

EFFICIENCY IN MOTION

RECOMMENDATIONS FOR
IMPROVING DISPOSITIVE
MOTIONS PRACTICE IN STATE AND
FEDERAL COURTS

IAALS

INSTITUTE *for the* ADVANCEMENT *of the*
AMERICAN LEGAL SYSTEM



UNIVERSITY *of*
DENVER



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BRITTANY K.T. KAUFFMAN

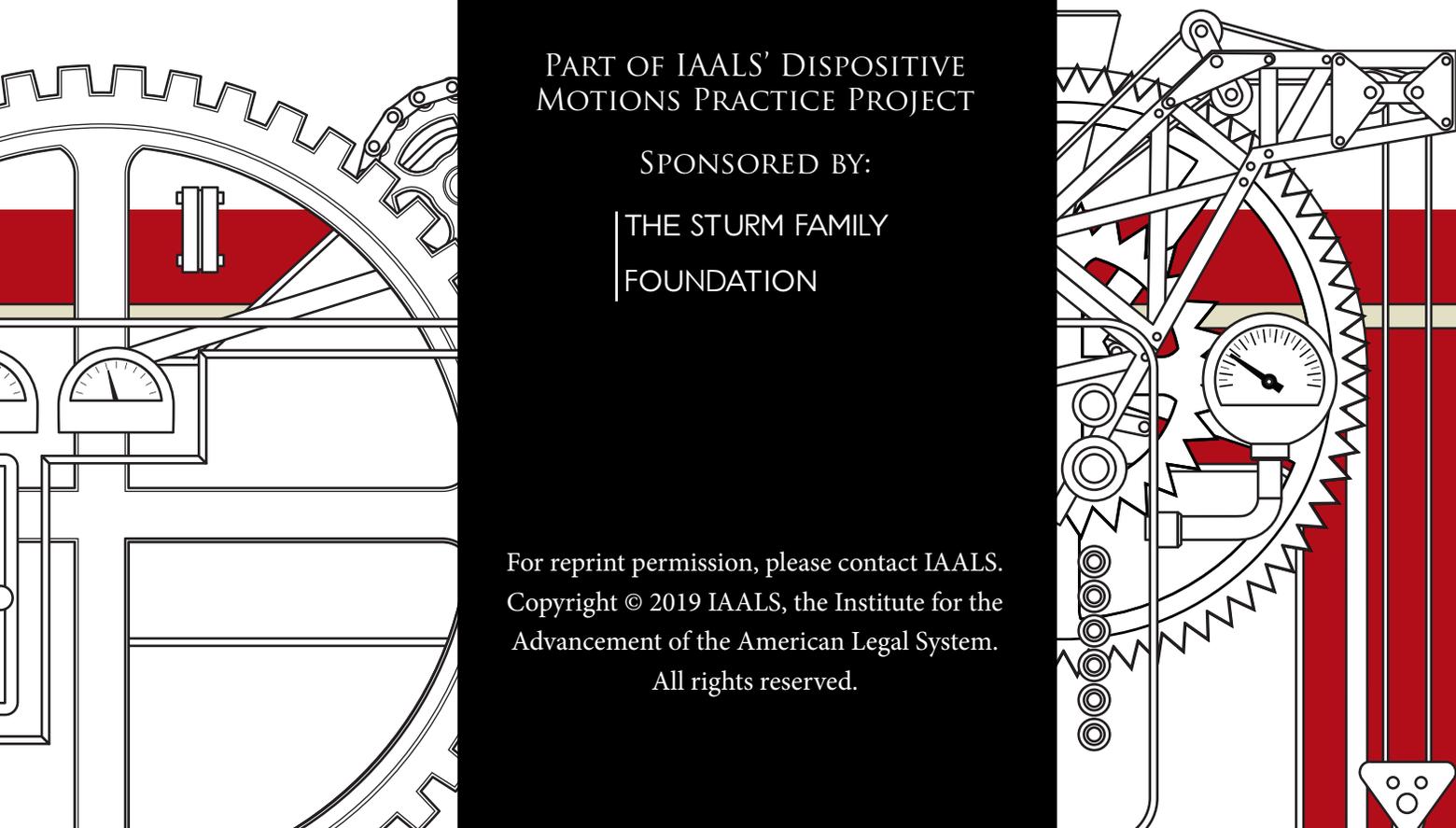
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PART OF IAALS' DISPOSITIVE
MOTIONS PRACTICE PROJECT

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INSTITUTE *for the* ADVANCEMENT
of the AMERICAN LEGAL SYSTEM



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IAALS, the Institute for the Advancement of the American Legal System, is a national, independent research center at the University of Denver dedicated to facilitating continuous improvement and advancing excellence in the American legal system. We are a “think tank” that goes one step further—we are practical and solution-oriented. Our mission is to forge innovative and practical solutions to problems within the American legal system. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications, and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models, and will to advance a more accessible, efficient, and accountable American legal system.

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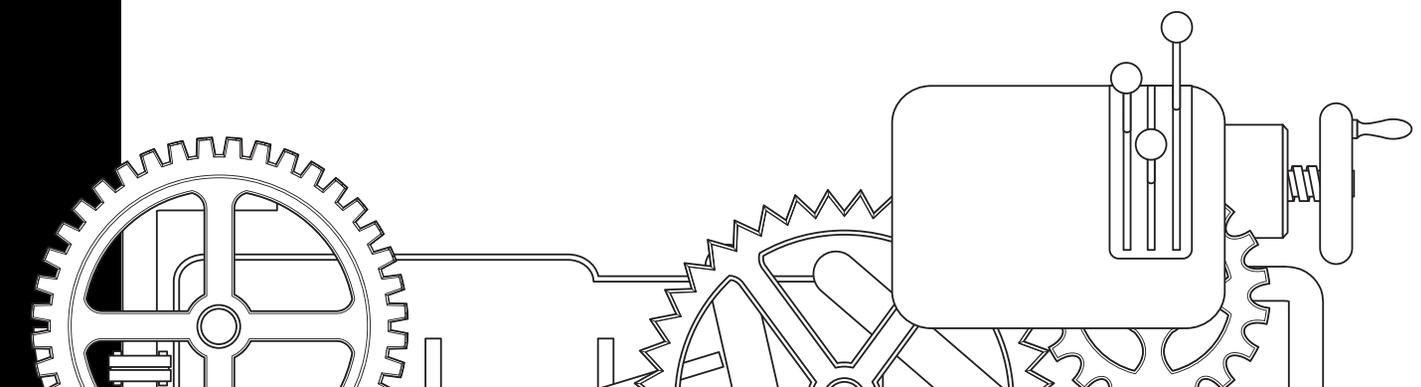
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INTRODUCTION

“Trial by jury is justly dear to the American people,” Justice Story once wrote.¹ At the same time, United States courts have always allowed judges to render judgments in cases in which the dispositive issues are legal, or the evidence is insufficient to support a verdict. One of the weightiest tasks of a trial judge today is to determine if a case should be resolved by trial, or if it is more appropriately resolved as a matter of law. The possibility of a judgment as a matter of law also strikes at the heart of an attorney’s case strategy for his or her client. Thus, while trials—and particularly the jury trial—play an essential role in the administration of justice in the United States, resolution of issues and cases by dispositive motion remains vital to the resolution of disputes in our civil system. It is also an area where reform is needed.

The two most common procedures for resolving cases as a matter of law are motions to dismiss for failure to state a claim and motions for summary judgment. Under Rule 12(b)(6) of the Federal Rules of Civil Procedure and many state counterparts, a plaintiff’s claims must be dismissed at the outset if they are unsupported by valid legal theories or sufficient factual allegations such that “no relief could be granted under any set of facts that could be proved consistent with the allegations.”² And under Rule 56 of the Federal Rules of Civil Procedure and many state counterparts, “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to material fact and the movant is entitled to judgment as a matter of law.”³

When used well, these procedures make civil litigation more efficient. If a plaintiff’s claim lacks legal merit, a motion to dismiss “streamlines litigation by dispensing with needless discovery and factfinding.”⁴ And if there are no “genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party,” there is no “need for a trial,” and summary judgment allows the court to efficiently resolve the case.⁵ Summary judgment motions also “may be utilized to separate formal from substantial issues [and] eliminate improper assertions.”⁶ In short, dispositive motions serve an important role in the pre-trial process.

But while dispositive motions can make civil litigation more efficient, they can also have the opposite effect. Excessive or improper motions, inefficient processes, and untimely rulings by the court can inject significant cost and delay into the system. Recognizing this, attorneys and judges around the country have highlighted dispositive motion practice as an important area for reform. In response, IAALS, the Institute for the Advancement of the American Legal System at the University of Denver, undertook a multi-phase project, titled *Efficiency in Motion*, to identify the issues associated with dispositive motions practice and propose recommendations for reform.

1 *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433, 446 (1830).

2 *Neitzke v. Williams*, 490 U.S. 319, 327 (1989).

3 Fed. R. Civ. P. 56.

4 *Neitzke*, 490 U.S. at 326–27.

5 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250–51 (1986).

6 10A Fed. Prac. & Proc. Civ. §2712 (4th ed.).

As a first step, IAALS undertook a summary judgment docket study of federal PACER data from ten United States District Courts around the country to report on the current use of summary judgment in federal court. The study began in 2017 and culminated in a report, *Efficiency in Motion: Summary Judgment in the U.S. District Courts*, published in May 2018.⁷

In tandem with the docket study, IAALS hosted a convening in November 2017 of a group of judges, attorneys, and scholars from around the country focused on the challenges of dispositive motions practice and solutions designed to decrease cost and delay. Over two days, the group identified problems and brainstormed practical solutions. The discussion was informed by preliminary results from IAALS' docket study, as well as other compiled research on motions to dismiss and motions for summary judgment. Judge Jeremy Fogel, former Director of the Federal Judicial Center, and Judge John D. Bates, Chair of the Advisory Committee on Civil Rules, presented their takeaways from having moderated the American Bar Association Section of Litigation Roadshow 2.0, "*Precision Advocacy: Reinventing Motion Practice to Win*." Possible solutions from the convening ranged from rule reforms to on-the-ground practices that could be employed by courts and parties.

Following the convening, IAALS created a smaller Working Group to dive deeper and develop a set of recommendations for reform, informed by the research. To further inform the Working Group's recommendations, IAALS conducted a survey of American College of Trial Lawyers (ACTL) state committee members from around the country to get input on the effectiveness of potential innovations.⁸ In addition, IAALS conducted additional analysis of docket data from IAALS' *Efficiency in Motion* docket study.⁹

This report is the culmination of that effort. The following Principles and Recommendations are intended to advance and amplify the national conversation about pre-trial processes that contribute to cost and delay, thereby undermining access to justice for all. The Recommendations build off of IAALS' work with the ACTL Task Force on Discovery and Civil Justice's *Report on Progress and Promise*,¹⁰ with a continuing focus on how we can best achieve a more "just, speedy, and inexpensive" system for all.

7 BRITTANY K.T. KAUFFMAN AND LOGAN CORNETT, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *EFFICIENCY IN MOTION: SUMMARY JUDGMENT IN THE U.S. DISTRICT COURTS* (2018) [hereinafter *SUMMARY JUDGMENT*].

8 The results have been summarized and included in Appendix A.

9 We looked back at the data collected in support of the Summary Judgment Report, *supra* note 7, to further inform this report and recommendations. In particular, we reviewed all cases, including those with no summary judgment motion filed, that met our other study inclusion criteria in the District of Maine to better understand the application of their local rules, including the notice of intent to file a pre-motion conference and pre-motion conferences.

10 INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. AND AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND CIVIL JUSTICE, *REFORMING OUR CIVIL JUSTICE SYSTEM: A REPORT ON PROGRESS AND PROMISE* (2014) [hereinafter *REPORT ON PROGRESS AND PROMISE*].

ANIMATING PRINCIPLES

PRINCIPLE 1: “One size does not fit all.” The dispositive motions process must be right-sized and tailored to the needs of the case.

PRINCIPLE 2: Motions are part of the whole case and should not be addressed in a vacuum.

PRINCIPLE 3: Courts should rule promptly on dispositive motions.

PRINCIPLE 4: Summary judgment motions are not appropriate for all cases.

PRINCIPLE 5: Cooperation and communication between counsel is critical to the speedy, effective, and inexpensive resolution of dispositive motions.

RECOMMENDATIONS

RULE 12 RECOMMENDATIONS

RECOMMENDATION 1: Before filing a motion to dismiss, the parties should meet and confer in a good faith, substantive, and meaningful way.

RECOMMENDATION 2: Non-jurisdictional motions to dismiss should be resolved by the court through a collaborative, expedited process.

RULE 56 RECOMMENDATIONS

RECOMMENDATION 3: When summary judgment deadlines are built into the case scheduling order as an expected event at the outset of the case, it likely encourages the reflexive filing of motions. Instead, courts should set a date by which the parties must alert the court that a summary judgment motion will be filed.

RECOMMENDATION 4: Judges should hold a summary judgment pre-motion conference in any case in which a conference will focus and potentially even resolve some of the issues.

GENERAL RECOMMENDATIONS

RECOMMENDATION 5: Absent unusual circumstances, federal district judges should not refer dispositive motions to magistrate judges for an initial report and recommendation.

RECOMMENDATION 6: Judges likely already have the power to adopt these practices, but putting these processes in the rules and making the court’s power explicit will encourage their use.

RECOMMENDATION 7: Education is critical to encourage both judges and attorneys to rethink their current approach to motions practice and develop a more collaborative, focused, and efficient approach to this process.

RECOMMENDATION 8: To support efficient motions practice, courts must track standardized, real-time case data and utilize this information at all levels to improve case management. In addition, courts should publish measurement data as a way of increasing transparency and accountability.

TOWARD A NEW PARADIGM FOR MOTION PRACTICE

To fully understand the issues and areas for improvement, we start with the research. National survey data on dispositive motions is informative. One takeaway is that plaintiff and defense attorneys have very different views about dispositive motions practice. Plaintiff attorney survey respondents nationwide tend to believe that “summary judgment motions are used as a tactical tool rather than a good faith effort to narrow the issues,”¹¹ that “summary judgment motions practice increases cost and delay without proportionate benefit,”¹² and that “judges grant summary judgment more frequently than appropriate.”¹³ Defense attorneys tend to disagree with each of these propositions.¹⁴ Instead, defense attorneys point to the use of dispositive motions to address overreaching and unsupportable claims. These divergent views contribute to tensions within individual cases as well as in the appetite for reform.

