

Attorney survey reveals concerns about litigation costs

A recent survey of fellows of the American College of Trial Lawyers (ACTL) has revealed that both plaintiff and defense counsel are concerned about the high costs of litigation. But some observers claim the results do not accurately represent the views of all litigators, especially those whose practices primarily include plaintiff personal injury work.

"The groups that organized this study and the respondents to the survey are primarily defense-oriented. That bias shows," said John Vail, vice president and senior litigation counsel at the Center for Constitutional Litigation in Washington, D.C.

About three-fourths of the survey's respondents identified themselves as primarily defense counsel; one-fourth said they mainly represent plaintiffs. The average respondent had been practicing law for 38 years.

The ACTL Task Force on Discovery teamed with the Institute for the Advancement of the American Legal System (IAALS) at the University of Denver to conduct the study. An electronic survey was sent to 3,800 ACTL fellows in April 2008. Nearly 1,500 fellows (about 42 percent) responded.

The majority of respondents—65 percent—said the Federal Rules of Civil Procedure do not promote the goal of a "just, speedy, and inexpensive determination of every action," according to an interim report on the findings. However, opinion was split on whether there are too many rules (54 percent disagreed with that statement) and whether they are too complex (51 percent disagreed).

A large majority of the study's respondents indicated particular concern about discovery costs: 87 percent said the discovery process has become too expensive, and 83 percent answered that high costs mean that some cases are settled when they otherwise would not be.

The survey's examination of discovery also included e-discovery, which re-

sulted in conflicting answers from respondents. According to the interim report, "Nearly 66 percent of fellows with e-discovery experience stated that they believe that the 2006 e-discovery amendments allow for efficient and cost-effective discovery of electronically stored information at least some of the time."

However, more than 87 percent said that e-discovery increases litigation costs, and almost 77 percent indicated that courts "do not understand the difficulties in providing e-discovery."

According to one respondent, "The biggest issue facing litigants today is how to handle e-discovery. It can be incredibly expensive, and costs are not routinely passed on to the requesting party. The rules are trying to address this, but there has to be a better solution with more certainty."

And both plaintiff and defense lawyers agreed, in roughly equal numbers, that discovery abuse is a significant problem. "Although the survey respondents felt that all of the existing discovery devices are cost-effective and important, almost half, 45 percent, believe that there is discovery abuse in almost every case," according to the interim report.

Vail said he suspected that many respondents were not focused on personal injury cases when they answered the survey. "What is true for personal injury and employment disputes is not generally true for large commercial disputes. I suspect that many of these respondents had those disputes in mind when answering," Vail said.

Approximately two-thirds of respondents—63 percent—said that the civil justice system works better for some types of cases than others. According to the report, respondents "most commonly identified personal injury, torts (generally), and products liability as the types of cases in which the system works well."

William Norwood of Atlanta, a member of the ACTL Task Force on Discovery and a plaintiff lawyer for 41 years, said that for the most part, the survey's

results were what he expected, although he noted that he was surprised by the "high number of respondents who said that they thought alternative dispute resolution [ADR] was a good thing." Eighty-two percent said the use of court-ordered ADR to settle cases without trial is a positive development. This finding is "probably a result we should follow up on," Norwood said.

IAALS Executive Director Rebecca Love Kourlis, a former Colorado Supreme Court justice, also noted that the respondents' answers were largely what she expected on the subjects of litigation costs and discovery, including e-discovery. However, "I was surprised—and pleased—by the number of respondents [nearly three-quarters] who thought judges should be involved in cases earlier," she said.

Of particular interest to plaintiff attorneys is the belief expressed by many respondents that "judges are too few, and too seldom available, particularly with regard to resolving disputes about discovery," Vail said.

"Rules cannot solve resource problems, and many of the problems identified [in the survey] are resource problems," he added.

The ACTL discovery task force plans to develop a set of operating principles that could be used to influence future amendments to the Federal Rules of Civil Procedure. The task force expects to share its recommendations with the ACTL's Board of Regents early this year.

"I hope that the principles that result from our work will change the public perception of trial lawyers' work, especially regarding the cost" of litigation, Norwood said.

Kourlis agreed, adding, "I hope this study will start a really serious national conversation between lawyers and judges about how we might restore the pretrial system."

The interim report may be read on the ACTL Web site at www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=3650. ■

—CECILY WALTERS