FOURTH CIVIL JUSTICE REFORM SUMMIT

Creating the Just, Speedy, and Inexpensive
COURTS OF TOMORROW

February 25-26, 2016 | Denver, Colorado

MATERIALS

Presented by:

RULE ONE INITIATIVE

10 YEARS OF IAALS
INSTITUTE *for the* ADVANCEMENT *of the* AMERICAN LEGAL SYSTEM
UNIVERSITY of DENVER

Sponsored by:

AMERICAN COLLEGE OF TRIAL LAWYERS FOUNDATION

State Projects and Rules Update: Experiences, Empirical Research, and Expectations

Materials

- Paula Hannaford-Agor, Scott Graves & Shelley Spacek Miller, Nat'l Ctr. for State Cts., The Landscape of Civil Litigation in State Courts (2015)
- Hannah E.M. Lieberman, Linda Sandstrom Simard & Ed Marks, Problems and Recommendations for High Volume Dockets (2015)
- Massachusetts BLS Pilot Project Summary
- Jordan Singer, Suffolk Superior Court Business Litigation Session Pilot Project: Final Report on the 2012 Attorney Survey (2012)
- New Hampshire PAD Pilot Rules
- Paula Hannaford-Agor, et al., Nat'l Ctr. for State Cts., New Hampshire: Impact of the Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules (2013)
- Utah Rules of Civil Procedure—Disclosure and Discovery
- Paula Hannaford-Agor & Cynthia G. Lee, Utah: Impact of the Revisions to Rule 26 on Discovery Practice in the Utah District Courts, Final Report (2015)
- Supreme Court of Colorado, Chief Justice Directive Adopting Pilot Rules for Certain District Court Civil Cases (amended July 2014)
- 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)
- Supreme Court of Minnesota, Order Relating to the Civil Justice Reform Task Force, Authorizing Expedited Civil Litigation Track Pilot Project, and Adopting Amendments to the Rules of Civil Procedure and the General Rules of Practice (May 8, 2013)

Civil Justice Initiative

The Landscape of Civil Litigation in State Courts

NCSC
National Center for State Courts
Williamsburg, Virginia

SJI
State Justice Institute

Note: The Allegheny County Court of Common Pleas in Pittsburgh, Pennsylvania, was one of 152 courts in 10 counties that participated in the NCSC *Landscape of Civil Litigation in State Courts.* The study examined all civil cases disposed in those counties from July 1, 2012 through June 30, 2013. The resulting dataset included over 900,000 cases, approximately five percent of the total civil caseload in state courts nationally.

Paula Hannaford-Agor, JD
Director, NCSC Center for Jury Studies

Scott Graves
Court Research Associate

Shelley Spacek Miller
Court Research Analyst

Acknowledgements

This study was undertaken to inform the deliberations of the Conference of Chief Justices (CCJ) Civil Justice Improvements Committee as it developed recommendations based on evidence-based practices to improve civil case processing in state courts. We are grateful to the committee members and staff who asked probing questions that spurred us to mine the *Landscape* dataset for as much information as could possibly be gleaned. We are especially indebted to the Committee Chair, Chief Justice Thomas Balmer (Supreme Court of Oregon); the chairs of the Rules/Procedures and Court Operations subcommittees, Judge Jerome Abrams (First Judicial District Court, Minnesota), and Judge Jennifer D. Bailey (Eleventh Judicial Circuit, Florida); the Committee Reporter, Judge Gregory E. Mize (D.C. Superior Court); and Brittany Kauffman and Corina Gerety of the Institute for the Advancement of the American Legal System (IAALS), who shouldered far more than their fair share of research and administrative support for the Committee's work.

We are also immensely grateful to the state courts that participated in the study. It is a gross understatement to say that state courts today are operating under enormous pressure to manage voluminous caseloads with significantly reduced resources. We recognize that it is no small task for those courts to allocate scarce resources to extract case-level data from their case management systems and, as important, to answer detailed questions about computer codes and formatting that is necessary to make sense of the data. Their willingness to do so is a testament to their commitment to maintaining the American civil justice system as a forum for the speedy, inexpensive, and just resolution of civil claims.

No research project undertaken by the National Center for State Courts is ever solely the product of the professional staff assigned to that project. We relied heavily on guidance and support from colleagues who contributed many hours to this project brainstorming ideas, answering questions about related projects, reviewing report drafts, and generally offering encouragement throughout the process. We especially acknowledge the following individuals who were particularly helpful: Tom Clarke, Vice President, Research & Technology; Richard Schauffler, Director, Research Services; Neil LaFountain, Senior Court Research Analyst; Pamela Petrakis, Senior Administrative Manager; Brenda Otto, Program Specialist, and Bethany Bostron, Research Intern.

Finally, both the CCJ Civil Justice Improvements Committee and the *Landscape* study were generously supported by a grant from the State Justice Institute (SJI-13-P-201). The views expressed in this report are those of the authors and do not necessarily represent those of the State Justice Institute, the National Center for State Courts, or the participating courts.

Table of Contents

Executive Summary

Much of the debate concerning the American justice system focuses on procedural issues that add complexity to civil litigation, resulting in additional cost and delay and undermining access to justice. Many commentators are alarmed by the increasing privatization of the civil justice system and particularly by the dramatic decline in the rates of civil bench and jury trials. In addition, substantially reduced budgetary resources since the economic recession of 2008-2009 have exacerbated problems in civil case processing in many state courts.

In response to these concerns, state and federal courts have implemented a variety of civil justice reform projects over the past decade. Some have focused on particular types or characteristics of civil cases such as business and complex litigation programs. Others have aimed at problematic stages of civil litigation, especially discovery. In 2013, the Conference of Chief Justices (CCJ) convened a Civil Justice Improvements Committee to assess the effectiveness of these efforts and to make recommendations concerning best practices for state courts. To inform the Committee's deliberations, the National Center for State Courts (NCSC) undertook a study entitled *The Landscape of Civil Litigation in State Courts* to document case characteristics and outcomes in civil cases disposed in state courts.

Differences among states concerning data definitions, data collection priorities, and organizational structures make it extremely difficult to provide national estimates of civil caseloads with sufficient granularity to answer the most pressing questions of state court policymakers. The sample of courts in the *Landscape* study was intentionally selected to mirror the variety of organizational structures in state courts. The resulting *Landscape* dataset consisted of all non-domestic civil cases disposed between July 1, 2012 and June 30, 2013 in 152 courts with civil jurisdiction in 10 urban counties. The 925,344 cases comprise approximately five percent (5%) of state civil caseloads nationally.

Many commentators are alarmed by the increasing privatization of the civil justice system and particularly by the dramatic decline in the rates of civil bench and jury trials.

FINDINGS

The picture of civil caseloads that emerges from the *Landscape* study is very different than one might imagine from listening to current criticism about the American civil justice system. High-value tort and commercial contract disputes are the predominant focus of contemporary debates, but collectively they comprised only a small proportion of the *Landscape* caseload. In contrast, nearly two-thirds (64%) were contract cases, and more than half of those were debt collection (37%) and landlord/tenant cases (29%). An additional sixteen percent (16%) were small claims cases involving disputes valued at $12,000 or less,

and nine percent (9%) were characterized as "other civil" cases involving agency appeals and domestic or criminal-related cases. Only seven percent (7%) were tort cases and one percent (1%) were real property cases.

To the extent that damage awards recorded in the final judgment are a reliable measure of the monetary value of civil cases, the cases in the dataset involved relatively modest sums. Despite widespread perceptions that civil litigation involves high-value commercial and tort cases, only 357 cases (0.2%) had judgments that exceeded $500,000 and only 165 cases (less than 0.1%) had judgments that exceeded $1 million. Instead, three-quarters (75%) of all judgments were less than $5,200. These values varied somewhat based on case type; three-quarters of real property judgments, for example, were less than $106,000 and three-quarters of torts were less than $12,200. For most represented litigants, the costs of litigating a case through trial would greatly exceed the monetary value of the case. In some instances, the costs of even initiating the lawsuit or making an appearance as a defendant would exceed the value of the case.

Litigation costs that routinely exceed the case value explain the low rate of dispositions involving any form of formal adjudication. Only four percent (4%) of cases were disposed by bench or jury trial, summary judgment, or binding arbitration. The overwhelming majority (97%) of these were bench trials, almost half of which (46%) took place in small claims or other civil cases. Three-quarters of judgments entered in contract cases following a bench trial were less than half of those in small claims cases ($1,785 versus $3,900). This contradicts assertions that most bench trials involve adjudication over complex, high-stakes cases.

Most cases were disposed through an administrative process. A judgment was entered in nearly half (46%) of the cases, most of which were likely default judgments. One-third of cases were dismissed, possibly following a settlement; ten percent (10%) were explicitly recorded as settlements.

Summary judgment is a much less favored disposition in state courts compared to federal courts. Only one percent (1%) were disposed by summary judgment, and most of these would have been default judgments in debt collection cases except the plaintiff pursued summary judgment to minimize the risk of post-disposition challenges.

A traditional hallmark of civil litigation is the presence of competent attorneys zealously representing both parties. One of the most striking findings in the dataset was the relatively large proportion of cases (76%) in which at least one party was self-represented, usually the defendant. Tort cases were the only ones in which a majority (64%) of cases had both parties represented by attorneys. Small claims dockets had an

At least one party was self-represented (usually the defendant) in more than three-quarters of the cases.

The picture of civil litigation that emerges from the *Landscape* dataset confirms the longstanding criticism that the civil justice system takes too long and costs too much.

unexpectedly high proportion (76%) of plaintiffs who were represented by attorneys, which suggests that small claims courts, which were originally developed as a forum for self-represented litigants to obtain access to courts through simplified procedures, have become the forum of choice for attorney-represented plaintiffs in lower-value debt collection cases.

Approximately three-quarters of cases were disposed in just over one year (372 days), and half were disposed in just under four months (113 days). Nevertheless, small claims were the only case type that came close to complying with the *Model Time Standards for State Trial Courts (Standards)*. Tort cases were the worst case category in terms of compliance with the *Standards*. On average, tort cases took 16 months (486 days) to resolve and only 69 percent were disposed within 540 days of filing compared to 98 percent recommended by the *Standards*.

IMPLICATIONS FOR STATE COURTS

The picture of civil litigation that emerges from the *Landscape* dataset confirms the longstanding criticism that the civil justice system takes too long and costs too much. As a result, many litigants with meritorious claims and defenses are effectively denied access to justice in state courts because it is not economically feasible to litigate those cases. Most of the litigants who have the resources and legal sophistication to do so have already abandoned the civil justice system either preemptively through contract provisions (e.g., for consumer products and services, employment, and health care) or after filing a case in court through private ADR services. Ironically, private ADR is often provided by experienced trial lawyers and retired judges.

The vast majority of civil cases that remain in state courts are debt collection, landlord/tenant, foreclosure, and small claims cases. State courts are the preferred forum for plaintiffs in these cases for the simple reason that in most jurisdictions state courts hold a monopoly on procedures to enforce judgments. Securing a judgment from a court of competent jurisdiction is the mandatory first step to being able to initiate garnishment or asset seizure proceedings. The majority of defendants in these cases, however, are self-represented. Even if defendants might have the financial resources to hire a lawyer to defend them in

court, most would not because the cost of the lawyer exceeds the potential judgment. The idealized picture of an adversarial system in which both parties are represented by competent attorneys who can assert all legitimate claims and defenses is an illusion.

State court budgets experienced dramatic cuts during the economic recessions both in 2001–2003 and in 2008–2009, and there is no expectation among state court policymakers that state court budgets will return to pre-2008 recession levels. These budget cuts combined with constitutional and statutory provisions that prioritize criminal and domestic caseloads over civil caseloads have undermined courts' discretion to allocate resources to improved civil case management. As both the quantity and quality of adjudicatory services provided by state courts decline, it becomes questionable whether state legislators will be persuaded to augment budgets to support civil caseloads.

These trends have severe implications for the future of the civil justice system and for public trust and confidence in state courts. The cost and delays of civil litigation greatly outpace the monetary value of most cases filed in state courts, effectively denying access to justice for most litigants and undermining the legitimacy of the courts as a fair and effective forum to resolve disputes. Reductions in the proportion of civil cases resolved through formal adjudication threaten to erode a publicly accessible body of law governing civil cases. Fewer common law precedents will leave future litigants with lessened standards for negotiating civil transactions or conforming their conduct in a responsible manner. The privatization of civil litigation likewise undermines the ability of the legislative and executive branches of government to respond effectively to developing societal circumstances that become apparent through claims filed in state courts. Because the civil justice system directly touches everyone in contemporary American society — through housing, food, education, employment, household services and products, personal finance, and commercial transactions — ineffective civil case management by state courts has an outsized effect on public trust and confidence compared to the criminal justice system. If state court policymakers are to return to the traditional role of state courts as the primary forum for dispute resolution, civil justice reform can no longer be delayed or even implemented incrementally through mere changes in rules of procedure. It is imperative that court leaders move with dispatch to improve civil case management with tools and methods that align with the realities of modern civil dockets to control costs, reduce delays, and ensure fairness for litigants.

Ineffective civil case management by state courts has an outsized effect on public trust and confidence.

National Center for State Courts 1971

Introduction

Concerns about the slow pace, high costs, procedural complexity, and lack of predictable outcomes associated with civil litigation have been raised repeatedly for more than a century.[1] Many of the court reform efforts of the 20th century were intended to address these concerns even as courts struggled to manage rapidly expanding criminal, family, and juvenile caseloads. After the federal judiciary adopted uniform rules of civil procedure in 1934, the vast majority of state courts followed suit, enacting state rules of civil procedure that often mirrored the federal rules verbatim. In subsequent decades, courts experimented with a variety of procedural and administrative reforms to the civil justice system including simplified evidentiary requirements for small claims cases, front-loading discovery through automatic disclosure of witnesses and other key evidence supporting each party's claims and defenses, differentiated caseflow management, increased judicial case management, and alternative dispute resolution (ADR) programs.

CHALLENGES CONFRONTING THE CIVIL JUSTICE SYSTEM

Despite the good intentions, it is clear that these efforts have either been an inadequate response to current problems or have been rendered obsolete by new challenges confronting the civil justice system. In some instances, reform efforts have even created new problems. A detailed description of the myriad issues confronting the contemporary civil justice system is beyond the scope of this report and, in any case, would merely duplicate a great deal of scholarly work. Nevertheless, a brief summary of the most common complaints and some applicable responses helps to illustrate the scope of the problem.

- **Pleadings.** The complaint and answer are the formal court documents that initiate a civil case and articulate the factual and legal basis for any claims or defenses. Increasingly, courts have moved from notice pleading, in which plaintiffs merely state the initiation of a lawsuit, to fact pleading, in which plaintiffs are required to state the factual basis for the claim. Under a fact pleading standard, defendants likewise must state the factual basis for any legal defenses they plan to raise. The rationale for fact pleading rather than notice pleading is twofold. First, because both parties have knowledge of the factual basis for their opponent's claims, they can prepare more promptly and efficiently for subsequent stages of the litigation process (e.g., discovery, settlement negotiations). Second, fact pleading is also intended to minimize frivolous litigation by requiring both parties to make a sufficient investigation of the facts before filing claims, thus preventing the expenditure of needless time, energy, and resources to defeat unsupported claims.[2] In 2009, the U.S. Supreme Court further heightened the fact pleading standard. In federal courts, plaintiffs must now allege sufficient facts to allow a trial judge to determine the plausibility of a claim.[3] This raises Seventh Amendment concerns that judicial plausibility assessments based on the factual content in pleadings will displace the role traditionally played by juries in a full evidentiary trial.[4]

---

[1] Roscoe Pound is credited with first raising these concerns in an address to the American Bar Association in 1906. Roscoe Pound, Address at the American Bar Association Convention: The Causes of Popular Dissatisfaction with the Administration of Justice *in* A.B.A. Rep., pt. I, 395-417 (1906).

[2] The ease with which litigants may assert legally or factually unsupported claims is a constant concern in the civil justice system. Civil justice reform leaders initially hailed efforts to impose sanctions on frivolous filings. However, many scholars have regretted the institution of such reforms due to satellite litigation over whether, in fact, the claims and/or defenses were known to be unsupported when filed. Joint comment by Helen Hershkoff et al. on Proposed Amendment to Federal Rules of Civil Procedure, to Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, 7 (Feb. 25, 2014), *available* at http://www.afj.org/wp-content/uploads/2014/02/Professors-Joint-Comment.pdf. *See* also Lonny Hoffman, *The Case Against the Lawsuit Abuse Reduction Act of 2011*, 48 HOUSTON L. REV. 545 (2011).

[3] *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009) (holding Iqbal's factual pleadings insufficient to state a claim); Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007) (holding a complaint insufficient absent factual context to support plausibility for relief).

[4] Kenneth S. Klein, *Ashcroft v. Iqbal Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB. L. REV. 261 (2009). Scholars have also examined Seventh Amendment consequences of heightened factual pleading requirements in securities fraud actions. Allan Horwich and Sean Siekken, *Pleading Reform or Unconstitutional Encroachment: An Analysis of the Seventh Amendment Implications of the Private Securities Litigation Reform Act*, 35 SEC. REG. L. J. 4 (2007).

- **Service of process.** Traditional procedures for serving notice in civil lawsuits are functionally obsolete, especially in suits against individuals. Typical methods of serving process are riddled with inaccuracies and inadequacies. In some cases, private process service companies have undergone civil lawsuits and criminal prosecutions regarding service practices.[5] One study of process service in New York's King and Queen Counties found that personal service was achieved in only six percent of civil debt collection cases.[6] Service of process via newspaper publication and/or posting on the courthouse door seems quaint in light of technological advancements. The consequences of inadequate service are especially damaging for individuals who only learn of a case through court orders authorizing award enforcement by garnishment or asset seizure following a default judgment. Technological advancements have alleviated some of the issues surrounding inadequate service of process. Electronic service provides a method of serving process for especially difficult-to-reach parties. The cost-saving potential of electronic service is also incredibly high. However, electronic service is not without its limitations with potential controversies over receipt of service and sufficiency of notice.[7]

- **Discovery.** While opinions on excessive discovery may vary from the plaintiff to the defense bar, several national surveys report a consensus that the time devoted to discovery is the primary cause of delay in the litigation process.[8] Most state court rules and case law permit discovery for anything that might lead to admissible evidence. This results in an unfocused, and often disproportionate, approach to discovery in which lawyers fail to identify key issues and spend time and effort investigating tangential issues. This expansive nature of discovery and the resulting delays translate to increased litigation costs. In fact, there are frequent complaints that discovery costs often dwarf the value of the case.[9] The traditional law firm business model (based on the billable hour) and the lack of disciplinary action in response to excessive discovery filings encourages lawyers to do more discovery rather than smart discovery.

- **Electronically Stored Information (ESI).** Evidence needed to support claims and defenses increasingly exists only in electronic format rather than live witness testimony, papers, or other tangible objects. The costs of ESI discovery include expenses associated with processing old data, reviewer complications based on qualitative differences between paper and electronic documents, and the production of documents.[10] The expertise needed to organize, review and analyze electronic records is also very expensive, further increasing the costs of the discovery process. A lack of experience and knowledge on the part of judges and attorneys about how to assess and manage ESI discovery often leads to overly broad requests for production. The effects of over-production are especially felt in specialized areas of civil litigation such as business litiga-

---

[5] *See* NEW YORK CITY BAR ASSOCIATION COMMITTEE ON NEW YORK CIVIL COURT COMMITTEE ON CONSUMER AFFAIRS, OUT OF SERVICE: A CALL TO FIX THE BROKEN SERVICE PROCESS INDUSTRY *available at* http://www.nycbar.org/pdf/report/uploads/ProcessServiceReport4-10.pdf; Bernice Yeung, *"Bay Area Residents Sue Process Servers for Failing to Deliver Lawsuits"* CALIFORNIA WATCH (May 24, 2012); Press Release, New York State Office of the Attorney General, The New York State Attorney General Andrew M. Cuomo Announces Guilty Plea of Process Server Company Owner Who Denied Thousands of New Yorkers Their Day in Court (Jan. 15, 2010) *available at* http://www.ag.ny.gov/press-release/new-york-state-attorney-general-andrew-m-cuomo-announces-guilty-plea-process-server.

[6] MFY LEGAL SERVICES, JUSTICE DISSERVED: A PRELIMINARY ANALYSIS OF THE EXCEPTIONALLY LOW APPEARANCE RATE BY DEFENDANTS IN LAWSUITS FILED IN THE CIVIL COURT OF THE CITY OF NEW YORK 6 (2008) *available at* http://www.mfy.org/wp-content/uploads/reports/Justice_Disserved.pdf.

[7] Ronald Hedges, Kenneth Rashbaum, and Adam Losey, *Electronic Service of Process at Home and Abroad: Allowing Domestic Electronic Service of Process in the Federal Courts*, 4. FED. CTS. L. REV. 55, 66, 72-73 (2011).

[8] Based on responses of a national survey of the American College of Trial Lawyers, American Bar Association Litigation Section, and the National Employment Lawyers Association. Judicial responses to an accompanying survey also indicated that the time required to complete discovery was the source of the most significant delay in the litigation process. CORINA GERETY, EXCESS AND ACCESS: CONSENSUS ON THE AMERICAN CIVIL JUSTICE LANDSCAPE 11 (2011) [*hereinafter* EXCESS AND ACCESS].

[9] *See* Paula L. Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, 20(1) CASELOAD HIGHLIGHTS 1, 2013 [*hereinafter* CASELOAD HIGHLIGHTS].

[10] John Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L. J. 547, 564-567 (2010).

tion. As the amount of ESI grows, concerns about costs associated with developing an efficient and effective ESI discovery process are paramount.[11]

- **Expert evidence.** Scientific or expert evidence is needed to support a growing proportion of claims in all types of civil cases with respect to both causation and damages. Procedures developed to govern the admissibility of expert evidence require judges, who are rarely subject matter experts, to make a twofold assessment: 1) the expert's qualifications to opine on a given issue and 2) whether the expert's opinion is sufficiently grounded in recognized science to be admissible in a court of law.[12] This process has raised Seventh Amendment concerns related to judges usurping the jury's role in making determinations about the weight of expert evidence.[13]

- **Mandatory alternative dispute resolution (ADR).** ADR encompasses a range of services including mediation, arbitration, and neutral case evaluation and is an integral part of virtually all civil litigation. It offers opportunities for litigants to settle their cases, usually in less time than a formal court hearing (trial) and often at less cost. Beginning in the early 1980s, many courts introduced procedural requirements that litigants engage in one or more forms of ADR, or at the very least consider doing so, especially in lower-value cases (e.g., less than $50,000).[14] ADR programs are not without their critics.[15] Some allege that mandatory ADR imposes an additional procedural hurdle on litigants and drives up the cost of litigation. Other complaints have focused on the qualifications of the professionals who conduct the ADR proceedings. The fees charged by ADR professionals also often exceed court fees.[16] Because courts must ensure the quality of their mandatory arbitration programs, there are concerns that the maintenance costs for mandatory ADR programs will pass on unnecessary costs to all litigants.

- **Summary judgment.** Summary judgment rulings in federal and state courts have broad implications for the civil justice system.[17] The resolution of a case at the early stages of litigation both halts the unnecessary continuation of litigation and contributes to the expansion of discovery. Rule changes and subsequent case law have facilitated summary judgment rulings in recent decades,[18] creating controversy as jurisprudence and rules continue to develop.[19] Variations in local rules and ruling propensities of local judges can also complicate summary judgment procedures and make the summary judgment stage a source of uncertainty for litigants.

- **Perceived unpredictability in trial outcomes, especially jury verdicts.** The proportion of civil cases disposed by trial has decreased dramat-

---

[11] EXCESS AND ACCESS, *supra* note 8, at 14.

[12] Daubert v. Merrel Dow Pharmaceuticals Inc., 509 U.S. 579 (1993), further defined the judicial gatekeeping role with respect to expert witness testimony.

[13] *See* Allan Kanner and M. Ryan Casey, *Daubert and the Disappearing Jury Trial*, 69 U. PITT. L. REV. 281 (2007-2008) (discussing the impact of the *Daubert* ruling and subsequent seventh amendment concerns in the civil justice system). While it will not alleviate constitutional concerns, better training for trial judges making expert witness determinations can help ensure more knowledgeable determinations regarding the admissibility of expert witness testimony. *See also Forensic Sciences: Judges as Gatekeepers*, in JUDGES' J. (Summer 2015) (publishing articles by scientific experts to provide knowledge to judges and lawyers to assess the reliability of expert evidence).

[14] Oregon has a mandatory ADR provision for cases under 50,000. OR. REV. STAT. § 36.400 (3) (2011). New Hampshire requires mediation in small claims cases in which the jurisdictional amount is in excess of $5,000. N.H. Cir. Ct. R, Dist. Div. 4.29. Some jurisdictions classify certain summary jury trial programs as ADR programs. For examples of jurisdictions in which summary jury trials are classified as ADR programs, *see* PAULA HANNAFORD-AGOR et al., SHORT, SUMMARY, & EXPEDITED: THE EVOLUTION OF CIVIL JURY TRIALS (2012) [*hereinafter* SHORT, SUMMARY & EXPEDITED].

[15] Michael Heise, Why ADR Programs Aren't More Appealing: An Empirical Perspective (Cornell Law Faculty Working Paper No. 51) *available at* http://scholarship.law.cornell.edu/clsops_papers/51/.

[16] RAND CORP., ESCAPING THE COURTHOUSE, RB-9020 (1994) (*available at* http://www.rand.org/pubs/research_briefs/RB9020/index1.html).

[17] *See* Brooke Coleman, *Summary Judgment: What We Think We Know Versus What We Ought to Know*, 43 LOY. U. CHI. L. J. 1 (2012) (describing various scholarship on summary judgment effects).

[18] John Langbien, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 566-568 (2012).

[19] For a succint analysis of summary judgment in the federal courts, see WILLIAM SCHWARZER et al., THE ANALYSIS AND DECISION OF SUMMARY JUDGMENT MOTIONS: A MONOGRAPH ON RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE (1991).

ically over the past 40 years.[20] The reasons for the decline are numerous and, in some instances, quite subtle. They include increases in the availability of alternative dispute resolution (ADR) programs including contractually required binding arbitration in many consumer and employment contracts; the costs for discovery and pretrial stages of litigation, which have prompted some litigants to forego trials for a negotiated settlement; delays in scheduling trials due to the increased volume of civil cases without commensurate increases in court resources; and widespread public perceptions about the unpredictability of trial outcomes, especially in jury trials.[21] Although empirical research confirms that jury trial verdicts are actually very predictable,[22] the shift away from trial as the dominant mode of case disposition has likewise reduced the number of attorneys with jury trial experience. Consequently, attorneys are less qualified to assess the merits of their cases and to advise clients about taking cases to trial by jury.[23]

- **Lack of court resources allocated to civil justice.** Constitutional guarantees of a speedy trial in criminal cases tend to relegate civil matters to the bottom of scheduling priorities.[24] This is exacerbated in tight budgetary cycles as courts may be operating under furloughs or reduced hours, further decreasing scheduling options for civil cases. Some courts have responded by creating specialized courts, especially for business or commercial litigation, to address the recent lack of court resources. Although these dockets and courts guarantee civil litigation its own niche in court scheduling, sustaining the dockets may become challenging as there must be a sufficient case volume to justify the expenditures. Additionally, efforts to provide scheduling priorities within civil case categories might meet statutory requirements,[25] but the bulk of civil litigation is then left last in line for scheduling.

CIVIL JUSTICE IMPROVEMENT EFFORTS

The general complaint concerning these challenges is that collectively they contribute to unsustainable cost and delay in civil litigation, ultimately impeding access to justice. These problems have not been allowed to develop entirely unchecked, however. Across the country, court leaders have developed a variety of reform efforts to address issues in the civil justice system. For example, some states have designed and implemented programs targeting specific types of cases, especially related to business, commercial, or complex litigation. The California Judicial Council instituted a complex civil litigation pilot program in response to litigant concerns regarding the "time and expense needed to resolve complex cases, the consistency of decision making, and perceptions that the substantive law governing commercial transactions was becoming increasingly incoherent."[26] Fulton County, Georgia implemented a Business Court that moves complex contract and tort cases through the litigation process in half the amount of time the general docket moves the same types of cases.[27] Other states have designed and implemented more tailored projects. In 2009, Colorado began developing pilot rules and procedures for the Colorado Civil Access Pilot Project (CAPP) applicable to business actions

[20] Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIR. LEGAL ST. 459 (2004) [*hereinafter The Vanishing Trial*].

[21] The first issue of the *Journal of Empirical Legal Studies* published the papers presented at the ABA Vanishing Trial Symposium, which addressed these and other issues related to vanishing trials.

[22] *See generally* NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT (2007) (summarizing several decades of empirical research on juror decision-making in a variety of contexts and concluding that jury verdicts are largely rational and conform to the weight of the evidence presented at trial).

[23] Tracy W. McCormack & Christopher J. Bodnar, *Honesty is the Best Policy: It's Time to Disclose Lack of Jury Trial Experience*, 23 GEO. J. LEG. ETHICS 1 (Winter 2010).

[24] U.S. CONST. amend VI. State constitutions also contain provisions guaranteeing the right to a speedy trial. *See e.g.* MO. CONST. art. I, § 18(a).

[25] It should be noted that certain civil matters such as protective order hearings also have temporal scheduling requirements and supplant more generic civil matters in scheduling. For examples of these requirements *see e.g.*, N. H. REV. STAT. ANN. § 173-B:3 (2014) (setting timeline for domestic violence protective order hearing); VA. CODE ANN, § 16.1-252 (2014) (setting timeline for removal hearings in child abuse and neglect matters).

[26] Nat'l Center for St. Cts., *Complex Litigation: Key Findings from the California Pilot Program*, 3(1) CIVIL ACTION 1 (2004).

[27] Sixty-five percent faster disposition time for complex contract cases and 56 percent faster disposition time for complex tort cases. FULTON COUNTY SUPERIOR COURT, BUSINESS COURT: 2014 ANNUAL REPORT 4 (2014).

in the Colorado district courts. The CAPP program focused on developing new procedures to streamline the pretrial discovery process and minimize expert witness costs.[28] The final pilot rules were implemented in 2012 and have been authorized for application to cases filed through December 31, 2014.[29]

Similarly, New Jersey, Pennsylvania, and Texas have all undertaken efforts to coordinate the management of mass tort litigation through the promulgation of court rules. For example, the Supreme Court of New Jersey promulgated a rule enabling the unification of qualifying mass tort cases for central management purposes.[30] The rule grants the Administrative Director of the Courts the power to develop criteria and procedures for unifying the mass tort litigation, subject to approval by the Court. Complex litigation centers generally serve as the clearinghouse for such litigation. Similar coordination efforts in the form of dedicated trial calendars have also taken place for landlord/tenant and mortgage foreclosure cases.

Federal and state courts have also pursued procedural reforms on a broader scale. As discussed above, federal courts have heightened pleading standards. New Hampshire also altered their pleading standards (from notice pleading to fact pleading) in a two-county pilot program implemented in 2010. The pilot rules were subsequently adopted on a statewide basis effective March 1, 2013.[31] Statewide rule changes in Utah have altered the discovery process in a variety of ways including proportional discovery requirements and tiered discovery based on the amount in controversy.[32] Discovery reforms have also taken place in the federal courts. The Seventh Circuit Electronic Discovery Pilot Program aims to reduce the rising costs of e-discovery through a myriad of reforms and is currently in phase three of its implementation.[33]

Some federal agencies are also focusing on civil justice improvement in certain types of cases. For example, the Consumer Financial Protection Bureau (CFPB) recently issued proposed rules of procedure for debt collection cases filed in state courts to address complaints concerning venue, service of process, and disclosure of the factual basis for debt collection claims.[34] Research organizations such as the NCSC and the Institute for the Advancement of the American Legal System (IAALS) have also coordinated with pilot project jurisdictions to conduct comprehensive outcome and process evaluations of reform efforts. These implementation and evaluation reports are a crucial aspect of ensuring effective and efficient reforms of the civil justice system. This is especially the case as court leaders continue to take a proactive stance towards civil justice reform through efforts such as the Conference of Chief Justices (CCJ) Civil Justice Improvements Committee.[35]

---

[28] State of Colorado Judicial Branch, A History and Overview of the Colorado Civil Access Pilot Project Applicable to Business Actions in District Court 3, *available at* http://www.courts.state.co.us/userfiles/file/Court_Probation/Educational_Resources/CAPP%20Overview%207-11-13.pdf. CORINA D. GERETY & LOGAN CORNETT, MOMENTUM FOR CHANGE: THE IMPACT OF THE COLORADO CIVIL ACCESS PILOT PROJECT (October 2014).

[29] *Id*. at 2.

[30] N. J. SUP. CT. R. 4:38A.

[31] PAULA HANNAFORD-AGOR ET AL., NEW HAMPSHIRE: IMPACT OF THE PROPORTIONAL DISCOVERY/AUTOMATIC DISCLOSURE (PAD) PILOT RULES 2 (2013) [*hereinafter* NEW HAMPSHIRE PAD RULES REPORT].

[32] PAULA HANNAFORD-AGOR & CYNTHIA LEE, UTAH: IMPACT OF THE REVISIONS TO RULE 26 ON DISCOVERY PRACTICE IN THE UTAH DISTRICT COURTS (April 2015) [*hereinafter* UTAH RULE 26 REPORT]. For a synopsis of amendments to Utah's Rules of Civil Procedure see IAALS, Utah Rules of Civil Procedure, http://iaals.du.edu/library/publications/utah-changes-to-civil-disclosure-and-discovery-rules (last visited April 14, 2014).

[33] For information on the Seventh Circuit Pilot Program see the program's website at http://www.discoverypilot.com/.

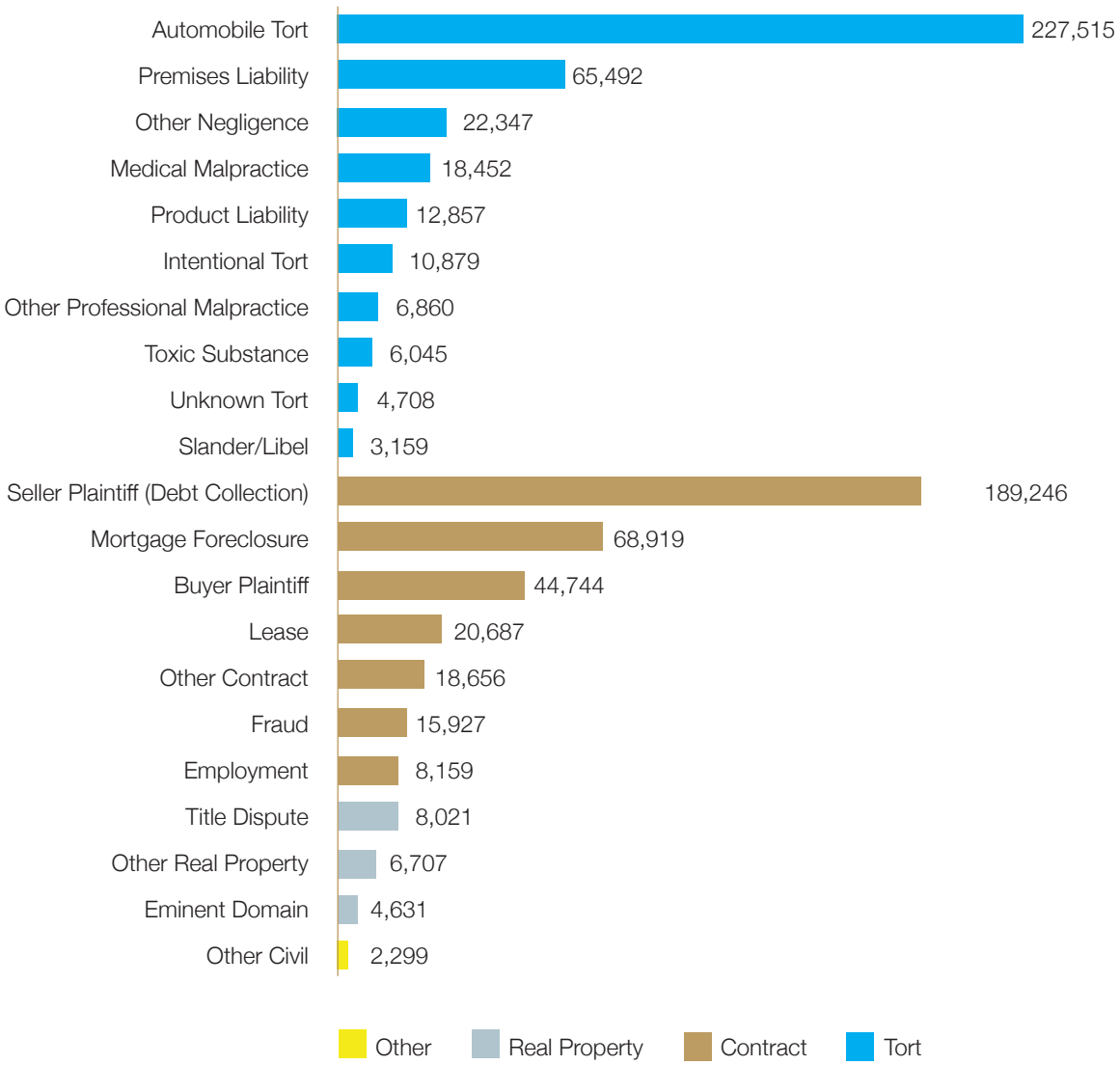
[34] Advance Notice of Proposed Rulemaking from Consumer Financial Protection Bureau, 78 Fed. Reg. 218 (proposed Nov. 12, 2013) (to be codified at 12 CFR Part 1006).

[35] In 2013, The Conference of Chief Justices created the Civil Justice Improvements Committee. The mission of the committee is to translate the lessons learned from state pilot projects, applicable research, and rule changes into guidelines and best practices for civil litigation. The committee's mandate also includes the development of caseflow management reforms for the improvement of the state court civil justice system. Committee membership was finalized in the spring of 2014 and consists of judges, lawyers, academics, researchers, and court administrators with broad expertise related to civil litigation issues. The committee membership strikes a balance between the plaintiff and defense bars, trial and appellate judges, and court administrators with case management expertise. Both the National Center for State Courts (NCSC) and the Institute for the Advancement of the American Legal System (IAALS) provide research and logistical support to the committee. The Civil Justice Improvements Committee is conducting the bulk of its work through plenary meetings and subcommittees. This report is meant to provide an overview of the current landscape of civil litigation in state courts for the committee members.

An Incomplete Picture of the Civil Justice System

The vast majority of civil cases in the United States are filed in state courts rather than federal courts.[36] However, other than the actual number of filings, and sometimes number of dispositions, detailed information about civil caseloads in the United States such as caseload composition, case outcomes, and filing-to-disposition time, is difficult to obtain. The most recent large-scale national study of civil caseloads is the 1992 *Civil Justice Survey of State Courts* (see Figure 1).[37] In that study, the NCSC collected detailed information about civil cases disposed in 1992 in the general jurisdiction courts of 45 large, urban counties

Figure 1: 1992 Civil Justice Survey of State Courts, Case Types



[36] In 2013, litigants filed approximately 16.9 million civil cases in state courts compared to 259,489 civil cases filed in U.S. District Courts. NCSC COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS, 2013 (2015) (this estimate includes probate and mental health filings in addition to general civil filings). Federal Judicial Caseload Statistics, Table C *available at* http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables?tn=C&pn=All&t=68&m%5Bvalue%5D%5Bmonth%5D=12&y%5Bvalue%5D%5Byear%5D=2014.

[37] The *Civil Justice Survey of States Courts* was a periodic study of civil litigation funded by the U.S. Department of Justice, Bureau of Justice Statistics (BJS). The statistical frame of estimating characteristics of cases filed in state courts based on filings in a sample of the 75 most populous counties was a technique employed by BJS to estimate national trends for a number of ongoing data collection efforts. Subsequent iterations of the *Civil Justice Survey of State Courts* (1998, 2001, and 2005) have focused exclusively on case characteristics and outcomes for bench and jury trials rather than the full range of possible case outcomes.

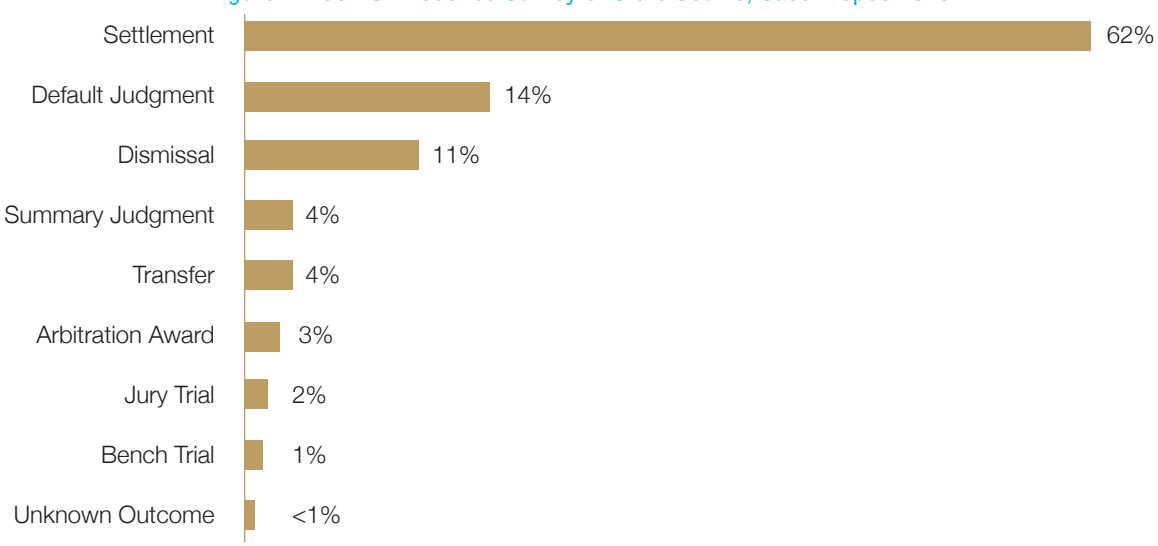
and used that information to estimate civil caseloads and case outcomes for the 75 most populous counties in the country.[38] Of more than 750,000 civil cases disposed in the 75 most populous counties, it estimated that approximately half (49%) alleged tort claims, 48 percent alleged contract claims, and two percent were real property disputes. Automobile torts were the single largest subcategory of tort cases, accounting for nearly two-thirds (60%) of all tort cases. In contrast, product liability and medical malpractice cases, which generate some of greatest criticisms of the civil justice system, reflected only four percent of total civil cases combined. More than half (52%) of the contract cases were debt collection (seller-plaintiff) cases, and mortgage foreclosures accounted for another 18 percent of total civil cases.[39]

Settlement by the parties was the single most common outcome for a civil case (62%), compared to 14 percent default judgments, 10 percent dismissals for failure to prosecute, four percent transfers to another court, four percent summary judgment, and only three percent judgments following a bench or jury trial (see Figure 2).

Subsequent iterations of the *Civil Justice Survey of State Courts* focused exclusively on bench and jury trials. Consequently, more recent descriptions of civil justice caseloads have relied on aggregate statistics reported to the NCSC as part of the Court Statistics Project as well as studies of specific issues in individual state or local courts. For a variety of reasons, these types of studies are often unable to provide definitive answers to the most commonly asked questions.

Part of the difficulty stems from the inability of many case management systems to collect and generate reports about civil caseloads. Most case management systems were initially developed to schedule and record case filings and events (e.g., hearings and trials) and report the progress of the case through the system in general terms. Although some of these

Figure 2: 1992 Civil Justice Survey of State Courts, Case Dispositions



[38] In the 1992 *Civil Justice Survey of State Courts*, the U.S. Department of Justice, Bureau of Justice Statistics employed a 2-stage stratified sample in which 45 of the 75 most populous counties were selected based on aggregate civil cases filed in 1990. For a detailed description of the sampling methodology, see CAROL J. DEFRANCIS ET AL., CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES 11 (July 1995). The *Civil Justice Survey of State Courts* restricted data collection to cases identified as general civil (e.g., tort, contract, and real property) in which monetary damages were sought. The data excluded cases involving equitable relief as well as probate/estate, mental health, domestic, other civil, and unknown case types.

[39] Thirty-one states permit mortgage holders to foreclose on property through an administrative procedure specified by statute without court involvement; 20 states require that foreclosures be conducted through the court. *See* REALTYTRAC, FORECLOSURE LAWS AND PROCEDURES BY STATE, http://www.realtytrac.com/real-estate-guides/foreclosure-laws/.

Figure 3: Incoming Civil Caseload Composition in 17 General Jurisdiction Courts, 2010

STATE	TOTAL INCOMING CASES	Contract 61%	Probate 11%	Small Claims 11%	Tort 6%	Real Property 2%	Mental Health 2%	All Other Civil 7%
Kansas*	193,402	81%	5%	4%	2%	1%	2%	6%
North Carolina	106,166	78%	1%	n/j	10%	3%	n/j	9%
Colorado	130,716	77%	9%	n/j	4%	1%	4%	5%
Mississippi	27,611	75%	n/j	n/j	14%	1%	n/j	11%
Missouri*	317,613	69%	7%	4%	5%	1%	5%	10%
Utah	125,670	67%	4%	15%	2%	7%	2%	4%
New Jersey	1,004,778	65%	21%	5%	6%	<1%	n/j	1%
North Dakota*	35,633	57%	14%	15%	1%	1%	5%	7%
Minnesota	**211,898**	48%	5%	24%	2%	3%	2%	16%
Maine	47,225	46%	n/j	24%	2%	1%	2%	25%
Connecticut	149,027	44%	<1%	43%	10%	1%	n/j	3%
Alabama	51,723	40%	3%	n/j	16%	1%	n/j	39%
Oregon	193,458	40%	5%	39%	3%	<1%	4%	9%
Rhode Island	11,286	38%	<1%	<1%	25%	7%	n/j	30%
New Hampshire	7,864	37%	n/j	1%	20%	5%	<1%	38%
Washington	102,813	31%	19%	n/j	9%	20%	10%	11%
Hawaii	12,998	23%	17%	n/j	9%	16%	5%	30%

Note: States in bold have a single-tiered court system. "n/j" indicates no jurisdiction over that case type.
* These states process all civil cases in their general jurisdiction court.
"All Other Civil" cases include civil appeals, habeas corpus, non-domestic restraining orders, tax cases, writs, and other civil cases.
Source: R. LaFountain et al., Examining the Work of States Courts: An Analysis of 2010 State Court Caseloads (NCSC 2012).

systems capture detailed case-level information, very few are programmed to extract and report that information in a format conducive to a broader management-oriented and case propulsion perspective.

DATA DEFINITIONS

A related issue is the relative lack of uniformity in the use of case definitions and counting rules. In most courts, the term "general civil" encompasses tort, contract, and real property filings and differentiates those cases from probate/estate, domestic relations, and mental health cases. But in many courts, court automation systems are not programmed to offer a more finely grained picture of civil caseloads. For example, Figure 3 documents civil filings from general jurisdiction courts in 17 state single-tier or general jurisdiction courts that were able to breakdown their caseloads to seven categories in 2010. The wide variation in percentages across courts and case types is largely due to differences in how those states define and count cases, differences in whether cases are filed in the general jurisdiction court or in limited jurisdiction courts (which are not reflected in the graph), and differences in state law and community characteristics that

affect the types of legal disputes that might be litigated in those states.

Similarly, courts differ with respect to how case events are counted. For example, when a civil case has been closed and is then reopened for some reason (e.g., a default judgment that is later challenged for lack of service in the original case), some courts will count the case as a new case. Other courts will count this as a reopened case and still others as the same case that was originally adjudicated. Although there is no requirement that state and local courts adopt uniform case definitions and counting rules, the NCSC Court Statistics Project has promulgated standardized data definitions and counting rules for more than three decades.[40] Courts are increasingly adopting the standards and integrating them into their case management systems to be able to compare their caseloads with those of other courts and to take advantage of more sophisticated case management tools available in newer case automation systems.

DATA COLLECTION PRIORITIES

Another factor contributing to the difficulty in obtaining a detailed national picture about the civil justice system is courts' philosophical focus on operational process rather than substantive outcomes in civil litigation. Whether an enforceable judgment had been entered in a case is generally considered operationally more important than which party prevailed in the case or what remedy the judgment actually ordered (e.g., money damages, specific performance, or injunctive relief). Those details are obviously important to the parties, and legislative and executive leaders might be interested for the purpose of informing public policy, but the primary objective of the judicial branch has always been to provide an objectively fair process for resolving disputes. Thus, focusing attention on substantive outcomes was often viewed as unseemly and potentially detrimental to public confidence in the objectivity and neutrality of the judicial branch. Documentation of case outcomes, where it existed at all, was often captured in text files in case automation systems and was consequently extremely difficult to extract and manage in an aggregate format.

Clearance rates, which traditionally express the ratio of new filings to dispositions over a given period of time, served as the primary measure of court efficiency. Clearance rates do not, however, document the amount of time expended from filing to disposition. Beginning in the mid-1970s, concerns about court delay led many prominent court and bar organizations to promulgate time standards as aspirational deadlines for resolving cases.[41] A major criticism of these standards was that they were often based on the amount of time that these organizations thought cases should take to resolve rather than the amount of time that cases actually took to resolve. For example, the national time standards promulgated by the Conference of State Court Administrators (COSCA) in 1983 specified that all civil cases resolved by jury trial should be disposed within 18 months of filing, and all non-jury civil cases should be tried, settled, or disposed within 12 months of filing. Based on the cases examined in the 1992 *Civil Justice Survey of State Courts*, however, less than half (49%) of non-jury cases met those standards and only 18 percent of jury trial cases did so. The discrepancy between the aspirational time standards and actual disposition time served as a considerable disincentive for courts to adopt those standards, much less to publish their performance based on the standards. Since then, researchers have developed and promulgated more empirically based standards including the *Model Time Standards for State Trial Courts*, which was a collaborative effort by the Conference of Chief Justices, the Conference of State Court Administrators, the American Bar Association, the National Association for Court Management, and the NCSC. The *Model Time Standards* now recommend that 75 percent of civil cases should be fully disposed within 180 days, 90 percent within 365 days, and 98 percent within 540 days.

---

[40] The *State Court Model Statistical Dictionary* (1980), developed jointly by the Conference of State Court Administrators and the National Center for State Courts, was the first effort to provide a uniform set of data definitions. The Dictionary was revised in 1984 and again in 1989. The Dictionary was replaced with the *State Court Guide to Statistical Reporting* (Guide) in 2003. The most recent version of the Guide was published in 2014.

[41] For a summary of the evolution of various time standards for civil cases, *see* RICHARD VAN DUIZEND, MODEL TIME STANDARDS FOR STATE TRIAL COURTS 13-15 (2011) [*hereinafter* MODEL TIME STANDARDS].

ORGANIZATIONAL STRUCTURE

Perhaps the largest hurdle to learning about civil litigation in the state courts lies at the heart of courts as organizations. State court organizational structures are the culmination of each state's unique legal history and efforts to improve the administration of justice. Accordingly, state courts organizational structures can be as unique as the constituencies they serve. Data collection efforts must accommodate these varying structures without sacrificing data integrity and reporting. To consider how this may be done, it is imperative to fully consider the diversity of organizational structures across courts with civil jurisdiction.

Figure 4 illustrates how state courts allocate jurisdiction over civil filings among general jurisdiction and limited jurisdiction courts. The most common organizational structure (20 states) involves a single general jurisdiction court and a single limited jurisdiction court. The two courts may have exclusive jurisdiction over particular types of cases or cases involving certain amounts-in-controversy. Some states provide for over-lapping (concurrent) jurisdiction for a specified range of cases based on amount-in-controversy. Ten states and the District of Columbia have only a single-tier general jurisdiction court for general civil cases, although many of these permit local courts to organize their dockets and judicial assignments based on case type or amount-in-controversy.

The remaining states exhibit some combination of multiple general jurisdiction and limited jurisdiction courts. In most instances, these courts are situated within individual counties, municipalities, or judicial divisions encompassing multiple counties. However, a few states also maintain statewide general or limited jurisdiction courts over specific types of cases. Examples include Courts of Claims in Michigan, New York, and Ohio, which have jurisdiction over civil cases in which the state is a litigant; Water Courts in Colorado and Montana, which have jurisdiction over civil cases involving claims to water rights; and Worker's Compensation Courts in Montana and Nebraska, which have jurisdiction over administrative agency appeals.

Eleven states have a single general jurisdiction court with two or more limited jurisdiction courts. In Georgia, for example, the Superior Court is the general jurisdiction court for the state's 149 counties; the Superior Court is organized into 49 judicial circuits and has jurisdiction over tort, contract, and all real property cases as well as civil appeals from the State Courts (70 courts), the Civil Courts (in Bibb and Richmond Counties, only), and the Municipal Courts (383 courts). The State Court has concurrent jurisdiction with the Superior Court for tort and contract cases; the Civil Courts have jurisdiction over tort and contract cases up to $25,000 in Bibb County and up to $45,000 in Richmond County; the Municipal Courts have jurisdiction over small claims up to $15,000 and, in Bibb and Richmond Counties, concurrent jurisdiction with the Civil Court over tort and contract cases.

Eight states have multiple general jurisdiction courts with concurrent jurisdiction over general civil matters and one or more limited jurisdiction courts. Delaware, for example, has both a Court of Chancery, which has general jurisdiction over tort, contract, and real property cases seeking equitable relief, and a Superior Court, which has general jurisdiction over civil cases seeking money damages or other legal relief. In addition, Delaware has two limited jurisdiction courts: the Court of Common Pleas, which has jurisdiction over tort, contract, and real property cases up to $50,000, and the Justice of the Peace Court, which has jurisdiction over tort, contract, and real property cases up to $15,000.

Maine has two general jurisdiction courts — the District Court and the Superior Court — with concurrent jurisdiction over general civil matters. The primary difference in jurisdictional authority is that the District Court has exclusive jurisdiction over small claims cases (up to $6,000) and cannot conduct jury trials in general civil cases.

Figure 5 illustrates the maximum amount-in-controversy thresholds for litigants to file in limited jurisdiction courts. The thresholds range from $4,000 (Kentucky) to $200,000 (Mississippi and Texas).[42] In 18 states, the general jurisdiction and limited juris-

[42] The County Court in Mississippi has jurisdiction over tort, contract, and real property cases seeking money damages or other legal relief up to $200,000; the Chancery Court has jurisdiction over civil cases seeking equitable relief. County Courts in Texas have jurisdiction over tort, contract and real property cases up to $200,000 and the Justice Courts have jurisdiction over tort, contract, and real property up to $10,000.

Figure 4: Organization of State Court Jurisdiction over General Civil Cases

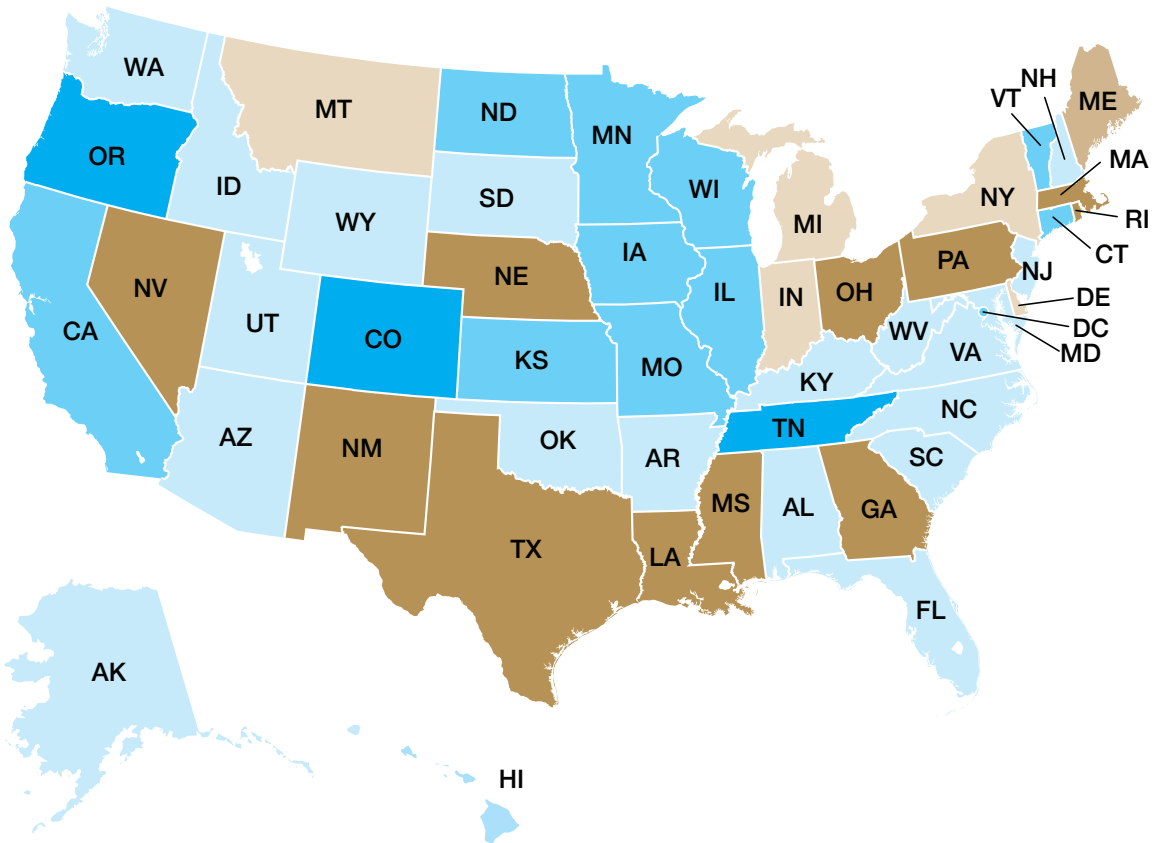
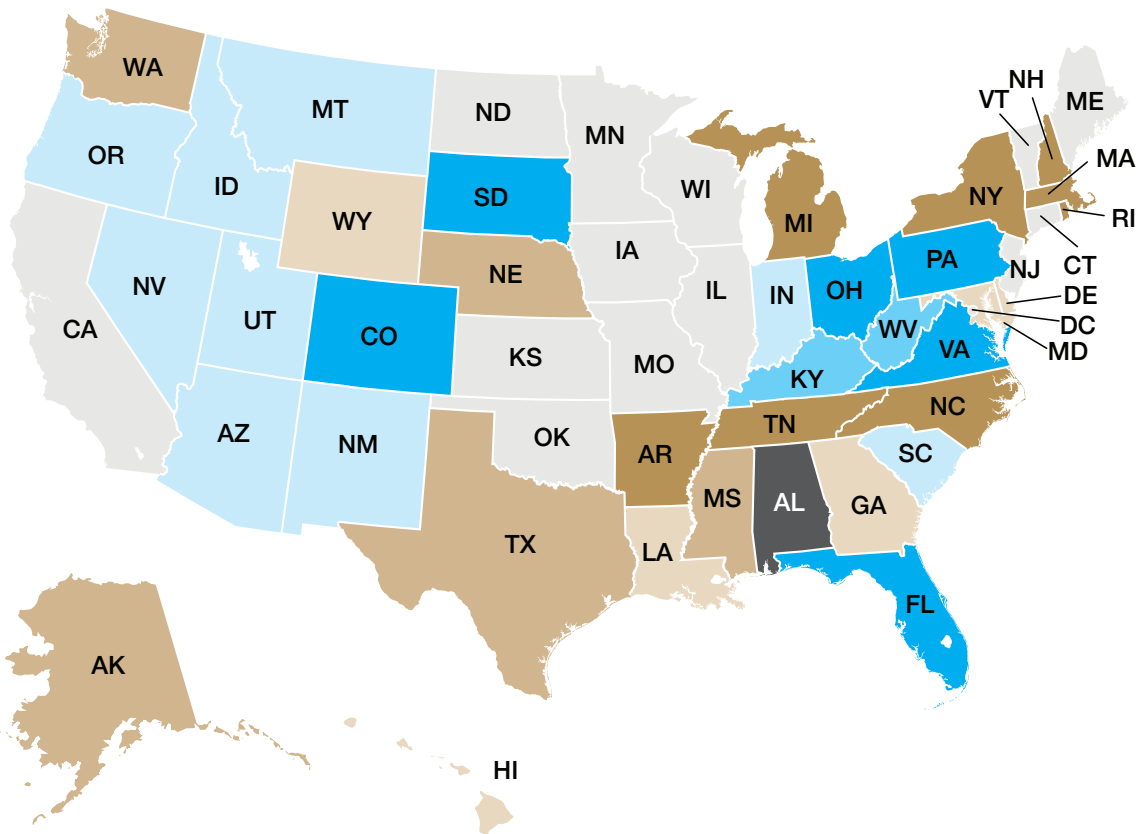


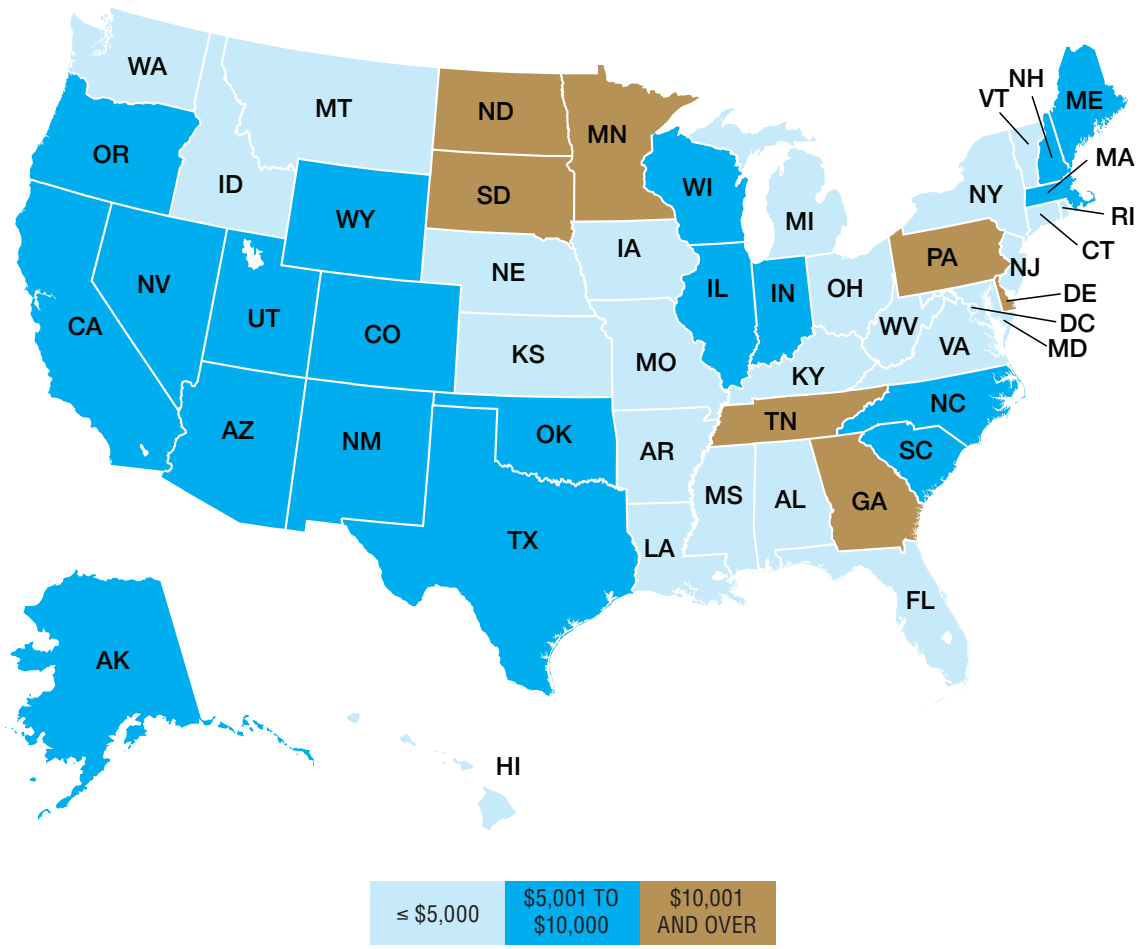
Figure 5: Maximum Amount-In-Controversy to File in Limited Jurisdiction Courts



diction courts have concurrent jurisdiction up to the amount-in-controversy threshold for the limited jurisdiction court. That is, a litigant can opt to file a case up to the threshold in either the general jurisdiction or the limited jurisdiction court in those states. Ten states have concurrent jurisdiction for civil cases with the minimum threshold for filing in the general jurisdiction court ranging from as little as $50 in Tennessee to as much as $10,000 in Alabama. In the remaining nine states, the general jurisdiction and limited jurisdiction courts each have exclusive jurisdiction for their respective caseload thresholds ranging from $4,001 in Kentucky to $52,001 in Nebraska.

States also differ with respect to the types of cases encompassed by their civil caseloads. In addition to the more widely recognized categories of tort, contract, and real property disputes, a civil case may refer to any non-criminal case including family and non-criminal juvenile matters, probate/estate and guardianship matters, mental health cases, state regulatory and local ordinance violations, traffic infractions, small claims, and appeals from state and local executive agency decisions. State general jurisdiction courts are typically authorized to hear appeals of decisions from civil cases adjudicated in limited jurisdiction courts, often on a *de novo* basis. Although some states have created general jurisdiction courts specifically for family, juvenile, or probate and estate matters, in those states that maintain only a single general jurisdiction court (single-tier courts), local courts often segregate their civil dockets to manage family, juvenile, and probate/estate cases separately from general civil cases. Nevertheless, the resources allocated to courts with broad jurisdiction over civil cases are generally shared across all case types. Most states have eliminated the distinction between law and equity for the purposes of civil procedure, but some states — notably Delaware

Figure 6: Maximum Amount-In-Controversy for Small Claims Cases



and Mississippi — maintain separate courts for law and equity at either the general jurisdiction or limited jurisdiction court level.

Small claims cases are lower-value tort or contract disputes in which litigants may represent themselves without a lawyer.[43] Most small claim dockets also involve somewhat less stringent evidentiary and procedural rules. Figure 6 illustrates the amount-in-controversy maximums for small claims cases, which range from $1,500 in Kentucky to up to $25,000 in Tennessee. In many instances, the limited jurisdiction courts have exclusive jurisdiction over small claims cases; litigants opting to file their cases in the general jurisdiction court, or in limited jurisdiction courts rather than in the small claims docket, are expected to adhere to the established procedural and evidentiary rules regardless of whether they are represented by counsel or self-represented.

All of these factors — the lack of common data definitions, differing organizational structures and subject matter jurisdiction for trial courts, and the traditional reluctance to collect and report performance measures — make it extraordinarily difficult to compile an accurate picture of civil litigation based on aggregate statistics published by state courts themselves. The only reliable method of doing so involves the extremely time-consuming and labor-intensive task of collecting case-level data from the trial courts themselves and mapping them onto a common template that facilitates both a reliable count of the cases themselves and an "apples-to-apples" comparison among courts.

[43] Small claims courts were originally developed for self-represented litigants, but states vary with respect to whether and under what conditions lawyers may appear on behalf of clients in small claims court.

Project Methodology

A perennial challenge in conducting multi-jurisdictional research using data extracted from case management systems (CMS) is to obtain data with both sufficient accuracy and granularity to be able to make reliable comparisons across jurisdictions. For several reasons, the NCSC decided to limit the potential courts from which to request data to courts with civil jurisdiction in counties that have participated in the *Civil Justice Survey of State Courts* series. First, those courts have participated in numerous NCSC research studies over the past three decades and thus are familiar with the NCSC and confident in the quality of the research conducted, which tends to improve participation rates. Likewise, NCSC staff are familiar with the CMS in those courts and confident in their ability to extract CMS data. The NCSC also had confidence that those courts would be able to produce data with sufficient case and disposition type granularity for the present study based on their previous participation in the *Civil Justice Survey of State Courts*.

To select the courts to participate in the *Landscape of Civil Litigation in State Courts*, the NCSC randomly selected 10 counties from the 45 counties that participated in all four iterations of the *Civil Justice Survey of State Courts*. The sampling design classified counties into two categories based on the organizational structure of courts with civil jurisdiction: (1) counties with a unified general jurisdiction court in which all civil cases are filed (single-tier courts); and (2) counties with one or more general jurisdiction courts and one or more limited jurisdiction courts (multi-tier courts). The intent of the sampling design was to ensure some representation of different organizational structures found in state courts. The counties that were selected are listed in Table 1. These included two counties with single-tier courts, and eight counties with multi-tier courts. Within the 10 counties were 36 courts of general jurisdiction and 116 courts of limited jurisdiction.[44]

The two single-tier courts have segmented dockets for civil cases within the unified court structure. The docket assignments for the Santa Clara County Superior Court are based on the amount in controversy: the limited civil docket includes all cases with claims valued less than $25,000 and the unlimited civil docket includes all claims $25,000 and over.[45] The Cook County Circuit Court employs different dockets for legal and equitable claims and for small claims.

Three counties have three separate tiers of trial courts with jurisdiction over civil cases.[46] Marion County, Indiana has two general jurisdiction trial courts — the Circuit Court and the Superior Court — that have concurrent jurisdiction over tort, contract, and real property cases. There is no monetary threshold for cases filed in these courts, but small claims cases up to $6,000 can be filed in any of nine Marion County Small Claims Courts.[47] Harris County, Texas has one general jurisdiction trial court (the District Court), which has jurisdiction over civil cases involving claims greater than $200 as well as exclusive jurisdiction for administrative agency appeals. The Harris County Civil Court of Law is a limited jurisdiction court with jurisdiction over civil cases involving claims up to $200,000. The Civil Court of Law also has exclusive jurisdiction over eminent domain cases in Harris County and appeals from the Harris County Justice of the Peace Court (Justice Court).[48] Finally, the Harris County Justice Court has jurisdiction over tort, contract, real property, and small claims up to $10,000. Cuyahoga County has a countywide general jurisdiction trial court (Court

[44] In the Texas judicial system, each District Court, Civil Court of Law, and Justice Court is comprised of a single judge elected to that office. In the Indiana judicial system, the Superior Court and the Circuit Court are courts of general jurisdiction that have concurrent jurisdiction over civil matters. In the Ohio judicial system, the Court of Claims is a statewide general jurisdiction court with jurisdiction over civil matters in which state agencies are named as litigants.

[45] The $25,000 monetary threshold differentiating limited from unlimited civil cases is a remnant from the court structure in place prior to 2000, when the California judicial branch unified its trial courts into a single tier. With unification, the former municipal courts, which had jurisdiction over civil cases up to $25,000, were incorporated into the county superior courts. Most courts maintained the $25,000 threshold as a familiar mechanism for case assignments.

[46] The 1816 Indiana Constitution established the Circuit Court (IND. CONST. art. 7, §8) and the Marion County Superior Court was established by statute in 2004 (IND. CODE § 33-33-49). By agreement, the Superior Court exercises exclusive jurisdiction over criminal cases and the Superior and Circuit Courts have concurrent jurisdiction over civil cases. The Circuit Court has exclusive jurisdiction for insurance reorganizations/liquidations, medical liens, and Marion County tax collection cases. The Circuit Court also supervises the Marion County Small Claims Courts.

[47] Each township in Marion County has a Small Claims Court. These courts have jurisdiction over civil cases in which the claim for damages does not exceed $6,000. Generally, a small claims case may be filed in any township's Small Claims Court, however all landlord/tenant cases must be filed in the township where the property is located.

[48] In Texas, each trial court judge is recognized as an individual "court." Consequently, there are 25 district courts, 4 civil courts of law, and 16 justice courts in Harris County. Each trial court level is supported administratively by a clerk of court.

Table 1: Counties and Courts Selected for Landscape of Civil Litigation in State Courts

COUNTY	TYPE COURTS	# COURTS	COURT NAME	SUBJECT MATTER JURISDICTION
Maricopa County, Arizona	GJC	1	Superior Court	Tort, contract and real property claims involving monetary relief $1,000 and over. Real property claims involving non-monetary relief.
	LJC	26	Justice Court	Tort, contract and real property claims involving monetary relief up to $10,000. Exclusive small claims up to $3,500.
Santa Clara County, California	SIngle Tier	1	Superior Court	All tort, contract and real property. Civil cases up to $25,000 assigned to limited civil docket; civil cases $25,000 and over assigned to unlimited civil docket. Small claims up to $10,000. Appeals from small claims decisions assigned to limited civil docket.
Miami-Dade, Florida	GJC	1	Circuit Court	Tort, contract and real property claims $15,001 and over. Appeals from County Court.
	LJC	1	County Court	Tort, contract and real property claims $5,001 to $15,000. Exclusive small claims up to $5,000.
Oahu, Hawaii	GJC	1	Circuit Court	Tort, contract and real property $5,000 and over. Exclusive mental health, probate/estate, and administrative agency appeals.
	LJC	1	District Court	Tort, contract and real property up to $40,000. Exclusive small claims up to $5,000.
Cook County, Illinois	SIngle Tier	1	Circuit Court	All tort, contract and real property. Claims involving monetary relief assigned to Law Division; claims involving non-monetary relief assigned to the Chancery Division. Small claims up to $10,000.
Marion County, Indiana	GJC	1	Superior Court	Tort, contract and real property (concurrent with Circuit Court). Appeals from Small Claims Court.
	GJC	1	Circuit Court	Tort, contract and real property (concurrent with Superior Court). Exclusive jurisdiction for insurance reorganizations/liquidation and medical liens. Exclusive jurisdiction for Marion County tax collection. Supervision of Small Claims Court of Marion County.
	LJC	9	Small Claims Court	Small claims up to $6,000.
Bergen County, New Jersey	GJC	1	Superior Court	All tort, contract, and real property. Claims involving monetary relief assigned to Law Division; claims involving non-monetary relief assigned to Chancery Division; Special Civil Part manages claims for monetary relief up to $15,000 without jury trial and exclusive small claims up to $3,000.
	LJC	1	Tax Court	Administrative agency appeals, tax cases.
Cuyahoga County, Ohio	GJC	1	Court of Common Pleas	Tort, contract and real property claims $15,000 and over. Administrative agency appeals. Exclusive mental health/probate.
	GJC	1	Court of Claims	Exclusive claims filed against the State of Ohio and claims filed under the Victims of Crime Compensation Program.
	LJC	12	Municipal Court	Tort, contract, and real property up to $15,000. Small claims up to $3,000.
Allegheny County, Pennsylvania	GJC	1	Court of Common Pleas	Tort, contract and real property, probate/estate, and administrative agency appeals.
	LJC	46	Magisterial District Court	Small claims up to $12,000.
Harris County, Texas	GJC	25	District Court	Tort, contract, and real property $201 and over. Exclusive administrative agency appeals.
	LJC	4	Civil Court of Law	Tort, contract, and real property up to $200,000. Appeals from Justice Courts. Exclusive jurisdiction over eminent domain cases in Harris County.
	LJC	16	Justice Court	Tort, contract, and real property up to $10,000. Small claims up to $10,000.

of Common Pleas) with jurisdiction over civil claims exceeding $15,000 as well as appeals from administrative agencies and mental health/probate cases. Civil claims up to $15,000 are filed in the 12 municipal courts in Cuyahoga County. In addition to these county-based courts, Ohio has a statewide Court of Claims, which has jurisdiction over civil claims in which the State is a defendant as well as claims filed in the Victims of Crime Compensation Program.

The remaining five counties in the sample each have a single general jurisdiction court and a single limited jurisdiction court. Bergen County Superior Court has exclusive jurisdiction for all general civil cases, but a separate limited jurisdiction Tax Court has jurisdiction over administrative agency appeals and tax cases. The monetary thresholds for the other four limited jurisdiction courts range from $10,000 (Maricopa County Justice of the Peace Court) to $40,000 (Oahu, Hawaii District Court). The general jurisdiction and limited jurisdiction courts in Miami-Dade maintain exclusive jurisdiction over their respective caseloads. The Miami-Dade County Court has jurisdiction over cases up to $15,000 and the Circuit Court has jurisdiction over cases exceeding $15,000. The general jurisdiction and limited jurisdiction courts in Allegheny and Maricopa Counties and Oahu have concurrent jurisdiction over some portion of their respective civil caseloads ($0 to $15,000 in Allegheny County, $1,000 to $10,000 in Maricopa, and $5,000 to $40,000 in Oahu).

All of the counties in the sample have small claims courts. The monetary thresholds for small claims range from $3,500 (Maricopa County, Arizona) to $12,000 (Allegheny County, Pennsylvania). With the exception of Bergen County, jurisdiction for small claims cases is exclusively in the limited jurisdiction courts in counties with multi-tier court structures.

In November 2013, NCSC contacted each of these courts in a letter that described the goals and objectives of the *Landscape of Civil Litigation in State Courts* study and requested their participation by providing case-level data for all non-domestic civil cases disposed in those courts between July 1, 2012 and June 30, 2013.[49] The requested data elements included the docket number, case name, case type, filing and disposition dates, disposition type, the number of plaintiffs and defendants, the representation status of the parties, and the case outcome including award amounts. NCSC project staff obtained detailed case-level data from all of the contacted courts except the Superior Court of California, Santa Clara County; the Bedford, Cleveland Heights, and South Euclid Municipal Courts in Cuyahoga, Ohio; the Ohio Court of Claims[50]; and the Decatur and Pike Township Small Claims Courts in Marion County, Indiana.[51]

Upon receipt of the case-level data, NCSC project staff formatted the individual datasets to conform to a common set of data definitions based on the NCSC *State Court Guide to Statistical Reporting*.[52] The coding process also involved aggregating some records to obtain a single code or value per case for datasets that included multiple records per case (e.g., judgment amounts, representation status). The final dataset consisted of 925,344 cases including aggregated cases from courts unable to provide case-level data. The NCSC originally intended to apply case weights to estimate civil cases, characteristics, and outcomes nationally, but was unable to generate reliable estimates due to the small sample size and the complexity of the weighting procedure. Consequently, these findings report statistics only for the courts serving these 10 counties. The counties themselves, however, reflect the variation in national court organizational structures for civil cases. Collectively, their caseloads comprise approximately five percent of general civil caseloads nationally.

[49] The *State Court Guide to Statistical Reporting* includes the following case types as non-domestic civil cases: tort, contract, real property, guardianship, probate/estate, mental health, civil appeals, and miscellaneous civil (habeas corpus, writs, tax, and non-domestic restraining orders). NAT'L CTR STATE CTS., STATE COURT GUIDE TO STATISTICAL REPORTING (ver. 2.0) 3-8 (2014) [*hereinafter* STATE COURT GUIDE].
[50] The Ohio Court of Claims was unable to identify cases originating in Cuyahoga County. NCSC staff estimated the number of cases by multiplying the proportion of the Ohio population residing in Cuyahoga County by the total cases filed in the Ohio Court of Claims for one year.
[51] The NCSC was ultimately able to obtain aggregate case information for these courts from the Administrative Office of the Courts in the respective states, which eliminated the need to select replacement counties.
[52] The *State Court Guide* provides a standardized framework for state court caseload statistics, enabling meaningful comparisons among state courts. STATE COURT GUIDE *supra* note 49.

CASELOAD COMPOSITION

Table 2 shows both the total number of disposed civil cases provided to the NCSC by court structure type and the percentage breakdown of these cases by broad case type descriptions (contract, tort, real property, small claims, and other civil). Limited jurisdiction courts within multi-tier court structures disposed of 43 percent of the total civil caseload. The single-tier courts in the sample (Santa Clara and Cook Counties) account for slightly less than one-third (31%) of the total cases and the general jurisdiction courts in multi-tier court structures account for 26 percent of the total caseload.

Across all of the courts, slightly less than two-thirds (64%) of the cases are contract disputes with the remainder of the civil caseload consisting of small claims (16%), other civil (9%),[53] tort (7%), unknown case type (4%),[54] and real property (1%). One of the most striking features is that contract cases comprise at least half of the civil caseloads across all three types of court structures, although there are some notable differences. For example, in addition to having the largest volume of cases overall, limited jurisdiction courts have the highest proportion of small claims cases (30%) and the lowest proportion of contract cases (50%). It is highly likely that many of those small claims cases are, in fact, lower-value debt collection cases (a subcategory of contract cases) that were filed as small claims cases to take advantage of simplified procedures. Tort cases have a much higher concentration in general jurisdiction courts of multi-tier court structures than in limited jurisdiction courts. This is likely due to claims for monetary damages exceeding the maximum thresholds for limited jurisdiction courts in personal injury cases.

Small claims cases constituted only six percent of the caseload in counties with single-tier courts, which is due mainly to the small proportion of small claims cases in Cook County.[55] In Santa Clara County, small claims accounted for 18 percent of the total civil caseload. Interestingly, the monetary limit on small claims cases is $10,000 in both Santa Clara and Cook

Table 2: Caseload Composition, by Court Type

		PERCENTAGE OF					
	TOTAL CIVIL CASES	CONTRACT	TORT	REAL PROPERTY	SMALL CLAIMS	OTHER CIVIL	UNKNOWN
Single Tier Courts	287,131	80	10	1	6	4	0
General Jurisdiction Courts	221,150	69	13	2	1	15	0
Limited Jurisdiction Courts	417,063	50	3	0	30	10	7
Total	925,344	64	7	1	16	9	3

[53] "Other civil" includes appeals from administrative agencies and cases involving criminal or domestic-related matters (e.g., civil stalking petitions, grand jury matters, habeas petitions, and bond claims).

[54] Nearly all of the unknown cases (99%) were filed in six of the 12 municipal courts in Cuyahoga County. Because the other six courts indicated multiple case types, and their caseload composition varied across courts, NCSC staff were unwilling to infer case types for this analysis.

[55] Small claims data were not included with the Cook County dataset, but Illinois caseload and statistical reports indicate that small claims filings and dispositions account for approximately 5 percent of the civil caseload in the Cook County Superior Court. Caseload and Statistical Reports, CASELOAD SUMMARIES BY CIRCUIT, CIRCUIT COURTS OF ILLINOIS, CALENDAR YEAR 2012 at 17.

Counties, which is considerably higher than both the average limit for counties with multi-tiered court structures ($5,938) and the actual limit in all but two of the eight counties. For some reason that may be unique to Cook County, rather than to single-tier courts generally, litigants opt to file lower-value contract cases as contract cases rather than as small claims cases.[56]

Table 3, however, documents some striking variations across counties. For example, the proportion of contract cases in Marion County, Indiana is only eight percent compared to an overall caseload average of 64 percent while small claims comprise 82 percent of the civil caseload compared to the 16 percent overall average. In Marion County, many creditors file debt collection actions in the Marion County Small Claims Courts, ostensibly due to perceptions that those courts are a more attractive venue for plaintiffs.[57] The proportion of contract cases in Cuyahoga County is also much lower (39%) than the overall average.[58]

The counties participating in this study did not consistently describe case types with more detailed subcategories, but most broke down caseloads for case types of particular local interest. Those breakdowns provide additional information about civil caseloads.

Table 3: Caseload Composition, by County

		PERCENTAGE OF					
COUNTY (STATE)	TOTAL CIVIL CASES	CONTRACT	TORT	REAL PROPERTY	SMALL CLAIMS	OTHER CIVIL	UNKNOWN
Maricopa (AZ)	53,226	78	1	0	4	16	0
Santa Clara (CA)	27,503	64	9	2	18	7	0
Miami-Dade (FL)	156,096	64	8	1	25	2	0
Oahu (HI)	22,363	64	5	0	0	30	0
Cook (IL)	259,628	82	10	1	5	3	0
Marion (IN)	75,834	8	2	0	82	8	0
Bergen (NJ)	64,068	60	8	0	4	27	0
Cuyahoga (OH)	76,970	39	7	0	6	9	38
Allegheny (PA)	34,011	55	8	2	32	4	0
Harris (TX)	155,645	72	7	1	3	16	0
Total	925,344	64	7	1	16	9	3

[56] Illinois does not permit corporations to initiate small claims cases unless they are represented by an attorney, although a corporate representative may appear to defend a small claims case. IL SUP. CT. R. ART. II, R. 282(b). The cost of retaining an attorney may negate the cost advantage of filing in small claims court.

[57] The Marion County Small Claims Courts have been the focus of intense criticism for several years due to concerns about venue shopping, lack of due process for defendants in debt collection cases, and collusion between debt collection plaintiffs and Small Claims Court judges. *See* Marisa Kwialkowski, *Judges Call for an End to Marion County's Small Claims Court System*, IndyStar (July 12, 2014) (http://www.indystar.com/story/news/2014/07/12/judges-call-end-marion-countys-small-claims-court-system/12585307/). Debt collection procedures are also the basis for a class action lawsuit alleging violations of the Fair Debt Collection Practices Act. Suesz v. Med-1 Solutions, LLC, 734 F.3d 684 (7th Cir. 2013). A Small Claims Task Force appointed by the Supreme Court of Indiana and an evaluation by the NCSC have both recommended that the Marion County Small Claims Courts be incorporated into the Superior Court to provide appropriate oversight and due process protections for litigants. *See* JOHN DOERNER, MARION COUNTY, INDIANA, SMALL CLAIMS COURTS: FINAL REPORT (July 2014); INDIANA SMALL CLAIMS TASK FORCE, REPORT ON THE MARION COUNTY SMALL CLAIMS COURTS (May 1, 2012).

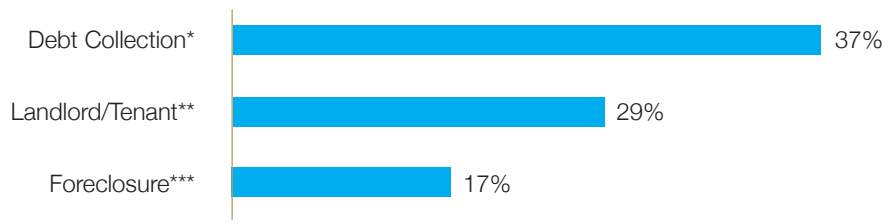
[58] It is likely that a large proportion of the unknown casetypes in the six municipal courts from Cuyahoga County that did not provide case-level data are actually contract cases.

Figures 7 and 8 illustrate the caseload composition for common subcategories of contract and tort caseloads. Contract caseloads consist primarily of debt collection (37%), landlord/tenant (29%), and foreclosure (17%), cases.[59] Tort caseloads consist primarily of automobile tort (40%) and other personal injury/property damages cases (20%).[60] Although medical malpractice and product liability cases often generate a great deal of attention and criticism, they comprise only five percent of tort caseloads (less than 1% of the total civil caseload).

CASE DISPOSITIONS

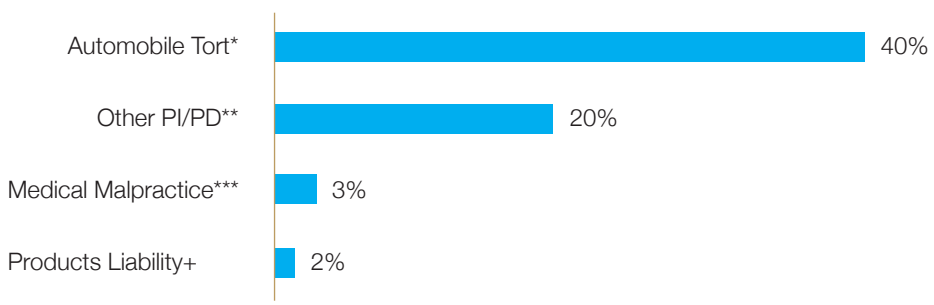
Documenting how civil cases are actually resolved is somewhat challenging due to varying disposition descriptions among case management systems. As discussed previously, courts traditionally record the procedural significance of the disposition in the case management system rather than the actual manner of disposition. Consequently, a case may be recorded as "dismissed" for a variety of reasons such as an administrative dismissal for failure to prosecute, upon motion

Figure 7: Subcategories of Contract Cases



* Not Reported by Santa Clara County
** Not reported by Marion County
*** Not reported by Santa Clara and Cuyahoga Counties

Figure 8: Subcategories of Tort Cases



* Not reported by Marion County
** Not reported by Marion and Allegheny Counties
***Not Reported by Santa Clara and Marion Counties
+ Not reported by Maricopa, Santa Clara and Marion Counties

[59] Landlord/tenant cases include claims for both eviction and collection of past due rent payments.

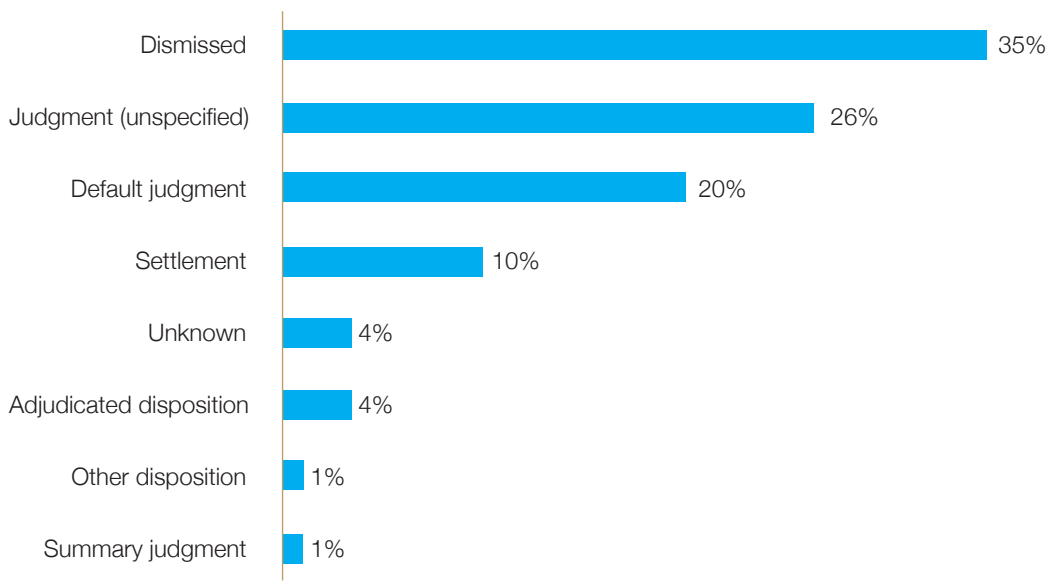
[60] "Personal injury/property damage" reflects a characteristic of the type of damages rather than the legal claim upon which relief is requested. Consequently, that term is not recognized as a unique case type by the NCSC *State Court Guide*. Nevertheless, that term is used by many courts, including courts in eight of the 10 counties participating in the *Landscape* study. Although the term is over-inclusive, it likely includes premises liability and other negligence cases.

by a litigant for withdrawal or non-suit, or upon notice that the parties have settled the case. Similarly, a case disposed by "judgment" may indicate either a default judgment or an adjudication on the merits in a bench or jury trial. Some of the courts in the *Landscape* study employed more descriptive disposition codes that provide guidance about the manner of disposition. For example, a dismissal with prejudice often indicates that the parties have settled the case while a dismissal without prejudice generally indicates either withdrawal or an administrative dismissal. Cases adjudicated on the merits usually had some notation to that effect (e.g., judgment from jury trial, judgment from nonjury trial, arbitration judgment). Nevertheless, the lack of consistency across counties with respect to the data definitions and the lack of descriptiveness for disposition codes undermines the reliability of precise estimates, especially when compared to earlier studies such as the 1992 *Civil Justice Survey of State Courts*. For this study, the NCSC coded dispositions as follows:

- Dismissal: cases recorded as withdrawal, dismissed, or dismissed without prejudice;
- Judgment (unspecified): cases recorded as judgment;
- Default judgment: cases recorded as default judgment;
- Settlement: cases recorded as settlement, agreed judgment, stipulated judgment or dismissal with prejudice;
- Summary judgment: cases recorded as summary judgment;
- Adjudicated disposition: cases recorded as disposed by jury trial, directed verdict, bench trial, or arbitration;
- Other disposition: cases recorded as change of venue, removal, transferred or bankruptcy stay; and
- Unknown disposition: cases without a specified disposition.

Keeping these caveats in mind concerning the reliability of disposition rates, Figure 9 reflects the overall disposition breakdown based on this categorization. Dismissals were the single largest proportion of dispositions, accounting for more than one-third (35%) of the total caseload. Judgments (unspecified) and default judgments were the second and third largest

Figure 9: Case Dispositions (all cases)



categories, at 26 percent and 20 percent respectively. Settlements comprised only 10 percent of dispositions. Four percent of cases were adjudicated on the merits and only one percent were disposed by summary judgment. These disposition rates are a dramatic change from the 1992 Civil Justice Survey of State Courts.[61] The dismissal rate is more than three times higher and the default rate is 42 percent higher in the *Landscape* study. The settlement rate, in contrast, is less than one-fifth of the 1992 study. Adjudicated dispositions also declined from six percent to four percent.

Some of these differences may reflect differences in how these studies were conducted. The 1992 survey examined civil cases disposed in the general jurisdiction courts of 45 large, urban counties. Although all of the counties selected for the *Landscape* study participated in the 1992 *Civil Justice Survey of State Courts*, the *Landscape* study also collected data from the limited jurisdiction courts in those counties, which accounts for almost half (43%) of the total caseload.[62] Table 4 suggests that some of the difference in disposition rates may be the result of differences in the respective caseloads of limited jurisdiction and general jurisdiction courts. Approximately one-third of the cases in the limited jurisdiction courts (32%) were disposed by default judgment, but only 18 percent of the general jurisdiction court cases were default judgments.[63] The default rate for single-tier courts was three percent, which is unrealistically low and it is likely that a substantial majority of the unspecified judgments for single-tier courts (51%) are actually default judgments.[64] Settlement rates in the single-tier and general jurisdiction courts (13% and 12%, respectively) are two times the settlement rate in the limited jurisdiction court (6%), but all are still much lower than the 62 percent settlement rate in the 1992 *Civil Justice Survey of State Courts*. It is likely that a substantial proportion of cases disposed by

Table 4: Percentage of Case Dispositions by Court Type

	SINGLE TIER	GENERAL JURISDICTION	LIMITED JURISDICTION	ALL COURTS
Dismissed	31	36	37	35
Judgment (unspecified)	50	15	16	26
Default judgment	3	18	32	20
Settlement	13	12	6	10
Adjudicated disposition	1	4	5	4
Unknown	0	13	2	4
Summary judgment	0	1	1	1
Other disposition	1	2	1	1

[61] *See* Figure 2, *supra*, at p. 7.

[62] In 2012, more than half of new civil cases were filed in limited jurisdiction courts. R. LAFOUNTAIN ET AL., EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2012 STATE TRIAL COURT CASELOADS 8 (NCSC 2014).

[63] The default rate in the 1992 *Civil Justice Survey of State Courts* was 14 percent.

[64] The Cook County Circuit Court did not include default judgment as a disposition type at all.

dismissal are also settlements rather than withdrawals or administrative dismissals.[65] Surprisingly, adjudication rates are highest in the limited jurisdiction courts (5% compared to 4% in general jurisdiction courts and 1% in single-tier courts), but two-thirds (66%) of the adjudicated dispositions are bench trials in contract, other civil, and small claims cases in limited jurisdiction courts.

In addition to differences in courts included the samples, the coding methodology employed in the two studies differed. Data for the 1992 *Civil Justice Survey* was collected through personal inspection of individual case files rather than extraction from the case management systems. Consequently, the 1992 data are more accurate and precise than the *Landscape* data. It is particularly difficult to interpret the dismissal and unspecified judgment rates in the *Landscape* dataset. Generally, litigants will request that settled cases be dismissed with prejudice to preclude the plaintiff from refiling the case in the future. Cases with that designation were classified as settlements in the *Landscape* dataset, but some cases may have been coded by court staff only as dismissals in the case management system, which would result in an inflated dismissal rate. Similarly, unspecified judgments may include a substantial proportion of cases that were actually default judgments.

