



FUTURE OF LITIGATION

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FUTURE OF LITIGATION

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INTRODUCTION

FUTURE OF LITIGATION INTRODUCTION

This chapter provides an introduction to Smock Sterling Strategic Management Consultants' report for DRI examining the future of litigation. This introduction includes a brief guide to the balance of the report.

The objectives of this future of litigation research project were essentially two-fold. Namely, to develop insights into the future drivers of litigation in order to:

- Inform the development of DRI's CLE and other program development initiatives
- Broadly share the results of the research with DRI members – as a direct benefit of their participation in DRI.

It should be noted that this research was commissioned in August 2008, the survey sample and interview guide were finalized in late September, and interviewing took place in mid-October through mid-November. Thus, the primary research was conducted during a period of unprecedented upheaval in the global financial system. The interview guide was adjusted to recognize that reality directly.

While the findings in this report were certainly influenced by the events surrounding the primary research phase, the input provided by interviewees did not appear to be overtly clouded by the financial crisis. The sole exception to this general conclusion relates to individual interviewees' predictions regarding commercial litigation and torts. In that portion of the interview, several interviewees directly noted that the ongoing financial crisis was likely to have an impact on selected areas of litigation – those areas are noted in the appropriate section. In fact, interviewees were asked to offer any predictions they might have regarding the impact the financial crisis might have on civil litigation.

This report is based on three related sets of sources – a thorough secondary literature review; interviews with DRI leadership; and interviews with experts and industry participants. Interview lists (both DRI leadership and in-depth industry interviews) are included in an appendix to this report. An annotated bibliography of key secondary sources is also included as an appendix to this report as a list of further readings.

It is important to note that The American College of Trial Lawyers: Task Force on Discovery and The Institute for the Advancement of the American Legal System (IAALS) jointly commissioned a survey of College Fellows in late Spring 2008 to create a baseline of information regarding potential problems with discovery – and more broadly with the civil litigation system – in the United States. The Interim Report of the survey findings is referenced in the further readings appendix. And, because many of the central questions in the survey closely paralleled topics explored in this future of litigation research, selected findings of that survey are highlighted in appropriate sections of the findings chapter of this report.

RESEARCH FINDINGS

FUTURE OF LITIGATION RESEARCH FINDINGS

This chapter discusses the findings of DRI's Future of Litigation research. It is organized around the major topics addressed by the primary research interview guide. The chapter includes major sections addressing:

- Top of mind issues and concerns
- Impact of e-discovery
- Litigation costs and economics
- Impact of declining numbers of trials
- Impact of alternative dispute resolution
- Impact of globalization
- Predictions – commercial litigation and torts
- Other predictions – future of litigation.

Findings are discussed in descending order of the frequency with which each topic was raised by interviewees. Thus, topics and ideas raised most often will appear near the beginning in each section below. In general, outliers raised by only one or two interviewees are not addressed (unless it was clearly supported by the secondary literature).

TOP OF MIND ISSUES AND CONCERNS

Interviews were structured to cover a number of topics identified via the literature review and interviews with DRI leadership. However, prior to discussing those topics in depth, each interviewee was asked:

As you look at the trends and developments in litigation and dispute resolution, what issue or challenges concern you the most (i.e., “keep you awake at night”)?

The most frequently raised top of mind concern was the decline in the number of trials. Concerns in this context most often centered on the need to find appropriate training forums for younger lawyers (i.e., to get young lawyers live experience trying cases before a judge and jury). Other related concerns included a belief that alternative dispute resolution (ADR) was displacing trials in situations where a trial was a more appropriate forum. Further, some believe the decline in jury trials is a threat to the fabric of our democratic system – that a trial before a jury of one's peers is integral to democracy.

ADR itself was frequently raised as the top concern of interviewees. Concerns in this area centered mainly on arbitration – with the primary top of mind issue being perceived inconsistency in how ADR processes work from case to case.

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The cost of litigation was also a frequently raised concern. Some are concerned that the cost of litigation (and the underlying costs in law firms and the legal system) may be “pricing ourselves out of work.” Many pointed to e-discovery as a major factor further driving up the cost of litigation.

A few interviewees noted that the complexity of (some) litigation has become a concern for them personally. One interviewee summed up the concern well saying, “The complexity of some of these cases has gotten beyond our ken.” Related to this point, some expressed a concern that complexity, delays and high costs are limiting access to the justice system.

Finally, it should be noted that a number of interviewees responded to this opening question by noting that they are not concerned about the future of litigation. On the contrary, on overwhelming majority anticipate a very positive future for litigators and a very robust litigation environment in the coming years.

IMPACT OF E-DISCOVERY

The literature review phase of this research uncovered a large volume of material focusing on electronic discovery – a mix of concerns and potential solutions. The joint project of the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System (IAALS) was initially motivated by a desire to determine how significant a concern e-discovery actually is among trial lawyers.

That survey found that roughly two-thirds of Fellows of the American College of Trial Lawyers (with direct experience with e-discovery) believe the 2006 e-discovery rule amendments do “allow for efficient and cost-effective discovery of electronically stored information at least some of the time.” However, there were concerns expressed regarding e-discovery among those with direct experience (well over half of all survey participants).

- Over 87% of Fellows believe e-discovery increases costs and 75% agree that discovery costs are rising disproportionately due to e-discovery
- Over three-quarters believe courts do not yet understand the difficulties in providing e-discovery
- Over 70% said costs to outside vendors have increased costs without adding value for clients
- Over 60% believe e-discovery is being abused by counsel

In depth interviews conducted on behalf of DRI confirmed the results of this survey. Interviewees agreed overwhelmingly that e-discovery is having and will have a profound impact on the future of litigation (using terms like “horrible” and “outrageous” to express their concern). Likewise, an overwhelming majority believe that it will be incumbent on judges to bring e-discovery under control – via effective rule enforcement; limiting “fishing expeditions;” imposing meaningful sanctions for abuse; and providing sufficient guidance to both parties regarding appropriate document production (and related processes).

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The cost implications of e-discovery were a primary concern among interviewees. Those concerns addressed two distinct cost issues. First, many are simply concerned that in an attempt to create fast, efficient discovery by requiring production of documents in electronic formats, the process has increased the volume of documents being produced resulting in inordinate costs of production and excessive time to conduct document reviews. Second, many lawyers are concerned that e-discovery requests and some rulings are imposing unreasonable continuing costs on clients by forcing long term document retention that adds costs on a defensive basis.

Many noted that e-discovery is creating an irreversible dependence on technology in order to manage complex litigation. Many are optimistic that technology will help lawyers manage e-discovery efficiently. However, some are concerned that text retrieval technologies are encouraging plaintiffs to use discovery as an end rather than a means (e.g., to fight over discovery issues rather than focus on the merits of the case). At the client level, several technology related concerns were raised.

- Several lawyers noted that many clients remain unaware or under-prepared for e-discovery – that substantial counseling regarding document retention and electronic communication is still needed.
- Some are concerned that technology and e-discovery may be exacerbating the asymmetrical nature of (some) commercial litigation – that larger organizations may be capable of adopting needed technologies, but that smaller organizations cannot.