On the other hand, judges often express frustration with dispositive motions and what they see as attorneys reflexively filing such motions in every case. When surveyed, about two-thirds of federal judges indicated their belief that summary judgment motions are filed in “almost every case.”¹⁵ Our recent summary judgment docket study of ten federal district courts showed that, in fact, summary judgment motions “are filed in fewer cases than the bench and bar might expect.”¹⁶ Summary judgment motions were filed in approximately 13.7 percent of cases, with that percentage varying from 9.7 percent to 22 percent across districts.¹⁷

11 AM. BAR ASS’N, ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: FULL REPORT 113 (2009) [hereinafter ABA LITIGATION SURVEY]; REBECCA M. HAMBURG & MATTHEW C. KOSKI, NAT’L EMP’T LAWYERS ASS’N, SUMMARY OF RESULTS OF FEDERAL JUDICIAL CENTER SURVEY OF NELA MEMBERS, FALL 2009 38 (2010) [hereinafter NELA SURVEY]; KIRSTEN BARRETT ET AL., MATHEMATICA POLICY RESEARCH, ACTL CIVIL LITIGATION SURVEY: FINAL REPORT app. C, tbl. VIII.1 (2008) [hereinafter ACTL FELLOWS SURVEY] (on file with authors).

12 ABA LITIGATION SURVEY, *supra* note 11, at 114; NELA SURVEY *supra* note 11, at 38; ACTL FELLOWS SURVEY *supra* note 11, at app. C, tbl. VIII.1.

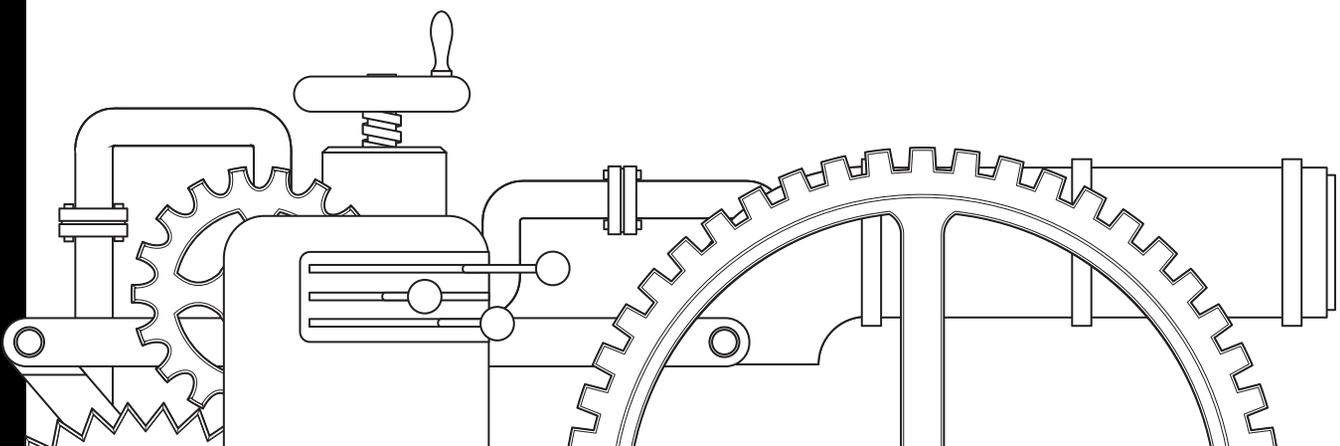
13 ABA LITIGATION SURVEY, *supra* note 11, at 116; NELA SURVEY *supra* note 11, at 38; ACTL FELLOWS SURVEY *supra* note 11, at app. C, tbl. VIII.1.

14 ABA LITIGATION SURVEY, *supra* note 11, at 113, 114, 116; ACTL FELLOWS SURVEY *supra* note 11, at app. C, tbl. VIII.1.

15 CORINA GERETY, TRIAL BENCH VIEWS: FINDINGS FROM A NATIONAL SURVEY ON CIVIL PROCEDURE 40 (2010).

16 SUMMARY JUDGMENT, *supra* note 7, at 1.

17 *Id.*



The judges' perceptions are likely driven by their day to day experiences, particularly at the federal level, as a judge's time is largely spent on resolving motions. For cases that do proceed to the summary judgment stage, the time and cost associated with such briefing on the part of the attorneys, and with resolution on the part of the courts, is significant.¹⁸ The docket study confirmed that a considerable number of cases in our system do resolve through summary judgment motions—although not as high a number as some attorneys or judges might suspect—and these cases involve a major expenditure of time and resources on the part of both the bench and the bar.

Attorneys on both sides of the “v” also raise concerns about the timeliness of the courts' rulings on motions when they are filed. In three national surveys, a majority of attorneys agreed that judges “routinely fail to rule on summary judgment motions promptly.”¹⁹ While IAALS' summary judgment docket study highlighted that judges in some jurisdictions rule relatively quickly (e.g., an average time to ruling of 65 days in the Eastern District of Virginia²⁰), rulings in other federal district courts take six months or more on average. These findings are consistent with IAALS' prior docket study of federal courts in 2009, which found significant variations across courts with respect to the time it takes to rule on both motions to dismiss and motions for summary judgment.²¹

For motions to dismiss, there is cost and delay associated with the multiple rounds of briefing and amendments that often accompany such motions, particularly following *Bell Atlantic Corp. v. Twombly*²² and *Ashcroft v. Iqbal*.²³ A recent study showed that 21 percent of motions to dismiss resulted in the plaintiff being permitted to amend the complaint to fix defects, and 17 percent were denied outright.²⁴ Given these results, there are opportunities to minimize the time and cost associated with briefing and ruling on these motions, thus making the entire process more efficient for the court and the parties.

The research above focuses primarily on federal court, and it is important to recognize the significant differences in our state courts. In comparison to the finding in IAALS' recent docket study that summary judgment was granted in whole in 5.9 percent of studied federal cases,²⁵ the National Center for State Courts' recent *Landscape of Civil Litigation in State Courts* found that just 1 percent of state cases were disposed of by summary judgment.²⁶ Looking at the trends over time in state court, the NCSC data shows a significant decline from 1992, when 4 percent of state cases were disposed of by summary judgment.²⁷ Cases with summary judgment motions are among the longest-lasting cases in state court,²⁸ and they are also the cases with the highest percentage of attorney representation (61 percent of cases have both sides represented).²⁹

18 *Id.* at 25.

19 ABA LITIGATION SURVEY, *supra* note 11, at 115; NELA SURVEY *supra* note 11, at 38; ACTL FELLOWS SURVEY *supra* note 11, at 61.

20 SUMMARY JUDGMENT, *supra* note 7, at 26.

21 INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21ST CENTURY ANALYSIS 5, 45, 48, 51 (2009) [hereinafter CIVIL CASE PROCESSING].

22 550 U.S. 544 (2007).

23 556 U.S. 662 (2009).

24 Patricia W. Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 614 (2012).

25 SUMMARY JUDGMENT, *supra* note 7.

26 PAULA HANNAFORD-AGOR, SCOTT GRAVES, AND SHELLEY SPACEK MILLER, NATIONAL CENTER FOR STATE COURTS, CIVIL JUSTICE INITIATIVE: THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS iv (2015) [hereinafter LANDSCAPE OF CIVIL LITIGATION].

27 *Id.* at 7.

28 *Id.* at 31.

29 *Id.* at 33.

A NEW APPROACH TO DISPOSITIVE MOTIONS FOR THE BENCH AND BAR

The research discussed above highlights issues related to both motions to dismiss and to motions for summary judgment, as well as the significant differences across and within our state and federal systems. Jumping off from this research and their own experiences—with the goal of improving access to justice and the just, fair, and efficient resolution of disputes—the Working Group members identified several areas for recommendations.

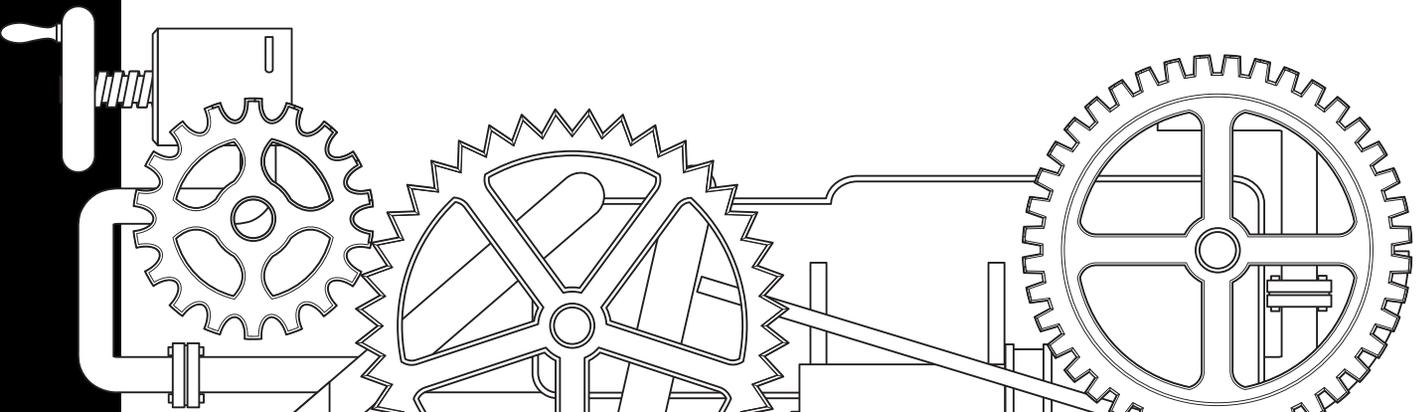
First, the Working Group emphasized the need for timely rulings. When dispositive motions are not ruled on promptly, the case can grind to a halt. With motions to dismiss, a court's failure to rule promptly causes unnecessary front-end delay. Failure to rule promptly on motions for summary judgment results in unnecessary expense in preparation for trial, a continued trial date, or both. IAALS' summary judgment docket study highlighted significant differences in time to ruling across districts,³⁰ as well as clear opportunities for improvement.

In addition to timeliness, the group identified the need for more active engagement from judges with respect to motions practice. When judges are engaged and actively managing motions as an integral part of the pre-trial process, motions practice can contribute to efficiency; but when the judge is not engaged, the opposite is true. Judge Lee Rosenthal and Professor Steven Gensler best summed up our hopes in their 2013 essay, *The Reappearing Judge*:

[W]hen we look at the current scheme, we see one that is flush with opportunities for live interactions and exchanges between judges and lawyers. We see extraordinary potential for reconnecting trial judges with lawyers and the litigants they represent. We see important opportunities for lawyers to be advocates for their clients in live proceedings before judges. We see a civil pretrial process in which the best case-management practices make trial judges more visible, not less, and the case-management tools more effective as a result.³¹

30 SUMMARY JUDGMENT, *supra* note 7, at 26.

31 Steven S. Gensler and Lee H. Rosenthal, *The Reappearing Judge*, 61 KAN. L. REV. 849, 852 (2013).



We embrace this vision of active case management and encourage judges to take a proactive approach to managing dispositive motions within the broader context of the pre-trial process.

While our focus is primarily on judicial case management, we also recognize that case management must be viewed more broadly to include the full complement of the court.³² This is particularly important in state court where judges have larger dockets and fewer law clerks and support staff. Thus, our recommendation embraces the concept of a case management team, with judicial leadership but not necessarily judicial action at every step.

Third, a shift in approach is needed on the part of attorneys. Motions practice has become a routine part of civil litigation, particularly in federal court and complex state court cases. As one judge has shared, “Today’s generation of lawyers seems more comfortable with motion practice than trial practice.”³³ For lawyers, unfortunately, motions practice has become just that—routine. Lawyers do not always approach motions practice with a broader view of the case and the goal of overall efficiency for their client; instead, they “file motions, including motions for summary judgment, without questioning whether to file the motion or to do so in a more tailored way.”³⁴ The Working Group recognized that motions also may be filed for reasons other than dismissal, including framing the issues in the case and educating the judge, as well as informing settlement discussions. Some of these goals, however, could be served in other ways that are not as costly and time intensive. And when motions are filed, the arguments and briefing should be more focused and streamlined. Even more problematic is when lawyers file motions, at least in part, to increase the litigation burden on the opposing party and force a settlement or dismissal of the case.

Finally, the Working Group recognized that there is often a lack of communication and cooperation between the parties, which leads to an unnecessarily adversarial climate that also increases cost and delay. The litigation process could be more cooperative, efficient, and civil if issues were discussed, with or without a judge, with the goal of cooperation and compromise where appropriate.

Our goal in reforming dispositive motions practice is not to discourage the filing of dispositive motions. They play a critical role in our system, as they can be an important avenue for resolving cases expeditiously. Rather, our goal is to encourage courts and judges to be creative and attentive in managing motions practice, including ruling on motions in a timely manner, and to encourage attorneys to be thoughtful and focused when bringing them. Our vision is a system in which courts and judges are actively engaged, including providing input and guidance early in the process and ruling quickly when motions are filed. We also envision more intentional and focused lawyering, with increased communication and cooperation.

32 BRITTANY K.T. KAUFFMAN AND NATALIE KNOWLTON, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., REDEFINING CASE MANAGEMENT (2018) [hereinafter REDEFINING CASE MANAGEMENT].

33 See comments on file with author.

34 BRITTANY K.T. KAUFFMAN, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CHANGE THE CULTURE, CHANGE THE SYSTEM 10 (2015) [hereinafter CHANGE THE CULTURE, CHANGE THE SYSTEM].

AN IMPORTANT NOTE ABOUT THE RECOMMENDATIONS THAT FOLLOW:

Moving toward a new paradigm for motion practice is not without its challenges. Throughout this project, the research and discussions both within the Working Group and externally have highlighted numerous tensions that must be taken into account in developing recommendations. These challenges may explain why dispositive motions reform has taken a back seat to other issues in civil justice reform.

First, there is a fine line between improving the process and adding cost and delay. This tension exists in other areas of civil justice reform, including discovery, but it is particularly challenging for motions practice. Although the inclusion of additional procedures such as pre-motion letters and conferences may increase the amount of procedure in a particular case, the goal is never to add unnecessary procedure. “A stitch in time saves nine” in many situations. Our conversations with judges and attorneys from across the country confirm that having a judge actively involved in shaping dispositive motion practice can help streamline motions and provide valuable data to attorneys and clients about a judge’s “temperature,” which can help inform litigation strategy and settlement prospects. A screening process for motions to dismiss may also help the parties quickly identify cases in which a complaint can easily be corrected with an amendment, thereby obviating the need for additional rounds of briefing.