Finally, the current study was undertaken shortly after this country's most significant economic recession since the Great Depression, during which state courts experienced a spike in civil case filings, especially in debt collection and mortgage foreclosure cases.[66] The disposition rates may reflect the unique economic and fiscal circumstances of state court caseloads during this period rather than more general trends. Table 5, which describes case dispositions by case type, documents substantially higher default judgment rates for contract and small claims cases (21% and 32%, respectively). Tort cases, in contrast, had substantially higher settlement and dismissal rates (32% and 39%, respectively). Real property, small claims, and other civil cases were the most likely to be adjudicated on the merits (6% for real property and other civil cases, 10% for small claims cases).

Table 5: Proportion of Case Dispositions by Case Type

	CONTRACT	TORT	REAL PROPERTY	SMALL CLAIMS	OTHER	ALL CASES
Dismissed	33	39	37	47	31	35
Judgment (unspecified)	31	11	23	10	25	26
Default judgment	21	4	13	32	7	20
Settlement	7	32	12	2	19	10
Unknown	3	8	5	0	11	4
Adjudicated disposition	3	3	6	7	6	4
Other disposition	1	3	2	1	1	1
Summary judgment	1	1	3	0	0	1

[65] Cases dismissed for failure to prosecute averaged five percent among the 17 courts in seven counties that separately identified these cases, but ranged as high as 14 percent in the general jurisdiction courts. Even if all of the dismissals in the general jurisdiction courts were settlements, it would only bring the settlement rate to 34 percent (approximately 55% of the 1992 settlement rate).

[66] LAFOUNTAIN, *supra* note 62, at 4.

Collectively, these factors suggest that the actual differences in disposition rates may be less dramatic than indicated by the differences between Figure 2 and Figure 9, but it is unlikely that they account for the entire difference. Compared to two decades ago, it seems likely that more civil cases are being disposed in a largely administrative capacity (dismissals or default judgments), resulting in lower overall settlement rates. With the exception of cases filed in limited jurisdiction courts, in which contract, other civil and small claims collectively comprise 40 percent of the total civil caseload, very little formal adjudication is taking place in state courts at all.

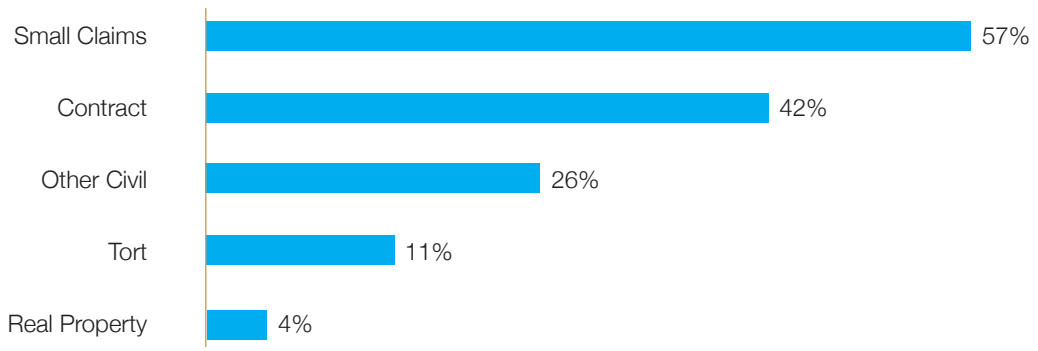
CASE OUTCOMES AND JUDGMENT AMOUNTS

The *Landscape* courts were not able to provide data documenting which party prevailed in cases that resulted in a judgment, so we are only able to infer case outcomes based on whether the judgment included a damage award. This is an imprecise measurement insofar that some judgments in which the plaintiff prevailed will include only equitable rather than monetary relief.[67]

By the same token, a judgment in which the defendant prevailed on both the original claim as well as a counterclaim against the plaintiff will also reflect a monetary award.[68] Recall also from Tables 4 and 5 that only 46 percent of cases were disposed by judgment (26% judgment (unspecified), 20% default judgment), and that rate varied considerably by case type. Only 15 percent of tort cases were disposed by judgment compared to 65 percent of small claims, 56 percent of contract cases, 45 percent of real property cases, and 32 percent of other civil cases. Figure 10 provides the proportion of judgments greater than zero, which may be interpreted as a very rough proxy for the plaintiff win rate. Given the factors discussed above, however, these rates likely underestimate the actual rate at which plaintiffs prevailed, but it is not known by how much. The estimated rates are likely to be considerably more accurate for small claims and contract cases in which the proportion of cases disposed by judgment is higher.

For the most part, the monetary values at issue in state court civil cases are relatively modest, at least

Figure 10: Proportion of Cases in which Judgment Exceeded $0



[67] A substantial proportion of real property cases, for example, involve disputed property boundaries. Judgments in such cases would determine the boundaries, but would not ordinarily award monetary damages unless the complaint alleged other claims (e.g., trespass). The *Civil Justice Survey of State Courts* series excluded cases involving equitable claims, so it is unknown what proportion of cases involve only claims seeking legal remedies.

[68] Eight percent of the trials in the 2005 *Civil Justice Survey of State Courts* involved cross claims or third-party claims. Of those cases, the defendant prevailed in 39 percent of the trials. 2005 *Civil Justice Survey of State Courts* (data on file with the authors).

in cases resulting in a formal judgment. Table 6 shows the average amount and the interquartile range[69] of the final award for cases resulting in a judgment greater than zero by court type, case type, and manner of disposition.[70] Overall, the average judgment award was less than $10,000 and the interquartile range was just $1,273 (25th percentile) to $5,154 (75th percentile). Not surprisingly, these values were lowest in limited jurisdiction courts, ostensibly due to the lower monetary thresholds for those courts. General jurisdiction courts had the highest judgment awards, while judgment amounts for single-tier courts, which manage all civil cases for their respective jurisdictions, predictably fell in between. Although some cases resulted in extremely large judgments,[71] they comprised only a small percentage of judgments greater than zero. For example, only 357 cases (0.2%) had judgments that exceeded $500,000 and only 165 cases (less than 0.1%) had judgments that exceeded $1 million.

Table 6: Judgment Amounts Exceeding $0*

			INTERQUARTILE RANGE		
	N	MEAN	25TH	50TH	75TH
Overall	**227,812**	**$9,267**	**$1,273**	**$2,441**	**$5,154**
Court Type					
General Jurisdiction	19,237	$24,117	$2,270	$5,592	$14,273
Single Tier	64,894	$18,023	$1,685	$3,029	$6,291
Limited Jurisdiction	143,681	$3,325	$1,060	$1,956	$4,085
Case Type					
Real Property	102	$157,651	$2,181	$12,789	$105,822
Tort	3,554	$64,761	$2,999	$6,000	$12,169
Other	9,704	$12,349	$749	$2,002	$4,219
Contract	160,465	$9,428	$1,251	$2,272	$4,981
Small Claims	39,517	$4,503	$1,568	$3,000	$6,000
Disposition Type					
Summary judgment	1,187	$133,411	$3,200	$6,174	$15,198
Adjudicated disposition	11,341	$15,088	$675	$1,120	$2,000
Judgment (unspecified)	96,037	$11,312	$1,340	$2,525	$5,302
Default Judgment	107,524	$5,876	$1,312	$2,442	$5,305

* Categories sorted in descending order based on the mean judgment amount.

[69] The interquartile range is the value of judgment awards at the 25th, 50th, and 75th percentiles. Because the mean (average) is often skewed by extreme outliers, the interquartile range reflects a more accurate picture of the value of typical cases for each category.

[70] Monetary damages were reported for less than half (41%) of cases that resulted in a final judgment. These cases comprise 25 percent of the entire *Landscape* caseload.

[71] The largest judgment recorded in the *Landscape* data was $84.5 million awarded in a contract case disposed in the Circuit Court of Cook County, Illinois. The case involved a dispute between a pharmaceutical company and its insurer concerning losses suffered by the pharmaceutical company due to a drug recall. At issue was whether the pharmaceutical company was covered under its insurance policy, or whether that coverage was previously rescinded. The trial court judgment in favor of the pharmaceutical company was subsequently upheld by the Illinois Court of Appeals. Certain Underwriters at Lloyds, London v. Abbott Laboratories, 16 N.E.3d 747 (Ill. App. 2014).

With respect to case types, average judgments awarded in real property cases were the highest overall ($157,651), followed by torts ($64,761), other civil cases ($12,349), contracts ($9,428), and small claims ($4,503). Although average judgments in real property cases were the highest of all of the case types, they comprised only a fraction (0.5%) of the total cases in which a judgment was entered; contracts and small claims cases comprised 82 percent of the caseload in which a judgment was entered, and 88 percent of the cases in which the judgment exceeded zero.

The monetary value of judgments is considerably lower than one would imagine from listening to debates about the contemporary justice system and largely confirms allegations that the costs of litigation routinely exceed the value of the case. In 2013, the NCSC developed a methodology — the Civil Litigation Cost Model (CLCM) — to estimate legal fees and expert witness fees in civil cases.[72] Using the CLCM, the NCSC found that in most types of civil cases, the median cost per side to litigate a case from filing through trial ranged from approximately $43,000 for automobile tort cases to $122,000 for professional malpractice cases. Indeed, in many cases the cost of litigation likely outstrips the monetary value of the case shortly after initiating the lawsuit.[73] Debt collection cases were the only exception. In a study of Utah attorneys using the CLCM, the NCSC found that the median cost per side to litigate a debt collection case through trial was $2,698.[74] Given the median judgment amount, most plaintiffs would find it economically feasible to pursue these claims, but not most defendants. There is, moreover, a fairly wide gap between the actual costs involved in resolving civil disputes and litigant expectations about what those costs should be. In 1999, for example, the New Mexico Judicial Branch conducted a series of public opinion polls, focus groups, and litigant surveys to measure the gap between the costs that litigants believe are reasonable and the actual costs in civil cases.[75] Litigants reported that the estimate of a reasonable cost for resolving their case was $3,682 on average, but actual costs were $8,385.[76]

BENCH AND JURY TRIALS

Courts reported a total of 32,124 trials as case dispositions in the *Landscape* dataset, 1,109 of which were jury trials (3%) and 31,015 were bench trials (97%).[77] Collectively, they comprised less than four percent of the entire *Landscape* dataset (0.1% jury trials, 3.4% bench trials). Jury trials were distributed about equally in the single-tier and general jurisdiction courts (49% and 45%, respectively) with only seven percent of jury trials taking place in limited jurisdiction courts. In contrast, limited jurisdiction and single-tier courts disproportionately conducted bench trials (45% and 42%, respectively) compared to only 13 percent in the

[72] CASELOAD HIGHLIGHTS, *supra* note 9.

[73] The costs per side associated with case initiation ranged from approximately $2,400 in automobile tort cases to $7,300 in professional malpractice and employment cases. *Id.*

[74] *See* UTAH RULE 26 REPORT, *supra* note 32, at 46-48.

[75] John M. Greacen, *How Fair, Fast, and Cheap Should Courts Be?* 82 JUDICATURE 287 (May-June 1999).

[76] *Id.* at 289.

[77] The Miami-Dade Circuit and County Courts and the Marion County Superior and Circuit Courts were not able to identify cases disposed by bench or jury trial. Data from the Cook County Circuit Court did not indicate cases disposed by bench trial. The trial rates reflect only cases for courts that identified bench and jury trials.

general jurisdiction courts. As Figures 11 and 12 illustrate, over three times as many jury trials took place in tort trials (65%) as in other types of cases. Over half of all bench trials (51%) took place in contract cases, followed by other civil cases (27%), small claims (19%), tort (2%), and real property cases (1%).

Only 69 percent of the jury trials and 58 percent of the bench trials in the *Landscape* dataset included information about the final judgment amount. As noted previously, some of the bench trials may have involved equitable relief, which would explain the absence of a damage award. In other instances, judgment awards

Figure 11: Proportion of Jury Trials by Case Type

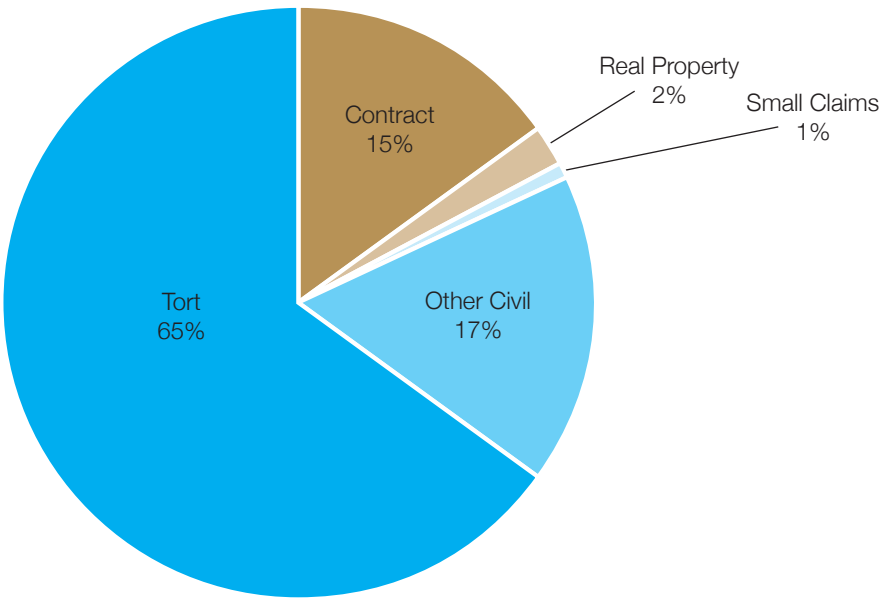
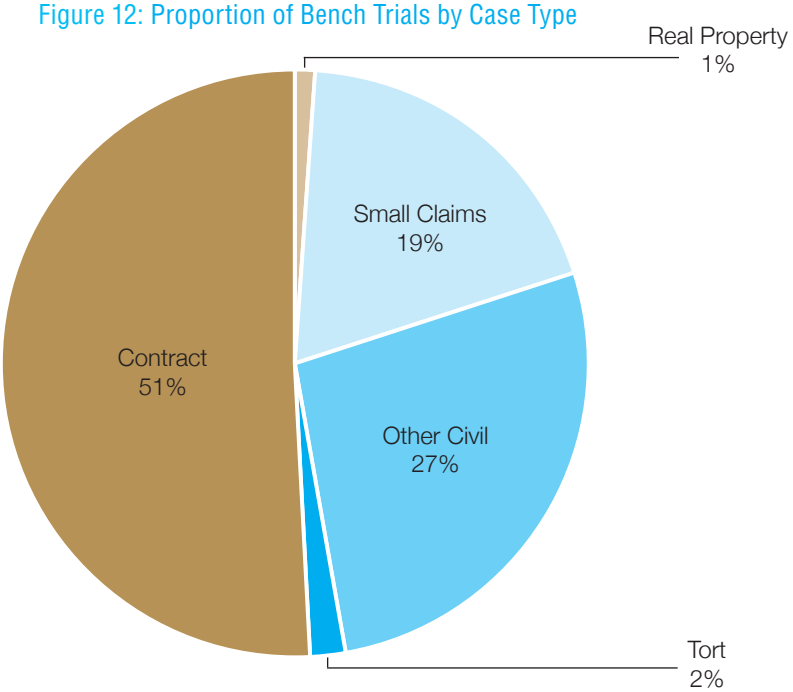


Figure 12: Proportion of Bench Trials by Case Type



were not included in the case-level data.[78] Tables 7 and 8 provide the average (mean) judgment award by case type for jury and bench trials in which the reported judgment was greater than zero. Those data highlight some important differences between bench and jury trials. First, the damage awards in jury trials are *48 or more times greater* than those in bench trials for all case types except small claims. This suggests that litigants engage in significant case selection strategies when deciding whether to try a case to a judge or jury. Tort cases, especially those involving more serious injuries and/or more egregious negligence on

Table 7: Jury Trials, Judgment Amounts Exceeding $0*

			INTERQUARTILE RANGE		
	N	MEAN	25TH	50TH	75TH
Total	**194**	**$ 1,468,554**	**$7,962**	**$31,097**	**$201,896**
Case Type					
Real Property	6	$947,589	$175,522	$370,199	$2,764,839
Contract	43	$226,635	$10,012	$48,806	$257,600
Tort	134	$2,003,776	$8,845	$30,000	$151,961
Other	9	$106,412	$2,193	$5,000	$139,232
Small Claims	2	$2,510	$1,621	$2,510	$3,400

Table 8: Bench Trials, Judgment Amounts Exceeding $0*

			INTERQUARTILE RANGE		
	N	MEAN	25TH	50TH	75TH
Total	**11,481**	**$6,408**	**$679**	**$1,131**	**$2,028**
Case Type					
Real Property	5	$19,277	$4,259	$7,826	$37,500
Tort	53	$7,300	$3,443	$8,629	$14,385
Small Claims	730	$2,749	$827	$2,000	$3,900
Other	1,498	$2,638	$200	$1,339	$3,664
Contract	9,195	$7,300	$700	$1,098	$1,785

* Categories sorted in descending order based on 75th percentile.

[78] Courts that provided judgment amount for cases disposed by trial included Cook County Circuit Court (jury trials only); Allegheny Court of Common Pleas; Bergen County Superior Court; Maricopa County Superior Court; the Euclid and Garfield Heights Municipal Courts in Cuyahoga County; Harris County Justice Court; and the Maricopa County Justice Court.

the part of the defendant that might warrant punitive damages are much more likely to be tried by a jury. Cases in which there is only limited potential for higher damage awards are more likely to be disposed by bench trial because the costs associated with a jury trial will exceed the potential award.

Second, the average jury and bench awards are heavily skewed by a very small number outlier cases. For example, compared to a mean jury award of $2 million in tort cases, 50 percent of jury awards in tort cases were $30,000 or less, and 75 percent of jury awards in tort cases were less than $152,000. Jury awards exceeded $500,000 in only 17 cases (3% of cases in which judgment exceeded zero), and exceeded $1 million in only 13 cases (2%).[79] The average judgment awarded in bench trials ($6,408) was three times more than the judgment awarded at the 75th percentile ($2,028).

Another noteworthy consideration concerning bench and jury trials is number of trials involving self-represented litigants. In the 1992 *Civil Justice Survey of State Courts*, attorneys represented both parties in 97 percent of jury trials and 91 percent of bench trials. In the trials from the *Landscape* dataset, the proportion of trials in which both parties were represented decreased to 87 percent of jury trials and 24 percent of bench trials. Restricting the analysis to general jurisdiction courts (for better comparability with the 1992 *Civil Justice Survey*) does not measurably improve the picture. Except for tort trials, defendants had representation in less than 30 percent of bench trials. In tort cases, plaintiffs were represented in 69 percent and defendants were represented in 71 percent of bench trials, resulting in only 56 percent of bench trials with both sides represented. The costs associated with bringing a case to trial may be a factor in the relatively high proportion of bench trials involving self-represented litigants in general jurisdiction courts.

TIME TO DISPOSITION

The average time from filing to disposition for cases in the Landscape dataset was 306 days (approximately 10 months); the interquartile range was 35 to 372 days (approximately 1 month to just over 1 year). Table 9 documents the average disposition time as well as the interquartile range for disposition. On average, tort cases took the longest time to resolve (486 days), followed by real property cases (428 days), other civil cases (323 days), contract claims (309 days), and small claims (175 days).

Some cases in the *Landscape* dataset had unusually long disposition times. A total of 1,252 cases (0.1%) were 10 years or older when they were finally disposed. Of the 521 cases that were 15 years or older, more than half were foreclosure cases filed in the Bergen County Superior Court. The second oldest case in the dataset, People's Trust of New Jersey v. Garra, filed in 1972 and administratively closed in 2013 (41 years), was one of these, although case records suggest that the case was actually resolved in 1998 (26 years). The oldest case was a guardianship case (coded as "Other Civil—Domestic Related"), filed in the Marion County Superior Court in 1950 (62 years).[80]

Addressing court delay has been a major focus of court improvement efforts for several decades. The most recent national effort to manage civil caseloads in a timely manner was a component of the *Model Time Standards for State Trial Courts*. The *Model Time Standards* recommend that 75 percent of general civil cases be disposed within 180 days, 90 percent within 365 days, and 98 percent within 540 days.[81]

[79] The highest jury award in the *Landscape* dataset was $80 million, awarded in a premises liability case involving an iron worker who become paralyzed from the neck down after falling headfirst from a steel beam while not using a safety harness. Bayer v. Garbe Iron Works, Inc. et al., No. 07-L-009877 (Cook Cir. Ct., Dec. 17, 2012). The trial judge subsequently reduced the $80 million verdict to $64 million.

[80] The *State Court Guide* recommends that guardianship and other cases in which an initial entry of judgment is filed, but are then reviewed on a periodic basis by a judicial officer, be coded in the case management system as "set for review" rather than leaving the case as "pending" or "open" on the court docket to avoid distorting disposition time statistics. STATE COURT GUIDE, *supra* note 49, at 4.

[81] MODEL TIME STANDARDS, *supra* note 41.

Table 9: Time to Disposition (days)*

			INTERQUARTILE RANGE		
	N	MEAN	25TH	50TH	75TH
Overall	**820,893**	**306**	**35**	**113**	**372**
Court Type					
General Jurisdiction	206,209	410	50	215	546
Single Tier	247,815	366	45	148	491
Limited Jurisdiction	366,869	206	23	72	219
Case Type					
Tort	60,460	486	165	340	640
Real Property	5,745	428	102	297	573
Other	79,077	323	26	160	401
Contract	553,271	309	28	107	371
Small Claims	110,274	175	39	70	169
Disposition Type					
Settlement	84,992	478	78	267	650
Summary judgment	5,812	441	185	321	574
Dismissal	293,466	391	49	195	544
Other disposition	7,819	323	57	149	374
Unknown disposition	16,740	316	64	147	373
Judgment (unspecified)	229,634	264	19	68	302
Adjudicated disposition	27,281	147	13	21	167
Default Judgment	155,149	132	36	70	159

* Categories sorted in descending order based on 75th percentile.

Generously speaking, it is clear from Table 10, which documents the proportion of cases disposed within these timeframes, that the *Model Time Standards* are still an aspirational goal rather than a current achievement. Overall, only the limited jurisdiction courts come close to meeting the *Model Time Standards*, with 71 percent of general civil cases disposed within 180 days, 84 percent within 365 days, and 89 percent within 540 days. General jurisdiction courts fared the worst with only 75 percent of cases disposed within 540 days.

Because contract cases comprise such a large proportion of civil caseloads, they will necessarily have an outsized effect on disposition times. Looking closely at the different subcategories of contracts, we find that debt collection cases (37% of contracts) are generally disposed quite quickly, with 91 percent closed within 180 days and 95 percent within 540 days. However, foreclosures (17% of contracts) are significant contributors to overall delay in contract

Table 10: Cases Disposed within Model Time Standard Guidelines*

		PERCENTAGE DISPOSED WITHIN		
	N	180 DAYS	365 DAYS	540 DAYS
Overall	**820,893**	**59**	**75**	**82**
Court Type				
Limited Jurisdiction	366,869	71	84	89
Single Tier	247,815	54	69	77
General Jurisdiction	206,209	45	64	75
Case Type				
Small Claims	110,274	76	88	92
Other Civil	79,077	53	73	81
Contract	553,271	61	75	81
Debt Collection	*101,089*	*91*	*94*	*95*
Foreclosure	*240,115*	*14*	*36*	*51*
Landlord/Tenant	*90,495*	*68*	*87*	*92*
Real Property	5,745	37	57	73
Tort	60,460	27	53	69
AutoTort	*26,802*	*27*	*57*	*74*
PI/PD	*13,614*	*26*	*52*	*68*
Product Liability	*1,987*	*24*	*39*	*51*
Medical Malpractice	*1,332*	*21*	*36*	*46*
Disposition Type				
Default Judgment	155,149	79	94	97
Adjudicated disposition	27,281	76	88	93
Judgment (unspecified)	229,634	67	78	84
Unknown disposition	16,740	56	75	83
Other disposition	7,819	55	75	82
Dismissal	293,466	48	66	75
Summary judgment	5,812	24	56	73
Settlement	84,992	40	59	70

* Note: Categories sorted in descending order based on cases disposed within 540 days.

cases.[82] Only 14 percent were disposed within 180 days, and slightly more than half (51%) within 540 days. Landlord/tenant cases similarly did not meet the *Model Time Standards* guidelines, although they fared considerably better than mortgage foreclosures.

Although tort cases comprise only seven percent of the *Landscape* dataset, they were the worst case category in terms of compliance with the *Model Time Standards*. Only two-thirds (69%) were disposed within 540 days. Automobile torts performed somewhat better (74% disposed within 540 days) than other subcategories of torts. Less than half of the medical malpractice and product liability cases were disposed by 540 days, ostensibly due to their evidentiary and legal complexity. Perhaps the most surprising of the disposition time analysis is the fact that even small claims cases did not fully comply with the *Model Time Standards*, although they came closer than any other broad case type. Small claims slightly exceeded the *Model Time Standards* guidelines for cases disposed within 180 days (76%), but then lost ground for cases disposed within 365 days (88%) and 540 days (92%).

The manner of disposition may also explain some of the longer disposition times. Cases disposed by summary judgment and settlement, which necessarily would be characterized by longer discovery and pretrial litigation activity, were the least likely to have closed within 540 days (73% and 70%, respectively). In contrast, almost all (97%) of the cases disposed by default judgment closed within 540 days. Although some of the dismissals were undoubtedly administrative dismissals for failure to prosecute, the relatively long timeframes to close these cases (75% disposed within 540 days) suggests that many of these may have been settlements. Nevertheless, closer supervision of these cases might have improved compliance with the *Model Time Standards*.

REPRESENTATION STATUS OF LITIGANTS

Most state court judges and court administrators can attest that the representation status of civil litigants has changed dramatically since the publication of the 1992 *Civil Justice Survey of State Courts*.[83] In that study, attorneys represented both plaintiffs and defendants in 95% of the cases disposed in general jurisdiction courts. This high level of attorney representation existed across case types; both parties were represented by attorneys in 98 percent of tort cases, 94 percent of contract cases, and 93 percent of real property cases. While plaintiffs remained overwhelmingly represented by counsel (92%) in the *Landscape* dataset, the average representation for defendants was 26 percent and the average percentage of cases in which both sides were represented by counsel was only 24 percent (see Table 11). As before, there are some striking variations across court types, case types, and disposition types.

Cases filed in general jurisdiction courts provide the most accurate comparison of the 1992 *Civil Justice Survey of State Courts* and the *Landscape* datasets. Although attorney representation for plaintiffs has declined only slightly (from 99% to 96%), attorney representation for defendants has decreased by more than half (97% to 46%), resulting in a commensu-

[82] Mortgage foreclosures were a substantial factor in the spike in civil filings following the 2008-2009 economic recession. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, Table 1194: Mortgage Originations and Delinquency and Foreclosure Rates: 1990-2010. Many state courts found themselves overwhelmed by the volume of foreclosure filings, including the Miami-Dade Circuit Court and the Maricopa County Superior Court. Subsequent complications related to mortgage servicing company record-keeping and internal foreclosure procedures may account for some of the delays apparent in these cases. Joe Adler, *OCC Offers Updates on Compliance with Foreclosure Settlement*, AMERICAN BANKER (April 30, 2014) *available at* http://www.americanbanker.com/issues/179_83/occ-offers-update-on-compliance-with-foreclosure-settlement-1067226-1.html, last visited on Aug. 24, 2015; Kate Berry, *Robo-Signing Redux: Servicers Still Fabricating Foreclosure Documents*, AMERICAN BANKER (Aug. 31, 2011) *available at* http://www.americanbanker.com/issues/176_170/robo-signing-foreclosure-mortgage-assignments-1041741-1.html?BCnopagination=1&gclid=CMWK-MmXwscCFcEUHwod0X4LRw, last visited on Aug. 24, 2015.

[83] The 1992 *Civil Justice Survey of State Courts* measured representation status based on whether any party was represented by counsel at any time during the litigation. The NCSC *State Court Guide to Statistical Reporting* now recommends that representation status be measured based on whether a party was *self-represented* either at any time during the life of the case or, if the case management system does not capture that information, at disposition. COURT STATISTICS PROJECT, *supra* note 52, at 31-32. The *Landscape* study employed the *State Court Guide* methodology to measure representation status. As a result of the differing definitions, the 1992 *Civil Justice Survey of State Courts* statistics on representation status may inflate the proportion of litigants who were represented by counsel.

Table 11: Representation Status (Percentage of Cases)*

		ATTORNEY REPRESENTING		
	N**	PLAINTIFF	DEFENDANT	BOTH
Overall	**649,811**	**92**	**26**	**24**
Court Type				
General Jurisdiction	200,789	96	46	45
Limited Jurisdiction	201,194	86	22	17
Single Tier	247,828	91	19	11
Case Type				
Tort	60,358	96	67	64
Real Property	4,970	95	45	39
Other	38,010	78	36	25
Contract	453,115	95	23	20
Small Claims	98,176	76	13	13
Disposition Type				
Summary judgment	5,266	99	62	61
Other disposition	6,428	96	54	49
Unknown disposition	27,491	93	45	42
Settlement	64,435	92	40	37
Adjudicated disposition	6,106	64	38	37
Dismissal	231,730	92	33	31
Judgment (unspecified)	205,202	90	19	16
Default Judgment	108,150	91	7	5

* Categories sorted in descending order based on both parties represented by counsel.
** Number of cases in courts that reported representation status for both parties.

[84] Lawyers were permitted to represent clients in small claims cases in seven of the 10 counties that participated in the *Landscape* study: Cook County Circuit Court, Miami-Dade County Court, Oahu District Court, Harris County Justice Courts, Marion County Small Claims Court, Bergen County Superior Court, and the 12 municipal courts located in Cuyahoga County, Ohio.

rate decrease in cases with attorney representation for both sides (96% to 45%). Not surprisingly, limited jurisdiction courts had the lowest proportion of plaintiff representation (86%), but single-tier courts had the lowest proportion of both defendant representation (13%) and overall litigant representation (11%).

Tort cases had the highest proportion of attorney representation overall (64%) and were the only case catagory in which more than half of defendants were represented (67%). Attorney representation was lowest in small claims cases (both sides represented in 13% of cases), which was expected given that these calendars were originally developed as a forum for self-represented litigants to obtain access to courts through simplified procedures. What was surprising, however, was the higher than expected proportion of small claims cases in which plaintiffs were represented by counsel (76%). This suggests that small claims courts may have become the forum of choice for many debt collection cases.[84] If so, it raises troubling concerns that small claims courts, which were originally developed as a forum in which primarily self-represented litigants could use a simplified process to resolve civil cases quickly and fairly, provide a much less evenly balanced playing field than was originally intended.

The *Landscape* data are insufficiently detailed to draw firm conclusions about the impact of attorney representation in any given case, but it is clear that it does affect case dispositions. For example, cases disposed by summary judgment had the highest proportions of attorney representation (61% with both sides represented), and likely reflects the fact that self-represented litigants would be less likely to file motions for summary judgment. Defendants in cases resolved by "other disposition" (e.g., bankruptcy stays, removal to federal court, and change of venue) were represented more than half the time (54%), again suggesting that lawyers would be more aware of and inclined to take advantage of these procedural options.

Conclusions and Implications for State Courts

The picture of contemporary litigation that emerges from the *Landscape* dataset is very different from the one suggested in debates about the contemporary civil justice system. State court caseloads are dominated by lower-value contract and small claims cases rather than high-value commercial and tort cases. Only one in four cases has attorneys representing both the plaintiff and the defendant. In addition, only a tiny proportion of cases are adjudicated on the merits, and almost all of those are bench trials in lower-value contract, small claims and other civil cases.

With rare exceptions, the monetary value of cases disposed in state courts is quite modest. Seventy-five percent (75%) of judgments greater than zero were less than $5,200. Only judgments in real property cases exceeded $100,000 more than 25 percent of the time. At the 75th percentile, judgments in small claims cases were actually greater than judgments in contract cases ($6,000 compared to $4,981). This is particularly striking given recent estimates of the costs of civil litigation. In the vast majority of cases, deciding to litigate a typical civil case in state courts is economically unsound unless the litigant is prepared to do so on a self-represented basis, which appears to be the case for most defendants.

The relatively high proportion of self-represented defendants in civil cases is also troubling. Much of the civil justice system is designed with the assumption that both parties will be represented by competent attorneys. The asymmetry of representation between plaintiffs and defendants across all of the case types — even in small claims courts — raises serious questions about the substantive fairness of outcomes in those cases.[85] Although there has been a sea change in state court policies with respect to the legitimacy of court-supported assistance to self-represented litigants, it is still a very controversial topic in many states.[86] Moreover, most of that assistance takes the form of self-help forms and general instructions for filing cases and gathering documents in preparation for evidentiary hearings. As a general rule, state codes of judicial ethics prohibit judges from giving the appearance of providing assistance, much less actually giving assistance, to a self-represented litigant.[87] This has certain implications with respect to public trust and confidence in the courts. The idealized view is that courts provide a forum in which civil litigants can negotiate effectively to resolve disputes, but also one in which Justice (with a capital J) will be done if those negotiations fail. It is fair to question the extent to which self-represented defendants are able to bargain effectively with represented litigants given unequal resources and expertise.

The economic realities of contemporary civil litigation suggest one explanation for the dominance of contract and small claims cases, which comprise 80 percent of civil caseloads in the *Landscape* courts. For plaintiffs in these cases, state courts essentially function as a monopoly insofar that securing a judgment from a court of competent jurisdiction is the only legal mechanism for enforcing payment of the award through post-judgment garnishment or asset seizure proceedings. Even so, plaintiffs must generally wait months to secure the judgment before they can initiate enforcement proceedings. The majority of claims asserted in tort cases, in contrast, are likely to involve insurance coverage for the defendant, which provides greater incentives for litigants to settle claims and a mechanism for judgments and settlement agreements to be paid. Indeed, in the vast majority of incidents giving rise to tort claims, the existence of a robust and highly regulated insurance market largely precludes the need to file cases in court at all.[88]

---

[85] In 2010, the Federal Trade Commission published a report describing common problems involving unfair, deceptive, and abusive debt collection practices. FEDERAL TRADE COMMISSION, PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION (July 2010). In response to consumer complaints, the Consumer Financial Protection Bureau recently published model rules and procedures for state courts designed to curb the most frequently alleged abusive practices. CONSUMER FINANCIAL PROTECTION BUREAU, PROPOSED RULES, 78 FED. REG. 67,848 (Nov. 12, 2013) (to be codified at 12 C.F.R. pt. 1006).

[86] DEBORAH SAUNDERS, ACCESS BRIEF: SELF-HELP SERVICES (NCSC 2012).

[87] Jona Goldschmidt, *Judicial Ethics and Assistance to Self-Represented Litigants,* 28 JUST. SYS. J. 324 (2007).

[88] As just one example, the Insurance Research Institute reports that of automobile insurance claims closed in 2012, only eight percent of claimants ultimately filed suit in court. INSURANCE RESEARCH INSTITUTE, COUNTRYWIDE PATTERNS IN TREATMENT, COST, AND COMPENSATION (2014).

DISTORTED PERCEPTIONS OF CIVIL LITIGATION IN STATE COURTS

This reality raises the question of why perceptions of civil litigation are so distorted. One possibility is that some findings from the *Landscape* study may be at least partly attributed to ongoing effects of the 2008-2009 economic recession. For example, the large proportion of debt collection and foreclosure cases may have inflated the proportion of contract cases relative to other case types. However, the majority of those cases were filed after July 1, 2011, well after the peak of civil filings from the recession. Moreover, civil case filing statistics indicate that the proportion of contract cases routinely fluctuates over time in response to economic conditions, and rarely dips below 50 percent of civil caseloads. The relative stability of caseload compositions over time tends to counter the possibility that the *Landscape* findings are a temporary anomaly.

A more likely explanation is the focus on high-value and complex litigation by the media (especially business reports), much of which is filed in federal rather than state courts. Lower-value debt collections, landlord/tenant cases, and automobile torts involving property damage and soft-tissue injuries are rarely newsworthy. Another explanation is that perceptions are largely driven by the experiences of lawyers, who are repeat players in the civil justice system and who are much more likely to be involved in high-value and complex cases. Likewise, judges tend to focus on their experience in cases that demand a great deal of judicial attention. A final explanation for the distorted perception of civil caseloads is the institutional complexity inherent in the variety of organizational structures and jurisdictional authorities in state courts, which make it extremely difficult to document the size of civil caseloads, much less make accurate comparisons across states.

In spite of distorted perceptions, state courts do have serious problems managing civil cases. Of particular concern is the extent to which costs and delay impede access to justice. Procedural complexity is often cited as a contributing cause of cost and delay, but recent commentary suggests that uniform procedural rules that treat all cases exactly the same regardless of the complexity of the factual and legal issues underlying the dispute may be a more significant problem.[89] Most uniform rules place a great deal of discretion in the hands of lawyers to determine the extent to which each case should be litigated. The bar has largely resisted proposals to restrict that discretion on grounds that any individual case might need an exceptional amount of time or attention to resolve and therefore all cases should be managed as if they need that exceptional treatment. Courts that have imposed mandatory restrictions on lawyer discretion have tended to generate considerable pushback including the use of creative procedural techniques to exempt cases from their application.[90] Opt-in programs designed to streamline case management have often failed due to underuse.[91] As the findings from the Landscape dataset make clear, however, very few cases need as much time or attention as the rules provide and, ironically, many of them likely take longer and cost more to resolve as a result.

Another contributor to cost and delay is the traditional practice of allowing the litigants, rather than the court, to control the pace of litigation. Proponents

[89] INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND CIVIL JUSTICE AND IAALS A-2-3.

[90] After the Utah Supreme Court implemented mandatory restrictions on the scope of discovery based on the amount in controversy in November 2011, attorneys appear to have inflated the purported amount-in-controversy to secure assignment to higher discovery tiers. UTAH RULE 26 REPORT, *supra* note 32, at 10-12. The NH PAD Pilot Rules required attorneys to meet and confer within 20 days of the filing of the Answer to establish deadlines for various discovery events, alternative dispute resolution (ADR) proceedings, dispositive motions, and a trial date, and submit a written stipulation to the court to be used as the case structuring order. Although compliance with the PAD Pilot Rules was quite high, it did not have the intended effect of reducing disposition time. Because the rules did not impose restrictions on the timeframe for completing discovery and pretrial procedures, attorneys simply stipulated to the timeframes to which they were already accustomed. NEW HAMPSHIRE PAD RULES REPORT, *supra* note 31, at 7-9.

[91] Several states and local trial courts have developed opt-in programs designed to increase civil jury trial rates by offering expedited pretrial processing, but participation rates have varied considerably. *See* SHORT, SUMMARY & EXPEDITED, *supra* note 14.

of this tradition offer several justifications. First is a philosophical justification that although the civil justice system is a public forum, the cases themselves remain private disputes that should be wholly controlled by the parties. Proponents of party-driven pacing argue that the parties have more complete knowledge about the case and the attractiveness of any proposed resolution and are therefore are in a better position to determine the pace at which the case should proceed and the extent to which additional investments in litigation are worthwhile. Second, until fairly recently, most litigants were represented by attorneys who were repeat-players in the civil justice system. As such, courts have generally been more attentive to bar demands for control over case management than litigant demands for speedy, just, and inexpensive resolution of disputes.

Finally, courts historically have not had sufficient resources to effectively manage civil caseloads. The sheer volume of civil cases filed in state courts greatly overwhelms the ability of judges to provide individual attention and oversight to every case. Instead, judges focus most of their attention on the "squeaky wheels," (cases involving overly aggressive litigants clamoring for the court's attention and using extensive motions practice to disagree on every conceivable issue). Judges have few incentives to pay attention to those cases that are just quietly "pending" on the civil docket. With rare exceptions, previous recommendations concerning caseflow management have not been broadly adopted or institutionalized in state courts. Nor have courts developed case management automation to support effective caseflow management.

While most automation systems can track case filings and calendar events, they lack the ability to monitor compliance with deadlines or other court orders.[92] Case progress, therefore, depends on the litigants to inform the court that the case is in need of some judicial action (e.g., to resolve a discovery dispute, rule on a summary judgment motion, or schedule the case for trial). Furthermore, non-judicial staff serve primarily in clerical roles and rarely have either the training or the authority to undertake routine case management tasks on behalf of the judge. As a result, state courts struggle to comply with the Standards.

THE FUTURE OF THE CIVIL JUSTICE SYSTEM IN STATE COURTS?

Substantial evidence supports allegations that civil jury and bench trials have declined precipitously over the past several decades.[93] The most frequent explanation for this trend is that the cost and time involved in getting to trial make alternative methods of dispute resolution more attractive.[94] A substantial commercial industry providing ADR services (e.g., mediation, arbitration, private judging) not only actively competes with state and federal courts for business, it even relies largely on experienced trial lawyers and judges to provide those services. Not only are these methods more likely to be pursued in existing disputes, many routine consumer and commercial transactions (e.g., utility contracts, financial services agreements, healthcare and insurance contracts, commercial mergers, and employment contracts) now specify that future disputes must be resolved by mediation or binding arbitration.[95] The rise of the Internet economy has also

[92] The COSCA-NACM-NCSC Joint Technology Committee began developing Next-Gen technology standards for court automation in early 2015. JOINT TECHNOLOGY COMMITTEE, BUSINESS CASE FOR NEXT-GEN CMS STANDARDS DEVELOPMENT (June 10, 2014), http://www.ncsc.org/~/media/Files/PDF/About%20Us/Committees/JTC/BusinessCaseforNextGenCMS%20StandardsDevelopmentDRAFT7214.ashx. More effective judicial tools are also envisioned as part of the Next-Gen standards. JTC Resource Bulletin: Making the Case for Judicial Tools (Dec. 5, 2014), http://www.ncsc.org/~/media/Files/PDF/About%20Us/Committees/JTC/JTC%20Resource%20Bulletins/Judicial%20Tools%201%200%20FINAL.ashx.

[93] *The Vanishing Trial, supra* note 20.

[94] Thomas J. Stipanowich, ADR and the *"Vanishing Trial": The Growth and Impact of Alternative Dispute Resolutio*n, 1 EMPIRICAL LEG. ST. 843 (2004); Stephen C. Yeazell, Getting What We Asked For, *Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEG. ST. 943 (2004).

[95] CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET AND CONSUMER PROTECTION ACT §1028(a), Section II, 6-26 (March 2015).

spurred the development of online dispute resolution forums for major Internet-based companies such as E-bay, PayPal, and Amazon.[96] A significant consequence of these trends is the growing lack of jury trial experience within the bar and increasingly the state court trial bench. This may further feed the decline in civil jury trials as lawyers and judges discourage their use due to unfamiliarity with trial practices.[97] In addition to declining trial rates, there is growing concern that many civil litigants are not filing claims in state courts at all.[98] Preemptive clauses for binding arbitration in consumer and commercial contracts divert claims away from state courts, but other factors including federal preemption of certain types of cases,[99] international treaties,[100] and legislative requirements that litigants exhaust administrative remedies in state or federal agencies before seeking court review[101] have also proliferated in recent years.

Although not related to trends in civil caseloads and disposition rates, state court budgets declined precipitously during the economic recessions in 2002-2003 and again in 2008–2009. Although most state courts experienced some recovery after the 2003 recession, there is currently no expectation among state court policymakers that state court budgets will return to pre-2008 recession levels. Moreover, state and federal constitutional and statutory provisions place higher priority on criminal and domestic caseloads in state courts, further undermining timely and effective management of civil caseloads. For the past two decades, state courts leaders have resigned themselves to doing more with less, all the while watching civil litigants move with their feet to other forums to resolve disputes or forego civil justice entirely.

These trends have severe implications for the future of the civil justice system and for public trust and confidence in state courts. The cost and delays of civil litigation greatly outpace the monetary value of most cases filed in state courts, effectively denying access to justice for most litigants and undermining the legitimacy of the courts as a fair and effective forum to resolve disputes. Reductions in the proportion of civil cases resolved through formal adjudication threaten to erode a publicly accessible body of law governing civil cases. Fewer common law precedents will leave future litigants without clear standards for negotiating civil transactions or conforming their conduct in a responsible manner. The privatization of civil litigation likewise undermines the ability of the legislative and executive branches of government to respond effectively to developing societal circumstances that become apparent through claims filed in state courts. Because the civil justice system directly touches everyone in contemporary American society — through housing, food, education, employment, household services and products, personal finance, and commercial transactions — ineffective civil case management by state courts has an outsized effect on public trust and confidence compared to the criminal justice system. If state court policymakers are to preserve the traditional role of state courts as the primary forum for dispute resolution, civil justice reform can no longer be delayed or even implemented incrementally through changes in rules of civil procedure. Instead, it will require dramatic changes in court operations to provide considerably greater court oversight of caseflow management to control costs, reduce delays, and improve litigants' experiences with the civil justice system.

---

[96] Online dispute resolution services have become so widely available that an academic journal — *The International Journal of Online Dispute Resolution* — has been launched to provide practitioners with information about current initiatives and developments. *See* http://www.international-odr.com/. Pablo Cortés, *Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers*, 19 INT'L J. L. & INFORMATION TECH. 1 (2011).

[97] Paula Hannaford-Agor et al., *Trial Trends and Implications for the Civil Justice System*, 11 CASELOAD HIGHLIGHTS 6 (June 2005).

[98] The NCSC Court Statistics Project reports that civil filings have declined by 13.5% since the peak in filings in 2009. Although population adjusted filings vary periodically in response to economic conditions, there is no apparent decrease overall since 1987, the year that the NCSC began reporting these statistics.

[99] CLASS ACTION FAIRNESS ACT OF 2005, 28 USC §§ 1332(d), 1453, 1711-1715; David G. Owen, *Federal Preemption of Product Liability Claims*, 55 S.C. L. REV. 411 (2003).

[100] Joachim Pohl, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey*, OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT (2012/02).

[101] JACOB A. STEIN, ADMINISTRATIVE LAW §§ 49.01-03 (Exhaustion of Administrative Remedies) (2013).

National Center for State Court
300 Newport Avenue
Williamsburg, VA 23185

800.616.6164
www.ncsc.org

Problems and Recommendations for High Volume Dockets: A Report of the High Volume Case Subcommittee to the CCJ Civil Justice Improvements Committee

By Hannah E. M. Lieberman, Linda Sandstrom Simard & Ed Marks

Introduction

As NCSC's recently completed study, *The Landscape of Civil Litigation in State Courts* reflects, the civil business of state courts has changed dramatically over the last few decades:

> State court case loads are dominated by lower-value contract and small claims cases rather than high-value commercial and tort cases. Only one in four cases has attorneys representing both the plaintiff and the defendant. Only a tiny proportion of cases are adjudicated on the merits, and almost all of those are bench trials in small claims and other civil cases.[1]

This transformation is evident in "high volume" dockets that present enormous challenges to litigants, judges and court administrators.[2] The huge volume of cases, mostly consisting of lower-value contract cases, landlord /tenant and debt collection filings, presents one challenge.[3] Nationally, landlord/tenant cases number in the millions every year.[4] Debt collection filings, which also number in the millions nationally, reflect the burgeoning business of third-party debt buyers. A second challenge is the lack of representation for, and sophistication of, most defendants in these cases, which creates unique management problems and asymmetries between the parties. If left unaddressed, these challenges threaten the integrity of judicial processes and can thwart meaningful examination of basic facts and

[1] PAULA HANNAFORD-AGOR ET AL., THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 35 (NCSC, 2015) [hereinafter LANDSCAPE].

[2] There are other "high volume" courts outside the scope of the CCJ mandate (e.g., domestic relations), for which some of the recommendations offered here may be applicable.

[3] The LANDSCAPE study found that contract cases made up between 64 and 80 percent of the civil caseloads in the jurisdictions that were the subject of the study. Thirty-seven percent (37%) of those were debt collection cases, 29 percent were landlord/tenant, and another 17 percent were foreclosure matters. *Id.* at 17-19.

[4] For example, a 2008 study estimated that approximately 300,000 eviction cases were filed in New York City annually. Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 750 n.22 (2015) [hereinafter Steinberg] (citing Rashida Abuwala & Donald J. Farole, *The Perception of Self-Represented Tenants in a Community-Based Housing Court,* 44 CT. REV. 56 (2008). This is not only an urban problem. The Quincy Housing Court in Massachusetts handles 1,280 cases annually. James D. Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future,* 126 HARV. L. REV. 901, 917 (2013) [hereinafter Greiner]. *See also* LANDSCAPE, *supra* note 1, at 17-19 (contract and small claims cases comprised 80 percent (as an average) of caseloads in studied jurisdictions). The study notes that some of the small claims cases are also likely debt collection cases. That means that, in those ten jurisdictions alone, debt collection cases numbered in the hundreds of thousands, and landlord/tenant cases exceeded 100,000.

claims.[5]

The outcomes in high volume dockets typically have serious and long-lasting consequences for litigants. Although the average dollar value of the debt collection and small claims cases handled annually is low,[6] a civil judgment can stand in the way of housing, employment and income. Data-miners check and report court records for prospective employers, landlords and creditors. With jobs, shelter and wages hanging in the balance,[7] generally for persons of limited means, it is critical that the judgment be the product of a fair and adequate process.[8] Post-judgment enforcement efforts including wage garnishment follow on the heels of civil judgments in these cases and should likewise conform to applicable state and federal law. Studies reveal, however, that recurrent practices in many jurisdictions undermine the adequacy or fairness of the operations and results of such high volume dockets.

This sub-committee tasked with developing recommendations regarding high volume dockets put together this memorandum to (1) identify the unique characteristics of these cases and dockets; (2) define the most pressing problems they present; and (3) suggest some initial responses for possible inclusion in the final report of the CCJ Civil Justice Improvements Committee. We are motivated by a sense of urgency. A judicial system that is not readily navigated by many, and where outcomes are too frequently not based on a full and fair ventilation of the underlying facts of the case, will lose its integrity and legitimacy. It is thus ultimately our strong commitment to and respect for our system of justice that underlies this effort.

In putting together this outline, we are mindful of the scope of the CCJ Committee mission. Our recommendations focus on changes that court systems can achieve (perhaps to varying degrees based on resources and need) through changes to court administration, operations, rules or "culture" (practices that may have developed over time but are not embodied in law or formal policies). They

---

[5] Unlike other types of cases discussed in the *Landscape,* delay and litigation expenses are typically not problems in these courts. Trials are infrequent; discovery rarely occurs and when it does, is limited and streamlined. Greiner, *supra* note 4, at 915-16 (noting simplified rules and standardized forms used in landlord/tenant courts and the rarity of evidentiary hearings, including trials). Indeed, the *Landscape* study indicated a 42 percent higher default rate and a trebling of dismissals over the past two decades, leading the authors to conclude that "very little formal adjudication is taking place in state courts at all." LANDSCAPE, *supra* note 1, at 23.

[6] LANDSCAPE, *supra* note 1, at 35.

[7] *See* Mary Spector, *Litigating Consumer Debt Collection: A Study,* 31 BANKING & FINANCIAL SERVICES POLICY REPORT 1, 3 (2012) [hereinafter Spector, *Litigating*]; Greiner, *supra* 4 at 914, 916, and n. 59. A quick online inquiry reveals the substantial business of record searching, which includes court records. Courts have responded to the increase in efforts to obtain bulk data in varying ways; some charge a fee for the information and restrict its resale. More information can be obtained at the NCSC *Privacy/Public Access to Court Records—State Links* at http://www.ncsc.org/Topics/Access-and-Fairness/Pravacy-Public-Access-to-Court-Records/State-LOinks.aspx. . Improper garnishments increase the harm of improper practices. FEDERAL TRADE COMMISSION, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION ii (2010), *available at* https://www.ftc.gov/reports/repairing-broken-system-protecting-consumers-debt-collection-litigation [hereinafter FTC REPORT].

[8] James D. Greiner et al., *Engaging Financially-Distressed Consumers*, FEDERAL RESERVE BANK OF BOSTON, COMMUNITY AND BANKING, Summer 2015, *available at* https://www.bostonfed.org/commdev/c&b/2015/summer/greiner-jimenez-lupica-engaging-financially-distressed-consumers.htm.

include suggestions for innovative partnerships and new uses of technology, and reflect recognition that court personnel, including judges, have opportunities to use the "bully pulpit" to educate the public and policymakers about the challenges facing the court system. We have steered away from recommendations that would likely require legislation or significant substantive changes in the law. In keeping with our mission, we have concentrated on possible roles for courts in improving the management of high volume dockets.

Distinctive Characteristics of High Volume Dockets

Cases filed in high-volume court dockets tend to share a number of common characteristics. The factual and legal issues alleged in the pleadings tend to be highly repetitive. Plaintiffs are likely to be represented by an attorney who often handles a high volume of similar cases.[9] Debt collection plaintiffs are almost always corporate entities rather than individual litigants, and landlord/tenant plaintiffs are usually so. Plaintiffs are thus likely to have significantly greater knowledge of formal and informal court practices and far greater resources, including access to both case-specific and general information, than defendants.

Defendants, in contrast, are likely to be self-represented individuals,[10] who are often of low or modest income. These defendants often face additional barriers that impede effective navigation of the civil justice system and their ability to present an effective defense.[11] Barriers may include limited literacy; limited English proficiency; cognitive impairments including mental illness; and distrust of the courts based on prior experience or upbringing in a different culture. Many defendants are uncomfortable with the adversarial process and may adopt a non-linear approach to story narration that does not lend itself well to court proceedings. They are likely to be ill-equipped to handle formal court proceedings,

---

[9] *See* LANDSCAPE, *supra* note 1, at 31-32 (of almost 650,000 cases, plaintiffs were represented by counsel in 92 percent of cases compared with 24 percent of defendants). Greiner, *supra* note 4, at 908, n. 26 (over 90 percent of evictors represented by counsel); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City Housing Court: Results of a Randomized Experiment,* 35 L. & SOC'Y REV. 419, 421 (2001) (indicating that 98 percent of landlords had legal representation compared to 12 percent of tenants). *See also* Mary Spector, *Defaults and Details Exploring the Impact of Debt Collection Litigation on Consumers and Courts,* 6 VA. L & BUS. REV. 257, 285 (2011) [hereinafter Spector, *Debt, Defaults & Details*] (noting the concentration of cases in the hands of a few high-volume law firms).

[10] The vast majority of tenants are not represented by counsel. *See* LANDSCAPE, *supra* note 1, at 32; *see also S*teinberg, *supra* note 4, at 751. Among the statistics cited in the article, a 2008 study revealed that 88 percent of tenants in New York City did not have counsel, while 98 percent of their landlords were represented. *Id.* at n. 23, 24 (with similar statistics for other jurisdictions including Maine, California, New Hampshire and Illinois). In Maryland, a 2011 report indicated that 95 percent of tenants – approximately 601,751 litigants - were self-represented. *Id.*

[11] Steinberg, *supra* note 4, at 758-59 ("Tenants with mental disabilities, victims of domestic violence, overwhelmed single mothers, non-English speakers, and the mentally ill flood the courts and exacerbate the inadequacy of self-representation;" "Even in courts where pro se litigants are the rule rather than the exception, judges and other court players routinely disregard the narrative-style testimony of unrepresented litigants…"); *see also id.* at 756 "[In Baltimore Housing Court] … judges typically reject the way pro se litigants speak – through narrative – and automatically deem their stories legally irrelevant;" Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court,* 3 CARDOZO PUB. POL'Y & ETHICS J.659, 662-665 (2006) [hereinafter Baldacci].

specialized rules of evidence and procedure, complex or technical federal and state laws or rules related to standing, burdens of proof, and the availability of a wide range of defenses, mitigating circumstances, or opportunities for negotiation or settlement.[12]

Common Problems Experienced in High Volume Dockets

Well-documented, serious, recurrent problems face courts and litigants in high volume dockets. These include inadequate service, insufficient information available to litigants, overcrowded and confusing courtrooms, inadequate explanations to litigants concerning the role of counsel, and insufficient court scrutiny of plaintiff claims. Additional problems that contribute to high default rates and erroneous civil judgments are specific to consumer debt collection cases. These problems are discussed below in roughly the order that cases move from initiation to resolution.

Inadequate Service

The *Landscape* study notes that "traditional procedures for serving notice in civil lawsuits are functionally obsolete, especially in suits against individuals. Typical methods of serving process are riddled with inaccuracies and inadequacies."[13] State Attorneys General, including those in New York (2009), California (2013) and Minnesota (2014) have pursued large-scale fraud where hundreds or thousands of persons were not properly served and therefore did not receive notice of the pendency of a Complaint against them.[14] These fraudulent practices taint untold numbers of individual cases.[15]

---

[12] For example, landlord tenant cases may require application of federal and states statutes, regulations and common law involving a variety of types of housing (federal subsidies, public housing, private landlord-tenant, condominium). The wide ambit of issues addressed in landlord-tenant disputes can include non-payment of rent; sub-standard conditions; accommodations for persons with disabilities; state laws that protect rights of first purchase; relocation assistance; or the obligations of governmental subsidy providers, to name a few. *See also* Greiner, *supra* note 4, at 915 ("The substantive law applicable in summary eviction cases bears notable complexity. Sources of relevant law include federal statutes, federal regulations, state statutes, state regulations, and state common law. Content includes, for example, non-waivable warranties, allocations of duties that can be shifted only by means of written agreements, dependent covenants, and procedural requirements regarding the service and content of the 'notice to quit', the initial document the would-be evictor must serve on the occupant as a precursor to a formal court action.")

[13] LANDSCAPE, *supra* note 1, at 2.

[14] *See, e.g.,* Press Release, The Office [Minnesota] Attorney General Lori Swanson, Attorney General Swanson Sues Legal Process Server for Engaging in "Sewer Service," (Nov. 6, 2014), http://www.ag.state.mn.us/Office/PressRelease/20141106SewerService.asp; Press Release, Attorney General Cuomo Announces Arrest of Long Island Business Owner for Denying Thousands of New Yorkers Their Day in Court, (Apr. 14, 2009), http://web.archive.org/web/201O1117070043/http://www.ag.ny.gov/media-center/2009/apr/aprl4a09.html (also announced intent to sue law firm that used the process server to serve over 28,000 summons and complaints); Press Release, Attorney General Kamala D. Harris Announces Suit Against JP Morgan chase for Fraudulent and Unlawful Debt-Collection Practices (May 9, 2013), http://oag.ca.gov/news/press-release/attorney-general -kamala-d-harris-announces-suit-against-jpmorgan-chase; *See also* People v. Zmod Process Corp. DBA Am. Legal Process & Singler, Index No. 2009-4228 (Erie County Sup. Ct., Apr. 2009) (Civil suit alleged more than 100,000 instances of sewer service in New York. Defendants thereby lost their opportunity to defend and had default judgments entered against them). People v. Singler & Zmod Process Corp. dba Am. Legal Process, Inc. (Apr. 2009) (felony complaint); *In re* Pfau v. Forster & Garbus et al., Index No. 2009-8236 (Erie County Sup. Ct., July 2009) (civil petition to vacate default judgments obtained against consumers in debt collection cases filed against numerous attorney collectors who used American Legal Process to serve process

Victims of "sewer service" may not be aware that they were sued until garnishments, asset seizures or evictions are attempted or a judgment appears on a credit report, at which time it may be extraordinarily difficult, if not impossible to vacate the judgment and restore the individual to the status quo ante.

Debt collection dockets have especially high default rates,[16] which have increased substantially over the past 20 years.[17] Studies show that, in more than half of default cases, consumers had good faith defenses to collection.[18] Other studies suggest that defaults decrease when litigants have more information. Thus it cannot be assumed that defaults are a de facto "admission" of liability or no contest. Indeed, many cases result in voluntary and involuntary dismissals after the defendants appeared.[19]

Insufficient Litigant Information

Many litigants lack sufficient information to enable them to navigate court processes effectively or efficiently, making each step frustrating both for the litigant and for court staff. Frontline court staff often cannot provide detailed information to help litigants answer a complaint; understand how, when and where to present the facts of their cases; understand what will happen in the courtroom and how to respond; distinguish between court employees and other players including lawyers for the opposing party; and understand the language of the law and the courts. For their part, court staff also need assistance with self-represented litigants, many of whom need more assistance than staff have time to provide. Staff also need assistance to attend to litigants who are confused, upset, angry or have mental or cognitive impairments. Staff often need coaching to understand non-English speakers and respond in ways that bridge cultural differences; to identify the line between "legal advice" and "legal information;" and to adhere to appropriate boundaries about the litigant's case (e.g., seeming to challenge the legitimacy of positions, asking questions such as "why did you default?" or "why do you need more

---

and obtained default judgments in New York); MFY LEGAL SERVICES, JUSTICE DISSERVED: A PRELIMINARY ANALYSIS OF THE EXCEPTIONALLY LOW APPEARANCE RATE BY DEFENDANTS IN LAWSUITS FILED IN THE CIVIL COURT IN THE COUNTY OF NEW YORK, (2008), http://www.mfy.org/wp-content/uploads/reports/Justice_Disserved.pdf (personal service achieved in only six percent of civil debt collection cases in King and Queen Counties, NY).

[15] *See, e.g.* Capital Development Group LLC v. Marcus Jackson et al, 142 Daily Wash. L. Rptr. 2645 (D.C. Super. Ct. Oct. 2014 (Kravitz, J., dismissing landlord's eviction case due to false attestation of service of mandatory 30 day notice, and awarding fees to defendant's counsel, stated: "To the extent the conduct exhibited here. . .may not be unique. . .it is all the more important that the intended message of deterrence emanating from the court's award of reasonable attorney's fees and costs be heard loud and clear by those who would consider litigating other landlord-tenant cases in [this] bad faith manner. . .Perhaps most concerning about the bad faith litigation tactics exhibited here is the reality that the fatal legal and factual deficiencies in the plaintiff's claim likely never would have come to light. . .without counsel. . .").

[16] FTC REPORT, *supra* note 7, at 7 (estimates from 60% to 95%). *See also* Holland, Peter A., "Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers", University of Maryland Francis King Carey School of Law Legal Studies Research Paper No. 2014-13 [hereinafter HOLLAND], http://ssrn.com/abstract=2406289 at 192.

[17] LANDSCAPE, *supra* note 1, at 26.

[18] Spector, *Debt, Defaults and Details, supra* note 9, at 272; Spector, *Litigating, supra* note 7, at 3. Federal and state laws may provide defenses. Forty-two states supplement the federal Fair Debt Collection Act with legislation governing debt collection. Spector, *Litigating, supra* note 7, at 2.

[19] Spector, *Debts, Defaults and Details, supra* note 9, at 263.

time?").[20]

Overcrowded, confusing courtroom environments

In high-volume dockets, large numbers of cases are often scheduled for the same block of time. Courtrooms then become very crowded. Docket calls in the courtroom to determine who is present before the judge takes the bench are often fast-paced and hard to hear and understand. Litigants may miss their case call because they don't hear it, don't understand what is required of them, don't recognize their case by number or plaintiff name or because their name is mispronounced. They can become distracted by competing activities such as loud interruptions from counsel looking for opposing parties. Default judgments are often sought and entered quickly after an apparent lack of response.[21]

Calling large numbers of cases at the same time frequently means that many parties experience long wait times before their case is called. This is difficult for everyone, lawyers included, but particularly burdensome on persons who are employed, disabled, elderly or frail, or have childcare needs. The sequence of handling cases after the initial call may seem skewed to benefit the attorneys, particularly those who have many cases (easily dozens per day) on the calendar.

Lack of explanations concerning the role of plaintiff counsel

The behavior of plaintiffs' attorneys in the courthouse often leads to coerced or misunderstood settlements. Attorneys who regularly handle landlord/tenant or consumer debt cases in significant volume may occupy desks or places in the well of the court, hallways, or public areas adjacent to the courtroom. Sometimes the positioning of their desks suggests to a newcomer that they have an official court role. To move cases along, judges may encourage parties to return to the hallway to explore settlement possibilities. Litigants often read this as judicial pressure to settle[22] or they may unnecessarily acquiesce to opposing counsel demands because they mistakenly assume that the attorney with whom they are speaking is connected to the court. Studies have documented repeated instances of lawyers violating the ethical rules against advising unrepresented opponents, or misrepresenting the law.[23] This practice has been well documented for years in both densely populated urban areas and smaller communities.[24]

---

[20] Baldacci, *supra* note 11, at 665.

[21] NEW YORK COUNTY LAWYERS' ASSOCIATION, THE NEW YORK CITY HOUSING COURT IN THE 21ST CENTURY: CAN IT BETTER ADDRESS THE PROBLEMS BEFORE IT? 13 (2005) [hereinafter NEW YORK COUNTY LAWYERS' ASSOCIATION].

[22] *See, e.g.,* Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiation with Unrepresented Poor Persons,* 85 CAL. L. REV. 79, 120 (1997) [hereinafter Engler] (litigants told by judges to try to work out the dispute in the hall); Baldacci, *supra* note11, at 665 (primary conversation of pro se litigants in landlord/tenant court is a rushed interchanged with the landlord's attorney in the hallway).

[23] NEW YORK COUNTY LAWYERS' ASSOCIATION, *supra* note 21, at 12.

[24] *E.g.,* Greiner, *supra* note 4, at 942-43; Baldacci, *supra* note 11, at 665; Joe Lamport, *Hallway Settlements in Housing Court*, GOTHAM GAZETTE (Dec. 19, 2005), http://www.gothamgazette.com/index.php/about/3083-hallway-settlements-in-housing-court. *See also* Erica Fox, *Alone in the Hallway: Challenges to Effective Self-Representation*

As a result of the hallway negotiations, judges often do not obtain complete information from both sides to ensure a legally correct judgment on the facts and the law. When presenting a settlement for court review, attorneys opposing self-represented litigants tend to dominate the courtroom colloquy.[25] Self-represented litigants also may not appreciate the far-reaching implications of choices in how a case is resolved and recorded in court records when they agree to settle (e.g., dismissal, entry of judgment).[26]

Pro se litigant difficulties at trial

Pro se litigants are often unable to present their stories effectively because they do not know how to present facts in technically acceptable forms. The legal vocabulary is unfamiliar. They do not know how to respond to objections, particularly those asserting lack of relevance or hearsay. They may have difficulty getting documents admitted. Those who are from non-American cultures or speak a language other than English may narrate events in ways to which judges and opposing counsel are not accustomed. As a result, their stories may not emerge fully or coherently.

Problems specific to consumer debt collection cases

The explosion of consumer debt collection cases, fueled by the proliferation of third party debt buyers and bulk filings, has created additional procedural challenges for judges and litigants. For example, the practice of buying debt instruments in bulk from original and subsequent creditors means that debt buyers often cannot show, and may not have, ownership of the debt or accurate information about the debt.[27] Studies have shown debt buyers/collectors often cannot substantiate the chain of title or

---

in Negotiation, 1 HARV. NEGOTIATION L. REV. 85 (1992). We are not suggesting that court personnel directly participate in these documented abuses and overreaching. However, such unchecked practices lead to court cultures that reward litigant asymmetries, enable unscrupulous attorneys to engage in unethical practices and undermine the adequacy and fairness of the fact-finding process, thereby preventing fair resolution of disputes.

[25] NEW YORK COUNTY LAWYERS' ASSOCIATION, *supra* note 21, at 13. Self-represented litigants often cannot present their cases effectively and are therefore effectively silenced in court proceedings because they cannot translate their narrative into legally acceptable forms. Their difficulties include unfamiliar vocabulary; problems with evidence (e.g., legal relevance, hearsay objections, difficulty getting documents admitted, dealing with objections); cultural differences in narrating facts).

[26] Greiner, *supra* note 4, at 916. *See also,* HOLLAND, supra at 200, 224, citing comments of a Maryland Assistant Attorney General that settlement discussions between plaintiffs' attorneys and unrepresented defendants open the door to settlements "on terms defendants] do not understand and cannot afford"; NEW YORK COUNTY LAWYERS' ASSOCIATION, *supra* note 21, at 13.

[27] At the time of the bulk sale, the buyer typically acquires a computerized record of often hundreds of transactions, with only the names, addresses of consumers, account numbers and total amount allegedly owed. The information is "rarely sufficient to support a judgment against the consumer." Spector, *Debts, Defaults and Details, supra* note 9, at 259. *See also* FTC REPORT, *supra* note 7; Spector, *Litigating, supra* note 7, at I, 2; Jamie S. Hopkins, *Maryland Court Dismisses 3,168 Debt-Collection Cases,* BALT. SUN (Oct. 11, 2012), http://articles.baltimoresun.com/2012-10-11/news/bs-bz-debt-collection-cases-dismissed-20121011_1_debt-collection-cases-judge-ben-c-clyburn-maryland-court (Maryland court dismissed 3,168 debt collection cases and ordered liens released as part of a class action settlement. The debt collection firm was alleged to have been unlicensed, sued for wrong amounts, sued for debt barred by limitations, and included private social security numbers in public filings. The firm was also ordered to pay penalties and damages.); Jamie S. Hopkins, *A Push for More Proof in Debt Collection Lawsuits,* BALT. SUN (July 24, 2011), http://articles.baltimoresun.com/2011-07-24/business/bs-bz-debt-collection-overhaul-20110724_1_debt-buyers-debt-cases-past-due-consumer-debts; Lippman, C.J., Law Day Remarks: Consumer Credit Reforms (Apr. 30, 2014) [hereinafter Lippman].

legitimacy of the amount claimed.[28]

This fundamental lack of proof has implications at every stage of the proceedings. Specifically, complaints often do not meet basic "fact" pleading requirements including identification of the original creditor and original debt, date of the default, the chain of title or connection between the plaintiff and the original lender, relevant contract terms, or the portion of the amount sought attributable to penalties, and interest or attorneys' fees.[29] Without identification of the original creditor or terms, defendants may not recognize the transaction, assume it to be an error and will therefore not respond. Studies suggest that defaults decrease when litigants have more information, so it cannot be assumed that defaults are a de facto "admission" of liability or no contest.[30]

In addition, bulk debt collectors often sue on debts when the suit is legally or factually precluded including those in which the statute of limitations has expired, the debt has been discharged in bankruptcy, has been satisfied, or is not that of the person sued.[31]

Exacerbating the legal insufficiencies of the claims themselves, well-documented instances of sharp litigation practices on the part of some debt collection attorneys may also serve to keep relevant information from the trial judge. For example, collection attorneys often do not expect defendants to appear in court on the hearing date, and when defendants do appear, the attorneys frequently claim lack of preparedness and seek continuances that are costly for litigants and inefficient for courts.[32] There have been documented instances of recurrent choice of inconvenient forums or improper venue by the same high volume collection attorneys.[33] Some high-volume collection attorneys have engaged in documented practices of "robo-signing" including automated signing of incorrect or false affidavits,

---

[28] *Id.* *See also* DISTRICT COUNCIL 37, MUNICIPAL EMPLOYEES LEGAL SERVICES, DEBT COLLECTION ABUSE: 10 TIPS FOR WORKING FAMILIES 4 (2010), http://www.dc37.net/benefits/health/pdf/MELS_DebtCollectionAbuse.pdf (citing their report that found that debt buyers failed to provide documentation in over 94% of the MELS cases in an 18 month period in which a debt buyer sued a consumer; 27% were not properly served and 50% were beyond the statute of limitations).

[29] Lippman, *supra* note 27at 2-3 (plaintiff debt buyers file lawsuits "based on little more than boilerplate language and a few fields of data from a spreadsheet. All too often, these credit card debts are several years old, have been resold multiple times, and critical documents like the original credit agreement and account statements are missing. By the time these so-called "zombie" debts show up in court, it is extremely difficult for debtors —98 percent of whom are unrepresented –to assess the validity of the claims against them: whether they actually owe the debt at issue, whether the amount due is correct, and whether the plaintiff is the actual owner of the debt. As a result, many debtors who receive court papers fail to appear in court.

[30] Replacing the notice pleading standard with a fact pleading standard on a pilot basis in two counties resulted in significantly lower default rates. PAULA HANNAFORD-AGOR ET AL., NEW HAMPSHIRE: IMPACT OF THE PROPORTIONAL DISCOVERY/AUTOMATIC DISCLOSURE (PAD) PILOT RULES 10-12 (Aug. 19, 2013).

[31] Spector, Litigating, *supra* note 7, at 1-2.

[32] FTC REPORT, *supra* note 7, at 14. This is not a new problem. *See* Engler, *supra* note 22, at 120 (plaintiffs' attorneys routinely continue cases where defendants appear, increasing the likelihood of default).

[33] *See, e.g.,* Marisa Kwiatkowski, *Judges Call for an End to Marion County's Small Claims Court System*, INDYSTAR (July 12, 2014), http://www.indystar.com/story/news/2014/07/12/judges-call-end-marion-countys-small-claims-court-system/12585307/ (describing law suits and investigations of widespread consumer debt filings in jurisdictions where the defendant did not sign the contract, do business, work or have other contact on which jurisdiction could be based).

inclusion of unlawful rates of interest and claims for improper fees.[34] Debt collectors also have high rates of non-compliance with state bonding requirements, which in some jurisdictions provide a defense or an affirmative counter-claim in response to the collection effort.[35]

Recommendations

The following recommendations are taken from research and information gathered from various jurisdictions. We give particular emphasis to practices that have demonstrated results but also include recommendations from attorneys who have direct experience with these high volume dockets and those emerging from studies conducted by the Federal Trade Commission and the federal Consumer Financial Protection Bureau. The recommendations will hopefully advance the three-fold focus of the Committee's charge: to reduce delay and cost and to achieve fairness. We realize that one size does not fit all, but believe these can be tailored to fit varying circumstances of different jurisdictions. As in the above section, we provide recommendations that may be appropriate generally for high volume dockets and those that are intended to address the unique challenges presented by consumer debt collection cases. We focus on changes that we believe many courts can implement through rules or other policy changes, but also include proposed changes that judges or other court personnel might want to discuss with others, including the public and policy makers, following the model of New York's Chief Judge Lippman.

We have tried to avoid recommendations that are likely to require statutory change (although that varies state by state).[36] We also have considered the cost, complexities and benefits to the courts and parties of established and emerging technologies that could help address identified challenges. We are confident that others will have refinements or additions to these recommendations, particularly in the area of technology.

[34] Spector, Litigation, *supra* note7, at 10. Data suggests that collection efforts may be disproportionately targeted at vulnerable populations: studies have found that debt cases are concentrated in cities and counties with significant minority populations, lower median income, and communities with lower rates of home ownership. Spector, *Debt, Defaults and Details, supra* note 9, at 273.

[35] Spector, *Debt, Defaults and Details, supra* note 9 at 280-281.

[36] These recommendations do not address the opportunities offered or challenges faced by "problem solving" courts. The growth of such specialized courts underscores the extent to which the courts are called upon to address problems that have both legal and non-legal dimensions, as well as individual and community-wide impact. Although beyond the scope of these recommendations and this Report, we encourage courts to examine successful experiments in which courts have joined with community organizations and others to find broad-based solutions to the problems they are eventually called upon to resolve. *See, e.g.,* JUDGE HENRY NOWAK, BUFFALO HOUSING COURT REFORM PROJECT: 2006 REPORT (2006), http://www.nycourts.gov/courts/8jd/pdfs/housing/Oishei_Final_Report.pdf.

General Recommendations

Recommendation 1: Ensure that Constitutional notice requirements are met.[37]

- Require or incentivize process servers to use and document GPS records and smartphone photographs to document service location and time. Such systems should have protections against forgery, such as systems that are proprietary to the courts and capable of independently verifying real-time upload locations. If requiring use of GPS documentation exceeds a court's rule-making authority,[38] the court could incentivize use of such proof through a rule that would confer a presumption of validity for service that is supported by GPS documentation. Note that some process servers are using their capacity to "geotag" as a marketing device that provides additional assurance of the validity of service, reinforcing the reasonableness of such a requirement.[39]
- Utilize a procedure such as that adopted in New York City that requires plaintiffs in consumer collection cases to provide the court with a stamped envelope addressed to the defendant with a return address to the Clerk of the Court. The envelope contains a standardized notice of the lawsuit, which the court mails. The Court will not enter a default judgment in instances where the notice is returned to the court as undeliverable, addressee unknown, etc.[40]
- Conduct random audits; announce the fact that the court will be doing this periodically.[41]
- Institute penalties for improper service, such as: impose court and other costs incurred by opposing party and the court as a result of moving forward with cases in which the plaintiff had reason to know that service was not properly effectuated; post notices of entities or persons who commit sewer service in prominent places in the courthouse and in local legal publications or newspapers.
- Require parallel electronic service via court-controlled e-filing portals to allow and confirm electronic delivery and acknowledgement of receipt of summons, complaint and other documents for parties with verifiable smart phone numbers or email accounts.
- Encourage actions of consumer protection agencies and other policy makers, including legislators, to examine the issue of inadequate service and the desirability of additional protections.

---

[37] FTC REPORT, *supra* note 7, at iii, 9-10, n. 23 et seq. Despite lack of comprehensive national evidence, the FTC had sufficient information to recommend that states strengthen protections against inadequate service. *See also, id.* at n. 14, 15.

[38] There may be states in which some variant of a GPS requirement can be effectuated by court rule. At least one state – New York – proceeded through administrative rulemaking and legislation. It now has a law that process servers much retain GPS-based records to document service – a product of a Department of Consumer Affairs regulation requiring process servicers to log all service attempts with an electronic system such as GPS and legislation passed by the New York City Council.

[39] *See, e.g.,* CERTIFIED SERVE, https://certifiedserve.com/GPS-Introduction.php (last visited Nov. 11, 2015).

[40] 22 NYCR §§ 208.6(h), 208.14-a (2014). Following implementation of this rule, more consumers appeared to defend actions and many said that the notice was the only one they got about the lawsuit.

[41] FTC REPORT, *supra* note 7, at 10, n. 30, noting that such an audit in Cook County, Illinois revealed significant problems.

- In jurisdictions that require licensing or bonding of professional process servers, maintain and post lists of licensed entities. Refuse to accept service from professional process servers who are unlicensed or who have not documented that they have paid the required bond.

Recommendation 2: Provide information to self-represented litigants about court processes, options and expectations through a variety of portals/sources.

- Notice of the availability of such services should accompany the first communication from the court; perhaps required as a form with service of the Complaint or Summons.
- Inform litigants that they may seek reasonable accommodations for physical or mental disabilities with the first court communication. Provide defendants with a form to indicate that they have special needs that require a reasonable accommodation or assistance.[42]
- Notices and information should be available in languages that are spoken by significant numbers of litigants and community members.
- Such services should be available on-site and remotely, including web-based and potentially at off-site, community-based locations. Web-based services should include an interactive portal, where a court employee or other informed person provides interactive guidance. The court, alone or in partnership with others, could develop webinars or other canned presentations on common questions or concerns.
- The information should include a step-by-step guide to how particular court processes work. Such a presentation could be offered in video form with an opportunity to select a language preference.
- The information should include sources for additional legal assistance in the community.
- In light of observations that unrepresented individuals often have difficulty using self-help materials, consider "reimagined" tools that draw from other disciplines and take into account other impediments that self-represented persons face, including cognitive, psychological and emotional challenges. Use simple illustrations to explain court layout, logistics and players.[43]
- Deliver clinics or workshops on-site and/or in the community on the basics of relevant laws and procedures (e.g., landlord-tenant; debt collection) and how the court system works. For example, the Los Angeles Superior Court system offers consumer debt workshops at two of its courthouses which are conducted by legal aid organizations and a county consumer protection agency. Court clerk's offices and self-help centers throughout the county distribute flyers and information about the workshops. They also provide workshops for both tenants and landlords (separately). The workshops for landlords are organized to guide participants through each stage of the litigation

[42] Greiner, *supra* note 4, at 33.

[43] James d. Greiner et al., *Engaging Financially-Distressed Consumers*, FEDERAL RESERVE BANK OF BOSTON, COMMUNITY AND BANKING, Summer 2015, *available at* https://www.bostonfed.org/commdev/c&b/2015/summer/greiner-jimenez-lupica-engaging-financially-distressed-consumers.htm.

process.[44]

Recommendation 3: Develop an interactive system for triaging cases to proper dockets/pathways, notifying litigants of deadlines and hearings and completion of other pre-trial requirements.

- Develop an automated system that takes the litigant through a series of steps (guided pathway) starting with filing a Complaint and an Answer. Based on "Turbo Tax" and A to J models, the system could achieve multiple functions: (1) initial triage – placing a matter into the correct docket or pathway; (2) increased adequacy of filings - requiring completion of standardized forms that require the plaintiff to establish basic service and standing requirements; (3) assistance with answers, including standardized questions that lead to the inclusion of common defenses or counterclaims. The assistance should include an explanation of next steps, options and choices, such as whether the litigant wants a jury trial. This tool could be made available on the Internet and accessible after initial filing/response as a private portal, so that litigants could continue to handle much of their case remotely. Examples of forms that would translate issues into claims are included in the Appendix. Although such an automated "triaging" system may be well suited to high volume dockets where there tends to be an identifiable universe of issues and defenses, some litigants may have difficulty using such a system. Therefore, a qualified person should be available to assist those for whom such a system is difficult and a bail-out option for persons who cannot use it or lack reliable access to a computer. The system be accessible in jurisdiction- appropriate multiple languages.
- Notify litigants of court dates and other deadlines via text messaging.

Recommendation 4: Develop opportunities for optional remote responses and hearings.[45]

- Develop on-line systems for pre-litigation resolution of disputes incorporating user- friendly plain language systems such as Hiil.org's Rechtwijzer 2.0 on-line dispute resolution platform now being implemented for use in the Netherlands and England.
- Provide assisted access to such systems at court-authorized locations for parties otherwise unable to access or use the systems on their own and provide a "bail out" option for persons whose circumstances (e.g., disability, cultural background, lack of reliable computer access) preclude effective use of such systems.
- Develop systems, including periodic evaluation or monitoring by persons who are neither court personnel nor associated with either party, to ensure that the above systems are not manipulated to coerce or mislead less sophisticated litigants.

[44] Los Angeles Superior Court Self-Help Center, *available at* http://www.lacourt.org/selfhelp/selfhelp.aspx.

[45] This would avoid loss of work time, avoidance of costly transportation, promote efficiency for all parties. It may only be suitable if persons have adequate access to, and familiarity/comfort with technology, and therefore should be offered as an option and not as a requirement. *See* FTC REPORT, *supra* note7, at 13.

- Develop capacity for pro-se friendly on-line filing and answering of complaints. Integrate with the triaging system described above. Remote filing opportunities may enable litigants to avoid trips to the courthouse and facilitate expeditious processing by court personnel.
- For cases or hearings that are procedural or involve very few witnesses or documents, provide opportunities for remote appearances through video-conferencing, skype, face time or other on-line mechanisms. Work with community-based resources, such as libraries, to provide appropriate spaces where litigants who otherwise lack access to technology could participate in hearings remotely. Consider training a cadre of lay persons to assist such litigants with using the technology (a remote version of the Court Navigator pilot described in note 61, below).

Recommendation 5: Provide for exchange of information between parties via the Internet.[46]

Recommendation 6: Limit circumstances that tend to intimidate self-represented persons or create confusion about the roles of the court and counsel.

- Provide clear physical separation of counsel from court personnel and services (e.g., no counsel desks, no negotiations with self-represented opposing parties in the well of the courtroom; no storage of collection attorney file boxes in courtroom).
- Clear signage should reinforce physical separation of court personnel and counsel.
- Provide standardized guidelines to all litigants and counsel regarding how settlement discussions may be conducted and the consequences of settlement. Affirm that the litigants have the right to trial in a way that doesn't suggest that going to trial is something to be feared. Make it clear that the lawyers are not court personnel.
- Adopt a program like New York City's Court Navigator Program that includes making volunteer assistance available to self-represented litigants for "hallway" settlement discussions. *See infra* at p. 15 (Recommendation 12).
- Before accepting settlements, judges should ascertain that both parties understand what they are signing and its implications. It might be helpful to develop a standard set of protocols/questions that both sides answer orally based on clear criteria and incorporating information to avoid common misunderstandings. The inquiry might be analogous to the inquiry a judge makes before accepting a plea in a criminal case or a highly truncated version of the “fair, reasonable and adequate” determination judges make in approving a class action settlement.[47] Such a review could be integrated readily into a Court Navigator type program.
- Give litigants the opportunity to seek legal guidance from an on-site or immediately accessible on-line resource regarding settlement/mediation process and results before final agreement is

[46] *See* FTC REPORT, *supra* note7, at 13, n. 12. (noting caveats).
[47] *Id.* at 14, 16; *see also* Engler, *supra* note 22, at i, 43-44.

reached. *See infra* at p. 15 (Recommendation 12).

- Organize dockets so as not to benefit any category of litigant (for example, volume-driven attorneys) at the expense of other litigants and attorneys. Scheduling cases at pre-designated intervals instead of requiring everyone to appear all at once should benefit litigants and court personnel, including interpreters.
- Establish automated data tracking systems to flag cases with outcomes that exceed predetermined variances compared to standard baselines weighted for amounts in controversy, and defendants' educational levels, age, gender, primary languages, zip codes etc. Require heightened review by a judge or court staff attorney of proposed settlement agreements which exceed the predicted ranges of outcomes before judgment can be made final.

Recommendation 7: Develop an electronic or other user-friendly "sign in" system to reduce possibility that a litigant will fail to respond when case is called.

Recommendation 8: Establish statewide procedures and forms for standard filings and consistent venue (e.g., avoid concurrent jurisdiction of multiple courts in same system).[48] Standardized forms should:

- Be available online, at court and at other sites where litigants can receive free assistance.[49]
- Use plain English.
- Include check-off lists for standing and other basic claim elements, potential common defenses, and ability to assert counterclaims.[50]
- Include form discovery requests (including requests to conduct discovery where not available as a matter of right).

Recommendation 9: Provide adequate access for persons with limited English proficiency.

- Multi-lingual notice on each point of contact with the court (summons, complaint, subpoena, etc.) in jurisdictions where there is a significant non-English speaking population.
- Multi-lingual signage at the courthouse.

---

[48] *See, e.g.,* Virginia's statewide forms for landlord-tenant and consumer cases, which can generally be found at http://www.courts.state.va.us/forms/home.html. *See also* Mass. Unif. Summ. Process R., available at http://www.lawlib.state.mass.us/source/mass/rules/tc/summaryprocessrules.html.

[49] *E.g.,* Washington State adopted Court Rule GR 34 regarding uniform fee waivers. *See* Jafar v. Webb, 177 W.2d 520 (2013); Sobota v. Mahlik, 2015 WL 2260852 (Wash. Ct. App. 2015).

[50] 22 NYCR §§ 208.6(h), 208.14-a (2014). *See* Maria Aspan, *Top New York Judge Toughens Debt-Collection Lawsuit Rules,* NEW ECONOMY PROJECT (Apr. 30, 2014), http://www.neweconomynyc.org/2014/04/top-new-york-judge-toughens-debt-collection-lawsuit-rules/.

- Basic forms should be available in multiple languages.
- Staff in self- help centers should be able to access language assistance promptly.
- Front-line staff should be able to communicate with litigants in widely spoken languages in addition to English. Have adequate access to on-demand telephone interpreter services for infrequently encountered languages.
- First filers should be required to provide known language information about any party at time of filing. Courts should use the information to provide the appropriate notice (see above) and language-sensitive scheduling, where possible.
- Institute simple interpreter request processes. Process should not be dependent on request of litigant but should be used by court personnel and judges when it is needed.
- Qualified language assistance should be free in all cases involving LEP parties or witnesses who complete an IFP form, including mediations, settlement conferences, other ancillary proceedings and court services.
- Courts should not use relatives, opposing parties, friends, or other "casual interpreters". Courts must never use children to interpret.
- Courts should seek to avoid delays and continuances to obtain interpreters, so that LEP litigants do not make unnecessary trips to court and so court time is not wasted.
- Judges and other court personnel should receive cultural competency training that includes ways non-English speakers or persons from different cultures narrate events.
- Courts should explore high quality video remote interpreting systems, especially for languages other than Spanish and for courts located away from high LEP population centers.[51]

Recommendation 10: Enable judges and judicial staff to have immediate electronic access to case records and to enter dispositions and other information into the system from the bench.[52]

- Electronic records should significantly reduce the risk of lost or misfiled paper. Electronic records should be available on-line.
- Access to electronic records will enable judges to ascertain a party's adherence to procedural rules before entering an Order and could facilitate identification of recurrent problems.
- Electronic records and record-keeping systems could simplify and speed up communications between the court and litigants/attorneys.

Recommendation 11: Provide training to enable judges to guide cases involving self-represented litigants more actively.

[51] *See generally* STANDARDS FOR LANGUAGE ACCESS IN COURTS (Am. Bar Assoc.).
[52] *See* JTC RESOURCE BULLETIN, MAKING THE CASE FOR JUDICIAL TOOLS 6 (Dec. 5, 2014).

Groups including the *Pro Se* Implementation Committee of the Minnesota Conference of Judges (2002) and the Idaho Committee to Increase Access to the Courts (2002) have recommended ways that judges should explain the process, legal issues (claims, defenses and elements of each), and evidence. These recommendations generally encourage judges to take a substantially more active role in guiding the fact-finding process. [53] Judges reported success using similar strategies.[54] Generally, the recommendations include:

- Review order and protocols of an evidentiary hearing at the beginning of hearing.
- Explain elements of claims and defenses that each side will need to demonstrate to get the relief they are seeking.
- Explain the burden of proof and what that means in simple, lay terms.
- Explain the kind of evidence that may or may not be considered.[55] Consider rules that emphasize weight, rather than traditional technical standards of "admissibility."[56]
- Permit litigants to offer narrative testimony. [57]
- Question pro se litigant to obtain general information about litigant's story (claims/defenses).
- Avoid questions that encourage pro se litigants to admit liability or settle.
- Assist self-represented litigants to establish the foundational requirements of claims and defenses by probing for the facts when they are not otherwise clear.
- Consider a standard interrogatory form that judges would follow to establish entitlement to claim and whether defenses exist. Given limited or no discovery in many jurisdictions, judges don't get benefit of developed facts.[58]
- Provide training on cultural competency, mental capacity/disability.

Recommendation 12: Foster opportunities for self-represented litigants to secure assistance, including "unbundled representation" for all stages of the litigation process.

Many of the problems identified in this document would be eliminated or substantially reduced if both

[53] Discussed in greater length at Baldacci, *supra* note 11, at 670-71.

[54] *Id.* at 671-72. In *Turner*, the Supreme Court has suggested that, where liberty or other constitutionally-protected interests are at stake, such increased "judicial engagement" may be required to ensure that self-represented litigants receive adequate procedural safeguards. Turner v. Rogers 131 S. Ct. 1507 (2011). *See also* Steinberg, *supra* note 4, at 790-92 (arguing that explosion of self-representation requires judges to assume burdens of litigation traditionally left to parties including notice, availability of defenses, how to elicit factual information, making sure that required findings can be made.

[55] *See* Baldacci, *supra* note 11, at 671-72 (citing PRO SE IMPLEMENTATION COMMITTEE OF THE MINNESOTA CONFERENCE OF JUDGES; IDAHO COMMITTEE TO INCREASE ACCESS TO THE COURTS PROTOCOL).

[56] Steinberg, *supra* note 4, at 747; Baldacci, *supra* note 11, at 680-84.

[57] *See* Steinberg, *supra* note 4, at 756.

[58] *See* FTC REPORT, *supra* note 7, at 26.

parties to a dispute were represented by lawyers.[59] Courts can play a helpful role in facilitating opportunities that make counsel available to persons who want counsel in civil matters but are unable to afford representation. We encourage courts to collaborate with stakeholders to secure access to representation for civil litigants. We also recommend that courts continue to develop robust collaborations with legal aid and other providers to facilitate informed and balanced case development, presentation and resolution. Examples include:

- Subject-specific self-help centers (e.g., consumer, small claims) where volunteer lawyers provide "unbundled" services, assisting with discrete and limited tasks to help litigants successfully navigate the process. The lawyers could enter a limited appearance to develop or draft pleadings (claims, defenses, counterclaims), write/argue motions, respond to or ask for discovery, gather evidence, prepare a litigant about how to talk to the court or present the case; offer trial assistance, review settlement agreements, and/or accompany a litigant to talk to the opposing counsel, etc.[60] The assistance should be available to help a litigant at any stage of the litigant's case.[61] Information about such opportunities should be made available to litigants at the courthouse and in the first communication(s) the litigant receives about the pendency of a lawsuit. Self-help centers staffed by volunteers and legal aid programs already exist in some state courts (e.g., Superior Court of the District of Columbia); this recommendation would broaden the scope of services such centers typically provide.
- New York City's "Court Navigator Program", launched as a pilot project in 2014, where college students, law students and other volunteers assist self- represented litigants in housing court proceedings, including helping litigants explain facts to judges (when the judges ask) and opposing counsel, helping litigants organize their papers, and securing other litigant needs, such as interpreters.[62]

[59] *See* Greiner, *supra* note 4, at 903 (randomized study found having a lawyer makes a difference in retention of housing and increased positive outcomes for tenants); *see also* Seron, *supra* note 9 (only 22% of represented tenants had final judgments against them, compared with 51% of tenants without legal representation). The Greiner study also found that defendants' representation didn't significantly add to the burden on the court in terms of number of motions or rulings, although it did increase the time the case the case took. Griener, *supra* note 4, at 932, et seq. The FTC also notes that access to counsel would improve outcomes in debt collection cases and provides examples of courthouse-based programs that exist in several states (New York, Illinois and Massachusetts) and are often staffed by a combination of pro bono and legal services attorneys. Such programs are most effective when they offer litigants full representation or meaningful on-going guidance over the entire course of their case, rather than simply helping them complete an initial complaint or answer. *See also* Rosmarin, Tr. V at 50-52; *but see* Debski, Tr.V at 29 (claiming that such programs may unethically involve poaching clients or soliciting clients at the courthouse steps while they're in an emotional state").

[60] We encourage incorporating explicit approval in Rules of Professional Responsibility for this type of "unbundled assistance."

[61] *See* Steinberg, *supra* note 4, at 785 (the availability of "unbundled" services tends to drop off as litigation continues; litigant satisfaction with unbundled service declines over time as cases progress and become more complex). *See also* FTC REPORT, *supra* note7, at 13.

[62] *See, e.g.,* NEW YORK CITY HOUSING COURT, COURT NAVIGATOR PROGRAM, www.courts.state.ny.us/courts/NYC/housing/rap_prospective.shtml (last visited, Nov. 11, 2015) The program has

- Law school and legal aid projects that expand attorney availability to those who currently cannot afford representation. Support for such projects could include providing space and logistical support through "attorney of the day" programs and explaining to the public and decision-makers how access to lawyers benefits the justice system and society.

Additional Recommendations Specific to Consumer Debt Collection Cases

Recommendation 1: Establish template forms, accessible electronically, that require demonstration of right to collect (standing), basis of relief sought and **amount and timeliness. The form could be used in any of the electronic or court-based access points described above. Require that consumer debt collector's complaints contain:**

- Identity of original creditor;
- Date of default or charge off;
- Amount due at time of default;
- Name of current owner;
- Original contract or, if not attached, at least relevant terms;
- Chain of ownership;
- Affirmative statement that the claim is not time-barred under applicable State law or applicable statute of limitations;
- Amount currently due broken down by principal, interest and fees;[63]
- Attestation that the plaintiff has verified defendant's current address;
- In states where bonding or licensing is required of process servers, attestation to their compliance with state requirements;[64]
- Provide sufficient verifiable information with or attached to the Complaint so recipient can identify original debt, original signature, debt amount and billing statement.[65]

---

an online manual which could provide a model.

[63] *See, e.g.,* MASS. ANN. LAWS UNIF. SMALL CLAIMS R. 2(a), 2(b); MICH. CT. R. 3.101; N.C. GEN. STAT. §§ 58-70-115, 58-70-145, 58-70-150, 58-70-155 (2009); *see also* FAIRFAX COUNTY, VIRGINIA GENERAL DISTRICT COURT BEST PRACTICES: DEFAULT JUDGMENTS/DEBT BUYERS AND PURCHASED DEBT-DEFAULT JUDGMENT CHECKLIST (2009); State of Connecticut Judicial Branch, Report OR THE Bench/Bar Small Claims Committee at 4.10 (2009). The FTC has also recommended that states adopt such requirements, citing comments of judges who decried the inadequacy of information in debt collection complaints). FTC REPORT, *supra* note7, at iii, 16, 30; *see also* Spector, *Litigating*, *supra* 7 at 4.

