sup> (ACTL Fellows: 90%; ABA Litigation: 86%; NELA Members: 80%; State Judges: 84%; Federal Judges: 75%). Second, according to majorities of respondents, “[i]ntervention by judges or magistrate judges early in the case helps to narrow the issues” (ACTL Fellows: 90%; ABA Litigation: 86%; NELA Members: 80%; State Judges: 84%; Federal Judges: 75%), and it also “helps to limit discovery” (ACTL Fellows: 67%; ABA Litigation: 72%; NELA Members: 58%; State Judges: 59%; Federal Judges: 79%).<sup>48</sup> Third, there was consistent agreement that “[w]hen a judicial officer gets involved early in a case and stays involved until completion, the results are more satisfactory to the [litigants]”<sup>49</sup> (ACTL Fellows: 71%; ABA Litigation: 73%; NELA Members: 64%; State Judges: 62%; Federal Judges: 75%). Accordingly, early and active judicial management, to the extent that it is currently lacking, may very well improve the process for its users.

Finally, the area of electronic discovery (“e-discovery”) may provide opportunities for increasing the effectiveness of pre-trial information exchange. Over two-thirds of respondents in every group expressed agreement with the statement that “[e]-discovery has enhanced the ability of counsel to discover all relevant information” (ACTL Fellows: 72%; ABA Litigation: 78%; NELA Members: 86%; State Judges: 70%; Federal Judges: 69%). Nevertheless, majorities in every attorney group also agreed with the proposition that “[e]-discovery increases the costs of litigation” (ACTL Fellows: 87%; ABA Litigation: 86%; NELA Members: 61%).<sup>50</sup> It appears that respondents find e-discovery to be useful, but it poses challenges for keeping costs down. In the quest for efficiency improvements, better ways of conducting e-discovery are thus worth examining.

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<sup>45</sup> The Sedona Conference®, *supra* note 41, at 331.

<sup>46</sup> The Sedona Conference®, *The Case for Cooperation*, 10 SEDONA CONF. J., 340 (2009 Supp.).

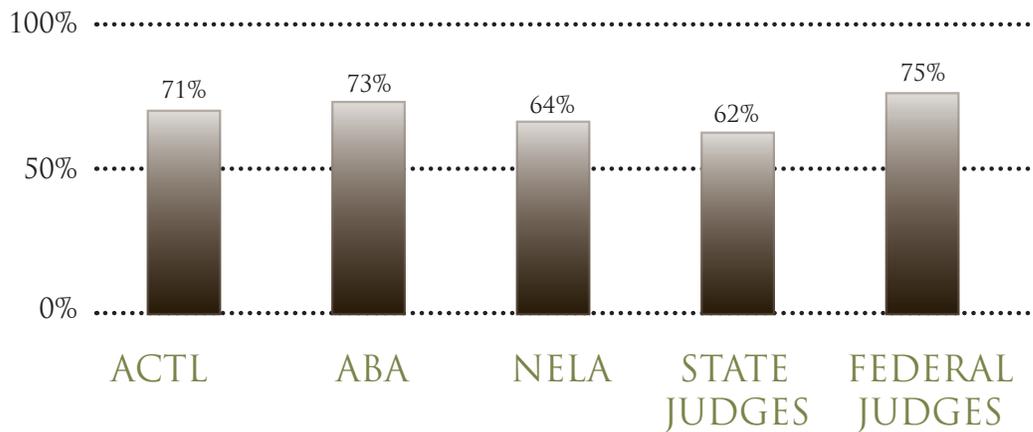
<sup>47</sup> In the judge survey only, the question specifically excluded “settlement matters.”

<sup>48</sup> These questions in the judge survey did not include the “or magistrate judges” language.

<sup>49</sup> Again, the attorney surveys employed the term “clients,” while the judge survey employed the term “parties.”

<sup>50</sup> See Lee & Willging, *supra* note 32, at 35, 37 (plaintiff attorneys’ reported median costs for cases with any electronic discovery (\$30,000) were more than triple the median costs for cases with no electronic discovery (\$8,126), and defendant attorneys’ reported median costs for cases with any electronic discovery (\$40,000) were more than double the median costs for cases with no electronic discovery (\$15,000)).

“WHEN A JUDICIAL OFFICER GETS INVOLVED EARLY IN A CASE AND STAYS INVOLVED UNTIL COMPLETION, THE RESULTS ARE MORE SATISFACTORY TO THE [LITIGANTS].”