A number of interviewees expressed a genuine concern regarding potentially perverse incentives in document review in an electronic discovery environment. Specifically, many are concerned that e-discovery encourages a search for “needles in a haystack” – particularly as it relates to searching for documents that influence determination of punitive damages, but are not central to the merits of the litigation per se. Some representative quotes can illustrate this concern.

- *“Looking for that unfortunate, but not material, email”*
- *“Not litigating merits, we’re fighting over discovery”*
- *“Just trying to find a way to pump up punitive damages”*
- *“It is a lot of sugar for a nickel”*

Other concerns raised frequently enough to warrant inclusion in this report include the following points (each of which was raised less frequently than the points above).

- The complexity and sophistication of the discovery process and the pace of change is a concern.
- Some believe the scale of e-discovery will lead to more settlements – simply to avoid complex and expensive discovery. As one trial lawyer put it, “you settle or drown in a sea of actual and virtual documents.”

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- Some are concerned with compliance – specifically, with ensuring that they are pursuing defensible document production and will not be subject to sanctions or malpractice claims as a by-product of e-discovery.

Finally, a meaningful sub-set of the lawyers interviewed for this research noted that – either because of the state venues in which they primarily practice and/or the mix of case work their firm handles – they have been affected less than they expected by the adoption of e-discovery rules. Some of those individuals noted that they do anticipate more states adopting a form of e-discovery rules – suggesting the issue will ultimately affect them as well.

LITIGATION COSTS AND ECONOMICS

Interviewees were asked to discuss how litigation costs are influencing how outside counsel fees are set and managed. They were also asked specifically to discuss any alternative fee arrangements they “have seen work in practice and/or have inherent intellectual appeal.” The questions were motivated both by DRI’s desire to ensure members are prepared to effectively manage their law practices and by findings in the secondary literature pointing to genuine concerns with the cost of litigation.

The IAALS survey of Fellows of the American College of Trial Lawyers underscored concerns with the cost of litigation. Over 80% of survey participants agreed that the civil justice system is too expensive. In addition, that survey found:

- Over 80% of Fellows reported that their firms turn away cases that cannot be handled cost effectively;
- Over 80% of Fellows believe that litigation costs drive cases to settle when the merits of the case suggest they should not settle;

Over 90% of Fellows believe attorney fees are an important factor in driving cases to settle.

Findings related to litigation costs and economics from this future of litigation research are organized into two sub-sections – a general discussion of how costs are being managed and a specific discussion of alternative fee arrangements.

Cost Management Findings

The most frequently cited challenge regarding cost management centered on the rapid rise of billing rates. Many interviewees noted that rates have been rising faster than the rate of inflation for a number of years. Three underlying causes of this rate growth were discussed.

- First, many believe the pace of rate growth has been driven by a widespread focus on profit per equity partner (PPEP). As one respondent noted, “*this focus on PPEP has led to an insidious run-up in rates.*”

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- Second, many are concerned that increasing starting salaries for associates are contributing to rate increases. A number of related points were made regarding starting salaries.
 - Some noted that because rates for those new associates are being raised to cover the salaries, all rates at firms paying high starting salaries must increase as well – in order to maintain a rational differential between first year associate and senior partner rates.
 - Some expressed genuine concern with a “*bi-modal distribution*” in associate compensation – with a select group joining large firms with high salaries and the balance of law school graduates starting at less than half the pay of their large firm peers.
- Finally, some expressed concerns related to overhead – that technology and other overhead costs are also driving up rates.

Given this focus on rate increases, it was not surprising to hear that the most common approach clients and firms are taking to managing costs is discounting (or even freezing) billing rates. In addition, a number of interviewees noted that budgets are now commonly developed for each matter – at least for larger scale and/or more complex cases.

Other cost management strategies noted by respondents included the following.

- Many interviewees noted that high volume work – particularly cases covered by insurance – is (and will continue to be) closely controlled.
 - Interviewees pointed to a clear trend toward highly rate sensitive work in which billing rates (and often total budgets) are predetermined by the client (typically an insurance company).
 - Lawyers and law firms can take or leave those rates – and in turn structure and manage their firms in response to those economics.
- In contrast, experienced trial lawyers in so-called “brand name firms” are expected to command higher rates (if occasionally discounted) – and the case work tends to be more complex and carries higher risks for the client.
- A number of lawyers noted that third party cost management and/or auditing vendors have been inserted between clients and outside counsel.
 - This trend is expected to continue, though some note that the process has had unintended consequences that could limit the future impact of third party cost managers.
 - The process itself creates an environment of mistrust between client and counsel.

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- Some believe it has had a negative impact on the quality of work performed – as third parties control decisions that should be made on a case-by-case basis.
 - Detailed billing and staffing rules have encouraged an attention to minutia in billing that actually results in higher bills in some cases.
 - Further, delays in payment and write-downs associated with disallowed charges have led good lawyers with good relationships to walk away from selected clients. As the IAALS research found, over 80% of trial lawyers now turn away work they believe cannot be handled cost-effectively by their firm.
- Some interviewees expressing concerns around this trend underscored the importance of working from a position of mutual trust – that to really control the cost of litigation, clients and counsel need to share information and jointly manage cases with a focus on work (e.g., depositions, document review, etc.) that truly adds value to resolution of the dispute in question.

One final point regarding cost management strategies should be noted. Both the secondary literature and participants in this research project noted that more routine disputes will be settled before outside counsel is ever engaged. Early termination strategies are being adopted by many companies – particularly insurance companies – to resolve disputes outside the civil justice system. That trend is expected to accelerate in the coming years.

Alternative Fee Arrangements

In raising the question of alternative billing arrangements, an overwhelming majority of interviewees noted that regardless of whether work is performed on a traditional time and materials basis or under an alternative approach, cases involving a degree of complexity will continue to have pre-defined budgets.

In discussing alternative fee arrangements, both in-house and outside counsel were able to share a wide variety of examples. In fact, there were as more variations on alternative approaches than there were interviews. An analysis of those anecdotal examples uncovered some basic principles and guidelines for pursuing alternative fee arrangements.

- First, it is imperative that private practitioners understand their own costs and the underlying economics of their practice and their firms. Whether the focus is on managing margins (a fairly high level instrument) or on managing selected profit drivers, good alternatives cannot be constructed unless the lawyer understands his/her own practice economics.
- Second, it is incumbent on outside counsel to understand their client's underlying motivation for seeking an alternative fee arrangement. Underlying motivations fit a pattern.

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- Some simply need to cut costs. Fee arrangements trend toward discounts and blended rates in these contexts.
- Some need predictability, particularly if they have a block of recurring or continuing litigation. Fee arrangements in this context trend toward fixed caps for matters – or more often for blocks of business. For continuing relationships built on trust, those fixed fee arrangements can be adjusted annually to bring charges in line with actual ongoing costs.
- Some are driven by risk management models or strategies. In this context fee arrangements trend toward some form of contingency. Contingency arrangements for defense lawyers usually involve agreeing on an overall value (or exposure) for a case, an assessment of positive outcomes and negative outcomes. Work is billed at a discount – with an upside reward (e.g., closer to standard rates) for an outcome close to an expected outcome and a premium for outcomes closer to the most positive potential outcome.