There are also differences across state and federal systems that make it difficult to develop a set of one-size-fits-all recommendations. State court civil dockets tend to be dominated by debt collection, landlord-tenant, and other small-claims cases. And in the majority of those cases, at least one party is not represented by a lawyer.³⁵ In addition, state court dockets are much larger, staff and support resources are more limited, and motions may not be individually assigned to a single judge, particularly for simple cases. Strategies for resolving dispositive motions in state court, therefore, may not mirror those that work best in the federal system. And, we cannot ignore that there are simple cases in federal court as well that would benefit from a tailored approach.

Despite these challenges—and because of them—we have taken up the charge to reform dispositive motions practices in state and federal court. This report proceeds in two parts. First, we have developed a number of animating principles to guide judges’ and attorneys’ thinking about dispositive motions practice. By changing the culture regarding dispositive motions, we hope and expect that the system will improve accordingly.³⁶

Second, we include a set of specific recommendations with the goal of balancing the above tensions and making the system more efficient, less costly, more accessible, and more just.³⁷ Building off of our first Principle that “one size does not fit all,” reforms in this area must necessarily be tailored across systems and cases to ensure a positive impact. The recommendations include tools that judges and courts can deploy in a targeted fashion to help change the culture and move toward a new paradigm for dispositive motions practice.

35 LANDSCAPE OF CIVIL LITIGATION, *supra* note 26, at iv.

36 CHANGE THE CULTURE, CHANGE THE SYSTEM, *supra* note 34, at 1–2.

37 REPORT ON PROGRESS AND PROMISE, *supra* note 10, at 3.

ANIMATING PRINCIPLES

PRINCIPLE 1: “One size does not fit all.” The dispositive motions process must be right-sized and tailored to the needs of the case.

The 1938 creation of uniform, transsubstantive rules of procedure was a boon to efficiency and simplicity in our federal courts. After decades of experience across a variety of case types, however, it is clear that a one-size-fits-all approach creates inefficiencies in particular cases.³⁸

Recent efforts to reform civil litigation have focused on making discovery proportional to the needs of the case.³⁹ The concept of proportionality has been central to recent shifts in thinking about discovery practice, and the 2015 amendments to the federal rules brought new focus to the concept by moving proportionality into the scope of discovery under Rule 26(b)(1). In determining whether discovery is proportional to the needs of the case, there are a number of enumerated factors to be considered, including the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.⁴⁰ The concept of proportionality is largely new to dispositive motions practice, but is nonetheless applicable. The intention is not to carry over the exact proportionality analysis in discovery to dispositive motions, but rather to think about aligning motions practice more broadly with the needs of the case.

At the state level, recent recommendations from the Conference of Chief Justices’ Civil Justice Improvements (CJI) Committee adopt this idea of proportionality and extend it to the entire pre-trial process under the concept of “right-sizing”—tailoring the rules, procedures, and resources to the needs of the case.⁴¹ The need for parties and judges to change their mindset from a one-size-fits-all approach to motions practice to a process tailored to the needs of the case underlies the recommendations in this report. Introducing the concepts of proportionality and right-sizing to dispositive motions practice is the cornerstone of our efforts to develop a new paradigm for dispositive motions that is more “just, speedy, and inexpensive.”⁴²

The judge plays a critical role in tailoring processes and procedures to best fit the needs of the case. For example, some issues raised in a motion to dismiss or a motion for summary judgment may be complex and require full briefing, while others may be clear-cut enough to be resolved through short filings with key authorities. A judge may be able to avoid ruling on a motion to dismiss by allowing the plaintiff to self-correct any deficiencies in the complaint perceived by the defendant. A judge may determine that it would be helpful to hold a conference before a dispositive motion is filed to help the parties focus on and narrow potential issues. In other cases, the court may find oral argument is needed after the motion is fully briefed, or that oral

38 Joshua M. Koppel, *Tailoring Discovery: Using Nontranssubstantive Rules to Reduce Waste and Abuse*, 161 U. PA. L. REV. 243, 261 (2012); REPORT ON PROGRESS AND PROMISE, *supra* note 10, at 4.

39 See generally REPORT ON PROGRESS AND PROMISE, *supra* note 10, at 17-18; Memo from Hon. David G. Campbell to Hon. Jeffrey Sutton re: Proposed Amendments to the Federal Rules of Civil Procedure, Rules Appendix B-1 (2014); Utah R. Civ. P. 26(b)(1).

40 Fed. R. Civ. P. 26(b)(1).

41 CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL, RECOMMENDATIONS TO THE CONFERENCE OF CHIEF JUSTICES BY THE CIVIL JUSTICE IMPROVEMENTS COMMITTEE 18 (2017) [hereinafter CALL TO ACTION].

42 Fed. R. Civ. P. 1.

argument may be more efficient than a reply brief. It may be that a ruling from the bench may be more efficient than a written decision. Not every case requires a law review opinion, and an immediate ruling may be most beneficial. The judge can issue a follow-up opinion later in the case if needed. In short, judges need to tailor their approach to promote efficiency and expediency in a particular case.

How can judges do this effectively? They must be actively involved in managing dispositive motions practice. The benefits of active case management are well documented.⁴³ Judges who meet with parties early and often can help move cases along in an efficient, speedy, and predictable manner. And judges who take the time to make an initial assessment of a case are best positioned to evaluate the particular needs of the case and determine how it should proceed.⁴⁴ Judges must also work with their staff to engage them as a team in case management, including management of dispositive motions.

Given the different landscape of state court civil litigation, we have to think differently about how to best right-size dispositive motions practice.⁴⁵ Many state court systems are moving toward or have already adopted a system in which cases are assigned to one of three pathways at the time of filing based on the complexity of the case.⁴⁶ Each pathway matches the procedures, resources, and case management to the needs of the assigned cases. Streamlined cases (e.g., debt collection and landlord-tenant cases) have limited discovery and require less oversight by the judge. For these simpler cases, intensive judicial case management throughout the pre-trial process is rarely necessary and instead clear rules, procedures, and deadlines are critical, with flexibility for increased court involvement when necessary.⁴⁷ In these cases, non-judicial staff and technology can play an important role in case management.⁴⁸ General and complex cases, on the other hand, benefit from closer judicial supervision.⁴⁹

Like discovery, dispositive motions procedures in state court must be similarly tailored to work within this three-pathway approach. For instance, streamlined cases may rarely involve summary judgment motions, and those motions filed will likely be limited to a small number of issues. Clear rules and timely rulings in the streamlined pathway are important to ensure motions are resolved quickly. General and complex cases, on the other hand, would benefit from much of the same flexible judicial case management as the majority of federal

43 See, e.g., NATALIE ANNE KNOWLTON & RICHARD P. HOLME, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. AND AMERICAN COLLEGE OF TRIAL LAWYERS, WORKING SMARTER, NOT HARDER: HOW EXCELLENT JUDGES MANAGE CASES (Jan. 2014) [hereinafter WORKING SMARTER, NOT HARDER].

44 *Id.* at 8.

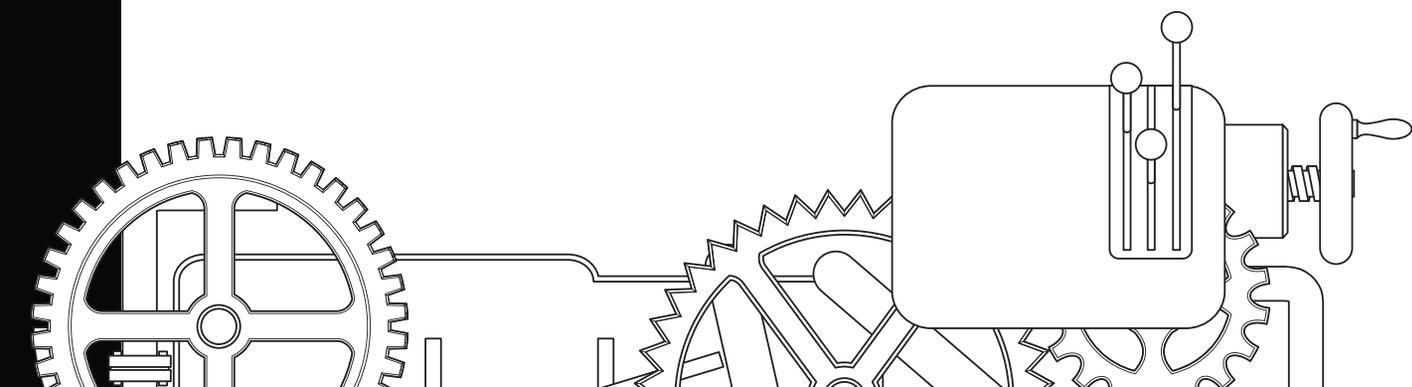
45 See generally LANDSCAPE OF CIVIL LITIGATION, *supra* note 26.

46 See, e.g. CALL TO ACTION, *supra* note 41, at 19-20.

47 *Id.* at 21-22.

48 *Id.* at 29-32. See generally NATIONAL CENTER FOR STATE COURTS, CIVIL JUSTICE INITIATIVE: A GUIDE TO BUILDING CIVIL CASE MANAGEMENT TEAMS (2017).

49 *Id.* at 23-27.



cases. State procedural rules for civil case pathways should therefore ensure that the procedures in place for dispositive motions are right-sized to the type of case.

PRINCIPLE 2: Motions are part of the whole case and should not be addressed in a vacuum.

There is a tendency for both the courts and the parties to think about dispositive motions as a single event rather than considering a motion within the broader context of the case. A shift in thinking is necessary within both the bench and the bar to consider motions within the greater plan for case resolution, including the interplay of motions with discovery, settlement, and trial preparation.

For the court, this shift means that judges must consider the role of dispositive motions in the life of the case. When are such motions anticipated and how do they affect the timing of other case events, including the case management conference, discovery, settlement discussions, and trial? Too often dispositive motions are allowed to disrupt the schedule and flow of the case. The court should factor these motions into the larger context of the case and manage the case accordingly. When a motion to dismiss is filed, should the judge stay discovery or not? Should the parties be encouraged to bring a motion for summary judgment as a partial motion early in the case to help resolve a specific issue, with more focused discovery thereafter? Judges and lawyers need to think—and engage in conversations with each other—about how these motions are linked to the rest of the pre-trial process and then tailor the process accordingly.

Several of the 2015 federal rule amendments promote earlier and more active judicial case management, including more robust case management conferences.⁵⁰ “An important part of this management is an initial case management conference where judges confer with the parties about the needs of the case and fashion an appropriate schedule for litigation.”⁵¹ In addition to an in-depth discussion regarding a discovery plan, the case management conference should also include a discussion about dispositive motions. We are in the midst of a culture change toward more robust discussions regarding discovery at these conferences, and we encourage these discussions to include dispositive motions as well. “Case management lets judges work to devise practical solutions to pressing problems and to shape cases toward pre-trial preparation that is reasonable and proportional to what each case requires.”⁵² Just as this is true for discovery, it also is true for dispositive motions.

This principle applies to attorneys as well. Rather than reflexively filing motions based on the deadline in the scheduling order, attorneys should spend time early in the case determining whether such motions should be filed, when, and how best to craft the motion given the other issues in the case. Just as the 2015 federal rule amendments encourage the parties to be creative in their approach to discovery,⁵³ so, too, should the parties think creatively about motions practice.

⁵⁰ Memo from Campbell to Sutton, *supra* note 39, at Rules Appendix B-12.

⁵¹ *Id.*

⁵² Gensler and Rosenthal, *supra* note 31, at 857.

⁵³ See Hon. Craig B. Shaffer, *The “Burdens” of Applying Proportionality*, 16 SEDONA CONF. J. 55, 113 (2015).

PRINCIPLE 3: Courts should rule promptly on dispositive motions.

There is no denying that judges have a tough job staying on top of their cases and ruling expeditiously on all dispositive motions. With a significant number of vacancies in the federal judiciary, and a never-ending flow of cases in many state court systems, it is easy for judges to fall behind and for pending motions to remain outstanding for too long.

In conjunction with the ACTL Task Force, IAALS has previously recommended that judges promptly rule on all motions, giving greater priority to those that will advance the case more quickly.⁵⁴ Dispositive motions, almost by definition, fall into that category.

A pending motion to dismiss may stop all discovery and bring the case to a halt until it is resolved. Parties will be unlikely to negotiate further on a settlement until they know whether the judge will allow the case to proceed.

A summary judgment motion may also bring the case to a standstill, as parties have little incentive to negotiate a settlement or begin to prepare for trial until the motion is resolved. Moreover, if a judge waits until shortly before trial to deny a summary judgment motion, parties may lack adequate time to prepare for trial, which may necessitate continuing the trial date. On the other hand, cautious parties may start to prepare for trial only to find that summary judgment is granted and their preparation is wasted.

Conversely, a meritorious motion to dismiss or motion for summary judgment will result in the case being completely resolved without further ado—an efficient resolution of the case. Judges must implement procedures that prioritize consideration of dispositive motions and prompt rulings. The parties are the ones who bear the costs of failure to do so.

Of course, dispositive motions take time to resolve precisely because so much is at stake. Such motions are especially time-consuming when they involve complex or novel issues of law. However, even in those instances, judges who implement the recommendations in this report may find that they are better prepared to address dispositive motions in an efficient manner.⁵⁵ A collaborative, expedited approach to motions to dismiss has the potential to help judges resolve those motions much more quickly. Holding a pre-motion conference in particular has the potential to help judges rule quickly on motions, as judges are educated in advance by the pre-motion letters and are able to ask questions during the conference to clarify issues and inform their rulings.⁵⁶ The resulting motion may itself be more targeted. But with or without a conference, judges must commit to ruling on dispositive motions in a timely fashion.

54 REPORT ON PROGRESS AND PROMISE, *supra* note 10, at 13.

55 *Id.* at 14; WORKING SMARTER, NOT HARDER, *supra* note 43, at 23–26.

56 IAALS' summary judgment docket study found "the trend of the results suggest a *longer* time to ruling in instances where a pre-motion conference was held versus not." SUMMARY JUDGMENT, *supra* note 7, at 35. There is relatively little empirical research regarding pre-motion conferences in the context of summary judgment, and it is an area where additional research, including qualitative research, would be informative.

