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Report on Survey of the Bar

Committee on Federal Courts of the New York State Bar Association

REPORT ON SURVEY OF THE BAR*

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INTRODUCTION

A year ago, the Committee on Federal Courts of the New York State Bar Association undertook a survey of the bar's experience with and opinions regarding sanctions and attorneys' fees, two topics of interest to the federal practitioner. The resulting report issued by the committee was well received and has been frequently cited. As a result of this success, the committee decided to conduct another survey this year.

In choosing a topic, the committee felt that it would be interesting to design a broad questionaire that explored a large number of areas of concern to the federal practioner. Thus, the concept of this year's study was born.

A questionnaire of nine pages and one hundred questions was prepared and distributed. It covered topics ranging from discovery, trial and appellate practices to judicial workloads and salaries, use of magistrates, diversity jurisdiction, arbitration, admission requirements, cameras in courtrooms, and mandatory pro bono representation.

In view of the length of the questionnaire, the committee was somewhat concerned about the response rate. Much to our surprise and pleasure, however, the recipients, members of the bar of this state, expressed their interest in the questions posed by returning more than 1200 questionnaires, a response rate that approximates twenty percent. The results were analyzed both by all respondents and by subgroups, such as those based on district of practice, years of experience, size of firm, area of specialization, and amount of trial experience.

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* This article is based on the Report on a Survey of the Bar originally published on June 29, 1988 by the Committee on Federal Courts of the New York State Bar Association, Robert L. Haig, Chairperson. The Report resulted from a survey conducted by the Subcommittee on Survey of the Bar, Chairperson Shira A. Scheindlin. The members of the subcommittee were Cathi A. Hession, Alan M. Klinger, Lawrence Mentz, Gerald G. Paul, Daniel Turbow, and Paul D. Wexler.

The specific opinions expressed by the recipients and the committee's many recommendations based on those opinions are too numerous to summarize. Accordingly, only the more significant findings that provide a sense of the bar's attitudes are highlighted here. The annexed appendix documents the results, both in raw figures and percentages, and provides the reader with easy access to the specific responses of the bar.

In brief, the survey revealed that the bar usually is ready to accept change if the proposed modifications, such as the broader use of magistrates, the adoption of more procedures for discovery dispute resolution, case management control, and settlement efforts by the court, will assist the courts in the expeditious resolution of cases. In other areas of federal practice, the bar favors the status quo, for example, its preference for traditional methods of dispute resolution.

In the area of discovery practice, the bar expressed dissatisfaction with its burdensome nature, finding that adversaries serve abusive interrogatories, produce documents in a disorganized manner, and act unprofessionally at depositions. Significantly, the bar raised the basic question of whether the definition of "relevance" contained in Rule 26[1] should be narrowed so as to minimize the potential for abusive discovery tactics.

The respondents firmly rejected the practice of requiring premotion conferences on substantive motions. Similarly, they agreed that the submission of a memorandum of law should not be required with respect to all motions. This concurrence with reduction of formalities is consistent with recent experiments encouraging a telephone conference or a short letter in lieu of a discovery motion. Finally, with respect to pretrial practices, the bar expressed a desire for greater participation by the courts in the settlement process, as well as the implementation of standardized pretrial orders.

With respect to trial practice, the respondents favored fixed notice of trial dates, and suggested that two weeks' notice is adequate. They also supported greater lawyer participation in *voir dire*, no fixed limit on the amount of time to be afforded a party to present its case, and review by attorneys of the court's standardized charges prior to the submission of particularized requests to charge. With regard to jury practices, most respondents supported a number of

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1. FED. R. CIV. P. 26. Rule 26 contains the general provisions governing discovery, which may be obtained "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." *Id.* (emphasis added). The rule specifically contemplates discovery information which, although inadmissible at trial, "appears reasonably calculated to lead to the discovery of admissible evidence." *Id.*

innovations including permitting jurors to take notes, providing jurors with a written copy of the charge, and permitting videotaped trials and play backs.

A majority of members responding supported the efforts by the New York Court of Appeals to settle cases and dispose of them in a prompt fashion. The Civil Appeal Management Plan[2] (CAMP) has proven effective in the settlement of cases at the appellate level. Respondents were most appreciative of the right to have oral argument in every appeal. The only dissatisfaction expressed was with regard to the practice of issuing summary dispositions that cannot be cited as precedent.

A number of inquiries concerned issues involving the judiciary. In short, the responses reported a feeling that judges are overworked and underpaid but that they nonetheless manage to perform their duties reasonably promptly. Moreover, the bar approved the use of procedures designed to maximize a judge's efficiency, such as the use of magistrates to handle both discovery matters and settlement discussions. Respondents reported a distinct preference for jury trial by a district judge as the optimum method of dispute resolution, followed by non-jury trials conducted by a district judge. Finally, the members of the bar did not perceive a need for the specialization of judges, except possibly in the areas of patent law and tax law.

As to procedural issues, the bar favored the retention of diversity jurisdiction by the federal courts, but agreed that the amount in controversy should be increased to $50,000.00.[3] Amended Federal Rule 4,[4] permitting service of process by mail, was approved, although certain changes in procedure were recommended, particularly with respect to the filing of acknowledgments of receipt of service. Federal Rule 68[5] offers of judgment were felt to be substantially underutilized, partially because the shifting of costs the rule permits does not include an award of attorneys' fees, usually the largest expense in litigation.

The survey also inquired about a number of "miscellaneous" issues. The experimental mandatory arbitration program now utilized in the Eastern District was felt to be effective in assisting the courts to resolve disputes. The bar, however, did not generally favor the use of mandatory arbitration. Respondents approved of the relaxation of

2. *See infra* notes 240-56 and accompanying text.

3. On 11/19/88, 28 U.S.C. § 1332(a) and (b) were amended to raise the minimum amount in controversy in diversity cases to $50,000. P.L. 100-702, (Nov. 9, 1988).

4. *See* FED. R. CIV. P. 4 (Process).

5. *See* FED. R. CIV. P. 68 (Offer of Judgment).

requirements for admission to the bar of the federal courts in New York. Finally, respondents distinctly rejected mandatory pro bono service.

The survey covered a good deal of territory. The committee believes that the results and attendant recommendations are significant. Thus, the report should be read and studied by both judges and practitioners in the federal system.

I. SURVEY RECIPIENTS

In order to make the survey results meaningful, the committee attempted to reach the broadest possible spectrum of New York attorneys who practice in the federal courts. Virtually all segments of the litigating bar throughout the state received the questionnaire. Every effort was made to seek out attorneys in diverse specialties, including labor, antitrust, admiralty, tort, and civil rights. Efforts were also made to reach equal numbers of plaintiffs' and defendants' attorneys, as well as representative numbers of practitioners in large and small firms, and in federal, state, and municipal governments.

Eight thousand questionnaires were distributed. Over twelve hundred responses were received. Considering duplicate mailings, survey returns exceeded twenty percent. A return rate of this size is statistically meaningful.

The questionnaire was sent to the following groups:

New York State Bar Association — Antitrust Section
New York State Bar Association — Labor Section
New York State Bar Association — Committee on Federal Courts
New York State Bar Association — Committee on Patents and Trademarks
New York State Bar Association—Committee on Civil Rights
Second Circuit Federal Bar Council
Defense Association of New York, American Trial Lawyers Association—Tort Section (New York only)
American Trial Lawyers Association—Admiralty Section (New York only)
Defense Research Institute (New York only)
Office of the New York State Attorney General
United States Attorneys Offices—Eastern, Northern, Southern and Western Districts of New York
Office of the Corporation Counsel of the City of New York

Respondents to the survey included a broad cross-section of litigators, whether measured by experience, breadth of specialties, or size of firms. Of the 1,233 respondents, the vast majority practice in

the Southern and Eastern Districts of New York, although fourteen percent of respondents reported practicing principally in the Northern District and ten percent reported practicing primarily in the Western District.[6] The largest specialty represented by respondents was personal injury, closely followed by general commercial, civil rights and securities.[7]

The vast majority of respondents are civil litigators, almost three-quarters of whom reported that over sixty percent of their practice is devoted to civil litigation.[8] The group as a whole litigates frequently in the federal courts; sixty-two percent of the respondents reported that over one-fifth of their litigation practice is in the federal court.[9] Sixty-three percent of all respondents have been admitted to the bar for over eleven years[10] and almost one-third have been admitted for more than twenty years.[11] Respondents included small firm and large firm practitioners in almost equal numbers.[12] More attorneys represent entities than individuals, although nine percent state they represent both groups.[13] Forty-one percent of all respondents reported representing both plaintiffs and defendants, although nineteen percent represent only plaintiffs, whereas thirty-one percent represent only defendants.[14] Thus, the defendants' bar appears to be somewhat better represented than the plaintiffs' bar. Finally, eighty-four percent of the respondents have tried at least one case to verdict, and over half have tried more than five cases to verdict.[15]

In sum, the views of these respondents would appear to be reasonably representative of federal court practitioners throughout the state.

II. PRETRIAL PROCEEDINGS

The Southern and Eastern Districts have in recent years attempted to address certain long-standing problems attendant to the discovery process by implementing rules designed to make the process more efficient and economical. In March 1984, following a

6. *See infra* Appendix, Question 5.
7. *Id.*, Question 6.
8. *Id.*, Question 2.
9. *Id.*, Question 3.
10. *Id.*, Question 1.
11. *Id.*
12. *Id.*, Question 4.
13. *Id.*, Question 7.
14. *Id.*, Question 8.
15. *Id.*, Question 9.

study of "how discovery necessary to just and speedy resolutions of disputes can be obtained at minimum costs in money, time and annoyance,"[16] the Eastern District adopted, for a three-year trial period, Standing Orders on Effective Discovery in Civil Cases (Standing Orders). In 1987, after further study,[17] the effectiveness of the Standing Orders, with minor amendment, was extended until March 1, 1991. In 1985, in an effort to eliminate the use of interrogatories as a means "to overburden an opponent or to delay trial of an action,"[18] the Southern District adopted Civil Rule 46, which restricts the use of interrogatories and prescribes certain procedures designed to eliminate evasive responses to interrogatories and requests for production pursuant to Rule 34[19] of the Federal Rules of Civil Procedure (Federal Rules). In June, 1987, so as "to reduce unnecessary motion practice over non-substantive issues and reduce legal fees associated with composing or reviewing lengthy 'boilerplate' definitions,"[20] the Southern District promulgated Civil Rule 47[21] which established uniform definitions in discovery requests. The Eastern District adopted the same Rule in 1988.[22]

The survey revealed that, notwithstanding these efforts, there are still significant problems with discovery practice in both the Southern and Eastern Districts. While similar problems exist in the Western and Northern Districts, they are frequently less pronounced, even in the absence of comparable district-wide rules.[23] In some measure, the regional disparity may be explained by the fact that some of the problems appear most frequently in the context of "big" cases, such as those in the area of securities, which are more likely to be brought in the Southern and Eastern Districts than upstate. However, some disparities could not be explained in this manner and suggest instead that practitioners in the Southern and Eastern Districts

16. *Revised Report of the Special Committee on Effective Discovery in Civil Cases for the Eastern District of New York to the Honorable Jack B. Weinstein*, (Jan. 31, 1984) (quoting mandate of the Committed) [hereinafter *Special Committee Report*].

17. *Report of the Discovery Oversight Committee to the United States District Court for the Eastern District of New York*, (June 10, 1986) [hereinafter *Oversight Committee Report*].

18. *Report of the Discovery Committee of the Southern District of New York* 15 (Feb. 1988) *quoted in* N.Y.Sr. B.A. *Report on Civil Rule 46 of the Southern District of New York Restricting Use of Interrogatories.*

19. *See* FED. R. CIV. P. 34 (Production of Documents and Things and Entry upon Land for Inspection and Other Purposes).

20. News Release, S.D.N.Y. (June 3, 1987) (quoting Chief Judge Brieant).

21. *See* S.D.N.Y. Civ. R. 47.

22. *See* E.D.N.Y. Civ. R. 47.

23. *See* W.D.N.Y. Rules and N.D.N.Y. Rules; Survey of the Bar, Questions 10-22, Analysis of Data by District.

are simply more litigious and less cooperative than their upstate counterparts.

In general, the results of the survey warrant the conclusion that, particularly in the Southern and Eastern Districts, additional measures should be considered which would reduce the number of disputes attendant to discovery and permit those disputes to be resolved in an economical way. Perhaps more significantly, the results suggest that serious consideration should be given to a complete re-examination of the costs and benefits of the continued use of the broad standard of relevance presently governing discovery practice contained in the Federal Rules.[24]

A. Scheduling Practice

Rule 16 of the Federal Rules was substantially amended in 1983 to encourage "a process of judicial management that embraces the entire pretrial phase, especially motions and discovery."[25] To further that goal, the Rules require that no more than 120 days after the filing of the complaint, and after consulting with the parties "by a scheduling conference, telephone, mail, or other suitable means,"[26] the court enter a pre-trial scheduling order which, among other things, limits the time to complete discovery and file motions.[27] Except for the Western District,[28] no district has a local rule which specifically requires that a conference be conducted. Nonetheless, approximately seventy-three percent of the respondents who generally practice in the Southern, Eastern, and Western Districts stated that 16(b) conferences were, indeed, routinely held at the outset of

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24. *See supra* note 1.

25. FED. R. CIV. P. 16 advisory committee's note to the 1983 amendment, *reprinted in* 97 F.R.D. 165, 207.

26. FED.. R. CIV. P. 16(b).

27. In accordance with the permission granted in Federal Rule 16(b), the Eastern and Northern Districts have promulgated local rules which exempt particular categories of cases from the scheduling requirements of Rule 16. *See* Rule 45, Civil Rules, Southern and Eastern Districts (exempts habeas corpus petitions, social security disability cases, motions to vacate sentences, forfeitures, and reviews from administrative agencies) (applicable only to Eastern District; adoption presently under consideration by Southern District); Rule 49, General Rules, Northern District (exempts, among other things, pro se cases unless assigning judge determines otherwise, cases where a party is incarcerated, reviews from administrative agencies, and prize, forfeiture, condemnation, bankruptcy, and citizenship proceedings). Interestingly, the Northern District Rule also exempts any action "in which the assigned judge determines that the interests of efficient court administration will be served by dispensing with a scheduling order or by the issuance of such an order more than 120 days after the filing of the complaint." Gen. R.N.D. 49.

28. *See* W.D.N.Y. LOC. R. 16(b).

litigation.[29] Interestingly, however, only fifty-five percent of respondents who practice in the Northern District reported such conferences being conducted as a matter of course.[30] This may be the result of that district's General Rule 49, which grants individual judges the discretion to dispense with a scheduling order or to issue it later during the litigation.[31]

In any event, the efficacy of scheduling orders entered at conferences at such an early stage may be questioned, especially in the Southern and Eastern Districts. Of the respondents who practiced there, only sixteen percent and fifteen percent respectively disagreed or strongly disagreed with the proposition that parties rarely meet the deadlines set at the conference.[32] And, while the figures were higher in the Northern and Western Districts, even there, over half the respondents agreed that the dates set at the Rule 16 scheduling conference are rarely met.[33]

These responses suggest that although the courts understandably exercise tight control over their dockets, they frequently impose unrealistic time constraints upon counsel. This problem could perhaps be partially obviated by permitting counsel to set their own deadlines. Indeed, almost eighty percent of the respondents agreed or strongly agreed that courts should generally abide by counsels' own agreements regarding the time by which discovery is to be completed.[34]

The Eastern District has already promulgated Standing Order 3(b),[35] which expressly requires that parties attempt to agree to a scheduling order which the court is directed to approve if reasonable. This Standing Order apparently has not had a salutary effect since, as noted, even the vast bulk of Eastern District practitioners apparently do not meet scheduling deadlines.[36] This failing may be explained, however, by the Oversight Committee's finding that "few attorneys were aware that there is a Standing Order on point."[37]

It is recommended that all districts, either through local rule or through each judge's individuals rules of practice, permit counsel to set their own reasonable discovery schedules. It is likely that if the

29. Survey of the Bar, Question 10, Analysis of Data by District.
30. *Id.*
31. *See supra* note 26.
32. Survey of the Bar, Question 11, Analysis of Data by District.
33. *Id.*
34. *See infra* Appendix, Question 12.
35. E.D.N.Y. Standing Order 3(b).
36. *See supra* note 32 and accompanying text.
37. *Oversight Committee Report*, *supra* note 17, at 54.

practice becomes publicized and utilized, the 16(b) scheduling order could provide a more realistic mechanism to gauge progress of a case than it does now. In addition, the waste of judicial resources which inevitably attends applications for extensions of overly burdensome court imposed deadlines would be reduced.

