



SUMMARY OF RESULTS OF FEDERAL JUDICIAL CENTER
SURVEY OF NELA MEMBERS, FALL 2009

A Report By The
National Employment Lawyers Association
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By
Rebecca M. Hamburg
Program Director

Matthew C. Koski
Paul H. Tobias Attorney Fellow

National Office · 44 Montgomery Street · Suite 2080 · San Francisco, California 94104 · Phone: 415.296.7629 · Fax: 415.677.9445

Washington DC Office · 1090 Vermont Avenue, NW · Suite 500 · Washington, DC 20005 · Phone: 202.898.2880 · Fax: 866.593.7521

nelahq@nelahq.org · www.nela.org

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I. INTRODUCTION

In October and November 2009, the Federal Judicial Center (FJC) administered a survey to members of the National Employment Lawyers Association (NELA) at the request of Judge Mark R. Kravitz, Chair of the Advisory Committee on Federal Rules of Civil Procedure for the Judicial Conference of the United States. Approximately 300 NELA members responded to this survey.¹ The FJC administered a similar survey to members of the American Bar Association Section of Litigation (ABA).² Both surveys had been adapted from a previous version developed by the Institute for the Advancement of the American Legal System and administered in similar fashion to members of the American College of Trial Lawyers (ACTL).³ The response rate for NELA members was comparable to the overall response rate for the ABA.⁴

NELA advances employee rights and serves lawyers who advocate for equality and justice in the workplace. NELA provides assistance and support to lawyers in protecting the rights of employees against the greater resources of their employers and the defense bar. It is the 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. NELA and its 68 state and local affiliates have more than 3,000 members around the country.

This report is a summary of the results of the NELA survey. Within the summary we have noted some select points of convergence among the NELA results and those of the ABA and ACTL surveys. Based on the survey results,⁵ we have identified those areas requiring further study and made substantive recommendations designed to increase efficiency and fairness in the litigation process.⁶

¹ In November 2009, the survey was sent via e-mail to 2,156 NELA members, with 296 members responding (a 14% response rate).

² See, *ABA Section of Litigation Member Survey on Civil Practice: Detailed Report* (Dec. 11, 2009) (hereinafter *ABA Report*).

³ See, Mathematica Policy Research, Inc., *ACTL Civil Litigation Survey Final Report*, MPR Ref. No. 6478-500 (June 27, 2008) (hereinafter *ACTL Report*).

⁴ For a comparison of portions of all three surveys, see, Emery G. Lee III and Thomas E. Willging, *Attorney Satisfaction with the Federal Rules of Civil Procedure: Report to the Judicial Conference Advisory Committee on Civil Rules*, The Federal Judicial Center (2010), at [http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/\\$file/costciv2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/$file/costciv2.pdf) (last visited Mar. 18, 2010).

⁵ As with the ACTL and ABA surveys, a substantial number of the questions asked NELA members to respond to a given statement with any one of the following four choices: *strongly agree*, *agree*, *disagree*, or *strongly disagree*. For purposes of ease, we have aggregated the degrees of agreement with each other (doing the same for the degrees of disagreement), except when otherwise noted.

⁶ See *infra* Part IV.

II. EXECUTIVE SUMMARY

A. The NELA Respondents

NELA members who responded to this survey practice extensively in federal court,⁷ devoting substantial portions of their practice to defending employee rights arising under federal statutes such as Title VII of the Civil Rights Act of 1964 as amended,⁸ the Americans with Disabilities Act⁹ and the Age Discrimination in Employment Act.¹⁰

NELA members overwhelmingly recognize that it is becoming ever more difficult to prevail in employment discrimination and civil rights cases in federal court.¹¹ Consequently, many NELA respondents find that there are better opportunities for positive substantive outcomes for their clients in state courts. The sense that federal courts are growing increasingly hostile to certain types of employment claims is discouraging and raises serious questions about meaningful access to justice in our federal courts.

B. The Federal Rules

A clear majority of NELA respondents (60%) find that the Federal Rules as written are not conducive to securing a “just, speedy, and inexpensive determination of every action.”¹² While a minority of NELA respondents also expressed reservations about the adequacy of the Rules as currently written, most remain hopeful that only minimal reforms, if properly directed, can remedy any current problems with the Rules.

What is more troubling is the clear indication from NELA respondents that the Rules are not applied as written and are applied inconsistently, even within a single district. While NELA members provide additional insight elsewhere in the survey into some specific areas where they consistently see the Rules misapplied, we recommend further study of attitudes on this topic because the inconsistent application of the Rules can create serious problems for the integrity and credibility of the civil justice system.

C. Local Rules

In addition to pointing out that local rules often conflict with the Federal Rules, NELA members made clear their belief that local rules currently do little to improve flexibility, consistency and efficiency in the litigation process.¹³

⁷ NELA respondents are also more likely than their counterparts from the ABA survey to practice mostly in federal court. While 54% of NELA respondents litigate primarily in federal court, only 39% of ABA plaintiff attorneys and 31% of the total ABA respondents do so. (*ABA Report* at 24).

⁸ 42 U.S.C. § 2000e, *et seq.*

⁹ 42 U.S.C. § 12111, *et seq.*

¹⁰ 29 U.S.C. § 621, *et seq.*

¹¹ See *infra* note 23 and accompanying text.

¹² Respondents to the ACTL survey also tended to be skeptical about the Rules’ ability to facilitate the goals of Rule 1. (*ACTL Report* at 26).

¹³ ABA respondents expressed some similar sentiments in regards to local rules. Nearly half of ABA plaintiff respondents find that local rules promote inconsistency and unpredictability, and 50% of all ABA respondents disagree that local rules are uniformly applied within the district to which they pertain. (*ABA Report* at 45, 47).

D. Pleadings

We note at the outset that the survey administered to NELA members posed different questions regarding pleading standards than the other two surveys. While the ACTL and ABA surveys asked respondents to express their opinions about notice pleading, fact pleading, and the interplay between pleadings and discovery,¹⁴ the NELA survey only sought information about pleading practice in the wake of the recent United States Supreme Court decisions in *Bell Atlantic v. Twombly*¹⁵ and *Ashcroft v. Iqbal*.¹⁶

As a result of the substantive differences between the questions posed, comparing the various sets of results is difficult. This is unfortunate because pleading standards can have a profound effect on how complaints are crafted, and the attitudes of those practitioners who regularly draft complaints are highly relevant to the discussion. It would therefore be useful if NELA members, as well as other groups of civil practitioners, were surveyed about their attitudes regarding heightened pleading standards.

It is important to consider the effects that heightened pleading standards have had and will likely continue to have on the ability of individuals to access the federal courts to vindicate their rights. As Professor Arthur Miller emphasized in his written testimony before the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, the openness of the Federal Rules has effectively allowed individuals to help enforce important Congressional and constitutional policies.¹⁷ Therefore, by limiting the ability of private litigants to access the courts, heightened pleading standards pose a substantial risk of closing the courthouse doors to meritorious claims.¹⁸ This will have harmful effects, not only on the litigants themselves, but also on our broader system of justice.

Further, nearly two-thirds of all ABA respondents find that local rules are not always consistent with the Federal Rules. (*ABA Report* at 48).

¹⁴ See, *ACTL Report* at 34-35; *ABA Report* at 50-54.

¹⁵ 550 U.S. 544 (2007).

¹⁶ 556 U.S. ___, 129 S. Ct. 1937 (2009).

¹⁷ Miller, Arthur. Statement to House, Subcommittee on the Constitution, Civil Rights and Civil Liberties. *Access to Justice Denied: Ashcroft v. Iqbal*, Hearing, Oct. 27, 2009 (Serial 111-36) at 10, at http://judiciary.house.gov/hearings/printers/111th/111-36_53090.PDF (last visited Mar. 17, 2010).

¹⁸ This problem is particularly acute in employment discrimination and civil rights cases, in which much of the information relevant to proving a claim is in the possession of the alleged wrongdoer. Heightened pleading standards and circumscribed discovery (as discussed *infra*) make such information effectively unobtainable, thereby rendering those claims practically unprovable. See, e.g., Letter to The Honorable Jerrold Nadler, Chairman, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, U.S. House of Representatives Committee on the Judiciary, dated October 26, 2009, at 1-2, at http://www.aclu.org/files/assets/asset_upload_file615_41370.pdf (last visited Mar. 23, 2010); Julie Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 WASH. U. L. REV. 1315, 1356 (2008) (“the liberal approach to pleading under the Federal Rules of Civil Procedure, particularly as it has been applied to the civil rights and employment discrimination contexts, makes it possible for victims of discrimination to have access to discovery before specific facts giving rise to a claim of discrimination can be articulated.”).

E. Initial Disclosures

NELA respondents indicated clearly that initial disclosures do not succeed in either reducing discovery or saving their clients money.¹⁹ Consequently, identifying specific types of information that will inevitably be relevant in a given cause of action and requiring prompt disclosure of that information would increase both the utility of the initial disclosures and the efficiency of the discovery process. For example, requiring prompt disclosure of an employee's entire personnel file, as well as disclosure of all communications referencing the employee, the employee's position, and the employment action at issue in an employment discrimination case would accomplish both of these goals.

F. Discovery

There was a universal sentiment among NELA respondents that the discovery process is too costly. Significant majorities indicated both that discovery is abused in almost every case, and that sanctions designed to curb discovery abuse are seldom imposed. This criticism is tempered by the fact that 56% of NELA respondents find that in the majority of cases counsel agree on the scope and timing of discovery.

As a group, NELA respondents find many discovery tools to be very important, though they are less likely to find that those same tools are very cost-effective. It would be useful to probe further into the reasons why specific discovery mechanisms are seen as useful but not cost-effective. As part of such an inquiry, the various forms of discovery should be isolated and the ways in which those forms operate in actual cases should be scrutinized. It would also be prudent to refrain from pursuing policies that broadly reduce the amount of discovery to which a party is entitled. While such policies may produce short-term cost savings, they would do nothing to improve the efficient exchange of discoverable information. In fact, they would frustrate the goal of complete factual development of cases, further blocking victims from accessing justice.

G. E-Discovery

A large majority (71%) of NELA respondents have had experience with e-discovery in their practice. Perhaps the most important conclusion to be taken from NELA members' responses is that there is near total agreement that e-discovery is helping litigants construct a more complete factual picture of their cases by allowing for the discovery of more relevant information.

While NELA respondents agree that e-discovery currently increases the costs of litigation in the near term, they also believe that properly managed e-discovery can reduce the overall costs of discovery. This is logical because electronic documents, though more voluminous, can be far easier to locate, copy and transfer. As such, it would be helpful to investigate the best ways to save, store, locate and share this type of information, as well as to scrutinize the costs involved in

¹⁹ ABA respondents expressed similar dissatisfaction with the ability of initial disclosures to reduce overall discovery and control costs. Over half of ABA plaintiff and 70% of ABA defendant respondents find that initial disclosures fail to reduce discovery (*ABA Report* at 56); additionally, 58% of ABA plaintiff and nearly three-quarters of ABA defendant respondents disagree that initial disclosures save the client money (*ABA Report* at 57).

each step. When all relevant stakeholders have a clear and comprehensive picture of the costs involved, better informed procedures for managing e-discovery can be developed.²⁰

H. Dispositive Motions

Consistent with responses from NELA respondents to other parts of the survey, there is a clear and strong dissatisfaction with the current state of summary judgment practice in the federal courts.²¹

NELA respondents now face motions for summary judgment in nearly every case that they file. They find that discovery is used more to gather information to be used for summary judgment than it is to prepare for trial, that summary judgment motions are rarely decided promptly, and that judges are granting summary judgment more often than is appropriate.²² As a result, nearly all NELA respondents believe that summary judgment has become a tactical tool, rather than a good faith means to narrow issues not in dispute. The practice of summary judgment has grown to the point where NELA respondents find that it increases cost and delay without any attendant benefit.

When combined with Federal Judicial Center data showing that employment discrimination and civil rights cases have a disproportionate number of summary judgment motions being both filed and granted in them,²³ it is clear that trial by paper is to a large extent supplanting trial by jury in our civil justice system.²⁴

I. Trial Dates

Slight majorities of NELA respondents agree that trial dates should be set early on in cases (56%) and that discovery need not be completed before trial dates are set (53%). Almost two-thirds disagree with waiting to set trial dates until after motions for summary judgment have been decided.

²⁰ For a general discussion of the contours of current e-discovery practice, as well as an evaluation of some proposals for improving it, see, Joseph D. Garrison, *E-Discovery is THE Discovery*, submitted to the Judicial Conference Advisory Committee on Civil Rules and included in the materials for this conference.

²¹ As one NELA respondent stated: “I have never heard of a federal court that consistently applied Rule 56 as written. The rule’s notion that genuine disputes of material fact should allow a trial is completely inconsistent with how the federal court world is administered.” (See *infra*, Appendix II at 52).

²² In the words of another NELA respondent: “Rule 56, as applied to discrimination and retaliation cases, results in summary judgment for employers far more frequently than it should in cases which always involve questions of intent or motivation. Questions of fact are characterized incorrectly as immaterial or ignored, and courts routinely make credibility determinations and draw inferences against the non-moving party.” (See *infra*, Appendix II at 57).

²³ See, Joe Cecil and George Cort, *Report on Summary Judgment Practice Across Districts with Variations in Local Rules*, The Federal Judicial Center, at 8-9 (2008), at [http://www.fjc.gov/public/pdf.nsf/lookup/sujulrs2.pdf/\\$file/sujulrs2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sujulrs2.pdf/$file/sujulrs2.pdf), (last visited Mar. 17, 2010); see also, Kevin M. Clermont and Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103 (2009); and see, Kevin M. Clermont and Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004).

²⁴ See generally, Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591 (2004).

J. Judicial Role In Litigation

NELA respondents agree with their counterparts from the ABA and ACTL surveys that early and consistent involvement by judges in cases is a positive development that leads to a more efficient and just litigation process. While 80% of NELA respondents would prefer that one judicial officer handle a case from start to finish, most agree that as long as pre-trial matters are handled promptly and appropriately, it does not matter whether the judge deciding pre-trial matters ultimately tries the case. A substantial majority (69%) of NELA respondents believes that only individuals with significant trial experience should be chosen as trial judges, though they do not think that only trial judges with expertise in a given subject matter area should handle cases in that area.

K. Costs

As nearly all of the NELA members responding to the survey tend to practice in firms with 10 attorneys or fewer (89%), their sensitivity to increased costs in the litigation process is particularly acute. Unsurprisingly, large majorities of NELA respondents agree that litigation is in general too costly (77%), that discovery is too expensive (70%), and that delays increase costs for the client (73%). When probed about the primary causes of delay, NELA respondents were most likely to identify “the time required to complete discovery” and “delayed rulings on pending motions.” While economic considerations do play a role in the decision to settle, respondents were still most likely to identify the likelihood of an unfavorable ruling as providing the strongest incentive to settle a case.

L. Alternative Dispute Resolution

Nearly two-thirds of NELA respondents consider court-ordered dispute resolution a positive development in terms of cost management, and over four-fifths think settling cases before trial through court-ordered dispute resolution is a positive development. In addition, NELA respondents’ experiences with mediation were overwhelmingly positive, with significant majorities agreeing that mediation provides for largely fair outcomes (60%) while saving time and money (74%). In contrast, a plurality of respondents find that arbitration increases costs relative to litigation and nearly three-quarters of respondents find that arbitration produces less fair outcomes than litigation.²⁵

²⁵ These survey results are consistent with NELA’s longstanding position that when forced on individual employees as a condition of gaining or maintaining employment, arbitration is a one-sided, privatization of justice that both drastically increases the cost of dispute resolution and often strips employees of many of the legal safeguards they would enjoy when proceeding in court. Since its inception in 1985, NELA has been a leader in opposing forced arbitration of employment claims. We believe, however, that alternative dispute resolution, when fully voluntary and properly designed, can in many cases helpfully resolve employment disputes.

III. NELA SURVEY RESULTS

A. NELA Survey Respondents: A Snapshot

The NELA members who responded to the survey practice primarily in the areas of employment discrimination and civil rights, and nearly all of the respondents (91%) practice in a private law firm. Further, they are experienced practitioners, with the average respondent possessing more than twenty years of civil litigation experience.

In addition, NELA members differ from respondents to the ABA and ACTL surveys in that they are more likely to practice in a firm with fewer than 10 attorneys (89%), and are more likely to practice in a firm with only one location. The majority of NELA respondents (54%) practice primarily in federal court, while smaller percentages practice either in state court (19%), or split their practices fairly evenly between state and federal court (23%).

NELA members are fairly evenly split in their forum preferences, with 44% preferring to file cases in federal court and 42% preferring state court. When probed further to identify the reasons for their forum preferences, a plurality (46%) of those respondents preferring state to federal court chose “favorable to plaintiffs” as a reason, though other factors such as “the ability to conduct voir dire,” “less expensive,” “the geographic area from which the jury is drawn,” and “better substantive outcomes” were each identified by at least 30% of the group. By contrast, a majority (55%) of NELA members who prefer federal court identified “more substantive legal knowledge/case type/judges” as a reason for doing so, with 47% picking “quality of judges,” and 42% identifying “the court’s experience with the type of case.”

B. NELA Members And The Federal Rules Of Civil Procedure

A strong majority (60%) of NELA respondents find that the Federal Rules of Civil Procedure (FRCP or the Rules) are not conducive to securing the “just, speedy and inexpensive determination of every action,” while a substantial minority (40%) disagrees. Similar majorities do not find that there are too many rules (61%), and do not believe that the Rules are too complex (62%). Further, 68% agree that the Rules are on the whole internally consistent. When asked about the general adequacy of the FRCP, however, no response garnered a majority: 45% agree that the Rules are adequate as written, but 49% disagree. Meanwhile, 58% do not think that the Rules need to be reviewed in their entirety, and 57% believe that the Rules “need only minor amendments to make them work.” A strong majority find that the rules do *not* promote unnecessary conflict among counsel.

Nonetheless, NELA members are clearly dissatisfied with the general enforcement of the Federal Rules, with 64% answering that the Rules are not enforced as written, and 62% answering that the Rules are not enforced as written *even within a single district*. This perception, if allowed to grow more pervasive among litigants, could seriously undermine the credibility of the broader civil justice system. It is therefore important to further probe attitudes in regards to this issue, identify the specific areas of the Rules where these problems exist, and implement measures to ensure uniform enforcement of the Rules.

C. NELA Members And Local Rules

Roughly two-thirds (66%) of NELA respondents find that local rules are not always consistent with FRCP. Nearly a majority of NELA respondents agree that local rules currently in force promote inconsistency and unpredictability, and 61% find that local rules are not uniformly applied within the districts to which they pertain. No majority could be found amongst the NELA respondents in evaluating the flexibility of local rules, with 42% agreeing that local rules provide necessary flexibility from one jurisdiction to the next and 48% disagreeing.

D. Pleadings

Over two-thirds of our respondents have filed an employment discrimination claim in federal court since *Twombly* was decided, with 70% of those respondents asserting that the new decisions have affected the way in which they structure complaints. Nearly all of those respondents now include more factual allegations in their complaints, and three-quarters of them have had to respond to additional motions to dismiss. In addition, 7% have had an employment discrimination complaint dismissed for failure to state a claim under the pleading standard announced in *Twombly* and extended in *Iqbal*.

One may be tempted to take the relatively small number of NELA respondents who have had a case dismissed under the *Twombly/Iqbal* standard as evidence that heightened pleading standards will only mildly affect access to the courts, but to do so would be a mistake. While *Twombly* itself represented a rather drastic departure from well-established pleading standards, it was also unclear to what extent the newly heightened pleading standard would be applied outside of antitrust cases.²⁶ Prior to the ruling in *Iqbal*, courts and plaintiffs' counsel generally believed that *Twombly* was limited to that narrow group of complex commercial cases where discovery costs may run disproportionately high.²⁷ Those hopes were dashed by *Iqbal*. The adverse impact on civil rights cases of the extension of *Twombly*'s plausibility standard in the *Iqbal* decision has begun to be felt acutely among members of the plaintiffs' bar,²⁸ who now face dismissal motions at a rate rivaled only by summary judgment motions in employment discrimination cases.

As *Iqbal* is still a relatively new decision, we very well may be witnessing only the beginning of its fallout.²⁹ It is therefore important to examine attitudes about what the

²⁶ Indeed, when *Iqbal* was before the Second Circuit, the court stated about *Twombly* that "some of the [Supreme] Court's linguistic signals point away from a heightened pleading standard and suggest that whatever the Court is requiring in *Bell Atlantic* [v. *Twombly*] might be limited to, or at least applied most rigorously in, the context of either all section 1 [anti-trust] allegations or perhaps only those section 1 allegations relying on competitors' parallel conduct. First, the Court explicitly disclaimed that it was 'requir[ing] heightened fact pleading of specifics,' and emphasized the continued viability of *Swierkiewicz*, which had rejected a heightened pleading standard." *Iqbal* v. *Hasty*, 490 F.3d at 156 (2nd Cir. 2007) (internal citations omitted).

²⁷ *Id.* at 156-57.

²⁸ See, Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Employment Discrimination and Civil Rights Cases*, 158 U. PA. L. REV. 518 (2010); see also, Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1013; and see, Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. ____ (2010) (forthcoming), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1477519 (last visited Mar. 22, 2010).

²⁹ While *Iqbal* has quickly become one of the most cited cases in federal district court opinions, in many of those cases judges have granted plaintiffs leave to amend their complaints to conform to the new, higher standard, rather

appropriate pleading standard should be, as well as to engage in an ongoing effort to measure the extent to which *Iqbal* is increasing the number of cases being dismissed, relative to the periods before and after *Twombly*. These questions were left unanswered by this survey.

E. Initial Disclosures

Most NELA respondents (70%) find that initial disclosures fail to reduce the need for further discovery, and a similarly large majority (69%) finds that initial disclosures fail to *save* the client money. NELA respondents, however, split evenly on the question of whether initial disclosures actually *add* to the client's costs. Nearly every case in which NELA respondents participate requires further discovery after initial disclosures.

F. Discovery

Nearly 65% of NELA respondents find that existing discovery mechanisms do not work well, and approximately two-thirds believe that discovery is abused in almost every case.³⁰ NELA members also find that magistrate judges tend to be more available to resolve discovery disputes than the trial judges who would be tasked with resolving substantive disputes elsewhere in the case.

A narrow majority (51%) agrees that counsel use discovery as a tool to force settlement, while an overwhelming majority (87%) agrees that sanctions allowed by the discovery rules are seldom imposed. Nearly three-quarters think that discovery is used more to develop evidence for or in opposition to motions for summary judgment, rather than for purposes of understanding the other party's claims and defenses for trial.

Slim majorities agree both that the duty to confer with opposing counsel before filing a motion serves a purpose (53%), and that in the majority of cases counsel agree on the scope and timing of discovery (56%). More than half of all NELA respondents agree that counsel do not typically request limitations on discovery under the Rules, and two-thirds agree that judges do not invoke Rule 26 limitations on their own. Forty-nine percent of NELA respondents also agree that judges do not enforce Rule 26 to limit discovery.

As to the utility and cost-effectiveness of certain discovery mechanisms, depositions of fact witnesses (94%), requests for production of hard copy documents (92%), and requests for production of electronically stored documents, including e-mail (79%) were each identified as *very important* tools of discovery, while requests for production of hard copy documents (90%), requests for admission (89%), interrogatories (82%), requests for production of electronically stored documents, including e-mail (79%) and depositions of fact witnesses (76%) were identified as either *very* or *somewhat cost-effective*. The NELA respondents currently spend, on

than dismissing the complaints outright. One cannot formulate an accurate picture of the broad impact of *Iqbal* until this period of "polishing the pleadings" is finished and courts begin to reevaluate the complaints under the new standard.

³⁰ As an example of a way in which discovery is abused, one NELA respondent commented as follows: "Generally, defendants resist discovery and rely on the (expensive) persistence of plaintiff's counsel or motions to compel simply to attempt to get production of their basic discovery obligations. Such gamesmanship in resisting discovery should be discouraged by the rules and by courts." (*See infra*, Appendix II at 79).

average, 70% of their time and expense on discovery, though they believe that number *should* be closer to 50%.

Over 80% of NELA respondents do *not* think that courts should automatically stay discovery when a threshold motion to dismiss is pending.

G. E-Discovery

Since the effective date of the 2006 e-discovery amendments to the FRCP, 71% of NELA respondents have either requested or been the recipient of a request for electronically stored information. Of that group, 80% find that the amendments provide for efficient and cost-effective discovery of electronically stored information *most* or *some* of the time. Of the group of NELA respondents that have faced e-discovery issues in their cases:

- Over 85% agree that e-discovery has enhanced the ability of counsel to discover all relevant information;
- 60% agree that e-discovery increases the costs of litigation, but 66% agree that properly managed e-discovery can *reduce* the overall costs of discovery;
- Majorities disagree both that total costs have increased disproportionately due to e-discovery abuse (52%) and that e-discovery is being abused by counsel (53%);
- Over three-quarters disagree that e-discovery is generally overly burdensome, and 72% find that courts protect parties from unreasonably burdensome e-discovery demands; and
- 72% also agree that the costs of e-discovery will become more reasonable as technology advances.

H. Dispositive Motions

NELA respondents were nearly unanimous (92%) in agreeing that summary judgment motions are used as a tactical tool, rather than in a good faith effort to narrow the issues, with a striking percentage (77%) agreeing strongly.³¹ They were similarly near-unanimous in agreeing that judges are granting summary judgment more frequently than appropriate. Further, 70% agree that judges routinely fail to rule on summary judgment motions promptly, and 88% believe that summary judgment practice increases cost and delay without proportionate benefit (with 68% agreeing strongly). Nearly all NELA respondents (95%) agree that a motion for summary judgment is filed in almost every case.

³¹ ABA plaintiff respondents also expressed serious reservations about the motives that underlie current summary judgment practice, with 83% agreeing that such motions are used as a tactical tool, rather than in a good faith effort to narrow issues (with 35% agreeing strongly). (*ABA Report* at 113).

I. Trial Dates

Majorities of NELA respondents agree that trial dates should be set early on in the case (56%), and that discovery need *not* be completed before a trial date is set (53%). Over 60% disagree with waiting to set trial dates until after motions for summary judgment have been decided.

J. Judicial Role In Litigation

Almost two-thirds of NELA respondents agree both that early intervention in cases by either district or magistrate judges helps to narrow the issues, and that when a judicial officer intervenes early on in a case and stays involved, the results are more satisfactory. A substantial majority (80%) agree that one judicial officer should handle a case from start to finish, while 56% prefer to have the judge who is going to try the case handle all pre-trial matters. Sixty percent agree, however, that, so long as pre-trial matters are managed appropriately, it does not matter whether the trial judge decides them. A similar majority (58%) finds that early intervention by either district or magistrate judges helps to limit discovery.³² As there is widespread agreement on the broad utility of early intervention by judicial officers, it should be noted that the federal district courts continue to operate below capacity, thereby increasing the caseloads of individual judges and limiting their ability to effectively manage cases.³³

Nearly half of NELA respondents disagree with needing to have judges with expertise in certain fields trying those types of cases, though 69% agree that only those individuals with significant trial experience should be chosen for positions as trial judges.

Four-fifths of respondents participate in Rule 16(a) pre-trial conferences regularly. Of that group, 61% find that such conferences inform the court of the issues in the case, 47% find that they identify and narrow the issues, and 40% find that they encourage settlement.

K. Costs

Almost three-quarters of NELA respondents agree that the longer a case goes on, the more it costs (with 21% agreeing strongly). Conversely, 64% of respondents also find that expediting cases makes them less costly, and a significant portion recognize that continuances cost the client money. More than three-quarters agree that litigation is too expensive in general (with 31% agreeing strongly) and, in particular, 71% agree that discovery is too expensive (with 30% agreeing strongly). There is universal support for the proposition that cases cost less when counsel is collaborative and professional.

More than 80% agree that litigation costs are not proportional to the value of a small case (with 43% agreeing strongly), while respondents were fairly evenly split on whether litigation costs are proportional to the value of a large case.

³² Strong majorities of all ABA respondents also agree that early intervention in cases by judicial officers helps to narrow the issues (79%), focus discovery (72%), and provide more satisfactory results for the client (73%). (*ABA Report* at 124-26).

³³ See generally, *Federal Court Management Statistics – 2009*, at <http://www.uscourts.gov/cgi-bin/cmsd2009.pl> (last visited Mar. 20, 2010).

Over 70% agree that the economic models used by many law firms result in more discovery, and thus more expense, than necessary. On average, discovery practice provides one quarter of the revenue at NELA respondents' firms, which is about half of the percentage of revenue discovery provides at civil defense firms.

When asked to select the primary cause of delay in the litigation process, NELA respondents chose "the time required to complete discovery" (35%) and "delayed rulings on pending motions" (33%) more often than the rest of the options combined.

Nearly 60% of NELA respondents also agree that the cost of litigation forces cases to settle that should not settle based on the merits. Portions of that group identified the following reasons as *very important* factors in the decision to settle:

- The likelihood of an unfavorable verdict or judgment (71%);
- The monetary stakes in the litigation (58%);
- Overall discovery costs (50%);
- Deposition time and costs (47%);
- Attorney fees (46%); and
- Trial costs (46%).

While 88% of NELA respondents will turn away cases when they are not cost-effective, 39% do not base the decision on the amount in controversy in the case.³⁴

L. Alternative Dispute Resolution

Nearly two-thirds of NELA respondents find that court-ordered ADR is a positive development in terms of cost management, and 85% find that settling cases without trial through court-ordered ADR is also a positive development.

NELA members also have positive views regarding mediation. Two-thirds of respondents find that it reduces costs, 77% find that it shortens time to disposition, and 59% find that mediation provides fairer outcomes.³⁵ Taking all forms of ADR into account, 74% find that mediation provides the greatest savings in time and expense, while 60% find that mediation provides the highest level of fairness.

³⁴ In addition to the 39% of NELA respondents who do not turn away cases based on the amount in controversy, 17% answered that the question was "not applicable" to them. One explanation for this response is that the \$100,000 lower threshold set for responses was too high, and that those NELA respondents may not consider turning a case away unless the amount in controversy is far lower than \$100,000.

³⁵ Similarly, over 60% of all ABA respondents find that mediation reduces costs compared to litigation, 70% find that mediation reduces the time to disposition, and nearly half find that mediation produces fairer outcomes. (*ABA Report* at 182-84).

NELA respondents view arbitration in a distinctly less positive light. Nearly three-quarters of respondents find that arbitration produces less fair outcomes than litigation.³⁶ Accordingly, when given the choice between litigation and arbitration, less than 20% of NELA respondents prefer arbitration or some other private dispute resolution procedure. This dissatisfaction is understandable when almost two-thirds of NELA respondents find either that arbitration increases costs relative to litigation or provides no difference in costs.³⁷ Similarly, the majority of respondents (53%) find either that arbitration lengthens the time to disposition or provides no difference in time to disposition.

IV. CONCLUSION AND RECOMMENDATIONS

The responses to the surveys administered to NELA, ABA and ACTL members, while diverging on certain points, reflect consensus in other key areas that provide the basis for some practical and achievable ways to improve efficiency in the litigation process. Specifically, all respondents acknowledged that Rule 26 Initial Disclosures have been largely ineffective in streamlining the discovery process. In addition, all respondents recognized that early judicial involvement in cases and increased cooperation among litigants greatly improved the efficiency of the litigation process. Further, NELA and ABA members shared views on effective and fair forms of alternative dispute resolution, like mediation, while also agreeing that compared to litigation, arbitration was generally more expensive and less fair. As such, what follows are four proposals designed to synthesize the aforementioned points of convergence and incorporate them into concrete avenues for future action.

