

# In Their Words: Attorney Views About Costs and Procedures in Federal Civil Litigation

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## Introduction

The Advisory Committee on Civil Rules (“Committee”) of the Judicial Conference of the United States asked the Federal Judicial Center to study the costs of federal civil litigation. In the spring of 2009, the Center conducted a survey of a random sample of attorneys who had represented the plaintiff or defendant in a set of federal cases that had been terminated in the last quarter of 2008. The Center presented the results of that survey to the Committee in October 2009.<sup>1</sup>

The Center also performed a multivariate analysis of the case-based survey results, identifying the variables that explain variations in attorney estimates of the costs of civil litigation in their cases. To supplement the multivariate analysis, District Judge John Koeltl, chair of the Planning Committee for the May 2010 Litigation Review Conference at Duke Law School, and the Center agreed that it would be useful for the Center to interview a number of the attorneys who responded to the case-based survey. The purpose is to present attorneys’ general experiences and thoughts about the factors found to be associated with the costs of litigation. Interviews help explain and illuminate the quantitative findings presented in the other two reports. This report documents those interviews, organizing them where possible to track the results of the multivariate analyses of the Center’s case-based survey, which the Center is also presenting to the Committee at this time.<sup>2</sup>

We should be clear at the outset that the comments made in the interviews do not represent a random cross-section of the views of respondents to the case-based survey. Nonetheless, we think these attorneys’ views offer valuable insights into the costs of civil litigation and the operation of the Federal Rules of Civil Procedure (“the Rules”) in a broad spectrum of litigation.

In December 2009 and January 2010, we sent email invitations to 75 attorneys who had responded to the Center’s case-based survey, asking them to volunteer to discuss questions relating to federal civil litigation. Of the 75 attorneys, 28 had, in their response to the case-based survey, spontaneously offered to be available for further discussion. The remaining 47 attorneys were selected to span the distribution of costs reported by attorneys representing a plaintiff or defendant in the closed case identified in the case-based survey. In the end, 36 of the 75 attorneys responded positively to the invitation. Telephone interviews lasting 20–30 minutes

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1. Emery G. Lee III & Thomas E. Willging, Federal Judicial Center National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules (Federal Judicial Center, Oct. 2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf) [hereinafter “Preliminary Report”].

2. Emery G. Lee III & Thomas E. Willging, *Litigation Costs in Civil Cases: Multivariate Analysis* (Federal Judicial Center 2010) [hereinafter *Multivariate Analysis*].

were conducted with 35 attorneys. Of the interviewees, 16 primarily represent plaintiffs; 12 primarily represent defendants; and 7 represent plaintiffs and defendants about equally. We promised interviewees that their communications with us would be treated as confidential. We did not record the interviews. Based on detailed notes, the responses presented in quotes below represent our best efforts to capture the words used by each interviewee.

## Executive Summary

### *Costs of Litigation*

For the most part the interviewees corroborated and clarified the results of the case-based survey on the costs of civil litigation as follows:

- Stakes in the litigation guided their investment of resources.
- Factual and procedural complexity increased costs.
- Aside from intellectual property, the nature of suit had little value in explaining differences in costs.
- Law firm size has a significant impact on costs, but some attorneys argued that the driving force was the size and resources of corporate clients, not the size of the law firm.
- Characteristics of counsel, including experience and competence in a specialty area, are significant factors affecting costs (factors not studied in the case-based survey and probably not quantifiable).
- Volume of discovery is a primary force driving the costs of litigation.
- Most attorneys had little experience with electronically stored information (“ESI”) beyond the exchange of some documents in electronic form.
- Problems with ESI were related primarily to the volume of ESI held by large companies.
- Most attorneys on both sides of the litigation described ways to limit the cost of discovery and keep it commensurate with the stakes.

### *Pleading*

- Most attorneys have seen no impact of the *Twombly/Iqbal* cases in their own practice. Some reported an increase in the number of motions filed without an increase in the likelihood that a motion would be granted. This activity has increased the costs of litigating their cases.
- Almost all of the attorneys report that they do not use notice pleading and that they prefer to plead enough facts to tell a coherent story to the judge.

### *Summary Judgment*

- The plaintiff attorneys we interviewed find summary judgment to be overused. Defendant attorneys find it to be underused and not always granted when warranted. Both sides agree that summary judgment motions are filed routinely in employment discrimination cases but disagree about how appropriate summary judgment is for resolving the issues in those cases.

- Summary judgment is closely related to settlement, particularly in employment discrimination cases.
- Summary judgment has the effect of postponing settlement discussions until after most costs have been incurred.

### *Rule Changes*

Many of the attorneys' suggestions focused on rule changes designed to promote early case evaluation and settlement discussion.

## Results

### *Stakes in the Litigation*

In the multivariate model, a 1% increase in monetary stakes was associated with a 0.25% increase in a plaintiff's reported costs and a 0.24% increase in a defendant's reported costs, all other factors being equal.<sup>3</sup> So, a case with monetary stakes of \$100,000 for a plaintiff would have 25% higher litigation costs than a case with monetary stakes of \$50,000. In addition, nonmonetary stakes (such as a concern about future litigation or about reputation) have a substantial impact, increasing plaintiff costs by about 42% and defendant costs by about 25%, all else equal.<sup>4</sup>

Focusing on the component of costs represented by discovery, in the case-based survey more than half of the attorneys indicated that the costs of discovery were “just right” relative to their clients' stakes, while about a quarter of the attorneys indicated that the costs of discovery were too much relative to the stakes.<sup>5</sup> This finding raises the question of how attorneys keep discovery costs proportional to the stakes. This issue will be discussed further below under the heading “How much discovery is enough?”

In the interviews, attorneys explained how the stakes in the litigation influenced their activity. A fair summary of the attorney comments is that the stakes in the litigation serve as a guide for attorneys and clients to make decisions about how much discovery to conduct and how much time to invest in the litigation.

In the words of an attorney who represents both plaintiffs and defendants, “one always tailors the amount of discovery to the stakes. The difference between a \$50,000 case and a \$500,000 case is always on one's mind.” Many others expressed similar sentiments:

- “Companies are willing to invest more in cases where the stakes are . . . high.”
- “Even the client expects an attorney to invest more time in high stakes cases.”
- “One has to take into account the possibility of being enjoined from selling a product, which increases the stakes.”
- “If there's a lot of money involved, parties dig in their heels and litigate every little thing.”

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3. *Id.* at 5, 7.

4. *Id.* at 6, 8.

5. Lee & Willging, *Preliminary Report*, *supra* note 1, at 27–28.

- “Stakes make a difference in that clients are willing to pay and more likely to dig deeper into discovery.”

Other attorneys echoed the theme that the stakes affect the level of discovery. In the words of one plaintiff attorney: “Stakes particularly affect how much discovery one does.” And a defense attorney put it this way: “Our guide on costs is the amount at stake. I cannot justify to a client spending more than a fraction of the amount at stake in the litigation.”

In turn, the guidance found in the responses above regarding stakes may be what courts implicitly apply in deciding whether to limit discovery. One defendant attorney told us: “Stakes definitely matter. Stakes provide the court with a reference point in deciding whether to limit discovery. If we claim that spending \$1 million on discovery is a burden and the stakes are \$100 million, the court will allow the discovery.”

Not only do stakes guide attorneys in deciding how much discovery to undertake, they also provide a benchmark in deciding how much time the attorney should spend on the litigation: “Stakes are the measure of time we spend on a fraud case. We put in a lot of time because the stakes are high and we represent the plaintiff.”

In some cases, though, fee-shifting alters the calculus by converting the plaintiff attorney into the equivalent of an attorney billing by the hour. An employment lawyer provided an example of that effect, saying: “We will expend enormous resources in a good case. We want to pursue cases vigorously and we have to show defendants we will go to the nth degree. We will chase discovery to the limits and defendants will attempt to thwart us.”

Two plaintiff employment lawyers said the stakes in their cases do not vary by much. One said: “We have to take the same measures regardless of the amount at stake. There is one exception: for cases in which a tangential witness is out-of-state, we might not pursue that witness in a case with less at stake.”

But several attorneys told us stakes are not the primary factor affecting costs. In the words of one: “Stakes are not the main driving force; the competence of the opposing lawyer is primary.” Another added a twist to the competence factor: “Paradoxically, stakes involving higher dollar amounts are sometimes handled by more experienced lawyers who try to keep the costs down and resolve a matter.”