B. Discovery Practice

The survey revealed wide-spread dissatisfaction with current discovery practice and a concomitant desire to institute standardized and inexpensive mechanisms to remedy the situation.

1. General

A majority of all respondents who expressed an opinion agreed or strongly agreed with the proposition that the broad definition of relevance provided by Federal Rule 26[38] generally permits too much discovery without enhancing the truthfinding process.[39] Interestingly, agreement with this proposition was greatest among practitioners who specialize in discovery-intensive fields such as antitrust, intellectual property, and securities, while somewhat less agreement was found among practitioners who specialize in bankruptcy, personal injury, civil rights, and general commercial litigation.[40] Nonetheless, substantial segments of every category of respondents, except, not surprisingly, the private plaintiffs' bar, voiced agreement with the proposition.

These results suggest that many of the basic problems relating to the costs of discovery cannot necessarily be solved simply by focusing on discovery practice per se and creating efficient means to obtain judicial resolution of particular discovery disputes. Rather, thought must be given to whether these problems are a result of the application of a theory of relevance which encourages discovery of matters unnecessary to the truth-finding process.

Rule 26(b)(1) partially addresses this issue by requiring the courts to limit discovery if it is "unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy . . . and the importance of the issues at stake in the litigation."[41] However, the effectiveness of this Rule is undercut because it only im-

38. *See supra* note 1.
39. *See infra* Appendix, Question 33.
40. Survey of the Bar, Question 33, Analysis of Data by Specialty.
41. *See supra* note 1.

pacts upon the discovery process if a party affirmatively seeks its invocation by the court through a motion for a protective order or similar mechanism. Accordingly, where the costs attendant to seeking such judicial intervention are higher than those attendant to the production of the potentially objectionable discovery, there is no financial incentive to invoke the Rule.

We therefore recommend that a full-scale study be conducted to consider the efficacy of Rule 26(b)(1) and specifically whether the standard of relevance presently governing discovery should be narrowed in some of all types of cases.

2. Practice problems

a. Depositions

The survey results demonstrated that depositions are frequently conducted in a manner which unnecessarily and improperly inhibits their efficiency.

Thus, over half of all respondents agreed or strongly agreed that counsel defending depositions often obstruct the deposition's course.[42] Seventy-six percent of practitioners who generally represent private plaintiffs noted their agreement with the proposition as compared with only forty-seven percent of practitioners who generally represent private defendants.[43] This may represent an understandable perception by the plaintiffs' bar that defendants are generally obstructive of the discovery process.

More troublesome and difficult to explain is the disparity in responses between downstate and upstate practitioners. Thus, while approximately sixty percent of the practitioners in the Southern and Eastern Districts noted their agreement or strong agreement that defense tactics are often obstructionist, the agreement was approximately forty percent, still disturbingly high, in the Northern and Western Districts.[44]

As previously noted, the discrepancy may be based in part on the types of cases in which the practice is most prevalent. Thus, for example, seventy percent of respondents who specialize in securities litigation and bankruptcy agreed or strongly agreed that obstructionist tactics were often followed.[45] Because more securities cases and

42. *See infra* Appendix, Question 17.
43. Survey of the Bar, Question 17, Analysis of Data by Practice.
44. *Id.*, Analysis of Data by District.
45. *Id.*, Analysis of Data by Specialty.

more complex bankruptcy matters may be litigated in the Southern and Eastern Districts than in the Northern or Western Districts, it may be that it is the type of case, rather than where it is litigated, which leads to obstructive conduct. However, the figure was sixty-five percent, still very high, for all general commercial practitioners, who, presumably, litigate roughly comparable cases throughout the state.[46] Accordingly, it simply may be that downstate practitioners approach deposition practice in a less responsible manner than those upstate. Probably at least one of the reasons for such a difference in conduct is that adversaries in the Southern and Eastern Districts frequently do not know each other and are thus likely to be less cooperative than practitioners who, presumably, deal with each other regularly in the smaller and more collegial upstate courts.

The survey results suggest other comparable problems and conclusions. Thus, nearly sixty percent of all respondents agreed or strongly agreed that disputes between counsel at a deposition generally are about issues that have no bearing on the ultimate outcome of the lawsuit.[47] Once again, whereas about sixty percent of respondents who practiced in the Southern and Eastern Districts noted their agreement or strong agreement with the proposition, only about fifty percent of their counterparts in the Northern and Western Districts concurred.[48]

b. Document Production

Rule 34(b) of the Federal Rules requires a party to produce documents in response to a request for production "as they are kept in the usual course of business or [to] organize and label them to correspond with the categories in the request."[49] The survey reveals that this Rule is largely being ignored.

Thus, fifty-eight percent of all respondents agreed or strongly agreed with the proposition that documents provided in response to written requests seldom are produced in an organized fashion.[50] Once again, while this problem is state-wide, approximately sixty percent of practitioners in the Southern and Eastern Districts agreed

46. *Id.*

47. *See infra* Appendix, Question 16.

48. Survey of the Bar, Question 16, Analysis of Data by District.

49. FED. R. CIV. P. 34(b).

50. *See infra* Appendix, Question 20.

or strongly agreed with the proposition while only about half of the practitioners in the Northern and Western Districts did.[51]

Interestingly, unlike problems attendant to depositions, the problem of producing documents in an organized fashion was seen as least significant by those respondents who specialize in antitrust and securities litigation.[52] Perhaps this is because such practitioners, having regularly dealt with "large" cases and obtained familiarity with the requirements of Rule 34, have created methods to obey its strictures. The problem was perceived as substantially more significant by sole practitioners, who, presumably, are more burdened by the need to go through disorganized productions, than by practitioners in firms.

Seventy percent of practitioners who represent private plaintiffs agreed or strongly agreed that documents were not produced in an organized fashion, whereas the figure was only fifty-four percent for practitioners who represent private defendants.[53] Once again, this apparently reflects a not surprising perception by the plaintiffs' bar that defendants' counsel generally obstruct efforts to obtain information necessary to the development of the case.

c. Interrogatories

The survey results also evidence dissatisfaction with the current utilization of interrogatories. Federal Rule 33[54] allows for expansive use of this discovery tool: under the rule, a party may serve upon any other party a limitless number of written inquiries, which may touch upon "any matter" which falls within the broad scope of relevance of Rule 26(b).[55] Almost sixty percent of the survey respondents agreed that interrogatories routinely seek information which could be more readily obtained through other discovery methods, while only thirty percent disagreed with the statement.[56] Moreover, if we consider only those responses which expressed an opinion on this issue, the number registering their disapproval jumps to sixty-six percent.[57]

The sentiment that interrogatories are misused pervaded responses from all four districts. Even with the relatively easygoing litigation practice of the Northern and Western Districts, more than sixty per-

51. Survey of the Bar, Question 20, Analysis of Data by District.
52. *Id.*, Analysis of Data by Specialty.
53. *Id.*, Analysis of Data by Practice.
54. FED. R. CIV. P. 33 (Interrogatories to Parties).
55. *See supra* note 1.
56. *See infra* Appendix, Question 13.
57. *Id.*

cent and sixty-nine percent of respondents from those districts respectively reported that interrogatories were overused.[58]

Of particular significance, we believe, is that those attorneys with the most experience, more than 20 years at the bar, were the most troubled by current interrogatory practice. Almost sixty-one percent of the respondents in this group believed that information sought via interrogatories could be more readily obtained through other discovery methods, as compared to approximately fifty percent of their most junior colleagues, those having less than five years of experience.[59] Size of law firm affiliation, however, did not matter: practitioners in small and large firms alike registered the same general range of disapproval with current practice.[60]

Once again, attorneys specializing in antitrust and securities litigation were the most vehement in their belief that other discovery methods should be substituted for at least part of the reliance upon interrogatories.[61] However, every category of specialized practitioners surveyed agreed with this position.[62]

One method of addressing attorneys' concerns with the current use of interrogatories that has gained favor with many federal courts (though none in New York) is to limit the number of interrogatories that may be propounded by any one party.[63] Slightly more than half the respondents apparently believed in principle that a numerical limitation was appropriate, though there was no consensus as to what that number should be.[64] Of those who indicated that they would support "some" number, fewer than three percent favored placing it in excess of fifty; the largest group, though still fewer than one-fourth of respondents, felt that the figure should be in the range of eleven to twenty-five.[65]

Slightly over a third of the respondents reported, however, that they believed that the number of interrogatories should not be limited.[66] With respect to practitioners in firms in excess of one hundred attorneys, the number advocating the "no limitation" position rose to

58. Survey of the Bar, Question 13, Analysis of Data by District.

59. *Id.*, Analysis of Data by Experience.

60. *Id.*, Analysis of Data by Size of Practice.

61. *Id.*, Analysis of Data by Specialty.

62. *Id.*

63. *See, e.g.*, Local Rule 16, Dist. of Mass. (presumptively restricted to 30); *see generally* J. SHAPARD & C. SERON, ATTORNEYS' VIEW OF LOCAL RULES LIMTING INTERROGATORIES (Federal Judicial Center 1986).

64. *See infra* Appendix, Question 14.

65. *Id.*

66. *Id.*

over forty percent, perhaps reflecting that the larger cases often handled by these firms necessitate a greater use of interrogatories or perhaps indicating that the largest firms do not want to lose the option of conducting very aggressive discovery.[67]

As to specialties canvassed, whereas the antitrust and general commercial bars were over forty percent in favor of no numerical limitation, only about thirty percent of the intellectual property and personal injury bars were receptive to this concept.[68]

Once again evidencing a more "laissez-faire" attitude towards litigation practice, approximately forty percent of the Northern and Western District attorneys registered approval of the "no limitation" position while only thirty-five percent of their Southern and Eastern District brethren did.[69]

The Southern District of New York, in fact, has selected a different method for attempting to treat the interrogatory malady. Rather than limit the number of interrogatories, it has, by adoption of Civil Rule 46, restricted the manner and timing of interrogatory usage: at the commencement of discovery, parties may employ interrogatories solely to ascertain the "names of witnesses with knowledge or information relevant to the subject matter of the action, the computation of each category of damage alleged, and the existence, custodian, location and general description of relevant documents;"[70] during discovery, interrogatories seeking information other than that prescribed above may only be served "if they are a more practical method of obtaining the information sought than a request for production or a deposition;"[71] and, at the conclusion of discovery, parties may issue interrogatories to learn the "claims and contentions of the opposing party."[72]

Since Civil Rule 46 applies only to litigation in the Southern District,[73] and is itself only three years old, it was not surprising that a quarter of the respondents were unfamiliar with the rule. Of those

67. Support for this proposition may be derived by comparing the significantly higher percentage of attorneys representing entities that oppose numerical limitations (40%) to the figure for those who primarily represent individuals (30%), who typically would have fewer financial resources available to fund a litigation than would their corporate counterparts.

68. Survey of the Bar, Question 14, Analysis of Data by Specialty.

69. *Id.*, Analysis of Data by District.

70. S.D.N.Y. Civ. R. 46(a).

71. S.D.N.Y. Civ. R. 46(b).

72. S.D.N.Y. Civ. R. 46(c).

73. The Eastern District, while recognizing serious abuses in the use of interrogatories, has declined to follow the Southern District approach. Rather, through its Standing Orders, it has rejected the use of "form interrogatories" and directed that interrogatories be drafted and read reasonably, and answered separately and fully.

familiar with the provisions, the assessment was mixed: twenty-six percent believed that Civil Rule 46's three-tiered system imposed too many restrictions on interrogatory usage while thirty-four percent felt to the contrary.[74]

With respect to Southern District practitioners (those presumably with the most experience with the Rule), of the respondents who expressed an opinion as to the rule's operation,[75] fifty-seven percent registered their approval, although a significant minority of forty-three percent found the Rule too restrictive. Those practicing principally in the Eastern District, where the Standing Orders have followed a different approach, produced comparably mixed results.[76] Few attorneys identifying themselves as Northern or Western District practitioners were familiar with Civil Rule 46 or had an opinion regarding its effect.[77]

Almost sixty percent of securities law practitioners were supportive of the Rule, while the personal injury bar was the sole specialty group surveyed that reported more attorneys against the Rule than in favor.[78]

3. Possible Solutions

The respondents generally voiced a strong desire to implement or retain procedures to eliminate certain of the discovery abuses they perceived. While the strongest advocates for eliminating those abuses practiced in the Eastern and Southern Districts, where the problems appeared most pronounced, all practitioners concurred in the need for major remedial measures.[79]

Thus, fewer than ten percent of all respondents disagreed or strongly disagreed with the suggestion that courts should adopt district-wide rules regarding discovery practice.[80] Even though the figure exceeded ten percent in the Northern and Western Districts, even there adoption of such rules was perceived as strongly desirable.[81]

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74. *See infra* Appendix, Question 15.

75. In light of the substantial coverage of the Rule's adoption in the popular legal press, a surprising number of Southern District practitioners, in excess of 16%, reported that they were unfamiliar with it.

76. Survey of the Bar, Question 15, Analysis of Data by District.

77. *Id.*

78. *Id.*, Analysis of Data by Specialty.

79. *Id.*, Questions 10-22, Analysis of Data by District.

80. *Id.*

81. *See infra* Appendix, Question 22.

Notwithstanding this virtually unanimous desire to see uniform district-wide rules, more than three-quarters of the respondents were either unfamiliar with or had no opinion as to the effectiveness of the one set of district-wide rules which have already been promulgated, the Standing Others.[82] This is understandable with respect to respondents who do not practice in the Eastern District. However, almost a quarter of the respondents who do generally practice there were also unfamiliar with the Standing Orders and almost twice that many had no opinion as to their effectiveness in reducing the number of discovery disputes in that court.[83] This response is somewhat inconsistent with the findings of the Oversight Committee which reflect a greater awareness of the Orders by Eastern District practitioners.[84]

In any event, of those respondents who did express an opinion as to the efficacy of the Standing Orders, they were perceived as being effective in reducing discovery disputes by almost a three-to-one margin.[85]

Of course, each district has its own administrative needs and customs of practice which may counsel against the promulgation of a uniform set of rules as broad as the Standing Orders. Nonetheless, given the apparent desire of the bar to see such rules, that each district should commission a study as to their desirability. In addition, certain procedures in the Standing Orders which permit speedy and informal resolution of discovery conflicts should be generally implemented.

Standing Order 6 was adopted "[t]o encourage the prompt and inexpensive resolution of discovery disputes . . . without the burden, time and expense of preparing motion papers."[86] Among other things, it requires attorneys seeking judicial resolution of discovery disputes unrelated to depositions to bring the matter to the court's attention in the first instance either by telephone or by a letter of no more than three pages. Disputes arising during the taking of a deposition are to be raised with the court by telephone. After reviewing the utilization of these and related procedures, the Oversight Com-

82. *Id.*, Questions 69-71.

83. Survey of the Bar, Questions 69-71, Analysis of Data by District.

84. *See Oversight Committee Report, supra* note 17, at 25-27 (90% of respondents to survey who had more than 25% of their federal civil litigation practice in the Eastern District knew of the Standing Orders. The judges of the Eastern District that were interviewed indicated that practitioners were generally not aware of the Orders). The Oversight Committee recommended that more should be done to publicize the Orders. *Id.* at 27-29. The results of this survey clearly reinforce that conclusion.

85. *See supra* note 55.

86. *See Special Committee Report, supra* note 16 (commentary to Standing Order 6).

mittee found "inescapable" the "conclusion the Court is resolving discovery motions through less expensive and less time-consuming methods."[87] The survey results indicate that a great majority of practitioners wish to see such procedures implemented in all districts.

Thus, of those respondents expressing an opinion, nearly ninety percent approved of the procedure which permits discovery disputes to be raised by a short letter to the court rather than by motion.[88] (The small number of practitioners in the Northern District who expressed an opinion also approved of this Order, but by a substantially smaller margin. Those responses seem to be statistically insignificant.)

Similarly, almost eighty percent of respondents agreed or strongly agreed that judges or magistrates should generally be accessible by telephone to resolve disputes at depositions when they occur.[89] And, while the need for such a procedure was seen as slightly less pressing by respondents practicing in the Northern and Western Districts, they too strongly endorsed the procedure.[90] Given the overwhelmingly favorable response of respondents to the procedures set forth in Standing Order 6, all districts should promulgate a comparable rule.

Not surprisingly, considering the problems attendant to the deposition process, slightly under three-quarters of all respondents agreed or strongly agreed that guidelines for the conduct of depositions should be promulgated.[91] Expectedly, the need was seen as greatest by practitioners in the Eastern and Southern Districts. However, a large majority of practitioners in the Northern and Western Districts concurred.[92] Notwithstanding this response, in view of the fact that conduct at a deposition is necessarily extemporaneous and case-specific, creation and enforcement of a comprehensive set of detailed guidelines might prove difficult, if not impossible.