Finally, it should be noted that – although alternative fee arrangements are new to some and are an important dynamic in the future of litigation – many interviewees reported long experience with fixed fees and other alternative fee arrangements.

IMPACT OF DECLINING NUMBERS OF TRIALS

Professor Marc Galanter published a study on the *Vanishing Trial* in November 2004 – roughly a year after presenting his initial research findings at an ABA Section of Litigation Symposium. That study found the number of civil trials peaked in the mid-1980s and have steadily declined since. A recent spot check on 2007 statistics (by the *American Lawyer* and confirmed with professor Galanter) found that the trend continues.

In that light, this future of litigation research sought input on two potential implications related to this trend away from cases proceeding to trial. First, are trial skills and trial experience still highly valued in an environment in which a very small percentage of cases are actually resolved via jury trial? Second, in an environment in which trials are increasingly rare, what are the implications for developing the next generation of litigators and trial lawyers?

Value of Trial Experience and Skills

A large majority of study participants agreed that there is still substantial value and weight placed on engaging lawyers with strong trial skills and experience. Many were quick to make a distinction between “trial lawyers” and “litigators” – the latter perceived as being risk averse and “afraid of going to court.” Some shared anecdotes regarding colleagues who had worked as litigators for over 30 years and never tried a case to a jury verdict.

Ultimately, interviewees believe that the threat of a trial remains the “hammer” in most disputes – leading to settlement on favorable terms. However, as complexity and scale has increased other factors have also become important.

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- Trial and litigation teams have become more important. Some pointed to an analogy to the Barrister system in the United Kingdom – that teams need highly experienced trial lawyers, but also need a strong team to effectively assemble a winning case.
- Technology – both in document review (e-discovery) and in trial – has become increasingly important. Some believe a significant continuing legal education (CLE) need exists regarding litigation support technology.
- Related litigation skills – deposing skills, negotiation skills, mediation and arbitration process skills, etc. – are increasingly valuable and need to be a component on litigation teams.

Finally, in discussing trial experience in the context of the decline in the number of trials, several interviewees expressed concerns related to access to the civil justice system, a need to ensure judges have solid trial experience before ascending to the bench, and a belief that ADR is not the central reason driving the decline in trials.

Training and Professional Development

Interviewees were asked to discuss the approaches they and their firms are taking to develop needed skills in young litigators in an environment in which there are few “low stakes” trials in which to gain needed experience.

- Many spoke highly of trial academies available both as off-site training experiences and/or as in-house programs (customized for larger firms). The International Association of Defense Counsel’s (IADC) program was cited most often. However, the National Institute for Trial Advocacy (NITA) program also got high marks from those who have used NITA. Some larger firms also augment that training with in-house, mock trial experiences.
- A number of interviewees noted that they both recruit from and provide young lawyers (on a pro bono basis) to prosecutor’s offices and legal aid organizations – with the intention of getting trial experiences for those lawyers.
- A number of interviewees indicated that their firms are actively investing in training in aspects of ADR as well – particularly training on the mediation process and related negotiation skills. A smaller number also directly train associates in arbitration process skills.
- Finally, a number of interviewees noted that training in other pre-trial skills remains extremely important. Among the core litigation skills firms are working to develop in their younger lawyers are:
 - “Basic blocking and tackling skills” like taking effective depositions, managing discovery and document review, and related litigation process management skills;

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- Writing skills – essential to win pre-trial motions and important in the broader context of the large number of cases that settle before going to trial;
- Technology and trial support management – including tools to support document review, organize and index exhibits for trial, and work effectively with litigation support vendors.

IMPACT OF ALTERNATIVE DISPUTE RESOLUTION

The discussion of declining trials often directly prompted a discussion of alternative dispute resolution (ADR). In instances in which it did not emerge naturally in the discussion, interviewees were asked to discuss the topic directly.

The literature is full of articles and analysis of the rise of ADR. However, in the IAALS/American College of Trial Lawyer survey, 73% of Fellows reported that a quarter or fewer of their cases are processed through ADR. Further, the survey found that, given a choice, only about 40% of clients choose ADR over the court system.

In raising the topic with interviewees, it became abundantly clear that litigators and clients make a clear distinction between two forms of ADR. Mediation is common and is generally held in high regard. Arbitration is less common and gets decidedly mixed reviews from experienced litigators. Each is discussed in the sections below.

Mediation

As noted above, mediation is overwhelmingly viewed as a positive and is in widespread use across the country. In some jurisdictions, cases are required to go to mediation before proceeding to trial (see Michigan’s case evaluation process as one example). Virtually every interviewee had experience with mediation (“everyone uses it”).

Positive comments regarding mediation could be grouped into two categories.

- First, mediation is viewed as a good means of forcing both parties in a dispute to examine the core issues of a case – and focus on the value and merits of the case. Sample comments in this regard included:
 - *“It produces a nitty gritty look at the real value of the case”*
 - *“It provides a neutral referee who can force a realistic, big picture perspective”*
 - *“It takes emotion into account, but focuses on bringing closure based on the issues”*
- Second, it provides a good exit strategy for parties wanting to settle (which most interviewees believe characterizes the majority of litigants). Representative comments included:

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- *“Essentially, mediation is a facilitated settlement conference”*
- *“Good lawyers exhaust this avenue (for clients who want to settle)”*
- *“Most of these would settle anyway, this ensures that happens before you get on the court house steps”*

While comments regarding mediation were overwhelming positive, a few cautionary points were raised. The primary cautionary note involved concerns with the inconsistency in the quality of mediators and/or mediation processes. It was noted that mediators with strong national reputations can be “stunningly good.” However, weak mediators can fail to keep the process focused on core issues and become “costly chaperones for negotiation.”

Experienced litigators offered a number of anecdotal observations that help ensure mediation results in positive outcomes. That included training young lawyers on the mediation process (“with good training on the process, with trusted parties, you can actually manage the mediation process without the mediator”), ensuring sufficient discovery so that both parties understand the value of the case, and ensuring both parties understand one another’s fundamental premises in the dispute (“there are no opening statements, you have to establish your premise”).

Arbitration

Arbitration did not get positive reviews from interviewees. In fact, many anticipate a decline in the pervasiveness of mandatory arbitration clauses in contracts. Many clients are reportedly souring on mandatory arbitration clauses and many attorneys are advising their clients to remove those clauses from standard contract language.

Many noted that a key positive arbitration was intended to generate was a faster and less expensive approach to dispute resolution. Relatively few interviewees were able to cite that as an actual benefit of the arbitration process.

In fact the only widely expressed positive for arbitration was the privacy of the process. For clients hoping to resolve disputes – particularly embarrassing disputes – quietly, arbitration has been a good tool.

Other positives cited by a few interviewees included:

- The ability to move forward without the constraints of a courts’ docket;
- The tendency of awards to plaintiffs to be constrained, particularly with regard to punitive awards;
- The finality of rulings (“when you’re done, you’re done”);
- A view that professional arbitrators can be moderately better (or more predictable) than juries.

