IN THE NEWS

IAALS Focuses on Summary Judgment

Research shows variance in motion practice

BY **TONY FLESOR**
LAW WEEK COLORADO

For years, courts have targeted discovery as a pain point for the cost and efficiency of courts. But with a new report, the focus is shifting to summary judgment.

The Institute for the Advancement of the American Legal System on May 31 published a report that examines the effects of summary judgment on the cost, duration and overall effect on access to justice. The report is the next step in IAALS' efforts to streamline the court system, and depending on recommendations that come from the organization this fall, it could be the next focus for judges' case management efforts.

"I'd say the focus primarily for civil justice reform over the past 10 years has been on discovery reform — the cost and delay that litigants and attorneys and the entire system have seen in terms of discovery," said IAALS Rule One Initiative director Brittany Kauffman. "We really heard a call from those attorneys and judges we've worked with to also look at dispositive motions practice. They are feeling that it is equally contributing to the cost and delay in our system and that process can be more efficient as well."

For its recent report, IAALS studied the effects of summary judgment in 10 federal districts. According to the organization, the study "offers a window into summary judgment practice in America's federal courts and is intended to serve as the foundation for robust conversations about current practices." Overall, IAALS found that summary judgment motions are filed less frequently than expected and that filing rates, length of motions, time to disposition and time to ruling vary depending on the district.

Defendants file motions more than plaintiffs across all courts, but more so in some districts than others. The percentage of cases in which they're used ranges from 24 percent to 43 percent, and the time to disposition for cases with summary judgment motions ranges from 350 days in Virginia to 1,039 days in Connecticut.

"It's probably driven most importantly by individual judges and the philosophy of the districts," Kauffman said. "Some embrace efficient motions process and ruling process before them and have an expedited approach. The variation across districts highlights the different approaches to summary judgment across the country, and we can learn and inspire other districts to be more efficient."

In Denver, for instance, summary judgment motions are filed in just more than a quarter of cases — the second-lowest of the 10 studied districts — but pre-motion conferences are held for only 0.9 percent of instances where motions are filed. Using such conferences could make an impact on whether motions are even filed and how effective they are when they do get filed. According to IAALS, that is one of the innovative ways judges are currently working to make cases more efficient.

Peter Koclanes, a partner at Sherman & Howard said he has had pre-motion or scheduling conferences — though not summary judgment conferences specifically — before Magistrate Judge Kathleen Tafoya and Judge R. Brooke Jackson in complicated cases in Colorado's federal court. Koclanes said both judges were careful not to preclude the parties from filing motions but instead focused on having a dialog with both plaintiffs' and defense counsel about what they thought the