Another form of nonmonetary stakes may arise in the form of the reputation of the client or the precedent that a case might set. One plaintiff attorney said:

Another costly type of case is when a manager feels personally attacked. The allegations may be career-ending for some managers and they will take every step to prolong the case and sometimes they will try to cover



up unfavorable facts and keep them from counsel. I understand why they fight.

Another plaintiff attorney talked about another set of cases in which the defendant's stakes may have included nonmonetary components: "Stakes to my client are about the same in employment cases, roughly \$25,000 to \$100,000, but it seems like defendants fight harder against disability claims and it may be because their stakes are higher in those cases."

Stakes may also take a back seat to the complexity of the litigation. One defendant attorney said: "A client will look under every rock if the potential loss is \$20 million. But [assuming defendant is liable] if it's a death case for \$20 million [as opposed to a case with complicated, catastrophic injuries for the same amount], there may be fewer rocks to turn over."

### *Factual Complexity*

In the multivariate analysis, factual complexity, as reported by the responding attorneys on a seven-point scale, was associated with higher costs. For plaintiffs, each one-point increase on the seven-point scale was associated with an 11% increase in costs, and for defendants, a 13% increase, all else equal.<sup>6</sup>

A number of attorneys mentioned that factual complexity added to the costs of litigation and offered some insights into how complexity might relate to increases in discovery and in costs. The most direct indicator of complexity is the number of parties in the litigation, and one can readily see how that might affect the costs of discovery, motions practice, and, indeed, all aspects of civil litigation. Other attorneys pointed to the number of transactions underlying the claims in the litigation as a marker for increased costs. One attorney expressed the relationship this way:

Cases with multiple transactions can affect costs greatly. In the mortgage fraud area, a single case by a lender against a title company will have relatively modest costs. But in a similar case in which the alleged fraud took place in forty transactions—the costs will be much higher because of the additional discovery needed.

In other cases, procedural complexity may influence the process, as in the patent area described in the next section. Adding evidentiary hearings on motions for preliminary injunction and *Markman* hearings to the ordinary litigation process inevitably adds complexity and cost. Disputes about science methods call for additional expert witness costs and *Daubert* hearings.

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6. Lee & Willging, *Multivariate Analysis*, *supra* note 2, at 6–7.

### *Types of Cases and Issues*

In the multivariate analysis, for defendants, intellectual property cases had costs almost 58% higher than the baseline, all else equal.<sup>7</sup> Some interviewees elaborated on the high cost of intellectual property litigation, while others reported varying experiences in employment discrimination litigation, some finding it costly and others not.

One attorney cited figures from the American Intellectual Property Association that for a case with a \$25 million recovery, the cost averages over \$4 million. The attorney explained that “companies are willing to invest more in cases where the stakes are that high, especially in B2B [business v. business] cases where what is at stake is a virtual monopoly—the right to exclude others from selling a product.” In pharmaceutical patent cases, that attorney continued, companies reportedly “are willing to put down up to \$20 million for the right to sell a drug for \$1 billion.”

In patent cases, attorneys noted that the cases are costly to litigate because they are very document-intensive and involve complex questions of science and technology. In addition, patent cases have a level of procedural complexity not found in ordinary civil litigation. As one attorney observed, as noted above, “in patent cases there is often a motion for a preliminary injunction as well as a *Markman* hearing on claims construction.” This is not to mention the possibility of a jury trial.

A number of interviewees specialized in employment litigation, particularly employment discrimination. Discussions about employment discrimination cases illustrated that interviewees’ perceptions of which cases are costly may differ. Some plaintiff attorneys specializing in employment discrimination cases indicated that they are not very expensive to litigate and pointed to routine document discovery and depositions as the major components of costs.

Other plaintiff attorneys specializing in employment discrimination cases reported different experiences. In the words of one:

All of our cases are costly to litigate because we are suing . . . large corporations or public entities and these defendants have basically unlimited resources. . . . Corporations use outside counsel who bill by the hour and have little incentive to do things efficiently. We have to fight to obtain discovery.

Several plaintiff attorneys pointed to factors that can add costs to employment discrimination claims. One attorney reported that he spent more time on employment cases that involved the Federal Arbitration Act than on other employ-

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7. *Id.* at 8.

ment cases. In those cases, the attorney sometimes has to challenge the client's alleged waiver of the right to sue in addition to litigating the discrimination claims. In arbitration, "the discovery fights are much worse than in ordinary litigation because defendants think they can get away with not turning things over." In that attorney's experience, "arbitrators never grant summary judgment because they have an economic interest in proceeding to a hearing."

Another attorney said: "Years ago, when we had disparate impact cases, costs were higher because of the need for statistical analysis and expert witnesses." Several others noted that cases that stretch out over time and involve multiple incidents or analysis of multiple records, such as those of similarly situated employees, may be more costly. Another element of costs in employment litigation—the routine filing of motions for summary judgment—is discussed below under the subhead "Summary judgment."

At the low end of the cost spectrum, a specialist in employment cases remarked that she had potential clients who could not afford to pay the fee for filing a case in federal court. She could not represent such clients because they would not be able to pay for other discovery expenses and this sole practitioner did not have the resources to front such expenses. A number of other specialists reported the difficulty plaintiffs have in paying for deposition transcripts. Several employment lawyers indicated their clients generally agreed to pay these and other litigation expenses.

An attorney defending Fair Labor Standards Act and Americans with Disabilities Act claims pointed to high costs in such cases resulting from excessive plaintiff attorney demands for electronically stored information. This attorney asserted that plaintiff attorneys "ask for things like all of the 'swipe' records showing entry to a defendant's building." This factor will also be discussed below under the subhead "Electronically stored information."

### *Economics of Law Practice*

Our multivariate analysis found that firm size affects costs for both plaintiffs and defendants. For example, a plaintiff attorney in a firm of more than 500 attorneys had costs more than double (109% larger) those of a sole practitioner, all else equal. And a defendant represented by an attorney in a firm of more than 500 attorneys had costs more than double (156% larger) those of a sole practitioner, all else equal.<sup>8</sup>

We also found that hourly billing was associated with higher costs for plaintiffs, and that compared to other billing methods (primarily contingency fee),

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8. *Id.* at 6, 8.

plaintiff attorneys charging by the hour reported costs almost 25% higher.<sup>9</sup> Because almost all defendant attorneys reported billing by the hour, there was little basis for comparison with other defendant attorney billing methods.

In sum, some interviewees reported, in line with the multivariate analyses, that the costs are affected by the size of the law firm and by hourly billing. The case-based survey, however, did not inquire into the resources of the party or, aside from a question on contentiousness, into the character and specialized experience of the attorneys involved in the closed cases. Our interviews suggest that part of the variation in cost might be explained by the resources or size of the party and the character and specialized experience of the attorneys. The observations of the attorneys in these interviews might be useful in shaping questions for future research.

Below we discuss the size of the law firm, the size and resources of the client, and the character of the individual attorney in that order.

*Size of law firm.* A defendant attorney who left a large firm to create a small firm said “the tendency to run up costs is part of the internal dynamic of large law-firm practice on two levels: generating revenue and avoiding the increasingly real concern about malpractice litigation. . . . The main drivers are the size of the company and the size of the law firm representing the company.” Another defendant attorney said “some firms—often huge firms with huge overhead—increase the amount of work needed to resolve a case and settle later, after fees have been billed to the client.”

Yet another defendant attorney expressed this sentiment:

Yes, the size of the law firm matters. Large firms are the worst. There’s an element of the lawyers not having enough work to do and they do more than necessary. They staff up a case beyond its needs, for example, sending two or more lawyers to attend a deposition or any other proceeding.

A plaintiff attorney expressed a similar sentiment more colorfully and tersely: “We have a saying in the plaintiffs’ bar that ‘You have to feed the tiger first’” before defendant attorneys will settle a case. Another simply said: “That’s how they get paid. They do not want to talk settlement until they get their hours in. That’s the system.”