The Eastern District has already made an attempt to govern some aspects of deposition conduct with inconclusive results.[93] Thus, for example, Standing Order 11 notes that "repeated directions to a witness not to answer questions calling for non-privileged answers are symptomatic that the deposition is not proceeding as it should." The

87. *See Oversight Committee Report, supra* note 17, at 69.
88. *See infra* Appendix, Question 71.
89. *Id.*, Question 19.
90. Survey of the Bar, Question 19, Analysis of Data by District.
91. *See infra* Appendix, Question 18.
92. Survey of the Bar, Question 18, Analysis of Data by District.
93. *See* E.D.N.Y. Standing Orders 7-14.

Oversight Committee found this Order "modestly successful."[94] Standing Order 12 provides that suggestive objections in the presence of the witness "are presumptively improper." The Oversight Committee's analysis of changes in conduct following promulgation of this Order was "not very encouraging."[95] Standing Order 13, which was designed to prevent the attorney from suggesting an answer to the witness, prohibits attorney-initiated conferences with a client during the deposition, except to determine whether a privilege may be asserted. The Oversight Committee found that this Order "to date . . . appears to have had no effect on conferences during depositions."[96] As noted, this survey largely confirms the Oversight Committee's analysis in that, notwithstanding the existence of the Standing Orders, Eastern District practitioners voiced strong criticism of deposition conduct.[97]

Moreover, the difficulty in reaching a consensus as to the type of conduct which should be permitted at a deposition was evidenced by the results of this survey, which reflect a virtually even split among all categories of respondents as to whether they generally approve of Standing Order 13.[98] Nonetheless, given the bar's apparently strong desire to curb abuses in deposition procedures, the issue deserves greater study.

Seventy-seven percent of all respondents agreed or strongly agreed that uniform definitions and instructions applicable to all discovery requests should be adopted in every district.[99] As previously noted, the Southern and Eastern Districts already provide such definitions and instructions in Civil Rule 47.[100] However, Northern and Western District practitioners also expressed very strong approval of such a mechanism,[101] and it should be seriously considered for adoption by those districts.

With respect to interrogatories, they are, when properly used, a valuable discovery device, particularly for parties that must litigate on a low budget. Nevertheless, it is beyond dispute that parties have too frequently resorted to page after page of expansive inquiries,

94. *Oversight Committee Report, supra* note 17, at 79.
95. *Id.* at 80.
96. *Id.* at 82.
97. Survey of the Bar, Questions 16-17, Analysis of Data by District.
98. *Id.*, Questions 69-71, Analysis of Data.
99. *See infra* Appendix, Question 21.
100. *See supra* notes 20-22 and accompanying text.
101. Survey of the Bar, Question 21, Analysis of Data by District.

leading to a serious abuse of our discovery process and threatening the desirable expeditious prosecution of civil litigation.

The Southern District's notion that a fixed limit on the number of interrogatories, even if only presumptive, is too arbitrary appears to be correct:[102] while ten interrogatories may be an appropriate number for a simple case, a complex matter might reasonably require fifty. Judges and magistrates are already overworked; a process that is likely to invite motion practice to determine such weighty issues as whether subdivisions count as single or multiple interrogatories should not be encouraged.

Although this committee recently reported that Civil Rule 46 appears to be working,[103] a significant number of practitioners found it too restrictive. There is concern that, as more attorneys become aware of the Rule, it, too, may led to satellite litigation, such as whether a particular type of inquiry is premature at a given stage of the litigation.

What might be preferable to the ever-increasing adoption of layers of local rules which add conditions and restrictions to the Federal Rules of Civil Procedure and lead, in effect, to the balkanization of federal practice, might be the re-consideration of the scope of relevance advocated above; if the range of permissible discovery were narrowed, that change could result in a similarly limiting effect on the (over)use of interrogatories. At the very least, courts should be mindful of Federal Rule 16's admonition to discourage wasteful pretrial practices,[104] and should be prepared to strike abusive interrogatories and to sanction those who respond to proper interrogatories in an improper fashion.

Finally, the survey did not consider possible remedies to the problem of disorganized document productions in response to Federal Rule 34 requests.[105] However, given the apparent scope of the problem, each district should study the possibility of imposing specific measures designed to assure compliance with the Rule. For example, a procedure may be implemented comparable to that already contained in Southern District Civil Rule 46 which requires that where a "party answers an interrogatory by reference to records from which the answer may be derived or ascertained, as permitted by Fed. R. Civ. P. 33, . . . the specification of documents to be pro-

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102. *See supra* notes 70-72 and accompanying text.

103. *See supra* notes 70-78 and accompanying text.

104. FED. R. CIV. P. 16 (Pretrial Conferences; Scheduling; Management).

105. FED. R. CIV. P. 34 (Production of Documents and Things and Entry upon Land for Inspection and Other Purposes).

duced shall be in sufficient detail to permit the interrogating party to locate and identify the records and to ascertain the answer as readily as could the party from whom discovery is sought."[106]

C. *Pretrial Proceedings Other Than Discovery*

1. Motion Practice

a. Pre-motion Conferences

Despite the absence of an applicable Local Rule or Standing Order, the New York Law Journal reveals that at least fifteen Southern District Judges and one Eastern District Judge require the parties to attend a pre-motion conference before permitting a party to file a substantive motion.[107] A few additional judges require a conference prior to the making of a discovery motion.[108]

The bar is overwhelming opposed to the practice of requiring attorneys to seek judicial permission prior to filing a substantive motion.[109] Thirty percent of respondents "strongly agreed" that such permission should not be required, while an additional forty-seven percent "agreed" that there should be no such requirement. Fewer than twenty percent of all respondents favored the practice of requiring judicial permission prior to making a substantive motion.[110]

Disagreement with this requirement increased with experience. Eighty-five percent of the most experienced lawyers (contrasted with sixty-nine percent of the least experienced) opposed the requirement of seeking judicial permission prior to making a substantive motion.[111] The same result was found with respect to increased trial experience.[112] There was little variation between districts, with Western and Northern District practitioners more opposed to the requirement than those practicing in the Southern and Eastern Dis-

106. S.D.N.Y. Civ, R. 46.

107. The Southern District judges include Judges Broderick, Canella, Cederbaum, Conner, Edelstein, Griesa, Keenan, Knapp (summary judgment only), Kram, Leisure, Leval, Pollack, Sprizzo, Stanton, Walker and Ward. The Eastern District judges include Judges Mishler, Neaher and Nickerson. No judges in either the Northern or Western Districts of New York require any pre-motion conferences.

108. Judges Stewart, Glasser and Korman require conferences prior to the making of a discovery motion. Moreover, pursuant to Standing Order 6 of the Eastern District of New York, all discovery motions must be raised in the first instance by a letter or a telephone call rather than by the making of a motion.

109. *See infra* Appendix, Question 23.

110. *Id.*

111. Survey of the Bar, Question 23, Analysis of Data by Experience.

112. *Id.*

tricts.[113] Finally, attorneys representing individuals for whom the cost of defending motions is more difficult to bear, as opposed to those representing entities, were most receptive to the concept, but only one-fifth of them supported the requirement.[114]

In sum, the practice of requiring a conference prior to the making of a motion has won little acceptance from the practicing bar. We recommend that the court seriously consider eliminating this requirement for substantive motions.

b. Length of Motion Papers

Over one-half of respondents rejected the suggestion that the length of motion papers should be limited to a specific number of pages.[115] Nonetheless, thirty-eight percent of respondents agreed with this suggestion.[116] The groups most in favor of imposing a numerical limit were more experienced practitioners,[117] Eastern and Southern District practitioners,[118] antitrust and securities specialists,[119] and plaintiffs' attorneys as opposed to defendants' attorneys.[120] In view of the relatively close split on this issue, further study is recommended.

c. Requirement of a Memorandum of Law

Civil Rule 3 of the Southern and Eastern Districts requires the filing of a memorandum of law in support of all motions.[121] Rule 10(c) of the General Rules of the Northern District sets forth the same requirement.[122] The Rules of the Western District do not appear to include this requirement.[123]

Almost three-quarters of the survey respondents felt that a memorandum of law should not necessarily be required in the filing of all motions.[124] Fewer than one-quarter of respondents supported the requirement.[125] These findings were generally consistent throughout all

113. *Id.*, Analysis of Data by District.
114. *Id.*, Survey of the Bar, Question, Analysis of Data by Practice.
115. *See infra* Appendix, Question 24.
116. *Id.*
117. Survey of the Bar, Question 24, Analysis of Data by Experience.
118. *Id.*, Analysis of Data by District.
119. *Id.*, Analysis of Data by Specialty.
120. *Id.*, Analysis of Data by Practice.
121. S.D.N.Y. CIV. R. 3; E.D.N.Y. CIV. R. 3.
122. N.D.N.Y. GEN. R. 10(c).
123. *See* W.D.N.Y. Rules.
124. *See infra* Appendix, Question 25.
125. *Id.*

subcategories with only small, but nonetheless interesting, variations. For example, sole practitioners were more opposed to the requirement than practitioners in the largest firms,[126] personal injury specialists were the most opposed whereas securities specialists were the least opposed,[127] and those representing individuals were more opposed than those representing entities.[128]

In short, all sections of the bar opposed the mandatory requirement of filing a memorandum of law in support of all motions. Those upon whom the financial burden falls most heavily are even more opposed. In view of the strong feelings of the practicing bar, the courts should consider the advisability of retaining a rule requiring the submission of a memoranda of law to accompany all motions.

2. Settlement Conferences

When asked whether a court should routinely hold a settlement conference prior to trial, the bar's response was overwhelmingly affirmative.[129] Once again, this response was consistent throughout the subcategories with only slight variations in predictable areas. For example, large firms were more opposed than smaller firms;[130] intellectual property, securities, and bankruptcy specialists were more opposed than personal injury specialists;[131] attorneys for entities were more opposed than attorneys for individuals[132] and governmental litigants were most opposed.[133]

In sum, all sectors of the bar favor the routine holding of a settlement conference prior to trial, which recommendation should be implemented.

In a jury trial there can be little doubt that the trial judge is best suited to hold the recommended pretrial settlement conference. The situation in a non-jury trial may be somewhat different. Fifty percent of all respondents felt that the trial judge in a non-jury trial should not hold the pretrial settlement conference.[134] However, thirty-eight percent believed that the trial judge should hold the con-

126. Survey of the Bar, Question 25, Analysis of Data by Practice.
127. *Id.*, Analysis of Data by Specialty.
128. *Id.*, Analysis of Data by Practice.
129. *See infra* Appendix, Question 28.
130. Survey of the Bar, Question 28, Analysis of Data by Size of Practice.
131. *Id.*, Analysis of Data by Specialty.
132. *Id.*, Analysis of Data by Practice.
133. *Id.*
134. *See infra* Appendix, Question 29.

ference.[135] More experienced attorneys were the most opposed to the trial judge holding the settlement conference.[136] Defendants' attorneys were more opposed to the practice than plaintiffs' attorneys.[137] No other distinct variations were noted.

Since the majority of respondents expressed displeasure at the notion of the trial judge in a non-jury trial engaging in settlement discussions, judges might wish to consider possible alternatives including referral to a different judge or to the magistrate solely for settlement purposes.

3. Pretrial Orders

Seventy-six percent of respondents agreed that a well-designed pretrial order generally expedites the trial process.[138] Consistent with that view, seventy-two percent of all respondents felt that each district should adopt a standard pretrial order.[139] It should be noted, however, that over forty percent of all respondents felt that courts generally require unnecessary information in a pretrial order.[140] These findings were consistent throughout all subcategories, except that experienced attorneys were most favorably inclined toward a standardized, district-wide, pretrial order[141] and were also most convinced that courts currently require unnecessary information in their pretrial orders.[142] Seventy-seven percent of the most experienced lawyers agreed that a well-designed pretrial order expedites the trial process, while only sixty-nine percent of their less experienced colleagues concurred.[143]

These findings reveal that while the bar favors the use of pretrial orders and would like to see district-wide uniformity in this area, it encourages the court to eliminate unnecessary information from inclusion in the pretrial order. The courts should seriously consider these recommendations.

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135. *Id.*

136. Survey of the Bar, Question 29, Analysis of Data by Experience.

137. *Id.*, Analysis of Data by Practice.

138. *See infra* Appendix, Question 30.

139. *Id.*, Question 32.

140. *Id.*, Question 31.

141. Survey of the Bar, Question 32, Analysis of Data by Experience.

142. *Id.*, Question 31, Analysis of Data by Experience.

143. *Id.*, Question 30, Analysis of Data by Experience.

III. TRIAL

Although problems in trial practice have received less play in the popular legal press than those linked to the discovery and motion phases discussed above, the results of the survey evidence dissatisfaction with certain traditional notions of trial procedure. A healthy segment of the bar favors experimentation—in some cases, just tinkering, in others, more innovation—to make the trial of a dispute a fairer and more efficient process.

A. Scheduling

Because a trial lawyer does his best when he is fully prepared, advance notice of a definite trial date is most important. When asked whether courts provide definite trial dates in a majority of civil cases, only forty-two percent of all respondents agreed that they do.[144] The positive response was somewhat greater in the Northern and Western Districts.[145]

Fifty-two percent of all respondents agreed that courts provide adequate notice of trial dates.[146] Once again the proportion was higher in the Northern and Western Districts.[147] Two weeks' notice was considered adequate by most respondents, while thirty percent found one week's notice to be acceptable.[148] Twenty-two percent considered more than two weeks necessary for adequate notice; only a very small percentage considered forty-eight hours to be sufficient.[149]

To the extent that courts consider forty-eight hours to be adequate notice, the bar strongly disagrees. It appears that courts in the Northern and Western Districts are more likely to provide a definite trial date than those in the Southern or Eastern Districts.[150] A definite date should routinely be set and attorneys should receive at least two weeks' notice of the trial date whenever possible.

B. Jury Selection

Unlike the New York state system when jury selection is conducted by the lawyers without a judicial presence, potential jurors in most federal courts are questioned solely by the court. Some have

144. *See infra* Appendix, Question 34.
145. Survey of the Bar, Question 34, Analysis of Data by District.
146. *See infra* Appendix, Question 35.
147. Survey of the Bar, Question 35, Analysis of Data by District.
148. *See supra* note 146.
149. *Id.*
150. Survey of the Bar, Question 34, Analysis of Data by District.

argued that the federal process is inadequate for the purpose of achieving an impartial, unbiased jury.[151] In the recent past, several attempts have been made to permit more latitude in federal jury selection so that the process more closely approximates that of the state court system.[152]

Respondents were almost equally divided over adoption of the New York State procedure for jury *voir dire* with slightly more preferring this procedure than not.[153] Agreement was relatively higher among those admitted to practice more than twenty years[154] and those who have tried more than fifteen cases to verdict.[155] Among specialists, over seventy percent of personal injury litigators favored the state court method of jury selection, while almost an equal percentage of securities litigators opposed it.[156] The disparity between those representing private plaintiffs and those representing private defendants was stark with sixty-eight percent of the former and only forty-six percent of the latter preferring the state system.[157] There was general agreement that peremptory challenges should be increased if there is more than one party per side.[158]

Because a substantial percentage of the bar prefers attorney-conducted *voir dire*, the federal courts might consider an experimental program allowing this practice.

C. *Presentation of Evidence*

A federal judge has the ability to control the length of a trial both by means of a pretrial order specifying the issues to be tried, and through rulings on the admissibility of evidence.[159] Relevant and material evidence is admissible under the Federal Rules of Evidence.[160] A debate has arisen, however, over whether a trial judge has the

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151. Address by Chief Judge T. Emmet Clarie, D. Conn., 1982 Ann. J. Conf., 2d J. Cir. *reported at* 97 F.R.D. 545, 560 (1982). *See* J. KENNELLY, TRIAL LAWYERS GUIDE 352 (1980).

152. Address by Chief Judge T. Emmet Clarie, *supra* note 151 at 559. *But see*, Address by Justice Thurgood Marshall, 1982 Ann. J. Conf., 2d J. Cir., *reported at* 97 F.R.D. 545, 559 (1982).

153. *See infra* Appendix, Question 39.

154. Survey of the Bar, Question 39, Analysis of Data by Experience.

155. *Id.*

156. *Id.*, Question 39, Analysis of Data by Specialty.

157. *Id.*, Question 39, Analysis of Data by Practice.

158. *See infra* Appendix, Question 40.

159. FED. R. EVID. 403 (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time); FED. R. CIV. P. 16 (Pretrial Conferences; Scheduling; Management).