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> **"THERE IS A LOT OF ROOM TO MAKE THE PROCESS MORE EFFICIENT."**
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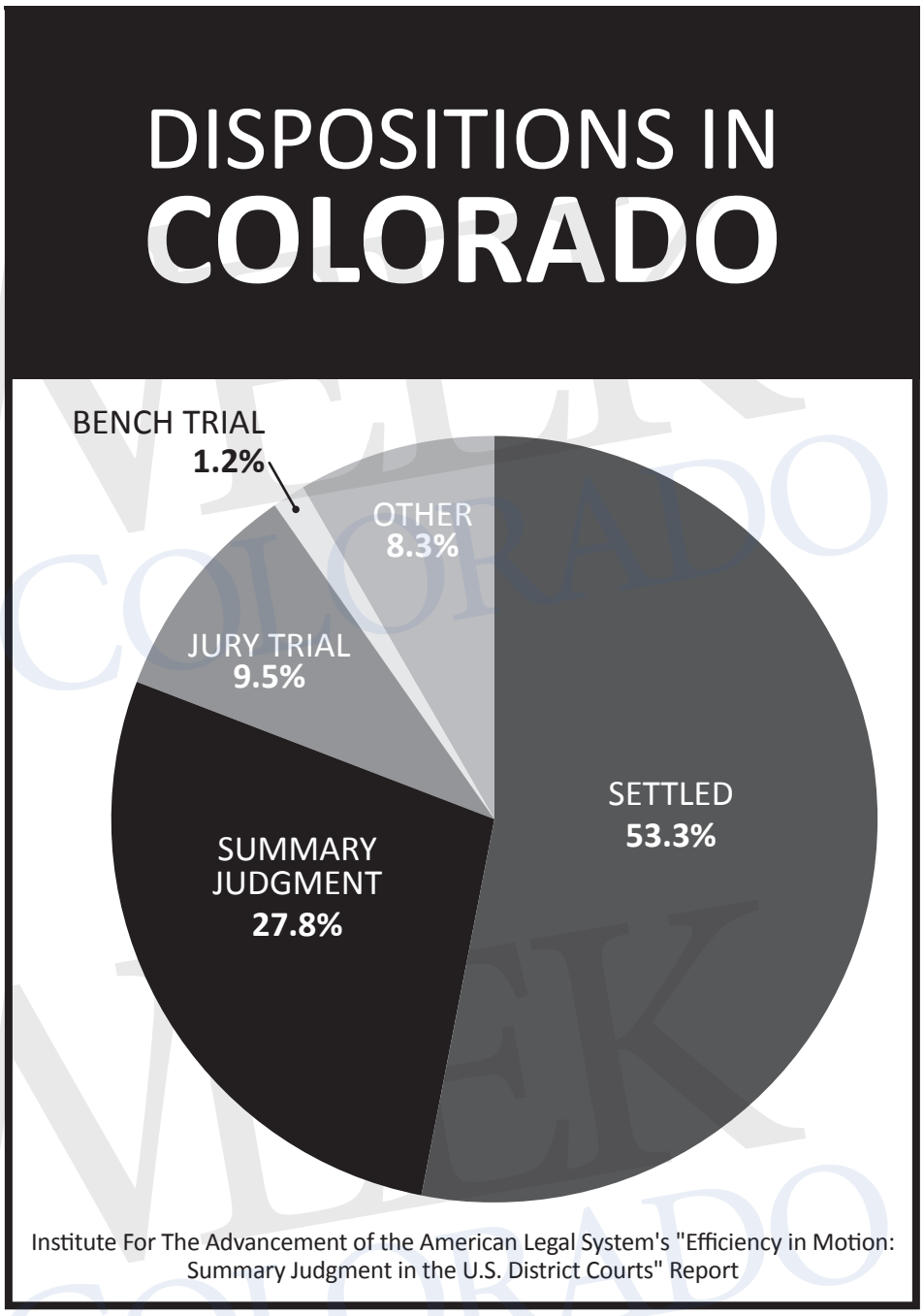

Institute For The Advancement of the American Legal System's "Efficiency in Motion: Summary Judgment in the U.S. District Courts" Report

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basis might be for different motions. In a case before Tafoya, for example, he said she was effective in eliminating the need for full-blown discovery motions.

"When judges take an active role in their docket and their cases and have cold pre-motion filing conferences in order to have a dialog ... it's extremely productive, it helps the court with its resources, it helps the parties with their resources and time," Koclanes said. "It's so much more efficient than the parties filing motions and going through the briefing."

IAALS' study does say when pre-motion conferences are held, motions are just as likely to be denied but more likely to be granted in part rather than in whole. The report does not say whether pre-motion conferences are less likely to see a motion filed at all.

At this point IAALS is not offering recommendations for whether or how judges should use pre-motion conferences, but the organization is working with a group of judges and attorneys to develop best practices for dispositive motions and plans to publish those recommendations by November.

Based on IAALS' previous research on discovery, pre-motion conferences for discovery are used frequently in Colorado's federal court, and, according to Kauffman, their use has been successful in cutting back on discovery issues. She suspects that IAALS will hear similar comments regarding conferences for dispositive motions.

"For us, I think the major point is there is a lot of room to make the process more efficient," Kauffman said. "The variation across case types and districts highlight there are approaches out there that make the process more efficient. We can learn from research to look at those examples and make recommendations for best practices and make the practice across the country more efficient and effective." •

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One snafu, they said, can happen when a young heir believes he or she should have a high-level position in the business [while] they're actually ready, which might lead to them not being taken seriously because of perceptions of nepotism. Vaselaney said she has seen some of the most successful transitions happen when a young heir works for a different company for several years to learn the ropes and pay his or her dues. He or she can get better mentorship and feedback than in the business where his or her status is that of the owner's child.

"Send them off someplace else, see how well they do on their own before you bring them into the family business," she said.

Vaselaney talked about the importance of an option to buy less involved family members out of the business to head off any bitterness they might feel. One option is through estate insurance.

"Taking a kid out of a family business by giving them something else, even if you have to create it through insurance, is a better thing to do than having a disappointed minority shareholder getting no distributions while you and your sister are taking out a bunch of salary," she said. "You're just asking for a shareholder lawsuit."