A. Make Pattern Discovery Requests Available Through A Voluntary Pilot Program In Federal Courts Around The Country

As noted above in Section III (E), survey respondents believe that the current required initial disclosures under Rule 26 do not succeed in either reducing discovery or saving their clients money. In order to facilitate a more efficient exchange of information, NELA endorses the proposal made by Joseph D. Garrison in his paper submitted for this Conference, *A Proposal to Implement a Cost-Effective and Efficient Procedural Tool Into Federal Litigation Practice*, which would proscribe pattern discovery requests to be used in civil cases in addition to discovery mechanisms already available to litigants under the Rules.

This proposal would, based on the type of case filed, adopt pattern interrogatories, pattern requests to produce documents, and a pattern protective order. The pattern interrogatories and requests for production would be served with the complaint, and would largely replace the current procedures under Rule 26(a)(1). Once receiving the complaint, the defendant would be entitled to issue its own pattern discovery to the plaintiff. The pattern discovery would not be subject to objection, and parties would be required to provide answers to interrogatories and produce requested documents within a specified time after service. The trial judge would then

³⁶ This view is shared by a majority of ABA plaintiff respondents and significant minorities of ABA defendant and mixed-practice respondents. Only 10% of all ABA respondents agree that arbitration produces fairer outcomes than litigation. (*ABA Report* at 181).

³⁷ See discussion *supra* Part II.L..

immediately issue a pattern protective order to facilitate the prompt production of confidential documents, if any.

NELA believes that this procedure would be most effectively implemented as a pilot program in which districts could voluntarily enroll. We recommend that ten to twenty pilot districts be sought for the initial program. Within these districts, we recommend that a listserv be established to allow members of the court and their clerks to share their experiences with the program and make suggestions for revisions to the pattern documents. From these discussions best practices could be developed and implemented on a voluntary basis elsewhere.

B. Provide For Informal Judicial Intervention To Resolve Discovery Disputes More Efficiently

Under current practices, significant amounts of time and resources are wasted on resolving relatively minor discovery disputes. A streamlined, collaborative procedure for deciding such issues would allow these decisions to be made in days or weeks rather than months.

Instead of using fully plead motion practice to resolve minor discovery disputes, we recommend that the Rules Committee promulgate a procedure that would allow parties to submit discovery disputes to magistrate judges for resolution through letter briefs. Under this procedure, a party seeking discovery would submit a letter brief – generally no more than five pages – outlining the issues and attaching the requests for production, interrogatories, or other propounded discovery requests to be discussed. The opposing party would then have an opportunity to submit a responsive letter brief. Thereafter, a magistrate judge would convene a teleconference to discuss the letters with the parties. Following this discussion, but during the telephone conference, the magistrate judge would issue a ruling about the disputed requests. Similar procedures are now used informally by several judges around the country, but NELA recommends that the Advisory Committee consider adopting a recommendation that this practice become routinely used to resolve discovery disputes wherever possible.

C. Encourage Greater Judicial Collaboration On Local Rules

Another point of consensus among the respondents to the various surveys was that local rules are inconsistently applied, even within single districts. NELA recommends that judges within each district be encouraged to meet on a regular basis and discuss their own variations on the applicable local rules. The hope is that these discussions would allow the judges to compare and contrast those variations, identify those that promote clarity, efficiency and collaboration in the litigation process, and perhaps begin to develop a uniform set of local rules. This would undoubtedly be a welcome development for the litigants, especially those who may appear in a given district on a limited basis.

D. Promote The Expansion of Current Pilot ADR Programs With Emphasis On Non-Binding Mediation And Scrutinize The Use Of Arbitration Carefully

NELA encourages the expansion of current court-sponsored pilot ADR programs and increasing the prominence of non-binding mediation within those programs. In addition to reducing costs, saving time and preserving substantive fairness, these programs facilitate early

judicial involvement in the litigation process and encourage cooperation among the parties, all of which were recognized as positive by most NELA and ABA survey respondents.

As the survey results indicate, both NELA and ABA practitioners find that arbitration produces less fair outcomes than either mediation or litigation. Thus, we strongly recommended that courts be encouraged to scrutinize carefully the way in which arbitration is practiced in their jurisdictions. This includes determining whether arbitrators have conflicts of interest or otherwise are perceived as unfair; the use of arbitration in adhesion contracts with employees and consumers; and the high cost of arbitration which often bars access to justice.

We thank the Advisory Committee for the opportunity to participate in this important process and look forward to discussing this Report during the upcoming 2010 Civil Litigation Conference, to be held at the Duke University School of Law, May 10-11, 2010.

APPENDIX I

2009 CIVIL RULES SURVEY

DETAILED TABLES

**Prepared for the
National Employment Lawyers Association
(NELA)**

December 23, 2009

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I. ABOUT YOUR PRACTICE

Please choose the option that best describes your practice.

	<u>N</u>	<u>%</u>
Law firm (including solo practice)	267	91.4
Government	4	1.4
Non-profit or advocacy group	20	6.8
Other (Of counsel & contract)	1	0.3
Total	292	100.0

How many attorneys currently practice in your law firm or practice? Please include attorneys who practice full- or part-time.

	<u>N</u>	<u>%</u>
Between 1 and 5	94	31.9
Between 6 and 10	169	57.3
Between 11 and 25	21	7.1
Between 26 and 50	2	0.7
Between 51 and 100	2	0.7
Between 101 and 250	7	2.4
Total	296	100.0

Does your firm have offices in multiple locations?

	<u>N</u>	<u>%</u>
Yes	61	20.7
No	233	79.3
Total	294	100.0

How many attorneys practice at your office location? Please include attorneys who practice full- or part-time.

RESPONDENTS ANSWERING 'YES' TO PREVIOUS QUESTION

	<u>N</u>	<u>%</u>
Between 1 and 5	32	51.6
Between 6 and 10	14	22.6
Between 11 and 15	3	4.8
Between 16 and 20	3	4.8
Between 21 and 50	6	9.7
Between 51 and 100	3	4.8
Between 101 and 250	1	1.6
Total	62	99.9

How many years have you practiced law?

<u>Mean</u>	<u>Median</u>	<u>N</u>
21.4	22.0	294

How many years have you practiced civil litigation?

<u>Mean</u>	<u>Median</u>	<u>N</u>
20.6	21.0	293

How many of your civil cases have gone to trial in the last five years?

<u>Mean</u>	<u>Median</u>	<u>N</u>
4.2	3.0	293

Approximately what percentage of those trials were jury trials?

<u>Mean</u>	<u>Median</u>	<u>N</u>
54.5	66.5	280

What types of cases do you most often litigate? *Respondents could select up to three areas.*
Listed from most common overall response to least common overall.

	N	%
Employment discrimination	238	80.4
Civil rights	124	41.9
Labor	46	15.5
ERISA	27	9.1
Personal injury	26	8.8
Contracts	20	6.8
Torts (generally)	20	6.8
Complex commercial disputes	11	3.7
Administrative law	11	3.7
Domestic relations	9	3.0
Insurance disputes	8	2.7
Antitrust	5	1.7
Securities	4	1.4
Professional malpractice	3	1.0
Construction	3	1.0
Real property	3	1.0
Intellectual property	2	0.7
Products liability	2	0.7
Mass torts	1	0.3
Bankruptcy	1	0.3
Oil and gas	1	0.3
Maritime	0	0.0

In which forum does most of your litigation practice take place?

	N	%
State court	56	19.0
Federal court	159	54.1
Roughly equal split of state and federal courts	68	23.1
Roughly equal split of courts and arbitration panels	4	1.4
Arbitration panels	0	0.0
International tribunals	0	0.0
Administrative agencies	6	2.0
Other	1	0.3
Total	294	100.0

In your primary jurisdiction, when you have a choice, do you prefer to litigate in state court or federal court?

	N	%
State court	123	41.7
Federal court	130	44.1
No preference	20	6.8
Other	22	7.5
Total	295	100.0

In your primary state court, what are the advantages of litigating in state court, as compared to federal court? *Respondents could select as many options as they wished. Listed from most common overall response to least common overall.*

	N	%
More favorable to plaintiffs	137	46.3
Ability to conduct voir dire	106	35.8
Less expensive	95	32.1
Geographical area from which jury is drawn	92	31.1
Better substantive outcomes	89	30.1
Judicial temperament	74	25.0
Convenience	70	23.6
Quicker time to disposition	58	19.6
Non-unanimous verdicts	58	19.6
Less hands-on mgt of cases by judicial officers	57	19.3
More careful consideration of dispositive motions	57	19.3
The applicable rules of civil procedure	51	17.2
Other	48	16.2
Judicial officers are more available to resolve disputes	30	10.1
Quality of judges	26	8.8
No advantages to state court	22	7.4
The applicable rules of evidence	19	6.4
The court's experience with the type of case	18	6.1
More substantive legal knowledge/case type/judges	14	4.7
Availability of interlocutory appeals	10	3.4
More hands-on mgt of cases by judicial officers	5	1.7
More favorable to defendants	1	0.3

In your primary federal court, what are the advantages of litigating in federal court, as compared to state court? *Respondents could select as many options as they wished. Listed from most common overall response to least common overall.*

	N	%
More substantive legal knowledge/case type/judges	164	55.4
Quality of judges	138	46.6
The court's experience with the type of case	124	41.9
More hands-on mgt of cases by judicial officers	92	31.1
Quicker time to disposition	82	27.7
Single judge assigned to case	81	27.4
More careful consideration of dispositive motions	70	23.6
Judicial officers are more available to resolve disputes	67	22.6
The applicable rules of civil procedure	56	18.9
Convenience	38	12.8
There are no advantages to litigating in federal court	36	12.2
The applicable rules of evidence	29	9.8
Judicial temperament	27	9.1
Other	27	9.1
Less expensive	21	7.1
Geographical area from which jury is drawn	14	4.7
Better substantive outcomes	13	4.4
More favorable to defendants	5	1.7
Less hands-on mgt of cases by judicial officers	4	1.4
More favorable to plaintiffs	4	1.4
Unanimous verdicts	0	0.0

II. FEDERAL RULES OF CIVIL PROCEDURE

Rule 1 of the Federal Rules of Federal Procedure (“Rules”) provides that the Rules shall be construed and administered to secure the “just, speedy, and inexpensive determination of every action.” Are the Rules conducive to meeting this goal?

	N	%
Yes	109	40.1
No	163	59.9
Total	272	100.0

The following are statements about the Rules. For each, please give your opinion.

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
<i>There are too many Rules.</i>	4.1	17.4	51.9	8.9	17.7	272
<i>The Rules are too complex.</i>	5.3	23.2	54.6	7.4	9.5	284
<i>The Rules, as a whole, are internally inconsistent.</i>	2.1	16.2	59.2	8.5	14.1	284
<i>The Rules are adequate as written.</i>	4.2	40.6	40.6	7.7	7.0	286
<i>The Rules are enforced as written.</i>	2.1	29.1	38.1	26.0	4.8	289
<i>The Rules are enforced in an inconsistent manner, even within a single district.</i>	19.2	43.2	25.3	5.5	6.8	292
<i>The Rules should be more flexible.</i>	9.7	40.1	33.2	3.8	13.1	289
<i>The Rules should be more rigid.</i>	1.8	9.4	54.3	20.5	14.0	278
<i>The Rules need minor amendments in order to make them work.</i>	3.9	53.2	24.1	5.7	13.1	282
<i>The Rules must be reviewed in their entirety and rewritten to address the needs of today's litigants.</i>	8.1	26.4	44.4	13.7	7.4	284
<i>The Rules promote unnecessary conflict between counsel.</i>	6.9	24.7	51.0	8.3	9.0	288
<i>One set of Rules cannot accommodate every case type.</i>	9.6	29.2	38.8	7.9	14.4	291

The following are statements about Local Rules in federal districts. For each, please give your opinion.

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
<i>Local Rules promote inconsistency and unpredictability.</i>	17.1	32.5	38.0	5.8	6.5	292
<i>Local Rules provide necessary flexibility from one jurisdiction to the next.</i>	2.4	39.4	38.7	9.1	10.5	287
<i>Local Rules are uniformly applied within the district to which they pertain.</i>	21.0	23.6	48.3	13.0	13.0	292
<i>Local Rules are always consistent with the FRCP.</i>	1.4	17.6	55.7	10.7	14.5	289

III. PLEADINGS

Have you filed an employment discrimination case in federal court since the Supreme Court issued its decision in *Bell Atlantic v. Twombly* in 2007?

	N	%
Yes	198	67.1
No	97	32.9
Total	295	100.0

Has *Twombly* – or the more recent Supreme Court decision in *Ashcroft v. Iqbal* (2009) – affected how you structure complaints in employment discrimination cases?

RESPONDENTS ANSWERING PREVIOUS QUESTION ‘YES’

	N	%
Yes	138	70.1
No	59	29.9
Total	197	100.0

Please indicate how the decision(s) have affected how you structure complaints. Please check all that apply. *Listed in order of frequency, most common to least common.*

RESPONDENTS ANSWERING PREVIOUS QUESTION ‘YES’

	N	%
Include more factual allegations	130	94.2
Have to respond to additional mtns to dismiss	103	74.6
Raise different claims	17	12.3
More factual investigation prior to filing	17	12.3
Screen cases more carefully	16	11.6

Have any of your employment discrimination cases been dismissed for failure to state a claim under the standard announced in *Twombly/Iqbal*?

RESPONDENTS HAVING FILED SINCE *TWOMBLY*

	N	%
Yes	14	7.2
No	181	92.8
Total	195	100.0

Note: Given the small number of respondents answering ‘yes’ to the previous question, analysis of the subsequent questions is omitted.

IV. INITIAL DISCLOSURES

The following are statements about Rule 26(a)(1) initial disclosures. For each, please give your opinion.

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
<i>Rule 26 (a)(1) initial disclosures reduce discovery.</i>	2.7	23.7	41.7	29.5	2.4	295
<i>Rule 26 (a)(1) initial disclosures save the client money.</i>	2.4	22.2	39.9	29.0	6.5	293
<i>Rule 26 (a)(1) initial disclosures add to the client's costs of litigation.</i>	10.1	33.4	41.8	5.2	9.4	287

What percentage of your federal court cases require further discovery, after initial disclosures?

<u>Mean</u>	<u>Median</u>	<u>N</u>
98.9	100.0	289

V. DISCOVERY

The following are statements about discovery in general, including, if applicable, discovery of electronically stored information. For each statement, please give your opinion.

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
<i>Current discovery mechanisms work well.</i>	2.4	31.6	50.2	14.4	1.4	291
<i>Discovery is abused in almost every case.</i>	21.5	43.7	27.6	6.1	1.0	293
<i>District Judges are available to resolve discovery disputes on a timely basis.</i>	1.4	25.9	54.3	15.7	2.7	293
<i>Magistrate judges are available to resolve discovery disputes on a timely basis.</i>	7.2	53.6	27.3	5.8	6.1	293
<i>Most discovery in my cases occurs informally.</i>	1.4	7.2	62.7	28.8	0.0	292
<i>Cases involving informal discovery are less expensive.</i>	8.2	52.6	18.9	2.1	18.2	291
<i>Sanctions allowed by the discovery are seldom imposed.</i>	33.7	53.3	8.2	1.7	3.1	291
<i>Counsel use discovery as a tool to force settlement.</i>	11.7	38.8	38.1	5.5	5.8	291
<i>Clients, not attorneys, drive excessive discovery.</i>	1.4	4.1	58.9	26.0	9.6	292
<i>Fear of malpractice claims forces attorneys to conduct more discovery than necessary.</i>	1.0	12.0	59.8	20.3	6.9	291
<i>Discovery is used more to develop evidence for or in opposition to summary judgment than it is used to understand the other party's claims and defenses for trial.</i>	34.1	39.9	20.5	1.7	3.8	293

The following are statements about discovery in general, including, if applicable, discovery of electronically stored information. For each statement, please give your opinion. (continued)

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
<i>Discovery is used more to determine the value of the case for settlement than it is used to understand the other party's claims and defenses for trial.</i>	6.2	29.9	49.8	8.2	5.8	291
<i>The duty to confer with opposing counsel before filing a discovery motion serves little purpose.</i>	16.4	30.0	43.3	9.9	0.3	293
<i>Requiring clients to sign all requests for extensions or continuances limits the number of those requests.</i>	2.4	11.0	40.9	21.3	24.4	291
<i>In the majority of cases, counsel agree on the scope and timing of most discovery.</i>	5.9	49.7	33.0	10.4	1.0	288
<i>Counsel do not typically request limitations on discovery under Rule 26 (b)(2)(C) (burden or expense outweighs the likely benefit, etc.).</i>	4.8	49.3	27.7	12.3	5.8	292
<i>Judges do not invoke Rule 26 (b)(2)(C) on their own initiative.</i>	11.0	56.7	13.1	3.1	16.2	291
<i>Judges do not enforce Rule 26(b)(2)(C) to limit discovery.</i>	6.7	41.8	23.4	5.3	22.7	282
<i>Counsel with limited trial experience seek more discovery than experienced trial lawyers.</i>	4.5	23.0	40.2	12.7	19.6	291
<i>Discovery about the adequacy of e-discovery responses is used as a tool to force settlement.</i>	3.8	14.7	34.9	14.7	31.8	292

To what extent is each of the following an important discovery tool?

	Very Important	Somewhat Important	Not Important	No Opinion	N
<i>Requests for Admission</i>	35.3	53.2	11.2	0.3	295
<i>Interrogatories</i>	45.0	46.4	8.6	---	291
<i>Requests for production of hard copy documents</i>	92.1	6.9	1.0	---	291
<i>Requests for production of electronically-stored documents, including email</i>	78.8	18.8	0.3	2.1	292
<i>Deposition of fact witnesses</i>	93.8	5.5	0.3	0.3	291
<i>Deposition of expert witnesses where expert testimony is limited to the expert report</i>	27.1	46.6	17.8	8.6	292
<i>Depositions of expert witnesses where expert testimony is NOT limited to the expert report</i>	54.4	28.6	5.1	11.9	294

To what extent is each of the following a cost-effective discovery tool?

	Very Cost-Effective	Somewhat Cost-Effective	Not Cost-Effective	No Opinion	N
<i>Requests for Admission</i>	49.5	38.6	9.6	11.9	294
<i>Interrogatories</i>	33.2	48.6	16.8	1.4	286
<i>Requests for production of hard copy documents</i>	45.0	45.0	8.9	1.0	291
<i>Requests for production of electronically-stored documents, including email</i>	35.4	44.3	16.2	4.1	291
<i>Depositions of fact witnesses</i>	32.2	44.3	22.1	1.4	289
<i>Depositions of expert witnesses where expert testimony is limited to the expert report</i>	9.9	36.3	41.1	12.7	292
<i>Depositions of expert witnesses where expert testimony is NOT limited to the expert report</i>	20.7	37.6	27.2	14.5	290

Do Rule 26(f) party conferences frequently occur?

	N	%
Yes	206	71.0
No	84	29.0
Total	290	100.0

When Rule 26(f) party conferences occur, are they helpful in managing the discovery process?

	N	%
Yes	140	47.8
No	133	45.4
No experience with Rule 26(f)	20	6.8
Total	293	100.0

Beginning with the concern about abuse of discovery that was identified by the Pound Conference in 1976 and continuing through 2007, there have been numerous changes in the discovery provisions of the Rules

The following statement is about all the changes that were made in the discovery rules from 1976 through 2007. Please give your opinion.

	Strongly Agree	Agree	Disagree	Strongly Disagree	N
<i>The cumulative effect of the changes has significantly reduced discovery abuse.</i>	2.5	27.8	52.5	17.3	284

Please think about typical cases that do not go to trial and are not dismissed on an initial 12(b) motion. What percentage of total expenses and time spent on that case is incurred in connection with discovery (including discovery motions and other discovery related disputes)?

<u>Mean</u>	<u>Median</u>	<u>N</u>
66.1	70.0	278

For cases that do not go to trial and are not dismissed on an initial 12(b) motion, what percentage of total expenses and time spent on such cases should be incurred in connection with discovery (including discovery motions and other discovery related disputes)?

<u>Mean</u>	<u>Median</u>	<u>N</u>
52.7	50.0	271

Should there be an automatic stay of discovery in all cases, pending determination of a threshold motion to dismiss?

	N	%
Yes	55	18.7
No	239	81.3
Total	294	100.0

VI. ELECTRONIC DISCOVERY

Have you had any cases that raise e-discovery issues?

	N	%
Yes	203	69.0
No	91	31.0
Total	294	100.0

NOTE: The remaining tables in this section include only respondents answering ‘yes’ to the previous question.

The following are general statements about e-discovery. For each statement, please give your opinion.

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
<i>E-discovery has enhanced the ability of counsel to discover all relevant information.</i>	35.3	50.2	9.0	4.0	1.5	201
<i>When properly managed, discovery of electronic records can reduce the costs of discovery.</i>	23.4	43.3	17.4	7.5	8.5	201
<i>E-discovery increases the cost of litigation.</i>	16.1	44.7	22.1	9.5	7.5	199
<i>Discovery costs, as a share of total litigation costs, have increased disproportionately due to the advent of e-discovery.</i>	10.0	24.9	41.3	11.4	12.4	201
<i>The costs of outside vendors have increased the costs of e-discovery without commensurate value to the client.</i>	15.1	27.6	26.1	4.5	26.6	199
<i>E-discovery is being abused by counsel.</i>	12.9	21.4	41.3	12.4	11.9	201
<i>Courts do not understand the difficulties in providing e-discovery</i>	10.1	24.1	36.2	12.6	17.1	199
<i>E-discovery is generally overly burdensome.</i>	6.0	12.4	49.8	25.9	6.0	201
<i>Courts do not sufficiently limit or otherwise protect parties against unreasonably burdensome e-discovery demands.</i>	4.5	12.1	43.2	29.1	11.1	199
<i>The costs and efficiency of e-discovery will become more reasonable as technology advances.</i>	20.0	52.5	8.0	3.5	16.0	200

December 1, 2006 was the effective date of the e-discovery amendments to the FRCP. Since that time, have you requested or been the recipient of a request for a request for electronically stored information?

	N	%
Yes	193	71.0
No	10	29.0
Total	290	100.0

Do the e-discovery amendments provide for efficient and cost-effective discovery of electronically stored information?

RESPONDENTS ANSWERING 'YES' TO THE PREVIOUS QUESTION

	N	%
Yes, most of the time	56	29.6
Yes, some of the time	94	49.7
No	39	20.6
Total	189	100.0

VII. DISPOSITIVE MOTIONS

The following are general statements about dispositive motions. For each statement, please give your opinion.

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
<i>Summary judgment motions are used as a tactical tool, rather than in a good faith effort to narrow the issues.</i>	76.8	14.7	6.8	1.4	0.3	293
<i>Summary judgment practice increases cost and delay without proportionate benefit.</i>	68.1	20.0	8.5	2.7	0.7	293
<i>Judges routinely fail to rule on summary judgment motions promptly.</i>	33.3	36.7	23.1	2.7	4.1	294
<i>Judges are granting summary judgment more frequently than appropriate.</i>	77.1	15.1	4.8	0.3	2.7	292
<i>Judges decline to grant summary judgment even when warranted.</i>	1.7	4.5	31.5	59.9	2.4	292
<i>Summary judgment motions are filed in almost every case.</i>	75.5	19.4	4.4	--	0.7	294

VIII. TRIAL DATES

The following are general statements related to trial dates. For each, please give your opinion.

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
<i>Trial dates should be set early in the case.</i>	27.1	28.5	33.3	7.9	3.1	291
<i>Trial dates should not be set until discovery is completed.</i>	13.1	32.0	37.1	16.2	1.7	291
<i>Trial dates should not be set until motions for summary judgment have been decided.</i>	16.4	19.9	43.2	19.5	1.0	292
<i>Trial dates should not be continued or vacated except for exceptional circumstances.</i>	12.7	31.6	40.2	12.7	2.7	291

IX. JUDICIAL ROLE IN LITIGATION

The following are statements about the judicial role in litigation. For each, please give your opinion.

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
<i>Intervention by judges or magistrate judges early in the case helps to narrow the issues.</i>	15.1	48.6	21.2	6.2	8.9	292
<i>Intervention by judges or magistrates judges early in the case helps to limit discovery.</i>	9.3	48.6	26.2	5.5	10.3	290
<i>When a judicial officer gets involved early in a case and stays involved . . . the results are more satisfactory . . .</i>	15.6	47.9	17.4	5.2	13.9	288
<i>One judicial officer should handle a case from start to finish.</i>	24.9	55.3	11.9	2.4	5.5	293
<i>The judge who is going to try the case should handle all pre-trial matters.</i>	17.2	38.7	32.9	3.8	7.5	292
<i>It does not matter whether the trial judge or a magistrate judge handles pre-trial matters, so long as they are handled appropriately.</i>	14.8	45.4	30.6	6.5	2.7	291
<i>Judges inappropriately pressure parties to settle cases.</i>	5.8	20.9	61.0	8.9	3.4	292
<i>Judges do not like taking cases to trial.</i>	31.9	38.5	21.9	1.7	5.9	288
<i>Judges with expertise in certain types of cases should be assigned to those types</i>	11.7	28.2	40.5	8.9	10.7	291
<i>Only individuals with significant trial experience should be chosen for positions as [trial judges].</i>	29.1	39.7	20.5	4.8	5.8	292

Are Rule 16(a) pretrial conferences regularly held in your federal civil cases?

	N	%
Yes	232	80.8
No	55	19.2
Total	287	100.0

What effect, if any, does the holding of a Rule 16(a) pretrial conference have on a case?

Respondents could select as many options as they wished.

	N	%
Identifies and narrows the issues	136	47.3
Informs the court of the issues in the case	176	61.3
Encourages settlement	114	39.7
Shortens the time to case resolution	44	15.3
Lengthens the time to case resolution	12	4.2
Improves time mgt.	85	29.6
Lowers cost	45	15.7
Increases cost	32	11.1
No effect	44	15.3
Other	20	7.0

To what extent are Rule 16(e) final pretrial orders helpful in preparing the case for trial?

	N	%
Very helpful	60	21.7
Somewhat helpful	152	55.1
Not very helpful	48	17.4
Not helpful at all	16	5.8
Total	276	100.0

What effect, if any, does the timing of a Rule 16(e) final pretrial order have?

	N	%
After ruling on summary judgment is more helpful than before	189	70.3
Before ruling on summary judgment is more helpful than after	22	8.2
Timing makes no difference	58	21.6
Total	269	100.0

X. COSTS

The following are general statements about litigation costs. For each statement, please give your opinion.

	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N
<i>Continuances cost clients money.</i>	14.2	38.9	36.1	4.5	6.3	288
<i>The longer a case goes on, the more it costs.</i>	20.9	51.6	23.0	2.1	2.4	287
<i>Expediting cases costs more.</i>	3.5	22.0	55.4	8.7	10.5	287
<i>Litigation is too expensive.</i>	31.1	46.0	17.6	3.1	2.1	289
<i>Discovery is too expensive.</i>	29.6	40.8	22.0	5.6	2.1	287
<i>When all counsel are collaborative and professional, the case costs the client less.</i>	49.0	49.0	1.0	1.0	0.0	290
<i>Litigation costs are not proportional to the value of a small case (small amount in dispute).</i>	43.3	39.2	9.6	3.1	4.8	291
<i>Litigation costs are not proportional to the value of a large case (large amount in dispute).</i>	10.3	29.7	40.7	5.2	14.1	290
<i>Economic models in many law firms result in more discovery and thus more expense than is necessary.</i>	44.8	27.1	7.6	1.7	18.8	288

The primary cause of delay in the litigation process is:

	N	%
Delayed rulings on pending motions	93	32.6
Court continuances of scheduled events	6	2.1
Attorney requests for extensions and continuances	40	14.0
The time required to complete discovery	100	35.1
Other	46	16.1
Total	285	100.0

Does the cost of litigation force cases to settle that should not settle based on the merits?

	N	%
Yes	171	58.6
No	121	41.4
Total	292	100.0

Note: The next question battery of questions was only asked of respondents who answered 'yes' to the previous question.

How important is each of the following factors in driving the decision to settle?

	Very Important	Somewhat Important	Somewhat Unimportant	Not At All Important	N
<i>Expert Witness Costs</i>	33.5	47.6	15.9	2.9	170
<i>Overall discovery costs</i>	49.7	43.3	5.8	1.2	171
<i>Deposition time and costs</i>	47.4	43.9	7.6	1.2	171
<i>Document production costs</i>	14.7	44.7	30.0	10.6	170
<i>E-discovery costs</i>	18.5	51.8	21.4	8.3	188
<i>Trial costs</i>	45.9	42.9	8.8	2.4	170
<i>Costs of legal research</i>	5.9	26.5	44.1	23.5	170
<i>Costs of motion practice</i>	20.1	45.6	26.0	8.3	169
<i>Court appearance other than trial</i>	4.8	28.1	45.5	21.6	167
<i>Attorney fees</i>	46.4	39.9	10.1	3.6	168
<i>The monetary stakes in the litigation</i>	58.1	35.9	4.8	1.2	167
<i>Likelihood of an unfavorable verdict or judgment</i>	70.8	26.3	1.8	1.2	171
<i>Possibility of an unfavorable precedent</i>	18.3	37.9	32.5	11.2	169
<i>Possibility of unfavorable publicity from trial</i>	11.8	26.5	34.7	27.1	170

The next series of questions apply to the private law firm environment. Is your practice in a private law firm environment?

	N	%
Yes	266	90.8
No	27	9.2
Not sure	293	100.0

Note: The following questions were asked only of respondents who answered 'yes' to the previous question.

In general, does your firm turn away cases when it is not cost-effective to handle them?

	N	%
Yes	234	88.0
No	15	5.6
Not sure	17	6.4
Total	266	100.0

Our firm routinely turns away cases with less than _____ at issue because it is not cost-effective to handle them.

	N	%
\$100,000	69	30.5
\$250,000	15	6.6
\$500,000	3	1.3
\$1,000,000	6	2.7
\$5,000,000	6	2.7
We do not routinely turn cases away based on amount of money	88	38.9
Not applicable	39	17.3
Total	226	100.0

Of the revenue attributable to civil litigation practice in your firm, what percentage is attributable to discovery?

<u>Mean</u>	<u>Median</u>	<u>N</u>
27.2	25.0	218

In your firm, has the litigation practice increased or decreased in the past five years (measured by number of attorneys doing litigation)?

	N	%
Increased	92	35.4
Decreased	37	14.2
Remained the same	131	50.4
Total	260	100.0

If **increased**, by what percentage has the litigation practice in your firm increased over the past five years (measured by number of attorneys doing litigation)?

<u>Mean</u>	<u>Median</u>	<u>N</u>
48.2	40.0	86

If **decreased**, by what percentage has the litigation practice in your firm decreased over the past five years (measured by number of attorneys doing litigation)?

<u>Mean</u>	<u>Median</u>	<u>N</u>
34.4	25.0	36

What is your usual arrangement with clients regarding attorney fees?

	N	%
Hourly fees	18	10.9
Contingent fee	119	72.1
Other arrangement	9	5.5
I can't say	19	11.5
Total	165	100.0

What is your usual hourly rate?

<u>Mean</u>	<u>Median</u>	<u>N</u>
345.09	325.00	116

Does your firm have an expectation of annual billable hours for lawyers at your level?

	N	%
Yes	49	18.4
No	217	81.6
Total	266	100.0

What is the expectation of annual billable hours?

<u>Mean</u>	<u>Median</u>	<u>N</u>
1714.1	1775.0	46

XI. ALTERNATIVE DISPUTE RESOLUTION

What percentage of your cases are processed exclusively through some alternative dispute resolution process versus the courts?