PRINCIPLE 4: Summary judgment motions are not appropriate for all cases.

“Lawyers are taught to look under every stone.”⁵⁷ Because attorneys are trained to pursue every avenue to win a case for their client, many translate this to using every procedural opportunity available regardless of cost, delay, or chance of success. The tendency to be risk-averse, coupled with the fear of committing malpractice, exacerbates the belief that attorneys should fight every possible battle.

The increasingly adversarial nature of litigation has sometimes led to the overzealous use of summary judgment motions. Some lawyers appear to file motions at least in part to increase the litigation burden on the opposing party and force a settlement or dismissal of the case. Summary judgment has an important role to play in many cases, and when used correctly it can resolve a case much more efficiently than proceeding to trial. But the incentive to fight every battle can sometimes work against, rather than for, efforts to make the justice system more efficient. And scorched-earth, win-at-all-cost litigation tactics can get in the way of the best interests of clients, who are seeking a fair and timely resolution that is not needlessly expensive.

From our discussions with judges and attorneys, it is clear that some attorneys reflexively file summary judgment motions. There are some cases in which the attorneys should clearly recognize the existence of a genuine dispute of material fact and know that summary judgment is not appropriate. To file such a motion is inefficient for the client and for the system. Attorneys sometimes choose to file summary judgment motions for reasons other than dismissal, including framing the issues in the case, educating the judge, or advancing settlement discussions. But summary judgment motions are not intended for these purposes, and they are too time-consuming and expensive to be used for these reasons. We need to find alternate ways to meet those needs through processes that are less expensive and time consuming for both the bench and the bar. The recommendations here are a move in this direction. Engaged judicial case management across the entire pre-trial process, particularly for complex cases, is also critical, so that there are ample opportunities for interaction with the parties.⁵⁸

PRINCIPLE 5: Cooperation and communication between counsel is critical to the speedy, effective, and inexpensive resolution of dispositive motions.

IAALS has previously written about the importance of communication between opposing counsel for promoting accountability and collegiality. If we look back just 25 years ago, “when lawyers would call opposing counsel as a matter of habit to resolve or clarify issues, or would chat with one another at the courthouse, cooperation was not a matter of debate, but rather, cooperation was a critical component of representing a client well.”⁵⁹ Those types of interactions are important for relationship-building and in creating a climate of cooperation.⁶⁰

57 BRITTANY K.T. KAUFFMAN, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CREATING THE JUST, SPEEDY, AND INEXPENSIVE COURTS OF TOMORROW: IDEAS FOR IMPACT FROM IAALS’ FOURTH CIVIL JUSTICE REFORM SUMMIT 11 (2016).

58 See generally REDEFINING CASE MANAGEMENT, *supra* note 32, at 25-28.

59 CHANGE THE CULTURE, CHANGE THE SYSTEM, *supra* note 34, at 7.

60 *Id.*

Unfortunately, interactions between counsel—particularly in-person—have become much less frequent, as has cooperation. Whether or not the belief is well-founded, many in our profession have the perception that dispositive motions are frequently used to harass opposing parties or increase their costs to the point of forcing settlement or even dismissal. This has to change.

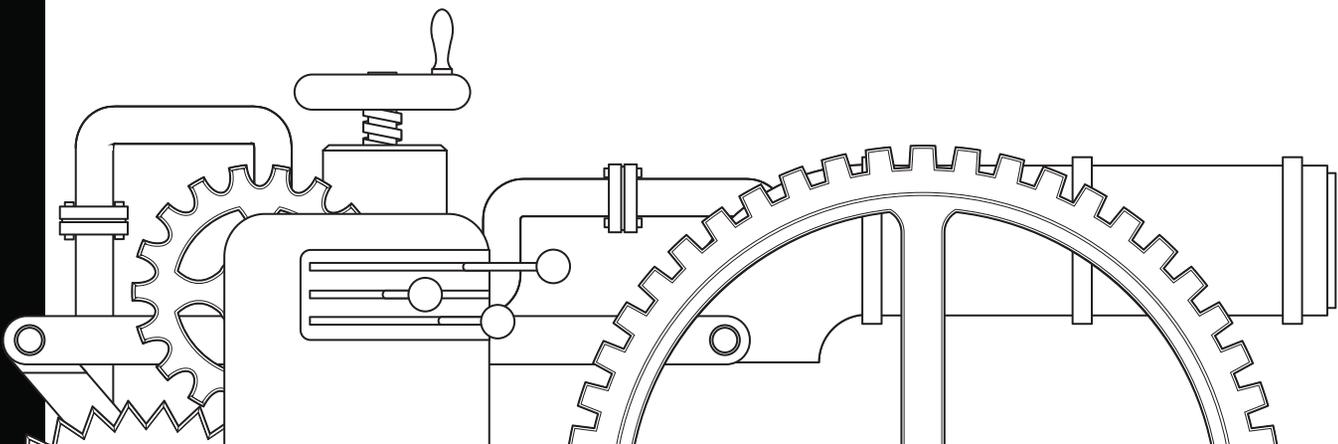
This Principle of cooperation builds directly off of Principle 6 in the IAALS/ACTL Task Force *Report on Progress and Promise*.⁶¹ As that report noted, our 2009 ACTL survey found that 90 percent of respondents “said that when all counsel are collaborative and professional, the case costs the client less.”⁶² The 2015 federal rule amendments embrace this approach, amending Rule 1 to clarify that the civil rules “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”⁶³ As the Committee Note explains: “[D]iscussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure.”

By focusing on cooperation and communication, and by avoiding motions designed to burden or bother opposing counsel, attorneys can help to make dispositive motions practice more efficient and less costly.

61 REPORT ON PROGRESS AND PROMISE, *supra* note 10, at 11.

62 *Id.*

63 Fed. R. Civ. P. 1.



RECOMMENDATIONS

The following recommendations to improve dispositive motions practice are driven by the above fundamental principles of proportionality, efficiency, timeliness, and cooperation.

RULE 12 RECOMMENDATIONS

RECOMMENDATION 1: Before filing a motion to dismiss, the parties should meet and confer in a good faith, substantive, and meaningful way.

Fitting with the idea that attorneys should communicate and cooperate when possible, we recommend that parties be required to meet and confer before filing a motion to dismiss. Requiring lawyers to speak with one another about the case will allow them to better explain their positions and may lead them to discover areas about which they are in agreement. And in some cases, pre-motion discussion may eliminate the need for a motion altogether, as a defendant who explains the reason she intends to file a motion to dismiss may prompt a plaintiff to voluntarily amend the complaint.

Attorney respondents to our 2018 ACTL Survey were largely split on the efficacy of meet and confer requirements, although those opposed tended to have stronger feelings.⁶⁴ The responses highlight that the effectiveness of the meet and confer lies in the hands of the attorneys. When attorneys “view it as pro forma” or are unlikely (or even unable) to agree with opposing counsel to narrow a claim or refrain from filing a motion, the process can be seen as a “big waste of time.”⁶⁵ Others recognize, however, that a discussion to summarize positions and clarify issues can reduce cost and effort “[i]f the parties approach this in a forthright manner.” Ultimately, it appears, the success of a meet and confer is “[d]ependent upon the attorneys involved” and the court holding the parties accountable.⁶⁶

To that end, we emphasize that attorneys must approach the meet and confer process in good faith, and they must be committed to a substantive and meaningful discussion. While such a meet and confer need not be in person, it is also not enough for an attorney to call opposing counsel merely to ask whether

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Building off of our first Principle that “one size does not fit all,” reforms in this area must necessarily be tailored across systems and cases to ensure a positive impact. The recommendations include tools that judges and courts can deploy in a targeted fashion to help change the culture and move toward a new paradigm for dispositive motions practice.

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⁶⁴ See generally Appendix A.

⁶⁵ *Id.*

⁶⁶ *Id.*

the case should be dismissed—the answer to that question will certainly be “no.” Instead, attorneys must be prepared to discuss:

- The issues that the movant intends to raise in the motion to dismiss;
- Whether the parties could resolve all or some of those issues without a motion;
- The reasons that the movant believes those issues are legally meritorious;
- The reasons that the non-movant believes the motion should be denied;
- Whether there are any alternatives to the motion that would suffice (for example, could the plaintiff simply amend the complaint?); and⁶⁷
- Whether the motion could be resolved through a streamlined process (for example, letters instead of briefs, or in a conference with the court).

Requiring lawyers to talk about their disputes will, at least in some cases, allow them to reach agreement and narrow the issues presented in a case, and attorneys will be precluded from reflexively filing lengthy and expensive written motions. Moreover, a meet and confer process will make attorneys more accountable to the rules of professional conduct, as an attorney will be less likely to make a specious or questionable argument if the lawyer has to present it in person, rather than hiding behind the facelessness of the written word.

To ensure that the meet and confer process is meaningful, courts must take an active role in its enforcement. Judges must be willing to actively police the meet and confer requirement, with real consequences, to ensure that the benefits of in-person communication between opposing counsel are fully realized.⁶⁸

Again, we understand the concern that creating additional procedure has the potential to backfire by making the motions process longer and less efficient. But if attorneys approach the meet and confer with an appropriate attitude, the benefits of having attorneys discuss legal issues before filing motions to dismiss will help promote cooperation, reduce the rancor sometimes associated with legal proceedings, and streamline the motions process to make it easier for judges to rule quickly and fairly.

⁶⁷ If the parties agree that an amendment would cure the issue, the defendant can consent to the plaintiff amending the complaint. Fed. R. Civ. P. 15(a)(2).

⁶⁸ How judges do so will depend in part on what procedures the judge adopts. If parties are permitted to file a motion after the meet and confer, the motion should describe the details of the meeting and tell the court what topics were discussed, what the results of the discussion were, and why the motion is being filed. If parties instead are asked to file a pre-motion letter seeking a pre-motion conference, the details of the meet and confer should be discussed in the letter. The non-movant should also have the opportunity to contest the movant's description of the meet and confer if necessary.

RECOMMENDATION 2: Non-jurisdictional motions to dismiss should be resolved by the court through a collaborative, expedited process.

Motions to dismiss play an important role in civil litigation, ensuring that meritless lawsuits are quickly brought to an end without “needless discovery and fact-finding.”⁶⁹ Empirical research suggests, however, that after the Supreme Court’s decisions in *Twombly* and *Iqbal*, judges have been increasingly likely to grant a motion to dismiss with leave to amend.⁷⁰ So while motions to dismiss are still an effective tool to streamline civil litigation, judges and attorneys should always consider whether the cost and delay associated with a fully-briefed motion to dismiss is necessary, or whether the plaintiff should go ahead and amend his or her complaint voluntarily.

To that end, we recommend the following collaborative, expedited process for resolving non-jurisdictional motions to dismiss:

The Court may require the parties to attend a pre-motion conference with the Court before a motion to dismiss is filed. The Court may require the moving party to submit a short letter (not to exceed three pages) before filing a motion to dismiss setting forth the basis for the anticipated motion, as well as a responsive letter from the opposing party. Throughout this process, the parties and court should discuss whether amendments could cure any alleged deficiencies in the complaint.⁷¹

The primary purpose of the letter exchange is for parties to clarify their positions from the meet and confer, relying on authority when necessary, to help get a better sense of whether there are potential areas of agreement or whether voluntary amendments can prevent the need for formal motions. The Rule 12(b)(6) pre-motion letter exchange was one of the most well received of the proposals in our 2018 ACTL survey, with respondents noting that such letters provide an opportunity for an amendment to narrow the issues in dispute or even resolve the dispute without court involvement.⁷²

A post-motion conference gives the court an opportunity to evaluate the defendant’s arguments and discuss with the parties what the next steps should be. Is the motion likely to be granted, such that the plaintiff wants to go ahead and amend the complaint? Is a response brief necessary, or could the issue be resolved through short letters with key authorities or during oral argument in court? An in-person conference may be particularly helpful for self-represented litigants in state court, as it provides a simpler, more navigable approach to resolution of the issues than written briefs.⁷³

69 *Neitzke*, 490 U.S. at 326–27.

70 Patricia W. Hatamyar Moore, *An Updated Quantitative Study of Iqbal’s Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 613–14, 621 (2012). See also Scott Dodson, *A New Look: Dismissal Rates of Federal Civil Claims*, 96 JUDICATURE 127 (2012); JOE S. CECIL ET AL., FED. JUDICIAL CTR., UPDATE ON RESOLUTION OF RULE 12(B)(6) MOTIONS GRANTED WITH LEAVE TO AMEND: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 1, 3 (2011); JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER IQBAL: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 5-6 (2011).

71 These procedures largely mirror those adopted by the Southern District of New York in its Pilot Project Regarding Case Management Techniques for Complex Civil Cases in effect from 2011–14. See REPORT OF THE JUDICIAL IMPROVEMENTS COMMITTEE, PILOT PROJECT REGARDING CASE MANAGEMENT TECHNIQUES FOR COMPLEX CIVIL CASES (2014) [hereinafter S.D.N.Y. PILOT PROJECT].

72 Appendix A.

73 CALL TO ACTION, *supra* note 41, at 37.

In conjunction with the above process, court staff should be mindful of any motions to dismiss and bring them to the attention of the judge immediately upon filing, before a response is filed. This allows the judge to screen the motion to dismiss and determine the best course of action in response. In addition, in order to reduce cost and delay, rather than contribute to it, such conferences should be expedited.

The Federal Rules of Civil Procedure already give plaintiffs a wide berth (21 days) to amend their complaints in response to a defendant's 12(b)(6) motion to dismiss.⁷⁴ And even if that time has passed, the court may permit an amendment by granting leave—and the rules specify that “[t]he court should freely give leave when justice so requires.”⁷⁵ In a litigation climate in which an increasing number of motions to dismiss result in an amended complaint, any steps the parties or court can take to speed up that process would be beneficial.

Another issue that the judge must decide after receiving a motion to dismiss is whether discovery will be stayed. Under Principle 19 in the IAALS/ACTL *Report on Progress and Promise*, we called on the court to decide whether initial production and discovery should be stayed on a case-by-case basis.⁷⁶ When discovery is stayed, the case grinds to a halt and the parties will make no further progress toward its resolution until the motion is resolved. The prospect of a stay also incentivizes defendants to file motions that are unlikely to succeed just to delay a case. On the other hand, allowing discovery to continue may prove to be wasteful if the case ultimately lacks merit and is dismissed.

