February 18, 2014

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rules of Civil Procedure

Dear Members of the Committee on Rules of Practice and Procedure:

The National Employment Lawyers Association (NELA) appreciates the opportunity to supplement its earlier, comprehensive comments dated March 1, 2013 on the proposed amendments to the Federal Rules of Civil Procedure (Rules). NELA is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 circuit, state, and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been treated illegally in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the Rules amendments actually will play out on the ground.

We write now to address an inaccurate interpretation of a report issued by NELA in March 2010, entitled "Summary of Results of Federal Judicial Center Survey of NELA Members, Fall 2009" (NELA Summary), that became apparent during the public hearings held by the Advisory Committee. A member of the Advisory Committee stated at public hearings held in Washington, D.C. and Dallas, Texas that NELA members surveyed in 2009 complained about disproportionate and costly discovery and that the findings from the survey supported the proposed changes to the federal civil discovery rules.

At the hearing in Washington, D.C. on November 7, 2013 an Advisory Committee Member stated:

> When the NELA lawyers were surveyed with the assistance of the [Federal Judicial Center], the NELA lawyers thought that there was a problem with disproportionate discovery. Eighty percent of the NELA lawyers thought that in small cases the amount of discovery was disproportionate to the stakes in the case. And in larger cases, it was about 50 percent of the lawyers thought that the costs were disproportionate.

November 7, 2013 Hearing Transcript at p. 224:6-14.

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At the hearing in Phoenix, Arizona, on January 9, 2014, NELA member Kathryn Burkett Dickson, who testified on behalf of NELA, responded to this comment and directed the Advisory Committee's attention to page 11 of the NELA Summary. Ms. Dickson pointed out that more than 90 percent of NELA respondents believed that depositions, document requests, and interrogatories are very important to the prosecution of employment cases. She further explained that NELA members were *not* complaining that there was too much discovery, but that recurrent discovery abuses requiring endless meet and confer conferences and multiple motions to compel cost them time and money. January 9, 2014 Hearing Transcript at pp. 165:22-166:15. Nonetheless, we understand that at the hearing in Dallas, Texas on February 7, 2014, an Advisory Committee Member again cited the NELA Summary and reiterated that he believed that NELA members' dissatisfaction with the amount of discovery supported the proposed changes to the Rules. (A copy of the transcript from the Dallas hearing is not available at this time.) With all due respect, this is an incorrect reading of the NELA Summary and survey data.

Some background regarding the survey of NELA members is informative. The survey was administered in October and November 2009 to NELA members by the Federal Judicial Center (FJC) at the request of Judge Mark R. Kravitz, the then-Chair of the Advisory Committee. The survey was adapted from a previous version developed by the Institute for the Advancement of the American Legal System (IAALS). Surveys were mailed to 2,156 NELA members and 296, or 14 percent, responded. On March 26, 2010, NELA issued the NELA Summary, which compiled and analyzed the data from the NELA members' responses. A copy of the NELA Summary narrative, pp. 1-17, is attached to these comments.[1]

The NELA Summary concluded that a clear majority, or 60 percent, of NELA respondents agreed that the Rules as written were not conducive to a "just, speedy, and inexpensive determination of every action." NELA Summary at p. 4. Additionally, approximately two-thirds believed that discovery was abused in almost every case and 87 percent concurred that sanctions were seldom imposed for improper conduct.[2] *Id.* at 11. While respondents found the discovery tools to be important, 70 percent deemed they are too expensive. *Id*. at 8. It is important to unpack these overall results and review the underlying data to understand what NELA respondents were saying exactly.

A large majority of NELA members identified the following discovery tools to be *very important* to the development of their cases: depositions of fact witnesses (94%); requests for production of hard copy documents (92%); and requests for production of electronic documents, including e-mail (79%). Additionally, a significant number of respondents also believed that these types of

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[1] A complete copy of the 151-page NELA Summary including Appendices is available on request.

[2] For example, NELA survey respondents made the following comments regarding discovery abuses and sanctions. "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." "FRCP are generally fine, just need to be enforced by judges as written." "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." NELA Summary at pp. 52-53.

discovery were *very or somewhat* cost-effective: requests for production of hard copy documents (90%); requests for admissions (89%); interrogatories (82%); requests for production of electronically stored documents, including e-mail (79%); depositions of fact witnesses (76%). *Id*. at 11.

Moreover, it is important to recognize that NELA members were complaining about the *abuse* of discovery that drove up litigation costs, not the *amount* of discovery. As Ms. Dickson testified at the Phoenix hearing, the increase in discovery costs results from litigation gamesmanship and does not reflect the true expense of these tools in the abstract. For this reason, we urged in the NELA Summary that it would be prudent to refrain from revising the Rules to reduce the amount of discovery to which a party is entitled, because that would not improve the efficient exchange of discoverable information. *Id.* at 6. Instead, it would inhibit greatly the development of facts and evidence plaintiffs must have in order to prosecute their cases successfully and that are asymmetrically in the possession of the defendants.

In conclusion, the NELA Summary does not support the proposed changes to the Rules regarding proportionality and limiting discovery. NELA wishes to thank the Advisory Committee for its attention and consideration to our comments.

Sincerely,

Roberta L. Steele
Program Director
National Employment Lawyers Association

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

A Report By The
National Employment Lawyers Association
March 26, 2010

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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]

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[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 (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 Act[9] 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]

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[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.

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[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, (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

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[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

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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.

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[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.

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[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.