Yet another plaintiff attorney described his experience and offered a counterexample that highlights the lost opportunities for early settlement:

There is an economic bind for defense counsel. They need to generate income from their caseload and so discovery is obligatory and summary judgment motions are filed in every case. In an unusual case, though, I

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9. *Id.* at 6.

had a defendant attorney with a client who wanted to manage costs in a case. This attorney arranged to bring his client [from another city] to my office to go over claims of Fair Labor Standards Act violations and we found a way to settle the case early without discovery. He made my client whole and avoided the possibility of having a collective action certified that would have drawn in other employees and cost more money. In 95% of my cases—the percent that settle after discovery—most could settle before discovery. But, I don't suggest this because it would be taken as a sign of weakness. I do, though, look for overtures to move in that direction.

An attorney who represents both plaintiffs and defendants boiled down his similar experiences: “Lawyers in firms produce in the form of billable hours rather than focusing on client needs.”

Specific effects of these practices span the full spectrum of litigation short of trial. None of the interviewees suggested that the alleged churning of cases included taking cases to trial simply to rack up billable hours. Nonetheless, attorneys complained that “large firms will drive up the costs of discovery and will have no hesitation to shell out big bucks for expert witnesses and we have to match those experts.” Another complained about a large firm objecting to “all 25 of my interrogatories, using the same language to object to each.” Another asserted that in a recent case involving a big law firm, “we faced four motions to dismiss, but once we got through discovery the case settled because we discovered what we needed and the firm knew that we had enough to prove our case.” And, as we will discuss further below under “Summary judgment,” filing a motion for summary judgment in some types of cases, especially employment discrimination, has become a standard practice.

An experienced defendant attorney who represents insurers described his observations about the economics of law practice:

In contingency cases, lawyers learn quickly that they are spending their own money when they do discovery and they learn not to uncover every stone. Hourly lawyers may have to uncover those stones. When there are hourly lawyers at both ends of the litigation, that litigation is likely to be the most expensive.

Another defendant attorney reported experience in defending cases in which the lawyers were

completely delusional about their case. Often this occurs when defense attorneys are representing a plaintiff. They are being paid by the hour and are incentivized to spend time on a case. They then approach the case with a ridiculous lack of reason about how much to spend. It always happens that such cases are brought by defense attorneys.

These last two comments suggest that having hourly attorneys on both sides of the litigation is a particularly costly venture.

*Size or resources of client.* Implicit in the last two comments above is a suggestion that a plaintiff who can afford to pay an attorney on an hourly basis is likely to have resources to finance costly litigation. A substantial number of attorneys interviewed rejected the possibility that the size of the law firm might influence costs and countered that the size and resources of the party or the character of the attorney is more important.

An attorney who represents both plaintiffs and defendants said: “It’s not the size of the firm; it’s the size of the client. Large firms wear down smaller firms and force settlement of cases in which the smaller firm and their lawyer continue to think they are in the right but cannot afford to contest.”

Similarly, a plaintiff attorney said that lawyers from large firms make cases more costly, “but not necessarily because of the size of the law firm, but rather because of the resources of the defendant.” Another said: “Lawyers, not always in large firms, often get instructions from the client to conduct scorched-earth litigation.” Yet another said “It’s not necessarily the size of the law firm but the size of the client.”

A plaintiff attorney specializing in product liability and personal injury litigation found that the client drives a process in which the interests of the client and the law firm are aligned:

The opposing party seems to call the shots and seems to have a strategy of making the plaintiff spend a lot of money. Both insurers and the product manufacturers take that approach. The client drives the process, not the law firm. Law firms have no incentive to broach settlement or to cooperate in discovery. Defendant attorneys litigate contentiously to keep their billing hours up.

Apropos of client size, two plaintiff attorneys pointed to policies and practices of state and municipal governments. One said “the state government . . . will spend whatever it wants on a case” and another pointed to a city’s express policy of refusing to settle specific types of civil rights actions.

In a variation on the effect of hourly billing, one defendant attorney pointed to the effect of fee-shifting statutes on costs:

It’s not the size of the firm, but the fee-shifting statutes that encourage some plaintiff attorneys to spend more time on discovery. The tactic is to push for excessive discovery and build up the fees they have to be paid under the fee-shifting statute. Some lawyers on the other hand rely heavily on the administrative record in the case and ask for relatively little discovery.

A plaintiff attorney expressed another perspective:

Fee-shifting should serve as a damper on costs, but some opponents act irrationally. I screen cases for clear evidence of liability and I let people know that I'm bringing a claim but I am often surprised by the irrational behavior of defense counsel. For example, in a recent case . . . I proposed a settlement at an early stage. We spent nine months doing discovery and defendant even brought in an expert. The settlement then had to be much higher because my fees were included.

That experience, of course, may be the flip side of the large law firm's interest in being paid for a sufficient number of hours before settling a case, as discussed in the section "Size of law firm."

One attorney articulated the purpose of fee-shifting statutes as follows:

Damages are not expected to be huge in civil rights cases and that was a good part of the reason that Congress found it important to enact fee-shifting—so that plaintiffs could bring such cases even though the damage awards would not by themselves support fees necessary to litigate the cases. . . . Much of our time is spent in pre-filing investigation so that we can screen the cases and determine that we can meet our burden of proof. At the early stages at least our fees will generally exceed those of defense counsel.

*Characteristics of attorney.* In our interviews, attorneys reported instances and local patterns of contentiousness among the attorneys. One plaintiff attorney observed:

It's not the size of the law firm but its character. Some attorneys and law firms simply adopt a more contentious posture; others are more client-centered and keep the costs down. These differences can result in a two-fold or threefold increase in the costs of an employment discrimination case.

Another attorney indicated the costs are more affected by the "personality of the attorney than the size of the firm." Similarly, another attorney said:

Not necessarily large firms but aggressive lawyers, "scorched-earth lawyers," make it costly and unpleasant to litigate a case. Some are more subtle than others. Lawyers and clients know who they are. There are four firms in [this city] who practice that way and the client who wants such a defense hires one of those firms.

Another attorney reported almost the same observations: "My experience is that it's the individual hyper-aggressive lawyer who is the primary driving force behind costs. We know who they are. Their clients may also know their character and select them because they know."

Other attorneys focused more on the lack of experience and lack of skills of opposing attorneys as a primary force driving costs. One attorney said:

The size of the firm does not seem to have an impact. I would much rather deal with an employment law specialist from a large firm than with a generalist lawyer from a small law firm. The generalist may do things we don't expect, might not understand Rule 26 or Rule 56 procedures, and might also have difficulty evaluating the case.

Another put it even more succinctly: "The better and more experienced opposing counsel is, the less the litigation costs. It's easier to cut to the chase. Some lawyers litigate everything."

A defendant attorney had this to say: "There are some dedicated lawyers who handle employment cases and they live and breathe the cases and do a fine job and we handle those cases efficiently. Then there are a group of outliers and some dabblers. Some scorch the earth."

### *Volume of Discovery*

In the multivariate analysis, discovery had different effects on costs for plaintiffs and defendants. Higher levels of discovery, as measured by the number of types of discovery used in the closed case, were not associated with higher costs for plaintiffs, once other factors were controlled for. But for defendants, each additional reported type of discovery was associated with approximately 5% higher costs, all else equal.<sup>10</sup> For plaintiffs, each expert deposition was associated with approximately 11% higher costs while for defendants the number of expert depositions was not associated with higher costs, once other factors were controlled for.<sup>11</sup> For both plaintiffs and defendants, each non-expert deposition was associated with approximately 5% higher costs, all else equal.<sup>12</sup>

With few exceptions, attorneys in our interviews said that in their practice the volume of discovery is a primary factor driving the cost of litigation, and many said it was the most important factor:

- "Discovery is the number one cost-driver and there isn't a close second."
- "Discovery is the single most important factor and e-discovery is the most important element of discovery."
- "It's all about discovery."
- "Discovery is the major factor."

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10. *Id.* at 5, 7.

11. *Id.* at 5–7.

12. *Id.* at 6, 7.



- “Discovery and associated paperwork related to motions to compel are major factors.”
- “The volume of discovery is the main factor affecting costs in our cases.”

More specifically, many plaintiff attorneys reported that depositions are the leading component of discovery costs. One said:

Depositions are the most costly form of discovery because they involve preparation, reviewing the transcript, and paying the court reporter. I generally start with interrogatories and requests for documents. Responding to deposition requests is also costly in terms of time to prepare and review depositions of my clients.

Another plaintiff attorney remarked that “court reporter fees are huge—\$1,500 to \$2,000 for a one-day deposition.” Another simply said: “Deposition transcripts are a killer.”

