

Attorney Satisfaction with the
Federal Rules of Civil Procedure

*Report to the Judicial Conference
Advisory Committee on Civil Rules*

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Federal Judicial Center
March 2010

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Executive Summary

This report provides a brief comparison of the results of three surveys on the current operation of the Federal Rules of Civil Procedure (“Rules”). These surveys asked attorneys in the American College of Trial Lawyers (“ACTL”), the American Bar Association Section of Litigation (“ABA Section”), and the National Employment Lawyers Association (“NELA”) to respond to a series of statements regarding the Rules. The Federal Judicial Center (“FJC”) did not administer the ACTL survey, but it did administer the ABA Section and NELA surveys. Respondents in the ACTL survey had many more years of practice, on average, than respondents in the other surveys. The following findings are discussed in this report:

- Members of the ABA Section tended to agree that the Rules are conducive to the goals stated in Rule 1 (“to secure the just, speedy, and inexpensive determination of every action and proceeding”), but ACTL fellows and NELA members tended to disagree.
- The statement, “The Rules must be reviewed in their entirety and rewritten to address the needs of today’s litigants,” elicited more disagreement than agreement in each of the surveys and among all groups (plaintiff attorneys, defendant attorneys, and attorneys representing both plaintiffs and defendants about equally).
- The statement, “One set of Rules cannot accommodate every type of case,” elicited more disagreement than agreement from ABA Section and NELA members, and more agreement than disagreement from the ACTL fellows.
- The statement, “Trial dates should be set early in the case,” elicited more agreement than disagreement with every group except ABA Section defendant attorneys.
- The statement, “Discovery is abused in almost every case,” elicited more disagreement than agreement from the ACTL fellows and ABA Section plaintiff attorneys, and more agreement than disagreement from NELA members and other ABA Section members.
- The statement, “Economic models in many law firms result in more discovery and thus more expense than is necessary,” elicited more agreement than disagreement in each of the surveys and among all groups.
- The statement, “The cumulative effect of the changes [enacted since the Pound Conference in 1976] has significantly reduced discovery abuse,” elicited more disagreement than agreement in every survey and among every group except ABA Section plaintiff attorneys.

- The statement, “Intervention by judges or magistrate judges early in the case helps to limit discovery,” elicited more agreement than disagreement in each of the surveys and among every group.
- The statement, “Judges do not enforce Rule 26(b)(2)(C) to limit discovery,” elicited more agreement than disagreement in each of the surveys and among every group, although ABA Section plaintiff attorneys were almost evenly divided.
- The statement, “Summary judgment practice increases cost and delay without proportionate benefit,” elicited more agreement than disagreement from plaintiff attorneys in each of the surveys and more disagreement than agreement from defendant attorneys and those representing both plaintiffs and defendants about equally.
- Attorneys in all three surveys reported that costs were disproportionate to the value of some cases, although respondents in the ABA Section and NELA surveys tended to answer that costs are not disproportionate to the value of large cases.
- In all three surveys, the most common response to the question asking about “the primary cause of delay in the litigation process” was “time to complete discovery.”

Respondents to the NELA survey were also asked a series of questions about the impact of the Supreme Court’s recent pleadings decisions on employment discrimination cases. The most commonly reported impact was the inclusion of additional facts in the complaint, followed by an increase in the number of motions to dismiss filed by defendants. Few respondents, however, reported that any of their employment discrimination cases had been dismissed under the new standard.

Background¹

The Advisory Committee on Civil Rules (“Committee”) requested that the Federal Judicial Center study, among other things, whether attorneys are generally satisfied with the present operation of the Federal Rules of Civil Procedure. This request followed a joint report issued by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System (“IAALS”), based on a survey of ACTL fellows.² In summarizing the survey results, the ACTL-IAALS joint report stated: “In short, the survey revealed widely-held opinions that there are serious problems in the civil justice system generally.”³ Most of the report, however, focused specifically on the ACTL fellows’ views on the operation of the federal Rules.

The FJC made a preliminary report to the Committee in October 2009, based on a national, case-based survey of attorneys of record in federal civil cases terminating in the last quarter of 2008.⁴ That report included analysis of respondents’ views both on potential reforms (fact pleading and simplified procedures) and on the operation of the Rules more generally. In addition to the case-based survey, in 2009 the FJC (at the request of the Committee’s chair, the Honorable Mark R. Kravitz) administered two additional surveys. Using a modified form of the ACTL-IAALS survey instrument,⁵ the FJC surveyed members of the Section of Litigation of the American Bar Association and members of the National Employment Lawyers Association to provide the Committee with a wider range of views than that provided by the ACTL survey.⁶ This report will focus on the origi-

1. We acknowledge the valuable assistance of a number of FJC staff members in various stages of preparing this report, especially Meghan Dunn and Jill Gloekler. The staff of the organizations involved in the surveys provided invaluable assistance in the preparation and distribution of the surveys.