Balancing these considerations, a judge must use his or her best judgment to decide whether discovery should be stayed pending resolution of the motion to dismiss.⁷⁷ The primary consideration should be whether the motion appears to be likely to succeed, but judges should also consider whether initial discovery requests will likely be costly and burdensome (especially when electronic files are likely to be requested). “It is important for the courts to consider the relevant competing considerations so that, on one hand, costly discovery that may ultimately prove unnecessary because the case will be dismissed does not need to occur, while, on the other hand, stays do not result in the very costs and delays they are meant to avoid.”⁷⁸

We make these recommendations primarily with non-jurisdictional motions to dismiss in mind. Jurisdictional motions may be more likely to be based on legal propositions rather than an absence of facts, so an amendment may be less likely to cure the issue. And when motions are jurisdictional, it will usually be fairer and more efficient to resolve the motion before additional discovery. Alternatively, these collaborative and expedited procedures were applied to all types of motions to dismiss in the S.D.N.Y. Pilot Project,⁷⁹ so judges may find it beneficial to use these procedures no matter what type of motion to dismiss.

74 Fed. R. Civ. P. 15(a)(1)(B).

75 Fed. R. Civ. P. 15(a)(2).

76 REPORT ON PROGRESS AND PROMISE, *supra* note 10, at 24.

77 See CORINA D. GERETY & LOGAN CORNETT, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., MOMENTUM FOR CHANGE: THE IMPACT OF THE COLORADO CIVIL ACCESS PILOT PROJECT (2014). “The Colorado experience highlights the competing tensions relating to motions and stays. In Colorado’s CAPP, motions to dismiss did not stay the obligation to file an answer or any of the pleading or disclosure requirements.” REPORT ON PROGRESS AND PROMISE, *supra* note 10, at 24.

78 REPORT ON PROGRESS AND PROMISE, *supra* note 10, at 24.

79 S.D.N.Y. PILOT PROJECT, *supra* note 71.

RULE 56 RECOMMENDATIONS

RECOMMENDATION 3: When summary judgment deadlines are built into the case scheduling order as an expected event at the outset of the case, it likely encourages the reflexive filing of motions. Instead, courts should set a date by which the parties must alert the court that a summary judgment motion will be filed.

As discussed above, attorneys are sometimes predisposed to think that they must take advantage of every procedural opportunity—which sometimes leads them to reflexively file summary judgment motions. On the part of the court, many judges routinely include deadlines for summary judgment motions in their initial case scheduling orders regardless of the need for such a deadline in the case. Those judges should be applauded for setting clear timelines to help keep cases moving forward. But the inclusion of a summary judgment deadline in the initial order may have an unintended effect of implicitly suggesting that the court *expects* to receive a summary judgment motion. The inclusion of a deadline may spur attorneys to file unnecessary motions either because they believe, whether consciously or subconsciously, that they have to.

We want to put an end to the practice of reflexive filing of summary judgment motions. Summary judgment motions are not appropriate in every case.

Accordingly, we recommend that judges take a different approach to summary judgment in their case scheduling orders. Instead of instructing parties that summary judgment motions must be filed by a particular date, judges can put the responsibility on the parties to alert the court when a motion will be filed. The case scheduling order, therefore, should include a date by which a party will file a notice of an intent to file for summary judgment. The local rules for the District of Maine include a pre-motion notice procedure,⁸⁰ and judges in other districts have implemented similar notice requirements. Following this notice the court should hold a pre-motion conference, as discussed under Recommendation 4, at which point the court can set deadlines for briefing as needed.

There is an important caveat to this pre-motion notice procedure, however. The deadline for such notice must be set thoughtfully, building in time for the pre-motion conference and the setting of a briefing schedule (e.g., 30-45 days in advance of a traditional summary judgment motion deadline). It must be implemented in a way that does not undermine other deadlines in the case, including a firm trial date. We cannot overstate the importance of having the judge set a realistic trial date early in the case. Research has shown that the existence of a known trial date helps cases move forward, as claims tend to narrow and evidence becomes streamlined as the trial date nears.⁸¹ That is why IAALS has consistently recommended that trial court judges set a trial date early in the case and stick to it.⁸²

Leaving the summary judgment deadline out of the initial scheduling order may create a tension with the need to have clear deadlines up front so that the trial date can be held firm. But the use of a pre-motion notice

⁸⁰ D. Me. R. 56(h).

⁸¹ REPORT ON PROGRESS AND PROMISE, *supra* note 10, at 10; CIVIL CASE PROCESSING, *supra* note 21.

⁸² REPORT ON PROGRESS AND PROMISE, *supra* note 10, at 9-10; WORKING SMARTER, NOT HARDER, *supra* note 43, at 16-18; CALL TO ACTION, *supra* note 41, at 21-22.

procedure need not affect the trial date. The scheduling order will instead have a firm deadline by which the parties must indicate their intent to file a summary judgment motion. Judges can take care to place this deadline early enough in the case that the trial date will not be impacted if a party chooses to avail itself of summary judgment procedures. The court must have a clear process in place for the parties once a party files a notice of intent. For this reason, this recommendation goes hand in hand with the following Recommendation 4 related to pre-motion conferences. When the pre-motion conference occurs, judges and counsel will address not only the appropriateness and scope of a summary judgment motion, but also the associated deadlines, with a view toward other deadlines in the case.

Most importantly, this notice procedure cannot become a way for parties to open the door to additional discovery. While the notice deadline may be slightly earlier than the usual summary judgment motion deadline to allow for the pre-motion conference, it should still be set after the close of discovery. While a judge may determine that additional discovery is appropriate at this stage, receiving notice that opposing counsel will be requesting summary judgment cannot be “good cause” for a party to reopen discovery to have better odds to defeat a summary judgment motion. That defeats the whole purpose.

Finally, we recognize that this approach may not be appropriate in every case, particularly for more streamlined cases in state court. For those cases, as noted previously, a clearly communicated pre-trial schedule with deadlines will be most effective.

RECOMMENDATION 4: Judges should hold a summary judgment pre-motion conference in any case in which a conference will focus and potentially even resolve some of the issues.

As with motions to dismiss, there are significant benefits to a process that engages the parties with the court before they file lengthy and expensive motions. Thus, we recommend the following process for pre-motion conferences in the summary judgment context:

The Court may require that, before a summary judgment motion can be filed, the party intending to file a summary judgment motion request a pre-motion conference with the court by submitting a short letter (not to exceed three pages). The letter should briefly describe the principal grounds for summary judgment and set forth the details of the meet and confer process. Parties opposing summary judgment may also file a letter in response.⁸³

As soon as possible following the filing of the letters, the court should hold a conference with the parties, preferably in person.

This practice was central to the Southern District of New York’s Pilot Project Regarding Case Management Techniques for Complex Civil Cases in effect from 2011–14, and a number of S.D.N.Y. judges continue to use the practice.⁸⁴ The local rules for the District of Maine also require a pre-motion conference with the

⁸³ D. Me. R. 56.

⁸⁴ S.D.N.Y. PILOT PROJECT, *supra* note 71.

judge before a summary judgment motion is filed.⁸⁵ Other judges throughout the country hold pre-motion conferences on an individual basis. Attorney responses to this approach in the 2018 ACTL Survey were mixed—many recognized that the opportunity for judicial feedback at a conference saved time and resources, but it is clear that the effectiveness of the pre-motion conference lies with the judge.⁸⁶ In conversations with judges who have utilized the procedure, they have shared that it is indispensable.⁸⁷

The pre-motion conference gives the parties a chance to communicate about their respective positions, allowing for dialogue and discussion rather than an impersonal exchange of adversarial writing. Lawyers who must appear in person in front of a judge may be reluctant to argue extreme positions that they might otherwise include in a written document. In addition, there are benefits to an conference with the judge:

“[T]he value of these live interactions is that they are an opportunity for the judge and the lawyers to have an informed dialogue that penetrates the surface and exposes what matters most in the case or the issue to be decided.”⁸⁸

While this approach requires the judge to review the facts and legal issues in advance, this initial investment of time by the judge is worthwhile for the case overall. The judge has two major roles in the conference. First, the judge should further the parties’ discussions by helping them identify points of agreement and narrow the issues in dispute.⁸⁹ Second, the judge should give the parties guidance about what issues will require the most attention. In some cases, this could allow parties to conclude that a motion for summary judgment would not be likely to succeed, perhaps deterring them from filing one. And if a motion is filed, getting input from the judge in advance will allow the parties to streamline their briefing to best aid the judge in resolving the motion. The pre-motion conference should also discuss logistical issues for summary judgment briefing: the briefing schedule, the length of papers, and the possibility of stipulated statements of material facts.⁹⁰

In many cases, it may become clear to the court from the pre-conference letters and conference discussion that a genuine issue of material fact exists and a summary judgment motion would be denied. As long as the parties’ letters and discussion are thorough enough for the parties to have an opportunity to make all of their arguments, trial court judges may be permitted to construe a pre-motion letter as the motion itself and deny it.⁹¹

The pre-motion conference may also highlight the need for additional settlement discussions prior to full briefing on the motion. The goal of such conferences is not to push settlement. Rather, the pre-motion conference may provide information that the parties need to assess the value of pursuing their case, thereby allowing them to accurately measure the benefits of settling with less time and expense than a fully briefed

85 D. Me. R. 56(h). In Local Rule 56(h), there is a mechanism by which the parties can avoid a pre-filing conference if they agree on a joint schedule and agree that a pre-filing conference with a judicial officer would not be helpful. While the parties could come to an agreement and include this in the letters to the court, this approach has not been incorporated into these recommendations as the pre-motion conference may be invaluable even in cases where the parties do not see this value.

86 Appendix A.

87 *E.g.*, Telephone conversation with Judge John Koeltl (Aug. 16, 2018).

88 Gensler and Rosenthal, *supra* note 31, at 852.

89 *See id.* at 862.

90 D. Me. R. 56(h)(3).

91 *See NMD Interactive, Inc. v. Chertok*, No. 11-CV-6011, 2017 WL 993069 at *2–4 (S.D.N.Y. Mar. 13, 2017); *In re Best Payphones, Inc.*, 450 F. App’x 8, 15 (2d Cir. 2011).

and decided motion for summary judgment.⁹² Our additional review of cases from IAALS’ docket study in which the parties chose not to file a summary judgment motion following a notice of intent to file a summary judgment motion reflected that multiple cases settled prior to briefing the summary judgment motion.⁹³ This suggests that, although difficult to measure, the pre-motion conference did have very real benefits in the progress of the case.

Pre-motion conferences can certainly be helpful in some cases, but as emphasized throughout this report, one size does not fit all. Holding a conference adds an additional layer of procedure to a case, which has the potential to lengthen the time to disposition.⁹⁴ As Judge Lee Rosenthal and Professor Steve Gensler have pointed out, “the beauty of case management is that it is case-specific. The pre-motion conference held in advance of filing a summary judgment motion is a tool that can be selectively applied.”⁹⁵

In many federal or complex state court cases, the benefit of a conference will outweigh this risk—but not always. Again, those judges must be actively involved in managing their cases to decide when a conference will or will not be helpful.

In streamlined-pathway cases in state court, the extraordinarily high volume of cases will make pre-motion conferences infeasible in many cases. For general and complex cases, however, this pre-motion conference process will be beneficial, and this approach is specifically recommended in the CJI Committee report for both pathways: “Courts should establish informal communications with the parties regarding dispositive motions and possible settlement, so as to encourage early identification and narrowing of the issues for more effective briefing, timely court rulings, and party agreement.”⁹⁶ The CJI recommendations note that such processes “encourage narrowing of the issues and concise briefing that in turn can promote more efficient and effective rulings by the court.”⁹⁷

92 Gensler and Rosenthal, *supra* note 31, at 863.

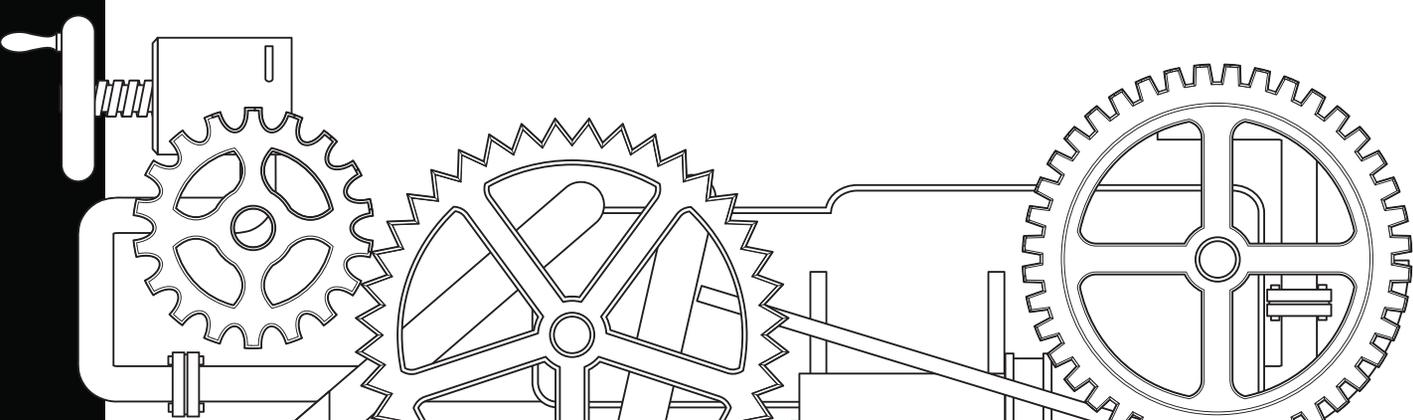
93 *See generally supra*, note 9.

94 SUMMARY JUDGMENT, *supra* note 7, at 34–35.

95 Gensler and Rosenthal, *supra* note 31, at 863.

96 CALL TO ACTION, *supra* note 41, at 23.

97 *Id.* at 24.



GENERAL RECOMMENDATIONS

RECOMMENDATION 5: Absent unusual circumstances, federal district judges should not refer dispositive motions to magistrate judges for an initial report and recommendation.