160. FED. R. EVID. 402 (Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible).

authority to limit the length of a trial by setting a maximum trial time.[161]

More respondents disagreed than agreed with the idea that courts should limit the length of a trial.[162] The greatest disagreement came from those practicing in the Northern and Western Districts[163] or specializing in personal injury cases.[164] Approval of this practice, though still less than a majority, was greatest among respondents from firms over 100[165] or specializing in antitrust[166] and securities litigation.[167]

Leaving aside the question of whether a trial judge has the power to limit trial time, it appears that the bar does not favor this practice in any event.

Forty-one percent of all respondents agreed or strongly agreed that jurors should be permitted to submit questions to the court to be posed to witnesses in the court's discretion, while forty-nine percent disagreed or strongly disagreed.[168] This, of course, is not the prevailing practice now and represents what many lawyers would consider an intrusion by the jury into the fact-finding process. Again, personal injury lawyers reacted more unfavorably towards this procedure than the respondents as a whole. Sixty percent of the personal injury lawyers opposed or strongly opposed the proposition.[169] Attorneys who had tried more than fifteen cases to verdict seemed to disapprove of the procedure more frequently than the group as a whole.[170] Attorneys who practice in the Western District were most outspoken in rejecting the suggestion.[171]

The court is generally permitted to question witnesses during a jury trial. Respondents were asked whether they agreed with the statement that courts should *not* be permitted to do so. The group as a whole seemed to favor allowing courts to question witnesses, since almost two-thirds disagreed or strongly disagreed with the statement while only a little more than one-fourth percent agreed or strongly

161. Johnson v. Ashby, 808 F.2d 676, 678 (8th Cir. 1987); J. WEINSTEIN AND M. BERGER, WEINSTEIN'S EVIDENCE 403(6) (1986).

162. *See infra* Appendix, Question 41.

163. Survey of the Bar, Question 41, Analysis of Data by District.

164. *Id.*, Analysis of Data by Specialty.

165. *Id*, Analysis of Data by Size of Practice.

166. *Id.*, Analysis of Data by Specialty.

167. *Id.*

168. *See infra* Appendix, Question 47.

169. Survey of the Bar, Question 47, Analysis of Data by Specialty.

170. *Id.*, Analysis of Data by Experience.

171. *Id.*, Analysis of Data by District.

agreed.[172] By contrast, over half of the personal injury lawyers disagreed with this statement and only thirty-eight percent agreed.[173] At the other extreme, almost three-quarters of securities lawyers disagreed or strongly disagreed with this statement[174] and less than twenty percent of the securities lawyers agreed or strongly agreed with it.[175]

D. The Charge

Prior to submission of the case to the jury, virtually all federal courts require that counsel provide proposed jury charges. In addition, judges usually use their own standard charges.

A clear majority of respondents believe that courts should provide their "standard" charges to counsel.[176] A substantial majority of respondents agreed that counsel should only be required to submit charges on specific facts or law of the particular case.[177] Overall, a small minority of sixteen percent disagreed.[178] However, among respondents from firms with more than 100 lawyers, or those specializing in antitrust litigation, there was more disagreement.[179] It is suggested that the court require counsel to submit only particularized charges and also that it routinely share with counsel the standard charges it intends to use.

E. Verdict

In a civil case juries have traditionally rendered a unanimous general verdict.[180] The Federal Rules of Civil Procedure permit the parties to agree to a verdict by a less than unanimous jury.[181] A significant majority of respondents agree that a five-sixths majority verdict should be sufficient.[182] Those specializing in personal injury,[183] representing individuals,[184] or private plaintiffs[185] agree in even greater

172. *See Infra* Appendix, Question 48.
173. Survey of the Bar, Question 48, Analysis of Data by Specialty.
174. *Id.*
175. *Id.*
176. *See infra* Appendix, Question 37.
177. *Id.*, Question 38.
178. *Id.*
179 Survey of the Bar, Question 38, Analysis of Data by Size of Practice and Specialty.
180. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2501 (1970); *see* J.W. MOORE, MOORE'S FEDERAL PRACTICE ¶ 49.02 (1988).
181. FED. R. CIV. P. 48 (Juries of Less Than Twelve—Majority Verdict).
182. *See infra* Appendix, Question 42.
183. Survey of the Bar, Question 42, Analysis of Data by Specialty.
184. *Id.*, Analysis of Data by Practice.

numbers. The least enthusiasm for a non-unanimous verdict came from those representing governmental plaintiffs[186] and from antitrust specialists.[187] Agreement increased with trial experience[188] but decreased by size of firm.[189] Forty-seven percent of respondents agreed that the same jurors must be in the five-sixths majority on every question decided.[190] Agreement with this proposition was highest among antitrust specialists[191] and those representing private defendants.[192]

Special verdicts have become more commonplace and have greatly increased the ability of trial and appellate courts to analyze the jury's factual findings. Over three-quarters of the respondents agreed that a special verdict form should generally be used if requested by a party.[193] On the other hand, only slightly over half agreed that one should be used in order to assist appellate review if all parties objected.[194]

F. Jury Practices

Respondents were divided on whether civil jurors should be permitted to take notes during the trial and use them in their deliberations.[195] For example, almost three-fourths of the lawyers specializing in antitrust and bankruptcy either strongly agreed or agreed with the proposition.[196] On the other hand, a majority of personal injury lawyers rejected the concept.[197] There also seemed to be some disparity in opinion based upon the number of cases the respondent had tried to verdict. Only forty-three percent of those who had tried fifteen or more cases to verdict agreed with the proposition that civil jurors should be allowed to take notes and use them.[198] By contrast, among those who had tried only one to five cases, more than sixty percent were in favor of the practice[199] and of those who had tried

185. *Id.*
186. *Id.*
187. *Id.*, Analysis of Data by Specialty.
188. *Id.*, Analysis of Data by Experience.
189. *Id.*, Analysis of Data by Size of Practice.
190. *See infra* Appendix, Question 43.
191. Survey of the Bar, Question 43, Analysis of Data by Specialty.
192. *Id.*, Analysis of Data by Practice.
193. *See infra* Appendix, Question 44.
194. *Id.*, Question 45.
195. *Id.*, Question 46.
196. Survey of the Bar, Question 46, Analysis of Data by Specialty.
197. *Id.*
198. *Id.*, Analysis of Data by Experience.
199. *Id.*

six to ten cases, fifty-seven percent were in favor.[200] It appears that the more experienced the trial lawyer, the less likely he is to favor the use of notes by jurors.

Respondents with the most trial experience reacted most favorably to limiting questioning by the court during a jury trial.[201] Fewer than one-fifth of attorneys with no trial experience would limit questions by the court,[202] whereas thirty-six percent of the most experienced trial lawyers would do so.[203] It appears that more experienced litigators are less prone to have the court get involved in the questioning of witnesses. Once again, respondents from the Western District were most in favor of limiting questioning by judges.[204]

Respondents as a whole overwhelmingly favored the idea of permitting civil jurors to review the court's written charge during deliberations.[205] Seventy-one percent agreed or strongly agreed and only twenty-two percent disagreed or strongly disagreed.[206] Personal injury specialists had a problem with this concept; fewer than sixty percent agreed or strongly agreed and thirty-five percent disagreed or strongly disagreed.[207] Attorneys who had tried more than fifteen cases were more opposed to the concept than the general group and over one-third disagreed or strongly disagreed.[208] Attorneys who had tried fewer than twelve cases were less bothered by the idea since only sixteen percent of them opposed it.[209] Although government attorneys favored the concept, they were split by representation: attorneys who represented governmental plaintiffs were eighty percent in agreement with the concept and only ten percent disagreed, whereas attorneys who represented governmental defendants were sixty-seven percent in favor and almost twenty-two percent opposed.[210]

The bar was fairly evenly split on the question of whether judges should tape record their live jury instructions for replay to the jury during deliberations if the jury so requests. Approximately forty-one percent of the respondents agreed or strongly agreed that tape recordings of the charge should be replayed upon request and thirty-

200. *Id.*
201. *Id.*, Question 48, Analysis of Data by Experience.
202. *Id.*
203. *Id.*
204. *Id.*, Analysis of Data by Experience.
205. *See infra* Appendix, Question 49.
206. *Id.*
207. Survey of the Bar, Question 49, Analysis of Data by Specialty.
208. *Id.*, Analysis of Data by Experience.
209. *Id.*
210. *Id.*, Analysis of Data by Practice.

four percent disagreed or strongly disagreed.[211] Again, personal injury lawyers appear to have the most concern with this departure from the norm. Almost forty-four percent of the personal injury lawyers surveyed thought that this was a bad idea.[212] On the other hand, more antitrust lawyers[213] and bankruptcy lawyers[214] agreed or strongly agreed with the concept, than respondents as a whole. The vast majority of attorneys with little civil litigation experience strongly favored this procedure.[215] However, attorneys who had tried more than fifteen cases were more opposed to the procedure than the group as a whole.[216]

The bar overwhelmingly approved of the court giving an introduction to the jury concerning the governing legal principles of the case on trial prior to the taking of evidence.[217] Seventy-three percent of those polled strongly agreed or agreed with this procedure and only eighteen percent disagreed or strongly disagreed.[218] The overwhelming approval of this procedure cut across all of the categories; it was even favored by personal injury lawyers[219] and those who have tried more than fifteen cases.[220]

Respondents were asked whether civil juries should be permitted, upon request, to review the written trial transcript during deliberations, if the transcript is available.[221] On the whole, just under two-thirds of the respondents agreed or strongly agreed with that procedure while slightly more than one-third disagreed or strongly disagreed.[222] Governmental plaintiffs' attorneys,[223] securities,[224] and antitrust lawyers[225] favored this procedure more often than the group as a whole. Personal injury lawyers, however, were much more vehemently opposed, as almost half of them disagreed.[226] Moreover, almost fifty percent of the practitioners in the Western District re-

211. *See infra* Appendix, Question 50.
212. Survey of the Bar, Question 50, Analysis of Data by Specialty.
213. *Id.*
214. *Id.*
215. *Id.*, Analysis of Data by Experience.
216. *Id.*
217. *See infra* Appendix, Question 51.
218. *Id.*
219. Survey of the Bar, Question 51, Analysis of Data by Specialty.
220. *Id.*, Analysis of Data by Experience.
221. *See infra* Appendix, Question 52.
222. *Id.*
223. Survey of the Bar, Question 52, Analysis of Data by Practice.
224. *Id.*, Analysis of Data by Specialty.
225. *Id.*
226. *Id.*

sponded unfavorably.[227] Attorneys who generally try complex factual cases appear to be more favorably disposed to allowing the jury to review the written transcript than those who try actions involving simpler fact patterns.[228]

The bar firmly rejected the concept that edited videotape testimony should not be replayed even when requested by the jury and that only a "read-back" of the transcript should be permitted.[229] Interestingly, personal injury lawyers fit the norm in this category although they generally seemed more opposed to changes in procedures than other groups. Fifty-one percent of the personal injury lawyers favored the video replay option.[230]

On the question of whether trials should be videotaped so that juries may see the tape during deliberations instead of relying on a trial transcript, however, the procedure was unpopular with the bar as a whole.[231] Only eighteen percent of responses agreed or strongly agreed with the idea, while fifty-nine percent disagreed or strongly disagreed.[232] Again, personal injury lawyers were even more strongly opposed than the group as a whole.[233] No members of the antitrust bar, and only two percent of the bankruptcy bar favored the option of permitting jurors to view a videotape of the trial during their deliberations.[234] In the Western District, seventy-two percent were in disagreement with the procedure as opposed to the overall fifty-nine percent response.[235] One-fourth of the attorneys who had never tried a case favored this procedure whereas among the attorneys who had tried fifteen or more cases, only sixteen percent were in favor or strongly in favor.[236] In the Western District, only twelve percent favored this procedure.[237] By contrast, only slightly more than one-third of the lawyers representing governmental plaintiffs strongly disagreed or disagreed with the procedure[238] and of those who represented both governmental plaintiffs and defendants only half disagreed or strongly disagreed.[239] Thus, videotaping trials for the pur-

227. *Id.*, Analysis of Data by District.
228. *Id.*, Analysis of Data by Practice.
229. *See infra* Appendix, Question 53.
230. Survey of the Bar, Question 53, Analysis of Data by Specialty.
231. *See infra* Appendix, Question 54.
232. *Id.*
233. Survey of the Bar, Question 54, Analysis of Data by Specialty.
234. *Id.*
235. *Id.*, Analysis of Data by District.
236. *Id.*, Analysis of Data by Experience.
237. *Id.*, Analysis of Data by District.
238. *Id.*, Analysis of Data by Practice.
239. *Id.*

pose of play-backs during deliberations was, by and large, an unpopular suggestion.

G. Sentiment for Change

Historically, the trial of a case under our system of jurisprudence has been regarded as a battle between hired adversaries. Many trial lawyers, even now, resent intrusions by the court into the presentation of the case to the jury. However, as the "litigation explosion" continues, and more complex disputes find their way to the federal courts, many judges are taking a more active role in the trial process so that the jury can more easily understand the case and arrive at a fair and expeditious verdict.

In reacting to these innovations (jury note taking, tape recording of charges and the like) the bar, by and large, approved of these procedures. This should be construed as a signal to the bench that the bar will tolerate and even applaud variations on the traditional jury trial that contribute to expediting the trial and making the jury's task easier.

IV. APPEALS

A. Civil Appeals Management Plan

In 1974, the United States Court of Appeals for the Second Circuit adopted a Civil Appeals Management Plan (CAMP) to encourage parties in civil cases to reach voluntary settlements and to simplify issues and otherwise expedite the processing of civil appeals.[240] CAMP has the force and effect of a local rule adopted pursuant to Rule 47 of the Federal Rules of Appellate Procedure.[241]

Two staff counsel oversee CAMP. Shortly after a notice of appeal is filed, a staff counsel issues a scheduling order which establishes time frames for all steps, from docketing the record through oral argument. The deadlines set forth in the scheduling order tend to be shorter than those provided in the Federal Rules of Appellate Procedure.[242] Generally, the scheduling order also provides for a pre-argument conference before the staff counsel. These conferences are pri-

240. Kaufman, *The Pre-Argument Conference: An Appellate Procedural Reform*, 74 COLUM. L. REV. 1094 (1974) [hereinafter *The Pre-Argument Conference*].

241. FED. R. APP. P. 47 (Rules by Courts of Appeals) ("In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules.").

242. Kaufman, *Must Every Appeal Run the Gamut?—The Civil Appeals Management Plan*, 95 YALE L.J. 755, 757 n.10 (1986) [hereinafter *Must Every Appeal Run the Gamut?*].

marily designed to explore settlement possibilities or, if settlement is not possible, to narrow the issue on appeal.[243] Sometimes the scheduling order is modified as a result of the pre-argument conference.

The members of the court are insulated from the CAMP process.[244] Staff counsel do not communicate in any way with the bench concerning the pre-argument conference.[245] Nor are counsel for the parties permitted to inform the court about these discussions.[246] This separation of staff counsel from the court is designed to foster candor in the conferences. Indeed, staff counsel often provide the attorneys with an analysis of the appeal, even predicting the outcome in an effort to encourage either settlement or the withdrawal of an appeal.[247]

CAMP has undeniably fulfilled one of its major objectives: promoting settlements. From its inception as an experimental program in 1974, when, in its first four and one half months, it resulted in 66 successful dispositions from a total of 181 cases,[248] to Statistical Year 1987 (July 1, 1986 through June 30, 1987), when it terminated 519 out of a total of 1,062 cases,[249] CAMP has substantially assisted the Second Circuit in processing appeals.[250]

Somewhat surprisingly, only fifty-three percent of all respondents to the survey had personal experience with CAMP.[251] As a result, about one-half of all respondents either expressed "no opinion" or did not even answer the remaining CAMP-related questions.[252] Of

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243. CAMP eliminated the necessity for many procedural motions by addressing such issues at the pre-argument conference. Feinberg, *Unique Customs and Practices of the Second Circuit*, 14 HOFSTRA L. REV. 297, 314 (1986).

244. CAMP Guidelines, *reprinted in* APPEALS TO THE SECOND CIRCUIT 116, 117 (5th ed. 1984).

245. Interview with Stanley Bass, Esq., Staff Counsel for CAMP, in New York City (Mar. 11, 1988) [hereinafter Bass Interview]. *See also Must Every Appeal Run the Gamut?*, *supra* note 242, at 760.

246. *Must Every Appeal Run the Gamut?*, *supra* note 242, at 760; CAMP Guidelines, *supra* note 244.

247. *Must Every Appeal Run the Gamut?*, *supra* note 242, at 760.

248. *The Pre-Argument Conference*, *supra* note 240, at 1098.

249. Memorandum from Vincent F. Flanagan, Esq., Chief Deputy Clerk, United States Court of Appeals for the Second Circuit (Mar. 22, 1988).