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By contrast, negative comments and experiences were very frequent. The primary objections to arbitration revolved around its failure to deliver on the benefits it originally promised (e.g., faster and cheaper). Negative comments are summarized in the following points.

- Arbitration does not save money. On the contrary, it often involves just as much discovery; adds the cost of one (or more) arbitrators; and ends up costing as much or more as conventional litigation.
- Arbitration decisions trend toward compromises – regardless of the merits of a case. Many interviewees used the same phrase – arbitrators “tend to split the baby.” Arbitrators rarely award nothing, are trying too hard to be perceived as fair, and end up producing outcomes worse than a jury trial.
- The process is not necessarily faster. While it avoids working around a crowded court docket, better arbitrators are over-scheduled. Further, extensive discovery takes the same amount of time in the courts or in arbitration.
- Many perceive arbitration as being “litigation with no recourse.” Thus, while some believe one positive of arbitration is its finality, many believe the lack of recourse – particularly in a process with limited safe guards on the evidentiary process – is dangerous.
- Some expressed the view that juries and judges are more interested in justice than arbitrators. In other words, some believe that the quality of justice is better via the jury system (with the threat that the jury may seek a “pound of flesh”). “You are less able to influence the outcome with good lawyering.”
- Some are concerned that truly good arbitrators are in short supply and that third party quality evaluators are not doing an adequate job in screening and rating arbitrators.

Finally, many interviewees expressed philosophical concerns with regard to the impact arbitration is having or could have on the US civil justice system. Concerns in this regard included:

- A further suppression of the number of trials – and the inherent challenge that creates for developing good trial lawyers and good trial judges. Some put it plainly – “it is privatizing the civil justice system, limiting access to justice”
- A loss of transparency and precedent in the administration of civil justice
- A system that draws good judges off the bench – in pursuit of the substantial incomes good arbitrators earn
- A belief that “we already pay for the courts and shouldn’t pay again to have arbitration”
- Asymmetrical resources at the disposal of parties in arbitration.

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IMPACT OF GLOBALIZATION

The secondary literature review generated a number of articles addressing globalization and its impact on the US legal system. In this context, a very open ended question was posed to research participants.

How much impact do you expect globalization to have on US based law firms and litigators? Why?

The question brought two inter-related responses forward from a large majority of interviewees.

- First, a large number of research participants noted that business has globalized – even for relatively small companies. As a result, most expect that there will be growing influence – both from the world on the US legal industry and from US based law firms on the world.
 - As one interviewee put it, “having a global perspective will be table stakes to compete in the future.”
 - The global nature of the current financial crisis and the pervasiveness of imported products and ingredients were both cited as evidence of the growing importance of a global perspective.
- Second, research participants believe that US based lawyers (and firms) expecting to compete for globalizing business will need some combination of knowledge (of jurisdictions, legal systems, etc.), networks of resources, and/or an overseas presence.
 - Some predict large law firms will look more like large accounting firms in the future (e.g., multiple offices around the world).
 - Others believe the more common approach will be development of international contacts and networks in response to (or in anticipation of) clients’ needs.

A number of interviewees noted that for lawyers expecting to resolve their clients’ global disputes, a knowledge and capability in international arbitration will be extremely valuable. Many were quick to note that international arbitration is markedly different from US based arbitration processes. Further, many shared positive experiences with international arbitration processes.

Some interviewees believe both international arbitration and foreign legal systems will influence the US civil justice system over time. The US Supreme Court has cited foreign law in recent decisions. More importantly in the eyes of some interviewees, international arbitration has efficiently resolved multi-jurisdictional disputes for US based corporations. It is that latter experience that leads those with experience in international arenas to predict growing influence on the US civil justice system over time.

Many were quick to follow the above points with the observation that precedents and traditions in the US legal system will endure. They noted that US and UK legal systems have broadly influenced the development of legal systems around the world. Further, they note that strong client relationships built on cost effective service will remain important – even as the law and the economy continue to globalize.

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Finally, a number of interviewees highlighted a separate and important dimension of globalization – and its potential impact on the US legal system and law firms. Namely, several interviewees predict that the growing trend to global outsourcing will increasingly affect US based law firms. China and India are expected to train intelligent young professionals on US law – positioning them to carry-out large scale document reviews at much lower costs. In fact, outsourcing services of this nature have already emerged in India. This trend will most dramatically affect litigation practices at larger firms and boutiques that handle large scale, complex litigation.

PREDICTIONS – COMMERCIAL LITIGATION AND TORTS

The primary research interviews asked participants to predict what areas of commercial litigation and torts are likely to grow and/or be at the center of complex disputes in the future. Some interviewees were more comfortable than others to “gaze into their crystal ball” and predict the future hot areas of litigation.

As noted at the beginning of this chapter, research participants overwhelmingly anticipate a robust litigation environment over the next few years. That is in part a function of the unfolding recession and financial crisis (many noted that litigation generally increases during recessions). However, it is also a function of underlying trends in particular areas of law.

Fulbright & Jaworski conducts an annual survey of in-house counsel on litigation trends that looks quite specifically at the question of what is hot and what is expected to grow. On the question, “do you expect the number of legal disputes your company will face in the next year to increase, decrease or stay the same?” over 30% anticipate an increase, while only 8% anticipate a decrease.

The question that essentially asks clients to look forward at where they anticipate disputes to be concentrated, the following areas were in the top 10.

- Contract disputes (53%)
- Labor and employment (47%)
- Personal injury (24%)
- IP/Patents (22%)
- Product liability (19%)
- Class actions (17%)
- Insurance disputes (15%)
- Regulatory (14%)
- Professional services (13%)
- Antitrust/Trade (11%)

Predictions of research participants in this future of litigation project parallel these findings with a few exceptions.

Commercial Litigation Predictions

Interview participants’ expectations relative to commercial litigation over the next few years are listed in descending order of the frequency with which each was mentioned (note, respondents could name an unlimited number of areas).

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- Financial service industry disputes (e.g., securities, banking, disputes around subprime debt, disputes around derivative financial instruments)
- Complex commercial disputes (e.g., complex breach of contract, property and property management disputes, supply chain contracts, “deals gone bad”)
- Patent and other IP litigation
- Employment practices and labor disputes
- Regulatory enforcements, investigations, and administrative law defense
- Bankruptcy related litigation.

Tort Predictions

Many interviewees noted that the current financial crisis was likely to spur growth in torts. However, several interviewees noted that cash is at a premium in the current environment – both for corporations and for individuals. As a result, many predicted quick settlements where cash offers are on the table.

In descending order, the most frequently mentioned areas of torts anticipated to grow over the next few years.

- Product liability – particularly around exposures to perceived or actual toxins (e.g., BPA, melamine, radiation, pharmaceutical ingredients). Note: several interviewees noted they expected growth in this area regardless of the outcome of the Wyeth vs. Levine case currently pending in federal court.
- Environmental – including water rights and pollution, climate change, energy, food, and air
- Finance related – credit fraud, predatory lending claims, foreclosure disputes (some of which may be consolidated into classes)
- Asbestos related – arguably a subset of product liability, but those citing it noted that 1) it will continue for the foreseeable future and 2) the legal industry will never see a product liability exposure like it ever again.