	Less than 10%	10-25%	25-50%	More than 50%	N
	52.2	18.0	15.6	14.2	289

In general, do your clients choose arbitration or other private alternative dispute resolution over litigation if they have a choice?

	Yes	No	N
	19.2	80.8	286

As compared to litigation, does arbitration generally:

	Increases Cost	Decreases Cost	No Difference in Cost	No Experience With Arbitration	N
<i>Increase or decrease costs to your client</i>	39.4	19.7	25.6	15.2	289
	Lengthens Time	Shortens Time	No Difference in Time		N
<i>Lengthen or shorten the time to disposition</i>	20.9	47.1	32.0	--	244
	Fairer Outcomes	Less Fair Outcomes	No Difference		N
<i>Produce fairer or less fair outcomes</i>	3.7	73.8	22.5	--	244

As compared to litigation, does mediation generally:

	Increases Cost	Decreases Cost	No Difference in Cost	No Experience With Mediation	N
<i>Increase or decrease costs to your client</i>	15.1	66.1	17.1	1.7	292
	Lengthens Time	Shortens Time	No Difference in Time		N
<i>Lengthen or shorten the time to disposition</i>	7.8	76.7	15.5	--	283
	Fairer Outcomes	Less Fair Outcomes	No Difference		N
<i>Produce fairer or less fair outcomes</i>	58.7	17.4	23.9	--	276

As compared to litigation, does early neutral evaluation (ENE) generally:

	Increases Cost	Decreases Cost	No Difference in Cost	No Experience With ENE	N
<i>Increase or decrease costs to your client</i>	11.5	28.1	8.7	51.7	288
	Lengthens Time	Shortens Time	No Difference in Time	No Experience With ENE	N
<i>Lengthen or shorten the time to disposition</i>	14.1	50.4	30.4	5.2	135
	Fairer Outcomes	Less Fair Outcomes	No Difference		N
<i>Produce fairer or less fair outcomes</i>	43.1	14.6	42.3	--	130

Which of the following alternative dispute resolution processes generally provides the greatest savings in time and expense over litigation?

	N	%
Arbitration	8	2.8
Mediation	211	74.3
ENE	15	5.3
No Difference	18	6.3
Do Not Know	32	11.3

Which of the following processes generally provides the highest level of fairness?

	N	%
Arbitration	7	2.5
Mediation	171	60.0
Litigation	65	22.8
ENE	6	2.1
No Difference	171	3.5
Do Not Know	26	9.1

Is court-ordered alternative dispute resolution a negative or positive development in managing costs?

	N	%
Negative	51	18.3
Positive	180	64.7
No Impact	147	16.9

Does court-ordered alternative dispute resolution

	Yes	No	N
<i>Increase the number of cases that settle without trial</i>	75.4	24.6	280
<i>Result in earlier settlements</i>	70.5	29.5	281

Are cases settling without trial, due to court-ordered alternative dispute resolution, a negative or positive development?

	N	%
Negative	42	15.3
Positive	232	84.7

APPENDIX II

2009 CIVIL RULES SURVEY

ATTORNEY COMMENTS

Prepared for
National Employment Lawyers Association
(NELA)

December 23, 2009

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The Federal Rules and Local Rules

(1) I think Rule 56 is not enforced as written as summary judgment is granted too frequently despite the plain meaning of the rule. (2) I think the discovery rules could be amended to rein in over-inclusive, overly-burdensome discovery. There is positive movement away from over-broad discovery, but this trend needs to be accelerated.

3 districts in NC = 3 different electronic filing procedures. That is UNSAT. If the DoD can standardize, then so can federal clerks.

Allowing Federal Judges to put page limitations on responses to Motions for Summary Judgment is unconstitutional because it places arbitrary limits on a party's ability to show that there is a genuine issue of material fact and often it results in a denial of a jury trial.

By local rule, in Federal Court we cannot discuss a case with a trial juror or we could be charged with a crime.

Case categorization unnecessarily limits the use of interrogatories and requests to produce in favor of depositions which often increases costs.

Case decisions applying the FRCP to ERISA cases, particularly with respect to discovery, are "all over the place." see e.g. Hogan-Cross v. Metro. Life Ins. Co., 568 F. Supp. 2d 410 (SDNY 2008) or Burgio v. Prudential Life Ins.Co., 253 F.R.D. 219 (E.D.N.Y. Sept.24, 2008) or Copus v. Life Ins. Co. of No.Am., 2008 U.S. Dist. LEXIS 55099 (N.D. Tex. 7/18/2008), and compare to Roberts v. American Electric Power LTD Plan, 2009 U.S.Dist LEXIS 68886 (SDWV 8/6/2009); and even within the same circuit there are widely differing results that can dramatically affect the outcome and the rights and protections of employee plan participants: Whelan v. Standard Ins. Co., 2009 U.S. Dist LEXIS 37324 (C.D. Cal. Apr. 14, 2009) or Reinking v. Alyeska Pipeline Service Co., 2009 U.S.Dist. LEXIS 53583, 2009 WL 1259385 (D.Ak. 5/6/09); then compare to Bartholomew v. Unum, 579 F.Supp.2d 1339 (W.D. Wash. 2008) or Crisandra Leu v. Cox LTD Plan, (D.Az. July 24, 2009). although not a discovery case, the above widely divergent results occurs despite statements by the Supreme court in Metropolitan Life Ins. Co. v. Glenn, 128 S. Ct. 2343, 2348, 171 L. Ed. 2d 299, 76 U.S.L.W. 4495 (2008) such as : Do not "believe it is necessary or desirable for courts to create special burden-of-proof rules, or other special procedural or evidentiary rules, focused narrowly upon the evaluator/payor conflict." The Court continued: "Indeed, special procedural rules would create further complexity, adding time and expense to a process that may already be too costly for many of those who seek redress." Id.

Central District of California unjustifiably restricts rights of plaintiffs in class actions by imposing rigid timelines for class certification motions that contravene purpose and structure of Rule 23

Chambers rules of individual judges should be discouraged.

Court inconsistently apply the rules to ERISA benefits cases, even though nothing in the ERISA statute exempts the cases from the FRCP.

Defendants are rarely required to comply with discovery rules and their baseless refusal to produce documents is almost universally tolerated to some degree or another.

Different local rules in different districts create inconsistency, uncertainty and the potential for lawyer error.

District Court Judges tend to apply their own local local rules to their courtroom, which causes undue problems for counsel.

EDVa is too tough on discovery objections.

FRCP allows for expert depositions. OR Local Rule only allows deposition of experts if there is a court order or stipulation.

FRCP are generally fine, just need to be enforced by judges as written.

FRCP are NOT followed in ERISA cases.

Get rid of local rules, particularly as they relate to filings. Specific judge rules for courtroom procedure are ok.

Greater latitude is provided to corporate parties such that the rules are often applied inequitably. The concept of 80 paragraphs of fact to say there is no material fact and only 40 to say there is a material fact (Local Rule 56.1 SJ) is not only senseless, but puts a lot of cases in jeopardy of losing due process.

I am greatly concerned about the state of summary judgment in federal court. The judges use summary judgment as a way to reduce their case load rather than allowing the jury to decide important facts. In the realm of Labor and Employment law, the effect is most obvious when examining summary judgment on sexual harassment. Because judges have been so quick to define what is sexual harassment rather than allowing a jury to make that determination, we are now in a position where there is a huge disconnect between what the courts see as sexual harassment and what an average female would see as sexual harassment.

I believe the failure of the FRCP to compel the furnishing a copy of deposition transcripts, at no cost to the deponent and adverse party, is outrageous. This allows better funded parties to secure testimony that poorer parties are unable to secure copies of because they cannot pay the sometimes quite substantial cost of securing a copy from a Court Reporter. This great unfairness should be corrected.

I do not have much of a problem with the rules themselves but instead with the manner that the application of the rules favors parties with more money and attorneys with more to gain from prolonging litigation. In my particular field, that is defendants in employment discrimination litigation. Abuses of the federal rules by defendants abound in this type of litigation, i.e., unnecessarily long depositions, failure to properly respond to discovery requests and excessive use of summary judgment or Rule 12 motions. The Rules need to address these abuses in order to protect plaintiffs from "scorched earth" litigation tactics.

I feel that employees, who are usually plaintiffs in employment cases, are held to a higher standard than the employer-defendants in general, and in some instances strikingly so.

I had a judge in a different district who applied his own time limits for filing briefs, which he did not make well known. It was common for attorneys to miss the filing deadlines, because of his arbitrary rule.

I have never heard of a federal court that consistently applied Rule 56 as written. The rule's notion that genuine disputes of material fact should allow a trial is completely inconsistent with how the federal court world is administered.

I have never observed inconsistency between local rules and FRCP.

I think discovery disputes would be less costly if model interrogatories were adopted for employment cases, similar to the model interrogatories in California. I think the number of discovery documents and number of requests for admissions should be enlarged in the average employment discrimination case.

I think the rules concerning summary judgment have become overly complex and a boon to defendants who have the time and money to file motions for summary judgment. This is especially so in employment cases where summary judgment motions have been abused and used as a tool to deny plaintiffs their day in court.

I think you should separate what rules we are talking about here. Overall, I like the federal rules, and the only problem I have is with Rule 56. Rule 56 is the problem b/c more often than not judges dismiss cases when there are issues of fact. The statement of facts requirement is too time-consuming, and an opportunity for opposing counsel to bury you with 100 plus facts, which you have to respond to. In my mind, if there are 100+ facts, then there has to be a dispute among them.

In addition to inconsistencies between FRCP and local rules, individual judges have pretrial requirements that can often be onerous and unnecessarily time consuming.

In addition to local rules, some judges have rules, which cover topics not addressed by local rules, which adds to the costs to litigants. With regard to local rules, they are not always clear and not always enforced.

In addition to the inconsistency between Local Rules and the FRCP, there is a growing tendency of prima donna judges who create their own rules and standing orders that defeat the purpose and value of the existing FRCP.

In ERISA cases the federal courts have disregarded the federal rules on an ad hoc basis. This disregard for the rules greatly favors the insurance industry and is so incoherently justified as to call in to question the reasoning capacity and fairness of the federal courts.

Inconsistency is compounded by judges adopting their own rules, such as for the length of discovery and deadlines and requirements for pretrial submissions.

Individual practices may vary from the local rules or the Civil Rules. Local rules may not cover all of the local customs to which judges want litigants to conform. For people who handle cases across the country, this is a serious problem. Indeed, no tall local lawyers are familiar with all the local customs with which counsel are expected to comply.

It is extremely difficult to keep up with all of the various local rules. We should have one set of uniform rules that cannot be modified by local rule.

It is too difficult to try and keep up with the local rules when you practice in multiple districts because each district usually has its own rules. For example, deadlines for filing motions, responses and replies. The deadlines are all different and some jurisdictions don't allow any replies. This is where I would like to see uniformity.

judges constantly recite by rote that sj is rare in employment cases--but give it out 90% of the time--judges FAIL TO TAKE VIEW OF FACTS MOST FAVORABLE TO NONMOVANT; Judges also fail to draw necessary inferences and at times case widely to find some 'acceptable' way to explain away or disregard key evidence.

Judges too often disregard or hold inapplicable the FRCPs in ERISA cases, which should be handled like any other civil matter.

Local rule changes are constantly changing with new judicial appointments. The extraordinary cost of electronic discovery and the difficulty of obtaining relevant electronic discovery orders that do not require the outlay of >\$100k (where there is simply no reason for such a high charge).

Local Rule regarding Rule 56 Motions benefits the defendant in employment cases in ample contradiction to the history and purpose of the Rule. Local Rule regarding Motion for Summary Judgment practice gives the Defendant in an employment case the benefit of developing the scope of the allege undisputed facts and the Plaintiff in its Reply is force to file a statement simply denying, affirming or qualifying the facts as developed by the Defendants in its statement. The Plaintiff should be able to develop his factual allegations without imposing upon them the straight jacket of limiting their answers to the Defendant statement of undisputed facts.

Local Rules and individual judges' procedures are all too often an unpredictable, unreasonable abomination.

Local Rules appear to be designed more for the convenience of the courts than the litigants and hinder the goal of justice.

Local rules are a good idea but they need to be consistently applied.

Local Rules are hard to know and follow.

Local rules are vexatious when you practice in more than one district. They give the appearance of an advantage for local practitioners.

Local rules attempt to limit FRCP 15 and other pleading rights to the detriment of plaintiffs.

Local rules imposing 90 day deadlines to file motions for class certification should be abolished and amended in light of current trends.

Local Rules often have page limits but big firms ignore them, write enormous briefs, triple or quadruple or longer than the 15 page limits, but we as plaintiff's attorneys are still expected to respond within the time limit. We must go the trouble and aggravation of filing a motion and memo in support even if it should be obvious that we need more time when defense counsel files 70pages. The summary judgment rules that are point-counter point are unworkable, impossible, hugely burdensome and operate to deny our clients the right to tell their stories in a context that a jury could understand but a federal judge mechanically applying the point counter point formula either can't see, or won't see. When we have to file motion after motion to compel, we never ever ever get fees, even though the defense forces us to compel repeatedly.

Local rules often have stupid time limits or practices designed to identify outsiders and permit judges to rule against a party on a matter for reasons other than the merits. Too many result oriented judges can then lazily claim a local rule was violated and caused them to rule the way they did.

Local rules should be much more limited, to things that really need to be different. And judge's personal rules make the situation even worse. Expensive and difficult to get up to speed on rules if you don't appear before that judge a lot.

Local rules which require that out of district counsel affiliate with local counsel to obtain pro hac vice admission are out of date in the electronic filing and jet age. They impose an unnecessary financial burden on litigants. They are based on the notion that there must be counsel in the district on which to serve papers and who can be summoned to answer to the court on short notice. With e-filing and cheap air travel an out of district attorney can function properly in any district if he pays attention to local rules. There should be one federal rule on pro hac vice which

allows any attorney admitted in any district to pro hac into any other district if he familiarizes himself with local rules, appears on short notice and be subject to discipline.

Local summary judgment practice way too burdensome.

Major conflict between Rule 15a and 16b, scheduling orders in our district have a short deadline for amending complaints, allowing defendants to get away with putting forth a different illegal reason for termination late in discovery knowing that a new cause of action cannot be added. This is a major problem in discrimination wrongful termination cases where there is a long administrative period, so by the time the defendant makes that admission; the statute of limitations may have run on the new cause of action.

Many judges employ their own local rules, which deviate from the district's local rules and the FRCP. This makes the situation even more overcomplicated.

Many local rules are applied differently by the judges and even magistrates will have different means of enforcing the rules or interpreting what is required. This also occurs at the state level.

Many local rules are far too cumbersome.

My biggest complaint is that courts only pay lip service to the summary judgment standard under Rule 56. Rather than interpret all evidence and draw all permissible inferences in favor of the non-moving party, too often judges seem to look for reasons to grant summary judgment, and thus either reject the non-moving party's evidence out-of-hand or weight the evidence in favor of the moving party.

My complaint is that judicial interpretation and application of FRCP and local rules vary too much from judge to judge.

My first preference is no Local Rules. My second preference is if we must have Local Rules, they should be uniformly applied by the Judges and Magistrate Judges in our District. That, unfortunately, is not the case.

My principal objections are to the procedures governing motions for summary judgment and preparation of trial management alerts. Both impose extremely onerous, time-consuming and expensive burdens on litigants. The benefits they offer are outweighed by these costs. They also promote abuse by large firms interested in increasing hourly billings and unfairly pressuring plaintiffs in smaller firms. the rules on electronic discovery also are complicated and tend to require huge investments of time and money can be effectively utilized this often works to this advantage of individuals and/or small firms as opposed to corporations and large law firms which have far greater resources. It might be best to require voluntary initial disclosure of electronic discovery that falls within the broad scope of discovery, coupled with meaningful sanctions if a party does not comply.

Not sure if you are going to ask about Local Local rules (i.e., the different rules adopted by each Judge within the District) but those are horrible and many times conflict with FRCP.

Occasionally we have an Article III judge whose "local local" rules conflict with the FRCP--and there is no real remedy for litigants.

Practice should be the same regardless of the judicial district.

PS NEED DISCOVERY AND MEANINGFULL DISCOVERY IS ALMOST IMPOSSIBLE BECAUSE OF TIME LIMITATIONS AND RULES.

re discovery, the limits of interrogatories could be expanded somewhat; document requests should have no limits; summary judgments should be denied as matter of course if there are material facts in dispute -- that doesn't happen. Re discovery, electronic discovery does not lend itself to one set of rules for all cases; put another way, many cases if not most have very limited electronic discovery needs yet there seems to be a growing trend to develop approaches and requirements re electronic discovery based on those small percentage of cases with massive electronic discovery needs.

Rule 56 - courts, especially federal, do NOT adhere to the standard for summary judgment motions. Courts also do not impose sanctions on recalcitrant defendants for failing to properly cooperate in discovery.

Rule 56 as applied results in approximately 90+ percent summary judgment in favor of the employer in the Northern District of Georgia, with judges ignoring the admonitions regarding drawing inferences, weighing evidence, credibility, etc. I'm not sure how to correct the situation as the rule itself is clear. IN addition, Iqbal/Twombly has adversely affected courts' interpretations of Rule 8 and the rule should be modified to reflect the reality of the new pleading requirements if Congress does not overturn Iqbal/Twombly.

Rule 56 has been used by the courts to eliminate the right to a jury trial in employment discrimination cases, and should be abolished or changed dramatically. Too many judges are making credibility determinations.

Rule 56 is abused by the judiciary to dismiss meritorious plaintiff's employment discrimination cases. The "point-counter-point" methodology is biased against plaintiffs and abused by defendants and contributes to meritorious plaintiff's cases being dismissed on summary judgment.

Rule 56 is being used improperly to eliminate cases that should be heard by a jury -- courts are deciding factual disputes.

Rule 56 is misused to decide questions of fact that should be determined by a jury.

Rule 56 is not applied properly by the federal courts, particularly not within the Northern District of Georgia. Rule 56 has created judges who think they should take the place of juries. It needs to be substantially rewritten to protect the 7th Amendment rights of litigants.

Rule 56 needs to be rewritten to stress that summary judgment is the exception, not the rule.

Rule 56, as applied to discrimination and retaliation cases, results in summary judgment for employers far more frequently than it should in cases which almost always involve questions of intent or motivation. Questions of fact are characterized incorrectly as immaterial or ignored and Courts routinely make credibility determinations and draw inferences against the non-moving party (e.g., by applying the "honest belief" rule, the "same actor inference").

Rules should be uniform so counsel doesn't run afoul of a local judge's rules.

Setting aside Iqbal, Rule 16's trumping of Rule 15 is an unmitigated disaster to sole practitioners. It allows district court judge's to place greater emphasis on their docket, and promotes, if not awards, the so-called "rocket-docket" judge. For a sole practitioner, rocket docket judges practically chain the solo to the law, which impacts negatively on one's ability to raise a family and participate in extracurricular activities (judicial and non-judicial alike). The FRCP should mandate a minimum amount of time for the parties to complete discovery, e.g., 9 months.

Simplify.

Some local rules are helpful, if they fill in the gaps in the FRCP, or set out approved forms.

Sometimes I wonder why there is a local rule when the situation seems to be covered by FRCP.

Sometimes, Local Rules are used to shorten the response time to motions, with unrealistic deadlines.

Summary judgment is frequently granted even though there are credibility issues.

Summary judgment need not be made more cumbersome or difficult than it is in the FRCP now!!

Summary judgment rules should be tightened to prevent excessive granting of dispositive motions.

The "point-counterpoint" method of arguing and defending against summary judgment is an incredible waste of time with no apparent benefit to the judiciary or plaintiff's counsel. But, it's a great billing opportunity for defense counsel.

The biggest problem from my point of view is the differences between the rules and procedures of individual Judges within a particular district.

The biggest problems are failure to enforce the rules as written, conversion of summary judgment into an excuse for judicial fact-fact-finding, and result-oriented ideologically-

motivated decision-making which leads to inconsistent results in the same District or from panel-to-panel in the same Circuit.

The courts always seem to interpret the rules against plaintiffs and in favor of the defendants.

The discovery rules are not enforced, which is highly prejudicial to the party that does not have access to the evidence held by the other party(ies). Requiring "informal" discovery conferences hides the problem and does not protect the record for appeal.

The federal trial courts do not properly apply summary judgment rules and procedures but use them as a docket clearing device to the unfair detriment of civil rights plaintiffs. It is virtually impossible to get oral argument on summary judgment and unduly difficult to get past summary judgment in well-supported civil rights employment cases. Trial judges should be encouraged to hold oral arguments, even short ones, in such cases, and to take the words of Rule 56 seriously, rather than in many instances, drawing inferences in favor of the moving party (usually the defense/employer), making credibility judgments (against employees and in favor of employers) without hearing live testimony, and resolving and weighing evidence, and thereby supplanting the role of a jury.

The FRCP are applied to favor defendants in employment cases and act as a tool for judges to dismiss cases.

The interplay between Rule 26(f) and Rule 16 is too complicated.

The local rules in the Northern District of Georgia and in particular the requirement in Local Rule 56.1 B of responding to a statement of material facts as to which the employer contends that there is no material issue to be tried imposes a heavier burden on plaintiff employees than is warranted by the Federal Rules. Plaintiffs are required to provide citations to the record for each response - which may require a citation to many items of evidence. In addition, the need to provide record cites for issues in dispute (especially in a district where uncorroborated plaintiff testimony is routinely disregarded) results in many plaintiffs with genuine claims of discrimination having summary judgment granted against them without having an opportunity for a trial by jury. In addition, each Magistrate Judge has her/his own set of guidelines on discovery in addition to the local rules. Since the Defendant Employer is in possession of most of the relevant documents and information, Plaintiffs are routinely denied even the most basic information in discovery (even that required by Initial Disclosures) until after they go through required good faith conferences and suffer through defense counsel delays that push productions of documents to the end of the discovery period and impair plaintiff's counsel's ability to obtain depositions with full knowledge of relevant documents and information. Recently Magistrate Judges in our district have begun issuing their own individual guidelines in addition to the local rules - which in some cases encourage counsel to schedule conference calls with the Court to resolve these issues without the need for filing extremely long motions to compel - that must recite each discovery request, response and objections, all discussions with regard to that request.

While this is a step in the right direction - these guidelines are not consistent among the magistrate judges. And defense counsel still are often permitted to delay in providing information. In addition, there is little consistency in the parameters of Protective Orders. This creates additional difficulties because often a Plaintiff must agree to a defense-drafted Protective Order to timely obtain relevant documents and information. Defendants have an interest in protecting even non-confidential evidence of discrimination from disclosure to prevent it from being used in subsequent lawsuits against repeat offenders. These interests are contrary to those of the public at large to publicize violations of law in order to prevent their recurrence.

The primary problem is that recent federal appointees have applied the rules to meet a judicial philosophy, rather than the facts of the case.

The problem with local rules is that the local judges do not apply them consistently. Some judges do not apply some local rules at all.

The proposed changes regarding time calculation will affect working mothers disproportionately than other attorneys. I have to pick my kids up at daycare by 5:30 p.m. When my district went to electronic filing, I didn't get the luxury of filing at midnight, but it did mean I had until 5:00 to get a pleading or motion filed. In the old days, you'd have to be done by 2:00 p.m. so a courier could get it to district court. Under the current rules, I also do not get the luxury of working on motions or responses on weekends or holidays because of childcare issues, but I do get ten working days to get the work done. Under the new rules, my ten days has been shortened to eight.

The rules on summary judgment are constantly abused to place judicial opinion over the right to a jury trial. The fact that cases are being thrown out more and more before a jury gets to decide is a travesty, and should not be permitted. Further, sanctions are being used as a weapon directed disproportionately against plaintiffs' counsel. Defense counsel get away with murder where plaintiffs are bullied and economically harassed. The blatant favoritism shown defense counsel and large firms has to end. Justice is no longer being served in federal court in Florida.

The single biggest concern I have is today's trend of federal judges who rely on arguments of "proportionality" and "case value" to excuse litigants from meeting discovery obligations, largely with respect to e-discovery. Until judges learn to factor in the considerable savings enjoyed by corporations by virtue of a "paper-free" environment, the current attitude toward parties seeking ESI from big companies is that corporate America is "too big" and "too busy and important" to be sued on "small value" claims, such as employment discrimination. The courts and federal rules seem to have willingly bent to the will of big industry and big law which permits important civil rights statutes to go unenforced. Why should we permit suspect discriminators to slide into "safe harbors" when they engage in opaque decision-making processes? Don't plaintiff employees face a daunting enough battle after decisions like *Twombly*, *Iqbal* and, now, *Gross*,

without shutting them out in the discovery process as well? It's a bit like asking the fox to guard the henhouse!

There are just too many rules. Rules do not solve problems. We need more judges or magistrates who can help shepherd the case through the stages of pre-trial.

There is a distinct defense bias among most of the Judges. When I have a defense case I am extended grace in discovery, or any other issue. When I have a Plaintiff's case I get no grace. Some Plaintiffs lawyers file their plaintiff's cases as pro se on behalf of the Plaintiff. Once they survive summary judgment they enter an appearance.

There is a marked, negative trend in the Rules' revisions and interpretation by judges to substitute the judge's view of the evidence for a jury's.

There needs to be a less difficult to litigate some employment cases. Clients want their day in court but it costs too much to do so. There must be a way to provide remedy to cases with not so much at stake without a huge expense.

They create a byzantine maze: federal rules, local rules, electronic filing rules, scheduling orders. This favors deep pocket defendants with their hourly rate lawyers. Virginia sensibly abolished local rules and individual scheduling orders and created a single form of scheduling order.

TOO MANYT JUDGES HAVE USED THE RULES TO CLEAR DOCKETS, DESPITE THE OATH THEY TOOK TO UPHOLD THE LAW.

Too often the rules operate as a 'stimulus package' to the defense bar.

We have 11 days automatically for responding to motions for summary judgment. The extensions motions are pretty much routine, as a result. Also, having 90 days to file a motion for class cert is too short, considering discovery is needed to develop the factors to show a class is needed.

When I began to practice law the FRCP just had been rewritten to make them more simple and user-friendly. 41 years later, we are back to where we were before the 1960's rule revisions.

With a high proportion of employment discrimination cases being dismissed under Rule 56, the rule needs more work to make it fair to non-moving parties. Moving party has generally as much time as it wants to marshal its evidence and craft its Motion; while the rule allows non-movers only three weeks to prepare opposition. It is usually not possible to anticipate all evidence to be used by moving party.

You learn how Judges interpret the rules-- it seem to vary by Judge-- there are problems when out of District Judges are assigned to local district cases and do not abide by the local rules.

Pleadings

Allows defense counsel an opportunity to unnecessarily increase the overall cost of an employee's right to litigate these types of cases.

Although my practice was always to include a good amount of detail in the complaints I filed, I am now paranoid about whether I have included enough detail.

As an agency, we do less notice pleading. In Colorado, our complaints were already specific, so it hasn't really affected us.

As it is being applied by some courts, the holdings have a detrimental impact on civil rights and Title VII actions where the vast majority of documentation is the possession and control of the putative defendant, making an adequate investigation extremely difficult.

Based on the information I have heard from others, Twombly/Iqbal have resulted in unjustified dismissals and unnecessary motions to dismiss. Since employment discrimination plaintiffs often need to conduct extensive discovery in order to develop their claims, the Twombly/Iqbal standards are particularly ill-suited for those types of claims.

Causes unnecessary litigation and expenses, employer's routinely filing motions to dismiss now to drive up costs of litigation and hoping to get a favorable decision by a judge looking to toss out any type of employment case.

Currently waiting decision on motion to dismiss filed using Twombly analysis. Filed motion to amend complaint concurrently with response to motion for SJ.

Defense counsel have interpreted Twombly/Iqbal as license to bring meritless 12(b)(6) motions in a very high percentage of cases, which delays resolution of the case and drives up costs.

Defendants have not asserted the issue...

Employment discrimination plaintiffs are in an extremely difficult position as it is David v. Goliath, and Goliath has it all - all the documents pertinent to the claim (which often clients do not have after termination due to handbook statements or agreements saying they are not allowed to keep any company documentation upon termination); all electronic documents and communications such as email; and all organizational charts and listing providing names of other employees. Generally, plaintiff's counsel also has not access to other employees of the company as ethical constraints prevent contact with current or former managers. Plaintiff's counsel who practice wholly in this area also generally take nearly all work on a contingent fee basis, as almost no clients can afford to pay attorney's fees, and therefore are already extraordinarily careful in case selection. Otherwise, if a case gets thrown out, you have worked for nothing. In essence, we have done the homework we can, based on the documents or information, often

limited, that the client can provide. We are unable to conduct further investigation, for example, as to "comparator" employees treated differently, until discovery. Erecting further barriers to suit and asking such plaintiffs to basically provide evidence that is inaccessible to them or not be allowed to bring a claim is just a further way to bar access to the courts for individual plaintiffs.

Employment discrimination victims are at a disadvantage from the start b/c the employers have all the documents and facts, so it makes it even harder now to get access to that information b/c cases are being tossed before you're even allowed to conduct discovery.

Encourages more motions to dismiss and more frivolous motions to dismiss.

Encourages unnecessary motions practice.

Even before Twombly, I have included a detailed statement of facts in complaints. Many of my cases involve public agency employees, who usually already have an extensive investigative file and/or agency hearing before filing. Therefore, many detailed facts are available in public sector EEO cases.

Federal District Courts are reading Twombly/Iqbal as an opportunity to decide whether they believe facts plead in a complaint.

For strategic reasons, I typically file detailed complaints that undeniably go above and beyond the minimum requirements of "notice pleading" set forth in the rules. Thus, the Twombly/Iqbal decisions have not impacted my practice significantly.

Have always filed very fact-dense complaints, so no effects on case outcomes under Twombly/Iqbal; however, seeing much more (attempted) use of these opinions by defendants.

Has not had much effect; I always included a lot of factual allegations. You have to be more careful about statements that could be considered solely conclusory, so I might restructure paragraphs, but the information included in the complaint is about the same.

I always file detailed complaints; it confuses the defense.

I always plead my employment discrimination cases with sufficient facts to support a prima facie case.

I am currently defending against two (2) Twombly/Iqbal motions filed by the same defense attorney in two different cases. It appears to be a habit amongst the defense bar. What was wrong with Rule 8?

I am forced to make unnecessary assertions in the complaint, conduct additional investigation before filing the complaint, all of which adds to the cost of the litigation.

I do not feel that those decisions should apply in the employment arena. Liberal pleading requirements should stay in effect. Plaintiffs are generally at a disadvantage when it comes to having specific information/documents when compared to the employer who has free access to that information. Thus, sometimes, facts must be plead upon information and belief and/or without specifics until some minimal discovery can be had.

I don't know why they have not, but I hope that it is because I take particular care in drafting complaints and have always done so.

I filed a detailed complaint, and the United States Attorney General moved to strike the complaint as too detailed. Ryan v. Holder, S.D. Ind. Cause No. 1:09-cv-0547-WTL-DML.

I filed two cases. One was an ADEA case with 140 paragraphs; defendant moved to dismiss under Twombly. The other was a Title VII and sec. 1983 harassment / discrimination / retaliation case with 241 paragraphs; defendant moved to dismiss under Iqbal and Twombly.

I had a 20 plus page Title VII- Sec. 1981 complaint dismissed under Twombly-Iqbal-Rule 12(b)(6). No one would have dreamed of bringing a 12(b)(6) motions here pre-Twombly-Iqbal. Federal courts have become instruments of big business.