250. Through 1984, the Second Circuit had for nine consecutive years been the federal court with the shortest time in the nation for processing appeals. *See Must Every Appeal Run the Gamut?*, *supra* note 242, at 761. That record was repeated in 1987. Flanders, *Annual Report of the United States Courts for the Second Circuit* 7 (1987) [hereinafter *Flanders Report*]. What makes this statistic so impressive is the fact that the Second Circuit, contrary to the national trend, continues to allow and encourage oral argument of virtually all appeals and substantive motions. *See* Feinberg, *supra* note 243, at 303.

251. *See infra* Appendix, Question 55.

252. *Id.*, Questions 55-58.

those who did express an opinion, an overwhelming majority felt CAMP staff counsel should not shorten the timetable provided by the Federal Rules of Appellate Procedure for docketing the record and briefing an appeal.[253]

The approximately one-half of the respondents who expressed an opinion on the techniques employed by staff counsel in pressuring attorneys to settle rather than litigate at the appellate level were reasonably divided: twenty-eight percent of the respondents felt too much pressure was exerted by staff counsel, while twenty percent disagreed.[254] Only eighteen percent of those responding believed that CAMP pre-argument conferences "often result in the disposition of an appeal,"[255] a surprising result given the fact that, as we have seen, the court's statistics credit CAMP with successfully terminating approximately one-half of the cases it processes.[256]

B. Summary Dispositions and the Preservation of Oral Argument

In 1973, the Second Circuit, in an effort to deal with a burgeoning caseload, adopted Rule 0.23, permitting the disposition of certain cases to be made in open court or by summary order.[257] The Rule is controversial because it prohibits the citation of, or other reliance upon, these summary dispositions in unrelated cases.[258] This elimination of all precedential value can be frustrating to practitioners who closely monitor the court's rulings in areas of particular interest to them.

The court attempted to heed the substantial criticism from the bar which followed adoption of the Rule. In 1982, sixty-two percent of all appeals decided by the Second Circuit were decided by summary orders and another three percent by decisions from the bench.[259] Thereafter, the court made a conscious effort to reduce its reliance

253. A fact generally not known to attorneys dealing with CAMP is that the shortened appellate timetable is the result of a directive from the court. In the past year, the court has extended the timetable somewhat so as to more closely approximate that provided for in the Federal Rules of Appellate Procedure. Bass Interview, supra note 245.

254. *See infra* Appendix, Question 57.

255. *Id.*, Question 58.

256. *See supra* notes 248-50 and accompanying text.

257. The Rule permits summary disposition "in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion." 2d CIR. R. 0.23.

258. "Since these statements do not constitute formal opinions of the court and are unreported and not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court." 2d CIR. R. 0.23.

259. Feinberg, *supra* note 243, at 317 n.64.

on summary dispositions.[260] By 1985, the combined figure was down to fifty-four percent.[261] In 1986 and 1987, however, that trend reversed and the court's use of summary disposition increased slightly, to fifty-nine percent in 1986, and fifty-eight percent in 1987.[262]

The Second Circuit may be justifiably proud of its continued policy of encouraging oral argument of virtually all appeals, particularly in view of the contrary national trend. As Chief Judge Feinberg has written, oral argument is a chance for a face-to-face interchange between the lawyers and the bench, provides the litigants a "day in court," frequently affects the mode of disposition of an appeal, if not the result, and enhances judicial collegiality.[263] But to the extent that the continuing guarantee of oral argument, and the additional judicial time it entails, may compel greater use of summary disposition, the committee was curious about the bar's views of the inevitable tension between two generally desirable objectives of the appellate process: the opportunity for oral argument and a published decision available for citation in every case.

Of those respondents who expressed an opinion, the repeal of Rule 0.23's restriction on the citation of summary dispositions was favored by more than a two-to-one margin.[264] Yet, when asked whether they would be willing to forego the absolute right to oral argument if the Second Circuit did away with summary dispositions and decided all appeals in written opinions, more than two-thirds of the respondents who expressed their views were unwilling to make this across-the-board tradeoff.[265] Only ten percent of all respondents did *not* believe that oral argument is a valued means of persuasion at the appellate level.[266] Interestingly, however, more than two-thirds of those who expressed their views favored the option, *in a particular case*, to waive oral argument in return for the promise of a written opinion.[267]

In sum, of those practitioners who expressed an opinion, a healthy majority favored continuation of the Second Circuit's tradition of encouraging oral argument, but opposed the restriction on citing summary dispositions. These results suggest that the Second Circuit is

260. *Id.* at 317.
261. *Id.*
262. *Flanders Report*, *supra* note 250 at 8.
263. Feinberg, *supra* note 243, at 306.
264. *See infra* Appendix, Question 59.
265. *Id.*, Question 60.
266. *Id.*, Question 62.
267. *Id.*, Question 61.

acting appropriately in attempting to preserve the right to oral argument while, at the same time, trying to reduce its reliance on summary dispositions.

V. JUDICIAL ISSUES

A. Use of Magistrates

Before reporting on the survey data regarding the bar's views on the use of magistrates, it might be helpful to briefly review the various rules and orders which establish the powers of the magistrates. Section 636 of Title 28 of the United States Code is the governing statute.[268] Section 636(b)(1)(A) permits a judge to refer any non-dispositive pretrial matter to a magistrate to hear and determine. Non-dispositive matters generally concern discovery disputes. Once a magistrate has made a ruling it may be appealed to the district judge within ten days of the ruling.[269] The standard of review with respect to a magistrate's ruling in a non-dispositive motion is "clearly erroneous" or "contrary to law."[270] Thus, unless the magistrate abuses his or her discretion, the magistrate's ruling on a discovery matter is likely to be final.

Section 636(b)(1)(B) permits a judge to refer any dispositive pretrial motion to a magistrate to hear and report. Such matters are likely to include requests for injunctions, summary judgment, motions addressed to the pleadings, motions for class certification, or an inquest on damages. The report of the magistrate may be appealed to the district judge within ten days of the report's issuance.[271] The court must then consider the matter de novo.[272] Thus the magistrate's ruling on these motions is not entitled to any special weight.

Section 636(c) permits the parties to consent to have a magistrate hear their entire case, from inception through trial and judgment. In fact, the clerk of the court is required to notify the parties of their right to consent to the exercise of such jurisdiction at the time the action is filed.[273] The parties may choose whether to appeal the eventual judgment to the district court or directly to the court of ap-

268. 28 U.S.C. § 636 (1986).
269. *Id.* § 636(b)(1).
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.*

peals.[274] The appeal shall be treated in the same manner as would an appeal from the district court to the court of appeals.[275]

The Magistrates Act is applicable in all federal courts. In addition to this act, however, there are a number of local rules which further explain the permissible uses of the magistrate.[276] The dispositive and non-dispositive motions which the magistrate is permitted to handle are specifically listed in these rules.

Standing Order 4 of the Eastern District Standing Orders requires that a magistrate be randomly assigned to every civil case. The commentary to the original Standing Orders noted:

> [T]he Committee believes for several reasons that discovery matters in most cases ought to be handled by magistrates and further that greater utilization of magistrates is important to the expeditious disposition of discovery disputes . . . . [T]he magistrates are . . . likely to provide greater uniformity in the disposition of discovery disputes than is now perceived to be the case by the practicing bar. . . . [M]agistrates can be instrumental in encouraging settlement negotiations. Some judges prefer not to become involved in settlement discussions of matters which they will eventually try, lest their impartiality appear diminished. In view of the fact that a very large percentage of cases are settled, the magistrate's involvement in pretrial matters provides a substantial benefit.[277]

Three years after the Standing Orders were adopted, a follow up report was prepared by the Discovery Oversight Committee to the United States District Court for the Eastern District.[278] In its Report, the Committee found that:

> The members of the Eastern District bar approve of the use of Magistrates in connection with discovery matters. The survey asked respondents whether they favored greater or less use of Magistrates to resolve discovery disputes. Of the 180 lawyers who answered the question, 140, or 78 percent sought increased use of Magistrates while

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274. *Id.*

275. *See* 28 U.S.C. § 636 (c)(3)(5). If the parties choose to take their appeal to the district court, they may then attempt to reach the court of appeals by filing a petition for leave to appeal.

276. Rules 7, 8, 13 and 15 of the Joint Local Rules of the Southern and Eastern Districts cover the topics, respectively, of objections to magistrates' rulings, consent trials, general pretrial supervision, and Rule 16 scheduling conferences. Rules 43 and 44 of the General Rules of the Northern District cover all of the duties of the magistrate as set forth in 28 U.S.C. § 636 as well as general duties such as supervision of all civil calendars. Finally, Rules 35 through 37 of the General Rules of the Western District again specify the duties of the magistrate as set forth in 28 U.S.C. § 636, as well as how matters are to be assigned to the magistrate, how to consent to a magistrate's trial and how to file an appeal of a magistrate's ruling.

277. Commentary, Standing Orders on Effective Discovery on Civil Cases, E.D.N.Y., at 33.

278. *See Oversight Committee Report supra* note 17.

> 40, or 22 percent preferred less use. Similarly, 63 percent of the telephone respondents favored greater use of the Magistrates to resolve discovery disputes while 15 percent wished that the Magistrates would be used less on discovery matters.[279]

This introduction is necessary to an understanding of the findings arising from our survey of the bar.

1. Referrals to Magistrates

Sixty-four percent of all respondents favored referring cases to magistrates for the supervision of pretrial discovery.[280] It might be interesting to note that 270 of the respondents practice outside of New York State whereas only 126 respondents practice primarily in the Western District and 178 practice primarily in the Northern District.[281] The vast majority of respondents practice in the Southern and Eastern Districts.[282] The respondents least amenable to the general referral of discovery matters to magistrates were the out-of-state practitioners.[283] By contrast, support was pronounced in all the New York districts. The Western, Eastern, Southern, and Northern districts in that order ranged from seventy-four to sixty percent approval.[284] The greatest support was found among personal injury specialists[285] and the least support was found among antitrust specialists.[286] Sole practitioners and small firm practitioners[287] were more supportive than lawyers from big firms.[288] Lawyers for individuals were more supportive than lawyers for entities.[289] No differences were noted by level of experience or representation of plaintiffs versus defendants.[290]

Fifty-six percent of all respondents also favored referring settlement discussions to the magistrates.[291] Once again, the least supportive group was out-of-state practitioners[292] with the greatest support

279. *Id.* at 59-60.
280. *See infra* Appendix, Question 83.
281. *Id.*, Question 5.
282. *Id.*
283. Survey of the Bar, Question 83, Analysis of Data by District.
284. *Id.*
285. *Id.*, Analysis of Data by Specialty.
286. *Id.*
287. *Id.*, Analysis of Data by Size of Practice.
288. *Id.*
289. *Id.*, Analysis of Data by Practice.
290. *Id.*, Analysis of Data by Experience.
291. *See infra* Appendix, Question 84.
292. Survey of the Bar, Question 84, Analysis of Data by District.

in the Western District[293] followed by the Eastern District,[294] the Southern District,[295] and the Northern District.[296] The most supportive specialty group was civil rights specialists[297] and the least supportive was antitrust specialists.[298] Sole practitioners were far more interested in referring settlement talks to the magistrate[299] than were attorneys in the largest firms.[300] Lawyers for individuals were more supportive than lawyers for entities.[301] Attorneys for private plaintiffs were more enthusiastic than attorneys for private defendants.[302] No significant differences based on level of experience were noted.[303]

By and large, attorneys in this state seem to favor referrals to magistrates both for the supervision of discovery matters and for settlement discussions. The courts should heed the preference of the bar and regularly make these referrals unless the parties specifically object.

2. Jury Selection

The respondents appeared overwhelmingly to reject the suggestion that magistrates should select juries in civil trials to be conducted by the district court.[304] Sixty-four percent of the bar rejected this suggested, which was favored by only seventeen percent of all respondents.[305] Little difference was apparent between districts, except that, by a small margin, the highest favorable rate was in the Eastern District,[306] where civil juries are routinely selected by magistrates. The only other significant difference noted was that almost thirty percent of the attorneys representing governmental plaintiffs and defendants were amenable to the practice.[307] It is also true that nearly seventeen percent of all attorneys had no opinion on this subject.[308]

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293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.*
297. *Id.*, Analysis of Data by Specialty.
298. *Id.*
299. *Id.*, Analysis of Data by Size of Practice.
300. *Id.*
301. *Id.*, Analysis of Data by Practice.
302. *Id.*
303. *Id.*, Analysis of Data by Experience.
304. *See infra* Appendix, Question 85.
305. *Id.*
306. Survey of the Bar, Question 85, Analysis of Data by District.
307. *Id.*, Analysis of Data by Practice.
308. *See infra* Appendix, Question 85.

Obviously, in view of these results, the practice cannot be recommended. However, it may be that the bar has, as yet, had little experience with the concept. The question should be studied again, particularly in the Eastern District, after a couple of years of experience with the magistrates' selection of juries.

3. Consent Trials

A little over one-quarter of respondents felt that counsel should consent more frequently than they now do to a trial by the magistrate,[309] however, nearly thirty percent of respondents had no opinion on the subject,[310] and forty-two percent of respondents rejected the proposition.[311] Practitioners in the Western District most favored increasing consents, followed by the Southern and Northern Districts, and Eastern District.[312] Out-of-state practitioners were the least enthusiastic at only twenty percent.[313] As for specialities, the bankruptcy lawyers were the most interested in consent trials[314] and the least interested were the antitrust lawyers.[315] No distinctions were found in the subcategories of firm size or years of experience.[316] By far the most enthusiastic group was that representing both governmental plaintiffs and defendants with over half of the respondents approving.[317]

At this time, there is surely no groundswell favoring more consent trials before the magistrates, although more support was expressed by those practicing in New York State than outside it.

B. Judicial Workload

According to the Administrative Office of the United States Courts and the Circuit Executive of the Second Circuit, the Second Circuit had no vacancies in its thirteen active judgeships during 1987 until Judge Irving Kaufman took senior status in October.[318]

309. *Id.*, Question 86.
310. *Id.*
311. *Id.*
312. Survey of the Bar, Question 86, Analysis of Data by District.
313. *Id.*
314. *Id.*, Analysis of Data by Specialty.
315. *Id.*
316. *Id.*, Analysis of Data by Size of Practice and Experience.
317. *Id.*, Analysis of Data by Practice.
318. UNITED STATES COURTS FOR THE SECOND CIRCUIT, SECOND CIRCUIT REPORT, 1987, *Report of the Circuit Executive* 8 [hereinafter SECOND CIRCUIT REPORT].

The Northern District had no vacancies in its four judgeships,[319] and the Eastern District had only 10.8 "vacant judgeship months" in its twelve active judgeships.[320] The Southern and Western Districts, however, had continuing judicial vacancy problems. There were 41.8 vacancy months among the twenty-seven active judgeships in the Southern District (ten percent of the total vacancies in the ninety-five United States districts)[321] and 12 vacancy months among the four Western District Judgeships, including one judicial vacancy dating back to 1984.[322] The Western District's vacancy problem was eased in November, 1987, when Judge David G. Larimer was sworn in, and will be eliminated when Richard Arcara, whose nomination has been confirmed, is inducted.[323]

For the year ending June 30, 1987, 3,008 appeals (231.38 per active judgeship) were filed in the Second Circuit.[324] When vacancies in other circuits are taken into account, that filing rate per active judgeship is slightly below the national average.[325] The weighted number of filings per authorized judgeship in each of the four district courts was equal or close to the national average of 461.[326] Judicial workloads in the four district courts in New York were eased by seventeen full-time and four part-time magistrates who disposed of over 18,000 matters pursuant to 28 U.S.C. § 636.[327] However, the number of cases pending per authorized judgeship exceeded the national average of 460 in both the Eastern and Western Districts which had 535 and 577 pending cases per authorized judgeship respectively, and greatly exceeded the national average in the Northern District, which had 773 pending cases per authorized judgeship.[328]

In response to questions as to whether the number of circuit judges, district court judges, and magistrates are sufficient for current workloads, the majority of respondents in each district felt that there are two few district court judges[329] and a significant minority

319. *Id.* at 84.
320. *Id.* at 36.
321. *Id.* at 38.
322. *Id.* at 40.
323. *Id.*
324. *Id.* at 8.
325. *Id.*
326. *Id.* at 18.
327. *See* 1987 ANN. REP. DIRECTOR ADMIN. OFF., U.S. CTS. 401, 405.
328. SECOND CIRCUIT REPORT *supra* note 318, at 20.
329. *See infra* Appendix, Question 96.

felt more magistrates are needed.[330] (The highest percentage of dissatisfaction with district judge and magistrate staffing levels was among respondents from the Western District, where the case backlog is high.[331] Surprisingly, respondents from the Northern District — which has the largest case backlog by far — had the lowest percentage of dissatisfaction.)[332] Less than one-quarter of the respondents perceived a need for more circuit judges.[333]

C. Disposition of Motions and Decision of Non-Jury Trials

In the first six months of last year, all four district courts in New York State substantially reduced the number of matters pending for more than sixty days before a district judge, bankruptcy judge, or a magistrate.[334] The Western District, which has the most decisions pending for more than sixty days per judicial officer, reduced the total number of such matters by more than forty percent.[335]

This improvement in disposition rates may account for the relative satisfaction of the survey group with the speed of dispositions and decisions. Although two-thirds of respondents favor the imposition of time limitations on judges to decide pending motions and non-jury trials promptly,[336] only twenty-nine percent of the respondents feel that motions and non-jury trials are not decided "in a reasonably prompt manner."[337] Practitioners in the Northern District were most satisfied with the speed of dispositions and decisions;[338] practitioners in federal courts outside New York were least satisfied.[339] The speed of disposition of dispositive pretrial motions caused the most complaint from survey respondents, with over one-third indicating that their motions are not decided promptly.[340]

Although those figures do not appear to warrant any specific action, the courts should take note that an overwhelming majority of survey respondents (ninety-four percent) favor requiring the court to mail a copy of each decision to counsel.