Other plaintiff attorneys pointed to the need to obtain documents as a source of unnecessary costs. In the words of one:

It is difficult to prevent document dumping, either with paper or electronic documents. In most cases, we have to go through a standard set of steps before we get discovery. Defendant will deny that certain documents exist. Because courts have neither the time nor the inclination to get involved in discovery disputes, I have to prove the existence of the documents, perhaps by deposing defendant’s IT department, and then move to compel. Then we have to deal with privileges and then with objections that compliance will be unduly burdensome. Plus there are no true sanctions for failure to produce.

Yet another plaintiff attorney pointed to an example of discovery costs:

Stonewalling makes discovery a factor. In addition, defendants often used scorched-earth tactics. For example, in a recent case in which my client alleged emotional distress, the defendant sought all medical and prescription records going back forever. This costs us because we have to pay per-page copy costs to the medical records servicing company. In addition, we generally have about ten depositions in each case—everyone from management, human resources, and comparable co-workers.

Defendant attorneys pointed to production of documents and discovery of electronically stored information (ESI) as major components of their discovery costs. ESI will also be discussed in the next section. One defendant attorney simply said: “Cases with a large number of documents are particularly costly.” Another described the costs in these terms:

Searching and retrieval of such records is a huge burden. Email is also a problem, especially where there are multiple employees and multiple

electronic storage devices. In one case we had to take the mirror image of 40 hard drives before even beginning to search for relevant information. Most businesses are not set up for that. Plaintiffs also seek iPhones and cell phones, including phones used for personal matters. It's a nightmare.

Another said: "The volume of discovery is the main factor affecting costs in our cases. We have clients with lots of employees and millions of documents spread around the world and we have to collect, review, and produce all relevant documents."

Another attorney ventured an explanation for the excessive use of discovery and motions practice:

Part of the reason is that young lawyers look at scheduling orders and decide that they have to do all of the things listed on the order. So, if depositions are mentioned, they have to do them. We used to do one or two depositions and go into a two- or three-day jury trial. Now, the scheduling order suggests that complete discovery, including expert discovery, and summary judgment have to take place in every case. This has increased the costs four and fivefold.

### *Electronic Discovery*

Multivariate analyses found that plaintiffs who requested ESI had 37% higher costs and plaintiffs who requested *and* produced ESI had 48% higher costs. Plaintiffs who only produced ESI had no statistically significant increase in costs.<sup>13</sup> Defendants exhibited a different pattern. Defendants who requested *and* produced ESI had a 17% increase in costs, but where the defendants only requested or only produced ESI, there was no statistically significant change to costs.<sup>14</sup> For both plaintiffs and defendants, however, each dispute about ESI was associated with a 10–11% increase in costs.<sup>15</sup>

**Experience.** Before delving into the problems with and benefits of using ESI, as reported by the attorneys, it is important to note that the majority of interviewees reported having little experience with electronic discovery. One plaintiff attorney articulated a response that appears to describe the experience of many:

Mostly we avoid dealing with electronic documents. In large volume cases, it is imperative that we identify electronic documents but we almost never exchange documents in electronic form. At Rule 26(f) conferences, I have never met an attorney who wants to get into the electronic issues. Neither of us brings it up.

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13. *Id.* at 5.

14. *Id.* at 7.

15. *Id.* at 5, 7.

A defendant attorney presented the other side of the above experience:

There hasn't been much difference in e-discovery since the 2006 rules. I thought it would be a nightmare and have been telling clients about the changes, but plaintiffs have not been pushing to get archived documents and such. I expected plaintiffs to hammer away. We have clients who have multiple offices and computer systems, but very few problems have arisen.

Other attorneys reported that they were beginning to have experience with requesting and receiving electronic documents, but many of those experiences seem to be at the basic level of exchanging documents in electronic formats—or sometimes in both electronic and paper formats—without confronting more complex issues involved in searching multiple electronic media or in providing ESI in native format. For example, one plaintiff attorney said: “I am just starting to have some experience with electronic discovery. I have always exchanged printed copies of e-mails and I have received copies of computer logs, but always in hard copy.” But a substantial number of interviewees indicated that they still exchanged discovery documents exclusively in paper form.

Attorneys also talked about providing or receiving documents on a compact disk rather than as hard copy and, in general, seemed to be aware of the benefits in searching and managing electronic documents. For example, one attorney said:

I don't usually get electronic materials. But recently I have been getting some documents as email attachments, followed by a hard copy. The government provides disks. Between hard copy and pdf attachments, I prefer the latter. I go through them quickly and store them electronically. Then I go through the paper copy at my leisure, maybe on a Saturday, and then I scan the electronic version and search for key words and use that search as the basis for a second request for documents.

Another attorney reported a substantial benefit to email, regardless of the form of production:

We always get documents in paper format. It's not a big deal to review them and usually I can go through it all. Emails, though, are more likely to contain revelations. Loose lips happen more on email than in more formal communications.

Yet another reported a benefit in organizing files: “Electronic documents make my practice easier. The custom is not to exchange all documents electronically. I also scan all documents from my client, assign Bates numbers, and include everything in the same file.”

Other attorneys found that turning over documents electronically saves the costs of printing and delivering hard copies and that receiving electronic documents allowed them to be selective in printing documents.

In sum, most attorneys reported that their experiences in using electronic documents have been quite limited. But a substantial number of attorneys appeared to suggest that their familiarity and comfort level with electronic documents is growing.

**Problems in using ESI.** As attorney comments in the section on “Volume of discovery” indicated, electronic discovery can involve identification and review for privilege of perhaps millions of electronic documents stored on the computers of multiple employees in multiple locations around the world. We asked those attorneys with some experience with electronic discovery to describe how the cost of reviewing and producing ESI differs from the cost of reviewing and producing paper documents. Responses varied considerably, typically according to whether the attorney primarily represented plaintiffs or defendants. As might be expected, defendants expressed far more problems with reviewing and producing ESI. Plaintiffs, though, reported benefits in the form of making the review process easier.

In sum, the interviews suggest that electronic discovery poses serious problems for a number of defendants with huge volumes of ESI stored in multiple locations and on multiple computers of a number of employees.

One defendant attorney simply and clearly summarized the difference in reviewing ESI:

The main difference is that the volume of material to collect and review is so much larger with e-discovery. There are so many forms of electronic documents—instant messaging, emails, voicemail, etc.—that the volume has expanded immensely. Now, when we gather paper documents, we scan them into an electronic form for reviewing, numbering, redaction, and the like.

Another defendant attorney expressed similar observations:

It’s the increased volume of information that is capable of being stored in a permanent form that is the major difference from prior practice. There are no limits. Prior forms of documents are retained, plus there are e-mails, PDAs, blackberries, voicemail and much more. So the same question might demand looking at a vastly increased number of sources.

Another added the cost of hiring outside consultants to the equation:

E-discovery is substantially more expensive than production of paper documents, largely because the production is not under the control of the lawyers. A company has to hire consultants and they are expensive. In the end, the lawyers still have at least the same number of documents to review.

Yet another defendant attorney presented a variation on the review costs and on the need for outside expertise:

E-discovery becomes more expensive even for the same volume of material because at some point I need paper to study. I always review documents in paper form. Another cost is document management. We typically use an outside service to collect, organize, cut disks, and otherwise manage e-discovery.

One defendant attorney, though, said:

In fact, it's easier to review electronic documents. And it's easier to share and store the documents. I no longer produce paper documents if the other side agrees. Most of our documents are on CDs. Paralegals in other offices can have access to the same documents.

An attorney representing the government both as plaintiff and defendant spoke in terms of being the producing party and described the advantages and disadvantages of electronic review:

The volume of documents that the producing party has to review before producing is much higher, in some cases impossible to review on a paper basis. We organize the data by creating a searchable database of all documents and then using concept searches, based on key words such as a person's name, and including words developed during the investigation. Then we have attorneys or case agents or both review the documents turned up by the search. Mostly we do this work in-house and are learning to do more and more of it. We hire outside experts when we need to retrieve forensic evidence from back-up sources.

Plaintiff attorneys on the receiving end of electronic documents typically found that electronic document review is easier than review of paper documents. One said:

My cases involve a lot of electronic data and files. I find that the electronic documents and files are much easier to use than paper documents, which are much more cumbersome. With electronic documents, I can have a paralegal search through them, identify what is important, and make copies of the documents we need.