And she said parents should have a conversation with their children about whether they actually want to take up the mantle of the family business, since that's not always the case.

"That is so much more important to younger people today, is they want to be doing something that they feel is fulfilling, and maybe making widgets isn't fulfilling if that's what your family business does, even if it had done it for three generations," Vaselaney said. "Maybe they're working at the business to keep you happy and they're not happy, and that's not going to work in the long run."•

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COYLE
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Monica Márquez chairs the task force in Colorado.

Coyle said when he first came to the office, there was not the same emphasis on well-being in attorney competence. He speculated excessive drinking and drug use were likely more common, and there was nothing to reduce the stigma attached to getting help.

"It was a kind of 'suck it up and tough it out' mentality," he said. "Trial lawyers were warriors. You worked hard and you played hard."

Former Snell & Wilmer partner Jessica Yates will take over as regulation counsel after June 30, but she'll start in the office June 18. She has talked with Coyle to begin the transition, and she said she has been impressed by his work with the national task force and statewide efforts to focus on professional development, such as a competency self-evaluation for lawyers released last fall. Though Yates said she doesn't have a pre-set agenda for the job, she said she wants to build on Coyle's work.

"He's shown that attorney regulation isn't just about taking the bar exam and getting your CLEs in," she said, adding his view has been that "professionalism is something that isn't static."

The OARC has rewritten or updated many sets of regulatory rules during Coyle's tenure, such as those for admissions and continuing legal education. Yates will continue the current process of rewriting the disciplinary and disability regulatory rules, which Coyle said will likely be submitted to the Supreme Court within the next six months to a year.

"I'm grateful I'm inheriting an organization that has thrived under [Coyle's] leadership," Yates said.

DIVERSITY AND ACCESS TO JUSTICE

Coyle has made regulatory objectives for diversity and inclusiveness in the legal profession another hallmark of his tenure. He said he defines diversity as bringing all segments of Colorado's demographics into the legal profession so it represents the general population.

"We're not as diverse as we'd like to be, and so we have to somehow find a way to increase the population into the legal profession." Attorney registration for 2019, which begins in December of this year, will include for the first time a section asking attorneys for self-identified demographic information, such as race, LGBTQ identity and veteran status.

Coyle said the National Task Force on Lawyer Well-Being looked at diversity and inclusiveness as an integral part of lawyer well-being.

"If the legal profession doesn't open our doors to make all members of the legal profession welcome in law firms in law firms and elsewhere, that also contributes to the depression, the anxiety, the stress, the lack of satisfaction in the legal profession," he said. "And we all suffer."

Coyle said access to justice is another challenge the legal profession will continue to face in the next several years. Lawyers address only about 15 percent of the legal services industry, he said, which leaves a large swath of the public without access to services. He said he believes Colorado is best equipped to address the issue, with the state shifting focus away from only protecting the public to promoting public interest in initiatives such as better access to justice.

"And so that's a huge challenge for the next 10 years," he said.

After his tenure ends June 30, Coyle said he plans to take 18 months off to travel and work on personal projects. Reflecting on his time at the OARC, he said he's not necessarily concerned about what other people say about his tenure, but rather that he gave his all to the role and furthered what he considered important. "That I was a part national and international discussion on how we can best improve our legal profession, and that I was helpful to my court in furthering my court's objectives."

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MICRO UNITS
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ployees.

"If they can't get the whole unit, it's for a reason," Berger said. If the union can't convince a majority of the workers to unionize, there's a problem for the union that will likely still be there even when it succeeds in organizing a smaller unit. Micro units can also disrupt worker camaraderie when the union creates what amounts to a middle school "clique" in the workplace, Berger said.

Berger and Suflas each noted that even as it can be easier for unions to win elections with so-called micro units under Specialty Healthcare, the strategy didn't seem to boost union membership overall. Union membership among U.S. wage and salary workers continued its steady decline from 11.8 percent in 2011 to 10.7 percent in 2017, according to the Bureau of Labor Statistics.

If unions begin losing NLRB determinations on micro units and then appeal them to the appellate circuit courts, an "interesting issue" will likely emerge, Suflas said. Six of the circuits have affirmed the NLRB's Specialty Healthcare standard as a reasonable interpretation of the statute. But a union appeal would put the Trump-era NLRB in the awkward position of asking the courts, to judges' irritation, to "forget" the Specialty Healthcare standard the agency fought to have affirmed just a few years previous, Suflas said.•

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