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330. *Id.*, Question 97.
331. Survey of the Bar, Question 97, Analysis of Data by District.
332. *Id.*
333. *See infra* Appendix, Question 95.
334. *See* SECOND CIRCUIT REPORT *supra* note 318, at 35-41.
335. *See id.* at 26.
336. *See infra* Appendix, Question 92.
337. *Id.*, Questions 90-91.
338. Survey of the Bar, Questions 90-91, Analysis of Data by District.
339. *Id.*
340. *See infra* Appendix, Question 90.

D. District Judges' Salaries

Some of New York's largest law firms pay their third-year associates more than our federal district judges earn.[341] Recruitment and retention problems plague the federal judiciary as a result of the ever-widening gap between public and private sector salaries.[342] Although each of the Quadrennial Commissions on salaries has recommended increases for federal judges, the Commissions' recommendations are subject to modification by the President which may subsequently be disapproved by Congress.[343] The current $89,500 salary for district judges has risen only $35,000 from the salary level of ten years ago. (The next Quadrennial Commission salary recommendations will be made later this year.)[344]

Not surprisingly, over three-fourths of survey respondents believe the current salary of district judges is too low.[345] Less than one percent of respondents believe the current salary is too high.[346]

E. Specialized Judges

According to statistics compiled by the Administrative Office of the United States Courts, 19,647 cases were filed in the district courts in New York during the twelve-month period ended June 30, 1987.[347] Twelve percent of those cases were criminal cases and another 10 percent were prisoner petitions. Copyright, patent, and trademark suits accounted for 4.2 percent of the total and 1 percent of the filings were tax suits. Tort actions account for 15.2 percent of all cases filed in the United States district courts for the same period. Personal injury product liability actions were 5 percent of the total, including asbestos product liability actions which were 2.8 percent of the total. Fewer than 1 percent of actions filed in the New York districts were antitrust actions. The Administrative Office does not generate statistics which identify the number of admiralty suits filed each year.[348]

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341. *See* N.Y.L.J., Apr. 18, 1988, at 4, col. 3.

342. *See* 2 U.S.C.A. § 358 notes (salary recommendations for 1981 and 1987 increases).

343. *See* 2 U.S.C. §§ 357-59 (1985).

344. On February 7, 1989, the Quadrennial Commission's recommendation for federal salary increases was defeated by Congress, N.Y. Times, Feb. 8, 1989, at 1, col. 5.

345. *See infra* Appendix, Question 98.

346. *Id.*

347. *See* 1987 ANN. REP., DIRECTOR ADMIN. OFF. U.S. CTS.

348. *Id.*

Forty-two percent of survey respondents believe that there should be judges who specialize in certain of these areas.[349] However, no more than thirty percent of all respondents felt a need for specialized judges in any particular area suggested as a possible area for such specialization.[350] Of those respondents who favored specialized judges, almost three-quarters believe patent cases are appropriate for specialization[351] and slightly fewer believe there should be specialized judges in tax cases.[352] However, the areas that account for the largest percentages of annual filings—criminal and product liability actions—drew the fewest votes as appropriate areas for specialization.[353] Without a clear mandate for specialization, pursuit of a program of specialized assignment of cases by subject matter is not recommended.

F. Choice of Method of Dispute Resolution

Given the choice among six methods of dispute resolution, the bar chose the following order of preference: jury trial by district judge; non-jury trial by district judge; jury trial by magistrate; non-jury trial by magistrate; compulsory arbitration; special master fact-finder.[354] These figures contain no surprises.

VI. PROCEDURAL ISSUES

A. Diversity Jurisdiction

In 1987, diversity jurisdiction accounted for 67,071 new filings nationwide—over one-fourth of all federal civil filings.[355] That number reflects a 112 percent increase in the number of annual diversity filings over the last ten years.[356] The Justice Department and Judicial Conference of the United States both are longstanding advocates of eliminating or substantially restricting the availability of diversity

349. *See infra* Appendix, Question 99.

350. *Id.*, Question 100.

351. *Id.*

352. *Id.*

353. *Id.*

354. *See infra* Appendix, Addendum for Question 87.

355. *See* 1987 ANN. REP., DIRECTOR ADMIN. OFF., U.S. CTS. 8.

356. *See* 1985 ANN. REP. DIRECTOR ADMIN. OFF., U.S. CTS. 10 (reporting 31, 635 diversity filings for 1987).

jurisdiction as a means of easing the increasing burdens on our federal courts.[357]

Two-thirds of survey respondents oppose abolition of diversity jurisdiction "as it is now defined,"[358] and sixty-one percent believe the jurisdictional amount should be increased.[359] Almost eighty percent of practitioners in each of two areas where federal question jurisdiction always exists — antitrust and securities — are in favor of increasing the jurisdictional amount in diversity cases.[360] Of those respondents who expressed an opinion about an appropriate jurisdictional amount, a little over one-quarter favored an amount below $50,000.[361] More than forty percent favor an amount in excess of $75,000.[362] Based on these results, it is apparent that the practicing bar supports the Judicial Conference's 1987 recommendation that 28 U.S.C. 1332 be amended to increase the required jurisdictional amount to $50,000.[363]

B. Service of Process by Mail

In 1983, Congress amended Rule 4 of the Federal Rules of Civil Procedure to permit service of process by mail. Unfortunately, new Rule 4(c)(2)(C)(ii), designed to reduce the time, expense and difficulty of serving a summons and complaint, has itself generated a good deal of litigation.[364]

One area which has spawned satellite litigation—and conflicting decisions—involves the availability of service by mail outside the forum state. By an overwhelming majority, more than three-to-one, those respondents who expressed an opinion felt that nationwide service of process by mail should be permitted.[365]

Federal Rules 4(c)(2)(C)(ii) and 4(c)(2)(D) require the defendant served by mail to return within twenty days a copy of the notice

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357. The Judicial Conference estimated last year that the elimination of diversity jurisdiction would reduce the number of new district court judgeships needed from 56 to 15, saving millions of dollars.

358. *See infra* Appendix, Question 63.

359. *Id.*, Question 64.

360. Survey of the Bar, Question 64, Analysis of Data by Specialty.

361. *See infra* Appendix, Question 65.

362. *Id.*

363. *See supra* note 3.

364. For a detailed discussion of the problems which have arisen, *see* New York State Bar Association Committee on Federal Courts, *Report on Service of Process by Mail Pursuant to Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure, reprinted at* 116 F.R.D. 169 (1987) [hereinafter *Report*].

365. *See infra* Appendix, Question 66.

and acknowledgment form (Official Form 18-A) that accompanied the summons and complaint. If the defendant does not complete and return the notice and acknowledgment form within twenty days after its mailing to him, and the plaintiff resorts to some other method of service, the Rule provides that "the court shall order the payment of the costs of personal service by the person served."[366] The Rule is silent as to whether these "costs" may include attorneys' fees and there is virtually no case law on this subject.[367] By nearly a two-to-one margin, those respondents who expressed an opinion favored permitting an award of attorneys' fees as a further inducement to defendants to complete and return the notice and acknowledgment form in a timely fashion.[368]

Another issue which has led to conflicting judicial decisions relates to the *effect* of a defendant's failure to return the notice and acknowledgment form. In *Morse v. Elmira Country Club*,[369] the Second Circuit held that return of the notice and acknowledgment form only goes to proof of service; received, but unacknowledged, mail service is effective. Since *Morse* does require receipt of the summons and complaint so that the defendant has actual notice, it has led to litigation over whether and when the summons and complaint were received. Of those respondents who expressed an opinion (and many, some forty-six percent did not),[370] an overwhelming majority felt *Morse* should be abrogated by legislation.[371]

C. Rule 68

Under Rule 68,[372] a party "defending against a claim" may offer, any time more than ten days before trial, to allow judgment to be taken against him on the terms specified in the offer. The offeree has ten days to accept or reject the offer. If he rejects the offer and then obtains a judgment less favorable than the offer he rejected, he must pay "the costs incurred after the making of the offer."[373]

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366. FED. R. CIV. P. 4(c)(2)(D). Payment is ordered "[u]nless good cause is shown for not going so." *Id.*

367. *See Report, supra* note 364, at 178 n.35.

368. *See infra* Appendix, Question 67.

369. 752 F.2d 35, 39-41 (2d Cir. 1984).

370. *See infra* Appendix, Question 68.

371. *Id.*

372. FED. R. CIV. P. 68 (Offer of Judgment).

373. *Id.*

Though the purpose of Rule 68 is to encourage settlement,[374] the Rule has rarely been used, probably for two main reasons: (1) only a party "defending against a claim" can invoke the Rule; and (2) the sanction of post-offer "costs" is generally not sufficient to encourage settlement since these "costs" almost never include the largest expense of litigation, fees.[375] Not surprisingly, the vast majority of respondents who expressed an opinion agreed that Rule 68 offers are rarely made.[376] Only seventeen percent of all respondents *disagreed* with the proposition that attorneys' fees should be included as costs under Rule 68.[377]

Another flaw in Rule 68 stems from the Supreme Court's highly technical, much criticized holding in *Delta Air Lines* v. *August*[378] that the Rule is not triggered unless there is a "judgment obtained by the *offeree*."[379] In other words, if defendant makes a Rule 68 offer, plaintiff rejects it, and defendant *wins*, obtaining a judgment dismissing the complaint, the Rule has no application; defendant *cannot* recover his post-offer costs; whereas if defendant *loses*, so long as the judgment is for less than the amount of the offer, defendant *can* recover post-offer costs. Congress should consider amending Rule 68 to correct this anomaly.[380]

VII. MISCELLANEOUS ISSUES

A. Admission Requirements

Another topic that has caused some controversy recently is the question of bar admission requirements. In *Frazier* v. *Heebe*,[381] the Supreme Court faced the issue of whether a district court, by local rule, could condition membership to its bar on either residence or maintenance of an office in the state where that court sits. Frazier,

374. *See* Delta Air Lines v. August, 450 U.S. 346, 352 (1981).

375. For an excellent analysis of Rule 68 see Simon, *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1 (1985).

376. *See infra* Appendix, Question 74.

377. *Id.*, Question 75.

378. 450 U.S. 346 (1981).

379. *Id.* at 351 (emphasis added).

380. As Justice Rehnquist wrote:

> [N]o policy argument will convince me that a plaintiff who has refused an offer under Rule 68 and then has a "take nothing" judgment entered against her should be in a better position than a similar plaintiff who has refused an offer under Rule 68 but obtained a judgment in her favor, although in a lesser amount than was offered pursuant to Rule 68.

Id. at 375 (Rehnquist, J. dissenting).

381. 107 S. Ct. 2607 (1987).

an attorney who lived and worked in Mississippi, and who also had been admitted to the Louisiana state bar, was initially denied admission to the bar of the United States District Court for the Eastern District of Louisiana by the operation of such a rule. The Supreme Court, in the exercise of its supervisory power, determined that the requirement was irrational and invalidated the district court's rule.[382]

The New York bar was surveyed for its views regarding admission requirements for New York's federal courts. To place the responses in perspective, a brief review of existing requirements is appropriate.

The Northern and Western Districts are the most liberal in their admission policy. They allow admission to: (1) a member in good standing of the New York bar on petition and with a sponsoring affidavit of a member of their bar;[383] (2) a member in good standing of the bar of any of the other New York federal district courts; and (3) a member in good standing of any federal district court and of the bar of the state in which the district court is located.[384]

The Southern and Eastern Districts are less hospitable. They grant membership to: (1) a member in good standing of the New York bar on petition and with a sponsoring affidavit, and (2) a member of the bar of the district court of New Jersey, Connecticut or Vermont and of the bar of the state in which the district court sits, providing the district court extends a corresponding privilege to its members, also on petition and with a sponsoring affidavit. The Eastern District also will grant admission without formal application to a member in good standing of the bar of *any* district court in the Second Circuit, whereas the Southern District will extend that privilege only to a member of the Eastern District.[385]

In terms of the survey, when asked whether admission to the New York bar should be the only eligibility requirement for appearing in our federal district courts, over half of the respondents agreed and

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382. *Id.* at 2613-14. Locally, the issue of admission requirements for the New York bar was recently before the state Court of Appeals. A group had sought to condition an out-of-state attorney's membership in the New York bar on the attorney's home state providing a reciprocal right to New York attorneys, a move probably aimed at New Jersey's parochial protection of its bar. The Court, however, refused to so tighten the criteria.

383. These courts, as well as the Southern and Eastern Districts, also require familiarity with various federal and local rules.

384. The Western District conditions this last option on the out-of-state attorney's home district providing a corresponding privilege to members of its bar. *See generally* Rule 2 of the General Rules for the Northern District; Rule 3 of the Local Rules of Practice for the Western District.

385. *See generally* Rule 2 of the General Rules for the Southern and Eastern Districts.

only one-third disapproved.[386] This solid sentiment for making state bar membership the sole determining factor spanned all four districts, with the Western District the most supportive.[387] Of the specialized practitioners canvassed, the personal injury bar registered the most support,[388] while the securities bar was the only group that rejected the concept, by a narrow margin.[389]

When pointedly asked whether out-of-state attorneys should be subject to more stringent requirements than now exist for trying a case in federal court, our respondents proved most generous.[390] Fewer than fifteen percent believed that the admission requirements should be stiffened, while almost seventy percent disagreed with that notion.[391] This resounding sentiment against parochialism crossed all levels of experience, firm sizes, and specialties.[392] And, predictably, attorneys who identified themselves as practicing primarily in federal courts outside of New York were the least in favor.[393]

With the advent of more nationalized practices, particularly in the area of federal litigation, we see little reason to make it difficult to become members of the bar of any federal district court.

The bar was also polled on admission requirements for the Second Circuit. Rule 46 of the Federal Rules of Appellate Procedure[394] simply provides that any attorney who has been admitted to practice before the Supreme Court, the highest court of a state, another court of appeals, or a district court, and who is of good moral and professional character, is "eligible" for admission to the bar of a court of appeals.[395] Section 46 of the Second Circuit's Rules Supplementing the Federal Rules of Appellate Practice adds a practice requirement for those desiring membership in the bar of that court: an attorney must have argued at least three appeals in either state or federal appellate courts, must have observed two appeals before the Second

386. *See infra* Appendix, Question 80.

387. Survey of the Bar, Question 80, Analysis of Data by District.

388. *Id.*, Analysis of Data by Specialty.

389. *Id.* There proved to be an interesting gap between those attorneys who generally represent entities and those who tend to service individuals. As to the former, 51% favored state bar membership as the sole requirement, while the latter group reported a significantly higher 67%. *Id.*

390. *See infra* Appendix, Question 81.

391. *Id.*

392. Survey of the Bar, Question 81, Analysis of Data.

393. *Id.*, Analysis of Data by District.

394. FED. R. APPELL. P. 46 (Attorneys).

395. *Id.*

Circuit, and must have read the Federal Rules of Appellate Procedure.[396]

The question posed was whether these practice requirements should be eliminated and admission to any state bar made the sole eligibility requirement.[397] While the results were mixed, a surprising forty-four percent responded that any state bar membership should suffice; thirty-eight percent disagreed and sixteen percent had no opinion.[398] There was little variation in the numbers when assessed by years at the bar or by primary district of practice, though attorneys in the larger firms of more than forty attorneys were less supportive of the simplified requirement than were their brethren in smaller practices.[399]

With respect to the specialty practices, most groups (with the exception of the intellectual property and securities bars) narrowly approved of state bar membership as the sole criterion, though there were a substantial number of respondents reporting no opinion.[400]

These results, unlike those with respect to district court membership, are too close to prompt any call for revision of existing requirements for admission to the Second Circuit. Moreover, because the Second Circuit is an appellate court, it is more appropriate that it have specialized requirements.