OTHER PREDICTIONS – FUTURE OF LITIGATION

Prior to ending the interviews, participants were asked to share any other insights they might want to offer regarding the future of litigation. A few topics were raised by multiple research participants.

- Technology will be increasingly important for litigators – in the discovery phase and at trial. Some also noted that as the cost of technology has fallen, it is “leveling the playing field” for smaller firms to compete – even on the most complex, large scale litigation.

FUTURE OF LITIGATION RESEARCH FINDINGS

- The average age of experienced trial lawyers (distinguished by interviewees from litigators) is rising. A concerted effort will be needed to ensure the next generation of litigators gains substantive trial experience.
- The economics of the legal industry is becoming increasingly segmented. Some anticipate a future of highly profitable “brand name” firms and economically constrained insurance defense firms – with the middle tier stripped out of the industry.
- Some anticipate considerable growth in dispute resolution outside the civil justice system entirely – for instance, via internet based claims systems that offer fast, simple settlements based on predictive analytics.

CONCLUSIONS AND RECOMMENDATIONS

FUTURE OF LITIGATION CONCLUSIONS AND RECOMMENDATIONS

This chapter provides brief review of the primary conclusions emerging from the future of litigation research and a short set of recommendations based on those conclusions.

RESEARCH CONCLUSIONS

The future of litigation in the US is robust – based on both the secondary literature review and the primary research conducted for this report. However, there are challenges and concerns for those planning to practice as trial lawyers in the future.

Factors contributing to future growth in litigation include:

- Anticipated growth of litigation into the future – both commercial litigation and torts. Many anticipate that growth to accelerate in the context of the unfolding recession and financial crisis.
- A widespread commitment within the profession to ensure that electronic discovery rules and other challenges to an efficient and effective civil justice system are addressed professionally and systematically.
- A strong commitment to developing the next generation of trial lawyers and litigators – including a commitment to developing fundamental skills (e.g., writing, argument, discovery, deposition, etc.) and higher order capabilities (e.g., trial and ADR capabilities).
- An emerging backlash against arbitration and a predicted decline in the adoption of mandatory arbitration clauses in commercial contracts – pushing disputes back toward the civil justice system over time.
- Emergence of sophisticated technologies enabling defense counsel to manage large scale document production and document review, as well as to present highly effective and persuasive cases at trial.
- Reasonable and creative approaches to the economics of litigation – suggesting solid financial prospects for most members of the defense bar.
- Growing opportunities in international arbitration and global dispute resolutions – for those firms and practitioners interested in developing capabilities in these areas.

Future challenges and concerns include:

- Growing complexity and costs – particularly in the wake of electronic discovery – creating incentives to find alternatives to traditional, law firm driven litigation management, billed on a time and materials basis.
- A continuing decline in the number of cases resolved via jury trials – creating meaningful challenges for developing the next generation of experienced trial lawyers.

FUTURE OF LITIGATION CONCLUSIONS AND RECOMMENDATIONS

- Growing segmentation within the defense bar – creating the potential for a dramatically bifurcated defense bar over the long term (e.g., some generating very large profits, while a majority earn considerably less).
- Development of perverse incentives within the e-discovery process driving plaintiff’s lawyers to litigate the discovery process rather than the merits of a given case – creating challenges for defense lawyers and potential exposure to malpractice claims or other sanctions related to discovery.
- The potential emergence of global outsourcing for large scale document review – challenging the business model of firms invested in handling large scale, complex litigation.

RECOMMENDATIONS FOR MEMBERS OF DRI

The research findings and conclusions lead to a number of calls to action for members of DRI and the defense bar more broadly. While the following list of recommendations for members will not be on point for every member, a collection of these recommendations should be relevant for all members.

- Relative to e-discovery and electronic documents, the research is fairly clear. Many clients (particularly middle market commercial and manufacturing enterprises) are under-prepared for document production in an e-discovery environment.
 - While defense counsel may understand the process well and have likely sent multiple “client advisory” newsletters out addressing the topic, DRI members should not consider themselves done with the process of counseling clients on e-discovery, electronic document retention policies, and related technology (and cost management) considerations.
 - Return to the topic in 2009 with clients. Understanding the topic, the implications of not effectively managing electronic documents, and the tools available for organizing easily searchable document archives can save clients substantial costs (and headaches) in the future.
- Relationships matter more than ever. Obviously, maintaining strong relationships with clients is critical. Likewise, maintaining positive working relationships with the courts is an ongoing necessity.
 - The research results also highlight the value of cultivating and maintaining relationships built on trust and mutual respect with plaintiffs’ counsel – particularly in mediation settings.
 - In addition, the need for strong collegial and professional referral relationships with competing defense counsel will be increasingly valuable. This need will be increasingly pronounced as clients’ businesses are influenced by globalization. Your best means for resolving a client’s international dispute may very well be via a strong referral relationship with another defense firm.

FUTURE OF LITIGATION CONCLUSIONS AND RECOMMENDATIONS

- In the context of globalization, have a conversation with substantial clients focused on the question, “*what is your business doing internationally?*” There are a number of reasonable alternatives for helping clients resolve international disputes.
 - International affiliation networks are growing and generally provide some level of exclusivity in a defined jurisdiction (usually a state, but occasionally a major city). Networks make sense if clients’ international needs will be recurring and/or your firm has both litigation and transactional practices.
 - Targeted affiliations with a “*sister*” firm (or firms) in selected jurisdictions can be a very effective solution if clients’ international needs are limited to relatively few international jurisdictions. Many of the mega firms began the path to globalization via one or two targeted affiliations – developed 25 years ago.
 - Training on and/or hiring in international arbitration expertise can be a solution if clients are finding themselves in those forums.
 - Finally, as noted above, a strong relationship with a firm that has global capabilities can be a reasonable approach to meeting episodic international needs.
- Know your own economics – what are you structured well to do on behalf of what kind(s) of clients?
 - At a minimum, you must be able to budget cases based on an informed understanding of the case and the issues at work in that case. Budget tools can be as simple as spreadsheets or as complex as large scale project management software – but, regardless of the underlying tools you use, you must be capable of presenting a budget with confidence in the assumptions that drive it.
 - Further, if your firm has not done so already, develop an ability to craft alternative fee arrangements based on clients’ motivations. Have models in hand that respond to clients interests in:
 - Risk sharing (modified contingency arrangements)
 - Predictability (variations on fixed fee and quasi-retainer arrangements)
 - Cost savings (particularly in the current economic environment).
- Adopt cost management strategies that aligns your firm’s economic model with the needs and expectations of the clients you primarily serve. Among the cost management strategies you might consider are:
 - Alternative career paths for associates (and for very senior lawyers). Putting lawyers on an “*up or out*” path straight out of law school is expensive – develop roles for experienced people that save you and your clients money over the long run.