[64] Based on Spector *Litigating* discussion regarding rampant violations in Texas at 5-6.

[65] MD. CT. R. 3-306; Danner v. Discover Bank, 99 Ark. App. 71, 72 (Ark. Ct. App. 2007).

Recommendation 2: Provide standardized answer forms, containing check-off list for common defenses. Examples are included in the Appendix and have been adopted in some jurisdictions, including New York.

Recommendation 3: Adopt rule awarding defendants costs of preparing for and attending hearings that are cancelled or postponed at request of collecting party, including lost wages and costs of transportation.[66]

Recommendation 4: Adopt rule that requires plaintiffs to complete standard checklists to demonstrate they are entitled to default judgments.[67] Models for such standard checklists have been adopted in a number of states, including those listed in the notes. Include a requirement that plaintiff attest, under penalties of perjury, that it consulted reliable sources in an effort to locate the defendant.[68] This may be substantially satisfied with adoption of standardized Complaints that require much of the information be provided at the outset.

Recommendation 5: Courts should issue a standardized notice that goes to a debtor when a creditor seeks a court Order to permit garnishment of bank accounts. The notice would give the debtor an opportunity to indicate that the funds in the account to which garnishment is directed are exempt from garnishment (SSI, veteran's benefits, etc.).[69]

[66] See, e.g., FTC REPORT, *supra* note 7, at 14, 22 (with example from Blair County, PA judge who reported that if collector fails to appear at mandatory conciliation conference, case is dismissed with prejudice); MASS. ANN. LAWS. UNIF. SMALL CLAIMS R. 7(c) (judgment for defendant must be entered if defendant appears and plaintiff does not appear, is not ready to proceed and no good cause for continuance).

[67] *See*, FAIRFAX COUNTY [VIRGINIA] GENERAL DISTRICT COURT BEST PRACTICES: DEFAULT JUDGMENTS/DEBT BUYERS (2009), https://www.ftc.gov/sites/default/files/filings/initiatives/312/091119bestpractices.pdf. Fairfax County incorporated many of its "best practices" regarding default judgments and debt buyers into the Court's Administrative Procedures Manual. Such a practice may be helpful to judges and court personnel. *See also* MASS. ANN. LAWS UNIF. SMALL CLAIMS R. 7(d); Small Claims Default Judgment Checklist provided in Trial Court of the Commonwealth of Massachusetts District Court Department Memorandum from Hon. Lynda M. Connolly, Chief Justice (Sept. 11, 2009); N.C. GEN. STAT. §§ 58-70-155 (2009); NEW YORK CITY CIV. CT. DIRECTIVES AND PROCEDURES DRP-182 (May 13, 2009).

[68] MASS. ANN. LAWS UNIF. SMALL CLAIMS R. 2(b), cited in Spector, *Debts, Defaults, and Doubts*, *supra* note 9 at 261 & n. 14.

[69] FTC REPORT, *supra* note 7, at 35.

Introduction to BLS Pilot Project

The Business Litigation Session (the BLS) will implement a Pilot Project on a voluntary basis beginning January 4, 2010 for all new cases in the BLS and all cases that have not previously had an initial Rule 16 case management conference. The BLS Pilot Project was developed as a result of (i) a joint effort of the BLS judges and the BLS Advisory Committee[1] to address the increasing burden and cost of civil pretrial discovery, particularly electronic discovery, and (ii) release of the Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System dated March 11, 2009.

1 Robert J. Muldoon, Jr., Chair, Wayne A. Budd, Paul T. Dacier, James C. Donnelly, Jr., Sandra L. Jesse, Michael B. Keating, Joan A. Lukey, Katherine A. Robertson; Margaret R. Hinkle, Stephen E. Neel, Judith Fabricant, JJ.

BLS Pilot Project

For all cases filed in the Business Litigation Session between January 4, 2010 and December 31, 2010 and all cases with an initial Rule 16 Case Management Conference occurring within those dates, the parties may elect to participate in a voluntary pilot project intended to reduce discovery costs and therefore better serve the needs of the parties. The BLS pilot project incorporates certain of the proposed principles (often in their exact wording) in the March, 2009 Final Report of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System ("the Final Report").

For cases in the pilot project, the following principles will apply:

A. The court, with the parties, will determine the scope and timing of permitted discovery, generally at the initial Rule 16 Case Management conference. The concept of limited discovery proportionally tied to the magnitude of the claims actually at issue will be the guiding principle. Final Report at 7, 10. In making a proportionality assessment, the factors to be considered include, but are not limited to, the needs of the case, the amount in controversy, the parties' resources, and the complexity and importance of the issues at stake in the case. In limiting discovery, the parties and the court will consider such techniques as numerical and time limitations and limiting the persons from whom discovery can be sought. Final Report at 10. Contention interrogatories will be disfavored.

B. If possible, discovery will be staged to insure that discovery related to a potentially dispositive issue (such as interpretation of a contract) occurs initially so that the potentially dispositive issue may be adjudicated first. Final Report at 7.

C. At the beginning of litigation, each party will be expected to produce "all reasonably available non-privileged, non-work product documents and things that may be used to support that party's claims, counterclaims or defenses." Final Report at 7. Absent agreement of the parties, the court will set the timing of this disclosure. The parties will have an ongoing duty to supplement this disclosure. Final Report at 8.

D. Discovery in general and document discovery in particular will be limited to documents and information that would enable a party to prove or disprove a claim or defense, or enable a party to impeach a witness. Final Report at 8.

E. Promptly after litigation is commenced, the parties will be expected to discuss and attempt to reach agreement about preservation of electronic documents.

F. Electronic discovery will also be limited by proportionality. The factors governing the scope of permitted electronic discovery will include the "nature and scope of the case, relevance, importance to the court's adjudication, expense and burdens." Final Report at 14. If the parties cannot agree about the scope of electronic discovery, after a hearing, the court will issue an order governing electronic discovery. "That order will address the scope of allowable proportional electronic discovery and the allocation of its cost among the parties." Final Report at 12.

G. Beyond what is set forth above, the parties will conduct no additional discovery absent agreement or a court order, which will be made only after a showing of good cause and proportionality. Final Report at 9.

H. The parties will be expected "to confer early and often about discovery and, especially in complex cases, to make periodic reports of these conferences to the court." Final Report at 21. The court will conduct periodic litigation control conferences concerning discovery, beginning promptly after service of the complaint, either on the request of a party or on the court's initiative. Final Report at 19.

I. Participants in the pilot project will be expected to comply with Superior Court Standing Order 1-09 (Written Discovery).

J. The court anticipates that parties who participate in the pilot project will be willing to provide feedback so data may be gathered and analyzed to assess the efficacy of the project.

Public Distribution Version

SUFFOLK SUPERIOR COURT BUSINESS LITIGATION SESSION PILOT PROJECT

FINAL REPORT ON THE 2012 ATTORNEY SURVEY

December 2012

Submitted by Jordan Singer
Assistant Professor of Law
New England Law | Boston
154 Stuart Street
Boston, MA 02116
(617) 368-1434
jsinger@nesl.edu

SUFFOLK SUPERIOR COURT BUSINESS LITIGATION SESSION PILOT PROJECT
FINAL REPORT ON THE 2012 ATTORNEY SURVEY
December 2012

Background on the Pilot Project

In December 2009, the Suffolk Superior Court Business Litigation Session (BLS) announced the implementation of a discovery pilot project designed to address the increasing burden and cost of civil pretrial discovery. The pilot project incorporated certain proposed principles of the March 2009 Final Report of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System. Among these principles were: (1) limiting discovery (including electronic discovery) proportionally to the magnitude of the claims actually at issue; (2) staging discovery where possible so that potentially dispositive issues may be adjudicated first; (3) requiring all parties to produce "all reasonably available non-privileged, non-work product documents and things that may be used to support the party's claims, counterclaims or defenses"; and (4) requiring parties to confer early and often on discovery and, especially in complex cases, to make periodic reports of these conferences to the court.

The pilot project ran for an initial one-year period starting in January 2010. It was later extended for a second consecutive calendar year, ending in December 2011.

The Pilot Project Survey

In mid-2011, the Superior Court developed a 10-question "Pilot Project Evaluation" survey, which was distributed to attorneys who had participated in the pilot program at least once since its inception. That survey drew a low rate of response. In early 2012, the Court explored administering a revised survey by electronic means. The new survey was still limited to ten questions in the hope that a small time commitment would elicit more (and better) responses. While controls were set in place to assure the quality of the data, the primary purpose of the survey was to obtain meaningful feedback on user experiences with the program.

The final survey was administered electronically via Survey Monkey. The Court contacted all attorneys with valid e-mail addresses who had participated in the pilot and asked them to complete the survey, providing an electronic link to the survey instrument. Respondents were assured that their responses were anonymous, although they were given the option of identifying themselves for follow-up with the court.

Survey Findings

Respondent demographics and experience

The survey was in the field for approximately three weeks in August-September 2012. During that time, forty-four attorneys completed at least part of the survey, representing approximately 25% of all attorneys contacted. As a group, the respondents were highly experienced civil litigators. Exactly half had at least 16 years of litigation experience, and more than 70% had at least ten years of experience. More than 85% of respondents stated that at least three-fourths of their practice was in civil litigation.

Respondents also were directly involved in the coordination of discovery in their BLS pilot cases. Nearly 60 percent of respondents stated that they had the primary responsibility for discovery in those cases, and another 35% indicated that they had shared responsibility for coordinating discovery in the relevant cases.

Attorney participation in the pilot

More than 60% of respondents indicated that they had only one case in the pilot program. No respondent had more than three cases in the pilot.

Although participation in the pilot program was voluntary, very few respondents opted out of the program when they had eligible cases. More than 70% of respondents stated that they never opted out when they had an eligible case, and another 22% stated that they opted out only once.

The primary reasons given for participating in the pilot were: (1) the desire for cost savings; (2) the desire for speedier results; (3) the desire for more streamlined and focused discovery; (4) the desire for hands-on judicial case management and more judicial attention generally; and (5) the suitability of the case.

The primary reasons given for opting out of the pilot were: (1) fear of signaling weakness or lack of resolve to the opposing side; and (2) fear of giving the opposing side an advantage by failing to engage in complete discovery.

Attorney satisfaction with the pilot

Survey questions 8 and 9 asked respondents to compare their experiences in the pilot program with their experiences in non-pilot BLS cases, and with their experiences in other (non-BLS) sessions more generally. Comparisons were recorded on a five-point scale (much better in pilot, somewhat better in pilot, little or no difference, somewhat worse in pilot, and much worse in pilot).

The pilot program fared well on nearly all key indicators in comparison to other BLS cases. Most respondents concluded that the pilot was "much better" or "somewhat better" than other BLS cases with respect to the timeliness and cost-effectiveness of discovery, the timeliness of case events, access to a judge to resolve discovery issues, and the cost-effectiveness of case resolution. As an overall assessment, 71% of respondents said that their experience with the pilot was much better or somewhat better than that of a regular BLS case.

The pilot program also fared well when compared to other (non-BLS) sessions, particularly with respect to timeliness, cost-effectiveness, and access to a judge. A full 80% of respondents said that the BLS pilot provided a much better or somewhat better overall experience than a non-BLS session.

The responses to Questions 8 and 9 were cross-tabulated against certain characteristics of the respondents, to discern any differences in perception based on respondent seniority, level of involvement in discovery planning, or number of pilot cases. The results are set out in Appendix B. While there were not dramatic differences between demographic groups, on the whole the crosstabs suggested slightly more enthusiasm for the pilot as compared to regular BLS cases (Question 8) among attorneys with more than 20 years of experience, attorneys who shared responsibility for discovery

planning, and attorneys who had more than one case in the pilot program. The crosstabs also suggested slightly more enthusiasm for the pilot as compared to non-BLS cases (Question 9) among attorneys with 11-20 years of experience, attorneys who shared responsibility for discovery planning, and attorneys who had more than one case in the pilot program.

Cautionary notes about the data

The survey data as a whole points to high levels of attorney satisfaction with the pilot program, especially in comparison to regular BLS sessions or other (non-BLS) sessions. It also suggests that attorneys were frequently willing to opt in to the program, and opted out only when they felt that their client was at a strategic disadvantage.

At the same time, it is important to keep in mind that the survey data has important limitations. While the response rate was perfectly acceptable, responses were voluntary and it is likely that those who responded were highly motivated to do so. In the same vein, those who responded to the survey may feel a stronger investment in the pilot program than a typical attorney in the BLS. This is not to suggest that anything about the survey responses is invalid or not properly reflective of the respondents' positions. Rather, it simply cautions extrapolating too far beyond the respondent base to the larger population of attorneys who use the BLS.

The complete survey data, as well as respondent comments, is contained in Appendices A and B which follow.

Appendix A: BLS pilot project survey responses (as of December 12, 2012)

Q1: How many years have you practiced law?

44 responses

Years	Responses	Percent
Less than 5:	6	14%
6-10	7	16%
11-15	9	21%
16-20	3	7%
More than 20	19	43%

Q2: Since 2002 or your first year of practice, what percentage of your litigation practice has been:

44 responses

Civil?

Percent of practice	Responses	Percent of responses
0-25% of practice	1	2%
25-50% of practice	0	0%
50-75% of practice	5	11%
75-100% of practice	38	86%

In Massachusetts state court?

Percent of practice	Responses	Percent of responses
0-25% of practice	3	7%
25-50% of practice	5	11%
50-75% of practice	22	50%
75-100% of practice	14	32%

In the BLS?

Percent of practice	Responses	Percent of responses
0-25% of practice	23	52%
25-50% of practice	20	45%
50-75% of practice	1	2%
75-100% of practice	0	0%

Q3: In approximately how many BLS cases have you appeared:
44 responses

Since January 2002?

BLS cases	Responses	Percent of responses
Less than 5	21	48%
6-10	15	34%
11-20	5	11%
20-50	3	7%
More than 50	0	0%

Since January 2010?

BLS cases	Responses	Percent of responses
Less than 5	35	80%
6-10	9	20%
11-20	0	0%
20-50	0	0%
More than 50	0	0%

Q4: In how many BLS discovery pilot project cases did you participate between January 2010 and December 2011?
38 responses

Number of cases	Responses	Percent of responses
1	23	61%
2	11	29%
3	4	11%
4 or more*	0	0%

Note: the original survey allowed respondents to designate 4, 5, 6, 7, 8, or "More than 8" as responses to Question 4. Each of these categories received zero responses. I have simply consolidated those categories here.

Q5: In how many BLS discovery pilot project cases did you NOT participate because:
37 responses

a) You/your client opted out

Number of cases	Responses	Percent of responses
0	26	70%
1	8	22%
2	3	8%
3	0	0%
4	0	0%
5	0	0%
6 or more*	0	0%

b) You were willing to participate but another party opted out

Number of cases	Responses	Percent of responses
0	21	57%
1	13	35%
2	1	3%
3	1	3%
4	1	3%
5	1	3%
6 or more*	0	0%

Note: the original survey allowed respondents to designate 4, 5, 6, 7, 8, or "More than 8" as responses to Question 4. Each of these categories received zero responses. I have simply consolidated those categories here.

Q6: What factors influenced the decision to participate (or not participate) in the pilot program?

The relative lack of complexity of the legal issues and the limited scope of the relevant facts.

Cost; time considerations; assisting the court in an important initiative; curiosity.

Cost savings

Possibility that opponent might succeed in concealing evidence should less than full discovery be conducted. Possibly lack of familiarity with pilot project procedures, lack of clarity whether additional conferences will provide advantage/disadvantage to one party of another, lack of clarity on whether something significant is being given up that might become clear later, possibly eagerness to avoid any signal that might be interpreted as weakness or lack or resolve by opponent.

Give court and parties greater flexibility.

To evaluate and learn.

Speed and cost.

Taking control of discovery and having an expedited process were the reasons to use the pilot program. I have also stepped on as trial counsel in non-pilot program cases, which should have been in the pilot program. Indeed, in one case, there was a discovery problem that never would have happened if the case was in the pilot program.

Pressure from the judge.

Complexity of case required broad discovery of numerous parties.

The main reason I like the BLS pilot project is that it focusses discovery efforts on issues likely to resolve the case, resulting in more efficient litigation. One downside is that doing cases in phases can drag them out over time. That has happened in some BLS cases in which I have been involved.

Seemed complicated or no one wanted to bother to try to understand the advantages.

Chance to streamline discovery.

The potential for the disposition of cases at an earlier juncture, the ability to more narrowly focus discovery and most importantly special access to the Court for motions or other matters.

Not sure.

Appeared to be a sound approach to discovery management.

Limitation on discovery costs.

The cost of discovery and the number of parties.

Expeditious discovery and to see if the program worked.

Limited discovery; close attention paid by judge.

The apparent suitability of the case for participation -- it appeared, based on the pleadings, that plaintiffs' claims raised a single dispositive issue.

Additional attention from court to discovery matters, ability to raise them with the court without the need for extensive briefing.

Preference on hearing and summary judgment, court's willingness to conference and direct a less motion practice discovery process

Perception that cases that opted in would receive timelier attention to discovery disputes without extensive briefing; the perception that my adversary would be best controlled by the pilot program (i.e., I was reasonable, they were not)

Efficiency and fatigue with the process in Superior Court.

The client's resources and the amount of potential paper discovery.

Q7: Which best describes your involvement in the discovery process in your BLS pilot project case(s)? If you had multiple cases, please choose the answer most common to your experience.
37 responses

Level of discovery involvement	Responses	Percent of responses
Primary responsibility	22	58%
Shared responsibility	13	34%
Very limited responsibility	1	3%
No responsibility	2	5%

Q8: Think about your experience in BLS pilot project cases as compared to your experience in other (non-pilot project) BLS cases. Please indicate your level of agreement with the following statements.

	MUCH BETTER IN PILOT	SOMEWHAT BETTER IN PILOT	LITTLE OR NO DIFFERENCE	SOMEWHAT WORSE IN PILOT	MUCH WORSE IN PILOT
Timeliness of obtaining discovery	29% (7)	**42% (10)**	29% (7)	0% (0)	0% (0)
Cost-effectiveness of obtaining necessary discovery	23% (6)	**46% (12)**	31% (8)	0% (0)	0% (0)
Absence of unnecessary burdens in producing discovery	12% (3)	**56% (14)**	28% (7)	4% (1)	0% (0)
Absence of unnecessary conflict over discovery	25% (6)	**33% (8)**	**33% (8)**	4% (1)	4% (1)
Access to a judge when necessary to resolve discovery disputes	24% (6)	32% (8)	**36% (9)**	8% (2)	0% (0)
Timeliness of case events (motion hearings, trial, etc.)	33% (8)	**38% (9)**	29% (7)	0% (0)	0% (0)
Timeliness of case resolution	21% (5)	38% (9)	**42% (10)**	0% (0)	0% (0)
Cost-effectiveness of case resolution	25% (6)	**42% (10)**	33% (8)	0% (0)	0% (0)
Overall satisfaction with the litigation experience	33% (8)	**38% (9)**	25% (6)	4% (1)	0% (0)

Note: The number of responses to Question 8 varies slightly for each sub-question. Each box shows the percentage of respondents answering, followed by the actual number of responses. Most popular responses to each question are boldfaced.

Additional comments from respondents:

This is really not a fair comparison, as my BLS cases have varied widely in complexity, and that was the determinative factor for all questions asked in number 8.

Survey questions are counter-hypothetical; not sure how it would have worked out without pilot program. Puts cases in discovery earlier (shifting costs forward), but with more reasonable scope (flattening costs and making less costly to reach ultimate finish line). Every case is different so tough to give reliable answers to survey questions.

This program is a godsend.

Access to the Judge and effectiveness of resolution were key in my BLS pilot project cases.

The cases I was involved with both settled very quickly before we went too far down the road in discovery.

Case resolved early in the discovery process, so no real opportunity to fully evaluate.

The single case in which I am involved is, to put it mildly, unusual, so it's probably not a good indicator of the effectiveness of the program.

I had only one BLS case.

Q9: Now think about your experience in BLS pilot project cases as compared to your experience in other (non-BLS) sessions of the Massachusetts court system. Please indicate your level of agreement with the following statements.

	MUCH BETTER IN PILOT	SOMEWHAT BETTER IN PILOT	LITTLE OR NO DIFFERENCE	SOMEWHAT WORSE IN PILOT	MUCH WORSE IN PILOT
Timeliness of obtaining discovery	37% (10)	**41% (11)**	22% (6)	0% (0)	0% (0)
Cost-effectiveness of obtaining necessary discovery	**39% (10)**	31% (8)	31% (8)	0% (0)	0% (0)
Absence of unnecessary burdens in producing discovery	32% (8)	**40% (10)**	24% (6)	4% (1)	0% (0)
Absence of unnecessary conflict over discovery	28% (7)	**40% (10)**	24% (6)	4% (1)	4% (1)
Access to a judge when necessary to resolve discovery disputes	**63% (15)**	17% (4)	17% (4)	4% (1)	0% (0)
Timeliness of case events (motion hearings, trial, etc.)	**60% (15)**	24% (6)	16% (4)	0% (0)	0% (0)
Timeliness of case resolution	**52% (13)**	24% (6)	24% (6)	0% (0)	0% (0)
Cost-effectiveness of case resolution	**40% (10)**	36% (9)	24% (6)	0% (0)	0% (0)
Overall satisfaction with the litigation experience	**52% (13)**	28% (7)	16% (4)	4% (1)	0% (0)

Note: The number of responses to Question 9 varies slightly for each sub-question. Each box shows the percentage of respondents answering, followed by the actual number of responses. Most popular responses to each question are boldfaced.

Additional comments from respondents:

The same caveat [as applied to Question 8] applies [here], however the one marked difference between all BLS and non-BLS sessions, pilot project or not, is access to a judge to resolve discovery disputes and continuity of case management.

Seeks comparison of time standards sessions with BLS sessions. BLS sessions have some inherent advantages unrelated to pilot project.

This program is a godsend.

Case resolved early in the discovery process, so no real opportunity to fully evaluate.

Discovery matters were worked out by counsel and the case settled, so not much of a basis for evaluation.

I do think in the proper case the pilot project is a great assist but it puts additional burden on the Court to get involved in what is the necessary evil and less desirable part of litigation for everyone.

Q10a: Please provide any other comments you wish on the BLS pilot project.

The pilot project is worthwhile and shows promise, particularly the greater involvement of judges in details of discovery. (Imposes reason on situations without real stigma) Ad hoc nature tends to limit clarity for participates, but best guess is that participation will continue to rise as familiarity and clarity improve. Survey is a good idea, glad to see this initiative.

I think that the pilot program should be used in all cases.

Please see comments above. Unfortunately, due to plaintiffs' multiple changes and expansion of theories, the case, which would have been ideal for the program had it proceeded as pled, went "off the rails," so to speak. So it's not, probably, a good indicator of the value of the program. Thank you!

Q10b: Attorneys indicating willingness to be contacted for followup:

I'm sorry I can't be of much help. Though I recently litigated a pilot project BLS case and non-pilot project BLS case simultaneously, the pilot project case I was involved in was relatively straight forward, and opposing counsel was professional and cooperative, whereas the non-pilot project BLS case was highly complex and contentious. It is therefore likely that the pilot project case would have proceeded more efficiently regardless of the pilot project due to the nature of the case and the attorneys involved. In general, the BLS offers greater access to a judge to resolve discovery disputes and better continuity of case management than other sessions, however, I understand that budgetary issues have placed a great amount of pressure upon BLS judges who try to continue to ensure this level of attention, which is truly unfortunate. Daniel Treger Phillips & Angley 617-367-8787 dtreger@comcast.net

Michael F. Connolly, Esq. Mintz, Levin, Cohn Ferris,Glovsky and Popeo, PC, (617) 348-4448; MFConnolly@mintz.com

John M. Allen McCarter & English, LLP 617-449-6547 jallen@mccarter.com

Appendix B: Crosstabulations for Questions 8 and 9

By length of experience

- 0-10 years
- 11-20 years
- More than 20 years

By level of responsibility for discovery in BLS pilot cases

- Primary responsibility
- Shared responsibility

By number of BLS pilot cases

- One BLS case
- Two or more BLS cases

0-10 years general legal experience (8 responses)

Q8: Think about your experience in BLS pilot project cases as compared to your experience in other (non-pilot project) BLS cases. Please indicate your level of agreement with the following statements.

	MUCH BETTER IN PILOT	SOMEWHAT BETTER IN PILOT	LITTLE OR NO DIFFERENCE	SOMEWHAT WORSE IN PILOT	MUCH WORSE IN PILOT
Timeliness of obtaining discovery	14% (1)	**57% (4)**	28% (2)	0% (0)	0% (0)
Cost-effectiveness of obtaining necessary discovery	14% (1)	**57% (4)**	28% (2)	0% (0)	0% (0)
Absence of unnecessary burdens in producing discovery	0% (0)	**71% (5)**	14% (1)	14% (1)	0% (0)
Absence of unnecessary conflict over discovery	**28% (2)**	**28% (2)**	**28% (2)**	0% (0)	14% (1)
Access to a judge when necessary to resolve discovery disputes	25% (2)	25% (2)	**38% (3)**	13% (1)	0% (0)
Timeliness of case events (motion hearings, trial, etc.)	14% (1)	**57% (4)**	28% (2)	0% (0)	0% (0)
Timeliness of case resolution	14% (1)	**43% (3)**	**43% (3)**	0% (0)	0% (0)
Cost-effectiveness of case resolution	14% (1)	**43% (3)**	**43% (3)**	0% (0)	0% (0)
Overall satisfaction with the litigation experience	28% (2)	**43% (3)**	14% (1)	14% (1)	0% (0)

Q9: Now think about your experience in BLS pilot project cases as compared to your experience in other (non-BLS) sessions of the Massachusetts court system. Please indicate your level of agreement with the following statements.

	MUCH BETTER IN PILOT	SOMEWHAT BETTER IN PILOT	LITTLE OR NO DIFFERENCE	SOMEWHAT WORSE IN PILOT	MUCH WORSE IN PILOT
Timeliness of obtaining discovery	**43% (3)**	28% (2)	28% (2)	0% (0)	0% (0)
Cost-effectiveness of obtaining necessary discovery	**57% (4)**	14% (1)	28% (2)	0% (0)	0% (0)
Absence of unnecessary burdens in producing discovery	28% (2)	**43% (3)**	14% (1)	14% (1)	0% (0)
Absence of unnecessary conflict over discovery	28% (2)	**43% (3)**	14% (1)	0% (0)	14% (1)
Access to a judge when necessary to resolve discovery disputes	**57% (4)**	0% (0)	28% (2)	14% (1)	0% (0)
Timeliness of case events (motion hearings, trial, etc.)	**57% (4)**	14% (1)	28% (2)	0% (0)	0% (0)
Timeliness of case resolution	**57% (4)**	14% (1)	28% (2)	0% (0)	0% (0)
Cost-effectiveness of case resolution	**43% (3)**	28% (2)	28% (2)	0% (0)	0% (0)
Overall satisfaction with the litigation experience	**43% (3)**	28% (2)	14% (1)	14% (1)	0% (0)

11-20 years general legal experience (8 responses)

Q8: Think about your experience in BLS pilot project cases as compared to your experience in other (non-pilot project) BLS cases. Please indicate your level of agreement with the following statements.

	MUCH BETTER IN PILOT	SOMEWHAT BETTER IN PILOT	LITTLE OR NO DIFFERENCE	SOMEWHAT WORSE IN PILOT	MUCH WORSE IN PILOT
Timeliness of obtaining discovery	28% (2)	28% (2)	**43% (3)**	0% (0)	0% (0)
Cost-effectiveness of obtaining necessary discovery	13% (1)	**50% (4)**	38% (3)	0% (0)	0% (0)
Absence of unnecessary burdens in producing discovery	13% (1)	38% (3)	**50% (4)**	0% (0)	0% (0)
Absence of unnecessary conflict over discovery	14% (1)	28% (2)	**43% (3)**	14% (1)	0% (0)
Access to a judge when necessary to resolve discovery disputes	28% (2)	14% (1)	**43% (3)**	14% (1)	0% (0)
Timeliness of case events (motion hearings, trial, etc.)	28% (2)	28% (2)	**43% (3)**	0% (0)	0% (0)
Timeliness of case resolution	14% (1)	28% (2)	**57% (4)**	0% (0)	0% (0)
Cost-effectiveness of case resolution	28% (2)	**43% (3)**	28% (2)	0% (0)	0% (0)
Overall satisfaction with the litigation experience	14% (1)	**43% (3)**	**43% (3)**	0% (0)	0% (0)

Q9: Now think about your experience in BLS pilot project cases as compared to your experience in other (non-BLS) sessions of the Massachusetts court system. Please indicate your level of agreement with the following statements.

	MUCH BETTER IN PILOT	SOMEWHAT BETTER IN PILOT	LITTLE OR NO DIFFERENCE	SOMEWHAT WORSE IN PILOT	MUCH WORSE IN PILOT
Timeliness of obtaining discovery	33% (2)	**50% (3)**	17% (1)	0% (0)	0% (0)
Cost-effectiveness of obtaining necessary discovery	33% (2)	**50% (3)**	17% (1)	0% (0)	0% (0)
Absence of unnecessary burdens in producing discovery	**40% (2)**	**40% (2)**	20% (1)	0% (0)	0% (0)
Absence of unnecessary conflict over discovery	**40% (2)**	**40% (2)**	20% (1)	0% (0)	0% (0)
Access to a judge when necessary to resolve discovery disputes	**80% (4)**	0% (0)	20% (1)	0% (0)	0% (0)
Timeliness of case events (motion hearings, trial, etc.)	**80% (4)**	0% (0)	20% (1)	0% (0)	0% (0)
Timeliness of case resolution	**80% (4)**	0% (0)	20% (1)	0% (0)	0% (0)
Cost-effectiveness of case resolution	**40% (2)**	**40% (2)**	20% (1)	0% (0)	0% (0)
Overall satisfaction with the litigation experience	**60% (3)**	20% (1)	20% (1)	0% (0)	0% (0)

More than 20 years general legal experience (11 responses)

Q8: Think about your experience in BLS pilot project cases as compared to your experience in other (non-pilot project) BLS cases. Please indicate your level of agreement with the following statements.

	MUCH BETTER IN PILOT	SOMEWHAT BETTER IN PILOT	LITTLE OR NO DIFFERENCE	SOMEWHAT WORSE IN PILOT	MUCH WORSE IN PILOT
Timeliness of obtaining discovery	**40% (4)**	**40% (4)**	20% (2)	0% (0)	0% (0)
Cost-effectiveness of obtaining necessary discovery	**40% (4)**	**40% (4)**	20% (2)	0% (0)	0% (0)
Absence of unnecessary burdens in producing discovery	22% (2)	**56% (5)**	22% (2)	0% (0)	0% (0)
Absence of unnecessary conflict over discovery	**33% (3)**	**33% (3)**	**33% (3)**	0% (0)	0% (0)
Access to a judge when necessary to resolve discovery disputes	20% (2)	**50% (5)**	30% (3)	0% (0)	0% (0)
Timeliness of case events (motion hearings, trial, etc.)	**50% (5)**	30% (3)	20% (2)	0% (0)	0% (0)
Timeliness of case resolution	30% (3)	**40% (4)**	30% (3)	0% (0)	0% (0)
Cost-effectiveness of case resolution	30% (3)	**40% (4)**	30% (3)	0% (0)	0% (0)
Overall satisfaction with the litigation experience	**50% (5)**	30% (3)	20% (2)	0% (0)	0% (0)

Q9: Now think about your experience in BLS pilot project cases as compared to your experience in other (non-BLS) sessions of the Massachusetts court system. Please indicate your level of agreement with the following statements.

	MUCH BETTER IN PILOT	SOMEWHAT BETTER IN PILOT	LITTLE OR NO DIFFERENCE	SOMEWHAT WORSE IN PILOT	MUCH WORSE IN PILOT
Timeliness of obtaining discovery	40% (4)	**50% (5)**	10% (1)	0% (0)	0% (0)
Cost-effectiveness of obtaining necessary discovery	30% (3)	**40% (4)**	30% (3)	0% (0)	0% (0)
Absence of unnecessary burdens in producing discovery	30% (3)	**50% (5)**	20% (2)	0% (0)	0% (0)
Absence of unnecessary conflict over discovery	20% (2)	**50% (5)**	30% (3)	0% (0)	0% (0)
Access to a judge when necessary to resolve discovery disputes	**56% (5)**	33% (3)	11% (1)	0% (0)	0% (0)
Timeliness of case events (motion hearings, trial, etc.)	**50% (5)**	40% (4)	10% (1)	0% (0)	0% (0)
Timeliness of case resolution	30% (3)	**40% (4)**	30% (3)	0% (0)	0% (0)
Cost-effectiveness of case resolution	30% (3)	**40% (4)**	30% (3)	0% (0)	0% (0)
Overall satisfaction with the litigation experience	**50% (5)**	30% (3)	20% (2)	0% (0)	0% (0)

Primary responsibility for discovery in BLS pilot case(s) (18 responses)

Q8: Think about your experience in BLS pilot project cases as compared to your experience in other (non-pilot project) BLS cases. Please indicate your level of agreement with the following statements.

	MUCH BETTER IN PILOT	SOMEWHAT BETTER IN PILOT	LITTLE OR NO DIFFERENCE	SOMEWHAT WORSE IN PILOT	MUCH WORSE IN PILOT
Timeliness of obtaining discovery	33% (5)	27% (4)	**40% (6)**	0% (0)	0% (0)
Cost-effectiveness of obtaining necessary discovery	25% (4)	**44% (7)**	31% (5)	0% (0)	0% (0)
Absence of unnecessary burdens in producing discovery	19% (3)	**44% (7)**	31% (5)	6% (1)	0% (0)
Absence of unnecessary conflict over discovery	27% (4)	**33% (5)**	**33% (5)**	0% (0)	7% (1)
Access to a judge when necessary to resolve discovery disputes	13% (2)	31% (5)	**44% (7)**	13% (2)	0% (0)
Timeliness of case events (motion hearings, trial, etc.)	27% (4)	33% (5)	**40% (6)**	0% (0)	0% (0)
Timeliness of case resolution	13% (2)	33% (5)	**53% (8)**	0% (0)	0% (0)
Cost-effectiveness of case resolution	20% (3)	**40% (6)**	**40% (6)**	0% (0)	0% (0)
Overall satisfaction with the litigation experience	20% (3)	**40% (6)**	33% (5)	7%(1)	0% (0)

Q9: Now think about your experience in BLS pilot project cases as compared to your experience in other (non-BLS) sessions of the Massachusetts court system. Please indicate your level of agreement with the following statements.

	MUCH BETTER IN PILOT	SOMEWHAT BETTER IN PILOT	LITTLE OR NO DIFFERENCE	SOMEWHAT WORSE IN PILOT	MUCH WORSE IN PILOT
Timeliness of obtaining discovery	28% (5)	**50% (9)**	22% (4)	0% (0)	0% (0)
Cost-effectiveness of obtaining necessary discovery	28% (5)	**39% (7)**	33% (6)	0% (0)	0% (0)
Absence of unnecessary burdens in producing discovery	**40% (6)**	**40% (6)**	27% (4)	7% (1)	0% (0)
Absence of unnecessary conflict over discovery	29% (5)	**41% (7)**	24% (4)	0% (0)	6% (1)
Access to a judge when necessary to resolve discovery disputes	**63% (10)**	19% (3)	13% (2)	6% (1)	0% (0)
Timeliness of case events (motion hearings, trial, etc.)	**53% (9)**	29% (5)	18% (3)	0% (0)	0% (0)
Timeliness of case resolution	**47% (8)**	24% (4)	29% (5)	0% (0)	0% (0)
Cost-effectiveness of case resolution	**35% (6)**	**35% (6)**	29% (5)	0% (0)	0% (0)
Overall satisfaction with the litigation experience	**47% (8)**	29% (5)	18% (3)	6% (1)	0% (0)

Shared responsibility for discovery in BLS pilot case(s) (9 responses)

Q8: Think about your experience in BLS pilot project cases as compared to your experience in other (non-pilot project) BLS cases. Please indicate your level of agreement with the following statements.

	MUCH BETTER IN PILOT	SOMEWHAT BETTER IN PILOT	LITTLE OR NO DIFFERENCE	SOMEWHAT WORSE IN PILOT	MUCH WORSE IN PILOT
Timeliness of obtaining discovery	22% (2)	**67% (6)**	11% (1)	0% (0)	0% (0)
Cost-effectiveness of obtaining necessary discovery	22% (2)	**56% (5)**	22% (2)	0% (0)	0% (0)
Absence of unnecessary burdens in producing discovery	0% (0)	**78% (7)**	22% (2)	0% (0)	0% (0)
Absence of unnecessary conflict over discovery	22% (2)	**33% (3)**	**33% (3)**	11% (1)	0% (0)
Access to a judge when necessary to resolve discovery disputes	**44% (4)**	33% (3)	22% (2)	0% (0)	0% (0)
Timeliness of case events (motion hearings, trial, etc.)	**44% (4)**	**44% (4)**	11% (1)	0% (0)	0% (0)
Timeliness of case resolution	33% (3)	**44% (4)**	22% (2)	0% (0)	0% (0)
Cost-effectiveness of case resolution	33% (3)	**44% (4)**	22% (2)	0% (0)	0% (0)
Overall satisfaction with the litigation experience	**56% (5)**	33% (3)	11% (1)	0% (0)	0% (0)

Q9: Now think about your experience in BLS pilot project cases as compared to your experience in other (non-BLS) sessions of the Massachusetts court system. Please indicate your level of agreement with the following statements.

	MUCH BETTER IN PILOT	SOMEWHAT BETTER IN PILOT	LITTLE OR NO DIFFERENCE	SOMEWHAT WORSE IN PILOT	MUCH WORSE IN PILOT
Timeliness of obtaining discovery	**63% (5)**	25% (2)	13% (1)	0% (0)	0% (0)
Cost-effectiveness of obtaining necessary discovery	**63% (5)**	13% (1)	25% (1)	0% (0)	0% (0)
Absence of unnecessary burdens in producing discovery	25% (2)	**50% (4)**	25% (2)	0% (0)	0% (0)
Absence of unnecessary conflict over discovery	25% (2)	**38% (3)**	25% (2)	13% (1)	0% (0)
Access to a judge when necessary to resolve discovery disputes	**63% (5)**	13% (1)	25% (2)	0% (0)	0% (0)
Timeliness of case events (motion hearings, trial, etc.)	**75% (6)**	13% (1)	75% (1)	0% (0)	0% (0)
Timeliness of case resolution	**63% (5)**	25% (2)	13% (1)	0% (0)	0% (0)
Cost-effectiveness of case resolution	**50% (4)**	38% (3)	13% (1)	0% (0)	0% (0)
Overall satisfaction with the litigation experience	**63% (5)**	25% (2)	13% (1)	0% (0)	0% (0)

One BLS pilot case (15 responses)

Q8: Think about your experience in BLS pilot project cases as compared to your experience in other (non-pilot project) BLS cases. Please indicate your level of agreement with the following statements.

	MUCH BETTER IN PILOT	SOMEWHAT BETTER IN PILOT	LITTLE OR NO DIFFERENCE	SOMEWHAT WORSE IN PILOT	MUCH WORSE IN PILOT
Timeliness of obtaining discovery	**36% (5)**	**36% (5)**	29% (4)	0% (0)	0% (0)
Cost-effectiveness of obtaining necessary discovery	29% (4)	**36% (5)**	**36% (5)**	0% (0)	0% (0)
Absence of unnecessary burdens in producing discovery	14% (2)	**50% (7)**	36% (5)	0% (0)	0% (0)
Absence of unnecessary conflict over discovery	21% (3)	**43% (6)**	29% (4)	7% (1)	0% (0)
Access to a judge when necessary to resolve discovery disputes	14% (2)	29% (4)	**50% (7)**	7% (1)	0% (0)
Timeliness of case events (motion hearings, trial, etc.)	29% (4)	**43% (6)**	29% (4)	0% (0)	0% (0)
Timeliness of case resolution	21% (3)	**43% (6)**	36% (5)	0% (0)	0% (0)
Cost-effectiveness of case resolution	29% (4)	29% (4)	**43% (6)**	0% (0)	0% (0)
Overall satisfaction with the litigation experience	21% (3)	**50% (7)**	29% (4)	0% (0)	0% (0)

Q9: Now think about your experience in BLS pilot project cases as compared to your experience in other (non-BLS) sessions of the Massachusetts court system. Please indicate your level of agreement with the following statements.

	MUCH BETTER IN PILOT	SOMEWHAT BETTER IN PILOT	LITTLE OR NO DIFFERENCE	SOMEWHAT WORSE IN PILOT	MUCH WORSE IN PILOT
Timeliness of obtaining discovery	**36% (5)**	**36% (5)**	29% (4)	0% (0)	0% (0)
Cost-effectiveness of obtaining necessary discovery	**43% (6)**	21% (3)	36% (5)	0% (0)	0% (0)
Absence of unnecessary burdens in producing discovery	29% (4)	**36% (5)**	**36% (5)**	0% (0)	0% (0)
Absence of unnecessary conflict over discovery	29% (4)	**36% (5)**	29% (4)	7% (1)	0% (0)
Access to a judge when necessary to resolve discovery disputes	**54% (7)**	15% (2)	31% (4)	0% (0)	0% (0)
Timeliness of case events (motion hearings, trial, etc.)	**50% (7)**	29% (4)	21% (3)	0% (0)	0% (0)
Timeliness of case resolution	**50% (7)**	21% (3)	29% (4)	0% (0)	0% (0)
Cost-effectiveness of case resolution	**36% (5)**	**36% (5)**	29% (4)	0% (0)	0% (0)
Overall satisfaction with the litigation experience	**50% (7)**	29% (4)	21% (3)	0% (0)	0% (0)

Two or more BLS pilot cases (12 responses)

Q8: Think about your experience in BLS pilot project cases as compared to your experience in other (non-pilot project) BLS cases. Please indicate your level of agreement with the following statements.

	MUCH BETTER IN PILOT	SOMEWHAT BETTER IN PILOT	LITTLE OR NO DIFFERENCE	SOMEWHAT WORSE IN PILOT	MUCH WORSE IN PILOT
Timeliness of obtaining discovery	20% (2)	**50% (5)**	30% (3)	0% (0)	0% (0)
Cost-effectiveness of obtaining necessary discovery	18% (2)	**64% (7)**	18% (2)	0% (0)	0% (0)
Absence of unnecessary burdens in producing discovery	9% (1)	**64% (7)**	18% (2)	9% (1)	0% (0)
Absence of unnecessary conflict over discovery	30% (3)	20% (2)	**40% (4)**	0% (0)	10% (1)
Access to a judge when necessary to resolve discovery disputes	**36% (4)**	**36% (4)**	18% (2)	9% (1)	0% (0)
Timeliness of case events (motion hearings, trial, etc.)	**40% (4)**	30% (3)	30% (3)	0% (0)	0% (0)
Timeliness of case resolution	20% (2)	30% (3)	**50% (5)**	0% (0)	0% (0)
Cost-effectiveness of case resolution	22% (2)	**56% (5)**	22% (2)	0% (0)	0% (0)
Overall satisfaction with the litigation experience	**50% (5)**	20% (2)	20% (2)	10% (1)	0% (0)

Q9: Now think about your experience in BLS pilot project cases as compared to your experience in other (non-BLS) sessions of the Massachusetts court system. Please indicate your level of agreement with the following statements.

	MUCH BETTER IN PILOT	SOMEWHAT BETTER IN PILOT	LITTLE OR NO DIFFERENCE	SOMEWHAT WORSE IN PILOT	MUCH WORSE IN PILOT
Timeliness of obtaining discovery	42% (5)	**50% (6)**	8% (1)	0% (0)	0% (0)
Cost-effectiveness of obtaining necessary discovery	33% (4)	**42% (5)**	25% (3)	0% (0)	0% (0)
Absence of unnecessary burdens in producing discovery	36% (4)	**45% (5)**	9% (1)	9% (1)	0% (0)
Absence of unnecessary conflict over discovery	27% (3)	**45% (5)**	18% (2)	0% (0)	9% (1)
Access to a judge when necessary to resolve discovery disputes	**73% (8)**	18% (2)	0% (0)	9% (1)	0% (0)
Timeliness of case events (motion hearings, trial, etc.)	**73% (8)**	18% (2)	9% (1)	0% (0)	0% (0)
Timeliness of case resolution	**54% (6)**	27% (3)	18% (2)	0% (0)	0% (0)
Cost-effectiveness of case resolution	**45% (5)**	36% (4)	18% (2)	0% (0)	0% (0)
Overall satisfaction with the litigation experience	**54% (6)**	27% (3)	9% (1)	9% (1)	0% (0)

PAD Pilot Rules (5)

Proportional Discovery/Automatic Disclosure

PILOT RULE (PR)

RULE # PR 1, PLEADINGS

(a) Pleadings Allowed. The pleadings are the written statements by the parties of the facts constituting their respective claims and defenses There shall be a complaint and an answer; an answer to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint pursuant to Rule 27; a third-party answer, if a third-party complaint is served; and a reply, if an affirmative defense is set forth in an answer and the pleader wishes to allege any matter constituting an avoidance of the defense.

(b) Claim for Relief. Except as may be more specifically provided by these rules in respect of specific actions, a pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim or third-party claim, shall contain a statement of the material facts known to the pleading party on which the claim is based, showing that the pleader is entitled to relief, and a demand for judgment for the relief to which the pleader claims entitlement. Relief in the alternative or of several different types may be demanded.

(c) Answer; Defenses; Form of Denials. An answer or other responsive pleading shall be filed with the court within thirty (30) days after the person filing said pleading has been served with the pleading to which the answer or response is made. It shall state in short and plain terms the pleader's defenses to each claim asserted and shall admit or deny the allegations upon which the adverse party relies. If the party is without knowledge or information sufficient to form a belief as to the truth of an allegation, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the allegations denied. A pleader who intends in good faith to deny only a part or a qualification of an allegation shall specify so much of it as is true and material and deny only the remainder. The pleader may not generally deny all the allegations but shall make the denials as specific denials of designated allegations or paragraphs.

COMMITTEE NOTES:

Changes in New Hampshire's current system of writs to one more similar to the federal system and also including a requirement of fact-based pleading will require several changes in the Superior Court Rules. For example, Rules 1, 2, 2-A, 3 (first paragraph only), 8 (but this

should be amended to require that the demand for jury trial be set out in the Complaint or the Answer), 10, 23 and 29-32 would be eliminated by a general requirement of the filing of a complaint and answer and a third-party practice more similar to the federal court practice.

The Committee believes that pleadings which notify the opposing party and the court of the factual and legal basis of the pleader's claims or defenses will better define the issues of fact and law to be adjudicated. This definition should give the opposing party and the court sufficient information to determine whether the claim or defense is sufficient in law to merit continued litigation. Pleadings should assist in setting practical limits on the scope of discovery and trial and should give the court sufficient information to control and supervise the progress of the case.

RULE # PR 2, CASE STRUCTURING ORDER

(a) Within 20 days of the answer date counsel, or parties if unrepresented, shall confer to discuss the claims, defenses and counterclaims and to attempt to reach agreement on the following matters: (1) a statement as to whether or not a jury trial, if previously demanded, is waived; (2) a proposed date for trial and the estimated length of trial; (3) dates for the disclosure of expert reports; (4) status of waiver of RSA 516:29-b requirements; (5) deadlines for the parties to propound interrogatories; (6) deadlines for the completion of all depositions; (7) deadlines for the completion of all discovery; (8) deadline for filing all dispositive motions, which shall not be less than 90 days prior to the trial date; (9) deadlines for filing all other pre-trial motions, which shall be filed not later than 14 days prior to trial; (10) the type of alternative dispute resolution (ADR) procedures that shall be utilized and the deadline for completion of ADR; and (11) deadline for filing witness and exhibit lists, which shall not be later than the final pre-trial.

(b) If the parties reach agreement as to all information required by PR 2(a) above, they shall file a completed written stipulation setting forth their agreement on all of the required matters within the said 20 days. Upon review by the court, if those stipulations are deemed acceptable, they shall become the structuring conference order of the court pursuant to Rule 62.

(c) If the parties are unable to reach agreement as to any of the matters set forth in PR 2(a), or if the court rejects their proffered stipulations, the matter shall be scheduled for a telephonic hearing between the court and counsel, or parties if unrepresented. The hearing shall be held no later than 75 days after the answer is filed. The court may order the parties to appear in court for the hearing if the court deems this necessary for the efficient progression of the case. Should counsel, or parties if unrepresented, be unable to reach an acceptable agreement as to any

of the required matters, the court shall issue such orders as it deems appropriate. The fact that a structuring conference has not yet been held or a structuring conference order has not yet been issued does not preclude any party from pursuing discovery and does not constitute grounds for any party to fail to comply with its discovery obligations.

COMMITTEE NOTES:

This rule is substantially similar to existing Superior Court Rule 62, but does contain several provisions which the Committee believes improves the present rule. First, like the present rule it contains a "meet and confer" requirement that mandates that, within 20 days after the answer to the complaint is filed by the defendant, the parties must meet to discuss and attempt to reach agreement on all important issues regarding scheduling, discovery and the management of the litigation through the time of the trial. However, unlike present Rule 62, PR 2 provides that if the parties are able to reach agreement and execute a stipulation regarding all such matters, this stipulation shall presumptively become the pretrial structuring conference order, thus eliminating the need for a pretrial structuring conference. This change is designed to remedy the frequently-heard complaint that the practice of routinely holding structuring conferences requiring the personal appearance of counsel, or parties if unrepresented, in every case is expensive and unproductive. In addition, PR 2 also provides that even where the parties are unable to reach agreement on all issues or where the court finds the agreement unacceptable, the structuring conference will be held telephonically unless the court specifically orders that counsel and/or the parties appear in court for the conference. This aspect of the new rule reverses the current practice under which structuring conferences are held at the courthouse unless a party or counsel files a motion requesting that he or she appear telephonically. Again, the purpose of the change is to reduce costs and increase efficiency.

Subsection (c) of this rule also changes the current Rule 62 in two other significant ways. First, it changes the date for holding the structuring conference from 45 days after the return date, as now provided in Rule 62. Under PR 2, the structuring conference must be held within 75 days after the answer is filed. Given the automatic disclosure requirements established by PR 3, the Committee believes that 75 days after the answer is reasonable and will give the parties time to digest the disclosures made pursuant to PR 3 and to formulate reasoned positions in cases where they have been unable to reach agreement on all pretrial management issues. This time limit also is realistic in light of current superior court resource limitations. The second significant change accomplished by subsection (c) of PR 2 is the provision stating that discovery can be initiated before the structuring conference is held and before a structuring conference order has been issued and that a responding party is required to comply with its discovery obligations notwithstanding the fact that a structuring order has not yet been issued. This provision is intended to address the complaint often heard from lawyers that court scheduling issues which result in delay in holding a structuring conference are used as an excuse to delay responding to entirely legitimate discovery requests.

With respect to PR 2's requirement that the parties' stipulation and the court's structuring conference order address the issues of expert disclosures, the Committee felt it important to note

that current Superior Court Rule 35(f) must be read in conjunction with RSA 516:29-b. To the extent an expert is retained, RSA 516:29-b provides additional requirements. Superior Court Rule 35(f) is applicable to all witnesses from whom a party expects to elicit expert testimony. This includes retained and non-retained witnesses.

While the Superior Court Rule does not require reports, testimonial history, and detailed curriculum vitae, it still carries an obligation to make a reasonable disclosure of the facts and opinions which the expert is expected to address as well as the grounds for such opinions. To the extent non-retained experts have generated investigative records or other written documentation in the course of conducting their activities, such records should be provided to opposing counsel. To the extent the non-retained expert's opinions are not contained within such documents, but are fairly inferred from the documents, Rule 35(f) would call for a disclosure of anticipated opinions a party expects the non-retained expert will conclude from such records.

Typically, medical providers are exempt from statutory disclosure, as such witnesses are recognized as non-retained experts. If a medical provider is expected to render opinions beyond information contained in, or reasonably inferred from the medical records, disclosure of such opinions and foundational information should be provided under Superior Court Rule 35(f).

RULE # PR 3, AUTOMATIC DISCLOSURES

(a) Materials that Must Be Disclosed. Except as may be otherwise ordered by the court for good cause shown, a party must without awaiting a discovery request, provide to the other parties:

(1) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment, and, unless such information is contained in a document provided pursuant to PR 3(a)(2), a summary of the information believed by the disclosing party to be possessed by each such person;

(2) a copy of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(3) a computation of each category of damages claimed by the disclosing party together with all documents or other evidentiary materials on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(4) for inspection and copying, any insurance agreement or policy under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(b) Time for Disclosure. Unless the court orders otherwise, the disclosures required by PR 3(a) shall be made as follows:

(1) by the plaintiff, not later than thirty (30) days after the defendant to whom the disclosure is being made has filed its answer to the complaint; and

(2) by the defendant, not later than sixty (60) days after the defendant making the disclosure has filed its answer to the compliant.

(c) Duty to Supplement. Each party has a duty to supplement that party's initial disclosures promptly upon becoming aware of the supplemental information.

(d) Sanctions for Failure to Comply. A party who fails to timely make the disclosures required by this rule may be sanctioned as provided in Rule 35.

COMMITTEE NOTES:

This rule accomplishes a major change from current New Hampshire practice in that it requires both the plaintiff and the defendant to make automatic initial disclosures of certain information without the need for a discovery request from the opposing party. Although there is a similar but not identical requirement in the so-called "fast-track" section of current Superior Court Rule 62, see Rule 62(II), that rule has been used very little since its adoption, and therefore does not provide a significant base of experience for this rule. Nonetheless, such a base of experience can be found in federal court practice, where an automatic disclosure regimen in some form has been in existence since 1993, and appears to have worked reasonably well. The Committee believes that requiring parties to make prompt and automatic disclosures of information concerning the witnesses and evidence they will use to prove their claims or defenses at trial will help reduce "gamesmanship" in the conduct of litigation, reduce the time spent by lawyers and courts in resolving discovery issues and disputes, and promote the prompt and just resolution of cases.

Subsection (a) of PR 3 is taken largely from Rule 26(a)(1) of the Federal Rules of Civil Procedure. It differs from the federal rule, however, in that, unlike the federal rule, this rule does not permit the disclosing party to merely provide "the subjects" of the discoverable information known to individuals likely to have such information, Fed.R.Civ.P. 26(a)(1)(A)(i), and "a description by category and location" of the discoverable materials in the possession, custody or control of the disclosing party, Fed.R.Civ.P. 26(a)(1)(A)(ii). Rather, the rule requires that the disclosing party actually turn over to the opposing party a copy of all such discoverable materials, PR 3(a)(2), and also requires that the disclosing party provide a summary of the information known to each individual identified under PR 3(a)(1) unless that information is contained in the materials disclosed under PR 3(a)(2). The Committee believes that this more comprehensive discovery obligation does not impose an undue burden on either plaintiffs or defendants and will help to insure that information and witnesses that will be used by each party to support its case will be disclosed to opposing parties shortly after the issues have been joined.

Subsection (a)(3) of the rule also differs somewhat from the language of comparable Fed.R.Civ.P. 26(a)(1)(A)(iii), in that the rule eliminates reference to "privileged or protected from disclosure" information as being excepted from the disclosure obligation imposed by the subsection. By so doing, the Committee does not mean to eliminate the ability of a party to object on privilege or other proper grounds to the disclosures relating to the computation of damages or the information on which such computations are based. However, the Committee believes that genuine claims of privilege as a basis for avoiding disclosure of information pertinent to the computation of damages will be rare and that, to the extent such claims do exist, the ability to assert the privilege is preserved elsewhere in the rules. The Committee saw no need to make a specific reference to privileged or otherwise protected materials in this rule.

The Committee believes that the time limits established in subsection (b) of the rule are reasonable and will promote the orderly and expeditious progress of litigation. The Committee notes that the proposed rule differs from the initial disclosure proposal embodied in the Pilot Project Rules of the American College of Trial Lawyers (ACTL) and the Institute for the Advancement of the American Legal System (IAALS), in that, unlike ACTL/IAALS Rule 5.2, the rule does not require the plaintiff to make its initial disclosures before time when the defendant is required to file its answer. The Committee felt that the plaintiff should have the benefit of the defendant's answer before making its initial disclosure since the answer will in all likelihood inform what facts are in dispute and therefore will need to be proved by the plaintiff.

Subsection (c) of the rule is taken directly from ACTL/IAALS Pilot Project Rule 5.4 and its substance is generally consistent with Federal Rule 26(e) and present Superior Court Rule 35(e). It should be noted, however, that unlike the current superior court rule, which contains introductory language stating that there is no duty to supplement responses and then sets forth very broad categories of exceptions from this general rule, this rule is worded in positive terms to require supplementation of responses whenever the producing party becomes aware of supplemental information covered by the rule's initial disclosure requirements.

Subsection (d) of the rule references Superior Court Rule 35 and permits the court to impose any of the sanctions specified in that rule if a party fails to make the disclosures required of it by this rule in a timely fashion.

RULE # PR 4, WRITTEN INTERROGATORIES & DEPOSITIONS

(a) Interrogatories. A party may propound more than one set of interrogatories to an adverse party, but the total number of interrogatories shall not exceed twenty-five (25), unless the court otherwise orders for good cause shown after the proposed additional interrogatories have been filed with the court. In determining what constitutes an interrogatory for the purpose of applying this limitation in number, it is intended that each question be counted separately, whether or not it is subsidiary or incidental to or dependant upon or included in another question, and however the questions may be grouped, combined or arranged.

(b) Limitations on Depositions. A party may take as many depositions as necessary to adequately prepare a case for trial so long as the combined total of deposition hours does not exceed twenty (20) unless otherwise stipulated by counsel or ordered by the court for good cause shown.

COMMITTEE NOTES:

This Rule is a major change from current New Hampshire deposition practice and represents a further restriction on the use of interrogatories than that currently imposed by Superior Court Rule 36. The Committee felt that these new limitations were warranted by the adoption of the Automatic Disclosure requirements of PR 3, which itself tracks in part the provision of Fed.R.Civ.P. 26(a)(1). In adopting this limitation the Committee had in mind the typical case which ordinarily does not consume twenty hours of depositions and recognized that there are others for which twenty hours may not be adequate.

RULE # PR 5, DISCOVERY OF ELECTRONICALLY STORED INFORMATION (ESI)

(a) Promptly after litigation is commenced, the parties must meet and confer about preservation of any electronically stored information (ESI). In the absence of an agreement, any party may move for an order governing preservation of ESI. Because the parties require a prompt response, the court must make an order governing preservation of ESI as soon as possible.

(b) The parties have a duty to preserve all potential relevant ESI once the party is aware that the information may be relevant to a potential claim. Counsel for the parties have a duty to notify their clients to place a "litigation hold" on all potentially relevant ESI.

(c) Requests for ESI shall be made in proportion to the significance of the issues in dispute. If the request for ESI is considered to be out of proportion to the issues in the dispute, at the request of the responding party, the court may determine the responsibility for the reasonable costs of producing such ESI;

(d) A party may serve on another party a request for designated ESI, including documents, email messages and other electronically recorded messages and communications, photographs, sound recordings, drawings, charts, graphs and other data or data compilations, including back-up and archived copies of ESI – stored in any medium from which information could be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form;

(e) The request must describe with reasonable particularity each item or category of items to be produced. The request must also state the form or forms in which ESI is to be produced;

(f) The responding party must respond to each item or category of items or state an objection to the request including the basis of the objection, within thirty days of the receipt of the request;

(g) The responding party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(h) The responding party need not produce the same ESI in more than one form;

(i) The responding party does not waive privileged information by its inadvertent disclosure under this rule.

(j) Inadvertently disclosed privileged ESI is subject to "claw-back" at the request of the responding party. If agreement is not reached by opposing counsel or the litigants concerning any "claw-back" requests, the Court may decide any disputes.

(k) A party may also serve on another party a request to permit the requesting party and or its representatives to inspect, copy, test or sample the ESI in the responding party's possession or control.

COMMITTEE NOTES:

There is currently no rule codifying electronic discovery in New Hampshire. The Committee believes that the discovery of electronically stored information (ESI) stands on equal footing with the discovery of paper documents. It is likely that the growth of ESI and the systems for the creating and storing of such information will continue to be dynamic as technology continues to advance. For that reason, this Rule does not seek to precisely define ESI.

Self-represented persons are also subject to the duty to preserve such ESI.

For a resource to both litigants and judges dealing with the issues of electronically stored information, reference is made to "Navigating the Hazards of E-discovery" published by the Institute of the Advancement of the American Legal System.

This Rule is similar to Fed.R.Civ.P. 34 but with changes based on the Committee's discussion and consensus.

Civil Justice Initiative

New Hampshire: Impact of the Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules

August 19, 2013

NCSC
National Center for State Courts
Williamsburg, Virginia

Note: The Carroll County Superior Court was one of two courts to implement the PAD rules on a pilot basis beginning October 1, 2010. The Strafford County Superior Court was the second pilot court.

Paula Hannaford-Agor, JD
Director, NCSC Center for Jury Studies

Nicole L. Waters, Ph.D.
Principal Court Research Consultant

Cynthia G. Lee, JD
Court Research Associate

Susan Keilitz, JD
Principal Court Research Consultant

Acknowledgements

The NCSC would like to thank the following individuals for their assistance and support of this evaluation.

NEW HAMPSHIRE JUDICIAL BRANCH

Chief Justice Linda S. Dalianis, Supreme Court of New Hampshire

Chief Justice John Broderick (ret.), Supreme Court of New Hampshire

Justice Robert J. Lynn, Supreme Court of New Hampshire, Co-chair of the PAD Pilot Rules Committee

Chief Justice Tina L. Nadeau, Superior Court of New Hampshire

Justice Steven M. Houran, Superior Court of Carroll County

Patricia Lenz, Clerk of Court, Superior Court of Carroll County

Elaine Silvia, Superior Court of Carroll County

Lynne Dennis, Superior Court of Carroll County

Justice Kenneth C. Brown, Superior Court of Strafford County

Julie W. Howard, Clerk of Court, Superior Court of Strafford County

Justice Marguerite L. Wageling, Superior Court of Strafford County

Rebecca Kellerman, Superior Court of Strafford County

NEW HAMPSHIRE ADMINISTRATIVE OFFICE OF THE COURTS

Donald D. Goodnow, Director, Administrative Office of the Courts

Cheryl Bennett, Senior Systems Analyst

Lisa McManis, Executive Assistant

Barbara Sweet, Esq. Superior Court Administrator

Sandy Wentworth, IT Project Manager

PAD PROJECT RULES COMMITTEE

Philip Waystack, Co-Chair of the PAD Pilot Rules Committee (Waystack Frizzell, Colebrook, NH)

Michael Callahan (Gallagher, Callahan & Gartrell, PC, Concord, NH)

Bruce Felmly (McLane, Graf, Raulerson & Middleton, Manchester, NH)

Wilbur Glahn (McLane, Graf, Raulerson & Middleton, Manchester, NH)

Jeanne Herrick (New Hampshire Dept. of Justice, Civil Bureau, Concord, NH)

Jeffrey Osburn (McDowell & Osburn, North Hampton, NH)

R. Peter Taylor (McNeill, Taylor & Gallo, Dover, NH)

Martha Van Oot (Jackson Lewis, LLP, Portsmouth, NH)

James Wheat (Wadleigh, Starr & Peters, PLLC, Manchester, NH)

OTHER CONTRIBUTORS

Gary Burt (Primmer, Piper, Eggleston & Cramer, Manchester, NH)

Peter Callaghan (PretiFlaherty, Concord, NH)

James Cowles (Walker & Varney, Concord, NH)

Leslie H. Johnson (Law Office of Leslie H. Johnson, Center Sandwich, NH)

Emmanuel Krasner (Krasner Law Office, Farmington, NH)

Paul Monzione (Law Offices of Paul Monzione, Wolfeboro, NH)

Robert C. Wunder (Robert C. Wunder Law Office, Dover, NH)

Table of Contents

Introduction

Across the nation, a growing chorus of judges, lawyers, business leaders, and consumer advocates is calling for reforms to the American civil justice system. Civil litigation, they argue, has become too time-consuming, too expensive, and too unpredictable. Both plaintiffs and defendants claim they are forced to settle cases because the cost of pursuing litigation through trial greatly outweighs settlement costs. For some litigants, the costs of initiating litigation are so high that they are effectively excluded from the civil justice system entirely; plaintiffs forego filing claims and defendants accept a default judgment rather than respond to a complaint. Recent surveys of judges and lawyers have identified discovery as a frequent source of unnecessary cost and delay.[1] Other factors perceived to be driving up costs are excessively adversarial relationships between opposing counsel, too little pretrial supervision by judges, and complications with electronic discovery.[2]

To address these concerns, many state and federal courts have begun to develop and implement civil justice reform efforts intended to streamline the litigation process, to minimize the potential for discovery disputes, and to expedite the fair resolution of civil cases.[3] New Hampshire was one of the first jurisdictions to revise its rules of civil procedure with these objectives in mind. The project began under the leadership of Chief Justice John Broderick (ret.) of the Supreme Court of New Hampshire. In 2009 he appointed eight members of the New Hampshire Fellows of the American College of Trial Lawyers. Their task was to review the report and recommendations of the Institute for the Advancement of the American Legal System (IAALS), which outlined 29 principles concerning effective civil procedure, and to recommend appropriate revisions to the New Hampshire Rules of Civil Procedure given the unique characteristics of civil practice in the New Hampshire Superior Court. Justice Robert Lynn, then Chief Justice of the New Hampshire Superior Court, and Philip Waystack co-chaired the committee.[4]

Based on their discussions, the committee ultimately proposed the Proportional Discovery/Automatic Disclosure (PAD) Rules, a set of five rules governing pleadings, case structuring orders, automatic disclosure, written interrogatories and depositions, and discovery of electronically stored information (ESI).[5] To test the rules' effectiveness, the committee also recommended that the rules be enacted on a pilot basis in Carroll and Strafford Counties. These courts were selected in part because their respective Chief Judges and Clerks of Court[6] had expressed interest in the proposed reforms and were willing to cooperate in a pilot test. In addition, both courts had recently converted to a new case management system, which was being implemented on a rolling basis statewide, so court administrative staff had time to assist in the implementation of the new rules. On April 6, 2010, the Supreme Court of New Hampshire entered an Order adopting the PAD rules on a pilot basis in Carroll and Strafford Counties effective October 1, 2010 with the expectation that the rules would apply to all newly filed civil cases. Before the rules went into effect, the PAD Pilot Rules Committee and the pilot courts undertook a fairly extensive effort to educate the local bar about the changes.

State and federal courts across the nation are very interested in the impact of these and other civil justice reform efforts. To ensure that state courts would have access to reliable information on which to judge the efficacy of those efforts, the National Center for State Courts (NCSC) secured a grant from the Bureau of Justice Assistance of the U.S. Department of Justice to conduct evaluations of civil rules reform projects in up to four jurisdictions.[7] With the support of the Supreme Court of New Hampshire, the PAD Pilot Rules were selected as the first project to be evaluated.

---

[1] CORINA GERETY, EXCESS & ACCESS: CONSENSUS ON THE AMERICAN CIVIL JUSTICE LANDSCAPE 8 (2011).
[2] *Id.*
[3] Civil justice reform efforts encompass a range of initiatives including efforts to ensure that discovery activity is proportional to the issues at stake in the litigation, to expedite trial dates, and to restrict the amount of time expended in trial.
[4] In November 2010, Justice Lynn was appointed to the Supreme Court of New Hampshire.
[5] PAD Pilot Rules Project: Report and Proposed Rule Changes.
[6] Judge Kenneth C. Brown and Clerk of Court Julie Howard, and Judge Steven M. Houran and Clerk of Court Patricia Lenz agreed to oversee the implementation of the rules in Strafford and Carroll Counties, respectively.
[7] BJA No. 2009-D1-BX-K038. In addition to the New Hampshire PAD Pilot Rules Evaluation, the NCSC is evaluating the impact of civil justice reforms in Utah (revisions to U.R.C.P. Rule 26) and Oregon (Expedited Civil Jury Trial Program), and recently completed a series of case studies of summary jury trial programs in six jurisdictions.

Summary of PAD Pilot Rules and Evaluation Hypotheses

The PAD Pilot Rules enacted on October 1, 2010 apply to all newly filed non-domestic civil cases.[8] The rules are not retroactive and thus do not apply to cases filed before October 1, 2010.

Pilot Rule (PR) 1 changed the pleading standard in New Hampshire from notice pleading to fact pleading. Parties are required to file a Complaint or Answer and to state the material facts on which any claim or defense is based. The intent of this rule is to expedite the case initiation process for both the plaintiff and the defendant by providing each with sufficient factual information to begin evaluating the merits of their respective positions. This rule replaces the previous system of notice pleading in which plaintiffs filed a writ providing notice of the suit, and defendants entered an appearance acknowledging the suit, but neither party was required to specify the factual basis for the suit or defenses until discovery was underway.

PR 2 requires the parties to meet and confer within 20 days of the filing of the Answer to establish deadlines for various discovery events, alternative dispute resolution (ADR) proceedings, dispositive motions, and a trial date, and submit a written stipulation to the court, which becomes the case structuring order. If the parties are unable to agree on these deadlines or other pretrial matters, the court will schedule a structuring conference and will issue a case structuring order accordingly. For parties who are able to reach an agreement on all aspects of case structuring, the revised rule eliminates the need for a case structuring conference. The rule also specifies the use of telephonic structuring conferences rather than in-court structuring conferences to reduce costs and increase efficiency. Finally, PR 2 extends the period for holding the case structuring conference from 45 days to 75 days after filing in light of the revisions to PR 1 and PR 3 requiring fact pleadings and automatic disclosure to provide counsel with sufficient time to consider these materials.

PR 3 requires the parties to automatically disclose the names and contact information of individuals with information about the disclosing party's claims and defenses, and a brief summary of the information possessed by each person. The rule also requires the parties to automatically disclose all documents, electronically stored information, and tangible things to support the disclosing party's claims and defenses including a computation of damages (by category) and insurance agreements or policies under which any damages might be paid. Under PR 3, the parties have an affirmative duty to supplement their disclosures with any newly acquired information, and the court may impose sanctions against any party that fails to make these disclosures including barring the use of evidence related to those disclosures at trial.[9] Like PR 1, the revision is intended to expedite discovery and to minimize gamesmanship and delay in the pretrial process.

PR 4 restricts the number of interrogatories that any party may serve to no more than 25, and the number of hours of deposition to 20 hours. These restrictions were put in place in light of the amount of information that parties are now entitled to under PR 1 and PR 3, which are expected to greatly reduce the amount of discovery needed to prepare for trial. These limitations may be waived by stipulation of the parties or by the court for good cause.

PR 5 establishes a separate meet and confer requirement for counsel to discuss the preservation of electronically stored information (ESI), and to agree on deadlines and procedures involving the production of ESI. PR 5(c) specifically requires that requests for ESI be proportional to the significance of the issues in dispute.

NCSC staff reviewed background information about the purposes of and expectations for the PAD Pilot Rules, flowcharts depicting case events and timelines required under the PAD Pilot Rules, and court forms to correspond to these PAD requirements. They also conducted interviews with a number of individuals, including judges, attorneys, court clerks and staff of the Administrative Office of the Courts, who were involved in drafting the PAD Pilot Rules and implementing them in Carroll and Strafford Counties. Based on this information, NCSC identified the following working hypotheses about the expected impact of the PAD Pilot Rules on civil case processing.

- The introduction of fact pleadings (PR 1) and automatic disclosures (PR 3) are expected to reduce the time from filing to disposition. This effect will occur primarily through a reduction in the amount of time expended on case initiation and discovery.
- The introduction of fact pleading (PR 1) and automatic disclosure (PR 3) are expected to reduce the number of discovery disputes. This effect will occur primarily by making most of the previously discoverable information (and thus subject to dispute) routinely available to the parties without the need for court intervention, and thus not as amenable to strategic gamesmanship. Alternatively, the introduction of fact pleading (PR 1) and automatic disclosure (PR 3) may delay the onset of discovery disputes as counsel become aware of additional information needed at a later stage in litigation.
- The requirement to meet and confer regarding case structuring (PR 2) is expected to reduce the number of in-court case structuring conferences. The reduction in in-court case structuring conferences will be partially offset by an increase in the number of telephonic case structuring conferences.
- The amount of time between the filing of the Answer and the date of the case structuring conference (PR 2) is expected to increase due to the extension of time from 45 days to 75 days specified in the rule. Alternatively, telephonic case structuring conferences may be scheduled more quickly than in-court conferences, which may offset some of the time differential.
- Litigation costs are expected to decrease as a result of the reduction in the amount of time expended in case initiation and discovery.
- Litigation costs are expected to decrease due to the use of telephonic case structuring hearings.

The PAD Pilot Rules enacted on October 1, 2010 apply to all newly filed non-domestic civil cases. The rules are not retroactive and thus do not apply to cases filed before October 1, 2010.

[8] The PAD Pilot Rules exempt some types of civil matters, primarily filings related to criminal matters (e.g., civil stalking petitions, grand jury matters, habeas petitions, bond claims) and agency appeals (e.g., Labor Board, Dept. of Motor Vehicles).
[9] Pursuant to Rule 35(g)(2) of the Rules of Superior Court, permissible sanctions for discovery abuse include imposing monetary sanctions, ordering that designated facts be taken as established by the party adversely affected by the abuse, prohibiting the offending party from introducing certain matters into evidence, striking all or part of the claims or defenses, entering full or partial judgment in favor or the plaintiff or defendant, or staying the proceedings ordered discovery has been provided.

Evaluation Methodology and Data

This evaluation employs a quasi-experimental design that compares case processing outcomes for cases filed in the pilot courts under the PAD Pilot Rules with those for cases filed under the previous rules of civil procedure. By restricting the analysis to the pilot courts instead of comparing the pilot courts to other Superior Courts in New Hampshire, this strategy avoids potential bias associated with baseline differences in case processing practices and outcomes between the pilot courts and other courts that are unrelated to the PAD Pilot Rules. This is especially important in a small state such as New Hampshire, where the individual practices of a single judge or court clerk can have a large influence on case processing statistics for an entire court, making it impossible to isolate the impact of other factors such as variations in court rules.[10]

The pre-implementation data cover Superior Court cases filed in Carroll and Strafford Counties between July 1, 2008 and June 30, 2010. The post-implementation data describe cases filed between October 1, 2010 and September 30, 2012.[11] Each group includes all case types subject to the PAD Pilot Rules filed in the pilot counties during the time period in question. Both pre-implementation and post-implementation cases were followed until February 1, 2013.

Table 1: Civil Cases Filed in Carroll and Strafford Counties, July 1, 2008 – June 30, 2010 and October 1, 2010 – September 30, 2012

COUNTY	PRE-IMPLEMENTATION	POST-IMPLEMENTATION	TOTAL
Caroll			
number	475	473	948
percentage	50%	50%	100%
Strafford			
number	1,098	901	1,999
percentage	55%	45%	100%
Total			
number	1,573	1,374	2,947
percentage	53%	47%	100%

notes: Includes only case types subject to PAD rules. 24 additional cases excluded due to missing data or as duplicates.

[10] The evaluation team explored the possibility of comparing the change in case processing statistics over time between the two pilot courts and two similar courts that did not implement the PAD Pilot Rules, in order to isolate the impact of the PAD Pilot Rules from the influence of any statewide phenomena that might have occurred over the same period. This approach proved impracticable due to small sample sizes and the appointment of a new court clerk in one of the comparison courts during the evaluation period, an event that was associated with dramatic changes in case processing practices in that court.

[11] The three-month gap in filing dates between the end of the pre-implementation period and the beginning of the post-implementation period was designed to avoid potential complications related to strategic filing in advance of the PAD implementation date by attorneys wishing to litigate their cases under the previous rules of civil procedure. Due to constraints in the project timeline, it was not possible to allow a similar gap between the PAD implementation date of October 1, 2010 and the beginning of post-implementation data collection.

The final data set comprises 2,947 cases.[12] Sixty-eight percent (1,999 cases) were filed in Strafford County, with the remaining 32 percent filed in Carroll County (see Table 1). Just under half (47%) were processed under the PAD Pilot Rules.

Table 2 compares the caseload composition for the pre-implementation and post-implementation data. During both the pre-implementation and post-implementation periods, debt collection cases represented the largest share of civil caseloads, followed by tort cases. There is a small but statistically significant difference in caseload composition between the pre-implementation and post-implementation periods, driven primarily by a decrease in the proportion of contract/commercial cases and an increase in the proportion of petitions for equitable relief (e.g., accountings, partnership dissolution, receivership, specific performance, and injunctive relief).

Table 3 shows the length of observation and the percentage of cases that reached a disposition during the observation period for the pre-implementation and post-implementation data. Each case was observed until the entry of the initial judgment or until February 1, 2013, whichever occurred first.

Table 2: Civil Caseload Composition for Carroll and Strafford Counties

CASE TYPE	PRE-IMPLEMENTATION	POST-IMPLEMENTATION
Contract/commercial	14%	10%
Debt collection	34%	34%
Tort	29%	29%
Real property	5%	6%
Petition	15%	18%
Administrative agency appeal	2%	2%
Other	1%	1%
Total	100%	100%
Chi-square	191,167	
Degrees of freedom	6	
$p(\chi^2)$	.004	

n = 2,947
notes: Includes cases filed July 1, 2008 – June 30, 2010 and October 1, 2010 – September 30, 2012. Includes only case types subject to PAD rules.

[12] Twenty-four additional cases were excluded from the analysis due to missing disposition dates or because they appeared to be duplicate records.

Because the pre-implementation cases were filed earlier, it was possible to follow them for a longer period of time. The average length of observation was 55 days longer for pre-implementation cases than for post-implementation cases (289 days versus 234 days); the maximum period of observation was nearly twice as long (1,662 days versus 846 days). The longer time horizon for data collection provided a greater opportunity for pre-implementation cases to reach a disposition during the period of observation: 99 percent of pre-implementation cases were resolved within the observation period, as compared to 75 percent of post-implementation cases. To avoid any bias in the evaluation results associated with the different follow-up periods for pre-implementation and post-implementation cases, the evaluation team employed survival analysis techniques as well as restrictions on the timing of certain case events.

To provide a broader context for the evaluation findings, in October 2011 NCSC staff conducted qualitative interviews with key stakeholders involved in the development and implementation of the PAD Pilot Rules, including judges, court clerks, court staff, staff of the New Hampshire Administrative Office of the Courts. To gain the perspectives of practitioners, NCSC staff also interviewed attorneys who had litigated cases under the PAD Pilot Rules but had not been involved in the development of the rules.[13]

Table 3: Length of Observation and Percentage Disposed for Cases in Evaluation Data Set

	PRE-IMPLEMENTATION	POST-IMPLEMENTATION	TOTAL
Time observed (days)			
mean	289	234	263
maximum	1,662	846	1,662
Percentage disposed	99%	75%	87%
n	1,554	1,362	2,916

notes: Includes Superior Court cases filed in Carroll and Strafford Counties July 1, 2008 – June 30, 2010 and October 1, 2010 – September 30, 2012. Includes only case types subject to PAD rules.

[13] NCSC also pilot tested a new methodology for estimating civil litigation costs with a small sample of extremely experienced civil trial attorneys who routinely practice in counties other than Strafford and Carroll Counties and a second sample of attorneys who routinely practice in the PAD courts. *See* PAULA HANNAFORD-AGOR & NICOLE L. WATERS, CASELOAD HIGHLIGHTS: ESTIMATING THE COST OF CIVIL LITIGATION (Jan. 2013). Unfortunately, the attorney characteristics for the two samples were sufficiently different in terms of law firm size, client base, and the size of the local population that differences in the cost estimates could not be attributed solely to the implementation of the PAD Pilot Rules rather than to differences among the survey respondents.

The most important working hypothesis concerning the impact of the PAD Pilot Rules was an expected reduction in the time from filing to disposition. Virtually all of the PAD Pilot Rule provisions were intended to expedite the pleading and discovery process, permitting litigants to resolve cases more quickly. Of course, a necessary condition for this impact to take place is litigant awareness of and compliance with the rules changes. This section examines the pre-implementation and post-implementation case-level data to determine whether civil cases filed in Carroll and Strafford Counties resolve more quickly after implementation of the PAD Pilot Rules and the extent to which litigants complied with the new requirements.

TIME TO DISPOSITION

To analyze the impact of the PAD Pilot Rules on time to disposition, the NCSC employed survival analysis techniques. Survival analysis examines how long a unit (e.g., a civil case) "survives" in one state (e.g., pending) before experiencing "failure," or a transition to another state (e.g., disposed). In practice, it is not possible to observe the event of failure for each unit in a sample because some units will not fail until after the study has concluded. For these observations, known as "censored" observations, the observed survival time ends when the study's follow-up period ends, which is earlier than the actual point of failure. Because the observed survival times of the censored observations are shorter than their actual survival times, classical linear regression would produced biased estimates of the effects of the independent variables on survival time and might lead to erroneous conclusions about these impacts. Unlike linear models, survival models take censoring into account, eliminating the associated bias.[14]

Here, the unit of analysis is the case, failure is defined as the first disposition, and survival time is defined as the number of active days from filing until disposition or the end of the follow-up period, whichever occurred first.[15] Kaplan-Meier survival analysis was employed to provide a graphical comparison of the survivor functions for pre-implementation and post-implementation cases. The Cox proportional hazards model then controlled for the influence of multiple explanatory variables, such as case type and pilot court, on the probability of disposition.

Figure 1 shows the Kaplan-Meier survivor functions for pre-implementation and post-implementation cases.[16] Each survivor function plots the cumulative probability of a case's "surviving" without a disposition (on the vertical axis) up to a particular point in time (on the horizontal axis). If the PAD Pilot Rules reduce the time from filing to disposition — and hence the cumulative probability of survival at any given point in time — the curved line illustrating the survivor function for post-implementation cases should lie below the curved line illustrating the survivor function for pre-implementation cases. Contrary to expectations, however, the two survivor functions are virtually identical.[17] The log-rank test confirms that there is not a statistically significant difference in the time path of case dispositions between the two groups of cases.[18]

To provide a more nuanced picture of the PAD Pilot Rules' impact on time to disposition, the NCSC employed the Cox multivariate survival analysis. Unlike the bivariate Kaplan-Meier technique, the Cox model can account for the impact of multiple explanatory variables on survival time. If factors other than whether the case was subject to the PAD Pilot Rules — such as case type — are correlated both with time to disposition and with whether the case was subject to

[14] *See* JANET M. BOX-STEFFENSMEIER & BRADFORD S. JONES, EVENT HISTORY MODELING 7-16 (2004).

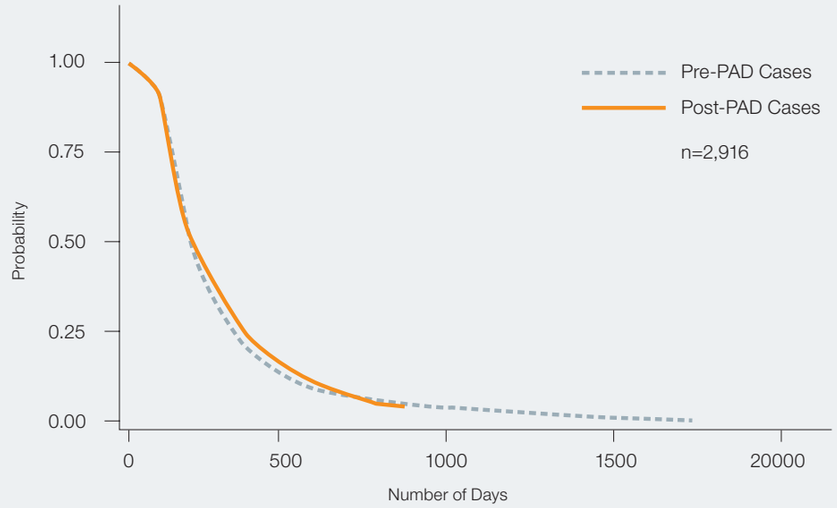
[15] Survival time does not include time spent in an inactive pending status.

[16] The Kaplan-Meier technique relies upon no assumptions regarding the shape of the baseline survivor function, estimating the function entirely on the basis of the available data and eliminating the possibility of bias due to faulty assumptions about the functional form. The technique estimates the survivor function by calculating the cumulative probability of survival at each failure point. Each case in which the event of failure was observed is factored into the analysis along the entire curve. A censored observation, in which the event of failure was not observed, is only factored into the analysis up to the time when observation ceased.

[17] Because pre-implementation cases were observed for a longer time than post-implementation cases, the survivor function for pre-implementation cases can be estimated over a longer period than the survivor function for post-implementation cases. This is why the survival curve for post-implementation cases appears to be shorter than the survival curve for post-implementation cases.

[18] The log-rank test fails to reject the null hypothesis that the survivor functions for the two groups are equivalent (chi-square = 1.30, 1 degree of freedom, $p(\chi^2) = 0.255$).

Figure 1: Cumulative Probability of Survival Without Disposition for Pre-Implementation and Post-Implementation Cases



the PAD Pilot Rules, failure to include these variables in the model may lead to a biased estimate of the PAD Pilot Rules' impact on time to disposition. The Cox model accommodates these additional explanatory variables, eliminating that bias.

The primary variable of interest in the Cox model is an indicator for cases filed after implementation of the PAD Pilot Rules. Because the caseload composition differs somewhat between the pre-implementation and post-implementation groups, and because case type affects time to disposition, our Cox model includes a set of dummy variables for case type. Because case processing practices may have differed between the two pilot courts, the model also includes an indicator variable for court.[19]

The estimated effects of the explanatory variables in the Cox model are presented in terms of hazard ratios. Each hazard ratio shows the impact of a one-unit change in the value of the explanatory variable on the probability of a case disposition's occurring at any particular point in time, provided that the case has remained open up until that time.[20] A hazard ratio greater than one indicates that the explanatory variable increases the probability of disposition at any given point in time, decreasing overall time to disposition. Conversely, a hazard ratio less than one indicates that the explanatory variable decreases the probability of disposition at any given point in time, increasing time to disposition. If the PAD Pilot Rules have the intended effect of reducing time to disposition, the hazard ratio on the PAD indicator should be greater than one.

Table 4 displays the estimated Cox model. Contrary to expectations, the hazard ratio of .94 on the PAD indicator does not differ significantly from 1.00. In other words, the model does not show that the PAD Pilot Rules have a statistically significant impact on the probability of a case disposition. Taken together, the results of the Kaplan-Meier and Cox analyses provide no evidence that the PAD Pilot Rules have had the desired effect of reducing time to disposition. To confirm that the lack of an impact on time from filing to disposition is due to the PAD Pilot Rules themselves rather than to litigant noncompliance with the rules, the next several analyses investigate the extent to which legal practice changed in response to the new rules.

Table 4: Estimate Relative Risks of Case Disposition, Cox Proportional Hazards Model

VARIABLE	HAZARD RATIO	P(|Z|)
Filed after PAD implementation	.94	.130
Case type (reference = tort)		
Contract	1.12	.104
Debt collection	2.95	< .001
Real property	1.05	.639
Petition	20.66	< .001
Agency appeal	.02	.002
Other	1.35	.153
Carrol County (reference = Strafford)	1.84	.006
Time-varying effects*		
Debt collection	.95	.290
Petition	.60	< .001
Agency appeal	2.36	< .001
Carrol County	.86	< .001

n= 2,916; 2,549 failures
*Variables with time-varying effects interatcted with ln (survival time).

[19] The Cox model relies upon the assumption that the impact of each explanatory variable on the risk of failure remains constant over time; this assumption is also known as the proportional hazards assumption. When the data do not support this assumption with respect to a particular variable, it is necessary to model the time-dependence of that variable's effect by including an interaction between the variable in question and a function of time. Here, interactions between the natural logarithm of survival time and the dummy variables for collections cases, petitions, agency appeals, and cases filed in Carroll County were included in the analyses.

[20] More formally, a hazard ratio is the ratio of the hazard rate associated with a one-unit change in the value of the explanatory variable to the baseline hazard rate, holding the values of all other explanatory variables constant. Each hazard rate represents the conditional probability of a failure's occurring within some particular interval of time, conditional on the unit's survival until the beginning of the interval. *See* BOX-STEFFENSMEIER & JONES, *supra* note 14, at 13-15, 50.

ANSWERS

PR 1 requires each defendant to file an Answer to the Complaint. Under the previous rules of civil procedure, an Answer was not required. The PAD Pilot Rules are therefore expected to greatly increase the proportion of cases in which an Answer is filed. The facts alleged or denied in the Complaint and Answer were intended to inform litigants of their opponents' positions and expedite their assessment of those allegations. To ascertain whether this impact occurred, the NCSC compared the proportion of cases in which an answer was filed within 120 days after the filing of the complaint before and after the implementation of the PAD Pilot Rules (Table 5).[21] This proportion rose from 15 percent to 56 percent, a statistically significant increase. The qualitative interviews indicated that many New Hampshire attorneys are familiar with the Federal Rules of Civil Procedure (which also require fact pleading and an Answer) because they also practice in federal court or in Maine, which follows the federal rules, and younger attorneys have recent exposure to the federal rules in law school. These attorneys reported that they routinely engaged in fact pleading and sometimes filed Answers in Superior Court even before the PAD Pilot Rules were implemented. This phenomenon likely explains the 15 percent answer rate observed before the implementation of the PAD Pilot Rules.

PR 1 requires the defendant to file an Answer within 30 days. Because the PAD Pilot Rules do not explicitly abolish the existing requirement that the defendant enter an appearance within seven days after the return date,[22] the Superior Courts in Stafford and Carroll Counties also require the defendant to enter an appearance within 30 days after service of the Complaint.[23] During the pilot period, a defendant's failure to file an Answer and/or enter an appearance within 30 days after service of the Complaint resulted in the automatic issuance of a notice of conditional default. The court then allowed the defendant to cure the default by filing an Answer and/or entering an appearance.[24]

Table 6 shows the percentage of cases in the post-implementation group in which a notice of conditional default for failure to file an Answer and/or appearance was issued within 120 days of case filing.[25] The rate of conditional default involving failure to file an Answer (13 percent) was slightly less than the rate of conditional default due solely to failure to file an appearance (14 percent).[26]

Table 7 shows the percentage of conditional defaults for failure to file an Answer that led to the subsequent filing of an Answer. Overall, 37 percent of defendants

[21] In order to avoid bias due to the fact that cases filed earlier were observed for a longer period, it was necessary to consider only answers filed within a fixed window of time. PR 1 requires that the answer be filed within 30 days after the complaint is served on the defendant, which may occur 45 days or more after the complaint is filed in court. To allow sufficient time for service and to accommodate extensions of time to file the answer, a window of 120 days after filing was selected for purposes of this analysis.

[22] N.H. SUP. CT. R. 14(a) (2013).

[23] Memorandum from Julie W. Howard, Clerk, Strafford County Superior Court to Attorneys, Legal Assistants & Litigants 7 (Jan. 22, 2013), *available at* http://www.courts.state.nh.us/superior/civilrulespp/PRIMER-on-PAD-Rules.pdf.

[24] As of October 1, 2012, a notice of default replaced the notice of conditional default for failure to file an answer or failure to file an answer and appearance. Because the PAD Pilot Rules neither require nor explicitly eliminate the requirement that the defendant enter an appearance, a notice of conditional default is still issued when the defendant files an answer but not an appearance. *Id.* at 10.

[25] The pre-implementation data did not reliably indicate conditional default rates for failure to file an Appearance. Consequently, the NCSC was unable to compare the pre-implementation and post-implementation data.

[26] The focus on notices of conditional default for failure to file an Answer and the responses to those notices is intended to measure the extent to which litigants are complying with the provisions of the PAD Pilot Rules. As a practical matter, approximately 11% of the pre-implementation cases ultimately resolved by default judgment because the defendant declined to challenge the plaintiff's claims. *See* Tables 13-15, *infra*. The frequency of strategic default should not be confused with that of unintentional non-compliance with the rules.

Table 5: Percentage of Cases With Answer Filed Within 120 Days of Case Filing for Pre-Implementation and Post-Implementation Cases

ANSWER FILES WITHIN 120 DAYS	PRE-IMPLEMENTATION	POST-IMPLEMENTATION
No answer	85%	44%
Answer filed	15%	56%
Total	100%	100%
Chi-square	568,031	
Degrees of freedom	1	
$p(\chi^2)$	< .001	

n = 2,947
notes: Includes cases filed July 1, 2008 – June 30, 2010 and October 1, 2010 – September 30, 2012. Includes only case types subject to PAD rules.

Table 6: Rate of Conditional Default for Failure to File Answer and/or Appearance, Post-Implementation Cases

TYPE OF CONDITIONAL DEFAULT	PERCENTAGE OF CASES
Failure to file answer and appearance	7%
Failure to file answer	6%
Failure to file appearance	14%
All types	27%

n = 1,374
notes: Includes cases filed October 1, 2010 – September 30, 2012. Includes only case types subject to PAD rules.

Table 7: Percentage of Conditional Defaults For Failure to File Answer With Answers Subsequently Filed, Post-Implementation Cases

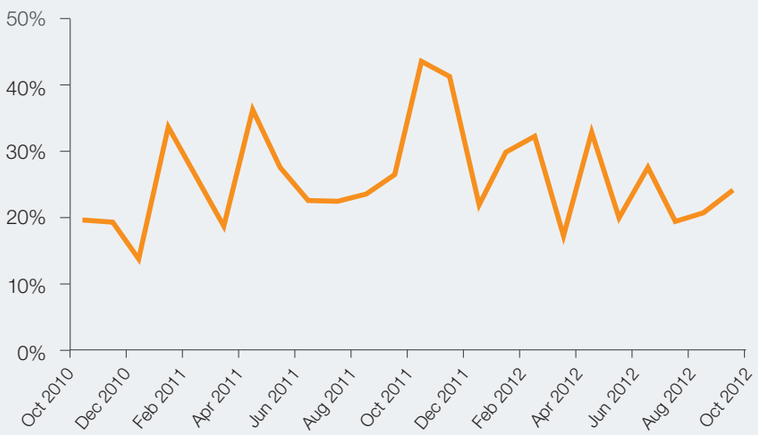
TYPE OF CONDITIONAL DEFAULT	PERCENTAGE WITH SUBSEQUENT ANSWER
Failure to file answer and appearance	16%
Failure to file answer	62%
Failure to file answer and appearance *or* answer only	37%

n = 175
notes: Includes cases filed October 1, 2010 – September 30, 2012, of case types subject to PAD rules, in which a notice of conditional default due to failure to file answer and appearance or failure to file answer was filesd with 120 days after case filing. Includes only answers filed subsequent to notice of conditional default and within 120 days after filing.

who received a notice of conditional default for failure to file an Answer went on to file an Answer. Answers were much more common in cases where the notice of conditional default was issued only for failure to file an Answer (62 percent) than in cases where the conditional default was due to failure to file both an Answer and an appearance (16 percent).[27]

To determine whether compliance with the Answer and appearance requirements improved as attorneys gained familiarity with the PAD procedures, Figure 2 plots the rate of conditional default for failure to file an Answer and/or appearance by month of case filing for post-implementation cases.[28] The rate ranges from 14 percent to 44 percent, with no trend evident over time. This suggests that there was no significant "learning curve" as lawyers acclimated to the new rules, but rather reflects normal fluctuations in the conditional default rate over time.

Figure 2: Rate of Conditional Default for Failure to File Answer and/or Appearance By Month for Post-Implementation Cases



n = 1,374
notes: Includes only case types subject to PAD Pilot Rules.