2. See Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System (Mar. 11, 2009) [hereinafter *Joint Report*], available to Committee members at <http://civilconference.uscourts.gov/>.

3. *Id.* at 2.

4. 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).

5. The IAALS and ACTL agreed to permit reuse of the survey instrument by the FJC. The IAALS also generously shared the raw data from the ACTL survey with the FJC; the percentages from the ACTL survey reported in this report are unweighted and thus may be slightly different from percentages reported by the IAALS.

6. ABA Section and NELA expressed to the Committee an interest in participating and cooperated in administration of the surveys. Moreover, the FJC has shared the underlying data with both organizations for their own use.

nal ACTL survey and the ABA Section and NELA surveys administered by the FJC, making reference to the FJC national, case-based survey where appropriate.

Because of the length of the survey instrument itself, a question-by-question comparison of the responses given by respondents to all three surveys would do little more than exhaust the Committee's patience. For this reason, we have selected about a dozen questions to provide a sense of the range of views elicited by the surveys. For interested members of the Committee, a more complete set of responses to the ABA Section survey is available on the website for the 2010 Conference on Civil Litigation.⁷ It is unclear at the time of this writing when NELA will provide a similar report.

Despite the efforts of the Committee, the FJC, and the organizations involved, the response rates for the ABA Section and NELA surveys were relatively low. Moreover, based on their internal policies, neither organization was willing to share its membership emails with the FJC. This meant, in turn, that the FJC could not construct its own sampling design for either organization. Instead, an email invitation to respond to the survey was sent by the organizations to every member with an email address on file. Taken together, these factors make it difficult to extrapolate from the responses received the underlying views of either organization's members as a whole. In short, the survey responses summarized in this report should only be taken as the views of the members who voluntarily took the time to respond.

This report is divided into four sections. The first section very briefly compares the survey respondents in the ACTL, ABA Section, NELA, and FJC case-based surveys. The second section examines attorney views on the operation of the Rules in general. The third section examines attorney views on discovery and the cost of litigation. The fourth section examines responses to a set of questions (asked only of the NELA respondents) on the impact of the Supreme Court's recent decisions on pleadings. Figures are included at the end of this report.

Survey Respondents Compared

Fellowship in the ACTL is limited to experienced litigators invited to join; moreover, the number of fellows in any given state cannot exceed 1% of the attorney population.⁸ Thus, one would expect that its respondents would differ from the other attorneys surveyed. And they do. The ACTL fellows had, on average, been practicing law for 37.9 years ($n = 1,474$). The respondents in the other surveys were much less seasoned, on average. ABA Section respondents had, on average,

7. See ABA Section of Litigation, Member Survey on Civil Practice: Detailed Report (2009), available to Committee members at <http://civilconference.uscourts.gov/>.

8. See *Joint Report*, *supra* note 2, at i.

22.9 years of practice ($n = 3,261$), and the NELA respondents had, on average, 21.4 years of practice ($n = 294$). Respondents in the FJC case-based survey had, on average, 20.9 years of practice ($n = 2,621$). For purposes of comparison, in 2000 the median age of an American attorney was 45 years old.⁹ The average age would likely be slightly higher. The respondents in the ABA Section, NELA, and FJC case-based surveys are much closer to the median (or mean) age than are the ACTL fellows.

Overall, ABA Section respondents were much more likely than ACTL or NELA respondents to prefer federal court over state court, when given a choice. Fully 60.4% of ABA Section respondents preferred federal court, 21.7% preferred state court, and 13% had no preference ($n = 3,294$). The other two organizations were more evenly divided. On the same question, 42.9% of all ACTL respondents preferred state court versus 39.8% preferring federal court ($n = 1,472$). Similarly, 41.6% of all NELA respondents preferred state court versus 43.9% preferring federal court ($n = 295$). But ABA Section plaintiff attorneys closely resembled NELA respondents, splitting 42% for federal court and 41.5% for state court ($n = 834$). ACTL plaintiff attorneys overwhelmingly preferred state court, with 66.5% preferring state court, compared to 19.4% preferring federal court ($n = 361$).