FUTURE OF LITIGATION CONCLUSIONS AND RECOMMENDATIONS

- Contract lawyers (of course) and off-shoring (potentially). The variability of large scale litigation and document review encourages growth, but some of that work should be done at very low rates – by either contract lawyers or other low cost (potentially off-shore) allies.
 - Technology investments. In particular, the emergence of innovative document management tools and the application of document review technologies can save substantial costs – much of which can be passed on to clients.
 - Case management. Many interviewees noted in the research that the best trial lawyers are often able to cut cases off in pre-trial stages. In house lawyers noted that defense counsel who can cut litigation short via effective use of pre-trial motions are highly regarded.
- Take a position regarding arbitration and mandatory arbitration clauses. Have a logical rationale for the position you take – the trend is moving away from arbitration clauses, but they may still make sense for your clients and their industries. Know where you stand and why.
 - Train young lawyers on how to manage the mediation process and how to negotiate effectively on behalf of clients. Negotiation should be driven by an understanding of key issues (those where the client is flexible and those where they are not) – and as such, it is a natural extension of being an effective litigator.
 - In some jurisdictions, young litigators can gain valuable trial experience working on a pro bono (or exchange) basis with prosecutors’ offices. Consider both hiring from prosecutors offices and loaning young litigators to prosecutors as means of adding substantive trial experience to your firm.
 - Finally, engage your young litigators with local legal aid (non-criminal) organizations on a pro bono basis. Legal aid cases often go to trial or administrative hearings. The stakes are meaningful for the litigants, but manageable in both scope and scale. And, the work itself puts young lawyers in the position of advocating for access to justice. It is a very good way to do well and to do good.

RECOMMENDATIONS TO THE ASSOCIATION

Based on the results of this research, DRI’s existing CLE offerings in asbestos related litigation, drug and medical device litigation, and products liability appear to remain relevant for the foreseeable future. The outcome of Wyeth vs. Levine will influence the content, but likely not the value of the drug and product liability courses.

Future CLE offerings recommended by the results of this research include:

FUTURE OF LITIGATION CONCLUSIONS AND RECOMMENDATIONS

- A course or other programming on litigation related technologies – with a definitive emphasis on continuing developments in text retrieval technologies, managing electronic records, and ensuring quality in e-discovery. Participants in the Sedona Conference may be a resource in this regard. The technology offering could also include exposure to trial support technologies – though that would have more limited value across the defense bar.
- A course on employment and labor disputes – which may be more timely after Obama Administration policies take shape (e.g., a stated commitment to Employee Free Choice Act, a desire to revisit recent discrimination rulings, etc.). Much of this risk is now underwritten by insurance companies and the defense bar will need tools to handle this work efficiently if it grows at the pace predicted by this research.
- Introduction of alternative fee setting principles in law practice management courses and seminars in the future.
- A course on effectively managing mediation – particularly in light of its reported pervasiveness and the underlying skills needed to generate positive outcomes for clients in a mediated setting.

Finally, DRI should consider logical alliances in areas of common concern for the future. For instance, as the American College of Trial Lawyers and the IAALS work on improvements to e-discovery rules, DRI may want to mobilize its large membership in advocating for changes beneficial to the defense bar.

APPENDICES

- Appendix A – DRI Leadership
- Appendix B – Expert Interview Guide
- Appendix C – Survey Sample
- Appendix D – Interview List
- Appendix E – Research Methodology
- Appendix F – Additional Readings

FUTURE OF LITIGATION DRI LEADERSHIP

Name	Organization/Title
Marc E. Williams	DRI, President Huddleston Bolen, Partner
Cary E. Hiltgen	DRI President Elect Hiltgen & Brewer, President
R. Matthew Cairns	DRI First Vice President Gallagher, Callahan & Gartrell, Shareholder-Director
Henry M. Sneath	DRI Second Vice President Picadio Sneath Miller International Association of Defense Counsel, Vice Chair Business Litigation Committee
John H. Martin	DRI Immediate Past President Thompson & Knight, Partner
Kimberly D. Baker	DRI Secretary-Treasurer Williams Kastner
John R. Kouris	DRI Executive Director

FUTURE OF LITIGATION EXPERT INTERVIEW GUIDE

- A. As you look at the trends and developments in litigation and dispute resolution, what issues or challenges concern you the most (i.e., “*keep you awake at night*”)?
- B. What areas of the law or the economy do you expect to be at the center of complex commercial litigation over the next five to ten years? (probe on bankruptcy, employment law, deceptive trade practices, subprime disputes, mortgage fraud, intellectual property, FASB 5, possible legislative dilution of protective orders, cross border disputes)
- C. What areas of the law or the economy do you expect to be at the center of torts and other civil litigation over the next five to ten years?
- D. How do you expect the current financial crisis to impact civil litigation?
- E. A great deal of attention has been focused the impact of electronic discovery on the cost and relative complexity of litigation. What do you anticipate the future impact of e-discovery will be on litigants and their counsel?
- F. What trends have you been seeing relative to outside counsel fees? What do you think the future holds for how fees are set and how costs are managed? What alternative fee arrangements have you seen that work in practice and/or have an inherent intellectual appeal?
- G. There has been a decisive trend over the past 20 years away from going to trial (i.e., toward settlement).
 - a. Given that trend, what skills and experience does outside counsel need to bring to a case?
 - b. How much value does extensive trial experience have in the current and future environment?
 - c. More broadly, what kinds of continuing education should litigators focus on going forward?
- H. Similarly, there has been a clear trend toward arbitration, mediation and other alternative means of resolving disputes.
 - a. What are your views regarding the trend to alternative dispute resolution?
 - b. What do you consider the primary advantages to arbitration?
 - c. What do you consider to be the primary disadvantages to arbitration?
 - d. What skills and experiences does outside counsel need to bring to an arbitration case?
- I. Do expect any particular states, regions, or countries to be particularly active (i.e., Texas, California, West Coast, international arbitration, etc.)?
- J. How much impact do you expect globalization to have on US based law firms and litigators? Why?
- K. What other insights would you like to offer with regard to the future – particularly as it relates to dispute resolution and litigation?
- L. Is there anyone you would suggest I contact for a similar interview in light of their insights into some or all of the issues we just discussed?

THANK YOU!