Another found review of ESI to be less costly: "If I get documents in a form in which I can use a key word search, the cost to me in reviewing the documents is less." Another plaintiff attorney said simply that there was "no difference" in the cost of reviewing documents in electronic or paper formats.

In addition to direct costs of document review, plaintiff attorneys occasionally pointed to the need for expert assistance in analyzing the documents. One said: "On e-mails we might do some forensic work." Another pointed to the need for

“expert assistance in learning how to read data without having the software used to create it.”

One plaintiff attorney found the benefits and costs of e-discovery to be intertwined:

E-discovery in one way is less expensive because you can put everything on a disk and it costs far less to review and store the contents. . . . It may be that the ability to track deletions in documents is a defendant’s worst nightmare. The actual increase in costs consist mainly of two things: (1) the barriers that defendants put up to prevent discovery of ESI, forcing the plaintiffs to narrow requests and arguing that full discovery is too costly; and (2) the increased volume of material to review. But it is far easier to review 20,000 documents electronically than it is to review the same number of documents in a dusty warehouse or in boxes.

As the latter comment suggests, the cost of electronic discovery encompasses the cost of disputes over the scope and magnitude of the discovery. Another plaintiff attorney said: “E-discovery can be more costly for us because there is often more resistance.”

An attorney representing the government in large document cases offered a broader perspective on the problems of the volume of ESI and offered an example of a practical, cooperative solution used by a colleague:

Our problems are not much different from those of corporations. The standards may be somewhat higher for a corporation, which has to put a pair of eyes on every page. But this has to change. To review all of the documents on a standard 60-gig hard drive would take one person full-time for a year. Even four hard drives in a small employment case would exhaust resources. We need to find ways to limit the amount of material produced. In one recent case, a colleague negotiated with the plaintiff to produce a reasonable but limited volume of electronic documents. The term “any and all documents relating to X” no longer has meaning because no one can review or use any and all documents.

The colleague’s experience suggests that some attorneys have developed informal means of limiting the production of ESI.

*Use of vendors.* A few attorneys responded to a question regarding the use of vendors. One said: “We use vendors. They will go long and hard unless one puts controls on what they do.” Another reported using in-house services primarily and using vendors only for special needs:

We use vendors, which are very high-priced, to collect documents from out-of-state and especially overseas employees and sources. There is always the risk of a problem with metadata. We also have problems with restoring lost data: say, for example, a hard drive is dropped and becomes

unreadable. We may spend a lot of money trying to restore the data, but often it's a waste of money because nothing can be retrieved. We also sometimes have large collections by vendors of data that are not used because the claims wash out or the case settles.

Along similar lines, another said: "Generally, we have been able to use the corporate IT people. Once or twice we had to bring in outside people, and they are expensive, not in terms of hourly rate, but in terms of the overall time spent."

**Judges and rules.** Two attorneys reported problems with judges and rules that failed to take into account differences in practice that might arise from electronic discovery. One defendant attorney reported two experiences with standing judicial practices that were problematic:

In one case there were over a million documents and we agreed that the Case Management Order (CMO) require that all documents be produced electronically, preferably in TIFF files, but otherwise in PDF. In related litigation . . . there was a case in [another federal court] in which both sides tried to agree to the electronic exchange of all pretrial disclosures. The judge would not sign our stipulation. We decided to ignore the disclosure rules until there was a CMO in place that would require electronic exchange.

We had a similar problem with a judge regarding numbering of exhibits. We numbered the exhibits sequentially as we produced them. The judge wanted to use the system of using numbers for the plaintiff and letters for the defendant. We finally got him to agree to have numbers on both sides, P-1 and D-1 for example, but we had to change all the numbers to conform to his system.

Another attorney reported a snag in using e-mail to facilitate discovery. He reported "a serious dispute about whether e-mail service of interrogatories was adequate service under the rules." To avoid such disputes, he said "I generally work around that rule, sometimes end up using snail mail."

Another attorney described a more fundamental problem for attorneys and judges this way: "Even going to court to explain the burden is burdensome. Nobody has a clue about the technical issues, not even the judge."

### *How Much Discovery Is Enough?*

As discussed above under "Stakes in the litigation," the case-based survey found that more than half of the attorneys indicated that the costs of discovery were "just right" relative to their clients' stakes; 16–18% found the costs to be "too little"; and about a quarter of the attorneys indicated that the costs of discovery were too

high relative to the stakes.<sup>16</sup> This finding raises the question of how approximately three-fourths of the attorneys reached outcomes where discovery costs appeared to be proportional to the stakes. We asked interviewees how they know when they have enough discovery.

In sum, it appears that some attorneys have developed plans and practices to control discovery costs in the wide range of litigation that takes place in federal courts. Interviewee reports seem generally consistent with the findings in our multivariate analysis that the stakes in the litigation represent an important factor in determining costs. The reports also appear to be consistent with the finding in the case-based survey that about three out of four attorneys found the costs in the closed case to be either “just right” or “too little.”

Recall that in the stakes discussion we reported the general conclusion that the monetary and nonmonetary stakes in the litigation served as a guide for the interviewees in making decisions about how much discovery to conduct. In this section we explore attorney responses that show how that guide works in everyday practice.

Not surprisingly, a handful of interviewees, primarily plaintiff attorneys, responded with a variation of: “I never know that I have gotten enough information from discovery and usually think I have not gotten enough” or “A test is whether I anticipate waking up in a cold sweat just before trial thinking about someone I should have deposed.” To cope with such occupational anxieties, these attorneys referred to professional formulas for guiding their discovery plans. The mechanisms they employ include:

- going as far as the law, or at least the scheduling order, allows;
- pressing as far as necessary to obtain all important known documents;
- following the elements of each claim or defense and checking to be sure they have strong, persuasive evidence for each element;
- employing well-established protocols or rules of thumb within their specialty area; and
- scaling discovery to the stakes of the litigation, in consultation with the client or in anticipation of the client’s wishes and resources.

Scheduling orders provide an outer boundary for discovery efforts. As one attorney expressed it: “I go as far as the law will allow. There are time constraints, usually about six months, and I generally do not have enough time to do all the discovery I want. I can get extensions, but often the additional discovery would

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16. Lee & Willging, *Preliminary Report*, *supra* note 1, at 27–28.



not be cost-effective.” Another said: “I prefer to practice in federal court because there is a pretrial order with a schedule or limits.”

Within those parameters, plaintiff attorneys expressed different approaches. One said that “generally all I can get is what the defendant is willing to turn over voluntarily. It would not be cost effective to file and litigate motions to compel, which courts discourage.” But another said: “Sometimes I know the documents exist because of my years of practice on the defense side, and in those cases I pursue it to the end.” And another said: “We generally have to file a motion to compel before we get the good stuff. We will mine a privilege log. In a recent case, in camera review of privilege claims ended up with us receiving three-fourths of the documents we requested.”

Most attorneys implemented the guidance they may have learned in law school: they looked at the elements of their claims and defenses and measured the completeness of their discovery by whether they had solid evidence to support each element of each claim or defense. One summarized the thought process succinctly: “You have to measure the sufficiency of discovery by matching up the elements of the cause of action. When you have strong evidence on each element, you feel comfortable.” Another elaborated on the process:

The only way to know is to sit down and figure out what you need to prove at trial. Lawyers who delay making that analysis ask for too much discovery. Sometimes they are worried about malpractice claims. . . . Lawyers are generally afraid to narrow the issues. They should know within the first months of a case what exactly will be in dispute. I advise lawyers to outline their jury instructions at the outset of a case. If they know what they want in the jury instructions, they will know what their claims are and what they have to prove at trial.

Other interviewees pointed to well-established processes they developed over years of practicing within a specialty area. One plaintiff specializing in a type of civil rights litigation said:

We have well-developed protocols about what we need to discover and what we have to prove. There are a fairly routinized set of procedures, with some variations. We know what we’re entitled to get. If we do not get it, we have no hesitation in filing a motion to compel. Our cases are covered by fee-shifting statutes, and we will usually be reimbursed for those hours.

Another plaintiff attorney said:

One has to go through the same steps for all cases. The three steps are (1) interrogatories and production of documents; (2) depositions of key witnesses; and (3) supplemental requests and additional discovery to fill

in the gaps. For the most part we keep our eye on the third element and may decide to forego such costs in less complex cases with lower stakes.