I had one Magistrate go off on a Twombly/Iqbal tangent when we moved to amend a complaint to add a party. We had stronger evidence against that party than the parties whom we originally sued and the original complaint was sustained by the District Judge. I felt this was indicative of the practice of finding ways to dismiss cases. Frankly I have no problem with Twombly/Iqbal, again if it is used objectively and not as simply in order to find a way to dismiss cases. The Magistrate's position has caused us to waste a lot of time on an amendment that was not even opposed by defendants. Sua sponte misuses of the rules are a big problem. We find we are often arguing against the Court on issues not even raised by our adversaries.

I have always carefully screened my cases and try to insert as many relevant facts as possible in the original petition / complaint. However, defendants are simply misusing Twombly / Iqbal as another tool to seek early dismissal and/or increase their billable work, and avoid jury trials. Only a small percentage of cases should be affected by MSJs or 12b6 motions, yet courts are depriving litigants their rights by early disposition of cases based on either inadequate pleadings, or by making factual / credibility findings based solely on deposition testimony.

I have always considered it important to plead detailed complaints.

I have always drafted detailed complaints.

I have always included detailed factual allegations in my complaints. However, after Twombly/Iqbal, I'm trying to make these even more detailed. However, it seems that I almost now need to prove my case in my initial complaint to avoid a motion to dismiss.

I have always included more detailed factual allegations since often defendants will look for any opportunity to file a 12(b)(6) motion. Now since Iqbal, I make my complaints even more factually intensive.

I have always pled many specific facts and therefore no defendants have to wonder what my clients' cases are all about.

I have always tended to file detailed factual complaints in order to tell a story. Whether that level of specificity in pleading should be required, however, is another story. For cases involving statistical evidence of discrimination, it may not be possible to allege discrimination with sufficient specificity until after discovery has been conducted.

I have always tended to include factual allegations to support my causes of action in the complaint.

I have always used pretty detailed complaints, but Twombly/Iqbal still worry me to the extent that they allow a judge, who may already be inclined to raise the pleading standard and/or be dismissive/suspicious when it comes to discrimination claims, a way to force a plaintiff to prove his case without the benefit of any discovery. Also, the cases are inconsistent with the pleading burdens established in the FRCP and in Conley and Swierczewitz.

I initially had to respond to a few motions to dismiss. Lately, defendants have not file motions to dismiss.

I make the Complaint more fact-detailed which I think is counter to the advantages of simple notice pleading.

I only had a couple and they haven't affected them. More due to my ignorance, though. I'm a new lawyer.

I recently fought against a motion to amend a complaint, in which the Defendant claimed the amendments to the Complaint were futile under a Twombly standard.

I think that Judges are sometimes imposing plausibility standards that are higher than what would be sufficient to support a jury verdict under *Reeves v. Sanderson*. I am concerned that cases are being scrutinized critically prior to discovery with the court favoring docket clearing rather than issue joinder and discovery with adjudication on the merits. Justice Thomas's opinion in *Swierkiewicz* specifically states that it is for the legislature to amend the rules though the Court now seems to have done so itself. Litigants ought to be provided with adjudication on the merits and a jury trial as provided for by statute and the Seventh Amendment.

I understand from colleagues that Twombly/Iqbal has created a serious problem with unnecessary time-consuming motions at the beginning of the case. I am sure it is only a matter

of time before I too get such a motion filed against me in a case. I think the whole thing is a horrendous waste of the parties' and courts' resources.

I was always a believer in detailed complaints that tell a story, so my complaints always met Twombly/Iqbal standard.

If the courts would hold the same standard as to the affirmative defenses raised by a Defendant, then I would have no problem w/ Twombly-Iqbal standard.

In employment discrimination cases, plaintiffs often have little or no information to support their claims beyond a statement that they satisfy the McDonnell Douglas prima facie case and a gut feeling that something had to be wrong. Perhaps if the EEOC engaged in substantive investigation beyond simply collecting the defendant employer's self-serving position statement, plaintiffs might have additional documents and information upon which to rely. Too often, however, the plaintiff must hope to get to discovery in federal court before formulating a more fleshed out opinion. A number of defendants are now using Twombly/Iqbal to prevent plaintiffs from getting to that point, insisting that the new pleading standard has not been met unless specific evidence is proffered in the complaint. While I have not had a case dismissed because of Twombly/Iqbal, I have been forced to expend resources defending motions to dismiss ... and then later been accused by the Judge of "over-litigating" ... and accusation that does not seem to be levied as often against the defense. A more dire consequence is that this sufficiency test seems to be bleeding over into discovery issues. Even if you survive the motion to dismiss, unless plaintiffs can articulate that they already possess enough evidence to support their claims, the courts are restricting plaintiffs from "fishing" for more. I'm not sure we should call this process "discovery" any longer, as it appears that you need to already be specifically aware of the particular facts/evidence that you are attempting to acquire through document requests and interrogatories. Unless you can state for certain that particular custodians have emails sent within specific date ranges containing particular content, the judges do not want to put defendants to the trouble and expense of retrieving relevant and responsive information that may be stored electronically. As noted above, Twombly and Iqbal have had a tremendous impact on my practice -which is odd, given that neither case involved employment discrimination claims.

In job rights cases, where the defendant is in possession of most of the information, it makes no sense to expect plaintiffs to plead more specifically. As discovery progresses, they'll have to amend their complaints, which will cause more motion practice, and more delay.

In my experience we have to plead every conceivable fact in sequence to meet the plausibility standard versus a short plain statement of the facts that give rise to a claim.

Iqbal has not resulted in a dismissal yet in one of our cases, but such motions are definitely anticipated; satisfying Iqbal if read in its most restrictive manner and that seems to be the trend seems to presuppose access to information that is only possessed by the employer.

Iqbal, which must be addressed legislatively, all but guarantees a motion to dismiss in the absence of direct evidence of discrimination. It prolongs cases, makes them more expensive and more difficult to settle.

It has become an additional opportunity for Defendants in employment discrimination cases to insist that the Plaintiff meet more than a short plain statement of the claims.

It increases the cost of litigation without any benefit.

It is my understanding that Twombly/Iqbal will have a detrimental effect specifically in employment cases because in these cases the employer has complete control of all the documents, information and possible witnesses and the same are not available to a Plaintiff prior to filing a complaint. Consequently, in employment cases the primary source of facts comes from the Plaintiff which in the majority of the cases does not have the documents and specific information prior to discovery to set the facts in as requires by Twombly/Iqbal.

It is nothing more than an added cost to both plaintiffs and defendants, with nothing benefiting either side. Notice pleading works better, and both the bench and bar are familiar with notice pleading.

It is simply not realistic to expect a victim of discrimination to have access to a great deal of evidence. The employer has all the evidence in its possession. The plaintiff can only point to general observations and presumptions based on activities in the workplace. Discovery is necessary to flesh out those allegations.

It unnecessarily has multiplied the cost of litigation without any added benefit to either side. The added facts are in the EEOC charge or otherwise available. It serves no purpose except to provide defense attorneys additional fees for a motion to dismiss. It may also screen out meritorious cases where the employer has tried to hide pertinent facts that are only available in discovery.

It's a trap for plaintiffs-- a return to pre-code pleading, and prevents meritorious cases from getting anywhere. Defendants simply conceal the facts from the EEOC, and then get motions granted.

It's given a whole new cottage industry for the defense and makes our job much harder to have to deal with the constant motions to dismiss.

Judges in our SC district/4th Circuit were already extremely conservative and nearly always dismissed cases at the summary judgment stage, they now dismiss sooner, leaving no time for mediation of good cases.

Just adds more unnecessary motion practice, and therefore adds to the legal fees the litigants must bear.

Just more grist for defendants' mill. Seems to have encouraged borderline and frivolous motion practice. More chance for delay and expense.

MA courts have adopted Twombly but not yet Iqbal--defendants have not used Twombly much--we are pleading many more facts than previously to try to Iqbal-proof our pleadings.

Minimal effect for anyone who was already writing adequate complaints that pled the elements of their claims.

More time and stress are involved in drafting complaints than previously. Stress is due to fear that a judge will subjectively construe factual allegations as merely conclusory. Stress is compounded by the inability to conduct pre-suit discovery of employers in advance of drafting and filing complaints.

My firm tends to write detailed complaints so that we have not had Twombly problems. But as the case law is developing, Twombly/Iqbal is a major problem. Judges are using the law to dismiss cases that may well be meritorious but in which the discovery necessary to develop the facts has not yet occurred.

My style of practice has always to provide fact-intensive complaints after conducting pre-litigation investigation.

No effect because we already wrote detailed complaints. Twombly only affects sloppy draftsmanship or to give another tool to a conservative activist judge to use against plaintiffs.

No effect (yet).

No effect because there have been no motions filed to dismiss on that basis.

No effect thus far on employment discrimination, but I always included a fair number of facts in my complaint. I am more concerned about FLSA complaints filed with few facts substantiating the grounds.

No effect yet and not likely to in light of earlier USSCT cases holding not necessary to plead EEO cases with such specificity.

No impact because we have always used fact pleading as part of our approach to hostile work environment cases which is all we do.

No motions to dismiss on those grounds filed.

Not sure why, no one is arguing either case, and I specifically plead NOTICE only.

Notice pleading is dead in employment cases, to the detriment of justice (and the workload of the courts). The decisions are leading to a Goldilocks standard for pleading -- on the one hand, when there are not enough facts in the complaint, I get hit with a Twombly/Iqbal motion to

dismiss, and when there are too many facts, I get hit with a motion to strike because the complaint is too long.

Notice pleading should be restored. Twombly/Iqbal is leading to more litigation and more delay. The decisions are being used in an obstructionist manner.

One case is stalled because the other plaintiff is facing a motion to dismiss based on Twombly/Iqbal.

Our complaints have a lot more facts than before which should be unnecessary. Also Defendants are not being held to the same pleading standards in their answers as Plaintiffs are in their complaints.

Our practice is to prepare factually detailed complaints; however, this should not be a requirement in order to proceed. The rules call for "notice" which is the appropriate standard.

Perhaps we just need the plaintiff to file an affidavit as part of the lawsuit, and then the court can dispose of discovery and dismiss the lawsuit under Rule 56, based on the judge's personal impression of the facts stated as a reasonable person standard.

Plaintiffs/employees usually do not have access to information prior to discovery such that they can meet a Twombly/Iqbal standard.

Please enter any comments that you may have on the effects of Twombly/Iqbal on employment discrimination cases you filed after those decisions. If those cases have not affected your employment discrimination cases, please indicate why they have not.

Ridiculous unrealistic standards and much harder and unlikely plaintiff cases will succeed with such high threshold of detail.

Since Connecticut State Courts always have required detailed fact pleading, my practice always has been to include detailed factual allegations in my complaints. Even so, I am being met with motions to dismiss based on Twombly & Iqbal which essentially argue that I must be able to plead each and every fact which might even arguably be necessary to support judgment, even when those facts are exclusively within the defendant's possession and control.

Since Twombly/Iqbal I have filed motions for more definite statements directed to Answers in an attempt to get defendants to meet the same standards for pleading affirmative defenses as is applied to plaintiffs. These motions are uniformly denied, leaving plaintiffs to the expensive venture of ferreting out the facts related to a defense which is merely named in an answer and not pled, e.g. "Allegations in the complaint are barred by laches." or "Plaintiff is barred from pursuing claim by applicable statute of limitations."

Since *Twombly/Iqbal*, we have seen more motions to dismiss filed by defendants. The motions have not been granted, but the need to respond to these motions and await the Court's ruling increases costs and delays the litigation.

Substantively, there is no change in the law. These cases provide inclined judges to dismiss when they felt constrained not to do so before these cases were decided.

The cases where motions to dismiss were filed resolved prior to court ruling. But, having to brief yet another substantive motion in addition to motions for summary judgment is costly to plaintiffs who already have limited resources. These cases have made motions to dismiss in employment cases as standard as motions for summary judgment. This is an unfortunate and unnecessary development.

The cases, at least are being read by the moving parties in a manner inconsistent with issue pleading required by the Federal Rules of Civil Procedure.

The decision is inconsistent with the reality of discrimination cases. We need to prove the intent of the decision maker, usually through circumstantial evidence. To do so, we need discovery. Although we always investigate our cases to ensure a reasonable chance of victory (and we do not file cases that do not have that good chance), some facts of our case can only be developed through discovery and are not obtainable before the complaint.

The decisions are inconsistent with Rule 8 and they have read to authorize district judges to make seat-of-the-pants assessments about the sufficiency of the facts that may be develop that are clearly wrong.

The decisions have created more uncertainty in these cases on issues that are almost entirely within the exclusive purview of the employer and now are challenged and tested with an unreasonable level of scrutiny on issues like state of mind, intent and motive and willfulness that need to be developed more through discovery before these issues should form the basis for a testing the merits of a case.

The heightened pleading standard adds an additional step in the process, causing delay and raising costs.

The holdings must be repealed by Congress. Return Rule 8 to basic notice pleading. These decisions slow down the process and make it far more expensive.

The only effect is to make us examine complaints more carefully to ensure factual plausibility. The cases have not really changed our practice, as we have always plead with factual specificity as to each count of the complaint.

The pleadings cases make already-confident defense attorneys even more confident that federal litigation is stacked in their favor regardless of the substantive merits. They are less likely to

settle and more willing to defend anything (no matter how egregious), believing they will win (with good reason).

The primary effect of Twombly/Iqbal is to lengthen the complaints (unnecessarily, in my view) and to encourage more motions to be filed by the defendants.

The reason why it has not affected employment discrimination cases is because after Iqbal, the new cases were filed in State court.

The ruling was an abomination and may not be followed by Fed judges.

There have been no defense motions to dismiss based on Twombly. I think we are more laid back in Oregon about such pleading technicalities and take more of a practical approach.

These are unjust decisions for employment cases in which plaintiff must prove employer's intent.

These cases allow for an unwarranted imposition of the District Judge's personal sense of plausibility at a very early stage of litigation.

These cases are an abomination. Additionally, the district judges (at least in Houston) apply a double standard. Plaintiffs' pleadings are held to the absurdly heightened pleading requirement under Twombly and Iqbal. Defendants' pleadings, however, are not. I have filed at least three motions to strike bare-bones affirmative defenses as failing under the Twombly standard and I have not prevailed in a one. In other words, the judges require me to allege facts to support a claim where as a defendant is permitted to allege "The plaintiff has unclean hands" or the like, and that are deemed sufficient.

These cases are inconsistent with the nature of notice pleading, and unduly complicate litigation. They promote expensive and time-consuming motions practice it serves no one's real interest in resolution of a dispute.

These cases give the court too much incentive to dismiss meritorious cases that could be proved through discovery. They reward defendants for "covering up."

These cases make 12(b)(6) motions a de facto Rule 56 determination prior to discovery and completely gut the concept of notice pleading.

These decisions are poorly reasoned. Evidence supporting state of mind tends to be in control of the employer, and I cannot access it until I can use the discovery tools. Discrimination rarely can be "proved" conclusively pre-filing. The impact of Twombly/Iqbal is that some district judges feel that one must have proof, and plead it, upon filing. This is a dangerous development.

These decisions have created burden and confusion with no benefit.

These decisions result in discrimination claims being treated less favorably under the federal rules than other cases. They also prevent plaintiffs from bringing good faith claims because the case must essentially be proved before discovery. These decisions do a disservice to our civil rights laws and require claimants to carry a burden no other plaintiff's are required to carry.

These two cases violate the principles of the FRCP regarding short, concise pleading. Similarly, detailed pleading to overcome immunity issues should end.

They have added burden on the courts by encouraging additional costly motion practice and, therefore, made early resolution of cases amicably much more difficult.

They have made pleadings prolix -- no more notice pleading. Additionally, the pleading of additional facts has made briefs (supporting or opposing dispositive motions) longer.

They have required additional briefing in response to motions to dismiss that would not have been filed before. So far, I have not had any cases dismissed as a result of those motions.

They ignore Rule 8's requirement for a short plain statement of the facts. They are not applied equally to defendants' affirmative defenses, which should also be subject to the requirements, if they apply to plaintiffs.

This has the potential to further eliminate employment cases. I am currently briefing a motion to dismiss.

This is a stupid development that adds more time to the same pleading.

Those decisions have not affected my cases, because my complaints always go beyond mere notice pleading. I do not "recycle" complaints like personal injury attorneys do.

Though I think the decision is wrong on the law (given what the federal rules require), the decision has caused me to write more detailed complaints. That is a good thing.

To avoid a stupid trap designed to help employers, we are more specific in our complaints which could cause problems (amendments) down the road.

Too rigid--one more way federal courts use to toss plaintiffs out of court unfairly.

Twombly & Iqbal set out a ridiculous standard that is solely designed to allow federal district judges to dismiss claims they disfavor.

Twombly and Iqbal represent a Supreme Court initiative to let judges dismiss disfavored cases, such as employment discrimination and civil rights cases. It is time to convene an international tribunal to prosecute the promulgators of these decisions for crimes against humanity.

TWOMBLY INVITES MTD'S.

Twombly is a joke. It is only applied to Plaintiffs in employment cases, never against employers who insist on BS affirmative defenses that don't even come close to satisfying the Twombly standard.

Twombly is but another example of how many judges have put on the hat of defense attorney. The variation from judge to judge is incredibly unfair.

Twombly is inconsistent with the Federal Rules and should be overruled. The only reason they have not affected my complaints is that we always found it advantageous to provide more content than is required by the pleading rules.

Twombly is unfair to Plaintiff. Plaintiff is unable to have access to information without discovery necessary and required under Twombly motions.

Twombly makes it too hard to prosecute a meritorious employment discrimination case because the defendant employer has access to much of the key evidence and discovery is often how Plaintiff obtains evidence of illegal discrimination.

TWOMBLY PERMITS LAZY JUDGES TO CLEAR THEIR DOCKETS THEY WERE HIRED TO TRY CASES - SO TRY THEM.

Twombly/Iqbal is just another tool in the defendant's pockets that make it almost impossible for a truly wronged individual to have their day in court. Employment discrimination cases evolve throughout the litigation, and to expect a lower level employee to have all the relevant facts when they walk through the door is ludicrous.

Twombly/Iqbal has made motions to dismiss a cottage industry for the defense that serve to delay and add unnecessary expense to federal litigation.

Twombly/Iqbal imposes a heavier burden on Plaintiffs in employment discrimination cases than is warranted by the Federal Rules or substantive law. Because in employment discrimination cases, discrimination is often inferred from circumstantial evidence, some of which may only be obtained during discovery - imposing additional requirements to plead facts before the discovery process had begun, may limit the parameters of Plaintiffs' potential claims or their ability to have a court consider their claims at all.

Twombly/Iqbal is fundamentally inconsistent with the entire philosophy of the FRCP and modern practice, and should be reversed by the Court.

Twombly/Iqbal is used by defense lawyers as a constant threat. The federal courts expansive embrace of Twombly/Iqbal is further erosion of the rights of litigants to have their cases heard by a jury of their peers.

Twombly/Iqbal makes the early stages of an employment discrimination case far more difficult than they need be. Often times a claims cannot be fully fleshed out until after some discovery,

Iqbal short-circuits that process and requires a Plaintiff to plead with a level of knowledge that he or she may not yet have access to. My cases have generally not been affected because I have the luxury of being quite choosy in the cases I accept.

Twombly/Iqbal unnecessarily draws attention away from the complaint and amounts to a mini-summary judgment process.

Twombly/Iqbal often times requires Plaintiffs to have information up front that can only be obtained through discovery. It makes no sense.

Twombly/Iqbal puts a burden on plaintiffs at the pleading stage that is inconsistent with Title VII, the Civil Rights law and the cases interpreting those laws. Thus there will be meritorious cases that will not be brought (I have at least one) and meritorious cases that do not survive.

Unnecessary time spent on Motions to Dismiss. Especially in sexual harassment cases I prefer not to be explicit about sexual comments and actions. For example, in the past I would have pled something like "the defendant made sexually explicit comments to plaintiff." Now I feel compelled to say "the defendant told the plaintiff that her tits were making him horny and he wanted to fuck her on the desk" since I fear it is "conclusory" to simply state the comments were sexually explicit. I don't think that is necessary or desirable by either party.

Unnecessary work is required, adding additional expense and inconsistent with the spirit of the federal rules.

We are hoping for a Congressional fix. In employment cases, plaintiffs have access to a limited world of facts and documents prior to filing suit. We need Twombly/Iqbal corrected so that we can make full use of discovery to substantiate our clients' claims.

We have always filed detailed complaints, and now we just make sure they are as detailed as possible.

We have always pleaded the way they require.

We obtain enough evidence during the administrative investigation of our cases, that we are able to state a plausible claim for relief without any difficulty.

We traditionally plead substantive, specific facts -- because they should be treated as Requests for Admission. But, defendants' answers are not held to same standard -- they plead a ton of affirmative defenses, often with no basis in fact.

When the other side holds the evidence, pleading with specificity is nearly impossible and trying to plead with specificity could leave to sanctions if discovery clarifies evidence contrary to the pleadings.

Where there are questions of intent discovery is essential. Twombly and Iqbal threatened dismissal of meritorious cases.

Initial Disclosure, Discovery, and/or E-Discovery

A Defendant should be required to provide sufficient information in the initial disclosures to permit it to defeat an offensive motion for summary judgment. In most cases, Defendants in employment cases provide nothing other than bare denials.

Again, the problem has been (the lack of) uniformity in the application of e-discovery rules amongst our Judges and Magistrate Judges. It seems every Judge or Magistrate Judge has his/her own protocols.

As noted in response to earlier portions of this survey, the e-discovery amendments have created greater obstacles to the efficient and effective administration of justice. E-discovery seems to have added just another layer of dispute to an already adversarial process. Defendants have but to rant and rave about cost-prohibitive e-discovery and plaintiffs' asserted threat of same to extort unwarranted settlements and the judges are all too happy to relieve defendants of their traditional discovery obligations. When will we take into account the fact that with the benefits, efficiencies and economies of ESI may come some burdens in the event of litigation and that, that too, is simply a cost of doing business. Why should a corporate defendant be shielded from producing ESI where, had the information existed in paper form, it would have been required to use reasonable efforts to locate it? The "value of a case" in terms of potential damages awards may not be terribly high in an ADEA or Title VII case in comparison to the cost to defendant to produce discoverable information, but is that the only measure of the value of justice?

Proportionality may be the word of the day, but there are often issues involved in cases that cannot be measured in dollars that ought to be considered in calculating these ratios. I have more often seen abuses in discovery by the responding party than I have by the requesting party. The respondent's bag of tricks includes: the assertion of boilerplate, generic objections; the use of the threat of cost-shifting in order to extort a better (and less productive) position in discovery; the partial answer that deliberately misunderstands the request as posed, rewrites it and then responds only to respondent's "revised" request; the insistence on counting subparts as separate interrogatories (even when they are related questions) and then objecting as to number; the refusal to answer interrogatories/requests re: ESI because they are the subject of ESI conferences among the parties; the reliance on "rolling productions" to comply with the 30-day time limit on the shallowest of levels by providing narrative responses but delaying large portions of production until the entire discovery period is nearly closed. The questions posed by this survey seem to ignore the fact that most discovery abuses seem to arise in a defensive, rather than offensive posture. Obdurate, evasive, and obfuscating behavior has practically been licensed by the federal rules in the hands of many federal judges. Rule 26 Initial Disclosures might be more effective if: (1) they required parties to identify all evidence that is clearly relevant to the claims and defenses in the case (not just those of the party); and (2) if they required the actual production of documents, rather than just the description by location (in the W.D.Pa., many of

the judges do at least require the production of documents simultaneously with the R.26 disclosures and this makes the whole exercise at least serve a point).

Aside from forcing defendant corporations to disclose insurance policies, 26a1 disclosures are a waste of time and duplicative.

Claw-back provisions are anathema to the discovery process.

Complaints about the allegedly excessive costs of e-discovery are inaccurate. Discovery of extensive amounts of paper documents is far more expensive to conduct, and the resulting information is far more difficult and expensive to search, than discovery of electronically stored information. Those who complain, in my view, are doing so precisely because e-discovery often results in the discovery of information that is detrimental to the claims or defenses of those parties and their attorneys.

Counsel simply do not provide the requested e-discovery and routinely force motions to compel.

Courts do not penalize defendants who make incomplete initial disclosures.

Courts need to be more diligent in sanctioning the obstructionist lawyer who interferes with one's ability to conduct a deposition. Speaking objections, directions not to answer (except where authorized by the Rules) and coaching must be stopped.

Defendants have overblown the cost of e-discovery.

Defendants in employment cases roundly refuse to provide access to electronic information, and motions to compel are required every time. Even then, some judges let employers get away with produced hard-copies based on non-electronic "searches" of email accounts, for example, rather than allowing mirror imaging or electronic word-searching of hard-drives.

Defendants often hold back discoverable information in all forms and usually have to be forced to comply.

Defendants purposefully do not respond to discovery until a motion is threatened. There is no deterrent for doing so. Defendants view discovery as the opening round of negotiations, rather than having a duty to actually respond.

Defendants put up all sorts of obstacles to easily identify their e-systems and to obtain access to them.

Defendants routinely make this process unduly complicated and burdensome by altering the format of documents, refusing to participate in efficient processes for focusing the scope of e-discovery and dragging out the process due to complexities largely of their own making and not reflecting inherent difficulties of accessing or producing relevant or possibly relevant documents. They make exaggerated claims of need to review documents for relevancy or privacy concerns

instead of producing documents clearly relevant or possibly relevant and narrowing e-discovery from there.

Defendants should confer with plaintiffs if Ediscovery requests are going to be very costly before spending the money.

Depositions are too long. There should be a presumptive limitation of 3 hours.

Discovery abuse is rampant--parties (usually defendants) stonewall routinely and then negotiate over how many of their legal obligations they can avoid. As a former federal law clerk, I know judges hate these disputes, but judges plainly must take a strong and early stand in telling parties these games will not be tolerated.

Discovery is crucial to get the facts on the table. But is it overuse, and under regulated. One size does not fit all, and rules, limits, and availability of judicial intervention, should vary by case size or complexity. There is nothing unique about e-discovery, same comments.

Discovery of electronically stored information is key to proving unlawful motive and pattern of discrimination in employment cases. The attacks on e-discovery are made by those who want to conceal evidence of unlawful discrimination.

Discovery of emails are essential in employment cases, and is hampered by lack of enforcement of sanctions for destruction of evidence despite demand for its preservation.

E-discovery and its related issues have provided some counsel with new excuses as to why relevant documents should not be produced. Judges need to be more familiar with e-discovery issues to properly evaluate objections to producing e-discovery based on burden, technological difficulties, etc.

E-discovery has raised costs tremendously but it is necessary.

E-discovery hasn't caught on yet in Northern New England. I've not seen a lot of litigation over access to ESI, due to counsel timidity, I think.

E-discovery increases costs because email and other technology have greatly facilitated written communication, so there is much more to discover. Discovery of that information is important because people put thoughts into writing that they did not used to do. Thus, costs of discovery have increased significantly with the advent of e-discovery, but so has the value of discovery.

E-discovery is at the baby stage. E-discovery is provided now that will not meet criteria in the future.

E-discovery is essential for a full understanding of the facts of the case.

E-Discovery is still the most difficult area to manage. I'm never quite certain that a defendant is producing all of the responsive information.

E-discovery need not be such a big deal, and many who make an issue out of the cost are playing "hide the ball."

E-discovery shouldn't be any different than any other type of discovery except at it relates to the metadata contained within the data sets. That does create peculiar problems that would not exist-for instance - with document production.

E-discovery would be effective if judges enforced the rules.

Electronic documents are more easily searched, sorted, copied and stored than paper documents. The main difference is that there are more written communications with email than with paper. It would be inexpensive to simply allow the other party (or other party's expert) access to emails or databases. The producing party often erroneously inflates the claimed cost of production because they desire to review the material--this is their right but it is not a true cost. For example, in a class action promotion case, the defendant had data tapes showing ALL personnel transactions (hires, promotions, bonuses, etc.) for the 10-year period. Defendants submitted a motion claiming it would cost in excess of \$50,000 and thousands of hours to review it for production. There was no claim that any privileged material was in the data--it was simply a computerized version of "personnel action forms". Our expert determined that all of the tapes could be copied in less than 3 hours, and that his firm could create a search for the relevant transactions (promotions fitting certain criteria) in a few hours.

Exact descriptions of a party's efforts to obtain requested e-discovery should be routinely provided.

Federal Discovery is often too limited in time. There are many opportunities to delay the production of discovery responses, and the normal time allowed for discovery is almost always not enough no matter how quickly discovery is started and compelled.

Federal judges are being swayed by outlandish expense claims by defense counsel in responding to Ediscovery requests because they do not understand that discovery of ESI is per se a billion times less costly than paper discovery. One major issue is servers which delete ESI and back up onto media which is not reasonably accessible. If defendants want to destroy the cost free nature of searching for ESI let them bear the cost.

From a plaintiff's perspective, interrogatories to defendants rarely produce useful or useable information and the courts rarely require more, saying instead to go to depositions. Defendants rarely provide adequate R 26 disclosure and the courts freely allow them to supplement later in case.

Generally, defendants resist discovery and rely on the (expensive) persistence of plaintiff's counsel or motions to compel simply to attempt to get production of their basic discovery obligations. Such gamesmanship in resisting discovery should be discouraged by the rules and by courts. Monetary and evidentiary sanctions should be awarded routinely for failure to respond to discovery. They are not currently.

Holding discovery until a motion to dismiss is decided is an incentive for defendants to file motions to dismiss where they might not otherwise have an incentive, and serves as a bar for plaintiffs to move forward with proving their case. Delay seldom inures to the benefit of the plaintiffs. Limits on the number of discovery requests are not realistic for all but the simplest of cases. It is routine that a motion to compel must or should be filed in cases, even with initial disclosures, simply because through objections, parties can make the other side work harder to obtain evidence which will be helpful to the other side. Sanctions are underutilized against parties and counsel that play fast and loose with the rules re: discovery.

I am against any further limitation on e-discovery. If anything, the limitations that now exist on e-discovery are excessive.

I think it is easier to gather electronic documents than it is to gather paper documents, because search features can be used. Plus, it is less expensive to Bates-label electronic documents. It is easier to keep track of documents in a case if they are provided electronically.

If courts want cases to move along, let's mandate that initial disclosures include evidence that is relevant to a party's claims/defenses, even if it is damaging. The state rules in Colorado require this, and cases move along more quickly and with fewer expenses. The presumptive limits on discovery are too minimal if courts are going to continue to hold that requesting discovery about each affirmative defense is a separate interrogatory. Also need additional discovery in multi-party cases, which is so often the case in employment disputes.

In employment cases, employer should be required to put a litigation hold on all emails sent by or to the plaintiff, and sent by or to the decision maker regarding the plaintiff.

In my experience, corporate defendants routinely fail to comply with their obligations to produce electronically stored information. I usually have to seek relief from the court in order to get the e-discovery I need.

In my experience, defendants (mostly gov't defendants) simply do not provide initial disclosures are required by the Rule and also by scheduling orders.

In theory, initial disclosures are a valuable tool. In practice, there is no penalty for inadequate initial disclosures, so most defense counsel in employment discrimination disclose very little information if any at the outset. E-discovery is particularly helpful for employees trying to obtain evidence of employment discrimination because of the complex nature of questions

involving motive or intent - it helps develop evidence of timing, motive, and pretext, among other things. The effectiveness of all discovery rules and tools are limited in their effectiveness by the attorneys who use and apply them. Without fair-minded attorneys on both sides who believe the discovery process is one phase of the truth-seeking mission of the justice system, there will be abuses of each rule and tool. Relevant and even outcome-determinative information will be shielded from the disinfectant of the light of day, causing inequality in employment opportunities to linger beyond its normal life expectancy.