FUTURE OF LITIGATION SURVEY SAMPLE

Name	Organization/Title
Thomas Steven	ACT Litigation Services
Robert D. Hunter	Altec, General Counsel IADC, President
Robert Rothman	Arnall Golden Gregory
Laura Stein	The Clorox Company, Senior VP, General Counsel
Frederick J. Krebs	Association of Corporate Counsel, President
Robb L. Voyles	Baker Botts, Partner
Fred J. Bartlit, Jr.	Bartlit Beck Herman Palenchar & Scott LLP
David J. Beck	Beck Redden & Secrest
Peter Bennett	Bennett Law Firm
John Michael Clear	Bryan Cave, Partner
Bettina Strauss	Bryan Cave, Partner
James M. Campbell	Campbell Campbell Edwards
Brett A. Ross	Carr Allison
James B. Buda	Caterpillar, Inc., General Counsel and Secretary
Richard W. Bethea, Jr.	Chambliss, Bahner & Stophel, P.C.
Thomas C. Galligan, Jr.	Colby-Sawyer College, President and Professor of Humanities
Clayton F. Farrell	Collins Einhorn Farrell & Ulanoff
Patrick J. O'Connor	Cozen O'Connor
Paul C. Saunders	Cravath, Swaine & Moore LLP
Honorable Barbara J. Rothstein	U.S. District Court, Washington, D.C.
Lorna G. Schofield	Debevoise & Plimpton
Philip K. Anthony, Ph.D	Decision Quest, CEO
Dennis W. Archer	Dickinson Wright, Partner
James A. Samborn	Dickinson Wright, CEO

FUTURE OF LITIGATION SURVEY SAMPLE

Name	Organization/Title
Kathleen (Kathy) A. Lang	Dickinson Wright; Member of DRI and IADC
Peter E. Strand	Shook Hardy & Bacon
D. Dudley Oldham	Fulbright & Jaworski
Hillarie Bass	Greenberg Traurig
Albert H. Parnell	Hawkins & Parnell, Partner
Homer C. LaRue	Howard University, Professor of Law
Rebecca Love Kourlis	Institute for Advancement of the American Legal System, Executive Director
Ann B. Frick	Jacobs Chase Frick Kleinkopf & Kelley LLC
Wayne Thorpe	JAMS – Dispute Resolution
Daniel A. Harvey	Deere and Company
David Kistenbroker	Katten Muchin Rosenman
Timothy W. Bouch	Leath Bouch & Crawford LLP
Richard S. Levick	Levick Strategic Communications, President & CEO
Larry Smith	Levick Strategic Communications
John R. Tarpley	Lewis King Krieg & Waldrop PC
James R. Courie	McAngus Goudelock & Courie, Managing Partner
Nancy J. Anderson	Microsoft, Corporate Vice President and Deputy General Counsel
Tom Burt	Microsoft, Corporate Vice President and Deputy General Counsel, Litigation Group
Les Weisbrod	Miller Curtiss Weisbrod; President, AAJ
Veta T. Richardson	Minority Corporate Counsel Association
Jason R. Baron	National Archives and Records Administration, Director of Litigation
Mary Campbell McQueen	National Center for State Courts
Sarah Ford	National Foundation for Judicial Excellence
Steve G. Morrison	Nelson Mullins, Partner; DRI Past President

FUTURE OF LITIGATION SURVEY SAMPLE

Name	Organization/Title
Honorable Gary A. Hicks	New Hampshire Supreme Court
Brian Dalrymple	Nixon Peabody, Partner
Paul Lippe	Qulas/Legal on Ramp, Chief Executive
Fred Baumann	Rothgerber Johnson & Lyons LLP
Joseph M. Goldberg	Sentry Insurance
George Edward Pickle, Jr.	Shell Oil Company
Leo P. Dreyer	Shook Hardy & Bacon L.L.P.
Paula Boggs	Starbucks, Executive Vice President, General Counsel and Secretary
Ralph Palumbo	Summit Law Group
Honorable Earl Maas	Superior Court of California, County of San Diego
Eric I. Cohen	Terex Corporation, Senior Vice President, General Counsel and Secretary
John J. Dalton	Troutman Sanders
Honorable Virginia M. Kendall	U.S. District Court,,Northern District of Illinois Eastern Division
Honorable Jay C. Zainey	U.S. District Court, Eastern District of Louisiana
Honorable Barbara M. G. Lynn	United States District Court, Northern District of Texas
Mark Galanter	University of Wisconsin Law School
Patrick J. Lamb	Valorem Law Group
Hugh Totten	Valorem Law Group
Lela Love	Yeshiva University

FUTURE OF LITIGATION INTERVIEW LIST

DRI LEADERSHIP INTERVIEWS

Name	Organization/Title
John H. Martin	DRI Immediate Past President Thompson & Knight, Partner
Marc E. Williams	DRI President Huddleston Bolen, Partner
Cary E. Hiltgen	DRI Vice President Hiltgen & Brewer, President
R. Matthew Cairns	DRI First Vice President Gallagher, Callahan & Gartrell, Shareholder-Director
Henry M. Sneath	DRI Second Vice President Picadio Sneath Miller
Kimberly D. Baker	DRI Secretary-Treasurer Williams Kastner
Patrick A. Long	DRI Past President Long, Williamson & Delis, Member
Paul M. Lavelle	DRI Past Board Member Abbott Simses & Kuchler, Shareholder
Richard T. Boyette	DRI Past President Cranfill Sumner & Hartzog, Partner
David E. Dukes	DRI Past President Nelson Mullins, Partner
Neil A. Goldberg	DRI Past President Goldberg Segalla
William R. Sampson	DRI Past President Shook Hardy & Bacon, Partner
Sheryl J. Willert	DRI Past President Williams Kastner
John R. Kouris	DRI Executive Director

FUTURE OF LITIGATION INTERVIEW LIST

INTERVIEWS FROM SURVEY SAMPLE

Name	Organization/Title
Robert D. Hunter	Altec, General Counsel
Dave J. Beck	Beck Redden & Secrest, Founding Partner
John Michael Clear	Bryan Cave, Partner
Brett A. Ross	Carr Allison. Shareholder
Tom C. Galligan, Jr.	Colby-Sawyer College, President and Professor of Humanities
Clayton F. Farrell	Collins Einhorn Farrell & Ulanoff, Partner
Phil Anthony	Decision Quest, Chief Executive Officer
D. Dudley Oldham	Fulbright & Jaworski
Albert H. Parnell	Hawkins & Parnell, Partner
Rebecca Love Kourlis	Institute for Advancement of the American Legal System, Executive Director
Pamela Gagel	Institute for Advancement of the American Legal System, Assistant Director
Jordan Singer	Institute for Advancement of the American Legal System, Director of Research
Timothy W. Bouch	Leath Bouch & Crawford LLP, Managing Partner
Larry Smith	Levick Strategic Communications, Senior Vice President
Les Weisbrod	Miller Curtiss Weisbrod, President American Association for Justice, President
Jason R. Baron	National Archives and Records Administration, Director of Litigation
Fred Baumann	Rothgerber Johnson & Lyons LLP
Joseph M. Goldberg	Sentry Insurance
Leo P. Dreyer	Shook Hardy & Bacon L.L.P., Partner American Arbitration Association, Member
Peter E. Strand	Shook Hardy & Bacon L.L.P., Partner DRI, Research and Development Committee Chair

FUTURE OF LITIGATION INTERVIEW LIST

INTERVIEWS FROM SURVEY SAMPLE

Name	Organization/Title
Honorable Barbara M. G. Lynn	United States District Judge for the Northern District of Texas
Marc Galanter	University of Wisconsin Law School