Others talked of using rules of thumb like “I always do depositions of all the trial witnesses and any expert for whom I do not have a decent report,” and “By experience I tend to know whether a potential witness will in fact be used and I take the deposition.”

Another plaintiff attorney reported a sophisticated technique, using forensic techniques to test electronic documents:

I focus discovery on a few documents. Sometimes I find that documents have been fabricated—a document that looks too perfect for a note to the file or a document that is internally inconsistent or that contradicts other evidence. When that happens I bring in an expert and seek a forensic analysis. The [federal district court] is conservative in granting such an analysis, so I have to be selective. But I have gotten such analyses in one out of four or five of my employment discrimination cases and I have never been wrong. I pay an expert about \$500 and we examine the defendant’s main computer and extract the metadata for the document. That always settles the case.

Finally, a number of lawyers expressed again their concern for keeping discovery commensurate with the stakes in the litigation. One defendant attorney had this to say:

I constantly assess how much information we have and how much we need. I tell my clients we don’t need perfect information, just enough to defend successfully. I need the basic facts about the incident and about the damages. I always need to have a deposition of the plaintiff because it’s important to see the person face-to-face. After that, I don’t need much. I need to be sure I have a handle on medical costs and damages. Some firms will bill more for discovery in cases, but our clients review our billing to be sure it’s in line with the stakes—unless it’s a matter of principle.

Another attorney who represents plaintiffs and defendants said: “Counsel and the client decide whether to turn over every rock. I do not go that far. I advise the client when the cost of obtaining marginal information will exceed its benefit. I work almost always on an hourly basis.”

Several plaintiff attorneys expressed similar sentiments. One said: “I try to keep discovery costs down because the client pays.” Another said: “In some of these cases, though, the client’s budget will tell you when you’ve done enough. Often our arrangement with a client is that the client pays the expenses. If the client cannot or will not pay for a given deposition, we face a limit.”

## *Pleadings*

We asked the attorneys to describe, based on their experience, the impact on their practice of the Supreme Court decisions in *Bell Atlantic v. Twombly*<sup>17</sup> and *Ashcroft v. Iqbal*.<sup>18</sup> We also asked how frequently they encountered notice pleadings, and whether they used notice pleading in their practices.

***Impact of Twombly/Iqbal.*** Most interviewees indicated that they had not seen any impact of the two cases in their practice. While some pointed to individual decisions granting a motion to dismiss for failure to state a claim under Rule 12(b)(6) (“12(b)(6) motion”) none of the attorneys identified an increase in the likelihood that such a motion would be granted. Many attorneys also pointed to the increases in the costs of litigation entailed in the increased frequency of litigating 12(b)(6) motions.

In sum, attorneys identified few concrete effects from the two decisions. For the most part, they reported no effect. The few effects identified seem more likely, at least in the short run, to increase than decrease the costs of litigation in the broad spectrum of cases by providing incentives to file unproductive 12(b)(6) motions to dismiss. In addition, most found notice pleading to be rare. Almost all indicated that their practice is to plead enough facts to tell a coherent and persuasive story.

Most plaintiff attorneys indicated that there had been no impact on their practice, explaining that for a variety of reasons to be discussed below, they do not use notice pleading in their practice and have always satisfied the standards laid out in the *Twombly/Iqbal* line of cases. A typical response from an attorney specializing in employment discrimination cases was:

No effect [from *Twombly/Iqbal*]. I fact plead and [the state where I practice] is a fact pleading state. I have never faced a serious challenge to a complaint in 20 years of practice and only have had 2–3 motions to dismiss for failure to state a claim filed (but always face summary judgment motions).

Another plaintiff attorney, specializing in consumer credit cases, said that the absence of dismissals did not tell the whole story: “They have not yet had an impact on my cases. The decisions, though, . . . will force people to spend more time and money on litigation.”

Interestingly, a number of defendant attorneys echoed the sentiment about the costs of litigating 12(b)(6) motions. One said: “I have not seen any impact yet. I generally view Rule 12 motions as a waste of time. Many judges seem to want to

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17. 550 U.S. 544 (2007).

18. 129 S.Ct. 1937 (2009).

use them only if a case stinks. Well, most of the high-stakes cases I deal with don't meet that criterion." Another attorney, who represents plaintiffs and defendants, discussed the additional costs in these terms:

More motions to dismiss are being filed, but there are not more dismissals. These motions add another layer to the litigation. The Third Circuit recently rebuked a judge for dismissing a case with prejudice. The practice adds delay to the litigation, generally about 3 months and more than a year if a dismissal is appealed. And cases that take more time cost more.

Yet another attorney who represents both plaintiffs and defendants reported no impact on his practice and said "I thought about using the cases to support a motion to dismiss in an employment matter I was defending but I could not justify charging my client for my time to do so." Another seemed more ambivalent, weighing potential costs and benefits:

No impact [from *Twombly/Iqbal*] as of yet. It seems more likely that a motion to dismiss will be filed, but this doesn't cost us much. I'm not sure district judges will implement the ruling fully. For example, some may be inclined to allow discovery pending a ruling. I haven't filed other motions. It does involve some time and costs.

A defendant attorney discussed having success in recent class action litigation involving insurance claims: "We filed a 12(b)(6) motion to dismiss, which the court granted. Plaintiff attempted to amend twice without success and the court turned down a third request to amend. The case is now on appeal." That case, of course, also illustrates the cost of even a successful motion.

Another defendant attorney reported some success in securities litigation: "We used *Twombly* in 12(b)(6) motions to dismiss in Section 11 and state-law claims. We've had a few partial dismissals that have cited the two cases and we view them very favorably. In at least one case, all the claims were dismissed under either *Twombly* or Rule 9(b)."

One defendant attorney, though, faced a motion based on the two cases:

Recently, plaintiffs in one of my cases cited *Twombly* and *Iqbal* in support of a motion to strike affirmative defenses because of the alleged lack of factual premises for those defenses. We spent thousands of dollars researching and briefing the issue. The court denied the motion and found that our pleadings were adequate.

Another attorney, representing both plaintiffs and defendants, predicted an impact on patent litigation:

The cases have not had much of an effect yet on the type of cases I handle, but they will in the future, in the form of requiring the pleading of particulars. I expect more defense motions to dismiss and they will

change pleading practices greatly. I see cases in which plaintiffs plead that a defendant's product violates patents 1 through 6. The cases will require more detailed analyses in the pleadings. On the defense side the cases should affect all affirmative defenses, especially the "delay" defense like laches, estoppel, acquiescence, which are always pled in a general form.

***How much notice pleading?*** Ten attorneys reported that they sometimes see notice pleading in their practice. Most indicated that notice pleading is rare; some pointed to specific types of cases in which notice pleading is particularly problematic. One intellectual property attorney contrasted the utility of notice pleading in trademark cases with its disutility in patent cases:

In trademark cases notice pleading works. Plaintiff has to attach a copy of the registered trademark to the complaint so that the Trademark Office can be notified. But in patent cases a party might allege 30 patents with 10 claims each that are applicable to multiple products—and not attach the patents. With a general allegation that defendant has infringed plaintiff's patent, it becomes impossible to know from the complaint what the issue is and how to answer the complaint. . . . The lack of detail in those pleadings is a problem. I don't want fact pleading like we have here in . . . state courts, and I recognize the need for notice pleading in personal injury cases, but in patent litigation the lack of specific facts imposes delays that add to the cost of litigation. The longer a case is open, the more it costs.

Several defendant attorneys gave examples of notice pleading in their practice. One government attorney said: "We see a lot in *Bivens* cases." Others said:

- "Occasionally I get pure notice pleadings in cases that are pled solely on state law grounds in a field that has been totally preempted for more than a century by a federal statute. In one case, the judge held that the state law claims gave sufficient notice of what the federal claims would be."
- "I do see notice pleadings. For example a vexatious litigant included allegations of slander against about a dozen defendants without any specification about where or when or by whom the statements were made."
- "I am defending three debt collections cases in which the plaintiff has used notice pleading in state court, with few details about how the debts were incurred."
- "Some commercial cases add a lot of general theories, ranging from fraud to conspiracy, to a basic breach of contract claim without supporting facts."