STRUCTURING CONFERENCES

The requirement in PR 2 for the attorneys to meet, confer, and file a proposed structuring order within 20 days after the filing of the Answer is designed to reduce the need for structuring conferences, saving time and money for litigants, attorneys, and the court. When the parties cannot agree on a complete structuring order on their own, PR 2 instructs the court to hold the structuring conference by telephone whenever possible. This measure is intended to produce further cost savings by eliminating the need for attorneys to appear for in-court hearings, many of which were perfunctory matters.

To address the question of whether the PAD Pilot Rules have reduced the need for structuring conferences, Table 8 compares the proportion of cases in which a structuring conference was held within 270 days after the filing of the Complaint before and after the implementation of the PAD Pilot Rules.[29] To ascertain the degree to which telephonic structuring conferences have replaced in-person structuring conferences, Tables 9 and 10 compare the proportion of cases in which each type of structuring conference was held within 270 days after filing. The proportion of cases in which any structuring conference was held within 270 days fell from 34 percent to 9 percent after implementation of the PAD Pilot Rules (Table 8). At the same time, the proportion of cases in which an in-person structuring conference was held within 270 days dropped from 31 percent to 2 percent (Table 9), while the proportion of cases in which a telephonic structuring conference was held within 270 days rose from 3 percent to 7 percent (Table 10). All of these differences are statistically significant.

Table 8: Percentage of Cases With Structuring Conference Within 270 Days of Filing for Pre-Implementation and Post-Implementation Cases

STRUCTURING CONFERENCE HELD WITHIN 270 DAYS	PRE-IMPLEMENTATION	POST-IMPLEMENTATION
No structuring conference	66%	91%
Structuring conference held	34%	9%
Total	100%	100%
Chi-square	214.784	
Degrees of freedom	1	
$p(\chi^2)$	< .001	

n = 2,699
notes: Includes cases filed July 1, 2008 – June 30, 2010 and October 1, 2010 – May 7, 2012. Includes only case types subject to PAD rules.

[27] The post-implementation data did not reliably indicate whether an appearance was filed in cases involving a conditional default for failure to file an answer.
[28] The focus on conditional default by month of filing, rather than month of entry of judgment, eliminates the potential for higher rates related to periodic sweeps for defaults by court clerks.

[29] The 270-day time window was selected to allow sufficient time for service of the complaint, the filing of the answer, and the scheduling of the structuring conference. Only cases filed at least 270 days before the end of the follow-up period were included in this analysis. As a practical matter, however, three-quarters of case structuring conferences were held within the first five months after filing (148 days). Half of the case structuring conferences took place within approximately 3.5 months after filing (111 days), significantly earlier than the 270-day margin employed in these analyses.

Table 9: Percentage of Cases With In-Person Structuring Conference Within 270 Days of Filing for Pre-Implementation and Post-Implementation Cases

IN-PERSON STRUCTURING CONFERENCE HELD WITHIN 270 DAYS	PRE-IMPLEMENTATION	POST-IMPLEMENTATION
No in-person structuring conference	69%	98%
In-person structuring conference held	31%	2%
Total	100%	100%
Chi-square	356.765	
Degrees of freedom	1	
$p(\chi^2)$	< .001	

n = 2,699
notes: Includes cases filed July 1, 2008 – June 30, 2010 and October 1, 2010 – May 7, 2012. Includes only case types subject to PAD rules.

Table 10: Percentage of Cases With Telephonic Structuring Conference Within 270 Days of Filing for Pre-Implementation and Post-Implementation Cases

TELEPHONIC STRUCTURING CONFERENCE HELD WITHIN 270 DAYS	PRE-IMPLEMENTATION	POST-IMPLEMENTATION
No telephonic structuring conference	97%	93%
Telephonic structuring conference held	3%	7%
Total	100%	100%
Chi-square	28.613	
Degrees of freedom	1	
$p(\chi^2)$	< .001	

n = 2,699
notes: Includes cases filed July 1, 2008 – June 30, 2010 and October 1, 2010 – May 7, 2012. Includes only case types subject to PAD rules.

Although the PAD Pilot Rules appear to have reduced the frequency of structuring conferences and replaced the majority of in-person structuring conferences with telephonic conferences, judges and court clerks report that many attorneys are failing to adhere to the meet-and-confer requirement or to file a proposed structuring order. Anecdotal reports from attorneys suggest that the timeline for the meet and confer requirement is too brief for attorneys who are unfamiliar with the PAD Pilot Rules or with federal practice, as well as for self-represented litigants. There is also anecdotal evidence that, contrary to the assumption behind the rules, courts are finding telephonic structuring conferences cumbersome to schedule.[30] For these reasons, some judges are reportedly moving towards scheduling in-court compliance hearings in place of telephonic case structuring conferences. During these hearings, the attorneys are required to explain why they have not filed a proposed structuring order in accordance with the PAD Pilot Rules.

Table 11 explores the sequence of the filing of the first structuring order[31] and the first structuring conference for cases filed before and after implementation of the PAD Pilot Rules.[32] Under the existing rules of civil procedure, many attorneys and litigants were already filing structuring orders either in place of a structuring conference (14 percent of cases) or in advance of the structuring conference (14 percent). After implementation of the PAD Pilot Rules, the proportion of cases in which a structuring order entirely replaced a structuring conference more than doubled to 34 percent, while the proportion of cases in which a structuring order was filed before a conference was held dropped to 2 percent. Consistent with the overall decline in the number of structuring conferences, the proportions of cases in which a structuring conference was held before the filing of a structuring order, and in which a structuring conference was held but no order was filed, each fell by more than one-half following implementation of the PAD Pilot Rules. These changes in event sequencing were statistically significant. Taken together, these observations suggest that, although many attorneys and litigants were already reaching agreement on some aspects of case structuring prior to the implementation of the PAD Pilot Rules, the new rules appear to encourage more frequent stipulation to complete structuring plans.

Table 11: Sequence of Structuring Order and Structuring Conference, Pre-Implementation and Post-Implementation Cases

SEQUENCE OF STRUCTURING ORDER AND CONFERENCE	PRE-IMPLEMENTATION	POST-IMPLEMENTATION
Neither order nor conference	53%	57%
Order only	14%	34%
Order before conference	14%	2%
Conference before order	14%	6%
Conference only	6%	2%
Total	100%	100%
Chi-square	291.347	
Degrees of freedom	4	
$p(\chi^2)$	< .001	

n = 2,699
notes: Includes cases filed July 1, 2008 – June 30, 2010 and October 1, 2010 – May 7, 2012. Includes only case types subject to PAD rules. Includes only events occurring within 270 days of case filing and before initial case disposition. Sum of percentages may exceed 100% due to rounding.

[30] Memorandum from Julie W. Howard, *supra* note 23, at 8-9.

[31] For purposes of this analysis, "structuring order" is defined as any type of structuring order, structuring conference order, or structuring conference statement, including proposed, stipulated, and final orders.

[32] To avoid bias due to the varying length of follow-up, this analysis is limited to cases filed at least 270 days before the end of the study period and counts only events that occurred within 270 days after case filing and prior to the initial disposition.

DISCOVERY DISPUTES

The automatic disclosure requirement in PR 3 is designed to forestall discovery disputes, thereby decreasing the potential for expensive satellite litigation related to discovery. To determine whether the requirement had an impact on the frequency of discovery disputes, we calculated the percentage of cases in which an event indicating the onset of a discovery dispute occurred within 365 days of case filing.[33] Such events included the filing of a motion for production of documents, motion for discovery, motion for protective order, motion to compel, motion to produce, motion for conditional default (which may be filed when interrogatories are not answered within 30 days), or petition for discovery, an objection to a request for admissions, and a hearing on a motion to compel or motion for discovery. Table 12 compares the frequency of discovery disputes for cases filed before and after the implementation of the PAD Pilot Rules.

Prior to the PAD implementation, discovery disputes were litigated in just 9 percent of cases. Contrary to expectations, there was not a statistically significant change in the proportion of cases in which a discovery dispute was litigated.

It is important to note that these discovery disputes were litigated in approximately one-tenth of civil cases in both the pre-implementation and post-implementation periods, which does not on its face suggest an overly litigious legal culture in which lawyers routinely complain of excessive discovery demands. The New Hampshire legal community has a reputation for collegiality. It is likely that when disagreements occur, most are resolved without court involvement. This does not discount the possibility that discovery disputes occur, but apparently they take place without court oversight and thus would be difficult to control through procedural rules.

Table 12: Percentage of Cases With Event Indicating Discovery Dispute Within 365 Days of Filing for Pre-Implementation and Post-Implementation Cases

DISCOVERY DISPUTE WITHIN 365 DAYS	PRE-IMPLEMENTATION	POST-IMPLEMENTATION
No event indicating discovery dispute	91%	90%
Event occurred indicating discovery dispute	9%	10%
Total	100%	100%
Chi-square	.467	
Degrees of freedom	1	
$p(\chi^2)$	.494	

n = 2,515
notes: Includes cases filed July 1, 2008 – June 30, 2010 and October 1, 2010 – February 2, 2012. Includes only case types subject to PAD rules.

[33] Three-quarters of discovery disputes are first raised by the tenth month (319 days) after filing; half are first raised within 6 months (193 days) after filing.

DEFAULT JUDGMENTS

Finally, the attorney interviews suggested that the PR 1 requirements of fact pleading and an answer might have the effect of decreasing the number of default judgments. Two possible explanations for this effect are that the writ system created the impression among some defendants that it was not necessary to appear on the return day unless the defendant wished to contest the suit, or that the fact pleading requirement provides defendants with more information upon which to base a defense. To assess the validity of the assumption that PR 1 leads to fewer defaults, Table 13 compares the proportion of cases in which a default judgment occurred within 365 days after filing.[34] As predicted, the proportion of default judgments fell by approximately one-quarter, from 11 percent to 8 percent of cases. This difference was statistically significant at the .05 level.

Because the majority of default judgments occur in debt collection cases, the NCSC also analyzed changes in the default rate separately for debt collection cases (Table 14) and cases of other types (Table 15). The decrease was roughly proportional across both groups of cases, providing no evidence that the PAD Pilot Rules' impact on the default rate was limited to debt collection cases.[35]

Table 13: Percentage of Cases With Default Judgment Within 365 Days of Filing for Pre-Implementation and Post-Implementation Cases

DEFAULT JUDGMENT WITHIN 365 DAYS	PRE-IMPLEMENTATION	POST-IMPLEMENTATION
First judgment other than default	89%	92%
Default is first judgment	11%	8%
Total	100%	100%
Chi-square	5.033	
Degrees of freedom	1	
$p(\chi^2)$	.025	

n = 2,515
notes: Includes cases filed July 1, 2008 – June 30, 2010 and October 1, 2010 – February 2, 2012. Includes only case types subject to PAD rules.

[34] To avoid bias associated with the varying length of follow-up, we limited the analysis to cases filed at least 365 days before the end of the data collection period, and counted only default judgments that occurred as the first judgment event and within 365 days of case filing.
[35] Although the decrease in the default rate among non-collections cases from 3 percent to 2 percent does not appear statistically significant at conventional levels, its magnitude renders it logically relevant. The small chi-square statistic and correspondingly large p-value result in part from the generally low rate of default judgments for these types of cases.

Table 14: Percentage of Cases With Default Judgment Within 365 Days of Filing for Pre-Implementation and Post-Implementation Debt Collection Cases

DEFAULT JUDGMENT WITHIN 365 DAYS	PRE-IMPLEMENTATION	POST-IMPLEMENTATION
First judgment other than default	74%	80%
Default is first judgment	26%	20%
Total	100%	100%
Chi-square	4.071	
Degrees of freedom	1	
$p(\chi^2)$	.044	

n = 844
notes: Includes debt collection cases filed July 1, 2008 – June 30, 2010 and October 1, 2010 – February 2, 2012.

Table 15: Percentage of Cases With Default Judgment Within 365 Days of Filing for Pre-Implementation and Post-Implementation Cases, Other Than Debt Collection

DEFAULT JUDGMENT WITHIN 365 DAYS	PRE-IMPLEMENTATION	POST-IMPLEMENTATION
First judgment other than default	97%	98%
Default is first judgment	3%	2%
Total	100%	100%
Chi-square	1.470	
Degrees of freedom	1	
$p(\chi^2)$	.225	

n = 1,671
notes: Includes cases filed July 1, 2008 – June 30, 2010 and October 1, 2010 – February 2, 2012. Includes only case types subject to PAD rules. Excludes debt collection cases.

The comparison of cases filed before and after implementation of the PAD Pilot Rules as well as interviews with lawyers who regularly practice in Carroll and Strafford County provides a mixed and somewhat curious picture about the PAD Pilot Rules impact on civil case processing. The fact pleading and automatic disclosure provisions were intended to provide the parties with an earlier opportunity to assess the legal merits and evidentiary strengths of their respective cases, which was ultimately expected to reduce the overall filing-to-disposition time. Anecdotal reports from attorneys who regularly practice in the pilot sites suggested that these provisions were working as intended. Most attorneys were delighted to abandon the practice of filing writs, and several expressed the opinion that fact pleading seemed to get the case moving along faster. Yet analysis of the rate at which cases were disposed showed no difference between cases filed before implementation of the PAD Pilot Rules and cases filed after implementation.

On the other hand, close examination of the case outcomes showed a dramatic decrease in the proportion of cases that were disposed by default judgment. Ostensibly, the fact pleading and automatic disclosure provisions provided defendants in the PAD cases with sufficient information on which to contest claims alleged by the plaintiff and possibly obtain a fairer resolution to the case, albeit one that might take somewhat longer to resolve. One attorney who regularly files debt collection cases first reported this effect during the NCSC site interviews in October 2011, but the case-level data show that the impact affects both debt collection and non-debt collection cases. Although the proportional difference in default judgments in non-debt collection cases was not statistically significant due to the very small proportion of default judgments in those cases, the reduction in default judgments in non-debt collection cases was actually greater (66%) than that in debt collection cases (23%).

Previous civil justice reform efforts in other jurisdictions have sometimes failed due to lack of compliance with the rules, but this does not appear to be a significant problem in the New Hampshire PAD Pilot Rules. Anecdotal reports suggested that attorneys initially experienced some confusion about the rules, prompting the Superior Court to issue conditional default notices in cases for failure to file an Answer or to schedule in-court compliance hearings for litigants that failed to comply with the meet-and-confer requirement to agree on and file a proposed Case Structuring Order. Overall, compliance with the PAD Pilot Rules was fair. The percentage of cases in which an Answer was filed pursuant to PR 1 increased from 15 percent to 56 percent. Ten percent (10%) of the cases ultimately were disposed by default judgment, leaving approximately one-third of the cases in which an Answer was not filed within 120 days of the initial filing date. The percentage of cases in which a proposed Case Structuring Order was filed pursuant to PR 2 increased from 14 percent to 34 percent which eliminated the need to hold a Case Structuring Conference in 91 percent of cases compared to 66 percent of cases filed before implementation of the PAD Pilot Rules. The majority of those cases in which a Case Structuring Conference was necessary were conducted telephonically (89) rather than during an in-court hearing (25).[36]

A number of factors may explain the failure to detect any significant decrease in the time from filing to disposition for cases filed under the PAD Pilot Rules. First, this evaluation is based on a relatively small number of cases observed over a fairly short period of time. It is possible that observing a larger sample of cases over a longer period of time might have detected a statistically significant impact on the final disposition rate. However, given the almost identical slopes of the survival function curves, any difference in the impact of

[36] Two cases involved both in-court and telephonic case structuring conferences.

the PAD Pilot Rules that might be detectable in a larger sample of cases would be insignificant for practical purposes, even if statistically measurable.

Another possible explanation may be the fact that most New Hampshire lawyers were already familiar with the fact pleading and automatic disclosure requirements through practice in the Maine state courts, the federal courts, or though law school training. Lawyers were already filing Answers in nearly one in six cases in response to a Complaint. So the PAD Pilot Rules did not necessarily impose a radical change in the general approach to legal practice. Indeed, it is possible that other than adhering to some new rule-based benchmarks (e.g., filing an Answer, filing a case structuring order), civil litigation is largely conducted by lawyers without excessive reliance on court rules to move the process along. Indeed, even though attorneys are now required to meet, confer, and file a proposed case structuring order, there is no explicit requirement in the PAD Pilot Rules that imposes restrictions on the time in which discovery, ADR, and other pretrial matters are completed. Ostensibly, those self-imposed deadlines largely mirror the deadlines imposed in similar cases filed before implementation of the new rules. Ironically, the fact pleading provisions of the PAD Pilot Rules may have counteracted any shift toward shorter filing-to-disposition time by permitting some cases to survive that would have otherwise defaulted under a notice pleading standard. Case-level data confirm this effect across all case types.

Finally, the budgetary constraints imposed on the Superior Courts over the past two years also may have mitigated the impact of the PAD Pilot Rules with respect to the rate of final disposition. Court restrictions on the number of civil cases that are scheduled for trial may have an especially pernicious effect insofar that they permit cases to languish indefinitely while giving one or both parties little incentive to settle. Moreover, the restrictions on scheduling cases for trial may have also undermined the severity of penalties associated with failure to comply with the automatic disclosure requirements of PR 3. The threat of being denied the opportunity to present evidence or testimony at trial because the basis for that evidence or testimony was not disclosed to the opposing party in a timely manner has little weight if the likelihood of ever getting to trial decreases to almost nothing.

Noncompliance with the PAD Pilot Rules does not appear to be a plausible explanation for the absence of a significant impact on the rate of final dispositions. The rate at which defendants filed Answers more than tripled in the post-implementation period compared to the pre-implementation period. Conditional default notices for failure to file an Answer or an appearance were issued in only 27 percent of cases, and more than one-third of those cases ultimately cured the noncompliance by filing an Answer or appearance. The proportion of cases in which a default judgment was ultimately entered likely reflects the defendant's decision not to contest the plaintiff's claims. Cases in which no Answer was filed, but were resolved by some disposition other than a default judgment, likely reflect out-of-court settlements.

Similarly, the incidence of case structuring orders being filed without the need for case structuring conferences increased as expected, suggesting that many lawyers stipulated to complete case structuring orders rather than filing partial case structuring orders and finalizing the remaining issues in a case structuring conference. Cases lacking both a case structuring order and a case structuring conference likely indicate that the parties settled or otherwise resolved the case before the time allotted for filing the case structuring order expired.

While the rate of discovery disputes did not decrease as a result of the automatic disclosure requirements, by the same token they did not increase due to allegations of failure to timely disclose pursuant to PR 3. Of particular significance is New Hampshire's longstanding culture of collegiality among practicing attorneys. Even before implementation of the PAD Pilot Rules, there was little empirical or anecdotal evidence of excessively aggressive or contentious litigation, which virtually all attorneys, judges, and court staff viewed as a unique and highly valued characteristic of the New Hampshire legal community. Thus, when the pre-implementation data show a baseline of relatively few instances of discovery disputes or other indicia of bad faith non-compliance with procedural rules, it will be extremely difficult to detect the impact of rule changes intended to reduce the frequency of those events even further.

In fact, the Superior Court judges themselves may have inadvertently hindered the beneficial impact of the meet-and-confer provisions intended to eliminate the need for in-court case scheduling hearings. Anecdotal reports suggest that the some judges have scheduled in-court "compliance hearings" when the lawyers fail to file a complete proposed case scheduling order, rather than holding a teleconference to settle any remaining issues in the case scheduling order pursuant to PR 3.[37] Some of the reluctance to schedule telephonic hearings apparently stems from the judges' own preference for in-court hearings over telephonic conferences. Ostensibly, block calendaring of in-court hearings provides trial judges greater flexibility for starting and ending hearings in individual cases. The Superior Court judges and court staff may need to explore the functionality of the teleconference system and experiment with different approaches to scheduling telephonic hearings to fully achieve the convenience and cost-savings to lawyers and litigants while preserving the efficiency of court operations.[38]

RECOMMENDATIONS

The Superior Court of New Hampshire evidently heard sufficiently positive reports about the PAD Pilot Rules before the completion of this evaluation to recommend that the rules be expanded statewide. The Supreme Court of New Hampshire accepted that recommendation earlier this year, and the PAD Pilot Rules were adopted statewide effective March 1, 2013. Nevertheless, the NCSC offers several additional recommendations to address some of the issues identified in both the case-level evaluation data and the reports from individual lawyers, judges and court staff.

1. Clarify the existing ambiguity in the Appearance requirement.

Before implementation of the PAD Pilot Rules, a defendant in a civil action was required to file an appearance within 30 days of service. Failure to do so resulted in the Superior Court issuing a notice of conditional default. Under the PAD Pilot Rules,

Noncompliance with the PAD Pilot Rules does not appear to be a plausible explanation for the absence of a significant impact on the rate of final dispositions.

[37] Some attorneys report that in some cases telephonic conferences also become forums to chastise attorneys for not stipulating to all aspects of case scheduling, rather than an opportunity to move the case along. In some instances, attorneys welcome the intervention of the judge to resolve issues impeding progress of the case.

[38] Some options to explore include calendaring telephonic hearings on a block basis and keeping the teleconference line open for lawyers to call in and wait for their case to be called – essentially an audio version of an open court calendar as was being tried on a pilot basis, then implemented, in one of the pilot courts toward the end of the pilot period. Alternatively, the court can advise attorneys of the approximate timeframe and order in which telephonic hearings will be held by emailing the attorneys directly or posting the calendar on the court's website. The court would then initiate those conferences with individual attorneys.

there is no explicit appearance requirement. In most jurisdictions that have adopted a Complaint and Answer process, the filing of the Answer provides formal acknowledgement of the receipt of service and of the jurisdictional authority of the court over the case. Nevertheless, the Superior Court has continued to require by local court order the filing of an appearance in addition to the Answer, issuing a notice of conditional default even if the defendant had already filed an Answer pursuant to PR 1. The fact that the appearance requirement is not mandated in the PAD Pilot Rules and is inconsistent with federal court practice has caused some confusion among attorneys. Unless there is another purpose to the Appearance requirement other than acknowledging the court's jurisdictional authority, the NCSC recommends that New Hampshire eliminate the filing of an Appearance as a separate requirement. The PAD Pilot Rules may be modified to specify that if the defendant intends to contest the jurisdiction of the court, the defendant may file a Special Appearance for that purpose in lieu of an Answer pursuant to Superior Court Rule 14.

2. Establish a firm trial date in the case structuring order.

The sanction for failure to timely disclose relevant information pursuant to PR 3 involves restrictions on the ability of a party to introduce evidence at trial that was not timely disclosed. Due to budgetary constraints, the New Hampshire Superior Courts have greatly restricted the availability of trial calendars for civil matters. For the purposes of the automatic disclosure requirement, if cases cannot be scheduled for trial, much less actually tried, the threatened sanction has no deterrent value. As a practical matter, civil trials were extremely rare events in New Hampshire even before the 2008 economic downturn and the resulting budget cuts. Nevertheless, experience in New Hampshire and elsewhere confirms that a firm trial date is the single most effective means of moving cases toward resolution. The NCSC recommends that the New Hampshire Superior Court reinstitute the practice of scheduling civil cases for trial on a date certain and specifying that date in the case structuring order. The existence of a firm trial date raises at least the possibility of a meaningful enforcement mechanism for the automatic disclosure requirements even with the expectation by both parties and the court that the case will ultimately resolve without a trial.

3. Avoid aggressive enforcement of the rules except for intentional or bad faith noncompliance.

Almost without exception, attorneys, trial judges, and court staff emphasized the importance of maintaining the collegiality of the New Hampshire legal community. To do so, it is important that the New Hampshire bench not introduce perverse incentives for satellite litigation about whether the parties have fully complied with the rules. The rules themselves should explicitly adopt a "reasonableness" standard and a safe harbor provision with sanctions only imposed for intentional or bad-faith noncompliance. This is especially important insofar as the decline in in-court structuring conferences will necessarily reduce the number of opportunities for trial judges to establish the tone for collegial litigation and for lawyers to become sufficiently acquainted with one another to develop collegial relationships. An overly aggressive approach to enforcement would likely exacerbate tensions.

4. Establish a uniform time standard for return of service.

The PAD Pilot Rules do not specify a timeframe in which a plaintiff must file proof of service. Currently, local court rules in Carroll and Strafford Counties require proof of service to be filed within 7 days of service. To avoid potential confusion for litigants concerning multiple deadlines involved in case initiation (e.g., service within 45 days of Orders of Notice date, Answer within 30 days of service date), a return day should be specified in the PAD Rules and this timeframe should be adopted statewide.

National Center for State Court
300 Newport Avenue
Williamsburg, VA 23185

800.616.6164
www.ncsc.org

Utah Rules of Civil Procedure—Disclosure and Discovery

Rule 1. General provisions.

Scope of rules. These rules govern the procedure in the courts of the state of Utah in all actions of a civil nature, whether cognizable at law or in equity, and in all statutory proceedings, except as governed by other rules promulgated by this court or statutes enacted by the Legislature and except as stated in Rule 81. They shall be liberally construed and applied to achieve the just, speedy, and inexpensive determination of every action. These rules govern all actions brought after they take effect and all further proceedings in actions then pending. If, in the opinion of the court, applying a rule in an action pending when the rule takes effect would not be feasible or would be unjust, the former procedure applies.

URCP 1. Advisory Committee Notes

These rules apply to court commissioners to the same extent as to judges.

A primary purpose of the 2011 amendments is to give effect to the long-standing but often overlooked directive in Rule 1 that the Rules of Civil Procedure should be construed and applied to achieve "the just, speedy and inexpensive determination of every action." The amendments serve this purpose by limiting parties to discovery that is proportional to the stakes of the litigation, curbing excessive expert discovery, and requiring the early disclosure of documents, witnesses and evidence that a party intends to offer in its case-in-chief. The committee's purpose is to restore balance to the goals of Rule 1, so that a just resolution is not achieved at the expense of speedy and inexpensive resolutions, and greater access to the justice system can be afforded to all members of society.

Due to the significant changes in the discovery rules, the Supreme Court order adopting the 2011 amendments makes them effective only as to cases filed on or after the effective date, November 1, 2011, unless otherwise agreed to by the parties or ordered by the court.

Rule 8. General rules of pleadings.

(a) **Claims for relief.** An original claim, counterclaim, cross-claim or third-party claim shall contain a short and plain: (1) statement of the claim showing that the party is entitled to relief; and (2) demand for judgment for specified relief. Relief in the alternative or of several different types may be demanded. A party who claims damages but does not plead an amount shall plead that their damages are such as to qualify for a specified tier defined by Rule 26(c)(3). A pleading that qualifies for tier 1 or tier 2 discovery shall constitute a waiver of any right to recover damages above the tier limits specified in Rule 26(c)(3), unless the pleading is amended under Rule 15.

(b) **Defenses; form of denials.** A party shall state in simple, short and plain terms any defenses to each claim asserted and shall admit or deny the statements in the claim. A party without knowledge or information sufficient to form a belief about the truth of a statement shall so state, and this has the effect of a denial. Denials shall fairly meet the substance of the

statements denied. A party may deny all of the statements in a claim by general denial. A party may specify the statement or part of a statement that is admitted and deny the rest. A party may specify the statement or part of a statement that is denied and admit the rest.

(c) **Affirmative defenses.** An affirmative defense shall contain a short and plain: (1) statement of the affirmative defense; and (2) a demand for relief. A party shall set forth affirmatively in a responsive pleading accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. If a party mistakenly designates a defense as a counterclaim or a counterclaim as a defense, the court, on terms, may treat the pleadings as if the defense or counterclaim had been properly designated.

(d) **Effect of failure to deny.** Statements in a pleading to which a responsive pleading is required, other than statements of the amount of damage, are admitted if not denied in the responsive pleading. Statements in a pleading to which no responsive pleading is required or permitted are deemed denied or avoided.

(e) **Consistency.** A party may state a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. If statements are made in the alternative and one of them is sufficient, the pleading is not made insufficient by the insufficiency of an alternative statement. A party may state legal and equitable claims or legal and equitable defenses regardless of consistency.

(f) **Construction of pleadings.** All pleadings shall be construed to do substantial justice.

Rule 26. General provisions governing disclosure and discovery.

(a) **Disclosure.** This rule applies unless changed or supplemented by a rule governing disclosure and discovery in a practice area.

(a)(1) **Initial disclosures.** Except in cases exempt under paragraph (a)(3), a party shall, without waiting for a discovery request, provide to other parties:

(a)(1)(A) the name and, if known, the address and telephone number of:

(a)(1)(A)(i) each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information; and

(a)(1)(A)(ii) each fact witness the party may call in its case-in-chief and, except for an adverse party, a summary of the expected testimony;

(a)(1)(B) a copy of all documents, data compilations, electronically stored information, and tangible things in the possession or control of the party that the party may offer in its case-in-chief, except charts, summaries and demonstrative exhibits that have not yet been prepared and must be disclosed in accordance with paragraph (a)(5);

(a)(1)(C) a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered;

(a)(1)(D) a copy of any agreement under which any person may be liable to satisfy part or all of a judgment or to indemnify or reimburse for payments made to satisfy the judgment; and

(a)(1)(E) a copy of all documents to which a party refers in its pleadings.

(a)(2) **Timing of initial disclosures.** The disclosures required by paragraph (a)(1) shall be made:

(a)(2)(A) by the plaintiff within 14 days after service of the first answer to the complaint; and

(a)(2)(B) by the defendant within 28 days after the plaintiff's first disclosure or after that defendant's appearance, whichever is later.

(a)(3) **Exemptions.**

(a)(3)(A) Unless otherwise ordered by the court or agreed to by the parties, the requirements of paragraph (a)(1) do not apply to actions:

(a)(3)(A)(i) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(a)(3)(A)(ii) governed by Rule 65B or Rule 65C;

(a)(3)(A)(iii) to enforce an arbitration award;

(a)(3)(A)(iv) for water rights general adjudication under Title 73, Chapter 4, Determination of Water Rights.

(a)(3)(B) In an exempt action, the matters subject to disclosure under paragraph (a)(1) are subject to discovery under paragraph (b).

(a)(4) **Expert testimony.**

(a)(4)(A) **Disclosure of expert testimony.** A party shall, without waiting for a discovery request, provide to the other parties the following information regarding any person who may be used at trial to present evidence under Rule 702 of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) all data and other information that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

(a)(4)(B) **Limits on expert discovery.** Further discovery may be obtained from an expert witness either by deposition or by written report. A deposition shall not exceed four hours and the party taking the deposition shall pay the expert's reasonable hourly fees for attendance at the deposition. A report shall be signed by the expert and shall contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them. Such an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. The party offering the expert shall pay the costs for the report.

(a)(4)(C) **Timing for expert discovery.**

(a)(4)(C)(i) The party who bears the burden of proof on the issue for which expert testimony is offered shall provide the information required by paragraph (a)(4)(A) within seven days after the close of fact discovery. Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be provided, within 28 days after the election is made. If no election is made, then no further discovery of the expert shall be permitted.

(a)(4)(C)(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered shall provide the information required by paragraph (a)(4)(A) within seven days after the later of (i) the date on which the election under paragraph (a)(4)(C)(i) is due, or (ii) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be provided, within 28 days after the election is made. If no election is made, then no further discovery of the expert shall be permitted.

(a)(4)(D) **Multiparty actions.** In multiparty actions, all parties opposing the expert must agree on either a report or a deposition. If all parties opposing the expert do not agree, then further discovery of the expert may be obtained only by deposition pursuant to paragraph (a)(4)(B) and Rule 30.

(a)(4)(E) **Summary of non-retained expert testimony.** If a party intends to present evidence at trial under Rule 702 of the Utah Rules of Evidence from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party must provide a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). A deposition of such a witness may not exceed four hours.

(a)(5) **Pretrial disclosures.**

(a)(5)(A) A party shall, without waiting for a discovery request, provide to other parties:

(a)(5)(A)(i) the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party will call and witnesses the party may call;

(a)(5)(A)(ii) the name of witnesses whose testimony is expected to be presented by transcript of a deposition and a copy of the transcript with the proposed testimony designated; and

(a)(5)(A)(iii) a copy of each exhibit, including charts, summaries and demonstrative exhibits, unless solely for impeachment, separately identifying those which the party will offer and those which the party may offer.

(a)(5)(B) Disclosure required by paragraph (a)(5) shall be made at least 28 days before trial. At least 14 days before trial, a party shall serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition and to the admissibility of exhibits. Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived unless excused by the court for good cause.

(b) **Discovery scope.**

(b)(1) **In general.** Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below. Privileged matters that are not discoverable or admissible in any proceeding of any kind or character include all information in any form provided during and created specifically as part of a request for an investigation, the investigation, findings, or conclusions of peer review, care review, or quality assurance processes of any organization of health care providers as defined in the Utah Health Care Malpractice Act for the purpose of evaluating care provided to reduce morbidity and mortality or to improve the quality of medical care, or for the purpose of peer review of the ethics, competence, or professional conduct of any health care provider.

(b)(2) **Proportionality.** Discovery and discovery requests are proportional if:

(b)(2)(A) the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;

(b)(2)(B) the likely benefits of the proposed discovery outweigh the burden or expense;

(b)(2)(C) the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case;

(b)(2)(D) the discovery is not unreasonably cumulative or duplicative;

(b)(2)(E) the information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and

(b)(2)(F) the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.

(b)(3) **Burden.** The party seeking discovery always has the burden of showing proportionality and relevance. To ensure proportionality, the court may enter orders under Rule 37.

(b)(4) **Electronically stored information.** A party claiming that electronically stored information is not reasonably accessible because of undue burden or cost shall describe the source of the electronically stored information, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to evaluate the claim.

(b)(5) **Trial preparation materials.** A party may obtain otherwise discoverable documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain substantially equivalent materials by other means. In ordering discovery of such materials, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(b)(6) **Statement previously made about the action.** A party may obtain without the showing required in paragraph (b)(5) a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement about the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order under Rule 37. A statement previously made is (A) a written statement signed or approved by the person making it, or (B) a stenographic, mechanical, electronic, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b)(7) **Trial preparation; experts.**

(b)(7)(A) **Trial-preparation protection for draft reports or disclosures.** Paragraph (b)(5) protects drafts of any report or disclosure required under paragraph (a)(4), regardless of the form in which the draft is recorded.

(b)(7)(B) **Trial-preparation protection for communications between a party's attorney and expert witnesses.** Paragraph (b)(5) protects communications between the party's attorney and any witness required to provide disclosures under paragraph (a)(4), regardless of the form of the communications, except to the extent that the communications:

(b)(7)(B)(i) relate to compensation for the expert's study or testimony;

(b)(7)(B)(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(b)(7)(B)(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(b)(7)(C) **Expert employed only for trial preparation.** Ordinarily, a party may not, by interrogatories or otherwise, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. A party may do so only:

(b)(7)(C)(i) as provided in Rule 35(b); or

(b)(7)(C)(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(b)(8) **Claims of privilege or protection of trial preparation materials.**

(b)(8)(A) **Information withheld.** If a party withholds discoverable information by claiming that it is privileged or prepared in anticipation of litigation or for trial, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing the information itself, will enable other parties to evaluate the claim.

(b)(8)(B) **Information produced.** If a party produces information that the party claims is privileged or prepared in anticipation of litigation or for trial, the producing party may notify any receiving party of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(c) **Methods, sequence and timing of discovery; tiers; limits on standard discovery; extraordinary discovery.**

(c)(1) **Methods of discovery.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; requests for admission; and subpoenas other than for a court hearing or trial.

(c)(2) **Sequence and timing of discovery.** Methods of discovery may be used in any sequence, and the fact that a party is conducting discovery shall not delay any other party's

discovery. Except for cases exempt under paragraph (a)(3), a party may not seek discovery from any source before that party's initial disclosure obligations are satisfied.

(c)(3) **Definition of tiers for standard discovery.** Actions claiming $50,000 or less in damages are permitted standard discovery as described for Tier 1. Actions claiming more than $50,000 and less than $300,000 in damages are permitted standard discovery as described for Tier 2. Actions claiming $300,000 or more in damages are permitted standard discovery as described for Tier 3. Absent an accompanying damage claim for more than $300,000, actions claiming non-monetary relief are permitted standard discovery as described for Tier 2.

(c)(4) **Definition of damages.** For purposes of determining standard discovery, the amount of damages includes the total of all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings.

(c)(5) **Limits on standard fact discovery.** Standard fact discovery per side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) in each tier is as follows. The days to complete standard fact discovery are calculated from the date the first defendant's first disclosure is due and do not include expert discovery under paragraphs(a)(4)(C) and (D).

Tier	Amount of Damages	Total Fact Deposition Hours	Rule 33 Interrogatories including all discrete subparts	Rule 34 Requests for Production	Rule 36 Requests for Admission	Days to Complete Standard Fact Discovery
1	$50,000 or less	3	0	5	5	120
2	More than $50,000 and less than $300,000 or non-monetary relief	15	10	10	10	180
3	$300,000 or more	30	20	20	20	210

(c)(6) **Extraordinary discovery.** To obtain discovery beyond the limits established in paragraph (c)(5), a party shall file:

(c)(6)(A) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulated statement that extraordinary discovery is necessary and proportional under paragraph (b)(2) and that each party has reviewed and approved a discovery budget; or

(c)(6)(B) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a motion for extraordinary discovery setting forth the reasons why the extraordinary discovery is necessary and proportional under paragraph (b)(2) and certifying that the party has reviewed and approved a discovery budget and certifying that the party has in good faith conferred or attempted to confer with the other party in an effort to achieve a stipulation.

(d) **Requirements for disclosure or response; disclosure or response by an organization; failure to disclose; initial and supplemental disclosures and responses.**

(d)(1) A party shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(2) If the party providing disclosure or responding to discovery is a corporation, partnership, association, or governmental agency, the party shall act through one or more officers, directors, managing agents, or other persons, who shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(3) A party is not excused from making disclosures or responses because the party has not completed investigating the case or because the party challenges the sufficiency of another party's disclosures or responses or because another party has not made disclosures or responses.

(d)(4) If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure.

(d)(5) If a party learns that a disclosure or response is incomplete or incorrect in some important way, the party must timely provide the additional or correct information if it has not been made known to the other parties. The supplemental disclosure or response must state why the additional or correct information was not previously provided.

(e) **Signing discovery requests, responses, and objections.** Every disclosure, request for discovery, response to a request for discovery and objection to a request for discovery shall be in writing and signed by at least one attorney of record or by the party if the party is not represented. The signature of the attorney or party is a certification under Rule 11. If a request or response is not signed, the receiving party does not need to take any action with respect to it. If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, may take any action authorized by Rule 11 or Rule 37(e).

(f) **Filing.** Except as required by these rules or ordered by the court, a party shall not file with the court a disclosure, a request for discovery or a response to a request for discovery, but shall file only the certificate of service stating that the disclosure, request for discovery or response has been served on the other parties and the date of service.

URCP 26. Advisory Committee Notes

Disclosure requirements and timing. Rule 26(a)(1). The 2011 amendments seek to reduce discovery costs by requiring each party to produce, at an early stage in the case, and without a discovery request, all of the documents and physical evidence the party may offer in its case-in-chief and the names of witnesses the party may call in its case-in-chief, with a description of their expected testimony. In this respect, the amendments build on the initial disclosure requirements of the prior rules. In addition to the disclosures required by the prior version of Rule 26(a)(1), a party must disclose each fact witness the party may call in its case-in-chief and a summary of the witness's expected testimony, a copy of all documents the party may offer in its case-in-chief, and all documents to which a party refers in its pleadings.

Not all information will be known at the outset of a case. If discovery is serving its proper purpose, additional witnesses, documents, and other information will be identified. The scope and the level of detail required in the initial Rule 26(a)(1) disclosures should be viewed in light of this reality. A party is not required to interview every witness it ultimately may call at trial in order to provide a summary of the witness's expected testimony. As the information becomes known, it should be disclosed. No summaries are required for adverse parties, including management level employees of business entities, because opposing lawyers are unable to interview them and their testimony is available to their own counsel. For uncooperative or hostile witnesses any summary of expected testimony would necessarily be limited to the subject areas the witness is reasonably expected to testify about. For example, defense counsel may be unable to interview a treating physician, so the initial summary may only disclose that the witness will be questioned concerning the plaintiff's diagnosis, treatment and prognosis. After medical records have been obtained, the summary may be expanded or refined.

Subject to the foregoing qualifications, the summary of the witness's expected testimony should be just that – a summary. The rule does not require prefiled testimony or detailed descriptions of everything a witness might say at trial. On the other hand, it requires more than the broad, conclusory statements that often were made under the prior version of Rule 26(a)(1)(e.g., "The witness will testify about the events in question" or "The witness will testify on causation."). The intent of this requirement is to give the other side basic information concerning the subjects about which the witness is expected to testify at trial, so that the other side may determine the witness's relative importance in the case, whether the witness should be interviewed or deposed, and whether additional documents or information concerning the witness should be sought. This information is important because of the other discovery limits contained in the 2011 amendments, particularly the limits on depositions.

Likewise, the documents that should be provided as part of the Rule 26(a)(1) disclosures are those that a party reasonably believes it may use at trial, understanding that not all documents will be available at the outset of a case. In this regard, it is important to remember that the duty to provide documents and witness information is a continuing one, and disclosures must be promptly supplemented as new evidence and witnesses become known as the case progresses.

The amendments also require parties to provide more information about damages early in the case. Too often, the subject of damages is deferred until late in the case. Early disclosure of damages information is important. Among other things, it is a critical factor in determining

proportionality. The committee recognizes that damages often require additional discovery, and typically are the subject of expert testimony. The Rule is not intended to require expert disclosures at the outset of a case. At the same time, the subject of damages should not simply be deferred until expert discovery. Parties should make a good faith attempt to compute damages to the extent it is possible to do so and must in any event provide all discoverable information on the subject, including materials related to the nature and extent of the damages.

The penalty for failing to make timely disclosures is that the evidence may not be used in the party's case-in-chief. To make the disclosure requirement meaningful, and to discourage sandbagging, parties must know that if they fail to disclose important information that is helpful to their case, they will not be able to use that information at trial. The courts will be expected to enforce them unless the failure is harmless or the party shows good cause for the failure.

The 2011 amendments also change the time for making these required disclosures. Because the plaintiff controls when it brings the action, plaintiffs must make their disclosures within 14 days after service of the first answer. A defendant is required to make its disclosures within 28 days after the plaintiff's first disclosure or after that defendant's appearance, whichever is later. The purpose of early disclosure is to have all parties present the evidence they expect to use to prove their claims or defenses, thereby giving the opposing party the ability to better evaluate the case and determine what additional discovery is necessary and proportional.

The time periods for making Rule 26(a)(1) disclosures, and the presumptive deadlines for completing fact discovery, are keyed to the filing of an answer. If a defendant files a motion to dismiss or other Rule 12(b) motion in lieu of an answer, these time periods normally would be not begin to run until that motion is resolved.

Finally, the 2011 amendments eliminate two categories of actions that previously were exempt from the mandatory disclosure requirements. Specifically, the amendments eliminate the prior exemption for contract actions in which the amount claimed is $20,000 or less, and actions in which any party is proceeding pro se. In the committee's view, these types of actions will benefit from the early disclosure requirements and the overall reduced cost of discovery.

Expert disclosures and timing. Rule 26(a)(3). Expert discovery has become an ever-increasing component of discovery cost. The prior rules sought to eliminate some of these costs by requiring the written disclosure of the expert's opinions and other background information. However, because the expert was not required to sign these disclosures, and because experts often were allowed to deviate from the opinions disclosed, attorneys typically would take the expert's deposition to ensure the expert would not offer "surprise" testimony at trial, thereby increasing rather than decreasing the overall cost. The amendments seek to remedy this and other costs associated with expert discovery by, among other things, allowing the opponent to choose either a deposition of the expert or a written report, but not both; in the case of written reports, requiring more comprehensive disclosures, signed by the expert, and making clear that experts will not be allowed to testify beyond what is fairly disclosed in a report, all with the goal of making reports a reliable substitute for depositions; and incorporating a rule that protects from discovery most communications between an attorney and retained expert. Discovery of expert

opinions and testimony is automatic under Rule 26(a)(3) and parties are not required to serve interrogatories or use other discovery devices to obtain this information.

Disclosures of expert testimony are made in sequence, with the party who bears the burden of proof on the issue for which expert testimony will be offered going first. Within seven days after the close of fact discovery, that party must disclose: (i) the expert's curriculum vitae identifying the expert's qualifications, publications, and prior testimony; (ii) compensation information; (iii) a brief summary of the opinions the expert will offer; and (iv) a complete copy of the expert's file for the case. The file should include all of the facts and data that the expert has relied upon in forming the expert's opinions. If the expert has prepared summaries of data, spreadsheets, charts, tables, or similar materials, they should be included. If the expert has used software programs to make calculations or otherwise summarize or organize data, that information and underlying formulas should be provided in native form so it can be analyzed and understood. To the extent the expert is relying on depositions or materials produced in discovery, then a list of the specific materials relied upon is sufficient. The committee recognizes that experts frequently will prepare demonstrative exhibits or other aids to illustrate the expert's testimony at trial, and the costs for preparing these materials can be substantial. For that reason, these types of demonstrative aids may be prepared and disclosed later, as part of the Rule 26(a)(4) pretrial disclosures when trial is imminent.

Within seven days after this disclosure, the party opposing the retained expert may elect either a deposition or a written report from the expert. A deposition is limited to four hours, which is not included in the deposition hours under Rule 26(c)(5), and the party taking it must pay the expert's hourly fee for attending the deposition. If a party elects a written report, the expert must provide a signed report containing a complete statement of all opinions the expert will express and the basis and reasons for them. The intent is not to require a verbatim transcript of exactly what the expert will say at trial; instead the expert must fairly disclose the substance of and basis for each opinion the expert will offer. The expert may not testify in a party's case in chief concerning any matter that is not fairly disclosed in the report. To achieve the goal of making reports a reliable substitute for depositions, courts are expected to enforce this requirement. If a party elects a deposition, rather than a report, it is up to the party to ask the necessary questions to "lock in" the expert's testimony. But the expert is expected to be fully prepared on all aspects of his/her trial testimony at the time of the deposition and may not leave the door open for additional testimony by qualifying answers to deposition questions.

The report or deposition must be completed within 28 days after the election is made. After this, the party who does not bear the burden of proof on the issue for which expert testimony is offered must make its corresponding disclosures and the opposing party may then elect either a deposition or a written report. Under the deadlines contained in the rules, expert discovery should take less than three months to complete. However, as with the other discovery rules, these deadlines can be altered by stipulation of the parties or order of the court.

The amendments also address the issue of testimony from non-retained experts, such as treating physicians, police officers, or employees with special expertise, who are not retained or specially employed to provide expert testimony, or whose duties as an employee do not regularly

involve giving expert testimony. This issue was addressed by the Supreme Court in Drew v. Lee, 2011 UT 15, wherein the court held that reports under the prior version of Rule 26(a)(3) are not required for treating physicians.

There are a number of difficulties inherent in disclosing expert testimony that may be offered from fact witnesses. First, there is often not a clear line between fact and expert testimony. Many fact witnesses have scientific, technical or other specialized knowledge, and their testimony about the events in question often will cross into the area of expert testimony. The rules are not intended to erect artificial barriers to the admissibility of such testimony. Second, many of these fact witnesses will not be within the control of the party who plans to call them at trial. These witnesses may not be cooperative, and may not be willing to discuss opinions they have with counsel. Where this is the case, disclosures will necessarily be more limited. On the other hand, consistent with the overall purpose of the 2011 amendments, a party should receive advance notice if their opponent will solicit expert opinions from a particular witness so they can plan their case accordingly. In an effort to strike an appropriate balance, the rules require that such witnesses be identified and the information about their anticipated testimony should include that which is required under Rule 26(a)(1)(A)(ii), which should include any opinion testimony that a party expects to elicit from them at trial. If a party has disclosed possible opinion testimony in its Rule 26(a)(1)(A)(ii) disclosures, that party is not required to prepare a separate Rule 26(a)(3)(D) disclosure for the witness. And if that disclosure is made in advance of the witness's deposition, those opinions should be explored in the deposition and not in a separate expert deposition. Otherwise, the timing for disclosure of non-retained expert opinions is the same as that for retained experts under Rule 26(a)(4)(C) and depends on whether the party has the burden of proof or is responding to another expert. Rule 26(a)(3)(D) and 26(a)(1)(A)(ii) are not intended to elevate form over substance – all they require is that a party fairly inform its opponent that opinion testimony may be offered from a particular witness. And because a party who expects to offer this testimony normally cannot compel such a witness to prepare a written report, further discovery must be done by interview or by deposition.

Finally, the amendments include a new Rule 26(b)(7) that protects from discovery draft expert reports and, with limited exception, communications between an attorney and an expert. These changes are modeled after the recent changes to the Federal Rules of Civil Procedure and are intended to address the unnecessary and costly procedures that often were employed in order to protect such information from discovery, and to reduce "satellite litigation" over such issues.

Scope of discovery—Proportionality. Rule 26(b). Proportionality is the principle governing the scope of discovery. Simply stated, it means that the cost of discovery should be proportional to what is at stake in the litigation.

In the past, the scope of discovery was governed by "relevance" or the "likelihood to lead to discovery of admissible evidence." These broad standards may have secured just results by allowing a party to discover all facts relevant to the litigation. However, they did little to advance two equally important objectives of the rules of civil procedure—the speedy and inexpensive resolution of every action. Accordingly, the former standards governing the scope of discovery have been replaced with the proportionality standards in subpart (b)(1).

The concept of proportionality is not new. The prior rule permitted the Court to limit discovery methods if it determined that "the discovery was unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." The Federal Rules of Civil Procedure contains a similar provision. See Fed. R. Civ. P. 26(b)(2)(C). This method of limiting discovery, however, was rarely invoked either under the Utah rules or federal rules.

Under the prior rule, the party objecting to the discovery request had the burden of proving that a discovery request was not proportional. The new rule changes the burden of proof. Today, the party seeking discovery beyond the scope of "standard" discovery has the burden of showing that the request is "relevant to the claim or defense of any party" and that the request satisfies the standards of proportionality. As before, ultimate admissibility is not an appropriate objection to a discovery request so long as the proportionality standard and other requirements are met.

The 2011 amendments establish three tiers of standard discovery in Rule 26(c). Ideally, rules of procedure should be crafted to promote predictability for litigants. Rules should limit the need to resort to judicial oversight. Tiered standard discovery seeks to achieve these ends. The "one-size-fits-all" system is rejected. Tiered discovery signals to judges, attorneys, and parties the amount of discovery which by rule is deemed proportional for cases with different amounts in controversy.

Any system of rules which permits the facts and circumstances of each case to inform procedure cannot eliminate uncertainty. Ultimately, the trial court has broad discretion in deciding whether a discovery request is proportional. The proportionality standards in subpart (b)(2) and the discovery tiers in subpart (c) mitigate uncertainty by guiding that discretion. The proper application of the proportionality standards will be defined over time by trial and appellate courts.

Standard and extraordinary discovery. Rule 26(c). As a counterpart to requiring more detailed disclosures under Rule 26(a), the 2011 amendments place new limitations on additional discovery the parties may conduct. Because the committee expects the enhanced disclosure requirements will automatically permit each party to learn the witnesses and evidence the opposing side will offer in its case-in-chief, additional discovery should serve the more limited function of permitting parties to find witnesses, documents, and other evidentiary materials that are harmful, rather than helpful, to the opponent's case.

Rule 26(c) provides for three separate "tiers" of limited, "standard" discovery that are presumed to be proportional to the amount and issues in controversy in the action, and that the parties may conduct as a matter of right. An aggregation of all damages sought by all parties in an action dictates the applicable tier of standard discovery, whether such damages are sought by way of a complaint, counterclaim, or otherwise. The tiers of standard discovery are set forth in a chart that is embedded in the body of the rule itself. "Tier 1" describes a minimal amount of standard discovery that is presumed proportional for cases involving damages of $50,000 or less. "Tier 2" sets forth larger limits on standard discovery that are applicable in cases involving damages above $50,000 but less than $300,000. Finally, "Tier 3" prescribes still greater standard discovery for actions involving damages in excess of $300,000. Deposition hours are charged to

a side for the time spent asking questions of the witness. In a particular deposition, one side may use two hours while the other side uses only 30 minutes. The tiers also provide presumptive limitations on the time within which standard discovery should be completed, which limitations similarly increase with the amount of damages at issue. Discovery motions will not toll the period. Parties are expected to be reasonable and accomplish as much as they can during standard discovery. The motions may result in additional discovery and sanctions at the expense of a party who unreasonably fails to respond or otherwise frustrates discovery. After the expiration of the applicable time limitation, a case is presumed to be ready for trial. Actions for non-monetary relief, such as injunctive relief, are subject to the standard discovery limitations of Tier 2, absent an accompanying monetary claim of $300,000 or more, in which case Tier 3 applies. The committee determined these standard discovery limitations based on the expectation that for the majority of cases filed in the Utah State Courts, the magnitude of available discovery and applicable time parameters available under the three-tiered system should be sufficient for cases involving the respective amounts of damages.

Despite the expectation that standard discovery according to the applicable tier should be adequate in the typical case, the 2011 amendments contemplate there will be some cases for which standard discovery is not sufficient or appropriate. In such cases, parties may conduct additional discovery that is shown to be consistent with the principle of proportionality. There are two ways to obtain such additional discovery. The first is by stipulation. If the parties can agree additional discovery is necessary, they may stipulate to as much additional discovery as they desire, provided they stipulate the additional discovery is proportional to what is at stake in the litigation and counsel for each party certifies that the party has reviewed and approved a budget for additional discovery. Such a stipulation should be filed before the close of the standard discovery time limit, but only after reaching the limits for that type of standard discovery available under the rule. If these conditions are met, the Court will not second-guess the parties and their counsel and must approve the stipulation.

The second method to obtain additional discovery is by motion. The committee recognizes there will be some cases in which additional discovery is appropriate, but the parties cannot agree to the scope of such additional discovery. These may include, among other categories, large and factually complex cases and cases in which there is a significant disparity in the parties' access to information, such that one party legitimately has a greater need than the other party for additional discovery in order to prepare properly for trial. To prevent a party from taking advantage of this situation, the 2011 amendments allow any party to move the Court for additional discovery. As with stipulations for extraordinary discovery, a party filing a motion for extraordinary discovery should do so before the close of the standard discovery time limit, but only after the moving party has reached the limits for that type of standard discovery available to it under the rule. By taking advantage of this discovery, counsel should be better equipped to articulate for the court what additional discovery is needed and why. The party making such a motion must demonstrate that the additional discovery is proportional and certify that the party has reviewed and approved a discovery budget. The burden to show the need for additional discovery, and to demonstrate relevance and proportionality, always falls on the party seeking additional discovery. However, cases in which such additional discovery is appropriate do exist,

and it is important for courts to recognize they can and should permit additional discovery in appropriate cases, commensurate with the complexity and magnitude of the dispute.

Protective order language moved to Rule 37. The 2011 amendments delete in its entirety the prior language of Rule 26(c) governing motions for protective orders. The substance of that language is now found in Rule 37. The committee determined it was preferable to cover motions to compel, motions for protective orders, and motions for discovery sanctions in a single rule, rather than two separate rules. Accordingly, Rule 37 now governs these motions and orders.

Consequences of failure to disclose. Rule 26(d). If a party fails to disclose or to supplement timely its discovery responses, that party cannot use the undisclosed witness, document, or material at any hearing or trial, absent proof that non-disclosure was harmless or justified by good cause. More complete disclosures increase the likelihood that the case will be resolved justly, speedily, and inexpensively. Not being able to use evidence that a party fails properly to disclose provides a powerful incentive to make complete disclosures. This is true only if trial courts hold parties to this standard. Accordingly, although a trial court retains discretion to determine how properly to address this issue in a given case, the usual and expected result should be exclusion of the evidence.

Rule 26.1. Disclosure and discovery in domestic relations actions.

(a) **Scope.** This rule applies to the following domestic relations actions: divorce; temporary separation; separate maintenance; parentage; custody; child support; and modification. This rule does not apply to adoptions, enforcement of prior orders, cohabitant abuse protective orders, child protective orders, civil stalking injunctions, or grandparent visitation.

(b) **Time for disclosure.** In addition to the disclosures required in Rule 26, in all domestic relations actions, the documents required in this rule shall be disclosed by the petitioner within 14 days after service of the first answer to the complaint and by the respondent within 28 days after the petitioner's first disclosure or 28 days after that respondent's appearance, whichever is later.

(c) **Financial declaration.** Each party shall disclose to all other parties a fully completed court-approved Financial Declaration and attachments. Each party shall attach to the Financial Declaration the following:

(c)(1) For every item and amount listed in the Financial Declaration, excluding monthly expenses, the producing party shall attach copies of statements verifying the amounts listed on the Financial Declaration that are reasonably available to the party.

(c)(2) For the two tax years before the petition was filed, complete federal and state income tax returns, including Form W-2 and supporting tax schedules and attachments, filed by or on behalf of that party or by or on behalf of any entity in which the party has a majority or controlling interest, including, but not limited to, Form 1099 and Form K-1 with respect to that party.

(c)(3) Pay stubs and other evidence of all earned and un-earned income for the 12 months before the petition was filed.

(c)(4) All loan applications and financial statements prepared or used by the party within the 12 months before the petition was filed.

(c)(5) Documents verifying the value of all real estate in which the party has an interest, including, but not limited to, the most recent appraisal, tax valuation and refinance documents.

(c)(6) All statements for the 3 months before the petition was filed for all financial accounts, including, but not limited to checking, savings, money market funds, certificates of deposit, brokerage, investment, retirement, regardless of whether the account has been closed including those held in that party's name, jointly with another person or entity, or as a trustee or guardian, or in someone else's name on that party's behalf.

(c)(7) If the foregoing documents are not reasonably available or are in the possession of the other party, the party disclosing the Financial Declaration shall estimate the amounts entered on the Financial Declaration, the basis for the estimation and an explanation why the documents are not available.

(d) **Certificate of service.** Each party shall file a Certificate of Service with the court certifying that he or she has provided the Financial Declaration and attachments to the other party in compliance with this rule.

(e) **Exempted agencies.** Agencies of the State of Utah are not subject to these disclosure requirements.

(f) **Sanctions.** Failure to fully disclose all assets and income in the Financial Declaration and attachments may subject the non-disclosing party to sanctions under Rule 37 including an award of non-disclosed assets to the other party, attorney's fees or other sanctions deemed appropriate by the court.

(g) **Failure to comply.** Failure of a party to comply with this rule does not preclude any other party from obtaining a default judgment, proceeding with the case, or seeking other relief from the court.

(h) **Notice of requirements.** Notice of the requirements of this rule shall be served on the Respondent and all joined parties with the initial petition.

Rule 26.2 Disclosures in personal injury actions.

(a) **Scope.** This rule applies to all actions seeking damages arising out of personal physical injuries or physical sickness.

(b) **Plaintiff's additional initial disclosures.** Except to the extent that plaintiff moves for a protective order, plaintiff's Rule 26(a) disclosures shall also include:

(b)(1) A list of all health care providers who have treated or examined the plaintiff for the injury at issue, including the name, address, approximate dates of treatment, and a general description of the reason for the treatment.

(b)(2) A list of all other health care providers who treated or examined the plaintiff for any reason in the 5 years before the event giving rise to the claim, including the name, address, approximate dates of treatment, and a general description of the reason for the treatment.

(b)(3) Plaintiff's Social Security number or Medicare health insurance claim number (HICN), full name, and date of birth.

(b)(4) A description of all disability or income-replacement benefits received if loss of wages or loss of earning capacity is claimed, including the amounts, payor's name and address, and the duration of the benefits.

(b)(5) A list of plaintiff's employers for the 5 years preceding the event giving rise to the claim if loss of wages or loss of earning capacity is claimed, including the employer's name and address and plaintiff's job description, wage, and benefits.

(b)(6) Copies of all bills, statements, or receipts for medical care, prescriptions, or other out-of-pocket expenses incurred as a result of the injury at issue.

(b)(7) Copies of all investigative reports prepared by any public official or agency and in the possession of plaintiff or counsel that describe the event giving rise to the claim.

(b)(8) Except as protected by Rule 26(b)(5), copies of all written or recorded statements of individuals, in the possession of plaintiff or counsel, regarding the event giving rise to the claim or the nature or extent of the injury.

(c) **Defendant's additional disclosures.** Defendant's Rule 26(a) disclosures shall also include:

(c)(1) A statement of the amount of insurance coverage applicable to the claim, including any potential excess coverage, and any deductible, self-insured retention, or reservations of rights, giving the name and address of the insurer.

(c)(2) Unless the plaintiff makes a written request for a copy of an entire insurance policy to be disclosed under Rule 26(a)(1)(D), it is sufficient for the defendant to disclose a copy of the declaration page or coverage sheet for any policy covering the claim.

(c)(3) Copies of all investigative reports, prepared by any public official or agency and in the possession of defendant, defendant's insurers, or counsel, that describe the event giving rise to the claim.

(c)(4) Except as protected by Rule 26(b)(5), copies of all written or recorded statements of individuals, in the possession of defendant, defendant's insurers, or counsel, regarding the event giving rise to the claim or the nature or extent of the injury.

(c)(5) The information required by Rule 9(l).

(d) All non-public information disclosed under this rule shall be used only for the purposes of the action, unless otherwise ordered by the court.

Rule 29. Stipulations regarding disclosure and discovery procedure.

The parties may modify the limits and procedures for disclosure and discovery by filing, before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulated statement that the extraordinary discovery is necessary and proportional under Rule 26(b)(2) and that each party has reviewed and approved a discovery budget. Stipulations extending the time for disclosure or discovery do not require a statement regarding proportionality or discovery budgets. Stipulations extending the time for or limits of disclosure or discovery require court approval only if the extension would interfere with a court order for completion of discovery or with the date of a hearing or trial.

Rule 30. Depositions upon oral questions.

(a) **When depositions may be taken; when leave required.** A party may depose a party or witness by oral questions. A witness may not be deposed more than once in standard discovery. An expert who has prepared a report disclosed under Rule 26(a)(4)(B) may not be deposed.

(b) **Notice of deposition; general requirements; special notice; non-stenographic recording; production of documents and things; deposition of organization; deposition by telephone.**

(b)(1) The party deposing a witness shall give reasonable notice in writing to every other party. The notice shall state the date, time and place for the deposition and the name and address of each witness. If the name of a witness is not known, the notice shall describe the witness sufficiently to identify the person or state the class or group to which the person belongs. The notice shall designate any documents and tangible things to be produced by a witness. The notice shall designate the officer who will conduct the deposition.

(b)(2) The notice shall designate the method by which the deposition will be recorded. With prior notice to the officer, witness and other parties, any party may designate a recording method in addition to the method designated in the notice. Depositions may be recorded by sound, sound-and-visual, or stenographic means, and the party designating the recording method shall bear the cost of the recording. The appearance or demeanor of witnesses or attorneys shall not be distorted through recording techniques.

(b)(3) A deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes (A) the officer's name and business address; (B) the date, time and place of the deposition; (C) the name of the witness; (D) the administration of the oath or affirmation to the witness; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of the recording medium. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall state any stipulations.

(b)(4) The notice to a party witness may be accompanied by a request under Rule 34 for the production of documents and tangible things at the deposition. The procedure of Rule 34 shall apply to the request. The attendance of a nonparty witness may be compelled by subpoena under Rule 45. Documents and tangible things to be produced shall be stated in the subpoena.

(b)(5) A deposition may be taken by remote electronic means. A deposition taken by remote electronic means is considered to be taken at the place where the witness is located.

(b)(6) A party may name as the witness a corporation, a partnership, an association, or a governmental agency, describe with reasonable particularity the matters on which questioning is requested, and direct the organization to designate one or more officers, directors, managing agents, or other persons to testify on its behalf. The organization shall state, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The person so designated shall testify as to matters known or reasonably available to the organization.

(c) **Examination and cross-examination; objections.**

(c)(1) Questioning of witnesses may proceed as permitted at the trial under the Utah Rules of Evidence, except Rules 103 and 615.

(c)(2) All objections shall be recorded, but the questioning shall proceed, and the testimony taken subject to the objections. Any objection shall be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a witness not to answer only to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion for a protective order under Rule 37. Upon demand of the objecting party or witness, the deposition shall be suspended for the time necessary to make a motion. The party taking the deposition may complete or adjourn the deposition before moving for an order to compel discovery under Rule 37.

(d) **Limits.** During standard discovery, oral questioning of a nonparty shall not exceed four hours, and oral questioning of a party shall not exceed seven hours.

(e) **Submission to witness; changes; signing.** Within 28 days after being notified by the officer that the transcript or recording is available, a witness may sign a statement of changes to the form or substance of the transcript or recording and the reasons for the changes. The officer shall append any changes timely made by the witness.

(f) **Record of deposition; certification and delivery by officer; exhibits; copies.**

(f)(1) The officer shall record the deposition or direct another person present to record the deposition. The officer shall sign a certificate, to accompany the record, that the witness was under oath or affirmation and that the record is a true record of the deposition. The officer shall keep a copy of the record. The officer shall securely seal the record endorsed with the title of the action and marked "Deposition of (name). Do not open." and shall promptly send the sealed record to the attorney or the party who designated the recording method. An

attorney or party receiving the record shall store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(f)(2) Every party may inspect and copy documents and things produced for inspection and must have a fair opportunity to compare copies and originals. Upon the request of a party, documents and things produced for inspection shall be marked for identification and added to the record. If the witness wants to retain the originals, that person shall offer the originals to be copied, marked for identification and added to the record.

(f)(3) Upon payment of reasonable charges, the officer shall furnish a copy of the record to any party or to the witness. An official transcript of a recording made by non-stenographic means shall be prepared under Utah Rule of Appellate Procedure 11(e).

(g) **Failure to attend or to serve subpoena; expenses.** If the party giving the notice of a deposition fails to attend or fails to serve a subpoena upon a witness who fails to attend, and another party attends in person or by attorney, the court may order the party giving the notice to pay to the other party the reasonable costs, expenses and attorney fees incurred.

(h) **Deposition in action pending in another state.** Any party to an action in another state may take the deposition of any person within this state in the same manner and subject to the same conditions and limitations as if such action were pending in this state. Notice of the deposition shall be filed with the clerk of the court of the county in which the person whose deposition is to be taken resides or is to be served. Matters required to be submitted to the court shall be submitted to the court in the county where the deposition is being taken.

(i) **Stipulations regarding deposition procedures.** The parties may by written stipulation provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions.

Rule 33. Interrogatories to parties.

(a) **Availability; procedures for use.** During standard discovery, any party may serve written interrogatories upon any other party, subject to the limits of Rule 26(c)(5). Each interrogatory shall be separately stated and numbered.

(b) **Answers and objections.** The responding party shall serve a written response within 28 days after service of the interrogatories. The responding party shall restate each interrogatory before responding to it. Each interrogatory shall be answered separately and fully in writing under oath or affirmation, unless it is objected to. If an interrogatory is objected to, the party shall state the reasons for the objection. Any reason not stated is waived unless excused by the court for good cause. An interrogatory is not objectionable merely because an answer involves an opinion or argument that relates to fact or the application of law to fact. The party shall answer any part of an interrogatory that is not objectionable.

(c) **Scope; use at trial.** Interrogatories may relate to any discoverable matter. Answers may be used as permitted by the Rules of Evidence.

(d) **Option to produce business records.** If the answer to an interrogatory may be found by inspecting the answering party's business records, including electronically stored information, and the burden of finding the answer is substantially the same for both parties, the answering party may identify the records from which the answer may be found. The answering party must give the asking party reasonable opportunity to inspect the records and to make copies, compilations, or summaries. The answering party must identify the records in sufficient detail to permit the asking party to locate and to identify them as readily as the answering party.

Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

(a) **Scope.**

(a)(1) Any party may serve on any other party a request to produce and permit the requesting party to inspect, copy, test or sample any designated discoverable documents, electronically stored information or tangible things (including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form) in the possession or control of the responding party.

(a)(2) Any party may serve on any other party a request to permit entry upon designated property in the possession or control of the responding party for the purpose of inspecting, measuring, surveying, photographing, testing, or sampling the property or any designated discoverable object or operation on the property.

(b) **Procedure and limitations.**

(b)(1) The request shall identify the items to be inspected by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable date, time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

(b)(2) The responding party shall serve a written response within 28 days after service of the request. The responding party shall restate each request before responding to it. The response shall state, with respect to each item or category, that inspection and related acts will be permitted as requested, or that the request is objected to. If the party objects to a request, the party must state the reasons for the objection. Any reason not stated is waived unless excused by the court for good cause. The party shall identify and permit inspection of any part of a request that is not objectionable. If the party objects to the requested form or forms for producing electronically stored information -- or if no form was specified in the request -- the responding party must state the form or forms it intends to use.

(c) **Form of documents and electronically stored information.**

(c)(1) A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c)(2) If a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable.

(c)(3) A party need not produce the same electronically stored information in more than one form.

Rule 35. Physical and mental examination of persons.

(a) **Order for examination.** When the mental or physical condition or attribute of a party or of a person in the custody or control of a party is in controversy, the court may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or control. The order may be made only on motion for good cause shown. All papers related to the motion and notice of any hearing shall be served on a nonparty to be examined. The order shall specify the time, place, manner, conditions, and scope of the examination and the person by whom the examination is to be made. The person being examined may record the examination by audio or video means unless the party requesting the examination shows that the recording would unduly interfere with the examination.

(b) **Report.** The party requesting the examination shall disclose a detailed written report of the examiner, setting out the examiner's findings, including results of all tests made, diagnoses and conclusions. If the party requesting the examination wishes to call the examiner as a witness, the party shall disclose the examiner as an expert as required by Rule 26(a)(3).

(c) **Sanctions.** If a party or a person in the custody or under the legal control of a party fails to obey an order entered under paragraph (a), the court on motion may take any action authorized by Rule 37(e), except that the failure cannot be treated as contempt of court.

Rule 36. Request for admission.

(a) **Request for admission**. A party may serve upon any other party a written request to admit the truth of any discoverable matter set forth in the request, including the genuineness of any document. The matter must relate to statements or opinions of fact or of the application of law to fact. Each matter shall be separately stated and numbered. A copy of the document shall be served with the request unless it has already been furnished or made available for inspection and copying. The request shall notify the responding party that the matters will be deemed admitted unless the party responds within 28 days after service of the request.

(b) **Answer or objection.**

(b)(1) The matter is admitted unless, within 28 days after service of the request, the responding party serves upon the requesting party a written response.

(b)(2) The answering party shall restate each request before responding to it. Unless the answering party objects to a matter, the party must admit or deny the matter or state in detail the reasons why the party cannot truthfully admit or deny. A party may identify the part of a matter which is true and deny the rest. A denial shall fairly meet the substance of the request. Lack of information is not a reason for failure to admit or deny unless, after reasonable inquiry, the information known or reasonably available is insufficient to enable an admission or denial. A party who considers the subject of a request for admission to be a genuine issue for trial may not object on that ground alone but may, subject to Rule 37(f), deny the matter or state the reasons for the failure to admit or deny.

(b)(3) If the party objects to a matter, the party shall state the reasons for the objection. Any reason not stated is waived unless excused by the court for good cause. The party shall admit or deny any part of a matter that is not objectionable. It is not grounds for objection that the truth of a matter is a genuine issue for trial.

(c) **Effect of admission.** Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment if the presentation of the merits of the action will be promoted and withdrawal or amendment will not prejudice the requesting party. Any admission under this rule is for the purpose of the pending action only. It is not an admission for any other purpose, nor may it be used in any other action.

Rule 37. Discovery and disclosure motions; Sanctions.

(a) **Motion for order compelling disclosure or discovery.**

(a)(1) A party may move to compel disclosure or discovery and for appropriate sanctions if another party:

(a)(1)(A) fails to disclose, fails to respond to a discovery request, or makes an evasive or incomplete disclosure or response to a request for discovery;

(a)(1)(B) fails to disclose, fails to respond to a discovery request, fails to supplement a disclosure or response or makes a supplemental disclosure or response without an adequate explanation of why the additional or correct information was not previously provided;

(a)(1)(C) objects to a discovery request ;

(a)(1)(D) impedes, delays, or frustrates the fair examination of a witness; or

(a)(1)(E) otherwise fails to make full and complete disclosure or discovery.

(a)(2) A motion may be made to the court in which the action is pending, or, on matters relating to a deposition or a document subpoena, to the court in the district where the deposition is being taken or where the subpoena was served. A motion for an order to a

nonparty witness shall be made to the court in the district where the deposition is being taken or where the subpoena was served.

(a)(3) The moving party must attach a copy of the request for discovery, the disclosure, or the response at issue. The moving party must also attach a certification that the moving party has in good faith conferred or attempted to confer with the other affected parties in an effort to secure the disclosure or discovery without court action and that the discovery being sought is proportional under Rule 26(b)(2).

(b) **Motion for protective order.**

(b)(1) A party or the person from whom discovery is sought may move for an order of protection from discovery. The moving party shall attach to the motion a copy of the request for discovery or the response at issue. The moving party shall also attach a certification that the moving party has in good faith conferred or attempted to confer with other affected parties to resolve the dispute without court action.

(b)(2) If the motion raises issues of proportionality under Rule 26(b)(2), the party seeking the discovery has the burden of demonstrating that the information being sought is proportional.

(c) **Orders.** The court may make any order to require disclosure or discovery or to protect a party or person from discovery being conducted in bad faith or from annoyance, embarrassment, oppression, or undue burden or expense, or to achieve proportionality under Rule 26(b)(2), including one or more of the following:

(c)(1) that the discovery not be had;

(c)(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(c)(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(c)(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(c)(5) that discovery be conducted with no one present except persons designated by the court;

(c)(6) that a deposition after being sealed be opened only by order of the court;

(c)(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(c)(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court;

(c)(9) that a question about a statement or opinion of fact or the application of law to fact not be answered until after designated discovery has been completed or until a pretrial conference or other later time; or

(c)(10) that the costs, expenses and attorney fees of discovery be allocated among the parties as justice requires.

(c)(11) If a protective order terminates a deposition, it shall be resumed only upon the order of the court in which the action is pending.

(d) **Expenses and sanctions for motions.** If the motion to compel or for a protective order is granted, or if a party provides disclosure or discovery or withdraws a disclosure or discovery request after a motion is filed, the court may order the party, witness or attorney to pay the reasonable expenses and attorney fees incurred on account of the motion if the court finds that the party, witness, or attorney did not act in good faith or asserted a position that was not substantially justified. A motion to compel or for a protective order does not suspend or toll the time to complete standard discovery.

(e) **Failure to comply with order.**

(e)(1) Sanctions by court in district where deposition is taken. Failure to follow an order of the court in the district in which the deposition is being taken or where the document subpoena was served is contempt of that court.

(e)(2) Sanctions by court in which action is pending. Unless the court finds that the failure was substantially justified, the court in which the action is pending may impose appropriate sanctions for the failure to follow its orders, including the following:

(e)(2)(A) deem the matter or any other designated facts to be established in accordance with the claim or defense of the party obtaining the order;

(e)(2)(B) prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters into evidence;

(e)(2)(C) stay further proceedings until the order is obeyed;

(e)(2)(D) dismiss all or part of the action, strike all or part of the pleadings, or render judgment by default on all or part of the action;

(e)(2)(E) order the party or the attorney to pay the reasonable expenses, including attorney fees, caused by the failure;

(e)(2)(F) treat the failure to obey an order, other than an order to submit to a physical or mental examination, as contempt of court; and

(e)(2)(G) instruct the jury regarding an adverse inference.

(f) **Expenses on failure to admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions proves the genuineness of the document or the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that:

(f)(1) the request was held objectionable pursuant to Rule 36(a);

(f)(2) the admission sought was of no substantial importance;

(f)(3) there were reasonable grounds to believe that the party failing to admit might prevail on the matter;

(f)(4) that the request is not proportional under Rule 26(b)(2); or

(f)(5) there were other good reasons for the failure to admit.

(g) **Failure of party to attend at own deposition.** The court on motion may take any action authorized by paragraph (e)(2) if a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to appear before the officer taking the deposition, after proper service of the notice. The failure to act described in this paragraph may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order under paragraph (b).

(h) **Failure to disclose.** If a party fails to disclose a witness, document or other material, or to amend a prior response to discovery as required by Rule 26(d), that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose. In addition to or in lieu of this sanction, the court on motion may take any action authorized by paragraph (e)(2).

(i) **Failure to preserve evidence.** Nothing in this rule limits the inherent power of the court to take any action authorized by paragraph (e)(2) if a party destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty. Absent exceptional circumstances, a court may not impose sanctions under these rules

on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Civil Justice Initiative

Utah: Impact of the Revisions to Rule 26 on Discovery Practice in the Utah District Courts

Final Report: April 2015

NCSC
National Center for State Courts
Williamsburg, Virginia

Note: The Utah Supreme Court adopted revisions to the rules governing discovery in civil cases filed in the Utah district courts effective November 1, 2011. The Matheson Courthouse in Salt Lake City, Utah, houses the Utah Supreme Court, the Utah Administrative Office of the Courts, and the Third Judicial District Court.

Paula Hannaford-Agor, JD
Director, NCSC Center for Jury Studies

Cynthia G. Lee, JD
Senior Court Research Associate

Acknowledgements

The NCSC project staff are extremely grateful to the judges, lawyers, and court staff within the Utah judicial branch who invited the NCSC to conduct this evaluation and who provided expert technical support and guidance for this project. We are especially indebted to the following individuals:

Hon. Matthew B. Durrant
Chief Justice
Utah Supreme Court

Hon. Christine Durham
Former Chief Justice
Utah Supreme Court

Daniel Becker
State Court Administrator
Utah Administrative Office of the Courts

Timothy Shea
Appellate Court Administrator
Utah Administrative Office of the Courts

Kim Allard
Court Services Director
Utah Administrative Office of the Courts

Debra Moore
District Court Administrator
Utah Administrative Office of the Courts

Tom Langhorne
Judicial Institute Director
Utah Administrative Office of the Courts

George Braden
Management Analyst
Utah Administrative Office of the Courts

Kim Matheson
Information Analyst
Utah Administrative Office of the Courts

We are also indebted to our NCSC colleagues who provided substantive expertise and administrative support to the project including Richard Schauffler, Director, Research Services; Nicole L. Waters, Principal Court Research Consultant; Amber Will, Research Assistant; Bethany Bostrom, Research Assistant, and Brenda Otto, Program Specialist. This project was partially supported by a grant from the Bureau of Justice Assistance, U.S. Department of Justice (BJA No. 2009-D1-BXK-036). The views expressed in this report are those of the authors and do not necessarily represent those of the Utah judicial branch, the U.S. Department of Justice, or the National Center for State Courts.

Table of Contents

Executive Summary

On November 1, 2011, the Utah Supreme Court implemented a set of revisions to Rule 26 and Rule 26.1 of the Utah Rules of Civil Procedure designed to address concerns regarding the scope and cost of discovery in civil cases. The revisions included seven primary components:

- Proportionality is the key principle governing the scope of discovery — specifically, the cost of discovery should be proportional to what is at stake in the litigation.
- The party seeking discovery bears the burden of demonstrating that the discovery request is both relevant and proportional.
- The court has authority to order the requesting party to pay some or all of the costs of discovery if necessary to achieve proportionality.
- The parties must automatically disclose the documents and physical evidence which they may offer as evidence as well as the names of witnesses with a description of each witness's expected testimony. Failure to make timely disclosure results in the inadmissibility of the undisclosed evidence.
- Upon filing, cases are assigned to one of three discovery tiers based on the amount in controversy; each discovery tier has defined limits on the amount of discovery and the time frame in which fact and expert discovery must be completed. Cases in which no amount in controversy is pleaded (e.g., domestic cases) are assigned to Tier 2.
- Parties seeking discovery above that permitted by the assigned tier may do so by motion or stipulation, but in either case must certify to the court that the additional discovery is proportional to the stakes of the case and that clients have reviewed and approved a discovery budget.
- A party may either accept a report from the opposing party's expert witness or may depose the opposing party's expert witness, but not both. If a party accepts an expert witness report, the expert cannot testify beyond what is fairly disclosed in the report.

In the short term, the Rule 26 revisions are anticipated to have the following effects:

- An increase in the number of orders to amend pleadings to specify damages so the appropriate discovery tier can be assigned;
- An increase in the number of motions to amend pleadings to adjust the assigned discovery tier;
- A possible increase in the proportion of Tier 2 and Tier 3 cases by parties preemptively pleading a higher amount in controversy to secure a higher tier for standard discovery;
- An increase in the number of amended disclosures as parties seek to ensure that potential witnesses and evidence will be admissible for trial if needed; and
- An increase in the number of stipulations and motions to expand discovery beyond the scope or time permitted under the assigned discovery tier.

The expected long-term impacts include:

- A decrease in the amount of time expended to complete discovery;
- A commensurate decrease in the time to disposition due to the shortened discovery period;
- A decrease in costs associated with discovery;
- An increase in filings in lower value (Tier 1) cases;
- A preference by litigants to opt for a written report rather than oral deposition of opposing expert witnesses;
- A lower compliance rate with the automatic disclosure requirements by self-represented litigants compared to litigants represented by legal counsel; and
- An increase in the trial rate, especially for Tier 1 cases, as pursuing a case past discovery becomes more affordable due to decreases in discovery costs; or, alternatively, a decrease in the trial rate and a corresponding increase in settlements as the automatic disclosure requirements provide sufficient information with which to assess claims and defenses.

EVALUATION DATA SOURCES AND METHODS

Funded in part by a grant from the U.S. Department of Justice, Bureau of Justice Assistance, the National Center for State Courts (NCSC) conducted an empirical evaluation of the short-term and long-term impacts of the Rule 26 revisions. The evaluation consists of five components: an analysis of trends in aggregate filings; a comparison of case-level characteristics for cases filed before and after implementation of the Rule 26 revisions; a survey of attorneys representing parties in civil cases subject to the Rule 26 revisions; focus groups with district court judges to assess judicial observations and opinions about the impact of the Rule 26 revisions in court proceedings; and a survey of attorneys to document the costs associated with civil litigation in Utah district courts.

IMPACT ON AGGREGATE CASE FILINGS

A time series analysis of total monthly civil case filings, excluding debt collection and domestic relations cases, provides no evidence that the Rule 26 revisions had an impact on the number of civil case filings.

TIER INFLATION

Discovery tier assignments for cases filed after the Rule 26 revisions (post-implementation cases) were compared with presumptive tier assignments based on the amount in controversy declared in the complaint for cases filed prior to the Rule 26 revisions (pre-implementation cases). Following implementation of the Rule 26 revisions, the proportion of cases assigned to Tier 1 fell, while the proportions of cases assigned to Tiers 2 and 3 increased, suggesting that some plaintiffs may be increasing the amount in controversy in the complaint to secure a higher discovery tier assignment and consequently a larger scope of discovery. Further evidence of this effect was found in the analysis of judgment awards: the proportion of judgment awards less than $50,000 was significantly higher in the post-implementation sample than in the pre-implementation sample despite a decrease in the proportion of Tier 1 cases.

CASE DISPOSITIONS

For Tier 1 cases other than debt collection, Tier 2 cases other than domestic relations, and Tier 3 cases, the Rule 26 revisions are associated with increases of 13 to 18 percentage points in the settlement rate. These differences suggest that the Rule 26 revisions, particularly the expanded automatic disclosure requirements, are providing litigants with sufficient information about the evidence to engage in more productive settlement negotiations. A similar impact was observed for cases in which no answer was filed, suggesting an unexpected shadow effect from the Rule 26 revisions even in cases in which no discovery was expected to occur.

FILING-TO-DISPOSITION TIME

Across all case types and tiers, cases filed after the implementation of the Rule 26 revisions tended to reach a final disposition more quickly than cases filed prior to the Rule 26 revisions. The decrease in time to disposition associated with the Rule 26 revisions was similar for courts with and without strong case management practices.

SHORT-TERM IMPACT OF RULE 26 REVISIONS

It was expected that for a brief period of time following the implementation of the Rule 26 revisions, attorneys who were just becoming aware of the new requirements would tend to file amended pleadings or motions to adjust the amount in controversy in order to secure a higher discovery tier assignment, as well as amended disclosures to ensure full compliance with the automatic disclosure requirements. Such documents, however, were filed in less than 1% of post-implementation cases in which an answer was filed; similarly, respondents to the attorney survey reported filing motions to amend the pleadings in less than 1% of cases. Coupled with the evidence of tier inflation, this suggests that attorneys were generally well informed about the Rule 26 revisions prior to implementation.

MOTIONS/STIPULATIONS FOR EXTRAORDINARY DISCOVERY

Contrary to expectations, the parties sought permission for extraordinary discovery in only a small minority of cases. Stipulations for extraordinary discovery were filed in 0.9% of cases, and contested motions for extraordinary discovery were filed in just 0.4% of cases. The rates of motions and stipulations for extraordinary discovery were highest in Tier 3 cases. The attorney survey confirms that motions for extraordinary discovery are rare. Overall, attorney-reported compliance with the scope of standard discovery generally exceeded 90% for both plaintiffs and defendants and across all three discovery tiers. Intriguingly, attorneys reported that no formal discovery took place in nearly one-third (32%) of Tier 1 and Tier 2 cases, and at least one of the parties did not engage in formal discovery in an additional 23% of Tier 1 cases and an additional 17% of Tier 2 cases. Taken together, these observations suggest that litigants in Tier 1 and Tier 2 cases generally find the default scope of discovery to be sufficient and/or that parties are stipulating to extraordinary discovery without seeking formal approval from the court. During the judicial focus groups, judges expressed suspicion that attorneys are frequently making discovery stipulations without filing them with the court.

COMPLIANCE WITH STANDARD DISCOVERY TIMELINES

Although a certificate of readiness for trial appears in the court record for a small minority of cases (5% of non-domestic cases, 8% of domestic relations cases), its filing is an important indicator of compliance with the Rule 26 discovery timelines. For those post-implementation cases in which a certificate of readiness is recorded, the certificate was filed on or before the due date in just over half of cases (51%). For cases in which no certificate of readiness was filed, only about one-third (34%) reached a disposition within 90 days after the due date. Although the post-implementation cases resolved more quickly overall, it appears likely that a large share of litigants are failing to comply with the standard discovery timelines under Rule 26. This finding is corroborated by the attorney survey, in which fact discovery was reported to be completed by the Rule 26 deadline in only 38% of Tier 1 cases, 25% of Tier 2 cases, and none of the Tier 3 cases.

FREQUENCY AND TIMING OF DISCOVERY DISPUTES

Following implementation of the Rule 26 revisions, the frequency of discovery dispute filings in Tier 1 debt collection cases doubled from 2.6% to 5.2%, while the frequency of discovery disputes fell in Tier 1 non-debt collection cases and Tier 3 cases and did not exhibit a statistically significant change in Tier 2 cases. Discovery disputes in post-implementation cases tended to occur about four months earlier in the life of the case compared to pre-implementation cases. The attorney surveys and judicial focus groups also provided evidence for the rarity of discovery disputes under the revised rules. Many judges reported substantial decreases in the number of motions to compel discovery and motions for protective orders.

IMPACT OF REPRESENTATION STATUS ON RULE 26 COMPLIANCE

The case-level data provide no evidence that self-represented litigants tended to have difficulty complying with the Rule 26 requirements. In fact, cases in which both parties were represented by counsel were most likely to involve amended pleadings and least likely to have a certificate of readiness for trial filed.

CONCLUSIONS AND RECOMMENDATIONS

For cases in which an answer was filed, the Rule 26 revisions appear to have had a positive impact on civil case management in the form of fewer discovery disputes in cases other than debt collection and domestic relations, as well as reductions in time to disposition across all case types and tiers. Compliance with the standard discovery restrictions appears to be

high, although there are suggestions that some parties may be stipulating around the restrictions without seeking court approval.

In response to the findings of this evaluation, NCSC recommends that the Utah judicial branch encourage courts to make greater use of the existing capacity for automated compliance reviews, as well as the availability of highly skilled and experienced judicial support staff, to manage civil cases more actively and engage in judicial intervention earlier in appropriate cases. More intensive monitoring and management of compliance with litigation timelines should assist in the timely resolution of cases and decrease the need for more intensive judicial intervention in the later stages of litigation. NCSC also recommends that state court policymakers investigate the reasons behind the low answer rates observed in both the pre-implementation and post-implementation samples to determine whether systemic factors are dissuading parties from actively litigating their cases.

Introduction

On Nov. 1, 2011, the Utah Supreme Court enacted sweeping changes to the rules governing discovery in civil cases filed in the Utah district courts. The reforms reflected three years of debate among members of the Utah Supreme Court Advisory Committee on the Rules of Civil Procedure (Advisory Committee) and extensive comment by the practicing bar. In a memorandum filed with the proposed rules, the Advisory Committee outlined the need for the reforms.[1] Noting that the Utah Rules of Civil Procedure had gradually evolved to mirror the federal rules,

> [I]t was perceived that consistency with the federal rules, along with the extensive case law interpreting them, would provide a positive benefit. … [T]he committee has come to question the very premise on which Utah adopted those rules. The federal rules were designed for complex cases with large amounts in controversy that typify the federal system. The vast majority of cases filed in Utah courts are not those types of cases. As a result, our state civil justice system has become unavailable for many people because they cannot afford it.

The concerns raised by the Advisory Committee echo those of judges and lawyers in other states. A 2008 survey of trial lawyers found that discovery was perceived to be the primary cause of burgeoning litigation costs.[2] In 2010, the federal Advisory Committee on Civil Rules hosted a national Conference on Civil Litigation at Duke University Law School, which included several sessions focused on issues related to discovery.[3] Proposals from these and other statewide investigations have focused on automatic disclosure requirements,[4] limits on either the amount or timeframe for completing discovery,[5] and cost-sharing or cost-shifting strategies, especially concerning e-discovery.[6]

Like the Federal Rules of Civil Procedure, Rule 26 of the Utah Rules of Civil Procedure as it existed prior to November 1, 2011 provided that the general scope of discovery permitted parties to obtain information about "any nonprivileged matter that is relevant to any party's claim or defense. … Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The Advisory Committee concluded that it was necessary to revise Rule 26 of the Utah Rules of Civil Procedure to explicitly introduce the concept of proportionality into the process of discovery to slow, if not reverse, the perceived trend toward ever-increasing discovery in civil cases. The committee proposals envisioned a cultural change in discovery practices "away from a system in which discovery is the predominant aspect of litigation … and toward a system in which each request for discovery must be justified by its proponent, and the focus is on moving quickly and efficiently to the disposition of the merits of the case."[7] The revised Rule 26 ultimately featured seven distinct components:[8]

- Proportionality is the key principle governing the scope of discovery — specifically, the cost of discovery should be proportional to what is at stake in the litigation.

---

[1] UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE, PROPOSED RULES GOVERNING CIVIL DISCOVERY [*hereinafter* PROPOSED RULES].

[2] AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT (2009).

[3] JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES AND THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION.

[4] NEW HAMPSHIRE: IMPACT OF THE PROPORTIONAL DISCOVERY/AUTOMATIC DISCLOSURE (PAD) PILOT RULES (NCSC Aug. 19, 2013).

[5] HANNAFORD-AGOR et al., SHORT, SUMMARY & EXPEDITED: THE EVOLUTION OF CIVIL JURY TRIALS 58-71 (NCSC 2012); Adoption of Rules for Dismissals and Expedited Actions, Per Curiam Opinion, Misc. Docket No. 12-9191 (Tex. S. Ct., Nov. 13, 2012).

[6] SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM: REPORT ON PHASE ONE (May 20, 2009 – May 1, 2010); SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM: FINAL REPORT ON PHASE TWO (May 2010 – May 2012); SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM: INTERIM REPORT ON PHASE THREE (May 2012 – May 2013).

[7] PROPOSED RULES, *supra* note 1, at 2.

[8] The revisions were also incorporated into Rule 26.1, which applies to domestic relations cases (e.g., divorce/annulment, child support and custody, and paternity determinations). In this evaluation, any references to Rule 26 also refer to Rule 26.1.

- The party seeking discovery bears the burden of demonstrating that the discovery request is both relevant and proportional.
- The court has authority to order the requesting party to pay some or all of the costs of discovery if necessary to achieve proportionality.
- The parties must automatically disclose the documents and physical evidence which they may offer as evidence as well as the names of witnesses with a description of each witness's expected testimony. Failure to make timely disclosure results in the inadmissibility of the undisclosed evidence.
- Upon filing, cases are assigned to one of three discovery tiers based on the amount in controversy. Each discovery tier has defined limits on the amount of discovery and the time frame in which fact and expert discovery must be completed. Cases in which no amount in controversy is pleaded (e.g., domestic cases) are assigned to Tier 2. See Table 1.
- Parties seeking discovery above that permitted by the assigned tier may do so by motion or stipulation, but in either case must certify to the court that the additional discovery is proportional to the stakes of the case and that clients have reviewed and approved a discovery budget.
- A party may either accept a report from the opposing party's expert witness or may depose the opposing party's expert witness, but not both. If a party accepts an expert witness report, the expert cannot testify beyond what is fairly disclosed in the report.

Since the amendments to Rule 26 went into effect, a number of related events and changes have occurred that may interact with the rule changes. Concurrent with the Rule 26 changes, for example, the Third Judicial District implemented a local rule providing for an expedited procedure for resolving discovery disputes. The local rule requires a party to file a "Statement of Discovery Issues" no more than four pages in length in lieu of a motion to compel discov-

Table 1: Standard Discovery by Tier

STANDARD DISCOVERY	NUMBER OF …				
	INTERROGATORIES	REQUESTS FOR ADMISSION	REQUESTS FOR PRODUCTION	DEPOSITION HOURS FOR FACT WITNESSES	FACT DISCOVERY COMPLETION WITHIN …
Tier 1: $50,000 or less	0	5	5	3	120 days
Tier 2: More than $50,000 but less than $300,000, or non-monetary relief	10	10	10	15	180 days
Tier 3: $300,000 or more	20	20	20	30	210 days

ery or a motion for a protective order. The Statement of Discovery Issues must describe the relief sought and the basis for the relief and must include a statement regarding the proportionality of the request under Rule 26(b)(2) and certification that the parties have met and conferred in an attempt to resolve or narrow the dispute without court involvement. Any party opposing the relief sought must file a "Statement in Opposition," also no more than 4 pages in length, within 5 days, after which the filing party may file a Request to Submit for Decision. After receiving the Request to Submit, the court must promptly schedule a telephonic hearing to resolve the dispute. As other judicial districts learned of this rule, they likewise adopted it as local rule. Ultimately, it was adopted as Rule 4-502 of the Utah Rules of Judicial Administration effective January 1, 2013. The Advisory Committee has recommended that it be integrated into Rule 37 of the Utah Rules of Civil Procedure. This expedited procedure for addressing discovery disputes was intended to mitigate the problem of long delays in case processing during which the filing of motions related to discovery effectively stayed the case until disputes could be fully briefed, argued, and decided, which sometimes took months.

At the same time that the Rule 26 revisions were being implemented, the Utah judicial branch was taking steps to strengthen its administrative and technological capacity to support effective case management. Beginning in 2011, the district courts began routinely digitizing civil case filings and implementing a more detailed coding system for identifying and classifying new filings. These steps permitted court staff to more easily allocate routine case management duties to non-judicial court staff, leaving judges free to concentrate on tasks requiring uniquely judicial expertise and discretion. Mandatory e-filing for attorneys was implemented on a statewide basis in April 2013, which automated the coding systems and greatly increased their effectiveness. The judicial staffing model within the Utah district courts was also reorganized from clerical operations into judicial and case support teams. The intent of the staffing change was to increase efficiency and enhance efforts to fulfill the court's mission to serve the public effectively by improving staff morale and job satisfaction, decreasing turnover and attrition, and providing opportunities for increased training and development.[9]

The appellate bench has added its support for the Rule 26 revisions in two recently decided cases affirming the striking of evidence for untimely disclosure. In *R.O.A. Gen., Inc. v. Chung Chu Dai*, the Court of Appeals ruled that it was not an abuse of discretion for the trial court to strike an expert report due to failure to comply with the scheduling order or for the trial court to dismiss the case for the party's failure to prosecute.[10] Furthermore, in *Townhomes at Pointe Meadows Owners Ass'n v. Pointe Meadows Townhomes, LLC*, the Court noted that Rule 37(b)(2) mandates the exclusion of untimely disclosed expert witnesses and does not require an affirmative finding of bad faith, willfulness, or persistent dilatory conduct.[11] In doing so, it firmly rejected the Appellant's argument that delays in civil litigation are the status quo and should not be subject to sanctions.[12] The message from the appellate bench is clear support for the authority of district court judges to manage their civil dockets in accordance with both the letter and the spirit of the revised rules.