The Rules

The ACTL, ABA Section, and NELA surveys asked respondents whether the Rules are conducive to meeting the three goals stated in Rule 1—“to secure the just, speedy, and inexpensive determination of every action and proceeding.”¹⁰ Figure 1 displays the percentage of respondents in each survey responding “yes” to this question, grouped into party groupings: plaintiff attorneys, defendant attorneys, and attorneys representing both plaintiffs and defendants about equally. The ACTL survey did not permit respondents to identify themselves as a member of the third group. In addition, because NELA is primarily a plaintiff attorneys’ organization, we grouped all respondents in that survey accordingly.

ACTL plaintiff and defendant attorneys answered “yes” only 35 and 35.5% of the time, respectively. ABA Section plaintiff attorneys answered “yes” 61%; ABA Section defendant attorneys answered “yes” 64.2%; and ABA Section attorneys representing plaintiffs and defendants about equally answered “yes” 62.3%. NELA respondents answered “yes” 40.1%.

It is obvious in Figure 1 that the differences between the organizations seem greater than the differences within organizations. ACTL plaintiff and defendant

9. Clara N. Carson, *The Lawyer Statistical Report: The U.S. Legal Profession in 2000*, at 3 (American Bar Foundation, 2004).

10. Fed. R. Civ. P. 1.

attorney respondents were very similar in answering about 35% of the time that the Rules are conducive to the goals stated in Rule 1. Although this percentage is roughly similar to the percentage of NELA plaintiff attorneys giving the same response, the ABA Section respondents cluster at a much higher level—agreeing more than 60% of the time, despite party grouping. The members of the Section who responded to the survey, in short, appear much more satisfied with the operation of the Rules in general than do the members of the ACTL and NELA who responded to the surveys. This is true even among the Section plaintiff attorneys.

Starting with Figure 2, responses to questions asking whether respondents strongly agree, agree, disagree, or strongly disagree with a given statement are analyzed. Because each of these questions generates as many as five response categories (including “no opinion”) for each party grouping, and there are six groupings across the three surveys, there is a great deal of information for every question. To simplify the presentation, we have summarized the data for the Committee by deriving the “net agreement” for each party grouping in each survey by subtracting the percentage of respondents disagreeing or strongly disagreeing with each statement from the percentage of respondents agreeing or strongly agreeing. A positive net agreement score indicates that more respondents in a given party grouping agreed (or strongly agreed) than disagreed (or strongly disagreed).¹¹ A negative net agreement score indicates that more respondents in a given party grouping disagreed than agreed with the given statement.

The net agreement score ranges, at least theoretically, from 100% (all respondents agreeing or strongly agreeing) to -100% (all respondents disagreeing or strongly disagreeing). A score of zero indicates that the same percentage of respondents agreed (or strongly agreed) as disagreed (or strongly disagreed). The vertical axis in Figures 2–11 range from 100 to -100 so that the figures will be directly comparable to one another. (The percentages used were calculated with “no opinion” answers included; i.e., the sum of the percentages of respondents agreeing and disagreeing will rarely equal 100.)

Figure 2 summarizes respondents’ net agreement with the statement “The Rules must be reviewed in their entirety and rewritten to address the needs of today’s litigants.” This question arguably provides respondents’ views on whether a complete overhaul of the Rules is needed at the present time. No party group in any of the three surveys had a positive net agreement score on this question. In other words, the percentage of respondents in every party group in each of the three surveys disagreeing was greater than the percentage of respondents agreeing. ACTL plaintiff attorneys tended to disagree, -15.1%, as did ACTL defendant at-

11. From this point forward, unless otherwise stated, “agree” includes the response category “strongly agree” and “disagree” includes “strongly disagree.”

torneys, -22.5%. ABA Section respondents, as in Figure 1, appear even more supportive of the current Rules. Section plaintiff attorneys registered a net agreement score of -41.3%, Section defendant attorneys -45.6%, and Section respondents representing both about equally -36.5%. NELA respondents also tended to disagree, -23.6.

Figure 3 summarizes respondents' net agreement with the statement, "One set of Rules cannot accommodate every type of case." This question arguably provides a measure of the attorneys' attitudes toward trans-substantive rules of civil procedure. ACTL plaintiff attorneys tended to agree, 6.1%. ACTL defendant attorneys also tended to agree, 6.6%. ABA Section respondents tended to disagree, across party groupings. Thus, ABA Section plaintiffs registered a net agreement score of -18.2%, Section defendants a net agreement score of -12.2%, and Section respondents representing both about equally a net agreement score of -14%. NELA respondents also registered a negative net agreement score, -7.9%. In short, members of the ABA Section and NELA who responded to the survey were more supportive of trans-substantive Rules than were the ACTL fellows.