B. Arbitration

Articles bemoaning the explosion of litigation in the federal courts—a development that if not arrested, it is claimed, could ground the judicial system—have filled the legal and even the popular press. Concomitant with this development has been a growth of interest in extrajudicial or alternative dispute resolution procedures as means of reducing the courts' dockets. One method that has prompted great interest, and the firm support of former Chief Justice Burger,[401] is mandatory arbitration, in which specified civil cases that otherwise would fall within the jurisdiction of the district court are shifted to an arbitration forum.

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396. The Rules allow a moot court argument to count for one of the three appeals and, furthermore, in substitution for any one of the remaining required arguments, two argued motions of a substantive nature in which briefs or memoranda of law were submitted in the district court will suffice. Rules of Second Cir.

397. *See infra* Appendix, Question 82.

398. *Id.*

399. Survey of the Bar, Question 82, Analysis of Data by Experience.

400. *Id.*, Analysis of Data by Specialty.

401. *See, e.g.*, New York Times, Aug. 22, 1985, at 21, col. 1.

Indeed, the Eastern District, since January 1, 1986, requires compulsory arbitration in all civil cases in which money damages only, in an amount not in excess of $50,000, are sought. The resultant hearing is conducted by a panel of three lawyers, previously certified as potential arbitrators by the court, unless the parties agree to have the proceeding heard by a single arbitrator. Discovery is allowed and the Federal Rules of Evidence are employed as a guide to the admissibility of evidence. Following the entry of an arbitration award and judgment, any party may demand a trial de novo in the district court, where the matter is treated as if it had never been referred to arbitration.[402]

The Southern District, although currently without a compulsory program, has in the past, through a project spearheaded by District Judge Sand, used a case referral system by which the court could direct parties to meet with representatives of the American Arbitration Association to consider arbitration of their dispute. It has been reported that the Southern District now is studying a proposal that would mandate arbitration of civil cases in which the amount at stake is less than $100,000.[403]

The bar's opinion on the Eastern District model, mandatory nonbinding arbitration where the amount in issue is $50,000 or less, was sought, and the results were not definitive. While only slightly more than a third of the respondents registered their approval of the program,[404] when those having "no opinion" were removed from the analysis, the positive rating increased to a not insignificant forty percent.[405] Still, half of all respondents believed that mandatory nonbinding arbitration is inappropriate.[406]

Disapproval of the concept spanned practitioners in all four districts, with the Northern District most opposed and the Eastern District the least opposed.[407] Breakdowns by law firm size or trial experience did not reflect any notable differences;[408] though in terms of assessment by practice specialities, the bankruptcy practitioners were almost evenly divided.[409]

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402. *See generally* Local Arbitration Rules 1-7.

403. The Committee which prepared this report was advised of this development by personnel of the Southern District.

404. *See infra* Appendix, Question 72.

405. *Id.*

406. *Id.*

407. Survey of the Bar, Question 72, Analysis of Data by District.

408. *Id.*, Analysis of Data by Size of Firm and Experience.

409. *Id.*, Analysis of Data by Specialty.

Of potential significance, though, is the reaction of the more experienced members of the bar—attorneys who might be thought to be wedded to traditional notions of practice. Generally speaking, attorneys with more than ten years of experience were more supportive of the program than were their more junior counterparts.[410] Thus, for example, forty-three percent of attorneys of sixteen to twenty years' experience approved of mandatory non-binding arbitration, while the figure was only thirty percent for those with under five years' experience.[411] Perhaps the experienced attorney, more familiar with the expense and delay which often characterize local federal litigation, is more prepared to experiment with extrajudicial measures.

We believe that mandatory non-binding arbitration deserves further consideration. The District Executive's office of the Eastern District reports that forty-one percent of the 547 cases referred to arbitration in 1987 (12.5 percent of the district's civil filings) were terminated that year.[412] In fact, twenty-two percent were discontinued without even being heard by the arbitrator,[413] perhaps indicating that it is only when a party is put to the task of making its case that a realistic appraisal of its chances is made. Since this record compares favorably with the average time from issue to trial of twenty-two months for the "regular" Eastern District calendar,[414] we believe that the arbitration program merits the bar's attention.[415]

C. Cameras in the Courtroom

More than forty states now permit some form of televised court proceedings. The Supreme Court has upheld against constitutional attack at least one state court rule permitting television coverage of court proceedings under controlled conditions designed to minimize disruption.[416] An 18-month experiment allowing still and television coverage of proceedings in New york state courts began last Decem-

410. *Id.*, Analysis of Data by Experience.

411. *Id.*

412. These figures were submitted to the committee which prepared this report by the District Executive's Office of the Eastern District.

413. *Id.*

414. *See* Judicial Workload Profile for the Eastern District.

415. Although the parties have the right to a trial de novo, according to the District Executive's figures, in only half of the 36 awards filed in 1987 did the parties exercise that right, and in about a third of those the proceeding was terminated before the retrial. Thus, "judicial" time does seem to be saved by the program.

416. Chandler v. Florida, 449 U.S. 560 (1981).

ber and has been reported to be going well based on preliminary surveys of judges, lawyers and witnesses.[417]

The federal district courts, however, continue to resist television broadcasting in the courtroom. None of the four federal district courts in New York permit the televising of court proceedings. Rule 7 of the General Rules of the Southern and Eastern Districts prohibits "television broadcasting from the courtroom or its environs . . . whether or not court is actually in session."[418] "Environs" is defined to "include the entire United States Courthouses at Foley Square and 225 Cadman Plaza East, including all entrances to and exits from the buildings."[419] Local Rule 41 for the Western District prohibits "television broadcasting from the courtroom . . . whether or not court is actually in session"[420] and, except with the Court's express consent, "in the jury rooms, the offices of the judges, magistrate, clerk, marshal or court reporters, or in any room, hallway, or corridor of the floor of the building in which the courtrooms, are located."[421] Television broadcasting also is prohibited in the Northern District although the prohibition is not set forth in a local rule.

The majority of our respondents believe that TV cameras do not belong in the courtroom.[422] Only thirty-one percent favor lifting the current prohibitions on television broadcasting in our courts.[423] This view was shared by all segments of the bar, regardless of specialty, district of practice, size of firm, or trial experience.[424] While respondents have not yet embraced this innovation, the extremely positive reports that have emanated from the state courts' experimental program counsels in favor of serious consideration of the use of cameras in the federal courtrooms as well.

D. Pro Bono

A fiery topic currently dividing the bar is the issue of mandatory pro bono service. While many attorneys traditionally have devoted part of their time to volunteer service, the need for legal pro bono assistance has risen dramatically over the past several years, particularly with the cutback in federal funding for the Legal Services Cor-

417. *See* N.Y.L.J., May 12, 1988, at 1, col. 3.
418. GEN. R. E.D.N.Y. 7; GEN. R. S.D.N.Y. 7.
419. *Id.*
420. LOC. R. W.D.N.Y. 41.
421. *Id.*
422. *See infra* Appendix, Question 78.
423. *Id.*
424. Survey of the Bar, Question 78, Analysis of Data.

poration. Although private groups have been galvanized to attempt to absorb the overflow of cases—locally, the Volunteers of Legal Service, Inc. was formed to serve as a clearinghouse for pro bono matters—it seems apparent that, as this committee recently found in its Report on Pro Se Litigation, they are fighting a losing battle, especially in the civil arena.[425]

In light of the seriousness of the problem, more and more commentators, including judges and practitioners, are calling for required pro bono service. Indeed, in 1980, the issue went before the American Bar Association, which, after bitter floor debate, rejected requiring such service.[426] Currently, a committee of federal judges of courts in the Second Circuit, headed by Circuit Judge Pratt, is considering the adoption of a local rule that would require private practitioners to accept appointment as counsel for indigent pro se civil litigants as a condition to practices in the courts; on the state front, Chief Judge Wachtler of the New York Court of Appeals has asked a committee to evaluate a similar provision for each of the state's 80,000 lawyers.[427]

Our survey disclosed that only slightly more than one-third of respondents favored any form of mandatory pro bono service,[428] while one-half were opposed.[429] But while no experience group favored required service on behalf of the poor, less experienced attorneys, those with up to five and ten years at the bar, were significantly more supportive of that proposition than their more experienced brethren.[430]

Attorneys in large firms favored mandatory pro bono service in far greater numbers than those affiliated with smaller operations.[431] Almost half of practitioners in firms or agencies with more than forty attorneys approved of required service, while less than a quarter of the sole practitioners and a third of attorneys in practices of ten and under supported that concept.[432]

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425. *See* Sub-Committee on Pro Se Litigation, *Report on Existing District Court Procedures used in the Federal District Court of New York and Recommendations for Revised Procedures*, Oct. 8, 1987.

426. *See generally Mandatory Pro Bono Won't Disappear; Volunterism Alone Not Enough*, Nat'l L.J., Mar. 23, 1987, at 1.

427. *See Wachtler Asks Panel to Explore Mandatory Pro Bono Program*, N.Y.L.J., May 3, 1988, at 1, col. 3; *Federal Judges Weigh Rule To Aid Poor in Civil Cases*, N.Y.L.J., Dec. 16, 1987, at 1, col. 3.

428. *See infra* Appendix, Question 94.

429. *Id.* Eighteen percent of those opposed characterized their disagreement as "strong," an unusually high percentage for that level of negative feeling.

430. Survey of the Bar, Question 94, Analysis of Data by Experience.

431. *Id*; Analysis of Data by Size of Practice.

432. *Id.*

With respect to those in specialized areas of private practice, only attorneys concentrating in civil rights work favored mandatory pro bono service.[433] And, not surprisingly, attorneys in government service strongly approved of such a requirement.[434]

While there is a serious problem in making adequate legal services available to the poor, as the survey results indicate, many attorneys, particularly those in their own or in small practices, could be financially burdened by a requirement that they donate a significant amount of time to free service. Attorneys who can afford to carry nonbillable matters should, as a moral and professional matter, devote a portion of their time to pro bono service.

433. *Id.*, Analysis of Data by Specialty.
434. *Id.*, Analysis of Data by Practice.

APPENDIX

SURVEY OF THE BAR
Results by Percentage of Responses and Number of Responses

I. BACKGROUND INFORMATION

1. How long have you been admitted to the bar?
   a) 0-5 years 15% (182) b) 6-10 years 21% (264) c) 11-15 years 21% (260)
   d) 16-20 years 11% (138) e) more than 20 years 31% (389)

2. What percentage of your practice is devoted to civil litigation?
   a) none 1% (15) b) 1-20% 8% (105) c) 21-40% 6% (78)
   d) 41-60% 8% (103) e) 61-80% 14% (177) f) 81-100% 60% (747)

3. During the past three years what percentage of your civil litigation practice was in the federal court?
   a) none 4% (51) b) 1-20% 33% (411) c) 21-40% 11% (140)
   d) 41-60% 15% (180) e) 61-80% 17% (216) f) 81-100% 19% (230)

4. How many attorneys are in your firm or agency?
   a) sole practitioner 9% (108) b) 2-10 32% (396) c) 11-40 23% (284)
   d) 41-100 9% (116) e) more than 100 25% (311)

5. In which federal courts do you generally practice?
   a) Eastern District of New York 55% (674)
   b) Northern District of New York 14% (178)
   c) Southern District of New York 74% (913)
   d) Western District of New York 10% (126)
   e) Outside of New York State 22% (270)

6. If you have a civil litigation specialty please check the subject matter(s) which most accurately reflect(s) that specialty.

a) Antitrust	12% (143)	e) Intellectual Property	7% (90)
b) Bankruptcy	4% (54)	f) Personal Injury	37% (453)
c) Civil Rights	15% (183)	g) Securities	13% (158)
d) General Commercial	35% (433)	h) Other	20% (252)

7. Do you usually represent
   a) Entities 59% (727) b) Individuals 28% (349) c) Both 9% (109)

8. Whom do you usually represent?
   a) Private Plaintiffs 19% (229) d) Governmental Plaintiffs 2% (20)
   b) Private Defendants 31% (378) e) Governmental Defendants 7% (83)
   c) Both a & b 41% (502) f) Both d & e 4% (48)

9. How many cases have you tried to verdict?
   a) None 16% (199) b) 1-5 31% (386) c) 6-10 12% (152)
   d) 11-15 6% (74) e) More than 15 33% (410)

II. THE LITIGATION PROCESS

A. Pretrial Proceedings

10. Do courts in your district routinely hold Rule 16(b) conferences at the outset of litigation in order to schedule discovery and motion dates?
    Yes 69.5% (859) No 22.98% (284) NA 7.44% (92)

11. Parties rarely meet the deadlines set at the Rule 16(b) conference.

11.08% (137)	50.40% (623)	14.56% (180)	16.75% (207)	0.40% (5)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 6.72% (83)

12. Generally courts should abide by counsels' own agreements regarding the time by which discovery is to be completed.

24.11% (298)	54.53% (674)	2.67% (33)	14.89% (184)	1.29% (16)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 2.43% (30)

13. Interrogatories routinely seek information which could be more readily obtained through other discovery methods.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
17.56% (217)	41.26% (510)	8.33% (103)	27.59% (341)	2.75% (34)

NA 2.43% (30)

14. Do you believe that the number of interrogatories should be limited, as they are in some district courts; and, if so, what should that number be?

a. no numerical limit	36.81% (455)
b. 1 to 10	12.94% (160)
c. 11 to 25	23.62% (292)
d. 26 to 50	17.80% (220)
e. more than 50	2.35% (29)
NA	6.15% (76)

15. If you are familiar with Local Rule 46 of the Southern District of New York (SDNY), do you agree that it imposes too many restrictions on the use of interrogatories?

Strongly Agree	Agree	Unfamiliar	Disagree	Strongly Disagree
5.66% (70)	20.79% (257)	26.94% (333)	25.81% (319)	8.09% (100)

NA 12.62% (156)

16. Disputes between or among counsel at a deposition generally are about issues that have no bearing on the ultimate outcome of the lawsuit.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
11.41% (141)	47.57% (588)	8.58% (106)	28.56% (353)	1.70% (21)

NA 2.10% (26)

17. Counsel defending depositions often obstruct the course of the deposition.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
11.17% (138)	45.71% (565)	7.12% (88)	32.04% (396)	1.62% (20)

NA 2.27% (28)

18. Guidelines for the conduct of depositions should be promulgated.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
14.89% (184)	54.85% (678)	7.52% (93)	19.17% (237)	1.78% (22)

NA 1.70% (21)

19. Judges, or magistrates appointed by the court, should generally be accessible by telephone to resolve disputes at depositions when they occur.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
25.24% (312)	53.16% (657)	4.45% (55)	14.24% (176)	1.29% (16)

NA 1.54% (19)

20. Documents provided in response to written requests are seldom produced in an organized fashion.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
9.95% (123)	48.87% (604)	11.17% (138)	27.83% (344)	0.40% (5)

NA 1.70% (21)

21. Uniform definitions and instructions applicable to all discovery requests should be adopted in all districts.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
19.66% (243)	57.61% (712)	8.17% (101)	11.97% (148)	1.05% (13)

NA 1.46% (18)

22. Courts should adopt district-wide rules regarding discovery practice.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
18.69% (231)	63.75% (788)	7.93% (98)	6.55% (81)	0.97% (12)

NA 2.02% (25)

23. Judicial permission should not be required prior to making substantive motions.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
29.77% (368)	47.09% (582)	4.05% (50)	14.72% (182)	2.75% (34)

NA 1.54% (19)

24. Motion papers should be limited to a specific number of pages, unless leave of the court is obtained to submit a lengthier document.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
7.52% (93)	30.58% (378)	6.23% (77)	42.64% (527)	11.41% (141)

NA 1.54% (19)

25. A memorandum of law should not necessarily be required in all motions.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
15.45% (191)	58.01% (717)	3.32% (41)	17.80% (220)	3.80% (47)

NA 1.29% (16)

26. Immediate appeal to the Court of Appeals should be permitted upon adjudication, by the district court, of any nonprocedural motion.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
7.77% (96)	28.56% (353)	14.56% (180)	38.43% (475)	9.06% (1.12)

NA 1.54% (19)

27. District judges are too sparing in certifying appeals from interlocutory orders.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
6.31% (78)	25.81% (319)	44.17% (546)	19.98% (247)	1.78% (22)

NA 1.86% (23)

28. A court should routinely conduct a settlement conference prior to the trial of a case.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
33.09% (409)	54.29% (671)	3.24% (40)	7.20% (89)	0.57% (7)

NA 1.54% (19)

29. Settlement conferences should not be conducted by the judge in a non-jury trial.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
16.59% (205)	33.82% (418)	9.55% (118)	32.36% (400)	6.07% (75)

NA 1.54% (19)

30. A well-designed pretrial order generally expedites the trial process.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
14.48% (179)	60.76% (751)	8.90% (110)	11.97% (148)	2.18% (27)

NA 1.62% (20)

31. Courts generally require unnecessary information in a pretrial order.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
9.39% (116)	32.85% (406)	21.04% (260)	33.33% (412)	1.70% (21)

NA 1.62% (20)

32. Each district should promulgate a standard form of pretrial order.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
15.21% (188)	56.72% (701)	12.86% (159)	12.06% (149)	1.05% (13)

NA 2.62% (25)

33. The broad definition of relevance provided by Rule 26 of the Federal Rules of Civil Procedure generally permits too much discovery without enhancing the truth-finding process.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
11.33% (140)	34.71% (429)	11.17% (138)	34.95% (432)	6.07% (75)

NA 1.70% (21)

B. Trial

34. The federal courts in your district provide counsel with definite trial dates in a majority of civil cases.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
2.75% (34)	39.64% (490)	17.15% (212)	29.77% (368)	6.80% (84)

NA 3.80% (47)

35. The federal courts in your district, as a general rule, provide counsel with sufficient notice of trial dates in civil cases.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
1.62% (20)	51.29% (634)	15.29% (189)	22.90% (283)	5.18% (64)

NA 3.64% (45)

36. Which of the following generally constitutes adequate notice before the commencement of a civil trial for which a pretrial order has already been prepared?