One plaintiff attorney reported his experience in dealing with notice pleading by defendants:

I routinely get back answers with laughable responses, disputing everything, even the indisputable, and including 15–30 affirmative defenses, all boilerplate legal conclusions without any factual link to the case. This is especially true if punitive damages are alleged in the complaint. Another example is the pleading of laches in response to a federal statutory complaint. Where is the equitable claim? I tried to take this type of pleading on one time, moving to strike the defense of “bona fide error” in a debt collection case. There were absolutely no factual allegations to support the defense. But I was slammed down on that motion and have given up trying to hold defendants to the *Twombly/Iqbal* standard. Most judges shrug it off.

Except for the last comment above, attorneys either stated or implied that in their experience notice pleading is relatively infrequent and limited to the cases described.

*Do you file notice pleadings?* Most interviewees said they avoided notice pleading. These attorneys offered reasons for what they typically asserted to be a longstanding personal practice of pleading specific facts. In their words:

- “My complaints are detailed, for tactical reasons. I want to have the complaint tell the client’s story clearly, and hopefully quickly as well. I want the reader, including the judge or more likely his clerk, to say to himself ‘Well, if he can prove this, he wins.’”
- “I have always thought it is a good idea to put as much detail as possible into a complaint so as to make a good first impression on the judge.”
- “In trademark and copyright cases, which I specialize in, the pleadings are straightforward and will not be affected because there are a limited number of particular details. I plead the trademark itself and the ad or statement that allegedly infringes. That’s the whole story.”
- “I use more than bare bones pleading but do not plead evidence. I try to tell the story and present facts to support each element of the statutory claim.”
- “We have always included more than is necessary for notice pleadings, and we are generally very specific about the facts.”
- “I always draw up a case with more rather than fewer facts. In commercial litigation it’s rare that there are not enough facts to plead at the start of a case. There are contracts, accounts, and other documents.”
- “I never did notice pleading, always much more. I tried to plead who is involved . . . and enough facts to apply all of the elements of a statute.”

- “I have always done very fact-intensive pleading and could always add more facts if needed. I have one client and one story to tell.”
- “I always plead enough facts in a complaint. I plead to influence the court, assuming that the judge reads the complaint.”
- “I tend to put in too many facts and then regret that I have to attempt to prove them. I have never had a case dismissed for failure to state a claim.”
- “I plead facts based on the prescreening I do before filing a case. My work is done up front and I plead with specificity.”
- “I have a tendency to do fact pleading. State rules require it. I load up the complaint with facts.”

As did the last attorney quoted above, several attorneys noted that their primary state courts require fact pleading and that federal practice tended to follow state practice.

Only two attorneys said that they routinely used notice pleading. One of those two, though, also mentioned the need to tell the story of the case:

Yes, I use notice pleading. I only plead what I need to plead. As a plaintiff I plead enough to tell the story but avoid pleading facts that might come back to haunt me. On the defense side I do about the same. But I plead affirmative defenses in broad general terms, often without pinning them down to any facts in the case.

The other said: “I used to file complaints that amounted to a ‘press release’ with complete details included, maybe to get attention and clients. Now I try to make a complaint as spare as possible.”

### *Summary Judgment*

We asked attorneys whether summary judgment is used when appropriate. We also asked the attorneys to discuss any relationship they found between summary judgment and settlement. As might be expected, the comments varied considerably by whether the attorneys primarily represented plaintiffs, defendants, or both.

In sum, plaintiff and defendant attorneys disagreed sharply about whether summary judgment is used appropriately, particularly in employment discrimination litigation. Interviewees also reported that summary judgment often serves as a catalyst for settlement but also apparently as a limit on early, pre-summary judgment settlement discussions, at least in employment cases. Because discovery generally precedes summary judgment, in most cases interviewees say they have already invested most of the cost of litigating the case before a motion for summary judgment is filed.

According to plaintiff and defendant attorneys, motions for summary judgment are filed routinely in employment discrimination cases.<sup>19</sup> Plaintiff attorneys complain that the process is overused; defendant attorneys assert that the process is underused in the sense that some judges are reluctant to issue summary judgment even when warranted.

***Plaintiff attorneys' comments.*** One plaintiff attorney who specializes in employment discrimination cases stated an opinion expressed by many employment discrimination attorneys in our interviews:

Summary judgment is overused. It's used in almost every employment discrimination case. In my 20 years of practice I have faced over 50 summary judgment motions and only 2 of those were granted. Summary judgment often varies by who the judge is. Some judges grant far more summary judgment motions than other judges.

Another plaintiff employment attorney went into more depth:

Summary judgment is overused. It's a knee-jerk reaction by defense counsel, and filing a motion for summary judgment has become the standard of practice. If a defendant loses a trial without having filed for summary judgment, there might be a malpractice case. . . . Judges grant far too many. Circuit judges talk about plaintiff's duty to present evidence, but Rule 56 does not contain that language. In reality the district judge and the circuit judges are saying "What does plaintiff have?" That's the real question and how the rule is being used, not to identify a genuine issue of material fact.

Another problem is with judges' case-management plans. By closing discovery before summary judgment motions are filed, judges allow defendants to lie without fear that their lie will be uncovered and tested in the open. Defendants manage information so that they reveal some arguments only at the summary judgment stage. Allowing or requiring that summary judgment motions be filed earlier would allow those arguments to be tested. State courts leave discovery open until just before trial and thus prevent defendants from managing information this way. The federal system interferes with the ability to find the truth and is not rational.

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19. See generally Joe Cecil & George Cort, Report on Summary Judgment Practice Across Districts with Variations in Local Rules, Memorandum to Judge Michael Baylson at 3, Aug. 13, 2008 (Federal Judicial Center) (stating "the expansive role of summary judgment in [employment discrimination] cases is striking"), available 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).



Similarly, a plaintiff attorney argued that courts sometimes apply the wrong standard in ruling on summary judgment motions:

There is too much getting into whether the plaintiff has a perfect case. For example, I had a . . . case involving a claim of . . . sexual abuse. I had an expert witness who was not excluded under *Daubert* but I still lost on summary judgment. This should never happen when plaintiff has a legitimate expert. Courts are not just looking for whether there is a material fact in dispute. I don't lose summary judgment that often, though.

Another presented an example of alleged misuse:

Summary judgment is used in every single case. In my cases, it's not often successful because I screen my cases carefully and only take cases I think will survive summary judgment. It's granted in less than half of my cases but still more often than it should be. In one case, the Fifth Circuit affirmed a grant of summary judgment in which the district judge declined on credibility grounds to give any weight to the declarations of coworkers.

Yet another concluded: "Summary judgment is overused and it results in litigant's loss of faith in the legal system. Because cases often cannot get to a jury, clients feel they have not been treated fairly, that their case has been decided at the whim of a judge."

*Defendant attorneys' comments.* Defendant attorneys maintain that summary judgment is being used appropriately. Some say it is used too infrequently.

Defendant attorneys confirm the routine use of summary judgment in employment discrimination cases and defend the use of summary judgment in that sphere and promote the utility of summary judgment in other types of cases as well. As to employment cases, one said: "I use summary judgment virtually all the time in employment discrimination cases because typically the complaints are not material to the adverse action. Management officials generally have legitimate reasons for their actions and plaintiffs typically have no evidence of a pretext."

That same attorney uses summary judgment more selectively in tort cases: "less than 50% of the time." Other defendant attorneys find summary judgment apt for other types of litigation. One said:

Defendants think summary judgment is underused. My commercial cases are most susceptible to summary judgment and I am a frequent user. I appreciate federal court on that issue. A state court judge might deny a motion by noting in the margin that there is a genuine issue of material fact. In federal court, you get a reasoned opinion.

Another said: "Summary judgment is my favorite thing. My cases often lend themselves to it, so I use it in about half of my cases, often in conjunction with requests to admit."

A number of defendant attorneys reported using summary judgment selectively. One attorney who does not handle employment discrimination cases had clear guidelines and, literally, a rule of thumb:

I don't like to file for summary judgment unless I feel solid about the issue. . . . I have about a 70% success rate. For me to file, the issue has to be simple and easy to digest. I follow a "one inch rule": If the appendix is thicker than an inch there is a genuine issue of material fact. Typically, summary judgment is needed only on a single issue, not the entire case.

Another articulated similar reluctance to file for summary judgment outside of the employment discrimination context:

We use summary judgment only when it's warranted and we have had success with it. We only file for summary judgment in 10%, maybe 20%, of our cases. We always file for summary judgment in employment cases because those are often legal cases. Filing for summary judgment is the norm in employment cases.

