SURVEY OF EXPERIENCED LITIGATORS FINDS SERIOUS CRACKS IN U.S. CIVIL JUSTICE SYSTEM

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Focus

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If the large number of anecdotes shared in law offices and courthouse hallways are any indication, many in the U.S. legal community now fear that the nation's civil justice system has become increasingly disabled by disproportionate cost and delay, and that this dysfunction is impacting justice. Two national organizations recently joined together to investigate these concerns and begin to quantify the scope of the problem. On September 9, 2008, the Institute for the Advancement of the American Legal System at the University of Denver (IAALS) and the American College of Trial Lawyers (ACTL) Task Force on Discovery released an Interim Report of the key findings of a major survey of some of America's leading lawyers, entitled the *2008 Litigation Survey of Fellows of the American College of Trial Lawyers.*

Both organizations were concerned about the impact of cost and delay on the legal system over the long haul. If potential litigants cannot or will not use the system as intended because it is too expensive or takes too long, disagreements might not be resolved on the merits of the parties' positions, as they should be. Common law will not be developed. And parties will not get their "day in court," an event that contributes substantially to litigants' perception of a fair process, and also serves as a mechanism for building public trust and confidence in America's system of justice.

In order to explore these concerns with specificity, in June 2007 IAALS and the ACTL Task Force on Discovery jointly began work to examine perceived problems associated with pretrial practice—primarily discovery—in civil cases. The focus of the research grew out of reports that the costs and burdens of discovery were precluding some potential plaintiffs from bringing meritorious claims, and were forcing some defendants to settle non-meritorious claims based purely on cost considerations.

IAALS and the Task Force examined existing studies on the cost of litigation and the impact of discovery. While valid, many of those studies were decades old, and it became clear that new data needed to be developed on the dynamics of litigation in the 21st century. Accordingly, the two organizations agreed to undertake a survey of the more than 3,800 members, or "Fellows," of the ACTL.[1] The survey focused on 13 different areas of the civil justice system, including civil rules generally, pleadings, discovery (including electronic discovery and initial disclosures), dispositive motions, the role of judges in litigation, costs, and alternative dispute resolution. In most sections, survey respondents were also invited to provide additional written comments. The survey was administered in April and May of 2008. Nearly 1500 Fellows responded, a response rate of 42 percent.

Survey results

Cost. Several major themes emerged from the survey. First, the survey confirmed that some deserving cases are not brought, and some meritless cases are settled out of court, not because of the strength of the parties' claims but because the cost of pursuing or defending those claims fails a rational cost-benefit test.

Eighty-one percent of survey respondents stated that their firms turn away cases when it is not cost-effective to handle them, and 83 percent said that litigation costs drive cases to settle that deserve to be tried on the merits. Overall, 94 percent of respondents agreed that trial costs and attorney fees are an important factor in driving cases to settle. More generally, more than four-fifths of respondents indicated that the civil justice system is too expensive. As one respondent noted, "Civil litigation has priced itself out of the market." The survey also indicated a strong connection between cost and delay in civil cases: more than 9 out of 10 respondents agreed that the longer a case goes on, the more it costs.

Discovery abuse. A related theme emphasized that discovery abuse in civil cases remains a significant problem. Nearly half the respondents (45 percent) indicated their belief that discovery is abused in *every* civil case. Relatedly, 71 percent agreed that attorneys use discovery as a tool to

1. The survey was sent to all Fellows of the College, with the limited exceptions of judges, Emeritus Fellows, Honorary Fellows, or Canadian Fellows. Those Fellows whose practice was limited strictly to criminal work were asked to so indicate on the survey, and did not respond to the remaining questions concerning civil litigation.

force settlement. The written comments fleshed out these concerns.

One respondent expressed the belief that judicial expansion of the scope of discovery rules "has caused the potential for blackmail suits, due to the extremely high cost of discovery searches." Another respondent recommended a dramatic solution: "I believe Rule 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." Discovery abuse, however, apparently is not being punished. Despite the impact of abusive discovery tactics, 86 percent of survey respondents indicated that discovery sanctions are seldom imposed by the court.

E-discovery. The survey also suggests that the worst problems associated with discovery cost and abuse are, unfortunately, combined in the electronic discovery arena. Over 87 percent of Fellows stated that e-discovery increases the costs of litigation, and 75 percent agreed that discovery costs, as a proportion of overall litigation costs, have increased disproportionately due to the advent of e-discovery. As one respondent put it, "The new rules concerning electronic discovery are a nightmare. The bigger the case, the more the abuse and the bigger the nightmare."