In federal court, district judges must also consider efficiency and cost to the parties when making decisions about the use of magistrate judges for civil pre-trial procedures. IAALS' docket study shows that in cases in which a motion for summary judgment is first resolved by a magistrate judge's report and recommendations, the overall resolution of the motion takes on average three months longer—that is, 238 days for a motion with a magistrate judge's report as compared to 142 days for those without.⁹⁸ The average time to issuance of the magistrate judge's report is 139 days, which is consistent with the 142 days for rulings by a district judge where there is not an initial magistrate judge report and recommendations. This suggests that the increase in time to ruling is due to the additional time necessary for the district judge to review the recommendation and issue a final ruling. That added delay is quite significant, and in the vast majority of cases it will be more efficient for the parties, with less cost and delay, if the district judge rules on summary judgment motions without first referring them to a magistrate judge.

This recommendation recognizes that there may be exceptions, such as when the parties come to an agreement that they prefer the summary judgment motion be referred first to a magistrate judge. For some jurisdictions there may be reasons to have the magistrate judges provide an initial report and recommendation, such as the workload of the district judges. However, from a cumulative perspective, this approach uses more of the court's resources than having the district judge rule on the motion directly.

Right now there is significant variation across jurisdictions in the role magistrate judges play in resolving dispositive motions.⁹⁹ Because of the very real likelihood that a referral will actually result in a costly, time consuming, and duplicative procedure for the litigants, district judges should not refer dispositive motions to magistrate judges for an initial Report and Recommendation absent unusual circumstances. On the other hand, federal magistrate judges are increasingly conducting all proceedings in a case, including trial and the entry of final judgment, by the consent of the parties. In such cases, the magistrate judge should handle all dispositive motions, and all the former recommendations apply.

RECOMMENDATION 6: Judges likely already have the power to adopt these practices, but putting these processes in the rules and making the court's power explicit will encourage their use.

In many parts of the country, judges already have the power to adopt these practices to streamline dispositive motions practice. Judges are generally given significant discretion over how they manage their cases and conduct pre-trial procedures.¹⁰⁰

98 SUMMARY JUDGMENT, *supra* note 7, at 28.

99 See, e.g., Table M-4B. U.S. District Courts – Reports and Recommendations Issued by U.S. Magistrate Judges Under 28 U.S.C. § 636(b), available at http://www.uscourts.gov/sites/default/files/data_tables/jb_m4b_0930.2017.pdf.

100 See, e.g., *Pac. Indem. Co. v. Broward County*, 465 F.2d 99, 103 (5th Cir. 1972); *Buffington v. Wood*, 351 F.2d 292, 298 (3d Cir. 1965).

We recognize some courts have historically been resistant to trial judges' efforts to add procedure to the summary judgment process. In *Brown v. Crawford County*, the Eleventh Circuit disapproved of a trial judge who used pre-motion letters to determine whether a summary judgment motion was appropriate.¹⁰¹ The court held that Rule 56 "makes no allowance for a preliminary 'procedure' by the district court for reviewing, with the potential of denying, a party's prospective summary judgment motion."¹⁰² California's appellate courts have also rejected trial courts' attempts to add pre-motion procedures to the summary judgment process.¹⁰³

Commentators have suggested that the Eleventh Circuit's decision in *Brown* is outdated, as it "pre-dates the contemporary flowering of judicial management techniques and attitudes" exemplified by the S.D.N.Y.'s Pilot Project Regarding Case Management Techniques for Complex Civil Cases, which required pre-motion letters and conferences.¹⁰⁴ And while *Brown* broadly rejected any "advance screening" of summary judgment motions, the court's primary concern seemed to be that the judge precluded the defendant from filing for summary judgment.¹⁰⁵ The Second Circuit has explained that judges may not require the court's permission before allowing a motion, but it has emphasized that judges *can* "hold a pre-motion conference for the purpose of persuading a party not to file a perceived meritless motion."¹⁰⁶ The Second Circuit, as mentioned above, has also allowed trial judges to construe a thorough and detailed pre-motion letter as the motion itself and deny it.¹⁰⁷ While this has been in the context of motions other than summary judgment, the reasoning is sound and can be applied here as well.

Even when judges already have the ability to implement these practices, however, there are benefits to codifying these practices in court rules.

First, establishing these practices in the court rules will ensure that all judges are aware of these best practices, which will likely result in more judges using them. As the Advisory Committee on Civil Rules stated regarding the 2015 amendment to Rule 16 regarding pre-motion conferences for discovery disputes, modifying court rules to "call[] attention to this practice, as a means of encouraging it, carries no noticeable costs."¹⁰⁸ Plus, because a federal court rule must be approved by the Standing Committee and the U.S. Supreme Court, subject to veto by Congress, judges may view court rules as more thoroughly considered and debated, and thus more persuasive, than a report or recommendation.

101 960 F.2d 1002, 1007–09 (11th Cir. 1992).

102 *Id.*

103 *Lokeijak v. City of Irvine*, 65 Cal. App. 4th 341 (1998) (disapproving of trial court's policy directing parties to try to agree on an "appropriate alternative" before filing for summary judgment, and holding that parties have a right to move for summary judgment and court practice may not "improperly interfere" with that right); *First State Ins. Co. v. Superior Court*, 79 Cal. App. 4th 324 (2000) (disapproving of trial court's case management order that required parties seeking summary judgment to file a notice with the court, attend a pre-motion hearing, meet and confer with opposing counsel, and file a joint statement of uncontested legal issues—and citing several cases in California holding that judges cannot adopt rules for summary judgment that deviate from court rules).

104 Edward Brunet, John Parry, and Martin Redish, *Summary Judgment: Federal Law and Practice* § 4:7, Appellate review of local rules for consistency with Rule 56; *see also id.* § 1.1, Summary judgment's critical and unique function in contemporary federal litigation.

105 960 F.2d at 1008 (expressing concern that judges using this procedure "effectively are precluding parties from filing summary judgment motions").

106 *Milltex Indus. Corp. v. Jacquard Lace Co., Ltd.*, 55 F.3d 34, 39 (2d Cir. 1995).

107 *See NMD Interactive*, 2017 WL 993069 at *2–4; *In re Best Payphones*, 450 F. App'x at 15.

108 Advisory Committee on Civil Rules Agenda Book 91 (Apr. 2014), available at http://www.uscourts.gov/sites/default/files/fr_import/CV2014-04.pdf.

Second, rule changes lead to culture changes by setting the baseline for how civil justice is practiced in the United States.¹⁰⁹ Adding rules that make the dispositive motions process more efficient will promote cooperation and diligence by attorneys and will motivate judges to engage in better case management.

Third, changing court rules will explicitly affirm that certain pre-motion case management practices are authorized. While case management has been widely supported and is now common place for the discovery process, case management for dispositive motions practice has not been as widely embraced.

Fourth, adding these practices to court rules will reduce inconsistencies between jurisdictions and among individual judges. Right now, attorneys in federal court must consult federal rules, local rules, and a judge's individual practices to know what procedures will be followed in a given case. Adopting court rules that encompass these dispositive motions practices will help bring uniformity to motions practice and reduce inter- and intra-jurisdictional inconsistency.

Possible amendments could include:

- Adding a meet and confer requirement, and the possibility of a pre-motion conference, to Rule 12.
- Clarifying Rule 16 to emphasize that a pre-motion conference for Rule 56 may be part of the scheduling order.
 - *This amendment would be similar to the 2015 amendment that specifies that a Rule 16 scheduling order may provide for pre-motion conferences prior to discovery motions.*
- Outlining particular dispositive motions processes specific to streamlined, general, and complex cases in state court rules.

RECOMMENDATION 7: Education is critical to encourage both judges and attorneys to rethink their current approach to motions practice and develop a more collaborative, focused, and efficient approach to this process.

At the end of the day, attorneys and judges need to change their thinking about dispositive motions. Rather than reflexively filing time-consuming, costly, and combative motions, attorneys should be required to cooperate and consider alternatives to motions practice whenever possible. And judges cannot wait until a lengthy motion is filed to spring into action—they must be actively involved in managing their cases and facilitating a pre-motion process that ensures the motions practice is proportional to the case. Nor can they allow a motion to languish, because of the impact on the case as a whole.

How will this culture change come to pass? The first step is educating judges and attorneys.

Judicial training should be a regular practice in every jurisdiction. The CJI Committee has previously advocated for “a comprehensive judicial training program” for new and sitting judges to instill the importance of civil case management.¹¹⁰ That training must include education about ways to make motions practice

¹⁰⁹ CHANGE THE CULTURE, CHANGE THE SYSTEM, *supra* note 34, at 22.

¹¹⁰ CALL TO ACTION, *supra* note 41, at 29.

more efficient. Judges can only implement those reforms about which they know, so judges must be exposed to the various types of pre- and post-motion practices that can help simplify and expedite the resolution of dispositive motions.

Attorneys, too, need to be taught that there are benefits for them and for their clients if they view dispositive motions practice in a different way. Rather than reflexively filing motions, attorneys must learn the value of conferring with opposing counsel and the court to try to resolve issues in a less adversarial manner. It may be true that in some cases attorneys may bill fewer hours because they may avoid a lengthy and costly motion, but their practice will hopefully be characterized by less adversarialism and more satisfied—as well as repeat—clients. Attorneys must remember that the focus should be on justice, not winning, and that a lawyer’s strategy should be proportional to the size and complexity of the case.¹¹¹

RECOMMENDATION 8: To support efficient motions practice, courts must track standardized, real-time case data and utilize this information at all levels to improve case management. In addition, courts should publish measurement data as a way of increasing transparency and accountability.

This recommendation is a fundamental step in making the motions process more efficient and effective. These recommendations rely heavily on case management, and courts must have the tools—including technology—to manage cases effectively. As the CJI Committee report recognizes:

To implement right-sized case management, courts must have refined capacities to organize case data, notify interested persons of requirements and events, monitor rules compliance, expand litigant understanding, and prompt judges to take necessary actions. To meet these urgent needs, courts must fully employ information technologies to manage data and business processes. It is time for courts to catch up with the private sector. The expanded use of online case filing and electronic case management is an important beginning, but just a beginning. Enterprises as diverse as commercial air carriers, online retailers, and motor vehicle registrars have demonstrated ways to manage hundreds of thousands of transactions and communications. What stands in the way of courts following suit?¹¹²

At a minimum, courts and judges must be able to easily identify and track pending motions. “Experience and research tell us that one cannot manage what is unknown.”¹¹³

Taking this one step further, we also call for greater transparency with regard to resolution of dispositive motions in our courts. The current Civil Justice Reform Act’s six-month list is limited in its effectiveness by the nature of its timing and application to federal court only. Nevertheless, it has been shown to be effective in incentivizing rulings on dispositive motions. Applying the old expression that “you get what you measure,” we need to refine what we measure and what is published to increase timeliness, accountability, and public trust and confidence in our courts.

111 CHANGE THE CULTURE, CHANGE THE SYSTEM, *supra* note 34, at 8-9.

112 CALL TO ACTION, *supra* note 41, at 31.

113 *Id.*

CONCLUSION

The recommendations in this report are intended to do more than list a set of practices to be used by innovative judges. While it is our goal that judges will read this report and be inspired to adopt these practices, our ultimate goal is broader and deeper. In order to have impact, we need to change the paradigm of how our courts, judges, attorneys, and parties think about and use dispositive motions to resolve issues and cases in our state and federal systems. Such a paradigm shift is not possible if only a few judges around the country consider and adopt a few of the recommendations. In addition, we encourage broader adoption through pilot projects and rule reform efforts, as well as evaluation to see if the above recommendations can be further revised and improved.

APPENDIX A: 2018 ACTL SURVEY RESULTS

BACKGROUND AND SURVEY DEVELOPMENT

In order to further illuminate the summary judgment docket study findings on dispositive motions procedures, we developed a survey aimed at helping us understand attorney experiences with and perceptions of each of the different procedures. Specifically, the survey asked attorneys to indicate whether or not they had experienced each of seven motion to dismiss and summary judgment practices:

MOTION TO DISMISS

- Mandatory meet and confer between the parties prior to filing
- Pre-motion exchange of letters between the parties (with or without a copy to the court) prior to filing
- Pre-motion conference with the court prior to filing
- Conference with the court following filing

MOTION FOR SUMMARY JUDGMENT

- Mandatory meet and confer between the parties prior to filing
- Pre-motion letter, written request for a pre-motion conference with the court, or other written notice prior to filing
- Pre-motion conference with the court prior to filing

For each procedure with which respondents indicated having experience, we asked them to evaluate the effectiveness of the procedure on a scale of *extremely ineffective* to *extremely effective* and to explain, in their own words, why and how the procedure is effective or ineffective in achieving the goal of a just, speedy, and inexpensive process.¹

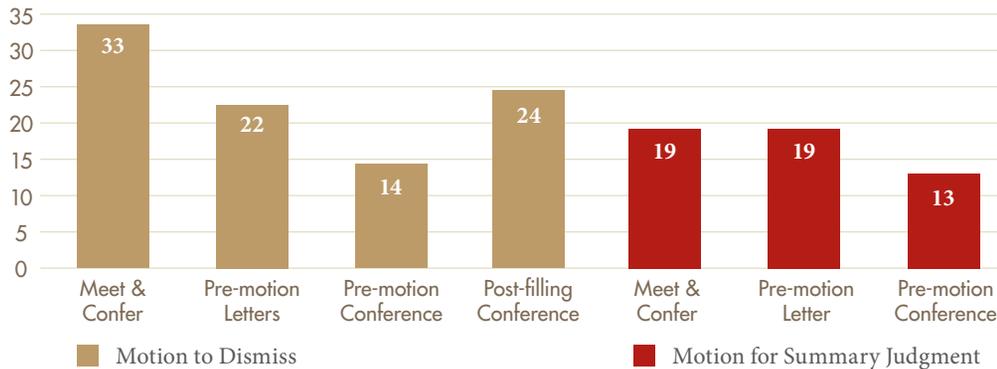
In August 2018, the American College of Trial Lawyers (ACTL) distributed the survey link via email to the members of its state committees, providing us a broad range of attorney input from across the country. It is worth noting that this was an informal survey effort and, though the results do not represent the final word, they are instructive in helping us understand attorney perspectives about dispositive motions practices.

¹ Response options included *extremely ineffective*, *somewhat ineffective*, *neither effective nor ineffective*, *somewhat effective*, and *extremely effective*.

RESULTS

Fifty-two out of the 91 respondents (57 percent) reported experience with at least one type of dispositive motion procedure; the remaining 43 percent indicated they did not have experience with any of these practices. Figure 1 presents the numbers of respondents who indicated having experience with each dispositive motion procedure.