Another said: "I try to wait for a strong case before seeking summary judgment," in part because "judges complain about the volume of summary judgment motions."

***Plaintiff attorney use.*** Some plaintiff attorneys use summary judgment as part of their practice. A plaintiff civil rights attorney said:

Some plaintiffs seem to be victimized by summary judgment. We do not have that experience. Motions are infrequent, maybe because our statutes raise issues of intent. Sometimes we use summary judgment to our advantage, seeking summary adjudication of liability where we have written evidence of discriminatory action.

Another civil rights attorney found value in successfully opposing summary judgment motions: "I like summary judgment. It's a good rule because it makes you be sure that you have enough evidence to proceed. Overcoming a summary judgment motion gives me confidence that I have something."

A consumer attorney said: "Summary judgment plays an extremely important role. By that stage of the case, motions are almost always filed. I file motions and they provide a powerful push toward settlement."

***Settlement and costs of summary judgment.*** The last two comments suggest that summary judgment plays an important role in promoting settlement. Almost all interviewees stated that summary judgment either serves as a catalyst for settlement or that the decision on summary judgment acts to polarize the parties and inhibit settlement. One defendant attorney summarized both the positive and negative aspects of summary judgment:

Summary judgment has both positive and negative impacts on settlement. The prospect of losing a motion focuses one's attention on a case's weaknesses, which is a good thing, forcing the attorney to evaluate a case more realistically. On the negative side, parties tend not to look at cases realistically until the summary judgment stage. In that way, parties use summary judgment as an excuse to avoid evaluating a case. Summary judgment may increase costs because people wait for it before they evaluate the case and discuss settlement. Until summary judgment they are preoccupied with deadlines, motions to dismiss, and completing discovery.

Another defendant attorney referred to the costs that are sunk into the case before a summary judgment ruling:

When a party files for summary judgment it forces both sides to evaluate their cases carefully and identify any weaknesses. Clients sometimes put too much stock in summary judgment and on losing a motion—they become very nervous about going to trial and then want to settle. In either case, though, most of the costs have been incurred by that time, including the cost of preparing for trial.

Another defendant identified the hidden cost of delaying the outcome of a patent case by waiting for a summary judgment ruling:

I save clients millions of dollars if I win, but it adds significantly to the hidden cost of litigation if I lose: that is the cost associated with tying up a client and the business. The process generally takes about eight months, with the possibility of an appeal. This can be an additional year during which the client is being damaged by a competitor's use of the patented process.

A plaintiff attorney put the cost of summary judgment this way:

In my cases it is being used to wear me down and delay settlement. It takes a long time to resolve a summary judgment motion. In one case, we argued the motion a year ago. The magistrate judge issued a report and recommendation to which defendant objected and the case is still pending before the district judge.

Another plaintiff attorney said:

Generally there is no discussion of settlement until after summary judgment has been denied. All defendants expect their lawyers to file for summary judgment and some defense counsel say it borders on malpractice not to file such a motion. Summary judgment motions are filed even when there are clearly disputed issues of fact. They are always denied in the police misconduct cases and usually but not always denied in the employment cases. In some cases, judges are deciding motive questions on summary judgment. We generally appeal those decisions and I am working on several right now.

## *Rule Changes*

We asked some of the attorneys whether past rule changes have affected costs and whether they had any suggestions for future rule changes. These questions came toward the end of interviews that were planned to span 20–25 minutes and in many instances the previous questions and answers had consumed all of the available time.

***Past rule changes that have affected costs.*** Attorneys on both sides identified a number of past rule changes that have affected costs in a favorable way. Two sets of changes, both dealing with electronic materials, received the most attention.

First, several attorneys mentioned the 2006 amendments dealing with ESI. One said specifically that the “clawback rules have had an effect.” Another pointed to rules governing restoration of backup tapes that are not reasonably accessible. A third said, in a positive way: “We would not be doing all of this electronic discovery without those changes.”

Second, a couple of attorneys pointed to rules creating electronic filing and the CM/ECF system. One specifically mentioned that these rules “make it enormously easier to communicate with parties and attorneys” and gave an example of a voting rights case in which 20 attorneys had to be sent a certified letter. What otherwise would be administratively costly was all accomplished electronically and inexpensively. Those changes, of course, were the result of technological changes that were then implemented through rules changes.

Other examples of past rules changes that reduced the costs of litigation were

- Rule 11 (but see the next section for suggestions for changes);
- case-management orders in general (Rule 16); and
- limits on the number of interrogatories.

***Suggestions for future rules changes.*** Interviewees suggested a number of areas where rule changes would be welcomed. Following the cost-focused theme of these interviews, more than half of the suggestions clustered on procedures to increase opportunities for case evaluation and settlement during the early stages of civil litigation. Several suggestions dealt with procedures such as phased or tiered discovery that would enable the parties to exchange information needed to evaluate cases soon after filing.

One attorney simply referred to a system of “tiered discovery,” with the purpose of gathering information to evaluate a case early in the litigation. Another referred to a system employed by some judges in the Middle District of Florida that would require plaintiff to answer a set of court interrogatories soon after filing a complaint. The plaintiff would “have to specify the amount of their claim, indicate whether they have issued a prefiling demand to the defendant, and how

much.” If they had not presented a demand to the defendant before filing the complaint, they would be ordered into mediation before proceeding further with the action.

Along similar lines, a plaintiff attorney called for

early, real settlement conferences that focus on identifying issues central to the litigation and putting together a short-term plan for identifying the information necessary to give counsel 70–80% certitude about the value of the case. Make the lawyers sit down and attempt to solve the problems posed in the case.

Another plaintiff attorney called for “a court-sponsored early settlement conference, before discovery costs have been incurred.” Yet another plaintiff attorney articulated a variation on the early case evaluation theme:

Find a way to circumvent discovery by following up disclosure of documents with a meeting of counsel, under the auspices of the court, to discuss the documents and allow counsel to ask questions about the documents. That would increase the chances of an early settlement on the merits.

One of the more elaborate proposals came from a defendant attorney specializing in insurance litigation:

This may not be amenable to a defined rule, but it would be interesting to see district judges experiment with phased discovery in which the initial phase is directed at evaluating the case and then have a freeze for a period of time during which the parties would evaluate the case and discuss settlement. Then, if no settlement, the parties would continue discovery and prepare for summary judgment and trial. It might be hard though to differentiate evaluation evidence from other merits evidence. Or the courts might open up a “time to think” period in a case’s schedule so that parties can evaluate cases at an earlier stage.

Two interviewees, both of whom represented plaintiffs and defendants, called for adding teeth to the offer-of-judgment rule by explicitly adding attorney fees to the costs.

A patent attorney called for changes in Rule 11 to make it more applicable to motions filed during civil litigation:

The new Rule 11 rules are not right in requiring notice before filing a motion for sanctions. Lawyers should feel that sanctions might be imposed on them at any time. The time limits for notifying lawyers of intent to file a sanctions motion do not work in the context of a frivolous summary judgment motion. There is not enough time to pursue sanctions while the litigation process is ongoing. Now I would have to prepare a sanctions motion before responding to a summary judgment motion.

In patent cases we sometimes send a letter at the outset laying out the various provisions that allow for fee-shifting, but those only apply to the party, not the attorney. Lawyers would pay more attention if they had to be exposed to paying the other side's fees. Trollers who threaten patent infringement cases would be intimidated. Lawyers have to know they will suffer personally if they pursue unsupported claims.

Another attorney described a Rule 11 encounter that had a chilling effect and offered a suggestion for fixing an imbalance:

I filed a challenge to the constitutionality of a state rule of procedure and thought I had a good-faith argument to support the challenge. An attorney sent a Rule 11 warning letter and I talked with my partners and we decided it was not worth the risk. We didn't want to guess the wrong way. One way to remedy that problem might be to make the unsuccessful Rule 11 filer pay the fees of the person opposing Rule 11 sanctions. Fortune 500 companies can afford to absorb Rule 11 sanctions but our firm and our clients cannot. That's an imbalance.

Attorneys provided a number of miscellaneous suggestions, including

- allow document requests after depositions have closed to blunt a strategy of postponing depositions until the end of discovery and cutting off any opportunity to obtain documents identified in a deposition;
- clarify that discovery requests and documents can be served by electronic means;
- eliminate the Rule 26(f) conference;
- limit document production; and
- create an expedited, simplified procedure for small cases.