The most recent initiative is a planned pilot project in which a small number of judges in the Second, Third, and Fourth Judicial Districts will apply intensive case management practices on incoming Tier 3 cases. The pilot project is premised on the assumption that Tier 3 cases are the most complex and therefore should benefit most from early and intensive case management. Participating judges plan to employ standard caseflow management strategies such as setting early case management hearings to identify key issues,

[9] COMPREHENSIVE CLERICAL COMMITTEE: REPORT AND RECOMMENDATIONS (2008).
[10] *R.O.A. Gen., Inc. v. Chung Chu Dai,* 327 P.3D 1233 (Utah App. 2014).
[11] *Townhomes at Pointe Meadows Owners Ass'n Pointe Meadows Townhomes, LLC,* 329 P. 3D 815 (Utah App. 2014).
[12] Id. at 819.

setting firm trial dates, and setting and consistently enforcing schedules for discovery and pretrial conferences.[13] The interest in experimenting with these techniques reflects a significant philosophical shift on the part of Utah district court judges, who have traditionally taken the view that the parties, not the bench, should control civil case management.

In addition to the legal and institutional factors of direct relevance to the Rule 26 revisions, the ongoing impact of the 2008 economic recession on civil case processing should be noted. As a result of the economic crisis, Utah district courts — indeed, state courts across the country — experienced tremendous increases in civil filings, especially debt collection and mortgage foreclosure cases, at the same time as state and local funding for the judicial branch was cut due to reductions in state tax revenues. Economists generally mark December 2007 as the start and June 2009 as the end of the recession, but effects related to the recession may have persisted in civil case filing and management.

NCSC EVALUATION OF RULE 26 REVISIONS

Excessive discovery practice in civil litigation is widely believed to be one of the primary factors driving cost and delay in both state and federal courts. Consequently, the revisions adopted by the Utah district courts have generated a great deal of national interest. Many court policymakers including the federal Advisory Committee on Civil Rules are considering similar reforms, but most are waiting for evidence that the Utah revisions are working as intended before proposing amendments to their own rules.[14] To ensure that state and federal courts have access to reliable information on which to judge the efficacy of these reforms, the National Center for State Courts (NCSC) secured a grant from the U.S. Department of Justice, Bureau of Justice Assistance, to conduct evaluations of civil procedure reform efforts in up to four jurisdictions.[15] With support from the Supreme Court of Utah, the Rule 26 revisions were one of the civil justice reforms selected for evaluation.

The evaluation design was developed over the course of a series of in-person and telephonic meetings with staff of the Utah Administrative Office of the Courts (AOC) in late 2011 and early 2012. These meetings focused on developing a series of working hypotheses about the intended impact of the Rule 26 revisions and exploring the case-level data captured in the Utah case management automation system (CORIS) to identify the data elements that would reliably measure these impacts. In these discussions, NCSC and AOC staff formulated a number of working hypotheses related to both short-term and long-term impacts of the rule changes. The expected short term impacts include:

- An increase in the number of orders to amend pleadings to specify damages so the appropriate discovery tier can be assigned;
- An increase in the number of motions to amend pleadings to adjust the assigned discovery tier;
- A possible increase in the proportion of Tier 2 and Tier 3 cases by parties preemptively pleading a higher amount in controversy to secure a higher tier for standard discovery;
- An increase in the number of amended disclosures as parties seek to ensure that potential witnesses and evidence will be admissible for trial, if needed; and
- An increase in the number of stipulations and motions to expand discovery beyond the scope or time permitted under the assigned discovery tier.

The expected long-term impacts include:

- A decrease in the amount of time expended to complete discovery;
- A commensurate decrease in the time to disposition due to the shortened discovery period;

[13] The inspiration for the pilot project was the publication WORKING SMARTER, NOT HARDER: HOW EXCELLENT JUDGES MANAGE CASES (IAALS 2014).

[14] The federal Advisory Committee on Civil Rules approved the adoption of similar rules concerning the proportionality of discovery and have forwarded the proposed rules to the U.S. Supreme Court. If approved, they will become effective December 1, 2015.

[15] BJA No. 2009-D1-BXK-036. In addition to the Utah Rule 26 evaluation, the NCSC has completed an evaluation of the New Hampshire Pilot Proportional Discovery/Automatic Disclosure (PAD) Rules; case studies of summary jury trial programs in six jurisdictions; and developed and pilot-tested the Civil Litigation Cost Model, a survey methodology designed to estimate civil litigation costs.

- A decrease in costs associated with discovery;
- An increase in filings in lower value (Tier 1) cases;
- A preference by litigants to opt for a written report rather than oral deposition of opposing expert witnesses;
- A lower compliance rate with the automatic disclosure requirements by self-represented litigants compared to litigants represented by legal counsel; and
- An increase in the trial rate, especially for Tier 1 cases, as pursuing a case past discovery becomes more affordable due to decreases in discovery costs; or, alternatively, a decrease in the trial rate and a corresponding increase in settlements as the automatic disclosure requirements provide sufficient information with which to assess claims and defenses.

To test these hypotheses, the NCSC employed an evaluation strategy comprising five components: an analysis of trends in aggregate case filings; a comparison of case-level characteristics for cases filed before and after implementation of the Rule 26 revisions; a survey of attorneys representing parties in civil cases subject to the Rule 26 revisions; focus groups with district court judges to assess judicial observations and opinions about the impact of the Rule 26 revisions in court proceedings; and a survey of attorneys to document the costs associated with civil litigation in Utah district courts.

The first component was a comparison of selected case characteristics extracted from CORIS for cases filed before and after the implementation date for the Rule 26 revisions (November 1, 2011). The pre-implementation sample consists of all civil cases subject to Rule 26 filed in the Utah district courts between January 1 and June 30, 2011.[16] The post-implementation sample consists of all civil cases subject to Rule 26 filed between January 1 and June 30, 2012. Both samples of cases were tracked from filing to disposition, or from filing to June 30, 2014, whichever occurred first. For each case, AOC staff extracted detailed case-level information from CORIS. See Table 2 for a list of data elements collected.

Table 2: Data Elements Extracted from CORIS for Pre-Implementation and Post-Implementation Comparison of Case-Level Characteristics

Case number
Case type
Report category
Filing date
Disposition date
Disposition type
Amount-in-controversy at filing
Discovery tier
Answer date
Rule 26 discovery deadline notice dates
Date of Certificate of Readiness for Trial filed
Dates and amounts of judgments
Representation status of litigants
Dates of bench and jury trials
Motions/stipulations to amend pleadings
Motions/stipulations and orders for extraordinary discovery (dates, filing party, relief sought)
Motions and orders concerning discovery disputes (dates, filing party, relief sought)
Motions and orders to exclude evidence due to untimely disclosure (dates, relief sought)

[16] Case types subject to rule 26 are asbestos, civil rights, condemnation, contracts, debt collection, malpractice, personal injury, property damage, property rights, water rights, wrongful death, and wrongful termination. Case types subject to rule 26.1 are custody/support, divorce/annulment, and paternity.

In addition to the comparison of case-level characteristics, the NCSC also examined monthly case filings by case type from January 2008 through June 2014. One of the working hypotheses concerning the impact of the Rule 26 revisions was an increase in filings, especially lower value (Tier 1) cases that might not otherwise be filed due to the anticipated expense of litigation. The monthly filing data were used to determine whether implementation of the Rule had a measurable effect on filing rates.

The third evaluation component was a survey of attorneys who were listed as counsel of record in CORIS in a civil case filed after implementation of the Rule 26 revisions. The purpose of the survey was twofold. First, it sought to document attorney opinions about how the revised discovery rules affected litigation of that case as well as civil litigation generally. Second, much of the activity that Rule 26 was designed to regulate takes place outside of the courthouse and is typically not reflected in either the electronic data captured by CORIS or in the physical case files. The attorney survey was designed to document this activity, in particular to assess compliance with the Rule 26 restrictions. See Appendix A for the Attorney Survey. The survey was administered on a rolling basis as cases were disposed between July 1, 2012 and June 30, 2014.

The fourth component was a series of focus groups conducted with selected district court judges in April 2014.[17] The purpose of the focus groups was to solicit the opinions of district court judges on the impact of the Rule 26 revisions on judicial caseloads as well as to document what the judges were hearing formally or informally from attorneys in their courtrooms. To facilitate the focus group discussions, judges were presented with preliminary results of the attorney surveys and asked for their reactions.

Finally, the NCSC administered its Civil Litigation Cost Model (CLCM) Survey to the attorneys who were listed as counsel of record in civil cases filed after implementation of the Rule 26 revisions. The CLCM provides estimates of the amount of time expended and, by implication, the costs incurred by attorneys for a variety of litigation-related tasks in different types of cases. The attorney responses reflect estimates of litigation costs in typical cases rather than actual costs in specific cases. Consequently, the findings cannot be used to determine whether the Rule 26 revisions resulted in a decrease in litigation costs, but they can be used to provide a baseline estimate of current costs of litigation for the cases most frequently filed in the Utah district courts given the frequency of discovery-related events confirmed by the case-level analysis and attorney survey components of the evaluation.

Subsequent sections of this report describe each of these components in greater detail including the data and methods employed, limitations of these methodologies, findings regarding the impact of the Rule 26 revisions on discovery and civil litigation generally in the Utah district courts. The report concludes with a brief summary of key findings and recommendations for future consideration.

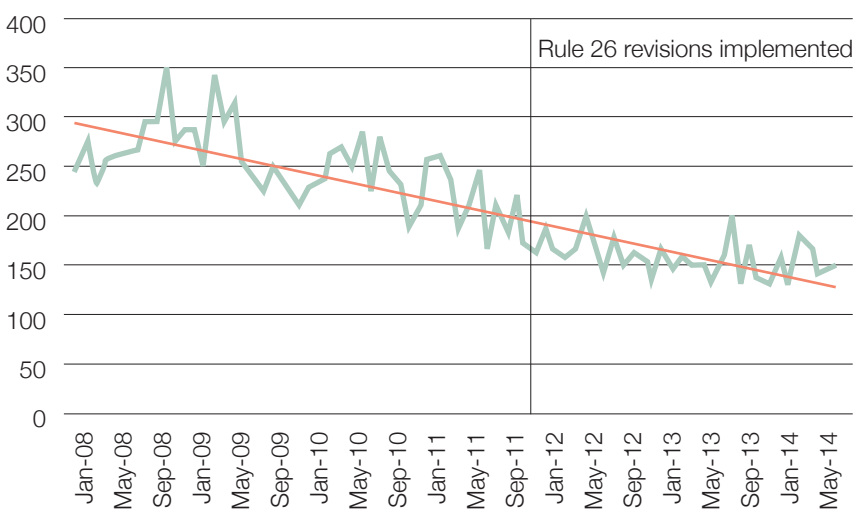
[17] The focus groups were conducted in conjunction with the Utah District Court Judges Spring Education Conference on April 23-25, 2014 in Bryce Canyon, Utah.

Impact on Aggregate Filings

By decreasing the cost of discovery in low-value cases, the Rule 26 revisions were expected to make litigating these cases more affordable, potentially leading to an increase in the number of low-value cases filed. Because it was not possible to break down filings data for the pre-implementation period by tier, filings were analyzed in the aggregate. Because the cost of discovery is not expected to be a major factor in the decision to file a debt collection or domestic relations case, these case types were excluded from the analysis.

In Figure 1, the green line shows monthly filings per million population for civil case types other than debt collection and domestic relations from January 2008 through June 2014. The orange line illustrates the overall downward trend in filings. This pattern is consistent with the national trend in civil filings during this period, which is characterized by a consistent 8.2% decline from 2008 to 2012.[18] A vertical line marks the month of November 2011, when the Rule 26 revisions were implemented. There does not appear to be a break in the level or trend of filings associated with the implementation of the Rule 26 revisions. Estimating a time series model with filings as the dependent variable and the Rule 26 revisions modeled as an intervention with a gradual permanent effect provides no evidence that the revisions had a statistically significant impact on the level of filings.

Figure 1. Monthly Civil Case Filings per Million Population, January 2008 through June 2014



Note: Does not include debt collection or domestic relations cases.

[18] R. LAFOUNTAIN et al., EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 4 (NCSC 2012).

Case-Level Analysis

To assess the impact of the Rule 26 revisions on discovery, the NCSC compared case characteristics and outcomes for cases filed between January 1 and June 30, 2011 (pre-implementation sample) with those for cases filed between January 1 and June 30, 2012 (post-implementation sample). For both samples the Utah AOC extracted descriptive data and case event data from CORIS. Descriptive data were extracted for all cases filed during those time periods, but case event data was extracted only for cases in which an answer was filed. The intent of the Rule 26 revisions was to streamline discovery in particular, and discovery does not typically occur in cases in which an answer is not filed. Table 3 shows the breakdown of cases in each sample by the assigned discovery and presumptive tiers.

Only a small handful of cases in the pre-implementation sample were actually assigned a discovery tier, which was expected given that the Rule 26 revisions did not become effective until November 1, 2011. Pre-implementation cases that were assigned a discovery tier involved post-filing activity that made it useful to assign a discovery tier for case management purposes. Surprisingly, more than one-third of the post-implementation cases (37.2%) were not assigned a discovery tier in CORIS. Subsequent discussions with AOC staff indicated that CORIS was not programmed to automatically assign a discovery tier based on amount in controversy or case type until early 2012, and discovery tiers were not assigned retroactively. Even with the programming change, some cases continued to lack a discovery tier assignment through the post-implementation period.[19] For evaluation purposes, it was necessary to assign presumptive discovery tiers to the pre-implementation sample and to cases in the post-implementation sample for which the discovery tier was missing. The presumptive discovery tiers were assigned based on the amount in controversy declared in the complaint; domestic relations cases were assigned as Tier 2.[20]

Table 3: Assigned and Presumptive Discovery Tiers

	ASSIGNED DISCOVERY TIER				PRESUMPTIVE DISCOVERY TIER			
	PRE-IMPLEMENTATION		POST-IMPLEMENTATION		PRE-IMPLEMENTATION		POST-IMPLEMENTATION	
Tier 1	1	0%	22,171	47%	41,418	79%	37,073	78%
Tier 2	51	0%	6,796	14%	8,768	17%	8,671	18%
Tier 3	1	0%	407	1%	190	0%	206	0%
Opt Out	–	0%	467	1%	–	0%	–	0%
Undeclared	6	0%	12	0%	–	0%	–	0%
	59	0%	29,853	63%	50,376	96%	45,950	97%
Missing	52,590	100%	17,660	37%	2,273	4%	1,563	3%
TOTAL	52,649	100%	47,513	100%	52,649	100%	47,513	100%

[19] The percentage of cases filed with missing tier assignments in CORIS fell from 63% in January 2012 to 53% in February 2012, 30% in March 2012, and then leveled off to 26% to 28% for April through June 2012. The Utah AOC implemented mandatory e-filing for all civil cases effective April 1, 2013, which automated the discovery tier assignment and reduced the percentage of cases missing an assigned discovery tier almost to zero.

[20] In designing the evaluation methodology, the NCSC tested the validity of the presumptive tier assignments by assessing the total judgment amounts awarded in civil cases filed in fiscal year 2008. Only 5% of the presumptive Tier 1 cases resulted in a judgment exceeding $50,000. Twelve percent (12%) of Tier 2 cases resulted in judgments less than $50,000 and another 9% of cases resulted in judgments exceeding $300,000. Twenty-three percent (23%) of Tier 3 cases resulted in judgments less than $300,000. The NCSC concluded that the initial amount in controversy determinations for the presumptive discovery tier assignments were quite reasonable. Memorandum on Utah discovery rules evaluation proposal from Paula Hannaford-Agor to Tim Shea (February 22, 2012).

Less than 5% of the cases could not be assigned a presumptive tier using those criteria. Table 3 indicates that the presumptive tier breakdown was comparable for the pre-implementation and post-implementation samples.

An implicit assumption about the likely impact of the Rule 26 revisions is that effects would only be observed for cases in which an answer was filed. It would be highly unusual for discovery to take place in cases in which an answer was not filed, as most of these cases would be resolved either by default judgment, voluntary dismissal (e.g., the parties agreed to settle the case after the complaint was filed without additional court involvement), or dismissal for failure to prosecute (e.g., no further case activity occurred and the case was dismissed administratively). Of particular significance for the impact of the Rule 26 revisions on the overall caseload is the relatively low rate of answers filed across all three discovery tiers. Overall, the answer rate was only 18% for the pre-implementation cases and only 16% for the post-implementation cases. The overall rate is heavily influenced by the answer rate for Tier 1 cases; an answer was filed in slightly less than one-third of Tier 2 cases and approximately half of the Tier 3 cases.[21] With the exception of Tier 1 non-debt collection cases, the answer rate was lower in the post-implementation sample than in the pre-implementation sample. The difference in the answer rate is statistically significant both overall and for each of the discovery tiers except Tier 2 non-domestic cases. See Table 4. The answer rate for Tier 1 non-debt collection cases and Tier 2 non-domestic civil cases filed in the district courts in FY 2008 was substantially higher than the corresponding answer rates in the pre-implementation and post-implementation samples. It is not clear why the answer rate for these cases has declined since 2008.

Table 4: Percentage of Cases with an Answer Filed

	FY 2008	PRE-IMPLEMENTATION	POST-IMPLEMENTATION	SIG. (PRE-IMPLEMENTATION AND POST-IMPLEMENTATION ONLY)
Tier 1 Overall	n/a	13%	12%	***
Debt collection	n/a	13%	11%	***
Non-debt collection	38%	27%	31%	**
Tier 2 Overall	38%	31%	29%	**
Domestic	31%	30%	27%	***
Non-domestic civil	64%	49%	47%	
Tier 3 Overall	60%	57%	49%	†
Total	n/a	18%	16%	***

† $p<.1$ * $p<.05$ ** $p<.01$ *** $p<.001$

[21] The NCSC obtained answer rates for cases filed in federal district court, which based on the amount in-controversy and diversity of citizenship requirements would be comparable to tier 2 and tier 3 cases. The answer rate for cases terminated in 2013 was 68% for contract claims, 52% for tort claims, 68% for civil rights claims, and 51% for real property claims. Email to Paula Hannaford-Agor, NCSC, from Emery Lee, Federal Judicial Center, Feb. 4, 2015 (on file with authors).

Table 5 documents the discovery tier breakdown for cases in which an answer was filed. The tier assignment is based on the actual tier assignment extracted from CORIS or, if the tier assignment was missing, the presumptive tier assignment based on amount in controversy or case type.[22]

TIER INFLATION

Excluding cases without answers resulted in a subtle difference in the discovery tier breakdown. Of the cases with a tier assignment, two-thirds of the pre-implementation sample (66%), but only 61% of the post-implementation sample were assigned as Tier 1. In contrast, the proportion of the post-implementation cases assigned as Tier 2 and Tier 3 increased from 32% to 36%, and 1% to 3%, respectively. The difference in these proportions is statistically significant, and the decrease in the proportion of Tier 1 cases and the corresponding increase in the proportions of Tier 2 and Tier 3 cases suggest that some litigants may have specified a higher amount in controversy in the complaint to secure a higher discovery tier assignment.

Comparing the distribution of case categories across tiers provides more evidence of tier inflation. See Table 6.[23] The proportional distribution of debt collection cases across tiers is comparable for the pre-implementation and post-implementation samples, but there is a marked decrease in the proportion of Tier 1 cases for non-debt collection general civil, property rights, and tort cases and corresponding increases in the proportions of Tier 2 and Tier 3 cases. This shift in the proportional tier distribution within case categories is statistically significant for all three case type categories.[24]

Table 5: Discovery Tiers (Cases with Answer Filed)

	PRE-IMPLEMENTATION		POST-IMPLEMENTATION	
Tier 1	5,505	66%	4,466	61%
Tier 2	2,686	32%	2,588	36%
Tier 3	109	1%	220	3%
Total	8,300		7,274	

n = 15,574; χ^2= 80.294, df = 2.

[22] These tier assignments were employed for all subsequent analyses in the NCSC evaluation on the theory that even if the CORIS data did not reflect the assigned discovery tier, the attorneys had constructive knowledge that the Rule 26 revisions were in effect and thus should have known which discovery tier applied to the case. Using the presumptive tiers when the CORIS data did not include the assigned discovery tier yielded a larger sample of post-implementation cases, permitting the NCSC to produce more precise estimates of the Rule 26 impact than would have been possible using only the actual discovery tier assignments recorded in CORIS.

[23] All of the pre-implementation domestic cases were presumptively assigned as Tier 2, and all but 13 of the 2,229 (0.6%) of the post-implementation domestic cases were assigned as Tier 2 (actual or presumptively). Consequently, the proportional distribution analysis for domestic cases was excluded from the investigation of tier inflation.

[24] The number of property rights and tort cases in which an answer was filed increased substantially from 41 to 63, and 116 to 435, respectively, from the pre-implementation to the post-implementation samples. The proportion of tort cases is comparable between the samples, so the increase is due exclusively to the difference in the answer rate. The proportion of property rights cases filed decreased from .6% to .5% between the pre-implementation and post-implementation samples (F=8.654, df=1, p=.003), so the increase in the numbers reflects both the difference in overall proportion and the difference in the answer rate.

Table 6: Discovery Tiers (Cases with Answer Filed), by Case Category

		PRE-IMPLEMENTATION		POST-IMPLEMENTATION	
DEBT COLLECTION	Tier 1	5,053	98%	4,046	98%
	Tier 2	104	2%	66	2%
	Tier 3	26	1%	8	0%
	Total	5,177		4,120	
	n=9,297; χ^2=5.654, df=2, p=.059				
		PRE-IMPLEMENTATION		POST-IMPLEMENTATION	
NON-DEBT COLLECTION GENERAL CIVIL	Tier 1	340	65%	224	52%
	Tier 2	116	22%	118	28%
	Tier 3	66	13%	87	20%
	Total	522		429	
	n=951; χ^2=17.834, df=2, p<.001				
		PRE-IMPLEMENTATION		POST-IMPLEMENTATION	
PROPERTY RIGHTS	Tier 1	28	65%	15	25%
	Tier 2	9	21%	38	62%
	Tier 3	6	14%	8	13%
	Total	43		61	
	n=104; χ^2=19.581, df=2, p<.001				
		PRE-IMPLEMENTATION		POST-IMPLEMENTATION	
TORT	Tier 1	86	74%	176	41%
	Tier 2	18	16%	152	35%
	Tier 3	12	10%	107	25%
	Total	116		435	
	n=551; χ^2=41.659, df=2, p<.001				

The NCSC also replicated the analysis of judgments awarded in non-domestic cases that it had used to verify the validity of the presumptive tier assignments in the FY 2008 data. Table 7 documents how the monetary value of cases shifted for the respective discovery tiers due to tier inflation. Judgments awarded in all but a small handful of Tier 1 cases were less than $50,000 in both debt collection and non-debt collection cases. However, the proportion of judgments less than $50,000 that were awarded in Tier 2 cases increased from just under one-third (31%) in the pre-implementation sample to almost half in the post-implementation sample (48%), while the proportion of judgments between $50,000 and $300,000 decreased from more than two-thirds (68%) to half (50%). This difference was statistically significant.[25] There was no measurable shift in the distribution of damage awards for Tier 3 cases, but as discussed in the analysis of case outcomes, the overall proportion of cases disposed by judgment also decreased by half (from 37% in the pre-implementation sample to 19% in the post-implementation sample). Because the majority of Tier 3 cases ultimately settled, the small number of cases for which judgment amounts were available in CORIS may not accurately reflect the monetary value of cases assigned to Tier 3.

Table 7: Damages Awarded in Non-Domestic Cases Disposed by Judgment

		PRE-IMPLEMENTATION		POST-IMPLEMENTATION	
TIER 1	Tier 1 Overall				
	Judgment < $50,000	29,039	100%	27,496	100%
	Judgment between $50,000 and $300,000	32	0%	57	0%
	Judgment > $300,000	3	0%	2	0%
	Debt Collection				
	Judgment < $50,000	28,218	100%	27,027	100%
	Judgment between $50,000 and $300,000	21	0%	48	0%
	Judgment > $300,000	1	0%	1	0%
	Non-Debt Collection				
	Judgment < $50,000	821	98%	469	98%
	Judgment between $50,000 and $300,000	11	1%	9	2%
	Judgment > $300,000	2	0%	1	0%
TIER 2	Judgment < $50,000	79	31%	97	48%
	Judgment between $50,000 and $300,000	171	68%	103	50%
	Judgment > $300,000	3	1%	4	2%
TIER 3	Judgment < $50,000	4	8%	11	24%
	Judgment between $50,000 and $300,000	19	38%	6	13%
	Judgment > $300,000	27	54%	29	63%

[25] N=457, χ^2=13.764, df=1, p=.001.

CASE DISPOSITIONS

The impact of the Rule 26 revisions on how cases are disposed is of obvious importance to all stakeholders in the civil justice system — plaintiffs and defendants, the practicing bar, and the trial bench. The disposition types recorded in CORIS tend to reflect the procedural impact of the disposition (e.g., dismissed with prejudice, judgment) rather than the manner of disposition (e.g., default judgment, settlement, bench or jury trial). Nevertheless, many CORIS disposition types can be used as proxy equivalents of commonly recognized manners of dispositions. Table 8 describes the manner of disposition (dismissal, settlement, judgment) by

Table 8: Impact on Manner of Disposition

			PRE-IMPLEMENTATION		POST-IMPLEMENTATION	
TIER 1	DEBT COLLECTION	Dismissal	1184	24%	870	22%
		Settlement	875	18%	753	19%
		Judgment	2800	58%	2404	60%
		Total	4859		4027	
		n=8,896, χ^2=9.926, df=2, p=.007				
			PRE-IMPLEMENTATION		POST-IMPLEMENTATION	
	NON-DEBT COLLECTION	Dismissal	127	30%	119	29%
		Settlement	126	30%	181	43%
		Judgment	172	40%	117	28%
		Total	425		417	
		n=842, χ^2=13.510, 20.507, df=2, p<.001				
			PRE-IMPLEMENTATION		POST-IMPLEMENTATION	
TIER 2	DOMESTIC	Dismissal	403	17%	376	17%
		Settlement	3	0%	6	0%
		Judgment	1962	83%	1818	83%
		Total	2368		2200	
		n=4,568, χ^2=1.245, df=2, p=.537				
			PRE-IMPLEMENTATION		POST-IMPLEMENTATION	
	NON-DOMESTIC CIVIL	Dismissal	75	34%	106	29%
		Settlement	74	33%	180	49%
		Judgment	73	33%	78	21%
		Total	222		364	
		n=586, χ^2=16.256, df=2, p<.001				
			PRE-IMPLEMENTATION		POST-IMPLEMENTATION	
TIER 3	ALL CASES	Dismissal	21	24%	56	26%
		Settlement	33	38%	120	56%
		Judgment	32	37%	40	19%
		Total 8	6		216	
		n=302, χ^2=12.653, df=2, p=.002				

discovery tier and case type.[26] Dismissals for Tier 1 debt collection cases declined slightly with corresponding increases in settlements and judgments, however settlements for Tier 1 non-debt collection cases increased from 30% to 43% while judgments decreased from 40% to 28%. The vast majority of Tier 2 domestic cases resolve by judgment (e.g., divorce granted, child support modification denied), so there was no expected change in the manner of disposition for these cases. However, dismissals and judgments for Tier 2 non-domestic cases declined significantly while settlements increased significantly. Similar results were observed for Tier 3 cases.

The increase in the settlement rate for non-domestic cases in which an answer was filed is dramatic across all three discovery tiers, especially for non-debt collection cases. Because comparable disposition data were available, the NCSC conducted the same analysis of outcomes for cases in which an answer was not filed and also for cases filed in FY 2008. Curiously, with the exception of Tier 1 debt collection cases, the shift from judgments to settlements and dismissals also appeared in cases in which an answer was not filed. Tier 1 non-debt collection judgments decreased from 61% to 54%, while settlements and dismissals increased from 7% to 11%, and from 32% to 35%, respectively.[27] Non-domestic Tier 2 judgments decreased from 55% to 46%, while the proportion of settlements doubled from 7% to 15% and dismissals remained the same at 38%.[28] Tier 3 judgments declined by more than half from 39% to 18%, while settlements increased from 12% to 21% and dismissals increased from 50% to 61%.[29] This shift toward settlements and dismissals appeared in cases in which the Rule 26 revisions were not expected to have an effect. It is possible, however, that this a shadow effect of Rule 26 — that is, defense attorneys knowing that the Rule 26 restrictions were in effect initiated settlement negotiations immediately upon receiving the complaint, leading to an increase in settlements and withdrawals. To the extent that settlements reflect case outcomes that are accepted by the respective parties as fair (or least fairer than they would otherwise obtain if they didn't settle), the difference in settlement rates between the pre-implementation and post-implementation samples suggests that the Rule 26 revisions, especially the expanded automatic disclosure requirements, are providing litigants with sufficient information about the merits of the case to engage in more productive settlement negotiations.

During the Advisory Committee's original debates, there was uncertainty as to whether the new requirements would result in a higher or lower trial rate. Breaking down trial rates by discovery tier and case type produces sample sizes too small to produce statistically measurable results. Overall, however, the bench trial rate decreased by 27% (2.6% to 1.9%).[30] There were too few cases (6 pre-implementation, 6 post-implementation) to document an impact on jury trial rates.

TIME FROM FILING TO DISPOSITION

One of the hypothesized impacts of the revisions to Rule 26 was the expectation that streamlining the discovery process would result in earlier case resolutions. A comparison of time to disposition for the pre-implementation and post-implementation cases is complicated by the fact that not all cases were resolved at the end of the data collection period. For these observations, known as "censored" observations, the observed time to disposition ends when the study's follow-up period ends, which is earlier than the actual time to disposition. Estimates of mean time to disposition are therefore biased downward, and comparison of mean time to disposition across groups might lead to erroneous conclusions. To analyze the impact of the Rule 26 revisions on time to disposition,

[26] Dismissals included the following CORIS disposition types: dismissed or dismissed without prejudice; no cause of action; and set aside/withdrawn. Settlements included ADR-stipulated agreement; dismissed with prejudice; and stipulated agreement. Judgments included petitions denied or granted, and monetary judgment awards.

[27] N=2,777, χ^2=12.671, df=2, p=.002.

[28] N=551, χ^2=9.086, df=2, p=.011.

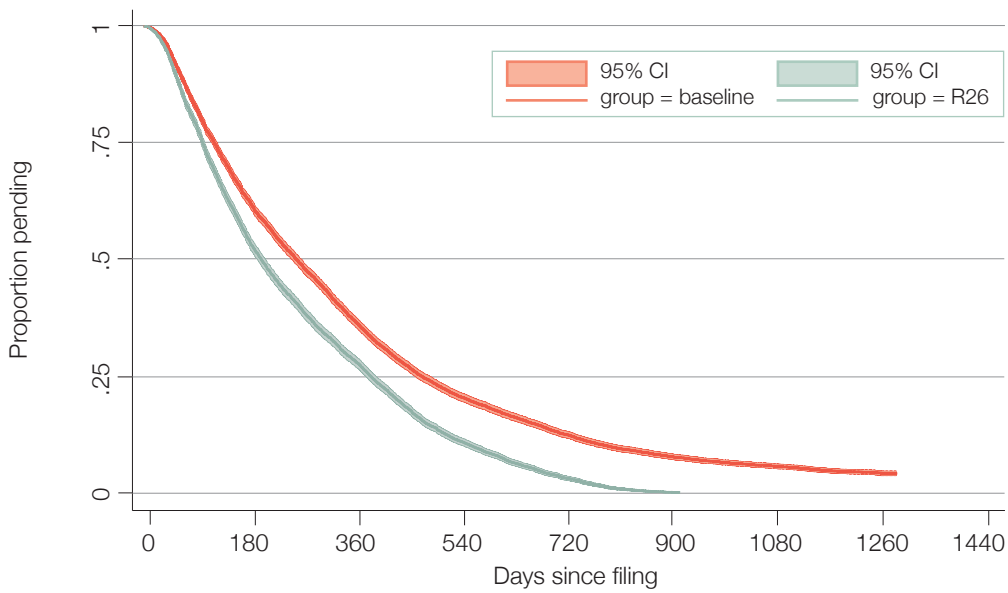
[29] N=210, χ^2=11.223, df=2, p=.004. The NCSC also examined the FY 2008 data and found that the distribution of outcomes for cases in which an answer was filed is very similar to the distribution in the pre-implementation sample for Tier 1 non-debt collection and Tier 3 cases, but Tier 2 non-domestic case outcomes more closely resembled case outcomes for the post-implementation sample.

[30] N=17,029, χ^2=7.870, df=1, p=.005.

the NCSC therefore employed Kaplan-Meier survival analysis. Survival analysis examines how long a unit (e.g., a civil case) "survives" in one state (e.g., pending) before experiencing "failure," or a transition to another state (e.g., disposed). Survival models take censoring into account, eliminating the associated bias.[31]

Here, the unit of analysis is the case, failure is defined as disposition, and survival time is defined as the number of days from filing until disposition or the end of the follow-up period, whichever occurred first. Figure 2 shows the Kaplan-Meier survivor functions for cases filed before and after the implementation of the Rule 26 revisions. Because the Rule 26 revisions apply to case events which occur after the filing of the answer, only cases in which an answer was filed are included in this analysis. Each survivor function plots the cumulative probability of a case's "surviving" without a disposition (on the vertical axis) up to a particular point in time (on the horizontal axis).[32] As expected, the survivor function for post-implementation cases lies below the survivor function for pre-implementation cases. This indicates that, at any given point in the life of the case, a case subject to the Rule 26 revisions is less likely to remain pending — and hence more likely to have been resolved — than a case not subject to the Rule 26 revisions. The narrow shaded bands represent 95% confidence intervals for the survivor functions. The confidence intervals do not overlap, indicating that the impact of the Rule 26 revisions on time to disposition is statistically significant. The log-rank test confirms that there is a statistically significant difference in the time path of case dispositions between the two groups of cases. The table below the graph shows the number of cases in each group that remain pending ("at risk") at 180-day intervals.

Figure 2. All Civil Case Types — Cumulative Probability of Survival Without Disposition For Cases Filed Before and After Rule 26 Revisions



Number at risk

Group = baseline	9474	5950	3524	1979	1206	756	552	100	0
Group = R26	7555	4107	2166	856	257	6	0	0	0

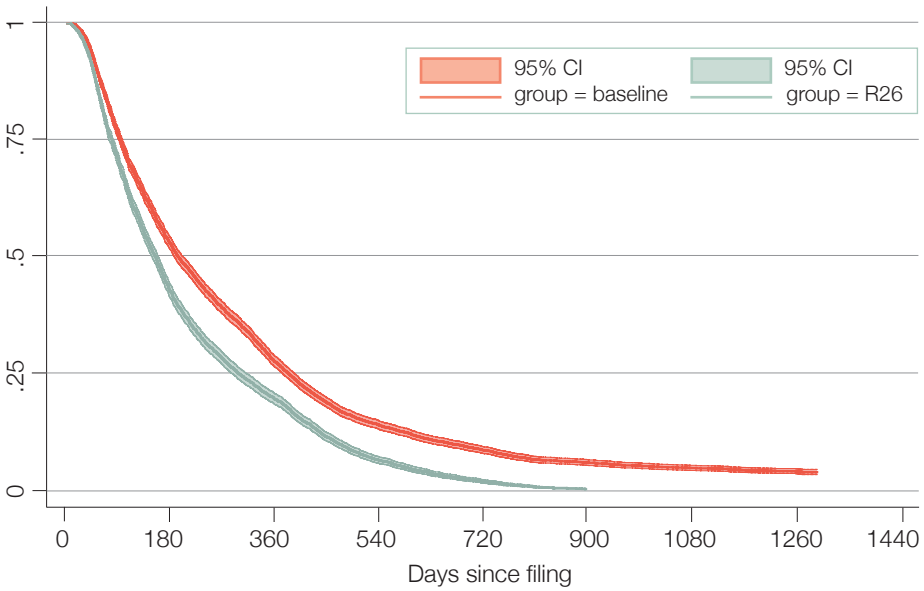
n = 17,029; 16,541 failures.
Log-rank test for equality of survivor functions: $\chi^2 = 525.21$, 1 degree of freedom, $p(\chi^2) < .001$.
Note: Includes only cases in which an answer was filed.

[31] See JANET M. BOX-STEFFENSMEIER & BRADFORD S. JONES, EVENT HISTORY MODELING 7-16 (2004).

[32] The Kaplan-Meier technique relies upon no assumptions regarding the shape of the baseline survivor function, estimating the function entirely on the basis of the available data and eliminating the possibility of bias due to faulty assumptions about the functional form. The technique estimates the survivor function by calculating the cumulative probability of survival at each failure point. Each case in which the event of failure was observed is factored into the analysis along the entire curve. A censored observation, in which the event of failure was not observed, is only factored into the analysis up to the time when observation ceased.

To analyze whether the impact of the Rule 26 revisions on time to disposition varies for different types of cases, the NCSC plotted the Kaplan-Meier survivor functions for pre-implementation and post-implementation cases by tier and case type. As shown in Figure 3, the revisions are associated with a statistically significant decrease in time to disposition for Tier 1 cases. The impact is similar for both Tier 1 debt collection cases (Figure 4) and Tier 1 non-debt collection cases (Figure 5). For Tier 1 non-debt collection cases, however, the probability of a disposition at early time points is similar for pre-implementation and post-implementation cases; the Rule 26 revisions are not associated with a statistically significant decrease in the probability of survival until more than a year after filing, as indicated by the point in time when the red and green confidence intervals stop overlapping.[33] The shaded confidence intervals around the survivor functions are considerably broader for the Tier 1 non-debt collection cases, indicating that the estimates are less precise due to the small sample size.

Figure 3. Tier 1 Cases — Cumulative Probability of Survival without Disposition, All Case Types Filed Before and After Rule 26 Revisions, All Case Types

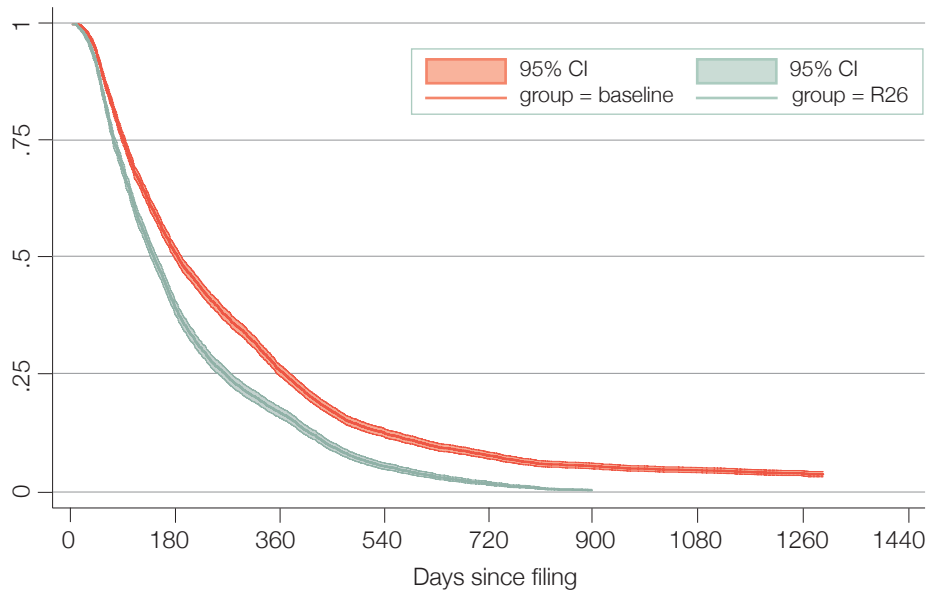


Number at risk									
Group = baseline	5505	2896	1506	755	463	316	253	54	0
Group = R26	4466	1889	864	276	75	0	0	0	0

n = 9,971; 9,738 failures.
Log-rank test for equality of survivor functions: $\chi^2 = 268.79$, 1 degree of freedom, $p(\chi^2) < .001$.
Note: Includes only cases in which an answer was filed.

[33] The log-rank test, which tests for the equality of the survivor functions over all points in time, does indicate that there is an overall decrease in time to disposition for tier 1 non-debt collection cases.

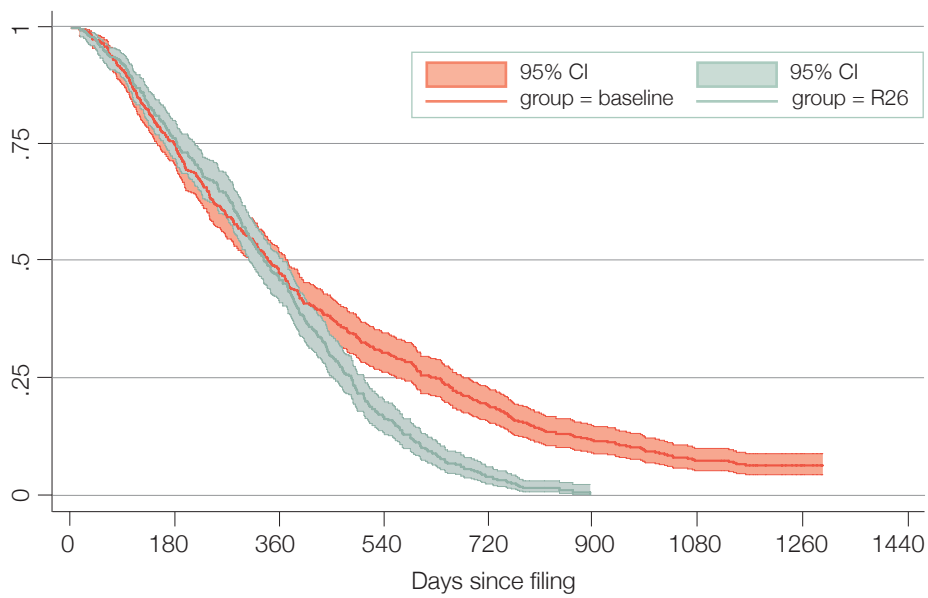
Figure 4. Tier 1 Debt Collection Cases — Cumulative Probability of Survival Without Disposition, Cases Filed Before and After Rule 26 Revisions



Number at risk									
Group = baseline	5051	2556	1291	617	377	263	220	47	0
Group = R26	4046	1569	671	208	59	0	0	0	0

n = 9,097; 8,896 failures.
Log-rank test for equality of survivor functions: $\chi^2 = 273.11$, 1 degree of freedom, $p(\chi^2) < .001$.
Note: Includes only cases in which an answer was filed.

Figure 5. Tier 1 Non-Debt Collection Cases — Cumulative Probability of Survival Without Disposition, Cases Filed Before and After Rule 26 Revisions

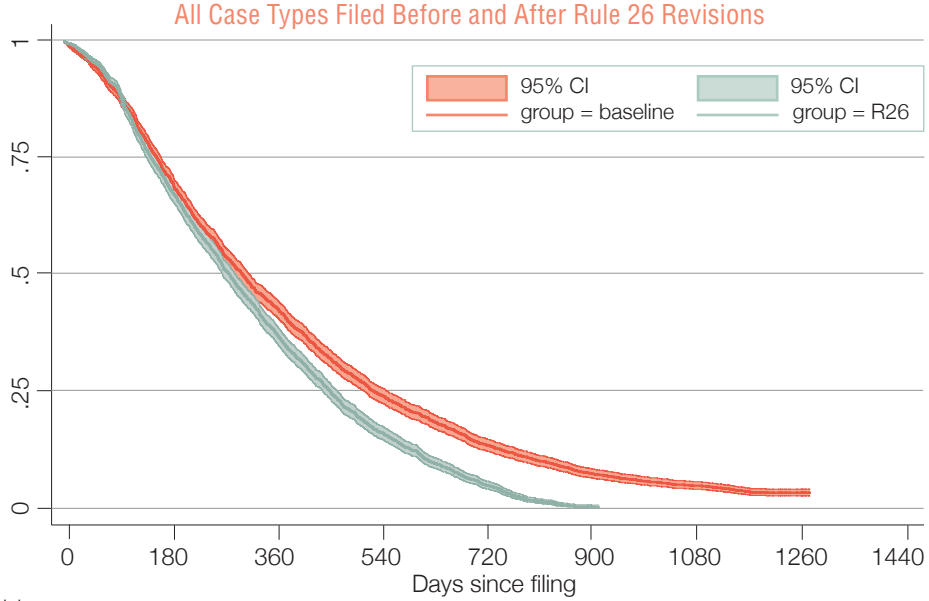


Number at risk									
Group = baseline	454	340	215	138	86	53	33	7	0
Group = R26	420	320	193	68	16	0	0	0	0

n = 874; 842 failures.
Log-rank test for equality of survivor functions: $\chi^2 = 29.99$, 1 degree of freedom, $p(\chi^2) < .001$.
Note: Includes only cases in which an answer was filed.

The impact of the Rule 26 revisions on Tier 2 cases is similar to the impact on Tier 1 non-debt collection cases (Figure 6). Although the log-rank test indicates an overall decrease in time to disposition for post-implementation cases, the difference does not begin to emerge until approximately one year after filing. This general pattern holds

Figure 6. Tier 2 Cases — Cumulative Probability of Survival Without Disposition, All Case Types Filed Before and After Rule 26 Revisions

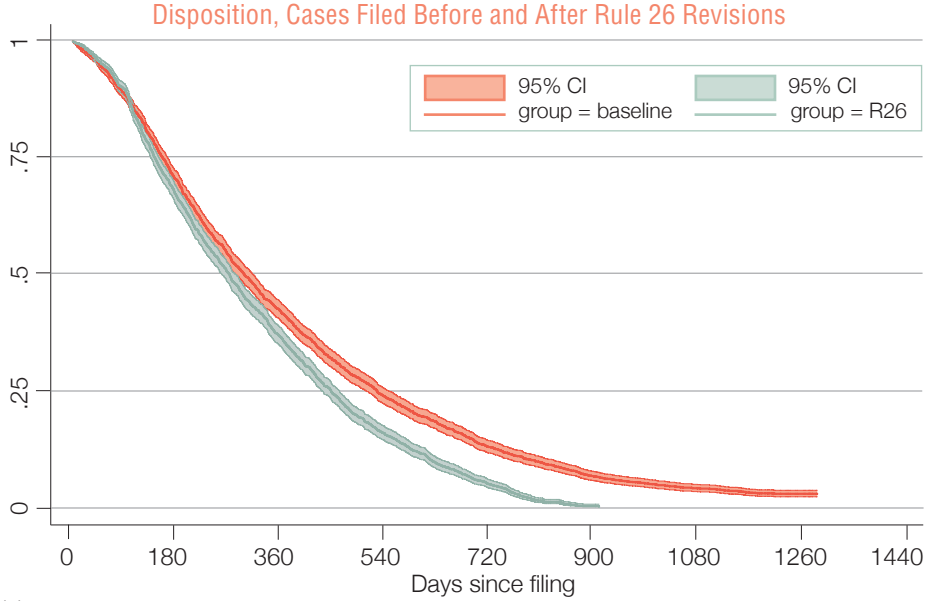


Number at risk

Group = baseline	2686	1913	1173	661	370	204	130	19	0
Group = R26	2588	1791	997	429	136	4	0	0	0

n = 5,274; 5,154 failures.
Log-rank test for equality of survivor functions: $\chi^2 = 105.57$, 1 degree of freedom, $p(\chi^2) < .001$.
Note: Includes only cases in which an answer was filed.

Figure 7. Tier 2 Domestic Relations Cases — Cumulative Probability of Survival Without Disposition, Cases Filed Before and After Rule 26 Revisions



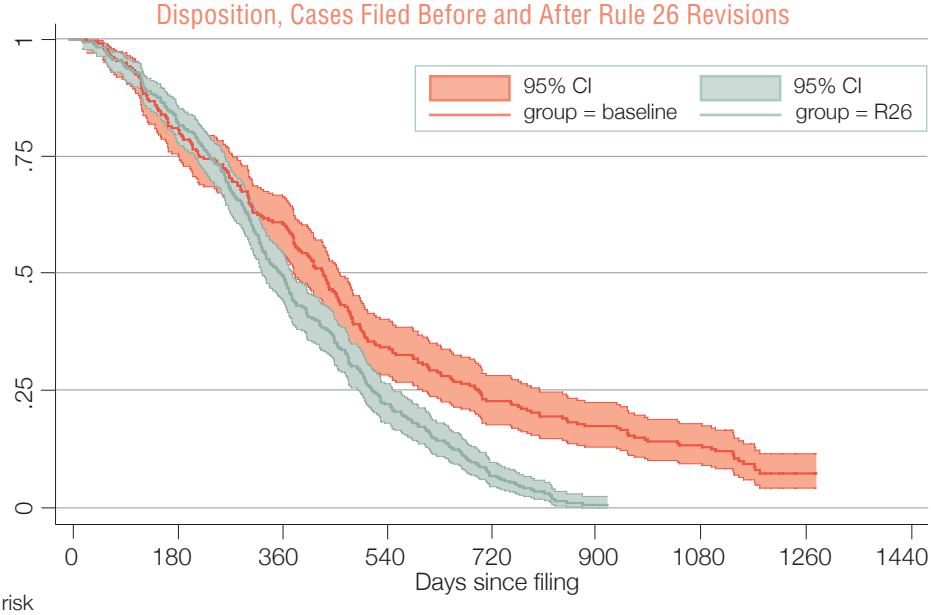
Number at risk

Group = baseline	2442	1715	1024	577	314	161	97	16	0
Group = R26	2216	1478	809	345	108	2	0	0	0

n = 4,658; 4,568 failures.
Log-rank test for equality of survivor functions: $\chi^2 = 93.97$, 1 degree of freedom, $p(\chi^2) < .001$.
Note: Includes only cases in which an answer was filed.

for both domestic relations (Figure 7) and non-domestic relations (Figure 8) cases in Tier 2, as well as for Tier 3 cases (Figure 9).

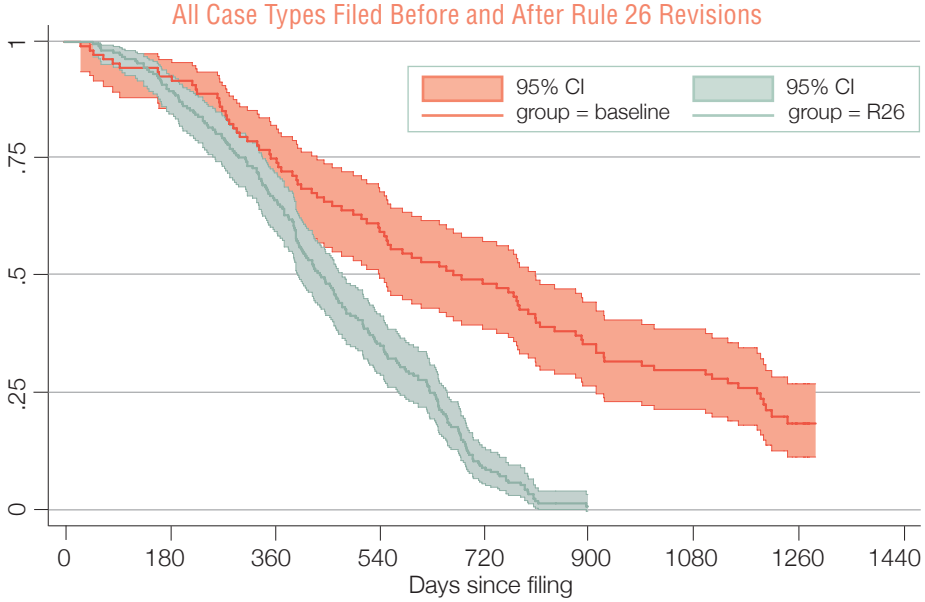
Figure 8. Tier 2 Non-Domestic Relations — Cumulative Probability of Survival Without Disposition, Cases Filed Before and After Rule 26 Revisions



Number at risk									
Group = baseline	244	198	149	84	56	43	33	3	0
Group = R26	372	313	188	84	28	2	0	0	0

n = 616; 586 failures.
Log-rank test for equality of survivor functions: $\chi^2 = 29.94$, 1 degree of freedom, $p(\chi^2) < .001$.
Note: Includes only cases in which an answer was filed.

Figure 9. Tier 3 Cases — Cumulative Probability of Survival Without Disposition, All Case Types Filed Before and After Rule 26 Revisions

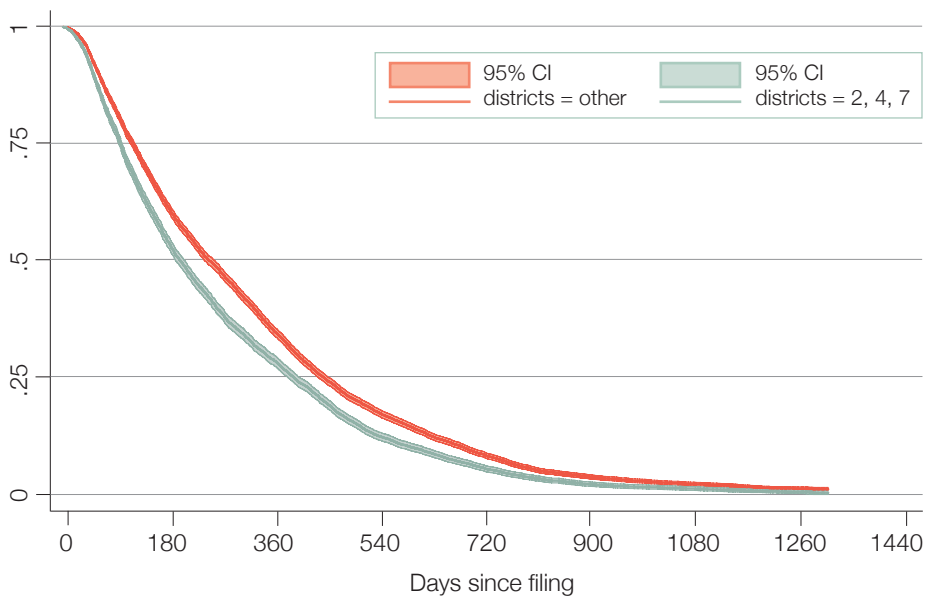


Number at risk									
Group = baseline	109	101	82	65	53	39	33	9	0
Group = R26	220	197	146	79	21	0	0	0	0

n = 329; 302 failures.
Log-rank test for equality of survivor functions: $\chi^2 = 59.31$, 1 degree of freedom, $p(\chi^2) < .001$.
Note: Includes only cases in which an answer was filed.

There are significant differences among the judicial districts with respect to the use of judicial caseflow management techniques in civil cases. In particular, the Second, Fourth, and Seventh Districts have a stronger tradition of caseflow management than other districts across the state. As shown in Figure 10, which includes both pre-implementation and post-implementation cases, time to disposition is shorter in those districts currently practicing active case management than in districts not practicing active case management. To determine whether the impact of the Rule 26 revisions on time to disposition is influenced by existing case management practices, the NCSC analyzed time to disposition before and after the implementation of the revisions separately for districts practicing active case management (Figure 11) and for districts not practicing active case management (Figure 12). Similar patterns were observed for both groups of districts, indicating that the Rule 26 revisions are associated with a decrease in time to disposition regardless of existing case management practices.

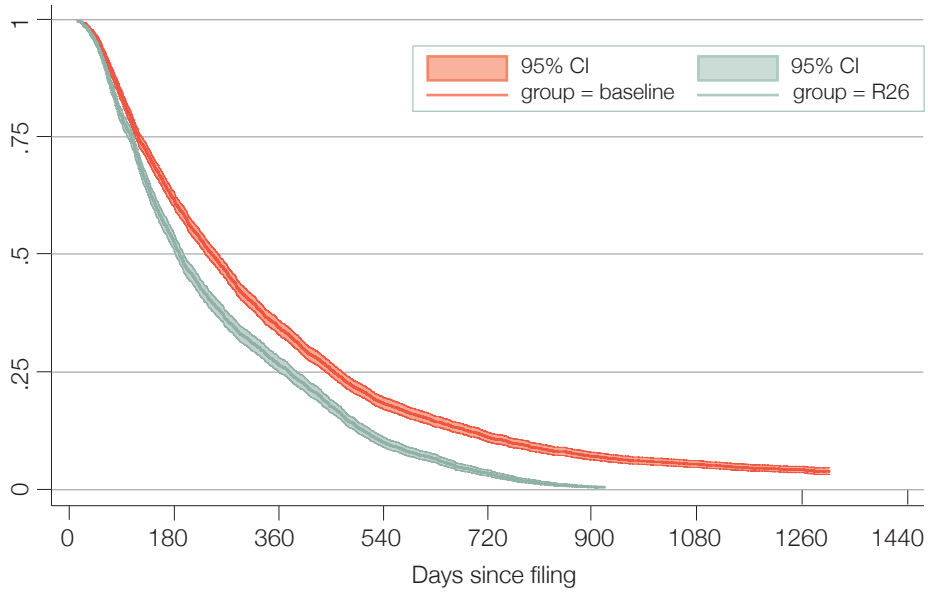
Figure 10. Districts 2, 4 and 7 versus All Other Districts — Cumulative Probability of Survival Without Disposition, All Civil Case Types



Number at risk									
Group = baseline	10475	6478	3745	1936	1009	525	376	69	0
Group = R26	6554	3579	1945	899	454	237	176	31	0

n = 17,029; 16,541 failures.
Log-rank test for equality of survivor functions: $\chi^2 = 105.13$, 1 degree of freedom, $p(\chi^2) < .001$.
Note: Includes only cases in which an answer was filed. Includes cases filed during both pre-implementation and post-implementation periods.

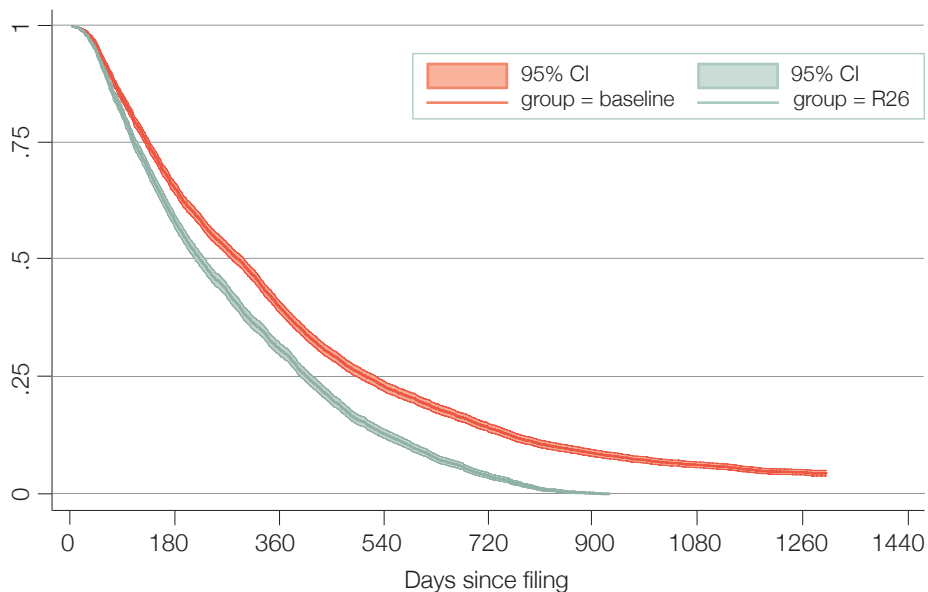
Figure 11. Districts 2, 4 and 7 — Cumulative Probability of Survival Without Disposition, All Civil Case Types Filed Before and After Rule 26 Revisions



Number at risk									
Group = baseline	3570	2111	1184	629	373	236	176	31	0
Group = R26	2984	1468	761	270	81	1	0	0	0

n = 6,554; 6,400 failures.
Log-rank test for equality of survivor functions: $\chi^2 = 179.43$, 1 degree of freedom, $p(\chi^2) < .001$.
Note: Includes only cases in which an answer was filed.

Figure 12. All Other Districts — Cumulative Probability of Survival Without Disposition, All Civil Case Types Filed Before and After Rule 26 Revisions



Number at risk									
Group = baseline	5904	3839	2340	1350	833	520	376	69	0
Group = R26	4571	2639	1405	586	176	5	0	0	0

n = 10,475; 10,141 failures.
Log-rank test for equality of survivor functions: $\chi^2 = 341.70$, 1 degree of freedom, $p(\chi^2) < .001$.
Note: Includes only cases in which an answer was filed.

POST-FILING ADJUSTMENTS

The working hypotheses for this evaluation posited that there would be a brief period of time during which attorneys who were not fully aware of the Rule 26 revisions would seek adjustments to the pleadings or motions to secure a higher discovery tier assignment as well as amended disclosures to ensure full compliance with the automatic disclosure requirements and thus prevent the opposing party from striking evidence due to untimely disclosures. Table 9 shows the percentage of post-implementation cases in which documents were filed that may reflect initial adjustments in response to the Rule 26 revisions. Such filings were identified based on the document title recorded in CORIS (e.g., "Amend Complaint and Jury Demand (Tier 3 Claiming More than $300,000 in Damages"), "Amended Disclosures"). Not all document titles made reference to the assigned discovery tier and may have only reflected additional claims or defenses without seeking to adjust the discovery tier. Consequently, the totals in Table 9 may be over-inclusive. In any event, the actual proportion of cases in which these types of documents were filed is quite small — less than 1% of all post-implementation cases in which an answer was filed. Given the strong evidence of tier inflation documented in Tables 5 and 6, it therefore appears that most attorneys were well aware of the Rule 26 revisions and were preemptively pleading higher amount in controversy claims to secure the discovery tier desired, rather than seeking post-filing adjustments in the discovery tier.

MOTIONS AND STIPULATIONS FOR EXTRAORDINARY DISCOVERY

Like the rate of post-filing adjustments, the proportion of cases seeking extraordinary discovery was smaller than initially expected. Of the 130 motions and stipulations for extraordinary discovery filed, 85% requested that the scope of discovery be expanded; the remaining 15% requested additional time to complete discovery. Most of the motions and stipulations were filed in Tier 3 cases. See Table 10. A total of 64 court orders were entered in response to these filings (58%), of which only four ultimately denied the motion or disapproved the stipulation. The high rate of orders granting motions and approving stipulations for extraordinary discovery suggests that the majority of litigants seeking extraordinary discovery did so only in meritorious circumstances.

Table 9: Frequency of Post-Filing Adjustments

	TIER 1		TIER 2		TIER 3		OTHER TIER ASSIGNMENT		TOTAL	
Amended pleading filed	7	0.1%	8	0.1%	8	0.1%	3	0.0%	26	0.4%
Amended disclosures filed	27	0.4%	22	0.3%	9	0.1%	4	0.1%	62	0.9%

Table 10: Motions/Stipulations for Extraordinary Discovery

	TIER 1		TIER 2		TIER 3		OTHER TIER ASSIGNMENT		TOTAL	
Motion	5	0.1%	15	0.6%	8	4.7%	3	2.4%	31	0.4%
Stipulation	18	0.4%	39	1.5%	35	15.9%	7	5.5%	99	0.9%

COMPLIANCE WITH CERTIFICATE OF READINESS FOR TRIAL (COR) DEADLINES

A Certificate of Readiness for Trial (COR) is required to be filed when discovery is complete, and consequently is the only field in the CORIS data that would accurately measure the length of time from filing to the completion of discovery.[34] The NCSC was particularly interested in examining this variable in the post-implementation sample to assess both compliance with the filing requirement itself and with the timeframes established for standard discovery.[35] Of the 4,626 post-implementation cases for which a discovery tier was assigned and an answer was filed, two-thirds (3,083) were disposed before the COR was due. Of the remaining 1,543 cases for which a COR should have been filed, one was found in CORIS in only 91 cases (5% non-domestic, 8% domestic).[36] See Table 11. In just over half of those cases (51%), the COR was filed on or before the due date; in another 21% of cases, it was filed within 90 days after the due date. In the remaining 28% of cases, the COR was filed more than 90 days after the due date. Perhaps not surprisingly, the COR was filed in a timely manner or within 90 days after the date most often in Tier 1 cases (88%) followed by Tier 2 cases (63%) and Tier 3 cases (38%).

Table 11: Certificate of Readiness for Trial Filed

	Tier 1 (n=25)	Tier 2 (n=56)	Tier 3 (n=8)	Total (n=91)
On or before due date	44%	38%	13%	51%
Within 90 days of due date	44%	25%	25%	21%
91 to 180 days after due date	8%	23%	38%	14%
181 to 270 days after due date	0%	9%	25%	9%
271 to 365 days after due date	4%	2%	0%	3%
More than 365 days after due date	0%	4%	0%	2%

[34] In designing the evaluation methodology, the NCSC examined a sample of cases filed in 2008 to assess the suitability of case-level data extracted from CORIS for use in the evaluation. In that sample, a certificate of readiness for trial (COR) was filed in only 8% of non-domestic cases and 11% of domestic cases in which an answer was filed. The review of 2008 data revealed that the filing date for the COR would be an unreliable field to measure the completion of discovery because so few litigants actually complied with the filing requirement. February 22, 2011 memorandum from Paula Hannaford-Agor to Tim Shea, p. 4 (noting that a certificate of readiness for trial was filed in only 43% of non-domestic cases and 57% of domestic cases in which a bench or jury trial was held, suggesting that this document is not routinely filed even in cases that complete discovery and proceed to a disposition on the merits).

[35] One of the operational changes that was implemented with the Rule 26 revisions was the ability for CORIS to automatically calculate discovery deadlines based on the assigned discovery tier including the date for filing a COR. These deadlines are mailed to litigants to advise them of the timeframes for completing fact and expert discovery and for filing the COR.

[36] In discussions with the Advisory Committee, the NCSC learned that a common practice in the Utah district courts involves the attorneys calling the court by telephone to schedule a pretrial conference rather than filing a COR to indicate that the case is ready to proceed. A total of 42 cases resolved by bench or jury trial without filing a COR (4.3%), so this is likely still occurring in spite of the explicit requirement in Rule 26.

For cases in which no COR was filed, approximately one-third (34%) were ultimately disposed within 90 days after the COR due date. See Table 12. Forty percent were disposed more than 6 months after the COR was supposed to be filed. The fact that so few litigants filed a COR in a timely manner for cases that had not otherwise been disposed suggests that they are not complying with the timeframes for Rule 26 standard discovery.[37]

FREQUENCY AND TIMING OF DISCOVERY DISPUTES

Taken together, the Rule 26 reforms were expected to decrease the incidence of discovery disputes. To investigate this hypothesis, the NCSC reviewed the CORIS data for use of the following terms in motions filed to indicate the existence of a discovery dispute: compel, protective order, Rule 37, Statement of Discovery Issues, duces tecum, sanctions, and Rule 4-502. The title of each filing was then reviewed to ensure that the motion involved initial disclosures, interrogatories, requests for production, requests for admission, depositions, or expert witness reports. As shown in Table 13, the overall frequency of litigated discovery disputes increased in the post-implementation sample by 1.2 percentage points, or more than one-quarter of the pre-implementation rate of 4.7%. When the results are broken down by discovery tier, however, it becomes apparent that the increase is being driven by Tier 1 debt collection cases, in which the

Table 12: Case Disposed without filing Certificate of Readiness for Trial

	Tier 1 (n=720)	Tier 2 (n=707)	Tier 3 (n=108)	Total (n=1,543)
Within 90 days of COR due date	34%	36%	30%	34%
91 to 180 days after COR due date	28%	24%	23%	26%
181 to 270 days after COR due date	20%	17%	25%	19%
271 to 365 days after COR due date	10%	14%	16%	12%
More than 365 days after COR due date	9%	9%	7%	9%

Table 13: Frequency of Discovery Disputes

	PRE-IMPLEMENTATION	POST-IMPLEMENTATION	SIG.
Tier 1 Overall	2.6%	5.2%	***
Debt collection	2.2%	5.6%	***
Non-debt collection	6.2%	1.7%	***
Tier 2 Overall	6.9%	6.5%	
Domestic	6.6%	6.2%	
Non-domestic civil	10.2%	8.3%	
Tier 3 Overall	18.3%	10.9%	*
Total	4.7%	5.9%	***

* $p<.10$
*** $p<.001$

[37] This is also consistent with attorney reports concerning compliance with the timeframe for standard discovery in the Attorney Survey component of the evaluation. See *infra* at pp. 36-38.

frequency of discovery disputes more than doubled.[38] The frequency of discovery disputes exhibited a statistically significant decrease for Tier 1 non-debt collection cases. Although the frequency of discovery disputes in non-domestic Tier 2 cases decreased from 10.2% to 8.3%, this decrease was not statistically significant, possibly due to the small number of cases (244 pre-implementation, 372 post-implementation)[39]; the frequency of discovery disputes in Tier 2 domestic cases did not change in response to the Rule 26 revisions. The frequency of discovery disputes in Tier 3 cases dropped by more than one-third, but the difference was only marginally significant, again likely due to the small number of cases in Tier 3 (109 pre-implementation, 220 post-implementation).

When discovery disputes did occur, however, they did so significantly earlier in the life of the case. See Table 14. Overall, the average number of days from initial case filing to the filing of the first discovery motion decreased by approximately 4 months across all discovery tiers. These decreases were statistically significant and extended to Tier 1 debt collection and Tier 2 domestic cases. Only the change in the timing of discovery disputes for Tier 1 non-debt collection cases was not statistically significant, likely due to the small number of cases with discovery disputes (28 pre-implementation, 7 post-implementation). Although this change in the timing of discovery disputes was not anticipated in the evaluation, it can certainly be viewed as a positive impact insofar as it alerts the trial judge and allows him or her to intervene in the case and get it back on track at an earlier point in the litigation than would otherwise occur.

Table 14: Number of days from case filing to filing of first discovery dispute motion

	PRE-IMPLEMENTATION	POST-IMPLEMENTATION	SIG.
Tier 1 Overall	234	109	***
Debt collection	203	104	***
Non-debt collection	360	270	
Tier 2 Overall	421	275	***
Domestic	417	279	***
Non-domestic civil	449	256	**
Tier 3 Overall	347	225	*
Total	355	184	***

* $p<.05$
** $p<.01$
*** $p<.001$

[38] In discussions with the Advisory Committee, it was suggested that plaintiff attorneys in debt collection cases have standardized the practice of filing motions to compel defendant responses to requests for admission, which may account for a large proportion of these discovery disputes. Alternatively, they may reflect defendant motions for additional information concerning the claim.
[39] $\chi^2=0.652$, df=1, p=ns.

IMPACT OF RULE 26 REVISIONS ON REPRESENTATION STATUS

One of the debates concerning the adoption of the Rule 26 revisions focused on its likely impact on self-represented litigants. In particular, Advisory Committee members and commentators on the draft version of the rules that were promulgated for public comment expressed the concern that self-represented litigants would be less likely than litigants represented by attorneys to comply with the Rule 26 automatic disclosure requirements due to their complexity. The NCSC obtained information about the representation status of litigants for cases in which an answer was filed to investigate this question. See Table 15.

Table 15: Litigant Representation Status

	PRE-IMPLEMENTATION (N=9,474)			
	BOTH PARTIES REPRESENTED	P REPRESENTED / D PRO SE	P PRO SE / D REPRESENTED	BOTH PARTIES PRO SE
Tier 1 Overall	13%	85%	1%	2%
Debt collection	10%	87%	<1%	2%
Non-debt collection	42%	54%	3%	2%
Tier 2 Overall	31%	26%	14%	29%
Domestic	28%	25%	15%	32%
Non-domestic	60%	34%	2%	2%
Tier 3 Overall	84%	16%	1%	0%
Total	26%	60%	5%	10%
	POST-IMPLEMENTATION (N=7,555)			
	BOTH PARTIES REPRESENTED	P REPRESENTED / D PRO SE	P PRO SE / D REPRESENTED	BOTH PARTIES PRO SE
Tier 1 Overall	17%	82%	1%	1%
Debt collection	12%	87%	<1%	1%
Non-debt collection	61%	33%	3%	2%
Tier 2 Overall	32%	25%	14%	29%
Domestic	26%	25%	16%	33%
Non-domestic	72%	24%	2%	2%
Tier 3 Overall	83%	10%	6%	2%
Total	26%	58%	6%	11%

Although there was little change in the overall breakdown of representation status between the pre-implementation and post-implementation samples, there were some significant changes within the discovery tiers. For example, the proportion of Tier 1 non-debt collection cases in which both parties were represented increased from 42% to 61%, and the proportion of Tier 2 non-domestic cases in which both parties were represented increased from 60% to 72%. In both instances, the shift is due exclusively to an increase in the proportion of plaintiffs retaining counsel in cases for which the defendant is self-represented; there is no difference for other representation categories. Recent discussions with the Advisory Committee suggest that the restrictions on discovery may actually provide an incentive for plaintiff attorneys to accept cases that they would previously have declined due to concerns about discovery costs exceeding the value of the case.

Not surprisingly, litigant representation status does affect the manner of disposition in civil cases. For example, Tier 1 cases were significantly more likely to be dismissed or to settle and less likely to result in a judgment, when both parties were represented by counsel compared to cases in which one or both parties were self-represented. But the Rule 26 revisions did not change this relationship between case outcomes and representation status. There was also no evidence that self-represented plaintiffs contributed to the tier inflation phenomenon that was observed in Table 6 for the non-debt collection and non-domestic cases. Indeed, such an impact would be surprising given that a self-represented litigant would be unlikely to have sufficient knowledge of the discovery rules to preemptively plead the case to obtain a higher discovery tier.

Representation status did have an effect on Rule 26 short-term impacts and compliance. Ironically, it was cases in which both parties were represented by counsel that were most likely to involve an amended pleading[40] and least likely to have a COR recorded in CORIS.[41] Post-implementation Tier 1 debt collection cases in which both parties were represented were also marginally more likely to involve discovery disputes (5.9%) compared to cases in the pre-implementation sample (4.4%), but otherwise there were no differences in the frequency of discovery disputes based on representation status.

[40] Both parties represented=93.3%, one or more parties self-represented=6.7%, χ^2=72.583, df=3, p<.001.
[41] COR filing rates: both parties represented=2.9%, one or more parties self-represented=7.5%; χ^2=14.036, df=1, p<.001.

Attorney Survey

One of the challenges of evaluating the impact of the Rule 26 revisions is that the rule is intended to regulate litigation activity that takes place largely outside the courthouse. Discovery is the process of exchanging information about the evidence that the parties need to support their respective claims and defenses. In the vast majority of cases, judges do not get involved in supervising the process except to the extent necessary to resolve disputes between the parties concerning whether requested information must be disclosed. Rule 26 does not require that the parties file copies of automatic disclosures and various discovery requests with the court, although many attorneys routinely file proof of service to create a record that disclosures or requested discovery were provided to the opposing party. Thus, information recorded in CORIS cannot be used to confirm the extent to which attorneys have complied with the Rule 26 provisions concerning either the scope or the deadlines for completing discovery. This information must come from the attorneys themselves, either through a review of attorney case files or through a survey asking attorneys to self-report on their discovery activities. The former approach offers the advantage of not relying on attorneys' willingness to self-report and ability to recall details about individual cases. Nevertheless, it is logistically problematic insofar as client confidentiality concerns would likely lead most attorneys to decline access to their case files, and even if files could be observed, the review process would be prohibitively time-consuming and expensive. Moreover, an attorney case file review would not provide information about the attorneys' opinions regarding the revisions.

For all of these reasons, the NCSC adopted the approach of surveying attorneys for the present evaluation. The surveys were administered online to attorneys who were listed as counsel of record in civil cases filed between January 1 and June 30, 2012. See Appendix A for a MS Word version of the survey. On a rolling basis as cases were disposed, the Utah AOC extracted the names and email addresses of attorneys of record for civil cases in the post-implementation sample in which an answer was filed. The NCSC eliminated records that were missing the attorney name or email address. To prevent attorneys who were listed as attorney of record for multiple cases in the same survey batch from receiving multiple copies of the survey, the NCSC randomly selected a single case for each attorney.[42] The surveys were administered on a quarterly basis beginning October 1, 2012 and ending June 30, 2014 for a total of eight survey batches. Table 16 shows the impact of the data cleaning process for each survey batch. The final dataset consisted of 817 attorney survey responses for 725 unique cases. These reflect an average attorney response rate of 19% for 27% of the cases on the survey distribution list.

[42] NCSC staff also implemented a policy of excluding attorneys who had already responded to three previous surveys from receiving future surveys.

Table 16: Attorney Survey

BATCH	DISPOSITION DATES	ORIGINAL SAMPLE			DISTRIBUTION LIST		SURVEY RESPONSES			
		TOTAL RECORDS	CASES	ATTORNEYS	CASES	ATTORNEYS	CASES	%	ATTORNEYS	%
1	July 1, 2012 to Sept. 30, 2012	11,576	3,445	888	595	845	161	27%	177	21%
2	Oct. 1, 2012 to Dec. 31, 2012	10,572	1,185	724	453	714	120	26%	139	19%
3	Jan. 1, 2013 to March 31, 2013	4,267	425	674	420	674	126	30%	146	22%
4	April 1, 2013 to June 30, 2013	3,891	1,036	373	264	372	122	46%	136	37%
5	July 1, 2013 to Sept. 30, 2013	4,313	505	543	302	536	59	20%	62	12%
6	Oct. 1, 2013 to Dec. 31 2013	9,435	403	359	243	466	52	21%	59	13%
7	Jan. 1, 2014 to March 31, 2014	4,311	278	437	206	423	46	22%	54	13%
8	April 1, 2014 to June 30, 2014	2,066	171	339	152	339	39	26%	44	13%

One implication of the data cleaning process is the skewed distribution of case types compared to the original sample of post-implementation cases. See Table 17. The exclusion of all but one case per batch for attorneys who had multiple cases disposed during the sampling period had a disproportionate effect on the proportion of debt collection cases reflected in the survey responses. For example, one attorney in Batch 1 was listed as the attorney of record in 307 separate debt collection cases, but only one of those cases was selected for the survey sample. Debt collection cases were also more likely to have an attorney of record recorded for the plaintiff than for the defendant because so many of the defendants were self-represented litigants, who were not included in the attorney survey distribution list. Finally, Tier 3 cases were more likely than Tier 1 or Tier 2 cases to have multiple attorneys of record recorded for each side. To increase the likelihood of receiving a response, the survey distribution list included all unique attorneys of record, not just the lead attorney for each case. The net result is underrepresentation of general civil cases, largely due to a low proportion of debt collection cases, and overrepresentation of domestic cases, driven by an overly large proportion of divorce/annulment cases. In addition, the initial screening criteria focusing on attorneys of record for cases in which an answer was filed resulted in a disproportionate number of attorneys representing plaintiffs/petitioners on the distribution list. Across all case categories, plaintiffs/petitioners were more likely to be represented by counsel than defendant/respondents, and differential default rates across case types exacerbated this effect.

Table 17: Caseload Composition for Filings, Survey Distribution List, and Survey Respondents

CASE TYPE	CASES FILED 1/1/12 TO 6/30/2012		SURVEY DISTRIBUTION LIST: CASES		SURVEY RESPONDENTS: CASES	
Asbestos	1	<1%	–	0%	–	0%
Civil rights	4	<1%	1	<1%	1	<1%
Condemnation	41	<1%	12	<1%	7	1%
Contracts	1,590	3%	539	7%	123	18%
Debt Collection	36,414	77%	4,341	57%	152	22%
Malpractice	76	<1%	25	<1%	9	1%
Personal injury	693	1%	421	6%	144	21%
Property damage	185	<1%	54	1%	13	2%
Property rights	171	<1%	58	1%	20	3%
Water rights	11	<1%	4	<1%	1	<1%
Wrongful death	22	<1%	8	<1%	1	<1%
Wrongful termination	7	<1%	2	<1%	2	<1%
Subtotal General Civil	39,215	83%	5,465	72%	473	68%
Custody/Support	546	1%	190	3%	18	3%
Divorce/Annulment	7,087	15%	1,631	22%	173	25%
Paternity	665	1%	275	4%	35	5%
Subtotal Domestic	8,298	17%	2,096	28%	226	32%
GRAND TOTAL	47,513	100%	7,561	100%	699	100%

Differential survey response rates further distort the caseload composition. Only 22% of survey respondents represented litigants in debt collection cases, compared with 57% on the survey distribution list. In contrast, attorneys representing clients in contract and personal injury cases were more likely to respond, while attorneys representing clients in domestic cases responded in roughly the same proportion as they appeared on the distribution list. These response rates likely indicate stronger, and possibly more negative, opinions compared to those who did not respond to the survey. Moreover, it is possible that some attorneys may not have always accurately remembered the cases they were asked to document in the survey, particularly with respect to detailed information about the scope and timeframe of discovery undertaken in those cases. All of these implications should be kept in mind when interpreting the survey responses.

RESPONDENT CASE CHARACTERISTICS

Attorneys responding to the survey represented clients in Tier 1 and 2 cases about equally. See Table 18. Although the Tier 3 cases accounted for only 13% of the attorney surveys, Tier 3 cases comprised less than 3% of the cases in which an answer was filed in the post-impementation sample. Thus, Tier 3 cases are considerably overrepresented in the attorney survey results. Tier 1 respondents are underrepresented (61% of Tier 1 cases with an answer, 45% of survey respon-

Table 18: Caseload Composition by Tier

	TIER 1		TIER 2		TIER 3	
Asbestos	0	0%	0	0%	0	0%
Civil rights	1	0%	0	0%	0	0%
Condemnation	6	2%	1	1%	1	1%
Contracts	60	22%	38	28%	33	36%
Debt Collection	125	45%	20	15%	7	8%
Malpractice	4	1%	1	1%	4	4%
Personal injury	68	24%	56	41%	36	40%
Property damage	7	3%	3	2%	4	4%
Property rights	7	3%	15	11%	5	5%
Water rights	0	0%	0	0%	0	0%
Wrongful death	0	0%	0	0%	1	1%
Wrongful termination	1	0%	1	1%	0	0%
Subtotal General Civil	279	85%	135	44%	91	95%
Custody/Support	7	14%	12	7%	0	0%
Divorce/Annulment	36	73%	131	75%	5	100%
Paternity	6	12%	31	18%	0	0%
Subtotal Domestic	49	15%	174	56%	5	5%
GRAND TOTAL	328		309		96	
	45%		42%		13%	

dents). Tier 2 attorneys are slightly overrepresented (36% of cases with an answer, 42% of survey responses). With respect to specific case types, divorce/annulment cases dominate the domestic cases in all three tiers, and domestic cases comprise more than half of the Tier 2 cases reflected in the attorney survey data (compared to 65% of the Tier 2 cases with answers). Of general civil cases, debt collection dominates Tier 1 (45%) followed by personal injury (24%) and contract cases (22%). Personal injury (40%) and contract cases (36%) dominated the Tier 3 survey responses.

An examination of case dispositions shows that most cases settled,[43] and more than half of the cases in the attorney sample were resolved by withdrawal, dismissal, default judgment or settlement before discovery was completed. See Table 19. Twenty-three respondents reported that the cases were still pending at the time the survey was distributed; these responses were excluded from further analysis.

In addition to issues related to representativeness, some caveats are warranted about the weight to accord to the survey data in the overall evaluation of the Rule 26 revisions. First, a comparison of case events reported by attorneys with data extracted from CORIS reveals some inconsistencies. For example, respondents reported filing motions to amend the pleadings in 5 cases, but the CORIS data confirmed that such a motion was filed in only one of those cases; in addition, the CORIS data indicated a motion to amend the pleadings in an additional 6 cases that were not reported by the attorneys. Similarly, 29 respondents (4.1%) reported that a stipulation for extraordinary discovery was filed in a total of 26 cases. CORIS confirms that information for 13 of the attorney responses in 10 unique cases (3 cases involved reports from multiple attorneys), but 16 of the attorney claims could not be verified with CORIS. Moreover, CORIS also indicated an additional 21 cases in which a stipulation for extraordinary discovery was filed, but the 25 attorneys who completed surveys related to these cases failed to record these stipulations in their survey responses. Similar discrep-

Table 19: Manner of Disposition, by Discovery Tier

	TIER 1		TIER 2		TIER 3	
Withdrawn	5	2%	12	4%	8	9%
Dismissed	18	6%	9	3%	2	2%
Default judgment	11	4%	3	1%	4	4%
Settlement before discovery completed	123	41%	162	56%	35	38%
Settlement after discovery completed	55	18%	76	26%	33	36%
Summary judgment	32	11%	9	3%	3	3%
Bench trial	7	2%	8	3%	0	0%
Jury trial	0	0%	0	0%	2	2%
Other disposition	47	16%	10	3%	5	5%
Total	298	96%	289	99%	92	100%

[43] Across all discovery tiers, 65% settled before discovery was complete and 22% after discovery was complete.

ancies were found concerning attorney responses regarding motions for extraordinary discovery and discovery disputes (motions to compel discovery and motions for protective orders). In most instances in which CORIS data could be used to confirm attorney reports, the incidence of underreporting by attorneys (CORIS data indicates an event that was not reported by the attorneys) greatly outweighs the incidence of over-reporting (attorneys reporting events that are not reflected in CORIS data). It is likely that some of the attorneys who responded to the survey confused the case on which they were asked to assess the impact of the Rule 26 revisions with other cases. Even when attorneys correctly recalled the details of those cases, respondents in cases in which discovery was never completed cannot provide a fully informed perspective on the impact of the Rule 26 revisions.

CASE EVENTS

Table 20 documents case activity related to discovery as reported on the attorney survey. Even taking into account the likelihood of substantial underreporting of case events, these statistics reveal remarkably little activity in response to the Rule 26 revisions. Attorneys reported filing motions to amend the pleadings to adjust the discovery in only four cases (less than 1%), and filed motions or stipulations for extraordinary discovery in only 31 cases (5%). Evidence of formal discovery disputes was reported in only 38 cases (5%). In the vast majority of these cases, the motions were granted or stipulations approved, which suggests that attorneys only sought formal relief in meritorious circumstances. Although the precise percentages differ, these rates largely conform to findings from the case-level analysis that the number of formal requests to amend the discovery or for extraordinary discovery is quite modest.[44] There are two possible conclusions to be drawn from these findings. First, the standard discovery provided under Rule 26 is sufficient to meet the needs of most cases. Second, attorneys that believe their cases require more discovery than is permitted by the assigned discovery tier are simply agreeing to do so among themselves without seeking formal court authorization. Of course, these two conclusions are not necessarily mutually exclusive.

Table 20: Case Activity (725 total cases)

	# CASES	(%)	# GRANTED / APPROVED	(%)
Motion to amend pleadings	4	< 1%	3	75%
Motion for extraordinary discovery	7	1%	6	86%
Stipulation for extraordinary discovery	24	4%	20	83%
Motion to compel discovery*	29	4%	18	62%
Motion for protective order*	11	2%	9	82%

* Two cases involved both motions to compel discovery and motions for a protective order

[44] *See* Tables 9 and 10, *supra*.

REPORTED COMPLIANCE WITH RULE 26 RESTRICTIONS ON DISCOVERY

Copies of discovery requests are only rarely filed with the court, and usually only as an appendix to a motion concerning a discovery dispute. To learn whether attorneys are complying with standard discovery limitations, the survey asked attorneys to report the number of discovery requests made both by the respondent and by the opposing party.[45] Table 21 describes the percentage of plaintiff and defendant reports that complied with the scope and timeframe for each discovery tier. Overall compliance with the scope of discovery was very good, generally exceeding 90% for both plaintiffs and defendants for all types of discovery requests across all three tiers.

One of the most intriguing findings from the attorney survey is the proportion of cases in which respondents indicated that NO formal discovery took place. Respondents reported that neither the plaintiff nor the defendant conducted discovery in the form of interrogatories, requests for production or admission, or witness deposition in the nearly one-third (32%) of both Tier 1 and Tier 2 cases. An additional 23% of Tier 1

Table 21: Reported Compliance with Rule 26 Scope of Discovery Provisions

			PERCENT COMPLIANCE	
		RULE 26 REQUIREMENTS	PLAINTIFF / PETITIONER	DEFENDANT / RESPONDENT
TIER 1 (N=217)	Number of Fact Witnesses		2.5	0.9
	Interrogatories	0	88%	92%
	Request for Admission	5	89%	100%
	Requests for Production	5	93%	97%
	Deposition Hours for Fact Witnesses	3	97%	95%
	Days to Completion of Fact Discovery*	120	38%	
TIER 2 (N=207)	Number of Fact Witnesses		2.0	1.2
	Interrogatories	10	94%	94%
	Request for Admission	10	99%	99%
	Requests for Production	10	98%	94%
	Deposition Hours for Fact Witnesses	15	99%	99%
	Days to Completion of Fact Discovery*	180	25%	
TIER 3 (N=49)	Number of Fact Witnesses		3.3	2.7
	Interrogatories	20	93%	98%
	Request for Admission	20	100%	100%
	Requests for Production	20	95%	96%
	Deposition Hours for Fact Witnesses	30	100%	96%
	Days to Completion of Fact Discovery*	210	0%	

* Calculated for cases in which parties settled after discovery completion, summary judgment, bench and jury trials only.

[45] Requesting information from both the respondent and the opposing party in that case ensured that the attorney survey captured information even if the attorney for the opposing party failed to respond to the survey.

cases and 17% of Tier 2 cases involved no formal discovery for at least one of the parties.[46] There was no formal discovery beyond the automatic disclosures in 9% of Tier 3 cases and an additional 13% had no formal discovery by at least one of the parties.

The same level of compliance did not exist with the timeframes to complete discovery. Attorneys reported that fewer than half (38%) of Tier 1 cases completed fact discovery within the 120 days mandated by Rule 26.[47] Nor were these deadlines missed by a small margin. Only 52% of the Tier 1 cases had completed discovery within 30 days of the Rule 26 deadline, and the average time from the answer date to the completion of fact discovery for cases that missed the deadline was 267 days. Tier 2 and Tier 3 cases fared even worse with respect to compliance with discovery deadlines. Only 25% of Tier 2 cases and none of the Tier 3 cases completed fact discovery within the required timeframes.[48] For those cases that exceeded the timeframe, the average number of days to complete fact discovery was 362 and 363 days, respectively. The fact that so few survey respondents reported completing fact discovery within the required timeframes is surprising given the significant decrease in time to disposition that was observed in the CORIS data analysis. It is likely that this discrepancy is due either to self-selection bias among the survey respondents, or possibly inaccurate reporting by the attorneys about the fact discovery completion date.

The survey respondents also reported the number of expert witnesses retained by each side, the number of expert witness reports accepted, the length of expert depositions, and the date that expert discovery was completed. See Table 22. As a general matter, only a

Table 22: Compliance with Rule 26 Expert Discovery Provisions

		PLAINTIFF / PETITIONER	DEFENDANT / RESPONDENT
TIER 1 (N=195)	Cases with Expert Witnesses	9%	8%
	Percent Accepting Expert Report	53%	79%
	No more than 4 Hours of Depositions per Expert Witness	100%	100%
	Days to Completion of Expert Discovery*	56%	
TIER 2 (N=179)	Cases with Expert Witnesses	11%	12%
	Percent Accepting Expert Report	53%	47%
	No more than 4 Hours of Depositions per Expert Witness	100%	100%
	Days to Completion of Expert Discovery*	36%	
TIER 3 (N=57)	Cases with Expert Witnesses	39%	33%
	Percent Accepting Expert Report	73%	78%
	No more than 4 Hours of Depositions per Expert Witness	100%	100%
	Days to Completion of Expert Discovery*	0%	

* Expert Discovery to be completed within 120 days of completion of fact discovery.

[46] Plaintiffs were more likely to forgo formal discovery (14% Tier 1, 13% Tier 2) compared to defendants (10% Tier 1, 5% Tier 2).

[47] The number of days to complete fact discovery was calculated from the date the answer was filed according to CORIS to the date fact discovery was completed as reported by the attorney. Cases that settled before discovery was completed or that resolved by non-meritorious means (default judgment, dismissal, etc.) were excluded from the analysis.

[48] Only 31% of Tier 2 cases and 8% of Tier 3 cases completed fact discovery within 30 days of the required deadlines.

small percentage of attorneys reported retaining any expert witnesses for the case — on average, approximately one in 10 per side for both Tier 1 and Tier 2 cases, and one in three per side for Tier 3 cases. In cases that settled after discovery was completed or were resolved on the merits (e.g., summary judgment, bench or jury trial), 19% of Tier 1 plaintiffs and 17% of Tier 1 defendants retained one or more experts. For Tier 2 and Tier 3 cases, the expert witness retention rates were 19% and 58% for plaintiffs, and 21% and 50% for defendants, respectively. Although much of the criticism about litigation focuses on expenses related to expert witnesses, these reports suggest that such costs are incurred in only a small proportion of cases.[49]

For cases in which an expert witness was retained, approximately half of the Tier 1 and Tier 2 litigants and three-quarters of the Tier 3 litigants accepted the opposing party's expert witness report in lieu of taking a deposition. For those that opted to depose the opposing party's expert witness, the length of the depositions were within the maximum time permitted (4 hours per expert) across all discovery tiers. As with fact discovery, however, the percentage of respondents reporting that the proportion of cases in which expert discovery was completed within 120 days of the fact discovery completion date was fairly small: just over half the Tier 1 cases, approximately one-third of Tier 2 cases, and none of the Tier 3 cases completed expert discovery within the time frame allowed by Rule 26. Again, this may be related to selection bias or inaccurate reporting on the part of the survey respondents.

OPINIONS ABOUT REVISED RULE 26 PROVISIONS

In addition to documenting case events and the scope of discovery, the attorney survey solicited respondents' opinions about the impact of the Rule 26 revisions on the specified case. The first three opinion questions inquired about the impact of the rules on attorneys' ability to obtain sufficient information about the claims and defenses. The questions focused specifically on the opposing party's compliance with the automatic disclosure requirements, the restrictions on the scope of discovery under standard discovery for the assigned discovery tier, and the impact of the proportionality requirement on discovery. In general, attorney opinions tended to be more positive than negative on these issues, with a fairly large proportion of neutral responses. See Table 23. Respondents in Tier 1 cases expressed the most negative opinions on these three items.

The second set of opinion questions inquired into the impact of the Rule 26 revisions on costs and timeliness. Attorneys expressed considerable disagreement with statements that the Rule 26 revisions decreased the amount of time for discovery completion and case resolution, and discovery costs. This is surprising insofar that it is inconsistent with findings based on the case-level analyses that time to disposition was significantly shorter in the post-implementation sample.[50] It is consistent, however, with the attorney survey reports concerning compliance with time restrictions. It is possible that the attorneys who responded to the survey had a less positive experience with the Rule 26 revisions with respect to time to disposition and were thus more highly motivated to respond to the attorney survey. This would also explain their comparatively more negative opinions.

The party the responding attorney represented did affect attorneys' opinions about the impact of the Rule 26 revisions. Overall, attorneys representing plaintiffs were significantly less likely to report that the opposing party complied with the automatic disclosure requirement,[51] and this effect was particularly noticeable for plaintiff attorneys in Tier 1 cases.[52] This may be related to the large proportion of self-represented defendants

[49] In a national survey of attorneys for cases filed in federal court, the Federal Judicial Center found that slightly less than one-third of attorney respondents reported disclosure of expert reports, which is similar to proportion of reported by attorneys in tier 3 cases in the present survey. EMERY G. LEE III & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 9 (Oct. 2009).