Figure 1: Respondent Experience with Dispositive Motions Procedures

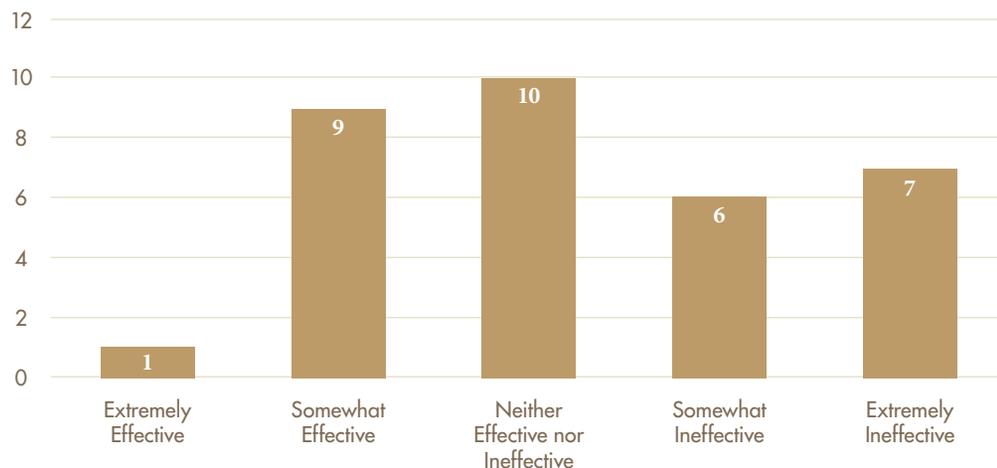


Each section below first presents the effectiveness responses for the relevant procedure, then provides an analysis of the open-ended explanations. Note that some open-ended responses contain more than one sentiment, so they may be represented more than once in the tables. Also note that the quotes presented are examples and not all coded responses are presented as quotes.

MOTIONS TO DISMISS

MANDATORY MEET AND CONFER BETWEEN THE PARTIES

Figure 2: Effectiveness of Mandatory Meet and Confer between the Parties, Motions to Dismiss



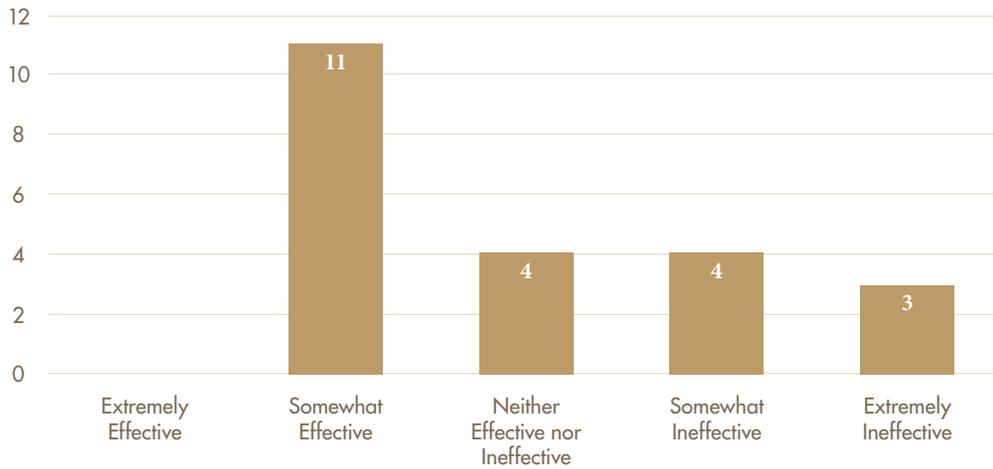
POSITIVE	COUNT	SAMPLE QUOTES
Parties have the opportunity to reconsider their position	1	“Gives counsel and the parties the opportunity to reconsider their positions before engaging in a lengthy 12(b)(6) motion process.”
Can result in amended pleadings that address the issues underlying the proposed motion	2	“It takes very little time, requires no travel, and may work toward having a complaint re-drafted properly by consent.”
Potential to resolve issues without court involvement	1	“Allows the parties to resolve prior to involving the court.”
Clarify/resolve issues	2	“This is an opportunity for the parties to briefly summarize their respective positions and clarify any significant misconceptions of law or fact. If the parties approach this in a forthright manner, it can reduce cost and effort.”
Can aid in resolution	1	

NEGATIVE	COUNT	SAMPLE QUOTES
Procedural impediment; waste of time/money	5	“In my 42 years of practice in state and federal courts, I’ve never seen anybody ‘confess’ a 12(b)(6) on the strength of a mandatory conference—big waste of time...” “Many attorneys view it as pro forma.”
Parties are unlikely to concede/change their minds	7	“Most meet and confer letters do not convince the other side of their errors.”
Concerns around professional negligence	1	

NEUTRAL	COUNT	SAMPLE QUOTES
Efficacy depends on the attorneys	3	“If there are obvious deficiencies and you have competent/professional counsel on the other side, a prior ‘meet and confer’ can be very helpful. That being said, truly competent counsel is rarely going to run afoul of Rule 12, and the attorneys that do typically lack the professionalism to admit a deficiency and correct it.”
Requires court supervision/involvement to be effective	4	“For this to work, the court needs to supervise and hold the parties accountable for what they said at the conference.” “In litigation, attorneys are reluctant to concede a point without the involvement of the court. Federal judges who are mindful of their statistics and their time are reluctant to become personally involved until their law clerks have fully summarized the opposing positions.”

PRE-MOTION EXCHANGE OF LETTERS BETWEEN THE PARTIES

Figure 3: Effectiveness of Pre-Motion Exchange of Letters between the Parties, Motions to Dismiss



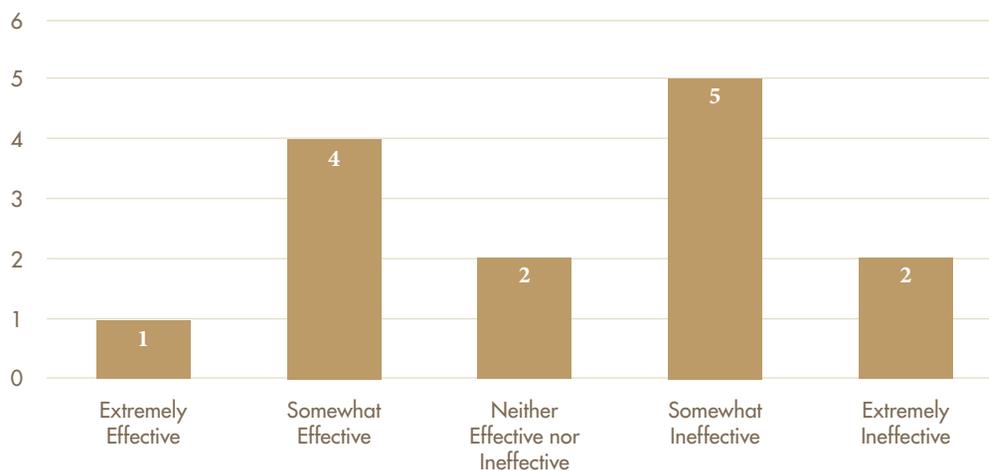
POSITIVE	COUNT	SAMPLE QUOTES
Allows for planning around the motion	1	“It helps to get some idea as to the grounds for a motion, which allows for better planning.”
Can result in amended pleadings that address the issues underlying the proposed motion	3	“Simple pleading errors can sometimes be corrected.”
Potential to resolve issues without court involvement	2	“The exchange of letters may obviate court involvement.”
Occasionally, parties reconsider their position	2	“Get the parties talking and sometimes causes them to reevaluate position.” “Occasionally, someone will rethink their position in the face a well-crafted letter—particularly if fees will be awarded if the 12(b)(6) is granted—but not often.”
Clarify/resolve issues	4	“Occasionally, one side or the other is persuasive enough to fend off a motion in all or part.” “Provides the attorneys with an opportunity to address issues with the complaint and case.”
Occasionally, parties reconsider their position	4	“Get the parties talking and sometimes causes them to reevaluate position.” “Occasionally, someone will rethink their position in the face a well-crafted letter—particularly if fees will be awarded if the 12(b)(6) is granted—but not often.” “We have had cases where the plaintiff’s counsel has agreed to drop certain claims upon receipt of our authority on the issue, narrowing down the claims.”
Opportunity for judicial feedback on the motion	1	“Allows the judge to weigh in but if the Rule 12(b)(6) is legal, not really effective.”

NEGATIVE	COUNT	SAMPLE QUOTES
Ineffective at narrowing the issues/ scope of the motion	1	“There have been no instances where the scope of a motion was narrowed.”
Parties are unlikely to concede/ change their minds	3	“Opposing counsel generally does not have authority to stipulate to the requested relief.” “In most cases, the plaintiff’s counsel either does not respond or just tells us to go file our motion.”
Concerns around professional negligence	1	
Can be expensive	1	“The letters can be expensive to write depending on the complexity of the issues.”

NEUTRAL	COUNT	SAMPLE QUOTES
Efficacy dependent upon attorney cooperation/objectivity	2	
Efficacy dependent upon issues being discussed	2	“The success or failure of an effort to shortcut an issue depends on many variables including the reasonableness of the issues being raised and whether the opposition has the ability and willingness to see the issue objectively. In my experience, these efforts fail far more times than they succeed.” [NOTE relates to previous subtheme, too.]

PRE-MOTION CONFERENCE WITH THE COURT

Figure 4: Effectiveness of Pre-Motion Conferences with the Court, Motions to Dismiss



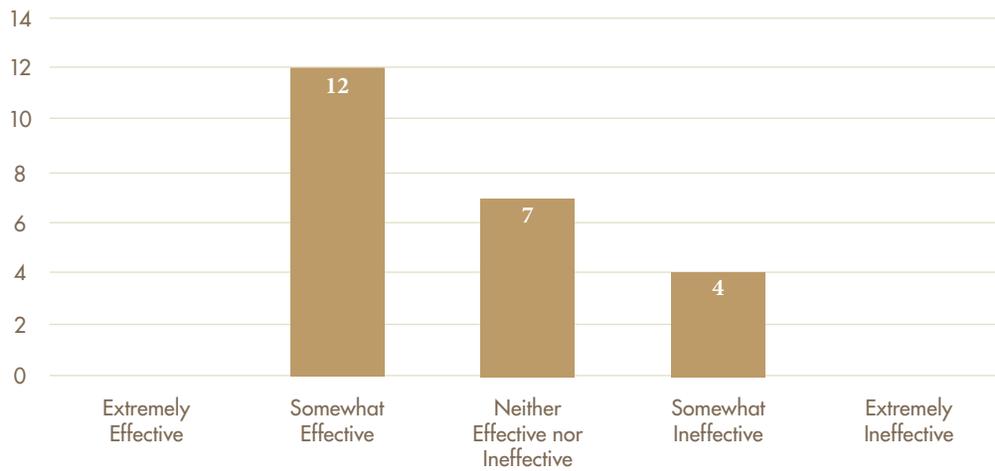
POSITIVE	COUNT	SAMPLE QUOTES
Clarify/resolve issues	2	“Often results in a resolution of the issues by the attorneys, without the need to file the motion.”
Opportunity for judicial feedback on the motion	2	“Depending on the judge, this can be extremely helpful. The judge, through questions and comments, provides the parties with a good understanding of his/her concerns and possible outcome of the motion.” “This conference is an opportunity to air the party’s respective position and explore the Court’s initial impressions and any shortcomings which may not be apparent otherwise.”
Effective if judge asserts authority re: filing of motions	1	“If the judge exerts him/herself to allow or disallow Rule 12(b)(6) motions, this is effective.”
Decreased filing of frivolous motions	1	“On the plus side, it does reduce expense and tends to restrict the filing of frivolous motions.”
Can decrease expense	1	

NEGATIVE	COUNT	SAMPLE QUOTES
Ineffective at narrowing the issues/scope of the motion	1	“Rarely results in narrowing.”
Concerns around professional negligence	1	
Parties are unlikely to concede/change their minds	1	
Conferences are intended to discourage filing of motions	1	“Courts rarely are helpful in such conference, the goal of which typically seems to be to discourage the filing of a motion.”
Judges make decisions based on incomplete information at these conferences	1	“The judge’s guidance at the pre-motion conference is based on minimal information and always suggests his or her pre-disposition to one side or the other to the merits of the case.”

NEUTRAL	COUNT	SAMPLE QUOTES
Requires court engagement to be effective	1	“If the court is engaged and willing to indicate how successful a motion might be that is helpful.”

POST-MOTION CONFERENCE WITH THE COURT

Figure 5: Effectiveness of Post-Motion Conferences with the Court, Motions to Dismiss



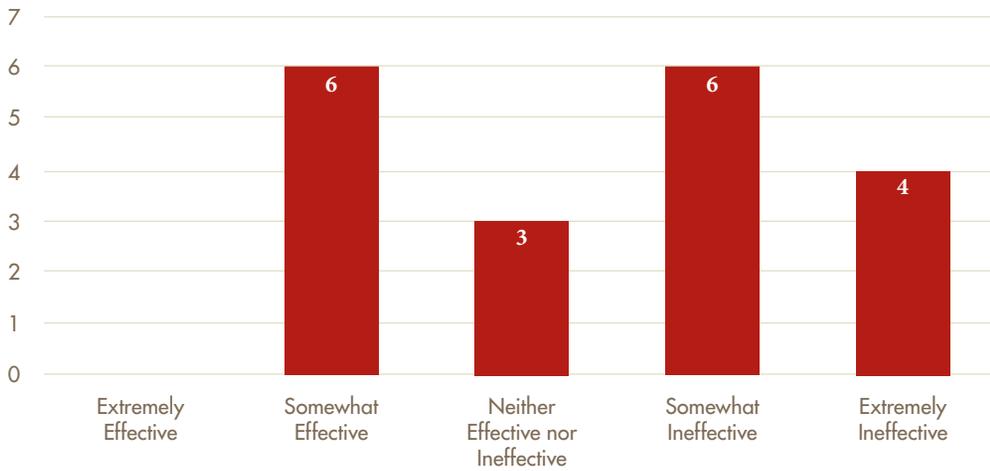
POSITIVE	COUNT	SAMPLE QUOTES
Can result in amended pleadings that address the issues underlying the motion	1	"A judge may allow the plaintiff to amend the complaint, correct the issue."
Potential to resolve issues without court involvement	1	"Get the case on track without a hearing."
Can be used as informal oral argument	2	"I have had other such conferences where the judge has read the briefs and uses the conference: (1) as an informal oral argument; and (2) as a means to explore realistic alternative processes for getting the case resolved. This is a better and more effective use of the process as long as the trial judge is willing to go to the work of ruling on the motion if that is the best way to proceed."
Can be used as a way to explore alternative paths to resolution	1	"I take this question to include oral argument on a motion and if you present a good oral argument that can be effective in winning the motion."
Can avoid unnecessary expense	1	"If a position is unreasonable or lacks merit, this is an early way to avoid additional expense."
Clarify/resolve/narrow issues	4	"Parties can discuss what led to the suit and what the plaintiff is really looking for." "Assists in honing the issues the judge believes are most important." "An opportunity to discuss merits and narrow issues."
Opportunity for judicial feedback on the motion	1	"The court can give its informal impressions of the merits of the motion."