Initial disclosures are generally worthless. Defendants almost uniformly disclose little information. Courts do not limit the use of witnesses or documents by parties who fail to disclose the information in initial disclosures so there is little incentive for parties to answer fully. When I have raised to the court that the initial disclosures were incomplete, almost uniformly the courts take no action unless I has also asked for the same information in interrogatories and requests for documents. Thus, I feel compelled to ask for the same information in discovery, just to make sure that the information is disclosed. I find defendants particularly evasive in responding to discovery, parsing words, raising unnecessary objections and unnecessarily requiring plaintiffs to move to compel. I have had reputable defense attorneys tell me they feel they have a duty to raise every possible objection and disclose as little as possible in hopes that the plaintiff won't bring a motion to compel. Courts typically don't sanction parties for making frivolous objections, so there is little incentive to cooperate in discovery. In employment discrimination cases, most of the necessary information is in the defendants' possession, so without adequate discovery responses, plaintiffs are disadvantaged. Since defendants have more financial resources, I feel discovery is used by defendants to overburden the plaintiff with frivolous objections. Since the rule limiting depositions to seven hours in one day was implemented, defendants now use almost seven hours for every deposition. The cost for just a copy of seven hour deposition is now over \$1000. In one recent case, the defendant deposed my client's mother, father and brother, among others, for little reason. The deposition costs, just for copies, not for the depositions I took, exceed \$10,000. The issues are neither complex nor fact intensive. It is clear to me that the defendant used the depositions primarily to cause the plaintiff unnecessary trouble and expense. Defense attorneys brag that they can charge over \$100,000 to a client just to get through discovery. In the case referred to above, the defendant has told me he has charged his client in excess of \$200,000, for a case where the initial demand was less than \$200,000, just to get through summary judgment.

Initial disclosures are not particularly useful. RFPs and RFAs should be unlimited, as provided in the Federal rules. E-discovery is great. In employment cases, plaintiffs should be allowed more discovery requests that defendants because defendants have all the records and we have to fight to get them to turn them over.

Initial disclosures from Defendant counsel are without any value; they contain no information no documents and no significant use. E-discovery is usually something deft counsel ignores as it costs them considerable money to retrieve requested documents. Discovery is general is a silly

game where deft counsel provides the laughable bare minimum and plaintiff counsel must jump thru hoop after hoop until the Magistrate judge orders the defendant to produce.

Initial disclosures unfairly favor defendants. Both sides should have to produce all relevant documents and identify all relevant witnesses. That would lead to significant cost savings in discovery.

IT HAS BECOME A TOOL FOR DEFENDANTS TO STOP AND IMPEDE RULE 26 VOLUNTARY DISCLOSURE REQUIREMENTS.

It is essential that e-discovery rules not be used to allow a party to fail to produce relevant information. That is, parties must bear the burden to produce relevant and responsive e-discovery regardless of the other party's designation of keywords or other guidance on e-discovery.

It is not possible, any longer, to prove an employment discrimination or wrongful discharge case without full access to e-discovery. The average case presents no greater cost to either party than was true before everything was on e-mail.

Judges more often than not accept conclusory arguments by corporate/defense lawyers that the e-discovery sought is "too burdensome."

Judges routinely allow parties to evade e-discovery because of their lack of understanding of computer data storage and computer database issues.

Judges typically buy party's argument that e-discovery is too expensive because they don't understand the technology available to reduce the claimed expenses.

Lawyers generally do not have the technological capabilities to understand e-discovery. That, not the rules, is the barrier to cost-effective e-discovery.

Many failures to give discovery, often accompanied by false denials of knowledge or possession; when exposed, judges shrug and impose no sanctions.

Many judges don't understand e-discovery and simply won't apply or enforce the federal rules or case law.

More and more evidence is in electronic format. Defense counsel tends to be clueless about e-discovery and what can and cannot be provided and the expense of it. They tend to misrepresent the burden to judges who are also not technologically savvy enough to catch them in their lies.

Most e-discovery requests result in voluminous paper productions, rather than appropriate electronic productions.

Most judges don't seem to get e-discovery and are reluctant to order it. Defendants routinely ignore it or refuse to disclose their efforts to preserve and produce electronic information.

My experience has been that responding parties -- in my practice, defendants -- rarely, if ever, consider producing ESI without a follow-up and demand on my part. Their discovery responses rarely, if ever, include the required explanation/objections to ESI requests. It appears oftentimes that they have done little more than search and produce hardcopies of documents. In addition, I have never received metadata in response to an ESI request. In my view, there is a basis to produce e-mail and documents in electronic form even where hardcopies exist (and have been produced), because the metadata is relevant.

Possibly because of limitations the courts are imposing in ERISA benefits cases despite the FRCP, even where I have made very limited discovery requests for electronic data (e.g., even a request for simple "print screen" of the document save code properties [document creation & modification dates], because of a real concern of back dated documents that appear to have been created after the fact to build a record after litigation began, the court has not compelled response by the party avoiding such production.

Some of the questions in this survey seem to be slanted to encourage responses that say that electronic discovery requests are being abused. Many abuses are the failure of corporations to adequately produce the discovery of electronic documents that they use to make decisions. As some of the questions recognize, we are all trying to develop efficient methods of retrieving evidence now kept in the new electronic methods. The search for truth cannot be accomplished without the production of the evidence used and kept in the new electronic formats.

The advent of e-discovery does not protect against purposeful withholding/destruction of relevant evidence.

The biggest problem is deposition costs. Court reporters charge costs that are too prohibitive for many deserving potential clients to take their cases to court. This is not a level playing field in employment discrimination law.

The costs associated with producing electronic data are much lower than costs related to paper documents. For example, searching for relevant e-mails is much easier and faster than searching for relevant paper memoranda. Discovery of electronic data should be broader than traditional paper discovery.

The default provisions in the event counsel cannot agree on the form of e-discovery are helpful to the requestor.

The e-discovery rules are used by wealthy larger firms to oppress and apply burden to small firms and individual and small litigants.

The expense of copying hard drives and forensic computer experts is prohibitive to requesting the information; the rules are not helpful regarding the problem of looking for a needle in a haystack.

The main problem I see with e-discovery is a near total failure of employers in employment discrimination cases to provide it. Often, no emails are provided at all despite the fact most communications at the company are conducted with email. When pressed on this issue, employers nearly always assert it is too expensive to provide, even when for example, I am just seeking emails pertaining to the plaintiff's work performance or termination, which it would seem would be easily searched just by a name search. Frequently, I conduct depositions and find counsel has not requested persons with knowledge at the company to even turn over emails stored in archived folders on their computers. It is true most judges/magistrates don't seem to have much knowledge on the costs of such searches or the difficulty of them, although this is also a difficult issue for counsel given general lack of technical areas by lawyers.

Judges/magistrates are in my opinion easily swayed by mere assertions of the employer's counsel that any e-discovery is too burdensome or costly, despite the fact they almost never support this type of assertion with any proof about the difficulty or expense. In employment cases emails and other electronic documents are the place where managerial employees are mostly likely to admit true motivations about actions taken against the plaintiff, but I face continual assertions by employer's counsel that they have no emails relating to an employee's job performance, or termination, even when they are terminated for alleged poor performance. It is nearly impossible to prove such documents exist in the face of such assertions.

The questions concerning e-discovery seem to assume the perspective of corporations and other large entities. I represent individuals who are, generally, not in possession of large amounts of discoverable, electronic data. The defendants we sue, however, are. They have, as entities, chosen to maintain relevant records in large data networks (email, online files, etc.). Defendants often complain about the cost of retrieving this data, but once we get the records, they are almost always very valuable to our case and help us prove our claims.

The rules need to explicitly state that broad interrogatories and requests for documents are not permitted - they must be specific enough to clearly answer.

There are difficulties inherent in e-discovery, but the rules are very helpful in trying to minimize difficulties.

There are ranges and needs for e-discovery in many cases that are relatively modest - but rules or rulings seem to anticipate massive e-discovery.

These QUESTIONS THEMSELVES reveal a preexisting bias against e-discovery. In my experience, those who complain about the cost of electronic discovery are mainly just upset that it makes it more difficult for their clients to get away with perjury. Extra cost is a small price to pay for the truth and for justice.

They are too restrictive and shift costs in an unjust manner.

We are still in the experimental stage, where sometimes it works easier and other times it becomes a real problem.

We requested e-discovery before the rule was changed. The rule probably makes it easier to get.

While in an ideal world initial disclosures should jump start cases and discovery, in actual practice it often does little to prevent routine stonewalling by defense counsel with respect to identifying (and producing) relevant witnesses and documents. In addition the requirement that defense counsel only provide identifying information for witnesses who have information that supports their contentions, rather than all witnesses with potentially relevant information, impedes Plaintiffs from early-on obtaining addresses and phone numbers for witnesses who may support their claims and thus impairs their ability to conduct informal (and less costly) discovery. Courts generally do not like having to get in the middle of discovery disputes, but often Plaintiffs cannot obtain the relevant information needed to present their claims without court intervention. If Judges and Magistrate Judges were more consistent in enforcing discovery obligations, perhaps defense counsel would cut short their delaying tactics and allow the parties to address the merits of claims. E-Discovery should generally be more cost effective than paper discovery. For example, a personnel database that can be produced in database or spreadsheets is a cost efficient way of producing relevant information regarding actual policies and practices, and comparators.

Your question about what proportion of time should be spent on discovery in cases that are not dismissed under 12(b)(6) really makes no sense. It doesn't take into account the time spent responding to a 12(b)(6) motion or a motion for summary judgment. You're really asking whether time should be spent on such motions, which can't be rationally answered. Of course summary judgment motions waste time, but what does that have to do with discovery?

Trial Dates

A set date for trial should be established by the trial judge once the court rules upon any dispositive motions; there just no reason to set trial dates until there is an issue for trial.

Court calendars need to be more rational, such as not scheduling critical deadlines between Christmas and new Year's Day, not taking into account the time it takes the court to issue a summary judgment ruling. Phased discovery should be used more (end fact discovery, set summary judgment deadline thereafter, but allow expert/damages discovery later as it does not impact summary judgment.) Prompt summary judgment rulings are important. In some courts summary judgment is fully briefed, taking months, decided by a magistrate and then the briefing starts anew with an appeal of the magistrate's opinion. There ought to be a better way.

Courts should respect the fact that lawyers some times have health issues or family emergencies that warrant continuance of a trial date.

Dates certain for trial should be the norm, rather than the exception.

Depends on type of case

Due to the increased burdens associated with summary judgment, it has become less time consuming and costly to try a case to a jury than to go through the summary judgment process. So, the rules should do more to encourage trials and also more to discourage summary judgment.

Early scheduling of trial dates can lead to fewer prolonged discovery disputes and fewer baseless motions for summary judgment. However, if both parties seek a continuance of a trial date, that motion should be granted.

Firm trial dates are one of the best tools to reduce cost and delay.

Firm trial dates with firm enforcement of discovery compliance serves all best.

Getting to trial in Fed Court is very difficult as Fed Judges are trying fewer civil cases every year.

Getting trial dates or moving trial dates has generally not been a problem in federal court.

Hard deadlines encourage discovery abuse because at the end of the day, it pays to delay and leave the requesting party in a bind for information. With no deadline looming, the incentive to stall is minimized.

Having a set trial date early in the case allows counsel to plan the work needed for their case. While dates are often continued due to problems with discovery or issues with parties, the looming date tends to keep people on track and moving forward toward resolution.

I can't stand it when a judge sets a "firm date" for trial but doesn't decide dispositive motions until right before that date. It costs the parties tremendous expense!!!

I don't see any place to comment on dispositive motions in the prior section so I wanted to do so here. In my opinion the most fundamental problem with litigation of employment discrimination cases in federal court is the granting of summary judgment motions in favor of employers. Statistical data indicates that judges are far more likely to grant summary judgment in individual employment cases that against plaintiffs generally, evidencing a very strong bias against such cases. I believe judges should have to track their own data in terms of the cases in which they grant summary judgment, and should be asked in training and other sessions to call into account the heavy employer/corporate bias in that regard. In talking to clients, I liken surviving summary judgment in federal court to walking through a heavily mined field. With every step you have a chance for your claim to die; e.g., you failed to identify a "nearly identical employee"; if you did you failed to show they committed a nearly identical offense and were treated differently; you failed to present evidence to rebut the employer's alleged non-discriminatory reason, or if you did we are going to dismiss, disregard, or demean it. Raising an issue of material fact is never sufficient, as courts regularly make credibility determinations or just state that even if evidence is true, "no reasonable juror" could rule in the plaintiff's favor. Basically, the judges seem to take their view of the evidence, and if it is not favorable to the plaintiff, find that no "reasonable juror" could find for the plaintiff. Such assessments fail to take into account just how different the life experiences of the average federal judge, and likely jury panel member, really are. And, another word on the "nearly identical" standard. This standard, imposed by the Fifth Circuit, is abused to the point of being ridiculous. Oftentimes, employees work for relatively small companies. There may have no, or very few, employees in the same position. Moreover, those other employees have almost never committed a "nearly identical" offense to that the employer says the plaintiff committed. Judges are granting summary judgment in such cases on the basis that the plaintiff cannot identify an exact comparator employee committing the exact offense and being treated differently. This flies in the face of common sense, that discrimination may be reflected in actions by managers that are directed at employees who do not hold the same title or commit somewhat different "misconduct." These types of judicially created hurdles to getting to the jury in employment discrimination cases are causing very significant barriers to access by potential plaintiffs in civil rights cases.

I don't think that trial dates should generally change, assuming set after dispositive motions, but I would not be so draconian as to not change them except in exceptional circumstances: I would weigh the reason for the continuance versus inconvenience to the parties and the Court

I think a trial date should be set early on, but the court should remain flexible in continuing it given the circumstances in a given case.

I would answer some of these questions differently for different type and size cases. Early setting of trial dates is insane in complex lit, might make more sense in a simple case to keep length and cost down.

If competent counsel are involved, they should be able to work out scheduling matters, and the courts should allow them to do so.

If the requirement to provide timely discovery responses was more strictly enforced, and if issues such as the scope of protective orders were worked out in advance as part of the Preliminary Planning Conference, trial dates could be set and enforced more consistently. Pending summary judgment motions often greatly delay the setting of a case for trial and consequently greatly increase the cost of trying a case. Brief, Statement of "Undisputed" Facts, response, Enumeration of all the facts in dispute, reply, Magistrate Judge R&R, objections to same, and then decision by the Court, following efforts to delay and drag out discovery, often greatly delay the time line for trial and impose additional costs not only on Plaintiffs, but also on Defendants. The only reason Defendants do not object to these costs is that summary judgment is inappropriately granted in far too many employment discrimination cases, in which the issues of intent should be decided by a jury not the Court.

If you wait until the end of discovery or even later to set trial dates, I am very concerned that it will take even longer to get to trial.

In federal court, where witnesses are likely to be traveling from various locations, trial dates should be firm. Being on a call list unnecessarily increases the costs associated with getting witnesses to the trial city just in case a case scheduled before yours settles and your case is called. This practice imposes excessive costs on the parties, both in travel and time away from other legitimate business.

In rule 16 conferences, I have urged judges to set the trial date and due date for the final pretrial memorandum for at least 10 days following a ruling on the summary judgment motion. Judges have routinely ignored this request. Preparing for trial while responding to a summary judgment motion is a waste of time and resources if the summary judgment motion is granted in whole or in part.

It is a good idea to set aspirational trial dates early, but then it is necessary to be flexible and postpone them relatively easily in response to unforeseen developments. Most important, when a motion for summary judgment is filed, the Court should estimate the time it will take to decide and adjust the trial date appropriately rather than leave the parties hanging until the eve of the scheduled trial date without informing them whether the trial will take place as scheduled.

It is difficult to answer the question about setting trial dates before summary judgment motions are decided because of the variations among judges in how quickly they rule on summary judgment motions.

It is the trial deadline that keeps the case moving and motivates the sides to explore settlement as that deadline draws near.

It is tremendously frustrating when a Judge puts off ruling on a Summary Judgment Motion until the day of trial and then grants it after the parties have prepared extensive pre-trial orders, have prepared for trial, and brought in witnesses.

It would be a beautiful thing if the CJRA list were taken more seriously.

Its the discovery deadline and amendment deadlines that give me the most headaches. Not enough time for discovery or amendments to pleadings to add parties or claims discovered during discovery.

I've had family medical crises and clients with aggressive cancers diagnosed during discovery and the flexibility to change trial and discovery deadlines is critical.

Judges and Clerks do not care about trial dates. In the last five years, all my cases have settled at the pretrial conference because the plaintiff is tired of being jerked around by the constant changes in the trial date.

Judges need deadlines, too. If a trial date has been set, summary judgment will be ruled upon by the pretrial conference. In the absence of that, summary judgment motions can sit around for 1 - 3 years (5 years is our record) without decision.

judges seem to have far too much concern with scheduling a trial date as soon as possible. Given the substantial dockets judges have to deal with, I have never understood why they are interested in pressing parties to litigate case sooner than they wish. As long as both parties are not pressing for a trial date, the court should be content to work on other matters and lead counsel figure out when they need the assistance of the court to set a trial date or resolve a dispute.

Judges that set rocket dockets are a menace to justice. trial dates when set at the outset should allow sufficient time bewteen the motion deadline and trial.

Judges wait too long to set trial dates, particularly in complex litigation.

Our district sets trial dates early. It is extremely helpful to keeping discovery and motion practice within a reasonable time period and provides an excellent incentive for settlement. It also provides comfort to clients because they know when to expect resolution of the case and can plan (mentally as well as their schedules and budgets). The Judges in my opinion are appropriately flexible about the need to continue the trial date, meaning they are not so rigid that it disadvantages the parties, but they are not so agreeable that caes are vacated without good reason. My experience in this district is very good regarding setting and adjusting trial dates.

Please stop using trial dates as legal fictions where the apparent purpose is to facilitate settlement. Few things are worse in a litigator's life than being told you're starting trial next Monday, then getting to court and discovering this is NOT TRUE.

Requiring attorneys to prepare for trial while summary judgment are still being considered and finding out at two or three days before trial that it will go forward or the case will be dismissed is a huge waste of time and resources. If summary judgment is granted the week or even days before trial, the attorneys have already issued subpoenas, been preparing witnesses, arranging and spending money for travel etc etc,

Rules do not prevent lawyers from abusing the process. Only judges who actively participate in the litigation process can smooth out the problems. The Court should appoint regular lawyers to serve as referees for discovery, with the power to rule.

Setting trial dates too early inevitably results in them being moved. Rather than setting them prematurely, they should be set at or near the close of discovery. Dispositive motions should be a rarity, not routine. If the Court has not had time to rule on summary judgment prior to trial, then trying the case may be more efficient for the Court.

Some courts, whether intentional or not, will leave a summary judgment motion pending until the eve of trial. I had a court call my office the Friday before a scheduled jury trial and tell me that a summary judgment motion was being granted and the order would be faxed to my office that afternoon. I received the order 16 months later and had to scramble to make sure that witnesses didn't show up.

Some judges abuse summary judgment in order to clear their calendars

Summary judgments dates completely control the timing of cases. Every litigant knows there will be a summary judgment motion, and trials are always therefore postponed.

The biggest problem with trial dates in the District of Columbia is the caseload of the courts, not party- or counsel-created delays.

The courts need to consider more than just their own interests in docket control. They should at least be somewhat more sensitive to the schedules of the attorneys involved in the case.

The EDVa remains far too difficult in this regard. True, they succeed in getting litigation to trial quickly, and that is good. But their primary tool is to bludgeon lawyers. Better tools include more judges and less summary judgment motions.

The federal courts have become courts of paper trials, instead respecting the right of citizens to actual trials. Federal court decisions reflect judgments about the credibility of the parties, the weighing of the evidence, and the rendering of policy decisions. As a stark example, some federal court decisions disparage a discrimination plaintiff's testimony as "self-serving," when

every party's testimony is self serving. Federal court decisions rarely disparage a civil defendant's testimony as self-serving like they disparage a discrimination plaintiff's testimony. The statements of the federal courts indicate that they do not like plaintiffs in discrimination cases. Some federal judges even complain about the number of discrimination cases and the need to reduce them by summary judgment, instead of the need to reduce discrimination by enforcing the discrimination laws. There is a wide disparity between the perception of minority communities of the frequency of discrimination and the perception of whites, including the mostly white federal courts, of the frequency of discrimination and the importance of enforcing discrimination laws.

The fixity of trial dates depends on getting discovery done in a timely fashion. This often depends, in turn, on judges ruling on discovery motions in a timely fashion, which is usually not the case. If trial dates are set early in the case, there should be flexibility as far as rescheduling the date in light of where discovery stands.

The problem with a trial date is the summary judgment practice. Let's make summary judgment motion practice the exception, not the rule; this will make setting a firm trial date much easier.

The time for setting of trial dates should depend on the circumstances of each case, however, earlier setting is generally better as it focuses the parties and reduces the time to disposition; courts should be flexible about continuances. In connection with discovery, setting trial dates and consideration of dispositive motions, courts should not allow a party to use its superior financial or economic resources to defeat a claim or defense or otherwise misdirect the course of justice.

The typical court practice in our area is to have very short deadlines for the parties to submit the pre-trial order, but then the trial is not scheduled for months, sometimes more than a year thereafter. This causes unnecessary expense as by time of trial damages typically have increased and the pre-trial order must be amended.

too many summary judgment motions are used by trial judges to clear their calendars and avoid trial, even when there are obvious fact issues

Trial dates drive settlements. Reasonably early trial dates drive efficient discovery and early settlements.

Trial date is a powerful factor in case strategy. Setting too early, though, can deprive impecunious plaintiff of adequate opportunity to develop evidence. Once discovery is complete, though, setting trial date can stimulate settlement discussions, other case work.

Trial dates could be sooner if discovery commenced upon filing a civil action.

Trial dates force both counsel to focus on getting discovery done. Courts should set them-- but also move them when necessary.

trial dates give all a goal to shoot for, otherwise the case more likely to be continued and delayed

Trial dates push discovery and settlement but there remains the need for flexibility depending upon the progress in discovery. The real issue is not the trial date, since most cases aren't getting to trial

Trial dates should be much more flexible

Trial dates should be set with initial automatic setting of calendaring dates by the clerk. There should be no hold on discovery and initial disclosures eliminated. 90-day hold on discovery requests is a waste of time and unnecessarily delays the entire process

Trial dates should not be set until the parties are ready for trial and dispositive motions are set, then once the trial date is set, the trial date should be firm. The real deadline that should be enforced is a reasonable deadline to complete discovery and to submit dispositive motions. There should be more tools available to force opposing counsel to cooperate with discovery more quickly.

We have one judge who does a great job with the scheduling of trials. He waits until after dispositive motions are resolved and then sets up a pretrial conference in which we (judge and counsel) come up with a date that works for all. It eliminates need for requesting continuances.

While I think trial dates should be set early, I do think it is incumbent on judges to either rule timely on dispositive motions or move the trial date. Far too often, parties incur thousands of dollars in expenses submitting pretrial reports only to have the court grant a motion for summary judgment just days before the trial setting. That is not efficient for either side.

With all the issues and delays that arise in discovery, it seems unrealistic to even hope to schedule trial dates. The result is that judges end up with dates blocked off on their calendar which may ultimately get moved, but which they dare not give away to other litigants who are presently ready to try cases. It seems inefficient and impractical to schedule dates until cases actually are ready for trial.

With summary judgment looming so large over federal litigation, trial dates are almost irrelevant to the system. The chance of a judge letting a case go to trial is so slim as to make the very thought more of a hypothetical than real possibility.

Judicial Role in Litigation

A good judge, carefully overseeing the case, is instrumental to the fair and efficient disposition of a case.

Because Judges want to get rid of cases, we are seeing more and more "threshold" summary judgment motions and "threshold" discovery which significantly increases the time it takes to complete a case and the cost of litigation.

Confusion arises when a final pretrial order enters when summary judgment may still enter; can lead to wasted effort and resources.

Discovery disputes should be decided on a case-by-case basis; not decided, for the most part, by "rules" from other cases, e.g., the "same supervisor" rule. Whether it is a judge or a magistrate judge, there needs to be flexibility in the discovery process.

Early aggressive management of discovery in a case sometimes suggests the court is manufacturing a predetermined substantive outcome. If the summary judgment rule is going to continue to exist as written, discovery should be managed by a judicial officer who does not rule on the SJ motion.

Final pretrial order is a waste of time because the judge rarely follows it anyway.

Final pretrial orders generally reflect the individual judge's predilections and not what is necessary to try to the case.

Functionally, federal judges have become the enemies of justice and the little guy and have eviscerated the right to trial by jury.

Having magistrates or special masters handle discovery disputes keeps the judge from learning important background and the case dynamics that may be essential where issues are raised in dispositive motions or at trial.

I believe that final pretrial orders are a waste of time.

I don't see how one can effectively prepare a final pre trial order until after the ruling on summary judgment. That makes no sense.

I don't think reports & recommendations are helpful b/c if you object, you've got to do another round of briefing - wastes time and money.

I have experienced final pre-trials in various federal districts. Usually these pre-trials are nothing more than a narrowing of the issues to be presented and a list of witnesses and exhibits. The most effective pre-trials which I have been involved in (W.D. Washington, for example) occur

months before the trial date, include not only lists of exhibits but also rulings on the admissibility of each exhibit and other motions in limine. Where this practice is used the parties leave the final pretrial knowing what the issues are for trial, what motions in limine have been granted, which might be granted and which denied, and what exhibits, depositions, witnesses, can be used at trial. When held sufficiently in advance of trial, this procedure allows the parties to enter into final settlement discussions knowing what is coming in and what isn't. In those jurisdictions that follow the slimmer version, the parties leave the pretrial making the same arguments about questionable exhibits/witnesses/theories which do not aid in the evaluation of the value of a case. This is particularly so where a client is insisting that it will prevail because of a particular piece of questionable evidence. That piece of evidence (which may or may not come in) can hinder settlement discussion. With a ruling on the evidence in hand, an attorney can easier manage his/her client and get it to understand that the case is not as strong (or weak) as it thought.

I have no objection to federal judges assisting in settling a case. However, I have a big objection to federal judges granting summary judgment even though there are material issues of fact - yet this happens way too often.

I really think that the judges should stay out of the way unless the parties ask their assistance. We have a judge in the Southern District who refuses to allow parties to develop their cases and micromanages the case to an amazingly unprofessional extent. This should not be allowed to happen.

Ideally early intervention would decrease costs and narrow the issues in dispute. My experience has been, however, that Magistrate Judges are far too lenient with defense counsel that stonewall and delay in releasing pertinent information and documents. These tactics, which greatly increase the costs of litigation, seem to be met with the view - well that's just how the game is played. Judges only very rarely impose discovery sanctions upon employer defendants and only in the most egregious cases. This helps perpetuate a system where defendants can and do greatly increase the time and cost of litigation for employment discrimination plaintiffs without any adverse consequences.

If federal judges had their personal (phone, in-person) contact with counsel increased from beginning to end of litigation, it would help the parties immensely. The federal system provides for little personal interaction with the court before trial; the parties must rely on written communications, which take much longer, and are far less interactive and personal, for all involved.

If judges would hold brief oral arguments on summary judgment motions, perhaps even before the non-movant's brief is due, much time could be saved on summary judgment practice.

In my last federal case, defense counsel relied on sua sponte rulings by court to rescue his client from his inadequate briefing; which deprived plaintiff of due process right to respond. Judicial involvement in initial case management conference is crucial. Limit on RFAs only makes sense

if evasive answers to allegations in complaint are deemed admitted. Good judges also require justification for deeming facts "disputed"; and strike inappropriate and factually unsupported affirmative defenses at initial conference.

In this district the parties prepare the pretrial order and the court rarely makes any changes. A pre-trial conference is set before trial and specific rulings on evidence, treatment of witnesses, and the like are discussed and ruled on by the Judges. This works well.

It is invariably a waste of time and money to require the parties to prepare pre-trial submissions, incl. the joint pretrial order, even though the defendants have indicated their intent to move for SJ.

It wastes valuable time to require a PTO *prior* to ruling on summary judgment. Opposing counsel and I once struggled thru a long weekend to finalize a joint PTO while summary judgment was still pending.

Judges need to handle cases more expeditiously. Judges should also give strong signals to the parties in cases where summary judgment is clearly not appropriate - this would save time and resources - and rule swiftly in any such MSJ in those cases.

Judges need to make rulings on summary judgment in enough time before the pre-trial order to be helpful to the litigants. Nothing is worse than doing the pre-trial stipulation, then showing up at the pre-trial conference and the judge then ruling on the SJ motions outstanding.

Judges resent being brought into discovery disputes, but it helps. Too much emphasis on parties trying to work things out wastes time and creates antagonism.

Judges routinely misapply the rules for Summary Judgment by substituting their judgment for that of a jury.

Judges should be forced to take some lessons on understanding their roles as public servants.

Judges should resolve disputes, not micromanage cases.

Judges, especially federal judges, abuse their authority and assume that the parties are there for the judge's convenience. As 1 example, I recently had an initial pretrial conference in an employment case which lasted 4 minutes. (I timed it, and I am not exaggerating in the least.) Given that I had to drive 60 mile each way, which I assume the judge was well aware of, this was a preposterous waste of time and money and was completely inconsistent with the goals set forth in Rule 1. There was no earthly reason why, assuming this conference served any purpose beyond satisfying the judge's ego, this could not have been done by conference call.

More and more we see judges with little or no experience in employment discrimination cases together with a very clear distaste for the cause of action - especially for Federal-Sector cases - shown by the Judge and his/her law clerk.

One of the most valuable services performed by magistrate judges in my district is the informal resolution of (usually relatively minor) discovery disputes.

Our courts don't even give a trial date until summary judgment denied.

Parties should file separate rather than joint pretrial statements. Since by the time a pretrial statement is filed, the relationship between parties is often contentious, agreements are hard to obtain and a joint statement is an onerous and futile process.

Pretrial conferences are best when they occur near the time of trial.

Pretrial orders are almost entirely a waste of time and resources. The pleadings are already on file and the amendments deadline will have long since expired, so there's no real need to set out contentions of the parties. All that's really necessary for trial are witness lists, exhibit lists, motions in limine and proposed jury charges or findings of fact/conclusions of law for nonjury cases.

See my last additional comment.

Some Judges do not require the proposed joint pretrial Order and/or the memoranda of contentions of fact and law in ERISA cases.

Summary judgment should be abandoned. Citizens are entitled to a trial.

The focus of pre-trial litigation should be to get promptly to trial.

The presumptive limits on discovery confer no benefit, and inflict problems, in many cases. They wrongly presume the incompetence of counsel. Judicial time is wasted in managing limits that confer no benefit. In addition, the presumption of sanctions in Rule 37 makes it too risky for many individual parties to challenge the discovery responses of well-financed adversaries.

The problem is less with the trial court as it is with appellate judges who are so far removed from the real world that they issue decisions agenda driven or ignore the constitutional right of trial.

The question seems to assume that summary judgment motions are denied with some regularity and that going to trial is the rule not the exception - since that is not the case not sure that pre-trial orders before the court rules on SJ makes much sense unless the court takes the posture that most cases are going to trial. That kind of pressure will result not only in more settlements but will avoid the time and energy spent by the parties and the court on SJ motions.

The Rule 16(a) conference is a waste of time in 90% of case. It doesn't have to be, but most judges refuse to manage their cases.

They need to be timelier. In Southern District, sometimes they do not take place until 3 - 6 months after case filed or removed.