24 hours 0.57% (7) 48 hours 1.62% (20) one week 29.85% (369)
two weeks 40.94% (506) more 21.52% (266) NA 5.42% (67)

37. Courts should make available to counsel "standard" charges given in particular types of cases.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
19.26% (238)	64.72% (800)	8.01% (99)	4.77% (59)	0.49% (6)

NA 2.67% (33)

38. Counsel should be required to submit requests to charge only as to the specific facts or law of the particular case.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
13.9% (163)	57.61% (712)	10.52% (130)	13.83% (171)	2.10% (26)

NA 2.67% (33)

39. Lawyers in a federal civil trial should be permitted to conduct the *voir dire* of potential jurors in the same manner as in New York state courts.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
18.61% (230)	28.56% (353)	10.03% (124)	26.62% (329)	13.67% (169)

NA 2.43% (30)

40. The number of peremptory challenges should always be increased when there is more than one party per side.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
15.45% (191)	47.01% (581)	14.97% (185)	17.88% (221)	1.86% (23)

NA 2.75% (34)

41. In recent protracted complex civil litigations, trial judges have set time limits, prior to trial, on the attorneys' time to present their cases. This is a good idea.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
4.77% (59)	30.42% (376)	13.03% (161)	35.84% (433)	13.35% (165)

NA 2.51% (31)

42. Jury unanimity should not be required for civil trial verdicts—a five-sixths majority is sufficient.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
12.94% (160)	51.62% (638)	8.17% (101)	18.69% (231)	5.99% (74)

NA 2.51% (31)

43. When a five-sixths majority is permitted, the same jurors must be in the majority on every question decided in order to reach a verdict.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
13.11% (162)	33.58% (415)	15.29% (189)	29.69% (367)	5.18% (64)

NA 3.07%

44. If requested by any party, the court should generally use a special verdict form.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
17.64% (218)	61.25% (757)	11.73% (145)	6.55% (81)	0.65% (8)

NA 2.10% (26)

45. The court should usually utilize a special verdict form, even if opposed by all parties, to assist the appellate court on review and prevent the need for a new trial.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
10.19% (126)	42.96% (531)	19.58% (242)	22.73% (281)	1.94% (24)

NA 2.51%

46. Civil jurors should be permitted to take notes during the trial and use them in deliberations.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
11.08% (137)	42.72% (528)	8.25% (102)	26.21% (324)	9.39% (116)

NA 2.27% (28)

47. Jurors should be permitted to submit questions to the court, to be posed to witnesses in the court's discretion.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
6.47% (80)	34.63% (428)	6.63% (82)	32.61% (403)	17.23% (213)

NA 2.35% (29)

48. Courts should not be permitted to question witnesses during a jury trial.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
6.72% (83)	20.47% (253)	5.66% (70)	53.56% (662)	11.17% (138)

NA 2.35% (29)

49. Civil jurors should be permitted to review the written charge of the court during deliberations.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
15.53% (192)	54.94% (679)	6.15% (76)	17.07% (211)	4.21% (52)

NA 2.02% (25)

50. Judges should tape record their live jury instructions for replay to the jury during deliberations if requested by the jury.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
6.63% (82)	39.40% (487)	16.50% (204)	29.21% (361)	5.99% (74)

NA 2.18% (27)

51. The court should generally give an introduction to the jury concerning the governing legal principles of the case on trial, prior to the taking of evidence.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
13.67% (169)	59.22% (732)	7.36% (91)	15.70% (194)	1.80% (23)

NA 2.10% (26)

52. Civil jurors should be permitted, if they so request, to review the written trial transcript during deliberations, if a transcript is available.

9.63% (119)	44.98% (556)	7.61% (94)	29.13% (360)	6.47% (80)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 2.10% (26)

53. Videotape testimony should not be replayed even when requested by the jury. Only a read-back of the transcript should be permitted.

3.48% (43)	25.97% (321)	16.34% (202)	42.64% (527)	9.14% (113)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 2.35% (29)

54. Trials should be videotaped so that jurors may review the tape, instead of relying on a trial transcript.

2.43% (30)	15.94% (197)	19.26% (238)	47.41% (586)	11.81% (146)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 3.07% (38)

C. Appeals

55. Have you had personal experience with the Second Circuit's Civil Appeals Management Plan ("CAMP")?

Yes 52.91% (654) No 44.42% (549) NA 2.59% (32)

56. CAMP staff counsel should not shorten the limitations periods provided by the Federal Rules of Appellate Procedure.

16.17% (199)	34.22% (423)	27.27% (337)	4.94% (61)	0.49% (6)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 16.67% (206)

57. CAMP staff counsel exert too much pressure on attorneys to settle cases rather than litigate at the appellate level.

9.95% (123)	18.20% (225)	34.39% (425)	19.01% (235)	1.29% (16)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 16.99% (210)

58. CAMP pre-argument conferences often result in the disposition of an appeal.

0.73% (9)	13.83% (171)	40.21% (497)	22.98% (284)	5.10% (63)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 17.07% (211)

59. The Second Circuit's prohibition against citing summary dispositions should be eliminated.

9.47% (117)	23.38% (289)	39.00% (482)	11.89% (147)	2.27% (28)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 13.92% (172)

60. It would be worth foregoing the absolute right to oral argument if the Second Circuit did away with summary dispositions and decided all appeals in written opinions.

3.24% (40)	14.72% (182)	31.72% (392)	29.53% (365)	7.20% (89)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 13.51% (167)

61. Parties should be permitted to waive oral argument in a particular case in return for the promise of a written opinion.

5.74% (71)	36.25% (448)	24.84% (307)	17.23% (213)	3.56% (44)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 12.30% (152)

62. Oral argument is a valued means of persuasion at the appellate level and the Second Circuit should be encouraged to preserve it.

19.74% (244)	43.12% (533)	15.53% (192)	8.90% (110)	1.05% (13)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 11.57% (143)

III. POLICY ISSUES AFFECTING FEDERAL CIVIL PRACTICE

A. Substantive

63. Diversity jurisdiction, as it is now defined, should be abolished.

5.74% (71)	15.25% (186)	11.17% (138)	44.98% (556)	21.04% (260)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 1.94% (24)

64. In diversity cases, the $10,000.00 jurisdictional amount should be increased.

14.72% (182)	45.79% (566)	9.63% (119)	19.58% (242)	8.09% (100)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 2.10% (26)

65. If so, what should be the appropriate jurisdictional amount?

A	B	C	D	
10-24,000	25-49,000	50-74,999	more than 75,000	NA
2.59% (32)	12.70% (157)	16.67% (206)	24.35% (301)	43.61% (539)

66. Nationwide service of process by mail, pursuant to Rule 4, should be permitted.

21.52% (266)	48.22% (596)	6.31% (78)	18.04% (223)	3.32% (41)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 2.51% (31)

67. The payment of costs of personal service provisions of Fed. R. Civ. P. 4(c)(2)(D) is an insufficient inducement to defendants to complete and return the notice and acknowledgment of service by mail in a timely fashion; an award of attorneys' fees should also be permitted.

14.48% (179)	39.16% (484)	17.31% (214)	22.25% (275)	4.29% (53)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 2.43% (30)

68. *Morse v. Elmira Country Club*, holding that failure to return the acknowledgment form does not affect the validity of service by mail, has led to unnecessary litigation over whether and when the summons and complaint were received, and should be abrogated by legislation.

9.87% (122)	31.23% (386)	42.48% (525)	10.68% (132)	2.18% (27)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 3.40% (42)

69. The Eastern District of New York's Standing Orders ("EDNY SOs") have been effective in reducing the number of discovery disputes in the Eastern District.

13.03% (161)	28.48% (352)	50.24% (621)	4.85% (60)	NA 3.32% (41)
Agree	Unfamiliar	No Opinion	Disagree	

70. Do you generally approve of EDNY SO 13 prohibiting attorney-initiated conferences with a client during depositions?

Yes 26.62% (329) No 27.59% (341) No Opinion 40.21% (497) NA 5.26% (65)

71. Do you approve of EDNY SO 6 requiring discovery disputes to be raised, in the first instance, by a letter to the court, consisting of no more than three pages, as opposed to making a motion?

Yes 58.33% (721) No 8.17% (101) No Opinion 28.07% (347) NA 4.94% (61)

72. Mandatory non-binding arbitration is appropriate where the amount in issue is $50,000.00 or less.

7.04% (87)	28.72% (355)	11.41% (141)	34.14% (422)	16.42% (203)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 2.18% (27)

73. Filing fees (now $120) should be increased to discourage the filing of frivolous or insubstantial suits.

5.99% (74)	15.05% (186)	8.82% (109)	47.57% (588)	20.63% (255)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 1.86% (23)

74. Fed. R. Civ. P. 68 offers of judgment are rarely made.

11.81% (146)	46.20% (571)	32.20% (398)	6.72% (83)	0.32% (4)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 2.67% (33)

75. The payment of costs provision of Rule 68 is an insufficient inducement to accept an offer of judgment; attorneys' fees should also be awarded.

14.40% (178)	40.94% (506)	24.84% (307)	12.30% (152)	4.85% (60)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 2.59% (32)

76. Rule 68's provisions for shifting of costs should apply equally to plaintiffs and defendants.

16.10% (199)	51.29% (634)	24.27% (300)	3.53% (44)	1.78% (22)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 2.91% (36)

B. Procedural

77. Courtrooms in your district are generally in sufficiently good condition to permit the attorney to try a case comfortably.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
13.51% (167)	71.93% (889)	4.45% (55)	5.58% (69)	1.94% (24)

NA 2.51% (31)

78. Television cameras should be permitted in the courtroom.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
4.13% (51)	26.86% (332)	12.14% (150)	37.62% (465)	17.23% (213)

NA 1.94% (24)

79. The court should be required to mail a copy of each decision to counsel.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
33.74% (417)	59.95% (741)	2.27% (28)	1.70% (21)	0.32% (4)

NA 1.94% (24)

80. Admission to practice in New York State should be the only eligibility requirement for an appearance in a district court of this state.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
13.67% (169)	42.15% (521)	8.90% (110)	28.16% (348)	5.18% (64)

NA 1.86% (23)

81. Requirements for the admission of an out-of-state attorney to try a particular case in federal court should be more stringent.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
3.56% (44)	11.33% (140)	15.21% (188)	55.10% (681)	12.78% (158)

NA 1.94% (24)

82. Admission to practice in any state should be the only eligibility requirement for admission to the Second Circuit Court of Appeals.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
9.71% (120)	34.14% (422)	15.94% (197)	33.01% (408)	4.94% (61)

NA 2.18% (27)

83. Civil cases should generally be referred to magistrates for supervision of pretrial discovery.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
10.36% (128)	53.80% (665)	9.79% (121)	20.55% (254)	3.48% (43)

NA 1.94% (24)

84. Civil cases should generally be referred to magistrates for settlement purposes.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
7.85% (97)	48.06% (594)	11.81% (146)	26.46% (327)	3.64% (45)

NA 2.10% (26)

85. Magistrates should select juries in civil trials that are to be conducted by the District Court.

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
2.91% (36)	14.00% (173)	16.91% (209)	48.54% (600)	15.29% (189)

NA 2.27% (28)

86. Counsel should consent more frequently than they now do to a trial conducted by a magistrate (either jury or non-jury).

Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree
3.80% (47)	22.25% (275)	29.69% (367)	31.55% (390)	10.11% (125)

NA 2.51% (31)

87. List, in numerical order of preference (#1 is the highest), which method of dispute resolution you prefer:

We have broken the question down by category, with totals and percentages for each individual choice.

Option	Preference	Percent	Total
Jury Trial by District Judge	1	47.57	588
	2	21.44	265
	3	9.14	113
	4	3.24	40
	5	4.21	52
	6	1.21	15
Non-Jury Trial by District Judge	1	37.14	459
	2	23.54	291
	3	19.34	239
	4	3.07	38

	5	1.70	21
	6	.81	10
Jury Trial by Magistrate	1	1.05	13
	2	22.57	279
	3	21.28	263
	4	19.98	247
	5	8.09	100
	6	6.80	84
Non-Jury Trial by Magistrate	1	.89	11
	2	13.43	166
	3	14.32	177
	4	39.97	494
	5	7.12	88
	6	3.48	43
Special Master Fact-Finder	1	1.05	13
	2	2.02	25
	3	10.03	124
	4	6.23	77
	5	40.70	503
	6	16.67	206
Compulsory Arbitration	1	3.48	43
	2	1.54	19
	3	6.07	75
	4	5.83	72
	5	12.94	160
	6	47.17	583

88. Judges should hold conferences more often than they do.

4.05% (50)	37.46% (463)	20.23% (250)	33.82% (418)	1.46% (18)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 2.91% (36)

89. Judges in your district(s) are deciding nondispositive pretrial motions in a reasonably prompt manner.

1.70% (21)	49.60% (613)	18.93% (234)	22.98% (284)	3.96% (49)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 2.75% (34)

90. Judges in your district(s) are deciding dispositive pretrial motions in a reasonably prompt manner.

1.21% (15)	42.07% (520)	17.80% (220)	29.74% (370)	5.91% (73)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 2.99% (37)

91. Judges in your district(s) are deciding nonjury trials in a reasonably prompt manner.

1.21% (15)	33.58% (415)	39.08% (483)	20.06% (248)	2.75% (34)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 3.24% (40)

92. Time limitations should be imposed on judges to decide pending motions and nonjury trials in a prompt manner.

12.22% (151)	54.85% (678)	9.95% (123)	19.09% (236)	1.38% (17)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 2.43% (30)

93. Settlement conferences with a judicial officer eventually lead to settlement in what percentage of your cases?

30.02% (371)	20.95% (259)	19.42% (240)	14.32% (177)	3.48% (43)
0-20%	21-40%	41-60%	61-80%	81-100%

NA 11.65% (144)

94. Attorneys should be required to devote a certain number of hours per year to *pro bono* activities.

8.90% (110)	29.13% (360)	9.79% (121)	32.20% (398)	17.64% (218)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 2.27% (28)

95. There are a sufficient number of circuit judges to handle the number of appeals in this circuit.

2.75% (34)	28.40% (351)	42.88% (530)	19.26% (230)	3.88% (48)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 2.75% (34)

96. There are a sufficient number of district judges in your district to handle the present caseload.

1.70% (21)	17.88% (221)	21.44% (265)	42.48% (525)	13.92% (172)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 2.51% (31)

97. There are a sufficient number of magistrates in your district to handle the present caseload.

1.21% (15)	18.85% (233)	40.21% (497)	29.05% (359)	7.61% (94)
Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree

NA 2.99% (37)

98. The present salary of district judges at $89,500.00 is:
Too low 76.38% (944) Adequate 19.50% (241) Too high 0.89% (11) NA 2.99% (37)

99. Do you believe there should be district judges who specialize in certain areas?
Yes 41.67% (515) No 54.53% (674) NA 3.48% (43)

100. If you answered "yes" to the previous question, please indicate those areas which you believe require or benefit from specialized judges.

Patents	30.34% (375)
Tax	28.48% (352)
Intellectual Property	15.05% (186)
Antitrust	21.93% (271)
Mass Torts	16.18% (200)
Criminal	19.50% (241)
Admiralty	23.30% (288)