NEGATIVE	COUNT	SAMPLE QUOTES
Some judges have a predisposition against motions	1	“I have had such conferences where the trial judge makes clear that he or she simply does not want to rule on the motion and automatically sends the case to early mediation instead. This is not an effective use of the process.”
Once filed, parties are looking for a ruling on the motion	1	“Post argument/briefs there is little to be gained by another conference. The parties are then looking for an opinion/ruling.”
Amended pleadings do not always correct the issues	1	“Usually the court gives the plaintiff an opportunity to amend the complaint to render our motion moot, and then we re-file later with an amended complaint that didn’t really solve the problems.”

NEUTRAL	COUNT	SAMPLE QUOTES
Depends on the judge	2	“Just depends on the judicial officer.” “In my experience, the effectiveness of such a conference varies considerably with the skill and motivation of the trial judge.”

MOTIONS FOR SUMMARY JUDGMENT

Figure 6: Effectiveness of Mandatory Meet and Confer between the Parties, Motions for Summary Judgment



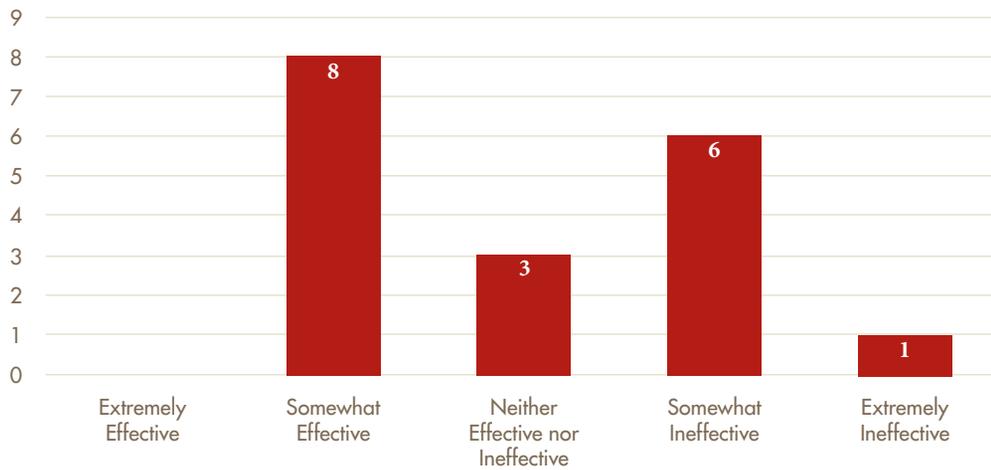
POSITIVE	COUNT	SAMPLE QUOTES
Clarify/resolve/narrow issues	1	<p>“It has caused claims to be narrowed.”</p> <p>“As with the motion to dismiss, we do have plaintiff’s counsel who will agree to dismiss certain claims once presented with our arguments. It does not result in dismissal of the whole case, but it does narrow the issues, and we have strict briefing page limits, so that is helpful.”</p>
Can aid in resolution	1	<p>“Meet and confer provides the attorneys with an opportunity to address issues in the case, which can aid in resolution without the time and expense of motions.”</p>
Can save time/money	1	

NEGATIVE	COUNT	SAMPLE QUOTES
Procedural impediment; waste of time/money	4	<p>“A party can fulfill its ‘meet and confer’ obligation on all opposed motions by simply sending an email to the non-moving party asking them whether they will concur with the granting of the motion. All the non-moving has to do is respond ‘No.’ And if there is no response, the moving party can proceed to file their motion and simply indicate that no response was received from opposing counsel.”</p> <p>“Such conferences and exchanges typically are not productive and a waste of time and expense.”</p>
Gamesmanship issues	1	<p>“Some lawyers want to file MSJs to ‘build their file’ (i.e., charge the client). Some lawyers don’t really appreciate the standard for Rule 56 motions and are hell-bent to file.”</p> <p>“Neither party wants to alert the other side to an argument that the other side might not have figured out.”</p>
Some judges have a predisposition against motions	1	<p>“Judges generally hate summary judgment motions and do not like to rule on them. So, mandatory meet and confers before filing usually turn into an opportunity for the Court to say that it would prefer that no motions for summary judgment be filed.”</p>
Parties are unlikely to concede/change their minds	4	<p>“A meet and confer will likely not change anyone’s mind.”</p> <p>“By this time the parties have hardened, become educated, and know the strengths and weaknesses of their case.”</p> <p>“It’s just very rare that counsel are going to reach agreement on the relief requested in a summary judgment motion.”</p>

NEUTRAL	COUNT	SAMPLE QUOTES
Depends on the attorneys	2	<p>“Depends on the attorneys involved.”</p> <p>“If the lawyers are sharp, the meet and confer may be beneficial.”</p>

PRE-MOTION LETTER, WRITTEN REQUEST FOR A PRE-MOTION CONFERENCE WITH THE COURT, OR OTHER WRITTEN NOTICE

Figure 7: Effectiveness of Pre-Motion Letter, Written Request for a Pre-Motion Conference with the Court, or Other Written Notice, Motions for Summary Judgment



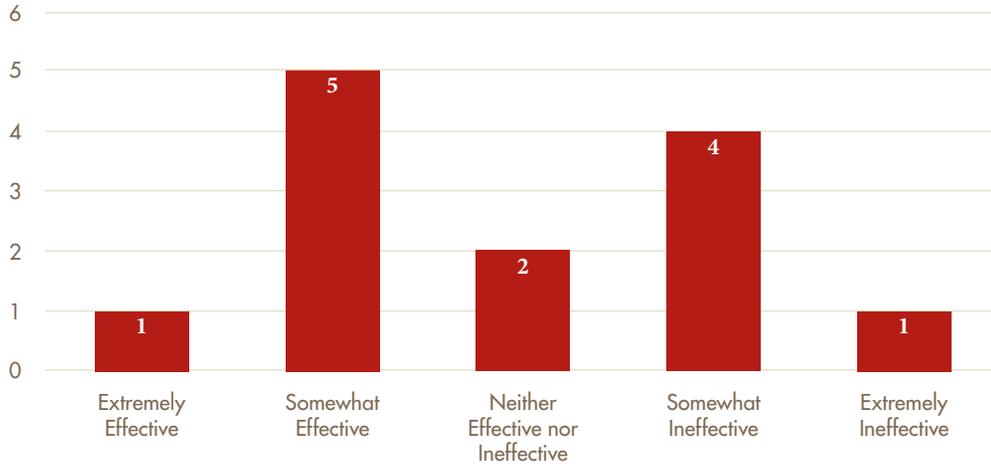
POSITIVE	COUNT	SAMPLE QUOTES
Allows for planning around the motion	1	
Opportunity for judicial feedback on the motion	1	“Judges can help pre-motion tell counsel how they see the case, which is helpful.”
Parties get a sense of likelihood of having a motion granted	2	“The letter or conference can give the parties a preview of whether the motion is likely to be granted.” “It certainly provides the parties with a judicial predisposition that may save time and money, at least to the extent that the court casts doubt upon the utility and prospects for success for such a motion.”
Decreased filing of frivolous motions	1	“Depending on the judge, a profound weakness in a potential motion can be identified and it can be made clear that the motion is baseless.”
Can save time/money	1	
Can aid in resolution	1	“Scope and substance of the letters at the summary judgment stage can be very helpful and aid in resolution of the case because the letters, if well-done, address the evidence and the law.”

NEGATIVE	COUNT	SAMPLE QUOTES
Procedural impediment; waste of time/money	1	“It’s just more paperwork.”
Some judges have a predisposition against motions	3	“[Court] more likely than not lets it be known that it would prefer no motion to be filed, a stance taken regardless of the strength of the motion.” “Also, attorneys opposing MSJs rarely just give up. They recognize that, even where their opposition is substantively weak, the motions are often denied for a variety of reasons; i.e., many judges are simply reluctant to grant them or are disposed, by temperament or workload, to hold that there is an issue of fact. There is often the view that courts are inclined to simply let the jury hear the evidence.”
Parties are unlikely to concede/change their minds	3	“By this time, the parties are in full command of all the facts and presumably the law.”
Judge provides feedback on incomplete record	2	“It necessarily [evaluates prospects of the motion] on an incomplete record that may ultimately require more, not less, judicial time if the motion goes forward.” “I think it is presumptuous that the court can indicate its leanings at this stage of the proceedings without the benefit of a full record.”

NEUTRAL	COUNT	SAMPLE QUOTES
Depends on multiple variables	1	“It depends on the issues, the strength of the motion, the clarity of the issue and the objectivity of both opposing counsel.”

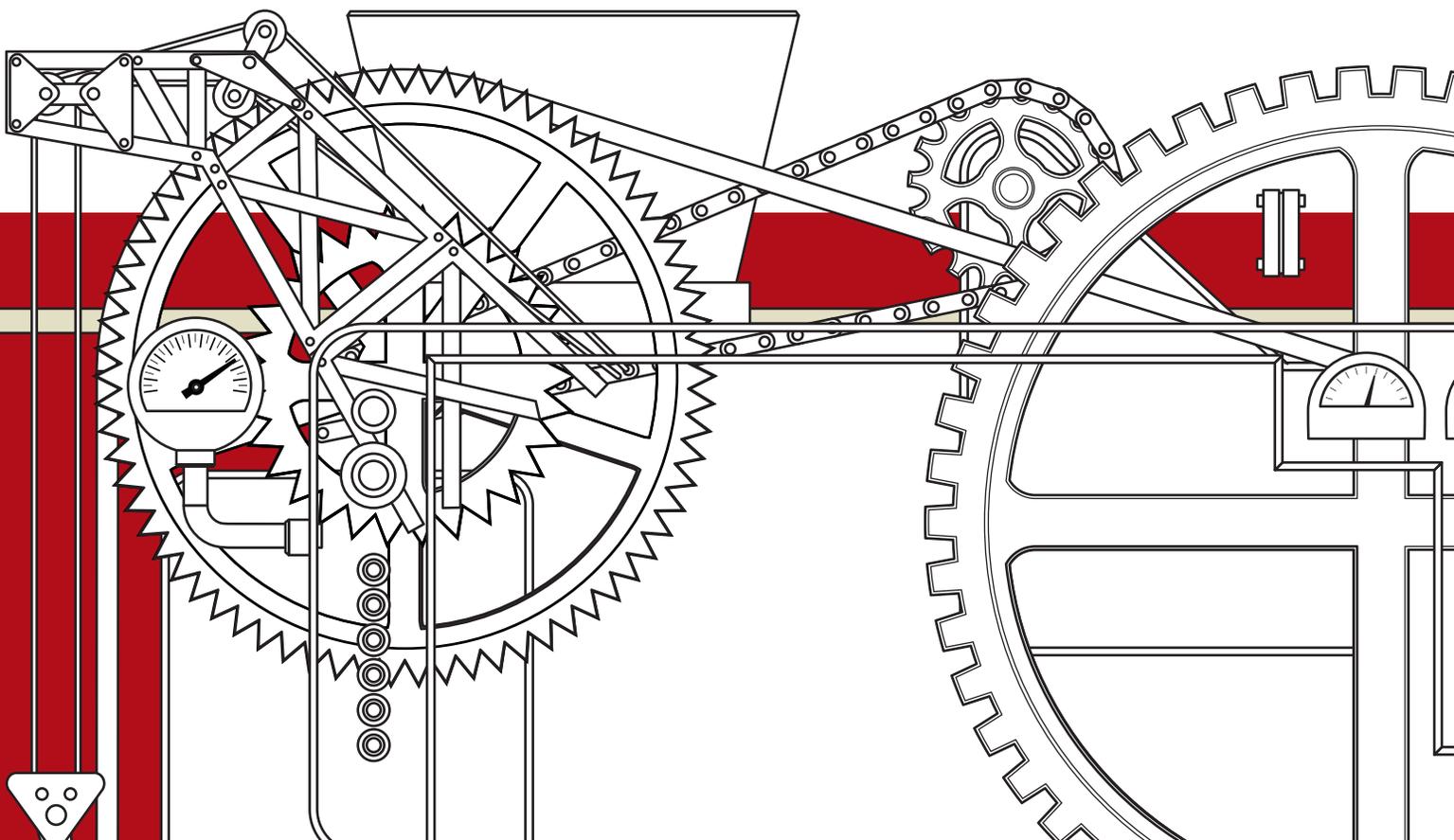
PRE-MOTION CONFERENCE WITH THE COURT

Figure 8: Effectiveness of Pre-Motion Conference with the Court, Motions for Summary Judgment



POSITIVE	COUNT	SAMPLE QUOTES
Opportunity for judicial feedback on the motion	3	<p>“One judge in our federal court—now retired—utilized this system to ‘cut off’ what he predetermined would be a waste of time or to indicate what portions of the case might have a chance re: MSJ. To that extent, it saved parties time and money.”</p> <p>“The court helps flesh out the issues, asks questions, raises concerns, and provides the parties with a good understanding of the court’s take on the matter and at least the areas of concern to address in the motion.”</p>
Can save time/money	2	
Decreased filing of frivolous motions	1	“It can avoid baseless motions.”
Can aid in resolution	1	“Can aid tremendously in the resolution of the case.”

NEGATIVE	COUNT	SAMPLE QUOTES
Some judges have a predisposition against motions	1	
Unnecessary if the trial judge is effective	1	<p>“Generally speaking, an effective trial judge will have held a pre-trial conference prior to dispositive motion cutoff, and will presumably have guided the process appropriately. I don’t see much value in requiring the parties to confer with the court in advance to notify it about an anticipated motion for summary judgment, or to seek some kind of permission to do so.”</p>
Judge provides feedback on incomplete record	1	





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