E-discovery also suffers on the whole from a lack of strong judicial management: 77 percent of respondents stated that courts do not understand the difficulties in providing e-discovery, and 63 percent said that e-discovery is being abused by counsel. One respondent echoed the sentiment of many of the Fellows by complaining that "The rules on e-discovery are completely out of touch with the costs of discovery."

Notice pleading. A fourth theme that emerged from the survey was that notice pleading is largely ineffective in shaping and narrowing the issues in a case. Only 21 percent of respondents stated that the answer to a complaint (as distinguished from affirmative defenses or counterclaims) shapes and narrows the issues in a case. And several of the comments were openly hostile to the current pleading regime.

One respondent wrote, "Pleading is ridiculous. Notice pleading simply starts the process and encourages sweeping answers which do not address the allegations. Pleading, especially in answers, is driven by fear of waiver, not by a desire to address claims." Another respondent commented, "A child can read a complaint and understand what is alleged to have gone wrong and what relief is sought; no one can gather, from an answer, what is the real defense of the defendant and why the defendant is defending the case." Furthermore, nearly 71 percent of respondents stated that motions to dismiss for failure to state a claim are not effective tools to limit claims and narrow litigation.

Judicial involvement. A final theme from the survey was that most attorneys believe that active judicial involvement in a case shapes and narrows the issues, and lowers the overall cost of litigation. Nine out of every ten respondents indicated their belief that one judicial officer should handle a case from start to finish. And when asked about the impact of early and regular judicial involvement in a case, 74 percent of respondents stated that it results in a narrower range of issues in dispute, 71 percent agreed that it results in greater client satisfaction, and 67 percent said that it results in lower costs. One respondent asserted that "Judges need to actively manage each case from the outset to contain costs; nothing else will work." A majority of respondents in most jurisdictions also felt that trial dates should be set early in a case.

Next steps

The survey responses confirmed many hypotheses developed by IAALS and the Task Force about the experience of attorneys with the civil justice system, and raised new issues for consideration. In particular, the results demonstrate that attorneys across all geographic and practice area distributions see discovery abuse and the rising cost of litigation as negatively impacting the fair and effective administration of civil justice in America. Some parties are being priced out of the system before the merits of their claims and defenses can be addressed, and existing tools of notice pleading are considered to be ineffective at narrowing issues as the case progresses. Electronic discovery is compounding the problem significantly. Importantly, however, attorneys feel that these

challenges can be alleviated, at least to some extent, by early and active judicial case management.

These themes are closely interrelated. If notice pleading and motions to dismiss are not narrowing issues sufficiently, the parties and their counsel are more likely to demand more discovery to flesh out the scope of the claims. Discovery is already costly, and e-discovery threatens to make it exponentially more so. Stronger judicial controls may narrow issues and keep discovery under closer control—if judges are willing to embrace a more significant managerial role. One respondent to the survey voiced the frustration and urgency of the current civil litigation landscape:

> The total lack of control of discovery including excessive depositions, overbroad interrogatories, [and] unfocused requests for admission[] as permitted by the [R]ules without any court control is killing civil litigation. The whole situation is further compounded by the [R]ules 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 ½-inch thick and 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.

The survey data and comments represent an important step in understanding what is working—and what is not working—in the civil justice system. But these data alone are only part of the overall picture. Accordingly, over the next several months the Task Force and IAALS will compile a set of operating principles that could be used to guide and shape future amendments to the Federal Rules of Civil Procedure. The Task Force expects to report its recommendations to the College's Board of Regents in February 2009.

For its part, IAALS will take steps to build on the survey data and further pinpoint those areas of the civil justice system most in need of attention and repair. Specifically, IAALS will examine practices in state courts that differ from those prescribed by the Federal Rules, in order to collate rules and practices that contribute to a fair and cost-effective system. IAALS will also explore civil rules and practices in foreign jurisdictions (both common law and civil law) to determine what practices help reduce cost and delay, and will complete a new statistical study of the impact of various case management practices on time to disposition in federal district courts. IAALS will further attempt to develop a method of measuring amendments to rules that would allow innovators to determine whether changed rules are achieving the desired results.

Ultimately, the findings from these projects will be used to develop a series of recommendations for refining the existing civil justice system so that it comports as closely as possible with the "just, speedy and inexpensive" prescriptions of Federal Rule of Civil Procedure 1. Based on these recommendations, IAALS will seek to partner with state and federal jurisdictions to pilot rules and procedures that may contribute to a less expensive, more efficient, and more user-friendly system.

Meaningful civil justice reform will not be quick or easy. But possible obstacles to constructive change should not prevent policy makers from moving with deliberate speed to identify and repair the serious cracks in America's civil justice system. Too much is at stake to wait. ⚖

The report is available at http://www.du.edu/legalinstitute/

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