[50] *See* Figures 2-9 and accompanying text, *supra*.

[51] On a scale of 1 (completely disagree) to 5 (completely agree), the mean plaintiff response was 2.79 compared to 2.98 for defendants (p=0.470).

[52] The mean plaintiff response (n=185) was 2.52 compared to 2.84 for defendants (n=85), F=3.452, df=2, p=.030.

Table 23: Attorney Opinions about Rule 26

	DISAGREE / STRONGLY DISAGREE	NEUTRAL	AGREE / STRONGLY AGREE
Opposing party complied with automatic disclosure provisions.			
Tier 1	42.5%	30.2%	27.2%
Tier 2	32.1%	26.0%	42.0%
Tier 3	25.3%	24.1%	50.6%
Disclosure and standard discovery under Rule 26 provided sufficient information to inform assessment of claims.			
Tier 1	26.2%	34.9%	38.9%
Tier 2	19.8%	33.2%	46.9%
Tier 3	27.8%	22.8%	49.4%
Discovery was proportional to case complexity and amount in controversy.			
Tier 1	15.6%	42.2%	42.2%
Tier 2	9.9%	38.9%	51.1%
Tier 3	11.4%	31.6%	57.0%
Discovery was completed more quickly due to Rule 26 restrictions.			
Tier 1	40.0%	40.0%	20.0%
Tier 2	37.4%	38.5%	23.9%
Tier 3	51.9%	29.1%	19.0%
Case was resolved more quickly due to Rule 26 restrictions.			
Tier 1	44.4%	40.7%	14.9%
Tier 2	42.4%	38.9%	18.7%
Tier 3	55.7%	32.9%	11.4%
Discovery costs were lower due to Rule 26 restrictions.			
Tier 1	46.5%	37.1%	16.4%
Tier 2	41.2%	40.1%	18.7%
Tier 3	53.2%	30..4%	16.5%

in Tier 1 debt collection cases who may not have been fully aware of or understood the automatic disclosure requirements. On the other hand, plaintiff attorneys were significantly more likely than defendant attorneys to report that discovery was completed more quickly and that the costs of discovery were lower due to the Rule 26 restrictions.[53] Overall, plaintiff attorneys did not report that cases resolved more quickly than did defendant attorneys, but compared to Tier 3 defendants (n=43), Tier 3 plaintiffs (n=36) reported marginally more positive opinions about the impact of the Rule 26 revisions on discovery time[54] and significantly more positive opinions about the revisions' impact on costs and on the timeliness of case resolution.[55]

Case type may also play a role in attorneys' opinions about Rule 26. For many of the case types reflected in the attorney survey, there were too few responses to analyze. However, aggregating the responses based on the Utah AOC reporting categories suggests how case types may affect attorney views of the revisions. All of the attorney opinions differed significantly based on reporting category. Attorneys in general civil cases (civil rights, contract, debt collection, and wrongful termination) expressed the most negative opinions in all three questions related to the impact of Rule 26 on their ability to obtain sufficient information about the claims and defenses. Attorneys in property rights cases (condemnation, property rights, and water rights) expressed the most positive opinions in the questions about the automatic disclosure requirements and the adequacy of the standard discovery restrictions; attorneys in domestic cases expressed the most positive opinions about the proportionality of discovery.[56] In the second set of opinion questions regarding the impact of the Rule 26 revisions on timeliness and costs, attorneys in tort cases consistently expressed the most negative opinions while attorneys in domestic cases expressed the most positive opinions.[57]

The NCSC also investigated whether opinions changed over the two-year course of the survey period. The average rating did not change for any of the survey questions, but there were significant decreases in the proportion of neutral responses to the first three opinion questions and a marginal decrease in the proportion of neutral responses concerning the costs of discovery.[58] That is, attorneys responding to more recent survey batches (e.g., post-implementation cases that resolved later in the survey period) were less likely to give a neutral opinion about the impact of the Rule 26 revisions. Although some attorneys in later batches responded with greater proportions of negative responses, there were slight but significant increases in positive responses for the questions concerning the adequacy of standard discovery and the proportionality of discovery, and marginal increases in positive responses for questions concerning the speed and costs of discovery.[59] These trends may indicate that the beneficial effects of the Rule 26 revisions do not appear for cases that resolve relatively early in the litigation. Alternatively, attorneys may be responding based on more general opinions about the Rule 26 revisions rather than their experience with a particular case, which would indicate that attorney acceptance of the rule may be improving with time.

---

[53] Respondents were asked to rate their agreement with statements on a scale of 1 (strongly disagree) to 5 (strongly agree). The average plaintiff agreement with the statement that discovery completed more quickly was 2.75 (n=380) compared to 2.52 for defendants (n=227), F=3.137, df=2, p=0.044); the mean plaintiff agreement with the statement that costs were lower was 2.62 (n=380) compared to 2.42 for defendants (n=227), F=3.282, df=2, p=0.38.

[54] Discovery was completed more quickly: Tier 3 plaintiffs=2.75, Tier 3 defendants=2.28, F=3.661, df=2, p=0.059.

[55] Costs were lower: Tier 3 Plaintiffs=2.81; Tier 3 Defendants=2.14, F=7.465, df=2, p=0.046; Case resolved more quickly: Tier 3 plaintiffs=2.61, Tier 3 defendants=2.16, F=4.106, df=2, p=0.008.

[56] Compliance with automatic disclosure requirements: General Civil=2.61, Domestic=2.94, Torts=3.13, Property Rights=3.37, F=8.551, df=3, p<0.001; Standard discovery sufficient: General Civil=3.03, Torts=3.04, Domestic-3.34, Property Rights=3.37, F=4.498, df=3, p=0.007; Proportional: General Civil=3.24, Torts=3.42, Property Rights=3.44, Domestic=3.50, F=2.998, df=3, p=0.030.

[57] Discovery completed more quickly: Torts=2.47, Property Rights=2.63, General Civil=2.65, Domestic=2.84, F=3.427, df=3, p=0.017; Case resolved more quickly: Torts=2.36, General Civil=2.53, Property Rights=2.56, Domestic=2.72, F=3.253, df=3, p=0.021; Costs were lower: Torts=2.28, General Civil=2.54, Property Rights=2.63, Domestic=2.76, F=5.613, df=3, p=0.001.

[58] Percentage of neutral responses for compliance with automatic disclosures, F=2.811, df=7, p=0.007; Adequacy of standard discovery, F=2.594, df=7, p=0.012; Proportionality, F=2.784, df=7, p=0.00); Speedier discovery, F=1.217, df=7, p=.217; Speedier case resolution, F=1.441, df=7, p=.186; Decreased costs, F=1.806, df=7, p=0.083).

[59] Percentage of positive responses for compliance with automatic disclosures (p=.370); Adequacy of standard discovery (p=0.010); Proportionality (p=.024); Speedier discovery (p=0.060); Speedier case resolution (p=.256); Decreased costs (p=0.057).

OPINIONS ABOUT RULE 4-502

Two of the opinion questions in the attorney survey focus on the expedited process for resolving discovery disputes, which was adopted as Rule 4-502 of the Utah Judicial Council Rules of Judicial Administration. A total of 176 attorneys answered the question about whether discovery disputes were resolved in a timely fashion; however, the CORIS data confirmed the existence of a discovery dispute for only 36 of those attorneys. The discrepancy suggests that a significant number of attorneys either experienced a discovery dispute in the case but failed to bring it to the court's attention for resolution or mistakenly reported on their experience with a discovery dispute in different case that was not selected for the attorney survey. This was an important factor influencing attorney responses to these questions. See Table 24.

Attorneys reporting on cases in which the CORIS dataset confirmed the existence of a discovery dispute had marginally more favorable opinions regarding whether the dispute was resolved in a timely manner.[60] They were also significantly more likely to report that the Statement of Discovery Issues and Statement in Opposition provided sufficient information for the court to decide the discovery dispute.[61] There was no difference in attorney opinions about whether discovery disputes were resolved in a timely manner based on discovery tier. There were too few cases to investigate whether the timing of the Request to Submit for Decision filing caused a delay in the resolution of the discovery dispute, as was suggested as a possibility in the judicial focus groups in April 2014.[62] In two-thirds of the cases in which CORIS confirmed the existence of a discovery dispute, the order resolving the dispute

Table 24: Attorney Opinions about Rule 4-502

	DISAGREE / STRONGLY DISAGREE	NEUTRAL	AGREE / STRONGLY AGREE
Discovery disputes were resolved in a timely manner.			
Discovery dispute confirmed by CORIS	38.9%	30.6%	30.6%
Discovery dispute not confirmed by CORIS	44.1%	47.1%	8.9%
Statement of Discovery Issues and Statement in Opposition provided sufficient information for the court to decide the discovery dispute.			
Discovery dispute confirmed by CORIS	25.9%	25.9%	48.1%
Discovery dispute not confirmed by CORIS	41.2%	48.0%	10.7%

[60] Discovery dispute confirmed by CORIS (mean=2.81), discovery dispute not confirmed by CORIS (mean=2.64), F=3.493, df=2, p=0.063.
[61] Discovery dispute confirmed by CORIS (mean=3.22), discovery dispute not confirmed by CORIS (mean=2.51), F=10.257, df=2, p=0.002.
[62] See *infra* at n. 65 and accompanying text.

was entered within 42 days of the first motion, but a Request to Submit for Decision was only found in the CORIS data in seven of those cases.

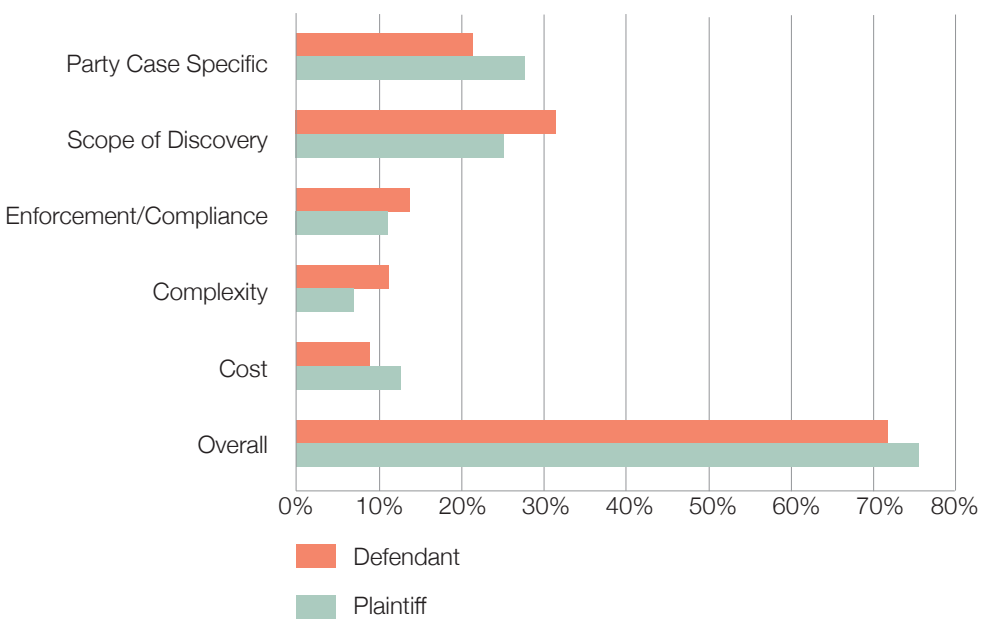
OPEN-ENDED ATTORNEY COMMENTS

The attorney survey concluded with an opportunity for respondents to provide written comments about the Rule 26 revisions and their impact on the case or on legal practice generally. In total, 39% of responding attorneys chose to complete the comment section. Because the comment section was an optional field, self-selection bias may have resulted in comments being submitted by attorneys with stronger, more negative opinions than attorneys who skipped the comment section. The NCSC analyzed the comments to identify common themes and to provide additional information to aid in the interpretation of data from other components of the evaluation.

A coding system was created to quantify the written comments. Most comments raised multiple issues. Negative themes were assigned a negative number, positive themes were assigned a positive number, and neutral or "other" themes were assigned a zero (0). Each comment was assigned up to four different numbers to represent the different issues or themes addressed by the attorney. The final coding scale ranges from -74 to 11, indicating significantly more unique negative themes than positive themes. Theme codes were then combined into seven categories: cost, complexity, enforcement/compliance, discovery tier issues, party or case type specific issues, positive comments, and "other" comments. These general categories make it possible to analyze the comment themes by batch, district, party, and case type. Appendix B provides an explanation and examples of each of the theme categories.

The vast majority of the comments (74%) reflect criticism of the Rule 26 revisions with only 9% positive and 17% neutral comments. Overall, there was no difference in the proportion of negative comments made by attorneys representing plaintiffs than by defendant attorneys, although there were subtle differences in the theme categories for their comments based on the party represented. See Figure 13. Plaintiff attorneys, for example, were significantly more likely than defense attorneys to express criticism about the Rule 26 revisions related to costs as well as party and case-specific complaints. Defense attorneys were more concerned with the complexity of the rules, the scope of discovery permitted under the standard discovery tiers, and enforcement and compliance issues.

Figure 13. Negative Comments by Party



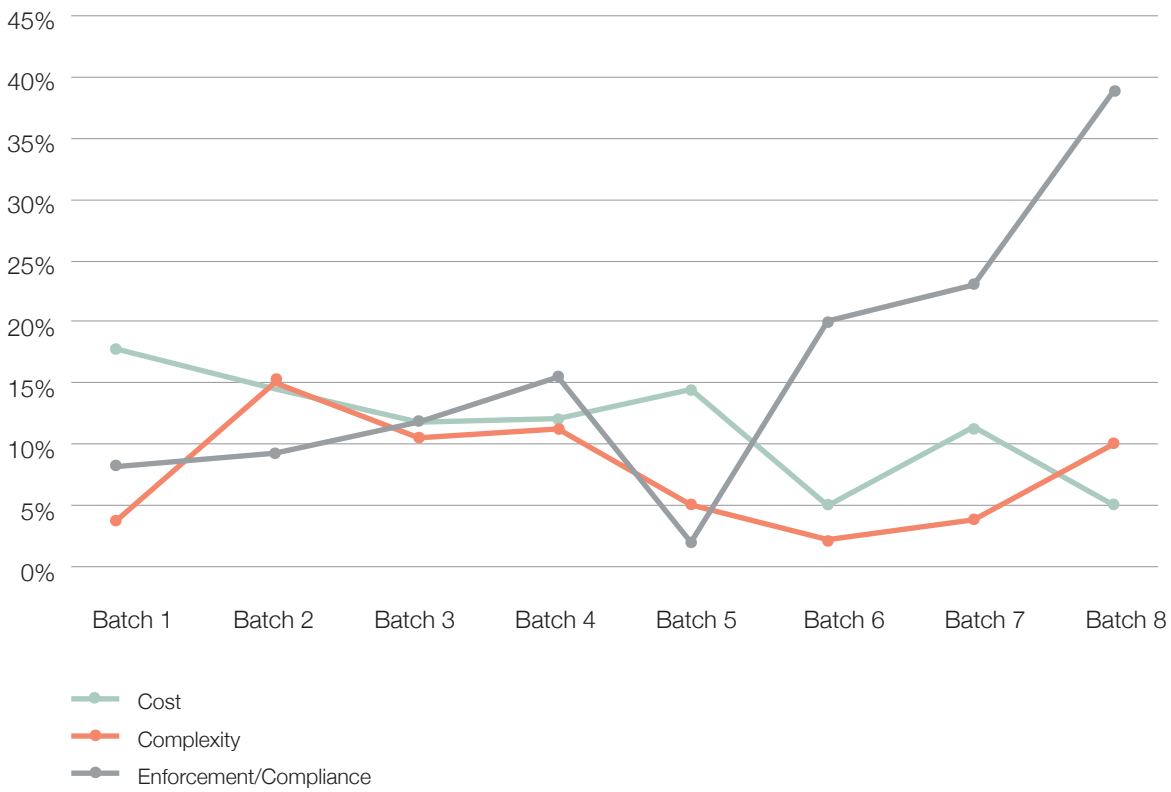
There were also subtle differences in the comments based on the Utah case type reporting categories. Overall, attorneys in property rights and domestic cases were the least negative in their criticism of the Rule 26 revisions (70% of comments) compared to attorneys in tort cases (75%) and contract cases (78%). Again, the specific nature of the criticisms varied by reporting category. See Table 25. There were no significant differences by reporting category concerning cost and complexity issues, but attorneys in contract cases raised enforcement/compliance issues approximately half as often (8%) as attorneys in other types of cases. Attorneys in domestic cases were the least concerned with issues related to the scope of discovery permitted by the standard discovery tiers (11%) and also offered the greatest proportion of positive comments (17%). Attorneys in tort and property rights cases were most concerned with the scope of discovery (38% and 44%, respectively).

Table 25: Comment Themes by Utah Reporting Category

	COST	COMPLEXITY	ENFORCEMENT / COMPLIANCE	SCOPE OF DISCOVERY	PARTY/CASE SPECIFIC	POSITIVE
Domestic	14%	8%	17%	11%	34%	17%
General Civil	14%	10%	8%	34%	25%	10%
Property Rights	13%	13%	13%	44%	19%	0%
Tort	10%	12%	16%	38%	14%	11%
Total	13%	10%	12%	30%	24%	11%

Finally the timing of the survey batches also affected the nature of the comments. See Figure 14. Comments related to cost and complexity were less frequent in later survey batches, while complaints about enforcement/compliance issues were more common. This is likely related to the nature of the cases themselves. Cases that resolved relatively early in the survey period (e.g., Batches 1 and 2) tended to be smaller and less complex, so attorneys in these cases reported that the revised rules were unnecessarily costly and complex. Cases that resolved later in the survey period tended to be more complex and more highly contested, and attorneys voiced greater concern about enforcement of the rules.

Figure 14. Comment Themes by Survey Batch



Judicial Focus Groups

To gauge the impact of the Rule 26 revisions from the perspective of the Utah district court judges, the NCSC conducted a series of judicial focus groups in conjunction with the 2014 District Court Spring Conference (April 23-25, 2015 at Bryce Canyon, Utah). A total of 20 district court judges were invited to participate in the focus groups. Judges were selected both with respect to their interest in the Rule 26 revisions and to ensure representation from all of the judicial districts. A total of 15 district court judges plus Utah AOC staff participated in the focus groups.[63]

To guide the focus group discussions, the NCSC prepared preliminary findings from the attorney survey (through Batch 6) and asked judges to help interpret them. Judges were also asked about how they were interpreting and applying the proportionality requirement when attorneys sought extraordinary discovery, whether judges were seeing an increase or decrease in the number or types of discovery disputes, and what they were hearing about the impact of the Rule 26 revisions either formally in motion arguments or informally from attorneys. Appendix C contains the written handout provided to judges who attended the focus groups.

A recurring theme across all of the focus group discussions was judicial awareness of the difficulty involved in changing well-established legal practices and culture in a relatively short period of time. Several judges noted that lawyers' penchant for excessive discovery had developed over several generations, and they believed it would take at least that long for the practicing bar to become acclimated to the new discovery procedures. They also remarked that younger attorneys, who had not become firmly entrenched in bad habits, and older attorneys, who remembered litigation practice from their youth, seemed to be the most comfortable with the Rule 26 revisions. In addition, several judges noted that there were some early missteps in which the rules were interpreted in a more complex manner than necessary in relatively straight-forward cases. Finally, several judges admitted to having initial concerns about the potential for backlash against strict enforceability of the rules because the legal culture in Utah had traditionally viewed civil case management as the responsibility of the lawyers.

COMPLIANCE WITH STANDARD DISCOVERY

The focus group discussions began with a brief description of preliminary findings from the attorney surveys through December 2013, which indicated that filings to adjust the discovery tier or seeking extraordinary discovery were quite infrequent. Many of the judges noted that they were seeing very few stipulations to expand the scope of discovery, but many motions for extensions of the discovery deadlines. Although Rule 26(c)(6) defines extraordinary discovery as discovery beyond the limits established for standard fact discovery in Rule 26(c)(5), including deadlines for the completion of fact discovery, many of the judges participating in the focus groups appeared to view extensions on the deadlines as not included within the definition of extraordinary discovery.

The judges expressed widespread suspicion that attorneys are routinely agreeing to discovery stipulations at the beginning of litigation, but not filing those stipulations with the court unless they are unable to complete discovery within the required time frame. They were also unsure about the extent to which attorneys were complying with the certification of client informed consent requirement in Rule 26(c)(6) when filing motions or stipulations for extraordinary discovery. Several judges noted that they had disapproved stipulations for extraordinary discovery on grounds that the attorneys had failed to comply with the certification requirement. One judge who was a member of the Advisory Committee while the revisions

[63] District court judges who participated in the focus groups included David M. Conners (2nd), Robert J. Dale (2nd), Noel S. Hyde (2nd), Thomas L. Kay (2nd), James T. Blanch (3rd), L. A. Dever (3rd), Paul Parker (3rd), Todd M. Schaughnessy (3rd), Kate A. Toomey (3rd), Derek P. Pullan (4th), James R. Taylor (4th), William Barrett (5th), Wallace A. Lee (6th), Lyle R. Anderson (7th), and Edwin T. Peterson (8th). AOC staff who participated included State Court Administrator Daniel Becker, District Court Administrator Debra J. Moore, and Judicial Education Director Thomas Langhorne.

to Rule 26 were being debated suggested that the Advisory Committee should consider removing the ability of attorneys to stipulate to time extensions and only permit them by leave of court.

Most judges expressed their belief that the disclosure requirements in Rule 26(a) have been quite helpful in helping attorneys understand and assess the merits of the respective claims and defenses, and cases therefore move forward faster. According to judges, attorneys in Tier 1 cases seemed to catch on more quickly about the need to conduct discovery quickly. But at least one judge thought that attorneys had many more opportunities to enter objections to evidence on the grounds of untimely disclosure than they were actually taking, possibly due to unfamiliarity with the detailed requirements of Rule 26(a).

DISCOVERY DISPUTES

Many judges indicated that they had experienced significant decreases in the number of motions to compel discovery and motions for protective orders since implementation of the Rule 26 revisions. They believed part of the decrease was the result of the restrictions on discovery associated with the discovery tiers. Because the amount of discovery is significantly curtailed, especially for Tier 1 and Tier 2 cases, there is simply less material about which to disagree. In addition, the Rule 4-502 procedure does not stay the discovery deadlines while a Statement of Discovery Issues and the associated Statement in Opposition are pending. Many lawyers are cognizant of the limited time to complete discovery and have taken a "pick your battles" approach to litigation. The combination of fewer discovery disputes and the expedited process for resolving them has resulted in an increase in judges' availability to decide discovery disputes in a timely manner.

Most of the focus with respect to discovery disputes has shifted to the automatic disclosure requirements. On the few occasions when discovery disputes arise, a major benefit of Rule 4-502 is the requirement that attorneys submit a proposed order with the Statement of Discovery Issues and Statement in Opposition, which helps judges focus on the disputed issues instead of having to wade through the often lengthy briefs that previously accompanied motions to compel and motions for protective orders.

USE OF CORIS FOR OVERSIGHT/ENFORCEMENT

There was a lengthy discussion in one of the focus groups about the preliminary finding from the attorney survey that a significant proportion of attorneys disagreed that discovery disputes were resolved in a timely manner.[64] One explanation proffered for the dissatisfaction was confusion on the part of attorneys about the mechanism for requesting a judicial decision on discovery disputes. Rule 4-502 requires the filing party to file a notice to submit for decision after the opposing party has had an opportunity to file a statement in opposition. This notice alerts the judge that the issue is ripe for decision. Since implementation of mandatory e-filing, most judges would be unaware that the issue is pending until the notice to submit for decision triggers an alert for the trial judge.

Much of the subsequent focus group discussion centered on the most appropriate and effective remedy for addressing delays associated with attorneys' failure to file the notice to submit for decision. Some judges believed that improved attorney education was necessary, particularly insofar that most attorneys would not be aware that the Utah e-filing system implemented in April 2013 does not automatically alert judges when a statement of discovery

[64] After comparing the attorney survey responses with the CORIS Data, the NCSC found that attorney opinions about the timeliness of resolving discovery disputes was significantly more positive for cases in which the CORIS data confirmed that a statement of discovery issues had been filed. *See supra* Table 24. The CORIS data was not available when the judicial focus groups took place in April 2014.

issues is filed. One judge explained that he has taken a proactive approach in discovery disputes: he asks his judicial assistant to be on the lookout for Rule 4-502 Statements, and rather than waiting for the statement in opposition and notice to submit for decision to be filed, he telephones the attorneys and resolves the dispute informally.[65] Other judges were less forgiving, opining that the practice of filing a notice to submit for decision predated Rule 4-502 and that attorneys who fail to follow the rule requirements should not complain when their own lapses affect the timeliness of decisions on discovery disputes. This point lead to a discussion about whether a technological approach — namely, programming CORIS to identify a statement of discovery issues at filing and automatically alert the judge of the pending filing after the 5-day period for filing a statement in opposition has expired — would be a more effective approach.

The discussion about technology-related factors contributing to delay also prompted a discussion about the extent to which judges were using the CORIS case management tools for routine oversight and enforcement of the Rule 26 revisions. CORIS is programmed to generate advisory notices of discovery deadlines including the due date for filing a COR. Although many of the judges authorize their judicial assistants to issue orders to show cause when cases have not registered any activity for a defined period of time (usually 120 days), most were unaware that CORIS had the capability to monitor Rule 26 compliance and had not directed their judicial assistants to include Rule 26 noncompliance in routine case management oversight.

OVERALL IMPRESSIONS

In general, the judges who participated in the focus groups were fairly positive about the impact of the Rule 26 revisions thus far. There was general agreement that one benefit of the revisions was that they leveled the playing field between smaller and larger law firms insofar as larger firms could no longer bury the small firms with excessive discovery requests. Several also opined that the automatic disclosure requirements had forced collection agencies to interact more constructively with defendants, who were disproportionately self-represented. Finally, the judges expressed greater confidence in their authority to enforce the disclosure rules by excluding evidence from trial due to the explicit language in Rule 37(h) mandating exclusion.

[65] The NCSC investigated the relationship between the frequency and timing of notices to submit decision and the timing of subsequent decisions on discovery disputes. A statement of discovery issues was filed in 103 cases, but a subsequent notice to submit for decision was only filed in 40 of those cases (40%). Judicial decisions on the statement of discovery issues were identified in 41 cases. The average number of days from the filing of the statement of discovery issues to the entry of a judicial decision on the issue was 50 days and there was no statistically significant difference based on whether a notice to submit for decision was filed (21 cases) or not (20 cases).

Civil Litigation Cost Model Survey

One component of this evaluation was intended to provide estimates of litigation costs (attorneys' fees and expert witness fees) for civil cases. In 2012, the NCSC developed the Civil Litigation Cost Model (CLCM), a new methodology for estimating litigation costs. The CLCM employs survey methodology to measure the amount of time expended by attorneys to complete a variety of litigation tasks in civil cases. The survey also documents hourly billing rates for senior and associate attorneys and paralegal staff to generate costs associated with the completion of those litigation tasks. The NCSC pilot-tested the CLCM with the membership of the American Board of Trial Advocates (ABOTA).[66] ABOTA's review of the findings from the pilot test concluded that the CLCM estimates were reasonable given the members' extensive experience in civil litigation. For the Utah evaluation, the NCSC distributed a modified version of the CLCM survey to attorneys identified as counsel of record for civil cases filed between January 1 and June 30, 2012. The modifications included an expanded list of civil cases to generate litigation costs for the most common types of civil cases filed in the Utah District Courts subject to Rule 26. The survey also included a series of questions intended to provide context about the substantive and procedural characteristics of a "typical" case that would likely affect the amount of time expended during litigation (e.g., the number and types of litigants, the number of claims and defenses raised, the expected value of the case, the likelihood of *Daubert* motions or other pretrial dispositive motions, and probabilities about how the case would resolve).

CLCM METHODOLOGY AND SURVEY RESPONSES

The Utah CLCM was distributed via email to 2,487 attorneys of record in the post-implementation sample cases. The attorneys were directed to the online survey beginning June 2 through June 13, 2014. The attorneys were asked a series of questions about their law practice including the county in which they most often practice, the size of the law firm, the hourly billing rates or average annual salaries for senior and associate-level attorneys and paralegals in the firm, and the types of civil cases on which they regularly practice. The survey then directed the attorneys to describe the substantive and procedural characteristics of a typical case of a type in which they regularly practice followed by estimates of the number of hours senior and associate-level attorneys and paralegals would normally expend to complete the litigation tasks associated with case initiation, discovery, settlement negotiations, pretrial preparation, trial, and post-disposition. The estimates requested for trials did not differentiate between bench trials and jury trials. The survey questions are included as Appendix D.

A total of 255 attorneys completed the Utah CLCM survey (10.3% response rate). Table 26 provides a description of respondent characteristics. More than two-thirds of respondents (69%) report that they practice primarily in the Third Judicial District, another 10% practice in the Second and Fourth Judicial Districts, respectively, and the remaining 11% of respondents practice elsewhere in the state. All of the Utah judicial districts are represented by at least one respondent in the survey. Slightly more than half of the respondents (52%) work in relatively small law firms (e.g., less than 5 attorneys) or as solo practitioners. Approximately one-third work in law firms of 6 to 20 lawyers. Only 13% work in firms of 50 or more lawyers. Most of the law firms (63%) serve both plaintiffs and defendants as clients; 22% are plaintiff-oriented law firms and 11% are defendant-oriented law firms, 7% of which represent insurance carriers. Seven respondents were in-house counsel. Nine out of ten respondents work in law firms that routinely practice in the area of tort, contract and real property law; 50 respondents practice in boutique firms that specialize in one particular area of law. One-third routinely practice domestic relations law.

Although the NCSC has confidence that the estimates generated by the CLCM provide reliable estimates of the range of costs associated with different types of civil cases, some caveats about the limitations of the methodology should be acknowledged. First, the accuracy of the estimates is based on attorney reports

[66] PAULA HANNAFORD-AGOR & NICOLE L. WATERS, CASELOAD HIGHLIGHTS: ESTIMATING THE COST OF CIVIL LITIGATION (NCSC Jan. 2013); Paula Hannaford-Agor, *Measuring The Cost Of Civil Litigation: Findings From A Survey Of Trial Lawyers*, VOIR DIRE 22 (Spring 2013).

Table 26: Respondent Characteristics

PRIMARY PRACTICE AREA	NUMBER	%
First District	6	2%
Second District	25	9.8%
Third District	176	69.0%
Fourth District	25	9.8%
Fifth District	15	5.9%
Sixth District	4	1.6%
Seventh District	1	0.4%
Eighth District	3	1.2%

LAW FIRM SIZE		
Solo Practitioner	56	22.0%
2-5 Attorneys	79	31.0%
6-20 Attorneys	71	27.8%
21-50 Attorneys	16	6.3%
More than 50 Attorneys	36	14.1%

LAW FIRM CLIENTELE		
In-house counsel	7	2.7%
Primarily Plaintiffs	57	22.4%
Both Plaintiffs and Defendants	161	63.1%
Primarily Defendants	30	11.8%
Insurance Carriers	19	7.5%

PRACTICE AREAS			BOUTIQUE SPECIALTY	
General Civil	**230**	**90.2%**	**37**	16.1%
Automobile Tort	101	39.6%	3	3.0%
Premises Liability	69	27.1%	0	0.0%
Professional Malpractice	67	26.3%	7	10.4%
Business/Commercial	160	62.7%	9	5.6%
Insurance Subrogation	16	6.3%	0	0.0%
Employment	34	13.3%	0	0.0%
Debt Collection	82	32.2%	12	14.6%
Real Property	135	52.9%	6	4.4%
Domestic Relations	**94**	**36.9%**	**14**	14.9%
Divorce	92	36.1%	13	14.1%
Paternity	71	27.8%	0	0.0%
Support/Custody	80	31.4%	1	1.3%

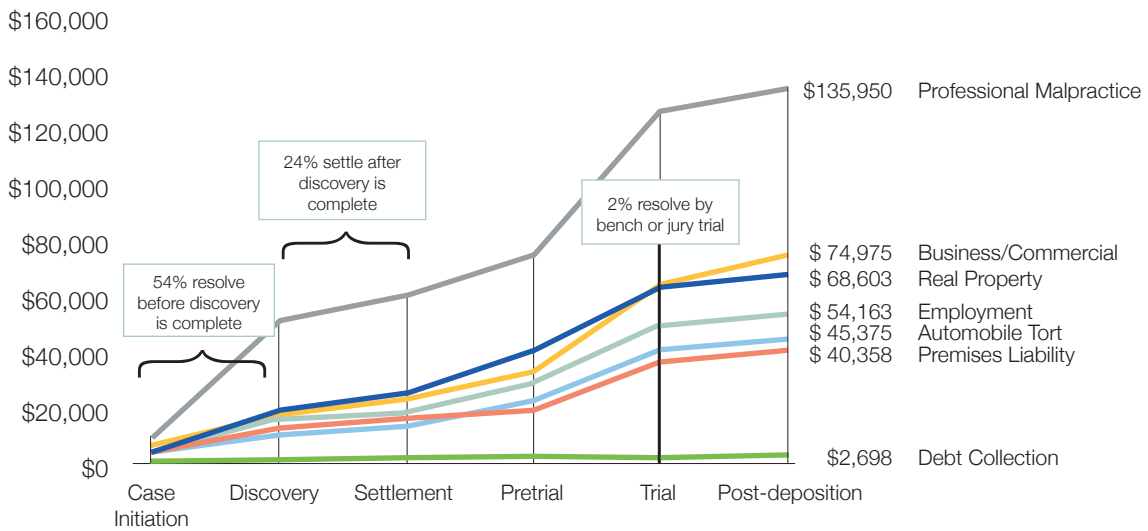
of the anticipated time expended in a "typical" case of each type, which is a challenging task for many attorneys as evidenced by the number of emailed comments that no cases are ever "typical" and all are completely unique. It is clear from both the emailed comments and the survey responses that most attorneys draft their responses envisioning a case that proceeds to a conclusion on the merits. Consequently, case events such as motions in limine and dispositive motions are anticipated even though other data from the evaluation (e.g., case-level disposition statistics, attorney surveys) suggest that most cases do not progress far enough to necessitate those events. In addition, plaintiff attorneys in particular reported great difficulty in estimating the amount of time expended on various litigation tasks due to practicing in contingency fee environments in which records of billable hours are not routinely kept.

ESTIMATES FOR LITIGATION TIME AND COSTS

The findings report the interquartile range of estimates — that is, the estimates for time and costs for the 25th, 50th and 75th percentiles — which has the advantage of displaying the likely variation in time and costs for similar cases and also mutes the effect of extreme outliers in the data. Detailed summaries of time and cost estimates and substantive and procedural case characteristics are attached in Appendix E.

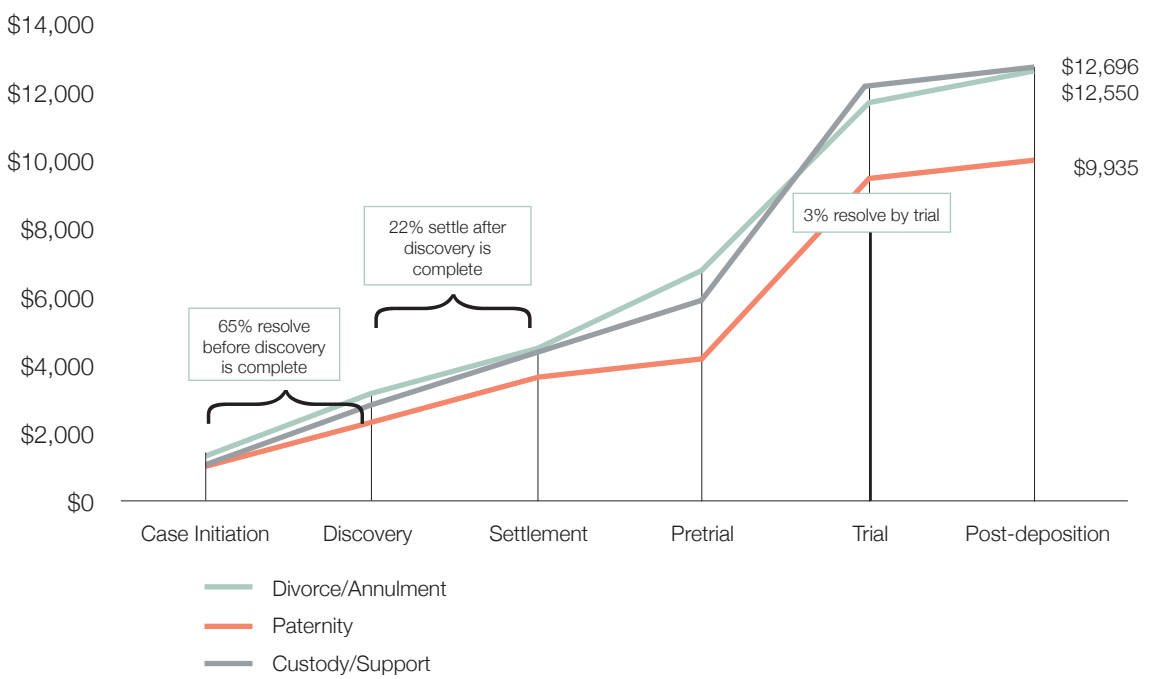
Figures 15a and 15b display the median estimated cumulative costs of litigation per side by litigation stage for the non-domestic and domestic case types

Figure 15a. Estimated Median Cumulative Legal Fees for Non-Domestic Civil Cases



included in the Utah CLCM survey.[67] Looking at the slopes at each litigation phase for different types of cases, we can see that the costs expended for trial result in the steepest increase in total cost for all case types. In addition, discovery in professional malpractice cases is considerably more expensive than for other general civil case types and is virtually cost free for debt collection cases. The implication is that if Rule 26 is effective, it should have the greatest impact on malpractice cases, a more moderate impact on domestic and most other general civil cases, and no appreciable impact on debt collection cases. As the attorney survey found, it is also important to recognize that very few cases actually proceed to trial (2% of non-domestic civil cases and 3% of domestic cases). More than half of non-domestic civil cases (54%) and nearly two-thirds of domestic cases (66%) resolve before completing discovery. In fact, a sizeable portion of cases have very little formal discovery other than the automatic disclosures.

Figure 15b. Estimated Median Cumulative Legal Fees for Domestic Civil Cases



[67] The median costs for automobile tort, professional malpractice, and real property cases are comparable to those reported in the ABOTA survey, but considerably lower for premises liability (75% of ABOTA median costs), business/commercial (83% of ABOTA median costs), and employment disputes (62% of ABOTA median costs). Some of the explanation for the lower costs may be related to the hourly billing rates for attorneys and paralegal staff, which tended to be somewhat lower in Utah for premises liability and employment dispute cases compared to the ABOTA sample. For the business/commercial cases, the hourly billing rates were somewhat higher in Utah compared to the ABOTA sample, but the explanation may lie in the terminology reflected in the two version of the surveys. The ABOTA version asked attorneys to provide time estimates for breach of contract cases, while the Utah version requested time estimates for business/commercial cases.

DISCOVERY AS A PROPORTION OF ALL TIME EXPENDED ON LITIGATION TASKS

Because the revisions to Rule 26 were intended to place restrictions on the scope and timing of discovery, it is useful to examine the time expended in discovery efforts as a proportion of time expended for all litigation stages if the case progressed through trial and post-disposition tasks. Table 27 shows the estimated number of hours and the proportion of time expended in discovery tasks. The estimates differ dramatically based on the type of case. Debt collection and domestic cases tended to involve the lowest estimated number of hours expended in discovery, while professional malpractice, real property, and business/commercial cases involved the most. Proportionately, discovery tasks accounted for approximately 10% to 25% of the total amount of time expended if the case progressed through trial and post-disposition. For most case types, the proportion of time expended in discovery tended to increase progressively from the 25th to the 75th percentile. That is, attorneys who estimated higher amounts of time expended in litigation also tended to report greater proportions of that time spent in discovery tasks. Employment, debt collection, and real property cases were exceptions, however, with the proportion of time expended in discovery either fluctuating or remaining fairly constant across percentiles for total time.

Table 27: Total Hours and Proportion of Time Expended in Discovery Tasks

	25TH PERCENTILE		50TH PERCENTILE		75TH PERCENTILE	
	HOURS	%	HOURS	%	HOURS	%
Non-Domestic Civil						
Automobile Tort	12	13%	35	16%	93	19%
Premises Liability	4	8%	39	20%	104	25%
Professional Malpractice	70	28%	200	32%	550	39%
Business/Commercial	14	12%	54	17%	158	22%
Employment	28	20%	50	20%	80	16%
Debt Collection	-	0%	4	24%	12	19%
Real Property	32	25%	78	24%	176	25%
Domestic						
Divorce	3	13%	9	15%	35	19%
Paternity	1	6%	7	15%	24	16%
Custody/Support	4	12%	10	16%	38	18%

PROBABILITY OF CASE DISPOSITION AND CORRELATION TO TIME EXPENDED ON LITIGATION TASKS

The Utah CLCM survey asked attorneys to estimate the percentage of cases that resolve by default judgment, dismissal, settlement, summary judgment, bench trial and jury trial. Settlement was reported as the predominant manner of disposition for all case types except debt collection, for which default judgment was the most common manner of disposition. For the purpose of estimating litigation costs, the manner of disposition is important insofar that it provides a mechanism to isolate time and costs for tasks that take place relatively early in the litigation process from tasks that take place in later stages of litigation (e.g., summary judgment motions and trials). Table 28 illustrates that the majority of cases for all case types settle or are resolved without the attorneys undertaking pretrial preparation or trial tasks. Moreover, the attorney surveys conducted earlier in this evaluation revealed that most cases (68% to 82% depending on the assigned discovery tier) settle without completing discovery. The CORIS data indicated that non-domestic cases in which an answer was filed settle at rates between 17% (debt collection) and 56% (Tier 3 cases). However, the CLCM estimates of cases resolved by bench trial (7% overall average versus 2% in CORIS) and jury trial (5% overall average versus 1% in CORIS) are extremely inflated.

Table 28: Average Probability of Disposition by Case Type

	DEFAULT JUDGMENT	DISMISSAL	SETTLEMENT	SUMMARY JUDGMENT	BENCH TRIAL	JURY TRIAL
Non-Domestic Civil						
Automobile Tort	1%	2%	81%	4%	3%	9%
Premises Liability	1%	4%	77%	7%	2%	9%
Professional Malpractice	0%	7%	67%	12%	2%	12%
Employment	4%	10%	60%	18%	6%	6%
Business/Commercial	6%	2%	55%	19%	12%	6%
Real Property	6%	4%	54%	21%	11%	6%
Debt Collection	50%	3%	36%	9%	4%	1%
Domestic						
Divorce	9%	4%	73%	3%	10%	1%
Paternity	7%	3%	71%	6%	10%	3%
Custody/Support	11%	3%	70%	4%	12%	1%

The NCSC examined the relationship between the attorney estimates of the frequencies of various case dispositions and the amount of time expended on litigation tasks. See Table 29. As attorney expectations that the case will result in a default judgment increase, the amount of time expended on both discovery tasks and all litigation tasks is significantly reduced. In contrast, as attorney expectations that the case will be resolved by summary judgment or by jury trial increase, the amount of time expended on discovery and on all litigation tasks is significantly increased. There was no correlation between time expended and attorney expectations for settlements or bench trials, and only a marginal correlation with total time for dismissals. In essence, the attorney expectation about how a case will resolve may act as an incentive to either expend very little time and effort preparing the case (default judgments) or to expend significantly more time and effort (summary judgments and jury trials).

Table 29: Case Disposition Probabilities and Time Expended on Litigation Tasks

	PEARSON R-SQUARED	
	TOTAL TIME	DISCOVERY TIME
Default judgment	-0.525 ***	-0.455 ***
Dismissal	0.123 †	0.106
Settlement	0.113	0.045
Summary judgment	0.349 ***	0.356 ***
Bench trial	-0.057	-0.06
Jury trial	0.37 ***	0.356 ***

† Significant at .10

* Significant at .05

** Significant at .01

*** Significant at .001

Conclusions and Recommendations

The Rule 26 revisions have been the focus of intense scrutiny across the nation as both state and federal courts seek to improve civil case management. The Utah district courts have focused their efforts on the discovery phase of civil litigation. The revisions to Rule 26 were intended to ensure that the scope and timing of discovery, and by extension the costs associated with discovery, are proportional to the interests at stake in the litigation. There is therefore some irony in the fact that one of the primary findings of this evaluation is that remarkably few cases filed in the Utah district courts are "litigated" in the traditional sense of that term. The vast majority of cases in both the pre-implementation and post-implementation samples were uncontested and were ultimately disposed by default judgment or dismissal. An impact from the Rule 26 revisions would not be expected for cases in which discovery never took place. For cases in which an answer was filed, however, the general conclusion is that the Rule 26 revisions have had a positive impact on civil case management in terms of both reduced time to disposition overall, and decreased frequency of discovery disputes in non-debt collection and non-domestic cases.

A reduction in time to disposition was observed for cases in all three discovery tiers, for both debt collection and non-debt collection Tier 1 cases, and for both domestic and non-domestic Tier 2 cases. The uniformity of this effect is remarkable in itself, as many other civil justice reforms tend to have differential effects depending on case type. In addition, the NCSC found that impact on time to disposition was independent of other caseflow management efforts. The Second, Fourth, and Seventh Districts have a stronger tradition of judicial case management than other districts across the state, and consequently had significantly shorter time to disposition than other districts. However, the impact of the Rule 26 revisions was observed in districts both with and without traditions of judicial case management. Finally, the Rule 26 revisions appear to shift dispositions for non-domestic cases in all three tiers from judgments to settlements regardless of whether an answer was filed. This suggests that the parties are engaging in more constructive settlement negotiations, presumably resolving the cases in ways that are perceived as fairer to both parties.

There was a difference in the impact of the Rule 26 revisions on the frequency of discovery disputes based on case type. In Tier 1 debt collection cases, the frequency of discovery disputes more than doubled from 2.2% to 5.6%. Although generally an increase in discovery disputes would be perceived as an undesirable effect for debt collection cases, it may actually confirm judicial beliefs that these types of cases are now being litigated on a more even playing field between collection agencies and debtors — a positive effect. All other non-debt collection civil case types experienced decreased rates of discovery disputes, although the reduction observed in Tier 2 non-domestic cases from 10.2% to 8.3% was not statistically significant. Moreover, when discovery disputes occurred, they arose significantly earlier in the litigation process across all discovery tiers, case categories, and case types. It is not clear whether the earlier emergence of discovery disputes is occurring because attorneys have shifted the focus of discovery from standard discovery to the automatic disclosures or, alternatively, because the time clock for completing discovery is running and attorneys are now buckling down and identifying issues earlier in the case. In either event, it provides the trial judges an opportunity to intervene and get the case back on track earlier than would have happened before the Rule 26 revisions went into effect.

The Rule 26 revisions have also had an unexpected impact on litigant representation status: the proportion of plaintiffs who retained legal counsel in non-debt collection and non-domestic civil cases

increased significantly for both Tier 1 and Tier 2, which also corresponded with the shift in case dispositions from judgments to dismissals and settlements. Representation status did have an effect on Rule 26 short-term impacts and compliance, but it was cases in which both parties were represented that were more likely contribute to tier inflation, to involve amended pleadings, and to have no Certificate of Readiness for Trial as compared to cases in which one or both parties were self-represented.

It was not possible to document whether the observed reduction in time to disposition resulted in a corresponding decrease in litigation costs, but this is certainly a plausible conclusion for many cases. A sizeable majority of attorney survey respondents either agreed that disclosure and standard discovery under Rule 26 provided sufficient information with which to assess claims or were neutral in their opinions on this matter. The majority of attorneys reported that they were able to resolve the case in question without completing discovery. Indeed, attorney reports about the scope of discovery undertaken suggest that very little discovery takes place, even in cases in which an answer is filed. It is not clear whether the information provided in the automatic disclosures is more than sufficient for many litigants to resolve the case with less formal discovery than before the Rule 26 revisions were implemented, or whether the amount of discovery undertaken in most cases has always been relatively low. In either event, because the automatic disclosures are required relatively early in the litigation, the parties may be able to resolve these cases earlier than before the Rule 26 revisions went into effect. Finally, the decrease in the frequency of discovery disputes in non-debt collection and non-domestic cases would likewise reduce costs associated with satellite litigation, and the explicit limits on the length of briefs accompanying discovery motions under Rule 4-502 should also reduce the amount of time involved in drafting motions.

CORIS data could not be used to assess the extent to which parties complied with the standard discovery restrictions, but responses from the attorney surveys requesting information about the scope of discovery suggest very high compliance — generally 90% or higher for all types of discovery and for all three discovery tiers. The survey was administered only to attorneys of record in cases filed between January 1 and June 30, 2012, so there are no data available to compare the scope and costs of discovery before the Rule 26 revisions went into effect. In drafting the Rule 26 revisions, the Advisory Committee intended that the expanded scope of information required for automatic disclosures would substantially reduce the amount of information to be disclosed through traditional discovery (interrogatories, requests for admission and production, and witness depositions). It is likely that the high rate of compliance with standard discovery restrictions reflects the impact of the expanded automatic disclosure requirements, in effect replacing the need for traditional discovery.

The attorney survey responses, especially the open-ended comments, voiced some criticism that the expanded automatic disclosure requirements added unnecessary complexity to the pretrial process, increasing costs. This may be an accurate assessment insofar as it describes a shift in the complexity of the information exchange from the formal discovery phase of litigation to the automatic disclosure process, which typically takes place much earlier in litigation. The overall effect of the increased availability of information on which parties can assess the merits of their respective claims and defenses, and the resulting shift in dispositions from judgments to settlements, suggests that the tradeoff is a fair one that may lead to greater satisfaction with outcomes on the part of the litigants.

It is also possible that the vast majority of cases never needed as much discovery as was permitted under the former version of Rule 26. The original formula-

tion of the rules permitted virtually unlimited discovery provided that requests were "reasonably calculated to lead to the discovery of admissible evidence."[68] The surprisingly large proportion of cases in which no discovery other than automatic disclosures took place raises the question of whether the standard discovery restrictions established in the Rule 26 revisions may still be excessively generous. The NCSC notes that the pilot project beginning in January 2015 in the Second, Third, and Fourth Judicial Districts will involve intensive judicial case management for Tier 3 cases, including an initial case management conference in which the trial judge and attorneys will meet to identify disputed issues and establish an individualized discovery plan for the case. If this pilot project proves successful, the Advisory Committee should consider restricting the scope of discovery even further, especially for Tier 2 and Tier 3 cases, and expanding the use of intensive judicial case management to Tier 2 non-domestic cases in which an answer is filed. In essence, the default standard discovery for non-domestic Tier 2 and Tier 3 cases would be the same as Tier 1 with adjustments decided during the Rule 16 conference. The open-ended comments from the attorney survey certainly suggest that additional judicial involvement in case management and meaningful enforcement of the rules would be welcomed by both plaintiff and defense attorneys.

Some additional concerns about the impact of the Rule 26 revisions are worth noting. Very few attorneys sought post-filing adjustments either to obtain a higher, less restrictive discovery tier or to request extraordinary discovery. Instead, there is ample evidence in non-debt collection and non-domestic cases that many attorneys are preemptively inflating the amount in controversy in the pleadings to secure a higher discovery tier. In addition, judges who participated in the judicial focus groups voiced suspicions that attorneys are routinely agreeing to extraordinary discovery among themselves, without filing formal stipulations with the court. Although the time to disposition analyses indicate that most cases are resolving sooner as a result of the Rule 26 revisions, many attorneys still fail to file a Certificate of Readiness for Trial even when it is apparent that the litigants have exceeded the timeframe for completing standard discovery by a significant margin. This raises the significant question of whether noncompliance with Rule 26 is normatively a bad thing. On the one hand, there is a reasonable argument that litigants should not be allowed to game the system, stipulate around the rules, or ignore established deadlines without express court approval. That, after all, is the point of the certification requirement — to ensure that trial judges have the opportunity to disapprove stipulations for extraordinary discovery if the client has not been informed about the potential for increased costs and time or if the proposed discovery is disproportional to the stakes of the case. On the other hand, the Rule 26 revisions may have already sufficiently raised expectations concerning timely discovery, particularly in light of judges' increased confidence in striking evidence for untimely disclosure, to achieve the desired effects without requiring district court judges to engage in aggressive procedural oversight of the litigation.

Second, it is important to note that the survey responses indicate that many attorneys are still unenthusiastic about the Rule 26 revisions. Negative opinions on the part of survey respondents may be affected by self-selection bias — that is, attorneys who were more critical of the Rule 26 revisions were more likely to respond to the survey than attorneys who were pleased or simply indifferent to the changes. Some caution about relying too heavily on the survey findings is also due given the inconsistencies between respondent reports of case events and the CORIS

[68] FEDERAL RULES OF CIVIL PROCEDURE Rule 26(b)(1).

records. This may indicate that attorneys were relying more heavily on their general perceptions about the rule changes than on their actual experiences in specific cases. Finally, it is possible that negative opinions are simply an artifact of lawyers' traditionally conservative attitudes toward change. The revisions have been in place for only a limited time, and attorney opinions may become more positive in time.

As policymakers within the Utah judicial branch consider the findings from this evaluation, the NCSC recommends that they keep in mind the increased capacity of the district courts for engaging in effective oversight and enforcement in civil case management. Mandatory e-filing makes discovery tier assignments virtually automatic and now generates advisory notices about discovery deadlines in all cases. The CORIS technology infrastructure can largely automate compliance reviews for key case events (e.g., completion of fact discovery, completion of expert discovery, trial readiness certificates). The staffing models now in place in Utah provide judges with more experienced judicial support than is available in most, if not all, state courts across the country. Yet the judicial focus group discussions indicated that many judges were unaware of the functionality in CORIS to track compliance with Rule 26 deadlines and had not authorized their judicial case management teams to routinely monitor Rule 26 compliance. The combination of experienced non-judicial support teams and enhanced technology functionality could be used to conduct routine case management, including monitoring compliance with benchmark events throughout the case. Doing so would provide more consistent oversight of the discovery process and permit earlier judicial intervention in appropriate cases, which would likely result in even shorter overall disposition times, especially for cases that would otherwise languish long after the Certificate of Readiness for Trial is due.

Finally, this evaluation focuses on the impact of the Rule 26 revisions on cases in which an answer was filed. As noted previously, these cases comprise only a small proportion of the total number of civil cases filed each year in the Utah district courts. There was a significant decrease in the answer rate in the post-implementation sample, although this was not an anticipated impact of the Rule 26 revisions and may be unrelated to the revisions. There is certainly no theoretical reason why the rule revisions would dissuade defendants from engaging in the litigation process by responding to complaints. Similarly, the NCSC did not find a difference in overall filing rates that would suggest that reduced discovery time and costs were resulting in more plaintiffs filing cases that would previously have been too expensive to file. This may result merely from the fact that too little time has elapsed for the legal community to adapt its practices to the rules; a difference in filing and answer rates may become more apparent over time. In the meantime, however, the NCSC was struck by how much of the civil caseload is uncontested and the implications of that finding for public trust and confidence in the civil justice system. It is neither possible nor necessarily good policy to force litigants to actively engage in the litigation process in every case; some litigants may obtain mutually acceptable resolutions to their disputes outside of the judicial process. Moreover, judicial resources should ordinarily be focused only on those cases in which the parties are actively engaged in litigation. Nevertheless, the NCSC recommends that state court policymakers take a closer look at the cases in which no answer is filed to determine if systematic factors are dissuading parties from actively litigating their cases.

Appendix A: Attorney Survey

UTAH DISCOVERY RULES EVALUATION

ATTORNEY SURVEY

The Utah Supreme Court has requested that the National Center for State Courts (NCSC) evaluate the impact of revisions to the Utah Rules of Civil Procedure related to discovery. This survey is intended to document your experience with the revised discovery procedures. You have been selected to participate because, according to the case management system for the District Court, you were an attorney of record in a civil case filed in the Utah District Courts between January 1, 2012 and June 30, 2012 that has since fully resolved.

We anticipate that the survey will take approximately 20 minutes to complete. Your responses will be kept strictly confidential and the evaluation findings will be presented only in aggregate form. If you have questions about the survey or the Rule 26 Evaluation, please contact Paula Hannaford-Agor at phannaford@ncsc.org or Nicole Waters at nwaters@ncsc.org.

Confirm Case Information

According to the case management system for the District Court, you are an attorney of record in the following case. Please verify that this information is correct, and if it is incorrect, please edit.

	PLEASE EDIT IF INCORRECT	CORRECT
Case Number:	124500024	❑
Case Name:	Ashley v. Ashley	❑
Case Type:	❍ Divorce / Annulment	❑
Representing:	❍ Plaintiff/Petitioner ❍ Defendant/Respondent ❍ Other	❑
Filing Date (MM-DD-YY):	4/12/2012	❑
Disposition Date (MM-DD-YY):	7/12/2012	❑
Discovery Tier:	❍ 2	❑

Please indicate how this case was disposed:

- ❍ Case withdrawn by plaintiff/petitioner
- ❍ Default judgment for defendant/respondent
- ❍ Settlement by parties before discovery completed
- ❍ Settlement by parties after discovery completed
- ❍ Summary judgment
- ❍ Bench trial
- ❍ Jury trial
- ❍ Other disposition [specify]_____

Litigation Actions Related to Discovery

Did you file a motion to amend the pleadings to specify a different discovery tier?
❍ Yes
❍ No

Did the trial judge grant the motion?
❍ Yes
❍ No

Did you file a stipulation with opposing party for extraordinary discovery with the court?
❍ Yes
❍ No

Did the trial judge deny or modify the stipulation?
❍ Yes
❍ No

Did you file a motion for extraordinary discovery with the court?
❍ Yes
❍ No

Did the trial judge grant the motion?
❍ Yes
❍ No

Did you file a motion to compel discovery?
❍ Yes
❍ No

Did the trial judge grant the motion?
❍ Yes
❍ No

Did you file a motion for a protective order?
❍ Yes
❍ No

Did the trial judge grant the motion?
❍ Yes
❍ No

Confirm Fact Discovery Conducted

Please indicate the amount of fact discovery conducted on behalf of your client.

	PLAINTIFF/PETITIONER	DEFENDANT/RESPONDENT
Number of...		
Fact witnesses for …	_____	_____
Requests for production served on …	_____	_____
Requests for admission served on …	_____	_____
Interrogatories served on …	_____	_____
Hours (rounded to nearest 30 minutes) of depositions of fact witnesses for …	_____	_____

Please indicate the approximate date on which discovery of fact witnesses was completed:
❍ Date (date must occur after filing date and before disposition date) _____
❍ N/A. Case resolved before fact discovery was completed.

Confirm Expert Discovery Conducted

Please indicate the amount of expert discovery conducted on behalf of your client.

	PLAINTIFF/PETITIONER	DEFENDANT/RESPONDENT
Number of...		
Expert witnesses for …	_____	_____
Expert reports accepted for...	_____	_____
Hours (rounded to nearest 30 minutes) of depositions of expert witnesses for …	_____	_____

Please indicate the approximate date on which discovery of expert witnesses was completed:

❍ Date (date must occur after filing date and before disposition date) _____

❍ N/A. Case resolved before expert discovery was completed.

Perceptions of Rule 26

Indicate the extent to which you agree or disagree with the following statements based on your experience in this case.

	STRONGLY DISAGREE	DISAGREE	NEUTRAL	AGREE	STRONGLY AGREE
The opposing party complied with the automatic disclosure provisions of Rule 26, including supplementing disclosures.	❑	❑	❑	❑	❑
The amount of disclosure and standard discovery permitted under Rule 26 provided sufficient information to inform my assessment of the merits of the opposing party's claims.	❑	❑	❑	❑	❑
The amount of discovery undertaken in this case was proportional to the legal and factual complexity of the case and the amount in controversy.	❑	❑	❑	❑	❑

Compared to similar cases filed before November 1, 2011...

	STRONGLY DISAGREE	DISAGREE	NEUTRAL	AGREE	STRONGLY AGREE
Discovery was completed more quickly due to the restrictions imposed by the Rule 26 revisions.	❑	❑	❑	❑	❑
This case was resolved more quickly due to the restrictions imposed by the Rule 26 revisions.	❑	❑	❑	❑	❑
The discovery costs were lower due to the restrictions imposed by the Rule 26 revisions.	❑	❑	❑	❑	❑

Discovery disputes that arose in this case were resolved in a timely manner by the expedited procedures in Rule 10-1-306.

- ❍ Strongly Disagree
- ❍ Disagree
- ❍ Neutral
- ❍ Agree
- ❍ Strongly Agree
- ❍ N/A. No discovery disputes arose in this case.

The Statement of Discovery Issues and Statement in Opposition provided sufficient information to the District Court to make an informed decision on the merits of the discovery dispute.

- ❍ Strongly Disagree
- ❍ Disagree
- ❍ Neutral
- ❍ Agree
- ❍ Strongly Agree
- ❍ N/A. No Statement of Discovery Issues or Statement in Opposition were filed in this case.

General Comments

The Utah Supreme Court is interested in any favorable or unfavorable critical analysis that you may have about how the Rule 26 revisions operate in practice. Please provide your comments in the space below.

Appendix B: Coding Themes for Attorney Survey Comments

LITIGATION COSTS

Comments with a **cost** theme said that the new rules require initial discovery and depositions that are unneeded. The lack of interrogatories in Tier 1 was cited as a specific reason for increased cost. The rules also force cases to go to trial that could be resolved in a more efficient manner. Examples:

"I believe that in most cases the Rule 26 revisions significantly increase the costs to litigate cases that would normally resolve in settlement because the Initial Disclosures are more in depth and, thus, take much longer to prepare."
(Batch 1, #90)

"For the parties themselves, the new rules have made it more difficult to settle cases without going to trial."
(Batch 4, #420)

LITIGATION COMPLEXITY

Comments with the **complexity** theme stated that the new rules surrounding expert witnesses was confusing and that attorneys have to gather too much evidence and can't focus on what is relevant. Examples:

"In almost all cases, I don't need one year's worth of paychecks, three months of bank statements or old appraisals from real estate... It seems that paperwork is being produced to produce paperwork."
(Batch 3, #12)

"The part that takes too long and stalls the case is the process of resolving discovery disputes. In my experience, it takes months and months before a discovery dispute will be resolved. During that time, the case comes to a halt and cannot move forward, particularly in domestic cases."
(Batch 4, #508)

ENFORCEMENT AND COMPLIANCE

Comments focusing on **enforcement and compliance** stated that judges are not enforcing the rules or there aren't any consequences for not complying. The rules also encourage parties to undermine each other. Examples:

"There is great uncertainty as to whether one judge will, and another judge will not, extend the deadlines."
(Batch 2, #88)

"The threat of Rule 11 sanctions is very serious and was dealt with in this case as though it were common place. The judge allowed these bullying tactics by both the Defendant and his attorneys. Discovery sanctions were not granted, but additional time to conduct discovery was granted."
(Batch 6, #347)

DISCOVERY TIERS / STANDARD DISCOVERY

Comments related to **defining tiers and the permissible scope and time frame of discovery** stated that cases don't fit in standard deadlines and recovery of attorneys' fees is limited by what tier the case is in. Comments suggested adding interrogatories for Tier 1 cases, allowing parties to determine timing, and other specific changes to make the process more efficient.

"There [are] many, many cases that have incalculable value, and are of incalculable importance to parties, that have a dollar value less the $50,000.00. Justice should not have a price tag on it."
(Batch 4, #472)

"If the debt is small, the party may plead the case as a tier one case, only to find out that a difficult defendant (or defense attorney) makes the case extremely expensive to litigate, to the point that the attorney's fee recovery would put the case into a tier two case."
(Batch 4, #130400284)

"Timing of discovery deadlines, expert disclosures cannot be determined in advance and are determined only after other events."
(Batch 7, #58)

"In Tier 3 cases, we still need expert reports AND depositions."
(Batch 4, #130404392)

"The lack of interrogatories makes discovery more difficult, as does the fact that most courts send out an advisory deadline notice. It seems the court should either set the dates, or let the parties set the dates, but to send out advisory dates, which are not set in stone, just adds to the confusion that can cause deadlines to be missed."
(Batch 3, #61)

PARTY OR CASE-TYPE SPECIFIC THEMES

Party or case type-specific comments stated that the rules put a certain group at a disadvantage. Examples:

"It has been my experience that pro se litigants are often unaware of the initial disclosure requirements or, if they are aware, they fail to understand their duty to participate and disclose relevant information."
(Batch 1, #126)

"I think the rule changes are well intentioned, and I can see how they would be very effective in certain types of cases, personal injury for example, but in divorce and child custody cases, it just creates more work than necessary."
(Batch 5, #187)

"Generally on other cases--especially as to interrogatories and request for documents, the new discovery only seriously hurt Plaintiffs/Petitioners and benefit Defendants and benefit court reporters because depositions are now the only avenue for a more open discovery exchange."
(Batch 4, #139900934)

POSITIVE COMMENTS

Positive comment examples:

"I typically represent consumers in debt collection cases. I have generally found the disclosure rules to enable my clients to present their defenses in a cost-effective manner."
(Batch 4, #641)

"In my practice the only useful aspects of Rule 26 revisions were shifting the burden to the party seeking discovery and the elimination of attorney conferences."
(Batch 1, #50)

"I appreciate the limitations on interrogatories and requests for production that unreasonably escalated the attorney fees and costs in divorce actions based on "canned" discovery requests on issues not relevant to the outcome of the divorce action."
(Batch 1, #59)

Appendix C: Handout and Focus Group Discussion Questions

OVERVIEW OF NCSC EVALUATION APPROACH

- Review of CMS data to identify case-level changes in evaluation metrics
  - Compare civil and domestic cases filed between January 1 and June 30, 2012 with comparable cases filed between January 1 and June 30, 2011.
  - Focus mainly on cases in which an Answer was filed (approximately half (56%) of civil cases and one-third (31%) of domestic cases.
- Attorney survey of Rule 26 impact on individual cases and attorney opinions
  - Attorneys surveyed quarterly on a rolling basis as cases resolved.
  - Caveats about data cleaning to prevent multiple surveys being sent to the same attorney.
  - Survey batches through December 31, 2013 included responses from 742 attorneys in 658 cases. Overall response rate was 22% and 31% of cases.
- Judicial focus groups to assess impact on judicial workload.
- Working hypotheses (short term)
  - Increase in the number of orders to amend pleadings to specify damages so the appropriate discovery tier can be assigned;
  - Increase in the number of motions to amend pleadings to adjust the assigned discovery tier;
  - Increase in the amended disclosures as parties seek to ensure that potential witnesses and evidence will be admissible for trial if needed; and
  - Increase in stipulations or motions to expand discovery beyond the scope or time permitted under the assigned discovery tier.
- Working hypotheses (long term)
  - Decrease in the amount of time expended to complete discovery;
  - Commensurate decrease in the time to disposition due to the decrease in the discovery period;
  - Decrease in costs associated with discovery;
  - Increase in filings in lower value cases;
  - Preference by litigants to opt for a written report rather than oral deposition of opposing expert witnesses;
  - Increase in the number of retained expert witnesses;
  - Lower compliance rate with the automatic disclosure requirements by self-represented litigants compared to litigants represented by legal counsel; and
  - Increase in the trial rate, especially for Tier 1 cases.

Short term working hypothesis that substantial numbers of attorneys would seek extraordinary discovery

ADJUSTED DISCOVERY TIERS/EXTRAORDINARY DISCOVERY SOUGHT	# CASES	%	GRANTED/APPROVED
Motion to amend pleadings to adjust discovery tier (n=545)	5	<1%	3
Stipulation for extraordinary discovery (n=560)	17	3%	13
Motion for extraordinary discovery (n=560)	5	<1%	3

A. Confirm with judges that these numbers/percentages appear to be correct.

B. Are judges hearing from attorneys informally that Rule 26 tiers are reasonable/unreasonable?

C. Most motions/stipulations are granted/approved, but not all. On what basis are decisions on motions/stipulations related to proportionality made?

Overall, the vast majority of attorneys — 90% or more for all discovery tiers and for all types of discovery — report that they are complying with Rule 26. In the 13 cases in which attorneys reported that discovery exceeded the Rule 26 requirements, nearly half (6) either entered a motion or stipulated to extraordinary discovery, which was accepted by the trial courts. In the remaining 7 cases, however, the attorneys either moved for or stipulated to extraordinary discovery, but the motion was denied by the trial court, and the attorneys nevertheless reported exceeding the scope of discovery permitted by Rule 26. In several of these cases, it was apparent from the attorney comments on the survey that they had agreed to exchange documents outside of the Rule 26 restrictions, regardless of whether the judge gave leave to do so. Other comments suggest that judges were not enforcing the limitations strongly enough.

Determining the extent of compliance with the discovery timeframes established by Rule 26 is somewhat more challenging due to logical inconsistencies in the data. For example, 15 attorneys reported the date on which fact discovery was completed (which was used to calculate the amount of time from filing to completion of fact discovery) for cases in which they also reported that the case was settled BEFORE discovery was completed; the average time for filing to fact discovery completion for these 15 cases was 308 days regardless of discovery tier. Ironically, for those 15 cases, Tier 1 cases had the longest average time for filing to fact discovery completion (339 days) compared to Tier 2 (301 days) and Tier 3 cases (249 days). It is not clear whether the attorneys simply reported discovery completion dates in error or whether some of these cases simply languished on the court's docket after the parties had agreed to settle, but failed to notify the court in a timely way.

Note that only 21% of attorneys said that discovery was completed more quickly due to the Rule 26 restrictions compared to similar cases filed before November 1, 2011 (40% disagreed, 39% neutral).

To minimize the potential for skewed analysis on this measure, we focused instead on cases in which the attorneys reported settlement AFTER discovery was completed or another form of disposition on the merits (bench trial or summary judgment). For these cases, the compliance with discovery timeframes was 48% of Tier 1 cases completing discovery within 120 days of filing (average = 159 days), 24% of Tier 2 cases within 180 days of filing (average = 205 days), and just 9% of Tier 3 cases within 210 days of filing (average = 303 days). Although it is clear that some cases are completing discovery within the requisite timeframes, most are exceeding those timeframes by a wide margin. If these reports from the attorney survey are representative of all cases, it does not bode well for expectations that Rule 26 will ultimately result in overall reduced filing-to-disposition times.

A. Request reactions for reported compliance with Rule 26 tier restrictions.

B. Request reactions for lack of timeliness in completion of fact discovery.

C. Request reactions to attorney comments suggesting deliberate noncompliance or judicial failure to enforce discovery restrictions. What repercussions do attorneys face with non-compliance to the Rule 26 timeframes? Explore whether the judges are incentivizing compliance adequately. Or is the non-compliance a function of caseflow management practices within the court?

Reported compliance with Discovery Tier Restrictions

Table 5: Compliance with Rule 26 Scope of Discovery Provisions

		PERCENT COMPLIANCE	
	RULE 26	PETITIONER	RESPONDENT
Tier 1 (n=181)			
Average Number of Fact Witnesses		1.8	1
Interrogatories	0	90%	92%
Requests for Admission	5	97%	99%
Requests for Production	5	94%	98%
Deposition Hours for Fact Witnesses	3	98%	95%
Days to Completion of Fact Discovery*	120	41%	
Tier 2 (n=159)			
Average Number of Fact Witnesses		1.6	1.2
Interrogatories	10	95%	95%
Requests for Admission	10	99%	95%
Requests for Production	10	97%	87%
Deposition Hours for Fact Witnesses	15	99%	99%
Days to Completion of Fact Discovery*	180	34%	
Tier 3 (n=29)			
Average Number of Fact Witnesses		3.4	2.8
Interrogatories	20	86%	94%
Requests for Admission	20	100%	100%
Requests for Production	20	97%	95%
Deposition Hours for Fact Witnesses	30	97%	97%
Days to Completion of Fact Discovery*	210	9%	

* Calculated for cases in which parties settled after discovery completion, bench trials, and summary judgment only.

Discovery of Expert Witnesses

Nearly two-thirds (64%) of attorneys in cases involving expert witnesses reported that they accepted the expert report while only 15% took expert depositions instead; all depositions conformed to the Rule 26 limit of no more than four hours per expert.

A. Surprisingly few cases had ANY expert witnesses retained for either side. Confirm with judges that this is consistent with past practice. Or has the retention of expert witnesses declined since adoption of Rule 26? If so, why?

B. The attorney survey asked whether discovery costs were lower due to the restrictions imposed by Rule 26 compared to similar cases filed before November 1, 2011. Only 17% agreed (43% disagreed, 39% neutral). Is the reason for the lack of an impact due to the fact that very little expert discovery actually takes place? Or some other reason?

CASES WITH EXPERT WITNESSES

	PETITIONER		RESPONDENT	
	# CASES	%	# CASES	%
Tier 1 (n=168)	15	9%	18	11%
Tier 2 (n=150)	12	8%	17	11%
Tier 3 (n=27)	9	32%	5	20%

Resolution of Discovery Disputes

JUDICIAL MANAGEMENT OF DISCOVERY DISPUTES

	STRONGLY DISAGREE	DISAGREE	NEUTRAL	AGREE	STRONGLY AGREE
Discovery disputes were resolved in a timely fashion (n=148)	18%	22%	47%	11%	2%
	40%		47%		13%
Statement of Discovery Issues and Statement in Opposition provided sufficient information for court to decide discovery dispute (n=105)	17%	20%	48%	12%	3%
	37%		48%		15%

A. New procedures put in place to expedite the resolution of discovery disputes. Why no improvement demonstrated in attorney surveys?

Appendix D: Utah CLCM Survey

UTAH LITIGATION COST MODEL SURVEY

At the direction of the Supreme Court of Utah, the National Center for State Courts (NCSC) is conducting an evaluation of the impact of revisions to Rule 26 of the Utah Rules of Civil Procedure on litigation practices in the District Courts. One component of the evaluation is a survey intended to assess the amount of attorney time and costs associated with litigating a variety of civil and domestic cases.

You have been selected as an experienced trial attorney with knowledge about the amount of attorney time needed to complete various litigation tasks. The survey should take approximately 20-30 minutes to complete. Your identity will remain anonymous and all individual responses will be kept confidential. Your responses will be aggregated with others to develop state and national estimates for litigation costs.

In which county do you practice most often? [drop down menu of Utah counties]

How many attorneys are employed in your law firm/office? [numeric: xx,xxx]

What types of clients does your law firm/office generally represent?

- In-house counsel
- Primarily plaintiffs
- Both plaintiffs and defendants
- Primarily defendants
  - Primarily insurance carrier defense

What is the average hourly billable rate OR annual salary for members of your law firm/office?

- Senior attorney _____ hourly billable rate _____ annual salary
- Junior attorney _____ hourly billable rate _____ annual salary
- Paralegal _____ hourly billable rate _____ annual salary

What percentage of your law firm income is based on contingency fees? _____

Please indicate the types of civil cases on which you regularly practice (check all that apply):

Civil

- Asbestos
- Civil Rights
- Condemnation
- Contracts
- Debt Collection
- Malpractice
- Personal Injury
- Property Damage
- Property Rights
- Sexual Harassment
- Water Rights
- Wrongful Death
- Wrongful Termination
- Other Civil (please specify)

Domestic

- Custody and Support
- Divorce/Annulment
- Paternity
- Other Domestic (please specify)

You will be presented with a series of questions concerning one of the types of civil cases on which you regularly practice. For each type of case, please consider a "typical" case for your law firm or office.

Assume the following:

- The case is "typical" — that is, it neither poses extraordinarily difficult or time-consuming issues nor is it an easy case that resolves quickly.
- The case is staffed appropriately in the context of your law firm or office. That is, senior-level attorney participation is focused on case supervision and more complex litigation tasks and junior-level attorneys and paralegal staff focus on more routine litigation tasks.

You will first be asked to provide a general description of case and litigant characteristics for a typical case of this type that your law firm or office undertakes. Then enter the estimated number of hours spent by both attorneys and paralegals on each stage of the litigation process. Report in increments of half-hours (e.g., 0.5 hours). If possible, use actual billing records to estimate average hours. Each litigation stage includes a description of litigation tasks that are routinely undertaken during that stage.

[Case type heading]

This case would typically be filed in [state/federal] court.

The plaintiff in this case would typically be:

- An individual
- A business entity
- A government agency
- Multiple plaintiffs (please indicate what types of litigants by selecting all that apply)
  - Individuals
  - Business entities
  - Government agencies

A defendant in this case would typically be:

- An individual
- A business entity
- A government agency
- Multiple defendants (please indicate what types of litigants by selecting all that apply)
  - Individuals
  - Business entities
  - Government agencies

Court costs would typically be:

- Less than $100
- $101 to $250
- $251 to $500
- $501 to $750
- $750 to $1,000
- More than $1,000

Please indicate whether the following statements are true or false with respect to a typical case.

The plaintiff in this case would typically allege multiple theories of liability. **[T/F]**

The defendant in this case would typically raise multiple affirmative defenses. **[T/F]**

This case would typically involve a claim for punitive damages. **[T/F]**

This case would typically involve motions for state class action certification. **[T/F]**

If liability were established, the reasonable expected economic and non-economic compensatory damages would typically be:

- Less than $50,000
- $50,000 to $249,99
- $250,000 to $499,999
- $500,000 to $1 million
- More than $1 million

How many experts would the plaintiff(s) typically retain in this case? [numeric: xx]

What is a reasonable fee (excluding travel) for EACH plaintiff expert? [currency: $xx,xxx]

How many experts would the defendant(s) typically retain in this case? [numeric: xx]

What is a reasonable fee (excluding travel) for EACH defendant expert? [currency: $xx,xxx]

Discovery in this case would typically involve electronically stored information (ESI). **[T/F]**

This case typically involves participation in the following types of formal or court-mandated ADR (check all that apply):

- Mediation
- Arbitration
- Other ADR
- Not applicable; ADR participation does not typically occur.

This case would typically involve Daubert motions concerning the reliability of expert witness testimony. **[T/F]**

A motion for summary judgment would typically be filed in this case? **[T/F]**

Please indicate the likelihood that this case will ultimately be resolved by (percentages should total 100%)

- Default judgment _____%
- Dismissal/withdrawal by plaintiff _____%
- Negotiated settlement by parties _____%
- Summary judgment _____%
- Bench trial _____%
- Jury trial _____%

What proportion of [type] cases is atypically difficult or complex? **_____%**

What proportion of [type] cases is atypically easy or straight-forward? **_____%**

Please enter the estimated hours spent by both attorneys and paralegals on each stage of the litigation process. Report in increments of half-hours (e.g., 0.5 hours). If possible, use actual billing records to estimate average hours. Each litigation stage includes a description of litigation tasks that are routinely undertaken during that stage.

	SENIOR-LEVEL ATTORNEY	JUNIOR-LEVEL ATTORNEY	PARALEGAL
	Number of hours spent on case:		
Case Initiation			
Client intake, initial fact investigation, legal research, draft complaint/answer, cross-claim, counterclaim or third-party claim, motion to dismiss on procedural grounds, defenses to procedural motions, meet and confer regarding case scheduling and discovery.			
Discovery			
Draft and file mandatory disclosures, draft/answer interrogatories, respond to requests for production of documents, identify and consult with experts, review expert reports, identify and interview non-expert witnesses, depose opponent's witnesses, prepare for and attend opponent's depositions, resolve electronically stored information issues, review discovery/case assessment, resolve discovery disputes.			
Settlement			
Mandatory ADR, settlement negotiations, settlements conferences, draft settlement agreement, file motion to dismiss			
Pre-trial motions			
Legal research, draft motion *in limine*, draft motion for summary judgment, answer opponent's motions, prepare for motion hearings, argue motions.			
Trial			
Legal research, prepare witnesses and experts, meet with co-counsel (trial team), prepare for, motion to sequester, prepare opening and closing statements, prepare for direct (and cross) examination, prepare jury instructions, proposed findings of fact and conclusions of law, proposed orders, and conduct trial.			
Post-disposition			
Conduct post-disposition settlement negotiations, draft motions for rehearing, JNOV, additur, remittitur, enforce judgment, and any appeal activity			

Appendix E: Summaries of Time and Cost Estimates by Case Type

AUTOMOBILE TORT CASES

Case description

According to the 23 attorneys who responded to questions concerning automobile tort cases, typical cases have the following characteristics:

- They are universally filed in state, rather than federal court;
- The overwhelming majority of plaintiffs (87%) are individuals, rather than business or government organizations;
- Three-quarters of complaints allege multiple claims and almost all (96%) of answers raise multiple defenses;
- Plaintiffs seek damages less than $50,000 in 17% of cases, between $50,000 and $250,000 in 74% of cases, and more than $250,000 in 9% of cases;
- Plaintiffs seek punitive damages in 17% of cases;
- All cases employ ADR to resolve the disputes, usually by mediation (76%) or arbitration (5%) or both (19%);
- One-third of cases file *Daubert* motions and 39% file summary judgment motions;
- The substantial majority of cases resolve by settlement (81%) with most of the remaining cases resolved on the merits by summary judgment (4%), bench trial (4%) or jury trial (9%).

Time estimates

	SENIOR ATTORNEY			JUNIOR ATTORNEY			PARALEGAL		
PERCENTILE	25TH	50TH	75TH	25TH	50TH	75TH	25TH	50TH	75TH
Intake	2.0	5.0	16.0	1.0	5.0	17.5	2.0	5.0	12.5
Discovery	5.0	10.0	27.5	2.5	15.0	40.0	4.0	10.0	25.0
Settlement	5.0	8.0	15.0	0.0	4.0	20.0	0.0	5.0	10.0
Pretrial	5.0	15.0	27.5	10.0	20.0	40.0	0.0	0.0	8.0
Trial	32.5	40.0	62.5	12.5	35.0	55.0	2.5	20.0	45.0
Post-disposition	5.0	10.0	20.0	2.5	10.0	25.0	0.0	5.0	10.0
Subtotal of Time	54.5	88.0	168.5	28.5	89.0	197.5	8.5	45.0	110.5
Prevailing Hourly Rates	225	$275	$350	$175	$200	$250	$75	$75	$125
Billable Costs	$12,263	$24,200	$58,975	$4,988	$17,800	$49,375	$638	$3,375	$13,813

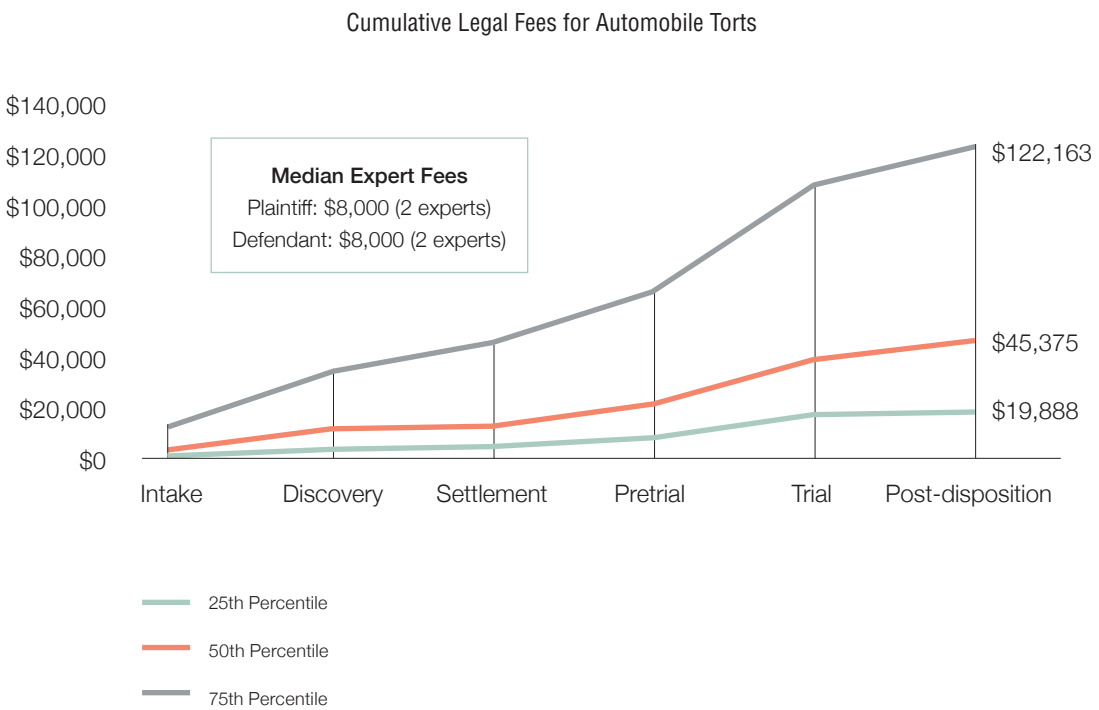
EXPERT WITNESSES

PERCENTILE	25TH	50TH	75TH
Number of plaintiff experts	1	2	2
Plaintiff Expert Fees	$1,500	$4,000	$5,000
Number of defendant experts	2	2	3
Defendant expert fees	$1,500	$4,000	$6,000
Total Expert Costs	$4,500	$16,000	$28,000

Proportion of Time Expended per Litigation Stage

PERCENTILE	TOTAL TIME 25TH		50TH		75TH	
Intake	5	5.5%	15	6.8%	46	9.7%
Discovery	12	12.6%	35	15.8%	93	19.4%
Settlement	5	5.5%	17	7.7%	45	9.4%
Pretrial	15	16.4%	35	15.8%	76	15.8%
Trial	48	51.9%	95	42.8%	163	34.1%
Post-disposition	8	8.2%	25	11.3%	55	11.5%
Subtotal of Time	92		222		477	

Estimated Costs



PREMISES LIABILITY CASES

Case description

According to the 24 attorneys who responded to questions concerning premises liability cases, typical cases have the following characteristics:

- They are universally filed in state, rather than federal court;
- The overwhelming majority of plaintiffs (96%) are individuals, rather than business or government organizations;
- Nine-tenths of complaints allege multiple claims and almost all (96%) of answers raise multiple defenses;
- Plaintiffs seek damages less than $50,000 in 13% of cases, between $50,000 and $250,000 in 79% of cases, and more than $250,000 in 8% of cases;
- Plaintiffs seek punitive damages in 4% of cases;
- Approximately one-third (38%) of cases involves discovery of electronically stored information (ESI);
- All cases employ ADR to resolve the disputes, usually by mediation (75%) or a combination of arbitration and mediation (25%);
- One-third of cases file *Daubert* motions and nearly half (46%) file summary judgment motions;
- More than three-quarters of cases resolve by settlement (77%) with most of the remaining cases resolved on the merits by summary judgment (7%), bench trial (2%) or jury trial (9%).

Time estimates

	SENIOR ATTORNEY			JUNIOR ATTORNEY			PARALEGAL		
PERCENTILE	25TH	50TH	75TH	25TH	50TH	75TH	25TH	50TH	75TH
Intake	2.3	10.0	23.8	0.0	2.0	10.0	0.0	4.5	10.0
Discovery	2.0	25.0	50.0	0.0	3.5	13.8	2.0	10.0	40.0
Settlement	5.0	10.0	20.0	0.0	2.0	8.8	0.0	1.0	10.0
Pretrial	2.0	10.0	25.0	0.0	4.5	10.0	0.0	1.0	5.0
Trial	35.0	70.0	100.0	0.0	5.0	30.0	2.0	20.0	30.0
Post-disposition	2.0	10.0	15.0	0.0	2.0	10.0	0.0	1.0	10.0
Subtotal of Time	48.3	135.0	233.8	0.0	19.0	82.5	4.0	37.5	105.0
Prevailing Hourly Rates	200	$250	$275	$175	$180	$210	$75	$85	$120
Billable Costs	$9,650	$33,750	$64,281	$–	$3,420	$17,325	$300	$3,188	$12,600

EXPERT WITNESSES

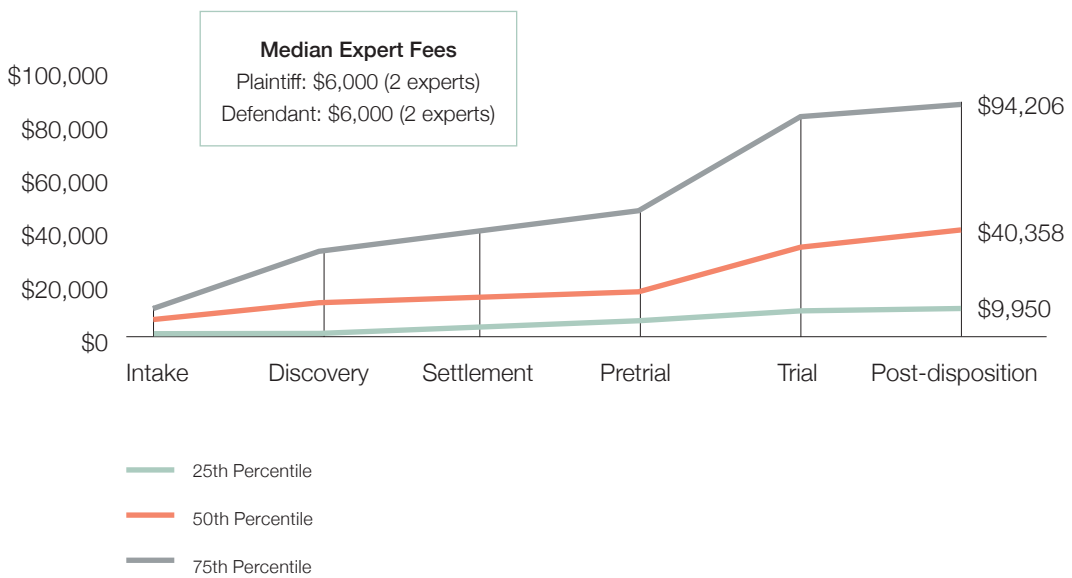
PERCENTILE	25TH	50TH	75TH
Number of plaintiff experts	1	2	2
Plaintiff Expert Fees	$1,500	$3,000	$5,000
Number of defendant experts	1	2	3
Defendant expert fees	$2,500	$3,000	$5,000
Total Expert Costs	$3,500	$12,000	$25,000

Proportion of Time Expended per Litigation Stage

	TOTAL TIME					
PERCENTILE	25TH		50TH		75TH	
Intake	2	4.3%	17	8.6%	44	10.4%
Discovery	4	7.7%	39	20.1%	104	24.6%
Settlement	5	9.6%	13	6.8%	39	9.2%
Pretrial	2	3.8%	16	8.1%	40	9.5%
Trial	37	70.8%	95	49.6%	160	38.0%
Post-disposition	2	3.8%	13	6.8%	35	8.3%
Subtotal of Time	52		192		421	

Estimated Costs

Cumulative Legal Fees for Premises Liability Cases



PROFESSIONAL MALPRACTICE CASES

Case description

According to the 22 attorneys who responded to questions concerning professional malpractice cases, typical cases have the following characteristics:

- They are universally filed in state, rather than federal court;
- Approximately three-quarters of plaintiffs (73%) are individuals with the remaining plaintiffs evenly split between business organizations and government agencies (14% each);
- Four-fifths of complaints allege multiple claims and almost all (96%) of answers raise multiple defenses;
- Plaintiffs seek damages less than $50,000 in 23% of cases, between $50,000 and $250,000 in 14% of cases, and more than $250,000 in 41% of cases;
- Plaintiffs seek punitive damages in 18% of cases;
- Approximately three-quarters (77%) of cases involves discovery of electronically stored information (ESI);
- The overwhelming majority of cases employ ADR to resolve the disputes, usually by mediation (86%) or a combination of arbitration and mediation (5%);
- More than half of cases file *Daubert* motions (55%) and nearly three-quarters (73%) file summary judgment motions;
- Two-thirds of cases resolve by settlement (67%) with most of the remaining cases resolved on the merits by summary judgment (7%), bench trial (2%), or jury trial (12%).

Time estimates

	SENIOR ATTORNEY			JUNIOR ATTORNEY			PARALEGAL		
PERCENTILE	25TH	50TH	75TH	25TH	50TH	75TH	25TH	50TH	75TH
Intake	10.0	20.0	50.0	5.0	10.0	30.0	1.0	10.0	20.0
Discovery	50.0	75.0	200.0	10.0	100.0	200.0	10.0	25.0	150.0
Settlement	10.0	20.0	30.0	1.0	10.0	20.0	0.0	5.0	10.0
Pretrial	20.0	25.0	60.0	20.0	30.0	75.0	0.0	10.0	20.0
Trial	80.0	100.0	200.0	15.0	100.0	150.0	5.0	50.0	100.0
Post-disposition	10.0	20.0	40.0	5.0	10.0	40.0	0.0	5.0	10.0
Subtotal of Time	180.0	260.0	580.0	56.0	260.0	515.0	16.0	105.0	310.0
Prevailing Hourly Rates	250	$283	$306	$185	$200	$230	$95	$100	$120
Billable Costs	$45,000	$73,450	$177,625	$10,360	$52,000	$118,450	$1,520	$10,500	$37,200

EXPERT WITNESSES

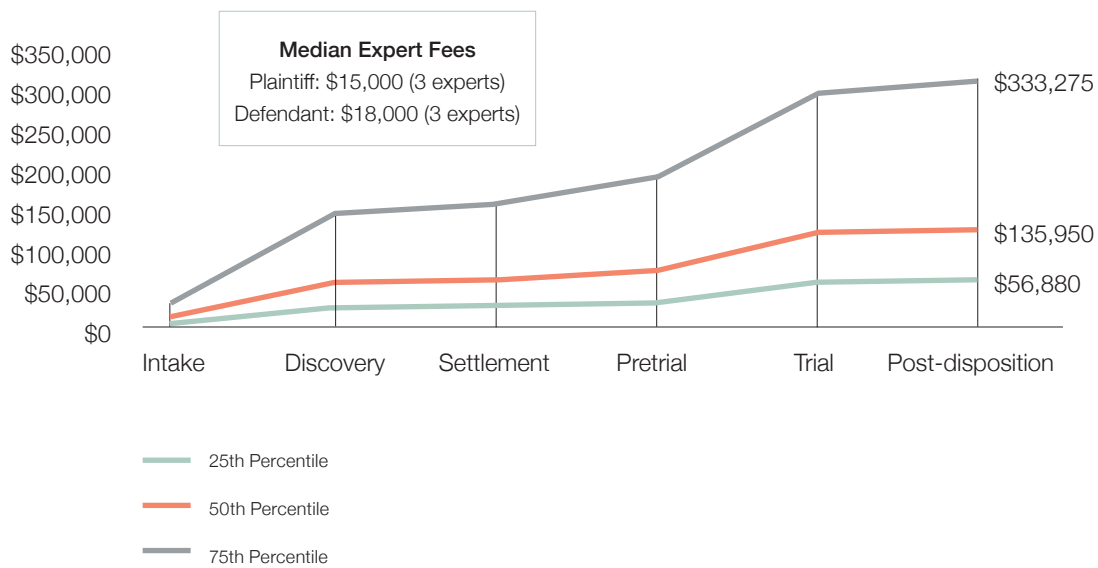
PERCENTILE	25TH	50TH	75TH
Number of plaintiff experts	2	3	4
Plaintiff Expert Fees	$4,625	$5,000	$10,000
Number of defendant experts	3	3	4
Defendant expert fees	$5,000	$6,000	$12,500
Total Expert Costs	$23,000	$33,000	$90,000

Proportion of Time Expended per Litigation Stage

PERCENTILE	TOTAL TIME 25TH		50TH		75TH	
Intake	16	6.3%	40	6.4%	100	7.1%
Discovery	70	27.8%	200	32.0%	550	39.1%
Settlement	11	4.4%	35	5.6%	60	4.3%
Pretrial	40	15.9%	65	10.4%	155	11.0%
Trial	100	39.7%	250	40.0%	450	32.0%
Post-disposition	15	6.0%	35	5.6%	90	6.4%
Subtotal of Time	252		625		1,405	

Estimated Costs

Cumulative Legal Fees in Professional Malpractice Cases



BUSINESS/COMMERCIAL LITIGATION CASES

Case description

According to the 25 attorneys who responded to questions concerning business/commercial litigation cases, typical cases have the following characteristics:

- Nine-tenths of cases (92%) are filed in state with the remaining 8% filed in federal court;
- Four-fifths of plaintiffs (80%) are business entities with the remaining plaintiffs comprised of individuals (20%);
- Nine-tenths of complaints (88%) allege multiple claims and almost all (96%) of answers raise multiple defenses;
- Plaintiffs seek damages less than $50,000 in 4% of cases, between $50,000 and $250,000 in 32% of cases, between $250,000 and $500,000 in 20% of cases, between $500,000 and $1 million in 24% of cases, and more than $1 million in 20% of cases;
- Plaintiffs seek punitive damages in 20% of cases;
- The overwhelming majority (84%) of cases involves discovery of electronically stored information (ESI);
- The overwhelming majority of cases employ ADR to resolve the disputes, usually by mediation (86%), arbitration or a combination of arbitration and mediation (10%);
- Less than one-fifth of cases file *Daubert* motions (16%), but four-fifths (80%) file summary judgment motions;
- Slightly more than half of cases resolve by settlement (55%) with most of the remaining cases resolved on the merits by summary judgment (19%), bench trial (12%), or jury trial (6%); an additional 6% of cases are disposed by default judgment.