CONSIDERING THE INDIVIDUAL PEOPLE AND ENTITIES WITH CASES DESERVING OF JUDICIAL DISPUTE RESOLUTION BUT WITH AN INABILITY TO COMMENCE OR SUSTAIN THE LITIGATION PROCESS, THE TRADEOFFS SEEM RATHER CLEAR.

## WHAT DOES IT ALL MEAN?

A number of policy judgments are not addressed by these survey results.<sup>51</sup> For example, with respect to litigation costs, the studies do not define either an appropriate measure or an appropriate level for costs (e.g., a particular dollar amount per case or a certain proportion of the stakes).<sup>52</sup> Further, the surveys do not determine what might be an acceptable failure rate (e.g., the specific percentage of cases for which a judicial decision on the merits is unattainable). Finally, the surveys do not make any time-related comparisons (e.g., the extent to which litigation costs have changed over time).

In 2009, the Federal Judicial Center (“FJC”) conducted a survey of counsel of record in federal civil cases that closed in the final quarter of 2008.<sup>53</sup> The FJC survey represents another interesting set of findings, limited to a subset of federal cases.<sup>54</sup> The survey asked respondents to “estimate, if possible, the total litigation costs for your firm and your client in the named case . . .”<sup>55</sup> The median for litigation costs reported by plaintiff attorneys was \$15,000 (ranging “from \$1,600 at the 10th percentile to \$280,000 at the 95th percentile”), and the median for litigation costs reported by defendant attorneys was \$20,000 (ranging “from \$5,000 at the 10th percentile to \$300,000 at the 95th percentile”).<sup>56</sup> Respondents were also asked to rate how “the costs of discovery to your side in the named case compare to your client’s stakes[.]”<sup>57</sup> A majority indicated that costs were “just the right amount” in relation to the stakes.<sup>58</sup> Based on that fact and the “strong linear relationship between [stated] stakes and [stated] costs,” the study’s authors concluded that litigation “costs appear to be proportionate to the monetary stakes” for most cases within the federal system.<sup>59</sup> Accepting, *arguendo*, that the data sufficiently support this conclusion, we ought to be asking whether success in “most cases” is good enough. In a sizeable minority of cases (23% for plaintiffs and 27% for defendants), attorney

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<sup>51</sup> The numbers in the following examples were taken from findings of a Federal Judicial Center survey of attorneys litigating in federal court.

<sup>52</sup> In fact, there are many possible baselines that could be used for determining an appropriate cost for litigation. For example, it could be set in relation to the parties’ resources.

<sup>53</sup> Lee & Willging, *supra* note 32, at 5. The strongest finding to come out of this survey is that the “monetary stakes in a case represent the single best predictor of litigation costs in that case.” Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 771 (2010). This is logical, and it is always useful to verify assumptions.

<sup>54</sup> It should be noted that the “vast majority” of litigation is handled in state court rather than federal court. American Bar Association, *ABA Family Legal Guide, How the Legal System Works, The Structure of the Court System* (2004), available at <http://public.findlaw.com/abafg/flg-2-2a-4.html>.

<sup>55</sup> Lee & Willging, *supra* note 32, at 94 (emphasis in original). The FJC has acknowledged that these numbers “are only as good as the respondents’ reports of costs in the closed cases.” Lee & Willging, *supra* note 30, at 2. For example, respondents may have examined billing records but may have only given a rough estimation from memory.

<sup>56</sup> Lee & Willging, *supra* note 32, at 2. The FJC found that these costs are “largely consistent” with estimated costs at one other point in time, those from a 1997 study. Lee & Willging, *supra* note 53, at 770. However, the authors acknowledged that a trend cannot be inferred from only two data points. *Id.* A longitudinal study of closed insurance claims in Texas from 1988-2004 found that “[i]nflation-adjusted [tort] defense costs rose at 4.5-5.5 percent per year.” Bernard Black et al., *Defense Costs and Insurer Reserves in Medical Malpractice and Other Personal Injury Cases: Evidence from Texas, 1988-2004*, 10 AM. L. & ECON. REV. 185, 187 (2008). Thus, the issue of a trend (or lack thereof) in the cost of American civil justice is not clear. In this regard, a more comprehensive and in-depth review of the existing literature on litigation costs would be useful.

<sup>57</sup> Lee & Willging, *supra* note 32, at 97. Certainly, this rating will be affected by respondents’ subjective judgments, views, beliefs, and attitudes.

<sup>58</sup> *Id.* at 27.