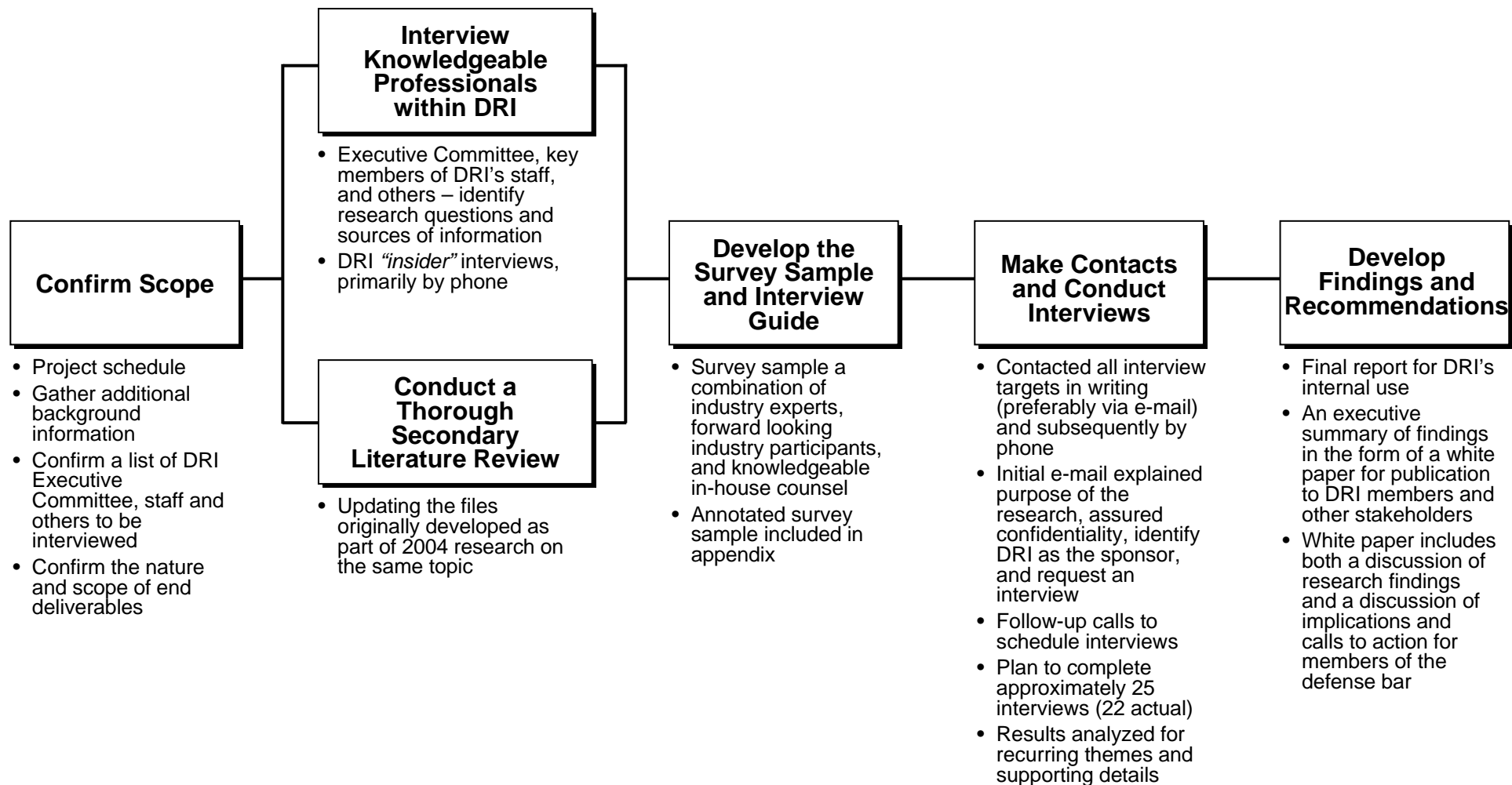
FUTURE OF LITIGATION RESEARCH METHODOLOGY

RESEARCH PROCESS

The schematic work plan on the following page summarizes the research methodology and that approach is outlined in greater depth in the following points.

- The research began with a confirmation of scope of the work with DRI's Executive Committee. At that time a project schedule was established; existing background information about DRI, its programs and its objectives for this research was gathered; a list of DRI Executive Committee, staff and other informed stakeholders to be interviewed early in the research project was confirmed; and the nature and scope of end deliverables were confirmed.
- Smock Sterling then conducted two background development steps roughly in parallel. Both steps informed the development of a survey sample (i.e., targets for expert and industry participant interviews) and the primary research interview guide (i.e., the questions to be asked).
 - Smock Sterling interviewed a number of knowledgeable professionals within DRI – including members of DRI's Executive Committee, key members of DRI's staff, and other active members who helped to identify research questions and sources of information (both secondary sources and knowledgeable industry participants to be interviewed). Background interview subjects are listed in an appendix to this report.
 - Smock Sterling also conducted a thorough secondary literature review – updating a file originally developed as part of a proprietary 2004 research on the same topic.
- A survey sample and the interview guide were then developed and confirmed.
 - The survey sample was a combination of industry experts (e.g., consultants, academics, etc.); forward looking industry participants (e.g., leaders of highly successful and/or progressive litigation practices and/or boutiques); and knowledgeable in-house counsel.
 - The interview guide ensured that key topics were covered consistently across all interviews – including those that meandered due to the interests and agenda of interviewees. A copy of the interview guide is included as an appendix to this report.

RESEARCH METHODOLOGY



FUTURE OF LITIGATION RESEARCH METHODOLOGY

- All interview targets were contacted in writing (preferably via email, though some were contacted by US Postal Service and/or FedEx) and subsequently by phone. The initial email contact explained the purpose of the research, ensured individual confidentiality to the research participants, identified DRI as the sponsor of the research, and requested an interview. Follow-up telephone contact was directed toward scheduling telephone interviews at a time convenient for the interviewee.
- We completed over 20 in depth interviews with a balance of experts, attorneys in private practice and knowledgeable in-house counsel.
- The results of those interviews were analyzed for recurring themes and supporting details. Together with the extensive literature review, that analysis provided the basis for this final report.
- Finally, this report of findings and recommendations was developed for DRI's for broad based publication to DRI members and other stakeholders.

FUTURE OF LITIGATION ADDITIONAL READINGS

Interim Report: On The Joint Project Of The American College Of Trial Lawyers Task Force On Discovery And The Institute For The Advancement Of The American Legal System; August 1, 2008.

2008 Litigation Trends Survey; Fulbright & Jaworski, L.L.P.; July 2008.

The Sedona Conference® Cooperation Proclamation; The Sedona Conference Working Group Series; 2008.

The Price Of Law: How The Market For Lawyers Distorts The Justice System; Gillian K. Hadfield; Michigan Law Review; February, 2000.

The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts; Marc Gallanter; Journal Of Empirical Legal Studies, Vol. 1, No. 3; November 2004.

ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution”; Thomas J. Stipanowich; Prepared for the Symposium on the Vanishing Trial; Journal of Empirical Legal Research; 2004.

Michigan’s Case Evaluation Rules: A Study in the Efficacy of Mandatory, Evaluative, and Narrow Alternative Dispute Resolution; Danielle Hessel; Michigan State University College of Law; King Scholars Thesis; 2006.

Please contact John Sterling for additional secondary research resources and/or for links to further readings.