Survey respondents' reactions to the first three statements are something of a mixed bag. Clearly, the NELA and ACTL respondents are expressing dissatisfaction with the Rules in general, to the extent that they think that the Rules are not conducive to the three goals stated in Rule 1. It is likely, however, that the dissatisfaction of the two groups stems from differing sets of concerns. ABA Section respondents, on the other hand, generally think that the Rules are conducive to Rule 1's goals. No group from the surveys supports, in the broadest sense, a complete overhaul of the Rules, however, and only the ACTL fellows tended to reject the general idea of trans-substantive Rules.

Although the issue of trial dates is more a matter of case management than the Rules, in selecting questions for inclusion in this report, we thought it might be useful to address what respondents thought about the practice of setting trial dates early in the case. Figure 4 summarizes respondents' net agreement with the statement, "Trial dates should be set early in the case." This question tended to elicit agreement, except among ABA Section defendant attorneys. The ACTL plaintiff attorneys tended to agree, 69.9%, and ACTL defendant attorneys tended to agree, 39.8%. The ABA Section plaintiff attorneys, at 17.1%, and attorneys representing both plaintiffs and defendants, 17.4%, also tended to agree. Section defendant attorneys tended to disagree, -13.7%. NELA respondents tended to agree, 14.4%. In short, the practice of setting an early trial date appears to have support among most groups, with the exception of some defendant attorneys.

Discovery and Litigation Costs

This section compares responses to questions on discovery and the cost of litigation, beginning with discovery abuse. Figure 5 summarizes respondents' net agreement with the statement, "Discovery is abused in almost every case." ACTL fellows tended to disagree: plaintiff attorneys, -9.2%; and defendant attorneys, -13.2%. ABA Section respondents differed depending on party grouping. Section plaintiff attorneys tended to disagree, -6.6%. But Section defendant attorneys and attorneys representing both plaintiffs and defendants about equally tended to agree, 7.2 and 10.9%, respectively. NELA respondents tended to agree, 31.5%.

This question was almost certainly interpreted in multiple ways by respondents. There are many possible meanings of discovery abuse,¹² and thus the question will mean different things to different groups of attorneys. NELA respondents, primarily representing plaintiffs in employment cases, are probably complaining that defendants in their cases are "refusing to supply information."¹³ But that is probably not how ABA Section defendant attorneys—who also agreed, but at a lower net level—tended to read the question.¹⁴

The FJC national, case-based survey asked respondents to respond to a similar statement: "Discovery is abused in almost every case *in federal court*." (The italics indicate the difference in wording.) The FJC respondents in all three groups registered disagreement: plaintiff attorneys, -33.6%; defendant attorneys, -44.3%; and respondents representing both about equally, -27%.¹⁵

Figure 6 summarizes respondents' net agreement with the statement, "Economic models in many law firms result in more discovery and thus more expense than is necessary." As we read it, this question gets at another sense of the term "discovery abuse," namely, lawyers may pursue or resist discovery "because it increases the number of billable hours."¹⁶ This question elicited agreement among

12. See Jack B. Weinstein, *What Discovery Abuse? A Comment on John Setear's The Barrister and the Bomb*, 69 B.U. L. Rev. 649, 654–55 (1989) (cataloguing five forms of discovery abuse).

13. *Id.* at 655. One NELA respondent, for example, commented, "Discovery abuse is rampant—parties (usually defendants) stonewall routinely and then negotiate over how many of their legal obligations they can avoid." Another commented that costs would be reduced if judges would "[e]nforce sanctions for discovery abuses. Much of the costs we deal with relate to trying to get sufficient discovery—the delay and the costs of filing motions to compel, etc., increase costs significantly."

14. One ABA Section defendant attorney commented, for example, "Demands for e-discovery are being used as a lever to force settlement in cases that have little merit. Most e-discovery is useless and should not be requested in the first instance. Requiring plaintiffs to bear the cost of producing what they request would help curb the abuse."

15. See Lee & Willging, Preliminary Report, *supra* note 4, at 70–71, Fig. 45.

16. Weinstein, *supra* note 12, at 654.

all the party groupings, but especially among plaintiff attorneys. ACTL plaintiff attorneys tended to agree, 69.9%, and ACTL defendant attorneys also tended to agree, 39.8%. Among ABA Section respondents, plaintiff attorneys, 42.3%, and attorneys representing both plaintiffs and defendants about equally, 41.7%, tended to agree at similar levels, and defendant attorneys tended to agree, 14.8%. NELA respondents also tended to agree, 62.6%. In short, respondents tended to view business models in many law firms as one source of unnecessary expense in discovery.