Time estimates

	SENIOR ATTORNEY			JUNIOR ATTORNEY			PARALEGAL		
PERCENTILE	25TH	50TH	75TH	25TH	50TH	75TH	25TH	50TH	75TH
Intake	3.5	12.5	26.3	1.9	10.0	24.8	0.0	2.5	7.0
Discovery	8.8	20.0	45.0	3.5	20.0	70.0	1.8	13.5	42.5
Settlement	5.0	13.5	26.3	0.0	4.5	10.5	0.0	0.5	5.0
Pretrial	9.5	20.0	31.5	4.8	20.0	40.0	0.0	2.0	5.3
Trial	40.0	55.0	105.0	20.0	55.0	105.0	8.8	20.0	50.0
Post-disposition	5.8	19.0	50.0	1.5	20.0	38.8	0.0	6.5	25.0
Subtotal of Time	72.5	140.0	284.0	31.6	129.5	289.0	10.5	45.0	134.8
Prevailing Hourly Rates	250	$320	$350	$175	$200	$250	$58	$95	$150
Billable Costs	$18,125	$44,800	$99,400	$5,535	$25,900	$72,250	$604	$4,275	$20,213

EXPERT WITNESSES

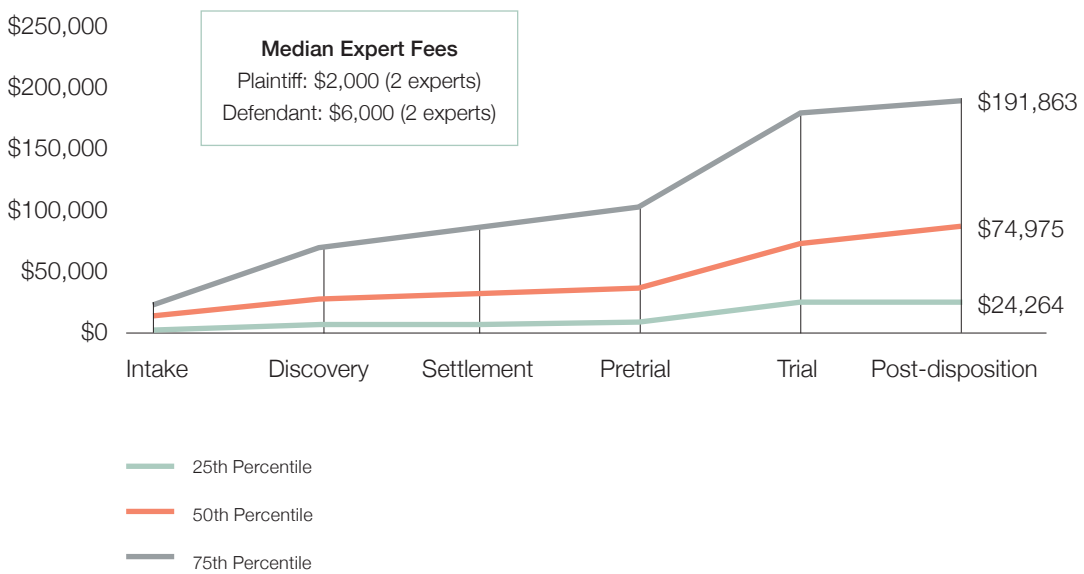
PERCENTILE	25TH	50TH	75TH
Number of plaintiff experts	1	2	2
Plaintiff Expert Fees	$300	$1,000	$10,000
Number of defendant experts	1	2	2
Defendant expert fees	$300	$3,000	$10,000
Total Expert Costs	$600	$8,000	$40,000

Proportion of Time Expended per Litigation Stage

	TOTAL TIME					
PERCENTILE	25TH		50TH		75TH	
Intake	5	4.7%	25	7.9%	58	8.2%
Discovery	14	12.2%	54	17.0%	158	22.3%
Settlement	5	4.4%	19	5.9%	42	5.9%
Pretrial	14	12.4%	42	13.4%	77	10.8%
Trial	69	60.0%	130	41.3%	260	36.7%
Post-disposition	7	6.3%	46	14.5%	114	16.1%
Subtotal of Time	115		315		708	

Estimated Costs

Cumulative Legal Fees for Business/Commercial Cases



EMPLOYMENT DISPUTE CASES

Case description

According to the 21 attorneys who responded to questions concerning employment disputes, typical cases have the following characteristics:

- Two-thirds of cases (67%) are filed in state with the remaining one-third (33%) filed in federal court;
- The overwhelming majority of plaintiffs (86%) are individuals with the remaining plaintiffs comprised of business entities (10%) and government agencies (5%);
- Almost all complaints (95%) allege multiple claims and nine-tenths (91%) of answers raise multiple defenses;
- Plaintiffs seek damages less than $50,000 in 14% of cases, between $50,000 and $250,000 in 67% of cases, between $250,000 and $500,000 in 10% of cases, and between $500,000 and $1 million in 10% of cases;
- Almost half of all plaintiffs (48%) seek punitive damages;
- The overwhelming majority (86%) of cases involves discovery of electronically stored information (ESI);
- Three-quarters of cases (77%) employ ADR to resolve the disputes, usually by mediation (71%) or a combination of arbitration and mediation (6%);
- One-third of cases file *Daubert* motions (35%), but three-quarters (76%) file summary judgment motions;
- Slightly more than half of cases resolve by settlement (60%) with most of the remaining cases resolved on the merits by summary judgment (18%), bench trial (6%), or jury trial (6%); an additional 10% of cases are dismissed.

Time estimates

	SENIOR ATTORNEY			JUNIOR ATTORNEY			PARALEGAL		
PERCENTILE	25TH	50TH	75TH	25TH	50TH	75TH	25TH	50TH	75TH
Intake	5.0	10.0	10.0	4.0	10.0	20.0	0.0	0.0	7.5
Discovery	10.0	20.0	20.0	17.5	20.0	40.0	0.0	10.0	20.0
Settlement	10.0	10.0	10.0	1.0	5.0	7.5	0.0	0.0	5.0
Pretrial	8.0	15.0	40.0	12.5	25.0	45.0	0.0	5.0	12.5
Trial	40.0	48.0	100.0	18.0	40.0	80.0	0.0	10.0	35.0
Post-disposition	5.0	10.0	20.0	3.5	10.0	27.5	0.0	0.0	10.0
Subtotal of Time	78.0	113.0	200.0	56.5	110.0	220.0	0.0	25.0	90.0
Prevailing Hourly Rates	198.75	$263	$331	$125	$200	$240	$45	$100	$120
Billable Costs	$15,503	$29,663	$66,250	$7,063	$22,000	$52,800	$0	$2,500	$10,800

EXPERT WITNESSES

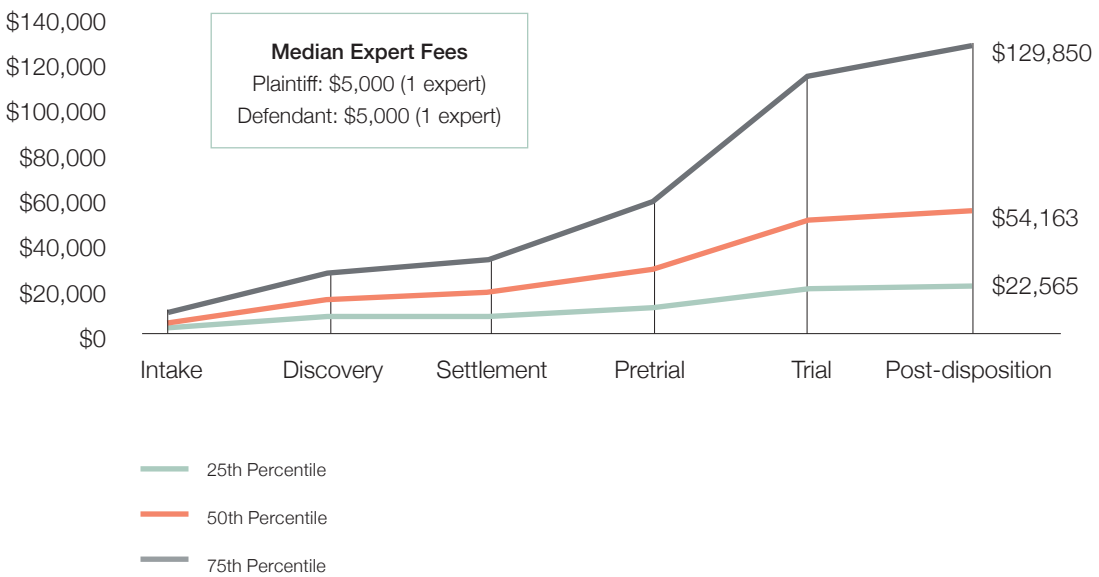
PERCENTILE	25TH	50TH	75TH
Number of plaintiff experts	1	1	2
Plaintiff Expert Fees	$1,075	$5,000	$7,375
Number of defendant experts	1	1	2
Defendant expert fees	$1,125	$5,000	$8,500
Total Expert Costs	$2,200	$10,000	$33,875

Proportion of Time Expended per Litigation Stage

PERCENTILE	TOTAL TIME 25TH		50TH		75TH	
Intake	9	6.7%	20	8.1%	38	7.4%
Discovery	28	20.4%	50	20.2%	80	15.7%
Settlement	11	8.2%	15	6.0%	23	4.4%
Pretrial	21	15.2%	45	18.1%	98	19.1%
Trial	58	43.1%	98	39.5%	215	42.2%
Post-disposition	9	6.3%	20	8.1%	58	11.3%%
Subtotal of Time	135		248		510	

Estimated Costs

Cumulative Legal Fees for Employment Dispute Cases



DEBT COLLECTION CASES

Case description

According to the 25 attorneys who responded to questions concerning debt collection cases, typical cases have the following characteristics:

- They are universally filed in state court, rather than federal court;
- The overwhelming majority of plaintiffs (88%) are business entities with the remaining plaintiffs comprised of individuals (8%) and government agencies (4%);
- More than two-thirds of complaints (68%) allege multiple claims and nearly two-thirds (64%) of answers raise multiple defenses;
- Plaintiffs seek damages less than $50,000 in 80% of cases, between $50,000 and $250,000 in 4% of cases, between $250,000 and $500,000 in 12% of cases, and between $500,000 and $1 million in 4% of cases;
- Plaintiffs do not generally seek punitive damages;
- More than half (60%) of cases involves discovery of electronically stored information (ESI);
- Less than one-third of cases (32%) employ mediation to resolve the dispute; no other form of ADR is used for these cases;
- *Daubert* motions are not generally filed in debt collection cases, but more than half (56%) file summary judgment motions;
- Half of cases resolve by default judgment (50%) with most of the remaining cases resolved by settlement (36%) or summary judgment (9%).

Time estimates

	SENIOR ATTORNEY			JUNIOR ATTORNEY			PARALEGAL		
PERCENTILE	25TH	50TH	75TH	25TH	50TH	75TH	25TH	50TH	75TH
Intake	0.5	2.0	4.5	0.0	0.0	0.5	0.0	0.5	1.0
Discovery	0.0	3.0	10.0	0.0	0.0	1.0	0.0	0.5	1.0
Settlement	0.1	1.0	5.0	0.0	0.0	0.3	0.0	0.0	0.8
Pretrial	0.5	2.0	7.5	0.0	0.0	1.0	0.0	0.5	1.5
Trial	0.0	2.0	14.5	0.0	0.0	1.0	0.0	0.0	2.0
Post-disposition	0.3	3.0	9.0	0.0	0.0	1.0	0.0	0.0	2.0
Subtotal of Time	1.3	13.0	50.5	0.0	0.0	4.8	0.0	1.5	8.3
Prevailing Hourly Rates	200	$200	$250	$175	$175	$200	$35	$65	$75
Billable Costs	$260	$2,600	$12,625	$0	$0	$960	$0	$98	$623

EXPERT WITNESSES

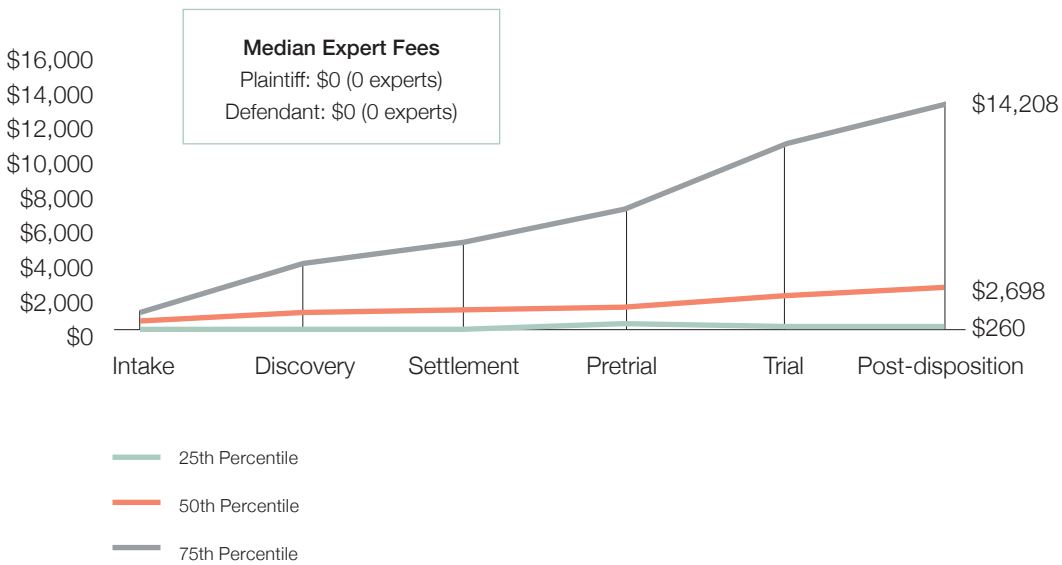
PERCENTILE	25TH	50TH	75TH
Number of plaintiff experts	0	0	0
Plaintiff Expert Fees	$0	$0	$550
Number of defendant experts	0	0	0
Defendant expert fees	$0	$0	$251
Total Expert Costs	$0	$0	$0

Proportion of Time Expended per Litigation Stage

	TOTAL TIME					
PERCENTILE	25TH		50TH		75TH	
Intake	1	38.5%	3	17.2%	6	9.4%
Discovery	_	0.0%	4	24.1%	12	18.9%
Settlement	0	3.8%	1	6.9%	6	9.6%
Pretrial	1	38.5%	3	17.2%	10	15.7%
Trial	_	0.0%	2	13.8%	18	27.5%
Post-disposition	0	19.2%	3	20.7%	12	18.9%
Subtotal of Time	1		15		64	

Estimated Costs

Cumulative Legal Fees for Employment Dispute Cases



DIVORCE CASES

Case description

According to the 21 attorneys who responded to questions concerning debt collection cases, typical cases have the following characteristics:

- They are universally filed in state court, rather than federal court;
- Less than one-fourth of complaints (24%) allege multiple claims and slightly more than one-third (38%) of answers raise multiple defenses;
- The monetary value at issue is less than $50,000 in 48% of cases, between $50,000 and $250,000 in 29% of cases, between $250,000 and $500,000 in 14% of cases, between $500,000 and $1 million in 5% of cases, and more than $1 million in 5% of cases;
- Approximately half (48%) of cases involves discovery of electronically stored information (ESI);
- Nine-tenths of cases (91%) employ mediation to resolve the dispute; no other form of ADR is used for these cases;
- *Daubert* motions are filed in only 5% of divorce cases, and motions for summary judgment are filed in only 14% of cases;
- More than two-thirds (71%) of cases resolve by settlement with most of the remaining cases resolve by default judgment (7%) or bench trial (10%).

Time estimates

	SENIOR ATTORNEY			JUNIOR ATTORNEY			PARALEGAL		
PERCENTILE	25TH	50TH	75TH	25TH	50TH	75TH	25TH	50TH	75TH
Intake	3.0	4.0	5.0	0.0	1.0	2.0	0.0	1.0	3.0
Discovery	3.0	5.0	20.0	0.0	1.5	10.0	0.0	2.0	5.0
Settlement	3.0	5.0	10.0	0.0	0.0	3.0	0.0	1.0	2.0
Pretrial	2.0	5.0	10.0	0.0	5.0	10.0	0.0	1.0	5.0
Trial	10.0	18.0	48.0	0.0	0.0	16.0	0.0	4.0	20.0
Post-disposition	2.0	2.0	5.0	0.0	2.0	5.0	0.0	0.0	1.0
Subtotal of Time	23.0	39.0	98.0	0.0	9.5	46.0	0.0	9.0	36.0
Prevailing Hourly Rates	217.5	$250	$294	$165	$200	$200	$68	$100	$100
Billable Costs	$5,003	$9,750	$28,788	$0	$1,900	$9,200	$0	$900	$3,600

EXPERT WITNESSES

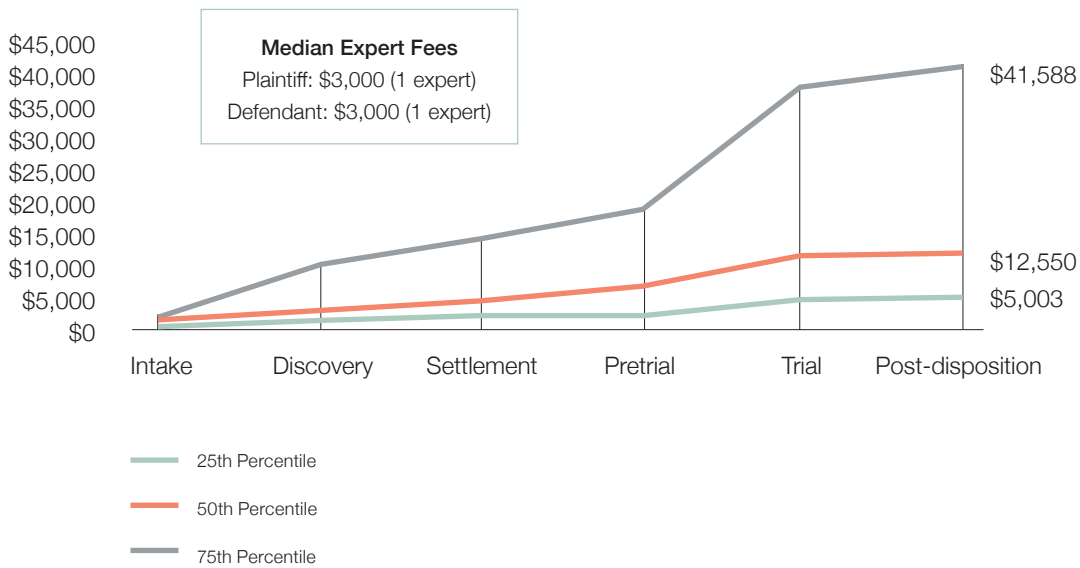
PERCENTILE	25TH	50TH	75TH
Number of plaintiff experts	1	1	2
Plaintiff Expert Fees	$400	$3,000	$5,000
Number of defendant experts	1	1	2
Defendant expert fees	$400	$3,000	$5,000
Total Expert Costs	$800	$6,000	$15,000

Proportion of Time Expended per Litigation Stage

PERCENTILE	TOTAL TIME 25TH		50TH		75TH	
Intake	3	13.0%	6	10.4%	10	5.6%
Discovery	3	13.0%	9	14.8%	35	19.4%
Settlement	3	13.0%	6	10.4%	15	8.3%
Pretrial	2	8.7%	11	19.1%	25	13.9%
Trial	10	43.5%	22	38.3%	84	46.7%
Post-disposition	2	8.7%	4	7.0%	11	6.1%
Subtotal of Time	23		58		180	

Estimated Costs

Cumulative Legal Fees for Divorce Cases



PATERNITY CASES

Case description

According to the 30 attorneys who responded to questions concerning debt collection cases, typical cases have the following characteristics:

- They are universally filed in state court, rather than federal court;
- Approximately one-fourth of complaints (27%) allege multiple claims and 43% of answers raise multiple defenses;
- The monetary value at issue is less than $50,000 in 80% of cases, between $50,000 and $250,000 in 10% of cases, and between $250,000 and $500,000 in 7% of cases;
- Approximately one-third (30%) of cases involves discovery of electronically stored information (ESI);
- Nearly all cases (95%) employ mediation to resolve the dispute; no other form of ADR is used for these cases;
- *Daubert* motions are filed in only 3% of paternity cases, and motions for summary judgment are filed in only 17% of cases;
- Nearly three-quarters (73%) of cases resolve by settlement with most of the remaining cases resolve by default judgment (9%) or bench trial (10%).

Time estimates

	SENIOR ATTORNEY			JUNIOR ATTORNEY			PARALEGAL		
PERCENTILE	25TH	50TH	75TH	25TH	50TH	75TH	25TH	50TH	75TH
Intake	1.0	3.5	12.5	0.0	0.0	3.0	0.0	1.0	2.0
Discovery	1.0	5.0	13.8	0.0	0.0	5.0	0.0	1.5	5.0
Settlement	4.0	5.0	10.0	0.0	0.0	5.0	0.0	0.5	2.0
Pretrial	1.0	2.0	11.3	0.0	0.0	3.0	0.0	0.0	2.0
Trial	10.0	20.0	40.0	0.0	0.0	10.0	0.0	4.0	10.0
Post-disposition	0.0	2.0	10.0	0.0	0.0	2.0	0.0	0.0	2.0
Subtotal of Time	17.0	37.5	97.5	0.0	0.0	28.0	0.0	7.0	23.0
Prevailing Hourly Rates	200	$250	$268	$150	$175	$200	$55	$80	$100
Billable Costs	$3,400	$9,375	$26,081	$0	$0	$5,600	$0	$560	$2,300

EXPERT WITNESSES

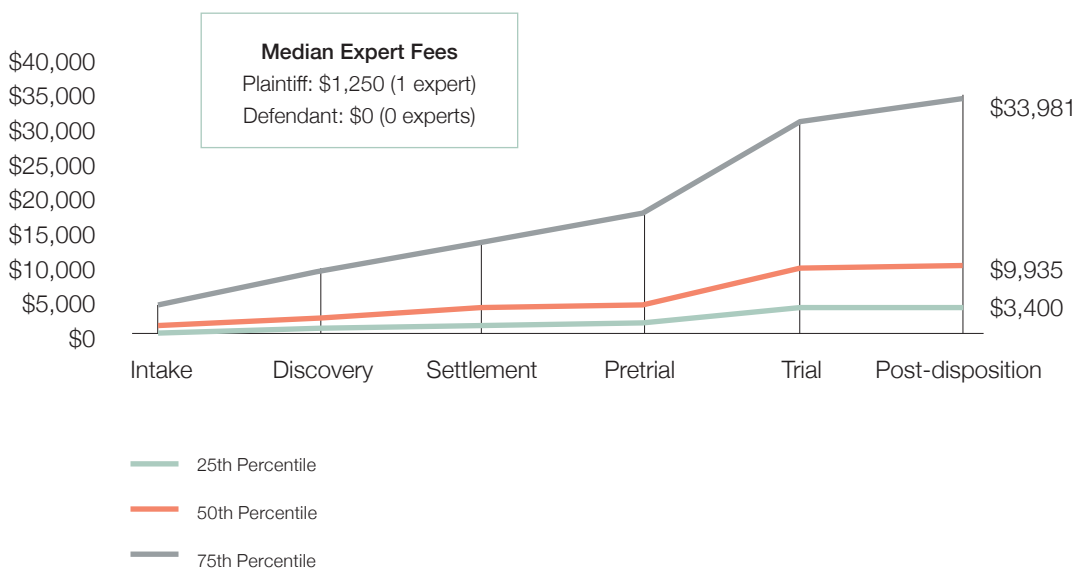
PERCENTILE	25TH	50TH	75TH
Number of plaintiff experts	0	1	1
Plaintiff Expert Fees	$0	$1,250	$5,000
Number of defendant experts	0	1	1
Defendant expert fees	$0	$0	$5,000
Total Expert Costs	$0	$1,250	$10,000

Proportion of Time Expended per Litigation Stage

	TOTAL TIME					
PERCENTILE	25TH		50TH		75TH	
Intake	1	5.9%	5	10.1%	18	11.8%
Discovery	1	5.9%	7	14.6%	24	16.0%
Settlement	4	23.5%	6	12.4%	17	11.4%
Pretrial	1	5.9%	2	4.5%	16	10.9%
Trial	10	58.8%	24	53.9%	60	40.4%
Post-disposition	–	0.0%	2	4.5%	14	9.4%
Subtotal of Time	17		45		149	

Estimated Costs

Cumulative Legal Fees for Divorce Cases



CUSTODY/SUPPORT CASES

Case description

According to the 30 attorneys who responded to questions concerning debt collection cases, typical cases have the following characteristics:

- They are universally filed in state court, rather than federal court;
- Approximately one-third of complaints (30%) allege multiple claims and 57% of answers raise multiple defenses;
- The monetary value at issue is less than $50,000 in 78% of cases, between $50,000 and $250,000 in 13% of cases, between $250,000 and $500,000 in 4% of cases; and between $500,000 and $1 million in 4% of cases;
- Approximately two-thirds (65%) of cases involves discovery of electronically stored information (ESI);
- Nine-tenths of cases (90%) employ ADR to resolve the dispute, usually by mediation (85%) or a combination of mediation and arbitration (5%);
- *Daubert* motions are not generally filed in custody/support cases, and motions for summary judgment are filed in only 9% of cases;
- More than two-thirds (70%) of cases resolve by settlement with most of the remaining cases resolve by default judgment (11%) or bench trial (12%).

Time estimates

	SENIOR ATTORNEY			JUNIOR ATTORNEY			PARALEGAL		
PERCENTILE	25TH	50TH	75TH	25TH	50TH	75TH	25TH	50TH	75TH
Intake	1.0	2.5	10.0	0.0	1.0	2.8	1.0	2.5	17.0
Discovery	2.0	5.0	11.5	0.0	0.8	8.8	1.5	4.5	17.5
Settlement	5.0	6.0	8.0	0.0	0.0	5.8	0.0	1.0	4.0
Pretrial	3.0	5.0	10.0	0.0	0.5	9.5	1.0	2.0	5.0
Trial	10.0	20.0	30.0	0.0	2.0	35.0	2.8	10.0	25.0
Post-disposition	1.0	2.0	5.8	0.0	0.0	2.0	0.0	0.3	1.8
Subtotal of Time	22.0	40.5	75.3	0.0	4.3	63.8	6.3	20.3	70.3
Prevailing Hourly Rates	200	$250	$296	$200	$200	$225	$58	$85	$100
Billable Costs	$4,400	$10,125	$22,293	$0	$850	$14,344	$359	$1,721	$7,025

EXPERT WITNESSES

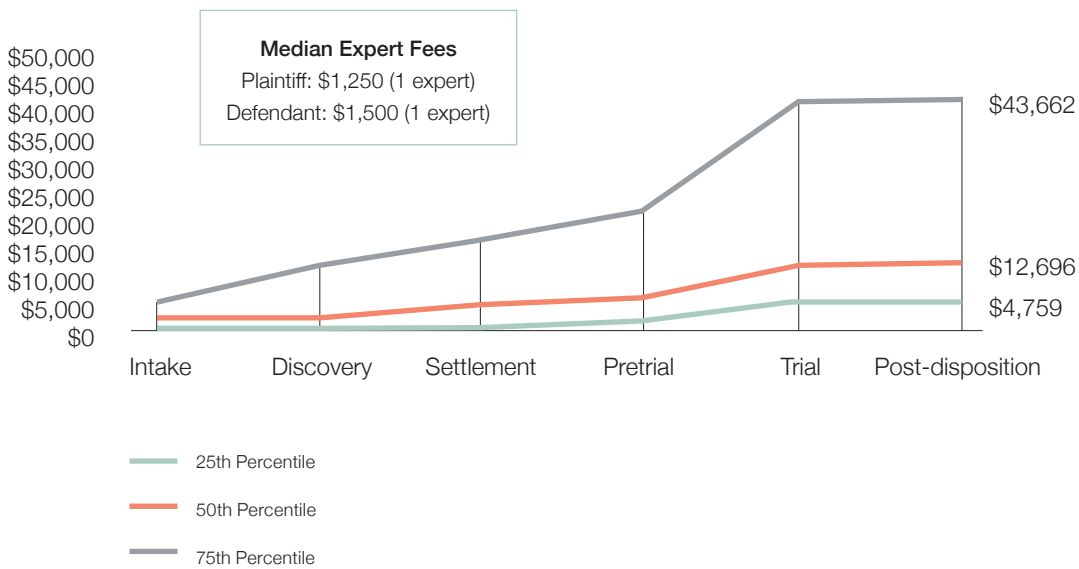
PERCENTILE	25TH	50TH	75TH
Number of plaintiff experts	0	1	1
Plaintiff Expert Fees	$0	$2,500	$5,000
Number of defendant experts	0	1	1
Defendant expert fees	$0	$1,500	$3,500
Total Expert Costs	$0	$3,250	$8,500

Proportion of Time Expended per Litigation Stage

PERCENTILE	TOTAL TIME 25TH		50TH		75TH	
Intake	2	7.1%	6	9.2%	30	14.2%
Discovery	4	12.4%	10	15.8%	38	18.0%
Settlement	5	17.7%	7	10.8%	18	8.5%
Pretrial	4	14.2%	8	11.5%	25	11.7%
Trial	13	45.1%	32	49.2%	90	43.0%
Post-disposition	1	3.5%	2	3.5%	10	4.5%
Subtotal of Time	28		65		209	

Estimated Costs

Cumulative Legal Fees in Custody/Support Cases



REAL PROPERTY DISPUTE CASES

Case description

According to the 27 attorneys who responded to questions concerning real property disputes, typical cases have the following characteristics:

- The overwhelming majority of cases are filed in state court (93%) compared to less than one-tenth of cases (7%) filed in federal court;
- Plaintiffs in approximately four-tenths of cases (41%) are individuals, nearly half (44%) are business entities, and the remaining plaintiffs are government entities (7%) or multiple plaintiffs (7%);
- The overwhelming majority of complaints (89%) allege multiple claims and 93% of answers raise multiple defenses;
- The monetary value at issue is less than $50,000 in 15% of cases, between $50,000 and $250,000 in 30% of cases, between $250,000 and $500,000 in 26% of cases; between $500,000 and $1 million in 19% of cases, and more than $1 million in 11% of cases;
- Approximately one-fourth of cases (22%) seek punitive damages;
- The overwhelming majority (82%) of cases involves discovery of electronically stored information (ESI);
- Nine-tenths of cases (88%) employ ADR to resolve the dispute, usually by mediation (83%) or a combination of mediation and arbitration (4%);
- *Daubert* motions are filed in 26% of real property disputes, and motions for summary judgment are filed in 82% of cases;
- More than half (54%) of cases resolve by settlement with most of the remaining cases resolve on the merits by summary judgment (21%), bench trial (11%), or jury trial (6%).

Time estimates

	SENIOR ATTORNEY			JUNIOR ATTORNEY			PARALEGAL		
PERCENTILE	25TH	50TH	75TH	25TH	50TH	75TH	25TH	50TH	75TH
Intake	10.0	10.0	28.8	0.0	5.0	42.5	0.8	2.0	10.0
Discovery	20.0	30.0	96.3	7.8	32.5	60.0	4.0	15.0	20.0
Settlement	10.0	15.0	28.8	0.0	10.0	21.3	0.0	0.5	5.0
Pretrial	16.3	30.0	40.0	8.8	25.0	56.3	0.0	7.5	25.0
Trial	26.3	60.0	95.0	8.8	35.0	78.3	2.8	17.5	50.0
Post-disposition	10.0	10.0	20.0	0.0	10.0	31.3	0.0	3.0	10.0
Subtotal of Time	92.5	155.0	308.8	25.3	117.5	289.5	7.5	45.5	120.0
Prevailing Hourly Rates	250	$268	$300	$183	$200	$208	$75	$80	$108
Billable Costs	$23,125	$41,463	$92,625	$4,608	$23,500	$60,071	$563	$3,640	$12,900

EXPERT WITNESSES

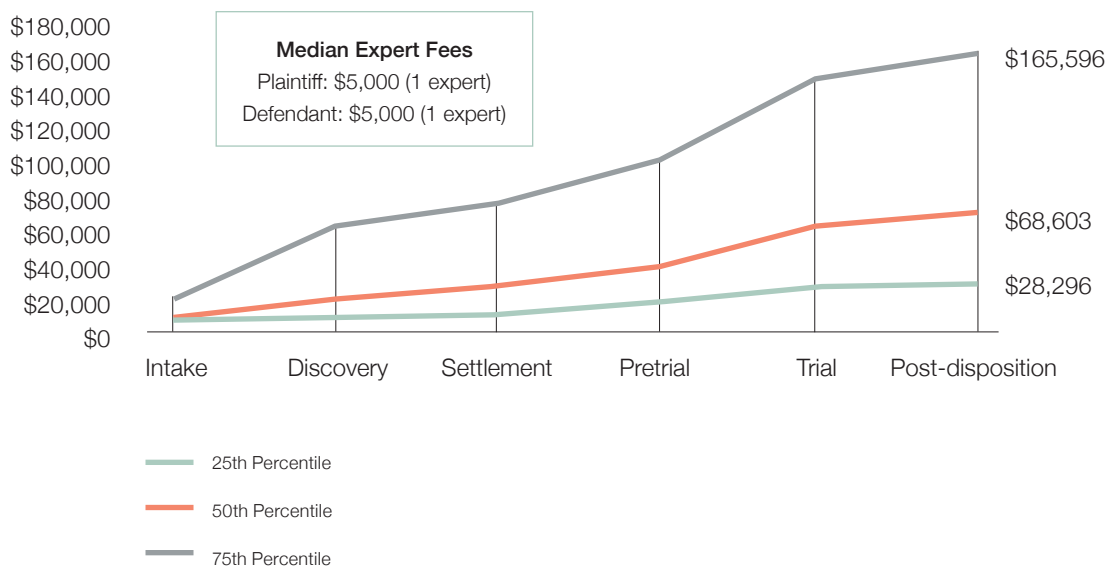
PERCENTILE	25TH	50TH	75TH
Number of plaintiff experts	1	1	2
Plaintiff Expert Fees	$2,000	$5,000	$10,000
Number of defendant experts	1	1	2
Defendant expert fees	$2,000	$5,000	$10,000
Total Expert Costs	$4,000	$10,000	$40,000

Proportion of Time Expended per Litigation Stage

PERCENTILE	TOTAL TIME 25TH		50TH		75TH	
Intake	11	8.6%	17	5.3%	81	11.3%
Discovery	32	25.3%	78	24.4%	176	24.5%
Settlement	10	8.0%	26	8.0%	55	7.7%
Pretrial	25	20.0%	63	19.7%	121	16.9%
Trial	38	30.1%	113	35.4%	223	31.1%
Post-disposition	10	8.0%	23	7.2%	61	8.5%
Subtotal of Time	125		318		718	

Estimated Costs

Cumulative Legal Fees for Real Property Cases



National Center for State Court
300 Newport Avenue
Williamsburg, VA 23185

800.616.6164
www.ncsc.org

SUPREME COURT OF COLORADO
OFFICE OF THE CHIEF JUSTICE

ADOPTING PILOT RULES FOR CERTAIN DISTRICT COURT CIVIL CASES

Whereas**,** the Court desires to study whether adopting certain rules regarding the control of the discovery process reduces the expense of civil litigation in certain business actions, and

Whereas, the Court has determined that the pilot project requires the use of modified rules of Civil Procedure concerning the pleading, discovery and trial management of certain cases; and

Whereas, the Court carefully considered the adoption of the pilot rules by:

- Publishing the proposal from the Colorado Pilot Project Committee (Committee);
- Inviting public comment about the proposal from the Committee;
- Holding a public hearing on January 19, 2011, concerning the Committee's proposal;
- Allowing and encouraging additional comment and suggestions to be made to the Court regarding the scope of the pilot project and the rules to be adopted;
- Narrowing the scope of the pilot to include business cases; and
- Redrafting rules to reflect the goals of the pilot to identify and narrow disputed issues at the earliest stage of litigation; require active ongoing case management by a single judge; and seek to keep litigation costs proportionate to the issues being litigated;

Whereas, on June 26, 2013, the Court extended the period of the pilot for an additional year through December 31, 2014, to provide the court with more data and a detailed evaluation of the pilot.

Whereas, the Court has now determined that extending the period of the pilot for an additional six months will provide the court with more data and a detailed evaluation. Extending the pilot for an additional six months will eliminate confusion, give the court time to determine whether the rules as piloted achieved the stated goals, and consider what, if any, changes to the Colorado Rules of Civil Procedure should be proposed or adopted prior to the end of the original pilot project.

Now therefore, the Court orders the attached rules adopted for use in the designated cases in the First (Jefferson and Gilpin Counties), Second (Denver County), Seventeenth (Adams County only), and Eighteenth (Arapahoe County only) Districts. The cases to which the rules apply are described in Amended Appendix A to the rules appended to this Directive.

These rules are effective January 1, 2012 and shall be applied to cases filed on or after that date. The pilot project shall apply to all applicable cases filed in the pilot districts up to June 30, 2015, or until further order of the court.

The effect of the pilot will be studied by the Institute for the Advancement of the American Legal System (IAALS) working at the request of the Court. IAALS will issue a report on the effect of the pilot project upon the conclusion of the evaluation.

Done at Denver, Colorado this 11th day of July, 2014.

/s/
Nancy E. Rice, Chief Justice

Civil Access Pilot Project

Applicable to Business Actions in District Court

January, 2012

Civil Access Pilot Project
Applicable to Business Actions in District Court

Pilot Project Rule 1—Scope

1.1. These Rules ("PPR") govern all pretrial process in all actions filed after January 1, 2012 that are part of the pilot project. They will be applied only to business actions as defined in Appendix A. Inclusion in the pilot project will be determined based on the contents of the complaint at the commencement of the action.

1.2. The PPR are not meant to be a complete set of rules. The Colorado Rules of Civil Procedure ("CRCP") will govern except to the extent that there is an inconsistency, in which case the PPR will take precedence.

1.3. At all times, the court and the parties shall address the action in ways designed to assure that the process and the costs are proportionate to the needs of the case. The proportionality factors include, for example and without limitation: amount in controversy, and complexity and importance of the issues at stake in the litigation. This proportionality rule is fully applicable to all discovery, including the discovery of electronically stored information. This proportionality rule shall shape the process of the case in order to achieve a just, timely, efficient and cost effective determination of all actions.

1.4. Continuances and extensions are strongly disfavored. Absent extraordinary circumstances, motions for continuances or extensions will be denied by the court upon receipt and without waiting for a response. Stipulated motions by the parties to continue or extend are not binding on the court and parties should assume the motion will be denied.

Pilot Project Rule 2—Pleadings—Form and Content

2.1. The intent of PPR 2 is to utilize the pleadings to identify and narrow the disputed issues at the earliest stages of litigation and thereby focus the discovery.

2.2. The party that bears the burden of proof with respect to any claim or affirmative defense should plead all material facts that are known to that party that support that claim or affirmative defense and each remedy sought, including any known monetary damages.

2.3. Any statement of fact that is not denied with specificity in any responsive pleading is deemed admitted. General denials of any statement of fact are not permitted and a denial that is based on the lack of knowledge or information shall be so pleaded.

Pilot Project Rule 3—Pleadings and Initial Disclosures

3.1. No later than 21 days after service of a pleading making a claim for relief, the pleading party shall file with the court a statement listing all persons with information related to the claims and a brief description of the information each such individual is believed to possess, whether the information is supportive or harmful. The statement shall also include a certification that the party has available for inspection and copying all reasonably available documents and things

related to the claims, along with a description by category and subject area of the documents and things being disclosed, whether they are supportive or harmful.

3.2. The due date for filing the answer and all other responsive pleadings shall be 21 days following the filing of the statement required by PPR 3.1.

3.3. No later than 21 days after service of a pleading defending against a claim for relief, the pleading party shall file with the court a statement listing all persons with information related to the claims for relief and the defenses asserted and a brief description of the information each such individual is believed to possess, whether the information is supportive or harmful. The statement shall also include a certification that the party has available for inspection and copying all reasonably available documents and things related to the claims and defenses, along with a description by category and subject area of the documents and things being disclosed, whether they are supportive or harmful.

3.4. Parties shall make these disclosures in good faith and may not object to the adequacy of the disclosures until the initial case management conference pursuant to PPR 7.1, at which time they may raise those issues.

3.5. When a party withholds information by asserting that the information is privileged or subject to some other protection, the party shall make the assertion expressly and shall provide a privilege log that describes the nature of the documents, communications, or things not produced or disclosed in a manner which, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection. The privilege log shall be provided at the same time as the initial disclosures required by PPR 3 are filed.

3.6. Each party has an ongoing duty to supplement the initial disclosures promptly upon becoming aware of the supplemental information.

3.7. Unless the court makes a specific determination that failure to disclose in a timely and complete manner was justified under the circumstances or harmless, such failure shall result in one or more of the following:

(a) a denial of the right to use the information not disclosed for any purpose;

(b) a denial of the right to object to the admissibility of the evidence;

(c) a dismissal of all or part of any claim or defense;

(d) assessment of attorney fees and costs; and

(e) any other sanction the court deems appropriate.

3.8. Parties may not stipulate to extend any of the deadlines set forth in this Rule 3. The court shall address any motions for extension immediately, without waiting for a response; and shall deny them absent extraordinary circumstances.

Pilot Project Rule 4—Motion to Dismiss

4.1. The filing of a motion to dismiss shall not eliminate the need to also file an answer. Unless otherwise prohibited by statute, the filing of a motion to dismiss shall not disrupt or interfere with the pleading and disclosure requirements of PPR 3 and the scheduling of the initial case management conference under PPR 7.

Pilot Project Rule 5—Single Judge

5.1. Upon the filing of a complaint, a judge will be assigned to the case for all purposes, and, absent unavoidable or extraordinary circumstances, that judge will remain assigned to the case until final resolution, including any post-trial proceedings. It is expected that the judge to whom the case is assigned will handle all pretrial matters and will try the case.

Pilot Project Rule 6—Preservation of Relevant Documents and Things

6.1. Within 14 days after the filing of an answer, the parties shall meet and confer concerning reasonable preservation of all relevant documents and things, including any electronically stored information. In the absence of an agreement, any party may move for an order governing preservation of such documents and things. The response to such motion shall be filed within 7 days. The court promptly shall enter an order governing preservation of such documents and things.

6.2. Unless directed otherwise by an order of the court, the cost of preserving, collecting and producing electronically stored information shall be borne by the producing party. The court may shift any or all costs associated with the preservation, collection and production of electronically stored information as the interests of justice and proportionality so require.

Pilot Project Rule 7—Case Management Conferences

7.1. Unless requested sooner by any party, the judge to whom the case has been assigned shall hold an initial case management conference no later than 49 days after the answer and responsive pleadings are filed pursuant to PPR 3.2. Each party's lead trial counsel shall attend this conference. At least seven days before the conference, the parties shall submit a joint report setting forth their agreement or their respective positions on matters set forth in the form contained in Appendix B.

7.2. As soon as possible after the initial case management conference, the judge shall issue an initial case management order with respect to each of the matters set forth in the form contained in Appendix B. In determining whether to permit or exclude discovery and pretrial motions, the court shall apply the proportionality factors set forth in PPR 1.3. Modifications to the initial case management order may be made only upon a showing of good cause.

7.3. The number and subject areas of expert testimony, and the dates for production of expert reports and files, shall be set forth in the initial case management order. There shall be no continuances of the trial date solely based on a failure to complete expert disclosures within the deadlines set forth in the case management order.

Pilot Project Rule 8—Ongoing Active Case Management

8.1. The court shall provide active case management from filing to resolution on all pending issues.

8.2. The parties may contact the court clerk by telephone, or as otherwise directed by the court, to arrange for prompt conferences for clarification, modification or supplementation of any of the court's outstanding orders, or for resolving disputes regarding any pretrial matter.

8.3. The court may hold additional status conferences on its own motion.

8.4. A conference may be held in person or by telephone or videoconference, at the court's discretion.

8.5. The trial date shall be set in the initial case management order, and shall not be changed absent extraordinary circumstances.

Pilot Project Rule 9—Discovery

9.1. Discovery shall be limited to matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and shall comport with the factors of proportionality in PPR 1.3.

9.2. Discovery shall be limited in accordance with the initial case management order. No other discovery will be permitted absent further court order based on a showing of good cause and proportionality.

Pilot Project Rule 10—Expert Discovery

10.1(a) In accordance with the case management order, each retained expert and any party or representative of a party who is testifying in part as an expert, shall furnish a report (in the form of the expert report set forth in Appendix C) signed by the expert, with each paragraph initialed by the expert, setting forth his or her opinions, and the reasons for them. Each expert witness report shall, at a minimum, contain:

1. a specific statement of the opinions by the expert and the facts and other information which form the basis for each opinion;

2. a listing of all of the material relied upon by the expert;

3. references to literature which may be used during the witness' testimony;

4. any then-existing exhibit prepared by or specifically for the expert for use at trial;

5. the witness' curriculum vitae including a list of publications over the last 10 years;

6. a list of all trial or deposition testimony given by the witness in the last four years;

7. an accounting of all time spent on the case; and

8. a fee schedule.

(b) The substance of each expert's direct testimony shall be fully addressed in the expert's report. Experts shall be limited to testifying on direct examination about matters disclosed in reasonable detail in their written reports.

(c) The parties shall obtain and voluntarily produce to all other counsel the files of their retained expert witnesses at the time the witness is disclosed. The expert has a continuing duty to make supplemental disclosures of new information and material obtained subsequent to the expert's production of his/her file. The court shall determine what, if any, portion of the supplemental information may be used at trial. See Appendix C for a complete list of what the expert's file shall include. Drafts of the expert report prepared by the expert are not required to be produced.

(d) There shall be no depositions or other discovery of experts.

10.2. Except in extraordinary cases, only one expert witness per side may be permitted to submit a report and testify in any given specialty or with respect to any given issue.

10.3. If any retained expert becomes unavailable to testify at trial, the court, upon good cause shown, should liberally grant a request for substitution by an equivalent expert. Any substituted expert remains subject to all requirements of PPR 10.

Pilot Project Rule 11—Costs and Sanctions

11.1. In addition to the sanctions set forth in PPR 3.7, the court may impose sanctions as appropriate for any failure to timely or completely comply with these PPR's.

AMENDED APPENDIX A:
Actions in the Colorado Civil Access Pilot Project

The case types listed in Section I are included in the Pilot Project; Section II contains specific exclusions from the Pilot Project.

I. INCLUDED ACTIONS

Business Actions. The district court should handle the following types of actions under the Pilot Project Rules for business actions, whether the relief requested is legal or equitable. Pilot project business actions are not limited to "business v. business," but also include "business v. individual" and "individual v. individual" business cases.

(a) Breach of contract actions;

(b) Business tort actions (e.g., unfair competition, fiduciary duty, fraud, misrepresentation);

(c) Actions for statutory and/or common law violations where the breach or violation is alleged to arise out of business dealings (e.g., sales of assets or securities; corporate restructuring; partnership, shareholder, joint venture, or other business agreements);

(d) Actions involving transactions governed by the Uniform Commercial Code;

(e) Actions involving commercial real property;

(f) Owner/investor derivative actions brought on behalf of business organizations;

(g) Actions involving business transactions with commercial banks or other financial institutions;

(h) Actions involving the internal affairs of business organizations;

(i) Actions involving insurance coverage, including directors and officers, errors and omissions, business interruption, environmental, or bad faith;

(j) Actions involving dissolution of corporations, partnerships, limited liability companies, limited liability partnerships or joint ventures;

(k) Private actions for securities fraud under C.R.S. § 11-51-501, et seq., and the common law;

(l) Private antitrust actions brought under the Unfair Practices Act (C.R.S. § 6-2-101, et seq.) or the Colorado Antitrust Act of 1992 (C.R.S. § 6-4-101, et seq.);

(m) Actions involving intellectual property, including state trademark laws;

(n) Professional malpractice actions, excluding those actions listed in Section II(h) below;

(o) Products liability actions.

As used herein, the term "business organization" includes all forms of entities recognized by Colorado law, and applies to single owner or member entities, for profit and nonprofit entities, unincorporated associations, and sole proprietorships.

As used herein, the term "financial institution" includes any bank, savings and loan association, state or federal savings bank, bank holding company, thrift holding company, industrial bank, credit union, mortgage or finance company, credit card company, or collection agency.

II. EXCLUDED ACTIONS

The following types of actions are not subject to the Pilot Project Rules:

(a) Actions solely for the payment of rent on real property;

(b) Colorado Rule of Civil Procedure 120 proceedings;

(c) Isolated motions for the appointment of a receiver that are not part of or attached to a civil complaint stating additional claims;

(d) Actions brought by commercial banks or other financial institutions solely for the collection of debt;

(e) Employment actions arising out of existing or former employment relationships, unless the dispute concerns claims of breach of non-compete covenants or theft of trade secrets;

(f) Actions involving construction defect claims;

(g) Actions subject to the Colorado Governmental Immunity Act;

(h) Medical negligence actions alleging a breach of the standard of care by a health care provider and which are covered under the Colorado Health Care Availability Act (C.R.S. §§13-64-101 to 503);

(i) Actions alleging negligence for physical injuries to one or more individual(s);

(j) Replevin actions under Colorado Rule of Civil Procedure 104;

(k) Administrative agency actions and proceedings, such as those involving the securities commissioner or the insurance commissioner;

(l) Actions involving a statute or rule that contains distinct time frames for the proceedings;

(m) Post-judgment proceedings in aid of satisfaction of a judgment.

APPENDIX B:
Form for Initial Case Management Conference Joint Report of the Parties

<table>
<tr><td>District Court _____County, Colorado
Court Address:</td><td rowspan="2">COURT USE ONLY</td></tr>
<tr><td>Plaintiff(s):
_____,

v.

Defendant(s):
_____,</td></tr>
<tr><td>Attorney or Party Without Attorney (Name and Address):

Phone Number: E-mail:
FAX Number: Atty. Reg. #:</td><td>Case Number:

Division Courtroom</td></tr>
<tr><td colspan="2">INITIAL CASE MANAGEMENT CONFERENCE JOINT REPORT OF THE PARTIES</td></tr>
</table>

Pursuant to Colorado Pilot Project Rule (PPR) 7.1, the parties should discuss each item below. If they agree, the agreement should be stated. If they cannot agree, each party should state its position. If an item does not apply, it should be identified as not applicable. This form shall be submitted to the court in editable format.

1. **Date for joinder of additional parties**: _____
2. **Amending or supplementing pleadings:** _____
3. **Non-parties at fault:** _____
4. **The timing of mediation or other alternative dispute resolution:** _____
5. **Dispositive motions:** _____

6. **The issues to be tried:** _____
_____
_____
_____

7. **An assessment of the application to the case of the proportionality factors in PPR 1.3:** _____
_____
_____
_____

8. **Production, continued preservation, and restoration of electronically stored information, including the form in which electronically stored information is to be produced and other issues relating to electronic information, including the costs:**
_____
_____
_____
_____

9. **Proposed discovery and limitations on discovery, consistent with the proportionality factors in PPR 1.3. Counsel will be required to represent to the Court at the conference that they have discussed the costs of the proposed discovery with their clients, or state to the court why they have not done so.**

    a. **adequacy of the initial disclosures:** _____

    b. **limitations on scope of discovery:** _____

    c. **limitations on the types of discovery**: _____

    d. **limitations on the number of written discovery requests:** _____

    e. **limitations on the number and length of depositions, and/or the total time of depositions allowed to each party:** _____

    f. **limitations on persons from whom discovery can be sought**: _____

    g. **limitations on the restoration of electronically stored information:** _____

    h. **cost shifting/co-pay rules, including the allocation of costs of the access to and production of electronically stored information:** _____

    i. **any other cost issues:** _____

10. **Proposed dates for:**

a. **commencement of fact discovery:** _____

b. **completion of fact discovery:** _____

c. **disclosure of trial witnesses:** _____

d. **exchange of all trial exhibits:** _____

e. **exchange of all demonstrative exhibits:** _____

11. The amount of time required for the completion of all pretrial activities and the approximate length of trial: _____

12. Proposed date for trial: _____

13. Expert witnesses: _____

14. Proposed dates for:

a. **production of expert reports:** _____
   i. **Plaintiff:**_____
   ii. **Defendant:**_____

b. **production of rebuttal expert reports:** _____

c. **production of expert witness files:** _____

15. Limitations on experts' fees to be taxed as costs: _____

16. Computation of damages and the nature and timing of discovery relating to damages: _____

17. Other appropriate matters: _____
_____
_____
_____
_____

DATED this ____ day of _____, 20____.

[signature block]

_____
[Attorney for Plaintiff]

[signature block]

_____
[Attorney for Defendant]

APPENDIX C:
Form for Disclosure of Expert Witness(es)

District Court _____County, Colorado Court Address:	
Plaintiff(s): _____, v. Defendant(s): _____,	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
__[NAME OF PARTY]__ DISCLOSURE OF EXPERT WITNESS[ES]	

__[NAME OF PARTY]__, by counsel, pursuant to Colorado Rule of Civil Procedure ("CRCP") 26(a)(2), hereby discloses persons who may present evidence at trial pursuant to Colorado Rules of Evidence 702, 703, or 705:

I. WITNESS[ES] RETAINED OR EMPLOYEE[S] OF DISCLOSING PARTY.

The following person[s] have either (1) been retained or employed to provide expert testimony, or (2) are employees of the disclosing party whose duties regularly include giving expert testimony and for each such expert the following information is submitted:

A. NAME, PROFESSIONAL ADDRESS, AND TELEPHONE NUMBER OF EXPERT.

B. A REPORT WHICH SHALL CONTAIN THE FOLLOWING:

1. A Specific Statement Of The Opinions By The Expert And The Facts And Other Information Specifically Relating To And Forming The Basis For Each Opinion:

2. A Listing Of All Of The Material Relied Upon By The Expert:

3. References To Literature Which May Be Used During The Witness Testimony:

4. Any Existing Exhibit Prepared By Or Specifically For The Expert For Use At Trial; Any Additional Exhibits To Be Used At Trial Shall Be Disclosed Consistent With The Deadlines Set Forth In The Case Management Order At 10(d) And (e):

5. Witness' Curriculum Vitae, Including A List Of Publications Over The Last 10 Years:

6. A List Of All Trial Or Deposition Testimony Given By The Witness In The Last Four Years:

Name of Case	Court	Case Number	Retained By	Date	D/T

7. Accounting Of All Time Spent On The Case:

8. A Fee Schedule:

9. A Certification That This Expert Has:

[ ] prepared or reviewed the report,
[ ] signed the report and,
[ ] initialed each paragraph of the report.

[Attach report hereto as an exhibit.]

C. CERTIFICATION THAT THE FILE FOR THE EXPERT HAS BEEN PRODUCED

Except to the extent information or materials are protected under the Colorado Rule of Civil Procedure 26(b)(5), the term "File" includes exhibits which the expert may use at trial, e-mails, notes of any kind, billing documentation, time logs, correspondence, literature references which the expert reviewed or relied upon as the basis of his opinion, and all reports or memos describing the experts opinions related to this litigation. The materials produced should also include copies of any chronologies, outlines, summaries or similar materials provided by counsel or created by the expert in either written or electronic form.

Materials common to both parties (depositions, pleadings, voluminous documents supplied by the opposing party) need not be produced if they are included in the *Listing Of All Of The Material Relied Upon By The Expert*, unless they contain written notations, highlighting or other markings made by the expert.

II. WITNESS[ES] NOT RETAINED OR EMPLOYEE[S] OF DISCLOSING PARTY.

The following person[s] may be called to provide expert testimony but have neither (1) been retained to provide expert testimony, nor (2) are employees of the disclosing party whose duties regularly involve giving expert testimony:

A. NAME, PROFESSIONAL ADDRESS, AND TELEPHONE NUMBER OF WITNESS.

1. Qualifications:

2. Substance Of All Opinions To Be Expressed And The Basis And Reasons Therefor:

DATED this ____ day of _____, 20____.

[signature block]

_____

[Attorney for Disclosing Party]

MOMENTUM FOR CHANGE

THE IMPACT OF THE COLORADO CIVIL ACCESS PILOT PROJECT

early case management

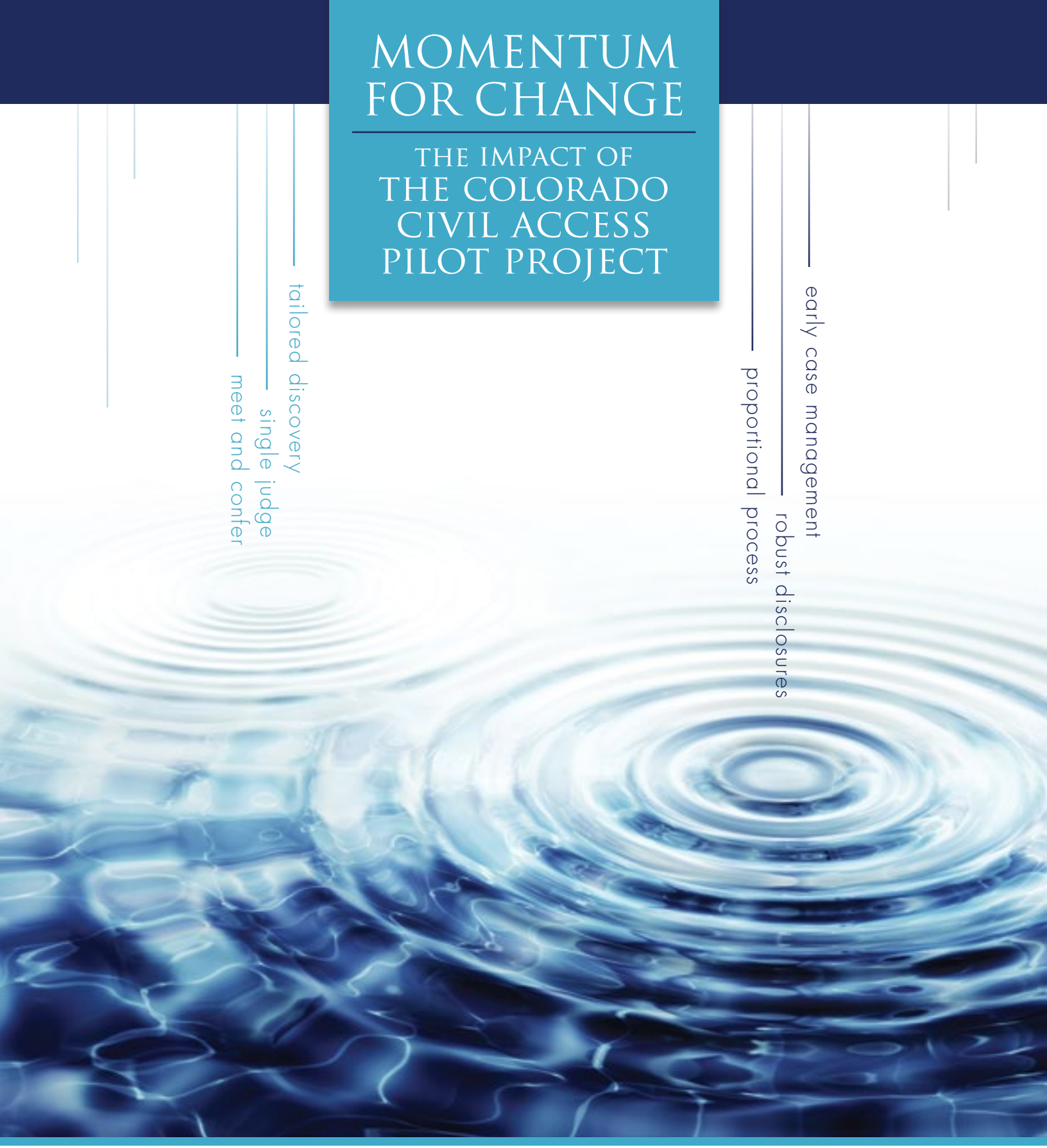
robust disclosures

proportional process

tailored discovery

single judge

meet and confer



RULE ONE INITIATIVE

IAALS
EMPOWERING IMPROVEMENT. ADVANCING EXCELLENCE.
INSTITUTE for the ADVANCEMENT of the AMERICAN LEGAL SYSTEM
UNIVERSITY of DENVER

SJI
State Justice Institute

MOMENTUM FOR CHANGE

THE IMPACT OF THE COLORADO CIVIL ACCESS PILOT PROJECT

Corina D. Gerety
Director of Research
&
Logan Cornett
Research Analyst

RULE ONE INITIATIVE

October 2014

This report was developed under grant number SJI-12-N-127 from the State Justice Institute. The points of view expressed are those of the authors and do not necessarily represent the official position or policies of the State Justice Institute.

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

IAALS—Institute for the Advancement of the American Legal System

John Moye Hall, 2060 South Gaylord Way, Denver, CO 80208

Phone: 303-871-6600

http://iaals.du.edu

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 solutions to problems in our system in collaboration with the best minds in the country. 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.

Rebecca Love Kourlis	Executive Director
Brittany K.T. Kauffman	Director, *Rule One Initiative*
Janet L. Drobinske	Legal Assistant, *Rule One Initiative*
Corina D. Gerety	Director of Research
Logan Cornett	Research Analyst
Caitlin Anderson	Research Legal Assistant

Rule One is an initiative of IAALS dedicated to advancing empirically informed models to promote greater accessibility, efficiency, and accountability in the civil justice system. Through comprehensive analysis of existing practices and the collaborative development of recommended models, the *Rule One Initiative* empowers, encourages, and enables continuous improvement in the civil justice process.

ACKNOWLEDGEMENTS

Our gratitude to the following organizations and individuals for their important contributions to the evaluation:

- The State Justice Institute for supporting this research under grant number SJI-12-N-127.
- The Colorado Supreme Court and the Office of the Colorado State Court Administrator for facilitating this research as an integral part of the pilot project.
- Duncan Lawrence (Ph.D.) and Gilad Wilkenfeld of Telluride Research Group, LLC for their invaluable work on the statistical methods and data analysis.
- Jane Macoubrie (Ph.D.) for her assistance in the selection of comparison courts.
- Caitlin Anderson, Catherine Afshar (M.S.L.A.), Shannon Love (J.D.), Kylie Osterloh, Tanya Sevy (J.D.), Roman Valencia, and Brycen Williams, for their help in collecting the data for analysis.
- The Colorado judges and attorneys who generously donated their time and expertise by participating in or contributing to this research.

We also thank Melinda Taylor for serving as the point of contact between the IAALS evaluation team and the courts, ensuring communication and coordination on CAPP implementation, and conducting outreach in the Colorado legal community.

Finally, we appreciate Colorado's commitment to monitoring and measuring innovations, thereby helping to ensure real improvements to the civil justice process.

TABLE OF CONTENTS

Executive Summary

Beginning in 2012, Colorado instituted a pilot project in five state district courts to test a new set of pretrial procedures for civil business cases. These procedures relate to pleadings, disclosures, discovery, and case management. They were designed to increase access to civil justice, by reducing cost and delay while maintaining a fair process.

This is the final report on IAALS' evaluation of the project. As a whole, the Colorado Civil Access Pilot Project (CAPP) has succeeded in achieving many of its intended effects:

- The docket study shows that CAPP reduces the time to resolution over both existing procedures (standard and simplified). Moreover, four out of five surveyed attorneys indicated that the time was proportionate to the subject CAPP case and the same proportion of surveyed judges indicated that the process allowed sufficient time to fairly resolve the CAPP cases on their dockets.
- Three out of four surveyed attorneys indicated that litigation costs were proportionate to the subject case.
- The docket study and survey data indicate that the CAPP process is not tilted in favor of either plaintiffs or defendants.
- The docket study shows that CAPP cases are more likely to have a single judge. In addition, the parties are 4.6 times more likely to see that judge earlier and will see him or her twice as often. CAPP's early, active, and ongoing judicial management of cases received more positive feedback in the surveys than any other aspect of the project, with many calling for it to become a permanent feature of the rules.
- The docket study and survey data suggest that CAPP reduces motions practice (although the project has not had a measurable effect on the number of motions to dismiss filed during the pleadings stage).
- Surveyed judges consider the initial case management conference to be the most useful tool in shaping the pretrial process, including discovery and timelines, proportionately to the dispute. A majority of surveyed attorneys with discovery in their subject CAPP case indicated that the discovery actually conducted was either less than or equal to the amount set forth in the initial case management order, was proportionate to the needs of the case, and resulted in effective information exchange.

Specific parts of the rules have presented issues that ought to be considered in any future rulemaking process:

- The rolling and staggered deadlines for the initial stages of the CAPP process (pleadings, initial disclosures, and the initial case management conference) raise

logistical issues. In addition, the plaintiff's responsibility to file initial disclosures before the defendant appears may increase the resources expended to obtain a default judgment.

- There must be consistent compliance with and enforcement of the expanded pleading and disclosure requirements for them to have the intended effect of providing more information prior to discovery.
- While CAPP has resulted in a decrease in the number of motions for extension of time filed and granted, and that has a beneficial effect on time to disposition, surveyed attorneys and judges find that the "extraordinary circumstances" standard is challenging to apply.
- The CAPP definition of a "business action" has resulted in confusion and inconsistency in application.

Finally, there are aspects of the pilot project about which conclusions cannot be drawn from the data. These include the effects of the expert witness limitations and the impact of the CAPP rules on the trial rate.

Overall, this project provides a rich source of information to inform more permanent rules changes aimed at achieving a just, speedy, and inexpensive civil justice process in Colorado—and around the nation.

Introduction

In 2011, the Colorado Supreme Court authorized the Civil Access Pilot Project Applicable to Business Actions in District Court (CAPP) and designated IAALS—the Institute for the Advancement of the American Legal System—to study its effects.[1]

This report contains the final results of IAALS' systematic data collection, which took place over the course of more than two years. It is intended to provide feedback on CAPP's new set of rules for pleading, disclosure, discovery, and case management in civil cases. IAALS hopes that information about this particular innovation will be helpful to decision-makers, in Colorado and elsewhere, who are committed to improving the legal process.

This report follows a preliminary report released in April of 2014.[2] Since that time, more cases within the study sample have resolved, and the results in this Final Report have been adjusted to reflect the inclusion of these new data, as well as additional analyses conducted. The overall conclusions remain substantially unchanged.

All referenced appendices are available online at **iaals.du.edu/ResearchAppendices** for readers seeking more detail.

Background

In recent years, there has been growing concern that the American civil justice process is not living up to its promise of a just, speedy, and inexpensive determination of every action. Majorities of surveyed attorneys and judges nationwide have identified the following challenges: 1) cost is a concern that affects court access, 2) delay increases cost, and 3) discovery is responsible for unnecessary cost and delay.[3]

Following the 2009 Final Report on the joint project of IAALS and the American College of Trial Lawyers Task Force on Discovery and Civil Justice,[4] and the ensuing 2010 Conference on Civil Litigation at the Duke University School of Law (sponsored by the federal Advisory Committee on Rules of Civil Procedure),[5] a flurry of federal and state rules projects began to take shape around the country.[6]

1 Chief Justice Directive 11-02: Adopting Pilot Rules for Certain District Court Civil Cases (Colo. amend. June 2013), *available at* http://www.courts.state.co.us/Courts/Supreme_Court/Directives/11-02amended%207-11-14.pdf [hereinafter Chief Justice Directive 11-02].

2 Corina Gerety & Logan Cornett, Inst. for the Advancement of the Am. Legal Sys., Preliminary Findings on the Colorado Civil Access Pilot Project (2014), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Preliminary_Findings_on_CAPP.pdf.

3 Corina Gerety, Inst. for the Advancement of the Am. Legal Sys., Excess & Access: Consensus on the American Civil Justice Landscape 8 (2011), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Excess_Access2011-2.pdf.

4 Am. Coll. of Trial Lawyers Task Force on Discovery & Inst. for the Advancement of the Am. Legal Sys., Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System (rev. ed. 2009), *available at* http://iaals.du.edu/images/wygwam/documents/publications/ACTL-IAALS_Final_Report_rev_8-4-10.pdf.

5 *See* Memorandum from the Honorable Mark R. Kravitz, Chair, Standing Committee on Rules of Practice and Procedure, to the Honorable Lee H. Rosenthal, Chair, Standing Committee on Federal Rules of Civil Procedure (May 17, 2010) (on file with authors).

6 *See* IAALS' *Action on the Ground* interactive map at http://iaals.du.edu/initiatives/rule-one-initiative/action-on-the-ground.

Colorado is familiar with the spirit of innovation, and a committee formed to develop and propose a pilot project for state district court. This committee was comprised of "local members of the American Board of Trial Advocates and the American College of Trial Lawyers; leadership from the Colorado Bar Association, the Colorado Trial Lawyers Association, and the Colorado Defense Lawyers Association; and other experienced members of the Colorado trial bar and judiciary."[7] The Colorado Civil Access Pilot Project arose out of that effort.

This report on CAPP complements a range of information and literature on rules projects around the country, available on the IAALS website at **http://iaals.du.edu/initiatives/rule-one-initiative/implementation/P0.**

The Colorado Civil Access Pilot Project (CAPP)

CAPP seeks to increase access to civil justice through a new set of pretrial rules designed to bring the disputed issues to light at the earliest possible point, tailor the process proportionally to the needs of the case, provide active case management by a single judge, and move the case quickly toward trial or other appropriate resolution.

The CAPP rules were created for state district (general jurisdiction) courts, and apply to "business actions" as specifically defined based on the claims set forth in the initial complaint. They are not a complete set of rules; rather, the Colorado Rules of Civil Procedure govern any aspect not addressed. The CAPP rules include the following components:

- Proportionality principles guide the application and interpretation of the rules.
- To help identify and narrow the disputed issues, complaints and responsive pleadings should include all material facts; general denials are deemed admissions.
- Initial disclosures are more robust, accompanied by a privilege log, filed with the court, and on a staggered schedule (the plaintiff must make disclosures before the defendant answers). Mandatory sanctions accompany the failure to properly disclose unless deemed "justified under the circumstances or harmless."
- Motions to dismiss do not stay the obligation to file an answer—or any of the pleading, disclosure, or case management conference requirements.
- The parties meet and confer on preservation shortly after the answer. They also prepare a joint case management report containing a statement of the issues, a proportionality assessment, proposed timelines, and proposed levels of discovery.
- The judge holds an initial case management conference with lead counsel to shape the pretrial process to the needs of the case. Permitted discovery (including expert discovery) and all timelines (including the trial date) are then set forth in the case management order. This order can be modified only upon a showing of "good cause."

7 State of Colorado Judicial Branch, A History and Overview of the Colorado Civil Access Pilot Project Applicable to Business Actions in District Court, http://www.courts.state.co.us/userfiles/file/Court_Probation/Educational_Resources/CAPP%20Overview%207-11-13.pdf (last visited Aug. 25, 2014).

- The scope of discovery is limited to matters that would "enable a party to prove or disprove a claim or defense or to impeach a witness," and is subject to proportionality considerations.
- Only one expert witness per side per issue or specialty is permitted, and expert discovery and testimony is limited to the expert's report. No depositions of expert witnesses are permitted.
- The judge assigned to the case is to handle all pretrial matters and try the case. This judge actively manages the case, and the parties may contact the court to arrange "prompt conferences" to address any pretrial issue.
- Continuances and extensions are strongly disfavored and are to be denied absent "extraordinary circumstances," even if stipulated.

Chief Justice Directive (CJD) 11-02 implemented the pilot project to test the new rules and provided the following project dimensions:

- The rules were adopted for use in the First (Jefferson and Gilpin Counties), Second (Denver County), Seventeenth (Adams County only) and Eighteenth (Arapahoe County only) Judicial Districts, to be applied to "business actions" as further delineated in the rules.
- The CJD initially made the rules effective from January 1, 2012, through December 31, 2013. The project was later extended through June 30, 2015, to allow the Court more time to "consider what, if any, changes to the Colorado Rules of Civil Procedure should be proposed or adopted."

Appendix 1 contains the CJD, the CAPP rules, the special definition of a "business action" (Amended Appendix A to the rules), the form for the joint case management report of the parties (Appendix B to the rules), and the form for disclosure of expert witnesses (Appendix C to the rules). More information on the pilot project is also currently available on the Colorado Judicial Branch website at **http://www.courts.state.co.us/Courts/Civil_Rules.cfm** (including a History and Overview of the Colorado Civil Access Pilot Project, as well as a CAPP Frequently Asked Questions document).

Evaluation Approach

Goals and Hypotheses

At the outset of the pilot project, IAALS established ten hypotheses to test, based on the project's goals:

It is hypothesized that the CAPP rules will be associated with…

- A reduction in time to case resolution;
- A decrease in the cost of case resolution;
- The maintenance of a fair process;
- An increase in the level of judicial case management;
- A decrease in the number of judges per case;
- A decrease in motions practice;
- A decrease in discovery practice;
- An increase in trials;
- A decrease in trial time; and
- An increase in the proportionality of the process to the needs of the case.

While some of these hypotheses—such as the level of judicial case management—are not readily susceptible to direct measurement, IAALS made every effort to obtain useful data in one way or another, even if those data are necessarily limited or qualified.

Moreover, given the nature of this research as a program evaluation, there was no attempt to limit information gathering or analysis to the hypotheses set forth in advance. Rather, the approach was to gain a full understanding of CAPP—both in theory and practice.

Study Methods

This research utilizes multiple methods, combining quantitative and qualitative research, to view CAPP from different perspectives and to help overcome some of the methodological shortcomings associated with any single approach.

Docket Study

Method

The docket study consisted of electronic court case file review and analysis. To help isolate the impact of the CAPP rules from other factors (i.e., reduce the effects of selection bias and maturation), the study included four sets of cases:

	Pre-Implementation	*Post-Implementation*
CAPP Courts	Baseline Pilot Set	Pilot Set
Comparison Courts	Baseline Comparison Set	Comparison Set

Comparison Courts: To select a set of comparison courts that would be as similar as possible to the set of pilot courts (in the aggregate), a number of demographic and court composition factors were analyzed. The factor that ultimately carried the most weight was caseload. The comparison courts are: Boulder, Douglas, El Paso, Larimer, and Weld Counties.

Time Period: The pre-implementation and post-implementation groups each encompass one year of cases, but form a mirror image. The pre-implementation cases *closed* between January and December of 2010, regardless of when they were filed.[8] The post-implementation cases were *filed* between July 2012 and June 2013, regardless of when they closed.[9] This design

8 Note that "closed" refers to cases that had an administrative closing event in the stated timeframe. Closing does not necessarily correspond with case resolution for the purpose of this study.

9 The time period for evaluation was selected so as to exclude the cases filed during the first six months of the project, recognizing that there is a learning curve that naturally accompanies any new process.

ensured that time to disposition (a dependent variable) did not influence inclusion in or exclusion from the study, while allowing the evaluation to conclude within a reasonable period of time.

Included Cases: One challenge of this study, particularly with respect to the baseline and comparison sets, was the identification of subject cases. The CAPP rules apply to a specially-defined set of "business actions" based on the claims set forth in the initial complaint. This definition is unrelated to any existing category of cases and is subject to differing interpretations. To ensure the likeness of cases in each of the four data sets given that the pilot courts would be designating CAPP cases, it was necessary to adopt the strictest interpretation for study purposes. Accordingly, only those cases *clearly* included under the plain language of Amended Appendix A were selected for the docket study—although the judges actually applied the CAPP rules to a broader range of cases.

Excluded Cases: The docket study aimed to evaluate the effects of the CAPP rules on standard litigation when put into practice. Thus, certain cases were excluded even if they met the definition of a "business action":

- Due to the substantial proportion of cases that end at an early point and the need to understand the operation of the rules throughout the pretrial process, cases without any defense appearance were excluded. The docket study thus examines the impact on cases that were at least minimally contested, defined as at least one pre-resolution filing by any defendant. The attorney and judge surveys nonetheless provide insight into application of the CAPP rules to cases resolved by early voluntary dismissal or by default judgment for failure to answer.
- Cases that were transferred between courts or consolidated with other cases were excluded to prevent double counting, to ensure accurate case analysis, and to reduce the risk that different procedures were applied at different times in the same case.
- Cases with distinct procedures that could be easily identified from the record, including class actions, were excluded to allow for direct comparison between the CAPP and standard processes.
- Recognizing limits on the time to conduct the evaluation, cases in both pre-implementation baseline sets that did not fall within the 90th percentile for time to disposition were excluded.

Sampling: The docket study analyzed a simple random sample from each of the four sets of cases.[10] First, a random sample was pulled from those existing court case types that could include "business actions" as defined for CAPP purposes (see Appendix 2 for a list of these case types) or, for the pilot set, those cases that were coded as having proceeded under CAPP. Second, the initial complaint in each sampled case was reviewed in the same order as randomly selected, and cases clearly falling within Amended Appendix A (and the other study criteria) were designated for inclusion in the study and underwent thorough review based on court documents and records.[11]

10 A stratified sampling approach was not feasible due to the lack of information on the distribution of CAPP "business actions" across courts.

11 In general, about 10 complaints had to be reviewed for each CAPP-eligible case in the study. Importantly, even those cases that the pilot courts designated as CAPP cases underwent this sampling process to ensure consistency in designation across all four datasets. Anywhere from about 20 to 40 data points (depending on data set and other case particulars) were collected from the records and documents for each included case via the state's online case management systems, Eclipse and ICCES.

In the final count, there were 859 cases in the docket study sample. However, the specific procedure applied was not clear from the court record in 19 of those cases. Accordingly, the analysis includes 840 total cases. This number proved sufficient to draw reliable conclusions.[12]

Modeling Approach: This evaluation used a three-pronged approach to analyzing the docket data: 1) difference-in-differences, 2) dependent variable-appropriate models, and 3) matching. The difference-in-differences approach is widely used to evaluate the impact of policy changes across many disciplines, as it is a pragmatic and readily-understood design capable of isolating effects. However, because this approach can exaggerate the impact of a program when the outcome variables are discrete or categorical rather than continuous, an appropriate alternative model (hazard, count, logit, or fractional logit) was also employed. Finally, to verify the results, each of the models was applied to a sub-sample of matched cases (groups of cases having the same characteristics except that some utilized the CAPP rules and some did not).[13]

The combination of the three approaches helps to ensure that conclusions drawn are meaningful and not simply a function of a particular statistical method. Where indicated, the docket study results control for the following: case type, court, number of plaintiffs, plaintiff type, plaintiff representation type, number of defendants, defendant type, defendant representation type, and resolution type.[14]

An additional 48 cases have resolved since the preliminary analysis, leaving only 25 of 840 cases still pending at the time of final analysis. The unresolved cases did not have the opportunity to fully experience many of the outcomes of interest.[15] To prevent those cases from biasing the results, they were removed from the analyses where possible and appropriate for the outcome of interest. Please refer to Appendix 3 for more information on the docket study methodology and the data tables for each model.

Procedures Examined: Generally, civil cases filed in Colorado district court are subject to either the standard procedure (i.e., following CRCP 16 and 26) or the voluntary simplified procedure (*i.e.*, following CRCP 16.1, for cases under $100,000 in monetary damages). The procedure used in each baseline or comparison case was identified so that any differences potentially attributable to the two distinct procedures used in non-CAPP cases could be parsed out.

---

12 Prior to data collection, it was roughly estimated that 860 cases (215 from each set) would be needed for 95% confidence and power, with a 0.15 effect size (using Cohen's algorithm to calculate sample size in a multivariate regression framework). Upon analyzing the collected data, it was determined that an 840-case sample was large enough to detect the effects of the CAPP rules.

13 Matching provides a pseudo-experimental framework when an experimental framework is not possible in the real world (i.e., the assignment of the CAPP rules to cases was not random) by reducing imbalance between the treatment (pilot) and control (baseline pilot, baseline comparison, and comparison) groups.

14 Plaintiff and defendant types included "all individuals" (all plaintiffs or defendants were individuals), "all entities" (all plaintiffs or defendants were businesses or other entities), and "mixed" (indicating that the plaintiffs or defendants consisted of a mixture of individuals and entities). Plaintiff and defendant representation types included "all represented" (indicating that all plaintiffs or defendants were represented by an attorney), "all self-represented" (indicating that all plaintiffs or defendants were self-represented), and "mixed" (indicating that the plaintiffs or defendants consisted of a mixture of represented and self-represented litigants).

15 This concept is known as "right-censoring." Censoring happens when a variable's value is not fully known. With right-censoring, it is known that a data point is above a certain value but it is not clear by how much.

Sample Description

Appendix 4 contains tables and graphs with more information on the cases included in the sample. The following is simply a brief summary:

Districts: The following table shows the representation of each court in the sample, all data sets combined.

Pilot Courts	*% of Total*	*Comparison Courts*	*% of Total*
Adams	5.4%	Boulder	11.2%
Arapahoe	9.5%	Douglas	9.6%
Denver	26.4%	El Paso	16.9%
*Gilpin**	0.0%	Larimer	6.4%
Jefferson	8.6%	Weld	6.0%

** Because Gilpin County is so small, and the number of CAPP cases in that court have been few, it has almost no presence in the research.*

Case Types: At least 50% of the cases in each data set were contract cases, as determined by IAALS researchers based on the initial complaint. The next most common case types were business tort and insurance cases, but each of those types made up less than 15% of each data set.

Number of Parties: It was most common for cases to have a total of two parties, regardless of data set. The average total number of parties was 3.5. The lowest number of parties was 2; the highest was 24.

Resolution: Settlement was the most common resolution for the cases in all data sets, with between approximately 62% and 69% being resolved in this way. None of the other methods of resolution rose above 15% for any data set. About 9% of comparison cases and about 3% of pilot cases had not reached resolution as of the time of writing. However, all baseline cases had resolved. The average time from filing to resolution across all data sets was 270 days. The shortest time was 16 days; the longest was 1,367 days.

Case-Specific Attorney Surveys

The second aspect of the evaluation involved surveying the lead attorneys in closed cases. Most of the attorney survey questions were case-specific, but there was also an opportunity for the attorneys to provide more general feedback on the pilot project.

Method

Upon filing and initial review of the complaint, pilot courts assigned a CAPP code to each case in the project. The attorney survey instrument (see Appendix 5) was sent to the lead attorney for each party (i.e., the attorney listed first in the online case management system) in coded cases that had a closing event from May 2012 through December 2013.[16] The attorney survey includes a different and broader range of cases than the docket study, due to a more generous judicial application of the "business action" standard and the inclusion of *all* coded cases upon closure rather than a more limited sample of cases.

With respect to the CAPP case survey, the overall response rate was 17.3%.[17] Because surveys were sent out for each designated case, some attorneys received multiple surveys. As most of the survey questions were case-specific, this was not generally a problem. However, for the open-ended opinion questions, only the final response for each attorney (identified by a code) has been analyzed. In addition, all reported percentages exclude respondents who left the question blank.

16 It should be noted that the court's administrative closing, upon which the survey case list was generated, does not always correspond with resolution of the case (all pretrial proceedings concluded). Therefore, a threshold question at the beginning of the survey asked whether the case had in fact resolved. If the case was unresolved, the survey ended and the respondent was informed that a new survey would be sent after the next administrative closing event in the case. In addition, the survey was administered electronically, although paper versions were sent to those who did not have an email address listed in the Colorado Legal Directory.

17 A total of 4,005 surveys were sent out, and there were 693 valid responses.

Sample Description

Appendix 6 contains tables and graphs with more information on survey demographics. The following is simply a brief summary:

Districts: More than half (54%) of the attorney survey responses related to CAPP cases in Denver. The portions attributable to the three other large counties were: Arapahoe, 20%; Jefferson, 17%; and Adams, 10%. Only a single response was received from Gilpin County.

Case Types: Consistent with the docket data, over 50% of respondents indicated that the subject case was a contract dispute. However, it should be noted that several case types not intended to be included in CAPP appeared in the population of attorney survey CAPP cases (e.g., construction defect, employment, medical malpractice, personal injury, etc.), indicating some confusion with regard to designation of CAPP cases.

Number of Parties: A plurality of responses indicated a total of two parties in the subject case, as is true with the docket data. The average total number of parties was 3.3, which is, again, consistent with the docket data. The minimum total number of parties was one; the maximum total number of parties was 40.

Party Represented: Approximately two out of three surveys (62%) were completed by an attorney who represented a plaintiff in the subject case, while about one-third (36%) were completed by a defendant's attorney. The remaining 2% of respondents selected "other."

Billing Structure: A majority (68%) of respondents indicated their firm follows an hourly billing structure. Another 22% indicated working on a contingency fee basis.

Amount in Controversy: About 60% of respondents indicated that the subject case had between $0 and $100,000 in controversy. About 6% of respondents indicated the amount in controversy exceeded $1,000,000. The median amount was $54,100, the mean amount was $741,353, and the highest amount was $200,000,000. One in five respondents reported important aspects of the case aside from amount in controversy (non-monetary relief, issues of importance beyond the particular case, or recoverable attorney fees)

Alternative Dispute Resolution: Exactly 30% of respondents indicated participating in some form of ADR in the subject case.

Discovery: About 40% of respondents indicated that discovery took place in the subject case. Of those who indicated that discovery was conducted, about 37% stated that e-discovery was conducted.

Resolution: As was true with the docket data, settlement was the most common mode of resolution, with about 59% of respondents reporting that the subject case resolved in this way. The second most common mode of resolution was default judgment (17%).

Judge Surveys

The third aspect of the evaluation involved surveying participating judges in the pilot courts concerning management of CAPP cases and views of the pilot project.

Method

The judge survey instrument (see Appendix 7) was administered electronically to all pilot judges on a quarterly basis, beginning the second quarter of 2012 and finishing the fourth quarter of 2013. The survey sought information about the CAPP cases on the judge's docket, as a whole, during the relevant quarter. A number of questions also solicited the judges' opinions about the project more generally.

With respect to the judge surveys, the overall response rate was 43%.[18] Because surveys were sent out each quarter, the judges could complete multiple surveys over the course of the project. For the open-ended opinion questions (i.e., not quarter-specific), only the final response for each judge (identified by a code) has been analyzed.

Sample Description

Appendix 8 contains tables and graphs with more information on judge survey demographics. The following is simply a brief summary:

Districts: Considering the total pool of survey responses received, the proportion coming from each participating court was: Adams, 13%; Arapahoe, 13%; Denver, 41%; and Jefferson, 34%. (Gilpin County shares Jefferson County judges.)

Docket Composition: Exactly 59% of responses indicated that the responding judge had a dedicated civil docket, while the other 41% indicated the judge had a mixed docket.[19]

CAPP Case Types: As is consistent with the docket data and attorney survey responses, respondent judges reported contract disputes as the most common type of CAPP case in their court. As with the attorney surveys, however, there is some indication of confusion in designating CAPP cases (e.g., inclusion of personal injury).

Discussion Groups, Questions, and Unsolicited Feedback

In an effort to gain as much insight as possible into the pilot project, IAALS also obtained information through less formal mechanisms. While this information cannot be considered representative of the overall CAPP experience and will not be systematically reported, it nevertheless serves to inform the docket and survey data.

Methods

Discussion Groups: The IAALS evaluation team attended a number of discussion sessions with various groups of participating judges. IAALS was also invited to a discussion with members of the Rocky Mountain Paralegal Association, which was helpful in illuminating the perspective of litigation support staff. These events allowed for a more free-flowing discussion, and the participants were able to react to each other's perspectives.

Questions: The IAALS evaluation team maintained a running list of the questions posed to the court liaison by attorneys, litigation support staff, self-represented litigants, and others throughout the project. These questions are useful for understanding points of confusion or ambiguity in the CAPP process.

Unsolicited Feedback: A number of individuals contacted IAALS directly to provide feedback.

---

18 Overall, 202 surveys were distributed to pilot court judges, with 86 valid responses submitted.

19 For research purposes, those dockets consisting of 95% or more civil cases were considered dedicated civil dockets.

Evaluation Results

As a whole, the CAPP process succeeded in achieving many of its intended effects, including a reduced time to disposition, early and appropriate case management, proportional discovery and costs, and a lower level of motions practice. Certain aspects of the rules have presented challenges that ought to be considered in any future rulemaking process.

Time

CAPP cases resolve sooner and the time to resolution is considered proportionate and sufficient.

One of CAPP's main goals is to bring cases to a resolution more quickly. For this evaluation, a case was considered resolved when the last outstanding claim was disposed with respect to the last remaining party.

The docket study found that CAPP is associated with a statistically significant reduction in the time it takes to resolve a case.

All else equal,[20] applying the CAPP rules increases the probability of an earlier resolution by 69% over the standard procedure. This is even greater than the impact of Rule 16.1, which applies only to cases of $100,000 or less, and increases the probability of an earlier resolution by 38% over the standard procedure.[21] In terms of time, application of the CAPP rules reduces the median case duration by about 59 days over the standard procedure (i.e., looking at a snapshot in time when 50% of the cases have resolved).[22] Even when none of the variable controls are applied, it is clear that cases proceeding under CAPP resolve more quickly overall. See Figure 1.

The association between CAPP and a reduced time to disposition is even stronger for cases that end in settlement.

The docket study found that for settled cases, application of the CAPP rules increases the overall probability of an earlier resolution by 89% over the standard procedure, all else equal. Again, this is even greater than the impact of Rule 16.1, which increases the probability of earlier resolution over the standard procedure by 46% in settled cases. In terms of time, the CAPP rules reduce the median case time by 71 days for settled cases. See Figure 2, which shows the effect of CAPP even when none of the variable controls are applied. It should be noted that the CAPP rules were not shown to affect the settlement rate.

20 The phrase "all else equal" is used to indicate that the analysis controls for the known variables described in the docket study method section: case type, court, number of plaintiffs, plaintiff type, plaintiff representation type, number of defendants, defendant type, defendant representation type, and resolution type.

21 Here, it is important to keep in mind that the docket study excluded cases without an appearance by any defendant, as it was designed to evaluate the procedures in cases that are at least minimally contested. Because over half of the cases proceeding under Rule 16.1 end in default judgment (see Corina Gerety, Inst. for the Advancement of the Am. Legal Sys., Measuring Rule 16.1: Colorado's Simplified Civil Procedure Experiment 23 (2012), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Measuring_ Rule_16-1.pdf), the CAPP docket study cannot speak to a large portion of those cases. The attorney survey comments, discussed on pages 19-21, contain insight into the CAPP process at the earliest stage of litigation and how this compares to the 16.1 and standard procedures.

22 At the median resolution time, the CAPP rules and Rule 16.1 have the same effect. However, it is important to note that the effect of the CAPP rules on case duration is stronger than Rule 16.1 in the 75th percentile of cases.

Figure 1

Business cases (as specifically defined) are more likely to resolve at an earlier point in time under the CAPP procedure.

Time to Resolution Survival Analysis by Procedure Type
All Qualifying Cases, No Additional Variable Controls

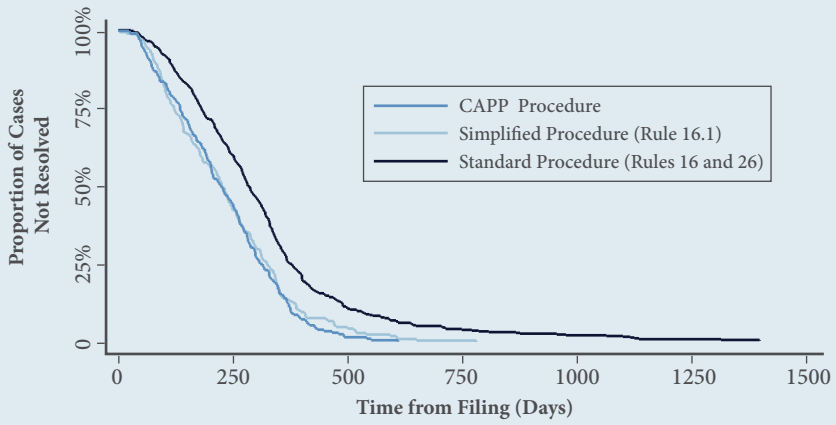
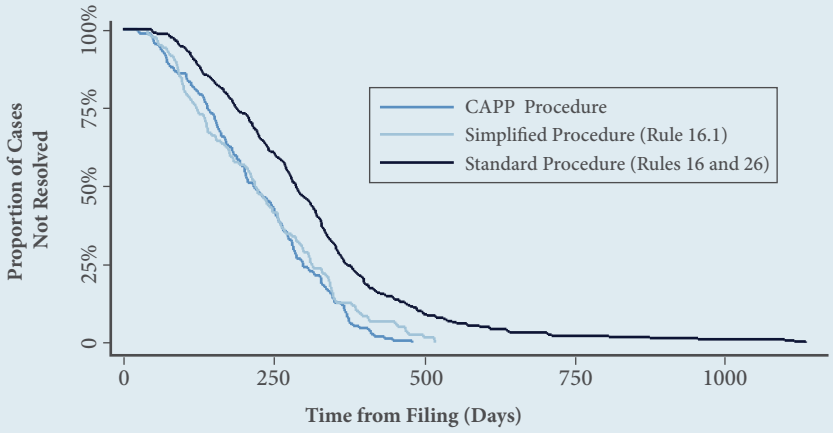


Figure 2

Cases ending in settlement are more likely to resolve sooner under the CAPP procedure.

Time to Resolution Survival Analysis by Procedure Type
Cases Ending in Settlement, No Additional Variable Controls



The effect of the CAPP process on time to resolution does not vary by case type.

Examining the five most prevalent case types in the sample (contract, insurance, business tort, business structure, and professional malpractice), the effect of the CAPP rules on disposition time was not shown to be stronger or weaker depending on the case type.[23] This is particularly notable with respect to professional malpractice cases (not including medical negligence cases, which do not fall within the pilot project), as these cases are considered among the more complex. In fact, none of the procedures showed different effects based on case type.

Considering the time data outside of the statistical models, the average time to resolution decreased between the baseline and pilot project time periods in every CAPP court.

The decrease was most pronounced in Adams and Arapahoe Counties and least pronounced in Jefferson County. By contrast, in every comparison court except for Weld County, the average time to resolution increased between the baseline and pilot project time periods.

It is also telling that, of the 25 cases in the sample that have not yet resolved, 72% are comparison cases while 28% are CAPP cases.

There does not appear to be higher rates of complexity within this set of cases, as most are contract and business tort cases, and most have three or fewer parties.

With respect to the appropriateness of the time to resolution in CAPP cases, a strong majority (80%) of surveyed attorneys indicated that the length of time to resolution at the trial level was proportionate to the subject case (considering the amount in controversy, the complexity of the litigation, and the importance of the issues).