<sup>59</sup> Lee & Willging, *supra* note 53, at 768.

respondents deemed discovery costs too high in relation to the stakes.<sup>60</sup> Moreover, the extent to which parties to disputes forgo litigation altogether, on the basis of cost, is unknown.

The issue is not about deciding where to draw the line designating an acceptable price for civil dispute resolution, and resting on our laurels if we determine that the status quo for median costs falls on or below that line. The issue is whether we can do better. We should be engaged in a constant effort to improve the system for its users in an ever-changing world. In a year-end report to the federal judiciary, U.S. Supreme Court Chief Justice John Roberts recently stated:

[T]he American people have . . . a national judicial system that [is] the model for justice throughout the world. But that is no reason for complacency. As the world moves forward, the courts must be responsive to change, while preserving their place as the venue where justice is achieved through impartial judgment and dispassionate application of law.<sup>61</sup>

Indeed, the Chief Justice did not present reform goals in absolute terms. Rather, he mentioned “cost savings, improved efficiency, and reduced backlogs,” while focusing on “maintenance of the public trust.”<sup>62</sup>

In New York University’s Review of Law and Social Change, one commentator recently wrote: “The human lawyer remembers that all abstract policy debates are about real people. We owe it to those people to ensure that their stories are not shortchanged when we make the difficult tradeoffs that governing a society of humans requires.”<sup>63</sup> Considering the individual people and entities with cases deserving of judicial dispute resolution but with an inability to commence or sustain the litigation process, the tradeoffs seem rather clear. While fairness cannot be sacrificed for efficiency, inertia can certainly be traded for increased efficiency and expanded access. The goal should be to reduce the number left behind and increase the number for whom this public forum is realistically available.

In this process, the assumption of a linear positive relationship between the amount of discovery and the fairness of the process ought to be carefully examined.<sup>64</sup> “For example, one might expand discovery expecting that this change will reduce the error risk only to discover later that the parties use the expanded dis-

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<sup>60</sup> *Id.* at 773-74; Lee & Willging, *supra* note 32, at 28.

<sup>61</sup> Chief Justice John Roberts, *2010 Year-End Report on the Federal Judiciary*, 1-2 (2010), available at <http://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx>.

<sup>62</sup> *Id.* at 4 (2010) (emphasis added).

<sup>63</sup> Alec Karakatsanis, *The Human Lawyer*, 34 N.Y.U. REV. OF L. & SOC. CHANGE 563, 566 (2010).

<sup>64</sup> One plaintiffs’ attorney has noted that “[m]ore and more [discovery] activity masks less and less substance.” Elizabeth J. Cabraser, *Uncovering Discovery*, 2 (2010) (paper presented at Duke Law Journal 2010 Litigation Review Conference), available at <http://civilconference.uscourts.gov> (follow “Library” hyperlink, last visited Jan. 24, 2011).

## WHAT DOES IT ALL MEAN?

covery strategically to impose asymmetric litigation burdens that distort settlement outcomes.”<sup>65</sup> Fair systems exist elsewhere in the world without expansive American-style discovery.<sup>66</sup> This is a time to experiment, to think creatively, and to be bold about how we might maximize both fairness *and* access. The focus should be on areas of *unnecessary* cost and delay, and the effort to adapt to new challenges should be continual.

A further question involves how positive reforms can be successfully implemented and institutionalized. While changing procedural rules is certainly not the only means for effectuating change, rules guide behavior and bring legitimacy and consistency to processes.<sup>67</sup> The rules of civil procedure could be a vehicle for bringing more efficiency and focus into civil litigation; they could be amended to promote attorney cooperation, judicial case management, and more effective e-discovery.

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<sup>65</sup> Robert G. Bone, *Procedure, Participation, Rights*, 90 B.U. L. REV. 1011, 1024 (2010).

<sup>66</sup> Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 301, 318 (2002) (“Large, high stakes cases notwithstanding, I do think we are learning a sense of discovery restraint that will be more appealing to the rest of the world. Smallness will look better.”).

<sup>67</sup> See *Report to the Chief Justice of the United States*, *supra* note 2, at 4, 10 (noting that rules changes could “make ongoing and detailed judicial case management more often sought and more consistently provided”).

## CONCLUSION

In our flight over the civil justice landscape, we caught a glimpse of the similar ways in which four groups of legal professionals broadly view the system. What we see is that the forest of cases could be healthier, could be greener. More research is required to better understand the legal ecosystem and how best to care for it. One thing is for certain: we cannot neglect our responsibility as stewards to ensure that the forest thrives, from the smallest shrub to the tallest tree.

# INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM

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