Figure 7 summarizes respondents' net agreement with the statement, "The cumulative effect of the changes [enacted since the Pound Conference in 1976] has significantly reduced discovery abuse." This statement tended to elicit disagreement, with the exception of the ABA Section plaintiff attorneys. ACTL plaintiff attorneys registered a net agreement score of -12.4%, and ACTL defendant attorneys -22%. ABA Section plaintiff attorneys agreed slightly more than they disagreed—by 0.4%, i.e., they were almost evenly divided—but Section defendant attorneys, -17.9%, and attorneys representing both plaintiffs and defendants about equally, -11.6%, tended to disagree. NELA respondents disagreed most strongly, -39.5%. No matter how respondents interpret "discovery abuse," in other words, they tend to think that it has not been reduced by Rules amendments, considered as a whole, since 1976.

Figure 8 summarizes respondents' net agreement with the statement, "Intervention by judges or magistrate judges early in the case helps to limit discovery." This statement tended to elicit agreement in all three surveys among all party groupings, the highest levels of support coming from ABA Section defendant attorneys and attorneys representing both plaintiffs and defendants about equally. ACTL plaintiff attorneys registered a net agreement score of 35.3%, and ACTL defendant attorneys 36.7%. ABA Section plaintiff attorneys agreed 29.5% more than they disagreed; the ABA Section defendant attorneys' net agreement score was 56.6%; and for attorneys representing both plaintiffs and defendants about equally, 57.9%. NELA respondents registered a 26.2% net agreement score. The responses to this question suggest that many attorneys think that active management of discovery by district and magistrate judges serves a useful purpose.¹⁷

The surveys asked questions about the proportionality of discovery and Rule 26(b)(2)(C). Figure 9 summarizes respondents' agreement with the statement, "Judges do not enforce Rule 26(b)(2)(C) to limit discovery." This statement

17. There is an ambiguity in the question, namely, that "limit[ing] discovery" can be interpreted either as limiting abusive, frivolous, and/or unnecessary discovery, or as arbitrarily limiting necessary or useful discovery. The same point holds for the next question to be discussed. Given the distribution of responses, it appears that many, if not most, respondents read the questions in the former rather than the latter sense.

tended to elicit agreement, with the exception of the ABA Section plaintiff attorneys. ACTL plaintiff attorneys registered a net agreement of 24.6%; ACTL defendant attorneys, 39.3%. ABA Section plaintiff attorneys agreed 1.1% more often than they disagreed (i.e., respondents were almost evenly split between agreement and disagreement), but Section defendant attorneys and attorneys representing both plaintiffs and defendants about equally expressed much greater levels of agreement: 51.1% and 41.6%, respectively. NELA respondents agreed 19.8% more than they disagreed.

A more controversial statement about costs addressed the net benefits of summary judgment practice. Figure 10 summarizes respondents' net agreement with the statement, "Summary judgment practice increases cost and delay without proportionate benefit." As one might expect, this statement tended to elicit agreement from plaintiff attorneys—plaintiff attorneys agreed with the statement in all three surveys, most strongly in the NELA survey—and disagreement from defendant attorneys. ACTL plaintiff attorneys tended to agree, 26.2%, and ACTL defendant attorneys tended to disagree, -59.6%. ABA Section plaintiff attorneys agreed more than they disagreed, 26.9%, while Section defendant attorneys, -77.2%, and attorneys representing both plaintiffs and defendants about equally, -45.1%, tended to disagree. NELA respondents agreed 76.9% more than they disagreed.

Figure 11 is a little more complex than the previous figures. The ACTL survey asked respondents to agree or disagree with the statement, "Litigation costs are not proportional to the value of a case." In the ABA Section and NELA surveys, this question was split into two questions: The first question asked respondents whether litigation costs were proportional to the value of a large case, and the second asked the same for small value cases. The terms "large" and "small" were not defined. Figure 11 summarizes respondents' net agreement with these statements.

In general, ACTL respondents agreed that litigation costs are not proportional to the value of a case—ACTL plaintiff attorneys agreed 36.5% more than they disagreed, and defendant attorneys agreed 45.5% more than they disagreed.