It should be noted that even when the subject case resolved early in the proceedings or ended in default judgment, a strong majority of attorneys indicated that the time was proportional to the case notwithstanding the early disclosure requirement. With respect to all subject cases, those attorneys who indicated that the time was not proportional were pretty evenly split between opinions that the time was "too long" (11%) and "too short" (9%). In general, those who reported an unfavorable result were more likely to show dissatisfaction with the length of the process than those reporting a favorable result.

- Of those who indicated that the time was *too long* and provided an explanation, nearly two-thirds gave a reason disconnected from the CAPP rules, such as the litigation tactics of the opposing party, the presence of a self-represented litigant, or delayed rulings on pending motions. CAPP-related reasons included the extended time for obtaining a default judgment, the additional case management requirements, and discovery disputes over the proportionality standard.

23 Here, the hazard models were used to run interactions between each case type and the different processes under review.

- Of those who indicated the time was *too short* and provided an explanation, over half gave a reason disconnected from the CAPP rules, such as an early settlement, bankruptcy, or consolidation. Many of those who gave a CAPP-related reason discussed needing more time to serve the defendant(s) or conduct discovery, resulting in dismissal or a rushed process.

Finally, the judge survey responses showed strong support for the proposition that the CAPP process "allows for sufficient time to fairly resolve cases on their merits."

Each quarterly survey asked the judges to consider their CAPP cases over the previous quarter. Taking all of the surveys administered over the course of the project together, not a single judge at any time disagreed that the time was sufficient for a fair process. Exactly 81% agreed, and 19% took a neutral position.

Cost

Litigation costs are generally considered to be proportionate in CAPP cases.

According to the case-specific attorney survey data, the resources expended in CAPP cases span a broad range.

Although it is unclear whether these numbers would be higher or lower in a similar set of standard procedure cases, this does serve as a point of reference.

MONETARY COST TO BRING OR DEFEND THE CLAIM(S) UNDER CAPP[24]

	Minimum	*Median*	*Mean*	*Maximum*
Attorney Fees	$0.00	$5,589.00	$24,968.68	$800,000.00
Other Costs	$0.00	$500.00	$3,381.74	$225,000.00

BILLABLE HOURS[25]

	Minimum	*Median*	*Mean*	*Maximum*
*Senior Attorney**	0.00	16.00	117.51	11,000.00
Junior Attorney	0.00	0.00	86.35	11,000.00
Paralegal	0.00	0.00	33.55	4,375.00

* *The pool of responses for senior attorney billable hours contained two outliers, which were excluded from the analysis: 150,000.00 and 33,850.00. If those responses are included, the minimum is 0.00, the median is 16.00, the mean is 449.55, and the maximum is 150,000.00.*

Exactly three out of four attorney survey respondents (75%) indicated that the total cost incurred for resolution at the trial level was proportionate to the subject CAPP case (considering the amount in controversy, the complexity of the litigation, and the importance of the issues).

Another portion of respondents (19%) indicated that the amount was "too high," while some (5%) indicated that the amount was "too low." This response pattern holds true for cases eligible for Rule 16.1 (involving monetary damages of $100,000 or less), and holds true for cases resolved on both ends of the spectrum (by default judgment and by trial). It should be noted that those who received an unfavorable result were more likely to report that costs were either too high or too low than those attorneys reporting a favorable result.

- Of those who indicated that the amount was *too high* and provided an explanation, half gave a reason somewhat disconnected from the CAPP rules, relating mainly to the unreasonable litigation tactics and positions of the opposing party and, less prevalently, to the failure of the judge to provide timely rulings on key substantive issues or enforce the rules. With respect to the half that were more directly related to CAPP, the following themes emerged: 1) the strict deadlines and procedural requirements can elevate form over substance and inhibit taking cost-saving measures in both simple and complex cases; 2) when service is difficult, the costs are higher in CAPP cases due to the need to obtain extensions or refile; 3) unnecessary costs are incurred in preparing disclosures when the defendant does not ultimately

24 Respondents were instructed to include "amounts even if they are recoverable from another party or will not be collected from your client(s)," and to exclude "the value of the claim(s), post-judgment or post-settlement activity, appeal costs, or expenses after remand."

25 This information relates only to those respondents indicating that their firm tracks billable hours (85% of all respondents).

appear or when settlement is likely simply based on the filing of the case; and 4) unnecessary costs are incurred litigating a case when a motion to dismiss is ultimately granted. Despite the comments concerning the initial stage procedures, sentiment that costs were too high was more prevalent in cases resolved later in the process—by summary judgment (44%), court dismissal (30%), and jury trial (25%). In addition, attorneys tended to report disproportionate costs at a higher rate for cases involving discovery than for cases without discovery. It is unclear how these numbers might differ from perceptions of cost under the standard procedure.

- Of those who indicated that the amount was *too low* and provided an explanation, four out of five provided a reason unrelated to CAPP, such as the provision of services at a reduced rate or an unexpected early settlement. The remaining responses related to terminating the case early to avoid CAPP requirements.

Fairness

The CAPP process appears to be fair to both plaintiffs and defendants.

One important issue is whether the CAPP rules are fair to both plaintiffs and defendants. There are multiple ways to view and measure the issue of fairness.

The docket study found no difference between the pilot and the comparison sets as to which party prevailed more often.

Studied cases were placed into four categories based on outcome: plaintiff(s) won on all claims; defendant(s) won on all claims; plaintiff(s) won some and defendant(s) won some; and liability not determined in court (including settlement). The proportion of cases distributed among these categories does not vary significantly as a result of application of the CAPP rules,[26] which means there is no evidence to suggest a relationship between CAPP and the likelihood of a favorable or unfavorable outcome on either side. It should be noted that these data do not speak to the relative favorability of the results for a particular party within the mixed outcome category, nor do they speak to the relative favorability of settlements and other outcomes determined outside of court.

From the perspective of the attorneys litigating the subject CAPP cases, a plurality (48%) agreed with the statement that "the pretrial process was fair to my client."

Another 27% expressed a neutral position on the issue. However, one in four disagreed that the process was fair. Some of this sentiment may be explained by the issues concerning the initial-stage deadlines, discussed beginning on page 19. The responses to this question appear to be independent of the party represented (plaintiff or defendant), but there are differences based on the reported outcome. About half of those who reported a favorable or mixed result agreed that the process was fair, while only one-third of those who reported an unfavorable result agreed.

26 Due to the structure of the data for this variable (aggregate outcome as the proportion of cases), two alternative modeling approaches were used here: the Pearson chi-square test and Fisher's exact test.

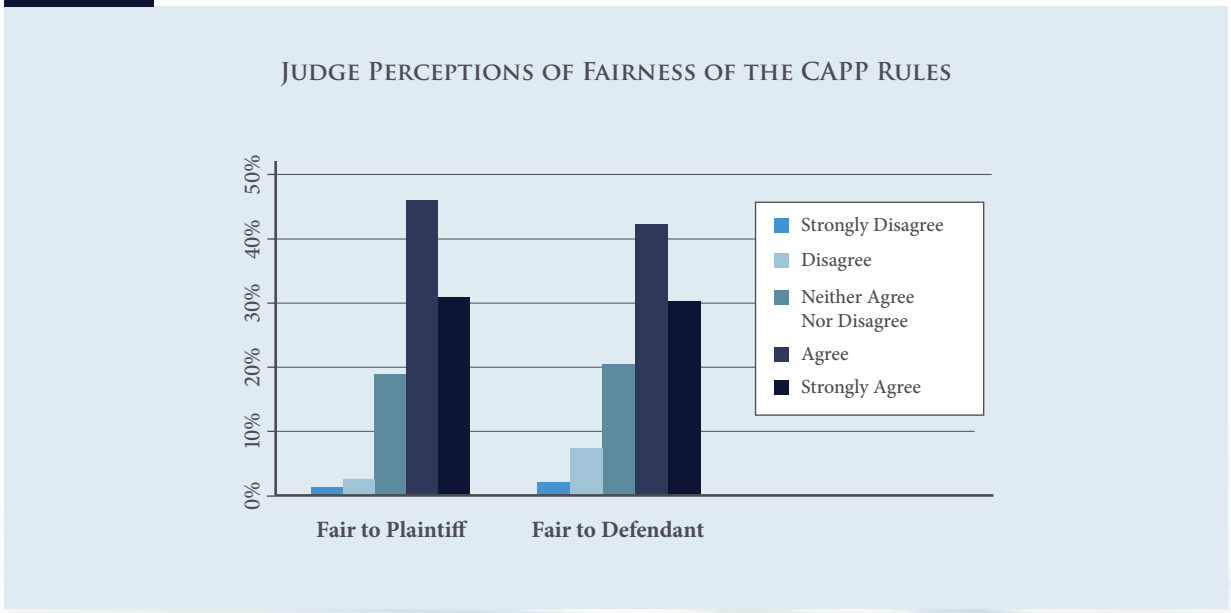
Attorney survey respondents gave even better marks to the judge, as nearly 60% agreed with the statement that the court "handled my client's case in a fair manner."

About one in three respondents were neutral and about one in ten respondents disagreed that the court was fair. As above, the responses appear to be independent of the party represented, but there are differences based reported outcome. Majorities of those who reported a favorable or mixed result agreed that the judge was fair, while just over one-third of those who reported an unfavorable result agreed. In addition, the level of agreement tended to be higher in cases where a higher level of contact with the judge would be expected (i.e., cases with discovery, cases over $100,000 with a significant consideration other than monetary damages, and cases resolved by summary judgment).

The judge surveys likewise found CAPP to be fair to both plaintiffs and defendants overall.

The judges were asked to assess the fairness of the rules in CAPP cases pending during each quarter. Considering all of the responses, more than 70% expressed agreement that the process is fair with respect to plaintiffs and defendants, while about 20% expressed a neutral position. See Figure 3.

Figure 3



The Early Stage

THERE HAS BEEN GENERAL ADHERENCE TO THE INITIAL-STAGE TIMELINES, EVEN IF THEY HAVE PROVED CHALLENGING IN CERTAIN RESPECTS.

Because CAPP applies only to those cases that meet the definition of a "business action" under the CAPP rules, the following procedure has been used for case designation. The plaintiff filing the case makes an initial determination on the case cover sheet, and the judge then reviews the complaint and makes a final determination. If the original classification was correct, the case proceeds; if it was incorrect, the plaintiff has generally been given additional time to serve the correct summons and amend the complaint. The substantive issues related to case designation are discussed beginning on page 35.

The plaintiff has 21 days from service of the complaint ("any pleading making any claim for relief") to file an initial disclosure statement with the court. From that filing, the defendant has 21 days to file an answer ("any pleading defending against a claim for relief"). Exactly 21 days after service of the answer, the defendant's initial disclosure statement is due to be filed with the court. The initial case management conference must be held within 49 days of the filing of the answer, with the joint case management report due 7 days before the conference.

The docket study found that where the plaintiff originally designated the case as non-CAPP on the cover sheet, and the judge changed the designation, there was some built-in delay. In this group (16% of CAPP cases), the average time from the filing of the complaint to the judge's order changing the designation was 15 days (minimum 1 day, maximum 64 days). Please refer to the discussion on page 35 concerning case differentiation.

The docket study found that the average time between the filing of the initial complaint and the plaintiff's first initial disclosures in CAPP cases was 28 days (median 23, minimum 0, maximum 274). The plaintiff's disclosures were filed within the 21-day time limit contained in the rule in 46% of cases, with 17% filed on the same day as the complaint. The remaining 54% were not filed according to the CAPP timeframe. Not surprisingly, cases in which all parties were represented tended to adhere more closely to the rule than cases involving a self-represented party.

The docket study found that the average time between the filing of the plaintiff's initial disclosures and the filing of the first answer was 18 days (median 21, minimum -230, maximum 165). In 64% of cases in which an answer was filed, the first answer was filed within 21 days of the plaintiff's first initial disclosures, as required by the rule. Interestingly, in 15% of cases, the first answer was filed prior to the plaintiff's first initial disclosures (which were late), accounting for the negative minimum time. Although this time period did not tend to increase as the number of defendants increased, the data speak only to how long it takes for the first answer to be filed, not how long it takes to conclude all pleadings and the initial phase of the litigation.

The docket study found that the average time between the filing of the first answer and the filing of the first initial disclosures by a defendant was 33 days (median 21, minimum 0, maximum 405). It is important to note that 58% of the first initial disclosures by a defendant were filed within 21 days of the first answer (the average is a bit skewed by an outlier), with a plurality of 41% taking the full amount of time without being late.

The docket study found that the average time from filing to the initial case management conference was 103 days (median 91, minimum 47, maximum 260). The rule requires the conference to be held within 49 days of the answer, which translates to within 70 days of the date of filing if there is only one defendant, if service of the complaint occurs at the time of filing, and if the pleadings and disclosures occur exactly on time.

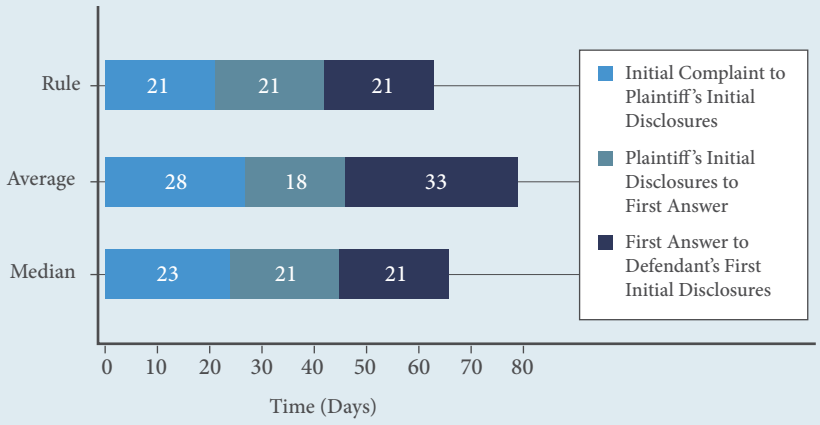
The joint case management report, which is to be filed with the court "at least seven days before the conference," was filed exactly on time in 41% of cases.
However, it was filed late in 43% and early in 16% of cases.

Most of the negative commentary contained in the attorney and judge survey responses relates to the initial-stage timelines.
Both attorneys and judges identified the following issues:

- Service of the plaintiff's initial disclosures has been a point of confusion, as the deadline to answer is counted from the filing of initial disclosures (and thus is not specified in the summons), but the defendant has not yet appeared in the action to receive notice of the deadline. It is not clear from the rules how this notice is to be accomplished.

Figure 4

CAPP Deadlines Compared to Actual Times for First Pleadings and First Disclosures



- For plaintiffs, the need to prepare detailed initial disclosures prior to the defendant's obligation to answer may increase the resources expended in cases that end in default judgment (note that those cases were excluded from the docket study but included in the surveys). This appears to be a particular issue with respect to collections actions, which are often brought under Rule 16.1 absent the CAPP rules.[27]

- From the defendant's perspective, the plaintiff can compress the time available to prepare initial disclosures by filing initial disclosures with the complaint or very soon thereafter, which is problematic in complex cases where the initial disclosures are more difficult to prepare. In addition, for cases that ultimately resolve via a granted motion to dismiss, the need to prepare an answer and initial disclosures can increase the time and money expended.

- The "rolling" deadlines at the initial stage, i.e., counting a deadline from the date of a previous event, can make it difficult to plan ahead in an environment where extensions are disfavored. The counting scheme has also resulted in a substantial administrative burden for both law firms and courts, as it requires entering new deadlines with each occurrence. This burden is often borne by support staff and law clerks, who must track deadlines for standard procedure and Rule 16.1 cases, as well.

- The initial-stage timelines were designed for a straightforward two-party case, and it is not clear how the CAPP deadlines for pleadings, disclosures, and the initial case management conference ought to be calculated for cases with multiple parties served at different times (sometimes even after the plaintiff's initial disclosure statement), cross-claims, third-party practice, amended pleadings, etc. Without vigilance on the part of the judge, such cases can easily veer off track and succumb to delay.[28] It should be noted that, in terms of the time from filing to the initial case management conference, the docket data do not reveal an apparent pattern when the number of parties rises from two to four, nor is there a pattern when comparing cases with four or fewer parties and cases with five or more parties.

Here, there is also some tension concerning the role of the court process early in the life of a case. While some attorneys responded positively to early and staggered initial disclosures, others expressed that the timelines give insufficient breathing room to pursue settlement after filing but before undertaking the full disclosure and discovery process.

---

27 Although debt collection actions brought by commercial banks or financial institutions are excluded from CAPP, such actions are included when brought by other types of creditors. With respect to a similar pilot project in New Hampshire, providing defendants with more information prior to the answer deadline (via fact-based pleading) may have reduced the default rate. *See* Paula Hannaford-Agor, et al., Nat'l Ctr. for State Courts, Civil Justice Initiative, New Hampshire: Impact of the Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules 17 (Aug. 19, 2013). However, default rates were not measured as part of this evaluation.

28 It is important to note that the times discussed on pages 19-20 relate to the *first* pleadings and disclosures, not for the close of *all* pleadings and disclosures by all parties.

Judicial Case Management

The CAPP rules expect early and ongoing case management by a single judge. This includes an early initial case management conference designed to shape the process proportionally to the needs of the case, court availability to address outstanding pretrial issues without the need for briefing, and additional status conferences as required.

> CAPP cases are more likely to have a court appearance, and will see the judge earlier and more often.

A court appearance includes, for docket study purposes, both in-person conferences and teleconferences in which the judge and at least one party were present.

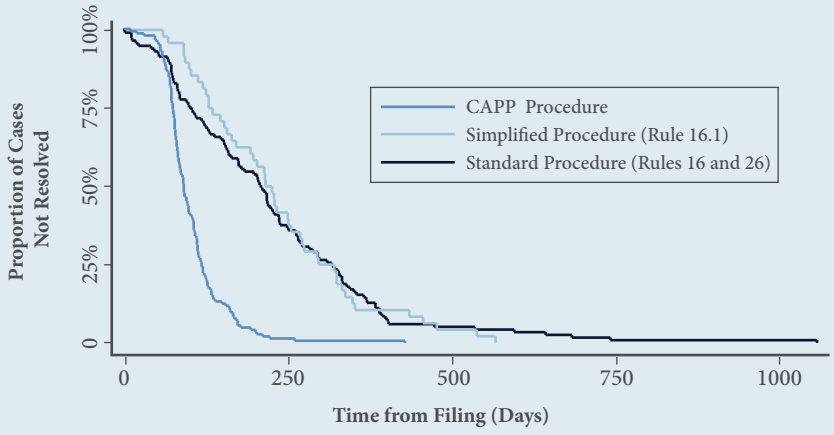
The docket study found that CAPP is associated with a statistically significant increase in the likelihood of a court appearance (i.e., whether either party sees a judge).
All else equal, CAPP increases the likelihood of a court appearance during the course of a case by 49%.

The docket study found that CAPP is associated with a statistically significant decrease in the time between the initial complaint and the first court appearance (i.e., how long it takes to see a judge).
All else equal, application of the CAPP rules increases the probability of an earlier court appearance by 360% over both Rule 16.1 and the standard procedure (in other words, CAPP cases are 4.6 times more likely to have an earlier first court appearance).[29] This effect is apparent even when none of the variable controls are applied. See Figure 5.

Figure 5

CAPP cases are much more likely to see a judge at an earlier point. This graph shows that when half of CAPP cases had already had a court appearance, nearly all simplified and standard procedure cases had not yet been before the court. In fact, for most of those cases, the first court appearance occurred more than 200 days after the case was filed.

Time to First Court Appearance Survival Analysis by Procedure Type
All Qualifying Cases, No Additional Variable Controls



29 Only cases with at least one court appearance are included in this analysis.

For every CAPP case in the docket study that had a court appearance, the first court appearance was the initial case management conference.

There is not a statistically significant association between the CAPP rules and the time from the first court appearance to resolution, perhaps because the court appearance occurs much earlier in CAPP cases. The result is the same considering only cases that end in settlement.

The docket study found that CAPP is associated with a statistically significant increase in the number of court appearances.

All else equal, CAPP more than doubles the number of court appearances from an expected 0.5 under the standard procedure to 1.3 under the CAPP rules. See Figure 6.

CAPP cases benefit from case management by a single judge.

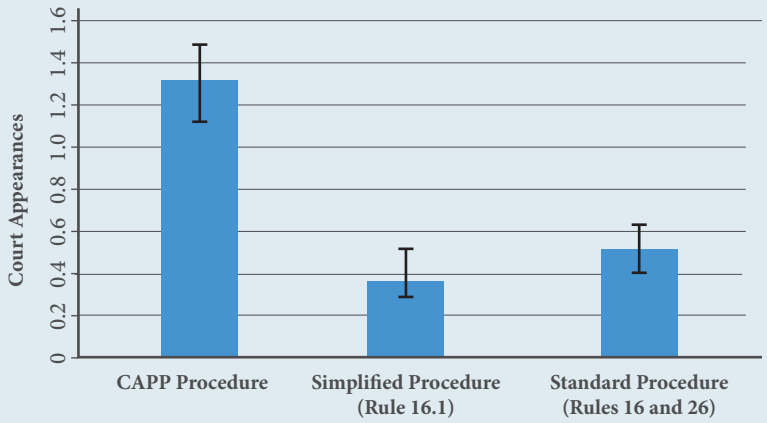
The docket study found that the CAPP rules are associated with a statistically significant increase in the probability that only one judge will be involved during the pretrial phase of a case.

All else equal, the likelihood of having a single judge hear the case prior to trial (rather than having different judges throughout the pretrial process) is about 25% higher in CAPP cases than in standard procedure cases. Although the CAPP rules call for the same judge to be involved in both the pretrial and trial stages, the CAPP judges determined that in the event of a conflict (docket or otherwise), it is better to have another judge hear the fully-prepared trial than to continue the case. Accordingly, only the pretrial phase is examined above. A full 90% of CAPP cases had a single judge through the pretrial *and* trial phases.

Figure 6

The number of court appearances is higher under CAPP.

Number of Court Appearances Per Case by Procedure Type



In 96% of survey responses, the attorney indicated that all portions of the subject CAPP case were heard by the same judge.
This is consistent with the docket data.

CAPP JUDGES TAILOR THE PRETRIAL PROCESS TO THE DISPUTE, PROVIDING ACTIVE CASE MANAGEMENT WHERE APPROPRIATE.

Once the CAPP initial-stage timelines (discussed beginning on page 19) have passed, the judge tailors the remainder of the pretrial process (timelines, discovery, etc.) proportionally to the needs of the case, as set forth in the initial case management order. In doing so, the judge has the benefit of the pleadings, the initial disclosures filed with the court, the parties' joint case management report, and the initial case management conference.

According to the attorney survey data, CAPP judges applied active case management selectively in those cases demonstrating the greatest need.
Only 16% of attorneys indicated "active" or "very active" judicial management in the subject case, with another 20% indicating a "moderate" level of case management. Examining these responses in the context of other reported factors, the following trends came to light:

- Attorneys tended to report higher levels of judicial management in cases with discovery than in cases without any discovery.
- Attorneys tended to report higher levels of judicial management in cases involving more than $100,000, particularly when non-monetary relief, issues of importance beyond the particular case, and/or recoverable attorney fees were also involved.
- Attorneys reported very low levels of judicial management when the subject case ended immediately after filing or during the pleading phase. For cases resolving by default judgment or voluntary dismissal, a majority reported "almost no" case management.

A strong majority (84%) of surveyed attorneys indicated that the level of judicial management employed was appropriate for the subject CAPP case.
The remainder were split between opinions that judicial management was "too much" (10%) and "not enough" (6%) for the subject case.

- Those who indicated that there was *too much* judicial management most commonly cited the imposition of layers of procedure considered to be unnecessary or arbitrary within the context of the particular case. The issue of the case needing breathing room to allow for settlement was also raised, as was the desire for more flexibility to allow the attorney to handle the case in the most appropriate manner for the client. Interestingly, however, one-third of those who indicated that the level of judicial management was too high also stated that there was "almost no" or "low" judicial management employed in the case. This could be an indication that some respondents simply provided general opinion rather than case-specific information.
- Those who indicated that there was *not enough* judicial management also identified three main issues: 1) *pro forma* or strict adherence to the rules without providing more substantive management directed at what the parties really needed; 2) failure to enforce or refusal to follow the rules on the part of the judge; and 3) delayed rulings on pending motions.

In the attorney survey comments, CAPP's focus on early, active, and ongoing judicial management of cases received more positive feedback than any other aspect of the project, with many calling to make it a permanent feature of the rules.

Overall, the case management aspects of the CAPP rules are perceived as beneficial to getting everyone engaged on the substance of the case and focused on its resolution, while preventing "drift" and decreasing motions practice. In particular, the initial case management conference received enthusiastic reviews, as it can set the standard of conduct, frame the issues, and provide the parties with a valuable opportunity for judicial input on the case prior to commencing discovery. Survey respondents also expressed appreciation for the accessibility of the judge to address pretrial issues and disputes promptly as they arise. However, it should be noted that when the management becomes more a matter of form than of substance, or when the case does not really need oversight, this aspect may be more of a hindrance than a help.

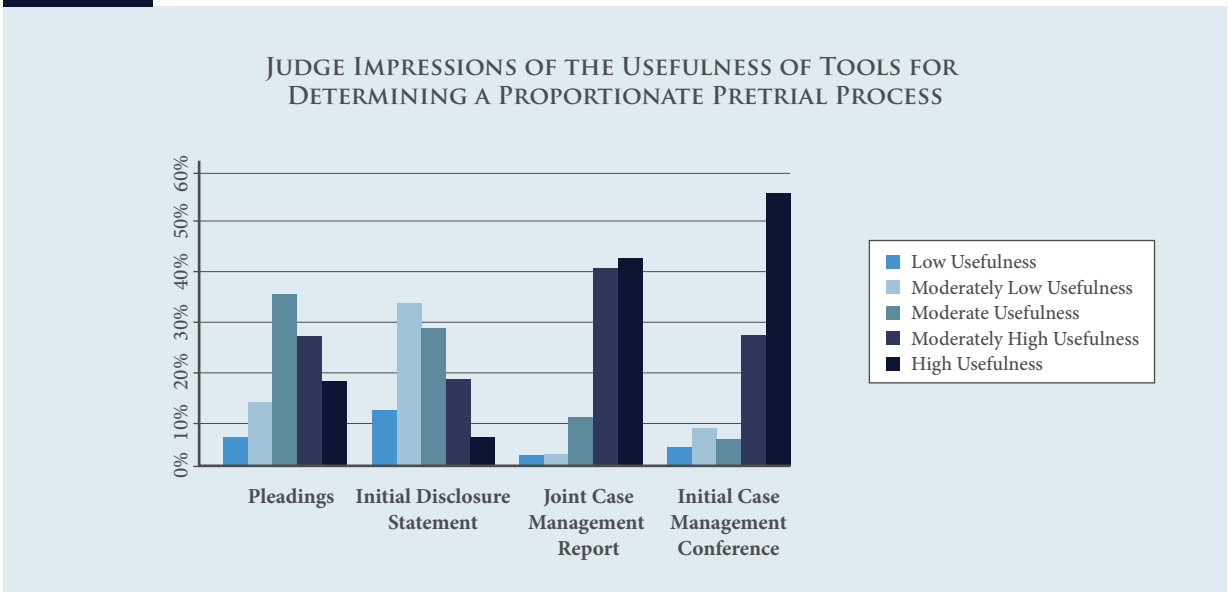
Considering all judge surveys completed over the course of the project, the initial case management conference was reported to be the most useful tool for determining a proportionate pretrial process, while initial disclosures were reported to be the least useful tool.

On a five-point scale ranging from low (1) to high (5) usefulness, the average scores were: 4.22 for the initial case management conference; 4.19 for the joint case management report; 3.36 for the pleadings; and 2.72 for initial disclosures. See Figure 7.

With respect to the qualitative data, most CAPP judges view shaping the pretrial process in the context of the particular dispute as important to ensuring proportionality.

However, at least one judge expressed concern that imposing strict time or discovery limits early in the case will inadvertently prejudice or favor a party, preferring to adhere to the joint case management report recommendations if all parties are in agreement.

Figure 7



There is general adherence to and enforcement of the rules as written.

In general, attorney survey respondents reported that the parties adhered to, and the judge enforced, the CAPP rules in the subject case.
A total of 82% indicated that the parties followed the rules of procedure "almost always" (51%) or "often" (31%). The remaining 18% stated that the parties followed the rules "about half the time," "occasionally," or "almost never." Similarly, a total of 87% indicated that the judge enforced the rules "almost always" (56%) or "often" (31%). The remaining 13% reported less frequent enforcement.

The judge survey data are mostly consistent with the attorney data on this issue, with party adherence to and judicial enforcement of the CAPP rules reported across dockets.
Considering all of the judge surveys completed during the course of the pilot project, 71% indicated that the parties followed the CAPP rules as written "almost always" (23%) or "often" (49%). The remaining 31% stated that the parties followed the rules "about half the time," "occasionally," or "almost never." Similarly, in 93% of surveys, the judge reported taking "action" to ensure compliance when the CAPP rules were not followed as written "almost always" (74%) or "often" (19%). It should be noted here, however, that judges with less enthusiasm about enforcing CAPP may also have been less likely to complete the surveys.

Nearly 90% of attorney survey respondents also indicated that sanctions were not warranted in the subject CAPP cases.
Of the responses indicating that sanctions were warranted, about one in three reported that sanctions were actually imposed. About 15% of the responses indicating that sanctions were imposed in the subject case also indicate that sanctions were, in fact, not warranted.

Motions Practice

With the parties conferring on substantive issues earlier in the case and the judge being available to informally address pretrial issues, it was expected that motions practice would decrease.

CAPP appears to reduce motions practice in general.

The docket data suggest that the CAPP rules may be associated with a decrease in the total number of motions filed in a case.
When applied to both the whole sample and the matched sets, the count model found that the CAPP rules significantly decrease the number of motions filed in a case from an approximate expected 4.9 motions under the standard procedure to 3.8 motions under CAPP, all else equal.[30] The expected number is even lower for Rule 16.1 (2.1 motions). See Figure 8. While the difference-in-differences model showed a decrease, a statistically significant effect was not detected. Due to the distribution of the data for this particular variable, more confidence can be placed on the count models, with the difference-in-differences model serving as more of a robustness check. However, it is important to note the variances across the different approaches in reaching any conclusions.

30 It should be noted that these data *include* continuance and extension motions, analyzed separately beginning on page 27, and discovery motions, addressed beginning on page 29.

The judge survey data also suggest that fewer motions are filed in CAPP cases.

Each quarter, the judges were asked to compare the number of motions in their CAPP cases during that quarter to their experience with similar non-CAPP cases (excluding discovery and dispositive motions, which are addressed below). Considering all of the judge survey responses, 51% indicated that there were "many fewer" (24%) or "moderately fewer" (27%) motions filed in their CAPP cases. Another 43% of responding judges reported that the number of motions was about the same.

The qualitative attorney survey data contain some comments about delay caused by the failure of judges to promptly rule on pending motions.

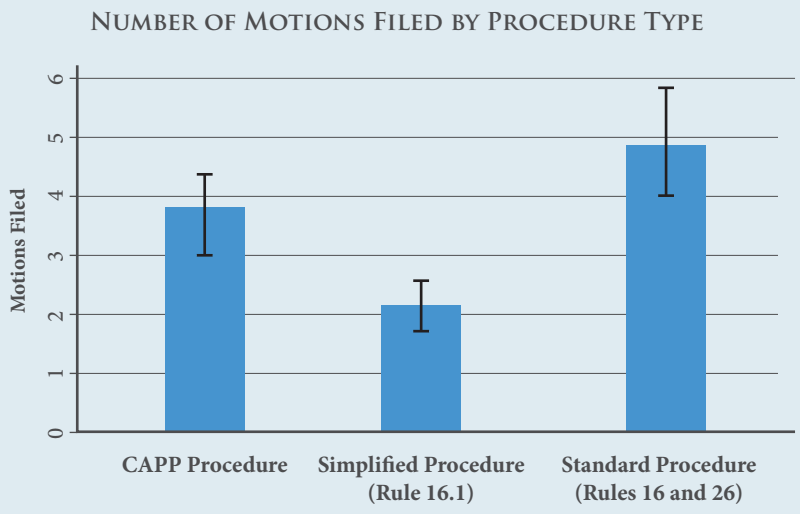
A handful of respondents suggested that ruling deadlines should be imposed on the court, in keeping with the strict deadlines to which the parties must adhere.

There are fewer extension motions filed and granted in CAPP cases, although the "extraordinary circumstances" standard can be a challenge.

Under the CAPP rules, continuances and extensions are "strongly disfavored," and are to be denied without awaiting a response absent "extraordinary circumstances." Further, there is no exception for stipulated motions for extension or continuance. This rule was designed to keep the case moving forward and to counteract the tendency for extensions and continuances to become par-for-the-course. It was anticipated that this rule would affect both the number of motions filed and the proportion of motions granted.

Figure 8

Both the CAPP and Rule 16.1 procedures reduce the number of motions filed over the standard rules.



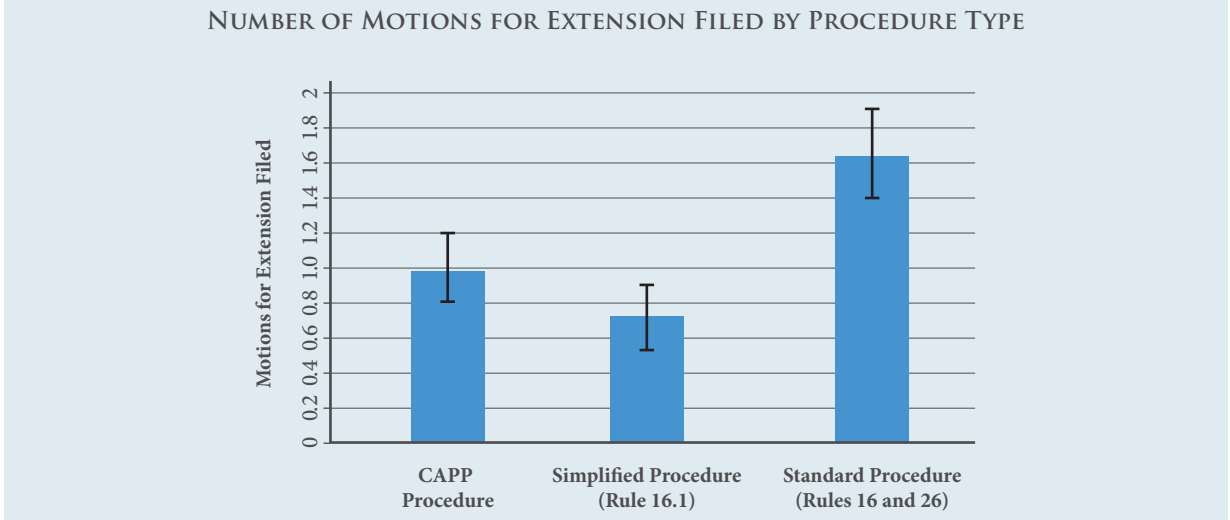
The docket study did not find any difference in motions to continue appearance dates (conferences, hearings, trials) under the CAPP rules.
All else equal, the CAPP rules are not associated with a statistically significant decrease in the likelihood that a motion for continuance will be filed during a case, nor are they associated with a statistically significant change in the proportion of such motions granted.

The docket study did find that the CAPP rules are associated with a statistically significant decrease in the number of motions for extension of time filed during the course of a case.
All else equal, CAPP decreases the number of requests for an extension from an approximate expected 1.7 per case under the standard procedure to an expected 1.0 per case under the CAPP rules. See Figure 9. It should be noted that there were no extensions requested in at least a plurality of cases in each data set.[31]

The judge survey data are consistent with the docket data. According to a majority of the survey responses, the parties in CAPP cases infrequently requested continuances or extensions.
Considering all of the judge surveys completed during the course of the pilot project, which asked each judge to refer to their experience over the past quarter, nearly 70% of respondents indicated that the parties requested to continue CAPP conferences, hearings, or trials "almost never" (46%) or "occasionally" (38%). Similarly, in 85% of responses, the judge indicated that the parties requested to extend CAPP deadlines "almost never" (23%) or "occasionally" (46%).

Figure 9

The number of requests for an extension of time is lower under CAPP.



31 Accordingly, the matched count models did not produce results, as the sample was too small.

The docket study found that the CAPP rules are associated with a statistically significant decrease in the proportion of motions for extension of time that are granted.
Motions for extension of time are less likely to be granted in CAPP cases. The CAPP rules decrease the proportion of motions granted by 11% as compared to the standard procedure.

Likewise, the judges reported infrequently finding "extraordinary circumstances" warranting relief.
In 89% of survey responses, the judges indicated that extraordinary circumstances were present to warrant granting a continuance or extension "almost never" (54%) or "occasionally" (35%). However, these data do not speak to how often the judges decided to grant continuances under circumstances less than "extraordinary."

The docket study revealed an inverse relationship between the number of extension motions and time to disposition under all three procedures.
All else equal, increasing the number of extension motions *filed* decreases the probability of an earlier resolution by 16%. Increasing the number of extension motions *granted* also decreases the probability of an earlier resolution by 16%. The effect is the same under all three procedures.

While the qualitative data reflected some appreciation of the importance of keeping cases moving and guarding against delay, surveyed attorneys and judges generally provided negative feedback on CAPP's strict standard for continuances and extensions.
The continuances and extensions rule caused many attorneys to characterize CAPP as rigid, inflexible, and arbitrary—notwithstanding the fact that the pretrial process is specifically tailored to the case at the initial case management conference.

Attorneys expressed that the strict standard is inconsistent with the realities of modern legal practice, and leads to additional anxiety in an already stressful environment, particularly for those in small firms or with primary family responsibilities. This has led some attorneys to refuse CAPP cases simply to eliminate the risk of missing a hearing or deadline for something unpredictable but less than "extraordinary." One judge mentioned that the standard can also lead attorneys to seek "cushions" in initial scheduling.

Moreover, commenting attorneys expressed that the standard can be counterproductive to the goal of an efficient and cost-effective process, such as when an extension will result in an earlier resolution or the avoidance of unnecessary or duplicative work. In general, survey respondents expressed support for increased judicial discretion or more built-in flexibility in this area, as long as there is no effect on the trial date or prejudice to another party.

There are indications of fewer discovery motions in CAPP cases.

The judge survey data suggest that there are fewer discovery motions filed in CAPP cases.
Each quarter, the judges were asked to compare discovery motions practice in CAPP cases during that quarter to their experience with similar non-CAPP cases. Considering all of the judge survey responses, 61% indicated that there were "many fewer" (35%) or "moderately fewer" (27%) discovery motions filed in their CAPP cases. However, more than one-third of the responses indicated that the number of discovery motions was about the same in both CAPP and similar non-CAPP cases.

After the project commenced, quite a few CAPP judges instituted a policy of not accepting written discovery motions and promptly holding a conference to resolve disputes in lieu of extended briefing. Qualitative judge and attorney survey comments on this policy were positive.

While the no-written-discovery-motions policy is not an explicit aspect of the CAPP rules, it is an extension of the rule giving the parties the right to contact the court to arrange for prompt resolution of pretrial disputes. The policy has been implemented differently in different courts, with some judges holding a weekly docket period for the express purpose of resolving discovery disputes and others scheduling conferences as the need arises. There are also some judges who allow, or require, short written statements of the issues in advance of the conference. Those who provided feedback on this policy indicated that it has worked well.

There is no clear evidence of impact on dispositive motions practice.

Because the filing of a motion to dismiss does not stay the obligation to proceed with an answer, initial disclosures, and the case management conference under CAPP, it was expected that the number of such motions would decrease. In addition, it was expected that the proportion of granted motions would increase, as motions would not be filed solely for the purpose of obtaining a stay. For the docket study, only Rule 12 motions to dismiss that were filed within the time for filing an answer were examined.

The docket study did not find any association between the CAPP rules and a statistically significant decrease in the likelihood that a pleading-stage motion to dismiss will be filed, all else equal.

However, this finding is contrary to the anecdotal experience of a number of CAPP judges, who believe that the CAPP rules do, in fact, reduce such motions.

The docket study also failed to find a statistically significant association between the CAPP rules and the likelihood that a pleading-stage motion to dismiss will be granted, all else equal.

As a result, it cannot be said that a greater proportion of motions to dismiss filed in CAPP cases are meritorious than those filed under Rule 16.1 or the standard procedure. Importantly, however, the small number of cases in the sample in which motions to dismiss were granted (33) impacts the likelihood of finding a significant relationship.

With respect to all dispositive motions (not just early motions to dismiss), the judge survey data give some indication that there may be fewer filed in CAPP cases.[32]

Each quarter, the judges were asked to compare the dispositive motions practice in CAPP cases during that quarter to their experience with similar non-CAPP cases. Considering all of the judge survey responses, 46% indicated that there were "many fewer" (23%) or "moderately fewer" (23%) dispositive motions filed in their CAPP cases. However, a plurality (48%) indicated about the same number of dispositive motions filed in CAPP and non-CAPP cases.

32 Motions for summary judgment were not examined as part of the docket study.

Discovery

CAPP seeks to put as much relevant information as possible in front of the parties and the court prior to commencing discovery, through pleadings and initial disclosures. The CAPP rules encourage more detailed pleadings, stating that the party bearing the burden of proof should plead all known material facts and monetary damages, in an effort to "identify and narrow the disputed issues at the earliest stages of litigation and thereby focus discovery."[33] For the same purpose, the parties are required to disclose and describe information related to the claims, whether supportive or harmful.

Next, the parties confer to identify the disputed issues and make a recommendation to the court regarding the needs of the case, via a joint report. Lead counsel then attend the initial case management conference to finalize the plan for discovery to be conducted. Discovery is limited to "matters that would enable a party to prove or disprove a claim or defense or to impeach a witness." Moreover, it must comply with proportionality factors.

> Supported by early information exchange and tailored to the case, discovery under CAPP is considered proportionate and sufficient.

Regarding docket study cases in which the judge changed the plaintiff's designation from non-CAPP to CAPP, only 21% filed an amended complaint in response, while 79% did not.

It seems that the majority of plaintiffs in this situation either determined that the original complaint was sufficient or decided to rest on the original complaint regardless of the CAPP language.

In the attorney survey comments, more respondents expressed support for CAPP's detailed pleadings and expanded initial disclosures than criticism of the standards.

Attorneys in favor of the CAPP pleading and disclosure rules stated that the additional information (if known) can be helpful for understanding the case and focusing on the disputed issues at an early point. However, there is also some sentiment that compliance is less than consistent. Although it helps that disclosures are filed with the court, enforcement generally does not occur until the initial case management conference, if at all.

33 This standard is permissive rather than mandatory, as there was no intent to affect the dismissal rate.

According to the case-specific attorney survey data, aggregate average discovery in CAPP cases with discovery (60% of subject cases) is lower than the default levels set forth in the standard rules. See the table below for the amount of each type of discovery conducted. While this does not provide a comparison with the levels of discovery actually conducted in similar cases proceeding under the standard rules, it does give a sense of where CAPP cases are falling in relation to presumptive permitted discovery.

CAPP DISCOVERY[34]

	Min	*Median*	*Mean*	*Max*
Requests for Production *(CRCP allows 20 for each adverse party)*	0	5	8.72	70
Requests for Admission *(CRCP allows 20 for each adverse party plus for the genuineness of 50 documents)*	0	0	4.36	60
Interrogatories *(CRCP allows 30 for each adverse party)*	0	9	10.87	90
Non-Expert Depositions *(CRCP allows one deposition of each adverse party plus two additional)*	0	0	0.87	11

Nearly all attorney survey respondents who conducted discovery in the subject CAPP case indicated that the amount of discovery was either less than (80%) or equal to (18%) the level of discovery authorized in the initial case management order.
Large majorities of respondents representing plaintiffs (81%) and those representing defendants (79%) indicated that the amount of discovery conducted was less than the amount authorized in the initial case management order. These proportions are independent of perceptions of outcome favorability, and show that parties have not had to return to the court to request additional discovery.

Nearly 70% of attorney survey respondents who conducted discovery in the subject CAPP case agreed with the statement that "the amount of discovery allowed was proportional to the needs of my client's case," and another 15% expressed a neutral position on the statement.
Breaking the responses down by party represented, 71% of plaintiff attorneys and 68% of defense attorneys agreed that the permitted discovery was proportional. Breaking down the responses by the reported favorability of the outcome to the client (favorable, unfavorable, and mixed), a majority within each group expressed agreement.

In terms of the efficacy of the information exchange, 52% of attorney survey respondents who reported discovery in the subject case agreed that "the pretrial process allowed me to obtain from the other side information necessary to resolve my client's case" (19% were neutral).
The responses concerning obtaining information did not vary according to whether the respondent represented a plaintiff or a defendant. However, those who perceived the outcome to be unfavorable were more likely to disagree that the process allowed them to obtain the necessary information.

34 CAPP cases in which no discovery was conducted have been removed from this analysis. The sample size for each category (*n*) ranges from 257-259.

Similarly, 55% of attorney survey respondents who reported discovery in the subject case agreed that "the pretrial process allowed me to present the information necessary to resolve my client's case" (25% were neutral).

With respect to the responses on presenting information, plaintiff attorneys were more likely to agree (61%) than defense attorneys (48%). In addition, those who perceived the outcome to be unfavorable were less likely to agree that the process allowed them to present the necessary information.

Judges also tend to perceive the information exchange under CAPP in a positive light.

While the judge's view of discovery is necessarily more limited than that of attorneys, few expressed disagreement over the course of the project with the proposition that CAPP "allows for the exchange of sufficient information to fairly resolve cases on their merits." In fact, nearly 70% of the judge surveys showed strong agreement (37%) or agreement (33%) with the statement, and another 25% took a neutral position.

> WHILE NO CONCLUSIONS CAN BE DRAWN WITH RESPECT TO THE EXPERT WITNESS RULES, THERE ARE SUGGESTIONS FOR IMPROVEMENT.

Expert witnesses are limited to one per side per issue or specialty. Expert discovery is limited to a comprehensive expert report (no depositions are permitted), and testimony is limited to the contents of that report. Hard data on the CAPP expert witness rules is exceedingly limited, particularly because so few cases proceeded all the way to trial. However, a few insights can be gleaned from the evaluation.

The case-specific attorney survey data revealed general—though not complete—compliance with the prohibition on expert witness depositions in CAPP cases with discovery.

The attorney surveys inquired into the number of such depositions in the subject case:

EXPERT DISCOVERY[35]

	Min	*Median*	*Mean*	*Max*
Expert Depositions (CRCP allows one for each expert who may present opinions at trial)	0	0	0.05	4

Where surveyed attorneys provided qualitative comments on the expert witness rules, most advocated for the return of depositions.

Some attorneys noted the tendency for expert depositions to lead to settlement. A few others stated that the lack of depositions leads to "sandbagging," or at least gives an advantage to the expert who writes an obtuse report. A portion suggested that depositions could be allowed under certain circumstances (e.g., regarding liability experts, in complex cases, when damages exceed a certain level, for professional malpractice, etc.). It is difficult to know whether these comments are based on actual experience with the CAPP expert rule or whether they are simply conceptual opinions, but the pattern of responses held true regardless of the point at which the subject case resolved.

35 This analysis excludes CAPP cases in which no discovery was conducted. The sample size (*n*) is 252.

A handful of attorney survey comments provided feedback on the other aspects of the CAPP expert witness rules.
First, it was noted that the requirement to sign every paragraph in the expert witness report is *pro forma* and wasted time. Second, it was noted that when multiple parties on the same side have divergent positions and interests, additional argument is required to advocate for the right to have separate experts.

Judges noted that the treatment of non-retained experts needs to be clarified in the rule.
Some portions of the expert witness provisions refer only to "retained" experts, some portions also contain a reference to parties or party representatives testifying in part as an expert, and some portions refer simply to "experts." Fact witnesses with expert knowledge, such as the treating physician in a products liability case, are not specifically mentioned. As a result, the rule is subject to differing interpretations for the various types of expert witnesses.

Trials

There is no clear evidence of impact on trial rate or trial time.

The CAPP rules have no distinguishable effect on the likelihood of going to trial, all else equal. With respect to this analysis of the docket study data, there are two issues of note: 1) the small number of cases that proceeded all the way to trial in the sample (57) reduces the likelihood of detecting a statistically significant relationship between CAPP and the trial rate, and 2) the direction of the association was inconsistent across statistical models. Without drawing any conclusions and keeping in mind that the study included only those cases with an appearance by a defendant, the trial rates for each procedure are set forth below.

TRIAL RATE

	Court Trial	*Jury Trial*	*Total*
CAPP Procedure	7.2%	1.4%	8.7%
Standard Procedure	4.8%	1.8%	6.5%
Simplified Procedure	4.8%	1.4%	6.3%

Likewise, it was not possible to draw any conclusions with respect to trial length (in number of days) from the docket data. Without drawing any conclusions, the data on trial length are set forth below.

TRIAL LENGTH IN DAYS

	Min	*Median*	*Mean*	*Max*
CAPP Procedure	1	2	2.28	5
Standard Procedure	1	2	2.62	7
Simplified Procedure	1	2	1.92	5

Culture and Cooperation

The level of cooperation among attorneys in CAPP cases is generally considered to be high.

A majority of attorney survey respondents indicated a strong level of cooperation between opposing counsel and parties to efficiently resolve the subject CAPP case.
Exactly 21% of attorney survey respondents indicated that there was no appearance by an opposing party in the subject case. Of those who did have contact with the opposing counsel/parties, more than half found that the level of pretrial cooperation to efficiently resolve the subject CAPP case was "high" (30%) or "moderately high" (27%). Another 22% reported moderate cooperation, while only about one in five perceived cooperation to be low or non-existent.

Attorney survey respondents commented that the effectiveness of the CAPP process is dependent upon adherence by attorneys and enforcement by judges.
The rules can be elevated or frustrated, depending, as one attorney stated, "on whether counsel (and/or their clients) choose to participate in good faith to achieve a decision on the merits or to engage in 'hide and seek' with boilerplate objections, avoidance of questions, etc."

Challenges in Differentiation

The process for defining and designating CAPP cases has resulted in a certain level of confusion and inconsistency.

For participating courts, a case's inclusion in CAPP is determined "based on the contents of the complaint at the commencement of the action," as designated by the plaintiff on the cover sheet and ultimately determined by the judge. The CAPP definition of a "business action" sets forth both a list of included actions and a list of excluded actions, based on the substantive claims rather than party type or relief sought.

The docket study found that in 96% of pilot cases, the plaintiff filed the correct (new) cover sheet, which contains a check box for designating CAPP cases.
Fewer than 5% filed the old cover sheet, indicating a high level of awareness of the new cover sheet.

The plaintiff made the pilot project designation in 84% of the cases, while the judge changed the designation to CAPP in 16%.
Accordingly, in over 15% of pilot cases, the plaintiff disagreed with the judge's determination that the case fell within the definition of a "business action" (or was making an attempt to avoid participation in the pilot project). These data do not speak to the proportion of cases in which the plaintiff designated the case to be in CAPP and the judge removed it from the project.

The attorney and judge surveys, along with the more informal feedback, revealed that the CAPP definition of a "business action" has created confusion and inconsistency in application of the pilot project.
The following issues have been raised with respect to case classification:

Some case types are not listed in either the included or the excluded categories. A few examples include mechanic's lien cases, quiet title actions, HOA assessment foreclosures, and cases claiming libel, slander, or defamation.

- Some cases have multiple claims, some of which are included and some of which are excluded. Although the judges have decided to use the "predominant claim" standard, making that call can be difficult when the different claims have the same factual basis.
- Some cases have one claim that fits within both the included and excluded categories. Is a case claiming personal injuries due to a defective product included as a product liability action or excluded as alleging negligence for physical injuries? Is a wage dispute a contract case or an employment case?
- Some complaints are factually insufficient to determine the proper categorization, such as those with a claim involving property but without specification of whether it is residential or commercial property.

In addition, attorneys and judges have questioned several distinctions with respect to case-typing under CAPP.

There are questions about the lines drawn in the following areas:

- Debt collection actions brought by commercial banks or financial institutions are excluded, while the same claims brought by any other type of creditor are included.
- Medical negligence actions are excluded, while other types of professional malpractice actions are included. All professional malpractice actions tend to be complex, and some non-medical malpractice cases involve proof of physical injuries.
- Some cases have been included because of the existence of a contract, but the contract may be nominal or ancillary to the issues to be litigated (i.e., the claims arose from a breach of duty independent of the contract). The attorney comments cited professional malpractice cases and insurance cases (subrogation, under-insured motorist (UIM), bad faith, and worker's compensation) as examples. There was extensive discussion on how to treat UIM cases among the judges, a good many of whom view those cases as contractual in nature and thus believe they belong in the project. This provides a vivid example of differing opinions on the scope of CAPP.

Overall Opinions

Survey opinions on CAPP overall are mixed, and reveal both benefits and challenges associated with the project.

A variety of opinions on CAPP were expressed through the attorney survey, though the suggestion to eliminate the project was more prevalent among attorneys who provided feedback in the comments section than was the suggestion to maintain or expand it.

In this respect, the qualitative comments are not exactly consistent with the quantitative data, which show compelling benefits to the project. The objective numbers (the docket data and the case- or quarter-specific survey data) provide insight into the project itself, while the subjective comments provide insight into attitudes in relation to the project. Both perspectives are important, which is why a multiple methods approach to research is valuable.

Aside from the comments described more specifically in sections above, the following broad themes emerged from the general feedback:

- The initial-stage timelines tend to work better for simple cases (with the exception of default judgments), while the subsequent case management provisions tend to work better for complex cases.
- The ways in which the CAPP rules fit into the larger CRCP scheme (e.g., relationship to Rule 16.1, effecting non-personal service, counting non-CAPP deadlines, etc.) could have used more attention to alleviate confusion arising out of the project. The confusion was especially great for self-represented litigants.
- Having parallel sets of rules apply to different cases is time-consuming and creates unnecessary difficulty in managing a legal practice, particularly when the standard for inclusion is not clear. Some attorneys expressed the view that the rules should be an all-or-nothing proposition.
- Certain attorneys are simply more comfortable with the standard procedure.

The judge survey requested an opinion on the overall impact of the CAPP rules during each quarter. Considering all of the surveys administered over the course of the project, a slight majority (51%) characterized the impact as positive, another 28% characterized it as neutral, and 21% characterized it as negative.

Taking into account each judge's final response to the survey (as identified by code), the following is a condensed list of the reasons given for the *positive* reactions:

- Because of the early-action and information-exchange requirements, attorneys reach an informed position—and engage in more meaningful settlement negotiations—sooner than under the standard process, enabling cases to move more quickly toward resolution. This, in turn, makes litigation more affordable.
- The timing and structure of the initial case management conference is useful.
- The project has reduced requests for additional time, as well as motions practice in general.
- From a cultural perspective, the project has made the bench and bar more cognizant of the need to proactively manage cases, while requiring opposing counsel to talk to one another.

The following reasons were provided for the *neutral* responses:

- The project does not really make a difference for judges who already actively manage their cases and for courts that are already efficient.
- The project has good points (e.g., early case management and no delay resulting from motions to dismiss) and bad points (e.g., the additional cost of requiring initial disclosures before the case is at-issue and the parties' tendency to rely on status quo discovery in the proportionality determination).
- The judges do not have sufficient information to assess one of the biggest issues, which is expert discovery in relation to trial.

The following reasons were provided for the *negative* feedback:

- The project's impact is insufficient to justify new layers of rules and administrative requirements.
- The project reduces judicial discretion and control over cases.
- There is now a need to hear motions based on non-compliance with CAPP.

Conclusion

It appears that the most valuable aspects of the Colorado Civil Access Pilot Project relate to getting the parties and the judge engaged with one another regarding the substance of the case at an early point in the process. It appears that the least valuable aspects of the project relate to case designation and the logistics of the process leading up to the initial case management conference. If the CAPP rules are maintained in one form or another based on the outcomes of this pilot project, it would be beneficial to coordinate them more fully with—or incorporate them into—the other procedures in place in Colorado.

It is IAALS' hope that this final evaluation report will inform current thinking on rules changes aimed at achieving a just, speedy, and inexpensive civil justice process, in Colorado and around the nation.

tailored discovery
single judge
meet and confer

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

UNIVERSITY *of* DENVER

Institute for the Advancement of the American Legal System
University of Denver
John Moye Hall, 2060 South Gaylord Way
Denver, CO 80208
Phone: 303.871.6600 http://iaals.du.edu

STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8051
ADM09-8009
ADM04-8001

ORDER RELATING TO THE CIVIL JUSTICE REFORM TASK FORCE, AUTHORIZING EXPEDITED CIVIL LITIGATION TRACK PILOT PROJECT, AND ADOPTING AMENDMENTS TO THE RULES OF CIVIL PROCEDURE AND THE GENERAL RULES OF PRACTICE

The Civil Justice Reform Task Force recommended certain amendments to the Rules of Civil Procedure and the General Rules of Practice for the District Courts aimed at facilitating more cost-effective and efficient civil case processing. By orders issued February 4, 2013, and February 12, 2013, the Court promulgated amendments to those rules to become effective July 1, 2013. In addition, the Civil Justice Reform Task Force recommended creation of an expedited litigation track pilot project to test whether certain expedited processes improve the way our trial courts process civil cases in order to secure the just, speedy, and inexpensive determination of every civil action.

Special rules for the proposed expedited litigation track pilot project have now been recommended. The Court has also considered further amendments to the Rules of Civil Procedure and the General Rules of Practice for the District Courts for consistency with the Task Force's recommendations for cost-effective and efficient civil case processing, specifically to: (1) delete a clause delaying automatic disclosures in medical and other malpractice cases in Rule 26.01(a)(3); (2) modify Rule 26.04 to clarify that

discovery may not be sought before the parties have conferred and prepared a discovery plan as required by Rule 26.06(c); (3) modify Rule 26.04 to accommodate the proposed special rules for the pilot expedited civil litigation track processes; and (4) make other corrective amendments. To ensure that the current version is used, and to avoid any confusion, attached to this order are the amendments to the Rules of Civil Procedure and the General Rules of Practice for the District Courts as approved by the court.

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED THAT:

1. The First Judicial District in Dakota County and the Sixth Judicial District in St. Louis County in Duluth ("Pilot District Courts") are hereby authorized to conduct a pilot project ("Pilot Project") under the attached Special Rules for the Pilot Expedited Civil Litigation Track.

2. The Pilot Project shall test whether the expedited processes authorized by the Special Rules improve the way our trial courts process civil cases in order to secure the just, speedy, and inexpensive determination of every civil action. The Pilot District Courts shall, with the assistance of the State Court Administrator, evaluate the Pilot Project and report to this Court after the first twelve months of the Pilot Project and as often thereafter as this Court shall direct. The reports shall examine the Pilot Project processes in light of the core principles that support the establishment of a mandatory Expedited Civil Litigation Track, and determine whether the efficiency and effectiveness in which the Pilot District Courts process civil cases are improved.

3. The Pilot Project and the attached Special Rules for that project shall be effective July 1, 2013, and shall apply to all civil actions identified therein that are filed on or after the effective date. The Pilot Project shall continue until further order of the Court.

4. The attached amendments to the Rules of Civil Procedure and the General Rules of Practice for the District Courts be, and the same are, prescribed and promulgated to be effective July 1, 2013. These amendments apply to all actions or proceedings pending on or commenced after the effective date provided that: (a) no action shall be involuntarily dismissed pursuant to Minn. R. Civ. P. 5.04 until one year after the effective date; and (b) amendments to Minn. R. Civ. P. 26 apply only to actions commenced on or after the effective date provided that the court may in any case direct the parties to comply with all or part of the rule as part of a pretrial order.

5. The February 4, 2013 and February 12, 2013 orders of the court are hereby rescinded to the extent inconsistent with this order. To the extent of any conflict between the terms of this order and its attached Special Rules for the Pilot Expedited Civil Litigation Track, and the provisions of the Rules of Civil Procedure and the General Rules of Practice for the District Courts, the terms of this order and its attached Special Rules for the Pilot Expedited Civil Litigation Track shall prevail.

Dated: May 7, 2013

BY THE COURT:

/s/
Lorie S. Gildea
Chief Justice

Special Rules for the Pilot Expedited Civil Litigation Track

Preface

The purposes of the Expedited Litigation Track (ELT) are to promote efficiency in the processing of certain civil cases, reduce cost to the parties and the court system, maintain a system for resolution of claims that is relevant to the parties, and provide a quick and reduced-cost process for obtaining a jury trial when civil actions cannot be resolved by judicial decision (dispositive motions) or by settlement.

The core principles that support the establishment of a mandatory Expedited Litigation Track include:

1. Most civil actions can be resolved by court decision or settlement upon a sharing of basic facts regarding the claims and defenses of the parties;
2. Timely and assertive judicial attention to matters results in the resolution of actions that can be resolved through settlement and provides for customized discovery and trial procedures that will be most cost-effective for the court and the parties;
3. Attorneys and parties are hesitant to voluntarily elect expedited procedures, thus a mandatory system is required;
4. Extensive discovery through interrogatories, requests for production, and depositions is often unnecessary, unproductive, and leads to protracted litigation and unnecessary litigation costs;
5. A compact discovery schedule will reduce the time and cost of litigation for courts and litigants;

6. Mandatory disclosure of relevant information, rigorously enforced by the court, will result in disclosure of facts and information necessary to evaluate the anticipated evidence for purposes of settlement and to allow parties to prepare for trial; and

7. Expedited cases should be completed within 4-6 months.

8. Having a trial date or week certain is key to minimizing cost and delay.

9. Assignment of an expedited case to a single judge is also highly desirable, but district courts may need flexibility to ensure that trial dates are observed. This may involve assignment of a case to a pool of judges for trial or the use of adjunct judicial officers to handle case management conferences. Where possible district courts should avoid assigning judges on the day of trial to prevent the last minute striking or removal of judges that necessitates a continuance.

RULE 1. MANDATORY ASSIGNMENT OF CERTAIN ACTIONS TO THE EXPEDITED LITIGATION TRACK

(a) General; Effective Date. Unless excluded by an order of the court made pursuant to Rule 1(c) herein, all civil actions identified in Rule 1(b) that are filed in the First Judicial District in Dakota County and in the Sixth Judicial District in St. Louis County in Duluth on or after July 1, 2013, shall be assigned to the ELT and managed pursuant to these Special Expedited Litigation Track Rules.

(b) Actions Included. The following civil actions shall be assigned to the ELT, unless excluded pursuant to Rule 1(c) herein:

(1) in the Sixth Judicial District in St. Louis County in Duluth, all civil matters having the case type indicator Consumer Credit Contract, Other Contract, Personal Injury, or Other Civil;

(2) in the First Judicial District in Dakota County, all civil matters having the case type indicator Consumer Credit Contract, Other Contract, Personal Injury, or Other Civil, and having been randomly assigned such as by a court-assigned case file number ending in an even number or some other random selection process at filing with notice to the parties;

(3) Any action where all the parties voluntarily agree to be governed by the Special ELT Rules by including an "ELT Election" in the civil cover sheet filed under the General Rules of Practice or by jointly filing an ELT Election certificate with the court.

(c) Initial Motion for Exclusion from ELT. A party objecting to the mandatory assignment of a matter to the ELT must serve and file a motion setting forth the reasons that the matter should be removed from the ELT. Said motion papers must be served and filed within 30 days of the filing of the action. The motion shall be heard during the Case Management Conference, if any, under Rule 3 of these rules or at such other time as the court shall direct. The factors that should be considered by the court in ruling on said motion include:

(1) Multiple parties or claims;

(2) Multiple or complex theories of liability, damages, or relief;

(3) Complicated facts that require the discovery options provided by the Minnesota Rules of Civil Procedure;

(4) Substantial likelihood of dispositive motions; or

(5) Any factor that demonstrates that assignment to the ELT would substantially affect a party's right to a fair and just resolution of the matter (e.g., timing of obtaining discovery from a third party, estimated damages significantly exceeding $100,000).

(d) Subsequent Motion for Exclusion from ELT. After the time for bringing a motion under Rule 1(c) of this rule has expired and no later than the trial date, a party may by motion request that the case be removed from the ELT for good cause shown related to a new development that could not have been previously raised.

RULE 2. AUTOMATIC DISCLOSURES OF INFORMATION

(a) Content; Timing. Each party shall prepare and serve an Automatic Disclosure of Information within 60 days after filing of the action or, where applicable, filing of the ELT Election. The Automatic Disclosure of Information shall include the following:

(1) A statement summarizing each contention in support of every claim or defense which a party will present at trial and a brief statement of the facts upon which the contentions are based.

(2) The name, address and telephone number of each individual likely to have discoverable information – along with the subjects of that information and any statement from such individual – that the disclosing party may use to support its claims or defenses. However, no party shall be required to furnish any statement (written or taped) protected by the attorney/client privilege or work-product rule.

(3) A copy – or description, by category and location – of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses.

(4) If a claim for damages is being made, a description of the precise damages being sought by the party and the method for calculation of said damages. If the party has any liability insurance coverage providing coverage for the claims being made by

another party, the name of the insurance company, the limits of coverage, and the existence of any issue that could affect the availability of coverage.

(5) A brief summary of the qualifications of any expert witness the party may call at the time of trial together with a report or statement of any such expert which sets forth the subject matter of the expert witness's anticipated testimony; the substance of the facts and opinions to which the expert is expected to testify, and a brief summary of the grounds for each opinion.

(6) Any offers of stipulation of any fact that is relevant to any claim or defense in the matter.

(7) An estimate of the number of trial days that it will take to complete trial of the matter.

(b) Filing Disclosures; Privacy Considerations. Automatic disclosures under this rule need not be filed with the court unless otherwise ordered by the court. If a court directs the filing of automatic disclosures, the party filing such disclosures shall take necessary and appropriate steps to protect the privacy interests (such as, without limitation, addresses and telephone numbers) of individuals identified in the disclosures.

RULE 3. CASE MANAGEMENT CONFERENCE

(a) Timing; Scope. Within 45 to 60 days of the date of filing of an action, or where applicable, within 30 days of filing of the ELT Election, the court shall convene a Case Management Conference (CMC). All counsel and parties, whether represented or unrepresented, must participate in the CMC. At the CMC, the court and the parties shall address the following subjects:

(1) Any motion to exclude the matter from the ELT Rules made pursuant to ELT Rule 1(c) of these rules;

(2) The prospects for settlement via mediation, arbitration, court-conducted settlement conference, or other form of ADR;

(3) Any request for modification of the abbreviated discovery process required by the ELT Rules;

(4) The setting of a day or week certain trial date to begin no later than 120 to 180 days following filing of the action or, where applicable, the ELT Certification;

(5) The setting of a deadline for the filing of all trial documents, including witness lists, exhibit lists, jury instructions, special jury verdict forms, trial briefs and motions in limine; and

(6) The setting of the date for completion of hearing of any motions.

(b) Format; Alternative Judicial Intervention. The court may conduct the CMC by telephone or may substitute other judicial intervention (including but not limited to one or more telephone discussions or issuing a scheduling order based on information supplied by the parties in their civil cover sheet) that addresses the above subjects.

RULE 4. LIMITATIONS ON DISCOVERY

(a) Time Period Limited. The period for conducting discovery shall continue for a period of 90 days from the Case Management Conference. Upon a request of the parties, the court, for good cause shown, may extend the period for conducting discovery for up to an additional 30 days.

(b) Written Discovery Limits; Motions to Compel. Written discovery shall be limited to 15 interrogatories, 15 requests for production of documents and things, and 25 requests for

admissions. Written discovery by each party must be served within 30 days of the date of the CMC and responses thereto must be served within 30 days of the date of service. Motions to compel responses to written discovery shall be made within 15 days of the date a response was due and shall be made pursuant to the modified discovery motion procedure set forth in Rule 4(d) of these rules.

(c) Depositions. Depositions are permitted as a matter of right of the parties only but must be taken within the deadline established by the court. Except as otherwise ordered by the court, a deposition of a non-party witness shall be allowed only if the deposition is being taken in lieu of in-person trial testimony.

(d) Meet and Confer Requirement. Prior to any motion to compel discovery, the party seeking the discovery and the party from whom responses are being sought must, by and through their counsel (or a pro se litigant if unrepresented by counsel), confer in an attempt to resolve the dispute. If the dispute is not resolved, the party seeking the discovery shall contact the court and schedule a telephone conference with the court, and provide notice of the date and time of the telephone conference to all adverse parties. No later than 5 days prior to the date of the discovery dispute telephone conference, each party shall serve and file with the court a letter not exceeding 2 pages in length setting forth the party's position on the discovery dispute and providing copies of the disputed discovery. The court, in its discretion, may allow additional argument at the telephone conference. The court shall promptly rule on the discovery dispute.

APPENDIX OF SAMPLE FORMS

The forms appended hereto are set forth as samples that may be used in the Expedited Litigation Track Pilot Project.

Appendix A: Sample Expedited Litigation Track Assignment Order

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF _____ — _____ JUDICIAL DISTRICT

CASE TYPE: _____

_____, Plaintiff — File Number:_____

v. — **ELT Assignment and Case**

_____, Defendant — **Management Conference Order**

_____

It is ORDERED:

1. This case is assigned to the pilot project (ELT Pilot") under the Special Rules For a Pilot Expedited Civil Litigation Track ("ELT Rules");
2. A party objecting to this assignment must make a formal motion under ELT Rule 1(c) or (d), for removal from the ELT Pilot;
3. Each party shall provide the Automatic Disclosure Of Information required under ELT Rule 2;
4. A Case Management conference shall be held on :_____, and each party shall attend the conference prepared to discuss the subjects identified in ELT Rule 3; and
5. The Limitations on Discovery set forth in ELT Rule 4 apply.

Dated: _____ BY THE COURT:

_____

Judge of District Court

Appendix B: Sample Expedited Litigation Track Case Management Order

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF _____ _____ JUDICIAL DISTRICT

CASE TYPE: _____

_____, Plaintiff File Number:_____

v. **ELT Case Management Order**

_____, Defendant

_____

It is ORDERED:

1. Each party shall provide the Automatic Disclosure Of Information required under Rule 2 of the Special Rules For a Pilot Expedited Civil Litigation Track ("ELT Rules")

2. ADR will/will not be used, and if used the deadline and form of ADR shall be:_____;

3. The Limitations on Discovery set forth in ELT Rule 4 apply;

4. All motions shall be heard by :_____;

5. The day or week certain for trial is:_____;

6. The deadline for submitting all trial documents, including witness lists, jury instructions, special verdict forms, trial briefs, and motions in limine is:_____.

Dated: _____ BY THE COURT:

_____

Judge of District Court

MINNESOTA RULES OF CIVIL PROCEDURE

[NOTE: *In the following amendments, deletions are indicated by a line drawn through the words and additions are indicated by a line drawn under the words.]*

RULE 1. SCOPE OF RULES

These rules govern the procedure in the district courts of the State of Minnesota in all suits of a civil nature, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

It is the responsibility of the court and the parties to examine each civil action to assure that the process and the costs are proportionate to the amount in controversy and the complexity and importance of the issues. The factors to be considered by the court in making a proportionality assessment include, without limitation: needs of the case, amount in controversy, parties' resources, and complexity and importance of the issues at stake in the litigation.

* * *

RULE 3. COMMENCEMENT OF THE ACTION; SERVICE OF THE COMPLAINT; FILING OF THE ACTION

Rule 3.01 Commencement of the Action

A civil action is commenced against each defendant:

(a) when the summons is served upon that defendant, or

(b) at the date of acknowledgement of service if service is made by mail, or

(c) when the summons is delivered to the sheriff in the county where the defendant resides for service; but such delivery shall be ineffectual unless within 60 days thereafter the summons is actually served on that defendant or the first publication thereof is made.

Filing requirements are set forth in Rule 5.04, which requires filing with the court within one year after commencement for non-family cases.

* * *

RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

* * *

Rule 5.04 Filing; Certificate of Service

Any action that is not filed with the court within one year of commencement against any party is deemed dismissed with prejudice against all parties unless the parties within that year sign a stipulation to extend the filing period. This paragraph does not apply to family cases governed by rules 301 to 378 of the General Rules of Practice for the District Courts.

All documents after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court within a reasonable time after service, except disclosures under Rule 26, expert disclosures and reports, depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto shall not be filed unless upon order of the court or for use in the proceeding.

The administrator shall not refuse to accept for filing any document presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices. Documents may be rejected for filing if tendered without a required filing fee or a correct assigned file number, or are tendered to an administrator other than for the court where the action is pending.

* * *

RULE 26. DUTY TO DISCLOSE; GENERAL PROVISIONS GOVERNING DISCOVERY

26.01 ~~Discovery Methods~~Required Disclosures

~~Parties may obtain discovery by one or more of the following methods: depositions by oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical (including blood) and mental examinations; and requests for admission.~~

(a) Initial Disclosure.

(1) In General. Except as exempted by Rule 26.01(a)(2) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(B) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(C) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(2) Proceedings Exempt from Disclosure. Unless otherwise ordered by the court in an action, the following proceedings are exempt from disclosures under Rule 26.01(a), (b), and (c):

(A) an action for review on an administrative record;

(B) a forfeiture action in rem arising from a state statute;

(C) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(D) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(E) an action to enforce or quash an administrative summons or subpoena;

(F) a proceeding ancillary to a proceeding in another court;

(G) an action to enforce an arbitration award;

(H) family court actions under Gen. R. Prac. 301 - 378;

(I) Torrens actions;

(J) conciliation court appeals;

(K) forfeitures;

(L) removals from housing court to district court;

(M) harassment proceedings;

(N) name change proceedings;

(O) default judgments;

(P) actions to either docket a foreign judgment or re-docket a judgment within the district;

(Q) appointment of trustee;

(R) condemnation appeal;

(S) confession of judgment;

(T) implied consent;

(U) restitution judgment; and

(V) tax court filings.

(3) Time for Initial Disclosures—In General. A party must make the initial disclosures at or within 60 days after the original due date when an answer is required, unless a different time is set by stipulation or court order, or unless an objection is made in a proposed discovery plan submitted as part of a civil cover sheet required under Rule 104 of the General Rules of Practice for the District Courts. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

[Publisher's Note: the following language was included in an earlier amendment adopted prior to the effective date of these rules changes, but is shown here in strikeout text to highlight that this language has NOT been adopted by the Court: ~~In medical malpractice and other professional malpractice cases in which an expert affidavit is required, a party must make initial disclosures within sixty (60) days of the service of the expert affidavit.~~]

(4) Time for Initial Disclosures—For Parties Served or Joined Later. A party that is first served or otherwise joined after the initial disclosures are due under Rule 26.01(a)(3) must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(5) Basis for Initial Disclosure; Unacceptable Excuses. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(b) Disclosure of Expert Testimony.

(1) In General. In addition to the disclosures required by Rule 26.01(a), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Minnesota Rule of Evidence 702, 703, or 705.

(2) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(A) a complete statement of all opinions the witness will express and the basis and reasons for them;

(B) the facts or data considered by the witness in forming them;

(C) any exhibits that will be used to summarize or support them;

(D) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(E) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(F) a statement of the compensation to be paid for the study and testimony in the case.

(3) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(A) the subject matter on which the witness is expected to present evidence under Minnesota Rule of Evidence 702, 703, or 705; and

(B) a summary of the facts and opinions to which the witness is expected to testify.

(4) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(A) at least 90 days before the date set for trial or for the case to be ready for trial; or

(B) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26.01(b)(2) or (3), within 30 days after the other party's disclosure.

(5) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26.05.

(c) Pretrial Disclosures.

(1) In General. In addition to the disclosures required by Rule 26.01(a) and (b), a party must provide to the other parties the following information about the evidence that it may present at trial other than solely for impeachment:

(A) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;

(B) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(C) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

(2) Time for Pretrial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32.01 of a deposition designated by another party under Rule 26.01(c)(1)(B); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26.01(c)(1)(C). An objection not so made—except for one under Minnesota Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.

(d) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rule 26.01 must be in writing, signed, and served.

26.02 Discovery Methods, Scope and Limits

Unless otherwise limited by order of the court in accordance with these rules, the methods and scope of discovery ~~is~~ are as follows:

(a) Methods. Parties may obtain discovery by one or more of the following methods: depositions by oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property; for inspection and other purposes; physical (including blood) and mental examinations; and requests for admission.

(b) ~~In General~~ Scope and Limits. Discovery must be limited to matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and must comport with the factors of proportionality, including without limitation, the burden or expense of the proposed discovery weighed against its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues. Subject to these limitations, ~~P~~parties may obtain discovery regarding any matter, not privileged, that is relevant to a claim or defense of any party, including the existence, description, nature, custody, condition and location of any

books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. Upon a showing of ~~For~~ good cause and proportionality, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information sought need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

~~(b) Limitations.~~

(1) Authority to Limit Frequency and Extent. The court may establish or alter the limits on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26.03.

(2) Limits on Electronically Stored Evidence for Undue Burden or Cost. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause and proportionality, considering the limitations of Rule 26.02(b)(3). The court may specify conditions for the discovery.

(3) Limits Required When Cumulative; Duplicative; More Convenient Alternative; and Ample Prior Opportunity. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought~~; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues~~. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26.03.

(c) Insurance Agreements. In any action in which there is an insurance policy that may afford coverage, any party may require any other party to disclose the coverage and limits of such insurance and the amounts paid and payable thereunder and, pursuant to Rule 34, may obtain production of the insurance policy; provided, however, that this provision will not permit such disclosed information to be introduced into evidence unless admissible on other grounds.

(d) Trial Preparation: Materials. Subject to the provisions of Rule 26.02(e) a party may obtain discovery of documents and tangible things otherwise discoverable pursuant to Rule 26.02(~~a~~b) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has

substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a party or other person may obtain without the required showing a statement concerning the action or its subject matter previously made by that person who is not a party. If the request is refused, the person may move for a court order. The provisions of Rule 37.01(d) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (1) a written statement signed or otherwise adopted or approved by the person making it, or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, that is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(e) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable pursuant to Rule 26.02(~~a~~b) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(1)(A) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (B) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to Rule 26.02 (e)(3), concerning fees and expenses, as the court may deem appropriate.

(2) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35.02 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(3) Unless manifest injustice would result, (A) the court shall require the party seeking discovery to pay the expert a reasonable fee for time spent in responding to discovery pursuant to Rules 26.02(e)(1)(B) and 26.02(e)(2); and (B) with respect to discovery obtained pursuant to Rule 26.02(e)(1)(B), the court may require, and with respect to discovery obtained pursuant to Rule 26.02(e)(2) the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(f) Claims of Privilege or Protection of Trial Preparation Materials.

(1) When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(2) If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

* * *

26.04 ~~Sequence and~~ Timing and Sequence of Discovery

(a) **Timing.** Notwithstanding the provisions of Rules 26.02, 30.01, 31.01(a), 33.01(a), 34.02, 36.01, and 45, parties may not seek discovery from any source before the parties have conferred and prepared a discovery plan as required by Rule 26.06(c) except in a proceeding exempt from initial disclosure under Rule 26.01(a)(2), or when allowed by stipulation or court order.

(b) **Sequence.** Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(c) **Expedited Litigation Track**. Expedited timing and modified content of certain disclosure and discovery obligations may be required by order of the supreme court adopting special rules for the pilot expedited civil litigation track.

* * *

26.06 Discovery Conference

(a) Conference Timing. Except in a proceeding exempted from initial disclosure under Rule 26.01(a)(2) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event within 30 days from the initial due date for an answer.

(b) Conference Content; Parties' Responsibilities. In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26.01(a), (b); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, and for attempting in good faith to agree on the proposed discovery plan. A written report outlining the discovery plan must be filed with the court within 14 days after the conference or at the time the action is filed, whichever is later. The court may order the parties or attorneys to attend the conference in person.

(c) Discovery Plan. A discovery plan must state the parties' views and proposals on:

(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26.01, including a statement of when initial disclosures were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(3) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(4) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order;

(5) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(6) any other orders that the court should issue under Rule 26.03 or under Rule 16.02 and .03.

(d) Conference with the Court. At any time after service of the summons, the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

(~~a~~1) A statement of the issues as they then appear;

(~~b~~2) A proposed plan and schedule of discovery;

(~~c~~3) Any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(~~d~~4) Any issues relating to claims of privilege or of protection as trial-preparation material, including—if the parties agree on a procedure to assert such claims after production—whether to ask the court to include their agreement in an order;

(~~e~~5) Any limitations proposed to be placed on discovery;

(~~f~~6) Any other proposed orders with respect to discovery; and

(~~g~~7) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matter set forth in the motion. All parties and attorneys are under a duty to participate in good faith in the framing of any proposed discovery plan.

Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after the service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

* * *

RULE 37. FAILURE TO MAKE ~~DISCOVERY~~ DISCLOSURES OR TO COOPERATE IN DISCOVERY: SANCTIONS

37.01 Motion for Order Compelling Disclosure or Discovery

(a) Appropriate Court. An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the county where the discovery is being, or is to be, taken.

(b) Specific Motions.

(1) *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26.01, any other party may move to compel disclosure and for appropriate sanctions.

(2) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(A) ~~If~~ a deponent fails to answer a question propounded or submitted under Rules 30 or 31~~,~~;

(B) ~~or~~ a corporation or other entity fails to make a designation under Rule 30.02(f) or 31.01(c)~~;, or~~

(C) a party fails to answer an interrogatory submitted under Rule 33~~,~~ or

(D) if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested~~,~~.

~~the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request.~~

The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(c) Evasive or Incomplete Answer, or Response. For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

* * *

37.03 ~~Expenses on~~ Failure to Disclose, to Supplement an Earlier Response, or to Admit

(a) **Failure to Disclose or Supplement**. If a party fails to provide information or identify a witness as required by Rule 26.01 or .05, the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(1) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(2) may inform the jury of the party's failure; and

(3) may impose other appropriate sanctions, including any of the orders listed in Rule 37.02.

(b) Failure to Admit. If a party fails to admit the genuineness of any documents or the truth of any matter as requested pursuant to Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of any such matter, the requesting

party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36.01, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (4) there was other good reason for the failure to admit.

* * *

37.06 Failure to Participate in Framing a Discovery Plan.

If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26.06, the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

MINNESOTA GENERAL RULES OF PRACTICE

RULE 8. INTERPRETERS

* * *

8.13 Requirement for Notice of Anticipated Need for Interpreter

In order to permit the court to make arrangements for the availability of required interpreter services, parties shall, in the Civil Cover Sheet, Initial Case Management ~~Informational~~ Statement or Joint Statement of the Case, and as may otherwise be required by court rule or order, advise the court of that need in advance of the hearing or trial where services are required.

When it becomes apparent that previously-requested interpreter services will not be required, the parties must advise the court.

* * *

RULE 104. CIVIL COVER SHEET AND CERTIFICATE OF REPRESENTATION AND PARTIES

Except as otherwise provided in these rules for specific types of cases and in cases where the action is commenced by filing by operation of statute, a party filing a civil case shall, at the time of filing, notify the court administrator in writing of:

(a) If the case is a family case or a civil case listed in Rule 111.01 of this rule, the name, postal address, e-mail address, and telephone number of all counsel and unrepresented parties, if known, in a Certificate of Representation and Parties (see Form ~~104~~ CIV102 promulgated by the state court administrator and published on the website www.mncourts.gov~~appended to these rules~~) or

(b) If the case is a non-family civil case other than those listed in Rule 111.01, basic information about the case in a Civil Cover Sheet (see Form CIV117 promulgated by the state court administrator and published on the website www.mncourts.gov) which shall also include the information required in part (a) of this rule. Any other party to the action may, within ten days of service of the filing party's civil cover sheet, file a supplemental civil cover sheet to provide additional information about the case.

If that information is not then known to the filing party, it shall be provided to the court administrator in writing by the filing party within seven days of learning it. Any party impleading additional parties shall provide the same information to the court administrator. The court administrator shall, upon receipt of the completed certificate, notify all parties or their lawyers, if represented by counsel, of the date of filing the action and the file number assigned.

* * *

Rule 111.02 The Party's Scheduling Input ~~Informational Statement~~

The parties may submit scheduling information to the court as part of the civil cover sheet as provided in Rule 104 of these rules. ~~Within 60 days after an action has been filed, each party shall submit~~ , ~~on a form to be available from the court (see~~ Form 111.02 ~~appended to these rules), the information needed by the court to manage and schedule the case~~. ~~The information provided shall include:~~

~~(a) The status of service of the action;~~

~~(b) Whether the statement is jointly prepared;~~

~~(c) Description of case;~~

~~(d) Whether a jury trial is requested or waived;~~

~~(e) Discovery contemplated and estimated completion date;~~

~~(f) Whether assignment to an expedited, standard, or complex track is requested;~~

~~(g) The estimated trial time;~~

~~(h) Any proposals for adding additional parties;~~

~~(i) Other pertinent or unusual information that may affect the scheduling or completion of pretrial proceedings;~~

~~(j) Recommended alternative dispute resolution process, the timing of the process, the identity of the neutral selected by the parties or, if the neutral has not yet been selected, the deadline for selection of the neutral. If ADR is believed to be inappropriate, a description of the reasons supporting this conclusion;~~

~~(k) A proposal for establishing any of the deadlines or dates to be included in a scheduling order pursuant to~~ Minn. Gen. R. Prac. 111.03; ~~and~~

~~(l) Identification of interpreter services (specifying language and, if known, particular dialect) any party anticipates will be required for any witness or party.~~

Rule 111.03. Scheduling Order

(a) When issued. No sooner than the due date of the last civil cover sheet under Rule 104, ~~60 days~~ and no longer than 90 days after an action has been filed, the court shall enter its scheduling order. The court may issue the order after either a telephone or in-court conference, or without a conference or hearing if none is needed.

* * *

RULE 113. ASSIGNMENT OF CASE(S) TO A SINGLE JUDGE

113.01 Request for Assignment of a Single Case to a Single Judge

(a) In any case that the court or parties believe is likely to be complex, or where other reasons of efficiency or the interests of justice dictate, the chief judge of the district or the chief judge's designee may order that all pretrial and trial proceedings shall be heard before a single judge. The court may enter such an order at any time on its own initiative, in response to a suggestion in a party's civil cover sheet ~~informational statement~~ filed under Rule 104 ~~111~~, or on the motion of any party, and shall enter such an order when the requirements of Rule 113.01(b) have been met. The motion shall comply with these rules and shall be supported by affidavit(s). In any case assigned to a single judge pursuant to this Rule that judge shall actively use enhanced judicial management techniques, including, but not limited to, the setting of a firm trial date, establishment of a discovery cut off date, and periodic case conferences.

* * *

RULE 114. ALTERNATIVE DISPUTE RESOLUTION

* * *

Rule 114.02 Definitions

The following terms shall have the meanings set forth in this rule in construing these rules and applying them to court-affiliated ADR programs.

(a) ADR Processes.

* * *

(10) *Other.* Parties may by agreement create an ADR process. They shall explain their process in the civil cover sheet ~~Informational Statement~~.

* * *

114.04 Selection of ADR Process

(a) Conference. After the service of a complaint or petition, the parties shall promptly confer regarding case management issues, including the selection and timing of the ADR process. Following this conference ADR information shall be included in the civil cover sheet required by Rule 104 and in the initial case management ~~informational~~ statement required by Rule ~~111.02 and~~ 304.02.

In family law matters, the parties need not meet and confer where one of the parties claims to be the victim of domestic abuse by the other party or where the court determines there is probable cause that one of the parties or a child of the parties has been physically abused or threatened with physical abuse by the other party. In such cases, both parties shall complete and submit form 9A or 9B, specifying the form(s) of ADR the parties individually prefer, not what is agreed upon.

(b) Court Involvement. If the parties cannot agree on the appropriate ADR process, the timing of the process, or the selection of a neutral, or if the court does not approve the parties' agreement, the court shall, in cases subject to Rule 111, schedule a telephone or in-court conference of the attorneys and any unrepresented parties within thirty days after the due date for filing initial case management ~~informational~~ statements pursuant to Rule ~~111.02 or~~ 304.02 or the filing of a civil cover sheet pursuant to Rule 104 to discuss ADR and other scheduling and case management issues.

Except as otherwise provided in Minnesota Statutes, section 604.11 or Rule 310.01, the court, at its discretion, may order the parties to utilize one of the non-binding processes; provided that no ADR process shall be approved if the court finds that ADR is not appropriate or if it amounts to a sanction on a non-moving party. Where the parties have proceeded in good faith to attempt to resolve the matter using collaborative law, the court should not ordinarily order the parties to use further ADR processes.

* * *

RULE 115. MOTION PRACTICE

* * *

Rule 115.04. Non-Dispositive Motions

(a) No motion shall be heard until the moving party pays any required motion filing fee, serves a copy of the following documents on the other party or parties and files the original with the court administrator at least 14 days prior to the hearing:

(1) Notice of motion and motion;

(2) Proposed order;

(3) Any affidavits and exhibits to be submitted in conjunction with the motion; and

(4) Any memorandum of law the party intends to submit.

(b) The party responding to the motion shall pay any required motion filing fee, serve a copy of the following documents on the moving party and other interested parties, and file the original with the court administrator at least 7 days prior to the hearing:

(1) Any memorandum of law the party intends to submit; and

(2) Any relevant affidavits and exhibits.

(c) **Reply Memoranda.** The moving party may submit a reply memorandum, limited to new legal or factual matters raised by an opposing party's response to a motion, by serving a copy on opposing counsel and filing the original with the court administrator at least 3 days before the hearing.

(d) **Expedited, Informal Non-Dispositive Motion Process**. The moving party is encouraged to consider whether the motion can be informally resolved through a telephone conference with the judge. The moving party may invoke this informal resolution process by written notice to the court and all parties. The moving party must also contact the appropriate court administrative or judicial staff to schedule a phone conference. The parties may (but are not required to) submit short letters, with or without a limited number of documents attached (no briefs, declarations or sworn affidavits are to be filed), prior to the conference to set forth their respective positions. The court will read the written submissions of the parties before the phone conference, hear arguments of counsel and unrepresented parties at the conference, and issue its decision at the conclusion of the phone conference or shortly after the conference. Depending on the nature of the dispute, the court may or may not issue a written order. The court may also determine that the dispute must be presented to the court via formal motion and hearing. Telephone conferences will not be recorded or transcribed.

* * *

RULE 144. ACTIONS FOR DEATH BY WRONGFUL ACT

144.01 Application for Appointment of Trustee.

Every application for the appointment of a trustee of a claim for death by wrongful act under Minnesota Statutes, section 573.02, shall be made by the verified petition of the surviving spouse or one of the next of kin of the decedent. The petition shall show the dates and places of the decedent's birth and death; the decedent's address at the time of death; the name, age and address of the decedent's surviving spouse, children, parents, grandparents, and siblings; and the name, age, occupation and address of the proposed trustee. The petition shall also show whether or not any previous application has been made, the facts with reference thereto and its disposition shall also be stated. The written consent of the proposed trustee to act as such shall be endorsed on or filed with such petition. The application for appointment shall not be considered filing of a ~~paper~~ document in the case for the purpose of any requirement for filing a certificate of representation or civil cover sheet. ~~informational statement.~~

* * *

RULE 146. COMPLEX CASES

[Publishers Note: Because rule 146 is a new rule in the General Rules of Practice for the District Courts, underlining to show new language has been omitted]

146.01 Purpose; Principles

The purposes of the Complex Case Program ("CCP") are to promote effective and efficient judicial management of complex cases in the district courts, avoid unnecessary burdens on the court, keep costs reasonable for the litigants and to promote effective decision making by the court, the parties and counsel.

The core principles that support the establishment of a mandatory CCP include:

(a) Early and consistent judicial management promotes efficiency.

(b) Mandatory disclosure of relevant information, rigorously enforced by the court, will result in disclosure of facts and information necessary to avoid unnecessary litigation procedures and discovery.

(c) Blocking complex cases to a single judge from the inception of the case results in the best case management.

(d) Firm trial dates result in better case management and more effective use of the parties' resources, with continuances granted only for good cause.

(e) Education and training for both judges and court staff will assist with the management of complex cases.

146.02 Definition of a Complex Case

(a) Definition. A "complex case" is an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel.

(b) Factors. In deciding whether an action is a complex case under (a), the court must consider, among other things, whether the action is likely to involve:

(1) Numerous hearings, pretrial and dispositive motions raising difficult or novel legal issues that will be time-consuming to resolve;

(2) Management of a large number of witnesses or a substantial amount of documentary evidence;

(3) Management of a large number of separately represented parties;

(4) Multiple expert witnesses;

(5) Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court;

(6) Substantial post judgment judicial supervision; or

(7) Legal or technical issues of complexity.

(c) Provisional designation. An action is provisionally a complex case if it involves one or more of the following types of claims:

(1) Antitrust or trade regulation claims;

(2) Intellectual property matters, such as trade secrets, copyrights, patents, etc.;

(3) Construction defect claims involving many parties or structures;

(4) Securities claims or investment losses involving many parties;

(5) Environmental or toxic tort claims involving many parties;

(6) Product liability claims;

(7) Claims involving mass torts;

(8) Claims involving class actions;

(9) Ownership or control of business claims; or

(10) Insurance coverage claims arising out of any of the claims listed in (c)(1) through (c)(9).

(d) Parties' designation. In any action not enumerated above, the parties can agree to be governed by Rule 146 of these rules by filing a "CCP Election," in a form to be developed by the state court administrator and posted on the main state court website, to be filed along with the initial pleading.

(e) Motion to Exclude Complex Case Designation. A party objecting to the provisional assignment of a matter to the CCP must serve and file a motion setting forth the reasons that the matter should be removed from the CCP. The motion papers must be served and filed within 14 days of the date the moving party is served with the CCP Designation. The motion shall be heard during the Case Management Conference or at such other time as determined by the court. The factors that should be considered by the court in ruling on the motion include the factors set forth in Rule 146.02 (b) and (c) above.

146.03 Judge Assigned to Complex Cases

A single judge shall be assigned to all designated complex cases within 30 days of filing in accordance with Rule 113 of these rules. In making the assignment the assigning judge should consider, among other factors, the needs of the court, the judge's ability, interest, training, experience (including experience with complex cases), and willingness to participate in educational programs related to the management of complex cases.

146.04 Mandatory Case Management Conferences

(a) Within 28 days of assignment, the judge assigned to a complex case shall hold a mandatory case management conference. Counsel for all parties and pro se parties shall attend the conference. At the conference, the court will discuss all aspects of the case as contemplated by Minn. R. Civ. P. 16.01.

(b) The court may hold such additional case management conferences, including a pretrial conference, as it deems appropriate.

146.05 Case Management Order and Scheduling Order

In all complex cases, the judge assigned to the case shall enter a Case Management Order and a Scheduling Order (together or separately) addressing the matters set forth in Minn. R. Civ. P. 16.02 and 16.03, and including without limitation the following:

(a) The dates for subsequent Case Management Conferences in the case;

(b) the deadline for the parties to meet and confer regarding discovery needs and the preservation and production of electronically stored information;

(c) the deadline for joining other parties;

(d) the deadline for amending the pleadings;

(e) the deadline by which fact discovery will close and provisions for disclosure or discovery of electronically stored information;

(f) the deadlines by which parties will make expert witness disclosures and deadlines for expert witness depositions;

(g) the deadlines for non-dispositive and dispositive motions;

(h) any modifications to the extent of required disclosures and discovery, such as, among other things, limits on:

(1) the number of fact depositions each party may take;

(2) the number of interrogatories each party may serve;

(3) the number of expert witnesses each party may call at trial;

(4) the number of expert witnesses each party may depose; and

(i) a date certain for trial subject to continuation for good cause only, and a statement of whether the case will be tried to a jury or the bench and an estimate of the trial's duration.

* * *

PART H. MINNESOTA CIVIL TRIALBOOK

* * *

Section 11. Interpreters

The party calling a witness for whom an interpreter is required shall advise the court in the Civil Cover Sheet, Initial Case Management ~~Informational~~ Statement, or Joint Statement of the Case of the need for an interpreter and interpreter services (specifying the language and, if known, particular dialect) expected to be required. Parties shall not use a relative or friend as an interpreter in a contested proceeding, except as approved by the court.