Too many federal judges appear to have an interest in the outcome rather than assuring a level playing field and too frequently allow a party to use its superior financial or economic resources to defeat a claim or defense or otherwise misdirect the course of justice. One reason that state courts tend to be the preferred forum is that federal courts are perceived to be overwhelmingly biased in favor of defense and institutions and large law firms and the Supreme Court of the US is just another political institution acting from ideological motives. A good judge involves themselves in the process of neutral case management and moving the case along, but allows the parties discretion to prepare and try the case as they conceive it. Also, federal judges appear insensitive to the economics of litigation.

Under our local rules, the Rule 16(a)/(b) pretrial conference is severely curtailed by certain judges. Those judges who take the time to become more invested in the facts and issues of the case through hearings can frequently save themselves time by discouraging unnecessary motion practice (including unnecessary Rule 56 motions). This expedites completion of the matter and encourages resolution.

When judges take an active role in managing discovery in problem cases early on, it hampers shenanigans by counsel or party. It doesn't prevent, but abuse of discovery can lead to unfair, but winning results for a client. Lawyers and clients do engage in discovery abuse for this reason. Fear of a judge is the only thing that controls some of these lawyers, particularly ones who do not practice primarily in this jurisdiction.

While pretrial orders can be somewhat helpful in preparing a case for trial, the benefit obtained is far outweighed by the cost and effort involved in preparing them given that large portions of them are of no use.

**Three ways to decrease the cost of litigation
and still permit the exchange of necessary information.**

A hard deadline to supplement initial disclosures and discovery responses following the discovery of new information.

A more co-operative attitude regarding discovery; also, have defendants really look to find the requested documents.

Abolish all the paperwork surrounding summary judgment (i.e. statements of "uncontested" facts).

Abolish summary judgment.

Abolish the presumptive limits so that we do not waste time fighting about which subparts of interrogatories count.

Active court management.

Active judicial intervention at the Planning Conference: what discovery will be available to both parties and when.

Actually answering of interrogatories instead of avoidance.

Actually basic party-driven discovery should begin before the Rule 16 conference. This is actually not allowed in the NDNY.

Actually sanction parties for discovery abuse (non-responsiveness or non-disclosure).

Add a definitions section to the FRCP to reduce wrangling about, for example, whether questions containing "respecting" or "relevant to" or "related to" must be answered, and, if so, what these words include.

Administrative hearing and arbitration transcripts should be utilized as if they were deposition transcripts.

Adoption of Model Interrogatories and Model Document Requests.

Aggressive, disciplined case management conferences.

All documents scanned and available to the court and the parties as needed on secure server.

Allow an unlimited number of Requests for Admissions- Florida state limits Request for Admissions to 30.

Allow as a matter of course for discovery motions to be heard informally quickly by telephone and letter briefing.

Allow client's to change and clarify answers to depositions not only in the transcript verification but later in affidavits and at trial, subject to impeachment. This would make summary judgment practice more like trial and fairer and would decrease the pressure of discovery, depositions, and lengthy and costly motion for summary judgment practice.

Allow discovery to get started right away after case is filed rather than delaying it for Rule 16 shenanigans.

Allow fact disputes to go to trial, rather than encouraging needless summary judgments. Often the case would be quick to try, but the time on summary judgment is almost endless.

Allow for more interrogatories, which would decrease the need for some depositions.

Allow more easily for differing ways to take pretrial testimony such as tape recorded witness interviews or interviews with CD's.

Allow more flexibility in case management.

Allow more time for plaintiffs to identify experts as we often do not know what discovery may reveal and cases often resolve w/o using an expert.

Allow video or audio depositions to be taken by counsel rather than requiring a third party professional, and allow playback at trial without requiring a transcript as long as segments can be found reasonably fast.

Allowing claw-back of privileged documents or ESI. Employers frequently complain of the cost of reviewing ESI for privileged material (while profiting from the endeavor).

Allowing counsel to simply pick up the telephone and seek guidance from the Court when there are discovery disputes.

Allowing plaintiff to commence discovery and not having to wait for an initial scheduling conference.

Alternate methods of taking depositions (other than through a private, expensive court reporter).

Alternative dispute resolution.

Amend Rule 56 to bar movants' reply briefs. This will eliminate gaming the system by saving matters until the non-movant has no opportunity to reply.

Amend Rule 56 to increase notice period (e.g. California state law) so that discovery streamlined and focused.

Answers to Complaints and denials of claims should be scrutinized to the same degree that claims in complaints are. Parties should be required to admit allegations (or those parts of allegations) that are true and there should be consequences for the failure to do so. A claimed lack of knowledge on the part of a defendant must be genuine and not tactical and this needs to be enforceable.

Answers to complaints should be taken more seriously, with a party expected to admit allegations and parts of allegations that are true and not to falsely claim lack of knowledge.

Answers to Complaints should be taken seriously, with enforcement of requirement that defendants admit allegations (or those parts of allegations) that are true and something to assure that a claimed lack of knowledge is genuine and not tactical. Eliminate boilerplate defenses.

Apply and enforce the FRCP in ERISA cases.

Apply sanctions more readily for abuse.

Appoint a referee to monitor discovery.

Appoint more judges so that the first two actions can be done expeditiously.

Assign all discovery disputes to a magistrate to be resolved with a telephone conference call. Adverse rulings can be challenged with a motion filed with assigned judge.

Automatic disregard of all "boiler-plate" objections, objections should be based on the individual question not cut and pasted.

Availability of form Protective Orders and standard methods of dealing with allegedly confidential information.

Availability of judges for on the record conference calls on discovery issues to quickly rule on discovery disputes and prevent tactical delays.

Avoid inferences favorable to the movant in Rule 56 proceedings, like the "stray remarks" doctrine, the "same actor" defense, etc. These are judge-created inferences that favor of the movant, contrary to the Rule.

Avoid rules (local practices) that require every case to be tried as if it were a "big" law firm handling a complex litigation. Not every case requires e-discovery productions and computerized technical staff to present the real heart of the lawsuit. Scanning, indexing, computers, technical support and presentations cost more, and require higher fees for overhead or charges for outside support during discovery and for trial preparations.

AVOID SUMMARYJUDGEMENT ABUSE BY JUDGES WHO USE IT TO KEEP UP THEIR STATS.

Avoidance of fishing expeditions.

Award sanctions for failure to respond to discovery or necessitating a motion to compel.

Awarding costs and fees to prevailing party based on time to complete, with no hostility towards fees. In our district, defense attorneys know that judges will routinely decrease fee awards.

Begin imposing sanctions for intentional discovery violations.

Better judicial control of discovery from the beginning.

Better organization, esp. of documents.

Better rules of civil procedure.

Better use of Magistrates.

Broaden extent of initial disclosures.

Broader mandatory disclosures under Rule 26(a) - with teeth. Either through the FRCPs, or through Local Rules, I would suggest additional mandatory disclosures for subject-matter areas (e.g., employment, intellectual property, contract, etc.) if the judge orders (or the parties stipulate) that the case falls within a particular subject-matter areas.

Candid, confidential, non-binding assessments by other judges other than your trial judge.

Cap the amount that could be awarded.

Change FRCP 26(a)(1) to require disclosure of ALL persons with knowledge and all relevant documents. Current rule only requires the disclosing party to identify people or documents that it "may use to SUPPORT its claims or defenses" so an entity need not disclose documents or witnesses that would support the other party's claims or defenses. This makes initial disclosures an exercise in futility.

Change in ethical rules to promote release of information.

Change of Motion for Summary Judgment Practice.

Change or eliminate mandatory disclosure, it increases the initial costs of litigation without necessarily giving any benefit.

Change over from the system of having Court Reporters to electronic real time transcripts. One of the biggest financial hurdles for person in the middle and lower economic class is the prohibitively high costs of court reporters and transcription in Florida cases where the parties have to provide the Court Reporters in Civil Circuit court matters.

Cheaper alternative to a deposition.

Clarification of the law of the case prior to trial.

Clear direction of court on case merits at an early stage, if possible understanding that discovery may change opinion.

Consider new technologies to reduce the cost of deposition and other transcripts.

Cooperation among counsel.

Cooperation between counsel.

Corporations can resolve discrimination cases for much less than they spend to fight against discrimination cases. Instead, corporations are paying large law firms to spend millions of dollars to fight against discrimination cases in order to discourage victims of discrimination from complaining about discrimination.

Court enforced discovery plans with sufficient time to complete discovery, but limited extensions.

Court enforcement of discovery deadlines.

Court intervention early to prevent unnecessary objections to legitimate discovery and to rule on overreaching requests.

Court intervention to compel discovery per R 26.

Court involvement in narrowing issues for discovery.

Court reporter fees should be reduced by utilizing technology to record depositions; the rules should be amended to allow easier recording mechanisms.

Courts could accept audio recordings of depositions without requiring transcription.

Courts could allow factual disputes to go to the jury rather than routinely granting summary judgment-- a practice that results in plaintiffs having to undertake significant discovery to survive the expected motion.

Courts could require letter briefs of no longer than two pages and then hold a conference or oral argument on discovery disputes rather than requiring a full motion practice.

Courts deciding discovery disputes on the phone, rather than requiring full blown motions.

Courts need to enforce Rule 26(a)(1). All defense initial disclosures are worthless. Courts will not enforce.

Courts should be more willing to allow inspection and copying of parties' computer and email systems, instead of relying on counsel to identify relevant emails.

Courts should be more willing to take cases to trial promptly. This would save the inordinate time and expense of unwarranted summary judgment practice.

Create pattern discovery requests approved for particular subject matters to reduce objections and pleadings re same.

Cut out the e-discovery experts and let regular in house people just copy the documents!

Decrease time per deposition.

Decreased costs of court reporters to do a deposition (not necessarily reducing their pay, but some type of automation system).

Decreased time for depositions by Defendant attorneys. Plaintiff attorneys seldom depose a witness for more than 2-3 hours, while Defendant attorneys who are paid by the hour go close to the seven hour limit on a regular basis.

Defendants almost always engage in the practice in initial disclosures of identifying the address and phone number of witnesses as "c/o the defense attorney" and listing the attorney's office address and phone number. This is often done for witnesses who are not even employees of the defendant, and without regard to whether they are witnesses that may ethically be contacted by the plaintiff's counsel. The rules should explicitly state that the address and phone number shall be the witnesses' address and phone number, not the lawyer's and not the defendant company they work for.

Defendants answer discovery without the normal boilerplate bull.

Defendants ask too many irrelevant ROGS/Doc requests to drive up litigation costs.

Defendants conducting plaintiff depositions that don't begin with the witness's high school experience and work forward year by year and instead focus on the issues.

Defendants could stop sending irrelevant and non-responsive documents.

Defendants purposefully refuse to respond to Discovery in order to drive up the cost of the case (and their fees). They assume Plaintiff firms are not financially viable due to economic conditions and recent recession. They purposefully drive up cost of case and will evade discovery until motions are filed.

Defense attorney not take unnecessary depositions

Defense attorneys not subpoena unnecessary entities.

Defense counsel could provide relevant information without requiring significant motion practice.

Defense counsel not being paid by the hour.

Delay in ruling on motions.

Deny opportunity to file summary judgment until and unless potential movement demonstrates no disputed questions of fact.

Deposition costs could be regulated.

Depositions are just too expensive but necessary because of the unwarranted penchant for granting summary judgment.

Depositions available as needed on secure server.

Depositions can be used as much for harassment as for discovery and lengthy depositions as well as an excessive number of depositions drives up the cost of litigation. Maximum time limits for depositions should be reduced along with the maximum number of depositions permitted which should be flexible according to the size and complexity of the case. There also should be a corresponding increase in the use of designated corporate representative depositions coupled with very strict enforcement of the requirement that such designated witnesses be required to actually have detailed knowledge of the areas for which they have been designated.

Deterrent effect through greater use of sanctions against parties and counsel who abuse the process to try to gain unfair advantage - from fines to striking claims and defenses.

Different tracks based on the size of the case.

Discourage multiple R. 12 and R. 56 motions.

Discourage the filing of summary judgment motions in cases where the question is one of unlawful intent. This could be done by allowing the moving party to file the motion, and then permit oral argument before the non-movant has to file a brief.

Discouraging "dispositive" motions that have no realistic chance.

Discouraging 12b6 motions which drive up costs and delay resolution.

Discouraging if not disallowing summary judgment motions in any case that involves a determination of the decision maker's intent.

Discovery is the heart of my cases, no one admits to discrimination, so it makes sense to me that the majority of litigation costs are discovery related; litigation costs will be reduced when defense lawyers understand that more cases will survive summary judgment and will be tried to a jury, and then they will give more serious consideration to settlement.

Discovery status conferences where the parties report on discovery retrieval to prevent problems/abuses.

Discovery would be less expensive if defendants did not routinely evade relevant requests.

Dismiss affirmative defenses that lack any factual allegations.

Do not set trial dates or require final pretrial compliance prior to ruling on motions for summary judgment.

Don't delay discovery while dispositive motions are pending.

Don't require oppressive numbers of trial notebooks for juries in cases with huge numbers of documents. The cost is overwhelming to a small firm.

Early and difficult to move trial dates that force parties to prepare and consider settlement earlier.

Early conference calls with a magistrate judge on discovery disputes without the necessity to file a motion.

Early discussion and ruling on potentially privileged and relevant matter, especially requiring early production of privilege logs.

Early exchange of documents to be used at trial.

Early exchange of expert reports.

Early judicial management of discovery.

Early knowledge judge view discovery objections and claims of privilege.

Early settlement conferences.

Early settlement conferences with court/mandatory mediation.

Educate judges about E-discovery and ease of collecting this information.

Electronic exchange of documents.

Eliminate frivolous automatic summary judgment motions and 12(b)(6) motions.

Eliminate motions for summary judgment.

Eliminate motions for summary judgment entirely, this would decrease the costs of litigation as there would be no need to discover many facts.

Eliminate point-counterpoint method in summary judgment pleadings.

Eliminate Rule 56; under current practice, it essentially requires proving case twice.

Eliminate summary judgment.

Eliminate summary judgment for questions of motive or intent.

Eliminate summary judgment.

Eliminate summary judgment. This seems counter-intuitive, but it would actually save costs as most cases could be tried in a few days for less attorney time than the parties put into the summary judgment briefing.

Eliminate the "meet and confer" requirement for discovery abuse issues since it does not result in a change in the initial abusive discovery response anyway.

Eliminate the "point-counterpoint" methodology for Rule 56 used in our districts, which is tremendously time consuming and abused. (It is not uncommon for a defendant to have more than 100 alleged undisputed material facts, each of which must be disputed with citations to the record by the plaintiff. Even if disputed by the plaintiff, the Court often ignores this and still grants summary judgment.

Eliminate the arbitrary limit on the number of interrogatories it causes me more time to draft discovery (trying to combine questions). The ease of answering interrogatories is not necessarily proportional to their length, and if one was not worried about squeezing all questions within the limit, one could draft simpler and narrower questions that would not necessarily take longer to answer. One could still allow objections to excessive length to be dealt with initially before the interrogatories must be answered, and the parties could impose mutual limits by agreement in the Rule 26(f).

Eliminate the automatic delay in discovery prior to the Rule 26 hearing.

Eliminate the requirement of statement of facts - waste of time and money - b/c definitely with a doubt has been abused by defendants' counsel who try to bury plaintiffs.

Eliminating the current summary judgment standard. It changes the entire focus -- and cost -- of litigation practice.

Elimination of the Twombly/Iqbal standard in employment discrimination cases.

Encourage court to deny motion for summary judgment if moving party relies on disputed facts.

Encourage defense firms to eliminate minimum billable hour requirements.

Encourage informal discovery between the sides/attorneys.

Encourage settlement discussions early in litigation of cases.

Encouraging more informal discovery.

ENFORCE CIVILITY AMONG THE JUDICIARY AND ALL COUNSEL, NOT JUST BIG FIRM ATTORNEYS.

Enforce defaults and not readily grant 60(b) motions.

Enforce disclosure rules.

Enforce discovery rules and punish sanctionable behavior to get rid of the incentives to stonewall.

Enforce fee shifts for forcing parties to engage in discovery to establish particular facts rather than admitting those facts in the answer or mandatory disclosures.

Enforce Rule 26 disclosures more effectively. Defense counsel still makes us ask for the information in formal discovery before we get necessary documents.

Enforce Rule 26 discovery.

Enforce Rule 56 by imposing sanctions on attorneys who file bad faith affidavits in support of or in opposition to summary judgment motions.

Enforce rules regarding discovery with deadlines for judges to rule on motions to compel. If there is no ruling by a certain date, then the discovery cutoff should automatically be extended by the amount of the delayed ruling. This rule change would lessen the reward for engaging in discovery disputes.

Enforce rules that require disclosure and discovery responses, instead of overly broad objections.

Enforce sanctions for discovery abuses. Much of the costs we deal with relate to trying to get sufficient discovery -- the delay and the costs of filing motions to compel etc. increase costs significantly.

Enforce the existing, traditional standard for granting SJ motions, so it was granted much less frequently. Cases would settle much sooner and for less money.

Enforce the limits on depositions.

Enforce the rules.

Enforce the rules re: protective orders and reject agreed to protective orders that do not meet the standards set forth in the rules. These protective orders unnecessarily restrict the ability for an attorney to engage in informal discovery with other litigants who may have experienced the same or similar problems.

Enforcement of rules and sanctioning of non-compliance. Make this the norm so that practitioners (including myself) no that there is no "wiggle room" which exists now.

Enforcing discovery against defendants and entering sanctions. If defendants knew that withholding information that must be produced would regularly result in sanctions, defendants would not do that and judges would not get bogged down in discovery fights.

Enforcing the duty to disclose under Rule 26 initial disclosures against defendants in civil cases.

Enforcing the FRCP.

Establish standard fee caps for e-discovery.

Evenhanded enforcement of discovery rules.

Evidence in a format that can support opposition to summary judgment drives more depositions - Making summary judgment more difficult can have a ripple effect on the quantity of depositions.

Except in complicated cases set matter for trial within 9 months.

Exchange theory of case and defense.

Expand Rule 26 initial disclosures back to where they were when first adopted. That would really hasten discovery.

Expand scope of automatic disclosures.

Expand the reach of initial disclosures.

Expand the scope of Rule 26 disclosures.

Expansive discovery to allow prompt attention to FRCP 41 dismissals; filing an amended complaint.

Expedited motions practice on discovery motions (less need for demonstrated informal efforts to resolve).

Expediting decisions on pending motions.

Face to face collaborative efforts.

Fairly deny motions for summary judgment where credibility issues are material. This will lead to fewer improper motions for summary judgment being filed.

Faster ruling on motions.

Faster rulings on discovery motions.

Fear of god sanctions for game playing in discovery.

Federal courts can stop spending hundreds of hours on paper trials trying to find ways to enter summary judgments, which increase the costs of everyone in the district courts and which increase the number of appeals. Set cases for trial and the vast majority of cases are settled by the good evaluation skills of attorneys on both sides and the skills of our magistrate judges. Good settlement processes save the district court time and money, reduce appeals, and make the parties more satisfied with resolutions in which they have input. The rules on motions for summary judgment have been abused to encourage such motions in every case, instead of encouraging such motions only in cases in which there are issues of law. The abuses of the rules on motions for summary judgment have short-circuited the settlement process. Parties now refuse to settle until they have fully briefed motions for summary judgment and had the district courts spend great amounts of the courts' time and money on such motions. The abuse of the rules on motions for summary judgment have substantially increased the costs of litigation, drained the resources of the district courts and of the courts of appeals, and made the federal courts less respected.

Fee shifting for motions re discovery disputes.

Finding alternative to written transcripts of depositions.

Focus on issues genuinely in dispute, e.g., courts should press for more stipulations early on facts and press for real Answers rather than blanket denials.

Focused depositions of key witnesses only.

Force compliance with initial disclosures.

Force early mediation.

Force employers to execute mandatory word-searches of all e-mail accounts based on a court-approved word list in every case.

Force more initial disclosure.

Forcing parties to identify which documents are responsive to which specific requests made.

Forget about metadata! (i.e. let regular people copy documents).

Frequent status conferences with Court/magistrate.

Frequently, in the effort to appear cooperative, organizational clients produce mounds of unimportant materials and fail to produce more clearly relevant information. Joint search and review efforts could help eliminate both problems.

Further limit length of depositions of non-technical witnesses.

Get rid of billable hours - would greatly reduce the number of frivolous motions and the incentive to draw out cases.

Get rid of discovery cutoff dates. The cutoff dates encourage expensive discovery disputes because a party is rewarded for having opposed a discovery request, i.e., the opposing party uses up the allotted time for preliminary discovery with the dispute.

Get rid of initial disclosures. Defense counsel don't provide complete information, and there are no consequences.

Get rid of mandatory nonbinding arbitration in employment and other fee shifting cases.

Getting parties to cooperate with each other.

Greater initial disclosures. Initial disclosures are minimal and courts do not enforce.

Guidance from courts re: ESI.

Have a rule that no interrogatory can be served if that information would be available from a live witness. Interrogatories are usually just used by defendants to oppress plaintiffs and the information becomes available through other devices anyway.

Have an early conference with a mediator or magistrate to test legal theories and factual assumptions.

Have coordinated bar efforts to create and maintain updated model protective/confidentiality orders so that these need not be litigated and negotiated in each case. Also these orders must provide for the open airing of most information once in Court.

Have discovery guidelines for each district. I.e. Comparator evidence is discoverable and will be routinely granted when there is a motion to compel. No DMEs for plaintiffs who claim garden variety emotional distress. Sanctions WILL be awarded for opposing the production of these documents.

Have form interrogatories and form document requests (similar to California state practice) that can be used without counting against the limits and that can (almost) never be objected to. Eliminate protective orders in most cases; limit them to truly confidential things and not simply ordinary business or personnel information.

Have form Protective orders that are routinely approved.

Have judges more involved in discovery process; hopefully that would encourage more defense lawyers to be more forthcoming in responding to discovery.

Have judges rule on pretrial motions (motion in limine) at least 2 weeks in advance of trial.

Have more confidence in juries, let juries decide factual issues, let them decide what is reasonable; let them assess weight of the evidence. In other words, stop granting summary judgment motions as a matter of course in employment cases. The judicial bias in these cases is widely known, and does a great disservice to the jury system, and the Constitution.

Have the Defendant's go ahead and produce the emails in question instead of threatening to make us go through getting a copy of their hard drives.

Have the Defense Bar stop sending unnecessary documents--they know what the Plaintiffs are looking for and are (more likely than not) being purposely evasive.

Have trial judge, judge's (knowledgeable) clerk or magistrate judge hold tele cons with parties counsel more frequently to discuss status of discovery, scheduling etc.

Having judges rule on dispositive motions well in advance of trial.

Hold mandatory mediations after SJ motion denied (with different judge) but before trial is scheduled.

Holding parties to admissions made in the motion for summary judgment.

I do not necessarily recommend it, but mandatory mediation would help.

Identification AND production at the outset of all non-privileged documents in the possession of each party that might reasonably be regarded as relevant to ALL the asserted claims and defenses in the case.

Identify 3 key depositions, per side, limit them to 3 hours apiece, and then mediate.

If a corporate defendant would designate only one individual to testify in a 30(B)(6) deposition rather than designating multiple individuals in multiple locations (usually out of state).

Requiring defendants to travel to the location where most of the parties and counsel are located would help as well.

If defense counsel was required to answer discovery and not hide behind boilerplate objections.

If expert reports are provided, no depositions.

If judges ruled more promptly and with more vigor on Motions to Compel, this would decrease the cost of litigation by sending a message that petty and baseless objections will not be rewarded.

If parties would be more forthcoming in responding to interrogatories and document requests without requiring opposing counsel to follow up with a discovery deficiency letter--when most of the more valuable documents are produced.

If the parties identified to which request a document is being produced or identified the documents in some general way with named folders. With the production of electronic documents, I frequently receive a disk with documents and there's no rhyme or reason to the order of the documents on the disk.

If there were an option for "Go directly to trial within 90 days; no discovery" that could be chosen if all parties consented, I wonder if there would ever be a case in which all parties would consent?

If we are going to continue with the Rule 26(a) initial disclosures requirement, judges should enforce it.

Immediate access to magistrates.

Immediate ruling by magistrate judges on all of the "boilerplate" objections stuffed into written discovery responses by large firm.

Impose meaningful sanctions on failure to provide mandatory initial disclosure, and increase the information required to be exchanged in this fashion.

Impose sanctions against parties who wrongly withhold information from discovery.

Impose sanctions on parties and attorneys who file frivolous motions to dismiss and motions for summary judgment.

Impose stiff sanctions on attorneys and parties who file multiple objections and unresponsive answers to discovery requests.

Imposing costs against a party challenging the admissibility of an expert. Defendants are filing Daubert challenges as often as they are summary judgments. It is just a tactic to drive up costs.

In all employment discrimination cases, court should order production of personnel files of all comparable employees with a protective order protecting the confidentiality of the employee files.

In Defendants' statements of facts in support of summary judgment, they should be required to include all facts contained in the complaint, answers to interrogatories, depositions that help the client.

In employment cases, a costly tactic used by employers is to request documents from former or subsequent employers, for the sole purpose of harassing and embarrassing the plaintiff. The information requested is rarely relevant or admissible at trial, but is used because it provides a billing opportunity and is used to pressure employees to drop their claims or to settle for a lesser amount in order to avoid embarrassment.

In employment litigation, the problem is that the Plaintiff's lawyer is severely restricted as to whom they may talk to--- hence, a lot of depositions need to be taken. Perhaps those restrictions could be loosened up.

In ERISA actions, the courts are split as to what extent they permit discovery. A uniform practice should be implemented so that a plaintiff does not have to bring a separate motion proceeding to be entitled to discovery.

In the judicial oversight on a case, treat each case as if it were unique and focus on what actually needs to be done. The reaction of clients and counsel will be surprising.

Include early mediation process after initial disclosures.

Increase minimum interrogatories and maximum depositions.

Increase number of request of admissions, particular as to identification by class of individual comparators.

Increase penalties for discovery abuse.

Increase sanctions for evasive discovery responses.

Increase the judge's personal (non-written) contact with counsel, from beginning to the end of the case.

Increase the kind of information that must be disclosed in employment cases (ex: personnel files).

Increase the number of interrogatories and requests for admissions permitted from 25 per case to 75 per claim and do not allow local rules to limit discovery.

Increase the number of Interrogatories permitted and delete Rule 33(d) except in the case of Interrogatories seeking identification of documents or the content of documents.

Increase the scope and use of 30(b)(6) depositions. We have one case where the Court denied a 30(b)(6) deposition instead causing us to take 6-8 unnecessary depositions.

Increased use of telephone conference calls, particularly with the court.

Informal questioning of minor witnesses instead of by deposition.

Initial disclosures that include fact witness statements and document indexes.

Inordinate costs result from a practice sanctioned by some courts of requiring on a summary judgment motion that the moving party set out each of the facts it considers "undisputed," in separately numbered paragraph -- a practice that may seem innocuous on its face. However,

because the courts will put no limitation on the number of enumerated facts, a party will often set forth 200, 300 or more, so-called "undisputed material facts" to which the non-moving party must then respond. Thousands of dollars, if not tens of thousands of dollars, in unnecessary legal costs result.

Involving magistrates in discussions regarding permissible discovery at the commencement of the case.

Issue appropriate sanctions when counsel unnecessarily delay or impede discovery.

It might be helpful if there was detailed discussion of the discovery intentions of each side, early in the case, with the Court, so that the Court could weigh in and avoid unnecessary and obstructive objections and tactics.

Judge should be much more proactive at initial case management conference re narrowing the issues; e.g., deeming evasive answers to complaints admitted; striking legally inappropriate and factually unsupported affirmative defenses; determining factual basis for categorizing facts as "disputed"; issuing standing orders on standard discovery and evidentiary disputes.

Judge to recommend (but not require) mediation in every case early on.

Judges and Magistrate Judges better trained in settling and strong encouraging third party mediation early or before PTO are prepared.

Judges and magistrates should be encouraged to grant sanctions more often and in significant amounts (proportional to the resources of the party) to deter discovery abuse.

Judges holding regular discovery conferences.

Judges indicating that they will deny defendant's inappropriate requests for motions to dismiss and sj motions and go to trial on issues of fact.

judges must force defense counsel to stop obstructing discovery; all too often defense counsel obstructs on the grounds of relevance - this objection should be deferred until trial; confidentiality agreements can guard against any harm from broad discovery yet allow the case not to get gummed over relevance disputes and objections.

Judges ordering expeditious production of discovery.

Judges should do all they can to create an expectation that counsel will cooperate.

Judges should enforce the rules more, and be more willing to impose sanctions when counsel and parties routinely object and delay discovery responses.

Judges should not rush cases forward, and insist on trial dates if a party is not ready. Where is the fire?

Judges should not tolerate the defense bar's objections and resistance to discoverable evidence; when found, sanction somehow to get them to stop this common practice.

Judges should resolve discovery issues early in cases and do so without requiring the submission of motions on discovery.

Judges should take a more active role in ensuring that defense counsel does not run up discovery costs by playing hide the ball.

Judges should tighten enforcement of FRCP 26.

Judges should welcome the opportunity to resolve discovery disputes, instead of discouraging counsel from bringing discovery disputes before the court.

Judicial enforcement of discovery (and other) deadlines instead of routine granting of extension requests.

Judicially-approved pattern discovery for types of cases.

judicious use of imposition of attorney's fees.

Just do regular searches on the documents instead of the searches of Meta data.

Large law firms can advise corporations to resolve discrimination, instead of spending large amounts of money to fight discrimination cases. Large law firms now feed off the fears of corporations and eagerly tell corporations that the law firms will fight discrimination cases forever, as long as the law firms are paid to do so.

Lawyers who prepare for trial, as opposed to summary judgment, take shorter and more efficient (thus, inexpensive) depositions because the deposition is more strategic and less of a meandering, fishing expedition.

Less bull.

Less emphasis on Summary Judgment.

Less leeway on defendants to resist discovery, combined with appropriate protective measures to guarantee privacy and non-disclosure of true proprietary info.

Less reliance on paper.

Lessing standard of Rule 56 and 12(b)(6) motions

Let the jury decide cases and not have to prepare every case to prevent losing a summary judgment motion. This greatly increases costs, for both sides especially in employment and civil rights cases.

Limit (further) deposition time period.

Limit deposition time.

Limit depositions of non party fact witnesses to 2 hours absent exigent circumstances.

Limit discovery.

Limit expert witness discovery until dispositive motions ruled on - if experts just going to damage amounts

Limit number of requests for production unless agreed upon by opponent or good cause shown.

Limit or eliminate the right of parties to seek sanctions. We have one case where the judge has permitted sanctions motions to the point of the sanction motions costing more time and money than the rest of the litigation.

Limit summary judgment motions.

Limit the experts' fees to prep and appearance - I've had door-to-door charges assessed time and again.

Limit the grant of summary judgment to truly meritless cases. As it is now, plaintiffs feel compelled to sometimes overdo discovery out of fear that the court is going to grant summary judgment, even in cases with strong evidence.

Limit the granting of Rule 56 motions b/c right now - defendants are encouraged to file b/c it's highly probably the court will grant the motion.

Limit the length of depositions intelligently.

Limit the number of interrogatories to 10.

Limit the types of e-discovery.

Limit the use of summary judgment motions in every case.

Limit time of fact depositions to 3 hours.

Limit use of summary judgment motions.

Limitations on objections to discovery requests.

Limiting deposition time of parties to 5 hours and others to 3.

Limits on number depositions.

Magistrates/special masters with expertise in discovery issues who could act as facilitators in a more collaborative development of broad discovery plans by counsel. To address scope and relevance issues in advance - before parties become entrenched in adversarial positions - might avert disputes, and certainly would cut down on lag time experienced from the time it takes to draft/serve discovery requests through the 30+ days for a response/objection to the obligatory (albeit often perfunctory) meet and confer to the drafting/filing of motions to compel or protective orders and the briefing cycle that follows and ultimately a judicial ruling.