With respect to small cases, both ABA Section and NELA respondents also tended to agree. ABA Section plaintiff attorneys' net agreement with the statement that litigation costs are not proportional to the value of a small case was 63.2%; defendant attorneys' net agreement was 85.3%, a number that was eclipsed by ABA Section respondents representing both plaintiffs and defendants about equally—89% net agreement. NELA respondents agreed at a level slightly higher than the ABA Section plaintiff attorneys, 69.8%.

With respect to large cases, however, both ABA Section and NELA respondents tended to disagree with the statement—in other words, to reject that litigation costs are not proportional to the value of a large case. ABA Section plaintiff

attorneys registered net agreement of -25.1%; defendant attorneys, -6.4%; and attorneys representing both plaintiffs and defendants about equally, -11.2%. NELA respondents registered a net agreement score of -5.9%. Given the similarity to the “small case” responses in the other surveys, it appears likely that many ACTL respondents were reading “small case” into the wording of the question.

Figure 12 summarizes the percentage of respondents in each survey selecting “time to complete discovery” as the “primary cause of delay in the litigation process.”¹⁸ (The other response options were delayed rulings on pending motions, court continuances of scheduled events, attorney requests for extensions of time and continuances, and other/fill in the blank.) In each survey, among all party groupings, “time to complete discovery” was the most common response. In the ACTL survey, 50.5% of plaintiff attorneys and 56.2% of defendant attorneys selected “time to complete discovery.” In the ABA Section survey, 37.9% of plaintiff attorneys, 54.9% of defendant attorneys, and 45.5% of attorneys representing both plaintiffs and defendants about equally selected “time to complete discovery.” In the NELA survey, 35.1% of respondents gave that answer.

Twombly/Iqbal Questions

In the NELA survey, the pleadings questions in the other surveys were replaced with questions specifically about the impact of *Bell Atlantic v. Twombly*¹⁹ and *Ashcroft v. Iqbal*²⁰ on the practice of employment lawyers. This substitution was made for a number of reasons, not the least of which was the substance of the comments received in response to the notice pleading questions in the ABA Section survey. Plaintiff attorney respondents to that survey wrote, for example, “We haven’t used notice pleadings since *Twombly*!” and “What notice pleading? The Supreme Court’s recent *Iqbal* decision wipes out notice pleading.” Given such responses, as well as the Committee’s interest in the subject, we thought it would be better to focus on the impact of *Twombly* and *Iqbal* in the NELA survey than to ask questions that some respondents perceived as out of date.

NELA respondents were first asked whether they had “filed an employment discrimination case in federal court since the Supreme Court issued its decision in *Bell Atlantic v. Twombly* in 2007.” Fully 67.1% of respondents answered “yes.” Those respondents were then asked, “Has *Twombly*—or the more recent Supreme

18. Just to be clear: This question posits that “time to complete discovery” is a form of “delay,” clearly implying that cases take longer to reach their conclusions than they should take. To the extent that completion of discovery is necessary for the resolution of the “litigation process,” however, it arguably cannot be considered as delay in this sense. In short, we would have worded the question differently.

19. 550 U.S. 544 (2007).

20. 556 U.S. ___, 129 S. Ct. 1937 (2009).

Court decision in *Ashcroft v. Iqbal* (2009)—affected how you structure complaints in employment discrimination cases?” Fully 70.1% of respondents indicated that *Twombly* and/or *Iqbal* had affected their practices (29.9% answered “no”).

Respondents indicating that their practices had been affected by *Twombly/Iqbal* were then asked about the nature of those effects. The most common response was, “I include more factual allegations in the complaint than I did prior to *Twombly/Iqbal*,” which was selected by 94.2% of the respondents. The second most common response was, “I have to respond to motions to dismiss that might not have been filed prior to *Twombly/Iqbal*,” selected by 74.6%. Fewer than 15% of respondents selected any one of the following: “I conduct more factual investigation prior to filing the complaint than I would have prior to *Twombly/Iqbal*”; “I screen cases more carefully for a claim that will survive a motion to dismiss than I did prior to *Twombly/Iqbal*”; or “I raise different claims than I did prior to *Twombly/Iqbal*.”

Finally, respondents were asked whether “any of your employment discrimination cases have been dismissed for failure to state a claim under the standard announced in *Twombly/Iqbal*.” This question was asked of respondents who had filed an employment discrimination case post-*Twombly*. Only 7.2% of those respondents answered in the affirmative (14 total respondents). Although the survey asked a series of questions about such dismissals, the small number of respondents answering those questions precludes meaningful analysis.

Figures