Make automatic disclosure of all relevant documents in party's possession.

Make Defendants produce the documents requested and confer with opposing counsel instead of making us go through boxes of information that they know is irrelevant.

Make it a requirement that certain documents have to be produced without a request.

Make plaintiffs' attorneys work on a contingent fee basis so they bring only worthwhile cases.

Make summary judgment more difficult to win.

Make the judiciary more accessible. Most law and motion matters could be avoided entirely if the parties simply discussed the matter with the judge before filing a motion. Taking the judge's "temperature" on a particular issue often resolves the matter between counsel.

Making mandatory initial disclosures include all relevant information -- not only that which supports a party's claims or defenses.

Making quick work of my Iqbal and Daubert motions. They certainly have merit in some cases, but not in most. But they, like summary judgments, have become prevalent in far too many cases.

Making summary judgment disfavored.

Making sure that documents produced are produced in a manner to facilitate searching them - requires co-operative professionalism on part of attorneys and vigilance by Court to make sure that happens.

Managers of the defendant should be produced in the jurisdiction or state of the litigation.

Mandate exchange of all relevant documents.

Mandate initial production of documents with the Rule 26 disclosures---rather than just the identification of types of documents. Defendants never produce documents with the Rule 26 disclosures, requiring additional requests for production.

Mandate mediation post-discovery but pre-summary judgment. Mediation should be conducted by third party professional.

Mandate sanctions if a party is found to engage in discovery abuses.

Mandate that defense attorneys are not paid for unnecessarily prolonging litigation.

Mandate the production of certain types of documents for certain types of cases. Example: the plaintiff's employment file in an employment discrimination case. There is no reason that should be the subject of a request for production.

Mandatory disclosures of basic documents such as personnel files of the client and managers and comparators.

Mandatory early mediation of law suits.

Mandatory exchange of all documents that may be used at trial.

Mandatory initial discovery disclosure obligations with real teeth for those violating the rules. Currently, in every single case we handle discovery is not produced. Recently, we were forced to file and won 7 different discovery motions on items that should have been produced in 26 disclosures. Although we prevailed on the 7 different motions, no monetary sanctions or other penalties were imposed. This encourages discovery gamesmanship.

Mandatory mediation early in the case, ideally by a federal judge, magistrate judge, or someone else with experience deciding the types of cases at issue.

Mandatory production in electronic mode at no cost to the receiving party. Exchange of logs of discovery.

Mandatory sanctions issued against a party losing a discovery motion.

Mandatory settlement conferences early in cases.

Meaningful cooperation between counsel through frequent and frank communication.

Model discovery requests and interrogatory requests for specific types of cases should be adopted by the district as part of local rules. This will give parties a good idea of what sorts of discovery is "automatic" which would avoid fights over dumb disputes.

More active judges ruling more quickly on discovery and other motions.

More ample initial disclosures.

More and earlier judicial and settlement conferences.

More and earlier mediations.

More appropriate scheduling so that discovery/dispositive motions/things like proposed PTO do not overlap in a time wasteful manner.

More balanced approach to summary judgment; making less likely summary judgment may be relied on by defendants regardless of discovery obligations.

More certain trial dates that come sooner, rather than later.

More communication during discovery rather than playing tactical gotcha games.

More consequences for not responding to discovery (sanctions after motions to compel are granted).

More consistent enforcement of discovery sanctions against parties who lose on motions to compel.

More court efforts to settle as case proceeds.

More effective ways of requiring production of essential discovery materials: motions to compel excessively complex and time consuming to complete, etc.

More extensive initial disclosures by both sides, with significant sanctions for counsel and clients who fail to make appropriate initial disclosures and who fail to supplement in a timely manner.

More frequent imposition of sanctions for dilatory conduct during discovery.

More informal discovery.

More judges to keep cases on track and moving to trial, delays cause lawyers to bill and spend resources unnecessarily.

More judicial guidance during discovery.

More judicial encouragement of alternative dispute resolution at various points.

More judicial involvement in discovery.

More judicial sanctions for discovery abuse.

More liberal award of fees in the event (a) a motion to compel discovery is granted, or (b) if supplemental discovery responses are made after the motion to compel discovery is filed.

More meaningful discovery planning and more serious meet and confers.

More meaningful mandatory initial disclosures.

More open e-discovery.

More rigid enforcement of timelines (no routine granting of continuances or extensions).

More routinely impose sanctions for failure to voluntarily produce relevant information, particularly documents, electronic or otherwise.

More sanctions against attorneys and clients who hide the ball or delay discovery.

More strictly enforce the FRCP.

More understanding from the court that plaintiffs/employees must have access to defendant/employer's records.

More utilization of the 30(b)(6) deposition.

More willingness by courts to impose sanctions for abuse of discovery process would likely curtail the discovery abuses that drive up litigation costs.

More willingness of defendants to produce electronic information in an efficient manner.

More written decisions on discovery disputes which would give attorneys a clearer picture of the types of information courts will order parties to produce.

Motions for Summary Judgment should be summarily denied without briefing in cases that have obvious issues of fact. A pre-summary-judgment conference (analogous to a pre-trial conference) could determine that.

Move all discovery to computer managed systems (if the law firms have the technology to do so) without any actual paper production. All searchable, etc.

Much shorter discovery periods. Trial dates should be set near the beginning of the case and the lawyers should be help to it.

Need to recognize that defense counsel have an incentive to improperly withhold relevant information, which leads to motions to compel, followed by renewed discovery, including re-depositions of defendants' corporate officers.

Not having to do point-by-point responses to movant's statement of relevant facts for summary judgment motions. Many of the facts alleged as material are not.

Not requiring point by point refutation by plaintiffs in responding to summary judgment motions by the defendant.

Opposing counsel could make a better effort to provide legitimate written discovery responses rather than hiding behind legalistic bull.

Outlaw the practice of attorneys making the same objection to every specific interrogatory and documents request.

Parties could agree to review documents before copies are produced.

Parties should be able to schedule motion hearings for motions to compel, without filing an actual motion. Motions to compel are unusually time consuming to draft, but all a judge really has to do is read the discovery request, and response, and the judge tends to have a good idea on how to rule, without briefing. Faster rulings on motions to compel means the rest of the case need not be held in abeyance.

Pattern discovery requests could be approved for certain claims, such as employment discrimination.

Pay defense lawyers based on how much money they saved their clients. The hourly defense practice model accounts for most of the delay and cost of litigation.

Penalize stonewalling.

Perhaps the Court could provide cheaper court reporters than what we have to pay private firms.

Permit as much time as needed for discovery.

Permit ex parte communications with current employees who are not an officer of the defendant entity.

Permit more non-litigation contact between counsel and witnesses.

Permit non-stenographic recording of all depositions in all cases with option of a party hiring a court reporter if it so chooses.

Permitting more cases to go to trial rather than holding a trial on the discovery documents where the judge in effect decides issues of fact on a purported "reasonable juror" standard.

Postpone damages expert disclosures and discovery until after ruling on summary judgment motions.

Preliminary discovery completed in good faith and then both parties attend a mandated settlement conference.

Pre-summary judgment hearings: making party wishing to file SJ motion demonstrate the absence of facts prior to allowing filing of motion. Legal requirement that moving party demonstrate absence of proof rarely enforced.

Prevent overuse of objections to discovery requests.

Production of expert report should not be required until discovery is complete; and expert opinions should be strictly limited (without need for MIL) to those expressed in their reports - making expert depositions unnecessary.

Professional court staff to handle scheduling, routine matters, time extensions in a prompt manner.

Professionalism and courtesy.

Prohibit the use of Protective Orders so that public information remains public. Protective Orders are often granted to resolve discovery disputes. This requires a discovery dispute to obtain the same information in a subsequent case.

Prompt court intervention in discovery matters.

Prompt resolution of objections to discovery and sanctions for frivolous objections.

Prompt responses.

Prompt ruling on motions by judges.

Prompt informal conferences with court involvement early in a case to avoid needless motion practice.

Provide a less formal more effective way to deal with discovery issues.

Provide bench trials only for personal injury cases of modest value. The right to jury trial can be preserved by permitting a party who disagrees with the judgment from the bench trial to request a jury trial but the judgment from the bench trial should be admissible evidence at the jury trial.

Provide for expedited resolution of discovery disputes.

Provide greater financial support for court hosted settlement conferences.

Provision of automatic disclosure documents with automatic disclosure.

Punish defendants that delay or obstruct the provision of legitimate discovery.

Punish discovery abuses.

R26a1 - mandatory exchange of documents rather than just identifying location of documents.

R45 - Each party to pay for their own copy of deposition.

Real Rule 26 disclosures.

Reduce cost of depositions (including video).

Reduce Ediscovery costs and volume.

Reduce summary judgment.

Reduce summary judgment motions. Probably half or more of the discovery we conduct (and more than half of depositions) are to resist SJ motions that are always filed by defendants. Judges should experiment to find ways to discourage SJ motions except in limited cases. Currently, defense counsel exercise no discretion; SJ is filed in 100% of cases. Nearly all discussions of reform focus on perceived abuses by plaintiffs, but we see defendants abuse the process more; courts virtually never sanction defendants for failing to admit facts in the complaint that it knows to be true and which have to then be the subject of discovery, etc. Defendants abuse discovery to be oppressive on individual litigants. And worse, summary judgment abuse is rampant.

Reduce the amount of discovery.

Reduce the complexity of the local rules.

Reduce the differences in the procedures and rules of judges within the same judicial district.

Reduce the filing fee substantially.

Reduce witness fees substantially.

Reduced Court Reporters fees.

Reduced summary judgment motions.

Reduction in motions for summary judgment in cases where there is no basis for it. SJ briefs take a huge amount of attorney time and really jack up the cost of litigation. Judges should adhere to the standards and perhaps impose sanctions on attorneys who file for SJ in cases where there is clearly no basis.

Refusing to allow depositions on written questions in employment cases that are indiscriminate; for example, to past or current employers, or for medical records when there is only a "garden variety" claim for emotional distress.

Regular and informal discovery conferences.

Regularly impose sanctions for a party's untimely and/or unreasonable discovery objections and failure to respond or produce.

Regulate the costs charged by court reporters; this cost is the primary driver of plaintiffs' cases.

Relax rules on expert witness reports -- allow document production and specific interrogatories to the party to substitute for report.

Remove or expand the limit on the number of allowable less expensive written discovery methods such as interrogatories and admissions.

Require adequate responses to properly worded interrogatories with penalties.

Require all discovery be provided with name(s) of persons involved in its preparation and declarations as to the efforts undertaken to provide the information sought.

Require all litigants to produce in the Rule 26 meeting all documents that support each allegation and/or affirmative defense in the case. In employment cases the majority of the effort in litigation goes to the production of medical files and the production of documents pertaining similarly situated employees and/or production of documents related to the allegation that other employees were treated differently than the plaintiff. These documents in employment cases should be ready and available since the Rule 26 meeting and disclosures. There should be no controversy that these documents are pertinent, relevant and are not protected by any privilege in litigation that should prevent their production. Moreover, when the employer has control of all of them and has them readily available as a matter in the common course of its business.

Require attorneys (particularly hourly-billing attorneys), at the beginning of a case, to disclose to their clients (a) a budget of expected fees and costs for the case from beginning to end; and (b) aggregate data from other cases as to what they cost, and how they are resolved, on average.

Require binding conference with the presiding judge to show cause why filing of summary judgment should be permitted, and grant judge authority to refuse to allow filing where cause is not shown.

Require corporate deponents to travel to the district where the litigation is conducted rather than requiring both sets of attorneys to travel out of state.

Require counsel to submit a sworn affidavit that they have counseled their client to conduct a thorough search for responsive information, that all responsive information that is not privilege has been provided. Sometimes clients do not undertake the required effort, but the attorneys don't know that until later. Requiring attorneys to certify this would force them to have the appropriate conversation with clients and increase confidence that what is provided really is all there is.

Example, in a recent case we received TEN supplemental discovery responses. All the information was available from the outset of the case.

Require courts to set trial dates when set summary judgment filing date.

Require defense counsel to provide an accurate litigation budget (through trial) EARLY to their client.

Require defense counsel to specify whether they represent witnesses in their individual capacities early in the litigation.

Require each party to list areas of dispute as to scope of electronic discovery.

Require effective disclosure.

Require electronic service of all written discovery and responses thereto unless parties agree otherwise or for good cause.

Require full and complete responses to initial disclosures, including anticipated impeachment evidence.

Require Judges to Rule on pending discovery motions in a timely manner.

Require more pre-filing conferences regarding dispositive motions, and make the rules regarding the preparation of pleadings relating to dispositive motions less onerous.

Require oral arguments on dispositive motions.

Require parties' counsel to contact trial judge chambers every 30 days during discovery period to report status of discovery and problems with discovery.

Require parties to fully answer interrogatories. A disturbing trend has been for defendants to answer interrogatories by saying that "this question is better answered by a deposition." That is not a proper response, but I have been seeing it quite a bit lately.

Require parties to provide complete answers to interrogatories and document requests, without stating lots of disclaimers and objections.

Require parties to submit their cases to mediation.

Require parties who are in possession of relevant information (particularly documents, electronic or otherwise) to voluntarily turn over such documents at the outset of the case without a request from the opposing side.

Require production of documents identified with Rule 26(a)(1) disclosures.

Require production of documents with the Rule 26 disclosures, rather than the useless "identification" requirement.

Require service of discovery requests in word processable format, so the recipient need not input them.

Require that all documents identified by a party in the rule 26 initial disclosures be disclosed, not simply listed; for all individuals identified in such disclosures, require the party to produce all statements of said individuals in their possession which pertain to the subject of the litigation. Further, to identify all statements (depositions, affidavits, etc) in the party's possession from each such witness, whether the statement pertains to the subject of the litigation or not.

Require that all e-mails, letters, communications etc. between an attorney and an expert pertaining to the retention and report of a testifying expert (including all drafts and responses thereto) be produced voluntarily along with the report of the expert.

Require that defendants respond fully to discovery by promptly being available to rule on discovery disputes.

Require that ESI be stored in a reasonably accessible fashion to eliminated motion practice about it.

Require the parties to meet and exchange information about available discovery and work out a joint plan for document discovery that does not require formal requests.

Require the production of witnesses' home addresses, telephone numbers and e-mail addresses (as well as work information).

Require, or at least encourage, cost-sharing between the parties of depo transcripts.

Required collection and data dump of ESI into "data room" for searches by either side and then required disclosure of documents to be used.

Required disclosures/production of documents at the beginning of a case, even without discovery requests (per D. Kan. Rules).

Requiring a good faith basis for a discovery objection.

Requiring counsel as part of their Initial Disclosures to disclose any Electronically Stored Information likely to contain discoverable information and the software necessary to access this data.

Requiring fast input/rulings/involvement from court officials to resolve discovery disputes. IN SD Tex, defendants almost always object to magistrate judge b/c they know it will delay discovery and trial. All pretrial discovery should be sent to magistrate judge, who should set aside one day week to quickly hear dispute.

Restore notice pleading.

Restrict depositions to parties and experts.

Restricted use of video depositions.

Rewrite Rule 56 to make it clear summary judgment motions are the exception and not the rule. This will result in better more direct discovery, thus lowering costs and saving time.

RFAs are useless. Defendants refuse to respond legitimately to the RFA, and instead evade answering the RFA by intentionally misreading them. Sanctions are a useless deterrent.

Routine case management conferences would force the parties to bring issues promptly to the court's attention.

Routinely objecting to discovery requests for the sake of objecting should not be allowed.
Prohibit boilerplate objections.

Rule 26 exchanges all docs and witnesses, not just those intend to rely.

Rule providing that prophylactic objections to written discovery requests result in waiver of all objections.

Rulings on motions to compel should be simplified and more timely dealt with.

Run all discovery concurrently and have one dispositive motion if necessary. Do not convert 12(b)(6) motions to Rule 56 motions and do threshold discovery and motion practice.

Sanction abusive discovery tactics.

Sanction abusive summary judgment motions.

Sanction for defense counsel who fail to produce relevant documents on a timely basis.

Sanction for improper filing SJ motions.

Sanction parties for failing to answer discovery and penalize parties who fail to make complete responses to initial disclosures and other discovery by not allowing use of the undisclosed evidence at trial.

Sanction parties who fail to produce responsive documents and data.

Sanctioning lawyers and clients who routinely refuse to answer any discovery because of 'over breadth' and other general objections.

Sanctions for attorneys who are abusive in depositions.

Sanctions for filing frivolous Motions for Summary Judgment.

Sanctions for filing frivolous motions for summary judgment.

Sanctions for frivolously withholding documents.

Sanctions for hide the ball tactics.

Sanctions imposed on parties who fail to cooperate in discovery.

Sanctions imposed on the defense for raising objections, necessitating motions to compel for documents and answers that are clearly relevant and required. We get discovery answers that are ENTIRELY objections, which then require time to engage in good faith discussions about what is needed, and usually motion practice. If sanctions were awarded when these kinds of objections are made, it would drastically cut down on discovery expenses. Actually taking

depositions and reviewing documents once they are produced is not perceived as prohibitively expensive.

Sanctions should be applied against parties and counsel who fail to comply with rules in providing written discovery responses. Plaintiffs resort to depositions because of the routine technical objections to doc. requests, admissions, and interrogatories.

Sanctions should be more frequently imposed for any discovery objection that is not clearly supported by existing case law.

Set a firm trial date at an early stage and require early mediation or settlement conferences, after disclosures but before considerable discovery is completed.

set fee structure for deposition costs & shorten usual time for taking deposition (e.g., usually DSO sets depo limit @ 7 hrs; make 4 hrs the norm & require special request for additional time.) this can't be done by agreement as firms w/ greater resources insist on longer time.

Set schedules for production.

Set short discovery deadlines.

Set trial dates early and monitor progress.

Set up deposition rooms in the federal courthouses and require the depositions to take place in these rooms; this will prevent unprofessional practices during depositions and lower costs and delays.

Settlement conferences as early as practical.

Severely restrict the circumstances under which summary judgment can be granted.

Sharply decrease the use of Rule 56 -- modern federal civil litigation is all about summary judgment, not trial. What a mess.

Short page limit for facts alleged to be undisputed in connection with motion for summary judgment.

Shorten depositions to a presumptive 3 hour limitation.

Somehow make court more like small claims court.

Something to deal with summary judgment problems. In this district summary judgment motions are filed in every single case, regardless of whether there is any plausible reason to grant it. The judges review these and essentially hold Plaintiffs to a requirement that they "win" the case in the motion, rather than show there is a basis for a trial. It makes discovery and responding to these motions extremely expensive. We have essentially tried the case in the summary judgment

papers and hope that the judge weighs the evidence and credibility favorably to plaintiff. The likelihood that a case will survive summary judgment in state court is MUCH higher, which has the effect of not as many extensive motions for summary judgment being filed. In state court it is a waste of money to file a motion for summary judgment unless there are very good grounds - it helps, but most defense counsel still file them in state court anyway. They aren't as cumbersome to respond to and not as much time and money is sunk into them.

Specifically stating that FRCP applies to ERISA welfare benefits litigation. A judicial fiction has been created that ERISA litigation of this type is like admin law and discovery must be severely limited.

Standard Interrogatories and Requests for Production Documents.

Standard production orders at the outset of the case in employment cases (damage calculations and support, documents used in support of case, personnel file, emails/documents relating to adverse employment action at issue, documents relating to comparators).

Statutory requirements regarding retention of ESI that is more specific (e-discovery becomes expensive, in part, because of short-lived document retention/destruction - particularly with emails - which make retrieval in discovery more expensive - which costs are increased exponentially with discovery disputes between counsel).

Stop allowing defendants to interpose frivolous objections that have repeatedly been overruled in other cases.

Stop discovery abuses of defense counsel by awarding costs if a motion to compel is filed.

Stop encouraging summary judgment motions on cases that have material questions of fact. The problem rests with appellate courts never setting aside sj for a defendant. There is no balance anymore.

Stop overusing summary judgment.

Stop requiring the filing of "working copies" of summary judgment briefs and exhibits. Printing and copying an 18 - 24 inch stack of paper is not cheap. The government that can rack up trillion dollar deficits can pay to print their own "working copies."

Stop unnecessary holds on initial discovery.

Stop using summary judgment as a weapon against plaintiffs. We spend way too much time defending against them.

Stop with the picayune requirements. Font sizes, colors of documents, ridiculous things that are burdensome on the attorneys, a waste of time for clerks, and have nothing to do with the merits of the case.

Stopping obstruction of discovery by parties.

Streamline the trial management orders so they do not require so much time and expense to complete.

Streamlined motion to compel practices.

Strict judicial enforcement of the timelines set forth in the rules.

Stricter enforcement of time limits on depositions.

Strictly enforce Rule 26(a) initial disclosures. Most seem to take this as a joke when it could save so much time and money.

Substantial attorney and client sanctions for obstructing discovery, and for delaying requested disclosures until filing a summary judgment motion.

Summary judgment abuse must be dealt with. Such motions are now expected in every case -- regardless of the strength of the merits -- and are oftentimes are (1) little more than a billing opportunity for the moving party's attorneys, and (2) as a shot in the dark to see if the judge will end the case before trial. One-way fee shifting might one approach, such that the nonmoving party may recover fees where the judge decides that the motion failed to meet some minimal standard of validity.

Summary judgment has become too routine; defendants will wait for a ruling on a summary judgment motion before getting serious about settlement.

Summary judgment in employment cases is a matter of course. This is because the federal judiciary is perceived as hostile to employment claims. As such, Defendants will file for summary judgment in every case, even in cases of fairly clear liability, because there is a chance that a conservative judge will deliver them from liability for free.

Summary judgment is granted too frequently, primarily due to fact finding by judges, resulting in injustice, appeals, motions for reconsideration, and strain on the system. Trials would be more efficient and cheaper.

Summary judgment is nothing more than the "first" trial. Process needs to be streamlined less cumbersome.

Summary judgment motions should be disallowed without advance permission of the court. They are abusive, hugely expensive, and too time-consuming. Judges use them inappropriately to clear dockets.

Summary judgment motions should be limited in employment discrimination cases. Defendants should be required to seek leave to file a motion for summary judgment, establishing good cause in 10 pages or less, with sanctions for frivolous motions.

Summary judgment motions take up inordinate time for parties and the court. Courts should discourage the filing of summary judgment by holding hearings as to whether summary judgment is appropriate.

Summary judgment motions that involve credibility disputes should be denied more often.

Summary judgment practice should be substantially curtailed. Defendants will seek summary judgment notwithstanding the existence of disputes of material fact that all parties know about, usually because they consider summary judgment practice a form of roulette -- they may spin the wheel and turn out lucky. Judges should issue more sanctions for these kinds of summary judgment motions, which in turn would reduce their workload by sending a clear message that Rule 56 motions are for limited circumstances, not all.

Summary judgment promotes the billing attorney's incentive to manufacture work (billing opportunities), rather than promote ways to resolving the case early in the process.

Summary-judgment motions are filed in almost every case and often in an abusive manner designed to drive up the costs of litigation. Summary-judgment motions that raise obvious issues of fact should be summarily denied without the need of responsive briefing, and summary judgment motions that are frivolous should be subject to sanctions in the same way that frivolous complaints are. Courts should employ a procedure like a pre-summary-judgment conference (analogous to a pre-trial conference) to ferret out and dispose of frivolous or unsupportable summary judgment motions.

Summary-judgment motions that raise obvious issues of fact should be summarily denied without the need of responsive briefing.

Telephone access to the Magistrate Judge when discovery disputes arise. Now, in order to resolve a dispute, takes usually 100 pages of pleadings and often two months from dispute to ruling. Sanctions, even in the unlikely event they are imposed, are ineffective. If, after a phone call, the MJ decides she needs more briefing, she can ask for it. The current procedure assumes the MJ has never heard a discovery dispute before and thus the parties must brief every possible issue. A phone call takes 2 hours; the current method takes two months to resolve even the most simple discovery dispute.

Test plaintiffs.

The 7-hour deposition length should be shortened, probably by 50%. Illinois state court has a three-hour limit that works fine.

The abuse and overuse of summary judgment motions must be controlled. This will not happen however until the courts more closely abide by the Supreme Court's dictates that, on a motion for summary judgment, the court must not weigh the facts and, perhaps more importantly, must draw all reasonable inferences from the facts in favor of the non-moving party. All too often, the courts will draw inferences from the facts in favor of the moving party - a deviation that leads directly to an improper grant of summary judgment and only further encourages the proliferation of unwarranted summary judgment motions.

The cottage industry spent on discovery disputes instead of trying to actually resolve the case and this may also be the fault of the insurance companies who do not want to settle.

The Courts' willingness to grant summary judgment causes the parties to have to take more depositions, because affidavits are disfavored. If Courts stopped granting summary judgment, the costs of discovery would decrease.

The entry of sanctions for abusive discovery practices eventually will reduce such abuse, thus lowering costs.

The filing fee is extremely steep for most litigants. \$350 is a lot of money for most Arkansans.

The filing of dispositive motions should be exception, not the rule. The granting of summary judgment should be the exception, not the rule. Judges should spend the bulk of their time on the bench, trying cases, not in their chambers deciding cases that should be decided by a jury.

The initial disclosure rules should revert to the 1993 version, which required disclosure of all relevant evidence, even that which does not help or support your side. The elimination of that requirement simply emboldened defendants to withhold evidence they know is unhelpful simply because they hope it won't be requested formally or because they can avoid producing it via clever objections to document requests.

The judge assigned the case should actively engage the parties and lawyers in all aspects of the case. Help narrow issues, require a discovery plan and stick too it, make sure deadlines are met and be available to resolve disputes. Mostly the judge needs to convey that all aspects of the litigation are important, that the judge is here to help and the judge must model the types of behavior, civility and professionalism she expects from the layers etc. If the judge conveys he does not care or does not want to be "bothered" with discovery disputes etc, then the message will be that the lawyers are on their own. Lawyers will then do what they think they can get away with.

The main inflator of the cost of litigation is that summary judgment motions have become routine in every case in federal court. If summary judgment motions were not routine, defendants be easier to deal with in discovery.

The scope of initial disclosures could be increased to include emails and other communications involving the opposing party, either as a sender, recipient or subject of the communication.

There could be initial disclosure by type of case. For example, in employment discrimination cases, the employer could be required to immediately turn over employment handbooks; documents identifying comparator employees and their personnel files; W-2's and financial information relating to the earnings of the plaintiff and comparator employees; all emails and other electronic documents relating to or mentioning the plaintiff or the plaintiff's job performance; etc. I end up fighting for personnel files in every single case as employers routinely only provide the plaintiff's file. I file a MTC in every case that does not settle early due to lack of production by employers. It is a rare employer who turns over anything other than the employment handbook, the plaintiff's personnel file, and EEOC documents relating to the employee. That's why it doesn't make any difference whether it is an initial disclosure district or not. I either get those same documents as an initial disclosure or in response to my first set of discovery. Everything else you have to fight for.

There should be sanctions for hide the ball tactics.

This would reduce discovery disputes.

Twombly/Iqbal pleadings standards should apply equally to defendants' affirmative defenses as to the plaintiff's allegations. Affirmative defenses often are boiler-plate and unsupported by factual allegations. Plaintiffs spend time in discovery ferreting out the actual defenses from those asserted only as a fail-safe.

Unnecessary depositions and/or unnecessary videotaping of depositions could be eliminated.

Use "discovery clerks" w/appeal to Judge to resolve disputes.

Use above w/ informal conference...little paper.

Utilize standard interrogatories and requests to produce to which no objection can be made as the first round of discovery.

We need to create a less formal and more time effective way to obtain rulings from the Courts on routine discovery matters. Most disputes should be solved with a telephone call - not a noticed motion.

We should not have to re-litigate the rights of plaintiffs in each discrimination case. That is why these cases cost so much. Defense attorneys re-litigate what should be black letter law.

Weekly telephone hearing calendars on discovery issues by magistrate judges.

When defense counsel are paid by the client's insurance carrier, defense counsel has an incentive to run up the bill by excessive motions and taking needless depositions.

Additional Comments on the Civil Litigation System

1. Return to notice pleading. 2. Allows amendments to pleadings liberally as discovery progresses. 3. Courts take too long to rule and issue orders.

A mandatory, non waivable cap should be placed on mediators' fees. While some courts may set an hourly fee for mediators, desirable mediators (those with expertise in the practice area) sidestep that by refusing to mediate the case unless the parties agree to the mediator's usual fee.

A number of your earlier questions suggest a view that the problem is discovery, whereas the bigger problem is obstructionism -- delay, evasion, prevarication and simple refusal to provide complete responses to discovery requests.

Activist appellant judges, especially the 5 person Supreme Court majority have grossly tipped the scales of justice away from a plaintiff's constitutional right to trial. A lot has changed for the bad in 34 years

Alternative dispute resolution must be voluntary.

Another continuing source of frustration is each federal judge has his/her own procedural memorandum, which defeats the purpose of one uniform set of federal rules. So, I encourage the abolition of all such individual memoranda across the board.

Answering the final round of questions about ADR pushes me back to my "one size doesn't fit all." Sending inexperienced lawyers to mediation on a smaller case makes sense and saves money. Sending sophisticated lawyers to mediation in a complex case when they don't want to go wastes money. They will get there when they are ready. The former may not.

Arbitration should not be mandatory in employment cases. It is a license to discriminate.

Article VII of the U.S. Constitution right to a jury trial is the best way to ensure the respect and confidence of the people in the Judicial System. If you take that away from the people, the people will feel that the Judicial System has failed to provide them with a forum in which to be heard by his/her peer and to be judge by them. Only people afraid from the judgment of its own peers can object to the wise counsel of Article VII of the U.S. Constitution.

Attention is required to Rule 1 about inexpensive litigation...eliminate R 56.

Attorneys' fee awards should be more widely available to less affluent litigants facing well-financed adversaries. Economic disparities make justice very unequal, especially where Judges are stingy in the amounts awarded to attorneys entitled to receive them.

Big firms not their clients increase costs to plaintiffs and judges don't see this or turn the other way.

Cases that are remanded from the circuit court get lost in the system.

Civil rights litigation from the Plaintiff's perspective has incredibly low odds of success. In part this appears due to a court bias against these cases and the inappropriate granting of summary judgment in particular and the failure to enforce discovery since most information is in the possession of the employer.

Court ordered mediation can cost thousands of dollars, and parties should be forced to incur that expense.

Courts should focus on trials rather than summary judgment and extended pre-trial proceedings. Courts appear afraid to try cases. If trial were the goal, rather than pre-trial litigation, cases would be quicker to settle, cheaper, and easier. There would be far less strain on the system as compared to the out of control summary judgment practice. "Discovery abuse" as practiced today is the unwarranted refusal of parties to produce responsive discovery.

Discovery is horrible. People only complain about Plaintiff's discovery, but Defendant's are the ones that abuse the system. They purposefully harass plaintiffs in order to drive up costs, and fail to respond to discovery until a motion is written.

Early neutral assessment followed by short discovery and mediation are the quickest and fairest methods of resolving a case absent a trial - and appeal.

Employment litigation has several aspects that make it deserving of separate thought. First, plaintiffs usually have to prove intent or motive, which is more difficult than what is at issue in most other civil cases. Second, at the start, the defendant/employer usually has nearly all the documents and control of nearly all the witnesses (and invokes Model Rule 4.2 to keep plaintiff's counsel from speaking to employees). In contrast, defendant/employers typically care mainly about the deposition of the plaintiff. Because the discovery needs are so different, there is little "horse trading" or bargaining and so discovery disputes are more frequent. Third, defendant/employers rarely admit facts in the complaint even when they should, thereby increasing the costs of discovery. There is no adverse consequence for refusing to admit facts. Fourth, summary judgment motions are filed in 100% of cases. The defense counsel we see generally are not interested in discussing settlement until after summary judgment is briefed and the parties are sent to court-ordered mediation. This timing ensures that the defense firms bill a lot of fees but does little to resolve cases quickly and cheaply. In most cases, the defendant has a good idea of what happened before the depositions start, or if not then, immediately after the plaintiff and main decision maker are deposed. Yet defense counsel rarely if ever get serious about settlement until after they have briefed summary judgment. This appears to an outsider as a potential conflict of interest with their clients, because SJ briefing often increases defense fees

substantially. If courts refused to permit summary judgment motions except in a small subset of cases where it is appropriate, cases would be cheaper and would likely settle earlier.

ERISA cases should be handled as a typical Federal Action, not as an administrative review.

ERISA cases should be handled like any other civil matter with no artificial limitations or adjustments on discovery or procedure.

Fair, reliable (predictable) enforcement of existing rules would do much to decrease civil litigation costs. Employer's perceived need for orders compelling production of "private" employee information should be expedited through standing orders on standard disputes in employment cases: e.g., harasser's and potential comparators' employment records and personnel files must be produced. Arbitration is a corrupt forum and compulsory arbitration should be abolished.

Federal courts of appeals dominated by Federalist Society alumni.

Federal judges seem to forget that it is their job to try cases and don't seem to realize the importance to society for citizens to have their "day in court." My clients are not ever happy to lose, but if they feel they have gotten to give their side of the story, they are more willing to accept the result. The abuse of summary judgment has resulted in many plaintiffs feeling that there is no meaningful method to resolve disputes through the judicial process. Federal judges also seem to forget that our constitution includes the right to a jury trial. Forced arbitration is another method used to undermine the civil justice system. It is neither faster nor cost effective. There are few of the checks and balances available in court. With arbitration the law also does not develop as there is little ability to appeal unjust decisions. If parties' post-dispute wish to agree to arbitration that option should be available, however, pre-dispute forced arbitration is more often than not used to deprive workers and consumers of a meaningful redress of their grievances.

Forced ADR, particularly repetitively, can delay trial and increase costs.

Forced arbitration should be eliminated.

Fortunately for them, most judges have no experience working in plants, in being treated horribly in the workplace, or being fired. And that is fortunate -- for them. These same judges should appreciate that their life experiences are much different than what the average person encounters, and acknowledge that a jury is in a much better position to determine whether some behavior is reasonable, whether there is a racist/sexist element to the decision, or who influenced whom.

Further cutting back on the discovery available to Plaintiffs would be a grave injustice.

I am disturbed that even some questions seem to assume the "merit" of "limiting discovery," which is the game played that keeps the truth from being uncovered. Full discovery is necessary, and the rules have gone too far in trying to "limit" discovery.

I do not think that mediation works well when the parties are ordered to go. Then parties show up, but not necessarily because of an interest in settlement is not there, but only going through the motions the party was ordered to do.

I find that ADR is being applied to tort litigation where it was not agreed to by parties in equipoise. This will bring the entire legal system into disrupt in the next 5 years as employers try to stuff every cause of action into an arbitration modality.

I have a great deal of appreciation for the members of the rules committee who keep trying to tune the process to get it more right. We all owe you a debt of gratitude.

I have been referred to magistrates for settlement conferences. It was a terrible experience because the magistrate was extremely biased and I felt incredible pressure to settle and was afraid to file a complaint against the magistrate. Summary judgments are defense tool and rarely benefit plaintiffs in the S.D. of Florida.

I think the federal courts are doing away with the right to trial by jury though the summary judgment process which has also increased the cost of litigation. I estimate that without the summary judgment process which takes place in every one of my cases, the cost of litigation would be 1/3 less than it is.

I wish it was more civil.

I work with a fee shifting statute in almost every case. Normally 42 USC Section 1988. As such my clients are not expected to pay my fees. The fees are contingent. Under these circumstances almost universally fees drive settlements. I am not proposing a change to the rule - but I have always felt that something is unfair about the system. Often it is the attorney that is making the largest compromise to obtain results in the settlement conference ... and the defense attorneys know it. Our founding fathers made the decision to create a judicial branch to resolve disputes amongst citizens. The rules are taking that constitutional right away with rules that are requiring parties to at least explore ADR. ADR is a useful tool. It should not be compelled by any rule. Let the parties decide themselves if they want to avail themselves of the tool.

In answering the questions regarding court order alternative dispute resolution, I am referring to the mandatory nonbinding arbitration in federal court. Successful mediations involve experienced private mediation (such as JAMS mediators) or good MJ or DJ involvement.

In discrimination cases, courts routinely find facts in order to grant summary judgment, contrary to the rules. Courts are not trying enough cases. Despite the significant growth in the number of judges over the past 4 decades, the number of trials is shockingly low. Courts should hold

hearings prior to any motions for summary judgment in order to determine if such motions are proper. Summary judgment practice costs are out of control and expend an enormous amount of Court's time as well. Courts would have more time and litigation would be less expensive if use of summary judgment motions was limited and if courts granted summary judgment less often. Discovery abuse is typified by defendants refusing to respond to discovery.

In larger cases (class or collective actions) I think monthly status conferences with the Magistrate or Judge on a case should be mandatory. This will prevent defendants from abusing discovery through delay. In cases where this has been ordered, our client's litigation costs are generally decreased by over 40%, as the defendant's attorneys are aware that any nonsense on their part will have to be addressed at each monthly conference, without the need for 20 page letters and fifty page briefs.

In litigation not enough time is permitted for discovery and/or amendment of pleadings.

In summary judgment, federal judges appear to have completely abandoned the rules against weighing credibility or drawing inferences against the moving party. Moreover, summary judgments are being granted prior to discovery despite non-movants' invocation of Rule 56(f). This is unfair and contrary to both letter and spirit of Rule 56.

In terms of employment law, the federal litigation system is broken. The practical right to trial by jury is substantially, if not predominantly, abrogated. The practical right to justice and remedies intended by Congress is substantially, if not predominantly abrogated.

It appears that some judges use summary judgment rulings as a way to manage the case docket, rather than taking evidence in favor of the opposing party and ruling fairly on the merits. Also, due to the games in discovery, sometimes a summary judgment motion is a way to force the hand of the opposing party to show its evidence not disclosed timely in response to discovery requests.

It works pretty well as is, but we should shorten depositions.

Job rights cases constitute a substantial portion of civil cases litigated in federal court. But your questions (particularly the ones about fees) don't include any options that cover the fee arrangements in most job rights cases. I find this disturbing; especially since judges frequently make assumptions about how the lawyers are getting paid in these cases, and, like yours, their assumptions are wrong. Perhaps the hostility to job rights cases could be reduced if there was a better understanding on the part of the bench about the economics of job rights litigation, on both the plaintiff's and the defendant's side.

Judges are ruling disproportionately against plaintiffs in employment cases and that issue needs to be addressed. Employment discrimination cases are more contentious than any other type of litigation; I have experience in class actions and big stakes complex litigation and the opposing counsel in those cases (from the same firms, different departments than employment defense

lawyers) are far more congenial and courteous. With employment discrimination 25% of the federal docket, serious inquiry needs to be made as to why defense counsel are so contentious in these matters and not in others. The courts need to act to stop this practice, as it is intimidating to plaintiffs and witnesses.

Judges need to lead by example in the movement for a more civil justice system. Improper grants of summary judgment are a reaction to the expansion of civil rights, and reflect continued institutional racism in America. We need to protect undocumented immigrants from inquiry about their immigration status; otherwise our courts will become an arm of a racist immigration policy. Attorney fee litigation would be simplified if each U.S. Court of Appeals would adopt Laffey rates, or set their own rates.

Judges should accept their duty to resolve disputes between adversaries in a fair and equitable manner.

Judges should respect the jury's role more - allow voir dire and let verdicts stand instead of remitting amount of damages. Federal judges tend to ignore plaintiff friendly facts in summary judgments and make decisions based upon arguments not made by the parties with no opportunity to address the court's theory.

Judicial activism favoring summary judgment and antagonism towards trials and juries is destroying our legal system. When judges mistreat litigants and their attorneys (usually plaintiffs), this encourages their opponents to engage in unethical or uncivil conduct. These trends have contributed to the decline in civility in our legal system.

Lengthen amount of time to oppose a motion for summary judgment; shorten ex parte proceedings to a matter of days, not weeks.

Litigation is probably the fairest, but mediation reduces stress and cost so it is the best if it works. Arbitration is legalized corruption to help corporations. Early neutral evaluation is not worthwhile and can do harm.

Mandatory ADR occurs too early in the process to be effective, and delays the progress of the case. It should be considered after the opportunity for discovery.

Mandatory arbitration is outrageous. The employee bears far greater costs than under the federal or state court system.

Mandatory arbitration or court ordered alternative dispute resolution is usually a disadvantage to plaintiffs and ignores the constitutional right of these persons to have their case heard by a jury. Also, the tenor of the questions suggests that there is a belief that discovery is negative or abused. I don't think that is true. In most discrimination and labor cases, the plaintiff has very little access to witnesses and documents. The ability to undertake wide ranging discovery when necessary is the only way for the plaintiff to gather the information necessary to survive the

inevitable motion for summary judgment and win his or her case. Any change in the rules to limit discovery would be a mistake in my opinion. Limiting discovery advantages of more powerful business interests, at the expense of persons who have been subjected to invidious and illegal discrimination but who need discovery in order to be able to prove this discrimination.

Mandatory pre-dispute arbitration is denying access to justice for many civil rights litigants.

Many of these questions are too generalized and are also geared towards a defense practice, particularly those regarding discovery issues. The questions appear to assume that all respondents are being paid by the hour for the work they do. For attorneys like me working on a contingency basis, defense discovery abuses often create more unpaid work. And of course responses to the questions in the discovery section need to be phrased differently depending on whether the attorney is representing plaintiffs or defendants. I do not have time to go back and suggest how to rephrase the questions but I would strongly suggest that next time a survey like this is disseminated; time is taken to assure that the questions are not so defense-oriented.

Many times parties use mediation as a discovery tool or a delay tactic.

Mediation allows for more creative solutions and outcomes than litigation alone. Without the threat of expensive civil litigation, however, most cases would never settle at mediation.

Mediation and negotiation by reasonable counsel is often a positive and cost effective way to resolve cases. However, the value of employment discrimination cases, both in mediation and litigation has been adversely affected by Courts that defer to Employers and grant summary judgment far too often against Plaintiffs. A Plaintiff who is the sole bread winner for her family who is wrongfully discharged because of her race, sex, national origin or a disability and who cannot easily obtain other employment should not have her claims diminished because she does not have a big money case. Her case, which may affect the ability of her family to eat, to obtain medical care, to keep a roof over their heads ... to live is more, not less, important, than the cases of people who are better off and have other means of redress. While it is commendable that our district provides such Plaintiffs with forms with which to file complaints when they cannot retain counsel, their penchant for granting summary judgment in far too many cases is precisely why counsel cannot be retained. (And forms need to be added to address the needs and cases of employees with claims under the Americans with Disabilities Act, as amended.)

Mediation and settlement conferences held with magistrate judges are very effective ways to settle a case - provided that both sides wish to go; if not, it's a waste of time.

Mediation is a good thing and judicial involvement in the mediation process is a good thing. Unfairness in the system is not due to ADR; it is due to judicial abuse of the summary judgment process Rule 56 needs to be rewritten to require a party moving for summary judgment to state, with record references, the undisputed material facts. Rule 56 also needs to include severe

sanctions for attorneys who move for summary judgment and state certain facts are not disputed when in fact they are disputed.

Mediation is far more likely to succeed when it occurs at the impetus of the party. Private mediators tend to be more skilled and more in touch with reality than court-appointed or ordered 'neutrals'.

Mediation is not effective as an alternative to litigation. It is effective in conjunction with litigation, or the potential of litigation.

Mediation should be used selectively, depending upon the interests of the parties, willingness of all parties to reach a resolution. Mediation is effective in setting a deadline for defendants to make a settlement offer and when the parties may desire relief in a format that a court cannot award at trial. Mediation is a waste of time and money if it is ordered in inappropriate cases. Although I have not represented a party in arbitration, I have sat as a FINRA arbitrator. The forum fees far exceed court fees; although depositions are rare, the paper discovery, motions and hearing procedures are still time consuming.

Most discovery abuse is actually by defense counsel, who improperly withhold relevant documents, and who play "hide the ball" with documents and witnesses.

Most federal judges are wonderful, bright, dedicated people who remember that they are public servants. But you have a serious problem with a small minority. They are insufferable. Were I a judge -- Heaven forbid -- I would try to get my fellow judges to come up with a system to police ourselves better. Right now, there literally is nothing that can be done about judicial temperament, because you all tend to operate as a series of sole proprietors, largely staying out of each other's business. This may be expedient, but it is wrong. I cannot easily tell a judge when he is being a jackass. Another judge can.

Much depends on the civility and professionalism of the lawyers.

My clients usually participate in mediation within the framework of litigation. In some cases, court-ordered mediation is a complete waste of time, if the other side is only there because they HAVE to be there. Free mediation through the court has been useful where both parties want to be there. Arbitration is terrible and we avoid it whenever humanly possible. The courts need more judges, so that case flow can speed up.

Our system of justice is challenged by the vanishing jury trial. Judges are now routinely acting as finders of fact, only pretending to indulge inferences in favor the non moving party.

Plaintiffs see ADR settlement as a way to avoid Rule 56 motions, where in federal court, they will surely lose.

Please find a way to shorten the discovery process. The present system is more about putting money in lawyers' pockets than attaining just results.

Provide rule change allowing service of subpoenas by certified mail or restricted deliver by FedEx or UPS.

Representing plaintiffs in mediation is difficult because defendant's representative usually does not have authority to settle, and def gets a lot of free discovery out of the process.

Require EARLY mandatory mediation of all employment cases, most of which end up becoming driven by attorneys' fees because of the early failure to settle.

Rule 56 is abused by defendants in that they file one in almost every case, and they are granted far too often. The rule is not followed and judges are weighing credibility and the evidence in ways they should not.

Rule 56 needs to allow cases that have issues of fact to be decided by our peers - that is what the constitution gives us. Litigants are disgruntled with the legal system when they never get inside a courtroom. I have one case, 3 police officers, whose cases were thrown out, and they can't understand why criminals get hearings/trials but they didn't.

Rule 56's notice periods are horribly imbalanced in favor of the moving party and increases the overall cost of discovery. Having minimal time to respond to a Rule 56 motion while the moving party has as much time as desired to build the motion creates a huge advantage to the moving party. When a plaintiff knows a Rule 56 motion is likely but does not know the identities of the witnesses or the subject matter of their declarations, the plaintiff must cast an extremely wide net in discovery and take ranging depositions to anticipate such testimony. If the response period was lengthened, as in California state courts, the plaintiff could hold off on some discovery until after the motion is filed, then engage in focused additional discovery during the response period. This provides for a fairer and lower-cost alternative to the present system.

Since the last topic was court ordered mediation, I will comment on that topic. Forced mediation does not always get the right decision-makers to the table, particularly where the defendant -- pre-mediation -- has no interest in settling and is at the mediation only because ordered to be there. This is an expensive exercise for employment discrimination plaintiffs.

Some of the questions throughout this survey were too limiting when applied to the unusual area of ERISA litigation. The courts have made up their own rules in ERISA even though there are no special set of FRCP to use for ERISA. The courts are all inconsistent. There is NO incentive for insurers of ERISA plans to settle cases. They know that there are no other damages available, interest on past due benefits is often limited to 29 USC 1961 method (resulting in little interest at all), so unless the claimant is willing to take 20-50 cents on the dollar, they usually litigate through trial in order to pay only what they would have to pay had they granted a claim to begin

with. And they generally convince the courts to 'cut' the plaintiff's time expended (and fees) which, are nevertheless, considered a cost of doing business and funded by other denied claims. For this reason, ENEC's and settlement conferences are often ineffective.

Some questions are hard to answer because plaintiff employment law cases are usually on a contingency basis. There is no incentive within the firm to conduct massive amounts of discovery because it decreases the ultimate hourly rate we can recover (absent a jury verdict and award of fees). My greatest complaint about the federal court system is the way that many of the judges treat plaintiff cases. They scoff at plaintiff's discovery requests and then grant summary judgment because plaintiff didn't have enough evidence to "win". The standard applied to summary judgment is not applied accurately, consistently or in accordance with the rules in many cases. There are excellent judges who are the exception, not the rule to this problem and the risk of getting one of the judges who is the "rule" makes federal court a dreaded forum. Defendants are allowed to hide the ball and force plaintiff to file numerous motions to get basic discovery, however, the plaintiffs attorneys are viewed by the courts as being the ones who can't compromise and are unreasonable because they are the ones who have to bring the motions. It is an uphill battle.

Successful mediation is fairer in the sense that both parties have agreed and have probably left the table somewhat unhappy. Court order mediation is generally ineffective if dispositive motions have not been resolved. When discussing arbitration one needs to distinguish between pre-dispute forced arbitration and that where the parties voluntarily agree to arbitration. Iqbal is a disaster even if it is applied even handily to Defendants re their answers. It is just one more device to encourage dismissal of cases based on the presumption that plaintiffs have sufficient information to demonstrate pretext and resolve intent questions when they lack access to critical evidence such as statistics, comparators.

Summary judgment abuse is one of the most pressing problems that I see in federal litigation, which is where most of my practice is. It drives up the costs, disposes opposing parties not to consider serious settlement negotiations until after the court has ruled on the "shot in the dark" motion, and very often produces unfair results, where far-too many cases are being decided before a jury has an opportunity to examine disputed factual issues and make credibility determinations. I believe judges are people of good will and, therefore, am forced to believe that the tendency of judges to weigh evidence and resolve factual issues in the guise of deciding summary judgment motions as a matter of law is the result of an overburdened judiciary that is being asked to resolve more cases than capacity and capabilities allow.

Summary judgment abuse is rife and needs to be remedied.

Summary judgment abuse is the biggest problem in federal litigation. Many judges do not take seriously their duty to determine whether factual disputes exist and simply use the motion for an opportunity to decide who they think should win. Also, judges often ignore testimony that is

inconsistent with affidavits, allowing defendants to tailor their case post-discovery in an effort to obtain summary judgment.

Summary judgment as currently practiced by a great proportion of judges in the federal court system is unconstitutional.

Summary judgment eviscerates a party's right to trial by jury.

Summary judgment is a huge waste of time and money. It takes at least as much, if not more, time for the attorneys to engage in summary judgment practice as it does to try the case. Likewise, it probably takes a judge the same amount of time to rule on a summary judgment motion as it does for her to preside over a trial. Consequently, every case with a summary judgment motion costs the parties as much as a case where there is a trial; and sometimes, when the plaintiff gets past summary judgment, as much as two trials. So, I think we would substantially lower costs if we just permitted every case that does not settle to go to trial without the expense of summary judgment motions.

Summary judgment is often used as a docket clearing device.

Summary judgment is over used.

summary judgment is too prevalent: filed for too much and granted too much; that increases litigation costs exponentially; if parties are faced with actual jury trial, that will motivate settlement of legitimate claims and the illegitimate claims will not win at trial; discovery is essential to litigation, it IS litigation; without discovery (or with less discovery) a defendant gets to just rely on its own word. If that is the case, no plaintiff will ever win because no defendant will admit to discrimination; we need more judges and we need more fair judges.

System needs to afford impecunious plaintiffs adequate access to full panoply of litigation if needed. State courts better because greater flexibility sometimes allows plaintiffs better opportunity prove case. Federal system often means more certainty in process and more efficiency generally.

Thank you for soliciting input from NELA. Improving our adversarial system is a process I'm proud to be part of - but gamesmanship will remain a reality because of the adversarial nature of the system. Ultimately, it is up to us as practicing attorneys to make the system work as designed by being forthcoming, cooperative, cost-effective and fair in the discovery process. The law regarding Rule 56 motions in employment discrimination cases results in different legal standards being applied at summary judgment and trial (e.g., the McDonald-Douglas burden-shifting method falls away at trial). Thus, the parties expend significant resources during discovery on issues or events that will never be part of a trial. Bringing those standards into line will help curtail unnecessary discovery. Additionally, "pre-filing" oral argument or hearings on expected Rule 56 motions - highlighting key issues and evidence of disputed facts - could save

the Courts significant time resolving unnecessary motions and, thereby, expedite the time from filing to judgment.

Thank you for the survey. It seems to be a good first attempt to get information. However, I was struck with the number of questions that seemed to be based on assumptions that may not be correct. I recognize that it is difficult to write such questions. I applaud your efforts. You may want to get some explanations from experienced attorneys about how the questions can be interpreted and what the responses are trying to say. You may be surprised about how some of the questions have been interpreted to be answered.

The arbitration process works when both parties are there voluntarily. It does not work when plaintiffs are forced there. Mediation is fantastic. It resolves cases and should be ordered in all cases. However, certain magistrate judges use what they call mediation to pressure attorneys and parties and to ridicule them. Putting the parties in a room, ordering them to settle or else, then leaving is not mediation. Magistrate judges who do that should be removed from the bench. It's an abuse of power.

The best time for mediation is at the administrative stage.

The biggest impediment to smooth and efficient litigation is summary judgment. Most summary judgment motions should be deny summarily - without written opinion.

The civil justice system needs a lot more judges, law clerks and courtrooms.

The civil litigation system is geared toward large corporate interests, with the armies of attorneys being paid by the hour, by clients who can afford to pay. It is not well suited to individual employment discrimination plaintiffs. Because most plaintiff's side attorneys must take cases on contingency (attorney's fees in cases litigated to summary judgment usually approach \$100,000, which almost no individual plaintiff can pay). Therefore, many plaintiffs with valid claims, but for example, small damages, cannot even obtain representation. For those cases that are taken, as noted, an individual employment plaintiff is far more likely than the average (business) plaintiff, to have summary judgment granted against them. In many districts, I believe this percentage far exceeds fifty percent. If they can manage to get an attorney and survive summary judgment, and win at trial, again on appeal, wins are statistically very disproportionately likely to be reversed (as compared to other winning plaintiffs), for such employment discrimination plaintiffs. The result is injustice to such plaintiffs. It also has a very negative effect on settlement. Because employers are sitting in the "cat seat" in all respects, enjoying the high likelihood of having summary judgment granted, they can refuse to make reasonable settlement offers, and I believe this rate of summary judgment granting against such plaintiffs, very much increases congestion on the court dockets because employers have little incentive to settle meritorious claims early on, in hopes they can get them dismissed. Also, I have a real problem with the page limits on summary judgment briefs in some districts, especially with the emphasis of many judges on refuting each and every point of the employer. By the time you do a

recitation of the facts, you have very limited space to argue the law. For example, in a recent case we made a decision not to make a subsidiary argument on a discrimination issue because of page constraints, and then were criticized by the court for not addressing this issue and pointing to evidence supporting this point. In that case we had asked for additional briefing pages and were denied, and had used every single page. It's like being between a rock and a hard place; you are limited to a certain number of pages, and then lambasted for failing to present certain evidence or make a certain legal argument, that you do not have space for. I think the party filing the motion should be page limited, but the party bearing the burden of coming forth with sufficient evidence, should not be precluded from their ability to present all such pertinent evidence by arbitrary page limits. Additionally, I have a real problem with employers not having to meet their burden when a motion to compel is filed. It is supposed to be their burden to come forth with evidence why discovery is burdensome. In my experience judges/magistrates always take counsel's word for it about expense, and don't require any evidence at all that such burden or expense really exists. Finally, I have a real problem with judges/magistrates routinely refusing to grant access to employee personnel files, even where there is an agreed confidentiality order. I always have to fight for these files and I am routinely denied access to most of them, including of relevant comparator employees and persons making managerial decisions. When I do get them, the Courts are not making clear to employers that documents relating to the person, even if not in a file marked "personnel file," must be produced, leaving out, for example, performance reviews and related emails that HR departments purposely don't put in such files. Then, despite the employer refusing to produce the files, and the judges agreeing, facing a summary judgment motion where it is argued I cannot identify a nearly identical comparator employee treated differently.

The civil litigation system is jeopardized by "involuntary" arbitration in which courts compel litigants to arbitration under the premise that they agreed to waive their constitutional right to a jury trial by simply receiving an employee handbook.

The costs of taking depositions are very high and impact my Plaintiffs in employment cases who are required by our firm to pay the costs of litigation. If there was a way to reduce those costs, it would be great. Also, discovery responses generally seem to be geared towards hiding information, as compared to revealing information. If I were a Judge, I would let litigants know that they are to be forthcoming, not experts in formulating objections.

The courts' handling of ERISA cases simply sucks. Never seen anything as bad given the level of the fed courts.

The cry against discovery primarily serves the defendants in cases because it is generally the defendants that have the relevant information. An engaged trial judge applying the rules we now have would do far more than changing the rules to make them less fair to the litigants who need the information.

The fabric of the civil litigation system is being threatened by the paucity of actual trials and the emphasis on the process of litigation, especially in the areas of motion practice. We have become so focused on summary judgment in federal courts that it is the rare case that is tried. In my district the percentage of civil cases tried in the last several years is fewer than 2%.

The federal civil litigation system is far too expensive for most potential employment discrimination plaintiffs. That is largely a function of summary judgment practice, combined with case law that has become increasingly complex and arcane. Most potential plaintiffs in this area do not have the resources to get their cases filed, let alone tried; and the amount of time required for motions practice, discovery and trial is so great that plaintiffs' employment attorneys, including myself, will take only the very strongest cases on a contingent fee basis. The resulting dispute resolution system denies justice for those who most need it but who cannot afford it.

The Federal Rules of Civil Procedure, should be applied to ALL actions, including ERISA actions. Plaintiffs should be permitted to conduct discovery. There should be no special showing required of a plaintiff to be entitled to discovery.

The last set of questions was problematic because court ordered mediation (with mediators willing to take the time which magistrate judges often are not) has been extremely useful in limiting cost and shortening the time for cases. Court ordered arbitration on the other hand, particularly the enforcement of arbitration clauses, has resulted in dramatic increases to the time and cost of litigation.

The motion for summary judgment practice should be changed dramatically. It causes increased discovery, increased litigation costs, and less fair outcomes for plaintiffs. The defendant gets a free bite at dismissal. The plaintiff loses substantial rights provided at a trial. The plaintiff retains the burden of proof yet defendant is provided the first and last argument. The plaintiff is not permitted to revise prior testimony subject to impeachment as at trial. The mechanism provides too great an incentive for the judge to weigh the evidence and try the case on paper without any counter incentives. Mandatory arbitration has proven to be extremely unfair and extremely expensive. The original purpose of the FAA was not intended for individual claims where the agreement to arbitrate was not fairly and equally made. The principle of contract of adhesion is ignored and constitutional rights to jury trials are being swept away in the name of free enterprise. Summary judgment and arbitration practice are fundamentally destroying individual rights and liberties sacred under our Constitution.

The neutral attorney is not used in TxSD. If discovery is allowed, mediation should occur earlier in case.

The number of summary judgment motions filed in one case should be limited.

The primary beneficiaries of civil litigation are hourly-billing defense attorneys, rather than their clients/defendants, plaintiffs, the courts, or justice.

The privatization of justice through forced arbitration is a travesty, both to individual clients and to the development of the civil law in this country. Forced arbitration has been abused and has been applied to parties with unequal bargaining power to deprive citizens of their Constitutional rights. While arbitration may be acceptable in a business setting between corporations, it is fundamentally disgusting when used to deprive individuals of their rights to a jury trial and to judicial review. The law itself is unable to evolve when private arbitrators decide matters, especially with no judicial review. As to discovery, generally speaking, in my experience and opinion, Defendants abuse discovery and motions practice and they are not held accountable for sanctionable conduct.

The rules, in particular Rules 26, 33, 34, 37, and 56, need to be applied as stated and intended. The federal judiciary's documented hostility toward employment and civil rights cases paradoxically increases the court's workload by inviting costly and time-consuming discovery abuses and motion practice by defendants.

The single biggest problem is judges who determine factual issues on summary judgment based upon their belief as to how the case should be decided. Juries should decide issues of fact and draw inferences from evidence, not judges who do so with regularity despite the clarity of Rule 56 and what every lawyer learns in law school. Forced arbitration is also a travesty of justice.

The summary judgment rule has completely distorted the federal court system. It makes all litigation vastly more expensive and results in unfair outcomes, both when it is granted and when it is denied. Instead of easing resolution of cases, it creates multiple layers of litigation costs, without assisting the parties in preparing for a trial that will never happen.

The summary judgment standard is not honored by courts. In my Title VII practice, every defendant files a motion for summary judgment. Summary judgment should be for rare cases in which no genuine issues of material fact remain. If the proper standard were honored by the court, parties would be less likely to file dispositive motions (regardless of the facts of the case). In addition, courts can more effectively eliminate excessive pre-trial motions by imposing sanctions against parties who wrongly withhold information from discovery and parties who file baseless motions.

The survey really doesn't get to the root of the costs problem which I feel is the desire of defense counsel to spin their hourly rate meter to bill their client to meet their quota

The system is not worth it for most plaintiffs. By the time a defendant has wrangled a plaintiff around through a motion to dismiss, the discovery disputes, and then the motion for summary judgment, often the clients are worn out by trial. Never have I seen a case settle before the summary judgment stage, but after that ruling, as the courthouse date and door near, defendants

then begin to consider settlement. This should be done earlier on, not in lip service, but with actual consideration of the case itself.

The time for a plaintiff to respond to an MSJ (seven days) is patently unfair given the time defense has to prepare the MSJ and impossible to work with to adequately defeat the MSJ.

The Twombly/Iqbal line of 12(b)(6) cases has effectively eliminated pleading standards in federal court, reducing that determination to the integrity and biases of the presiding judge. That is not a system based on law.

The value of arbitration totally depends on whether it is truly voluntary, there is a collective bargaining agreement ensuring equality of power and resources between the parties, the arbitrator is a purely neutral qualified third party who is capable of applying the law and providing the same remedies as a court.

There should be greater opportunities for pro se litigants to have counsel appointed to represent them.

This survey was way too long.

Throughout my career the Federal Courts have provided a relatively even playing field for the parties until recently. I think the burdens on individual plaintiffs and small groups of plaintiffs have increased with judicial dislike and impatience in matters that are not criminal cases or high value commercial disputes. I am extremely concerned with the Court limiting access through mandatory arbitration, increased use of motions to dismiss and summary judgment motions.

We need to better protect the right to a jury trial.

We should not structure the federal rules to satisfy the very rich or to deal with the most costly 5% of cases.

We still have a problem with far too many motions for summary judgment being granted in employment cases. I simply can't understand how so many judges believe that so many cases really do not have any fact issues sufficient to get to a jury. I believe that judges routinely give the employer the benefit of the doubt and draw factual inferences in favor of the employer when ruling on an employer's motion for summary judgment. Courts are still ignoring the U.S. Supreme Court rulings in various employment cases and imposing standards that simply are not included within the law or the rules.

We would all be better served if we followed Frank Rothman's advice: never write a letter when you can make a phone call and never file a complaint when you can write a letter.

When any resistance to or failure to settle a case leads a judge to turn on a party, then I think that the preference for negotiated resolution has been knocked off track. I think it is problematic

when a party settles a case for an amount that is far afield from its value. In that case, justice has been denied.

With respect to mediation, the answer is "it depends". Good mediators do help; bad mediators can make matters worse.

Without full and fair discovery, unlawful discrimination will go undetected.